

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RIVAS LOUIS STEWART,

Defendant-Appellant.

UNPUBLISHED

August 10, 1999

No. 207980

Saginaw Circuit Court

LC No. 97-013672 FH

Before: McDonald, P.J., and Kelly and Cavanagh, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of carrying a concealed weapon, MCL 750.227; MSA 28.424, and felon in possession of a firearm, MCL 750.224f; MSA 28.421(6). He was sentenced to three to five years' imprisonment for each count. He appeals as of right. We affirm.

Defendant argues that the prosecutor did not demonstrate due diligence when he failed to produce an endorsed witness, Constance Coates, at trial. We disagree. The relevant statute with regard to the production of witnesses who have been endorsed by the prosecution is MCL 767.40a; MSA 28.980(1), which provides in pertinent part:

(3) Not less than 30 days before the trial, the prosecuting attorney shall send to the defendant or his or her attorney a list of the witnesses the prosecuting attorney intends to produce at trial.

(4) The prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties.

Under the statute, the general rule has been that a witness endorsed by the prosecutor, whether the witness is a *res gestae* witness, must be produced at trial. *People v Jackson*, 178 Mich App 62, 65; 443 NW2d 423 (1989). Unless the prosecution seeks to delete a witness from the witness list as provided in MCL 767.40a(4); MSA 28.980(1)(4), it is obligated to exercise due diligence to produce the witness. *People v Wolford*, 189 Mich App 478, 484; 473 NW2d 767 (1991). We review a trial

court's decision to excuse the production of an endorsed witness, pursuant to MCL 767.40a(4); MSA 28.980(1)(4), for an abuse of discretion. *People v Burwick*, 450 Mich 281; 537 NW2d 813 (1995).

Here, Coates was endorsed by the prosecutor as a witness but was not served with a subpoena to testify at trial. Although the record demonstrates that there were no attempts to serve Coates until the day of trial, we agree with the trial court that any efforts to serve Coates prior to this date would have been futile; this witness either moved without leaving a forwarding address or purposefully evaded service. The prosecutor thus had good cause for failing to produce Coates at trial.

Defendant next argues that he was prejudiced by Coates' absence at trial and requests that this Court remand the case to allow him to move for a new trial. Our review is limited to the issue of whether defendant has demonstrated a miscarriage of justice justifying this relief. *Jackson, supra* at 66. He has not. At trial, the prosecutor introduced admissible evidence that Coates was the owner of the handgun found on the ground by Trooper James Smiley after defendant made a throwing gesture during a chase, and that Coates was defendant's sister. Defense counsel had opportunity to cross-examine the prosecutor's witnesses who provided this testimony. Defendant does not suggest that Coates, had she been present at trial, would have offered any exculpatory testimony on his behalf or provided impeachment with regard to the testimony of the other prosecution witnesses who linked defendant to the handgun through his sister. In fact, defendant has failed to assert how he was prejudiced by Coates' absence at trial. Under these circumstances, we decline to remand this case for further proceedings.

Affirmed.

/s/ Gary R. McDonald

/s/ Michael J. Kelly

/s/ Mark J. Cavanagh