STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIE JAMES WILLIAMS, JR.,

Defendant-Appellant.

UNPUBLISHED
October 1, 1999

No. 207984
Saginaw Circuit Court
LC No. 97-013901 FC

Before: Bandstra, C.J., and Jansen and Whitbeck, JJ.

PER CURIAM.

A jury convicted defendant of second-degree murder, MCL 750.317; MSA 28.549, possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and carrying a dangerous weapon with unlawful intent, MCL 750.226; MSA 28.423. The trial court sentenced him to twelve to forty years for the murder conviction, two years for the felony-firearm conviction, and 2½ to five years for the carrying a dangerous weapon conviction. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court improperly excused the production of a prosecution witness at trial. A trial court's determination on this issue is not to be disturbed on appeal unless an abuse of discretion is shown. *People v Burwick*, 450 Mich 281, 291; 537 NW2d 813 (1995); see, also, *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). There was no abuse of discretion in this case.

The prosecutor moved to delete the witness' name from the witness list because the police were unable to locate him. Under MCL 767.40a(4); MSA 28.980(1)(4) and *Burwick, supra* at 289, it was within the court's discretion to strike the witness from the list, thereby excusing his production, upon a showing of good cause by the prosecutor. An abuse of discretion can be found where the defendant is able to show prejudice as a result of an amendment to the list to delete a witness. *People v Rode,* 196 Mich App 58, 68; 492 NW2d 483 (1992), rev'd on other grounds sub nom *People v Hana*, 447 Mich 325; 524 NW2d 682 (1994). On appeal, defendant does not reveal how he was prejudiced by the absence of this witness, other than by referring to the fact that the witness was involved in a fight at a gas station, and thus could have testified regarding the subject of the fight. However, this evidence was

established by other testimony. Furthermore, there is nothing in the record that indicates that the witness had any specific exculpatory information regarding defendant. At trial, there was no dispute that defendant shot the victim, the only issue was defendant's intent at the time he did so. It is not clear to this Court what evidence the witness could have provided regarding the issue of defendant's state of mind at the time of the shooting. Without more, we conclude that defendant failed to show he was prejudiced by the absence of the witness, and the trial court did not abuse its discretion in excusing production of the witness.

Furthermore, although a finding of due diligence is no longer necessary, we agree with the trial court that due diligence was exercised here, and that this satisfied the "good cause" requirement for deleting the witness from the witness list pursuant to MCL 767.40a(4); MSA 28.980(1)(4). Due diligence is the attempt to do everything reasonable, not everything possible, to obtain the presence of a witness. *People v Gunnett*, 182 Mich App 61, 67; 451 NW2d 863 (1990); *People v Simon*, 174 Mich App 649, 657; 436 NW2d 695 (1989). Here, the police officers were unable to locate the witness, his telephone number, current address, or listing in the city directory. Officers visited an address found in the jail records, but no one there knew where the witness was or how to contact him. The officers attempted to locate a woman named as the witness' next of kin, but they were unable to locate this person. None of the witness' friends contacted by the police knew (or would admit to knowing) where to locate him. This Court has upheld determinations of due diligence in cases where similar efforts were made. See *People v Stewart*, 126 Mich App 374, 376; 337 NW2d 68 (1983); *People v Stanford*, 68 Mich App 168, 173; 242 NW2d 56 (1976). Accordingly, the trial court did not abuse its discretion in determining that the authorities exercised due diligence in attempting to produce the witness at trial. *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992).

Defendant next argues that he was denied the effective assistance of counsel when counsel failed to move for a directed verdict regarding defendant's first-degree murder charge, and for failing to object to improper statements by the prosecutor. Because defendant did not request an evidentiary hearing or move for a new trial, our review is limited to those mistakes apparent on the record. *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985). This Court reviews the existing record to determine if defendant has shown that his counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Effective assistance of counsel is presumed, and defendant bears the burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Defendant was originally charged with premeditated first-degree murder. He argues that defense counsel was ineffective for failing to move for a directed verdict regarding the first-degree murder charge because there was insufficient evidence of premeditation. See *People v Plummer*, 229 Mich App 293, 299-300; 581 NW2d 753 (1998). We disagree. There was testimony that defendant was involved in a fight with several men in the black truck, which included the victim, although it is not clear whether the victim actually participated in the fight. After the fight at the gas station, defendant took a friend home, returned to his house, looked for some friends to help him beat up the men in the black truck, drove to another friend's house, asked for a weapon, and received a high-powered, long-range

rifle. Defendant then drove to his former girlfriend's house because he thought she might know where the men in the black truck lived. As he got out of his car, he saw the black truck approaching him, he told his girlfriend to go inside, aimed the rifle at the truck, and fired. Defendant then got back into the Cadillac and drove home, passing the victim's body on the way. These facts and circumstances would support an inference that defendant premeditated and deliberated his actions. *Id.* at 301. Further, although it is not clear from the record how much time elapsed between the fight and the shooting, it is clear that defendant had enough time to take a "second look" at his behavior. *Id.* at 300. Accordingly, there was sufficient evidence of premeditation to withstand a motion for directed verdict on first-degree murder.

Although defense counsel could have moved for a directed verdict regarding the first-degree murder charge, there is no doubt that it should have been denied because there was evidence on which a rational trier of fact could find that the elements of the crime had been satisfied beyond a reasonable doubt. *People v Vincent*, 455 Mich 110, 121; 565 NW2d 629 (1997). Therefore, any motion would have been meritless. Defense counsel is not required to argue a frivolous or meritless motion. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998); *People v Lyles*, 148 Mich App 583, 596; 385 NW2d 676 (1986).

Defendant argues reversal is warranted because a note from some of the jurors indicated confusion. We do not conclude that the note suggested any confusion, although it did suggest that the jurors had sympathy for defendant and the circumstances that led to his crimes.

Defendant next argues that counsel should have objected to two improper comments the prosecutor made during his closing argument. Defendant contends that the first statement, relating to a bullet found in defendant's car, was unsupported by the evidence. Although a prosecutor may not make a statement of fact to the jury that is unsupported by the evidence, *Stanaway*, *supra* at 686, he or she is free to argue the evidence and all reasonable inferences arising from it as they relate to the prosecution's theory of the case, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996). After reviewing the record, we conclude that the prosecutor's statement was not an improper reference to facts not in evidence. Rather, the prosecutor drew and argued a reasonable inference from the evidence at trial as it related to the prosecutor's theory of the case. *Bahoda, supra*. Accordingly, there was no improper statement to which defense counsel should have objected. Because defense counsel is not required to raise groundless objections, *People v Rodriguez*, 212 Mich App 351, 355-356; 538 NW2d 42 (1995), defendant's claim of ineffective assistance on this basis is without merit.

Defendant also argues that the prosecutor made an improper "civic duty" argument. A prosecutor may not urge jurors to convict a defendant as part of their civic duty. *Bahoda, supra*; *People v Crawford*, 187 Mich App 344, 354; 467 NW2d 818 (1991). After reviewing the record, we conclude that the prosecutor's statement was not an improper civic duty argument because it did not inject issues broader than defendant's guilt or innocence of the charges, nor did it encourage the jurors to suspend their powers of judgment. *People v Truong (After Remand)*, 218 Mich App 325, 340; 553 NW2d 692 (1996). Rather, the prosecutor was implying that the jurors should not let sympathy for defendant interfere with their duty to look at the facts of the case, apply the law to the case, and to

reach a verdict. *People v Howard*, 226 Mich App 528, 546-547; 575 NW2d 16 (1997). Again, defense counsel is not required to raise groundless objections. *Rodriguez, supra*. Defendant has failed to overcome the presumption that counsel was effective, in that he has failed to show that trial counsel's performance fell below an objective standard of reasonableness resulting in prejudice to defendant. *Pickens, supra*.

We affirm.

/s/ Richard A. Bandstra
/s/ Kathleen Jansen
/s/ William C. Whitbeck