

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NATHANIEL ROSS,

Defendant-Appellant.

UNPUBLISHED

November 19, 1999

No. 211549

Jackson Circuit Court

LC No. 98 086578

Before: Hoekstra, P.J., and McDonald and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). Defendant was sentenced as a third-felony offender, MCL 769.11; MSA 28.1083 to five to forty years' imprisonment. We affirm.

This case arises from a sale of crack cocaine to an undercover police officer in October 1997. The police officer testified that defendant, in the presence of a police informant, sold him \$170 worth of crack cocaine. The police informant did not testify and was not present at trial.

Defendant first argues he is entitled to a new trial because the prosecution failed to list the police informant, Ray Glenn, as a *res gestae* witness on its filed information, and failed to use due diligence to produce him for trial. We disagree. We review the trial court's decision whether to grant a new trial for abuse of discretion. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998).

It appears Glenn was not listed on the information because the prosecution believed him to be a confidential informant whose identity was protected by privilege. However, the Friday before trial, the trial court apparently ruled Glenn was in fact a *res gestae* witness. See *People v Cadle*, 204 Mich App 646, 650-651; 516 NW2d 520 (1994), reversed on other grounds *People v Perry*, 460 Mich 55; 594 NW2d 477 (1999). The prosecution's duty under the *res gestae* witness statute, MCL 767.40a; MSA 28.980(1), is to provide notice of known witnesses and, upon request, to provide reasonable assistance to defendant to locate and serve process on witnesses. *People v Burwick*, 450 Mich 281, 289; 537 NW2d 813 (1995); *Gadomski*, *supra* at 36. We assume in this case defendant requested assistance to locate and produce Glenn after learning of his status as a *res gestae* witness.¹ The trial court held an

evidentiary hearing just prior to trial and found the prosecution's efforts to locate Glenn came too late. As a sanction, the trial court instructed the jury, pursuant to CJI2d 5.12, that it could infer that Glenn's testimony would have been adverse to the prosecution. The trial court did not abuse its discretion in imposing this remedy instead of granting defendant a new trial. See *People v Lino (After Remand)*, 213 Mich App 89, 92; 539 NW2d 545 (1995), overruled on other grounds *People v Carson*, 220 Mich App 662; 560 NW2d 657 (1999). Defendant is not entitled to any further remedy.

Defendant's next claim of error is that the trial court violated his right to a fair and impartial trial by denying the request that his leg chains be removed during trial. We review a trial court's decision whether to shackle a defendant for abuse of discretion. *People v Dixon*, 217 Mich App 400, 404-405; 552 NW2d 663 (1996).

In this case, the trial court indicated that defendant would remain in leg chains because the courtroom had four doors of egress and only one deputy and because of the severity of the possible sentence defendant was facing. We do not find an abuse of discretion under these circumstances. See *People v Williams*, 173 Mich App 312, 315; 433 NW2d 356 (1988). In any event, if we were to find an abuse of discretion, we would not reverse on this basis because there is no indication in the record that the trial court was incorrect in its belief that the shackles could not be seen by the jury. Furthermore, the trial court indicated that it would make accommodations if defendant testified to ensure the jury did not see the leg chains. In the absence of record evidence indicating that the jury could see the leg chains, we conclude defendant was not prejudiced by the trial court's ruling. *People v Johnson*, 160 Mich App 490, 493; 408 NW2d 485 (1987). The burden was on defendant to request an evidentiary hearing to discover whether members of the jury saw the shackles and if they were prejudiced as a result. *People v Herndon*, 98 Mich App 668, 673; 296 NW2d 333 (1980). Defendant has not presented any record evidence of prejudice caused by his shackling, and has therefore failed to establish that he was denied a fair and impartial trial.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Gary R. McDonald
/s/ Patrick M. Meter

¹ We were not provided with the transcript of the hearing held the Friday before trial at which the trial court apparently ruled on Glenn's status.