

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

BECKY ANN JONES,

Defendant-Appellant.

UNPUBLISHED

October 30, 2001

No. 223803

Calhoun Circuit Court

LC No. 98-002559

Before: Griffin, P.J., and Markey and Meter, JJ.

PER CURIAM.

Defendant was charged and convicted of filing a false police report of a felony, MCL 750.411a(1)(b) and sentenced to ninety days in jail and two years' probation. However, the jail time was suspended provided defendant successfully completed KPEP, a probationary program. Defendant appeals by right this conviction and sentence. We affirm.

Defendant argues that she should be granted a new trial because the prosecution did not produce a res gestae witness, and the trial court denied her request for a missing witness jury instruction. We disagree. We will not overturn the trial court's decision concerning the status of an alleged res gestae witness unless the decision is clearly erroneous. *People v Hatch*, 156 Mich App 265, 267; 401 NW2d 344 (1986). "A finding is clearly erroneous when the reviewing court, based on the entire evidence, is left with a definite and firm conviction that a mistake has been committed." *Id.* In addition, we review the trial court's denial of a missing witness jury instruction for an abuse of discretion. *People v Snider*, 239 Mich App 393, 422; 608 NW2d 502 (2000).

Before the 1986 amendment of MCL 767.40a¹, the res gestae statute "was interpreted to

¹The pertinent portion of MCL 767.40a(1) provides, in part:

The prosecuting attorney shall attach to the filed information a list of all witnesses known to the prosecuting attorney who might be called at trial and all res gestae witnesses known to the prosecuting attorney or investigating law enforcement officers.

require the prosecutor to use due diligence to endorse and produce all res gestae witnesses.” *People v Burwick*, 450 Mich 281, 287; 537 NW2d 813 (1995). However, the 1986 amendment eliminated this requirement as our Supreme Court explained:

The prosecutor’s former obligation to use due diligence to produce any individual who might have any knowledge, favorable or unfavorable, to either side, has been replaced by a scheme that 1) contemplates notice at the time of filing the information of known witnesses who might be called and all other known res gestae witnesses, 2) imposes on the prosecution a continuing duty to advise the defense of all res gestae witnesses as they become known, and 3) directs that that list be refined before trial to advise the defendant of the witnesses the prosecutor intends to produce at trial. The prosecutor’s duty to produce res gestae witnesses has been replaced with an obligation to provide notice of known witnesses and reasonable assistance to locate witnesses on defendant’s request. [*Id.* at 288-289.]

Therefore, under the current statute, the prosecutor only has a duty to list witnesses known at the time of the filing of the information and to notify defendant of those witnesses who become known before trial. *People v Canales*, 243 Mich App 571, 577; 624 NW2d 439 (2000); *People v Paquette*, 214 Mich App 336, 343; 543 NW2d 342 (1995). “Put in other terms, the prosecutor’s duty to produce res gestae witnesses was replaced with the duty to provide notice of known witnesses and to give reasonable assistance in the locating of witnesses if a defendant requests such assistance.” *Snider, supra* at 423. Indeed, the purpose of the statutory listing requirement is only to “notify the defendant of the witness’ existence and res gestae status.” *People v Gadomski*, 232 Mich App 24, 36; 592 NW2d 75 (1998), quoting *People v Calhoun*, 178 Mich App 517, 523; 444 NW2d 232 (1989).

In this case, the prosecutor listed several witnesses on the information, including Richard Mexico, defendant’s brother. The prosecutor, in compliance with the statute, later filed a witness list, providing a copy to defendant, which did not include Mexico’s name. This provided defendant with notice that the prosecutor would not be calling Mexico at trial. Therefore, if defendant wished to call Mexico to testify, defendant could have requested the prosecutor’s assistance in locating Mexico. However, such a request was never made. The prosecutor complied with the requirements of the statute; consequently, the trial court’s ruling was not error.

Defendant also asserts that the trial court abused its discretion when it denied defendant’s request for a missing witness jury instruction. First, we note that review is inappropriate because this issue was not raised in defendant’s statement of questions presented. *Weiss v Hodge (After Remand)*, 223 Mich App 620, 634; 567 NW2d 468 (1997). In any event, we conclude that the trial court did not abuse its discretion. In the case cited by defendant, *People v Pearson*, 404 Mich 698, 722; 273 NW2d 856 (1979), our Supreme Court stated that where a trial court decides that a prosecutor failed to exercise due diligence in locating a res gestae witness, the court should give a missing witness instruction. However, that rule was stated before the change in MCL

767.40a, and by its own terms, no longer applies because the due diligence scheme has now been replaced by a different scheme. *Burwick, supra*.

We affirm.

/s/ Richard Allen Griffin

/s/ Jane E. Markey

/s/ Patrick M. Meter