

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

JAMES MICHAEL KENNY,

Defendant-Appellant.

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UNPUBLISHED

October 25, 2002

No. 232528

Lapeer Circuit Court

LC No. 00-006881-FH

Before: Hoekstra, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of breaking and entering a building with intent to commit larceny, MCL 750.110, breaking and entering a motor vehicle, MCL 750.356a, and larceny from a building, MCL 750.360, entered after a jury trial. We affirm.

Defendant was charged in connection with the theft of certain items from a garage, a shed, and a vehicle belonging to complainant. Several of the items were later found in a pond located on complainant's property. Lapeer County Sheriff's Deputy Sierakowski testified that he questioned defendant about the incident and that initially, defendant denied any involvement in the incident. Nancy Kenny, defendant's mother, was present when defendant was being questioned, and reported having found wet clothes belonging to defendant. Deputy Sierakowski confronted defendant with the wet clothing found by defendant's mother, and defendant then admitted that he took the various items belonging to complainant.

Prior to trial, the prosecution endorsed Nancy Kenny as a res gestae witness. On the morning of trial the prosecutor notified the court that his office had been unable to locate and serve Nancy Kenny, and requested the court find that his office had exercised due diligence in attempting to locate her. The trial court found that Nancy Kenny was not a res gestae witness, and that the prosecution had exercised due diligence in attempting to locate her. The trial court declined to read CJI2d 5.12,<sup>1</sup> and defendant claims that this was error requiring reversal. We disagree.

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<sup>1</sup> That instruction provides that the jury may infer that the testimony of a missing witness whose appearance was the responsibility of the prosecution "would have been unfavorable to the prosecution's case."

A res gestae witness is one who witnessed some event in the continuum of a criminal transaction, and whose testimony would aid in disclosing all the facts. *People v Long*, 246 Mich App 582, 585; 633 NW2d 843 (2001). The prosecution has an ongoing duty to advise the defense of all res gestae witnesses that it intends to call at trial. MCL 767.40a. If the prosecution endorses a witness it is required to use due diligence to produce the witness at trial, regardless of whether the endorsement was required. *People v Welford*, 189 Mich App 478, 483-484; 473 NW2d 767 (1991). If the prosecution fails to produce an endorsed witness, it may be relieved of the duty to do so by showing that the witness could not be produced notwithstanding the exercise of due diligence. *People v Canales*, 243 Mich App 571, 577; 624 NW2d 439 (2000).

Due diligence is the attempt to do everything that is reasonable, not everything that is possible, to obtain the presence of a witness. *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988). The test is one of reasonableness. The focus is on whether diligent, good-faith efforts were made to procure the testimony, and not whether more stringent efforts would have produced it. Whether the prosecution demonstrated due diligence depends on the facts of each case. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). We review the trial court's factual findings, including whether a witness is a res gestae witness, for clear error, *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992); *People v Hatch*, 156 Mich App 265, 267; 401 NW2d 344 (1986), and review the determination of whether the prosecution exercised due diligence for an abuse of discretion. *Bean*, *supra*.

Assuming without deciding that defendant correctly asserts Nancy Kenny was a res gestae witness, the trial court's finding that the prosecution had taken reasonable steps to locate Nancy Kenny was not clearly erroneous. *Lawton*, *supra*. The facts and circumstances demonstrated that the prosecution exercised due diligence in attempting to locate Nancy Kenny. *Bean*, *supra*. As such, defendant was not entitled to have CJI2d 5.12 read to the jury.

Affirmed.

/s/ Joel P. Hoekstra  
/s/ Kurtis T. Wilder  
/s/ Brian K. Zahra