

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHENIECE L. SMITH,

Defendant-Appellant.

UNPUBLISHED
February 12, 2004

No. 243041
Wayne Circuit Court
LC No. 01-010124

Before: Cavanagh, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of assault with intent to commit murder, MCL 750.83, and felony-firearm, MCL 750.227b. The trial court sentenced defendant to eight to twenty-five years in prison for the assault conviction and two years in prison for the felony-firearm conviction. Defendant now appeals as of right. We affirm.

At trial, the victim alleged that on August 13, 2001, she was walking out of her house when defendant drove by and threatened to run the victim over with her car. After the victim spat into defendant's car, defendant threatened, "I'll be back to kill you." About thirty minutes later, defendant returned, jumped out of her car, and shot at the victim. The victim then began throwing bricks at defendant and ran up to the porch of her house and hid. Defendant again shot at the victim and the victim threw a miniature barbeque grill at defendant. When the victim attempted to run into the house, defendant shot at her again, this time hitting her in the right side.

Defendant denied shooting the victim. At trial, defendant acknowledged having a run-in with the victim, but defendant claimed that it was the victim who initiated the altercation when she ran outside and spat at defendant's baby who was in the backseat of the car as the car was stopped in the street. Defendant acknowledged returning to the victim's house a short while later and approaching the victim to ask why she spat on the baby, but the victim began throwing bricks and a barbeque grill at her and then pulled a gun from a Crown Royal bag and started shooting at defendant. According to defendant, defendant ran back to her car and drove off.

Defendant raises three issues on appeal. Defendant first argues that the prosecution failed to use due diligence to effectuate the presence of a res gestae witness at trial. Initially, we note that due diligence is no longer necessarily the statutory standard for attempting to produce an endorsed res gestae witness for trial. Pursuant to amended MCL 767.40a, 1986 PA 46, the

appropriate standard is whether the trial court abused its discretion in excusing production of the witness. *People v Burwick*, 450 Mich 281; 537 NW2d 813 (1995).

The 1986 amendments of MCL 767.40a altered a prosecutor's duty to produce res gestae witnesses at trial. Before the 1986 amendment, the statute plainly imposed on the prosecutor a duty to list all res gestae witnesses on the information and to produce them at trial. *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003). Unlike the former statute, however, the current statute no longer imposes a duty on the prosecution to discover, endorse and produce all res gestae witnesses. *Id.* at 419. The statutory amendment replaced the prosecutor's duty to produce res gestae witnesses with a continuing duty to advise the defense of all res gestae witnesses that the prosecutor intends to produce at trial, and to provide the defense with reasonable assistance in locating witnesses if the defendant requests such assistance. *Burwick*, *supra* at 290-291. Pursuant to MCL 767.40a(4), the prosecution may delete a witness from its witness list at any time "upon leave of court and for good cause shown."

The missing witness was Candice Brooks, who allegedly was present at the time of the shooting. Sergeant Jason Marzette testified that Brooks was served a subpoena to be in court. He spoke with Brooks before trial and she never indicated that she would not come to court; however, she did make herself unavailable for a scheduled interview and failed to follow up with Sergeant Marzette. After trial began, Sergeant Marzette did an exhaustive search to locate Brooks and tracked her to her mother's house. Sergeant Marzette sent two officers to Brooks' mother's house and they informed Brooks' mother that Brooks was needed in court. Brooks thereafter contacted Sergeant Marzette and advised him that she did not want to go to court because she feared for her safety. Sergeant Marzette backtracked the number that Brooks called from and it went back to her mother's house. Officers also located the address of Brooks' aunt, but also could not locate her there. The record indicates that officers served a witness detainer, and a bench warrant for the arrest of Brooks was issued, which officers spent considerable time attempting to serve Brooks. Despite these efforts, officers were unable to locate Brooks for trial. While the trial court found the prosecutor had used "due diligence" in attempting to locate the witness, it in effect, allowed the prosecutor to delete Brooks from the witness list for good cause under MCL 767.40a(4). Under the circumstances, the trial court did not abuse its discretion by allowing the prosecutor to delete the witness from the witness list.

Defendant next argues on appeal that the trial court erred in failing to grant a mistrial because of the presence of a cameraman in the courtroom. The denial of a motion for mistrial is reviewed for an abuse of discretion. *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003). A mistrial should be granted only because of an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial. *Id.*

Apparently, a cameraman was in the courtroom doing a court expose, and his presence had nothing to do with defendant's case. Defendant argues that "the jury could not have been other than impressed that the case merited media attention and was therefore somehow beyond the ordinary, run of the mill, criminal case, all to defendant's prejudice." Thus, defendant argues the trial court should have granted a mistrial. Defendant has failed to support this assertion with appropriate argument or authority. We will not search for support for this argument; thus, we consider this issue waived. See *People v Kelly*, 231 Mich App 627 640-641, 641; 588 NW2d 480 (1998). Nevertheless, we note that the First Amendment gives the media "a qualified right of access to courtroom procedures where the particular procedure has been *traditionally open* to

the public and where openness of the procedure *logically serves* the interests of justice.” *In re Disclosure of Juror Names & Addresses*, 233 Mich App 604, 610; 592 NW2d 798 (1999). “This right of media access is qualified and may be restricted where particular circumstances indicate that justice is better served by closure than by disclosure.” *Id.* Defendant provided no support for her argument that the presence of a cameraman in the courtroom prejudiced her right to receive a fair trial. Under these circumstances, no mistrial was warranted.

Finally, defendant argues on appeal that the trial court erred in failing to grant a mistrial or give a special jury instruction based on a conversation between the victim and her mother regarding a Crown Royal bag, which was contrary to a sequestration order.

A sequestration order functions to prevent witnesses from coloring their testimony in relation to the testimony of other witnesses. *People v Stanley*, 71 Mich App 56, 61; 246 NW2d 418 (1976). In order to obtain appellate relief, a defendant who asserts that a witness violated a sequestration order must demonstrate that prejudice resulted. *People v King*, 215 Mich App 301, 309; 544 NW2d 765 (1996).

In this case, the record demonstrates that efforts were made to keep the witnesses apart between their testimonies. However, a witness testified that while she was in the witness room, both the victim and her mother were also in the room, and the witness heard the victim and her mother whisper something about a Crown Royal Bag. The record shows that this brief conversation occurred after the victim and her mother had already testified, but before the victim gave her rebuttal testimony. The victim acknowledged the conversation and explained that her mother asked her “did they ask you about a Crown Royal bag?” and she answered “no.” Apparently, this was the extent of the conversation. We conclude that defendant has failed to demonstrate that she was prejudiced by this brief conversation between the witnesses. As the trial court noted, testimony concerning this conversation goes toward the credibility of the witnesses. Under the circumstances, no mistrial was warranted, nor did this incident warrant a jury instruction by the trial court.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Hilda R. Gage
/s/ Brian K. Zahra