

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAMARIO JASON ALLEN,

Defendant-Appellant.

UNPUBLISHED

March 4, 2004

No. 243160

Macomb Circuit Court

LC No. 2002-000541-FH

Before: Cooper, P.J., and O'Connell and Fort Hood, JJ.

MEMORANDUM.

Defendant appeals as of right from a jury conviction of felon in possession of a firearm, MCL 750.224f. This appeal is being decided without oral argument pursuant to MCR 7.214(E). We affirm.

Defendant's sole claim on appeal is that because the prosecutor failed to produce Jacky Connor, an endorsed res gestae witness, the trial court erred in denying his request for the missing-witness instruction, CJI2d 5.12. This Court reviews a claim of instructional error de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). The court's decision to delete an endorsed witness from the prosecutor's witness list is reviewed for an abuse of discretion. *People v Burwick*, 450 Mich 281, 291; 537 NW2d 813 (1995). The court's determination of due diligence is a question of fact that is reviewed for clear error. *People v Wolford*, 189 Mich App 478, 484; 473 NW2d 767 (1991).

The prosecutor is required to file a witness list naming all res gestae witnesses known to the prosecutor or the police. MCL 767.40a(1). The prosecutor does not have an obligation to produce res gestae witnesses unless they are named as witnesses to be called at trial. The prosecutor must provide the defendant with notice of known res gestae witnesses and provide reasonable assistance to locate those witnesses at the defendant's request. MCL 767.40a(5); *Burwick, supra* at 288-289. The prosecutor may add or delete a witness from the list upon leave of the court for good cause shown. MCL 767.40a(4). "The inability of the prosecution to locate a witness listed on the prosecution's witness list after the exercise of due diligence constitutes good cause to strike the witness from the list." *People v Canales*, 243 Mich App 571, 577; 624 NW2d 439 (2000). The missing-witness instruction is not appropriate where the court excuses production of the witness after a finding of due diligence. *People v Snider*, 239 Mich App 393, 422-423; 608 NW2d 502 (2000).

Connor was not originally named on the prosecutor's witness list. He was apparently added at a later date which cannot be determined from the record. A subpoena was issued the first day of trial. The evidence showed that the prosecution obtained and followed specific leads as to Connor's whereabouts and determined that he might be living in Franklin, Tennessee. The Michigan officer was unable to make personal contact with Connor. The Tennessee officer who delivered the subpoena to that address did not find anyone at home. On the fourth day of trial, Connor's mother reported that he was not home and she did not know when he would be home. Under the circumstances, the trial court did not clearly err in finding that the prosecutor had exercised due diligence to find and produce Connor. Given that defendant has failed to show that Connor actually observed defendant's actions or that defendant requested an adjournment until Connor could be located, the trial court did not abuse its discretion in allowing Connor's name to be stricken. *People v Perez*, 255 Mich App 703, 707; 662 NW2d 446 (2003), vacated in part on other grounds 469 Mich 415 (2003). Because the trial court properly excused production of Connor, it did not err in denying defendant's request for the missing-witness instruction.

Affirmed.

/s/ Jessica R. Cooper
/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood