

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM MATHIS, JR.,

Defendant-Appellant.

UNPUBLISHED

August 10, 2004

No. 247848

Wayne Circuit Court

LC No. 02-009004

Before: Cavanagh, P.J., and Jansen and Saad, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree murder, MCL 750.316, possession of a firearm by a person convicted of a felony, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to two years' imprisonment for the felony-firearm conviction, to be served consecutively with and preceding concurrent sentences of mandatory life imprisonment for the first-degree murder conviction and three to five years' imprisonment for the felon in possession of a firearm conviction, with credit for 209 days served. We affirm.

On appeal, defendant first argues that the trial court erred in finding that the prosecutor and police exercised due diligence in seeking to locate and produce four witnesses from the prosecutor's witness list at trial and in refusing to instruct the jury pursuant to CJI2d 5.12, which provides that the jury may infer the testimony of a missing witness would have been adverse to the prosecutor's case. We disagree.

Because a finding of due diligence is a factual finding, we review the trial court's decision for clear error. *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995). However, there is no indication on the record that defense counsel requested CJI2d 5.12 or objected to the trial court's ruling to omit the missing witness jury instruction. Moreover, defense counsel stated that he was "satisfied" with the jury instructions as given by the trial court. Because defense counsel approved the instructions that omitted a missing witness instruction, we hold that defendant waived this issue for appeal to the extent he contends the failure to instruct the jury on CJI2d 5.12 was erroneous. See *People v Carter*, 462 Mich 206, 220; 612 NW2d 144 (2000); *People v Lowery*, 258 Mich App 167, 173; 673 NW2d 107 (2003).

Due diligence is the attempt to do everything "reasonable, not everything possible," to secure the presence of a witness at trial. *People v DeMeyers*, 183 Mich App 286, 291; 454

NW2d 202 (1990). In 1986, MCL 767.40a was amended to replace the prior requirement that the prosecutor exercise due diligence in producing all witnesses who might have any knowledge of the crime at trial. The amended statute imposes a duty on the prosecutor to provide continuing notice of known *res gestae* witnesses and to provide, upon defendant's request, reasonable assistance to locate witnesses. *People v Perez*, 469 Mich 415, 418-419; 670 NW2d 655 (2003); *People v Snider*, 239 Mich App 393, 422-423; 608 NW2d 502 (2000). "A *res gestae* witness is a person who witnesses some event in the continuum of a criminal transaction and whose testimony will aid in developing a full disclosure of the facts." *People v Gadomski*, 232 Mich App 24, 32-33 n 3; 592 NW2d 75 (1998) (citations omitted). Once a prosecutor files a list of witnesses it intends to present at trial, the prosecutor must exercise due diligence to present all witnesses on that list, unless the prosecutor seeks to remove the witnesses from his witness list. *People v Wolford*, 189 Mich App 478, 483-484; 473 NW2d 767 (1991). A prosecutor is permitted to delete or add witnesses from his witness list at any time with leave of the court for good cause. MCL 767.40a(4); *People v Burwick*, 450 Mich 281, 292; 537 NW2d 813 (1995).

In a separate hearing at trial, the prosecutor presented evidence that the police attempted to serve subpoenas on the four witnesses at the addresses listed on the subpoenas, other addresses frequented by the witnesses and two of the witnesses' places of employment. The police also attempted to contact the witnesses via telephone. The police spoke to three of the four witnesses who indicated that they were aware of the trial date and would try to be present. The prosecutor obtained a material witness detainer for one of the witnesses, but the police were unable to locate the witness to execute the detainer. Based on the evidence presented, the trial court found that the prosecutor and police exercised due diligence in seeking to find and produce the four witnesses, essentially permitting the prosecutor to delete the four witnesses from the prosecutor's list for good cause.

Because the substance of missing witnesses' testimony was not presented, it is unclear from the record whether the four witnesses were *res gestae* witnesses. Even if the witnesses were *res gestae* witnesses, the prosecutor did not violate the statute because the prosecutor was essentially permitted to remove the four witnesses from the prosecutor's witness list. Therefore, we hold that the trial court did not err in ruling that the prosecutor and police used due diligence to locate and produce the witnesses for trial because there was sufficient evidence that the prosecutor and police made all reasonable efforts to procure the witnesses. Consequently, we also hold that the trial court's finding of due diligence excused the prosecutor's obligation to procure the four witnesses by essentially permitting the prosecutor to delete the witnesses from the prosecutor's witness list after a showing of good cause.

Defendant next argues that he was denied the effective assistance of counsel because trial counsel failed to reasonably investigate the facts and circumstances of the case and present a substantial defense. Specifically, defendant argues that trial counsel failed to adequately investigate, subpoena and present critical witnesses to substantiate defendant's version of the events. We disagree.

The determination of whether a defendant has been deprived of the effective assistance of counsel is a combined question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review a trial court's findings of fact for clear error and constitutional determinations *de novo*. *Id.* Without an evidentiary hearing, appellate review is limited to

mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003); *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

To prove the ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was so deficient that it failed to meet an objective standard of reasonableness, and the prejudicial effect of the deficient representation deprived the defendant of a fair trial. *Riley (After Remand)*, *supra* at 140; *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). "Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim." *People v Hill*, 257 Mich App 126, 138-139; 667 NW2d 78 (2003). Moreover, a defendant must overcome the strong presumption that counsel's representation was sound trial strategy. *Riley (After Remand)*, *supra* at 140. To overcome the strong presumption that trial counsel's decision was sound trial strategy, a defendant must demonstrate that trial counsel's failure to present or call a witness at trial deprived the defendant of a significant defense and resulted in a different trial outcome. *People v Rockey*, 237 Mich App 74, 77-78; 601 NW2d 887 (1999). Likewise, a defendant must demonstrate that counsel's failure to interview witnesses resulted in counsel's ignorance of important evidence that would have significantly benefited the defendant's case. *People v Caballero*, 184 Mich App 636, 642; 459 NW2d 80 (1990). If the record is silent regarding the content of a witness' testimony, the defendant cannot prove that failure to call the witness resulted in a different trial outcome. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999).

The record reveals that defense counsel stated on the record that he found a defense witness two days before the trial commenced. Defense counsel spoke to the witness on the telephone, but he did not subpoena her because she "assured" him that she would be at the trial. However, the witness was not present at the trial. We previously denied defendant's motion to remand for a hearing on the ineffective assistance of counsel issue. *People v Mathis*, unpublished order of the Court of Appeals, entered October 29, 2003 (Docket No. 247848). In compliance with our prior ruling, we find that defendant failed to demonstrate the substance of the proposed witness' or witnesses' testimony. Consequently, defendant failed to demonstrate that the proposed witness' or witnesses' testimony would have substantially benefited his case. Because the record is silent, we hold that defendant failed to prove that defense counsel's failure to present a critical defense witness or witnesses deprived defendant of a substantial defense that would have changed the trial outcome. See *Rockey*, *supra* at 77-78. In addition, defendant testified to shooting in self-defense. Therefore, we hold that defendant was not deprived of a substantial defense because any alleged testimony by the proposed witness or witnesses would have merely supported defendant's testimony and theory of self-defense.

Finally, defendant argues that the prosecutor denied defendant his due process right to a fair trial by vouching for the credibility of the prosecutor's witnesses, emphasizing that the victim had no prior record of violence, referring to defendant as a liar and requesting that the jury ignore the trial court's instruction. We disagree.

At trial, defendant failed to object to the prosecutor's closing arguments that formed the basis of the alleged misconduct. We review unpreserved claims of prosecutorial misconduct for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Reversal is warranted only when the plain error results in the conviction of an innocent

defendant or substantially impairs the fairness, integrity or reputation of the judicial system. *Carines, supra* at 763.

A prosecutor has the duty to provide a defendant with a fair trial. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). Prosecutorial vouching occurs when a prosecutor makes personal assurances of a witness' veracity or when a prosecutor claims to have personal information of which the jury is unaware, lending to the credibility of a witness. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). A prosecutor must argue the evidence and may not request that the jury find the defendant guilty based on the prosecutor's special knowledge or the prestige of his office. *People v Reed*, 449 Mich 375, 398-399; 535 NW2d 496 (1995). However, a prosecutor may argue the evidence and any reasonable inferences from the evidence relative to his theory of the case and is permitted wide latitude in his arguments. *Bahoda, supra* at 282; *People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1989). A prosecutor may argue from the facts the credibility of a witness when conflicting testimony exists and a defendant's guilt or innocence rests on which version of the testimony the jury believes. *People v Flanagan*, 129 Mich App 786, 795-796; 342 NW2d 609 (1983). Moreover, a prosecutor is permitted to argue from the evidence that a witness is worthy or not worthy of belief. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). The propriety of a prosecutor's closing argument must be determined as a whole, in light of the defendant's arguments, and in connection with the evidence admitted at trial. *Bahoda, supra* at 283; *People v Schultz*, 246 Mich App 695, 710; 635 NW2d 491 (2001).

In the instant case, witness credibility was at issue and conflicting testimony existed. Defendant's guilt or innocence was dependent upon which version of the events the jury believed. To support his theory of the case, the prosecutor presented evidence that defendant shot and killed the victim, Michael Brown, without provocation. To support his theory of the case, defense counsel presented contradictory evidence that defendant shot Michael Brown in self-defense after Michael Brown shot at defendant twice. In his closing argument, the prosecutor did not imply that he had personal knowledge lending to the credibility of Barbara Brown and Sergeant Paul Jones. Moreover, the prosecutor did not use the prestige of his office to persuade the jury to decide the case on information other than the evidence. Because witness credibility was at issue and conflicting testimony existed, we conclude that the prosecutor's remarks regarding the credibility of Barbara Brown and Sergeant Jones were proper arguments from the evidence or reasonable inferences drawn from the evidence in support of his theory of the case. See *Flanagan, supra* at 795-796. We also conclude that the prosecutor's statement regarding Michael Brown's non-violent record was argument based on the reputation evidence Barbara Brown presented at trial and responsive to defendant's theory that Michael Brown was the aggressor and defendant's trial testimony that Michael Brown had a bad reputation and fired the initial shots. See *Schultz, supra* at 710.

The prosecutor's remarks regarding defendant's credibility were in response to defendant's testimony at trial. The prosecutor implied that defendant was not worthy of belief because defendant denied giving a statement to the police, yet Sergeant Jones testified concerning defendant's statement. The prosecutor also implied that defendant was not worthy of belief because his credibility was impeached by evidence of his prior felonies. We hold that the prosecutor's comments regarding defendant's credibility were proper arguments from the evidence that defendant was not worth of belief. See *Launsbury, supra* at 361.

The prosecutor's remark for the jury to "ignore" the trial court's instruction was a comment regarding the trial court's forthcoming jury instruction on self-defense. The comment was part of the prosecutor's explanation that the trial court was required to give an instruction on self-defense due to the facts of this case but that the jury was not compelled to find self-defense. We hold that the prosecutor's remark regarding the self-defense instruction was not improper because it refuted defendant's theory of the case. See *Schultz, supra* at 710.

When viewed in context, the prosecutor's closing argument was related to the evidence or reasonable inferences drawn from the evidence to support the prosecutor's theory of the case and refute defendant's position. Moreover, the trial court instructed the jury that it was the jury's function to determine the credibility of the witnesses. The trial court also instructed the jury that the attorney's statements and arguments were not evidence. Such instructions would have cured the prejudicial effect of any error. See *Bahoda, supra* at 281. Thus, we hold that the prosecutor's remarks during closing argument did not constitute plain error affecting defendant's substantial rights, and the trial court's instructions to the jury cured any prejudicial effect.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Henry William Saad