

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VALENTINO ROSS,

Defendant-Appellant.

UNPUBLISHED

September 14, 2004

No. 247139

Wayne Circuit Court

LC No. 02-008699

Before: Donofrio, P.J., and White and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction for felonious assault, MCL 750.82. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On appeal, defendant asserts that the trial court erred in finding that the prosecutor showed good cause for failing to produce an endorsed witness and in denying a curative instruction. MCL 767.40a(3) requires the prosecutor to provide the defendant a list of witnesses the prosecuting attorney intends to call at trial. The prosecuting attorney may add or delete from the list of witnesses at any time upon leave of the court and for good cause shown. MCL 767.40a(4). The prosecutor's duty to use due diligence to produce *res gestae* witness has been replaced by the new statutory standards. *People v Burwick*, 450 Mich 281, 288-289; 537 NW2d 813 (1995).

The missing witness instruction, CJI2d 5.12, which instructs the jury that the prosecutor was responsible for securing the witness, and that the jury could infer that the testimony would be adverse to the prosecutor's case, remains viable after the amendment to the statute. *People v Perez*, 469 Mich 415, 420; 670 NW2d 655 (2003). The instruction may be appropriate where the prosecutor fails to secure the presence at trial of a listed witness who has not been properly excused. *Id.* Here, however, the trial court reviewed the actions taken, and found that the police exercised due diligence to produce the witness. The due diligence finding indicates that there was good cause to amend the witness list. The court did not err in denying the missing witness instruction.

Defendant also asserts that he was denied the effective assistance of counsel. To establish an ineffective assistance of counsel claim, defendant first must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms. The defendant must overcome a strong presumption that counsel's actions constituted

sound trial strategy. Second, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994).

Defendant raises three areas where he asserts counsel was ineffective. He claims that counsel should have presented his employer as a witness. However, the proposed witness did not see the incident, and his affidavit only addresses peripheral matters that would not likely have affected the outcome of the case. The failure to call the witness did not deprive defendant of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990).

Defendant also asserts that counsel should have obtained photographs and surveillance videotapes from the scene. However, defendant is only speculating that such evidence exists and would be helpful to his case. In the absence of an evidentiary hearing, review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). There is nothing on the record that would support defendant's claim.

Affirmed.

/s/ Pat M. Donofrio
/s/ Helene N. White
/s/ Michael J. Talbot