STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 29, 2009
v	No. 286963 Wayne Circuit Court
MARNIE CLAIRE KERLEY, Defendant-Appellant.	LC No. 07-014189-FH

Before: Meter, P.J., and Borrello and Shapiro, JJ.

PER CURIAM.

Defendant appeals as of right her conviction, following a bench trial, of failing to stop at the scene of a personal injury accident, MCL 257.617a.[1] She was sentenced to two years' non-reporting probation. For the reasons set forth in this opinion, we affirm.

On March 3, 2007, the complainant, Monique Couch, was working as a Guardian security guard at Cobo Hall in Detroit, Michigan. At approximately 5:00 or 5:30 p.m., immediately following a dog show, show participants were lined up in their vehicles on a ramp, which led to the loading dock, to retrieve their dogs and other belongings. The complainant testified that defendant drove her vehicle around a barricade and attempted to drive onto the loading dock, bypassing other vehicles that had been waiting in line for approximately 45 to 60 minutes. In response, the complainant instructed defendant to stop her vehicle, turn around, and proceed to the end of the line. According to the complainant, defendant replied, "No way. There is no way I [am] going to the end of the line. You [are] crazy. Get out of my way." The complainant and defendant continued to argue, and after a "few minutes," the complainant stepped "a few steps" back from defendant's vehicle. Defendant then told the complainant, "I will hit you," and accelerated her vehicle up the ramp to the loading dock, and struck the complainant's wrist and arm with her driver's side mirror[2]. The impact from defendant's vehicle

[1] Defendant was charged with felonious assault, MCL 750.82, and failure to stop at the scene of a personal injury accident, MCL 257.617a. However, defendant was acquitted of felonious assault.

[2] Defendant denied telling the complainant that she was going to hit her, and she also denied seeing her vehicle strike the complainant.

caused the complainant to spin around. The complainant walked to the top of the ramp and located defendant's unoccupied vehicle. The complainant recorded defendant's license plate number and used her security radio to call her supervisor, Cliff Johnson.

Defendant's versions of events are significantly different than those presented by the complainant. Defendant testified that the complainant instructed her to turn around and proceed to the end of the line. In response, defendant said, "Well, it would be dangerous to do that because there [were] people and dogs in crates coming down [the ramp]. . . . I [am] right up here. If I turn around, I [would] have to go [up] the ramp to do it safely." The complainant replied, "No. You have to go to the end of the line." According to defendant, she refused to do so, saying, "I will not do that. It [is not] safe." Defendant and the complainant continued to argue for approximately five or ten minutes, when defendant said, "Well, I [am] going to go up to the top of the ramp into the loading dock. I [will] turn around and go back[.]" According to defendant, as she proceeded up the ramp, the complainant reached into defendant's vehicle and "grabbed at [defendant] with her hand" and struck the left side of defendant's face.[3] Defendant continued up the ramp, parked her vehicle on the loading dock, and ran into Cobo Hall to report the incident to Johnson, the complainant's supervisor. Defendant told Johnson that the complainant struck her. Defendant also gave Johnson her name, phone number, and vehicle information.

Following her conviction, defendant filed her claim of appeal on August 5, 2008. On March 10, 2009, defendant filed a motion with this Court to remand based on her assertion that she had been "denied the opportunity to cross-examine an endorsed prosecution witness that the prosecutor failed to produce at trial" and to develop the record regarding her claim that she was denied the effective assistance of counsel. On April 23, 2009, this Court granted defendant's motion to consider affidavits and denied defendant's motion to remand. *People v Marnie Claire Kerley*, unpublished order of the Court of Appeals, entered April 23, 2009 (Docket No. 286963).

On appeal, defendant argues that the trial court abused its discretion by excusing the prosecutor from his obligation to produce an endorsed witness. "We review a trial court's determination of due diligence and the appropriateness of a 'missing witness' instruction for an abuse of discretion." *People v Eccles*, 260 Mich App 379, 389; 677 NW2d 76 (2004). "The abuse of discretion standard acknowledges that there may be more than one principled outcome in any given case. An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes." *People v Shahideh*, 277 Mich App 111, 118; 743 NW2d 233 (2007), rev'd on other grounds 482 Mich 1156 (2008) (citations and quotations omitted).

In *Eccles*, *supra* at 388-389, this Court discussed a prosecutor's obligation to produce a witness at trial as follows:

[3] The complainant denied reaching inside defendant's vehicle or striking defendant.

> A prosecutor who endorses a witness under MCL 767.40a(3) is obliged to exercise due diligence to produce that witness at trial. A prosecutor who fails to produce an endorsed witness may show that the witness could not be produced despite the exercise of due diligence. If the trial court finds a lack of due diligence, the jury should be instructed that it may infer that the missing witness's testimony would have been unfavorable to the prosecution's case. [Citations omitted; see also *People v Cook*, 266 Mich App 290, 292; 702 NW2d 613 (2005).]

In *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995), this Court defined due diligence as a reasonable good-faith effort. An exercise of due diligence includes efforts that are reasonable, not "everything possible." *People v Lawton*, 196 Mich App 341, 347-348; 492 NW2d 810 (1992). "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).

Defendant argues that the trial court abused its discretion for three reasons. First, the trial court abused its discretion because, contrary to the trial court's ruling, the prosecutor did not exercise due diligence; second, because it would *not* have been an invasion of privacy to obtain the endorsed witness, Cliff Johnson's, date of birth and social security number from his former employer; and, third, because the trial court should have considered the missing witness jury instruction for the prosecutor's failure to produce Johnson at trial.[4]

When made aware that Johnson would not be produced at trial, defense counsel objected, prompting the trial court to conduct an inquiry regarding the reasons for Johnson failing to appear. In response to the trial court's inquiry, the prosecutor stated he had sent a subpoena to Johnson's last known workplace and that Johnson's cellular and home phone numbers had been disconnected. The trial court then ruled that the prosecutor had exercised due diligence. Defense counsel then renewed his objection, suggesting that the prosecution could have attempted to locate Johnson through the Michigan Secretary of State's office. The trial court responded that the Secretary of State's office could not locate a person solely on the basis of their name, without additional information, such as a social security number or date of birth, which the prosecutor did not have. Moreover, to request this information from Johnson's former employer would have been an invasion of privacy.

In *People v Bean*, 457 Mich 677, 685-686; 580 NW2d 390 (1998), the witness gave police officers his name, social security number, date of birth, and his grandmother's name, address and phone number. At this time, the witness was living with his grandmother. Police officers also obtained the witness's mother's address and phone number. *Id.* Notwithstanding this information, the prosecution failed to exercise a diligent, good-faith effort to produce a material witness at trial. *Bean*, *supra* at 682-683. In *Bean*, *supra* at 689, the Michigan Supreme Court concluded that the following conduct did not amount to due diligence:

[4] In apparent reliance on the prosecutor's endorsement of Johnson as its witness, defense counsel stated that he did not subpoena Johnson.

> The police phoned [the witness's] grandmother, were told that her phone was disconnected, and then ceased all efforts to contact her. At no time did the police contact any Detroit or Washington agency that might have information regarding the whereabouts in Washington of [the witness's mother]. The police took no steps to track down her Detroit-area home or other local sources of information about her. The police simply returned several times to [the witness's] boarded-up, empty house, and to the houses across the street where they were told of the move to Washington, D.C. - sources that had already proven themselves not to be helpful.

Defendant's case is different from *Bean*, *supra* at 677, however, because the police officers in *Bean*, *supra*, had much more information or "specific leads" to investigate. See *People v Conner*, 182 Mich App 674, 681; 452 NW2d 877 (1990) (the prosecutor is obligated to pursue specific leads regarding a witness's whereabouts). Due diligence is determined by the facts and circumstances of each case. *Bean*, *supra* at 684-685. In this case, there was no reason to believe at the time that Johnson's statement was given to police that he would be difficult to contact. Johnson had provided police with his contact information and was an employee of Cobo Hall. However, since the incident, Johnson was no longer employed at Cobo Hall and his contact numbers were no longer operable. As previously stated, "an exercise of due diligence includes efforts that are reasonable, not 'everything possible.'" *Lawton*, *supra*. We find given the particular facts set forth in this matter that the prosecutor made reasonable efforts to locate Johnson. Therefore, the trial court's finding that the prosecutor exercised due diligence in locating Johnson was not clearly erroneous. *Briseno*, *supra* at 14.

Defendant further argues that the trial court should have conducted a due diligence hearing and should have instructed itself regarding the missing witness jury instruction. A hearing to determine due diligence is no longer required. See *Cook*, *supra* at 295-296 (overruled mandatory hearing requirement stated in *People v Pearson*, 404 Mich 698, 715; 273 NW2d 856 (1979)). However, the trial court addressed the parties' respective arguments at trial before ruling that the prosecutor had exercised due diligence. The missing witness jury instruction "may be appropriate if a prosecutor fails to secure the presence at trial of a listed witness who has not been properly excused." *People v Perez*, 469 Mich 415, 420; 670 NW2d 655 (2003). Here, we conclude that the witness was properly excused. Furthermore, in a bench trial, the trier of fact is presumed to know the law and need not instruct himself in the same fashion as in a jury trial. *People v Cazal*, 412 Mich 680, 691; 316 NW2d 705 (1982); *People v Alexander*, 234 Mich App 665, 675; 599 NW2d 749 (1999). Moreover, the inference that the missing witness's testimony would have been adverse to the prosecution is not a mandatory inference. *People v Fields*, 450 Mich 94, 105-106; 538 NW2d 356 (1995).

Defendant also argues that the trial court's findings of fact were erroneous, and thus, affected her right to a fair trial. "Findings on questions of fact are reviewed for clear error . . . ." *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). "'A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made.'" *People v Mullen*, 282 Mich App 14, 22; 762 NW2d 170 (2008), quoting *People v Lanzo Constr Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006).

At the conclusion of defendant's trial, the trial court made the following findings of fact:

Number one: That on March 3, 2007, at approximately 5:00 to 5:30 p.m.[,] [] defendant attempted to gain entrance onto the ramp of Cobo Hall to purportedly retrieve her belongings at the dock of Cobo Hall, she having been in attendance at a dog show at that facility.

Number two: At that same date and time[,] the [complainant], Monique Couch, employed by Guardian Security Company, was acting as a security guard at Cobo Hall and was in the process of controlling traffic to gain entrance to the ramp and the retrieval of participants' belongings from the dock at Cobo Hall and prevented [] defendant from gaining access to the ramp.

Number three: That while [the complainant] was next to [] defendant's vehicle on the driver's side, she indicated that [] defendant would have to go to the end of the line because there were several vehicles that were lined up to get to the dock area to retrieve their personal property and it was perceived by [the complainant], the security guard, that [] defendant had jumped line bypassing barricades which the security guard had put in place to prevent line jumping by the various participants.

Number four: That [] defendant was reluctant to go to the back of the line and made a statement to [the complainant], ["]I will hit you.["]

Number five: That [the complainant] backed up approximately two or three feet. More towards the front of the vehicle but still more in line with the driver's side rear view mirror of the vehicle when [] defendant accelerated her car or pickup truck which was a Trailblazer apparently and in the process struck the person of [the complainant] resulting in her spinning or moving away from the pickup truck.

Number six: That [the complainant,] subsequent to this incident reported the incident to her supervisor who then attempted to locate [] defendant who was at the docking area to retrieve her personal belongings and the dog or dogs which she had shown at the dog show along with her friend Cynthia Darling.

Number seven: That [] defendant spoke with [the complainant's] supervisor by giving [] her telephone number but nothing more and had complained of the [complainant] purportedly grabbing her or striking her while stopped at the ramp's entrance.

Defendant argues that the trial court erred by determining that Darling perceived redness on defendant's right cheek instead of her left cheek. However, as the prosecutor highlights in his brief, Darling testified that defendant was red on the right side of her face, and pointed to the right side of her own face, to further indicate which side she meant. When Darling was asked a third time which side of defendant's face was red, she replied, "I think it was this side [pointing to the right side of her own face]. I [am] not sure." Although the trial court determined that defendant reported to Johnson that she had been struck by the complainant, the trial court found defendant's testimony "incredulous." In fact, the trial court stated the following:

> The testimony that defendant was grabbed at by [the complainant] is incredulous. Especially in light of the fact that, even when [] Darling gave testimony, she indicated that this redness that was perceived by her on [defendant] was on her right cheek as opposed to her left which her left cheek would have been in close proximity to the door of her car or pickup truck[,] and therefore[,] would have been the side that would have been struck had [the complainant] attempted to reach into the vehicle and then struck [] defendant's face.

Where there are credibility questions "posed by diametrically opposed versions of the events in question," the trial court is given great deference. *People v Lemmon*, 456 Mich 625, 646-647; 576 NW2d 129 (1998). In light of the testimony, the trial court's findings of fact were not clearly erroneous. *Jordan*, *supra* at 667.

Lastly, defendant argues that she was denied the effective assistance of counsel. The Court's review of an ineffective assistance of counsel claim is "limited to errors apparent on the record." *Jordan*, *supra* at 667. "[T]he appellate record must contain sufficient detail to support the defendant's claim." *People v Sabin*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "Findings on questions of fact are reviewed for clear error, while rulings on questions of constitutional law are reviewed de novo." *Jordan*, *supra* at 667. "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Mullen*, *supra* at 22, quoting *Lanzo*, *supra* at 473.

"To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient" and thus there is a reasonable probability that, but for the deficient performance, the result of the trial would have been different. *People v Riley*, 468 Mich 135, 140; 659 NW2d 611 (2003). "[T]o demonstrate that counsel's performance was deficient, the defendant must show that it fell below an objective standard of reasonableness under prevailing professional norms. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." *Id.* at 140 (citations omitted). Counsel's performance should not be assessed with the benefit of hindsight. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "Thus, the Sixth Amendment guarantees a range of reasonably competent advice and a reliable result. It does not guarantee infallible counsel." *People v Mitchell*, 454 Mich 145, 170-171; 560 NW2d 600 (1997); see also *LeBlanc*, *supra* at 578. "Counsel is not ineffective for failing 'to advocate a meritless position.'" *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005). "In general, the failure to call a witness can constitute ineffective assistance of counsel only when it 'deprives the defendant of a substantial defense.'" *People v Payne*, 285 Mich App 181, 190; ___ NW2d ___ (2009), quoting *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990).

Defendant argues that Sue Hough would have testified that she encountered defendant while she was upset and heard defendant say that the complainant had hit her in the face. According to defendant, Hough would have also testified that it was unsafe for defendant to turn around on the ramp. As the trial court noted in its findings of fact, defendant reported to Johnson that the complainant struck her in the face. Darling also testified that she heard defendant tell another security guard that the complainant had hit her in the face. However, the trial court found defendant's testimony that the complainant actually struck her in the face "incredulous."

As a result, Hough's testimony would not have provided defendant with a substantial defense, and therefore, counsel's decision not to call Hough as a witness did not render his assistance ineffective. Moreover, even if counsel's performance was deficient, it is not likely that, but for that deficient performance, the result of the trial would have been different. *Riley*, *supra* at 140. Hough's testimony was cumulative of Darling's testimony, and therefore, defendant suffered no prejudice.

Affirmed.

/s/ Patrick M. Meter
/s/ Stephen L. Borrello
/s/ Douglas B. Shapiro