STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC LAHUE CRAIG,

Defendant-Appellant.

UNPUBLISHED
October 9, 1998

No. 200542
Muskegon Circuit
LC No. 96-139661 FH

Before: Smolenski, P.J., and McDonald and Saad, JJ.

PER CURIAM.

Following a bench trial, the court convicted defendant of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and sentenced him to 3 ½to 10 years for his assault conviction. Defendant appeals his conviction and we affirm.

FACTS AND PROCEEDINGS

On March 22, 1995, in the city of Muskegon Heights, defendant, a drug dealer, severely beat his victim, purportedly because he believed that she had bitten off a piece of crack cocaine which he had given her to test. The victim's niece and nephew, Teresa and Kenneth Jordan, were present during the beating. Teresa identified defendant as the assailant. The victim, who had identified defendant as her assailant from a photo lineup conducted approximately seven months after the assault, testified that she had known defendant as "Red." Teresa testified that Kenneth had told her that the assailant had been known as "Red." On appeal, defendant raises several issues, all of them pertaining to his claim that he has never been known as "Red".

I

Defendant contends incorrectly that the verdict was against the great weight of the evidence. "We review a denial of a motion for a new trial based on a great weight of the evidence argument under an abuse of discretion standard." *People v Delisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993) (citation omitted). "The question is whether the verdict was manifestly against the clear weight of the evidence." *Id*.

Here, Teresa testified that defendant was the crack cocaine dealer who assaulted the victim after she tested a rock of the cocaine. She testified that she clearly recognized defendant, because she had seen his face when she tried to intervene to stop the assault, and because the five-minute beating took place near a street light which partially illuminated his face. The victim also testified that defendant was the assailant. Seven months after the assault, the victim identified defendant from a photo lineup conducted at the police station.

Despite this inculpatory evidence, defendant argues that the verdict was against the great weight of the evidence because he, his wife, and Officer Gill all testified that defendant had never been known as "Red." However, even if the victim was mistaken about the name, it does not impeach her identification testimony. Also, although Teresa claimed that the assailant was named or nicknamed "Red," she explained that she learned of the name "Red" from her brother; therefore, this would not undermine her in-court identification of defendant. Accordingly, we hold that the verdict was not against the great weight of the evidence.

Defendant raises a number of other issues relating to his claim that the verdict was against the great weight of the evidence. Defendant claims that Teresa's and the victim's identification testimonies were the product of unduly suggestive in-court, pretrial encounters and a tainted memory, respectively. These issues are not preserved because defendant failed to object to the identification during trial or to move to suppress the identification testimony either before or during trial. *People v Syakovich*, 182 Mich App 85, 89; 452 NW2d 211 (1989); *People v Larry*, 162 Mich App 142, 155; 412 NW2d 674 (1987). Regardless, defendant cannot establish that the identification testimony should have been suppressed. Teresa's in-court identification of defendant had a basis independent from any suggestive pretrial identification. Teresa had ample opportunity to observe defendant's face during the drug transaction and assault. She testified that she remembered defendant from the assault, and that her perception was not impaired by the crack cocaine. Because she had an independent basis for the identification, the trial court could have properly admitted it. *Syakovich, supra*, 89; *People v Kachar*, 400 Mich 78, 95; 252 NW2d 807 (1977).

Defendant also argues that the victim was not a credible witness because she did not tell the complete truth at the preliminary examination (i.e., regarding her solicitation of a drug dealer). The victim explained that she was reluctant to admit that she had been buying drugs. We find no error, as it is the province of the trial court, as the trier of fact in the bench trial, to assess the credibility of witnesses. *People v Velasquez*, 189 Mich App 14, 16; 472 NW2d 289 (1991).

II

Defendant claims that the trial court erroneously denied his motion for a new trial on the basis of newly discovered evidence (witness affidavits averring that defendant was not known as "Red"). We disagree. Defendant failed to show below that he could not have reasonably discovered and produced the evidence at trial as required by MCR 2.611(A)(a)(f). Therefore, the trial court properly denied a new trial on the basis of newly discovered evidence. See *People v Johnson*, 451 Mich 115, 118 n 6; 545 NW2d 637 (1996).

III

Defendant argues erroneously that the trial court's failure to produce the res gestae witness Kenneth Jordan deprived him of his constitutional right to confront this witness. We first note that this issue is not preserved because defendant failed to move for a posttrial evidentiary hearing or new trial on this basis. *People v Dixon*, 217 Mich App 400, 409; 552 NW2d 663 (1996) (defendant did not preserve the issue regarding the prosecution's failure to produce a res gestae witness where he did not raise the issue below in a motion for a posttrial evidentiary hearing or new trial). In any event, we disagree with defendant's claim because the prosecution did not err by not producing Kenneth Jordan as a witness.

Under MCL 767.40a; MSA 28.980(1), the prosecution has a duty to provide initial and continuing notice of all known res gestae witnesses. *People v Burwick*, 450 Mich 281, 288-289; 537 NW2d 813 (1995). Specifically, subsection (1) states that "[t]he prosecuting attorney shall attach to the filed information a list of . . . all res gestae witnesses known to the prosecuting attorney or investigating law enforcement officers." Here, defendant has not established that the prosecution knew of the witness Kenneth. Teresa admitted at trial that she had not informed either the prosecution or investigating officer Roger Kitchen of Kenneth's presence during the commission of the assault against the victim. Furthermore, although the prosecution is imputed with the knowledge of facts which are known to the investigating law enforcement personnel, see *People v Cassell*, 63 Mich App 226, 228-229; 234 NW2d 460 (1975), Teresa's uncertainty as to whether Kenneth spoke to Officer Kitchen[1], coupled with Officer Kitchen's unequivocal testimony indicating that Teresa was the only individual, other than the victim, at the crime scene, suggests that Officer Kitchen was not aware of Kenneth as a res gestae witness.

IV

Defendant alleges without merit that his defense counsel rendered ineffective assistance of counsel in failing to object to the continuation of the trial without the benefit of cross-examining Kenneth. Because defendant did not move for a new trial on this basis or an evidentiary hearing based on a claim for ineffective assistance of counsel, review is limited to the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). Under the *Strickland* test, the burden is placed "on the defendant to show, with regard to counsel's performance, 'that [1] counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment . . . [and] that [2] the deficient performance prejudiced the defense.'" *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997), quoting *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). It is not sufficient for the defendant to show that defense counsel was deficient in failing to produce a witness; the defendant must also show that the "witness' testimony would have altered the result of the proceeding." *People v Pickens*, 446 Mich 298, 327; 521 NW2d 797 (1994).

Here, the record does not reveal whether defense counsel could have helped the defense by calling Kenneth. Defendant argues that Kenneth might have corroborated defendant's theory that the assault was committed by another drug dealer named "Red". Defendant cannot prevail on this issue unless he also presents evidence that Kenneth would have testified favorably at trial. He has not done

so. While it is possible that Kenneth might have exculpated defendant, it is also possible that he might have identified defendant as the assailant. We have no information as to how Kenneth would have testified. Therefore, we hold that defendant has not met his burden of showing that defense counsel committed a prejudicial error.

Defendant also says he was denied the effective assistance of counsel because his lawyer failed to move for the suppression of Teresa's identification testimony as the product of a suggestive in-court confrontation. This issue is not preserved because defendant did not set it forth in the statement of questions involved. *City of Lansing v Hartsuff*, 213 Mich App 338, 351; 539 NW2d 781 (1995), citing MCR 7.212(C)(5). In any event, as discussed above, defendant would not have been able to establish that a motion to suppress would have been successful. *Syakovich, supra*; *Kachar, supra*.

Affirmed.

/s/ Michael R. Smolenski
/s/ Gary R. McDonald
/s/ Henry William Saad

[1] Teresa testified that she was "almost sure" that Kenneth had spoken to Officer Roger Kitchen.