STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 26, 1999
v	No. 203000 Genesee Circuit Court
RODERICK MOON, Defendant-Appellant.	LC No. 96-054811 FC

Before: Whitbeck, P.J., and Cavanagh and Griffin, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316(1)(a); MSA 28.548(1)(a), assault with intent to murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to life in prison on the murder conviction, twenty-five to fifty years' imprisonment on the assault with intent to murder conviction, and two years' imprisonment on the felony-firearm conviction. Defendant appeals his convictions and sentences as of right. We affirm.

I

Defendant first argues on appeal that the trial court erred in finding that the prosecution exercised due diligence to produce two witnesses, Kenneth Davis and Roderick Clemons, whom the prosecution had named on the list of witnesses it intended to produce at trial. Pursuant to MCL 767.40a(3); MSA 28.980(1)(3), the prosecutor is required to send to the defendant not less than thirty days before trial "a list of the witnesses the prosecuting attorney intends to produce at trial." However,

> [t]he prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties. [MCL 767.40a(4); MSA 28.980(1)(4).]

Endorsement or deletion from this list is within the discretion of the trial court; the trial court's decision on this issue will be reversed only where there has been an abuse of discretion. *People v Burwick*, 450 Mich 281, 291; 537 NW2d 813 (1995).

Before the Supreme Court's decision in *Burwick*, this Court held that unless the prosecutor seeks to delete a witness from his witness list as provided in MCL 767.40a(4); MSA 28.980(1)(4), the prosecutor is required to exercise due diligence to produce the witness.[1] See *People v Wolford*, 189 Mich App 478, 484; 473 NW2d 767 (1991). It is unclear whether *Wolford* is still viable in light of *Burwick*.[2] However, we find it unnecessary to resolve this question because the trial court correctly concluded that defendant was not prejudiced by the prosecutor's failure to produce the two witnesses.[3] See MCL 769.26; MSA 28.1096; *People v Mateo*, 453 Mich 203, 210-212; 551 NW2d 891 (1996). The surviving victim of the assault, Crystal Gipson, testified that defendant had a gun which he used to shoot her and the decedent. Another witness, Joy Anderson, testified that defendant showed her a gun which he put in his pocket, that he fired the gun in the store, that defendant left the store with Gipson and the decedent, that she subsequently heard gunshots, that defendant came back into the store with the gun and discussed hiding it, and that he eventually left the store with the gun. At best, Davis could have contradicted testimony that defendant delivered a gun to 802 Stockdale. Given the overwhelming evidence that defendant had committed the shootings, it is highly probable that any error in the prosecution's failure to produce Davis and Clemons did not contribute to the verdict. See *People v Gearns*, 457 Mich 170, 205 (Brickley, J.), 207 (Cavanagh, J.); 577 NW2d 422 (1998).

II

Next, defendant argues that the trial court erred in admitting a hearsay statement made by an unidentified individual to an officer at the scene of the shootings, pursuant to the present sense impression exception to the prohibition against hearsay evidence, MRE 803(1). A trial court's decision to admit evidence is reviewed by this Court for an abuse of discretion. *People v McElhaney*, 215 Mich App 269, 280; 545 NW2d 18 (1996). An abuse of discretion will be found only when an unprejudiced person, considering the facts upon which the trial court made its decision, would find there was no justification or excuse for the ruling. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995).

We agree that the trial court erred in admitting the statements as a present sense impression. In order for a hearsay statement to qualify as a present sense impression, it must explain an event or condition and be made while the declarant was perceiving the event or condition, or immediately thereafter. *People v Smith*, 456 Mich 543, 551; 581 NW2d 654 (1998). Here, a police officer testified that the declarant's statement occurred approximately ten minutes after defendant was apprehended following his escape from a police car. As defendant points out, the interval between the declarant's observation of the event and his statement would have been even longer, since defendant was questioned for a time by police before being placed in the police car. The statements therefore were not admissible as a present sense impression because they were not made while the declarant was perceiving the event or immediately thereafter.[4] See *id.*

However, whether erroneously admitted evidence requires reversal depends on the nature of the error and its effect in light of the weight of the properly admitted evidence. *Id.* at 555. Here, given the overwhelming evidence that defendant possessed a gun and used it to shoot the victims, we find that it is highly probable that the erroneously admitted testimony did not contribute to the verdict. Accordingly, reversal is not required. See *Gearns*, *supra*.

III

Defendant next argues that the trial court erred in allowing a witness who did not personally observe any of the events in question to point out where he believed the security camera videotape showed defendant holding a gun in his hand. A trial court's decision to admit evidence is reviewed by this Court for an abuse of discretion. *McElhaney*, *supra*.

Under MRE 701, a lay witness may testify to his or her opinion if it is rationally based on the witness' perception and it is helpful to a clear understanding of a fact in issue. *People v Daniel*, 207 Mich App 47, 57; 523 NW2d 830 (1994). However, no foundation was laid to show, nor does the prosecution suggest, that the lay witness in this instance had any special knowledge or understanding of the contents of the videotape that would render his opinion helpful to the jury. See *United States v Begay*, 42 F3d 486, 502 (CA 9, 1994). Therefore, we find that the trial court abused its discretion in admitting the testimony. However, because the witness was not presented as someone with special knowledge or understanding beyond that of the jurors, we find it highly probable that his testimony did not contribute to the verdict, and therefore its admission was harmless error. See *Gearns*, *supra*.

IV

In his final argument, defendant maintains that the prosecutor made improper comments during closing arguments, thereby depriving him of a fair trial. Defendant did not object at trial to the comments of which he now complains. To preserve for appeal an argument that the prosecutor committed misconduct during trial, a defendant must object to the conduct at trial on the same ground as he asserts on appeal. In the absence of a proper objection, review is precluded unless a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice. *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996).

Defendant first contends that the prosecutor improperly commented that the surviving victim's testimony that defendant committed the shootings was uncontradicted. However, a prosecutor may observe that the evidence against the defendant is "uncontroverted" or "undisputed," even if the defendant is the only one who could have contradicted the evidence. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). Defendant also asserts that the prosecutor improperly described the reasonable doubt standard. After briefly reviewing the prosecutor's comments, we conclude that the prosecutor did not effectively shift the burden of proof. Cf. *People v Lee*, 212 Mich App 228, 254; 537 NW2d 233 (1995). Accordingly, we conclude that failure to further review defendant's claims of prosecutorial misconduct would not result in a miscarriage of justice. See *Nantelle*, *supra*.

Affirmed.

/s/ William C. Whitbeck
/s/ Mark J. Cavanagh
/s/ Richard Allen Griffin

[1] We note that a number of the cases cited by defendant address the standard of due diligence required when a party is seeking to use an absent witness' prior testimony. While the prosecutor does have a constitutional obligation to exercise due diligence before using prior testimony of a missing witness, that concept is not implicated in the present case. See *Burwick*, *supra* at 290, n 12.

[2] Justice Boyle has opined that "to the extent that opinions from the Court of Appeals have resurrected 'due diligence' as a statutory obligation, they are in error." *People v Bean*, 457 Mich 677, 694 (Boyle, J., concurring in part and dissenting in part).

[3] Even under the previous version of MCL 767.40; MSA 28.290, where a trial court erroneously finds that the prosecution has exercised due diligence to produce a witness, a new trial was required only where the defendant was prejudiced by the prosecution's failure to produce the witness. See *People v Pearson*, 404 Mich 698, 723-724; 273 NW2d 856 (1979).

[4] The prosecution argues that the statement qualifies as an excited utterance and was therefore admissible under MRE 803(2). The prosecution argues that because a murder is a startling event and the witness made his statement shortly thereafter, it qualifies as an excited utterance. However, there is no evidence in the record to indicate that the witness actually witnessed a startling event or that he was still experiencing the stress of the event. Therefore, we find that the statement was not admissible as an excited utterance. See *Smith*, *supra* at 550.