

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMONT MCLEMORE,

Defendant-Appellant.

UNPUBLISHED

November 30, 1999

No. 208834

Recorder's Court

LC No. 96-008099

Before: Jansen, P.J., and Hoekstra and J. R. Cooper*, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction of felonious assault, MCL 750.82; MSA 28.277, entered after a jury trial. We affirm.

At trial, the evidence showed that defendant and another person were riding in defendant's car when they observed a woman walking down the street. Defendant's passenger attempted unsuccessfully to engage the woman in conversation. Thereafter, defendant bumped the woman with his car. The unidentified passenger threatened the woman's boyfriend with a shotgun, and then fled the scene.

The prosecution did not list defendant's passenger as a *res gestae* witness, and did not call him at trial. Defendant did not object, did not call the passenger as his own witness, and did not request assistance in locating him. Defendant did not request that the trial court instruct the jury that the witness's testimony would have been unfavorable to the prosecution, and did not object to the jury instructions as read.

The jury found defendant guilty as charged. Subsequently, the trial court sentenced him to two years' probation, with the first six months to be served in jail.

A *res gestae* witness is a witness who observed some event in the continuum of a criminal transaction, and whose testimony would aid in developing a full disclosure of the facts. *People v*

* Circuit judge, sitting on the Court of Appeals by assignment.

Calhoun, 178 Mich App 517, 521; 444 NW2d 232 (1989). A prosecutor must list all known witnesses who might be called at trial, and all known res gestae witnesses. MCL 767.40a(1);

MSA 28.980(1)(1).

Defendant argues that he was prejudiced by the trial court's failure to either order the prosecutor to produce the passenger as a witness, or to sua sponte instruct the jury that it could infer that the witness's testimony would have been detrimental to the prosecution. CJI2d 5.12. We disagree and affirm. Defendant did not object to the prosecutor's failure to list or produce his passenger as a witness, and did not move for an evidentiary hearing on the issue. We decline to review the issue for the reason that it is not preserved. *People v Dixon*, 217 Mich App 400, 409; 552 NW2d 663 (1996).

Furthermore, it is virtually certain that had defendant's passenger been apprehended, he would have been charged along with defendant. A prosecutor's duty to list, call, or provide assistance in locating a witness does not extend to an accomplice. *People v O'Quinn*, 185 Mich App 40, 45; 460 NW2d 264 (1990).

Defendant neither requested nor objected to the trial court's failure to give CJI2d 5.12. Absent manifest injustice, we will not review an issue of instructional error preserved in the trial court. *People v Kelly*, 231 Mich App 627, 645-646; 588 NW2d 480 (1998). Manifest injustice did not occur as a result of the trial court's failure to sua sponte give CJI2d 5.12.

Affirmed.

/s/ Kathleen Jansen

/s/ Joel P. Hoekstra

/s/ Jessica R. Cooper