

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY HOBBS,

Defendant-Appellant.

UNPUBLISHED

February 18, 2000

No. 208821

Recorder's Court

LC No. 97-002930

Before: Jansen, P.J., and Collins and J.B. Sullivan*, J.J.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for receiving/concealing stolen property in excess of \$100, MCL 750.535; MSA 28.803, and possession of a weapon, MCL 750.224(1); MSA 28.421(1). Defendant was sentenced to two to five years' imprisonment for his convictions, the sentences to run concurrently. We affirm.

Defendant argues that his constitutional right to confront his accusers was violated when the prosecution failed to produce a *res gestae* witness the prosecution had endorsed. We disagree. Under the Michigan *res gestae* witness statute, MCL 767.40a; MSA 28.980(1), the prosecutor need only give initial and continuing notice of all *res gestae* witnesses, identify the witnesses the prosecutor intends to produce, and provide law enforcement assistance to investigate and produce witnesses the defense requests. *People v Burwick*, 450 Mich 281, 287-289; 537 NW2d 813 (1995). The statute requires the prosecutor to identify and list the prosecution witnesses no less than thirty days prior to trial, *id.*, at 288, and any amendment of the prosecution's witness list requires leave of the court and a showing of good cause. MCL 767.40a(4); MSA 28.980(1)(4). In this case, there was no clear determination by the trial court whether the prosecution's failure to produce the witness was tantamount to an amendment of the prosecution's witness list, or that the prosecutor was obligated to assist defendant in producing the witness. Whichever the case, the trial court found the absence of the witness disturbing, and remedied the error by instructing the jury pursuant to CJI2d 5.12. We review the trial court's decision for abuse of discretion. *Burwick*, *supra*, at 298.

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

The preferred remedy to a violation of the res gestae witness statute is a continuance. *Id.* However, when circumstances require, the trial court has the discretion to fashion any appropriate remedy to the violation as the court deems necessary. *Id.* When asked by the trial court what relief defense counsel sought for the prosecution's failure to produce the witness, defense counsel responded that, "my client says that I should ask for a dismissal, but I don't think I can go that far. I would be asking the [c]ourt to grant an adverse instruction against the prosecution. . . ." The court granted defense counsel's request. At no time did defense counsel suggest a continuance. Indeed, the failure to request a continuance can be viewed as trial strategy given that there then remained only one witness, the arresting officer, to identify defendant as the perpetrator. We find no abuse of discretion in the trial court's granting defendant's request for the adverse jury instruction.

Moreover, it cannot be said that defendant was prejudiced by the failure of the prosecution to produce the witness. Defendant claims that the absent witness, a police officer, would have provided testimony to the whereabouts of a jacket which was confiscated during defendant's arrest and which defendant claims was necessary for the prosecution to establish identification. We are unconvinced. Testimony as to defendant's identification was not based solely, if at all, on the jacket the fleeing suspect was wearing. The arresting police officer testified that he identified defendant by his race, complexion, hair style, and gap in his teeth. Furthermore, the arresting officer was out of visual contact with defendant for only five seconds during a sixty to eighty second chase. When the officer regained sight of defendant, he observed him taking off the jacket in question and walking away. At the time the officer saw defendant walking away, there were only two people on the street, one African-American and one white. The officer arrested defendant and testified that defendant's breathing and heart rate were above normal and he was sweating. The testimony by the arresting officer was clearly sufficient to establish defendant's identity as the perpetrator, and it cannot be said that failure to produce a witness to testify to the whereabouts of the jacket defendant was wearing in any way prejudiced defendant.

Affirmed.

/s/ Kathleen Jansen

/s/ Jeffrey G. Collins

/s/ Joseph B. Sullivan