STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 30, 2000
v	No. 217833 Kent Circuit Court
JESSIE LEE BROWN, a/k/a JAMES LEE BROWN, Defendant-Appellant.	LC No. 97-010631-FH

Before: Smolenski, P.J., and Zahra and Collins, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of intentional discharge of a firearm at an occupied dwelling, MCL 750.234b; MSA 28.431(2); being a felon in possession of a firearm, MCL 750.224f; MSA 28.421(6); and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced, as a third habitual offender, MCL 769.11; MSA 28.1083, to concurrent terms of 5 to 9 years' imprisonment for felon in possession of a firearm and 4 to 7 years' imprisonment for discharging the firearm. Defendant was also sentenced to a two-year term of imprisonment for felony-firearm, to be served consecutively with and preceding the above sentences. Defendant appeals as of right from his convictions, and we affirm.

Defendant first contends that the trial court erred by denying his motion for a new trial. We review a trial court's decision on a motion for a new trial for an abuse of discretion. *People v Gadomski*, 232 Mich App 24, 27-28; 592 NW2d 75 (1998). Specifically, defendant argues that he is entitled to a new trial because he was involuntarily absent from the second day of his four-day jury trial. In *People v Woods*, 172 Mich App 476, 478-479; 432 NW2d 736 (1988), this Court explained the contours of a defendant's right to be present at his felony trial:

> A criminal defendant has a statutory right to be present at his trial. MCL 768.3; MSA 28.1026. An accused's right to be present at trial is also impliedly guaranteed by the federal and state constitutions and grounded in common law.
>
> A defendant may waive his right to be present by failing to appear for trial. A valid waiver of a defendant's presence at trial consists of a specific knowledge of the

> constitutional right and an intentional decision to abandon the protection of the constitutional right. There can be no waiver if either of these elements is missing. [Internal citations omitted.]

However, a defendant's absence from trial, whether resulting from a voluntary waiver or not, requires reversal of his or her conviction only when the defendant demonstrates that there is a "reasonable possibility of prejudice" arising from his or her absence from trial. *Id.* at 480.

In the instant case, defendant was present on the first day of trial, and actively participated in his own defense. On the second day of trial, when defendant did not appear, the trial court determined that his absence was voluntary. The trial court then proceeded with trial, instructing the jury not to consider defendant's absence for any reason. Defendant was present on the third and fourth days of trial, and again actively participated in his own defense. Following his conviction, defendant moved for a new trial on the grounds that he was involuntarily absent from the second day of trial. After an evidentiary hearing, the trial court again concluded that defendant's absence was voluntary, and that defendant had waived his right to be present at trial.

Regardless of whether defendant voluntarily waived his right to be present on the second day of trial, he must demonstrate a "reasonable possibility of prejudice" arising from his absence, in order to justify the grant of a new trial. However, defendant offers no argument regarding what incriminating evidence might have been rebutted or prevented had he been present for the second day of trial, nor does he suggest exculpatory evidence that might have been presented. Although the trial court noted that defendant actively assisted his counsel on the other three days of the four-day trial, defendant offers no specific example of how his counsel would have been assisted by his presence on the second day of trial. Furthermore, some of the most damaging evidence of defendant's guilt was introduced on the third day of trial, while defendant was present. That evidence included an audio recording of defendant's statement to police and the testimony of Dorothy Whitbey that she begged defendant not to shoot her, as she fled the dwelling.

Defendant contends that he was prejudiced by the trial court's description of a defendant's non-attendance on the second day of trial as "annoying." However, the trial court immediately followed this comment by instructing the jury that defendant was presumed innocent of the charged crimes and that his absence could not be considered evidence of his guilt. We believe that defendant has failed to demonstrate any reasonable possibility of prejudice from his absence from a part of his trial. Therefore, we will not reverse his conviction. *Woods*, *supra* at 480.

Defendant next contends that a new trial is warranted because the prosecution failed to exercise due diligence in producing Richard Fortenberry as a witness at trial. Fortenberry was the only individual who claimed to have seen defendant possessing the firearm on the day in question. There is no dispute that Fortenberry was indeed a res gestae witness. However, the parties do dispute whether the prosecution was required to exercise due diligence to produce Fortenberry at trial.

The prosecution listed Fortenberry as a potential witness on the information, although he was identified only as "Ricky." On the second day of trial, the prosecutor indicated that he expected

Fortenberry to appear as a witness. However, on the third day of trial, the prosecutor informed the trial court that he would not be able to produce Fortenberry, due to the recent discovery that Fortenberry had apparently moved to Dallas, Texas. The trial court therefore permitted the prosecutor to delete Fortenberry from the witness list.

Defendant argues that the res gestae witness statute, MCL 767.40a; MSA 29.980(1), requires the prosecution to show that it exercised due diligence to produce Fortenberry as a witness at trial. As amended in 1986, the statute provides, in pertinent part:

> (1) The prosecuting attorney shall attach to the filed information a list of all witnesses known to the prosecuting attorney who might be called at trial and all res gestae witnesses known to the prosecuting attorney or investigating law enforcement officers.
>
> (2) The prosecuting attorney shall be under a continuing duty to disclose the names of any further res gestae witnesses as they become known.
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> (3) Not less than 30 days before the trial, the prosecuting attorney shall send to the defendant or his or her attorney a list of the witnesses the prosecuting attorney intends to produce at trial.
>
> (4) The 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.

In *People v Burwick*, 450 Mich 281, 291; 537 NW2d 813 (1995), our Supreme Court ruled that the amended statute allows the prosecution to delete from or add to its trial witness list at any time, with good cause. *Id.* at 291. We review a trial court's decision permitting the prosecution to delete a witness from the witness list for an abuse of discretion. *Burwick*, *supra* at 291.

MCL 767.40a; MSA 28.980(1) no longer contains "due diligence" language, and it expressly authorizes the prosecution to delete witnesses from the witness list for good cause. In the instant matter, testimony was presented indicating that, despite the prosecution's "numerous attempts" to serve Fortenberry and his contact with the victim/witness unit, Fortenberry's surprise relocation to Dallas was sufficiently good cause to support his deletion from the witness list. Accordingly, we do not believe that the trial court abused its discretion in permitting Fortenberry's deletion from the witness list.

Defendant further contends that the due diligence rule was revived by our Supreme Court in *People v Bean*, 457 Mich 677; 580 NW2d 390 (1998). In *Bean*, our Supreme Court ruled that the prosecutor had failed to demonstrate due diligence in locating a key witness for trial, and was therefore barred from introducing that witness' transcribed testimony from the preliminary examination as substantive evidence at trial. *Id.* at 683. That ruling was based on MRE 804 and the defendant's constitutional right to confront his accusers, and was not premised on the res gestae witness statute. *Id.* at 683-684. In contrast, the instant matter did involve an attempt to introduce preliminary examination

testimony, as Fortenberry never testified at the preliminary examination. Thus, we do not believe that *Bean* is applicable.

Finally, defendant contends that the trial court erred by denying his request for a "missing witness instruction," CJI2d 5.12, which provides:

> [Witness's name] is a missing witness whose appearance was the responsibility of the prosecution. You may infer that this witness's testimony would have been unfavorable to the prosecution's case.

We review a trial court's denial of a requested "missing witness instruction" for an abuse of discretion. *People v Snider*, 239 Mich App 393, 422; 608 NW2d 502 (2000). In *Snider*, we held that the prosecution's inability to locate a witness was sufficient to support a good cause deletion of a witness from the witness list. *Id.* We also ruled that the prosecution had no duty to produce a witness under the amended statute; thus, the trial court did not err by refusing to read a missing witness instruction. *Id.* at 422-423. Having already concluded that the prosecutor validly deleted Fortenberry from its witness list, we conclude that the trial court did not abuse its discretion by refusing to read a missing witness instruction.

Affirmed.

/s/ Michael R. Smolenski
/s/ Brian K. Zahra
/s/ Jeffrey G. Collins