

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GLEN STEPHENSON,

Defendant-Appellant.

UNPUBLISHED

August 4, 2000

No. 214116

Wayne Circuit Court

LC No. 98-004889

Before: Hood, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of burning a dwelling house, MCL 750.72; MSA 28.267, and five counts of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279. We affirm.

Defendant first argues that he was denied a fair trial by the trial court's ruling that the prosecutor exercised due diligence to produce two missing res gestae witnesses at trial. This Court reviews a trial court's denial of a request for a "missing witness" instruction, and a trial court's decision permitting the prosecutor to delete a witness from its witness list, for an abuse of discretion. *People v Burwick*, 450 Mich 281, 291; 537 NW2d 813 (1995); *People v Snider*, 239 Mich App 393, 422; 608 NW2d 502 (2000). An abuse of discretion exists when the court's decision is so grossly violative of fact and logic that it evidences perversity of will, defiance of judgment, and the exercise of passion or bias. *People v Gadomski*, 232 Mich App 24, 33; 592 NW2d 75 (1998).

After waiting more than an hour for res gestae witnesses Michael Bramel and Donald Robertson to appear at trial, and after defendant's request for an adverse inference instruction for failure to produce those witnesses, the trial court held an evidentiary hearing to determine what efforts the prosecutor made to secure their testimony. After hearing the testimony of Lieutenant Albert Hood of the Detroit Arson Squad, the court found that the prosecutor exercised due diligence to locate the missing witnesses and refused to give the requested instruction.

Generally, a res gestae witness is a person who witnesses some event in the continuum of a criminal transaction and whose testimony will aid in developing a full disclosure of the facts. *People v Calhoun*, 178 Mich App 517, 521; 444 NW2d 232 (1989). Before its amendment in 1986, MCL 767.40a; MSA 28.980(1) required the prosecutor to exercise due diligence to produce an individual who might have any knowledge of the crime. *Snider, supra* at 422-423. After its amendment, the statute changed the prosecutor's duty, so that the duty to produce res gestae witnesses was replaced with the duty to provide notice of known witnesses and to give reasonable assistance in the locating of witnesses if a defendant requests such assistance. *Id.* at 423. Now, rather than having to show due diligence, the prosecutor must only show good cause to strike a witness from its list when it is unable to locate the witness. See *Burwick, supra* at 291. Thus, there is no longer any duty to endorse or produce endorsed res gestae witnesses. See *People v Paquette*, 214 Mich App 336, 343; 543 NW2d 342 (1995).

Accordingly, the prosecutor had no duty to produce Bramel and Robertson and he was free to strike them from the witness list after introducing sufficient evidence of his inability to locate the witnesses. We hold that the trial court did not abuse its discretion in denying defendant's request to give a "missing witness" instruction and defendant was not denied his right to confront the witnesses against him.¹

Next, defendant argues that the court's use of an identification instruction improperly reduced the prosecutor's burden of proof, thereby denying defendant a fair trial. Defendant waived review of the jury instructions by failing to object at trial. *Snider, supra* at 420. This Court reviews unpreserved claims of constitutional error for plain error that affected substantial rights. *People v Carines*, 460 Mich 750, 761-764, 774; 597 NW2d 130 (1999). A "reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 774.

In this case, there was no plain error that affected defendant's rights. The trial court's instructions to the jury, when read in their entirety, fairly presented the issues to be tried and

¹ Significantly, unlike the prosecutor in *People v Bean*, 457 Mich 677, 690; 580 NW2d 390 (1998), the prosecutor in this case did not intend to use either of the missing witnesses' prior testimony at trial. Thus, *People v Dye*, 431 Mich 58; 427 NW2d 501, cert den 488 US 985 (1988), and *People v James (After Remand)*, 192 Mich App 568; 481 NW2d 715 (1992), relied upon by defendant, are also distinguishable. Additionally, MRE 804(a)(5), which requires the proponent of a witness' statement to exercise due diligence to attempt to locate the witness, involves the use of former testimony in situations where a witness is unavailable. Accordingly, while MRE 804 factored into the analyses in *Bean, supra*, *Dye, supra*, and *James, supra*, it is not a factor in this case because no testimony of the missing witnesses was offered.

sufficiently protected defendant's rights. See *People v Whitney*, 228 Mich App 230, 252-253; 578 NW2d 329 (1998).²

Affirmed.

/s/ Harold Hood

/s/ David H. Sawyer

/s/ Mark J. Cavanagh

² We note that defendant's assertion that he was denied the effective assistance of counsel by defense counsel's failure to object to the jury instruction at issue is without merit because defendant failed to establish that the instruction required reversal.