STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 2, 2004
v	No. 249417 Calhoun Circuit Court
DARYL DEVON LESLEY, Defendant-Appellant.	LC No. 03-000272-FC

Before: Meter, P.J., and Wilder and Schuette, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as an habitual offender, third offense, MCL 769.11, to a prison term of twenty to forty years for the robbery conviction, to be served consecutively to a mandatory two-year term for felony-firearm. Defendant appeals his convictions as of right and we affirm.

Defendant first contends that the trial court erred in admitting certain evidence at trial. This issue has not been preserved because defendant did not object at trial. MRE 103(a)(1); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Therefore, review is precluded unless the defendant demonstrates plain error that affected the outcome of the lower court proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

While the police were at the victim's home investigating the crime, the victim received a telephone call from someone who reported having observed defendant leaving the scene. On defendant's motion, the court ruled that the investigating officer, Charles Pelfrey, could testify that he took certain actions based on the information received during the telephone call, but could not testify to the informant's statements. After Pelfrey testified, the court asked certain questions posed by jurors. Some of those questions pertained to the information received from the informant. Defendant contends that by allowing Pelfrey to respond, the court violated its previous ruling and improperly admitted hearsay evidence showing that defendant committed the crimes charged.

Having reviewed the record, we find that the trial court's evidentiary ruling was not violated. Pelfrey testified only that he received information about the suspects, their vehicle, and their possible whereabouts, which led him to another witness's apartment. On questioning by the court, Pelfrey explained how he came to get this information, but did not expand on what the

informant had said. He did not recount the informant's statements or testify that the informant reported seeing defendant leaving the scene. Rather, he testified only that the caller reported that he "saw what had gone on outside" the apartment and "told me what he had seen." Because the court's questions did not elicit improper hearsay testimony previously ruled inadmissible, defendant has not shown plain error in the admission of the evidence. Because defendant has not shown that the evidence was objectionable, he likewise has not shown that counsel was ineffective for failing to object. *People v Kulpinski,* 243 Mich App 8, 27; 620 NW2d 537 (2000).

Defendant next contends that the court erred in excusing the prosecutor from producing Larry Carter as a witness and in failing to give a missing-witness instruction regarding Carter, who had been found with defendant when defendant was arrested. A search of Carter had produced some lottery tickets and two Friend of the Court checks made out to the victim's girlfriend.

The court's decision to delete an endorsed witness form the prosecutor's witness list is reviewed for an abuse of discretion. *People v Burwick,* 450 Mich 281, 291; 537 NW2d 813 (1995). The court's determination of due diligence is a question of fact that is reviewed for clear error. *People v Wolford,* 189 Mich App 478, 484; 473 NW2d 767 (1991), lv den 439 Mich 899 (1991). Whether a particular jury instruction is applicable is a question of law that is reviewed de novo. *People v Perez,* 469 Mich 415, 418; 670 NW2d 655 (2003).

The prosecutor is required to file a witness list naming all known persons to be called at trial and all res gestae witnesses known to the prosecutor or the police. MCL 767.40a(1). The prosecutor does not have an obligation to produce res gestae witnesses unless they are named as witnesses to be called at trial. The prosecutor need only provide the defendant with notice of known res gestae witnesses and provide reasonable assistance to locate those witnesses at the defendant's request. MCL 767.40a(5); *Burwick, supra* at 288-289. The prosecutor may add or delete a witness from the list "at any time upon leave of the court and for good cause shown or by stipulation of the parties." MCL 767.40a(4). "The inability of the prosecution to locate a witness listed on the prosecution's witness list after the exercise of due diligence constitutes good cause to strike the witness from the list." *People v Canales,* 243 Mich App 571, 577; 624 NW2d 439 (2000). Given the authority of the court to excuse the production of listed witnesses, the missing-witness instruction is not appropriate if the court excuses production of the witness after a finding of due diligence. *People v Snider,* 239 Mich App 393, 422-423; 608 NW2d 502 (2000). The instruction would, however, be appropriate where, for example, the prosecutor fails to provide reasonable assistance to the defense in locating a witness or fails to produce a listed witness who has not been properly excused. *Perez, supra* at 420.

The record shows that the police attempted to locate Carter at his last known addresses. No one at those locations knew him and the mailman said he had not seen Carter for over a year. The prosecutor had information that Carter had ties to Chicago and that someone attempted to track him down, only to be stymied by the overwhelming number of Larry Carters in the Chicago phone directory. Defendant contends that the prosecutor could have done more, such as check Illinois driver's license records and seek assistance from other agencies in locating Carter. It is possible that if the Illinois and federal authorities had sufficient manpower and time to devote to a search for Carter, they might have located him. However, "[d]ue diligence requires

that everything reasonable, not everything possible, be done." *People v Whetstone*, 119 Mich App 546, 552; 326 NW2d 552 (1982). It is possible that, if the prosecutor had Carter's full name and date of birth, a driver's license check might have been feasible. However, the test is whether the prosecutor "made good-faith efforts to procure the testimony, not whether more stringent efforts would have produced it." *People v Connor*, 182 Mich App 674, 681; 452 NW2d 877 (1990). Moreover, there is no evidence that the prosecutor had specific leads indicating that Carter was in Chicago; defendant indicated only that Carter was from there originally. Absent specific leads, the prosecutor need only contact known persons who might have information about Carter's whereabouts, *id*., and there is no evidence that such persons existed, here or in Chicago. In light of the record presented, the trial court did not err in finding due diligence and thus did not abuse its discretion in allowing Carter's name to be stricken. Therefore, the court properly declined to give former CJI2d 5.12.

We decline to consider defendant's contention that the court erred in ruling on the motion to strike Carter from the witness list without holding a full evidentiary hearing. This issue has not been preserved for appeal because defendant did not object below, *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994), and because defendant did not include the issue in his statement of questions presented for review. *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000).

Affirmed.

/s/ Patrick M. Meter
/s/ Kurtis T. Wilder
/s/ Bill Schuette