

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
November 28, 2017

v

JAMAL TYREZ STOKES,

Defendant-Appellant.

No. 334849
Kalamazoo Circuit Court
LC No. 2015-001052-FH

Before: SWARTZLE, P.J., and SAWYER and MARKEY, JJ.

PER CURIAM.

Defendant, Jamal Tyrez Stokes, appeals as of right from his jury trial convictions of assault with intent to commit sexual penetration, MCL 750.520g(1), and fourth-degree criminal sexual conduct (CSC IV), MCL 750.520e(1)(b). The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to 3 to 30 years' imprisonment for the assault with intent to commit sexual penetration conviction, and 1 to 15 years' imprisonment for the CSC IV conviction. We affirm defendant's convictions, but remand for resentencing.

This case arises out of a sexual assault that occurred on a wooded trail in Kalamazoo, Michigan, while defendant and the victim walked to a nearby Meijer grocery store. The victim recalled seeing a man she recognized from her apartment complex on the trail immediately before the assault, and then again immediately after the assault. Although the police were able to identify this potential witness before trial, they were unable to make in-person contact with him. As a result, defendant requested an adjournment for additional time to find and serve a subpoena to this witness. However, the trial court denied defendant's request, finding that an adjournment would not help produce this witness because he had no known address and five outstanding warrants for his arrest.

First, defendant contends that he was denied his state and federal constitutional rights to present a defense because the trial court denied his request for an adjournment to locate a *res gestae* witness. We disagree.

"This Court reviews *de novo* whether defendant suffered a deprivation of his constitutional right to present a defense." *People v Steele*, 283 Mich App 472, 480; 769 NW2d 256 (2009). However, defendant did not preserve this issue in the trial court. Unpreserved constitutional issues are reviewed for plain error. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). In addition, "[a] trial court's rulings on motions for a continuance are

reviewed for an abuse of discretion.” *Steele*, 238 Mich App at 484. “[A] defendant must show prejudice as a result of the trial court’s abuse of discretion.” *People v Snider*, 239 Mich App 393, 421; 608 NW2d 502 (2000).

“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 O’Quinn*, 185 Mich App 40, 44; 460 NW2d 264 (1990), overruled on other grounds by *People v Koonce*, 466 Mich 515, 516; 648 NW2d 153 (2002). According to MCL 767.40a, the prosecutor must advise the defendant of “all res gestae witnesses known to the prosecuting attorney or investigating law enforcement officers.”

Without deciding whether this individual was a res gestae witness, we conclude that defendant has failed to show that he was prejudiced by the trial court’s decision to deny his request for an adjournment. *Snider*, 239 Mich App at 421-422. First, the trial court’s determination that an adjournment would not have produced this witness at trial is supported by the record. The witness had no known address, and there were five outstanding warrants for his arrest. As the trial court found, the witness would have no motivation to appear at trial because he would be arrested once he arrived at the courthouse. The investigating detective attempted to locate the witness after learning where his daughter attended school. However, his attempts were unsuccessful. The detective, who spoke to the witness over the phone, tried to convince the witness to turn himself in so he would be available to testify, but the witness failed to do so.

Second, defendant has not shown that the witness’s testimony would have been helpful to his defense. The witness told the detective that he did not remember the night in question and that he did not observe a sexual assault on the trail. Moreover, the victim testified that the witness did not observe the assault. Based on the foregoing, the trial court did not abuse its discretion by denying defendant’s requests for an adjournment. See *Steele*, 283 Mich App at 484 (concluding “that the trial court did not abuse its discretion by denying the motion to adjourn,” because the defendant failed “to show how an adjournment of trial would have assisted him in finding a witness whom he had previously had no success in locating”). See also *Snider*, 239 Mich App at 422 (determining that defendant had not shown that he was prejudiced as a result of the trial court’s refusal to adjourn to obtain testimony from the emergency room doctor because the defendant was unable to show that the “doctor’s testimony would have been helpful in any way—particularly since [the defendant] himself admitted shooting both victims”). Because defendant has failed to show prejudice, the trial court’s refusal to adjourn did not constitute plain error affecting his substantial rights; therefore, defendant was not denied his right to present a defense. *Carines*, 460 Mich at 764.

Next, defendant argues that his trial counsel was ineffective for failing to object to the jury instructions. We disagree.

“Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law.” *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court’s “factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo.” *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). However, because defendant failed to move for a new trial or an evidentiary hearing, this Court’s

review of his ineffective assistance of counsel claim is limited to errors apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000).

In this case, defendant admits that trial counsel approved the jury instructions. However, he argues on appeal that trial counsel was ineffective for failing to request an instruction on a prior inconsistent statement and the missing witness instruction.

To prevail on a claim of ineffective assistance of counsel, a defendant must establish that “(1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel’s unprofessional errors, the outcome of the proceedings would have been different.” *Sabin (On Second Remand)*, 242 Mich App at 659. “A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy, and he must show that, but for counsel’s error, the outcome of the trial would have been different.” *Id.*

According to defendant, his trial counsel was ineffective for failing to request that the trial court include M Crim JI 4.5 in the jury instructions, which provides:

Prior Inconsistent Statement Used to Impeach Witness

You have heard evidence that, before the trial, [a witness/witnesses] made [a statement/statements] that may be inconsistent with [his/her/their] testimony here in court.

(1) You may consider an inconsistent statement made before the trial [only] to help you decide how believable the [witness’/witnesses’] testimony was when testifying here in court.

(2) If the earlier statement was made under oath, then you can also consider the earlier statement as evidence of the truth of whatever the [witness/witnesses] said in the earlier [statement/statements] when determining the facts of this case.

In this case, trial counsel admitted the victim’s written statement to her employer as evidence to contradict her statements in the initial police report. Thus, contrary to defendant’s argument, trial counsel did not admit the victim’s written statement into evidence to impeach her *trial* testimony. However, even if trial counsel was deficient for failing to request the prior inconsistent statement instruction, that failure was not outcome determinative. In this case, the jury was aware that the victim’s written statement was inconsistent with, or at the very least, provided more detail than her statements in the police report. Moreover, trial counsel questioned the victim’s credibility for this inconsistency in closing arguments, and the trial court instructed the jury at length regarding its obligation to determine witness credibility. Based on the foregoing, there is not a reasonable probability that absent trial counsel’s failure to request the prior inconsistent statement instruction, the outcome of defendant’s trial would have been different. *Sabin (On Second Remand)*, 242 Mich App at 659. Thus, defendant has not established that his trial counsel was ineffective in this regard.

Defendant next argues that his trial counsel was ineffective for failing to request the missing person instruction.

M Crim JI 5.12 provides:

Prosecutor’s Failure to Produce Witness

[*State name of witness*] 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.

After the 1986 amendment to MCL 767.40a, the Michigan Supreme Court held that the Legislature “eliminated the prosecutor’s burden to locate, endorse, and produce unknown persons who might be *res gestae* witnesses” *People v Burwick*, 450 Mich 281, 289; 537 NW2d 813 (1995). “Instead, the prosecution must notify a defendant of all *known res gestae* witnesses and all witnesses that the prosecution *intends to produce*.” *People v Cook*, 266 Mich App 290, 295; 702 NW2d 613 (2005). Therefore, “[t]he prosecutor’s duty to produce witnesses has been replaced with an obligation to provide notice of *known witnesses* and *reasonable assistance* to locate witnesses *on defendant’s request*.” *Id.*, quoting *Burwick*, 450 Mich at 289.

Moreover, “[a] prosecutor who endorses a witness under MCL 767.40a[] is obligated to exercise due diligence to produce that witness at trial.” *People v Eccles*, 260 Mich App 379, 388; 677 NW2d 76 (2004). Therefore, “[a] missing witness instruction should be given if the trial court finds a lack of due diligence on the part of the prosecutor in seeking to produce an endorsed witness.” *People v Everett*, 318 Mich App 511; __ NW2d __ (2017) (Docket No. 328660); slip op at 8.

In this case, trial counsel was not deficient for failing to request the missing witness instruction because defendant was not entitled to such an instruction. The prosecutor never endorsed this witness. In fact, the police did not discover the witness’s identity until July 2016. After discovering his identity, the police attempted to find him and have him testify at trial. However, the witness had no known address and the police were unable to make in-person contact with him. Furthermore, the witness told the detective over the phone that he could not recall the evening in question and did not observe a sexual assault on the trail. The victim also testified that the witness did not observe the assault. Based on the foregoing, the prosecutor was not required to produce this witness, *Burwick*, 450 Mich at 289, and defendant was not entitled to a missing witness jury instruction. *Everett*, __ Mich App at __; slip op at 8. As a result, his trial counsel was not deficient for not requesting that instruction. “Ineffective assistance of counsel cannot be predicated on the failure to make a frivolous or meritless motion.” *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003).

Finally, defendant contends that he is entitled to resentencing because the trial court improperly scored offense variable (OV) 4 and OV 13. Specifically, defendant asserts that the current record does not support a scoring of 10 points for OV 4 (serious psychological injury to the victim), or a scoring of 25 points for OV 13 (continuing pattern of felonious criminal behavior). We agree.

At the outset, the prosecutor concedes that OV 4 and 13 were incorrectly scored based on the existing record. Therefore, we believe that defendant is entitled to resentencing. See *People v Lathrop*, 480 Mich 1036, 1036; 743 NW2d 565 (2008) (stating that “the prosecution’s admission that prior record variable 5, MCL 777.55, was improperly scored establishes a plain error affecting the defendant’s substantial rights”). In addition, a change to the scoring of either OV 4 or OV 13 would result in a change of defendant’s minimum sentencing score range. As a result, defendant is entitled to resentencing. *People v Francisco*, 474 Mich 82, 92; 711 NW2d 44 (2006) (“Because [the Court] conclude[s] that the trial court erred in scoring OV 13, and that this error affected the statutory sentencing guidelines range, [the Court] remands to the trial court for resentencing pursuant to the correct guidelines range”).

We affirm defendant’s convictions, but remand this case to the trial court for resentencing. We do not retain jurisdiction.

/s/ Brock A. Swartzle
/s/ David H. Sawyer
/s/ Jane E. Markey