STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 14, 2013
v	No. 305687 Wayne Circuit Court
BRUCE MATHIS, Defendant-Appellant.	LC No. 11-002170-FC

Before: JANSEN, P.J., and FORT HOOD and SHAPIRO, JJ.

FORT HOOD, J. (*dissenting*).

I respectfully dissent.

At the start of trial, the prosecutor noted that her second witness, Mancil Brannon, did not appear in court that day. A subpoena was issued, but all phone numbers were disconnected, and the prosecutor was unable to contact him. Defense counsel indicated that he wanted to take due diligence testimony and requested an adverse inference instruction. Before trial commenced, a police officer was questioned regarding his efforts to contact Brannon who was endorsed by the prosecutor on the witness list. The officer indicated that he did not know if he actually spoke to Brannon. However, the individual the officer spoke to made it clear that he did not want to be involved in the case. Brannon gave a statement after the incident and acknowledged seeing one man push another. However, Brannon denied witnessing any shooting. With regard to his efforts to locate Brannon, the officer believed that the home address given for Brannon was a vacant home. The officer could not recall any other specifics regarding his attempt to locate Brannon. The trial court indicated that it was "leaning towards" giving the adverse witness instruction, but would discuss the issue with counsel when reviewing jury instructions. During opening statements, defense counsel advised the jury that, although five people were present in the home, only the victim would be produced to testify.

On February 12, 2011, the victim was visiting his neighbor, Joe. Defendant, the victim's friend for two years, was also at Joe's home with three to four other people.[1] The victim shared

[1] The victim did not know Joe's last name. Additionally, although the victim could identify three other individuals in the home by their first name, he did not know their last names.

his beer with Joe. The victim had recently ended his relationship with his girlfriend, and defendant tried to engage the victim in conversation. The victim did not want to talk and got up to leave the premises. Defendant stood up, and the men exchanged words. The victim pushed defendant away. Defendant stumbled back, then pulled a gun and shot the victim, striking him in the finger and in the leg. Everyone in the room walked over the victim and left. The victim lay on the porch and tried to use his telephone to call the police. He was unable to call, and Joe called the police.

On cross-examination, defense counsel asked the victim why Joe, his friend, did not come to his aid. The victim acknowledged that Joe did not intervene in the dispute between the victim and defendant, but noted that Joe was still his friend. Defense counsel then questioned whether Joe would attend the court proceedings. The victim testified that he saw Joe there. Defense counsel expressly asked, "You saw him here?" The victim responded, "He is here." At that time, defense counsel did not move for a recess to question Joe and add him to the defense witness list. Rather, counsel questioned the victim about what occurred after the shooting. The trial court interjected to determine if Joe was in the courtroom and on the witness list. The prosecutor indicated that he was not on the witness list. Defense counsel proceeded to inquire regarding the events following the shooting. There is no indication in the lower court record that defense counsel ever attempted to interview Joe and call him as a witness at trial.

Defendant testified that he was present at Joe's home when the victim was there. Although he acknowledged that the men exchanged words, he denied shooting the victim. Defendant testified that when he left Joe's home, no shooting had occurred.

At the conclusion of the testimony, the trial court requested an offer of proof regarding the testimony that would have been given by missing witness Brannon. Defense counsel did not provide an offer of proof, but merely stated, "Well, he [Brannon] is endorsed." The trial judge noted that, according to Brannon's statement to police, he did not have any information regarding the shooting, and therefore, Brannon's testimony would not have benefited the defense. Again, defense counsel reiterated that once the prosecutor endorsed a witness, she had a duty to bring him to court. When pressed further by the trial court, defense counsel stated that it took courage to come to court and accuse a person of lying; it was easier not to come to court. The trial court noted that the same logic would apply to all parties because all of the men were friends and drinking buddies who did not want to be involved in the criminal matter. The trial court held that defendant was not entitled to an adverse witness instruction because some reasonable effort was made to locate the witness, and the witness would not have provided exculpatory evidence for defendant. Finally, the trial court stated that if the prosecutor had produced the witness, the defense likely would not have asked the witness any questions.

On appeal, defendant contends that the trial court erred by failing to provide the missing witness instruction when the prosecution did not produce an endorsed witness and did not establish due diligence in the attempted production of the witness. I would hold that defendant is not entitled to appellate relief. A claim of instructional error presents a question of law reviewed de novo, but the trial court's determination that the instruction applies to the facts of the case is reviewed for an abuse of discretion. *People v Dupree*, 486 Mich 693, 702; 788 NW2d 399 (2010). The jury instructions must include all elements of the charged offenses in addition to any material issues, defenses, and theories if supported by the evidence. *People v McGhee*, 268

Mich App 600, 606; 709 NW2d 595 (2005). Imperfect instructions are not erroneous if they fairly present the issues to be tried and sufficiently protect the defendant's rights. *People v Clark*, 274 Mich App 248, 255-256; 732 NW2d 605 (2007) (citation omitted). The defendant bears the burden of proving that a claim of instructional error resulted in a miscarriage of justice. *Dupree*, 486 Mich at 702; see also MCL 769.26 which provides:

> No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

Defendant's claim of instructional error also arises from a purported violation of MCL 767.40a, the res gestae witness statute. A res gestae witness is an individual who witnesses some event in the continuum of the criminal transaction such that the testimony would aid in developing a full disclosure of the facts at trial. *People v Long*, 246 Mich App 582, 585; 633 NW2d 843 (2001). The prosecutor must include the names of all known res gestae witnesses on the witness list attached to the information and all known witnesses who might testify at trial. *Id*.; MCL 767.40a(1). The prosecutor has a continuing duty to disclose the names of res gestae witnesses as they become known. MCL 767.40a(2). Not less than 30 days before the trial, the prosecutor shall provide a list of all witnesses she intends to produce at trial, but may add or delete the witnesses upon leave of the court and for good cause shown or by stipulation of the parties. MCL 767.40a(3), (4). The prosecutor also has an obligation to provide law enforcement assistance to investigate and produce witnesses sought by the defense. MCL 767.40a(5); *Long*, 246 Mich App at 585-586.

The underlying purpose of MCL 767.40a is to provide notice to the accused of potential witnesses. *People v Callon*, 256 Mich App 312, 327; 662 NW2d 501 (2003). The plain language of MCL 767.40a reveals that the Legislature did not intend for the statute to act as a bar to relevant evidence. *Id*. Rather, the statute provides the trial courts with the discretion to permit the prosecution to amend its witness list at any time to add or delete witnesses. *Id*. Furthermore, the statute was not designed to allow defense counsel to engage in "gamesmanship." *Id*. at 328. Consequently, even if MCL 767.40a is violated, a defendant must show prejudice from the violation. *People v Hana*, 447 Mich 325, 358 n 10; 524 NW2d 682 (1994). Specifically, the defendant must demonstrate unfair prejudice that would warrant a new trial for a purported violation of MCL 767.40a. *Callon*, 256 Mich App at 328-329. Simply put, noncompliance does not mandate dismissal or reversal when defendant fails to establish prejudice. *People v Williams*, 188 Mich App 54, 58-60; 469 NW2d 4 (1991).

In the present case, I cannot conclude that the trial court's denial of the request for the adverse witness instruction premised on a violation of MCL 767.40a constituted an abuse of discretion. *Dupree*, 486 Mich at 702. First, I note that defense counsel did not proffer a valid reason for requiring Brannon's testimony at trial. When questioned by the trial court regarding the benefit of this testimony, defense counsel merely cited to the fact that the witness had been endorsed by the prosecution. The purpose of MCL 767.40a is to provide notice of potential witnesses, not to allow the defense to engage in gamesmanship. *Callon*, 256 Mich App at 327-

328. Moreover, irrespective of police efforts to ensure Brannon's presence at trial, another eyewitness to the events leading up to the shooting was present at trial, according to the victim. Despite "Joe's" appearance at trial, defense counsel did not seek a recess to interview Joe or move to add Joe to the witness list to allow him to testify at trial. Instead, defense counsel chose to deliberately proceed, consistent with his opening statement, with the testimony of the victim as the only witness to contradict defendant's version of events. Indeed, in closing argument, defense counsel faulted the prosecution for failing to call Joe as a witness. However, Joe was never endorsed by the prosecutor, and defense counsel declined to call Joe as a witness after being apprised of his presence in court. Therefore, even if it was assumed, without deciding, that a violation of MCL 767.40a occurred, defendant cannot establish prejudice from the violation when Joe, a res gestae witness, could have been called to testify at trial. *Hana*, 447 Mich at 358 n 10; *Williams*, 188 Mich App at 58-60. Defendant's claim of error does not entitle him to appellate relief.

I would affirm.

/s/ Karen M. Fort Hood