

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MATT WELLS,

Defendant-Appellant.

UNPUBLISHED

August 2, 1996

No. 180322

LC No. 93-007903

Before: Reilly, P.J., and Cavanagh, and R.C. Anderson,* JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of second-degree murder, MCL 750.317; MSA 28.549, for the drug-related slaying of Leroy Ashley. Defendant was sentenced to nineteen to fifty years' imprisonment. We affirm defendant's conviction but remand for sentencing proceedings consistent with this opinion.

Defendant initially contends that he was denied the effective assistance of counsel because trial counsel inadequately investigated his defense and made several mistakes during trial. Because defendant failed to preserve these issues by moving for an evidentiary hearing or new trial below, review is foreclosed unless detail of the deficiency is apparent on the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). Upon review of the record, we conclude that trial counsel's decision to neutralize the effect of defendant's prior conviction by disclosing it during direct examination was a legitimate trial tactic, which we will not second-guess. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987); *People v Swindlehurst*, 120 Mich App 606, 611; 328 NW2d 92 (1982). We also find that trial counsel adequately cross-examined witness Butler, and given Butler's admission that he was a drug dealer and sold guns, defendant was not prejudiced by trial counsel's failure to impeach Butler with evidence of a prior conviction. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Finally, we are not persuaded that defendant has demonstrated prejudice by his counsel's failure to locate witness William Powell. Defendant has not submitted an affidavit or other evidence to support his claim that Powell's testimony would have aided the defense. Furthermore, the

- Circuit judge sitting on the Court of Appeals by assignment.

prosecution made reasonable efforts to locate the witness, and there is no evidence in the record which demonstrates that further efforts by trial counsel would have been productive. *Id.*; *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990).

Defendant also contends that he was denied a fair trial by the prosecutor's failure to produce William Powell, a res gestae witness who was endorsed on the prosecution's witness list. We disagree. The prosecutor is not required by MCL 767.40a; MSA 28.980(1) to endorse and produce all res gestae witnesses, but must list such witnesses known at the time of the filing of the information and those that become known before trial. *People v Burwick*, 450 Mich 281, 290-291; 537 NW2d 813 (1995). Upon leave of the court and for good cause shown, the prosecutor may "at any time" delete a witness from the list of witnesses the prosecution intends to call at trial. MCL 767.40(4); MSA 28.980(1)(4); *Id.* at 292. The decision to permit the deletion of a witness is within the discretion of the trial court, and we review the decision for an abuse of that discretion. *Id.* at 291.

Here, rather than finding the "good cause," the trial court found that the prosecutor exercised due diligence¹ in attempting to locate Powell. The prosecution contacted hospitals, jails, morgues, Social Services, and utility and phone companies in an effort to locate the witness. The police also attempted to find Powell by means of phone numbers and addresses obtained during the search process. Because the prosecutor's failed attempt to locate the witness satisfies the good cause requirement of the statute as well as the due diligence standard, we find that the trial court did not abuse its discretion in permitting the prosecutor to delete Powell from the prosecution's witness list.

Defendant's final argument is that he should be resentenced because the trial court sentenced him under the erroneous belief that the guidelines range for the offense was 180 to 360 months or life. At sentencing, defense counsel argued and the prosecutor agreed that offense variable three should have been scored twenty-five rather than fifty. After the prosecutor agreed to the change, he erroneously advised the court that the guidelines range was 180 to 360 months as stated on the sentencing information report. The guidelines range for C-III is 120 to 300 months, not the higher range considered by the trial court. Although the sentence imposed is within the corrected guidelines range, remand is necessary to allow the trial court to consider whether knowledge of the correct guidelines range would affect its sentencing decision. *People v Polus*, 197 Mich App 197, 201; 495 NW2d 402 (1992). We therefore remand this matter for a determination of whether the change in guidelines would alter the sentence imposed, and if the trial court decides that it would, defendant should be resentenced.

Affirmed, but remanded. We do not retain jurisdiction.

/s/ Maureen Pulte Reilly

/s/ Kathleen Jansen

/s/ Robert C. Anderson

¹ “Before its amendment in 1986, MCL 767.40; MSA 28.980 was interpreted to require the prosecutor to use due diligence to endorse and produce all res gestae witnesses.” *Burwick, supra* at 287.