STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN DAVID COTTRELL, JR.,

Defendant-Appellant.

UNPUBLISHED
November 1, 1996

No. 180412
LC No. 93-013740

Before: Wahls, P.J., and Cavanagh and J.F. Kowalski,* JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, and assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279. Defendant was sentenced to an eight- to twenty-year term of imprisonment on the murder conviction which is to run concurrently with a four- to ten-year term of imprisonment for the assault conviction. Defendant appeals as of right. We affirm.

Defendant first contends that insufficient evidence existed to support his convictions for second-degree murder and assault with intent to do great bodily harm less than murder because the prosecutor's two eyewitnesses to the two stabbing incidents expressed uncertainty with regard to whether defendant was the assailant. We disagree. We review a challenge to the sufficiency of the evidence by looking at the evidence in the light most favorable to the prosecution and determining whether a rational trier of fact could have concluded that each element of the offense was proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). There was testimony from a witness that defendant was seen fighting with the victim who later died of stab wounds, particularly a fatal wound in the center of his chest. That same witness testified that he saw defendant wielding a shiny object in his hand as defendant's hand swung down toward the victim's chest. An assistant medical examiner for Wayne County testified that the victim's stab wounds were consistent with a steak knife that was identified as the murder weapon. There was also evidence that defendant's hand was badly cut during the fight. Furthermore, the shirt

* Circuit judge, sitting on the Court of Appeals by assignment.

that defendant wore the morning of the stabbing incident contained blood that matched the victim's blood type. There was sufficient evidence to sustain defendant's conviction for second-degree murder.

Another witness testified that during the midnight melee, he was stabbed twice in the back and shoulder. That witness further testified that while he did not know for certain who stabbed him, he was certain that defendant was the only person in close proximity to him when the stabbing occurred. We are satisfied that this evidence was sufficient to sustain defendant's conviction for assault with intent to do great bodily harm less than murder.

Defendant's final argument is that the trial court abused its discretion when it allowed a witness who had not been included on the prosecutor's pre-trial witness list to testify. We disagree. We review a trial court's decision whether to allow the prosecution to add to its witness list under an abuse of discretion standard. *People v Williams*, 188 Mich App 54, 58-59; 469 NW2d 4 (1991).

> MCL 767.40a; MSA 28.980(1) provides in relevant part:
> (3) Not less than 30 days before trial, the prosecuting attorney shall send to the defendant or his or her attorney a list of the witnesses the prosecuting attorney intends to produce at trial.
>
> (4) The prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties.

Failure to comply with MCL 767.40a; MSA 28.980(1) does not mandate automatic reversal. Furthermore, an abuse of discretion will not be found unless the defendant is able to show that he was prejudiced by the prosecution's failure to comply with the statute. *Williams, supra* at 58-59.

At trial, immediately before the close of the prosecutor's proofs, she sought to have the fire department officer who treated defendant's hand at the crime scene testify as to what defendant said during that treatment. The prosecutor noted that she was calling the officer to rebut a statement made by defendant to two police detectives that at the crime scene, defendant had pointed out the person who had cut his hand to the officer. The prosecutor further noted that defense counsel had a prior opportunity to talk to the fire department officer, and thus there was no risk of unfair surprise. Although defense counsel conceded that he knew of the officer's existence and had an opportunity to talk to him prior to trial, counsel objected to the testimony on the ground that the officer was not on the prosecutor's pre-trial witness list. Nevertheless, the trial court overruled that objection and allowed the officer to testify.

Defendant is correct when he asserts that the prosecutor failed to comply with MCL 767.40a; MSA 28.980(1), because the prosecutor also knew of the officer's existence and connection with the case, yet she failed to include the officer's name on the pre-trial witness list. However, because defense counsel had an opportunity to talk to the officer, defendant has failed to show, and indeed, failed to

argue, how he was prejudiced by the prosecutor's noncompliance with the statute. *Williams*, *supra* at 59. We therefore conclude that the trial court did not abuse its discretion.

Affirmed.

/s/ Myron H. Wahls
/s/ Mark J. Cavanagh
/s/ John F. Kowalski