

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHAWN DELTRICE BOLDEN,

Defendant-Appellant.

UNPUBLISHED

December 17, 1996

No. 179484

Ingham Circuit Court

LC No. 93-066689-FC

Before: Fitzgerald, P.J., and Holbrook, Jr., and E.R. Post,* JJ.

PER CURIAM.

Defendant appeals by right from his jury trial convictions for second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm at the time of the commission or attempted commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant argued with and shot the victim at close range in front of a crowd of onlookers. He was sentenced to serve a term of twenty to sixty years on the murder conviction and to a consecutive two-year term on the felony-firearm conviction. We affirm.

Defendant first contends that the prosecution failed to exercise “due diligence” in locating three res gestae witnesses, and therefore that the trial court’s subsequent refusal to so instruct the jury was prejudicial to defendant. We disagree. The trial court refused to give such an instruction upon its finding that the prosecution had fulfilled its duty of reasonable assistance, pursuant to MCL 767.40a; MSA 28.980(1), in attempting to locate and produce the res gestae witnesses. We note first and foremost that our review is limited to whether the trial court’s determination was clearly erroneous, *People v Wolford*, 189 Mich App 478, 484; 473 NW2d 767 (1991), and thus, our review is limited to the record before the trial court. We therefore do not, as defendant’s argument implicitly urges, review anew whether the prosecution fulfilled its duty of assistance. We also note that the prosecution’s statutory duty to render “reasonable assistance” to the defense in locating res gestae witnesses, MCL 767.40a(5); MSA 28.890(1)(5), is somewhat more relaxed than the previously-recognized duty of

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

“due diligence.” *People v Burwick*, 450 Mich 281, 287 & n 7; 537 NW2d 813 (1995) (citing with approval *People v Canter*, 197 Mich App 550, 562-563; 496 NW2d 336 [1992]).¹ However, even were we to review the record under the more stringent “due diligence” standard, upon review of the testimony before the trial court we are still not left with a definite and firm conviction that the trial court was mistaken when it found that the prosecution had satisfied its burden of assistance. *People v Gistover*, 189 Mich App 44, 46; 472 NW2d 27 (1991). Pertinent testimony indicated that the prosecution’s investigating officer had been in contact with various units of both the Lansing and Detroit police departments, as well as with relatives of the victim and other witnesses. The decision of the trial court was therefore not clearly erroneous. *Id.*

Defendant next contends that the trial court abused its discretion when it denied his motion for new trial based on newly discovered evidence. We disagree. The newly discovered evidence consisted only of the testimony of Steven Lee, an admitted drug dealer and confidant of defendant. Because of Lee’s questionable credibility, and because defendant presented no other exculpatory evidence whatsoever at trial, it cannot be said that Lee’s testimony would “probably” have led to a different result. Moreover, based on appellate counsel’s immediate success in locating Lee, the trial court logically deduced that defendant could have located and produced him for trial if he had so chosen. The trial court therefore did not abuse its discretion when it denied defendant’s motion for new trial. *People v Miller (After Remand)*, 211 Mich App 30, 46-47; 535 NW2d 518 (1995).

Finally, defendant contends that there was insufficient evidence presented to support the element of premeditation necessary for a conviction for first-degree murder, and that he was therefore prejudiced when the trial court instructed the jury on that offense. Defendant failed to preserve this issue by means of a timely objection. Furthermore, we find no manifest injustice, *People v Johnson*, 215 Mich App 658, 672; 547 NW2d 65 (1996), since the evidence presented at trial established that there was an interval between the victim’s challenge to defendant and defendant’s verbal response sufficient to afford defendant time to take a “second look.” *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Thereafter, defendant pulled a gun from his pocket, cocked it, and shot the victim at point blank range. The evidence therefore supported the first-degree murder instruction.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Donald E. Holbrook, Jr.

/s/ Edward R. Post

¹ Furthermore, we note that the prosecution’s duty to exercise due diligence before using “missing witness” testimony pursuant to MRE 804 is wholly distinct and inapposite to our instant review of MCL 767.40a; MSA 28.890(1). *Burwick, supra*, 450 Mich 290 & n 12.