

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHANNON PETE BROACH,

Defendant-Appellant.

UNPUBLISHED

February 11, 1997

No. 177025

Monroe Circuit Court

LC No. 93-025672-FH

Before: Young, P.J., and Corrigan and M.J. Callahan,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of delivering less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). He subsequently pleaded guilty to being a second-felony offender, subjecting him to the sentencing enhancement provisions of MCL 769.10; MSA 28.1082. Defendant was sentenced to eight to fifteen years' imprisonment. He now appeals as of right. We affirm.

Defendant allegedly sold cocaine on several occasions to Detective John Plath, an undercover narcotics officer, and was charged with a sale which occurred on April 28, 1993. Sean Pitt, a confidential informant working for the Monroe County Sheriff's Department, testified that he introduced defendant and Officer Plath and was present during the first drug sale. At defendant's first trial, defendant presented two alibi witnesses who testified that they were with defendant at a barbecue on April 28, 1993. Officer Plath testified about the drug sale, but Pitt did not testify at the first trial. When the jury was unable to reach a verdict, the trial court declared a mistrial. The jury convicted defendant after his second trial.

Defendant argues that the trial court abused its discretion in denying him an adjournment to prepare a response to the late disclosure of a police report that contradicted one alibi witness' testimony. Requests for continuances are addressed to the trial court's discretion, and the decision will

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

not be overturned absent an abuse of discretion. *People v Sekoian*, 169 Mich App 609, 613; 426 NW2d 412 (1988). Adjournments or continuances are not to be granted except for good cause shown. *Id.* In determining whether a trial court has abused its discretion in denying a criminal defendant's request for a continuance, we consider whether: (1) the defendant was asserting a constitutional right; (2) he had a legitimate reason for asserting that right; (3) he was not negligent in asserting it; (4) prior adjournments of trial were not at his request; and (5), on appeal, he has demonstrated prejudice resulting from the trial court's abuse of discretion. *People v Sinistaj*, 184 Mich App 191, 201; 457 NW2d 36 (1990).

Defense counsel failed to show good cause to justify an adjournment. On the day before trial, defense counsel learned that Deputy Don Brady, a rebuttal witness in the first trial, had previously prepared a police report indicating that he spoke with an alibi witness at the time of the alleged offense. In requesting an adjournment, defense counsel argued that the statements in the report effectively negated defendant's alibi and that he needed time to investigate the accuracy of the report. Defense counsel explained that he could not ethically present the alibi witness as part of the defense without this information.

The trial court properly denied the request for adjournment. Presumably, defendant's alibi witness was capable of recalling whether her testimony was accurate without the need for further investigation. Accordingly, we find no abuse of discretion.

Defendant also argues that the trial court abused its discretion in allowing Deputy Brady to testify concerning the police report. Defendant did not raise this objection as a basis to exclude Deputy Brady's testimony at trial. Therefore, this issue is not preserved. *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). Moreover, because defendant's alibi witnesses did not testify, Deputy Brady did not testify at defendant's second trial.

Still, defendant contends that the prosecution should have notified him of the change in Deputy Brady's testimony, and insists that the failure is, in effect, a failure to disclose the identity of a potential witness. As early as the first trial, Deputy Brady was properly endorsed as a rebuttal witness in response to defendant's notice that he was presenting an alibi defense.¹ Further, the prosecution is not required to disclose the substance of a witness' testimony. *People v Finley*, 161 Mich App 1, 10; 410 NW2d 282 (1987), *aff'd* 431 Mich 506; 431 NW2d 19 (1988). Thus, the failure to provide this information did not violate disclosure requirements. *Finley, supra*.

Defendant next argues that he was denied a fair trial by the prosecutor's attempts at appealing to the jury's sense of civic duty. This issue is not preserved for review since defendant did not object to the challenged remark at trial. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Read in context, the remark was simply a comment on the prosecution witnesses' motives for testifying. Thus, we find no manifest injustice as any potential prejudice could have been cured by appropriate instruction. *Id.*

Lastly, defendant argues that the trial court abused its discretion in allowing Pitt to testify where the prosecution identified him only by his confidential informant number on the witness list and failed to provide pre-trial notice of the prior acts evidence offered through Pitt's testimony. We disagree.

Generally, the prosecution is not required to disclose the identity of confidential informants. *People v Sammons*, 191 Mich App 351, 368; 478 NW2d 901 (1991). However, "[w]here the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." *Id.* (quoting *Roviaro v United States*, 353 US 53, 60-61, 77 S Ct 623, 628; 1 L Ed 2d 639 (1957)). Similarly, where the informant was a participant in the underlying transaction rather than a mere supplier of information, he is a res gestae witness, and the privilege does not apply. *Sammons*, *supra* at 368.

Although the prosecution erred in failing to disclose Pitt's name, the trial court did not abuse its discretion in allowing him to testify. The prosecution was required to provide a list of the names of all potential witnesses and res gestae witnesses. MCL 767.40a(1); MSA 28.980(1)(1). This interpretation is supported by the prosecution's continuing duty to "disclose the *names* of any further res gestae witnesses." MCL 767.40a(2); MSA 28.980(1)(2) (emphasis added). Even though the prosecution is entitled to protect the identity of confidential informants under certain circumstances, Pitt's identity became relevant to defendant's preparation once Pitt was identified as a potential witness and disclosure was therefore required. *People v Cadle*, 204 Mich App 646, 650; 516 NW2d 520, remanded for reconsideration on other grounds 447 Mich 1009 (1994).

However, the trial court has the discretion to allow the late endorsement of a witness with a showing of good cause for the failure to properly identify the witness. *People v Rode*, 196 Mich App 58, 67; 492 NW2d 483 (1992). The trial court's decision to allow the late endorsement of a witness is only an abuse of discretion where the defendant is prejudiced thereby. *Id.* at 68. In this case, the trial court gave defendant time to meet with Pitt and prepare a cross-examination before permitting the prosecution to call him. We find that the trial court did not abuse its discretion in allowing Pitt to testify.

We also reject defendant's claim that the prosecution violated the notice requirements in MRE 404(b). Defendant did not raise this as a basis for excluding Pitt's testimony. Therefore, the issue is not preserved. *Stimage*, *supra*. The evidence was admissible to show identity. *People v Vandervliet*, 444 Mich 52, 64; 508 NW2d 114 (1993), and Pitt's testimony was consistent with Detective Plath's testimony in the first trial regarding the prior transactions. Hence, in his second trial, defendant was on notice that evidence of these prior transactions would be introduced as Detective Plath was listed as a prosecution witness, given his testimony in the first trial. Accordingly, we find no error.

Affirmed.

/s/ Robert P. Young, Jr.
/s/ Maura D. Corrigan
/s/ Michael J. Callahan

¹ Deputy Brady's testimony was offered in the first trial to impeach the credibility of the same alibi witness whose alibi testimony is contradicted in his police report.