

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HENRY HICKS,

Defendant-Appellant.

UNPUBLISHED
February 28, 1997

No. 189620
Oakland Circuit Court
LC Nos. 92-119926 FH
92-119927 FH
92-119928 FH
92-119929 FH
92-119930 FH

Before: Gribbs, P.J., and Holbrook, Jr., and J. L. Martlew,* JJ.

PER CURIAM.

After a jury trial, defendant was convicted of five counts of false pretenses over one hundred dollars, MCL 750.218; MSA 28.415, and five counts of issuing an invalid certificate of insurance, MCL 500.3101(a); MSA 24.13101(1). He subsequently pleaded guilty as an habitual fourth offender, MCL 769.12; MSA 28.1084. Defendant's sentence for the false pretenses conviction was vacated. He was then sentenced to one year in prison for the conviction for issuing an invalid certificate of insurance, and to three to twenty years in prison for the habitual offender conviction.

Defendant first argues that the trial court erred by determining that he was not prejudiced by the absence of *res gestae* witness, Sam Willis, Sr. We disagree.

A defendant is presumed to have been prejudiced by the prosecution's failure to produce a *res gestae* witness, and the prosecutor has the burden of showing that the failure to exercise due diligence did not adversely affect the defendant's right to a fair trial. *People v DeMeyers*, 183 Mich App 286, 293; 454 NW2d 202 (1990); *People v Pearson*, 404 Mich 698, 725; 273 NW2d 856 (1979). The prosecutor may meet this burden by showing that the missing testimony would not have assisted the defendant, would have been merely cumulative, that its absence was harmless error, or that the witness could not have been produced at trial. *DeMeyers, supra*, 183 Mich App 293; *Pearson, supra*, 404 Mich 725.

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

Although the usual procedure is to determine whether a defendant was prejudiced by the absence of a res gestae witness at a post-conviction hearing, the trial court's pre-trial finding in the instant case that defendant was not prejudiced by the absence of Sam Willis, Sr. was not an abuse of discretion. See *Pearson, supra*, 404 Mich 722. Although defendant relied on *People v Fulton*, 414 Mich 898; 323 NW2d 4 (1982), for its holding that it was error for a trial court to find that the defendant was not prejudiced by a missing res gestae witness when the court had no knowledge as to the testimony of the missing witness, we find the instant case distinguishable. In *Fulton*, the trial court had no indication of the probable testimony of the missing res gestae witness. *People v Fulton*, 110 Mich App 313, 317; 313 NW2d 107 (1981), *rev'd* 414 Mich 898; 323 NW2d 4 (1982). In the instant case, however, a hearing was held at which the trial court heard testimony which shed light on Sam Willis, Sr.'s possible testimony. At the hearing, the prosecution satisfied its burden of proving that Sam Willis, Sr.'s testimony would not have assisted defendant. Accordingly, the trial court did not abuse its discretion in determining that defendant was not prejudiced by the absence of Sam Willis, Sr.

Defendant next argues that he was denied a fair trial because the prosecutor argued facts not in evidence. Defendant did not object to the prosecutor's remarks at trial and, therefore, this Court's review is precluded unless a cautionary instruction would not have cured the prejudicial effect of the remarks, or unless the remarks resulted in a miscarriage of justice. *People v Lee*, 212 Mich App 228, 245; 537 NW2d 233 (1995). We find no error.

A prosecutor may not argue facts not entered into evidence. *Lee, supra*, 212 Mich App 255. However, the prosecutor may argue the evidence and all reasonable inferences from the evidence as it relates to the prosecutor's theory of the case and is free to relate the facts to his or her theory of the case. *Id.* In the instant case, it does not appear that the prosecutor's closing argument resulted in a miscarriage of justice. The prosecutor's statements appear to have been intended to rebut defendant's theory that he was operating a legitimate real estate appraisal business which had nothing to do with the automobile insurance scheme. Based on the evidence presented at trial, it does not appear that the prosecutor's isolated remark resulted in a miscarriage of justice or that any prejudice could not have been cured by a cautionary instruction.

Defendant also argued that the prosecutor improperly argued that defendant defrauded more than 270 people in addition to the victims in the instant case. The prosecutor's statements were clearly based on Lieutenant Jones' testimony that 278 completed binders were found at the Southfield Agency, none of which has been found to have been properly issued. Therefore, the prosecutor's statements were proper.

Affirmed.

/s/ Roman S. Gribbs
/s/ Donald E. Holbrook, Jr.
/s/ Jeffrey L. Martlew