

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EARNEST L. POWELL,

Defendant-Appellant.

UNPUBLISHED

September 20, 2007

No. 273816

Wayne Circuit Court

LC No. 06-006276-01

Before: Bandstra, P.J., and Talbot and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to one year's probation for the assault conviction, and a consecutive two-year prison term for the felony-firearm conviction. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's sole claim on appeal is that the trial court erred in excusing the production of LaTonya Patton as a witness and in denying a request for the missing witness instruction. This Court reviews "a trial court's determination of due diligence and the appropriateness of a 'missing witness' instruction for an abuse of discretion." *People v Eccles*, 260 Mich App 379, 389; 677 NW2d 76 (2004).

Because Patton was a res gestae witness who was named on the prosecutor's witness list as a witness to be called at trial, the prosecutor was obligated to produce her at trial. MCL 767.40a; *People v Burwick*, 450 Mich 281, 292; 537 NW2d 813 (1995). The prosecutor may add or delete a witness from the list "at any time upon leave of the court and for good cause shown or by stipulation of the parties." MCL 767.40a(4). "The inability of the prosecution to locate a witness listed on the prosecution's witness list after the exercise of due diligence constitutes good cause to strike the witness from the list." *People v Canales*, 243 Mich App 571, 577; 624 NW2d 439 (2000).

To show due diligence, the prosecutor must demonstrate that he made a reasonable, good-faith effort to secure the witness's presence at trial. *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995). "Due diligence requires that everything reasonable, not everything possible, be done." *People v Whetstone*, 119 Mich App 546, 552; 326 NW2d 552 (1982). If there are no leads regarding a witness's whereabouts, the prosecutor should inquire of known

persons who might reasonably be expected to have information that would help locate the witness. If there are specific leads regarding the witness's whereabouts, they must be pursued. *People v Conner*, 182 Mich App 674, 681; 452 NW2d 877 (1990). The test is whether the prosecutor "made good-faith efforts to procure the testimony, not whether more stringent efforts would have produced it." *Id.*

We agree with defendant that the prosecutor did not make a good-faith effort to produce Patton for trial. Patton was endorsed as a witness to be called at trial on June 7, 2006. The officer in charge, James Hines, waited until mid-August to try to locate her. He went to her apartment and found that she had been evicted. Apart from checking the jail roster, however, Hines made no further attempt to locate Patton (such as by talking to her known friends, Ellis and Parker, or to other neighbors, conducting a LEIN check, or checking the post office for a forwarding address) until the day of trial when he obtained further information from the manager of her apartment building. However, the error does not require reversal.

Defendant asked the court for the missing witness instruction, which permits an inference that the witness's testimony would have been adverse to the prosecutor's case. CJI2d 5.12. However, the trial court in a bench trial is not required to instruct itself in open court on the law to be applied. *People v Casal*, 412 Mich 680, 691 n 5; 316 NW2d 705 (1982). Further, the inference is permissive, not mandatory, and thus the factfinder is not required to draw such an inference. Cf. *Brenner v Kolk*, 226 Mich App 149, 155-156; 573 NW2d 65 (1997). Therefore, it is unlikely that had the court considered CJI2d 5.12 in rendering its decision, the verdict would have been different. Cf. *People v McKinney*, 258 Mich App 157, 163; 670 NW2d 254 (2003) ("Reversal for failure to provide a jury instruction is unwarranted unless it appears that it is more probable than not that the error was outcome determinative").

Affirmed.

/s/ Richard A. Bandstra
/s/ Michael J. Talbot
/s/ Karen M. Fort Hood