

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS DAVIS,

Defendant-Appellant.

UNPUBLISHED

July 27, 2001

No. 221703

Wayne Circuit Court

LC No. 98-010911

Before: White, P.J., and Sawyer and Saad, JJ.

PER CURIAM.

After a two-day jury trial, defendant was found guilty of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to an enhanced term of thirty to sixty years as a habitual offender, MCL 769.12, with a consecutive two-year sentence for felony-firearm. Defendant appeals as of right. We affirm.

The testimony at trial showed that defendant went with John Wilder to a store parking lot in Inkster to buy drugs. Wilder drove and defendant was in the front passenger seat. Wilder asked Glaze, a drug dealer, to give him two packs of drugs on credit. Glaze declined. The victim, who was also a drug dealer, drove into the parking lot. Wilder spoke with the victim briefly and then the victim approached the passenger window of Wilder's car. Defendant grabbed the victim's drugs, the victim reached in the car to retrieve them, and the car pulled off. The victim ran alongside the car, still trying to retrieve his drugs. A gunshot was fired, and the victim fell to the ground.

Wilder was arrested later that evening and the next day gave a statement implicating defendant as the passenger and shooter. Wilder gave a second and similar statement the following day. Although Wilder admitted trying to obtain drugs on credit, and admitted intending to drive off without paying for the drugs (after defendant grabbed them), he denied knowing defendant had a gun before hearing the gunshot. Two other drug dealers at the parking lot that day identified Wilder as the driver of the car and defendant as the shooter. Another witness, who was sweeping the parking lot, also identified Wilder as the driver, and testified that the shot came from the passenger side of the car.

Wilder was charged in the same information as defendant with being an accessory after the fact to second-degree murder. Before trial, the prosecutor entered a plea agreement with Wilder requiring that he plead guilty to that charge, and that he testify truthfully at defendant's trial. In return, the prosecutor would recommend a sentence of three-to-five years' probation.

On appeal, defendant first argues that he was denied a fair trial based on prosecutorial misconduct. Defendant claims the prosecutor vouched for the credibility of Wilder when he informed the jury of the plea agreement. Defendant argues the prosecutor misled the jurors by informing them Wilder did not receive a charge reduction because Wilder was undercharged in the first instance. Also, defendant claims the prosecutor vouched for the witness by informing the jury that the plea agreement required truthful testimony or Wilder could face a life sentence for perjury. Defendant claims the prosecutor improperly claimed the plea agreement was of no real benefit to Wilder and implied special knowledge that the witness was truthful. Although not objected to at trial, defendant argues the error was plain and prejudicial, requiring reversal. We disagree.

The mere disclosure of a plea agreement with a prosecution witness, which includes a provision for truthful testimony and sanctions for untruthful testimony, does not constitute improper vouching or bolstering by the prosecutor, unless the prosecutor suggests special knowledge of truthfulness not available to the jury. *People v Bahoda*, 448 Mich 261, 276-277; 531 NW2d 659 (1995); *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). No plain error occurred that merits reversal. *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 722; 613 NW2d 370 (2000).

Whether Wilder could have been charged with a more serious offense does not change the fact that he was only charged with being an accessory after the fact, to which he pleaded guilty. Therefore, the prosecutor's comments that the witness did not receive a charge reduction were accurate, and did not deceive the jury or deny defendant a fair trial. *Bahoda*, *supra* at 264; *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). The witness' interest in the matter was clear.

Similarly, the prosecutor accurately commented that under the plea agreement the witness could face perjury if he lied in court. Such commentary would only be error if the prosecutor suggested special knowledge, other than evidence available to the jury, that the witness was in fact being truthful. *Bahoda*, *supra* at 276. The federal authority cited by defendant does not hold otherwise. It is only where, as in *United States v Francis*, 170 F3d 546, 550 (CA 6, 1999), that the prosecutor implies special knowledge regarding the truthfulness of the witness that error occurs. Here, the prosecutor did not suggest he possessed special knowledge to judge the credibility of the witness. In fact, the prosecutor conceded that without other evidence he would not be able to prove defendant's guilt beyond a reasonable doubt. The prosecutor instead pointed to facts in evidence or to be introduced into evidence that supported the witness' credibility.

In the present case, the trial court properly gave the disputed accomplice cautionary instruction because the witness denied knowledge of a plan to commit a robbery or knowledge before the shooting that defendant possessed a gun. *People v Perry*, 218 Mich App 520, 526-529; 554 NW2d 362, *aff'd* 460 Mich 55; 594 NW2d 477 (1999). Further, no request for additional curative instructions was made and manifest injustice did not occur. *Id.* at 529-530;

People v Allen, 201 Mich App 98, 104-105; 505 NW2d 869 (1994). Reviewing the prosecutor's statements, questions, and argument in context, plain error meriting reversal did not occur. *Carines*, *supra* at 761-762; *Schutte*, *supra* at 722.

Defendant next argues that the trial court erred by constructively denying the jury's request to rehear witness testimony by waiting two hours for defense counsel to become available before responding to the request. MCR 6.414(H); *People v Howe*, 392 Mich 670; 221 NW2d 350 (1974). Alternatively, defendant argues he was denied his Sixth Amendment right to counsel during a critical stage of the proceeding, when the jury requested to hear testimony of witnesses during its deliberations and his attorney was temporarily occupied in another courtroom. We disagree on both claims.

In the present case, the jury began deliberations late in the afternoon and returned the next day to resume deliberating. At about 9:35 a.m., the jury sent a note requesting the testimony of Wilder, one of the drug dealers, and the medical examiner. The trial court informed the prosecutor, who was present in the courtroom, and spoke to defendant's attorney on the telephone because he was occupied in another courtroom. The trial court intended to provide the jury the requested testimony as soon as defense counsel arrived, but before counsel arrived, the jury had reached a verdict. The jury was brought into the courtroom at about 11:45 a.m. The trial court explained the delay and asked the jurors if they had been able to reach a verdict without having testimony played back. The jury answered in unison, "yes." The jury then published its verdict, which each juror confirmed when individually polled. No objection was raised to the manner in which the trial court responded to the jury request for witness testimony.

MCR 6.414(H) was adopted nearly verbatim from our Supreme Court's holding in *Howe*, *supra*, which prohibited per se refusals to read back selected witness testimony. The Court opined, *id.* at 676,

Contained within this case law rule is the recognition that a jury will at times require testimony read back to it to resolve a disagreement or correct a memory failure. A trial court must exercise its discretion to assure fairness and to refuse unreasonable requests; but, it cannot simply refuse to grant the jury's request for fear of placing too much emphasis on the testimony of one or two witnesses.

In the present case, the trial court did not specifically inform the jury that its request for reading of testimony would not be granted. Defendant cites no case that holds a trial court's delay in responding to a jury request for reading of testimony, while waiting for the presence of counsel, in accordance with MCR 6.414(A), is a violation of MCR 6.414(H). The record here demonstrates that the trial court was attempting to secure the presence of both trial counsel to play the requested witness testimony for the jury as soon as counsel arrived. On this record, the trial court did not abuse its discretion under MCR 6.414(H). *Howe*, *supra* at 675; *People v Davis*, 216 Mich App 47, 56; 549 NW2d 1 (1996).

Moreover, when the trial court explained the reason for the delay in responding to the jury's request, the jury affirmed that it was able to proceed without the playback of witness testimony. Thus, defendant was not prejudiced.

Defendant's argument that he was denied counsel between the time that the jury requested a rereading of testimony and when his attorney arrived at court is also without merit. Defendant argues that because his counsel was temporarily absent from the courtroom while the jury was deliberating (and had sent a note requesting reading of testimony), he was denied counsel at a critical stage of the proceeding. Defendant was represented by counsel during jury deliberations. The record demonstrates that the trial court spoke to defendant's counsel by telephone and the trial court wanted to honor the jury's request as soon as counsel was able to get to court. Counsel's temporary absence from the courtroom did not mean counsel ceased representing defendant. Thus, defendant was not denied his right to counsel while the jury was deliberating in this case.

What defendant is really arguing, is that the right to counsel included a right to a speedy rereading of trial testimony when requested by the jury. However, the court may order the jury to deliberate further without the requested review, so long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed. MCR 6.414(H).

Finally, defendant's argument lacks merit when analyzed as a claim of ineffective assistance of counsel. Defendant implicitly argues that counsel should have waived his presence to permit immediate or at least a prompter response to the jury's request. However, defendant on this record cannot overcome the presumption that counsel was constitutionally effective. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Nor can defendant overcome the presumption that counsel's decision to insist on being at defendant's side during any rereading of trial testimony was not sound trial strategy. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). The record simply does not show that counsel's performance was deficient as measured against the constitutional standard of objective reasonableness under the circumstances according to prevailing professional norms. *Strickland, supra* at 687-688; *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994).

Defendant next argues that the prosecutor and police did not use due diligence to locate a defense witness. Under the res gestae witness statute, MCL 767.40a(5), the prosecuting attorney and the police have a duty to provide reasonable assistance upon a defendant's request to locate and serve process on a witness. *People v Burwick*, 450 Mich 281, 288-289; 537 NW2d 813 (1995); *People v Gadomski*, 232 Mich App 24, 35-36; 592 NW2d 75 (1998). In this case, while defense counsel made a record in the trial court that defendant wanted to present testimony from Todd Selma, defense counsel did not question the adequacy of the prosecution's efforts. Furthermore, at the *Ginther* hearing defendant presented no evidence on this issue, except defense counsel's belief that the police did all they could have done to find Selma. Defendant is entitled to no relief on this issue. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000); *People v Simpson*, 207 Mich App 560, 561-562; 526 NW2d 33 (1994).

Defendant's final claim is that he was denied effective assistance of counsel when his trial attorney failed to timely locate defense witness Todd Selma (whom defendant alleged would testify that Wilder admitted being the shooter) and when counsel failed to impeach one of the drug-dealer witnesses with 1992 and 1993 convictions for retail fraud. We disagree.

A *Ginther* hearing was held in the trial court on July 21, 2000, and defendant presented the testimony of his trial attorney and his own testimony. Defendant also submitted as an exhibit

a “showup & photo identification record” received through discovery that listed defendant and Todd Selma as part of a six person lineup on September 18, 1998. The prosecutor also stipulated that one trial witness had been convicted of second-degree retail fraud in 1992 and first-degree retail fraud in 1993. The trial court denied defendant’s motion for new trial.

To establish ineffective assistance of counsel, a defendant must show (1) that counsel’s performance was below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different. *Pickens, supra* at 303, 309, 314, 327.

In the present case, defendant’s primary claim of ineffective assistance of counsel is based on the argument that defendant’s trial counsel failed to timely attempt to locate, failed to produce, and thus failed to present testimony from an essential defense witness. However, defendant failed to present Selma’s testimony on remand. Further, defendant failed to establish that additional efforts to locate Selma would have been effective. These failures amount to a failure to show prejudice from counsel’s alleged ineffectiveness.

In *Pickens, supra*, the defendant claimed he was denied effective assistance of counsel because his trial attorney failed to file a notice of alibi and thus the trial court precluded the defense from presenting an alibi witness. *Id.* at 304. Our Supreme Court found that trial counsel’s performance was inexcusable neglect and fell below the professional norm. *Id.* at 327. However, the Court went on to hold that defendant failed to prove prejudice when he failed to produce the witness at the *Ginther* hearing, *id.*:

Nevertheless, *Pickens* has failed to establish the required showing of prejudice. Although the alibi witness was subpoenaed, he did not testify at the evidentiary hearing. Instead, for unexplained reasons, *Pickens* waived his production. Accordingly, no evidence has been presented to establish that the alibi witness would have testified favorably at trial. In other words, *Pickens* failed to establish that the alibi witness’ testimony would have altered the result of the proceeding. Because *Pickens* cannot show that there was a reasonable probability that the evidence would undermine confidence in the outcome of the trial, the decision of the Court of Appeals is reversed.

Applying these principles to the case at bar, there was no testimony that the missing witness was available to testify at trial. No testimony was presented at the motion for new trial from the witness, or anyone else who knew the witness, or knew his whereabouts at the time of the trial, to indicate that the witness was even available to testify. There was no showing that any earlier effort by defense counsel to locate the witness would have been successful. Moreover, the record establishes that trial counsel relied on the statutory duty of the prosecutor and the police to provide assistance to produce the witness. Trial counsel’s testimony that the prosecutor and police used due diligence to find and produce the witness was not rebutted by any evidence at the hearing. Thus, defendant failed to establish that counsel’s performance was deficient and that he was prejudiced.

As to the claim of error arising from counsel’s failing to impeach a witness with his retail fraud convictions, we conclude that the additional information that the witness had such

convictions would not have affected the outcome of the case. The marginal impact of the alleged error fails to satisfy the prejudice prong of the test for ineffective assistance of counsel.

Affirmed.

/s/ Helene N. White

/s/ David H. Sawyer

/s/ Henry William Saad