

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WALTER SENSAT, JR.,

Defendant-Appellant.

UNPUBLISHED
December 4, 2003

No. 241366
Branch Circuit Court
LC No. 01-037236-FC

Before: Murray, P.J. and Gage and Kelly, JJ.

PER CURIAM.

After a bench trial, defendant was convicted of two counts of first degree criminal sexual conduct (CSC I), the victim being under thirteen years of age, MCL 750.520b(1)(a), and one count of second degree criminal sexual conduct (CSC II), the victim being under thirteen years of age, MCL 750.520c(1)(a). Defendant appeals as of right. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

I. Basic Facts and Procedural History

Prior to trial the prosecution moved to strike Jim Finnegan from its witness list on the ground that Finnegan could not be located. Finnegan, a counselor, treated complainant after she made the allegations against defendant, and referred her for inpatient treatment. The prosecution stated that it contacted Finnegan's former place of employment and was told that he relocated to Mexico and then to Pennsylvania. The prosecution also sought to locate Finnegan by running a check through the Law Enforcement Information Network (LEIN). Defense counsel indicated that he had been unable to contact Finnegan, and that he did not know the substance of Finnegan's proposed testimony. The trial court found that no demonstration had been made that Finnegan's testimony would be beneficial to defendant, held that the prosecution exercised due diligence in attempting to locate Finnegan, and granted the motion to strike Finnegan from the witness list.

Complainant, who was seventeen years old at the time of trial, testified that during the period January-August 1993 defendant sexually molested her on four occasions. She was eight years old when the assaults occurred. She testified that in January 1993 and March 1993, defendant penetrated her vagina with his finger, and told her he would kill her if she reported the incidents. She further testified that on two separate occasions on August 29, 1993 defendant fondled her breasts. Complainant acknowledged that she did not tell anyone about the incidents

until December 12, 1999 when she told several persons, including her aunt and her mother. She admitted she was intoxicated at the time. Complainant indicated that she became depressed after seeing defendant at a Thanksgiving dinner in November 1999, and that her depressed emotional state led her to speak about the incidents. After the dinner she began drinking heavily and using drugs, and was hospitalized for depression. Complainant admitted that her mother asked if defendant had molested her, and she denied that anything had occurred because she was afraid that defendant would carry out his threat to kill her. Both complainant and her mother testified that prior to the alleged incidents complainant was an excellent student, but that subsequently her grades dropped precipitously, her school absences increased and she became withdrawn and angry.

Defendant's daughter, who is also complainant's aunt, denied that when she was speaking with complainant on December 12, 1999 she told complainant that she too had been molested by defendant. However, other witnesses, including complainant, testified that complainant's aunt stated that defendant had molested her as well.

A childhood friend of complainant, testified that when she and complainant were in the fifth or sixth grade complainant told her that she had been molested by defendant. Complainant asked her to not tell anyone about the incidents.

The trial court found defendant guilty of two counts of CSC I and one count of CSC II. The trial court noted that it did not base its verdicts on statements complainant made to her childhood friend or on complainant's testimony that her aunt told her that the aunt had been molested by defendant when she was a child. The trial court acknowledged that a significant amount of time passed between the dates on which the alleged incidents occurred and the time complainant reported them, but noted that complainant was quite young in 1993 and that she alleged that defendant threatened to kill her if she reported the incidents. The trial court found that complainant's deteriorating performance in school bolstered her assertion that she was frightened. The trial court noted that a photograph taken at the Thanksgiving dinner depicted complainant as smiling, but gave credence to complainant's assertion that she was surprised when the photograph was taken and did not know any other way to react. The trial court found that complainant's heavy use of alcohol and drugs shortly after Thanksgiving was a more accurate indicator of her mental condition at the time than was the photograph. The trial court found defendant guilty of the incidents of CSC I alleged to have occurred in January and March 1993, and of the first incident of CSC II alleged to have occurred on August 29, 1993, and acquitted him of the second incident of CSC II alleged to have occurred on August 29, 1993.

At sentencing defense counsel stated that he obtained copies of complainant's school records, and that those records did not support the assertion made by complainant and her mother that complainant's grades dropped precipitously after the alleged incidents. The trial court declined to consider evidence that was not presented at trial. The trial court sentenced defendant to concurrent terms of fifteen to thirty-five years for CSC I and nine to fifteen years for CSC II, with credit for thirty-eight days.

Defendant claimed an appeal and moved to remand the case to the trial court for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). Another panel of this Court granted the motion, and retained jurisdiction.¹

On remand, defendant moved for a new trial on the ground that trial counsel rendered ineffective assistance by failing to introduce complainant's school records at trial. Defendant's trial counsel testified that he believed that he discussed the issue of complainant's school records with defendant's family, but he did not receive complainant's records until after the conclusion of the trial. He did not make an effort to obtain the records during the trial, but stated that if he had had the records during the trial, he would have used them to impeach the testimony given by complainant and her mother.

The trial court denied defendant's motion for a new trial. The trial court acknowledged that the credibility of the witnesses was crucial at trial, but found that introduction of the school records would not have changed the verdicts. The trial court noted that it relied on evidence other than the witnesses' testimony regarding complainant's grades in order to find defendant guilty of three of the four charges.

II. Ineffective Assistance of Counsel

Defendant argues that trial counsel rendered ineffective assistance by failing to retrieve and introduce complainant's school records during trial. We disagree.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, §20; *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *Id.*, 600. Counsel is presumed to have afforded effective assistance, and the defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

As defendant correctly notes, this case turned on the credibility of the witnesses, and that complainant's school records contradicted the testimony given by complainant and her mother regarding complainant's performance in school following the alleged incidents. However, in denying defendant's motion for a new trial the trial court stated unequivocally that even if the records had been introduced at trial, its verdicts would have remained the same. The trial court sat as the trier of fact, and was entitled to find that complainant's testimony regarding the charged acts was credible. *People v Marji*, 180 Mich App 525, 542; 447 NW2d 835 (1989). The trial court stressed that it relied on evidence other than that regarding complainant's performance in school to determine that complainant was a credible witness. Defendant has failed to establish

¹ *People v Sensat*, unpublished order of the Court of Appeals, issued September 11, 2002 (Docket No. 241366).

he was prejudiced in that he has not shown that but for counsel's error, it is reasonably probable the result of the proceedings would have been different. *Carbin, supra*.

III. Res Gestae Witness

Next, defendant argues that the trial court abused its discretion by determining that the prosecution exercised due diligence in attempting to locate witness Jim Finnegan. We disagree.

A res gestae witness is one who witnessed some event in the continuum of a criminal transaction, and whose testimony would aid in disclosing all the facts. *People v Long*, 246 Mich App 582, 585; 633 NW2d 843 (2001). Under MCL 767.40a the prosecution has an ongoing duty to advise the defense of all res gestae witnesses that it intends to call at trial. If the prosecution endorses a witness it is required to use due diligence to produce the witness at trial, regardless of whether the endorsement was required. *People v Wolford*, 189 Mich App 478, 483-484; 473 NW2d 767 (1991). If the prosecution fails to produce an endorsed witness, it may be relieved of the duty to do so by showing that the witness could not be produced notwithstanding the exercise of due diligence. *People v Canales*, 243 Mich App 571, 577; 624 NW2d 439 (2000). Due diligence is the attempt to do everything that is reasonable, not everything that is possible, to obtain the presence of a witness. *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988). The test is one of reasonableness. The focus is on whether diligent, good faith efforts were made to procure the testimony, and not whether more stringent efforts would have produced it. Whether the prosecution demonstrated due diligence depends on the facts of each case. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). We review the trial court's factual findings, including whether a witness is a res gestae witness, for clear error, *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992), and review the determination of whether the prosecution exercised due diligence for an abuse of discretion. *Bean, supra*.

Here, the prosecution took various steps to determine Finnegan's whereabouts, including contacting his former employer and running a LIEN check. Moreover, although an abuse of discretion can be found where the defendant shows prejudice as a result of an amendment to delete a witness list, *People v Rode*, 196 Mich App 58, 68; 492 NW2d 483 (1992), rev'd on other grds sub nom *People v Hana*, 447 Mich 325; 524 NW2d 682 (1994), defendant has failed to establish prejudice in that he has not shown that Finnegan's testimony would have been detrimental to the prosecution. His contention that Finnegan might have testified that complainant had a fragile psyche or that she made inconsistent statements is based on mere speculation only.

On this record, we cannot conclude there was no justification for the trial court's ruling and find that the trial court did not abuse its discretion. *People v Gadomski*, 232 Mich App 24, 32-33; 592 NW2d 75 (1998). Defendant is not entitled to relief on this issue. MCL 769.26.

Affirmed.

/s/ Christopher M. Murray
/s/ Hilda R. Gage
/s/ Kirsten Frank Kelly