

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHNNY JONES,

Defendant-Appellant.

UNPUBLISHED

May 18, 1999

No. 197675

Recorder's Court

LC No. 95-012985

Before: Gage, P.J., and White and Markey, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial convictions on two counts of third-degree criminal sexual conduct (force or coercion used to accomplish sexual penetration), MCL 750.520d(1)(b); MSA 28.788(4)(1)(b). Defendant was sentenced to concurrent terms of nine to fifteen years' imprisonment for each conviction. We affirm.

Defendant first contends that he was denied the effective assistance of counsel because his trial counsel did not object or demand a due diligence hearing when the prosecution failed to produce the rape kit prepared when the complainant went to the hospital. To justify reversal under the state and federal constitutions for ineffective assistance of counsel, a defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Mitchell*, 454 Mich 145, 156-158; 560 NW2d 600 (1997); *People v Leonard*, 224 Mich App 569, 592; 569 NW2d 663 (1997). Furthermore, the defendant must overcome the presumption that the challenged action or inaction was sound trial strategy. *Leonard, supra*.

Defendant argues that because the prosecution included the rape kit on its pretrial witness list, the prosecution had an obligation to produce the rape kit and the emergency room physician or the EMS response team that examined the complainant. The prosecution's duty under the res gestae witness statute¹ is to provide the defendant notice of known witnesses and reasonable assistance to locate witnesses on a defendant's request. *People v Burwick*, 450 Mich 281, 289; 537 NW2d 813 (1995). The listing requirement of the res gestae statute serves merely to notify the defendant of the witness' existence and res gestae status. *People v Calhoun*, 178 Mich App 517, 523; 444 NW2d

232 (1989). There is no requirement under the statute that the prosecution must locate, endorse and produce unknown persons who might be res gestae witnesses. *Burwick, supra*.

The prosecution did mention “Analysis of Rape Kit” on its pretrial witness list, but did not include either the emergency room physician or the EMS response team. It does not appear, nor does defendant assert, that he ever requested assistance in locating the emergency room physician or the EMS response team. Because defendant did not request assistance in locating these witnesses, the prosecution was under no obligation to discover the names of these witnesses or to produce them. *Id.*

Regarding the rape kit, Investigator James Sanford, the officer in charge of this case, testified at trial that although a rape kit was collected, it was never sent to the laboratory for analysis and had been lost. Sanford stated that he had visited the property section of the police department several times in the months before the trial, but was unable to locate the rape kit. Without determining the extent to which the prosecution may have erred in failing to produce any evidence or testimony regarding the rape kit, however, we may still reject defendant’s ineffective assistance argument.

At defendant’s *Ginther*² hearing, defendant’s trial counsel testified that defendant told him that defendant had consensual sex with the complainant at Bob Clark’s home in March 1995. Defense counsel testified that he presented Clark as a witness at defendant’s trial and that Clark essentially corroborated defendant’s theory that defendant and the complainant had consensual sex. Defense counsel explained that he did not believe there was any reason to produce the rape kit because defendant’s theory of the case was that he and the complainant did indeed have sex, but that the sex was consensual. While defendant now argues that the rape kit “could have provided facts which may have supported [defendant’s] innocence and further contradicted the complainant’s allegations,” defendant has offered no evidence from which the trial court or this Court could determine that any rape kit evidence would have aided his defense.³ *People v Hyland*, 212 Mich App 701, 710-711; 538 NW2d 465 (1995) (defendant not denied effective assistance when he failed to show absence of witnesses deprived him of substantial defense), modified on other grounds 453 Mich 902 (1996). Therefore, defendant’s claim of ineffective assistance must fail because defendant has demonstrated neither that his trial counsel’s performance was objectively unreasonable nor that a reasonable probability exists that, but for counsel’s error, the result of the proceedings would have been different. *Mitchell, supra*.

Defendant also argues that the trial court erred in denying his motion for a new trial without first holding an evidentiary hearing to determine whether the prosecution exercised due diligence in attempting to produce the rape kit, the emergency room physician or the EMS response team. We review a trial court’s ruling on a motion for new trial for an abuse of discretion. *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994).

Defendant suggests that because the trial court held no hearing on his motion for new trial or evidentiary hearing, the value of the missing rape kit evidence cannot be ascertained. Defendant filed his motion for a new trial or evidentiary hearing, however, after the trial court had already held a *Ginther* hearing on defendant’s motion for new trial based on ineffective assistance of counsel. At the *Ginther* hearing, defendant’s trial counsel was questioned about the absence of the rape kit. As mentioned

above, he explained that given defendant's theory that he and the victim did engage in sexual intercourse, there was no reason to produce the rape kit. In its order denying defendant's motion for new trial or evidentiary hearing, the trial court referred to the prior *Ginther* hearing. Thus, the trial court had this information at the time it ruled on defendant's motion for new trial or evidentiary hearing, making it unnecessary to hold another hearing. Because the trial court ruled on defendant's motion having considered the relevant information regarding the applicability of any rape kit evidence to defendant's defense, we find no abuse of discretion in the court's denial of defendant's motion. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996) (An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling).⁴

Lastly, defendant claims that his trial counsel was ineffective in failing to request that the trial judge consider CJI2d 5.12 regarding the prosecution's failure to produce witnesses. Even assuming the applicability of this instruction, a trial judge is presumed to know the law, and therefore, instructions on the law to be applied are not required to be given in open court in a bench trial. *People v Casal*, 412 Mich 680, 691 n 5; 316 NW2d 705 (1982); *People v Garfield*, 166 Mich App 66, 79; 420 NW2d 124 (1988). In light of this presumption, such a request by defense counsel would have been frivolous; thus, defense counsel was not required to make the request. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). Therefore, we conclude that defense counsel was not ineffective for failing to specifically address the court's attention to CJI2d 5.12. *Id.*

Affirmed.

/s/ Hilda R. Gage

/s/ Helene N. White

/s/ Jane E. Markey

¹ The res gestae witness statute provides as follows:

- (1) The prosecuting attorney shall attach to the filed information a list of all witnesses known to the prosecuting attorney who might be called at trial and all res gestae witnesses known to the prosecuting attorney or investigating law enforcement officers.
- (2) The prosecuting attorney shall be under a continuing duty to disclose the names of any further res gestae witnesses as they become known.
- (3) Not less than 30 days before the trial, the prosecuting attorney shall send to the defendant or his or her attorney a list of the witnesses the prosecuting attorney intends to produce at trial.
- (4) The prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties.

(5) The prosecuting attorney or investigative law enforcement agency shall provide to the defendant, or defense counsel, upon request, reasonable assistance, including investigative assistance, as may be necessary to locate and serve process upon a witness. The request for assistance shall be made in writing by defendant or defense counsel not less than 10 days before the trial of the case or at such other time as the court directs. If the prosecuting attorney objects to a request by the defendant on the grounds that it is unreasonable, the prosecuting attorney shall file a pretrial motion before the court to hold a hearing to determine the reasonableness of the request.

(6) Any party may within the discretion of the court impeach or cross-examine any witnesses as though the witness had been called by another party. [MCL 767.40a; MSA 28.980(1).]

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

³ We note that while defendant now asserts that the rape kit, “the ER physician and EMS team could have provided testimony about the Complainant’s condition immediately after the offense occurred,” defendant waived the production at trial of Officer Danna Wudyka, who took complainant’s initial report and could presumably have offered testimony regarding the complainant’s condition.

⁴ With respect to the emergency room physician and EMS response team, as we discussed above, defendant never sought the prosecution’s assistance in locating these witnesses. Therefore, the prosecution had no obligation to exercise due diligence attempting to locate these witnesses, *Burwick*, *supra*; *Calhoun*, *supra* at 522, and defendant’s motion for new trial on this basis is without merit.