

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALFORD PIXLEY WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

September 13, 2007

No. 271834

Wayne Circuit Court

LC No. 05-012344-01

Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, and sentenced to two years' probation. He appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that the trial court abused its discretion by allowing the prosecutor to present at trial two witnesses who were not endorsed before trial. The prosecutor interviewed the complainant the week before trial and learned that Shirley Pringle was in the parking lot outside the bar where the assault occurred. The prosecutor notified defense counsel of Pringle's existence and the nature of her testimony the next day. The prosecutor then interviewed Pringle on the morning of trial and gave defense counsel an opportunity to interview her. A second witness, Bernard Onwuemelie, approached the prosecutor about half an hour before trial and indicated that he had been asked to appear, presumably by the complainant. He had information about statements defendant allegedly made to him after the assault. Over defendant's objection, the trial court allowed both witnesses to testify.

At trial, Pringle testified that she had a short conversation with the complainant in the parking lot of the bar and then witnessed him being assaulted by a group of men that included defendant. Bernard Onwuemelie testified that defendant later approached him at the same bar and asked that he speak to the complainant about dropping the charges in exchange for defendant paying the complainant's hospital bill.

We review the trial court's decision to allow testimony by a nonendorsed witness for an abuse of discretion. *People v McLaughlin*, 258 Mich App 635, 657; 672 NW2d 860 (2003); *People v Gadomski*, 232 Mich App 24, 32-33; 592 NW2d 75 (1998). The prosecutor's duty to inform a defendant of the names of witnesses before trial is outlined in MCL 767.40a. As our

Supreme Court explained in *People v Burwick*, 450 Mich 281; 537 NW2d 813 (1995), MCL 767.40a “contemplates notice at the time of filing the information of *known* witnesses who might be called and all other *known* res gestae witnesses” and “imposes on the prosecution a continuing duty to advise the defense of all res gestae witnesses *as they become known.*”¹ *Id.* at 288-289 (emphasis added).

Here, the prosecutor fulfilled her statutory duty by informing defense counsel of the existence of the witnesses when they became known and by further ensuring that defense counsel had the opportunity to interview the witnesses before trial. Defendant argues that, unlike the witness in *Burwick*, Pringle testified that she gave a statement to the police and thus her existence and potential testimony should have been known to the police and prosecutor well before trial. However, Pringle’s testimony reveals at most that she spoke to the officer who arrived on the scene and told him that she had witnessed the assault; it does not establish that she gave a formal statement to the officer.

Defendant also argues that he was unfairly prejudiced by the late endorsement of Pringle because defense counsel did not have time to discover the complainant’s preliminary examination testimony, during which he did not mention the presence of witnesses during the assault. However, defense counsel had at least three days after learning of Pringle’s existence to examine the short preliminary examination transcript. Defendant has not shown that he was prejudiced by lack of notice when there was sufficient time for counsel to prepare.

Defendant also argues that the complainant spoke to the police at the scene of the assault and later spoke twice to the officer in charge of the case, but did not mention the existence of an eyewitness until his conversation with the prosecutor on the Thursday before trial. The complainant also testified at defendant’s preliminary examination and, in response to a question whether he was with anyone before being assaulted, answered, “No.” We note that the complainant was not questioned during the preliminary examination about speaking with other persons after leaving the bar or about whether other persons might have seen the assault. The question during the preliminary examination was whether the complainant was “with” anyone, and the complainant consistently testified at both proceedings that he went to the bar alone, drank alone, and left alone. Therefore, the preliminary examination testimony is not inconsistent with his trial testimony or that of witness Shirley Pringle. To the extent that the complainant’s testimony at the two proceedings and statements to the police were not consistent, any inconsistency would go to the weight that the trial court gave the testimony of the complainant and Pringle in its role as fact-finder, not to the admissibility of Pringle’s testimony.

Finally, defendant argues that his trial counsel was ineffective for not using the complainant’s preliminary examination testimony to cross-examine the complainant at trial. In order to justify reversal on the basis that a defendant was deprived of the right to the effective assistance of counsel, “a defendant must show that counsel’s performance fell below an objective

¹ “A res gestae witness is a person who witnesses some event in the continuum of a criminal transaction and whose testimony will aid in developing a full disclosure of the facts.” *People v O’Quinn*, 185 Mich App 40, 44; 460 NW2d 264 (1990).

standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial.” *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Because the complainant’s preliminary examination testimony was not inconsistent with his trial testimony, defendant has not shown that trial counsel’s performance was constitutionally deficient.

Affirmed.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Kurtis T. Wilder