STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARON BEASLEY,

Defendant-Appellant.

UNPUBLISHED
August 2, 1996

No. 178427
LC No. 93-007903

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON E. SMITH,

Defendant-Appellant.

No. 178922
LC No. 93-007903

Before: Reilly, P.J., and Cavanagh, and R.C. Anderson,* JJ.

PER CURIAM.

Following a jury trial, defendants were convicted of second-degree murder, MCL 750.317; MSA 28.549, for the drug-related slaying of Leroy Ashley. Defendant Smith was also convicted of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant Beasley was sentenced to six to twenty years of imprisonment for his murder conviction. Defendant Smith was sentenced to a term of fifteen to thirty years for his murder conviction, to be served after he completes a two year sentence for his felony-firearm conviction. Defendants' respective appeals of right were consolidated by this Court. We affirm.

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* Circuit judge, sitting on the Court of Appeals by assignment.

Tracey Butler was the prosecution's sole eyewitness to the events underlying this case. At trial, Butler testified that defendants and a companion were selling drugs to passing motorists, but departed after Ashley, the local drug dealer, approached them while carrying a baseball bat. Fifteen minutes later, Ashley was standing near the street and talking to a motorist when defendant Beasley approached him from the sidewalk carrying a stick. Meanwhile, defendant Smith and a third man walked through a vacant lot located next to a house at which Ashley, Butler, and other friends were having a barbecue. Defendant Smith was carrying a long gun, and the third man, a handgun. Defendant Beasley shouted, "shoot the motherfucker," and shots rang out. Ashley died as a result of his wounds.

Defendant Beasley initially contends that he was denied a fair trial by numerous remarks of the prosecutor during his closing and rebuttal arguments. Because defendant failed to object at trial, review will be undertaken only if a miscarriage of justice would result from the failure to do so. *People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1989). We find that no miscarriage of justice would result from the failure to review this issue because the prosecutor's remarks were either proper or any prejudicial effect could have been cured by a timely objection and curative instruction. *Id.*

Next, we find that no manifest injustice would result from the failure to review defendant Beasley's unpreserved challenge to the trial court's instruction regarding aiding and abetting as it related to second-degree murder because the instructions were sufficient to protect defendant's rights. *People v Van Dorsten*, 441 Mich 540, 545; 494 NW2d 737 (1993); *People v Caulley*, 197 Mich App 177, 184; 494 NW2d 853 (1992). Further, the trial court did not abuse its discretion in providing written instructions that were responsive to the jury's request and were not misleading. *People v Bonham*, 182 Mich App 130, 134; 451 NW2d 530 (1989).. Moreover, the trial court did not err, and defense counsel was not ineffective, in failing to review the written instructions copied by the court officer and provided to the jury. The record reveals that the court officer complied with the trial court's directive. As such, error, if any, did not prejudice defendant. MCL 769.26; MSA 28.1096; *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994).

Defendant Beasley also contends that he was denied the effective assistance of counsel by trial counsel's failure to object during the prosecutor's closing argument and to the jury instructions. We disagree. Upon review of defendant's arguments and the record, we find that defendant was not denied effective assistance of counsel because either the objections would have been futile or defendant was not prejudiced by trial counsel's error. *People v Briseno*, 211 Mich App 11, 17; 535 NW2d 559 (1995); *People v Daniel*, 207 Mich App 47, 59; 523 NW2d 830 (1994).

Defendant Beasley next asserts that the trial court erred in denying his motion for a directed verdict, and the examining magistrate abused her discretion in binding him over on murder charges. We disagree. Viewing the evidence in a light most favorable to the prosecution, the trial court properly denied defendant's motion for directed verdict because there was sufficient evidence from which a rational trier of fact could find beyond a reasonable doubt that defendant aided and abetted defendant Smith. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). On the basis of Butler's testimony, the jury could infer that defendant approached Ashley for the purpose of distracting him so

that defendant Smith could gain the element of surprise in his attack. From this evidence, a rational jury could find that defendant Beasley intended to kill or acted with knowledge defendant Smith so intended, and accordingly, find Beasley guilty as an aider and abettor. *People v Partridge*, 211 Mich App 239; 535 NW2d 251 (1995). Furthermore, because sufficient evidence was presented at trial, any error in binding defendant over would be harmless. *People v Meadows*, 175 Mich App 355, 359; 437 NW2d 405 (1989).

Both defendants raise claims premised on the prosecutors' failure to produce William Powell, an endorsed res gestae witness. Both argue that the trial court erred in its finding that the prosecution exercised due diligence in attempting to find him. Although the prosecutor is no longer required by MCL 767.40a; MSA 28.980(1) to endorse and produce all res gestae witnesses, the prosecutor must list such witnesses known at the time of the filing of the information and give notice of those that become known before trial. *People v Burwick*, 450 Mich 281, 291; 537 NW2d 813 (1995). Upon leave of the court and for good cause shown, the prosecutor may "at any time" delete a witness from the list of witnesses the prosecutor intends to call at trial. MCL 767.40a; MSA 28.908(1)(4). *Id* .at 292.

Here, rather than finding "good cause", the court found that the prosecutor exercised due diligence[1] in attempting to locate Powell. The record indicates that the police checked several addresses, the jail, and the morgue. The day before the hearing regarding this issue, a police officer drove witness Butler to different locations in a further effort to locate Powell. Because these efforts satisfied the good cause requirement of the statute, as well as the due diligence standard, defendants are not entitled to new trials. Furthermore, the trial court did not err in declining to instruct the jury that Powell's testimony would have been favorable to the defense. *People v Paquette*, 214 Mich App 336, 344; ___ NW2d ___ (1995).

Defendant Smith additionally contends that he was denied a fair trial by the prosecutor's failure to list, locate, and produce five res gestae witnesses. Defendant failed to preserve this issue because he did not raise it in the lower court. *People v Calhoun*, 178 Mich App 517, 520; 444 NW2d 232 (1989). In any event, the prosecutor is not required to locate and produce res gestae witnesses. To the extent that Smith is arguing that the prosecutor failed to give notice of these witnesses, we note that "the purpose of the 'listing' requirement is merely to notify the defendant of the witness' existence and res gestae status." *Calhoun, supra* at 523. If a defendant knew of the res gestae witness before trial, the prosecutor's failure to list the witness is harmless error. *Id.* In this case, the existence and status of these witnesses was made known to defendants by the complaining witness' testimony at the preliminary examination. Thus, even if the prosecutor did not notify defendant Smith of the existence of these witnesses before the preliminary examination, any error was harmless. *Id.*

Defendant Smith next argues that he was denied a fair trial by the prosecutor's comments during voir dire and closing argument. We find that no miscarriage of justice would result from the failure to review this unpreserved issue because the prosecutor's remarks were either proper or any prejudicial effect could have been cured by a timely objection and curative instruction. *Gonzalez, supra* at 535.

Defendant Smith's remaining issues concern the jury instructions. Defendant contends that he was denied a fair trial by (1) the trial court's instruction regarding the number of witnesses produced by both parties when he, in fact, presented no evidence, and (2) the trial court's instruction regarding the order of deliberations because it infringed on his right to be presumed innocent. By not objecting at trial, defendant failed to preserve these issues, and therefore, relief will be granted only if necessary to avoid manifest injustice. *Van Dorsten, supra* at 545. Here, we find that no manifest injustice would result from the failure to review because, when taken as a whole, the instructions fairly presented the issues to be tried and sufficiently protected defendant's rights. *Caulley, supra* at 184.

Affirmed.

/s/ Maureen Pulte Reilly
/s/ Mark J. Cavanagh
/s/ Robert C. Anserson

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[1] "Before its amendment in 1986, MCL 767.40; MSA 28.980 was interpreted to require the prosecutor to use due diligence to endorse and produce all res gestae witnesses." *Burwick, supra* at 287.