

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROOSEVELT ERNEST PHILSON,

Defendant-Appellant.

UNPUBLISHED

January 14, 2010

No. 289152

Wayne Circuit Court

LC No. 08-009754

Before: K. F. Kelly, P.J., and Hoekstra and Whitbeck, JJ.

PER CURIAM.

A jury convicted defendant, Roosevelt Philson, of being a felon in possession of a firearm¹ and possessing a firearm during the commission of a felony.² He was sentenced to two to five years' imprisonment on the felon in possession conviction and two years' consecutive imprisonment on the felony-firearm conviction. He appeals as of right. We affirm.

I. Basic Facts And Procedural History

On July 4, 2008, Detroit police responded to reports of a shootout in a Detroit neighborhood. When they arrived at the scene, they observed Philson standing on the porch of a house, holding a shotgun. As a police car approached, Philson tossed the shotgun through the open front doorway of the house. The police then arrested him. No other people were seen on the porch at that time. Philson stipulated at trial that he had a prior felony conviction and that he was not permitted to possess a weapon.

During the investigation of the crime scene after Philson's arrest, the police took several photographs. One photograph depicted three people on the porch. But none of those three people testified at trial.

¹ MCL 750.224f.

² MCL 750.227b.

After sentencing, Philson moved for a new trial based on the absence of testimony from the three people in the photograph, whom he considered to be res gestae witnesses. The trial court denied the motion. Philson now appeals.

II. Motion For New Trial

A. Standard Of Review

Philson argues that the three people in the photograph were res gestae witnesses and that the trial court should have held a due diligence hearing regarding the prosecution's efforts to locate them. We will not overturn a trial court's decision regarding whether a witness is a res gestae witness unless it is clearly erroneous.³ A finding is clearly erroneous if the reviewing court, based on the entire evidence, is left with a definite and firm conviction that a mistake was made.⁴ Further, we review for an abuse of discretion a trial court's decision on a motion for a new trial.⁵

B. Requirements Concerning Res Gestae Witnesses

Philson has not fulfilled his responsibility to provide this Court with copies of all transcripts from the lower court proceedings.⁶ Accordingly, we consider this issue abandoned on appeal.⁷

Regardless, our review of the record indicates that Philson's claim of error is without merit. A res gestae witness is one who witnessed some event in the continuum of a criminal transaction and whose testimony would aid in developing a full disclosure of the facts.⁸ "Persons present at the scene of a crime are presumed to be res gestae witnesses and the prosecutor must prove otherwise[.]"⁹ However, the record clearly rebuts any presumption that the three people present at the crime scene were res gestae witnesses. The testimony indicates that no one was present in the area of the porch at the time the police observed Philson holding the shotgun and tossing it into the house, or at the time of his arrest. The police took the photograph at some point after they had placed Philson under arrest. There is no evidence that the three people were witnesses to the incident or could provide testimony that would aid in the development of facts. Therefore, the prosecutor was under no duty to list them on the information or produce them at trial, and the trial court did not abuse its discretion in denying Philson's motion for a new trial.

³ *People v Hatch*, 156 Mich App 265, 267; 401 NW2d 344 (1986).

⁴ *Id.*

⁵ *People v Leonard*, 224 Mich App 569, 580; 569 NW2d 663 (1997).

⁶ MCR 7.210(B)(1)(a).

⁷ See *People v Johnson*, 173 Mich App 706, 707; 434 NW2d 218 (1988).

⁸ *Hatch*, 156 Mich App at 266-267.

⁹ *People v Lamar*, 153 Mich App 127, 137; 395 NW2d 262 (1986), superseded by statute as stated in *People v Calhoun*, 178 Mich App 517; 444 NW2d 232 (1989).

C. Ineffective Assistance Of Counsel

We additionally note, that, to the extent Philson argues that his defense counsel was ineffective for failing to demand a due diligence hearing, that issue is waived on appeal because he did not properly present it to this Court in his questions presented.¹⁰ Regardless, defense counsel was not ineffective for failing to raise a futile objection.¹¹

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Joel P. Hoekstra
/s/ William C. Whitbeck

¹⁰ MCR 7.212(C)(5); *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000).

¹¹ *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).