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# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HOLLY CHRISTINE ALEXANDER,

Defendant-Appellant.

UNPUBLISHED
December 26, 2025
12:25 PM

No. 366968
Wayne Circuit Court
LC No. 2022-025589-FH

Before: GARRETT, P.J., and RICK and MARIANI, JJ.

RICK, J. (*concurring in part and dissenting in part*).

I agree with the majority's conclusion that the prosecutor erred by attempting to shift the burden of proof regarding whether defendant possessed a taser and by failing to exercise due diligence by failing to timely subpoena a res gestae witness whom he endorsed for trial. I likewise agree that the trial court erred by failing to provide the requested missing-witness instruction. Unlike the majority, however, I would find that the prosecutor's failure to adhere to MCR 2.506(C)(1) constituted structural error requiring reversal of defendant's convictions. Alternatively, I would conclude that the prosecutor's and the trial court's cumulative errors were of such magnitude that they implicated defendant's substantial rights and could not be considered harmless. As a result, I would reverse and remand for a new trial.

The missing witness, who was a friend of defendant's, was listed as one of the prosecutor's endorsed res gestae witnesses. In general, a prosecutor must exercise due diligence to produce endorsed witnesses at trial. *People v Eccles*, 260 Mich App 379, 389; 677 NW2d 76 (2004). "A prosecutor who fails to produce an endorsed witness may show that the witness could not be produced despite the exercise of due diligence." *Id*. Here, the prosecutor subpoenaed the missing witness only one day before she was scheduled to appear, in violation of MCR 2.506(C)(1). The rule states:

> The signer of a subpoena must issue it for service on the witness sufficiently in advance of the trial or hearing to give the witness reasonable notice of the date and time the witness is to appear. Unless the court orders otherwise, the subpoena must

> be served at least 2 days before the appearance or 14 days before the appearance when documents are requested. [MCR 2.506(C)(1).]

The trial court was aware that the prosecutor had only subpoenaed the missing witness the night before she was scheduled to appear at trial. It made no mention of MCR 2.506(C)(1). Instead, the court concluded that the prosecutor exercised due diligence in attempting to produce the witness because he personally served the witness with a subpoena; spoke with her on the morning of trial about her plan to appear; provided her with transportation via officers sent to her given address at lunch; and reported that the officers looked around the neighborhood for her when they failed to find her at her given address. Given the lack of proper notice as required under the court rules, however, the witness had no obligation to appear at trial—and indeed, she did not appear. And while we can only speculate as to nature of the witness's testimony, it is at least possible that she would have offered testimony favorable to defendant, particularly considering the fact that she was one of defendant's friends.

As the majority correctly concluded, the prosecutor's violation of MCR 2.506(C)(1) unequivocally constituted a failure to exercise due diligence. However, I disagree with the majority's conclusion that reversal was not required. At oral argument in this matter, defendant maintained that a prosecutor cannot establish that they exercised due diligence in locating a missing witness if they failed to timely subpoena that witness in accordance with MCR 2.506(C)(1). I agree that part of the due-diligence analysis must include a determination of whether the prosecutor adhered to MCR 2.506(C)(1). A review of published caselaw indicates that this is a matter of first impression for this Court.

The majority reasons that defendant is not entitled to relief because she has not shown that she was prejudiced by the prosecutor's violation of MCR 2.506(C)(1). In doing so, the majority essentially equates the prosecutor's violation of MCR 2.506(C)(1) with any other failure to exercise due diligence. But the violation of a court rule strikes me as patently different from, for example, how many times the prosecutor attempted to contact a witness, see *People v Brown*, ___ Mich App ___, ___; ___ NW3d ___ (2024) (Docket No. 359376); slip op at 12, or even *when* the prosecutor began attempting to contact the witness, see *People v Cummings*, 171 Mich App 577, 586; 430 NW2d 790 (1988). Unlike these rather nebulous criteria, a court rule violation is just that—a *rule violation*. Such actions must have consequences; without them, the rule becomes hardly more than a guideline. Here, by requiring defendant to prove that she was prejudiced by the prosecutor's actions, the majority has guaranteed that the prosecutor will suffer no negative consequences for a blatant rule violation. In truth, it appears that *defendant* is the only party in this matter who has experienced those negative consequences. I find it difficult to fathom that this was our Supreme Court's intention in promulgating MCR 2.506(C)(1).

After careful consideration of the issue, it is my belief that the only viable solution to the challenge presented in this case is to treat violations of MCR 2.506(C)(1) as structural error requiring automatic reversal. When a court rule establishes mandatory procedural requirements with specific timeframes, compliance is not optional. The prosecutor's complete lack of adherence to the court rule affected the fundamental framework of the trial by denying defendant the opportunity to present a complete defense. Beyond that, the majority has forced defendant into an untenable position by requiring her to establish that she was prejudiced by the prosecutor's rule violation. Defendant cannot say one way or another what the missing witness's testimony would

have been because *the prosecutor failed to produce the witness*. As a result, defendant has no meaningful way to establish how the absence of that testimony might have been prejudicial. This circular reasoning—requiring proof of prejudice from evidence that was never presented—clearly illustrates why these violations must be treated as structural error.

Further, it bears consideration that MCR 2.506(C)(10) exists precisely to ensure adequate notice and prevent the type of last-minute scrambling that occurred in this matter. Treating MCR 2.506(C)(1) violations as structural error would clearly signal to trial courts and prosecutors that such violations are not to be tolerated. Courts would not be required to engage in speculative harmless error analysis when faced with a clear court rule violation. Instead, they could focus on whether the procedural requirement was met, providing a bright-line rule that promotes consistency and fairness. Moreover, doing so would eliminate prosecutorial gamesmanship by removing any incentive to delay witness service until the last moment. As it stands now, parties face minimal consequences for violating MCR 2.506(C)(1), particularly if they can demonstrate that other efforts were made to secure a witness's attendance.

Even assuming arguendo that the prosecutor's failure to exercise due diligence was nonstructural error, I would nonetheless conclude that a new trial is warranted. The prosecutor's failure to produce the missing witness, combined with the jury's inability to draw the appropriate adverse inference via a missing-witness instruction, created a cumulative prejudicial effect and denied defendant a fair trial. See *People v LeBlanc*, 465 Mich 575, 591; 640 NW2d 246 (2002) ("[T]he cumulative effect of several errors can constitute sufficient prejudice to warrant reversal where the prejudice of any one error would not."). In my mind, the trial court's refusal to instruct the jury regarding the missing witness was the final nail in the coffin and assured that defendant would be convicted. Accordingly, I would reverse and remand for a new trial.

/s/ Michelle M. Rick