STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 26, 2025 12:25 PM
v	No. 366968 Allegan Circuit Court
HOLLY CHRISTINE ALEXANDER, Defendant-Appellant.	LC No. 2022-025589-FH

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

PER CURIAM.

Defendant appeals by right her jury-trial conviction of domestic violence, MCL 750.81(2), for which she was sentenced to serve one day in jail and nine months' probation.[1] We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Defendant and the victim dated for approximately two years, during which time they lived together and were engaged to be married, but the couple eventually broke up. In July 2022, defendant was at a gas station with her daughter when she ran into the victim. The two had an unpleasant exchange before parting ways. Immediately after the encounter, defendant and the victim both separately drove to a friend's house. According to defendant, she was bringing her daughter to visit her friend's daughter and did not know that the victim would be there as well.

Upon her arrival, defendant parked behind the victim's car and approached him in the garage. According to defendant, the victim proceeded to yell at her, and then put his hand on her shoulder as she turned to leave. Defendant testified that she told the victim to leave her alone and

[1] Defendant was acquitted of possession of a taser, MCL 750.224a, and assault with a dangerous weapon, MCL 650.82. For the sake of simplicity and consistency with the record in this case, we use "taser" throughout this opinion as shorthand for a device subject to MCL 750.224a's prohibitions.

not to touch her or else she would "zap" him with a device that she kept in her purse.[2] According to the victim, defendant already had the device in her hand as she approached him and held it close to his head as she threatened to use it. The victim testified that he grabbed defendant's arm to prevent her from using the device. The parties' friends came out of the house, there was more yelling, and eventually defendant left. The victim then called the police and filed a police report.

Relevant to this appeal, a res gestae witness endorsed by the prosecution failed to appear at trial. Defendant requested a missing-witness jury instruction, which the trial court agreed to grant unless the prosecution demonstrated that it had exercised due diligence to produce the witness. The prosecution shared that the witness had been personally served the day before trial and that the witness had called on the morning of trial to tell the prosecution that she intended to appear but did not have transportation. The prosecution sent officers to collect the witness at her given address during the trial's lunch recess, but the officers could not find her. After looking around the neighborhood for the witness, the officers returned to court without her. Based on this, the trial court found that the prosecution had exercised due diligence and denied defendant's request to provide a missing-witness instruction to the jury.

Defendant was convicted and sentenced as previously described. This appeal followed.

II. PROSECUTORIAL MISCONDUCT

Defendant first argues that the prosecutor engaged in misconduct during closing arguments by (1) misstating the law regarding domestic violence and (2) shifting the burden of proof regarding the nature of the device. We find no error warranting reversal.

"In order to preserve an issue of prosecutorial misconduct, a defendant must contemporaneously object and request a curative instruction." *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). Defendant did not object to the comments of the prosecutor that she now challenges on appeal; accordingly, her challenge is not preserved and is "reviewed for plain error affecting substantial rights." *Id*. "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id*. "[O]nce a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse." *Id.* "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id*. (quotation marks, citation, and alteration omitted).

[2] At trial, the victim described the device as a taser; defendant, meanwhile, testified that it was not a taser but "a flashlight with a shocker on it" that had less shocking power than her "dogs [sic] shock collar."

Defendant's claim of misconduct focuses on the following comments that the prosecutor made during closing arguments:

> You heard that [the defendant] threatened to use the taser and in fact held it by [the victim's] head, the defendant [sic] said he was in fear, that's an assault, he was in fear that the taser was going to touch him, that's the battery part . . . . This fact that this was [a] novelty item or something, there's no proof of that, and again it really doesn't matter because there was an assault, whether it was a novelty item or real taser, my—the victim was put in fear of being tased, of being battered, so again the definition of assault is being put in fear, he was . . . .
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> * * *
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> Domestic violence requires one that they had some type of dating relationship, it fills that element.
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> The victim also had to be put in fear of a battery. We are back to that assault and battery. Doesn't have to be battered, it just has to be put in fear of it. You heard that he was so they had a dating relationship and he was put in fear, so that meets the elements of Domestic Violence . . . .
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> * * *
>
> The defense has shown us nothing that this was not a taser other than the fact that the defendant admitted it was so for them to come back and say well nobody says, nobody can prove it's a taser, well nobody's proven that it's not either, but we do have testimony from the defendant herself saying it's a taser and she pulled it out and she was going to use it to defend herself . . . . [C]ommon sense says this was a weapon, this was a taser, it was meant to scare the victim into thinking there was going to be imminent battery . . . .

To start, we find no plain error in the prosecutor's statement of the law regarding domestic violence. Defendant was convicted of domestic violence under MCL 750.81(2), which, as relevant here, requires proof of the following elements: "(1) the commission of an assault or an assault and battery and (2) a dating relationship between the parties." *People v Cameron*, 291 Mich App 599, 614; 806 NW2d 371 (2011). A battery is "an intentional, unconsented and harmful or offensive touching of the person of another, or of something closely connected with the person," regardless of "whether the touching caused an injury," and an assault is "an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery." *Id*. (quotation marks and citations omitted).

"A prosecutor's clear misstatement of the law that remains uncorrected may deprive a defendant of a fair trial." *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002). Contrary to defendant's claim, however, the prosecutor did not misstate the law regarding the offense of domestic violence. Rather, the prosecutor accurately identified and described both requisite elements—the existence of a dating relationship and the commission of an assault or assault and battery—and fairly connected them to the evidence presented at trial. Defendant has

shown no error or impropriety in this regard. Furthermore, the trial court correctly instructed the jury on the law regarding this offense, and defendant has failed to explain how those instructions would have been insufficient to cure any prejudice from this claimed error. See *People v Zitka*, 335 Mich App 324, 348; 966 NW2d 786 (2020) ("Jurors are presumed to follow their instructions, and jury instructions are presumed to cure most errors.") (quotation marks and citation omitted).

We agree with defendant, however, that the prosecutor made comments regarding the nature of the device that improperly attempted to shift the burden of proof to defendant. As discussed, defendant, in addition to being charged with domestic violence, was charged with (1) possession of a taser, MCL 750.224a, and (2) assault with a dangerous weapon, MCL 750.82. As to possession of a taser, the prosecution was required to prove that defendant possessed "a portable device or weapon from which an electric current, impulse, wave, or beam may be directed, which current, impulse, wave, or beam is designed to incapacitate temporarily, injure, or kill." MCL 750.224a(1). And as to assault with a dangerous weapon, the prosecution was required to prove that defendant "assault[ed] another person with a gun, revolver, pistol, knife, iron bar, club, brass knuckles, or other dangerous weapon without intending to commit murder or to inflict great bodily harm less than murder." MCL 750.82(1).

As reflected in the prosecutor's comments to the jury, it was disputed at trial whether the device defendant had in her possession was, in fact, a taser. And as the above authority makes clear, it was the prosecution's burden to prove that the nature of the device met the requisite criteria of the charged offenses. The prosecutor, however, suggested otherwise in stating to the jury that defendant "has shown us nothing that this was not a taser other than the fact that the defendant admitted it was so for them to come back and say well nobody says, nobody can prove it's a taser, well nobody's proven that it's not either." These comments were plainly improper. See *People v Fyda*, 288 Mich App 446, 463-464; 793 NW2d 712 (2010) (explaining that "[a] prosecutor may not imply in closing argument that the defendant must prove something," nor may "a prosecutor . . . comment on the defendant's failure to present evidence").

Defendant, however, has not shown that this impropriety affected her substantial rights. See *Carines*, 460 Mich at 763. Most notably, defendant was acquitted of both offenses that required proof of the device's dangerous nature, so any improper shifting of the burden of proof for those offenses did not ultimately prejudice her. Nor do we see any prejudice that this error might have had as to the domestic-violence offense. As the prosecutor noted during closing arguments, whether the device was a taser was not a requisite element of that offense: "it really doesn't matter because there was an assault, whether it was a novelty item or real taser . . . ." The trial court's instructions to the jury did not suggest otherwise, but instead, as noted, correctly stated the law as to that offense. And the court's instructions as to the other offenses made clear that it was the prosecution's burden to prove the device's nature beyond a reasonable doubt. See *Zitka*, 335 Mich App at 348. Accordingly, we see no grounds for relief as to this claim.[3]

[3] Defendant also cursorily argues that her due-process rights were violated by the prosecutor's misconduct. "[T]he crux of the due process analysis in cases of alleged prosecutorial misconduct is whether the defendant received a fair trial. The remedy when a defendant receives an unfair

III. MISSING WITNESS

Defendant next argues that she is entitled to a new trial because she was prejudiced by the prosecution's failure to exercise due diligence to produce the missing witness discussed above, and the trial court therefore abused its discretion by refusing to provide the missing-witness instruction. We agree that the prosecution failed to exercise due diligence and that the court should have provided the requested missing-witness instruction. Defendant, however, has failed to demonstrate entitlement to relief for these shortcomings.

"We review a trial court's determination of due diligence and the appropriateness of a 'missing witness' instruction for an abuse of discretion." *People v Eccles*, 260 Mich App 379, 389; 677 NW2d 76 (2004). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *People v Craft*, 325 Mich App 598, 604; 927 NW2d 708 (2018). "A trial court necessarily abuses its discretion when it commits an error of law." *People v Butsinas*, ___ Mich App ___, ___; ___ NW3d ___ (2025) (Docket No. 364778); slip op at 4.

The prosecution must exercise due diligence to produce witnesses endorsed under MCL 767.40a(3) at trial. *Eccles*, 260 Mich App at 388. Although "[t]he prosecution no longer has an affirmative duty to call all res gestae witnesses at trial," it is nonetheless "obligated to render 'reasonable assistance' in locating and serving process upon a witness when requested in writing by [a] defendant." *Butsinas*, ___ Mich App at ___; slip op at 4 (citations omitted). "Due diligence is the attempt to do everything reasonable, not everything possible, to obtain the presence of a witness." *People v Brown*, ___ Mich App ___, ___; ___ NW3d ___ (2024) (Docket No. 359376); slip op at 11 (quotation marks, citations, and alteration omitted). This concept of due diligence is also incorporated into our court rules. For instance, MCR 2.506(C)(1) requires that a witness be served with a subpoena "at least 2 days before [his or her] appearance" at trial so that the witness is "sufficiently [notified] in advance of the trial . . . of the date and time [he or she] is to appear." "If the trial court finds a lack of due diligence, the jury should be instructed that it may infer that the missing witness's testimony would have been unfavorable to the prosecution's case." *Brown*, ___ Mich App at ___; slip op at 11 (quotation marks and citation omitted).

The prosecution's failure to exercise due diligence in producing an endorsed witness "does not result in automatic reversal." *Butsinas*, ___ Mich App at ___; slip op at 4. "Rather . . . , the trial court must [first] determine if [the] defendant was prejudiced by the witness's absence." *Id*. "As the party asserting error, [the] defendant bears the burden of providing this Court with a record to verify the factual basis of any argument upon which reversal was predicated." *Id*. (quotation marks and citation omitted). Similarly, a trial court's failure to provide a requested missing-witness instruction does not automatically warrant relief; rather, "if an applicable instruction was not given, the defendant bears the burden of establishing that the trial court's failure to give the requested instruction resulted in a miscarriage of justice." *People v Riddle*, 467 Mich 116, 124;

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trial because of prosecutorial misconduct is a new and, presumably, fair trial." *People v Aceval*, 282 Mich App 379, 391; 764 NW2d 285 (2009) (citation omitted). As discussed, the prosecutor's comments were either proper or ultimately inconsequential to defendant's conviction, and defendant has shown us no basis to conclude that they nonetheless violated her due-process rights.

649 NW2d 30 (2002). Reversal of a conviction is only warranted if, when weighing the error in light of the other properly admitted evidence, "it affirmatively appears that it is more probable than not that the error was outcome determinative." *Id.* at 124-125. See also MCL 769.26.

In this case, the missing witness in question was one of the prosecution's res gestae witnesses endorsed under MCL 767.40a(3). At the close of proofs, defendant requested that a missing-witness instruction be provided to the jury, but the trial court denied the request because it found that the prosecution had exercised due diligence to produce the witness. In support of this conclusion, the court noted that the prosecution personally served the witness with a subpoena the day before trial; 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 that address.

The trial court in this case erred by finding that the prosecution exercised due diligence to produce the missing witness. See *Butsinas*, ___ Mich App at ___; slip op at 4. As noted, our court rules expressly required the prosecution to serve the witness with a subpoena to appear at trial "at least 2 days before" she was set to appear. MCR 2.506(C)(1). The prosecution, however, did not serve the witness with the subpoena until the day before trial. Thus, the mandate that the witness be timely served with a subpoena was undisputedly not met here. See MCR 2.506(C)(1). This failure to comply with a clear and mandatory requirement meant to ensure that a witness receives adequate notice regarding his or her appearance at a trial plainly constitutes a failure to exercise due diligence. See also, e.g., *People v Pearson*, 404 Mich 698, 716-717, 743; 273 NW2d 856 (1979), superseded on other grounds by MCL 767.40a (holding that the prosecution failed to exercise due diligence to produce an endorsed res gestae witness when it made no attempt to locate and subpoena the witness until the day before trial); *People v Cummings*, 171 Mich App 577, 586; 430 NW2d 790 (1988) (holding that the prosecution failed to exercise due diligence to produce an endorsed witness when it waited until the day before trial to begin its search to locate and subpoena the witness).

Accordingly, the trial court clearly erred by concluding that the prosecution exercised due diligence in attempting to secure the attendance of this witness, and in turn by denying defendant's request for a missing-witness instruction. Defendant, however, has failed to show entitlement to relief for these errors. To start, defendant has not satisfied her burden of showing that she was prejudiced by the prosecution's failure to produce the witness. See *Butsinas*, ___ Mich App at ___; slip op at 4. When requesting the missing-witness instruction at trial, defendant asserted that the witness "was a critical witness to [the] defense," but did not elaborate any further. Defendant did not offer anything more about the witness or her potential testimony, nor did she explain why the witness's testimony was "critical" to her defense or how exactly she was prejudiced by the witness's absence. Nor has defendant done so on appeal. The evidence presented at trial likewise shed no meaningful light on what this witness's testimony would add or why it might be "critical" for defendant. We are instead left to speculate about what the witness's testimony might have been, with no idea of how the absence of this testimony might have been harmful to defendant. Defendant was obligated to establish the factual predicate of her claim of error, including any prejudice from the witness's absence, and she has failed to do so. See *id.*

Defendant has similarly failed to show reversible error in the trial court's refusal to provide the missing-witness instruction to the jury. See *Riddle*, 467 Mich at 124-125; MCL 769.26. The

witness in question was mentioned at trial only once and in passing, when the victim identified her as a friend of defendant's but otherwise provided no indication of what, if any, connection to or knowledge of the events at issue she might have had. Nor, as noted, does the record provide any meaningful information or context beyond that. There is thus nothing to suggest that the jury would have assessed defendant's guilt any differently had it been instructed that this "witness's testimony would have been unfavorable to the prosecution's case." *Brown*, ___ Mich App at ___; slip op at 11 (quotation marks and citation omitted). This is particularly so given the ample evidence of defendant's guilt of domestic violence, the one offense for which she was ultimately convicted. Indeed, there was no dispute at trial that she and the victim had been in a dating relationship, and defendant herself admitted that, during the events at issue in this case, she had threatened to "zap" the victim with the device. See *Cameron*, 291 Mich App at 614. In light of this and the other evidence presented at trial, it does not "affirmatively appear[] that it is more probable than not that the [absence of the missing-witness instruction] was outcome determinative." *Riddle*, 467 Mich at 124-125.

Affirmed.

/s/ Kristina Robinson Garrett
/s/ Philip P. Mariani

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Plaintiff-Appellee,

v

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Defendant-Appellant.

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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