

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THEODORE KURTZ, JR.,

Defendant-Appellant.

UNPUBLISHED

July 30, 1996

No. 178457

LC No. 94-001827-FC

Before: Gribbs, P.J., and Hoekstra and C. H. Stark,* JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529; MSA 28.797. He subsequently pled guilty to habitual offender-third, MCL 769.11; MSA 28.1083, and was sentenced to a term of six to twenty-five years. We affirm.

Defendant argues that the trial court abused its discretion by refusing to admit an exculpatory statement of an alleged res gestae witness. Defendant does not identify the statement in question and, therefore, has not properly presented this issue. *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993). In any case, defendant's claim is without merit. The trial court properly found that there was no corroborating evidence to justify admission of the statement. MRE 804(b)(3). We find no abuse of discretion.

Nor did the trial court abuse its discretion by denying defendant's motion to adjourn to allow defendant to locate a missing witness. Defendant had subpoenaed the witness, but failed to renew the witness' subpoena when the trial was delayed and did not advise the court of the necessity for an adjournment until the first day of trial. Defendant did not try to locate the witness during a recess between the first and second days of trial. Moreover, defendant failed to provide any showing that he was prejudiced by the denial of the adjournment. We find no abuse of discretion. *Lansing v Hartsuff*, 213 Mich App 338, 350-351; 539 NW2d 781 (1995).

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

Defendant also argues that there was insufficient evidence to support his conviction of armed robbery because complainant voluntarily gave defendant his wallet after defendant, armed with a knife, confronted him. We do not agree. The circumstantial evidence was sufficient to support the inference that defendant intended to permanently deprive complainant of his property. *People v Bell*, 209 Mich App 273, 277; 530 NW2d 167 (1995).

There is no merit to defendant's claim that he was denied a fair trial because the trial court failed to give a requested jury instruction on self defense. Defendant's theory was not *self* defense, but defense of another, and the trial court properly instructed the jury on defense of others.

Nor was defendant denied a fair trial because of the trial court's failure to give an instruction on the misdemeanor of larceny from a person of less than \$100. Although robbery necessarily involves a larceny, there is no "inherent relationship" between armed robbery and larceny from a person, because they do not serve the same societal interests. *People v Hendricks*, 446 Mich 435, 445; 521 NW2d 546 (1994). While robbery is primarily an assaultive crime, *Id* at 449, larceny against a person is a crime against property. *People v Jankowski*, 408 Mich 79, 88; In addition, because defendant admitted using a knife, use of a weapon was not in dispute. Where there is no dispute on an element that differentiates the two charges, a misdemeanor instruction is not warranted. *People v Beach*, 429 Mich 450, 491; 418 NW2d 861 (1988). We find no abuse of discretion.

Defendant argues that the trial court improperly determined that the prostitute was not a res gestae witness. We do not agree. The prostitute waited until complainant undressed and left the room for no apparent reason seconds before defendant entered the room armed with a knife. The prostitute was not present when the robbery occurred, and may have been an accomplice. The prosecution is under no duty to list or produce an accomplice. *People v Lawton*, 196 Mich App 341, 346; 492 NW2d 810 (1992). Moreover, the prosecution gave defendant notice that it was not going to call the witness in question at trial. Defendant neither moved to order the prosecution to endorse and produce the witness, nor requested assistance from the prosecution in locating her. The trial court did not err in refusing to let defendant comment in closing argument on the fact that the prosecution failed to call the witness, or in instructing the jury that the prostitute was not a res gestae witness.

Finally, there is no merit to defendant's claim that he was denied a fair trial because the trial court allowed the prosecution to argue against defendant's self defense, but refused to give an instruction on self-defense. As noted previously, defendant's defense, both at trial and as stated in his appellate brief, was defense of others, and the jury was properly instructed in this regard.

Affirmed.

/s/ Roman S. Gribbs

/s/ Joel P. Hoekstra

/s/ Charles H. Stark