

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN ROBERT DAVIS,

Defendant-Appellant.

UNPUBLISHED
September 6, 1996

No. 174170
L.C.No. 93-001017

Before: Gribbs, P.J., and Marilyn Kelly and White, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to do great bodily harm, MCL 750.84; MSA 28.279, and felony-firearm, MCL 750.227b; MSA 28.424(2). He subsequently pled guilty to habitual offender-second, MCL 769.10; MSA 28.1082. Defendant was sentenced to a term of six to 12½years' for habitual-second, and to a two year consecutive term for felony-firearm. We affirm.

The trial court did not abuse its discretion by denying defendant's request to give a jury instruction concerning the prosecutor's failure to produce a res gestae witness, or in determining that the prosecutor exercised due diligence. The witness was subpoenaed to appear in court and did, in fact, appear as ordered. Before the witness left court, the prosecutor told him to return the next day and ensured that he had transportation. When the witness failed to appear the next day, police were dispatched to find him. The police left messages at the witness' residence and at his friend's residence, a LEIN message was sent to all local police departments, and local prisons were checked. The trial court properly found that the prosecutor's efforts to locate the witness were not unreasonable, and we find no abuse of discretion. *People v Lawton*, 196 Mich App 341, 347-348; 492 NW2d 810 (1992). Because the prosecutor exercised due diligence, the trial court properly refused to instruct on failure to produce the witness.

Nor did the trial court abuse its discretion in refusing defendant's request for an instruction on the lesser included misdemeanor offense of aggravated assault. Aggravated assault involves an assault without a weapon, and a firearm was unquestionably used in this case. Because the evidence showed that defendant assaulted complainant with a gun and shot him in the back of the leg as he was running away, the misdemeanor instruction was not supported by a rational view of the evidence. *People v Steele*, 429 Mich 13, 20; 412 NW2d 206 (1987). We find no abuse of discretion.

Finally, there is no merit to defendant's claim that the trial court should have sua sponte granted a directed verdict on the charged offense of assault with intent to commit murder. Viewing the evidence in a light most favorable to the prosecution, a rational jury could conclude beyond a reasonable doubt that defendant was guilty of assault with intent to commit murder. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979). Defendant identified complainant as a participant in a prior fight, approached complainant with a gun and ordered him out of his car at gun point. Defendant attempted to hit complainant with the gun, and, when complainant ran away, defendant shot him while his back was turned and he was attempting to flee. The charge of assault with intent to commit murder was properly presented to the jury.

Affirmed.

/s/ Roman S. Gribbs

/s/ Marilyn Kelly

/s/ Helene N. White