

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STACEY MAYES,

Defendant-Appellant.

UNPUBLISHED
October 22, 1996

No. 172370
LC No. 93-000323-FH

Before: Sawyer, P.J., and Bandstra and M.J. Talbot,* JJ

PER CURIAM.

Defendant was convicted, following a jury trial, of aggravated assault, MCL 750.81a; MSA 28.276(1), and kidnapping, MCL 750.349; MSA 28.581. He was thereafter convicted of being a habitual offender (second offense). MCL 769.10; MSA 28.1082. He was sentenced to one year in jail on the assault conviction and to a term of six to seventeen and a half years on the kidnapping conviction. He now appeals and we affirm.

Defendant first argues that the trial court erred in denying him a new trial because *res gestae* witnesses were not produced. We disagree. Two of the four witnesses at issue were, in fact, produced during the prosecutor's case-in-chief. Apparently, however, those witnesses could not be located for defendant to recall during his case-in-chief. We agree with the trial court, however, that there was no prejudice to defendant because he had the opportunity to fully cross-examine the witnesses during their testimony. Furthermore, we are satisfied that the prosecutor acted with due diligence with respect to these two witnesses. They were, in fact, produced at trial, and both were informed at the conclusion of their testimony that they might be recalled later in the trial. In short, the prosecutor satisfied his burden of exercising good-faith efforts to produce the witnesses. *People v Watkins*, 209 Mich App 1, 4; 530 NW2d 111 (1995).

A third witness, the victim's four-year-old son, was not produced at trial. The witness had been subpoenaed, but the prosecutor informed the trial court and defendant that he did not intend to call the witness because the witness had virtually no recollection of the events. According to the prosecutor, the

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

witness could only remember defendant being arrested and that the door to the house had been broken. Defendant had reserved the right to call the witness, but the witness could not be located to testify during defendant's case-in-chief. We are satisfied that not only did the prosecutor make a good-faith effort to produce the witness, but also that defendant was not prejudiced by the failure to produce the witness because it appears that the witness would have provided little evidence, and what little would have been provided would have been cumulative.

Finally, there is the issue of the cab driver. During the course of the kidnapping, defendant had the victim and her son take a cab ride with him from the victim's house to his house. A cab driver was produced at trial, but she could not recall making the run. The driver had been located based upon cab company records which indicated that she was the driver dispatched for defendant's call. Accordingly, one of two situations exist: (1) the driver is the correct witness, but has no recollection of the events or (2) some other, unknown cab driver hijacked the witness' fare. In either event, we see no violation of the res gestae rule. If the first situation is what happened, then the prosecutor discharged his duty to produce the witness. If the second situation occurred, then it would not be reasonably possible to produce the driver who hijacked the fare and the prosecutor exercised due diligence to find the witness as demonstrated by the fact that the driver who was dispatched for the fare was located and produced.

Next, defendant argues that there was insufficient evidence to support the kidnapping conviction. Specifically, defendant argues that there was no showing of the use of force. We disagree. There was evidence that defendant assaulted the victim, was armed with a weapon (a knife), and that the victim told a police officer that she was being held against her will. We believe that a rational trier of fact could conclude that each element of the offense was proven beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979).

Finally, defendant argues that the trial court gave an erroneous instruction on kidnapping. However, we are satisfied that the instruction given correctly stated the law and was appropriately framed for the case at bar.

Affirmed.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ Michael J. Talbot