

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SIDNEY DANIEL,

Defendant-Appellant.

UNPUBLISHED

November 22, 1996

No. 179554

LC No. 93-012652

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER DANIEL,

Defendant-Appellant.

No. 179557

LC No. 93-012652

Before: Hoekstra, P.J., and Sawyer and T.P. Pickard,* JJ.

PER CURIAM.

Following a jury trial, defendant Sidney Daniel was convicted of two counts of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and defendant Christopher Daniel was convicted of one count of the same offense. Both defendants were also convicted of possession of a firearm during the commission of a felony, MCL 750.22b; MSA 28.424(2). Defendant Sidney Daniel was sentenced to concurrent terms of six years, eight months to ten years' imprisonment for his assault convictions, to be served after he completes a mandatory two-year term for his felony firearm conviction. Defendant Christopher Daniel was sentenced to consecutive terms of three to ten years' imprisonment for his assault conviction and two years' imprisonment for his

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

felony firearm conviction. Defendants were tried jointly before the same jury, and their respective appeals of right have been consolidated. We affirm defendant Christopher Daniel's convictions and sentences, and one of defendant Sidney Daniel's two assault convictions. The other assault conviction is remanded for further proceedings.

On October 10, 1993, three shooting incidents occurred at a house located in the City of Detroit. Krystal Karen Clinscales was sitting in the dining room of the home she shared with her mother, Willa Garrett, and her brother, Dayon Garrett, when she heard several gunshots at approximately 8:00 p.m. and went to investigate. Believing that the man on the porch was her brother, Krystal opened the front door, but quickly realized that she was wrong. Krystal testified that defendant Sidney Daniel then fired a long gun in her direction as she stood in the doorway.

The second shooting incident occurred between 9:00 and 9:30 p.m. Dayon Garrett stopped briefly at his house, and saw a man run toward his car as he drove away. After circling the block, Garrett saw six or seven people standing in front of the Clinscales/Garrett residence. Garrett testified that as he passed the group of people, defendant Christopher Daniel shouted at him and fired a handgun twice at the car.

The third shooting incident occurred at approximately 11:00 p.m. Michele Clinscales drove to her mother's house after learning of the first shooting incident. As she stood in the doorway looking outside, Michele observed two men exit a car and walk toward the house. The men, whom she identified as defendants, stopped in front of the house and discharged firearms in her direction.

Defendant Sidney Daniel's only contention is that the trial court abused its discretion in denying his motion for a new trial on the ground that his two assault convictions, one involving an assault against Michele and the other involving an assault against Krystal, were against the great weight of the evidence. The decision whether to grant a new trial is within the trial court's discretion and will not be disturbed on appeal absent an abuse of that discretion. *People v Herbert*, 444 Mich 466, 477; 511 NW2d 654 (1993). In considering a motion premised on the great weight of the evidence, the trial court may grant a new trial after finding testimony for the prevailing party not to be credible. *Id.* at 477. In the instant case, defendant asserts that the testimony of Krystal and Michele was not believable. With respect to the conviction involving the assault upon Michele, the trial court found Michele to have been a credible witness. We find no abuse of discretion in this regard and affirm defendant's assault conviction involving the assault against Michele. Turning now to the conviction involving the assault on Krystal, we recognize that the trial court failed to make explicit findings regarding Krystal's credibility. Although the trial court discussed Michelle's credibility at some length, there are absolutely no findings regarding Krystal's credibility. Because a finding that Krystal was credible would be necessary to support the assault conviction involving her, we remand so that the trial court can consider Krystal's credibility.

Defendant Christopher Daniel initially argues that the trial court abused its discretion in failing to grant a mistrial and adjourning the trial so that the prosecutor could locate and produce Dayon Garrett. As a consequence of the trial court granting an adjournment, defendant argues that he was denied a fair trial, the right to confront and cross-examine his accuser, and the right to due process. We disagree.

Absent an abuse of discretion, we will not interfere with a trial court's decision to grant a continuance or adjournment. *People v Bailey*, 169 Mich App 492, 499; 426 NW2d 755 (1988).

Upon review of the circumstances of this case, we find that the trial court did not abuse its discretion in adjourning the trial for five days so as to allow the prosecutor time to produce the witness. This case does not present a situation where the prosecutor made little effort to locate the witness and then sought a midtrial adjournment to produce him. Compare *People v James (After Remand)*, 192 Mich App 568, 572 n 1; 481 NW2d 715 (1992). Rather, the witness simply failed to appear on the third day of trial in order to continue his testimony regarding the events underlying the charge against defendant. The adjournment did not deny defendant his right of confrontation and was not prejudicial to him. Defendant was afforded his right to confrontation when Garrett reappeared after the adjournment and was cross-examined by defense counsel. The trial court guarded against the possibility that the jurors would infer that defendant caused Garrett's absence by instructing them as follows:

I'm the one who's doing all the apologizing because you shouldn't in any way hold this against the People or any of the individual Defendants. This was none of their doing and please don't do that. Don't think negatively of them at all.

Since the prosecutor promptly notified the trial court of the witness' absence and an adjournment was necessary in order to afford defendant his right of confrontation through cross-examination, we find that the trial court permissibly exercised its discretion in the instant case.

Defendant Christopher Daniel next argues that the trial court erred in admitting evidence regarding his involvement in the third shooting incident, for which codefendant Sidney Daniel was charged and convicted, because it was evidence of other "bad acts" inadmissible under MRE 404(b). Contrary to defendant's representations, he did not preserve this issue by objecting during the testimony of Michele Clinscales, but rather first raised the issue during a request for a jury instruction prohibiting the consideration of the evidence. Consequently, this Court will review the issue only if manifest injustice would result from our failure to do so. *People v Turner*, 213 Mich App 558, 583; 540 NW2d 728 (1995). We decline to review the issue because no manifest injustice will result from our failure to review, as the evidence was relevant to the issue of defendant's intent at the time he shot at Garrett.

In a related argument, defendant Christopher Daniel contends that he was denied a fair trial by the prosecutor's remarks during closing argument. We disagree. By not objecting at trial, defendant failed to preserve this issue, and consequently, review will be undertaken only if the failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). No miscarriage of justice will result from our failure to review in this case because the prosecutor properly commented on the evidence and limited her discussion of the third shooting incident to defendant Christopher Daniel's intent at the time he shot at Garrett. See *People v Sharbnaw*, 174 Mich App 94, 100; 435 NW2d 772 (1989).

Finally, defendant Christopher Daniel argues that the trial court erred in scoring Offense Variable 6 (OV 6) at ten points. Because a reduction in defendant's score on OV 6 would still place defendant in Offense Level III, we need not address this issue. *People v Jarvi*, 216 Mich App 161, 164; 548 NW2d 676 (1996).

Affirmed, with the exception of Sidney Daniel's assault conviction involving Krystal Clinscales, which is remanded for additional proceedings. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Timothy P. Pickard