STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RUFUS SHEPHARD, a/k/a
RUFUS SHEPARD,

Defendant-Appellant.

UNPUBLISHED
February 28, 1997

No. 184529
Recorder's Court
LC No. 94-006917

Before: Bandstra, P.J., and Neff and M.E. Dodge,* JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of felonious assault, MCL 750.82; MSA 28.277. Defendant was sentenced to thirty-two months to four years in prison for the conviction. We affirm.

Defendant argues that the trial court abused its discretion in admitting evidence that defendant had a prior larceny conviction when the prosecutor failed to lay the proper foundation under MRE 609(a). We disagree. Defendant did not raise this issue before the trial court either by moving that his conviction be suppressed or by objecting to the prosecutor's inquiry into defendant's conviction. *People v Gilbert,* 183 Mich App 741, 746-747; 455 NW2d 731 (1990); *People v Thomason,* 173 Mich App 812, 817; 434 NW2d 456 (1988). We do not find that the trial court's admission of defendant's conviction was inconsistent with substantial justice. MCR 2.613(A). The evidence was elicited from defendant on cross-examination. Larceny, the crime admitted by defendant, contains an element of theft. The prosecutor put the defendant's credibility before the trial court and the jury by asking defendant if he was "a person [who] tells the truth." The conviction was recent enough to be probative of defendant's credibility and dissimilar enough to the instant offense to avoid prejudice. *People v Hicks,* 185 Mich App 107, 110; 460 NW2d 569 (1990). We hold that the trial court did not abuse its discretion in admitting the evidence of defendant's larceny conviction. *People v Bartlett,* 197 Mich App 15, 19; 494 NW2d 776 (1992).

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

Defendant argues that he was deprived of a fair and impartial trial by the prosecutor's references to the larceny conviction during closing argument. We disagree. A prosecutor may not intentionally inject inflammatory arguments with no apparent justification except to arouse prejudice. *People v Lee,* 212 Mich App 228, 247; 537 NW2d 233 (1995). The prosecutor is, however, free to argue the evidence and all reasonable inferences from the evidence as it relates to the prosecution's theory of the case. *Id.* at 255. Looking at the prosecutor's remarks in context, we hold that they did not so deprive defendant of a fair and impartial trial that our failure to review the issue would result in a miscarriage of justice. *People v Stanaway,* 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Minor,* 213 Mich App 682, 689; 541 NW2d 576 (1995). The only witnesses to the assault that testified were defendant and complainant. Each told a completely different story. The prosecutor's closing arguments essentially theorized that one of the men had to be lying and that defendant had a reason to do so: "[h]e wants to walk out of here with you all when the case is all over." This argument was proper in light of the evidence, defense counsel's own remarks about defendant's larceny conviction, and defense counsel's statement during final arguments that there were "two different versions" of what happened. See *People v Stacy,* 193 Mich App 19, 36; 484 NW2d 675 (1992).

Defendant next argues that the trial court committed error requiring reversal by instructing the jury as to the elements of felonious assault the day after the jury began deliberations. Because defendant did not request that this instruction be given before the jury started its deliberations and failed to object to the initial failure to give it at trial, we review this issue only to see whether relief is necessary to avoid manifest injustice to defendant. *People v Van Dorsten,* 441 Mich 540, 544-545; 494 NW2d 737 (1993); *People v Haywood,* 209 Mich App 217, 230; 530 NW2d 497 (1995). The duty of the trial judge to instruct the jury is provided by statute. Pursuant to MCL 768.29; MSA 28.1052, a jury must be instructed regarding the law applicable to the case. *People v Hendricks,* 446 Mich 435, 440-441; 521 NW2d 546 (1994). Felonious assault is a lesser-included offense of the assault offenses upon which the jury was instructed. *People v Stewart,* 126 Mich App 374, 375; 337 NW2d 68 (1983). We conclude that the trial court's giving of the felonious assault instruction fairly presented the issues to be tried to the jury and protected the rights of defendant. *People v Curry,* 175 Mich App 33, 39; 437 NW2d 310 (1989). The jury requested the instruction after evaluating the evidence. The weight and credibility of the testimony is for the jury to determine. *People v LaPorte,* 103 Mich App 444, 447; 303 NW2d 222 (1981). Moreover, the evidence adduced at trial was sufficient to support defendant's conviction. We do not need to provide defendant with relief in order to prevent manifest injustice. *Van Dorsten, supra*.

Defendant argues that the prosecution failed to present sufficient evidence to support his conviction. We disagree. The elements of the crime of felonious assault are (1) a simple assault, (2) aggravated by the use of a weapon, and (3) including the element of present ability or apparent present ability to commit a battery. *People v Grant,* 211 Mich App 200, 202; 535 NW2d 581 (1995). A simple criminal assault is defined as "either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery." *Id.*

Viewing the evidence in the light most favorable to the prosecution, we conclude that the prosecution presented sufficient evidence to allow a rational trier of fact to find that defendant

committed a felonious assault beyond a reasonable doubt. *People v Head,* 211 Mich App 205, 210; 535 NW2d 563 (1995). Following a previous altercation, defendant approached the car in which complainant was sitting, with a knife apparently hidden in a coat wrapped around his arm, asked complainant, "[W]hat you say?" and stabbed complainant in the chest. Defendant stabbed complainant a second time in the leg when complainant tried to get away. As complainant's companion drove away, defendant shouted, "I'm going to kill that motherfucker.'' Defendant even admitted that he stabbed complainant, albeit under different circumstances than those described by complainant. We conclude that the prosecution presented sufficient evidence to allow a rational trier of fact to find that defendant assaulted complainant while using a weapon and had the present ability to commit a battery. *Grant, supra*.

Defendant's fifth issue on appeal is that the trial court abused its discretion in limiting its remedy for the prosecution's failure to produce complainant's companion as a res gestae witness to a jury instruction adverse to the prosecution. Defendant did not object to the prosecution's failure to produce the witness during the trial, therefore, we review this issue to see whether the trial court's action was consistent with substantial justice. MCR 2.613(A).

Under MCL 767.40a; MSA 28.980(1), the prosecutor is only obligated to attach to the information a list of all known witnesses who might be called at trial and to send a list to the defendant of those witnesses he or she intends to produce at trial not less than thirty days before trial. The prosecutor is no longer obligated to endorse or produce these witnesses. *People v Paquette,* 214 Mich App 336, 343; 543 NW2d 342 (1995). However, the prosecutor is still expected to use due diligence in attempting to locate and to produce res gestae witnesses. The test for due diligence is whether good faith efforts were made to procure the testimony of the witness, not whether increased efforts would have produced the witness' testimony. *People v Watkins,* 209 Mich App 1, 4; 530 NW2d 111 (1995).

In this case, the investigator in charge admitted that defendant's companion had not been subpoenaed, and the prosecutor admitted that due diligence had not been used to locate the companion. The trial court subsequently gave a jury instruction that, because the prosecution did not use due diligence in locating defendant's companion, the jury could infer that the companion's testimony would have been unfavorable to the prosecution's case. Thereafter, the jury convicted defendant of a lesser offense than that with which defendant was charged, so it can be inferred that the adverse instruction benefited defendant. We conclude that the trial court did not abuse its discretion in fashioning this remedy in such a way as to be inconsistent with substantial justice. MCR 2.613(A); *People v Williams,* 188 Mich App 54, 58-59; 469 NW2d 4 (1991).

Defendant's final argument is that he was deprived of effective assistance of counsel by defense counsel's failure to seek defendant's permission before asking that the jury be instructed as to felonious assault, and by defense counsel's failure to file a motion arguing that defendant had been deprived of a speedy trial under MCL 780.131; MSA 28.969(1). We disagree. Defendant has not fully preserved this issue for our review by moving for a new trial or for an evidentiary hearing in the trial court, so our

review is limited to the existing record. *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989).

Defendant cannot prove that defense counsel's failure to get defendant's permission before requesting a jury instruction on felonious assault was an error so serious and prejudicial that counsel was not functioning as an attorney guaranteed by the Sixth Amendment. US Const, Am VI. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). It was the jury, not defense counsel, that initially requested the instruction. The trial court is given considerable discretion in formulating jury instructions. *People v Emmert*, 76 Mich App 26, 32; 255 NW2d 757 (1977). Also, defense counsel's acquiescence to the trial court's giving of the instruction appears to be sound trial strategy because the jury convicted defendant of felonious assault instead of one of the greater offenses on which it was instructed. "Action appearing erroneous from hindsight does not constitute ineffective assistance if the action was taken for reasons that would have appeared at the time to be sound trial strategy to a competent criminal attorney." *People v Pickens*, 446 Mich 298, 344; 521 NW2d 797 (1994). We will not substitute our judgment for that of defense counsel on matters of trial strategy. *People v Kvam*, 160 Mich App 189, 200; 408 NW2d 71 (1987).

As for defendant's other claim, that defense counsel deprived him of effective assistance of counsel by not making a motion arguing that defendant was deprived of a speedy trial under MCL 780.131; MSA 28.969(1), the record below does not contain sufficient detail to allow us to evaluate defendant's claim. *Marji, supra*.

We affirm.

/s/ Richard A. Bandstra
/s/ Janet T. Neff
/s/ Michael E. Dodge