

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LUCIUS BOLEYJACK,

Defendant-Appellant.

UNPUBLISHED

March 14, 1997

No. 185273

Oakland Circuit Court

LC Nos. 94-134323;

94-134325

Before: Sawyer, P.J., and Marilyn Kelly and D.A. Burress,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and first-degree criminal sexual conduct, MCL 750.520b(1)(e); MSA 28.788(2)(1)(e). Thereafter, defendant pleaded guilty to the charge of habitual offender, fourth offense, on each conviction. MCL 769.12; MSA 28.1084. The trial judge sentenced defendant to concurrent terms of fifteen to forty years' imprisonment and thirty to sixty years' imprisonment respectively for the habitual offender convictions. Defendant appeals as of right. We remand for an evidentiary hearing.

Defendant argues that the trial court erred by admitting the preliminary examination testimony of Estralita Morris, the sole complaining witness, based upon the erroneous determination that the prosecutor used due diligence to secure and produce Morris for trial. Based upon the record below, we cannot review the merits of this issue. The trial court merely accepted the prosecutor's blank assertions without holding a hearing.

Therefore, we remand this matter to the trial court to conduct an evidentiary hearing within 21 days on the issue of whether the prosecutor exercised due diligence in securing the presence of Morris for trial. We will address defendant's other issues following remand.

Remanded. We retain jurisdiction.

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

/s/ David H. Sawyer

/s/ Marilyn Kelly

/s/ Daniel A. Burrell