

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LUCIUS BOLEYJACK,

Defendant-Appellant.

UNPUBLISHED
September 2, 1997

No. 185273
Oakland Circuit Court
LC Nos. 94-134323;
94-134325
AFTER REMAND

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

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder and first-degree criminal sexual conduct. MCL 750.84; MSA 28.279, MCL 750.520b(1)(e); MSA 28.788(2)(1)(e). He then pleaded guilty to habitual offender, fourth offense, on each conviction. MCL 769.12; MSA 28.1084. We remanded for an evidentiary hearing on the issue of whether the prosecutor exercised due diligence in securing the presence of a witness for trial. We now affirm defendant's convictions and sentences.

I

Defendant argues that the trial court erred in allowing the prosecution at trial to read Estalita Morris' preliminary examination testimony to the jury. He asserts that the prosecution failed to exercise due diligence in attempting to locate Morris so that she could testify personally. Defendant claims that the prosecutor waited too long before beginning the search for Morris, and that it should have maintained close contact with her between the preliminary examination and trial.

We review a trial court's finding of due diligence for clear error. *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995). A decision to admit a missing witness' earlier testimony is reviewed for an abuse of discretion. *Id.* In order to admit the testimony, the prosecution must show that it made a reasonable, good-faith effort to secure the witness' presence at trial. *Id.*

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

At the due diligence hearing, Carol Garagiola, the assistant prosecuting attorney, testified that she attempted to contact Morris at HAVEN where Morris stayed at the time of the preliminary examination. Garagiola was told that she was no longer there. She was given the names of Morris' relatives in Tennessee who might know her whereabouts.

Garagiola called Morris' relatives and was told that Morris stops by and that a message would be left for her. Morris never returned Garagiola's call. Garagiola then contacted authorities in Tennessee to help locate Morris. She also spoke to the officer-in-charge and asked him to look for Morris in Pontiac. Garagiola then received a message from John Seaborg from the Nashville District Attorney's Office, indicating that he had made personal contact with Morris' relatives and was advised that she no longer lived with them. Morris' relatives did not know where she could be located. The last contact from her was through a postcard that had a Pontiac postmark. Garagiola then contacted the Fugitive Apprehension Team, a specialized law enforcement group assigned to the prosecutor's office, to assist in locating Morris.

Detective Eleanor Mickens testified that she checked the address on the police report for Morris' address. At that location, a resident advised her that Morris did not live there. She then checked the police department computer to see if Morris had had any other contact with the police. The local hospitals were contacted to see if Morris was a patient. A criminal history was run and the Oakland County jail was checked. A LEIN check was made to see if there were any warrants for her arrest. The post office was checked for a forwarding address. None of Mickens' efforts bore fruit.

John Meiers, of the Fugitive Apprehension Team, testified that he put Morris' name into a national computer search. The computer showed an address in Nashville, but efforts to locate Morris in Tennessee were unavailing.

After reviewing the due diligence hearing transcripts, we conclude that the trial court did not clearly err in finding that the prosecutor used due diligence in attempting to locate Morris. The prosecution made a reasonable, good-faith effort to secure her presence at trial. Every lead was pursued in order to find her. See *People v Conner*, 182 Mich App 674; 452 NW2d 877 (1990).

Even though Morris was reluctant to testify at trial, she had cooperated by appearing for the preliminary examination. Also, the prosecution had over two weeks from the time it started looking for Morris to the time of trial. This was not a case where the prosecution waited until the start of trial to locate its witness. See *People v James (After Remand)*, 192 Mich App 568, 571-572; 481 NW2d 715 (1992).

Moreover, the trial court did not abuse its discretion in admitting Morris' preliminary examination testimony. Defendant had an opportunity to fully cross-examine Morris and did in fact cross-examine her during the preliminary examination. *Briseno, supra* at 16. Therefore, the testimony was properly presented to the trier of fact. *Conner, supra* at 684.

II

Next, defendant argues that it was an abuse of discretion to admit testimony, through cross-examination of Jean Johnson, that defendant had prior convictions for armed robbery, rape and prison escape. We disagree.

MRE 404(a)(1) allows a criminal defendant to introduce evidence of his character to prove that he could not have committed the crime. *People v Whitfield*, 425 Mich 116, 130; 388 NW2d 206 (1986). Once a defendant has introduced character testimony, the prosecution can rebut it by cross-examining the defense character witness concerning reports of specific instances of conduct. Also, it may present witnesses who testify to the bad reputation of the defendant. *Id.*; MRE 405(a).

A case that illustrates the foregoing is *People v Roupe*, 150 Mich App 469; 389 NW2d 449 (1986). In *Roupe*, the defendant placed his general reputation at issue when he elicited evidence of his good character from a character witness. During the prosecutor's cross-examination, the prosecutor presented evidence regarding the defendant's earlier convictions. *Id.* at 478. This Court found no reversible error, as the prosecutor's cross-examination was done to test credibility by ascertaining good faith, information, or accuracy. *Id.*

Similarly, in this case, defendant presented Johnson, the secretary and record keeper for his employer, as a character witness. Johnson testified that defendant was never rude to her, that he never displayed any violent characteristics and that he did not have any problems with alcohol or narcotics. From Johnson's observations of defendant, it was her opinion that he was not a violent person.

To rebut this testimony, the prosecutor asked Johnson, during cross-examination, whether she was aware of defendant's prior convictions. The prosecutor asked the question to impeach Johnson's credibility, not as substantive evidence of defendant's guilt. The jury was instructed that evidence of defendant's prior crimes was not to be used to evaluate whether defendant committed the particular crimes with which he was charged. Because defendant placed his good character in issue, it was proper for the prosecutor to elicit on cross-examination, through specific instances of conduct, evidence of defendant's bad character. *Roupe, supra*.

III

Defendant's final argument is that he was denied a fair trial when the prosecutor elicited testimony that defendant had been read his *Miranda*¹ rights. The fact that defendant had asserted his right to remain silent raised an inculpatory inference that he refused to discuss the crime because he was guilty. However, defendant did not object to the prosecutor's question. Because we find no manifest injustice, our review of defendant's claim is foreclosed. *People v Davis*, 191 Mich App 29, 30; 477 NW2d 438 (1991).

Affirmed.

/s/ David H. Sawyer

/s/ Marilyn Kelly

/s/ Daniel A. Burrell

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).