

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH PARHAM,

Defendant-Appellant.

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UNPUBLISHED

August 16, 2002

No. 230160

Wayne Circuit Court

LC No. 00-001576

Before: Murray, P.J., and Fitzgerald and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of two counts of assault with intent to commit murder, MCL 750.83. Defendant was sentenced to twelve to forty years' imprisonment for each of his assault convictions. We affirm.

Defendant argues that he was denied the right to present a defense because the prosecution failed to present a witness the prosecution had endorsed. We disagree. This issue focuses on the prosecution's failure to comply with its statutory duties under MCL 767.40a, regarding an endorsed res gestae witness and the appropriate remedy for the failure to comply. This Court reviews the remedy fashioned by the trial court for an abuse of discretion. *People v Burwick*, 450 Mich 281, 291; 537 NW2d 813 (1995).

On the second day of trial, the original prosecutor could not continue the case due to a family emergency, and another prosecutor proceeded with the trial. At the close of the prosecution's case-in-chief, defense counsel requested the production of the treating physician and the victims' medical records. The prosecutor informed the trial court that she was not ready to present the treating physician or the medical records and requested an adjournment. Defense counsel objected to an adjournment, and the trial court denied the prosecution's request for an adjournment. Defense counsel stated that the testimony of the treating physician was imperative to the issue of whether blunt force trauma was utilized in this case, and moved for dismissal of the case or a mistrial. The trial court denied both of defense counsel's requests, but stated that it would give itself an instruction adverse to the prosecution regarding the testimony of the missing witness.

The duty of a prosecutor regarding the production of witnesses at trial is found at MCL 767.40a, which no longer requires an obligation on the prosecutor to exercise due diligence to discover and produce res gestae<sup>1</sup> witnesses. *Burwick, supra* at 288-289; see also *People v Wolford*, 189 Mich App 478, 483; 473 NW2d 767 (1991). The prosecutor's duty to produce res gestae witnesses has been replaced with the obligation to provide "reasonable assistance" to the defendant in locating those witnesses, should the defendant request such assistance. MCL 767.40a(5).

If the prosecution endorses a witness, however, it is obliged to exercise due diligence to produce the witness at trial. *Wolford, supra* at 483-484. "It is the fact of endorsement, regardless of whether or not such endorsement is required, that puts the obligation of production on the prosecutor." *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988). "Due diligence is the attempt to do everything reasonable, not everything possible, to obtain the presence of res gestae witnesses . . . ." *Id.*, quoting *People v George*, 130 Mich App 174, 178; 342 NW2d 908 (1983). Our Supreme Court has stated the following regarding a prosecutor's violation of MCL 767.40a:

Assuming a statutory violation, the court must weigh this paramount interest against the opposing parties' interests in an adequate opportunity to meet the proofs. Where a continuance can accomplish both objectives, it serves administrative efficiency and is the remedy of choice. In other circumstances, other methods of addressing the problem may be appropriate. In all events, the remedy is confided to the discretion of the court. [*Burwick, supra* at 298.]

In the instant case, the trial court denied the prosecution's request for a continuance, and determined the appropriate remedy was to instruct itself in accordance with the missing witness instruction after it determined the prosecution did not meet its statutory duty to produce the endorsed witness. See CJI2d 5.12. It is appropriate to give the "missing witness" instruction if the prosecution fails to present a res gestae witness at trial. See generally *People v Jackson*, 178 Mich App 62, 65-66; 443 NW2d 423 (1989). We find that the trial court did not abuse its discretion by inferring the testimony of the treating physician would not be favorable to the prosecution in accordance with the "missing witness" instruction.

CJI2d 5.12 provides the instruction to be utilized when the prosecution fails to produce a witness. The instruction provides that the factfinder "may infer that th[e] witness's testimony would have been unfavorable to the prosecution's case." *Id.* Defendant provides no support for his conclusory statement that the trial court must find that the victims' testimony should be entirely impeached by such inference. Additionally, defendant provides no evidence that the trial court did not fulfill its promise to assume that the testimony of the missing witness would be adverse to the prosecutor. Defense counsel stated that the medical witness' testimony was imperative to the issue of whether blunt force trauma was utilized in this case. The trial court

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<sup>1</sup> "A res gestae witness is a person who witnesses some event in the continuum of a criminal transaction and whose testimony will aid in developing a full disclosure of the facts." *People v Gadomski*, 232 Mich App 24, 32-33 n 3; 592 NW2d 75 (1998) (citation omitted).

clearly referenced the adverse impact of the missing witness' testimony when it was making its findings of fact and conclusions of law. However, the trial court determined there was other sufficient evidence to support its determination that defendant was guilty of two counts of assault with intent to commit murder. Accordingly, the trial court fashioned a proper remedy and did not abuse its discretion. See *Burwick*, *supra* at 289.

Defendant also argues that there was insufficient evidence to support his convictions in light of the adverse inference made regarding the testimony of the missing witness. We find that there was sufficient evidence to support defendant's convictions for assault with intent to commit murder. "When reviewing a claim regarding the sufficiency of the evidence, this Court examines the evidence in a light most favorable to the prosecution to determine if a rational jury could find that the essential elements of the offense were proved beyond a reasonable doubt." *People v Joseph*, 237 Mich App 18, 20; 601 NW2d 882 (1999).

The elements of assault with intent to commit murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. Circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of the crime. The intent to kill may be proved by inference from any facts in evidence. Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient. [*People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999) (citations omitted).]

In reviewing the evidence in a light most favorable to the prosecution, we conclude that the evidence was sufficient to support the trial court's decision. Defendant admitted in a statement to the police that he assaulted both victims, and also admitted to hitting each of them several times. Both victims testified that they were struck several times over the head, both were hospitalized for significant periods of time, and each suffered significant injuries as a result of the beatings. The first victim testified that defendant utilized a pipe to beat each of the victims, and that he heard defendant state, "Yeah, I should kill you . . . I should kill yall [sic] right now." The second victim testified that defendant had a black object in his hand, although she was unable to identify the object, and also that defendant struck her with something hard. There was also evidence the police observed defendant leaving the apartment building and attempting to discard a pair of bloody gloves after the incident, and that defendant had fresh blood on one of his shoes. Accordingly, the evidence presented at trial, when viewed in a light most favorable to the prosecution, was sufficient.

As a final point, we note that, in *People v VanDiver*, 80 Mich App 352, 356; 263 NW2d 370 (1977), this Court noted four different types of assault statutes, including assault and simple assault, MCL 750.81, assault and infliction of serious injury, MCL 750.81a, assault with intent to do great bodily harm less than murder, MCL 750.84, and assault with intent to commit murder, MCL 750.83. This Court stated that "[n]one of these four statutes require that the actor perpetrate the assault with a dangerous weapon. Bare hands are sufficient." *VanDiver*, *supra* at 356; see also *McRunels*, *supra*. The Court further indicated that what distinguishes the misdemeanors of assault and simple assault and assault and infliction of serious injury from the felonies of assault with intent to do great bodily harm less than murder and assault with intent to commit murder is the actor's intended result. *VanDiver*, *supra* at 356. Accordingly, the central

issue in this case was defendant's intent, and not the means used to accomplish the assaults. Whether defendant used his hands (as he stated) or an object to strike his victims is irrelevant to the charge, as is the purported treating physician's testimony regarding the source of the injuries. See *id.*

Affirmed.

/s/ Christopher M. Murray

/s/ E. Thomas Fitzgerald

/s/ Peter D. O'Connell