

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT RANDALL BOULEY,

Defendant-Appellant.

UNPUBLISHED

April 3, 1998

No. 190460

Shiawassee Circuit Court

LC No. 95-007352-FH

Before: Hood, P.J., and McDonald and White, 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. He was sentenced as a fourth habitual offender, MCL 769.12; MSA 28.1084, to a term of 25 to 40 years. He appeals as of right, and we affirm.

Defendant first argues that the trial court erred when it denied his request for a jury instruction on mutual fight. We disagree.

The trial court did not err in concluding that no mutual fight instruction was necessary under *People v McGee*, 66 Mich App 164, 169-170; 238 NW2d 564 (1975), because the evidence did not show there was a mutual fight. There was no evidence that defendant and the victim agreed to engage in an affray. Rather, the question was who started the fight and who had the knife.

Defendant also claims that the trial court improperly instructed the jury with regard to self defense. However, this argument is not raised in the questions presented and defendant did not object to the jury instructions at trial. Where a defendant does not object to an instruction, appellate review is foreclosed absent manifest injustice. *People v Ullah*, 217 Mich App 669, 550 NW2d 568 (1996). We find no manifest injustice.

Defendant next argues that the trial court erred when it held that the prosecution exercised due diligence in its efforts to produce two endorsed witnesses. Again, we disagree.

The prosecution moved to strike the witnesses from its witness list. Defendant objected, claiming that they were critical to the case. Deletion of a witness from the prosecutor's witness list is within the discretion of the trial court and will be reversed only for abuse of discretion. *People v Burwick*, 450 Mich 281, 291; 537 NW2d 813 (1995). The trial court did not abuse its discretion in allowing the prosecution to strike the witnesses from its witness list where they could not be located, were not necessary to establish the elements of the offense, and did not observe the fight.

Next defendant argues that the trial court erred when it denied his request for a jury instruction regarding the missing witnesses. CJI2d 5.12 provides an instruction regarding missing witnesses. The commentary to CJI2d 5.12 provides that the adverse inference instruction is appropriate where the prosecutor fails without good cause to produce a designated trial witness; or fails to provide reasonable assistance to the defense in locating and serving an identified witness; or fails to exercise due diligence in discovering and disclosing the identity of a *res gestae* witness. In this case, the instruction was not appropriate. The prosecution did not fail without good cause to produce a designated trial witness. The witnesses were stricken from the witness list because the prosecution could not find them after exercising reasonable efforts. There was no basis for giving the missing witness instruction and the trial court did not err.

Lastly, defendant argues that his twenty-five-year minimum sentence is disproportionate and an abuse of the trial court's sentencing discretion.

Defendant has twelve misdemeanor convictions and six felony convictions. He was previously incarcerated five times and was placed on probation five times, which was violated repeatedly. Defendant's sentence was based on his criminal history and the nature of the crime; the court did not abuse its discretion and the sentence is not disproportionate.

Affirmed.

/s/ Harold Hood

/s/ Gary R. McDonald

/s/ Helene N. White