

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICK FRANCISCO RAMON,

Defendant-Appellant.

UNPUBLISHED

June 15, 2001

No. 223181

Calhoun Circuit Court

LC No. 98-005104-FH

Before: Hood, P.J., and Whitbeck and Meter, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v). He was sentenced, as an habitual offender, second offense, MCL 769.10, to eighteen months to seventy-two months' imprisonment, and appeals as of right. We affirm.

Defendant first argues that the trial court erred in concluding that the prosecution had exercised due diligence in attempting to locate witness Leslie Dillary. We disagree. A trial court's decision regarding due diligence will not be overturned on appeal absent an abuse of discretion. *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). The trial court's factual findings underlying its due diligence decision will not be reversed unless clearly erroneous. *Id.* We cannot conclude that the trial court abused its discretion by determining that the prosecution exercised due diligence in attempting to locate Dillary. *Id.* To exercise due diligence, there must be an attempt to do everything reasonable, not everything possible, to secure the presence of *res gestae* witnesses. *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988). In the present case, witness coordinator John Kostyo testified that efforts were made to locate Dillary at three plausible locations based on information from neighbors and former landlords. Those efforts did not lead to any other location to search for Dillary. Efforts were then made to locate Dillary through the Secretary of State. A lien check did not reveal any information. On cross-examination, Kostyo acknowledged that he did not check with local jails to determine if Kostyo had been arrested. However, there was no indication that Dillary was

involved or had a history of criminal activity. Review of the record reveals that the prosecution did everything reasonable to secure Dillary's presence at trial. *Cummings, supra*.¹

Defendant next argues that the trial court erred in failing to give an instruction regarding the "lesser included offense" of use of a controlled substance. We disagree. We review jury instructions in their entirety to determine if error requiring reversal occurred. *People v Brown*, 239 Mich App 735, 746; 610 NW2d 234 (2000). To warrant an instruction for a lesser included misdemeanor, a proper request must be made, an appropriate relationship must exist between the charged offense and the requested misdemeanor, the requested misdemeanor instruction must be supported by a rational view of the evidence presented at trial, the defendant must have adequate notice of the charges if requested by the prosecution, and the instruction must not result in undue confusion or injustice. *People v Steele*, 429 Mich 13, 19-22; 412 NW2d 206 (1987). In *Steele, supra*, the defendant arranged, on two occasions, for the purchase of lysergic acid diethylamide (LSD) by an undercover police officer. There was no evidence that the defendant ingested LSD arising from the two arranged transactions. The defendant was charged with two counts of delivery of LSD. At trial, the defendant requested a lesser included instruction for use of LSD. The Supreme Court held that the misdemeanor instruction was not supported by a rational view of the evidence. Specifically, there was evidence that the defendant was an LSD user, but the evidence did not relate to the charged offenses. *Id.* at 23-24. Likewise, in the present case, the misdemeanor instruction was not supported by a rational view of the evidence. The police found defendant pacing in front of a building trying to gain entry when he tossed a baggie from his person to the ground. Accordingly, the trial court properly denied the requested misdemeanor use instruction. *Steele, supra*.

Affirmed.

/s/ Harold Hood
/s/ William C. Whitbeck
/s/ Patrick M. Meter

¹ In defendant's brief on appeal, it is argued that "there is no indication" that police asked former landlords to examine Dillary's rental application for leads such as an employer or relatives. Defense counsel had the opportunity to explore this issue with Kostyo during cross-examination, but failed to make inquiry. Accordingly, whether such information was provided by Dillary on her rental applications is unknown. Furthermore, defendant's reliance on *People v Bean*, 457 Mich 677; 580 NW2d 390 (1998), is misplaced. In *Bean*, the police were provided information that the witness had moved to Washington, D.C. Upon learning that information, police ceased any local search, and no contacts were made to agencies or departments in Washington, D.C. Thus, the police were given information that could have led to the production of the witness, but failed to exercise due diligence and trace the leads. *Id.* at 686-689. Based on the record available in this case, there is no indication that police did not pursue all avenues of information regarding the location of Dillary.