

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARNELL MICHAEL BROWN,

Defendant-Appellant.

UNPUBLISHED

June 22, 2006

No. 261415

Wayne Circuit Court

LC No. 04-010608-02

Before: Davis, P.J., and Sawyer and Schuette, JJ.

PER CURIAM.

Defendant appeals by right from his bench trial conviction of assault with intent to murder, MCL 750.83, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to fifty-one to eighty-five months' imprisonment for the assault conviction and to a mandatory consecutive twenty-four months' imprisonment for the felony-firearm conviction. We affirm.

At trial, the prosecution called Quay Clarke, the victim, and one of the police officers who investigated the shooting. The prosecutor and defendant waived, by stipulation, the appearance of several witnesses who were police officers. The prosecutor also did not produce three civilian witnesses, including Modoris Williams. The prosecutor explained that a subpoena was given to Williams' mother and the other two witnesses could not be found. The prosecutor acknowledged that the court could make whatever inference it wished about the absence of these witnesses. The prosecutor made no further showing of any due diligence in producing witness Williams at trial. Defendant did not object to the absence of any of these three witnesses. The prosecution then rested. The defense also rested without calling any witnesses.

On appeal, defendant first argues that the trial court erred by failing sua sponte to conduct a due diligence hearing on the prosecutor's failure to produce an endorsed *res gestae* witness. We disagree. Before the *Res Gestae* Act, MCL 767.40a, was amended in 1986, the prosecution was required to locate, list, and produce at trial all persons, known or unknown, who might be *res gestae* witnesses. *People v Burwick*, 450 Mich 281, 287-290; 537 NW2d 813 (1995). However, now the prosecution must provide notice of known witnesses and reasonable assistance to locate witnesses and to serve process on them on defendant's request. *Id.* at 289. Under MCL 767.40a(3), a prosecutor who endorses a witness is obliged to exercise due diligence to produce that witness at trial. *People v Eccles*, 260 Mich App 379, 388; 677 NW2d 76 (2004).

Under MCL 767.40a(4), a prosecutor may add to or delete from the list of trial witnesses upon leave of the court for good cause shown. MCL 767.40a; *People v Canales*, 243 Mich App 571, 577; 624 NW2d 439 (2000). The failure to produce an endorsed witness may be excused if the prosecutor can show that the witness could not be produced despite the exercise of due diligence. *Canales*, *supra* at 577. However, if the prosecutor did not exercise due diligence in producing the missing witness, the trier of fact may infer that the missing witness' testimony would have been unfavorable to the prosecution's case. CJI2d 5.12; *People v Snider*, 239 Mich App 393, 422; 608 NW2d 502 (2000).

In this case, the prosecutor attempted to locate and produce Williams by leaving a subpoena for him with his mother. Defendant did not object or request a hearing after the prosecutor failed to produce Williams at trial. The trial court also did not pursue the matter. Because defendant did not preserve this issue by objecting, it is reviewed for plain error. To establish plain error, a defendant must show plain error that is clear and obvious and that affected both the defendant's substantial rights and affected the outcome of the proceeding. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant argues that the trial court should have sua sponte conducted a hearing to determine whether the prosecutor exercised due diligence. However, defendant has identified no authority for that proposition. Therefore, defendant has not shown that it was a clear and obvious error for the trial court not to conduct a hearing. Moreover, defendant has not shown that the outcome would have been different if Williams had been produced. Defendant has not presented an affidavit of Williams' proposed testimony stating that he did not see defendant at the scene. Whether defendant's cross-examination of Williams would have undermined Clarke's testimony that defendant shot him is speculative. Thus, defendant's claim lacks merit.

Second, defendant argues that the evidence was insufficient to prove beyond a reasonable doubt that he had the required actual intent to kill Clarke. We again disagree. When reviewing a challenge to the sufficiency of the evidence in a criminal case, we consider the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002). The elements of assault with intent to murder are (1) an assault, (2) a specific intent to kill, (3) which would make a death resulting from the assault a murder. *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995). The specific intent may be inferred from evidence of the use of a dangerous weapon. *Barclay*, *supra* at 674.

Defendant's claim lacks merit because the evidence, when considered in the light most favorable to the prosecution was sufficient to prove defendant's conviction beyond a reasonable doubt. The record shows that defendant brought a concealed, sawed-off shotgun with him to his encounter with Clarke. Defendant initially removed the gun from inside his jacket and only showed it to Clarke before replacing it in his jacket. However, defendant then removed the gun again, aimed it directly at Clarke's chest, and shot Clarke at a distance of no more than three feet. The fact that defendant did not tell Clarke that he was going to kill Clarke or that he initially did not kill Clarke does not obviate defendant's specific intent to kill because defendant shot Clarke with a deadly weapon aimed at a vital bodily area from no more than three feet away. Further, there is no indication that defendant merely wanted to scare Clarke or that defendant accidentally

shot Clarke. Accordingly, the evidence was sufficient to provide beyond a reasonable doubt that defendant possessed the actual intent to kill Clarke.

Affirmed.

/s/ Alton T. Davis
/s/ David H. Sawyer
/s/ Bill Schuette