S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY DONALDSON, a/k/a LARRY DAVIDSON, a/k/a LARRY DAVISON,

Defendant-Appellant.

UNPUBLISHED
March 27, 2008

No. 269673
Wayne Circuit Court
LC No. 05-007813-01

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY DAVIDSON, a/k/a LARRY DONALDSON, a/k/a LARRY DAVISON,

Defendant-Appellant.

No. 269674
Wayne Circuit Court
LC No. 05-011850-01

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY JOE DAVIDSON,

Defendant-Appellant.

No. 270411
Wayne Circuit Court
LC No. 05-007814-01

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY JOE DAVIDSON,

Defendant-Appellant.

No. 270413
Wayne Circuit Court
LC No. 05-011397-01

Before: Murray, P.J., and Bandstra and Fort Hood, JJ.

PER CURIAM.

In Docket No. 269673, defendant, Larry Donaldson, a/k/a Larry Davidson, a/k/a Larry Davison, appeals as of right his jury trial convictions of felony murder, MCL 750.316(b), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to life in prison for the felony murder conviction, 40 to 60 months in prison for the felon in possession of a firearm conviction, and two years in prison for the felony-firearm conviction. We affirm.

In Docket No. 269674, defendant appeals as of right his jury trial convictions of first-degree murder, MCL 750.316, felon in possession of a firearm, MCL 750.224f, and felony-firearm, MCL 750.227b. The trial court sentenced defendant to life in prison for the first-degree murder conviction, 40 to 60 months in prison for the felon in possession of a firearm conviction, and two years in prison for the felony-firearm conviction. We affirm.

In Docket No. 270411, defendant appeals as of right his jury trial convictions of two counts of assault with intent to murder, MCL 750.83, and one count each of felon in possession of a firearm, MCL 750.224f, and felony-firearm, MCL 750.227b. The trial court sentenced defendant to 35 years and 7 months to 70 years for each of the two assault with intent to murder convictions, 40 to 60 months for the felon in possession of a firearm conviction, and two years for the felony-firearm conviction. We affirm.

In Docket No. 270413, defendant appeals as of right his jury trial convictions of assault with intent to murder, MCL 750.83, first-degree home invasion, MCL 750.110a(2), felon in possession of a firearm, MCL 750.224f, and felony-firearm, MCL 750.227b. The trial court sentenced defendant to 562 months to 100 years in prison for the assault with intent to murder conviction, 24 to 60 years for the first-degree home invasion conviction (as a fourth habitual offender, MCL 769.12), 40 to 60 months for the felon in possession of a firearm conviction, and two years for the felony-firearm conviction. We affirm.

Docket No. 269673

Defendant's convictions in this case arise from his alleged fatal shooting of the owner of an auto care shop. The victim's employee, Booker Carroll, testified at trial that he was working in the back of the shop when he heard a wrestling sound coming from the office. He looked into the office and saw the victim and another man fighting as defendant stood pointing a gun at the victim. Seconds later, he heard a gunshot. Caroll ran across the street, to get help, and saw defendant and another man run out of the shop. Another witness also testified to seeing defendant leave the shop following the shooting.

Defendant argues that he is entitled to a new trial because the trial court denied him the opportunity to present a defense by refusing to order the appearance of three witnesses endorsed by the prosecution and by denying his request to recall two other witnesses that testified during the prosecution's case in chief. We disagree.

We review de novo the question whether a defendant was denied his constitutional right to present a defense. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). We review the trial court's decision to permit the prosecution to delete a witness from its endorsed witness list for an abuse of discretion. *People v Burwick*, 450 Mich 281, 291; 537 NW2d 813 (1995). Likewise, we also review for an abuse of discretion the trial court's determination whether the prosecutor used due diligence in attempting to produce a witness, the trial court's determination regarding the appropriateness of a "missing witness" instruction and the trial court's decision whether to allow a defendant to recall a witness. *People v Williams*, 470 Mich 634, 643; 683 NW2d 597 (2004); *People v Eccles*, 260 Mich App 379, 389; 677 NW2d 76 (2004); MRE 611(a).

Pursuant to MCL 767.40a, "the prosecution must notify a defendant of all known res gestae witnesses and all witnesses that the prosecution intends to produce" at trial. *People v Cook*, 266 Mich App 290, 295; 702 NW2d 613 (2005) (emphasis deleted). The prosecutor is obligated "'to provide notice of known witnesses and reasonable assistance to locate witnesses on defendant's request.'" *Id*. quoting *Burwick*, supra at 289 (emphasis deleted). "The prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties." MCL 767.40a(4).

The prosecution must exercise due diligence to produce the endorsed witnesses at trial. *Eccles*, *supra* at 388. "The test for due diligence is whether good-faith efforts were made to procure the testimony of the witness, not whether increased efforts would have produced it." *People v Watkins*, 209 Mich App 1, 4; 530 NW2d 111 (1995). "The inability of the prosecution to locate a witness listed on the prosecution's witness list after the exercise of due diligence constitutes good cause to strike the witness from the list." *People v Canales*, 243 Mich App 571, 577; 624 NW2d 439 (2000). "If the trial court finds a lack of due diligence, the jury should be instructed that it may infer that the missing witness's testimony would have been unfavorable to the prosecution's case." *Eccles*, *supra*; CJI2d 5.12.

After the prosecution rested, defendant requested the presentation of three endorsed prosecution witnesses: Officer Marcus Harris, Jimmy Taylor and Sergeant Jo Ann Kinney. The trial court denied these requests.

Defendant asserts that Harris's testimony would have corroborated Carroll's initial statement to police that the person holding the gun was wearing a black coat and blue jeans, thus contradicting Carroll's trial testimony that defendant was wearing a green camouflage jacket and hat and was holding the gun while the other man was wearing all black. The prosecutor advised the trial court that Harris was out of state because of a death in his family and offered to stipulate to the items Harris recovered from the victim's body at the hospital. Defense counsel objected, stating that he wanted Harris to be produced as a witness because, after the victim was shot, Harris and his partner had pulled someone over who, although not later identified during the photographic lineup, was initially a suspect in the case and whose clothing was consistent with Carroll's original description of the shooter.

By allowing the trial to proceed without Harris's testimony, the trial court essentially allowed the prosecutor to strike Harris from its list of endorsed witnesses, determining, apparently, that the prosecutor had shown good cause for doing so because of Harris's absence from the state, and considering the prosecution's offer to stipulate to the items Harris found on the victim's body. Under the circumstances, we conclude that the trial court did not abuse its discretion in allowing the prosecution to strike Harris from the witness list. Defendant failed to show how Harris's testimony that he stopped a person whose clothing matched Carroll's original description of the shooter, but who was not identified in the photographic line up, would be beneficial to defendant's case.

Defendant next argues that the trial court abused its discretion by failing to either conduct a due diligence hearing or grant defendant's request for a "missing witness" jury instruction, CJI2d 5.12,[1] with respect to Taylor, who may have been present during the shooting. According to the prosecutor, Taylor appeared for the first two days of trial, but, for unknown reasons, did not appear on the third day. The prosecutor argued that he had shown due diligence by having Taylor appear the first two days. The trial court agreed, and asked defense counsel to make a record of Taylor's expected testimony. Defense counsel did not know what Taylor's testimony would have been, but argued that he was entitled to cross-examine all res gestae witnesses and, further, was entitled to the "missing witness" instruction because Taylor was an endorsed witness. The prosecutor advised the court that, in his statement and in a conversation before trial, Taylor claimed that he was asleep during the shooting incident and did not see anything. The trial court asked the prosecutor to try to locate Taylor; an investigator was sent to Taylor's house, but no one was home. Trial proceeded; defense counsel did not renew his objection or his request for a jury instruction.

Under the circumstances, we conclude that the trial court did not abuse its discretion by concluding that the prosecutor used due diligence in attempting to produce Taylor. Taylor appeared for the first two days of trial and the prosecution sent a police officer to his house in an attempt to locate him when he did not appear on the third day. Moreover, we also conclude that, assuming defendant properly requested the "missing witness" instruction, the trial court did not

[1] **Prosecutor's Failure to Produce Witness.** *[State name of witness]* is a missing witness whose appearance was the responsibility of the prosecution. You may infer that this witness's testimony would have been unfavorable to the prosecution's case.

abuse its discretion in declining to advise the jury that it was permitted to infer that Taylor's testimony would be unfavorable to the prosecution. Defendant did not know how Taylor would testify, and his statement indicated that Taylor was asleep during the shooting and did not witness anything.

Defendant also argues that "[t]he court denied the presentation" of Kinney, the officer originally in charge of the case.[2] Defendant wanted Kinney to testify about information in her report that the victim was held to the ground and shot, to impeach Carroll's testimony regarding the victim's position when he was fired upon. The trial court found that the information in Kinney's report was hearsay. On appeal, defendant does not claim that the trial court erred in allowing the prosecution to forgo calling this witness or present any legal basis for a claim of error. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority." *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004) (change in *Matuszak*; citations and quotation omitted). "Such cursory treatment constitutes abandonment of the issue." *Id*.

Finally, defendant claims that the trial court abused its discretion in refusing to allow him to recall two prosecution witnesses, Carroll and police officer Abdell Gardner. We disagree.

Defendant wished to recall Carroll to inquire whether he discussed the shooting incident with Jamal Thomas before it occurred. If Carroll denied having done so, defendant wanted to recall Thomas for impeachment purposes.[3] However, defense counsel did not notify the court before Carroll and Thomas were dismissed that it might wish to recall them or ask that they not be excused. Further, defense counsel cross-examined these witnesses extensively during the prosecution's case in chief. It was clear from the testimony already on the record that Thomas's assertion that Carroll "presented" some sort of plan or idea to Thomas before the shooting was inconsistent with Carroll's portrayal of himself as merely present in the shop when the shooting occurred.[4] Thus it is not clear what the value of recalling these witnesses would have been.

With respect to Gardner, defense counsel did indicate that he might wish to recall her. However, the inconsistencies defense counsel was attempting to highlight were already before the jury. Carroll identified defendant as the person who was holding the gun, and initially

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[2] Kinney retired during the pendency of the investigation.

[3] Thomas, who was a codefendant in the home invasion case, testified that Ira Todd of the Detroit Police Department interviewed him on November 18, 2005. He said Todd wrote out a statement and he signed it because Todd told him that if he signed the statement, he would let Thomas, who was currently serving time in prison for violating his parole in another case, "walk" from a separate case that was then pending. Thomas also testified that Carroll discussed the incident with him before it happened. He testified, Carroll "presented it to us."

[4] Carroll was not asked about and did not mention Thomas during his testimony, but because Carroll testified that he was merely present in the shop at the time of the shooting, and did not acknowledge taking any part in it, it is unlikely that he would have admitted to discussing with Thomas any sort of plan to rob or shoot the victim before the incident occurred.

testified that he had described defendant to police as about 5'5," wearing a green camouflage jacket and a matching hat. He said the second man was wearing all black, including a black coat. However, on cross-examination, Carroll was shown the statement he had made to police on March 11, 2005, the date of the incident, and he admitted that at that time, he had said that the man holding the gun was 5'5" or 5'6," and wearing a black coat and blue jeans. It is not clear what Gardner's testimony would have contributed to the defense, and, on appeal, defendant does not specifically state why the trial court's refusal to allow him to recall Gardner was an abuse of discretion.

For these reasons, we conclude that the trial court's decisions with respect to these witnesses did not constitute an abuse of discretion, and did not deny defendant his constitutional right to present a defense.

Docket No. 269674

Defendant's convictions in this case arise from his alleged shooting of Darnell Lindsay, also known as "Blade," as he sat in his car outside of a carwash. At the time of his death, Lindsay used a wheelchair after having been shot, and partially paralyzed, a few months earlier. Defendant first argues that the trial court erred in admitting, pursuant to MRE 404(b), evidence of a prior home invasion during which defendant allegedly obtained the firearm used to shoot Lindsay, and testimony from two men regarding defendant's alleged statements about Lindsay made in a barbershop a few weeks before he was killed. We disagree.

"In order to preserve the issue of the improper admission of evidence for appeal, a party generally must object at the time of admission," *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004), "and specify the same ground for objection that it asserts on appeal," MRE 103(a)(1); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). "When the decision regarding the admission of evidence involves a preliminary question of law, such as whether a statute or rule of evidence precludes the admissibility of the evidence, the issue is reviewed de novo." *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003). Otherwise, we review a trial court's decision to admit evidence for an abuse of discretion. *Id*. at 670. "[A]n abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). "When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment." *Id*. "[A] trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion." *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002).

MRE 404(b) prohibits the introduction of otherwise relevant evidence "of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith." Such evidence "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident." MRE 404(b). The question "is whether the evidence is any way relevant to a fact in issue other than by showing mere propensity." *People v VanderVliet*, 444 Mich 52, 64; 508 NW2d 114 (1993), amended on other grounds 445 Mich 1205 (1994) (internal quotation marks omitted). MRE 404(b) limits the use of logically relevant evidence only when "the proponent's only theory of relevance is that the other act shows

defendant's inclination to wrongdoing in general to prove that the defendant committed the conduct in question." *Id*. at 63. This "forbidden theory" of relevance rests on two inferences: first, "inferring the defendant's character from the defendant's prior misdeeds," and second, "inferring the defendant's conduct on a particular occasion from his or her subjective character." *Id*. "Therefore, if the proffered other acts evidence is logically relevant, and does not involve the intermediate inference of character, Rule 404(b) is not implicated." *Id*. at 64.

At trial, the prosecution presented testimony establishing that defendant and Thomas committed a home invasion against Rodney Duane Harrison and his wife, taking a .45 caliber weapon from the home, which was recovered from defendant's home in Texas after Lindsay was killed, and was determined to be the weapon used in that shooting. The prosecution also presented testimony from Marcus Johnson, the owner of a Detroit barbershop, that two to three weeks before Lindsay was killed, defendant came into the shop and described how he and another person put Lindsay in a wheelchair; defendant also said that "he was going to get Blade." Johnson observed a black handgun in defendant's possession. Roger Forney, who worked in the barbershop, testified that the day before Lindsay was killed, defendant discussed the prior shooting of Lindsay, indicating that he did not shoot Lindsay, "the other guy" did. Forney also testified initially that he saw defendant with a black handgun; later, he said that defendant told him that he had a gun, but Forney did not actually see it.

Defendant argues that this evidence was inadmissible under MRE 404(b). We disagree.

We note initially that defendant waived any objection to the barber's statement that defendant said he "was going to get Blade" by conceding the admissibility of this statement before the trial court.[5] However, because defendant raised a general objection to the admission of the evidence of the home invasion and the barbershop testimony at the time the prosecution moved to admit it, this issue is otherwise preserved for appeal.

As to defendant's preserved claims of error, MRE 404(b) is not implicated because the evidence was logically relevant and did not involve an intermediate inference of character. *VanderVliet*, *supra* at 64. Harrison's testimony regarding the home invasion was offered to directly link defendant to the shooting of Lindsay, by linking defendant to the weapon used to shoot Lindsay. Similarly, Johnson's testimony that he heard defendant say, "he was going to get Blade," did not operate through an intermediate inference of character; rather, it tended to show that defendant intended to harm Lindsay, and was directly relevant to defendant's identity as the shooter, or as an aider and abettor in Lindsay's killing. Indeed, this evidence was admissible under MRE 401, without regard to MRE 404(b), because it tended to make the existence of facts of consequence to the determination of the action more or less probable, and the significant probative value of this evidence was not outweighed by the danger of unfair prejudice. MRE 403. Therefore, the trial court did not abuse its discretion in admitting it.

[5] Waiver is the intentional relinquishment or abandonment of a known right. *People v Carines*, 460 Mich 750, 762-763 n 7; 597 NW2d 130 (1999). "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Defendant also argues that the trial court erred in failing to give a limiting instruction with respect to this evidence. We disagree.

In order to preserve a claim of instructional error for review, a party must request a particular jury instruction or object to the instruction given. *People v Sabin (On Second Remand)*, 242 Mich App 656, 657; 620 NW2d 19 (2000). We review jury instructions that involve questions of law de novo, and a trial court's determination whether a jury instruction is applicable to the facts of the case for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). "We review jury instructions in their entirety to determine if reversal is required on the basis of an error in jury instructions." *People v Huffman*, 266 Mich App 354, 371; 702 NW2d 621 (2005). "If the jury instructions, taken as a whole, sufficiently protect a defendant's rights, reversal is not required." *Id*. at 371-372. "Error requiring reversal only occurs if requested instructions (1) were substantially correct, (2) were not substantially covered in the charge given to the jury, and (3) concerned an important point in the trial so that failure to give them seriously impaired the defendant's ability to present a defense." *Id*. at 372.

Defendant argues that the trial court erred in failing to give a limiting instruction concerning the admission of Harrison's testimony regarding the alleged home invasion. However, even were we to conclude that the trial court erred in failing to give a limiting instruction, any such error was harmless because defendant has not met his burden of showing that it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). There is no indication that, had the jury been instructed not to consider Harrison's testimony as evidence that defendant was a bad person or was likely to commit crimes, the outcome of the trial would have been different. Harrison's testimony was properly considered as direct evidence linking defendant to Lindsay's killing by establishing his involvement in obtaining the weapon used in the shooting.

Defendant also argues that the trial court erred in failing to give a limiting instruction concerning the admission of the testimony of Johnson and Forney regarding defendant's statements in the barbershop. Defendant forfeited this claim of error by failing to request such instruction with respect to this testimony, and by failing to object to the omitted instruction. *People v Gonzalez*, 468 Mich 636, 643; 664 NW2d 159 (2003). "A forfeited, nonconstitutional error may not be considered by an appellate court unless the error was plain and it affected defendant's substantial rights." *Id*. Further, this testimony was properly considered as evidence that defendant knew who Lindsay was, and had been involved in harming Lindsay in the past and intended to "get" him again in the future. This testimony was also properly considered as evidence that defendant possessed a handgun. "Because defendant cannot show error, he cannot demonstrate plain error that affected his substantial rights." *Gonzalez*, *supra* at 644. "Accordingly, defendant is not entitled to relief for the forfeited claim." *Id*.

Docket No. 270411

Defendant's convictions in this case arise from the shooting of Andre Lamar Carter and his mother, Sheila Lake. Defendant argues that there was insufficient evidence to convict him of assault with intent to murder. We disagree.

"In reviewing a challenge to the sufficiency of the evidence, this Court analyzes the evidence presented 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).

Defendant's claim that there was insufficient evidence of an intent to kill Lake to sustain this conviction is without merit. Lake testified that, while she was stopped at a red light, a burgundy Taurus pulled up close to the passenger's side of the car she was driving and in which Carter was a passenger, and "all these gun shots" started coming from the Taurus. There were two people in the Taurus, but Lake only saw one person shooting. Then the Taurus pulled up to the service drive, stopped again, and defendant, who was driving, got out and continued shooting. The passenger also got out of the Taurus, but Lake could not tell if he had a gun. Lake was shot while inside her car, when the Taurus first pulled up. Carter was also shot and he fell over into Lake's lap. Lake unbuckled her seatbelt and got out of the car. Defendant then shot her twice more. A rational trier of fact could infer from this testimony that defendant possessed the requisite intent to kill Lake.

Moreover, defendant does not assert that there was insufficient evidence to sustain his conviction for assault with intent to murder Carter. Evidence sufficient to sustain a finding that defendant intended to kill Carter was sufficient, under a theory of transferred intent, to satisfy the "actual intent to kill" element of assault with intent to murder Lake.[6] *People v Plummer*, 229 Mich App 293, 305; 581 NW2d 753 (1998); *People v Lawton*, 196 Mich App 341, 350-351; 492 NW2d 810 (1992); *People v Youngblood,* 165 Mich App 381, 387-388; 418 NW2d 472 (1988). Thus, there was sufficient evidence for a rational trier of fact to conclude beyond a reasonable doubt that defendant possessed the actual intent to kill Lake.

Defendant also argues that the trial court erred in denying his motion to quash the bindover with respect the charges of assault with intent to murder Lake. However, any error in binding defendant over for trial on this charge was necessarily rendered harmless by the presentation at trial of sufficient evidence to convict. *People v Libbett*, 251 Mich App 353, 357; 650 NW2d 407 (2002).

Docket No. 270413

Defendant's convictions in this case arise from his actions during the home invasion perpetrated against Harrison, described briefly above. Defendant argues that there was insufficient evidence of intent to support a conviction for assault with intent to murder Harrison, and that the trial court erred in denying his motion for a directed verdict with respect to the charge of assault with intent to murder. We disagree.

Harrison testified that defendant followed him into his home, pointed a gun at his head, and threatened to kill him. Thomas later told Harrison to sit on the sofa and threatened to kill him if he made a sound. Thomas kept a gun aimed at Harrison's head while defendant searched the house. After a third man came into the house, the men put Harrison on his stomach,

[6] The trial court instructed the jury on transferred intent and aiding and abetting.

handcuffed him, and tied his feet and legs together. Then defendant kicked Harrison several times and hit him in the head with the butt of a gun. Harrison sustained injuries, including a malfunctioning kidney. While there was no evidence that defendant shot at Harrison, taken in the light most favorable to the prosecution, the evidence that defendant aimed a gun at Harrison, repeatedly threatened to kill him, struck him in the head with the butt of a gun, and kicked him several times, was sufficient for a rational trier of fact to conclude beyond a reasonable doubt that defendant intended to kill Harrison. Because the defense did not present any evidence at trial, the same reasoning applies to defendant's alternative argument that the trial court erred in denying his motion for a directed verdict with respect to the charge of assault with intent to murder.

Defendant next argues that the trial court erred in finding that the prosecutor used due diligence in locating a number of endorsed civilian witnesses. We disagree.

After the close of its case, the prosecution moved to strike the remaining witnesses from its witness list. Defendant objected with respect to the civilian witnesses. The trial court conducted a due diligence hearing, outside the presence of the jury, during which Todd testified that, "[o]n several occasions members of the Task Force, including the F.B.I., Wayne County Sheriffs, we all went out looking for these individuals. We did electronic searches, we did everything humanly possible to try to locate these individuals." Todd testified further that subpoenas were left at the witnesses' last known residences, "and at a couple other residences that they used in the past," that these efforts had continued for months, and that, during the two weeks preceding the trial, members of the task force had tried to locate the witnesses five or six times, including the night before the second day of trial. Todd explained that he spoke to the witnesses four or five months before trial, but they had become uncooperative and disappeared after defendant called them from prison and threatened them during his other trials.

"The test for due diligence is whether good-faith efforts were made to procure the testimony of the witness . . . ." *Watkins*, *supra* at 4. Todd's testimony amply demonstrates that the prosecution made good-faith efforts over a period of several months to locate the witnesses. Therefore, the trial court did not abuse its discretion by concluding that the prosecution used due diligence in attempting to procure their testimony.

We affirm.

/s/ Christopher M. Murray
/s/ Richard A. Bandstra
/s/ Karen M. Fort Hood