

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY DARNELL MYLES,

Defendant-Appellant.

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UNPUBLISHED

February 1, 2005

No. 250686

Wayne Circuit Court

LC No. 03-005651-01

Before: Zahra, P.J., and Neff and Cooper, JJ.

PER CURIAM.

Defendant Gregory Darnell Myles was convicted of armed robbery, MCL 750.529, assault with intent to do great bodily harm less than murder, MCL 750.84, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to fifteen to thirty years in prison for the armed robbery conviction; five to ten years in prison for the assault with intent to do great bodily harm less than murder conviction; two to five years in prison for the felon in possession of a firearm conviction; and two years in prison for the felony-firearm conviction. Defendant appeals as of right. We affirm.

On appeal, defendant claims that the trial court abused its discretion in finding that the prosecution exercised due diligence in its efforts to produce two missing endorsed witnesses, and thus, erred in failing to give the requested adverse inference instruction to the jury. We disagree. This Court reviews “a trial court's determination of due diligence and the appropriateness of a ‘missing witness’ instruction for an abuse of discretion.” *People v Eccles*, 260 Mich App 379, 389; 677 NW2d 76 (2004). “An abuse of discretion is found when the trial court's decision is so grossly contrary to fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, or when an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling.” *People v Callon*, 256 Mich App 312, 326; 662 NW2d 501 (2003).

A prosecutor who endorses a witness . . . is obliged to exercise due diligence to produce that witness at trial. A prosecutor who fails to produce an endorsed witness may show that the witness could not be produced despite the exercise of due diligence. 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* at 388.]

Here, when defendant requested the adverse inference instruction, the trial court denied the request stating that the prosecution exercised due diligence in trying to produce the missing endorsed witnesses.

Whether the prosecutor has exercised due diligence in attempting to obtain a witness is a matter of reasonableness and depends on the facts of each case. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). “Due diligence is the attempt to do everything reasonable, not everything possible, to obtain the presence of” a witness. *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988), quoting *People v George*, 130 Mich App 174, 178; 342 NW2d 908 (1983). Defendant asserts that the prosecution could have done more to obtain the presence of the witnesses, such as checking hospitals, prisons and jails. However, as nothing in the record indicates that the missing witnesses were hospitalized or in custody, the trial court properly found such steps unnecessary. Furthermore, given the fact that several calls were made to the missing witnesses’ residences; police officers were sent to the residences on two occasions; and, investigator Blanks personally went to the residences in an effort to locate the witnesses and serve them process, this Court concludes that the trial court’s finding that the prosecution did everything reasonable to procure the presence of the missing witnesses was not an abuse of discretion. As the prosecution exercised due diligence in its attempts to produce the two missing witnesses, the trial court properly refused to give the requested adverse inference instruction to the jury.

Affirmed.

/s/ Brian K. Zahra  
/s/ Janet T. Neff  
/s/ Jessica R. Cooper