

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
December 11, 2012

v

MARTEZ DEANDREW MILLER,

Defendant-Appellant.

No. 306241
Calhoun Circuit Court
LC No. 2010-000299-FC

Before: O'CONNELL, P.J., and CAVANAGH and DONOFRIO, JJ.

PER CURIAM.

Following a jury trial, defendant appeals by right his conviction of armed robbery, MCL 750.529. He argues that the trial court abused its discretion when it failed to give the requested duress and missing witness instructions to the jury. We affirm.

Defendant's conviction arose from the robbery of Laurie Hill. Prior to the robbery, Hill had agreed to drive defendant, William Edwards, and Shondre Tucker to their homes. During the drive, Hill and her daughter, Mikayla Prude, were in the front seat of Hill's car; defendant and the two other men were in the rear seat. As Hill was driving, Tucker told her to stop, then produced a handgun and demanded Hill's keys and money. Edwards exited the car and disappeared, while defendant went around to the front passenger door, opened it, and grabbed Hill's purse. After struggling with Hill and Prude, defendant and Tucker ran away with Hill's purse.

Hill called the police, who brought a tracking dog. After the dog had followed the trail as far as it could, the police officers heard a gunshot nearby and approached the sound's origin. Officers found Edwards lying on a porch. Edwards indicated that Tucker had shot him because Edwards was going to tell the police about the robbery. Officers called for emergency personnel to take Edwards to the hospital. Other officers intercepted Tucker on foot and recovered a .22 caliber handgun near a trail of recent footprints. In the meantime, Prude had returned home and had identified defendant by looking up his picture on MySpace (a social networking website). She told the police of her discovery. Officers then went to a nearby home, where they arrested defendant.

Hill and Prude identified Edwards at the hospital and identified Tucker in a police lineup. Sometime later, Prude and Hill each identified defendant in police lineups. Defendant told a

detective that Edwards had told defendant to take the purse. At trial, Prude testified that she thought Tucker may have signaled defendant to go for the purse.

“[W]e review the trial court’s determination that a jury instruction applies to the facts of the case for an abuse of discretion.” *People v Dupree*, 486 Mich 693, 702; 788 NW2d 399 (2010). “The defendant bears the burden of establishing that the asserted instructional error resulted in a miscarriage of justice.” *Id.*; MCL 769.26. “Reversal for failure to provide a jury instruction is unwarranted unless it appears that it is more probable than not that the error was outcome determinative.” *People v McKinney*, 258 Mich App 157, 163; 670 NW2d 254 (2003), citing *People v Riddle*, 467 Mich 116, 124-125; 649 NW2d 30 (2002).

Jury instructions “must include all the elements of the charged offense and must not exclude material issues, defenses, and theories that are supported by the evidence.” *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521 (2002). “A defendant asserting an affirmative defense must produce some evidence on all elements of the defense before the trial court is required to instruct the jury regarding the affirmative defense.” *People v Crawford*, 232 Mich App 608, 619; 591 NW2d 669 (1998). “To merit an instruction on the affirmative defense of duress, a defendant must establish a prima facie case of the elements of duress.” *McKinney*, 258 Mich App at 164, citing *People v Lemons*, 454 Mich 234, 248-249; 562 NW2d 447 (1997). To do this, a defendant must present evidence that:

- A) The threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;
- B) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;
- C) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and
- D) The defendant committed the act to avoid the threatened harm. [*McKinney*, 258 Mich App at 164.]

“A mere threat of future injury is insufficient to support a defense of duress. Rather the threatened danger must be present, imminent, and impending.” *People v Ramsdell*, 230 Mich App 386, 401; 585 NW2d 1 (1998).

In this case, defendant did not present sufficient evidence to warrant the duress instruction. Though there was some evidence that Tucker may have given defendant a signal to take the purse, there was no evidence that Tucker threatened defendant with harm. In fact, defendant told the detective that it was Edwards, not Tucker, who told him to take the purse, yet Edwards simply left the car when Hill brought it to a stop. Further, Edwards had indicated that Tucker shot him because Edwards planned to report the robbery to the police, not because of his failure to assist in the robbery. Ultimately, there was no evidence that Tucker engaged in threatening verbal or physical conduct toward defendant, or that his conduct actually caused defendant to feel fear of death or serious bodily harm at any point, or that defendant took the purse to avoid any threatened harm. See *McKinney*, 258 Mich App at 164. Therefore, the trial

court's refusal to give a duress instruction was not an abuse of discretion. See *Dupree*, 486 Mich at 702.

Defendant next maintains that the prosecutor failed to produce Edwards for trial and that the failure warranted the missing witness instruction. According to defendant, Edwards was a critical witness who would have supported defendant's duress theory. "A prosecutor who endorses a witness under MCL 767.40a(3) 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." *People v Eccles*, 260 Mich App 379, 388; 677 NW2d 76 (2004) (citations omitted). The test for due diligence is one of reasonableness, "whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it." *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). If a prosecutor fails to delete an endorsed witness from its witness list . . . it may be appropriate for the trial court to provide a missing witness instruction. *People v Cook*, 266 Mich App 290, 293 n 4; 702 NW2d 613 (2005). "[A] trial court's determination of due diligence and the appropriateness of a 'missing witness' instruction" is reviewed for an abuse of discretion. *Eccles*, 260 Mich App at 389.

In this case, the trial court was within its discretion in refusing to give the missing witness instruction. The record indicates that the prosecution served Edwards with a subpoena. Even if the subpoena was not sufficient to demonstrate due diligence in securing Edwards' testimony, however, reversal would not be warranted because defendant did not establish that any error in failing to provide a missing witness instruction resulted in a miscarriage of justice. On appeal, defendant suggests that Edwards' testimony would confirm whether defendant was aware that Tucker had a weapon before the robbery, but defendant does not make clear why this would satisfy defendant's burden as to the outstanding elements of duress previously discussed. Nothing in the record indicates that Edwards could offer testimony about whether defendant was aware, just prior to the robbery, that Tucker had a gun. Further, in light of the weight and strength of the evidence that was presented, it does not appear more probable than not that failing to provide the requested instruction was outcome determinative. See *Riddle*, 467 Mich at 125. Therefore, the trial court's decision to forego a missing witness instruction does not require reversal. *Id.*

Affirmed.

/s/ Peter D. O'Connell
/s/ Mark J. Cavanagh
/s/ Pat M. Donofrio