

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HENRY YUSELFFATE KINDRED,

Defendant-Appellant.

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UNPUBLISHED

April 18, 1997

No. 173926

Calhoun Circuit Court

LC No. 93-001874 FC

Before: Wahls, P.J., and Gage and W.J. Nykamp,\* JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). For those respective convictions, he was sentenced to twenty to forty years' imprisonment and two years' consecutive imprisonment. He appeals as of right. We affirm.

Defendant argues that the trial court abused its discretion in denying his motion for a new trial that was premised on a claim of newly discovered evidence. We disagree. Defendant failed to create a record below that would support a conclusion that the missing witness' testimony probably would have caused a different outcome at trial. *People v Miller (After Remand)*, 211 Mich App 30, 47; 535 NW2d 518 (1995); *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994).

Defendant next argues that the prosecution deprived him of a fair trial by failing to use due diligence to identify a *res gestae* witness and by failing to disclose the existence of this witness to the defense before the jury commenced deliberations. Defendant failed to advance this argument below and so we decline to address its merits for the first time on appeal. *People v Dixon*, 217 Mich App 400, 409; 552 NW2d 663 (1996).

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\* Circuit judge, sitting on the Court of Appeals by assignment.

Defendant also failed to argue below that the failure of the prosecution to disclose the existence of this witness in a timely manner violated discovery rules and his due process rights. We decline to address the merits of this claim because any error committed was not outcome determinative. *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994).

Defendant argues that the trial court abused its discretion when it allowed a witness to give testimony which defendant characterizes as improper impeachment of a non-testifying witness on a collateral matter. Defendant incorrectly characterizes the testimony at issue.

The appellate courts of this state recognize a distinction between evidence which impeaches and evidence which contradicts. *People v Finley*, 177 Mich App 215, 217-218; 441 NW2d 774 (1989). Impeachment is directed at a witness' credibility and occurs any time a witness' credibility is attacked. *State v Wood*, 194 W Va 525; 460 SE2d 771, 777 (1995); *Maugh v Chrysler Corp*, 818 SW2d 658, 661 (Mo App, 1991); *Waters v Barbe*, 812 SW2d 753, 755 (Mo App, 1991). Contradiction is directed at the accuracy of a witness' testimony and supplies additional factual evidence. *Maugh, supra*; *Waters, supra*.

The record indicates that the testimony at issue was not directed at attacking the credibility of a witness. Instead, the testimony was directed at challenging the accuracy of defendant's recorded statement to the police, at contradicting defendant's claim of self-defense, and at proving that defendant acted with premeditation and deliberation.

Defendant's claim that the admission of this same testimony shifted the burden of proof onto the defense was not advanced below and, therefore, is not preserved for appellate review. *People v Considine*, 196 Mich App 160, 162; 492 NW2d 465 (1992). We decline to waive the preservation requirement because the admission of the testimony did not constitute plain error which affected a substantial right of defendant. MRE 103(d); *People v Fields*, 450 Mich 94, 106; 538 NW2d 356 (1995).

Likewise, defendant's claim that the admission of this testimony constituted a comment on his silence is not preserved. *Considine, supra*. Again, we decline to waive the preservation requirement. Defendant's Fifth Amendment right against self-incrimination was not implicated on the facts of this case. *People v Schollaert*, 194 Mich App 158, 164-167; 486 NW2d 312 (1992).

Defendant argues that the trial court abused its discretion when it admitted into evidence the preliminary examination testimony of a witness who failed to appear at trial. Defendant neglects to point out, however, that the testimony was admitted on his own motion. A defendant may not request that a trial court undertake a certain action and then argue on appeal that the action taken constituted error. *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995).

Defendant next argues that he was deprived of a fair trial when the trial court permitted the prosecution to endorse a surprise witness during trial. Defendant's claim lacks evidentiary support in

the record. The witness' name appears on a witness list filed with the trial court approximately 2-1/2 months before trial.

Defendant argues that the trial court abused its discretion when it denied his request for an adjournment. We disagree. The record demonstrates that defendant failed to establish that (1) he had a legitimate reason for asserting a constitutional right, (2) he was not negligent in asserting the constitutional right or (3) he suffered prejudice from the court's ruling. *Lansing v Hartsuff*, 213 Mich App 338, 350; 539 NW2d 781 (1995).

Defendant also argues that the prosecution violated its affirmative duty to make known all the evidence of which the prosecution had knowledge by failing to inform him that witness Demecio Ingram also used the alias Mitch Foreman. We find no breach of this duty where the prosecution provided defendant with the tools necessary to determine that Ingram and Foreman were the same person. *People v Sizemore*, 69 Mich App 672, 675-675; 245 NW2d 159 (1976).

Defendant argues that the trial court denied him the opportunity to present a defense by restricting his ability to cross-examine Ingram. Defendant failed to make an offer of proof with regard to the excluded testimony. Accordingly, the issue is not preserved for appellate review. MRE 103(a)(2). We decline to address the merits of the claim because the record fails to disclose plain error affecting a substantial right of defendant. MRE 103(d).

Defendant also argues that he was deprived of a fair trial by three instances of prosecutorial misconduct. We disagree. While the prosecution misstated the law of self-defense during closing argument, *People v Stallworth*, 364 Mich 528, 535; 111 NW2d 742 (1961); *Pond v People*, 8 Mich 150, 175 (1860); LaFave and Scott, Criminal Law (2d ed), §5.7(f), p 461, any potential prejudice was cured when the trial court twice instructed the jury that it was to apply the law as the court—and not the parties—explained it. Moreover, defendant's claim that the prosecution improperly vouched for the credibility of a witness is unsubstantiated by the record. The challenged remarks, viewed in the context in which they were made, constitute proper argument that a witness should be believed because the evidence adduced at trial confirmed the accuracy of the witness' testimony. *People v LeGrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994); *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984). Finally, although the prosecution made remarks that could be construed as suggesting to the jurors that defense counsel was attempting to mislead or confuse them, *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988), any potential prejudice emanating from the remarks was cured when the parties stipulated to the admission of the evidence that was the subject of the prosecution's remarks.

Finally, defendant argues that he is entitled to resentencing. We disagree. The record does not support defendant's claim that the sentencing court considered his failure to admit guilt when fashioning his sentence. *People v Yennior*, 399 Mich 892; 282 NW2d 920 (1977). Moreover, defendant's twenty-year minimum sentence does not violate the principle of proportionality. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990); *People v Sharp*, 192 Mich App 501, 505; 481 NW2d 773 (1992).

Affirmed.

/s/ Myron H. Wahls

/s/ Hilda R. Gage

/s/ Wesley J. Nykamp