

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RANDALL CURRY,

Defendant-Appellant.

UNPUBLISHED

May 13, 1997

No. 184013

Kent Circuit Court

LC No. 94-1271-FC

Before: Taylor, P.J., and McDonald and C. J. Sindt*, JJ.

PER CURIAM.

Following a jury trial defendant was convicted of second-degree murder. Thereafter defendant plead guilty to second habitual offender status and was sentenced to twenty-five to sixty years' imprisonment. Defendant appeals from his convictions and sentence as of right. We affirm.

Defendant claims the incriminating statements he made to his girlfriend, or a witness, while he was in police custody should have been suppressed because the conversation took place after defendant had requested the presence of his counsel. We disagree.

We review a trial court's ruling on a motion to suppress evidence on legal grounds for clear error. *People v McElhaney*, 215 Mich App 269; 545 NW2d 18 (1996). The court committed no clear error here. Although defendant may have been in custody at the time the statements were made, defendant was not subjected to interrogation. *People v Hoffman*, 205 Mich App 1; 518 NW2d 817 (1994). There is no indication the police sent defendant's girlfriend in to see defendant to solicit incriminating statements and defendant admits he was aware the conversation was being tape recorded. See *Arizona v Mauro*, 481 US 520; 107 S Ct 1931; 95 L Ed 2d 458 (1987). Although defendant urges the suppression of the statements on the alternate grounds his arrest was illegal, the tape recording was improperly destroyed and the taping of the conversation was an alleged violation of MCL 750.539d; MSA 28.807(4), none of these claims have been properly preserved for appeal. *People v Grant*, 445 Mich 535; 520 NW2d 123 (1994); *People v Considine*, 196 Mich App 160; 492 NW2d 465 (1992).

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

Defendant also raises several allegations of erroneously admitted evidence, none of which we find meritorious. The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. *People v Lugo*, 214 Mich App 699; 542 NW2d 921 (1995).

First, defendant claims the court erred in permitting the admission of a police officer's notes concerning the content of the conversation defendant had with his girlfriend at the police station. We disagree. MRE 1004 permits the introduction of "other evidence of the contents of a ...recording" if the originals are lost or have been destroyed and the loss or destruction of the originals was not the product of bad faith. Defendant testified at the suppression hearing the notes represented "bits and pieces" of the conversation and we find no indication the original recording was destroyed in bad faith. *People v Thompson*, 111 Mich App 324; 314 NW2d 606 (1981).

Defendant next claims the court improperly admitted testimony he possessed a key to the apartment in which the victim was beaten. We find no abuse of discretion. The evidence was probative of defendant's opportunity to have entered the apartment and thus was probative of the identity of the assailant. There was nothing about the nature of the testimony to indicate it was of such an inflammatory nature the jury would give it undue preemptive weight. *People v Mills*, 450 Mich 81; 537 NW2d 909 (1995). Finally, defendant's remaining evidentiary claims are not properly preserved either because they were not objected to on the same grounds at trial, *Considine, supra*, or because the issue was abandoned.

Defendant next claims the court committed several errors in instructing the jury. First defendant claims the court erred in failing to give the jury a cautionary instruction regarding the proper use of "bad acts" evidence upon the introduction of the evidence. However, a review of the record reveals the court left it to defendant to determine when the instruction was to be given and defendant specifically chose to have the instruction given during the preliminary instructions before the opening of proofs. Defendant may not now claim the court erred in the timing of his instruction when the court was honoring defendant's request. *People v McCray*, 210 Mich App 9; 533 NW2d 359 (1995). Defendant also claims error in the court's instruction regarding the introduction of the police notes in place of the original recording. Defendant claims the court's description of the "best evidence" rule constituted improper bolstering of the witnesses credibility. No objection to the instruction was made at trial and no manifest injustice will result from our failure to review. Defendant's claimed error is premised on a factual inaccuracy. *People v Ferguson*, 208 Mich App 508; 528 NW2d 825 (1995). The court did not instruct the jury that the notes constituted the best evidence of the contents of the conversation.

Defendant's remaining claims of instructional error, the court's failure to sua sponte instruct the jury on the crime of voluntary manslaughter and a defense alibi theory must also fail. The instructions were not requested, *Mills, supra*, and were not supported by the record. *People v Cheeks*, 216 Mich 470; 549 NW2d 584 (1996).

Defendant's claim the prosecutor improperly bolstered the credibility of a witness by stating the witness still loved defendant is without merit. The comment when viewed in the context in which it was given constituted nothing more than a summarization of the witnesses' testimony and was proper argument. *People v Johnson*, 187 Mich App 621; 468 NW2d 307 (1991).

We also reject defendant's claim the prosecutor presented insufficient evidence to convict him of second degree murder. Defendant's briefing of this issue contains no mention of the elements of second-degree murder and does not relate an accurate summary of the evidence with citation to the record. Defendant has, therefore, abandoned his sufficiency challenge on appeal. *People v Kent*, 194 Mich App 206; 486 NW2d 110 (1992).

Finally, defendant contends he is entitled to a resentencing arguing the court improperly considered prior counseless convictions, an assumption defendant was involved in drug dealing, and his alleged improper acquittal of first-degree murder. Defendant also claims his sentence is disproportionate. We disagree on all accounts. Defendant failed to carry his initial burden of establishing a prior conviction was secured without counsel or a proper waiver of the right to counsel, *People v Love (After Remand)*, 214 Mich App 296; 542 NW2d 374 (1995), the record does not support his claims of improper factual considerations, and the sentence is proportionate to both the offense and the offender. *People v Sharp*, 192 Mich App 501; 481 NW2d 773 (1992), *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

Affirmed.

/s/ Clifford W. Taylor
/s/ Gary R. McDonald
/s/ Conrad J. Sindt