

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

v

RANDY LEE,

Defendant-Appellant

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UNPUBLISHED

May 30, 1997

No. 179648

Kent Circuit Court

LC No. 94-822 FC

Before: Saad, P.J., and Hood and McDonald, JJ.

MEMORANDUM.

Following a jury trial in Kent Circuit Court, defendant was convicted as charged of armed robbery and possession of a firearm in the commission of a felony. On plea of guilty, defendant was adjudicated a third offender and sentenced accordingly. He now appeals by right.

Defendant first contends the trial court abused its discretion in granting the prosecutor's motion *in limine* to permit impeachment of defendant on the basis of two prior convictions containing an element of theft, one for retail fraud and one for larceny in a building. Inasmuch as defendant elected not to testify at trial, this issue is simply not preserved for appellate review. *People v Finley*, 451 Mich 506, 526 (plurality opinion of Riley, C.J.), 531 (concurring opinion of Brickley, J.); 431 NW2d 19 (1988).

Defendant's remaining contention is that the trial court abused its discretion in denying his motion for new trial, or even for an evidentiary hearing, regarding ostensibly newly discovered evidence, based on an affidavit from Nate Eatman, in which Eatman claims that he was present throughout the incident in question and that no robbery occurred. At trial, Eatman was listed as a prosecution witness, not a defense witness, apparently based on a police report of an interview with Eatman, in which on June 30, 1994, he indicated that he had witnessed defendant rob the complainant just as the complainant testified at trial. Eatman's current version of the incident is to the contrary, but is plainly cumulative of the testimony of Dorothy Hopkins, defendant's principal trial witness. Such cumulative evidence, particularly when Eatman was not considered a defense witness at the time of trial, was properly deemed an insufficient basis by the trial court to grant a new trial or even conduct an

evidentiary hearing on the basis of newly discovered evidence. *People v Machura*, 205 Mich App 481; 517 NW2d 797 (1994).

Defendant's enhanced convictions and sentences are accordingly affirmed.

/s/ Henry William Saad

/s/ Harold Hood

/s/ Gary R. McDonald