

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM MATTHESON DALEY,

Defendant-Appellant.

UNPUBLISHED

September 18, 1998

No. 197317

Jackson Circuit Court

LC No. 95-074069 FC

Before: Whitbeck, P.J., and McDonald and T. G. Hicks*, JJ.

MEMORANDUM.

A jury convicted defendant of one count each of premeditated murder, MCL 750.316; MSA 28.548, felony murder, *id.*, and entry without breaking with intent to commit larceny or murder, MCL 750.111; MSA 28.306. Defendant was subsequently adjudicated an habitual offender, third offense, MCL 769.11; MSA 28.1083, and received the statutorily mandated sentences for the murder convictions, *Manuel v Department of Corrections*, 140 Mich App 356, 359-360; 364 NW2d 334 (1985), and an enhanced seven to ten year sentence for the entry without breaking charge. Defendant now appeals as of right. We affirm in part and remand in part. We decide this appeal without oral argument pursuant to MCR 7.214(E).

Defendant first contends that, during closing argument, the prosecutor deprived him of a fair trial. The prosecutor, without objection, argued that defendant's failure to produce expert witnesses on the subject of fingerprints, as adverted to during the defense opening argument, should lead the jury to infer that these defense experts would have testified adversely to defendant's position, corroborating the prosecution's fingerprint experts. Since defendant testified in his own defense, it was within the settled bounds of propriety for the prosecutor to comment on defendant's failure to produce corroborating witnesses. *People v Spivey*, 202 Mich App 719, 722-723; 509 NW2d 908 (1993).

We note that arguments concerning the principles of "missing witness" situations do not apply here. There was no reason to believe that any defense witness had disappeared, violated a subpoena, or could not be located within the jurisdiction. Hence, it is unnecessary to focus on whether any such

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

witness was peculiarly available to only one side or the other. *Cf. People v Fields*, 450 Mich 94, 105; 538 NW2d 356 (1995), citing *Graves v United States*, 150 US 118, 121; 14 S Ct 40; 37 L Ed 1021 (1893). We do note that, even assuming that these experts were possessed of information protected by the work product privilege by virtue of consultations with defense counsel, any such witnesses could have been summoned by the prosecutor to testify concerning observations and conclusions drawn about matters pertinent to the case. *Kissel v Nelson Packing Co*, 87 Mich App 1, 3-5; 273 NW2d 102 (1978). The prosecution, however, having called the witnesses it desired, was not thereby precluded from suggesting to the trier of fact that defendant's failure to call its experts to contradict the prosecution's presentation should lead to an inference that such experts would not have been helpful to the defense. The proper inference was that if the defense could have significantly contradicted the prosecution fingerprint testimony, presumably it would have called its experts.

The prosecutor may have gone a bit too far by suggesting that these witnesses would actually have *supported* the prosecution's experts, but any error arising from this contention could have been obviated by curative instruction. Accordingly, there having been no contemporaneous objection, manifest injustice has not occurred and this issue may not furnish the basis for appellate relief. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995); *People v Walker*, 167 Mich App 377; 422 NW2d 8 (1988), overruled in part on other grounds *People v Mitchell*, 456 Mich 693; 575 NW2d 283 (1998)

Defendant's remaining contention is that his seven to ten year sentence, enhanced by his third offender status, for entry without breaking is improper. The prosecution acknowledges error in this regard, and we agree. This case is remanded to the Jackson Circuit Court for the ministerial purpose of correcting defendant's sentence on this count only to one of six and two-thirds to ten years' imprisonment. *People v Freeney*, 432 Mich 916; 441 NW2d 774 (1989).

Affirmed in part; remanded in part for correction of sentence. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Gary R. McDonald

/s/ Timothy G. Hicks