

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT LEE JONES,

Defendant-Appellant.

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UNPUBLISHED

March 20, 2003

No. 235098

Kalamazoo Circuit Court

LC No. 01-000051-FH

Before: Schuette, P.J., and Sawyer and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of unarmed robbery, MCL 750.530. Defendant, an habitual offender, fourth offense, MCL 769.12, was sentenced to nineteen to forty years' imprisonment for each of the convictions. The sentences are concurrent to one another but consecutive to a sentence for which defendant was on parole at the time of the offenses. Defendant appeals as of right. We affirm.

On October 19, 2000, at approximately 9:00 p.m., the elderly victims, Norman and Cecilia Bruex, were in their home in Kalamazoo Township. They answered a knock at their back door and found two African-American males, who indicated that they were having car trouble, and needed water for their vehicle. Norman glanced outside and saw the grill of a large, light-colored, older car. The men were carrying a pail, and the victims invited them inside the house. While Cecilia assisted the shorter man in obtaining water, she asked Norman to go to the neighbor's house and determine if the neighbor could assist the men with their car. At that point, the men became aggressive.

The shorter of the two men grabbed Cecilia around the neck with both of his hands. He dragged her into the living room. When he saw her purse, he stopped and removed seventy dollars from it. When Cecilia told the man to take her credit cards and leave, he punched her in the face. He then dragged her from one room to another until he found Norman's wallet and removed approximately one hundred dollars from it. When Cecilia complained to the man that she was having trouble breathing, he let go of her and she was able to get to her feet. She immediately went to find Norman. The taller man was holding Norman at the bottom of the basement stairs. Cecilia went downstairs. In the interim, the shorter man carried the living room television and video cassette recorder (VCR) into the kitchen. He also moved a small television from the "back room" into the kitchen. When Cecilia returned upstairs, she observed the shorter man winding cords around her possessions. The taller man was outside of the house and was

calling, “come on Bill, come on Bill, let’s go, let’s go.” The shorter man took the victims’ kitchen television, living room television, and VCR. He left the small television, which he had moved from the back room.

Neither Norman nor Cecilia could identify defendant at trial or in a corporeal lineup.<sup>1</sup> Other evidence, however, implicated defendant in the robbery. Cecilia and Norman never saw defendant before the robbery and he was never in their house before that time. Yet, latent fingerprints, which were lifted from the small television set, matched defendant’s fingerprints. Expert latent print examiner, Thomas Flowers, matched five fingerprints from the television lifts to defendant’s fingerprints from his fingerprint card. Another fingerprint examiner verified Flowers’ conclusions. In addition to fingerprint evidence, the victims’ neighbor testified that she saw a big, white car creeping down their street earlier that evening. She identified the car as an older Cadillac or Lincoln. Defendant admitted that he had a white 1993 Cadillac. Further, when defendant was questioned about the robbery, he told the police that he drove two men to the victims’ house because they needed to go there to get money from someone. Defendant claimed that he never went inside the house. When confronted with information that his fingerprints were found inside the house, defendant asked to make “a deal.” Finally, there was evidence that defendant ran and hid in a dumpster to try and evade arrest.

Defendant denied any involvement in the robbery and denied ever being at the victims’ house or touching their television. He claimed, and presented an alibi witness to testify, that the daughter of his girlfriend was in possession of the Cadillac during the relevant time period. He denied making statements to the police about driving two men to the victims’ home or about wanting to make “a deal.” Defendant claimed that he ran from the police because he had an illegal substance in his possession. In addition, no one ever called him “Bill” or “Billy.”

## I

Defendant first argues that the failure to preserve the small television set, from which the damaging latent prints were removed, violated his rights to a fair trial, effective cross-examination, and confrontation. Before trial, defendant moved to suppress the fingerprint evidence, arguing that he could not effectively refute the evidence because the television was not preserved, and further, that the failure to preserve the evidence constituted bad faith on the part of the police. The trial court denied the motion. We review de novo the trial court’s ultimate ruling with respect to the motion to suppress. *People v Davis*, 250 Mich App 357, 362; 649 NW2d 94 (2002).

Defendant first argues that US Const, Am VI, provides rights of confrontation and effective cross-examination. He cites authority in support of these basic propositions. He does not, however, explain how the failure to secure and produce the small television set interfered with these Sixth Amendment rights. Rather, his analysis relates to the issue of bad faith and denial of due process. “An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims.” *People v Kelly*, 231 Mich App 627,

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<sup>1</sup> There was undisputed evidence at trial that defendant significantly changed his hairstyle between October 2000 and the trial.

640-641; 588 NW2d 480 (1998). Moreover, “[t]he purpose of the confrontation clause is to provide for a face-to-face confrontation between a defendant and his accusers at trial.” *People v Bean*, 457 Mich 677, 682; 580 NW2d 390 (1998). In this case, defense counsel was able to confront and cross-examine the prosecution witnesses. His theory was that the police fabricated and manufactured the evidence against defendant. Defendant explored this theory by questioning the prosecution witnesses who lifted the fingerprints, processed the crime scene, and decided not to seize the television set. He was not deprived of his Sixth Amendment rights to confrontation or cross-examination.

Moreover, we disagree that defendant was deprived of *effective* cross-examination because of the missing television set. In *People v Cullens*, 55 Mich App 272, 274-275; 222 NW2d 315 (1974), this Court acknowledged that the fingerprints themselves, and not the object on which they are found, are the evidence. Fingerprints are actually lifted from the object during the fingerprinting process. *Id.* at 273 n 1. In *Cullens*, the defendant argued that he was denied effective cross-examination because the object from which his prints were lifted was destroyed by the police. *Id.* This Court disagreed because the prints were lifted from the item and preserved. *Id.* They could have been examined by the defendant. *Id.* In this case, the relevant evidence, the fingerprints, was preserved and could have been examined by defendant or an expert in preparation of his defense. Defendant was not deprived of the evidence necessary to rebut the fingerprint identification.

We also disagree that defendant’s right to due process was violated by the failure of the police to preserve the television set. The failure to preserve evidentiary material, which may exonerate a defendant, will not constitute a denial of due process unless bad faith is shown. *People v Hunter*, 201 Mich App 671, 677; 506 NW2d 611 (1993). In other words, “when the exculpatory nature of the evidence is speculative, due process is not violated in the absence of bad faith where the state fails to preserve such evidence.” *People Huttenga*, 196 Mich App 633, 642; 493 NW2d 486 (1992), citing *Arizona v Youngblood*, 488 US 51; 109 S Ct 333; 102 L Ed 2d 281 (1988). In *Youngblood*, *supra* at 57-58, the Court stated:

The Due Process Clause . . . makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence. But we think the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant. . . . We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police’s obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.

Defendant herein offers only speculative reasons about why the television itself should have been seized by the police. He asserts, without any support, that the “surface condition of the television was material.” He also argues that the only way he could prove that the lifted prints were fabricated was to view the television and show that it was never subjected to the

fingerprinting process or to “otherwise” have an expert conduct an independent examination. Because defendant merely speculates that production of the television may have exonerated him, we cannot find a due process violation unless we find bad faith on the part of the police.

Officer Lawrence Czarnowski testified that he dusted several items for fingerprints, lifted prints from the items by placing them on clear tape, and labeled the lifted prints with the case number and other information, including identifying the object from where the print was removed. Czarnowski testified that there was no need to seize the television after he lifted the fingerprints because the fingerprints constitute the evidence. Officer Stephen Rickey, who was the officer in charge of the case and the crime scene, also testified that once the fingerprints were removed from the television set and from other items in the home, there was no need to seize those items as evidence. Under the circumstances, where the police legitimately identified the fingerprints, and not the television, as the evidence, there was no bad faith. There was no due process violation.

## II

Defendant next argues that he was denied his right to a fair trial because the prosecutor repeatedly attempted to elicit sympathy for the elderly victims during closing argument. Because defendant did not object to the prosecutor’s comments at trial, the issue is unpreserved and, accordingly, is reviewed for plain error. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). There is no error if the prejudicial effect of the improper comments could have been cured by a timely instruction. *Id.*

Appeals to the sympathy of the jury constitute improper argument. *Watson*, *supra* at 591. In this case, defendant points to several passages of the prosecutor’s closing argument where the prosecutor referred to the ages of the victims or described them as elderly. We disagree that all of the challenged comments constituted pleas for sympathy. The prosecutor’s argument that the victim’s were chosen because they were elderly did not constitute an improper appeal for sympathy. It was a reasonable inference based on the testimony. Testimony revealed that several hours before the robbery, a car similar to the description of defendant’s car was observed driving very slowly down the victims’ street. While Norman could not recall whether he was outside on that day, he testified that he is “outside all the time, everyday,” taking care of his lawn and shrubbery. There was no question that Norman was elderly, being over the age of eighty.

In addition, the prosecutor’s other comments, referring to the victims’ ages, did not deprive defendant of a fair trial. With the exception of one comment, the references were not inflammatory and did not constitute overt appeals for sympathy. Moreover, the jury saw the victims and heard them testify. The jury was aware that the victims were elderly. Thus, there was no prejudice in the comments referring to the victims as elderly. Moreover, the trial court instructed the jury that it must not let sympathy or prejudice influence its decision. The trial court also instructed that the lawyers’ statements and arguments were not evidence. We agree that the prosecutor’s comment that defendant “shatter[ed] whatever tranquility those folks may have had in their own home in the golden years of their life,” was beyond the bounds of permissible argument. This comment, however, does not require reversal even when considered with the other comments. *Id.* at 586. The prosecutor did not suggest or argue that the jury should suspend its judgment and decide the case based on sympathy. *People v Hoffman*, 205 Mich App 1, 21; 518 NW2d 817 (1994). Indeed, almost immediately after the comment at issue,

the prosecutor asked the jury to find defendant guilty because the evidence supported the finding. A timely curative instruction would have cured any prejudice. *Watson, supra*. Defendant cannot demonstrate that the argument affected the outcome of the lower court proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

### III

Defendant also argues that the trial court should have suppressed the statements that he allegedly made to the police because the police failed to make an audio or video recording of his interrogation. This identical argument was rejected by this Court in *People v Fike*, 228 Mich App 178; 577 NW2d 903 (1998). We are bound by that decision. MCR 7.215(I)(1). Further, we find no reason to revisit the issue. In *Fike, supra* at 183, this Court declined to impose “views of police practice into a constitutional mandate” because the Legislature had not “spoken on the subject.” Given that the Legislature has still not deemed it appropriate to legislate police practice in this area, we find no cause to reconsider this Court’s decision in *Fike*.

### IV

Finally, defendant argues that the cumulative effect of the errors denied him his right to a fair trial and due process. This argument fails because there were no errors of consequence, which combined to collectively deny defendant a fair trial. *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999); *People v Miller (After Remand)*, 211 Mich App 30, 43-44; 535 NW2d 518 (1995).

Affirmed.

/s/ Bill Schuette  
/s/ David H. Sawyer  
/s/ Kurtis T. Wilder