

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY D. SMITH,

Defendant-Appellant.

UNPUBLISHED

July 31, 2001

No. 221724

Wayne Circuit Court

Criminal Division

LC No. 98-013094

Before: Doctoroff, P.J., and Murphy and Zahra, JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529, carjacking, MCL 750.529a, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a fourth habitual offender, MCL 769.12, to consecutive prison terms of twenty to forty years each for the armed robbery and carjacking convictions, and another consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant argues that the chief investigating officer failed to exercise due diligence in identifying and listing an important *res gestae* witness. To preserve such a claim, defendant was required to object at trial or raise the issue in an appropriate motion in the trial court. *People v Pearson*, 404 Mich 698, 722-723; 273 NW2d 856 (1979); *People v Dixon*, 217 Mich App 400, 409; 552 NW2d 663 (1996). He failed to do either and, therefore, this issue is not preserved.

In order to avoid forfeiture of this unpreserved issue, defendant must show: (1) that an error occurred; (2) that the error was plain; and (3) that the plain error affected his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Under MCL 767.40a(2) and (5), the prosecution has a continuing duty to provide notice of known *res gestae* witnesses and reasonable assistance in locating witnesses upon request. A defendant is not automatically entitled to a new trial, however, if the *res gestae* witness statute is violated. Instead, the trial court should conduct an evidentiary hearing to determine whether the defendant knew of the witness, whether the witness could have been produced through reasonable efforts had defendant requested, and whether the defendant was prejudiced by the absence of the witness at trial. *People v Calhoun*, 178 Mich App 517, 522-523; 444 NW2d 232 (1989).

In this case, even if the witness had been identified, he could not have been produced because he died approximately three months before trial. Further, there is no indication that the witness possessed information favorable to defendant. Accordingly, defendant has not shown a plain error that affected his substantial rights with respect to this issue.

Similarly, we reject defendant's in pro per claim that his constitutional right to due process was violated as a result of the prosecution's failure to timely obtain and disclose the name of the res gestae witness. To establish a violation of his due process right to the disclosure of information, it is incumbent upon defendant to show: (1) that the state possessed evidence favorable to himself; (2) that he did not possess the evidence and could not have obtained it with reasonable diligence; (3) that the prosecution suppressed the evidence; and (4) that if the evidence had been disclosed, it is reasonably probable that the result of the proceeding would have been different. *People v Lester*, 232 Mich App 262, 281-282; 591 NW2d 267 (1998). A reasonable probability is a probability sufficient to undermine confidence in the result. *Id.* at 282.

Here, the record indicates that even the prosecutor was unaware of the witness before trial. Further, because the witness died three months before trial and because there is no indication that the witness possessed information favorable to defendant, there is no basis for concluding that it is reasonably probable that the result of the proceeding would have been different had the witness' identity been disclosed on a more timely basis. Accordingly, this claim fails. Likewise, defendant has not shown that MCR 6.201 was violated.

Defendant also argues that his constitutional right to a speedy trial was violated. We disagree. A defendant must make a formal demand on the record to preserve a speedy trial issue for appeal. *People v Cain*, 238 Mich App 95, 111; 605 NW2d 28 (1999). Because defendant never asserted his right to a speedy trial in the trial court, this issue is not preserved. Further, the length of delay, approximately eight and one-half months, is not presumptively prejudicial and it is not plainly apparent from the record that defendant was prejudiced by the delay. See *Barker v Wingo*, 407 US 514, 530; 92 S Ct 2182, 2192; 33 L Ed 2d 101 (1972); *People v Mackle*, 241 Mich App 583, 602; 617 NW2d 339 (2000); *People v O'Quinn*, 185 Mich App 40, 47-48; 460 NW2d 264 (1990). Accordingly, defendant is not entitled to appellate relief with respect to this unpreserved issue. *Carines, supra*.

Finally, defendant claims that his consecutive sentences violate the principle of proportionality. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990). We disagree. In determining the proportionality of defendant's sentences, we do not consider the cumulative length of the consecutive sentences. *People v Miles*, 454 Mich 90, 95; 559 NW2d 299 (1997). Considering defendant's previous criminal record and habitual offender status, the escalating nature of his crimes, and the circumstances surrounding the instant offense, we conclude that defendant's sentences do not violate the principle of proportionality.

Affirmed.

/s/ Martin M. Doctoroff
/s/ William B. Murphy
/s/ Brian K. Zahra