

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
November 20, 2012

v

EDGAR RAY DEEL,

No. 307185
Oakland Circuit Court
LC No. 2011-236351-FH

Defendant-Appellant.

Before: FORT HOOD, P.J., and K. F. KELLY and DONOFRIO, JJ.

MEMORANDUM.

Defendant was convicted, following a jury trial, of entering without breaking with intent to commit a felony or larceny, MCL 750.111. He was sentenced as a habitual offender, fourth offense, MCL 769.12, to two years' probation, with 365 days to be served in jail and credit for 203 days served. He appeals as of right. We affirm.

Defendant's conviction arises from the theft of a red plastic toolbox from an open garage on the morning of March 22, 2011. A neighbor testified that she saw a man pacing near her home, saw him enter a garage, and then saw him walk away with something red tucked underneath his "hoodie." She called 911 and watched the man until the police stopped him. Officer Tom Kenyon saw defendant come from behind a garage. The officer recovered the toolbox from behind the garage. The primary issue at trial was the identity of the thief. Defendant admitted that he was the person who the neighbor saw pacing, but disputed that he was the person she saw entering the garage. He argued that he was in the wrong place at the wrong time.

Defendant argues on appeal that he was denied due process because the police officer did not produce an audio recording from the squad car that defendant contends would have captured the neighbor telling the police that she did not recognize defendant as the man she observed entering the garage. Although defendant raised the issue of the absence of the recording at trial, he did not assert that its absence implicated his constitutional rights. Therefore, his claim of constitutional error is not preserved for appellate review. *People v Jackson*, 292 Mich App 583, 594; 808 NW2d 541 (2011). Accordingly, this Court reviews the issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 764-767; 597 NW2d 130 (1999); *People v Hanks*, 276 Mich App 91, 92, 94-95; 740 NW2d 530 (2007).

“In order to warrant reversal on the claimed due process violation, a defendant must prove that the missing evidence was exculpatory or that law enforcement acted in bad faith.” *Hanks*, 276 Mich App at 95. By itself, a defendant’s account is inadequate to prove that the contents of a recording would have been exculpatory. *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992). Similarly, a claim that the police deliberately destroyed evidence must be supported by evidence, and a defendant’s blanket assertion is insufficient to substantiate the claim. *Id.* at 365-366.

Here, the record does not establish that the purported conversation between the neighbor and the officers was actually recorded. Therefore, defendant did not present a foundation for missing exculpatory evidence. Even if such a recording existed, defendant did not establish that the police purposefully destroyed it. Routine destruction of recordings is not evidence that law enforcement acted in bad faith. *Johnson*, 197 Mich App at 365. Accordingly, the record does not show that plain constitutional error occurred. Therefore, defendant is not entitled to appellate relief.

Defendant also asserts that the trial court erred by failing to give an adverse inference instruction. However, defense counsel expressed satisfaction with the instructions after they were given. Therefore, counsel waived any error regarding the jury instructions. *People v Chapo*, 283 Mich App 360, 372-373; 770 NW2d 68 (2009).

Affirmed.

/s/ Karen M. Fort Hood
/s/ Kirsten Frank Kelly
/s/ Pat M. Donofrio