

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

JAMES MICHAEL KLEE,

Defendant-Appellant.

UNPUBLISHED

December 4, 2001

No. 226086

Jackson Circuit Court

LC No. 99-095555-FH

Before: White, P.J., and Talbot and E.R. Post*, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of breaking and entering a building with intent to commit larceny, MCL 750.110, entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

At trial, the evidence showed that four men crawled through the window of a party store and removed items from the store. The police stopped a vehicle matching the description of the vehicle that left the store. The vehicle contained cash in moneybags, and large quantities of cigarettes and candy. The four occupants, one of whom was defendant, were arrested. A shoeprint found in the store matched the shoes worn by defendant when he was arrested. At one point during cross-examination, Detective Elwell, who participated in the investigation of the incident, stated that he believed that defendant had been lodged at the jail on a previous occasion. Defense counsel did not object, seek a curative instruction, or request a mistrial. Two defense witnesses mentioned defendant's prior record when they gave nonresponsive answers to questions. Defense counsel did not object or seek relief. The jury found defendant guilty as charged.

Defendant argues that he was unduly prejudiced and denied a fair trial by Elwell's remark to the effect that Elwell believed that he had been lodged in the jail on a previous occasion. We note that this claim of error is not properly preserved because defendant did not object to Elwell's testimony. Defendant bears the burden of showing prejudice either because of the conviction of an innocent person, or because the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

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

Elwell's unresponsive, volunteered remark was made in response to questioning that defendant does not contend was improper. We conclude that any request for a mistrial based on his statement would have been denied. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). Absent a motion, the trial court's failure to grant a mistrial cannot be deemed an abuse of discretion. *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999).

Furthermore, we conclude that in light of the strength of the evidence against defendant, Elwell's unresponsive remark did not prove to be unduly prejudicial. Defendant and three other men were arrested in a vehicle that matched the description of the vehicle driven from the party store. The vehicle contained cash in moneybags, and large quantities of cigarettes and candy. A shoeprint matching defendant's shoes was found in the store. MCL 750.110; *People v Vaughn*, 186 Mich App 376, 379-380; 465 NW2d 365 (1990). Reversal of defendant's conviction is not warranted under the circumstances. *Carines, supra*.

Affirmed.

/s/ Helene N. White
/s/ Michael J. Talbot
/s/ Edward R. Post