

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

OMAR L. BRAND,

Defendant-Appellant.

UNPUBLISHED

November 13, 2001

No. 220813

Genesee Circuit Court

LC No. 98-003505-FC

Before: Holbrook, Jr., P.J., and Cavanagh and Gribbs,* JJ.

PER CURIAM.

Defendant was convicted by a jury of kidnapping, MCL 750.349, and felonious assault, MCL 750.82. He was sentenced as a second-offense habitual offender, MCL 769.10, to concurrent terms of 22-1/2 to 40 years' imprisonment for the kidnapping conviction and four to six years' imprisonment for the assault conviction. He appeals as of right. We affirm.

First, we find that the trial court did not abuse its discretion when it denied defendant's motion for a one-day continuance in order to obtain the presence of defense witnesses Cedric and Keith Jones. *People v Wilson*, 397 Mich 76; 243 NW2d 257 (1976); *People v Suchy*, 143 Mich App 136, 141-142; 371 NW2d 502 (1985). Defendant has failed to demonstrate that he was prejudiced by the trial court's decision. *Wilson*, *supra* at 81; *Suchy*, *supra*. As the court noted, Cedric Jones had already testified in defendant's behalf, providing testimony favorable to defendant by not implicating him in the victim's kidnapping and assault. His testimony was stopped at the end of one day of trial and he was admonished by the court to return the following day but he did not; a police officer went to his house but was told that both Cedric and Keith had left. The prosecutor was thus not able to complete his cross-examination of that witness; defense counsel indicated only that he would have asked Cedric Jones only one question on redirect examination. Under these circumstances, it would appear that defendant was not prejudiced by Cedric Jones' failure to appear. Finally, there is no indication that Keith Jones' testimony would have been anything but cumulative to testimony already presented. The trial court noted that both witnesses had a history of failing to appear when required, and that there was little likelihood of their being found in one day. While a defendant need not point to a specific piece of evidence, or claim that new evidence has been discovered, to demonstrate prejudice, there must be some indication that the denial of the motion for continuance was prejudicial. *Suchy*,

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

supra at 146. Here, we conclude that defendant has failed to make a sufficient showing of prejudice. The trial court did not abuse its discretion in denying his request for a continuance.

Next, the prosecutor did not shift the burden of proof by questioning defendant about the absence of “Kiki.” *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995); *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999). It is apparent that the prosecutor was surprised by defendant’s testimony that he was with Kiki when the kidnapping and assault occurred, given defense counsel’s opening statement suggesting that the defense was simply one of lack of presence. Furthermore, the trial court immediately gave a cautionary instruction, which was sufficient to dispel any suggestion that defendant had the burden of proof.

Nor did the trial court abuse its discretion in denying defendant’s motion for a mistrial based on the prosecutor’s failure to turn over some notes of defendant’s custodial interview. *People v Wells*, 238 Mich App 383, 390; 605 NW2d 374 (1999). Defendant failed to establish a violation of the rule announced in *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). See *People v Lester*, 232 Mich App 262, 281-282; 591 NW2d 267 (1998). First, the record does not reflect that the prosecutor possessed evidence favorable to defendant. As the trial court remarked, the notes of the custodial interview reflected well-known facts. Second, it is clear that defendant could have obtained the notes of the interview with the exercise of reasonable diligence. Defendant, having made the statements reflected in the notes, had knowledge of the material independent of discovery. Consequently, there is no indication that the prosecution suppressed any favorable evidence or that there was a reasonable probability that the outcome of the proceedings would have been different had the prosecutor turned over the notes. Moreover, defendant is not entitled to a remedy for a prosecutor’s nondisclosure where defendant, having made the statements himself, had knowledge of them independent of discovery. See *People v Taylor*, 159 Mich App 468, 487-488; 406 NW2d 859 (1987).

Next, defendant claims that the trial court abused its discretion by denying his motion for a mistrial on the basis of alleged juror misconduct. We disagree. This Court will not reverse the trial court’s decision regarding a potentially biased juror absent a clear abuse of discretion. *Muilenberg v Upjohn Co*, 169 Mich App 636, 649; 426 NW2d 767 (1988). In *People v Gonzales*, 193 Mich App 263, 266; 483 NW2d 458 (1992), this Court observed that “[a] mistrial should be granted only where the error complained of is so egregious that the prejudicial effect can be removed in no other way.” Here, the alleged misconduct was one juror commenting to another about the credibility of a witness. The trial court, after questioning the juror outside of the presence of the jury, was in a superior position to evaluate the prejudicial effect of that misconduct. We cannot conclude that the court abused its discretion in denying defendant’s motion for a mistrial.

Defendant also claims that he was denied a fair trial by the prosecutor’s remarks during closing rebuttal argument. Defendant contends that the prosecutor improperly vouched for the victim’s credibility and denigrated defendant’s credibility. While we agree that the prosecutor improperly asserted that defendant’s testimony was “lies,” we find that the prosecutor did not vouch for the credibility of the victim. Viewed in context, the prosecutor did not suggest that he had some special knowledge that the victim was testifying truthfully. *People v Bahoda*, 448 Mich 261, 276-277; 531 NW2d 659 (1995); *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). Because defendant did not object to the prosecutor’s improper remarks about defendant, he must show that there was plain error affecting his substantial rights. *People v*

Carines, 460 Mich 750, 761-764, 774; 597 NW2d 130 (1999). In this case, a curative instruction could have removed any prejudice. *Knapp*, *supra* at 382-383. Further, as in *Knapp*, the trial court instructed the jurors that it was their duty to determine the credibility of the witnesses and that the lawyers' statements and arguments should not be considered evidence. Thus, defendant has failed to show that his substantial rights were affected by the prosecutor's remarks about defendant.

Finally, defendant's sentence for kidnapping does not violate the principle of proportionality. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). The trial court properly observed that defendant's underlying felony and criminal history demonstrate that he is unable to conform his conduct to the law. *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997).

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Mark J. Cavanagh

/s/ Roman S. Gribbs