

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED
October 11, 1996

Plaintiff-Appellee,

v

No. 182145
LC No. 94-004216

GREGORY NEAL,

Defendant-Appellant.

Before: Saad, P.J., and Holbrook, Jr., and G. S. Buth,* JJ.

MEMORANDUM.

Defendant was convicted by a jury of entering without breaking, MCL 750.111; MSA 28.306, and was sentenced to serve three to five years in prison. He appeals as of right and we affirm.

Defendant first argues on appeal that he was denied a fair trial by a witness' improper reference to the criminal past of his codefendant. Because the lay witness' reference to the codefendant's criminal past in an unresponsive answer to a proper question would not be ground for a mistrial with respect to the codefendant, *People v Von Everett*, 156 Mich App 615, 623; 402 NW2d 773 (1986), we conclude that defendant was not denied a fair trial by the remark. In addition, defendant cannot predicate error on the trial court's failure to give a cautionary instruction with regard to the testimony because he did not request such an instruction. *People v Haywood*, 209 Mich App 217, 229; 530 NW2d 497 (1995).

Defendant next contends that the trial court abused its discretion in scoring offense variable 17 as five points instead of zero. This issue, however, is not preserved because defendant failed to object at the sentencing hearing. *People v Hernandez*, 443 Mich 1, 16; 503 NW2d 629 (1993). Furthermore, we decline to remand this matter because, despite the lack of evidence to support the scoring of the variable as five points, there was evidence on the record to support a score of one point and that score would not alter the guidelines range for defendant's offense.¹ *Id.* Accordingly, any error was harmless.

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

Lastly, defendant argues that he was denied the effective assistance of counsel by trial counsel's failure to join in his codefendant's motion for a mistrial on the basis of the reference to his criminal past, request a cautionary instruction with regard to the testimony, and object to the scoring of offense variable 17. Upon review of the record, we find that defendant was not denied the effective assistance of counsel because the alleged mistakes did not result in outcome determinative prejudice. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). As discussed above, the isolated reference to his codefendant's criminal past did not deny defendant a fair trial, and any objection to the scoring of offense variables would not have changed the guidelines range for the present offense.

Affirmed.

/s/ Henry W. Saad

/s/ Donald E. Holbrook, Jr.

/s/ George S. Buth

¹ We further note that, when the trial court was presented with this same issue in the codefendant's sentencing, it held that one point was properly assessed for the variable.