

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHANE N. SERDA,

Defendant-Appellant.

UNPUBLISHED

May 2, 1997

No. 185061

Oakland Circuit Court

LC No. 94-134585-FH

Before: Young, P.J., and Markey, and D.A. Teeple,* JJ.

PER CURIAM.

In each of two separate cases, defendant was found guilty by a jury of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). He thereafter pleaded guilty to corresponding counts of habitual offender, third offense, MCL 769.11; MSA 28.1083, and was sentenced to two concurrent terms of twelve to thirty years of imprisonment. He appeals as of right. We affirm.

The trial court properly denied defendant's motion for an adjournment because he failed to provide an adequate explanation for the absence of the witness or show that diligent efforts were made to secure the witness' presence. *Tisbury v Armstrong*, 194 Mich App 19, 20; 486 NW2d 51 (1990). Further, defendant had not shown that he was prejudiced by the denial of his motion for an adjournment. *People v Sinistaj*, 184 Mich App 191, 201-202; 457 NW2d 36 (1990). Defendant was able to place his fabrication defense before the jury without the witness' testimony and there was strong, un rebutted evidence of defendant's guilt presented at trial. Under these circumstances, the trial court's failure to grant an adjournment to secure the testimony of the witness was not prejudicial to defendant. Hence, the trial court did not abuse its discretion in denying defendant's motion for an adjournment. *Sinistaj, supra*.

Further, the trial court did not abuse its discretion in denying defendant's motion for a mistrial. *People v Cunningham*, 215 Mich App 652, 654; 546 NW2d 715 (1996). The comment by one of the victims that defendant had burned down a house was not a basis for a mistrial because it was

volunteered and was not responsive to the prosecutor's proper question. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995); *People v Lumsden*, 168 Mich App 286, 299; 423 NW2d 645 (1988). Furthermore, the comment was fleeting and was not emphasized to the jury, *Lumsden, supra* at 299, and any prejudicial effect of the victim's comment was cured by the trial court's cautionary instruction to the jury. See *People v Gonzales*, 193 Mich App 263, 266-267; 483 NW2d 458 (1992).

Next, defendant argues that he was denied a fair trial by the trial court's failure to order discovery of the psychological reports prepared by the victims' counselors. Defendant's argument is puzzling given the trial court's order stating "that all counselors, social workers, psychiatrists and psychologists shall release any and all information and records" relating to the victims for an in camera review. This is consistent with the due process requirements set forth in *People v Stanaway*, 446 Mich 643; 521 NW2d 557 (1994). It is also puzzling because there is no record that the court had an in camera review of these documents and/or precluded discovery of these materials after an in camera review as defendant contends. Assuming arguendo that this occurred, defendant has not met his burden of providing the relevant record for appellate review. Defendant has the responsibility to file the full transcript of any hearing or provide a settled statement of facts such that this Court has a record on which to base its review. MCR 7.210(B)(1)(a). Accordingly, we consider this issue abandoned on appeal. *People v Johnson*, 173 Mich App 706, 707; 434 NW2d 218 (1983). Nevertheless, we conclude that defendant's claim of error is without merit. Defendant essentially sought these materials to engage in a fishing expedition for impeachment and cross-examination purposes, and did not articulate a specific good-faith basis for believing that such material existed. *Stanaway, supra* at 681-682.

Next, by failing to object on hearsay grounds, defendant has not preserved for appellate review his claim that the victims' mother should not have been allowed to testify regarding statements the victims made to her concerning the incidents in question. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). In any event, the testimony was not inadmissible hearsay because it fell within the tender years exception, MRE 803A, or was harmless in light of the un rebutted testimony given by the victims at trial.

Lastly, defendant has not preserved for appellate review his claim of being denied a fair trial due to instances of prosecutorial misconduct. *Stanaway, supra* at 643.

Affirmed.

/s/ Robert P. Young, Jr.

/s/ Jane E. Markey

/s/ Donald A. Teeple