

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VINCENT J. SMITH,

Defendant-Appellant.

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UNPUBLISHED

May 24, 1996

No. 176923

LC No. 93-129631 FC

Before: O'Connell, P.J., and Gribbs and T. P. Pickard,\* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, assault with intent to commit armed robbery, MCL 750.89; MSA 28.284, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to two to ten years' imprisonment for his assault with intent to do great bodily harm conviction, four to twenty years' imprisonment for his assault with intent to commit armed robbery conviction, and two years' imprisonment for each of his felony-firearm convictions. Defendant now appeals as of right. We affirm.

Initially, defendant argues that the admission of the in-court identification was improper because the in-the-field identification procedure was inherently unduly suggestive where defendant and codefendant were the only people shown to the witnesses, were riding in a car described by the witnesses as the getaway vehicle, were in possession of the jacket worn by the assailant, and on their way to the identification the police told the witnesses that they thought they "had the guys." Defendant further argues that he was entitled to counsel at the in-the-field identification procedure because there was very strong evidence that he was involved in the offense.

Defendant did not move at trial to suppress the in-court identification testimony, nor did he move for an evidentiary hearing concerning the suggestiveness of the in-the-field identification. Because there was no evidentiary hearing concerning this matter below, we do not have a record on which we

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

can review whether the in-the-field identification was unduly suggestive. Therefore, the issue is not preserved for appellate review. *People v Miller*, 208 Mich App 495, 504; 528 NW2d 819 (1995). Reversal is not required where the testimony concerning the on-the-scene identification should have been suppressed if the error was unpreserved, and the error was not decisive of the outcome because there was ample evidence that the defendant committed the crime. *Id.*, pp 503-504

In this case, two eyewitnesses testified at trial that they were certain that defendant was the assailant. When defendant was arrested, he was driving a car matching the description of the car involved in the incident, and had possession of a jacket matching the description of the one worn by the assailant. Furthermore, the police found the gun identified as the one used by the assailant which had recently been fired, and a mask in the trunk of the car. Moreover, the eyewitnesses had an independent basis to identify defendant as the assailant at trial. Therefore, reversal is not required on this basis. *Id.*

Next, defendant argues that the trial court clearly erred in denying his motion to suppress the mask and the gun found in the trunk of his car. Defendant claims that the warrantless search of the car was improper because the inventory search was illegal, the police did not have an established policy allowing the search of the vehicle's trunk and containers in that trunk and because the automobile exception did not apply. We disagree.

The police searched the interior of the car in the parking lot of a restaurant where defendant was apprehended. Because the police did not have a key to the trunk of the car, the car was taken to the police station security garage. Defendant told the police that he did not know where the key for the trunk was located. Subsequently, the police discovered the key to the trunk in defendant's shoe while he was searched during the booking procedure. The police opened the trunk and discovered a large speaker box. When the speaker box was lifted, the police heard something rattling. When the speaker box was tilted, the officers observed the gun.

The validity of the inventory search depends on the whether there were standardized criteria, policies, or routines regulating how inventory searches were to be conducted. *People v Long (On Remand)*, 419 Mich 636, 647-649; 359 NW2d 194 (1984). The goal is to prevent inventory searches from being used as "a ruse for general rummaging in order to discover incriminating evidence" and, therefore, the applicable policy "should be designed to produce inventory." *People v Poole*, 199 Mich App 261, 266; 501 NW2d 265 (1993). There was no testimony presented concerning the department's policy on inventory searches, and the policy was not presented below. Although defendant attached a copy of the Royal Oak Police policy on inventory searches to his brief on appeal, this Court is precluded from reviewing this policy because it was not presented in the trial court. MCR 7.210(A). Therefore, the appropriate remedy would be to remand to determine if the police had a departmental policy on inventory searches and whether the police operated within the policy. *Id.*

However, we find that remand is unnecessary because the search of the vehicle was valid pursuant to the automobile exception to the warrant clause. A police officer who has probable cause to believe that there is evidence of a crime or contraband somewhere in an automobile may search the

entire vehicle and any containers found therein without first obtaining a warrant, even after it has been impounded and is in police custody. *People v Carter*, 194 Mich App 58, 61; 486 NW2d 93 (1992). In this case, the police had probable cause to believe that there was evidence of a crime in the trunk of defendant's car. The eyewitnesses stated that the assailant used a gun during the assault, defendant was identified as the assailant, the description of the car matched defendant's car, and the jacket worn by the assailant was inside the car. After searching the interior of the car, no gun was found. Therefore, the trial court's denial of defendant's motion to suppress the mask and gun found inside the vehicle was not clearly erroneous because there was probable cause to search the trunk of the car pursuant to the automobile exception. *People v Bordeau*, 206 Mich App 89, 92; 520 NW2d 374 (1994).

Defendant further argues that the prosecutor improperly introduced evidence that the gun found inside the car was stolen. Because defendant failed to object to the evidence, this claim is not preserved for appellate review. *People v Yarger*, 193 Mich App 532, 539; 485 NW2d 119 (1992).

Next, defendant argues that he was denied a fair trial because the prosecutor improperly disparaged defense counsel, vouched for his guilt, argued facts not supported by the evidence, and blatantly disregarded the trial court's repeated rulings to refrain from injecting the specific circumstances of the case during voir dire. Because defendant failed to object to the prosecutor's comments and questions, review is precluded unless failure to review the issue would result in a miscarriage of justice or where a curative instruction could not have eliminated the prejudicial effect. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). After reviewing the remarks, we find that no miscarriage of justice will occur if we decline to review the issue because the prosecutor's remarks were not improper.

Finally, defendant contends that he was denied effective assistance of counsel because counsel failed to object to the prosecutorial misconduct. However, because none of the remarks were improper, defense counsel had no basis to object to the prosecutor's conduct. Therefore, defendant's claim has no merit.

Review of a claim of ineffective assistance of counsel is limited to the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that counsel's representation prejudiced the defendant so as to deprive him of a fair trial. *Id.* In determining whether an error was prejudicial, the defendant must overcome the presumption that, under the circumstances, the challenged action could be sound trial strategy. *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995). The defendant must show that there was a reasonable probability that, but for the error, the result of the proceedings would have been different. *Id.*

First, the prosecutor did not disparage defense counsel, but he responded to defense counsel's closing argument. Remarks which may otherwise be improper may not require reversal when they

address issues raised by defense counsel. *People v King*, 210 Mich App 425, 434; 534 NW2d 534 (1995).

Second, the record does not support defendant's claim that the prosecutor vouched for defendant's guilt. Instead, the prosecutor argued that defendant was not worthy of belief, which is permissible. *People v Gilbert*, 183 Mich App 741, 745-746; 455 NW2d 731 (1990). Because the comments were not improper, there was no error to which the defense counsel should have objected. Therefore, this claim is without merit. *People v Lyles*, 148 Mich App 583, 596; 385 NW2d 676 (1986).

Third, our review of the record does not support defendant's contention that the prosecutor argued facts not supported by the record. The prosecutor argued that defendant intended to rob complainant, that defendant was unable to withdraw money from the ATM because the transaction had been canceled, and that both eyewitnesses identified defendant at the line-up. The prosecutor's arguments are to be considered in light of defense counsel's arguments, and a prosecutor may comment about and suggest reasonable inferences from the evidence presented at trial. *People v Vaughn*, 200 Mich App 32, 38; 504 NW2d 2 (1993). Throughout trial and during his closing argument, defense counsel argued that defendant did not intend to rob complainant. Based on the evidence presented, the prosecutor properly suggested to the jury that defendant intended to rob complainant, and that defendant could not retrieve money from the ATM. Complainant testified that as he was attempting to use the ATM, defendant put a gun on the top of his head. The complainant then covered himself, ran into his truck and drove from the scene. When he was fifteen to twenty feet away, he observed defendant fire five or six gunshots at his truck. The prosecutor also stated that both eyewitnesses identified defendant at the lineup. However, the prosecutor corrected himself and clarified that only one of the persons identified defendant at the lineup. Because the prosecutor did not argue facts unsupported by evidence, counsel was not required to object to his statements. Therefore, defendant was not denied his right to effective assistance of counsel at trial. *Lyles, supra*.

Finally, defendant argues that defense counsel failed to object when the prosecutor blatantly disregarded the trial court's repeated rulings that he refrain from injecting the specific circumstances of the case during voir dire. The only incident which occurred during voir dire was when the trial court instructed the prosecutor that he should not refer to evidence that may or may not be coming into the case. Subsequent to the ruling, the prosecutor asked the jurors if they could convict a suspect if he was wearing a mask. Defense counsel objected and the trial court sustained the objection. We find that the record does not support defendant's claim that the prosecutor disregarded the trial court's repeated rulings. Therefore, this claim is without merit. *Id.*

Affirmed.

/s/ Peter D. O'Connell  
/s/ Roman S. Gribbs  
/s/ Timothy P. Pickard