

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN M. COLTON,

Defendant-Appellant.

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UNPUBLISHED

February 19, 1999

No. 203518

Oakland Circuit Court

LC No. 96-150027 FC

Before: Talbot, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of armed robbery, MCL 750.529; MSA 28.797, two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and one count of felon in possession of a firearm, MCL 750.224f; MSA 282.421(6). Defendant was sentenced to concurrent terms of two years' imprisonment for the felony-firearm convictions, such sentences to be followed consecutively by concurrent terms, as enhanced by his status as a third-offense habitual offender, MCL 769.11; MSA 28.1083, of twenty to forty years' imprisonment for the armed robbery convictions and three to ten years' imprisonment for the felon-in-possession conviction. Defendant appeals as of right. We affirm.

An armed robber wearing a hood and a mask over the lower part of his face walked into a carpet store in Clawson and ordered the store's salesman to lie on the floor. The robber then aimed his pistol at the store's manager and ordered her to give him the contents of the store's cash register. The robber then left the store. The salesman followed the robber and observed the robber discard some items. Defendant was stopped by the police a short time later in the vicinity of the robbery. Shortly thereafter, the police separately brought the salesman and manager to this location where they identified defendant as the robber (the field identification).

Defendant first challenges his armed-robbery conviction with respect to the salesman. The elements of armed robbery are (1) an assault, (1) a felonious taking of property from the victim's person or presence, and (3) the defendant must be armed with a weapon described in the armed-robbery statute. *People v Johnson*, 215 Mich App 658, 671; 547 NW2d 65 (1996). Defendant specifically challenges the presence element with respect to the salesman. For purposes of armed robbery, a thing

is in the presence of a person when it is within his reach, inspection, observation or control such that he could, if not overcome by violence or prevented by fear, retain his possession of it. *People v Raper*, 222 Mich App 475, 482; 563 NW2d 709 (1997); see also *People v McCray*, 17 Mich App 596; 170 NW2d 178 (1969). In addition, the prosecution must show that the victim's right to possession was superior to that of the robber's. *People v Jones*, 71 Mich App 270, 272; 246 NW2d 381 (1976).

Viewing the evidence in this case in a light most favorable to the prosecution, we conclude that a rational trier of fact could have found that the money was in the salesman's custody or control to the extent that violence or the threat of violence was necessary to sever such possession or control. *McCray, supra*; see also *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). A rational trier of fact could also have found that the salesman, an employee, had a superior right to possession of the money. *Jones, supra*; see also *Terry, supra*. Thus, we reject defendant's challenge to the sufficiency of the evidence. Because the evidence was sufficient that two persons were assaulted and robbed, we likewise reject defendant's double jeopardy challenge to his two armed-robbery convictions, *People v Wakeford*, 418 Mich 95, 112; 341 NW2d 68 (1983), and his contention that he must be resentenced.

Next, defendant contends that the witnesses' identification testimony should have been suppressed because he was not provided with counsel at his field identification. The trial court denied defendant's motion to suppress on this ground below. This Court reviews for clear error a trial court's findings of fact in deciding a motion to suppress. *People v Darwich*, 226 Mich App 635, 637; 575 NW2d 44 (1997). This Court reviews de novo the trial court's ultimate decision regarding a motion to suppress. *Id.*

It is clear that adversarial judicial criminal proceedings had not been initiated at the time of defendant's field identification. Moreover, the trial court's finding that defendant's field identification was conducted within minutes of the crime was not clearly erroneous. *Id.* Thus, defendant had no right, constitutional or otherwise, to counsel at the field identification. *People v Winters*, 225 Mich App 718, 721-724; 571 NW2d 764 (1997). Therefore, the trial court did not err in denying defendant's motion to suppress on this ground. *Darwich, supra*.

Next, defendant contends that the witnesses' identification testimony should have been suppressed because his field identification was unnecessarily suggestive and conducive to irreparable mistaken identity. However, defendant's challenge below was directed to the absence of counsel at defendant's field identification.<sup>1</sup> In deciding defendant's motion to suppress, the trial court appears to have ruled only on the absence-of-counsel issue. Thus, we conclude that this issue is not preserved. *Winters, supra* at 729. However, even if we were to address this issue<sup>2</sup> we would find no error because under the totality of the circumstances we find that no substantial likelihood of misidentification occurred at the field identification. *Neil v Biggers*, 409 US 188, 196-201; 93 S Ct 375; 24 L Ed 2d 401 (1972); *People v Kurylczyk*, 443 Mich 289, 302 (Griffin, J., with Mallett, J., concurring), 318 (Boyle, J., with Riley, J., concurring); 505 NW2d 528 (1993).

Finally, in a supplemental brief filed in propria persona, defendant claims that he was denied the effective assistance of counsel where (1) counsel failed to object to certain remarks made by the prosecutor during closing argument, and (2) counsel failed to provide the trial court with more legal authority at the suppression hearing. Our review of the prosecutor's remarks reveals that they were permissible arguments involving inferences drawn from the evidence. Because counsel is not required to raise a meritless objection, defendant has failed to establish that counsel's failure to object to the prosecutor's remarks was objectively unreasonable. *People v Mitchell*, 454 Mich 145, 158; 560 NW2d 600 (1997); *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997). Where no record was made concerning what defense counsel did or did not do at the suppression hearing, we can only conclude that counsel's failure to supply the trial court with more legal authority of this hearing was trial strategy. *Mitchell*, *supra* at 163. Moreover, where we have concluded that counsel was not required or that no substantial likelihood of misidentification occurred at the field identification, we conclude that defendant has failed to show that he was prejudiced by counsel's failure to supply the trial court with more legal authority at the suppression hearing. *Mitchell*, *supra* at 156.

Affirmed.

/s/ Michael J. Talbot

/s/ Janet T. Neff

/s/ Michael R. Smolenski

<sup>1</sup> At the evidentiary hearing on defendant's motion to suppress, the only remarks by defense counsel that even hint at a suggestiveness issue were counsel's briefs statements that defendant's field identification was "unfairly prejudicial" or "extremely prejudicial." However, even these remarks were in the context of the alleged improper absence of counsel at the field identification.

<sup>2</sup> Where a defendant raises a constitutional issue that may be decisive to the outcome of the case, appellate review is appropriate. *People v Pitts*, 222 Mich App 260, 272; 564 NW2d 93 (1997).