

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARCUS JACKSON, a/k/a MICHAEL
COLLINS,

Defendant-Appellant.

UNPUBLISHED

March 18, 2003

No. 237766

Wayne Circuit Court

LC No. 01-002307

Before: Meter, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316(1)(b); assault with intent to murder, MCL 750.83; armed robbery, MCL 750.529; possession of a firearm during the commission of a felony, MCL 750.227b; and possession of a firearm by a felon, MCL 750.224f. Defendant was sentenced to concurrent prison terms of life without parole for the felony murder conviction, twenty to thirty years' imprisonment for the assault with intent to murder conviction, fifteen to twenty years' imprisonment for the armed robbery conviction, and three to five years' imprisonment for the felon in possession conviction, and a consecutive two-year prison term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant challenges the admissibility of his statement to the police on two grounds. First, defendant argues that before he gave the statement, he repeatedly asked Investigator Simon and Officer Littlejohn for counsel, and counsel was not provided. Second, defendant argues that the statement was involuntary because it was induced by a promise of leniency made by Investigator Simon.

Pursuant to *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), if a suspect requests counsel during interrogation, the interrogation must cease until an attorney is present. *People v Kowalski*, 230 Mich App 464, 477-484; 584 NW2d 613 (1998). If the interrogation continues, without an attorney, and a statement is taken, "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Kowalski, supra*, 230 Mich App 472, quoting *Miranda, supra*. A suspect, who has requested an attorney, cannot be subject to further interrogation, in the absence of counsel, unless the suspect initiates further communication. *Edwards v Arizona*, 451 US 477; 101 S Ct 1880; 68 L Ed 2d 378

(1981); *Kowalski, supra*, 230 Mich App 478. A challenge to a court's ruling on a motion to suppress evidence of a confession on the ground that it was obtained in violation of a defendant's right to counsel requires de novo review of the record, but this Court will not disturb the court's factual findings unless they are clearly erroneous. *Kowalski, supra*, 230 Mich App 471-472.

Although defendant challenged the failure to provide him with counsel, the trial court did not fully address the issue at the evidentiary hearing. Ordinarily, the appropriate remedy would require remanding to the trial court for resolution of this issue because it requires an assessment of the credibility of the witnesses. However, that remedy is unnecessary here. The admission of the statement, even if erroneous, was harmless beyond a reasonable doubt in light of the other evidence of defendant's guilt. See *Arizona v Fulminante*, 499 US 279, 295; 111 S Ct 1246; 113 L Ed 2d 302 (1991); *People v Whitehead*, 238 Mich App 1, 7-10; 604 NW2d 737 (1999). Here, four witnesses to the shooting identified defendant. In addition, the car defendant was driving, when he was stopped, matched the physical description given by witnesses. The license plate seen by one witness was found in the trunk of the car defendant was driving. The proof of defendant's guilt was so overwhelming that all reasonable jurors would have found guilt even without the confession. *Whitehead, supra*, 238 Mich App 10. Because the admission of the confession, even if error, was harmless, we need not remand for further findings to resolve whether the confession was erroneously admitted.

In the interests of judicial expediency, we need not resolve whether defendant's statement should have been suppressed because it was induced by an improper promise of leniency by Investigator Simon. Assuming without deciding that the admission of the statement was error, the error was harmless in light of the overwhelming evidence of defendant's guilt even without the confession. *Whitehead, supra*, 238 Mich App 6. Having reached that conclusion, we need not determine whether the admission of the statement was error. *Id.* at 13.

Defendant contends that the trial court erred in admitting evidence of a license plate retrieved from the trunk of his car because it was the product of a search following his arrest, which defendant claims was unlawful because it was not supported by probable cause. The issue is not preserved because defendant challenged the admissibility of the evidence on a different basis at the trial court level. An objection raised on one ground is insufficient to preserve an appellate attack based on a different ground. *People v Thompson*, 193 Mich App 58, 62; 483 NW2d 428 (1992). Because this issue is unpreserved, we review for plain error in accordance with *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The analysis of probable cause depends on the facts available to the officer at the moment of arrest. See *People v Oliver*, 417 Mich 366, 374; 338 NW2d 167 (1984). Here, the parties disagree about when defendant was arrested, specifically, whether defendant was arrested before the officer saw a license plate in the partially open trunk that matched the one seen by a witness.

The similarity between the description of the getaway car and defendant's car provided reasonable suspicion justifying an investigative stop. The car matched not only the make, model and color, but also had a bungee cord securing the trunk and a lower driver's side, as had been described by witnesses. These facts provided "something more than an inchoate or unparticularized suspicion or hunch. . . ." *People v Rizzo*, 243 Mich App 151, 156; 622 NW2d 319 (2000) (citations and internal quotation marks omitted). "If an investigative stop of an automobile is proper, the officer is permitted to briefly detain the vehicle and make reasonable

inquiries aimed at confirming or dispelling his suspicions.” *Rizzo, supra*, 243 Mich App 156. (Citations and internal quotation marks omitted).

Here, defendant’s argument is premised on an unproven assertion that he was arrested immediately after the police stopped his car. However, the record does not clearly indicate when defendant was arrested. The detention of an individual during an investigatory stop may be a reasonable safety precaution. Compare *People v Nimeth*, 236 Mich App 616, 619, 624; 601 NW2d 393 (1999) (the defendant was not arrested, but only detained as a reasonable safety precaution, when he was handcuffed and placed in the back of a patrol car during a stop). Defendant relies, in part, on the officer’s affirmative response to the question, “And when you stopped the vehicle you placed the man under arrest?” However, the officer’s characterization of an arrest is not controlling. *People v Cipriano*, 431 Mich 315, 342; 429 NW2d 781 (1988).

Assuming *arguendo* that defendant was arrested before the discovery of the license plate, we believe that the match between defendant’s car and that described by the witnesses, particularly the unique features of the bungee cord securing the trunk, provided probable cause to arrest defendant. Defendant has not established plain error.

Defendant argues that the prosecutor committed misconduct in several instances during cross-examination of defendant, and during closing and rebuttal argument.

Generally, a claim of prosecutorial misconduct is reviewed *de novo*, *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001), and the test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial, *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). With respect to the unpreserved prosecutorial misconduct, we review the issue under the plain error test of *Carines, supra*. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

On appeal, the prosecution has conceded that it was improper for the prosecutor to question defendant about his assertion that the police officers were lying in their testimony. As explained in *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985), the rule that witnesses are not to comment on the credibility of another witness applies when the defendant is the witness asked to provide an opinion on the credibility of prosecution witnesses. The defendant’s opinion is not probative of the matter. *Buckey, supra*, 424 Mich 17. Nevertheless, reversal is not required where, as here, defendant handled the questioning well. *Id.*; *People v Loyer*, 169 Mich App 105, 117; 425 NW2d 714 (1988).

Defendant’s arguments concerning the remaining instances of alleged misconduct, all of which are unpreserved for appellate review, are unfounded. The prosecutor’s reference to a “record” did not insinuate that it was a criminal record. The prosecutor’s inquiry whether defendant’s other cars were stolen was not plain error. The questions asking defendant for documentation concerning his business did not shift the burden of proof. *People v Fields*, 450 Mich 94, 105-112; 538 NW2d 356 (1995). The prosecutor did not vouch for the credibility of Investigator Simon by arguing that according to defendant’s version of events, she “threw her career to the wind. . . .” The prosecutor did not vouch for the credibility of other witnesses by referring to their “courage.” These remarks do not suggest that the prosecutor had “some special knowledge or facts indicating the witness’ truthfulness.” *People v Bahoda*, 448 Mich 261, 276-277; 531 NW2d 659 (1995).

Defendant argues that the trial court erred in precluding evidence that a witness called by the defense was a court clerk. The witness' occupation was irrelevant to the proceedings and was properly excluded. MRE 401.

Defendant also contends that the court's limiting instruction concerning the court clerk witness' testimony did not comport with CJI 2d 4.5. Defense counsel did not object to this instruction at trial, and therefore, this Court reviews the issue for plain error in accordance with *Carines, supra*. *People v Snider*, 239 Mich App 393, 402; 608 NW2d 502 (2000). The court properly instructed the jury in accordance with CJI2d 4.5 at the close of proofs. Because the jury was instructed about the proper use of testimony concerning prior inconsistent statements, defendant has not established plain error in this regard.

Finally, defendant claims that the trial court lacked jurisdiction from the inception of the case. Charges concerning the robbery and homicide at issue in this case were initially filed and designated as Wayne Circuit Court docket no. 99-06197. For reasons not material to the present appeal, the trial court dismissed these charges without prejudice. The prosecution appealed. While the appeal was pending, in this Court, the prosecution filed a new complaint and later moved to dismiss the appeal. Defendant argues that the complaint and all subsequent proceedings were a "nullity" because the complaint was filed while jurisdiction was in this Court.

The only authority cited by defendant in support of his argument that the new complaint was a "nullity" is *People v Bower*, 3 Mich App 585; 143 NW2d 142 (1966). In that case, a municipal court accepted a defendant's plea and sentenced him. The court later set aside the sentence, rearraigned defendant on the same warrant, and bound him over to circuit court for trial on a felony. Following his conviction in circuit court, the defendant appealed and argued that the municipal court did not have jurisdiction to bind defendant over to circuit court. This Court set aside the conviction. The Court determined that once the court accepted defendant's plea and imposed sentence, the judge had no authority to set it aside sua sponte.

Having been used to obtain the conviction and sentence of the defendant for simple larceny, the warrant could not be retooled and be made the basis of a felony prosecution in circuit court. All proceedings in the circuit court were a nullity. A defendant once convicted of an offense consisting of different degrees cannot thereafter be tried for a different degree of the same offense. [*Bower, supra*, 3 Mich App 588-589.]

This Court further noted that the defendant had been subjected to two trials, for the same offense, in violation of the federal and state protections against double jeopardy.

Because the circumstances of the present case are markedly different, *Bower* is inapposite. Double jeopardy is not implicated here because jeopardy did not attach before the first case was dismissed. Unlike in *Bower*, defendant was not convicted of an offense of differing degrees and then retried. The case simply does not support defendant's position that the court lacked jurisdiction in the present case.

As noted by the prosecution, the court rule governing the trial court's authority while an appeal is pending does not support defendant's position that the circuit court lacked jurisdiction with respect to the new charges. MCR 7.208(A) states in part:

After a claim of appeal is filed or leave to appeal is granted, a trial court or tribunal may not set aside or amend the judgment or order appealed from except by order of the Court of Appeals, by stipulation of the parties, or as otherwise provided by law. . . .

Here, the trial court did not "set aside or amend" the order dismissing the case with prejudice.

Moreover, this Court's decision in *Yeo v State Farm Fire and Casualty Ins Co*, 242 Mich App 483, 485; 618 NW2d 916 (2000) (*Yeo II*), supports the view that the circuit court had jurisdiction over the re-filed charges despite the pending appeal of the former charges.

In *Yeo*, the plaintiff filed a lawsuit against her homeowner's insurance carrier. *Yeo v State Farm Fire and Casualty Ins Co*, 219 Mich App 254, 255; 555 NW2d 893 (1996) (*Yeo I*). The complaint was dismissed without prejudice because plaintiff failed to submit to an examination under oath, a condition precedent to filing the action against the defendant-insurer. *Yeo I, supra*, 219 Mich App 256. The defendant appealed the dismissal, arguing that it should have been with prejudice. *Id.* at 255. The plaintiff, thereafter, complied with the requirement, and the defendant-insurer denied her claim. *Yeo II, supra*, 219 Mich App 484-485. More than two years after the denial, the plaintiff filed a new lawsuit. *Id.* at 485. The trial court granted summary disposition to the defendant on the basis that the action was time-barred, and the plaintiff appealed. *Id.* at 484. This Court rejected the plaintiff's argument that the period of limitations was tolled while the appeal in the original lawsuit was pending. *Id.* at 485. "Contrary to plaintiff's argument, MCR 7.208(A) did not deprive the trial court of jurisdiction to entertain this lawsuit while the appeal of the earlier lawsuit was pending. MCR 7.208(A) only prohibits the court from which an appeal is taken from setting aside or amending the specific judgment or order appealed from." *Yeo II, supra*, 242 Mich App 485. In other words, because the ongoing appeal did not preclude the plaintiff from filing a new lawsuit, the period of limitation was not tolled during the period that the appeal was pending.

Similarly, during the period in which the prosecutor's appeal of the dismissal of the charges in lower court no. 99-06197 was pending, the prosecutor was not precluded from re-filing the charges. Under MCR 7.208(A), the trial court was not deprived of authority to act in all matters concerning the events that were at issue, just as the trial court in *Yeo* would not have been deprived of authority to act had the plaintiff filed the second lawsuit while the appeal of the first suit was pending. Rather, the restriction on the court's authority imposed by MCR 7.208(A) only applies to the judgment or order that had been appealed. Therefore, we find no support for defendant's argument that the court lacked jurisdiction and that all proceedings including his conviction were a "nullity."¹

¹ Within the argument concerning this issue, defendant included a single sentence referencing alleged noncompliance with the "fourteen day rule." This issue is not properly before this Court where defendant did not preserve the issue in accordance with MCR 6.110(B)(2), did not raise it
(continued...)

Affirmed.

/s/ Patrick M. Meter
/s/ Kathleen Jansen
/s/ Michael J. Talbot

(...continued)

in the statement of questions presented, MCR 7.212(C)(5), and did not adequately brief the issue. We deem the issue abandoned. *People v Van Tubbergen*, 249 Mich App 354, 364; 642 NW2d 368 (2002).