

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK EARL WHITE,

Defendant-Appellant.

UNPUBLISHED

March 28, 1997

No. 185321

Oakland Circuit Court

LC No. 94-134727-FH

Before: Fitzgerald, P.J., and MacKenzie and Taylor, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of unarmed robbery, MCL 750.530; MSA 28.798, malicious destruction of police property, MCL 750.377b; MSA 28.609(2), failure to obey a police officer's signal, MCL 750.479a; MSA 28.747(1), two counts of uttering and publishing, MCL 750.249; MSA 28.446, and two counts of resisting and obstructing a police officer, MCL 750.479; MSA 28.747. Defendant subsequently pleaded guilty to two counts of being an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, and was sentenced to prison terms of four to fourteen years for the convictions for uttering and publishing convictions, two and one-half to four years' for the conviction for malicious destruction of police property, one to two years for each conviction for uttering and publishing, one year for the conviction for failure to obey a police officer's signal, and seven to fifteen years for the conviction for unarmed robbery. With the exception of defendant's sentence for the conviction for failure to obey a police officer's signal, the sentences were vacated and defendant was sentenced as an habitual offender to concurrent terms of ten to fifteen and four to fifteen years. Defendant appeals as of right. We affirm.

On Saturday, July 30, 1994, eighty-one year-old Laurna Burns, was parking her car in the parking lot of a shopping center when she noticed an old, light-colored car pull into the parking space next to hers. A man exited the car and approached her as she walked toward the shopping center. The man grabbed her purse, flinging her to the ground. The man then returned to his car and drove off. Among the items in Burns' purse were her identification, credit cards, and a checkbook for her account

at TCF bank. At trial, Burns identified defendant as her assailant, and other witnesses identified defendant's car as being the one used in the robbery.

The following Monday morning, defendant cashed a \$100 check drawn on Burns' TCF account and payable to himself. Later that day, Detective Gerald Hopkins, a plainclothes police officer, was at the bank to retrieve the check cashed by defendant when defendant attempted to cash another check. Upon being notified of defendant's presence by a bank teller, Detective Hopkins approached defendant from behind with his gun drawn. Displaying his identification in one hand and holding his gun in the other, Detective Hopkins told defendant that he was under arrest and escorted him from the building. As they neared Hopkins' unmarked patrol car, defendant pushed Hopkins away and ran to his car, which was also parked in the lot. Hopkins struck defendant in the head several times with his gun in an attempt to prevent him from starting the car but was unable to stop him from escaping.

Before pursuing defendant, Detective Hopkins radioed to other officers, informing them that defendant had fled. Several marked patrol cars, with sirens activated and lights flashing, soon joined in the pursuit. The ensuing chase through residential neighborhoods and the business district lasted approximately fifteen minutes. After colliding with police cars and causing one officer to drive into a tree, defendant's car collided with a fence and came to a stop in a parking lot. Unable to proceed further, defendant climbed out of the passenger side window and attempted to flee on foot. After struggling with several officers, he was finally taken into custody. During a subsequent search of defendant's car, Detective Hopkins found Burns' identification, credit cards, and personal checks on the floor near the back seat.

Defendant initially contends that he was denied the effective assistance of counsel by trial counsel's failure to move to suppress Burns' in-court identification of him on the ground that it was the product of an unduly suggestive confrontation at the preliminary examination. Because defendant failed to preserve this issue by moving for an evidentiary hearing or new trial below, review is foreclosed unless detail of the deficiency is apparent on the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). Upon review of the totality of the circumstances surrounding the identification of defendant at the preliminary examination, we conclude that there was no substantial likelihood of misidentification, because, contrary to defendant's assertion, Burns positively identified defendant at a pretrial corporeal lineup. Under the circumstances, Burns' equivocal identification of another man as the perpetrator in a prior lineup presented an issue of credibility that was properly resolved by the jury. See *id.* at 676. Accordingly, defendant was not denied the effective assistance of counsel by trial counsel's failure to pursue a futile motion. *People v Daniel*, 207 Mich App 47, 59; 523 NW2d 830 (1994).

Next, defendant contends that he was denied a fair trial by the prosecutor's remarks during closing argument about defendant's credibility. Because defendant failed to preserve this issue by not objecting at trial, review will be undertaken only if the failure to do so would result in a miscarriage of justice or a curative instruction could not have eliminated the prejudicial effect of the improper remarks. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). No miscarriage of justice would result from our failure to review in this case because the prosecutor merely commented on defendant's credibility and permissibly argued that he was lying about how he came into possession of the stolen

property. *People v Sharbnaw*, 174 Mich App 94, 100; 435 NW2d 772 (1989); *People v Lodge*, 157 Mich App 544, 550; 403 NW2d 591 (1987).

Defendant argues that there was insufficient evidence presented at trial from which a rational trier of fact could find beyond a reasonable doubt that he was guilty of resisting Detective Hopkins' attempts to arrest him. We disagree. In order to support a conviction of resisting arrest, the prosecutor must prove that at the time of the arrest the defendant knew that the person he was resisting was an officer. *People v Julkowski*, 124 Mich App 379, 383; 335 NW2d 47 (1983). The defendant's knowledge may be inferred from circumstantial evidence. *People v Royal*, 62 Mich App 756, 761; 233 NW2d 860 (1975). Viewing the evidence presented in this case in a light most favorable to the prosecution, *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, modified 441 Mich 1201 (1992), we find that there was sufficient evidence from which a reasonable juror could infer that defendant knew that the plainclothes detective was a police officer at the time he resisted arrest. Unlike *Royal*, the circumstances surrounding the arrest do not suggest that defendant could have reasonably mistaken Detective Hopkins for an ordinary citizen. Defendant was arrested in the public area of a bank by an armed officer who, by defendant's own admission, identified himself as a police officer.

Lastly, defendant contends that he was denied the effective assistance of counsel by trial counsel's inadequate preparation and presentation of a defense, failure to object during the prosecutor's closing argument, and failure to move for a directed verdict with respect to the robbery charge. We disagree. Trial counsel's failure to object and move for a directed verdict did not constitute ineffective assistance of counsel because the motions would have been futile. *Daniel, supra* at 59. As previously discussed, the prosecutor properly commented on defendant's credibility and the evidence presented at trial. Further, upon review of the evidence, there was sufficient evidence presented to support defendant's robbery conviction because the jury could find that defendant was the perpetrator from his possession of the stolen property and Burns' identification of him as her assailant. See *People v Gordon*, 60 Mich App 412, 418; 231 NW2d 409 (1976). With respect to defendant's remaining allegations of error, review is foreclosed because detail of the alleged deficiencies is not apparent in the record.¹ *Barclay, supra* at 672.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Barbara B. MacKenzie
/s/ Clifford W. Taylor

¹ Defendant improperly seeks to enlarge the record on appeal by attaching affidavits to his appellate brief. *People v Brown*, 119 Mich App 656, 665; 326 NW2d 834 (1982). Because our review is limited to the lower court record, we do not consider these affidavits.