STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 28, 2000
v	No. 206749 Oakland Circuit Court
JOHN M. WINSTON, Defendant-Appellant.	LC No. 97-151243-FH

Before: O'Connell, P.J., and Murphy and Jansen, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of receiving and concealing stolen property in excess of $100, MCL 750.335; MSA 28.303. He was thereafter sentenced to three to fifteen years' imprisonment, the sentence to run consecutively to a parole violation. Defendant appeals as of right and we affirm.

I

Defendant first argues that the prosecution failed to present sufficient evidence to sustain his conviction of receiving and concealing stolen property in excess of $100. When determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe,* 440 Mich 508, 515; 489 NW2d 748 (1992).

The elements of receiving and concealing stolen property in excess of $100 are: (1) the property was stolen, (2) the property has a fair market value of over $100, (3) the defendant bought, received, possessed, or concealed the property with knowledge that the property was stolen, and (4) the property was identified as being previously stolen. *People v Gow*, 203 Mich App 94, 96; 512 NW2d 34 (1993). Circumstantial evidence and reasonable inferences can constitute satisfactory proof of the elements of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

Although the evidence was circumstantial, there was sufficient evidence that the property was stolen. The incident occurred in a Rite Aid drug store on January 7, 1997, at approximately 8:00 p.m. Debbie Staal, a customer, saw a man (later identified as defendant) and a woman hunched down and "peeking" around an aisle. A cashier saw two men picking up and replacing bottles of liquor. Peter Staal, Debbie's husband who was waiting for her in their car, saw a woman and two men leave the store and enter an older model Ford sedan. Peter watched the car as it circled the parking lot several times, then returned to park in the same area. Two people exited from the car and placed items in white plastic bags from the back seat to the trunk. A later police search of the white plastic bag found that it contained four bottles of liquor.

Troy Police Officer Michael Bjork received a dispatch about possible retail fraud at the store and that the perpetrators were in an old, yellow Ford Fairmont. Bjork pulled into the parking lot, saw a yellow Ford Grenada exit from the lot, followed the Grenada, and activated his police lights to pull over the Grenada. Bjork initially noticed liquor bottles on the floor of the back seat of the car and ultimately arrested the four occupants of the car and impounded the car. A search of the car revealed ten bottles of J & B whiskey, three bottles of Dewars, and one bottle of Hennessy. There were additional bottles in the trunk. The liquor manager of the store found two security tags on the floor of the liquor department and two of the bottles of liquor in the Ford appeared to have marks from removed stickers. Two Rite Aid employees also testified that the store was missing approximately the same amount and type of liquor bottles found in the car defendant was driving. Defendant produced no receipt for the liquor bottles, nor did Bjork find any receipts during his search of the car.

Further, it is clear that the property had a value in excess of $100. A Rite Aid employee testified that Martel sold for $27.26 a bottle, Hennessy sold for $27.95 a bottle, and J & B whiskey and Dewars sold for $20.92 a bottle. A total of one bottle of Martel, one bottle of Hennessy, four bottles of Dewars, and twelve bottles of J & B whiskey were found in the car and in the trunk. The value of the liquor found in the car was over $100.

Accordingly, viewing this evidence in a light most favorable to the prosecution, it was sufficient to support defendant's conviction for receiving and concealing stolen property in excess of $100.

II

Next, defendant argues that a comment made during the prosecutor's closing argument deprived him of a fair trial by unfairly shifting the burden of proof.

Defendant did not object to the prosecutor's comment. This Court's review of prosecutorial remarks is precluded absent objection by counsel, except in circumstances where a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). The prosecutor made one, isolated comment about the lack of evidence exculpating defendant. Had defendant objected to this remark, a curative instruction could have remedied any prejudice to defendant. Further, because this remark was isolated, because defense counsel, in his closing argument, informed the jury that defendant did not have to produce a receipt or any other evidence, and because

the trial court properly instructed the jury that the prosecution had the burden of proof, no miscarriage of justice resulted.

III

Defendant next argues that the evidence of the liquor bottles should have been suppressed as the fruit of the poisonous tree because the stop of the car defendant was driving was unconstitutional.

Defendant failed to object to the admission of the liquor bottles on the basis. Because suppression of evidence gained through an illegal search is an error of constitutional magnitude and the alleged error is unpreserved, the plain error rule applies. *Carines, supra*, p 764. To avoid forfeiture under the plain error rule, (1) error must have occurred, (2) the error was plain, and (3) the plain error affected substantial rights. *Id.*, p 763.

There is no error because the impoundment and search of the car was legal. Contrary to defendant's claim, the police had reasonable suspicion to initially pull over the car. Police officer Bjork received a dispatch at approximately 8:30 p.m. involving a possible retail fraud at a Rite Aid store. He received a description of the car and the people in the car. When Bjork arrived at the parking lot, he pulled over a car that matched the description given to him and the passengers in the car likewise matched the description. Under the totality of the circumstances, officer Bjork had reasonable suspicion that the passengers in the Ford were involved in criminal activity, thus, the investigatory stop was proper . *People v Nelson*, 443 Mich 626, 632; 505 NW2d 266 (1993). As he approached the car with his flashlight, Bjork noticed a number of liquor bottles in the back seat floor of the car in plain view. The driver (defendant) gave Bjork his name, however, defendant did not have a driver's license. The people in the car gave stories of their earlier whereabouts which did not conform to the information in the dispatch. Accordingly, the police officer had probable cause to arrest the passengers of the car and later impound and search the car.

IV

Defendant's final argument is that he was denied the effective assistance of counsel because his trial counsel failed to properly prepare and assert material defenses available to him which could have resulted in an acquittal, only conferred with him for twenty-five minutes before trial, did not properly advise him regarding the consequences of testifying, did not file a motion to suppress evidence, did not present exculpatory evidence such as the receipt for liquor or the liquor store owner's testimony that the liquor was purchased at his store, did not present the testimony of the other individual in the car, and did not object to the prosecutor's improper remark during closing argument.

Because no evidentiary hearing was held below concerning this issue, our review is limited to the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). To prove a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient, which requires a showing that counsel made an error so serious that counsel was not functioning as that guaranteed by the Sixth Amendment. *People v Johnson*, 451 Mich 115, 121; 545 NW2d 637

(1996). Second, defendant must show that counsel's deficient performance prejudiced the defense. This requires a showing that counsel's errors were so serious as to deprive defendant of a fair trial. *Id.*

We have reviewed defendant's claims of ineffective assistance of counsel and the lower court record and conclude that defendant's claims are either unsubstantiated (counsel spent only twenty-five minutes with him before trial, failed to properly advise defendant of the admissibility of his prior convictions such that he would not testify, failed to present a receipt for the liquor), not prejudicial (failure to move to suppress the evidence of the liquor bottles, failure to move for a directed verdict, failure to object to the prosecutor's closing argument), or were matters of trial strategy that we cannot second guess (decision to call witnesses). Further, to the extent that defendant claims that counsel failed to prepare and present a defense, the record directly contradicts such an assertion. Rather, a review of the record indicates that counsel vigorously cross-examined the witnesses to bring out inconsistencies and a lack of knowledge, and gave a well-prepared closing argument.

Accordingly, defendant has failed to show that counsel's performance was either deficient or prejudicial, thus, we cannot conclude that he was denied the effective assistance of counsel based on the record before us.

Affirmed.

/s/ Peter D. O'Connell
/s/ William B. Murphy
/s/ Kathleen Jansen