

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID LEE ROMESBURG,

Defendant-Appellant.

UNPUBLISHED

April 25, 2000

No. 209540

Wayne Circuit Court

Criminal Division

LC No. 97-502328

Before: Gribbs, P.J., and Doctoroff and T. L. Ludington*, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions of first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2), and habitual offender, second offense, MCL 769.10; MSA 28.1082, entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Complainant testified that one morning she found a window in her living room removed and her checkbook and wallet missing. The police found fresh fingerprints on the sill and the window. Complainant's wallet was found in a trash bag, and her checkbook and driver's license were found in a yard abutting the yard of defendant's home. A detective testified that he obtained the addresses of the homes behind the residence where complainant's checkbook and driver's license were found, and that defendant's residence had a number of police runs to it. Defense counsel did not object to this statement, or request a mistrial. A defense witness testified that during the course of performing yard work for complainant, defendant touched the window. Several defense witnesses testified that defendant was at home on the evening of the incident.

The jury convicted defendant of first-degree home invasion. The trial court sentenced defendant as an habitual offender to seven to thirty years in prison.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms,

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

and that the representation so prejudiced the defendant that he was denied a fair trial. *People v Pickens*, 446 Mich 298, 313-314; 521 NW2d 797 (1994). Counsel is presumed to have

afforded effective assistance; to overcome that presumption, a defendant must show that counsel's failure to perform an essential duty resulted in prejudice. *People v Stubli*, 163 Mich App 376, 379; 413 NW2d 804 (1987).

Defendant argues that he was denied a fair trial because the detective's remarks regarding police runs to his home lead the jury to infer that he was a known criminal. He asserts that the trial court's failure to declare a mistrial was an abuse of discretion; in the alternative, he argues that counsel's failure to move for a mistrial constituted ineffective assistance. We disagree. Absent a motion on which to rule, the trial court cannot be said to have abused its discretion. *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999). The testimony regarding police runs did not mention, much less focus on, prior criminal activity by defendant. Counsel's failure to object to the testimony could be considered trial strategy, i.e., a decision to not highlight the testimony. We do not substitute our judgment for that of counsel regarding matters of trial strategy. *Id.*, 445. Generally, an unresponsive, volunteered answer to a proper question is not grounds for a mistrial. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). Counsel's failure to move for a mistrial did not constitute ineffective assistance. *Pickens, supra*. Any error was harmless, and no miscarriage of justice occurred. *People v Grant*, 445 Mich 535, 552-553; 520 NW2d 123 (1994). Other evidence, including that regarding the presence of defendant's fingerprints on the window and sill, and the discovery of complainant's checkbook and driver's license near defendant's residence, supported the verdict.

Furthermore, defendant argues that he was denied a fair trial by the prosecutor's remarks regarding the freshness of the fingerprints and by the prosecutor's expression of personal opinion regarding his guilt. We disagree. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). Prosecutorial comments are to be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992). Defendant did not object to the remarks; thus, we review the issue only if a curative instruction would not have remedied the effect of the prosecutor's remarks, or if the failure to review the issue would result in manifest injustice. *People v Mayhew*, 236 Mich App 112, 122-123; 600 NW2d 370 (1999). The prosecutor's comment regarding the age of the fingerprints was a logical inference based on record evidence, and was not improper. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), reh den 448 Mich 1225 (1995). Had defendant objected to the prosecutor's declaration of guilt, a curative instruction, to the effect that arguments of counsel are not evidence, could have remedied any prejudice. No miscarriage of justice occurred. *People v Rivera*, 216 Mich App 648, 651-652; 550 NW2d 593 (1996).

Affirmed.

/s/ Roman S. Gribbs
/s/ Martin M. Doctoroff
/s/ Thomas L. Ludington