

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC ROMEL MARKS,

Defendant-Appellant.

UNPUBLISHED

May 19, 2000

No. 210727

Macomb Circuit Court

LC No. 96-003174-FC

Before: Gribbs, P.J., and Hoekstra and Markey

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to a term of eight to twenty years' imprisonment for the armed robbery conviction and a consecutive two-year term for the felony-firearm conviction. He appeals by of right. We affirm, but remand for a correction of the judgment of sentence.

Defendant first claims that trial counsel was ineffective for not challenging for cause or preemptory dismissing three jurors. One of the jurors had been a victim of two previous armed robberies and the other two jurors had family members who had been victims of similar crimes. In order for this Court to reverse because of an ineffective assistance of counsel claim, a defendant must show that his counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). The defendant also must "overcome the presumption that the challenged action might be considered sound trial strategy." *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, the defendant must show that there was a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnnie Johnson, Jr*, 451 Mich 115, 124; 545 NW2d 637 (1996). The burden is on the defendant to provide factual support for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Because defendant failed to raise this issue before the trial court and his untimely motion to remand was denied by this Court, our review of counsel's conduct is limited to the existing trial court

record. *People v Wilson*, 196 Mich App 604, 612; 493 NW2d 471 (1992). We conclude that the existing record does not support defendant's claim that trial counsel was ineffective. Defendant has not overcome the presumption that the challenged conduct might be considered sound trial strategy, nor do we conclude that counsel's performance of not challenging or dismissing the jurors undermines confidence in the reliability of the jury's verdict. *People v Mitchell*, 454 Mich 145, 162-169; 560 NW2d 600 (1997); see, also, *People v Robinson*, 154 Mich App 92, 95; 397 NW2d 229 (1986). Even if counsel's performance could be considered deficient, the record does not support a finding that defendant was prejudiced by the deficiency, such that the result of the proceeding would have been different absent the error. *Johnson, supra*.

Defendant alternatively requests that this Court remand this matter for an evidentiary hearing on the issue of counsel's performance. However, because defendant has not set forth any new or additional support for his request for a remand, we decline to do so. See *People v Ho*, 231 Mich App 178, 191; 585 NW2d 357 (1998).

Defendant also argues that the prosecutor engaged in misconduct by asking the officer in charge to comment upon the credibility of the testimony of other witnesses. Defendant did not preserve this issue with an appropriate objection at trial. "Prosecutorial misconduct cannot be predicated on good faith efforts to admit evidence." *People v Missouri*, 100 Mich App 310, 328; 299 NW2d 346 (1980). The prosecutor, as an advocate for the state, is entitled to attempt to introduce evidence that the prosecutor legitimately believes will be accepted by the court, so long as that attempt does not actually prejudice the defendant. Absent a showing of bad faith by the prosecutor, this Court will not reverse simply because defense counsel was required to do his job and object. *Id.* at 328-329.

The actual questions posed to the officer concerned whether the witnesses' prior police statements were consistent with their trial testimony. The questions did not require the officer to inject his own personal opinion regarding the credibility of the witnesses. Because defendant did not object to the questions, it is unclear whether a proper foundation could have been established to admit the testimony under MRE 801(d)(1)(B). Regardless, defendant has not shown that the prosecutor's questions were posed in bad faith or as an improper attempt to bolster the witnesses' credibility. Even if the questions were improper, defendant was not prejudiced by the error, which we are confident had no effect on the outcome of the case. *People v Carines*, 460 Mich 750, 761-767; 597 NW2d 130 (1999); *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

We affirm defendant's convictions, but remand for correction of the judgment of sentence in accordance with MCR 6.435(A). Although defendant was sentenced on the record to a consecutive two-year term for the felony-firearm conviction and, while the judgment of sentence provides that defendant's sentences for counts 1 and 2 are to "run consecutive," the two-year felony-firearm sentence is not separately identified on the judgment of sentence. Accordingly, we

remand for amendment of the judgment of sentence to correct this clerical error. MCR 7.216(A)(4); MCR 6.435(A). A copy of the amended judgment of sentence shall be sent to the Department of Corrections. We do not retain jurisdiction.

/s/ Roman S. Gibbs

/s/ Joel P. Hoekstra

/s/ Jane E. Markey