

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY SABO,

Defendant-Appellant.

UNPUBLISHED

May 5, 1998

No. 195234

Detroit Recorder's Court

LC No. 95-005727

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS COLLETTE,

Defendant-Appellant.

No. 195235

Detroit Recorder's Court

LC No. 95-005727

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LIBORIO GREGORY FLORES,

Defendant-Appellant.

No. 195236

Detroit Recorder's Court

LC No. 95-005727

Before: Whitbeck, P.J., and MacKenzie and Murphy, JJ.

PER CURIAM.

Defendants were tried jointly by a jury. In Docket No. 195234, the jury convicted defendant Anthony Sabo of four counts of armed robbery, MCL 750.529; MSA 283.797. The trial court sentenced defendant Sabo to four concurrent terms of seven to fifteen years' imprisonment. In Docket No. 195235, the jury convicted defendant Thomas Collette of four counts of armed robbery and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant Collette to four concurrent terms of twelve to fifteen years' imprisonment for the armed robbery convictions and a consecutive two-year term for the felony-firearm conviction. In Docket No. 195236, the jury convicted defendant Liborio Flores of four counts of armed robbery. The trial court sentenced defendant Flores to four concurrent terms of three to ten years' imprisonment. Each defendant also faced a fifth armed robbery count with regard to complainant Jessica Hernandez; those counts were dismissed, however, when Hernandez failed to appear to testify at trial. Defendants appeal as of right. We affirm.

These consolidated cases arise out of an armed robbery that occurred around midnight on April 21, 1995. The five female complainants drove to Detroit from their hometown of Toledo, in search of a dance club. The women stopped at a fast-food restaurant where they met defendants and one other male. The complainants discussed local dance clubs with the men and then followed their vehicle, believing they were en route to a club. The two cars stopped at two different houses. While at the second house, one of the complainants got out of the car and began talking to two of the defendants. A short time later, one of the males approached the driver of the complainants' vehicle, pointed a gun at her head, and ordered her out of the car. All four males then ordered the complainants against a fence and robbed them of their jewelry, purses, and money. Jessica Hernandez was able to remember the license plate number of defendants' car. The car was registered in the name of defendant Sabo's mother. The complainants identified defendants in a photographic lineup immediately after the robbery. When defendant Flores was arrested a short time later, he was in possession of a pager bearing the serial number of the pager belonging to one of the complainants.

I

On appeal, defendants Sabo and Flores argue that the trial court denied them a fair trial by failing to suppress the complainants' pre-arrest photographic identification of defendants. The determination of whether an identification procedure constitutes a denial of due process is evaluated in light of the totality of the circumstances. *People v Lee*, 391 Mich 618, 626; 218 NW2d 655 (1974). The test is whether the procedure was so impermissibly suggestive that it led to a substantial likelihood of misidentification. *People v Kurylczyk*, 443 Mich 289, 302, 318; 505 NW2d 528 (1993). Factors to consider include the witness' opportunity to view the criminal at the time of the offense; the witness' degree of attention; the accuracy of the witness' prior description of the criminal; the level of certainty demonstrated by the witness at the confrontation; and the length of time between the crime and the confrontation. *Id.*

Here, the trial court did not err in refusing to suppress the complainants' identification of defendants. The record shows that each complainant had ample opportunity, before and during the robbery, in which to view each defendant. Further, the photographic identification lineup took place

shortly after the crime occurred. Most important, the record does not support the claim that the police attempted to influence the witnesses' selection of the photographs or that the procedure employed by the police was unduly suggestive. Considering the circumstances in this case, we find that the identification procedures did not pose a substantial likelihood of misidentification. See *People v Noble*, 22 Mich App 499, 503; 177 NW2d 709 (1970). In light of this conclusion, we need not remand for a determination of whether there was an independent basis for the in-court identification of defendant Sabo. In any event, the record clearly shows that, based on the witnesses' lengthy opportunity to observe defendant Sabo, the complainants had a sufficient independent basis for their in-court identification.

II

Defendant Sabo argues that the trial court improperly denied him his right to confrontation by assuming the role of prosecutor at the evidentiary hearing on the motion to suppress the complainants' identification. Although defendant Sabo did not object to the trial court's questioning, this Court will consider a constitutional issue raised for the first time on appeal if the alleged error could have been decisive of the outcome. *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994); *People v Heim*, 206 Mich App 439, 441; 522 NW2d 675 (1994). We may also review a claim that the trial court assumed the role of the prosecutor if necessary to avoid manifest injustice. *People v Collier*, 168 Mich App 687, 697; 425 NW2d 118 (1988).

The record in this case reveals that, during the evidentiary hearing, the prosecutor and the three defense attorneys asked the first three witnesses an exhaustive list of questions relating to the photographic identification procedure. In questioning the final two witnesses, the trial court asked nearly the same questions that the defense attorneys had asked the previous witnesses. The trial court posed questions in a neutral manner and the questions neither added to nor distorted the evidence, nor were they intimidating, argumentative, prejudicial, or unfair. Because the trial court's conduct could not have been decisive of the outcome of the hearing and no manifest injustice will result if we decline further review of this issue, the issue is unpreserved.

III

Defendant Sabo argues that he was denied a fair trial because the prosecutor's opening statement indicated that Jessica Hernandez got the license plate number of defendants' car, but Hernandez subsequently failed to appear to testify at trial. We find no error requiring reversal. Opening statement is the appropriate time to state the facts that will be proven at trial. When a prosecutor states that evidence will be presented, which later is not presented, reversal is not required if the prosecutor acted in good faith, *People v Johnson*, 187 Mich App 621, 626; 468 NW 2d 307 (1991), and the defendant was not prejudiced by the statement, *People v Wolverton*, 227 Mich App 72, 75; ___ NW2d ___ (1997). In this case, there is nothing in the record to indicate that the prosecutor did not act in good faith when he stated that Hernandez would testify that she saw the license plate number of the car. Hernandez had been served and notified of the trial and she was present on the first two days of trial; she had also testified at the preliminary examination and a pretrial hearing without incident. Furthermore, defendant Sabo was not prejudiced by the prosecutor's statement because defense

counsel had stipulated to the admission of the police report, which included the license plate number. Any alleged prejudice could have been cured with an appropriate instruction if one had been requested upon timely objection. Accordingly, reversal is not warranted on this basis.

IV

Defendant Collette argues that he was denied a fair trial because the trial court (1) did not order the prosecutor to produce Hernandez as a missing *res gestae* witness, and (2) failed to determine whether the prosecutor exercised due diligence in securing Hernandez' presence. The claims are not preserved for review because defendant did not raise them in a motion for a post-trial evidentiary hearing, *People v Pearson*, 404 Mich 698, 722-723; 273 NW2d 856 (1979), or in a motion for a new trial, *People v Jackson*, 178 Mich App 62, 66; 443 NW2d 423 (1989). Accordingly, we decline consideration of this issue. *People v Dixon*, 217 Mich App 400, 409; 552 NW2d 663 (1996).

V

All three defendants argue that they were denied a fair trial because the trial court erroneously admitted evidence of their gang affiliation. We disagree with defendants' contention that the evidence was inadmissible because it was precluded under MRE 404. Evidence is not subject to MRE 404(b) analysis merely because it discloses a bad act; bad acts can be relevant as substantive evidence, admissible under MRE 401, without regard to MRE 404. *People v VanderVliet*, 444 Mich 52, 64, 74-75; 508 NW2d 114 (1993). However, we agree that because the testimony regarding defendants' gang affiliation was not necessary to the jury's understanding of the photographic identification procedure or the charged crimes, it was not relevant under MRE 401. Nevertheless, in light of the record, we conclude that the error in admitting the evidence was harmless beyond a reasonable doubt. *People v Oswald (After Remand)*, 188 Mich App 1, 8; 469 NW2d 306 (1991). The evidence overwhelmingly established that defendants robbed the complainants. The complainants identified defendants, the holdup car was linked to defendants, and the pager belonging to one of the complainants was found in one of the defendant's possession. Furthermore, the officer's reference to defendants' gang affiliation was brief and isolated. Accordingly, reversal is not warranted on this basis.

VI

Defendants Sabo and Flores argue that the trial court improperly instructed the jury, depriving them of a fair trial. Because defendants failed to object to the instructions and failed to request the omitted instructions, appellate review is foreclosed absent manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993); *People v Maleski*, 220 Mich App 518, 521; 560 NW2d 71 (1996). We have reviewed defendants' claims and find that the trial court properly instructed the jury and that defendants have failed to establish manifest injustice with respect to the omitted instructions. Accordingly, relief is not warranted.

VII

Defendant Flores argues that he was denied a fair trial by several instances of prosecutorial misconduct. The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. This Court reviews claims of prosecutorial misconduct on a case-by-case basis, examining the pertinent portion of the record to evaluate the remarks in the context that they were made. *People v Legrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994).

We have reviewed defendant Flores' claims and conclude that he was not denied a fair and impartial trial by the prosecutor's remarks. Contrary to defendant Flores' claim, there was evidence establishing that a pager was taken from one of the complainants and that defendant Flores possessed that pager when he was arrested. A prosecutor is free to argue the evidence and all reasonable inferences from the evidence as it relates to the prosecution's theory of the case. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). Moreover, defendant Flores failed to object to the statement that the pager belonged to Jessica Hernandez and a curative instruction could have cured any alleged prejudice. The remarks, "do the right thing" and "[e]vil triumphs when good men fail to act," if an improper civic duty argument, were harmless in light of the overwhelming evidence against defendants. *People v Ralph Williams*, 434 Mich 894; 453 NW2d 675 (1990), reversing 179 Mich App 15; 445 NW2d 170 (1989). Finally, while a prosecutor cannot personally attack the defendant's trial attorney, *People v Moore*, 189 Mich App 315, 322; 472 NW2d 1 (1991), the prosecutor in this case was merely advancing his position that the defense theory was dependent upon theories that did not comport with the evidence at trial. *People v Simon*, 174 Mich App 649, 655; 436 NW2d 695 (1989). Defendant Flores was not denied a fair trial by the prosecutor's comments.

VIII

Defendants Sabo and Flores contend that they were denied their right to effective assistance of counsel. This Court's review of claims of ineffective assistance of counsel is limited to the facts contained on the record. *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance was objectively unreasonable, and (2) defendant was prejudiced by counsel's defective performance. *People v Mitchell*, 454 Mich 145, 164; 560 NW2d 600 (1997). A defendant must also overcome the presumption that the challenged action or inaction was trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Defendants have failed to demonstrate that they were denied effective assistance of counsel. Defendant Sabo's counsel's failure to request an alibi instruction paralleled the decision to withdraw his alibi defense. These decisions were matters of trial strategy. Counsel's failure to move for a mistrial on the basis of the prosecutor's reference, in his opening statement, to the expected testimony of Jessica Hernandez, did not result in prejudice; other evidence was presented relating to the substance of the expected testimony. Nor was defendant Sabo's counsel ineffective because he failed to object to the trial court's aiding and abetting jury instructions. The instructions were not improper and did not result in prejudice.

Similarly, defendant Flores' counsel's decision not to present an alibi defense was a matter of trial strategy and did not constitute ineffective assistance of counsel. Defendant Flores further contends that he was denied the effective assistance of counsel when his attorney failed to object to evidence that Jessica Hernandez identified defendant at the photographic lineup. However, this identification testimony was merely cumulative to other identification testimony, making its admission non-prejudicial. Finally, defendant Flores was not prejudiced by defense counsel's failure to object to the prosecutor's statement, that the pager in defendant Flores' possession at the time of his arrest belonged to Hernandez. As previously noted, there was evidence that defendant Flores was carrying a pager bearing the serial number of a pager belonging to one of the complainants. Under these circumstances and given the strength of the evidence, linking the pager to a particular complainant without cross-examination of the complainant, while improper, could not have affected the outcome of the case. In the absence of any prejudice, reversal is not warranted.

Affirmed.

/s/ William C. Whitbeck
/s/ Barbara B. MacKenzie
/s/ William B. Murphy