STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JACK WILLIAM GRIMMETTE,

Defendant-Appellant.

UNPUBLISHED
August 4, 2000

No. 212363
St. Clair Circuit Court
LC No. 98-000629-FH

Before: Holbrook, Jr., P.J., and Kelly and Collins, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of aiding and abetting and conspiracy to deliver cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). Defendant was sentenced as an habitual offender, second offense, MCL 769.10; MSA 28.1082, to consecutive prison terms of five to thirty years for each conviction. We affirm.

On November 25, 1997, during the course of an undercover drug investigation, Michael Bailey and Julie Rix, deputies in the St. Clair County Sheriffs Department, made arrangements to buy crack cocaine from Ernest Holland. The deputies had made two purchases from Holland earlier in the day. While the two deputies were waiting in their car at the designated intersection, defendant approached and entered the vehicle. Defendant instructed Bailey and Nix to drive up the street and then return to the intersection. Bailey testified that when he asked defendant for the cocaine, defendant responded that he "didn't sell dope, that he was watching his boy's back." When the car got back to the intersection, defendant exited and Holland entered the vehicle. When the transaction was completed, the deputies drove away.

Defendant argues that the trial court abused its discretion by allowing the prosecution to elicit bad acts testimony from Bailey and Rix. Specifically, defendant asserts that while the disputed evidence is allowable under MRE 404(b)(1) to establish identity, reversal is nevertheless required because the probative value of this testimony was substantially outweighed by the danger of unfair prejudice. We disagree. Defendant's failure to raise a timely objection to the testimony means that we review this matter under the plain error rule. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have

occurred, 2) the error was plain . . . , 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice . . . that . . . affected the outcome of the lower court proceedings." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Further, if the three elements of the plain error rule are established, "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error """seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence."""" *Id.* at 763-764, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (quoting *United States v Atkinson*, 297 US 157, 160; 56 S Ct 391; 80 L Ed 555 [1936]).

The first line of testimony challenged by defendant is Bailey's testimony that he had interviewed defendant in the past. Because the testimony went to defendant's identity, and because the circumstances of the past interview were never specified, we conclude that defendant has failed to establish either the first or second prong of the plain error rule. Accordingly, defendant's claim based on this testimony has been forfeited. *Carines, supra* at 763.

The second line of challenged testimony is the deputies' testimony that they had accessed defendant's prior booking records at the drug task force office after their encounter with defendant. While we agree that the presentation of this testimony was plain error, MRE 403, we do not believe defendant has established that such error affected the outcome of the trial. *Carines, supra* at 771. Prior to testifying about accessing the records, both deputies testified that defendant was the man that had gotten into the back seat of their vehicle. It is clear from the testimony that these identifications were based on the contact the deputies had with defendant, and not on any supplemental information they received by accessing the booking records. Indeed, Bailey specifically testified that the records were not used "for identification purposes." Rather, Bailey stated that he looked up the records so that he "could fully complete [his] report with the middle name, date of birth, operator's code."[1] Therefore, we conclude that this issue is forfeited. *Id.* at 772. In any event, had defendant avoided forfeiture, in light of the overwhelming evidence presented against defendant, we would decline to reverse because the alleged error did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings. *Id.*

We also reject defendant's argument that reversal is warranted because the prosecution violated MRE 404(b)(2) by eliciting this testimony without giving notice to defendant before trial or without requesting permission from the trial court during trial. Defendant did not raise this objection below, and has failed to establish that any alleged error affected the outcome of the case. *Id.* at 763.

Defendant next argues that the prosecution engaged in prosecutorial misconduct in her closing argument by making an alleged "civic duty" argument to the jury, in which the prosecutor implicitly asked the jury to convict defendant to protect her own children from the illicit drug trade. Because defendant did not object to these comments when made, this Court's review of the issue is precluded in

[1] The clear import of Bailey's testimony is that he only need to look up defendant's middle name because he knew who defendant was when defendant got into the back seat of the car.

the absence of an objection unless a curative instruction could not have cured the error, or if this Court's failure to review this issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Accord *Carines*, *supra* at 763. Even assuming that the prosecution made a civic duty argument to the jury, we conclude that this claim is unpreserved because the prosecution's remarks were relatively brief and the trial court cured any error that may have occurred by giving the jury cautionary instructions that statements and arguments of counsel are not evidence and that they must not let sympathy or prejudice influence their decision when determining the guilt or innocence of defendant. See *People v Curry*, 175 Mich App 33, 45; 437 NW2d 310 (1989). Further, we conclude that the alleged error did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings. *Carines*, *supra* at 772.

Finally, defendant raises a three prong ineffective assistance of counsel argument. "Effective assistance of counsel is presumed. The defendant bears a heavy burden of proving otherwise." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). For a defendant to establish a claim of ineffective assistance of counsel, the defendant must show that (1) counsel's performance fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that he would have been acquitted but for counsel's performance. *Id.* Because defendant failed to raise this issue below by either moving for a *Ginther*[2] hearing or a new trial, our review is limited to mistakes apparent on the record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

First, defendant argues that he received ineffective assistance of counsel because defense counsel did not call Deidra Tucker and codefendant Ernest Holland as defense witnesses at trial. We disagree. After reviewing the record, we are not persuaded that counsel's decision not to call these witnesses was unreasonable. We see no reason to question counsel's decision on this matter of trial strategy. *People v Mitchell*, 454 Mich 145, 162; 560 NW2d 600 (1997). Furthermore, we note that defendant even stated on the record that he did not want to call Holland as a defense witness. Accordingly, we conclude that this first claim of ineffective assistance is without merit.

Second, defendant argues that he received ineffective assistance of counsel because defense counsel failed to object to the testimony of Bailey and Rix cited in defendant's first issue on appeal. Again, we disagree. Defendant fails to establish that there is a reasonable probability that he would have been acquitted had defense counsel objected to this testimony. *Rockey*, *supra* at 76. Even without this testimony, there was sufficient evidence to support defendant's conviction. Accordingly, we conclude that this ineffective assistance of counsel claim is without merit.

Finally, we reject defendant's third argument that his counsel's ineffectiveness is evidenced by counsel's failure to object to the prosecution's alleged civic duty argument. As we have previously observed, any alleged error was cured by the jury instructions given.

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[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Jeffrey G. Collins

I concur in result only.

/s/ Michael J. Kelly