STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NAKIA KWON CHAMPION,

Defendant-Appellant.

UNPUBLISHED
July 14, 1998

No. 201643
Recorder's Court
LC No. 96-004092

Before: Griffin, P.J. and Gribbs and Talbot JJ

PER CURIAM.

Following a jury trial, defendant was convicted 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). The trial court sentenced defendant to eight to twenty-five years' imprisonment for his armed robbery conviction and to two years' imprisonment for his felony-firearm conviction. Defendant's armed robbery sentence was then vacated and defendant was sentenced to eight to twenty-five years' imprisonment as a second habitual offender, MCL 769.10; MSA 28.1082. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court committed reversible error when it admitted "irrelevant bad act evidence contrary to MRE 404(b)." We disagree. To preserve an evidentiary issue for appellate review, a party must make a timely objection at trial specifying the same ground as is asserted on appeal. MRE 103(a)(1); *People v Considine*, 196 Mich App 160, 162; 492 NW2d 465 (1992). In this case, defendant failed to object to the testimony now challenged on appeal. Absent an objection, this Court may take notice of plain errors affecting substantial rights. MRE 103(d). Generally, a plain, unpreserved error may not be considered by this Court for the first time on appeal unless the error could have been decisive to the outcome. *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994).

Upon review of the record, we are not persuaded that the admission of the evidence now challenged on appeal was a plain error affecting substantial rights. First, the reference to defendant having called some of his "Club brothers" to pick him up and take them to robbery set up by a "Club

sister" (who worked at the record store in which the robbery took place), did not come within the purview of MRE 404(b)(1). While the evidence may have suggested defendant's affiliation with a particular group, it was not evidence of any specific crime, wrong, or act. Furthermore, it is not plain that the evidence was irrelevant or that its probative value was substantially outweighed by the danger of unfair prejudice. See MRE 401, 402, & 403. The prosecution's theory of the case was that one of the workers at the record store was also a member of the same gang as defendant. Use of such evidence was necessary to demonstrate that the robbery may have been an inside job. Accordingly, we decline to consider this issue on appeal. MRE 103(d); *Grant*, *supra* at 553.

Defendant next argues that his conviction must be reversed on the basis of two alleged instances of prosecutorial misconduct. We disagree. Specifically, defendant contends (1) that the prosecutor improperly suggested that defendant was possessed of a bad character due to his gang affiliations and (2) that he improperly denigrated defense counsel and shifted the burden of proof to defendant. Defendant did not object to these remarks at trial. Appellate review of improper prosecutorial remarks is generally precluded absent objection by counsel because the trial court is otherwise deprived of an opportunity to cure the error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). An exception exists if a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice. *Id.* On review of the entire record, we conclude that any prejudicial effect of challenged remarks would have been eliminated by a curative instruction and that no manifest injustice will result from our decision not to further consider this issue.

Next, defendant argues that the evidence presented at trial was insufficient to sustain his convictions. We disagree. When reviewing the sufficiency of the evidence in a criminal case, this Court must view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). Here, defendant does not contend that the prosecution failed to present sufficient evidence of any of the essential elements of armed robbery or felony firearm. Instead, he merely challenges the credibility of the two key prosecution witnesses. This argument is without merit. Credibility issues are for the trier of fact to resolve and this Court will not attempt to resolve them anew. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990). Because we will not upset the jury's determination regarding the credibility of the witnesses, we hold that the evidence presented at trial was sufficient to sustain defendant's convictions.

Finally, defendant argues that he was denied his right to effective assistance of counsel. We disagree. Because defendant failed to preserve this issue for review by moving for a new trial or evidentiary hearing in the trial court, our review is limited to errors by counsel evident in the existing trial record. *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989).

A criminal defendant attempting to prove that trial counsel was ineffective bears a heavy burden. E.g. *People v Leonard*, 224 Mich App 569, 592; 569 NW2d 663 (1997). To justify reversal on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-

303; 521 NW2d 797 (1994). In order to demonstrate that counsel's performance was deficient, the defendant must show that it fell below an objective standard of reasonableness under prevailing professional norms. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Strickland*, *supra* at 690-691; *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). To demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Strickland*, *supra* at 694; *Stanaway*, *supra* at 687-688.

Defendant contends that he was denied effective assistance of counsel when defense counsel failed to object to certain comments made by the prosecutor. In his closing argument, the prosecutor remarked that while defense counsel's "job" was to "establish a reasonable doubt about any of the elements of the crime or identity the case," his "job" was "to do justice." The prosecutor also reminded the jury that defendant was affiliated with a gang. Whether the remarks were proper or improper, we are not persuaded that defendant was prejudiced by counsel's failure to object to them. This is so because (1) any unfair prejudice resulting from the remarks would have been mitigated by the trial court's closing instructions to the jury with respect to the burden of proof and the arguments of counsel and (2) the evidence against defendant was overwhelming. Accordingly, defendant has not demonstrated a reasonable probability that the result of the proceeding would have been different if his counsel had objected to the prosecutor's remarks. *Strickland*, *supra* at 694; *Stanaway*, *supra* at 687-688.

Defendant also contends that he was denied effective assistance of counsel when defense counsel failed to request lesser included offense instructions. However, in doing so defendant fails to state which lesser included offense instructions defense counsel should have requested. Consequently, we are unable to fully appraise the merits of defendant's contention on appeal. In any event, we note that defendant has failed to overcome the presumption that defense counsel's decision not to request instructions on lesser included offenses constituted sound trial strategy. It is possible that defense counsel may have wished to force the jury into an "all or nothing" decision. Cf. *People v Rone (On Second Remand)*, 109 Mich App 702, 718; 311 NW2d 835 (1981). For the reasons stated, we deny defendant's request for relief on this claim of error.

Affirmed.

/s/ Richard A. Griffin
/s/ Roman S. Gribbs
/s/ Michael J. Talbot