STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CORNELIUS TERREL SHANNAN, a/k/a CORNELIUS TERRE SHANNON,

Defendant-Appellant.

UNPUBLISHED
November 22, 1996

No. 174662
LC No. 93-000297- FC

Before: Saad, P.J., and Griffin and M. H. Cherry,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of criminal sexual conduct in the first-degree (CSC), MCL 750.520b(1)(e); MSA 28.788(2)(1)(e), possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and habitual offender, second offense, MCL 769.11; MSA 28.1083. Defendant was sentenced to thirty to fifty years' imprisonment for the CSC and habitual offender convictions to be served consecutively to the mandatory two-year felony-firearm sentence. Defendant appeals as of right. We affirm defendant's convictions and remand for resentencing.

On appeal, defendant first contends that the trial court abused its discretion in admitting testimony that defendant informed the victim that he had served time for felonious assault. However, defendant failed to object to this evidence at trial. Therefore, the issue is unpreserved. MRE 103; *People v Grant*, 445 Mich 535, 546-547; 520 NW2d 123 (1994); *People v Dowdy*, 211 Mich App 562, 570; 536 NW2d 794 (1995). Because we are not persuaded that the error, if any, was decisive to the outcome of the case, we conclude that defendant has not established the prejudice necessary to avoid forfeiture of this unpreserved issue. *Grant, supra* at 547, 551, 553; see *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996). Even if the issue had been preserved, we conclude that the testimony that defendant told the victim immediately before the rape that he had just finished serving time for felonious assault was admissible under the "res gestae" exception to MRE 404(b)(1). See *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978); *People v Robinson*, 128 Mich App 338, 340;

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

340 NW2d 303 (1983); *People v Medina,* 100 Mich App 358, 361-362; 298 NW2d 648 (1980); *People v Castillo,* 82 Mich App 476, 479-480; 266 NW2d 460 (1978).

Next, defendant claims that the trial court abused its discretion in admitting evidence that the victim identified defendant in a photographic array. Defendant claims that a photographic array was improper because he could have been summoned for a corporal lineup. This issue is also unpreserved because defendant failed to object at trial. MRE 103; *Grant, supra* at 546-547; *Dowdy, supra* at 570. Again, because we are unpersuaded that the error, if any, was decisive to the outcome of the case, we conclude that defendant has not established the prejudice necessary to avoid forfeiture of this issue. *Grant, supra* at 547, 551, 553; see *Mateo, supra* at 12-13, 17. Even if the issue had been preserved, we conclude that the trial court did not clearly err in admitting the identification evidence. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993). Defendant was not in custody at the time of the photographic identification. In fact, the only way the victim could identify defendant before recognizing him in the photo array was by his knickname, "Corn." Defendant fails to demonstrate how this or any other factor made him "readily available" to be summoned to a live lineup. See *id.; People v Strand,* 213 Mich App 100, 104; 539 NW2d 739 (1995); *People v Derbeck,* 202 Mich App 443, 445; 509 NW2d 534 (1993); *People v Franklin*, 117 Mich App 393, 396; 323 NW2d 716 (1982).

Defendant's third argument contends that he was denied a fair trial because the prosecutor invited the jurors to place themselves in the role of a crime victim. However, defendant failed to object to the conduct he now claims improper. Accordingly, appellate review of this unpreserved issue is foreclosed unless the failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643; 521 NW2d 557 (1994); *People v Hoffman*, 205 Mich App 1, 21; 518 NW2d 817 (1994); *People v Vaughn*, 186 Mich App 376, 384; 465 NW2d 365 (1990); *People v Gonzalez*, 178 Mich App 526, 534-535; 444 NW2d 228 (1989). After reviewing the prosecutor's comments in context, we find no miscarriage of justice. *Gonzalez, supra* at 535; see *People v Fields*, 450 Mich 94, 107; 538 NW2d 356 (1995); *People v Gilbert*, 183 Mich App 741, 745-746; 455 NW2d 731 (1990); see also *People v Foster*, 175 Mich App 311, 317; 437 NW2d 395 (1989) overruled in part on other grounds 450 Mich 94; 538 NW2d 356 (1995) (reversal is not required if a timely objection could have cured the error). Contrary to defendant's characterization of the prosecutor's statement, the prosecutor did not try to invoke sympathy for the victim. Instead, the prosecutor responded to defense counsel's impeachment of the credibility of eyewitness testimony by asking the jury if they would accurately remember someone who robbed them at gunpoint. This hypothetical scenario bore little resemblance to defendant's crime and there was minimal chance of the jury's misconstruing the prosecutor's statements as a plea for sympathy.

Defendant further argues that the trial court erred in failing to sua sponte instruct the jury on lesser degrees of CSC. However, defendant failed to request these instructions or object to the jury instructions at trial. Therefore, this issue is unpreserved and will be reviewed only for the existence of manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993); *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995). We find no manifest injustice. Indeed, considering the proofs in this case, defense counsel may well have thought defendant had a

greater chance for acquittal if the jury was not given the option to convict defendant of lesser included offenses. See *People v Robinson*, 154 Mich App 92, 93-94; 397 NW2d 229 (1986); see generally, *People v Carr*, 141 Mich App 442, 452; 367 NW2d 407 (1985).

Next, defendant cites several examples in support of his claim that he was denied the effective assistance of counsel. However, there was no evidentiary hearing on this issue below. Therefore, appellate review is limited to the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). In *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994), our Supreme Court adopted the federal standard for determining whether a defendant has been denied effective assistance of counsel as set forth in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To establish ineffective assistance of counsel, defendant must prove that counsel's performance fell below an objective standard of reasonableness and that there is a "reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Pickens*, *supra* at 312, citing *Strickland*, *supra*, 691-692; see *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996); *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Eloby*, *supra*, 476; see *Unites States v Cronic*, 466 US 648, 658; 104 S Ct 2039; 80 L Ed 2d 657 (1984).

After a thorough review of the record, we conclude that defendant has neither sustained his burden of proving that counsel made a serious error that affected the result of trial nor overcome the presumption that counsel's actions were strategic. *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995); *People v Stanaway*, 446 Mich 643, 666, 687-688; 521 NW2d 557 (1994).

Finally, defendant contends that the sentencing court erred in considering the effect of possible disciplinary credits. We agree. In *People v Fleming*, 428 Mich 408, 425; 410 NW2d 266 (1987), our Supreme Court held that a sentencing court may not consider good-time credits to enhance a defendant's sentence. See also *People v Cannon*, 206 Mich App 653, 656; 522 NW2d 716 (1994); *People v Stack*, 156 Mich App 564, 566; 402 NW2d 7 (1986). Furthermore, in *People v Martinez (After Remand)*, 210 Mich App 199, 203; 532 NW2d 863 (1995), we held that:

> [p]ersons sentenced as habitual offenders are not eligible for parole before the expiration of the minimum sentence except by written permission of the sentencing judge or the judge's successor. MCL 769.12(3); MSA 28.1084(3). Therefore, they may not earn disciplinary credits. *People v Lincoln*, 167 Mich App 429, 431; 423 NW2d 216 (1987).

Accordingly, it is error requiring resentencing for a sentencing court to consider the effect of potential disciplinary credits when sentencing an habitual offender. See *Fleming*, *supra* at 428; *Stack*, *supra* at 566-567.

In the present case, the trial court stated that its sentence would "reflect" the effect of potential disciplinary credits. In addressing this issue in its order denying defendant's motion for a new trial, the

sentencing court did not deny that it considered prospective disciplinary credits in sentencing defendant. Instead, the sentencing court stated that its statements at sentencing were "vague and, at best, equivocal." The sentencing court proceeded to question the accuracy and wisdom of the principle that disciplinary credits may not be considered in sentencing habitual offenders. Under these circumstances, it appears that the sentencing court considered the effect of prospective disciplinary credits as a sentencing factor. Therefore, we remand this case for resentencing.

Defendant's convictions are affirmed. We remand for resentencing. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Richard Allen Griffin
/s/ Michael H. Cherry