

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
April 26, 1996

v

No.175603
LC No.93-010498

KEITH L. EPPES,
Defendant-Appellant.

Before: Doctoroff, C.J., and McDonald and J.B. Sullivan,* J.J.

PER CURIAM.

Following a jury trial in Detroit Recorder's Court, defendant was convicted of first degree murder, MCL 750.316; MSA 28.548, assault with intent to murder, MCL 750.83; MSA 28.278; and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to life imprisonment for first degree murder, twenty-five to forty years imprisonment for assault with intent to murder and two consecutive years' imprisonment for felony firearm. He filed this appeal as of right. We affirm.

Defendant's convictions arose out of the shooting death of a party store owner following an altercation with defendant at the party store. Defendant testified that the party store owner pulled a gun, and that defendant fired in self-defense. A worker in the store at the time testified that defendant was walking out of the store, turned around and started shooting at decedent. There was testimony that decedent was not carrying a gun.

Defendant first claims that he was denied effective assistance of counsel because, during direct examination, his counsel asked him if he had ever been arrested. Defendant replied that he had not, following which the prosecutor impeached defendant with a prior drug conviction. To prove ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not

*Former Court of Appeals Judge, sitting on the Court of Appeals by assignment pursuant to Administrative Rule 1995-6

functioning as an attorney as guaranteed under the Sixth Amendment. The defendant must overcome the presumption that the challenged action might be considered sound trial strategy. Second, the deficiency must be prejudicial to the defendant, which requires that counsel's errors were so serious as to deprive defendant of a fair trial. *People v LaVearn*, 448 Mich 207; 528 NW2d 721 (1995); *People v Hurst*, 205 Mich App 634; 517 NW2d 858 (1994). Where, as here, defendant did not move for a new trial or evidentiary hearing below, appellate review of a claim of ineffective assistance of counsel is limited to mistakes apparent on the record. *Hurst, supra*. This Court has held that even the intentional introduction by defense counsel of a prior criminal record does not constitute ineffective assistance of counsel where the record was introduced as a trial tactic. *People v Armstrong*, 100 Mich App 423; 298 NW2d 752 (1980).

In this case, defendant has not overcome the presumption that counsel's question consisted of trial strategy. It is possible that counsel wanted defendant to appear honest by admitting to a drug conviction, and it is possible that defendant advised counsel that he had no convictions and that counsel believed him. In any event, in light of the overwhelming evidence of guilt, it cannot be said that defendant would have been acquitted had his criminal record been excluded. *LaVearn, supra*.

Defendant next claims that the prosecutor was guilty of misconduct for eliciting testimony that several law enforcement agencies were searching for defendant in what amounted to an intense manhunt. We disagree. The test for prosecutorial misconduct is whether defendant was denied a fair and impartial trial. *People v Foster*, 175 Mich App 311; 437 NW2d 395 (1989). Where, as here, there is no objection at trial, appellate review of a claim of prosecutorial misconduct is foreclosed unless the prejudicial effect was so great that it could not have been cured by a cautionary instruction and failure to consider the issue would result in a miscarriage of justice. *People v Mack* 190 Mich App 7; 475 NW2d 830 (1991). It is well settled that evidence of flight is admissible and probative of consciousness of guilt, although evidence of flight by itself is insufficient to sustain a conviction. *People v Coleman*, 210 Mich App 1; 532 NW2d 885 (1995).

In this case, there was no objection to the prosecutor's line of questioning, and the jury was instructed that the fact that a person runs from a crime does not prove guilt. Defendant has not shown unfair prejudice and we conclude there was no miscarriage of justice.

Defendant also claims that the prosecutor impermissibly shifted the burden of proof to defendant by suggesting that defendant should have procured a police report of an alleged car-jacking in which he was the victim and because of which he carried a gun. We again note that there was no objection. A prosecutor may not suggest that a defendant must prove something because such an argument tends to shift the burden of proof, *Foster, supra*. However, in light of the lack of objection, the cautionary instruction to the jury that defendant was not required to prove his innocence or to produce any evidence whatsoever, and the overwhelming evidence of defendant's guilt, we conclude that the prosecutor's questioning of defendant, even if improper,

was harmless beyond a reasonable doubt. *People v Robinson*, 386 Mich 551; 194 NW2d 709 (1972).

Affirmed.

/s/ Martin M. Doctoroff

/s/ Gary R. McDonald

/s/ Joseph B. Sullivan