

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN P. UNGERLEIDER,

Defendant-Appellant.

UNPUBLISHED

December 13, 1996

No. 178244

LC Nos. 91-003692

89-014002

Before: Wahls, P.J., and Cavanagh and J.F. Kowalski,* JJ.

PER CURIAM.

Defendant was convicted by a jury of possession of over fifty grams and less than two hundred twenty-five grams of cocaine, MCL 333.7403(2)(a)(iii); MSA 14.15(7403)(2)(a)(iii), and subsequently by the trial court for violation of the probation imposed pursuant to an earlier conviction for possession of less than twenty-five grams of cocaine, MCL 333.7403(a)(2)(v); MSA 14.15(7403)(2)(a)(v). He was sentenced to twelve to twenty years' imprisonment on the possession of over fifty grams conviction, to be served consecutive to the two- to four-year sentence imposed for the possession of less than twenty-five grams conviction. Defendant appeals as of right. We affirm.

I

Defendant first claims that he was denied effective assistance of counsel. A defendant that claims that he has been denied the effective assistance of counsel must establish that (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), cert den ___ US ___; 115 S Ct 923; 140 L Ed 2d 802 (1995). Because defendant failed to move for

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

a *Ginther*¹ hearing or a new trial based on ineffective assistance of counsel, this Court's review is limited to errors apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

A

Defendant first argues that trial counsel was ineffective for allowing the police officer to testify about cocaine that had been destroyed in 1993 pursuant to department policy, before defendant's trial in this case. However, a review of the record reveals that counsel did not "allow" the admission of the testimony; rather, the trial court ruled that the testimony was admissible despite counsel's opposition. Counsel then chose not to raise the issue because, had he done so, the prosecutor would have informed the jury that defendant failed to appear for a 1991 pretrial proceeding and his whereabouts were unknown until he was arrested again in 1994. Evidence of flight may indicate consciousness of guilt. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). Counsel's decision to forgo inquiry into the destruction of the cocaine, and so avoid informing the jury of defendant's flight, was therefore a decision of trial strategy that we will not attempt to second guess. *People v Stewart (On Remand)*, ___ Mich App ___, ___; ___ NW2d ___ (Docket No. 196451, issued 9/17/96).

B

Defendant also contends that counsel was ineffective because he did not file a motion to dismiss challenging the legality of defendant's arrest. We disagree. Officer O'Connor's testimony was sufficient to establish that he saw defendant committing an assault and battery, *People v Bryant*, 80 Mich App 428, 433; 264 NW2d 13 (1978), and therefore the arrest was justified, MCL 764.15(1)(a); MSA 28.874(1)(a). Counsel was not required to argue a frivolous or meritless motion. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

C

Defendant next contends that his counsel was ineffective for failing to challenge a juror who has two brothers in the Detroit Police Department. Defendant has not demonstrated that this decision constitutes ineffective assistance of counsel. During voir dire, defense counsel elicited testimony from the juror that she understood the presumption of innocence and that she would not be biased in favor of the testimony of a police officer. Counsel's decision not to challenge the juror is a matter of trial strategy that we will not second guess on appeal. *Stewart, supra*.

D

Defendant asserts that his trial counsel inaccurately described the burden of proof during voir dire. After reviewing the transcript, we find no merit to this argument.

E

Defendant claims that he did not receive effective assistance of counsel because his trial counsel did not produce the arresting officers or the homeowner at 2027 Elm Street as witnesses. However,

because defendant offers no evidence as to what their testimony would have been, he has not shown how counsel's alleged failing prejudiced him. See *Pickens, supra*.

F

Finally, defendant contends that his counsel was ineffective for failing to object to the prosecutor's use of defendant's prior drug conviction for impeachment purposes. However, because the record clearly establishes that counsel specifically objected to any use of defendant's prior conviction, we cannot find that counsel was ineffective on that basis.

II

Defendant argues that the trial court violated MRE 609 when it allowed the prosecutor to use defendant's prior narcotics conviction to impeach defendant's testimony on direct examination. On direct examination, in response to defense counsel's question, defendant testified that he did not know what VCSA (violation of a controlled substance act) was. As soon as direct examination was concluded, the prosecutor indicated that she wanted to ask defendant about his prior conviction in order to demonstrate that he did know what VCSA meant. Over defense counsel's objection, the trial court allowed the prosecutor to proceed. On cross-examination, defendant admitted that he had in fact known the meaning of VCSA.

The decision whether to admit or exclude evidence is within the trial court's discretion. This Court will find an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there is no justification or excuse for the ruling made. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994). We find no abuse of discretion. MRE 609 was not intended to apply where evidence of prior convictions is offered to rebut specific statements of the defendant who testifies at trial. *People v Taylor*, 422 Mich 407, 414; 373 NW2d 579 (1985). In this instance, evidence of defendant's prior conviction was admissible to impeach defendant's testimony on direct examination. Cf. *id.* at 415-420. Accordingly, reversal is not required.

III

Next, defendant argues that the trial court did not determine during voir dire whether the jury could be fair and impartial. We disagree. The record reveals that the trial court asked probing questions concerning juror bias, including whether each juror had ever been a victim of a crime, was related to anybody who worked in law enforcement, or was close to anybody who was involved in drugs. The trial court also allowed both attorneys to ask questions of prospective jurors, and defense counsel asked jurors about the presumption of innocence, reasonable doubt, and what each juror would do in circumstances similar to those which defendant faced. The scope of voir dire is entrusted to the discretion of the trial court and will not be set aside absent an abuse of discretion. *People v Daniels*, 192 Mich App 658, 666; 482 NW2d 176 (1992). We find no abuse of discretion here.

Affirmed.

/s/ Myron H. Wahls
/s/ Mark J. Cavanagh
/s/ John F. Kowalski

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).