STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MELTON JACKSON,

Defendant-Appellant.

UNPUBLISHED
March 13, 1998

No. 195119
Genesee Circuit Court
LC No. 95-053094-FH

Before: McDonald, P.J., and Sawyer and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of unlawful delivery of less than 50 grams of cocaine. MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). He was sentenced to ten to thirty years' imprisonment pursuant to MCL 333.7413(2); MSA 14.15(7413)(2), the sentence enhancement statute. Defendant now appeals as of right.

Defendant argues that in instructing the jury, the trial court erroneously directed a verdict on an essential element of the crime, namely, that the substance found was cocaine, which was the subject of the parties' stipulation. However, defendant failed to object to the instructions given and acknowledged his acceptance of them. Failure to object to jury instructions waives error unless relief is necessary to avoid manifest injustice. MCL 768.29; MSA 28.1052, *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). Here, we find no manifest injustice because the instructions as a whole fairly presented the issues to be tried and sufficiently protected defendant's rights. *People v Davis*, 216 Mich App 47, 54; 549 NW2d 1 (1996).

Next, defendant alleges that he was denied effective assistance of trial counsel because counsel failed to object to the prosecution's motion to impeach defendant on his prior convictions. Trial counsel is presumed competent, and defendant has the burden of proving that the complained of conduct is not within trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). To prove ineffective assistance of counsel, defendant must prove that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for counsel's error, the outcome of the trial would have been different. *Id*. at 687-

688. Because no *Ginther*[1] hearing was held, our review is limited to any mistakes that are apparent on the record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996). We will not reverse a trial court's decision to allow impeachment by evidence of a prior conviction absent an abuse of discretion. *People v Hicks*, 185 Mich App 107, 110; 460 NW2d 569 (1990).

Defendant's prior convictions, which were retail fraud and breaking and entering, were admissible under MRE 609(a)(2), and were therefore subject to the probative value determination required by subrule (a)(2)(B). MRE 609(b); *People v Parcha*, ___ Mich App ___; ___ NW2d ___ (Docket No. 191381, issued December 30, 1997). Defendant did not challenge the admission of his prior convictions for impeachment purposes. On this record, where the prior convictions were dissimilar to the charged offense, we cannot find that, even if challenged, the trial court's decision to admit the convictions would have constituted an abuse of discretion because the probative value of the evidence outweighed the prejudicial effect. See *People v Bartlett*, 197 Mich App 15, 19-20; 494 NW2d 776 (1992). Therefore, because the court's decision would not have constituted an abuse of discretion by the trial court, defendant has failed to overcome the presumption of effective assistance of counsel because counsel is not required to make a groundless objection. *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995).

Third, defendant argues that he was denied a fair trial due to prosecutorial misconduct. On review, we examine the pertinent portion of the record and evaluate the prosecutor's remarks in context in order to determine whether the defendant was denied a fair and impartial trial. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). We note at the outset that defendant did not object to any of the instances of alleged misconduct. 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. *Stanaway, supra* at 687. 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.* After reviewing the record, we find that none of the comments made by the prosecutor improperly shifted the burden of proof, included facts not in evidence, or were improper civic duty arguments. Accordingly, a miscarriage of justice will not result by our failure to fully address the issue.

Fourth, defendant argues that he is entitled to a new trial based on newly discovered evidence, namely, the identity of the man who gave him the marked twenty dollar bill and the affidavit in which the man confesses to selling the cocaine to the undercover officer. We disagree. Pursuant to MCR 2.611(A)(1)(f), a new trial may be granted if there is newly discovered evidence. To merit a new trial on this basis, a defendant must demonstrate that the evidence (1) is newly discovered, (2) is not merely cumulative, (3) probably would have caused a different result, and (4) was not discoverable and producible at trial with reasonable diligence. *People v Miller (After Remand)*, 211 Mich App 30, 46-47; 535 NW2d 518 (1995).

Here, defendant has not met his burden of showing that the evidence probably would have caused a different result. First, the undercover officer testified that the person who sold her the cocaine was wearing certain distinguishable items of clothing. Defendant testified that he was wearing those exact articles of clothing. Moreover, although both defendant and a witness testified that Willie asked

defendant to change the twenty dollar bill, the jury found other witnesses' testimony more credible. Willie's averments in the affidavit similarly conflict with the testimony of other witnesses. In any event, based upon defendant's testimony that Willie is a drug addict, it is unclear how credible a jury would have found Willie to be. Therefore, we do not find that the evidence would have produced a different result. More significantly, we do not find that defendant exercised reasonable diligence to produce this evidence before trial. Both defendant and Jackson testified that they knew Willie because they saw him around Flint and the trailer park. Moreover, defendant testified that he knew Willie through someone named Michael. However, nothing in the record indicates that defendant made any attempt to find Willie. Accordingly, defendant is not entitled to a new trial based on newly discovered evidence.

Finally, defendant argues that he is entitled to be resentenced due to the court's numerous errors during sentencing. Defendant argues that the trial court's first error was to give him a harsher sentence than he otherwise would have received had he accepted the offered plea bargain rather than exercising his right to a jury trial. We disagree. Indeed, defendant, not the court, raised the issue of defendant's right to a jury trial. When given the opportunity to address the sentencing court, defendant apologized to the court for the money spent on the trial and stated that he would not have sought a jury trial if he could foresee the outcome.

The next three sentencing errors that defendant alleges concern the scoring of the sentencing guidelines, including the scoring of prior record variable 2 and offense variables 8 and 16. To the extent that defendant argued in his brief on appeal that PRV 2 was scored incorrectly because the court considered two convictions at which defendant was not represented by counsel, defendant conceded this argument to the prosecution during oral argument to this Court.[2] With regard to the sentencing court's scoring of the offense variables, defendant's challenge is limited to a challenge to the proportionality of his sentence because our Supreme Court recently held that "[a] putative error in the scoring of the sentencing guidelines is simply not a basis upon which an appellate court can grant relief." *People v Raby,* ___ Mich ___ ; ___ NW2d ___ (Docket No. 108010, issued February 5, 1998), slip op pp 12-13. We find that defendant's sentence of ten to thirty years' imprisonment is proportionate to the offense and the offender; therefore, the sentencing court did not abuse its discretion in sentencing defendant. *People v Milbourn,* 435 Mich 630, 636; 461 NW2d 1 (1990). The instant offense was defendant's second drug-related conviction. Additionally, as the sentencing court observed, defendant had four prior felonies, was under sentence for a conviction in another matter, was unemployed, and had a substance abuse problem that dated back thirteen years.

Defendant argues that the sentencing court last erred in failing to strike certain invalid convictions from the PSIR after it agreed on the record not to consider them.[3] We agree. MCL 771.14(5); MSA 28.1144(5), MCR 6.425(D)(3)(a); *People v Martinez (After Remand),* 210 Mich App 199, 202; 532 NW2d 863 (1995). But see *People v Yeoman,* 218 Mich App 406, 415-422; 554 NW2d 577 (1996). Therefore, we remand this case to the trial court to ensure that the challenged information is stricken from the PSIR.

Defendant's conviction is affirmed, but we remand this case to the trial court for the sole administrative purpose of amending the PSIR as directed. We do not retain jurisdiction.

/s/ Gary R. McDonald
/s/ David H. Sawyer
/s/ Joel P. Hoekstra

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

[2] In his brief on appeal, defendant argued that the sentencing court improperly considered his 10-7-82 conviction for attempted breaking and entering and his 1-18-87 conviction for breaking and entering, although the presentence investigation report in this case indicated that defendant was represented by counsel when these convictions were obtained.

[3] According to the sentencing transcript, the court agreed to disregard the following convictions of defendant:

> I did not consider the first three, 4-5-80, 7-28-80, 9-17-82, 1-14-87 on page 3; nor anything that's set forth from 1-22-88 to 9-26-90 on page 4; nor anything on page 5 from 9-26-90 to 2-6-91, because they don't tell me whether he was represented or not. And so that's all out.