

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY MAURICE SMITH,

Defendant-Appellant.

---

UNPUBLISHED

July 28, 2000

No. 212388

Jackson Circuit Court

LC No. 97-82611-FH

Before: Wilder, P.J., and McDonald and Doctoroff, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). The trial court sentenced defendant as a second habitual offender, MCL 769.10; MSA 28.1082, to three consecutive terms of five to thirty years' imprisonment. Defendant appeals as of right. We affirm.

At trial, an undercover police officer testified that defendant sold him crack cocaine on three occasions. Defendant claimed that he was misidentified as the person who sold the crack cocaine. On appeal, defendant first argues that the trial court erred in allowing as evidence a statement made by defendant during one of the drug transactions that he had sold \$1,200 of cocaine the previous week. Defendant argues that the evidence should have been precluded under MRE 404(b). Use of bad acts as evidence to show a defendant's character is excluded, except as allowed by MRE 404(b), so as to avoid the danger of conviction based on past misconduct. *People v Starr*, 457 Mich 490, 495; 577 NW2d 673 (1998).

Admissibility of evidence is reviewed for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). An abuse of discretion exists only when an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999). We find no abuse of discretion in this case.

In order to be admissible, other acts must (1) be offered for a proper purpose, (2) be relevant, and (3) have a probative value that is not substantially outweighed by its potential for unfair prejudice.

*People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994). A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *Starr, supra* at 496.

Defendant entered a general denial, and, in doing so, put at issue all the elements of the offense. *Starr, supra* at 501. The evidence was properly admitted to show intent and knowledge because these were essential elements of the crime. See *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998). The evidence was factually and legally relevant because it tended to make the legally consequential fact of intent and knowledge more probable. MRE 401. The statement's high probative value is not substantially outweighed by unfair prejudice. Rule 403 is not intended to prohibit prejudicial evidence, but only that which is unfairly prejudicial. *Crawford, supra* at 398. The statement is material to defendant's intent to sell cocaine and knowledge that he was selling cocaine. The evidence was relevant to the transaction for which defendant is on trial and was not admitted to show defendant's propensity to deal in illegal narcotics. *People v Mouat*, 194 Mich App 482, 484-485; 487 NW2d 494 (1992). We therefore conclude that the trial court did not abuse its discretion in allowing the evidence.

Defendant next argues that he was denied the effective assistance of counsel and a right to present a defense due to his trial attorney's failure to demand, on the record, the identification and production of the confidential informant used in the investigation and to demand on the record that defendant's shackles be removed during trial. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). To establish ineffective assistance of counsel, a defendant must demonstrate that trial counsel's performance was objectively unreasonable and that the defendant was prejudiced by counsel's defective performance. *People v Mitchell*, 454 Mich 145, 164; 560 NW2d 600 (1997). To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996).

Defendant has not shown on the record that he was deprived of the effective assistance of counsel. Defendant's claim is based on the argument that trial counsel failed to call a witness who would have supported his defense, but defendant has not shown any evidence that the informant's testimony would have supported the defense of mistaken identity. In order to prevail on a claim of ineffective assistance of counsel, a defendant must overcome the presumption that the challenged action or inaction was sound trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). Because defendant has not shown what the informant's testimony would have brought to the trial, that burden was not met here. The informant might have very well have corroborated the undercover officer's testimony and further inculpated defendant.

Further, as a matter of law, defendant cannot prevail on his claim that he was deprived a fair trial when he was restrained by shackles in the courtroom, unless defendant shows that any member of the jury saw his restraints. *People v Dunn*, 446 Mich 409, 425-426; 521 NW2d 255 (1994). Defendant also has not met this burden. To establish ineffective assistance of counsel, the defendant

must show that counsel's poor performance actually prejudiced him. *Mitchell, supra* at 164. Defendant cannot show that his wearing shackles was outcome determinative where he has not shown that the jury saw the shackles. *Dunn, supra* at 425-426.

Finally, defendant states, without supporting argument, that this Court should have granted his previous motion to remand for a *Ginther*<sup>1</sup> hearing. Defendant offers no new evidence to establish the need for a remand, but relies on substantially the same claims raised in his motion. This Court has held that its order on the merits denying a motion to remand bars further review by the Court when substantially the same issues are raised. *People v Wiley*, 112 Mich App 344, 346; 315 NW2d 540 (1981).

Finally, defendant argues that his sentence was disproportionate. Matters of sentencing are reviewed for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 654; 461 NW2d 1 (1990). A sentence constitutes an abuse of discretion if it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id.* at 636. The judicial sentencing guidelines do not apply to habitual offenders and thus they cannot be considered by this Court on appeal. *People v Gatewood*, 450 Mich 1025; 546 NW2d 252 (1996); *People v Yeoman*, 218 Mich App 406, 419; 554 NW2d 577 (1996).

We hold that defendant's sentence as an habitual offender was not disproportionate. The offenses in this case were serious. In the two years prior to the current offenses, defendant amassed a criminal record with numerous other convictions. Under these circumstances, we find no abuse of discretion.

Affirmed.

/s/ Kurtis T. Wilder  
/s/ Gary R. McDonald  
/s/ Martin M. Doctoroff

---

<sup>1</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).