STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERNEST PEREZ DIAZ,

Defendant-Appellant.

UNPUBLISHED
October 17, 1997

No. 195228
Recorder's Court
LC No. 95-008690

Before: Bandstra, P.J., and Murphy and Young, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). Defendant was sentenced to ten to twenty years in prison for his conviction, to be served consecutive to a sentence imposed in a previous, unrelated case. We affirm.

Defendant first contends that the trial court erred by refusing to allow defendant to call as a witness his codefendant, Miguel Martinez Aragowe, who had already pleaded guilty to his role in the drug sale prior to defendant's trial. We disagree. The trial court excluded Aragowe's testimony because defendant violated its order requiring the defense to give the prosecution a list of the witnesses it intended to call. A trial court has discretion to sanction parties for violation of its discovery order. MCR 6.201(I); see also *People v Lemcool (After Remand)*, 445 Mich 491, 499-501; 518 NW2d 437 (1994).

In this case, the prosecution indicated that it would be prejudiced if Aragowe were permitted to testify because there was no opportunity to review either the transcripts from Aragowe's plea proceedings or his presentence investigation report, thereby precluding effective cross-examination. Moreover, defendant has failed to show how Aragowe's testimony would have aided the defense. While defendant maintains that Aragowe could have shed light on the circumstances surrounding defendant's arrest, the testimony of defendant and the arresting police officers indicated that Aragowe was arrested and searched first. There is no indication that he was even aware of what was happening to defendant. On this record, we find no abuse of discretion. We also reject defendant's contention

that the trial court's decision violated his Sixth Amendment rights. See *Taylor v Illinois*, 484 US 400; 108 S Ct 646; 98 L Ed 2d 798 (1988).

Defendant also claims that the trial court's conduct prejudiced his right to a fair trial. Defendant failed to preserve this issue for our review by objecting to the trial court's allegedly prejudicial comments. *People v Sardy*, 216 Mich App 111, 117-118; 549 NW2d 23 (1996). In any event, we conclude that none of the trial court's comments or conduct pierced the veil of judicial impartiality so as to have deprived defendant of a fair trial. See *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988).

Defendant next argues that the trial court erred in allowing Officer Clyburn to testify about a radio message he received from Officer Hull. Defendant argues that the radio message was hearsay. We disagree. The radio message was not presented for its truth -- that defendant had just sold crack -- but for its effect on Officer Clyburn. The prosecutor, in asking about the radio message, was trying to discover why Officer Clyburn pursued the crack buyer and why he went to the bar where defendant was. *People v Lewis*, 168 Mich App 255, 267; 423 NW2d 637 (1988); *People v Flaherty*, 165 Mich App 113, 122; 418 NW2d 695 (1987). The trial court did not abuse its discretion in admitting the testimony. *People v McElhaney*, 215 Mich App 269, 280; 545 NW2d 18 (1996).

Defendant contends that the prosecutor asked a leading question when he asked Officer Clyburn if defendant was one of the men described in the radio message. Even assuming, arguendo, that the prosecutor's question was leading, there was no error requiring reversal because defendant has not shown any prejudice or that the prosecutor engaged in a pattern of eliciting inadmissible testimony. See *People v White*, 53 Mich App 51, 57-58; 218 NW2d 403 (1974).

Defendant next argues that he was denied a fair trial when the prosecutor was allowed to question defendant about his post-arrest, post-*Miranda*[1] warnings failure to make a statement to police, and then to argue that failure to make a statement to the jury as reflecting on defendant's credibility. We disagree. Defendant's own testimony created the impression that trial was his first opportunity to tell his version of the events leading up to his arrest. Moreover, defense counsel asked Officer Parker if anyone had taken a written statement from defendant. Defendant opened the door to the prosecutor's questions and comments. See *People v Allen*, 201 Mich App 98, 103-104; 505 NW2d 869 (1993).

Defendant also contends that he was denied a fair trial by the prosecutor's questions regarding defendant's name. According to defendant, while the prosecutor was trying to show that defendant tricked the police by using the name Ernest Perez instead of Ernest Diaz, the prosecutor, defense counsel, and the trial court were actually confused by the fact that, in Spanish, defendant would be referred to as "Mr. Perez." Since defendant failed to object to the prosecutor's questions, appellate review is precluded unless a cautionary instruction could not have cured the prejudicial effect, or unless failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Upon review of the record, we find no miscarriage of justice. Defendant did not testify at trial that the police mistakenly called him "Ernest Diaz" because they did not understand the Spanish-

speaking way of rendering names. Instead, defendant testified that the police confused him with another man named "Ernest Diaz." The prosecutor's questions, as well as his comments during closing argument, were therefore proper.

Defendant also raises several issues with respect to his sentencing. Defendant contends that the trial court incorrectly scored the sentencing guidelines. We reject defendant's argument because it is directed at the trial court's "calculation of the sentencing variable on the basis of [its] discretionary interpretation of the unchallenged facts," rather than the accuracy of the factual basis for the sentence. *People v Mitchell*, 454 Mich 145, 176; 560 NW2d 600 (1997). Since the sentencing guidelines do not have the force of law, "[t]here is no juridicial basis for claims of error based on alleged misinterpretation of the guidelines, instructions regarding how the guidelines should be applied, or misapplication of guidelines variables." *Id*. at 176-177. Further, defendant's minimum sentence is well within the minimum guidelines range and is therefore presumptively proportionate. *People v Price*, 214 Mich App 538, 548; 543 NW2d 49 (1995). Defendant has presented no unusual circumstances to overcome this presumption. *People v Sharp,* 192 Mich App 501, 505-506; 481 NW2d 773 (1992).

We reject defendant's argument that the trial court improperly considered defendant's Cuban nationality when imposing sentence. Although the trial court may not base its sentence upon an arbitrary classification such as race, religion or alienage, *People v Gjidoda,* 140 Mich App 294, 300-301; 364 NW2d 698 (1985), it is free to take into account the defendant's attitude toward his criminal behavior, his criminal history and his social and personal history. *People v Ross,* 145 Mich App 483, 495; 378 NW2d 517 (1985). The trial court's comments during sentencing, that defendant didn't like the United States and was "discrediting his new country," were directed toward defendant's criminal and personal history, not his nationality.

Finally, defendant argues that he was denied the effective assistance of counsel at trial. In order to prove a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). The defendant must also show that there is a reasonable probability that, but for the deficient performance, the result of the proceeding would have been different and that the result of the proceeding was fundamentally unfair or unreliable. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996); *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). Because defendant did not move for a new trial or evidentiary hearing on this basis below, and because this Court previously denied defendant's motion to remand for such a hearing, our review of this issue is limited to the record before us. *Barclay*, *supra* at 672.

The record does not support defendant's claim of ineffective assistance of counsel. First, defendant's claim that defense counsel failed to make "other objections" as necessary fails for lack of argument. *People v Sean Jones (On Rehearing),* 201 Mich App 449, 456-457; 506 NW2d 542 (1993). Second, defendant was not prejudiced by defense counsel's failure to present codefendant Aragowe's testimony because defendant has not shown that he was deprived of a substantial defense. See *People v Daniel,* 207 Mich App 47, 58; 523 NW2d 830 (1994). Third, while defense counsel did open the door to the prosecutor's questions about defendant's post-arrest silence, we conclude that in doing so she engaged in trial strategy to bolster defendant's claim that the trial was his first chance to

tell his side of the story. We will not second-guess decisions regarding trial strategy. *People v Kvam*, 160 Mich App 189, 200; 408 NW2d 71 (1987).

Finally, we reject defendant's claim that defense counsel deprived him of effective assistance by failing to "gain sufficient understanding of how names are used in Spanish to overcome prosecutorial suggestion that her client was lying about his name," because defendant used the officers' and the trial court's confusion in an attempt to characterize himself as an innocent victim of police railroading. In sum, we conclude that defendant has failed to show, on the existing record, that defense counsel performed so poorly at defendant's trial as to have deprived him of the representation guaranteed by the Sixth Amendment.

Affirmed.

/s/ Richard A. Bandstra
/s/ William B. Murphy
/s/ Robert P. Young, Jr.

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).