

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FRANK BLACKMON,

Defendant-Appellant.

UNPUBLISHED

December 4, 1998

No. 205013

Detroit Recorder's Court

LC No. 97-000017

Before: Griffin, P.J., and Gage and R. J. Danhof*, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and sentenced to lifetime probation. He now appeals as of right. We affirm.

Defendant argues that he received ineffective assistance of counsel because (1) defense counsel failed to move for a directed verdict based on the absence of a formal in-court identification, and (2) defense counsel elicited testimony regarding defendant's prior history of drug selling. We review a claim of ineffective assistance of counsel to see whether the defense counsel's representation fell below an objective standard of reasonableness, and whether there is a reasonable probability that but for the unprofessional errors the result of the proceeding would have been different. *People v Mitchell*, 454 Mich 145, 157-158; 560 NW2d 600 (1997). Because defendant has not moved this Court to remand for an evidentiary hearing on this issue, our review is limited to details contained in the record. *People v Ullah*, 216 Mich App 669, 684; 550 NW2d 568 (1996).

Assuming arguendo that defense counsel's failure to move for a directed verdict on the basis that no in-court identification of defendant had occurred constituted performance falling below an objective standard of reasonableness, this failure resulted in no prejudice to defendant because the trial court would have properly denied such a motion. Although defendant was never formally identified in open court by the two police officers who arrested him and testified against him at trial, the officers referred to defendant on numerous occasions during the course of their testimony. Their many

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

references to “the defendant,” in a context where it was clear that they were referring to the individual on trial, provided sufficient proof of defendant’s identity as the perpetrator to survive a motion for a directed verdict. *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967). Moreover, the trial judge, who had the benefit of observing the witnesses, found as a fact that during his testimony, one officer identified defendant in open court by pointing at him. Despite the trial judge’s comment that a motion for a directed verdict based on the absence of a formal identification would have given her “something to think about,” we are convinced that such a motion would properly have been denied, and that the comment merely represented advice to defense counsel, and perhaps an admonition to the prosecutor, intended to improve the practice of law in her courtroom. Absent any evidence in the record that defendant was not actually the individual the police observed and arrested, defendant has failed to establish any prejudice with regard to this aspect of his counsel’s performance. *Mitchell, supra*.

Nor can defendant establish that he suffered prejudice as a result of defense counsel’s introduction of testimony concerning his prior bad acts. We note that the trial judge specifically pointed out that the mere fact that defendant had sold drugs before did not mean he had sold them on this occasion. The trial judge explained that she found intent to deliver from the facts that the officers witnessed defendant, in a known drug trafficking area, engaging in what they thought was a narcotics transaction, and then found narcotics in his possession. Thus, even if the trial judge weighed the testimony regarding defendant’s prior drug sales, evidence that would not have been considered but for defense counsel’s error, we conclude that enough other evidence existed from which defendant’s intent to deliver could be inferred. Therefore, defendant’s claim of ineffective assistance must fail. *Mitchell, supra*.

Affirmed.

/s/ Richard Allen Griffin

/s/ Hilda R. Gage

/s/ Robert J. Danhof