

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH WAYNE HARWOOD,

Defendant-Appellant.

UNPUBLISHED

October 1, 1999

No. 213233

Kent Circuit Court

LC No. 96 06778 FH

Before: McDonald, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of resisting and obstructing a police officer, MCL 750.479; MSA 28.747, and operating a motor vehicle while visibly impaired, MCL 257.625(3); MSA 9.2325(3). Defendant was sentenced as a second habitual offender, MCL 769.10; MSA 28.1082, to one four-month jail term on both counts. Defendant appeals as of right. We affirm.

Defendant claims that the trial court erred in denying his motion for a new trial. A trial court's decision on a motion for new trial is reviewed for an abuse of discretion. *People v Hanna*, 223 Mich App 466, 476; 567 NW2d 12 (1997). We find no abuse of discretion.

Defendant claims that he is entitled to a new trial on the ground that evidence of defendant's prior arrest and conviction was inadmissible, under MRE 609 and MRE 404(b), and highly prejudicial. We find no error in the admission of this evidence. MRE 609(a) and MRE 404(b) set forth limitations on the use of prior conviction evidence at trial; however, neither rule prohibits the admission of such evidence where it is being offered for some other proper purpose. MRE 609(a); MRE 404(b); *People v VanderVliet*, 444 Mich 52, 64-65; 508 NW2d 114 (1993), modified 445 Mich 1205; 520 NW2d 338 (1994); *People v Taylor*, 422 Mich 407, 414; 373 NW2d 579 (1985). Further, "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." *Id.*

In this case, defendant raised the issue of his prior arrest and conviction on his own initiative. On direct examination, defendant testified that he delayed in responding to the police officers' commands during his arrest because was "not familiar with any of this." On cross-examination,

defendant further volunteered that he was not familiar with being arrested, thus opening the door to the prosecutor's questions about defendant's prior arrest and conviction.

Our courts have sanctioned the use of prior conviction evidence in response to issues raised by a defendant: *People v Johnson*, 382 Mich 632, 642; 172 NW2d 369 (1969) (cross-examination of the defendant, charged with second-degree murder, regarding details of a previous conviction for second-degree murder because the conviction was first raised by defense counsel on direct examination); *People v Armentero*, 148 Mich App 120, 134; 384 NW2d 98 (1986) (a defendant's statement on direct examination that he had no prior criminal convictions opened the door for the prosecutor to present evidence to rebut the statement); *People v Burse*, 62 Mich App 204, 212; 233 NW2d 232 (1975) (defendant was asked on direct examination if he had ever been convicted of a crime, and he answered in the negative, which opened the door for the prosecutor to show that the defendant's testimony was not true). In this case, defendant was not entitled to misrepresent himself as unfamiliar with arrest in order to provide the jury a logical explanation for his current charge of resisting an officer. Defendant opened the door to the prosecutor's questioning. We recognize that a cautionary instruction is generally advisable regarding the limited use of the evidence in this situation and that the evidence is subject to MRE 403 analysis. See *Taylor, supra* at 415. Here, defense counsel did not object to evidence; thus, the court had no opportunity to issue a cautionary instruction.

Defendant's claim of ineffective assistance of counsel is without merit. Because defendant opened the door to the prior conviction evidence, there was no error and, thus, no basis for objection. Counsel is not required to argue a frivolous or meritless motion. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). Further, where a defendant initiates testimony on the subject of his prior conviction, and there is no objection, counsel's action is a matter of trial strategy and will not support a claim of ineffective assistance of counsel. *People v Armstrong*, 100 Mich App 423, 425-426; 298 NW2d 752 (1980). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *People v Kvam*, 160 Mich App 189, 200; 408 NW2d 71 (1987).

Finally, defendant's claim that the "real error" was the prosecutor's failure to provide notice of MRE 404(b)(2), is also without merit. It was defendant who raised this issue by claiming he was not familiar with being arrested.

Affirmed.

/s/ Gary R. McDonald
/s/ Janet T. Neff
/s/ Michael R. Smolenski