

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID SHEARS,

Defendant-Appellant.

UNPUBLISHED
October 24, 2000

No. 217944
Kalamazoo Circuit Court
LC No. 98-001296-FH

Before: Fitzgerald, P.J., and Hood and McDonald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v), and was sentenced as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, to a prison term 1¹/₂ to fifteen years. He appeals as of right. We affirm.

Defendant first contends that he was denied effective assistance of counsel by his trial counsel's failure to identify and call known res gestae witnesses. To establish ineffective assistance of counsel, this Court must find (1) that counsel's performance was below an objective standard or reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674, on remand 737 F2d 894 (CA 11, 1984); *People v Toma*, 462 Mich 281, 296; ___ NW2d ___ (2000). In the absence of a hearing below, this Court's review of this issue is limited to errors apparent from the trial record. *People v Johnson*, 208 Mich App 137, 142; 526 NW2d 617 (1994).

Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, *People v Mitchell*, 454 Mich 145; 163 560 NW2d 600 (1997), and the burden is on the defendant to overcome this presumption. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Because defendant offered no information about the content of the proposed testimony of any potential witnesses, we are unable to determine whether the failure to call potential res gestae witnesses amounted to ineffective representation. Hence, defendant has failed to overcome the presumption that counsel's decision was a matter of trial strategy. Further, defendant

has failed to demonstrate how counsel's failure to call potential res gestae witnesses resulted in actual prejudice. *People v Murray*, 234 Mich App 46, 65; 593 NW2d 690 (1999).

Defendant also contends that the trial court erred by admitting prejudicial drug profile evidence at trial. Specifically, defendant challenges the prosecutor's reference to the area of the arrest as a high-volume drug area as well as eye witness police testimony that defendant's acts of walking up to a parked car, leaning into the passenger window, and placing his hands into the interior of the car is consistent with a routine drug transaction.

This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995). Drug profile evidence is defined as "a list of characteristics that those involved in the drug trade frequently display." *People v Hubbard*, 209 Mich App 234, 239; 530 NW2d 130 (1995). An example of such characteristics includes the following:

. . . drug dealers (1) "usually never" use their own vehicle, (2) use vehicles with improper license plates and registration; (3) usually travel in groups of two to six people; (4) rarely carry identification; (5) generally use their "street names" to communicate with each other; (6) seldom carry the trunk key of the vehicle they are driving; (7) typically walk away from their vehicle once stopped by the police; (8) usually carry large amounts of cash; (9) commonly keep drugs and money together; (10) commonly carry weapons; and (11) usually carry razor blades to break up rocks for crack cocaine. [*Id.* at 238.]

Referencing a particular area of town as a location known for its numerous drug transactions, and explaining a defendant's actions leading up to an arrest, do not meet the definition of drug profile evidence. Rather, such testimony merely provides an explanation for the officers' conclusion that illegal activity occurred. Hence, we find no abuse of discretion in the trial court's admission of the evidence.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Harold Hood

/s/ Gary R. McDonald