

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDDIE DEAN TRICE,

Defendant-Appellant.

UNPUBLISHED

April 14, 1998

No. 200802

Kalamazoo Circuit Court

LC No. 96-000902

Before: Hoekstra, P.J., and Jansen and Gage, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of possession of less than twenty-five grams of a controlled substance, cocaine, MCL 333.7403(2)(a)(v); MSA 14.15(7403) (2)(a)(v). Defendant was sentenced to three to fifteen years' imprisonment.

Defendant first argues that he was deprived of his right to a fair and impartial jury because of the trial court's requirement that the attorneys first consult with the judge before exercising peremptory challenges to excuse minority jurors. He contends that this requirement interfered with his freedom to exercise such challenges. Defendant did not object to the trial court's requirement at trial and therefore has not preserved this issue for our review. Plain, unpreserved errors will not be reviewed for the first time on appeal "unless the error could have been decisive of the outcome or unless it falls under the category of cases, yet to be clearly defined, where prejudice is presumed or reversal is automatic." *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994). Absent a showing of such prejudice, a defendant forfeits review of the unpreserved issue. *Id.* at 553-554.

There is no constitutional right to peremptory challenges, but failure to honor a peremptory challenge is error requiring reversal. *People v Juarez*, 158 Mich App 66, 71-72; 404 NW2d 222 (1987). However, in the present case, the trial court did not fail to honor any such challenges. The court's stated purpose in utilizing the challenged procedure was to avoid embarrassment to the prospective jurors and to the attorneys. The court also did not require counsel to provide race-neutral reasons for peremptory challenges of minority jurors in advance of an objection to such challenges. The court therefore did not violate the Equal Protection requirements for jury selection outlined in *Batson v*

Kentucky, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69, 79 (1986), and did not interfere with the freedom to exercise peremptory challenges. Defendant's argument that our holding in *Clarke v Kmart Corp*, 220 Mich App 381; 559 NW2d 377 (1996), requires reversal is not meritorious because in *Clarke* the trial court required the defendant to give race-neutral reasons for peremptory challenges to minority jurors before the plaintiff raised objections. *Id.* at 382-383. Accordingly, defendant has failed to establish the prejudice necessary to preserve an issue that was not raised before the trial court, and we decline to review it further. *Grant, supra* at 553-554.

Next, defendant argues that he was denied effective assistance of counsel. Defendant did not move for a new trial or an evidentiary hearing. Where a defendant does not so move, review may be granted only if the appellate record contains sufficient detail to support defendant's position. *People v Sharbnow*, 174 Mich App 94, 106; 435 NW2d 772 (1989). If so, review is limited to the record, and trial counsel is presumed to have provided effective assistance. *Id.* "[T]o find that a defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994).

At the beginning of trial, defendant's attorney reserved his opening statement. After the prosecution rested, the defense rested in turn without giving an opening statement, and then closing arguments were given. Defendant argues that his attorney's failure to make an opening statement left the jury with only one version of the facts, and only one viewpoint of the evidence, through two days of trial until closing arguments, at which time it was too late to repair the damage and defendant was, therefore, denied a fair trial. We disagree.

First, pursuant to MCR 6.414(B), an opening statement by a defendant is discretionary. Also, defense counsel gave an extensive closing argument in which he attacked the prosecution's case, specifically regarding the element of intent to deliver. Where a defense attorney makes an extensive closing argument during which he is afforded a full and fair opportunity to comment on the case and evidence presented, prejudice may not attach to the waiver of an opening statement. *People v Buck*, 197 Mich App 404, 413-414; 496 NW2d 321 (1992), rev'd in part on other grounds *People v Holcomb*, 444 Mich 853; 508 NW2d 502 (1993). Therefore, counsel's decision to forego an opening statement did not undermine defendant's chance for a fair trial, especially in light of the fact that the jury apparently agreed with defense counsel's closing argument regarding the intent to deliver and convicted on the lesser offense of mere possession. Moreover, a decision by an attorney to forego an opening statement is trial strategy, *In re Rogers*, 160 Mich App 500, 504; 409 NW2d 486 (1987), and this Court will not second-guess trial counsel in matters of trial strategy. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

Defendant also contends that he was denied effective assistance of counsel because his attorney failed to challenge the validity of the search warrant and its supporting affidavit. However, the record does not support a showing that defendant had a legally viable challenge to the validity of these instruments. Defendant thus cannot show that he suffered prejudice because

of any alleged error by his counsel. *Pickens, supra* at 338. Accordingly, defendant was not denied effective assistance of counsel.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Kathleen Jansen

/s/ Hilda R. Gage