STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROOSEVELT SUTTON,

Defendant-Appellant.

UNPUBLISHED
January 7, 1997

No. 184021
LC No. 9120-B

Before: Markey, P.J., and Michael J. Kelly and M.J. Talbot,* JJ.

PER CURIAM.

A jury convicted defendant Roosevelt Sutton of four counts of kidnapping, MCL 750.349; MSA 28.581, five counts of assault with a dangerous weapon, MCL 750.82; MSA 28.277, possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2)., and assault with intent to do great bodily harm, MCL 750.84; MSA 28.279. He was sentenced to fifteen to thirty years' imprisonment for the assault with intent to do great bodily harm conviction, ten to fifteen years' imprisonment for each of the five assault with a deadly weapon convictions, thirty to fifty years' imprisonment for each of the four kidnapping convictions, and a consecutive term of two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I.

First, defendant claims that the trial court erred by failing to instruct the jury on his defense of alibi. Upon de novo review, we disagree. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 593 (1996). There is no indication in the record that defendant requested such an instruction or objected to the instructions as given. When the jury is correctly instructed on the elements of the offense and the prosecution's burden of proof, as in the instant case, the trial court's failure to sua sponte instruct on alibi is not error warranting reversal. *People v Burden*, 395 Mich 462, 466-467; 236 NW 2d 505 (1975); *People v Duff*, 165 Mich App 530, 541-542; 419 NW 2d 600 (1987).

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

II.

Next, defendant claims that because there was only one black potential juror in the jury array, he was denied his constitutional right to have an impartial jury drawn from a fair cross-section of the community. We disagree. An objection to the jury array must be made prior to the jury being impaneled and sworn. *Hubbard, supra* at 465*; People v Dixon*, 217 Mich App 400, 404; 552 NW2d ___ (1996). In this case, the objection was too late and therefore the issue is waived. Cf. *Hubbard, supra;* accord *Dixon, supra;* see also *Harville v State Plumbing and Heating, Inc*, 218 Mich App 302, 305-319; 533 NW2d 377 (1996)..

III.

Next, defendant claims that he was denied a fair trial because the trial court improperly admitted hearsay testimony. We disagree. In the absence of a miscarriage of justice, no conviction shall be set aside in a criminal case on the basis of improperly admitted evidence. MCL 769.26; 28.1096. Although defendant alleged several instances of improperly admitted hearsay testimony, we find that admission of the testimony was not improper either because it did not constitute hearsay as it was not offered for the truth of the matter asserted or was offered as evidence of an individual's state of mind. MRE 801(c); MRE 803(3). Accordingly, the testimony was properly admitted, and we find no miscarriage of justice resulting from any of the trial court's evidentiary rulings. See *People v Fisher*, 449 Mich 441, 449-450; 537 NW 2d 577 (1995).

IV.

Last, defendant claims that he was denied effective assistance of counsel. In the absence of a *Ginther*[1] hearing, our review is limited to mistakes apparent on the record. *Dixon, supra* at 408; *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and prejudiced defendant, i.e., a reasonable probability exists that but for counsel's error, the result of the proceedings would have been different. *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995); *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Defendant alleges three grounds for his claim. First, defendant argues that his counsel was ineffective by failing to request an instruction on his primary defense of alibi. In light of the evidence against defendant, the fact that defense counsel argued and presented evidence in support of an alibi defense, and the fact that the jury was properly instructed on the prosecutor's burden to show beyond a reasonable doubt that defendant committed the crimes, an instruction on alibi "would add little to the jury's understanding of defendant's theory." *People v Seabrooks*, 135 Mich App 442, 451; 354 NW2d 374 (1984); see CJI2d 7.4. Because no reasonable probability exists that the result of the proceedings would have been different had the alibi instruction been requested and given, defendant was not denied effective assistance of counsel on this basis. *Stanaway, supra.*

Second, defendant argues that counsel was deficient in failing to make a timely objection to the racial composition of the jury array. Because the process for the selection of jurors, MCL 600.1304(2): MSA 27A.1304(2), is racially neutral, the process does not systematically exclude blacks from the jury array, and defendant failed to make allegations or present evidence that the process was susceptible of abuse. Moreover, no reasonable probability exists that a timely objection would have been successful or that the result of the proceedings would have been different had counsel raised this objection. *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979); cf. *Hubbard, supra* at 472-482.

Last, defendant argues that defense counsel was ineffective by failing to object to hearsay statements admitted at trial. We disagree. Defendant cites only one instance of alleged hearsay being admitted without objection. Given that the statement in question was not admitted for the truth of the matter asserted but instead for the effect it had on the listener, MRE 803(3), the statement is not hearsay, *Fisher, supra* at 449-450, and an objection would have been futile. We find no instance in the record where defense counsel's failure to object rose to the level of ineffective assistance of counsel. *Dixon, supra* at 408-409.

Affirmed.

/s/ Jane E. Markey
/s/ Michael J. Kelly
/s/ Michael J. Talbot

[1] *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973).