STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONNIE MONK,

Defendant-Appellant.

UNPUBLISHED
March 19, 1999

No. 190975
Recorder's Court
LC No. 94-012809 FC

Before: Murphy, P.J., and Gage and Zahra, JJ.

PER CURIAM

Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316; MSA 28.548, conspiracy to commit first-degree premeditated murder, MCL 750.157a; MSA 28.354(1), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to two concurrent terms of imprisonment for his "natural life" and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm in part and remand for modification of the judgment of sentence.

Defendant first contends that he was denied a fair trial due to systematic exclusion of African-Americans from the jury pool. However, because defendant did not object to the composition of the jury array at trial and expressed satisfaction with the jury as chosen, appellate review of this issue is waived. *People v Hubbard (After Remand)*, 217 Mich App 459, 465-467; 552 NW2d 493 (1996). Similarly, because the record contains no competent evidence showing the racial composition of defendant's jury or the jury array, defendant has failed to establish that defense counsel was ineffective for failing to object. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Defendant next argues that trial counsel was ineffective for failing to produce certain res gestae witnesses, failing to move to suppress defendant's statement to the police, failing to object to allegedly false rebuttal testimony, and failing to pursue an intoxication defense.

Although the testimony of two of the res gestae witnesses tended to suggest that the co-defendant was the gunman, none of the witnesses actually saw the shooting occur or could exonerate defendant. Furthermore, some of the testimony also implicated defendant in the conspiracy to murder

and contradicted defendant's claim that he was not at the scene. Therefore, defense counsel was not ineffective for failing to call these witnesses at trial.[1] *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996). Defendant's statement to police was partially exculpatory. Counsel's decision not to seek suppression of the statement and to address the issue of alleged coercion at trial was a matter of trial strategy that we will not second-guess. *Pickens*, *supra* at 325. Moreover, defendant has not demonstrated a reasonable probability that he would have prevailed on any motion to suppress. *Id*., at 312, 314. Next, defendant himself opened the door to the challenged rebuttal testimony concerning the alleged juvenile arrest involving the same police officer who took his statement regarding the shooting. An objection to the testimony would have been unsuccessful and, therefore, counsel was not ineffective for failing to object. See *People v Figgures*, 451 Mich 390, 390-400; 547 NW2d 673 (1996). Finally, counsel was not ineffective for failing to present an intoxication defense where it was defendant's position that he was not present at the crime scene. See *People v LaVearn*, 448 Mich 207, 213-215; 528 NW2d 721 (1995).

Defendant also claims that several instances of prosecutorial misconduct deprived him of a fair trial. However, appellate review of this issue is waived because there were no objections to the alleged misconduct at trial and any resulting prejudice could have been cured by a timely instruction. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Next, we find no merit to defendant's claim that the evidence was insufficient to support his convictions. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to find that the elements of the charged crimes were proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268; 380 NW2d 11 (1985). Credibility is a matter for the trier of fact to ascertain and this Court will not resolve it anew. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990).

Finally, we agree that a defendant sentenced to life imprisonment for conspiracy to commit first-degree murder is eligible for parole after fifteen years. See MCL 791.234(6); MSA 28.2304(6). Because the judgment of sentence indicates that defendant received identical sentences of "natural life" for the first-degree murder and conspiracy to commit first-degree murder convictions, we remand for modification of the judgment of sentence to reflect a sentence of "life," not "natural life," for the conspiracy conviction.

Affirmed in part and remanded for ministerial modification of the judgment of sentence. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Hilda R. Gage
/s/ Brian K. Zahra

[1] We also reject defendant's argument that the trial court erred in failing to sua sponte order the production of these witnesses when neither party decided to call them at trial.