

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EARL LEWIS WEBB,

Defendant-Appellant.

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UNPUBLISHED

November 26, 2002

No. 237217

Oakland Circuit Court

LC No. 2000-175464-FH

Before: Markey, P.J., and Saad and Smolenski, JJ.

MEMORANDUM.

Defendant appeals as of right his jury conviction on two counts of felonious assault, MCR 750.82. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that he was denied the effective assistance of counsel where counsel failed to object to a number of instances of hearsay evidence. To establish an ineffective assistance of counsel claim, defendant first must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms. The defendant must overcome a strong presumption that counsel's actions constituted sound trial strategy. Second, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994).

A hearsay objection to questioned testimony would have been futile. A large number of the allegedly objectionable statements were made by defendant, and are not hearsay. MRE 801(d)(2)(A). Other statements were commands to leave people alone, to leave the house, or to remain cool. Commands do not contain an assertion to be proven true or false and cannot be considered hearsay. *People v Jones (On Rehearing After Remand)*, 228 Mich App 191, 204; 579 NW2d 82, modified on other grounds 458 Mich 862 (1998). The trial court would have likely considered the remaining statements excited utterances, admissible under MRE 803(2). The statements made both before and after the attack were made while the witnesses were under the excitement caused by the startling event of the assaults. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). Counsel was not ineffective for failing to make fruitless objections. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

Defendant also asserts that he was denied his right to allocution where the court failed to comply with MCR 6.425(D)(2)(c). Defendant was asked if he wished to say anything before sentencing, and he responded that he was innocent. The court stated that the jury was instructed on self-defense and they ignored it. The court provided defendant with the opportunity to address the court. It was not required to specifically ask defendant if he had anything more to say. *People v Petit*, 466 Mich 624, 628; 648 NW2d 193 (2002). By his own words, defendant told the court the only thing he wanted to say. The court complied with the provisions of MCR 6.425(D)(2)(c).

Affirmed.

/s/ Jane E. Markey

/s/ Henry William Saad

/s/ Michael R. Smolenski