

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAMAR DOUGLAS CLINTON,

Defendant-Appellant.

UNPUBLISHED

November 25, 1997

No. 193486

Berrien Circuit

LC No. 95-002834-FC

Before: Smolenski, P.J., and MacKenzie and Neff, JJ.

PER CURIAM.

Defendant appeals as of right his conviction by a jury of second-degree murder, MCL 750.317; MSA 28.549. Defendant was sentenced as a third felony offender, MCL 769.11; MSA 28.1083, to twenty to fifty years' imprisonment. We affirm.

I

Defendant argues that only one witness, Bobbie Bruner, provided evidence that defendant participated in the drive-by shooting in this case, and that Bruner's testimony was highly questionable. Defendant is essentially arguing that his conviction was against the great weight of the evidence.

An objection going to the weight of the evidence can only be raised by a motion for a new trial before the trial court. *People v Bradshaw*, 165 Mich App 562, 565; 419 NW2d 33 (1988). Here, defendant did not file such a motion at the trial court level. Accordingly, this issue has not been preserved for appellate review.

II

Next, defendant argues that he was denied the effective assistance of counsel because his attorney failed to introduce evidence that police discovered Bruner in possession of drugs the night of the offense, and because counsel did not call Melvin Clinton, defendant's brother and the admitted shooter, to testify regarding Bruner's involvement with drugs. We disagree.

Counsel is presumed to have provided effective assistance and the defendant bears a heavy burden to prove otherwise. To establish a claim of ineffective assistance of counsel, a defendant must demonstrate both that counsel's performance fell below an objective standard of reasonableness and that this deficient performance prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-302; 521 NW2d 797 (1994).

Decisions regarding which witnesses to call are at the heart of trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). A failure to call witnesses can constitute ineffective assistance of counsel only if the failure deprives the defendant of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). In the present case, the alleged drug evidence involving Bruner was discussed immediately before jury selection, and the parties stipulated that it would not be admitted.¹ Also, defense counsel stated at sentencing that it was a strategic decision not to call Melvin Clinton to testify. Our review of the record reveals that these decisions did not deny defendant a substantial defense; therefore, we will not second-guess these tactical decisions made by defense counsel.

III

Defendant next argues that he was denied his state and federal constitutional right to an impartial jury because the array of potential jurors was drawn by procedures which systematically exclude a representative proportion of minority residents in Berrien County. Defendant claims, therefore, that the county's pool of potential jurors did not represent a fair cross section of the community where the crime was committed. In order to preserve a challenge to a jury array, a defendant must make an objection to this effect before the jury has been impaneled and sworn. *People v Hubbard (After Remand)*, 217 Mich App 459, 465; 552 NW2d 593 (1996). Here, defendant did not raise an objection to the jury array before the jury was impaneled and sworn or at any time during trial. Accordingly, defendant has forfeited appellate consideration of this issue. *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996).

Defendant further asserts that the requirement of preserving this issue is impractical and burdensome on assigned counsel because it is beyond the capability or resources of individual defendants to conduct the necessary study to effectively challenge a jury selection system. However, defendant presents no evidence to support his bald assertion that minorities were systematically excluded from the jury pool. Without more, this issue is unpreserved. *Id.*

Affirmed.

/s/ Michael R. Smolenski
/s/ Barbara B. MacKenzie
/s/ Janet T. Neff

¹ Insofar as defense counsel stipulated to the non-admission of evidence surrounding Bruner's alleged drug activity, defendant's claim that the prosecutor withheld exculpatory evidence is without merit.