

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY JOVAN GIVENS,

Defendant-Appellant.

UNPUBLISHED

July 30, 1999

No. 207473

Berrien Circuit Court

LC No. 96-505005-FC

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

PER CURIAM.

Defendant was charged with first-degree felony murder, MCL 750.316(b); MSA 28.548(b), assault with intent to commit murder, MCL 750.83; MSA 28.278, and two alternate counts of first-degree criminal sexual conduct, either by force or coercion or in the commission of the felony of first-degree home invasion, MCL 750.520b; MSA 28.788(2). After a jury trial, defendant was convicted on all four counts. Because counts three and four were alternate theories for elevating the same criminal sexual conduct to first degree, the trial court entered an order of nolle prosequi with respect to count four. The trial court sentenced defendant to three concurrent life sentences for each of the remaining three counts, with defendant's sentence for first-degree felony murder to be served without the possibility of parole. Defendant appeals of right. We affirm.

I.

Defendant first contends that the trial court erred in allowing the prosecutor to admit evidence that at the time the current offense was committed defendant was on probation for unlawfully driving away an automobile. A defendant can waive appellate review of the admission of bad acts evidence by failing to timely object, by stipulating to its admission, or by voluntarily injecting into the proceedings information regarding his prior bad acts. *People v Yarger*, 193 Mich App 532, 539; 485 NW2d 119 (1992); *City of Troy v McMaster*, 154 Mich App 564, 570-571; 398 NW2d 469 (1986). A review of the record indicates that defendant did not preserve this issue with a timely objection. Furthermore, defendant intentionally injected this issue into the trial apparently to illustrate that he had engaged in no prior incidents of violent behavior. Defendant has therefore waived our review of this issue. *McMaster, supra*.

II.

Defendant next argues that his trial counsel rendered ineffective assistance in failing to object to the admission of evidence regarding defendant's probationary status and in inadequately researching and preparing for trial. To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Failure to move for a new trial or evidentiary hearing in the trial court forecloses appellate review unless the record contains sufficient detail to support the defendant's claims; if so, review is limited to the record. *People v Armendarez*, 188 Mich App 61, 74; 468 NW2d 893 (1991).

Defendant first takes issue with defense counsel's failure to object to admission of evidence that at the time of the underlying crimes he was on probation. The Supreme Court has explained that other bad acts evidence is admissible when (1) offered for a proper purpose under MRE 404(b)(1); (2) relevant; and (3) the probative value of the evidence is not substantially outweighed by a danger of unfair prejudice. *People v Crawford*, 458 Mich 376, 385; 582 NW2d 785 (1998). The prosecutor questioned defendant's probation officer regarding defendant's probationary status in an effort to elicit evidence tending to show that defendant had the opportunity to have committed the underlying crimes, a proper purpose under MRE 404(b)(1). The prosecutor's inquiries revealed that, as a condition of defendant's probation for unlawfully driving away an automobile, defendant wore an electronic tether. An information readout from defendant's tether indicated that defendant had left his home for approximately 2.5 hours in the morning of the date of the crimes. Further questioning revealed that defendant had not reported to school during this time period. This information tended to show that defendant could have committed the crimes, and its introduction did not substantially, unfairly prejudice defendant, especially in light of defendant's own subsequent injection of evidence regarding his probationary status. Because the evidence was properly admitted, defense counsel was not ineffective in failing to object. *People v Flowers*, 222 Mich App 732, 737-738; 565 NW2d 12 (1997) (defense counsel not ineffective for failing to bring futile motion).

Defendant next argues that defense counsel failed to investigate and prepare an adequate defense because he did not investigate defendant's probation violation arraignment hearing. On the fourth day of trial, defense counsel informed the trial court that he had learned only the day before that defendant had previously pleaded guilty to the instant offenses as a part of his guilty plea to a probation violation. Because the trial court indicated that evidence of defendant's admissions would be permitted for impeachment purposes, defense counsel indicated he would not call defendant to testify. Defendant therefore concludes that defense counsel "based his entire trial strategy on sabotaging the statement made by [defendant] to authorities not knowing or realizing that another admission was placed on the record at [defendant]'s probation violation hearing."

Even assuming defense counsel's performance in this respect was objectively unreasonable, however, a review of the existing record does not suggest how, absent counsel's alleged error, a different outcome might have ensued. *Pickens*, *supra* at 312. Nowhere in the trial transcript or his appellate brief does defendant assert an alternate theory that defense counsel should have proffered to

create a reasonable doubt concerning defendant's guilt. The only thing that it appears defendant would have done differently is not have presented to the jury in his opening statement a theory that would place importance on the testimony of defendant. Moreover, the trial court questioned defendant at length regarding his decision not to testify, during which discussion defendant told the court that defense counsel had explained to him the pros and cons of testifying in his own defense, that he understood his prior statements could be used against him if he testified to anything different, and that he fully understood his right to testify in his own defense and was choosing to waive that right. Given these circumstances and the other evidence presented to the jury, we cannot conclude that defense counsel's alleged error deprived defendant of a fair trial. *Pickens, supra* at 303.

III.

Defendant also claims that the trial court erred in admitting over his objection an autopsy photograph of the deceased victim. The admission of photographs is a discretionary decision of the trial court, and is therefore reviewed by this Court for an abuse of that discretion. *Flowers, supra* at 736. Defendant objected to the admission of the deceased victim's autopsy photograph on the basis that under MRE 403 it was unduly prejudicial. The prosecutor explained that she intended to offer the photograph to assist those who had first arrived at the crime scene in testifying that, at the time they arrived, the blood on the murder victim's face had already dried and appeared much as it does in the photograph. The prosecutor submitted that this presentation was important to counter the theory espoused by the defendant in opening argument that defendant, whose sperm was identified inside the deceased victim, had engaged in consensual intercourse with the victim early in the day when he came to her house to purchase the drugs that were found in his possession, but that the victim was alive when he left and must have been killed by someone else later in the day. Because the photograph thus had significant probative value and was not offered merely to arouse the jury's sympathies or prejudices, we conclude that its gruesomeness alone did not substantially outweigh its probative value. *People v Mills*, 450 Mich 61, 76-80; 537 NW2d 909, modified in part on other grounds 450 Mich 1212 (1995). The trial court did not abuse its discretion in admitting the photograph. *Flowers, supra*.

IV.

Lastly, defendant contends that he "was denied equal protection under the law, and was thus deprived of a fair trial, because he was an African-American and the jury panel was almost entirely all white, save one." A challenge to the jury array is timely if it is made before the jury has been impaneled and sworn. *People v Hubbard (After Remand)*, 217 Mich App 459, 465; 552 NW2d 493 (1996). Defendant failed to object to the composition of the venire panel or the jury selection system before the jury that convicted him was selected and sworn. Therefore, the issue is not properly before this court. *Id.*; *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996). Furthermore, defendant expressed satisfaction with the jury. Because nothing in the trial record supports a conclusion that defendant's expression of satisfaction with the jury was a necessary part of trial strategy designed to avoid alienating prospective jurors, defendant's indication of satisfaction made at the close of voir dire likewise waives any appellate review. *Hubbard, supra* at 466-467.

Finally, even after briefly considering defendant's claim, we find it to be wholly without merit. The Sixth Amendment guarantees an opportunity for a representative jury by requiring that jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to constitute a fair cross section of the community. *Hubbard, supra* at 472-473. Defendant alleges only that he was denied a fair cross section of Berrien County in his petit panel, apparently on the grounds that there was only one African American member of defendant's petit jury. Defendant makes no allegations about the rest of the venire or the system by which it was selected. Because the fair cross-section requirement does not entitle defendant to a petit jury that mirrors the community and reflects the various distinctive groups in the population, defendant's allegation is without merit. *Id.* at 472.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Joel P. Hoekstra

/s/ Hilda R. Gage