

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MOSES J. PASSMORE,

Defendant-Appellant.

UNPUBLISHED
December 1, 2000

No. 216055
Wayne Circuit Court
LC No. 98-002822

Before: Cavanagh, P.J., and Talbot and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction for armed robbery, MCL 750.529; MSA 28.797. Defendant was sentenced to one year and one day to ten years' imprisonment. We affirm.

Defendant first argues on appeal that he was deprived of his right to due process and to a fair trial when the trial court gave a grossly inadequate instruction to the jury on the law of alibi. We disagree. Because defendant specifically approved of the alibi instruction by expressly stating that he was satisfied with the jury instructions as given, defendant has waived this issue on appeal, thereby extinguishing any error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). When a defendant waives his rights, as opposed to forfeiting them, there is no "error" to review. *Id.* at 219.

Defendant's second issue on appeal is that his trial attorney failed to provide him with the effective assistance of counsel. We disagree. Because defendant failed to preserve this issue for appeal by moving for a new trial or an evidentiary hearing before the trial court, our review is limited to mistakes apparent on the existing record. *People v Noble*, 238 Mich App 647, 661; 608 NW2d 123 (1999). To establish a denial of effective assistance of counsel, a defendant must demonstrate that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that the representation so prejudiced the defendant that, but for counsel's error, the result of the proceedings would have been different. *Id.* at 662 (citing *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994)). Furthermore, "[e]ffective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *Id.* at 661-662.

Defendant's claim of ineffective assistance of counsel arises out of two alleged errors by trial counsel that defendant claims so prejudiced him that he did not receive a fair trial. The first alleged error defendant claims prejudiced him was trial counsel's failure to draft an adequate proposed jury instruction regarding alibi and submit it to the trial court. However, it appears from the record that jury instructions were submitted to the trial court by both the prosecution and defense counsel and given to the jury. Moreover, the standard instruction on alibi was part of the instructions read to the jury prior to deliberations. Because the alibi instruction, as given, was adequate, fairly presented the issues tried, and sufficiently protected defendant's rights, a claim of ineffective assistance of counsel cannot be sustained. The jury was adequately instructed on alibi; therefore, defendant has failed to establish that trial counsel's performance was below an objective standard of reasonableness under prevailing professional norms. Thus, defendant has also failed to show that his trial counsel's failure to draft and submit an instruction on the law of alibi caused him such prejudice that, but for counsel's error, the outcome of the trial would have been different. See *People v Raper*, 222 Mich App 475, 483-484; 563 NW2d 709 (1997).

Defendant next claims that trial counsel prejudiced him by failing to object to the "minimalist" instruction regarding alibi evidence given to the jury. This argument is also without merit. Defense counsel is not required to raise meritless objections. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997). Because the instruction, as given, was adequate, fairly presented the issues tried, and sufficiently protected defendant's rights, defendant was not prejudiced by trial counsel's failure to object. For the same reason, defense counsel's failure to object was not deficient or below an objective standard of reasonableness under prevailing professional norms. Thus, defense counsel's failure to object to a proper jury instruction regarding alibi did not constitute ineffective assistance of counsel. *Id.* Accordingly, defendant failed to overcome the presumption that he received effective assistance of counsel.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael J. Talbot
/s/ Patrick M. Meter