

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAHJEAH LEMERE WISE,

Defendant-Appellant.

UNPUBLISHED

April 4, 1997

No. 185437

Genesee Circuit Court

LC No. 95-051588-FC

Before: McDonald, P.J., and Griffin and Bandstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, possession of a firearm during the commission of a felony, MCL 227b; MSA 28.548, and being a felon in possession of a firearm, MCL 750.224f; MSA 28.421(6). He was sentenced to two years' imprisonment for the felony-firearm conviction, consecutive to concurrent sentences of thirty to fifty years' imprisonment for the second-degree murder conviction and three to five years' imprisonment for the felon in possession of a firearm conviction. Defendant appeals as of right. We affirm but remand for correction of the judgment of sentence.

On appeal, defendant first contends that the trial court abused its discretion in denying defendant's motion for a mistrial. We disagree. A mistrial is to be granted only for an irregularity that is so prejudicial to defendant's rights that defendant is denied a fair trial. *People v Cunningham*, 215 Mich App 652, 654; 546 NW2d 715 (1996); *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). A trial court's grant or denial of a mistrial will not be reversed on appeal absent an abuse of discretion. *Haywood, supra* at 228; *People v McAlister*, 203 Mich App 495, 503; 513 NW2d 431 (1994).

In testifying for the prosecution, Eugene Gill, a witness to the shooting, stated that he had only a "glancing look" at the gunman and admitted to misidentifying the gunman at a corporal lineup. He did not identify defendant as the gunman. Although Gill was discharged following his testimony, he was recalled by the prosecution after a recess. When Gill testified that, upon reflection, he now knew "who did it," defense counsel objected. Before Gill was able to name the gunman, the trial court sustained

defendant's objection. Thereafter, the trial court denied defendant's motion for a mistrial and instructed the jury to ignore Gill's testimony on recall. Further, the court offered to issue a cautionary instruction regarding the incident.

We find no abuse of discretion in the trial court's denial of defendant's motion for a mistrial. Because Gill never testified regarding the person whom he thought "did it" and because the jury was instructed to disregard the complained of remarks, we conclude that defendant was not prejudiced. Additionally, the evidence against defendant was overwhelming, so there is no reasonable likelihood that the error, if any, affected the result of trial. See *People v Hubbard*, 209 Mich App 234, 243; 530 NW2d 130 (1995), quoting *People v Hall*, 435 Mich 599, 609, n 8; 460 NW2d 520 (1990).

Next, defendant claims that the trial court committed error requiring reversal by failing to order a separate trial of the felon in possession of a firearm charge. Defendant argues that had severance been granted, the jury would not have learned that defendant was on parole at the time of the alleged murder. However, defendant did not request severance below. Therefore, this issue is unpreserved. See *People v Grant*, 445 Mich 535, 546-547; 520 NW2d 123 (1994); *People v Connor*, 209 Mich App 419, 422; 531 NW2d 734 (1995); cf. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994) (failure to move for a separate trial precludes appellate review of defendant's claim that he should not have been tried with his codefendants). Defendant has not established the prejudice necessary to avoid forfeiture of this unpreserved issue. *Grant, supra* at 551, 553; *People v Mayfield*, ___ Mich App ___, ___ NW2d ___ (Docket No. 178956, issued 2/21/97).

In the present case, the prosecutor introduced evidence that defendant was on parole from a felony conviction only to establish a requisite element of the felon in possession of a firearm offense. *People v Tice*, 220 Mich App 47, 54; ___ NW2d ___ (1996). The prosecutor did not emphasize the conviction in closing argument, divulge the details of the prior conviction, or imply that the prior conviction evidenced defendant's criminal propensity. Furthermore, the trial court instructed the jurors not to consider the prior felony conviction in determining whether defendant is guilty of the crimes charged. Under these circumstances, defendant suffered no prejudice because his right to a fair trial was adequately safeguarded. Accord *United States v Valentine*, 706 F2d 282 (CA 10, 1983) (defendant was not prejudiced by the trial court's refusal to sever felon in possession of weapon charge where the prior conviction is not unduly emphasized at trial); see also *United States v Gilliam*, 994 F2d 97 (CA 2, 1993) (evidence of defendant's prior conviction was not unduly prejudicial where the court issues a curative instruction); *United States v Daniels*, 770 F2d 1111, 1118-1119 (DC Cir, 1985) (separate trial of ex-felon counts is not required where the trial court demonstrates a sufficiently scrupulous regard for defendant's right to a fair trial); *United States v Roe*, 495 F2d 600, 604 (CA 10, 1974) (trial court did not abuse its discretion in refusing to grant severance where a limiting instruction regarding the prior conviction adequately protected defendant against prejudice).

Finally, defendant argues that the trial court erred in ordering that the felony-firearm sentence would not begin to run until defendant served the maximum sentence in the convictions for which he was on parole. We agree. In *Wayne Co Prosecutor v Dep't of Corrections*, 451 Mich 569, 584; 548 NW2d 900 (1996), our Supreme Court overruled *People v Young*, 206 Mich App 144; 521 NW2d

340 (1994), and held that the “remaining portion” clause of MCL 768.7a(2); MSA 28.1030(1)(2) requires the offender to serve at least the combined minimums of his sentences, plus whatever portion of the earlier sentence that the parole board may require.

Defendant’s convictions are affirmed. We remand with instructions to the trial court to amend defendant’s judgment of sentence consistent with this opinion. We do not retain jurisdiction.

/s/ Gary R. McDonald

/s/ Richard Allen Griffin

/s/ Richard A. Bandstra