STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AARON CHRISTOPHER BRANCH,

Defendant-Appellant.

UNPUBLISHED
August 1, 1997

No. 192396
Lenawee Circuit Court
LC No. 95-006469-FC

Before: Doctoroff, P.J., and MacKenzie and Griffin, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of carrying a dangerous weapon, MCL 750.226; MSA 28.423, and two counts of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279. Defendant was sentenced to a prison term of 5 to 7½years on the weapons conviction, and received sentences of 10 to 15 years' imprisonment for each of the assault convictions. From the convictions and sentences, defendant appeals as of right. We affirm.

While an inmate at the Gus Harrison Correctional Facility in Adrian, defendant was accused of participating in the February 3, 1995, assault on two prison officers. For his role in that incident, defendant was charged with one count of possession of a dangerous weapon, one count of assault with intent to murder, and one count of assault with intent to do great bodily harm. Defendant's trial on these charges was joined with the trials of two other inmates who were charged with offenses arising out of the same incident. The jury found defendant guilty on the weapons charge and guilty of two counts of assault with intent to do great bodily injury less than murder.

On appeal, defendant first claims that error occurred when his religious beliefs were interjected into evidence. We disagree. We review a challenge to the admission of certain evidence for an abuse of discretion. *People v Phillips*, 217 Mich App 489, 497; 552 NW2d 487 (1996). Defendant asserts error in the prosecutor's questioning of a witness regarding the religious affiliation of defendant and the two codefendants. The witness indicated that all three were members of the Nation of Islam. The prosecutor's line of questioning was directed at establishing a motive for the assaults on the two officers

who had disciplined an inmate who was being recruited by the Nation of Islam members just hours prior to the assaults.

Defendant claims that the introduction of his religious affiliation was improper as a violation of MCL 600.1436; MSA 27A.1436. That statute provides: "No person may be deemed incompetent as a witness, in any court, matter or proceeding, on account of his opinions on the subject of religion. No witness may be questioned in relation to his opinions on religion, either before or after he is sworn." MCL 600.1436; MSA 27A.1436. We have recognized that the purpose of this statute is to avoid any possibility that a jury will be prejudiced against a witness because of a personal disagreement with the witness' religious beliefs. *People v Jones*, 82 Mich App 510, 516; 267 NW2d 433 (1978). Here, the witness was not questioned regarding his religious affiliation, but was asked about the religious affiliations of the three men charged with the assaults. As such, the statute is inapplicable, and defendant offers no other basis for his claim that the religious reference was error. Thus, we find this assertion of error to be without merit.

Defendant also claims that his counsel provided ineffective assistance because she did not object to the introduction of the evidence concerning his religion. We disagree. In order to prevail on a claim of ineffective assistance, a defendant must establish that (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) that a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303, 521 NW2d 797 (1994). As stated above, the statute defendant claims was violated by the admission of the evidence of defendant's religion is inapplicable. Therefore, defendant's assertion that his counsel erred in failing to raise that objection is without merit.

Next, defendant asserts that the trial court erred in joining his trial with those of the other two codefendants because they presented mutually exclusive and irreconcilable defense theories. We disagree. We review a trial court's decision to sever or join the trials of two or more defendants for an abuse of discretion. *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994). The joinder of distinct criminal charges is permitted where there is a significant overlap of issues and evidence, where the charges constitute a series of events, and where there is a substantial interconnection between the defendants, the trial proofs, and the factual and legal bases of the charged offenses. *People v Stricklin*, 162 Mich App 623, 630; 413 NW2d 457 (1987); MCR 6.121. Joint trials are improper where the codefendants' defenses are mutually exclusive and irreconcilable, not merely where they are inconsistent. *Hana*, *supra*, at 349; *People v McCray*, 210 Mich App 9, 12; 533 NW2d 359 (1995). Incidental prejudice inevitable in a joint trial is not sufficient. *Hana*, *supra*, at 349 Rather, the tension between the codefendants' defense theories "must be so great that a jury would have to believe one defendant at the expense of the other." *Id*.

Here, in response to the prosecutor's motion to join the trials, defendant objected on the grounds that the other two defendants were alleged to have committed their assaults on a different level of the prison than the alleged assault by defendant. In addition, defendant argued that the codefendants' defenses might incriminate him or the three defense theories might confuse the jury. At trial, the

codefendants, as well as defendant in this appeal, simply denied their involvement in the assaults. None of the codefendants' witnesses incriminated defendant, and in fact, several of them exculpated defendant. Counsel for the codefendants did not argue any theory which was mutually exclusive or even contradicted defendant's theory. Although the counsel for one of the codefendants mentioned the evidence that defendant was seen swinging the dust pan handle at one of the officers, we find this to be merely incidentally prejudicial. Accordingly, we find that the trial court did not abuse its discretion in joining the trials.

Defendant also argues that his convictions and sentences for the assaults violated his constitutional protection against double jeopardy because he was previously found guilty of the same offenses by the prison hearing division and put in administrative segregation for the offenses. We disagree. Although this issue was not raised below, it involves a fundamental constitutional right and thus we will review it. *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994). Both the federal and state constitutions prohibit placing a defendant in jeopardy more than once for a single offense. US Const, Am V; Const 1963, art 1, § 15. These provisions are substantively identical, both protect "against successive prosecutions for the same offense, and against multiple punishment for the same offense." *People v Bewersdorf*, 438 Mich 55, 72; 475 NW2d 231 (1991). For double jeopardy protections to be implicated, a defendant must first be put in jeopardy by a criminal prosecution in a court of justice. *People v Burks*, 220 Mich App 253, 256; 559 NW2d 357 (1996).

Defendant claims that the prior determination of the hearings division of the Department of Corrections precluded the subsequent prosecution which resulted in the instant convictions and sentences. An administrative hearing is not a criminal prosecution. *Burks, supra* at 256. Moreover, the administrative segregation did not expose defendant to additional punishment, it was merely a change in security classification with respect to the service of his prior sentence. See *People v Bachman*, 50 Mich App 682, 684; 213 NW2d 800 (1973). Therefore, we find defendant's double jeopardy claim to be without merit.

Next, defendant claims that the prosecution presented insufficient identification evidence to support the jury's guilty verdicts. We disagree. Due process requires that the prosecutor introduce sufficient evidence to justify a rational trier of fact that defendant is guilty beyond a reasonable doubt. *People v Fisher*, 193 Mich App 284, 287; 483 NW2d 452 (1992). In reviewing a criminal jury trial for sufficiency of the evidence, we view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the prosecution established the essential elements of the crime beyond a reasonable doubt. *People v Vaughn*, 186 Mich 376, 379; 465 NW2d 365 (1990).

At trial, the prosecution presented eyewitness testimony from two witnesses identifying defendant as the perpetrator of the two assaults. Officer DeLaGarza testified to observing defendant from a close range strike Officer Royalty twice with the dust pan handle. Similarly, inmate Harris testified to seeing defendant strike Officer Fouty with the dust pan. We find that this evidence was sufficient on the issue of identification for a reasonable jury to find that defendant was the perpetrator of the assaults beyond a reasonable doubt.

Finally, defendant asserts that his counsel was constitutionally ineffective for failing to adequately cross examine witnesses DeLaGarza and Harris. We disagree. As stated previously, to prevail on a claim of ineffective assistance, a defendant must establish that (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) that a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *Pickens, supra* at 302-303. Defendant does not identify any specific grounds for asserting that the cross examinations were objectively unreasonable. Contrary to defendant's general assertions, the record shows that defendant's counsel questioned these two witnesses extensively and raised several issues with regard to their credibility and their ability to identify defendant. Therefore, we find defendant's claim of ineffective assistance of counsel to be without merit.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Barbara B. MacKenzie
/s/ Richard Allen Griffin