# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN ELI,

Defendant-Appellant.

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UNPUBLISHED
April 16, 1999

No. 201641
Recorder's Court
LC No. 96-006613

Before: McDonald, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

Defendant was initially charged with felony murder, MCL 750.316; MSA 28.548, armed robbery, MCL 750.529; MSA 28.797, conspiracy to commit armed robbery, MCL 750.157a; MSA 28.354(1), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Following a jury trial, he was convicted of felony murder and armed robbery. He was sentenced to life in prison for the murder conviction and to ten to twenty years in prison for the armed robbery conviction. Defendant appeals as of right. We vacate defendant's armed robbery conviction, but otherwise affirm.

Defendant first argues that his convictions for both felony murder, based on the underlying felony of larceny, and armed robbery violated his right to be free from double jeopardy because larceny is a lesser included offense of armed robbery. The prosecution correctly concedes that this Court should vacate defendant's armed robbery conviction. *People v Harding*, 443 Mich 693, 714; 506 NW2d 482 (1993); *People v Minor*, 213 Mich App 682, 690; 541 NW2d 576 (1995). Accordingly, we vacate defendant's armed robbery conviction.

Defendant also argues that the trial court should have granted his motion to sever his trial from the trial of his codefendant, Joseph Richmond. The decision whether to sever the trial of defendants lies within the discretion of the trial court. *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994).

"A court may decide whether two or more defendants 'jointly indicted for any criminal offense' should be tried separately or together. MCL 768.5; MSA 28.1028. 'The general rule is that a defendant does not have a right to a separate trial.' A strong policy favors joint trials in the interest of

justice, judicial economy, and administration. A defendant does not have an absolute right to a separate trial." *People v Harris*, 201 Mich App 147, 152-153; 505 NW2d 889 (1993), citations omitted. MCR 6.121 provides in relevant part:

> (C) On a defendant's motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant.

"Severance is mandated under MCR 6.121(C) only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice." *Hana, supra* at 346. "The failure to make this showing in the trial court, absent any significant indication on appeal that the requisite prejudice in fact occurred at trial, will preclude reversal of a joinder decision." *Id*. at 346-347. "Inconsistency of defenses is not enough to mandate severance; rather, the defenses must be 'mutually exclusive' or 'irreconcilable.' The 'tension between defenses must be so great that a jury would have to believe one defendant at the expense of the other.'" *Id*. at 349, citations omitted.

We do not believe that the trial court abused its discretion in denying defendant's motion to sever his trial from that of Joseph Richmond. Defendant did not demonstrate that his substantial rights would be prejudiced by the court's refusal to sever the trials and that severance was the necessary means of rectifying the potential prejudice. *Hana, supra* at 346. Defendant merely indicated that he might be prejudiced by evidence that might be elicited during trial by each defendant trying to "save his own skin." However, there was no indication that either defendant was planning to testify at trial. Moreover, there is no significant indication on appeal that the requisite prejudice in fact occurred at trial. Neither defendant nor Richmond testified, and the only evidence that directly incriminated defendant in the crime was the testimony of Delrico Henley. Henley testified that Richmond told him that defendant and Vern Lloyd would conduct the robbery, which he planned. Henley testified that he recognized defendant as one of the robbers and that defendant shot John Scott. Neither defendant nor Richmond appeared to advance any defense at trial other than to cast doubt on their involvement in the crime and on Henley's credibility. Thus, the defenses of defendant and Joseph Richmond were not inconsistent or irreconcilable. The jury was not required to believe one defendant at the expense of the other.

Defendant points out that there were four instances that the court, sua sponte, indicated that the testimony being introduced could only be used against Joseph Richmond and not defendant. Defendant appears to claim that these instances demonstrate the prejudice he suffered in being tried jointly with Richmond. However, we do not believe that any of the statements were prejudicial to defendant. The statements did not incriminate defendant in the robbery or murder, nor did they provide a defense to Richmond that was inconsistent with a defense of defendant.

Defendant also claims that the trial court should have given a limiting instruction during each of the above four instances, but only did so the first time. A trial court is under no obligation to give sua sponte a limiting instruction to the jury. *People v Morris*, 139 Mich App 550, 558; 362 NW2d 830 (1984). Because defendant failed to request an instruction, this Court's review "is limited to the issue

whether relief is necessary to avoid manifest injustice to defendant." *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995). The trial court clearly stated, during each of the four instances raised by defendant, that the evidence was being offered only against Joseph Richmond. Defendant does not explain why the court should have given an additional instruction after the first time it instructed the jury that the evidence being offered against Joseph Richmond could not be used against defendant.

Accordingly, the trial court did not abuse its discretion in refusing to sever the trial of defendant from the trial of Joseph Richmond, nor did a miscarriage of justice occur from the trial court's failure to sua sponte give a limiting instruction above and beyond the comments given.

We vacate defendant's armed robbery conviction, but otherwise affirm.

/s/ Gary R. McDonald
/s/ Kathleen Jansen
/s/ Michael J. Talbot