STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 21, 2000
v	No. 213135 Saginaw Circuit Court
MICHAEL JAMES WINTERS, Defendant-Appellant.	LC No. 97-014825-FC

Before: Doctoroff, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Following a bifurcated jury trial, defendant was convicted, first, of assault with intent to commit murder, MCL 750.83; MSA 28.278, carrying a dangerous weapon in a motor vehicle, MCL 750.227; MSA 28.424, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; MSA 28.424(2), and, second, of felon in possession of a firearm, MCL 750.224f; MSA 28.421(6), and an additional count of felony-firearm. He was sentenced as a third habitual offender, MCL 769.11; MSA 28.1083, to concurrent terms of twenty to forty years' imprisonment for the assault conviction, two to ten years' imprisonment for the carrying a dangerous weapon conviction, and three to ten years' imprisonment for the felon in possession of a firearm conviction, to be served consecutive to two concurrent two-year terms for the felony-firearm convictions. Defendant appeals as of right. We vacate one of the felony-firearm convictions, but affirm in all other respects.

Defendant argues that the trial court erred in denying his motion to sever his trial from that of codefendant Horrison and his related motions for mistrial and for a new trial. We disagree.

MCL 768.5: MSA 28.1028 provides:

> When 2 or more defendants shall be jointly indicted for any criminal offense, they shall be tried separately or jointly, in the discretion of the court.

Similarly, MCR 6.121(C) states:

> 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.

Both this Court and our Supreme Court have recognized the strong policy embodied by MCL 768.5, MSA 28.1028, in favor of joint trials in the interest of judicial economy and fairness. See *People v Hana*, 447 Mich 325, 338 n 3; 524 NW2d 682 (1994), citing *Richardson v Marsh*, 481 US 200, 209; 107 S Ct 1702; 95 L Ed 2d 176 (1987); *People v Hoffman*, 205 Mich App 1, 20; 518 NW 2d 817 (1994). Mere "finger pointing" between codefendants is not enough to overcome the presumption in favor of joint trials. Rather, not only must codefendants have mutually antagonistic defenses, they must be mutually exclusive to such an extent that it would not be possible for a jury to believe the core of the evidence offered on behalf of one defendant, without disbelieving the core of the evidence offered on behalf of the other defendant. *Hana, supra* at 349-350, citing *State v Kinkade*, 140 Ariz 91, 93; 680 P2d 801 (1984).

Here, the core defenses of defendant, that he shot the complainant in self-defense, and codefendant Horrison, that he had nothing to do with the shooting and did not furnish the gun used by defendant, were not so antagonistic that the jury would have to believe one at the expense of the other. The trial court did not abuse its discretion in refusing to grant the defense requests for separate trials or in denying defendant's related motions.

Defendant also argues that multiple errors occurred at trial, including prosecutorial misconduct and trial court bias and error in conducting the trial, and the cumulative effect of these errors denied him a fair trial. We disagree.

First, defendant contended that he was denied a fair trial because of misconduct by the prosecutor. Prosecutorial comments must be viewed as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). Defendant failed to object to all but one of the alleged instances of misconduct. With regard to the unpreserved claims of misconduct, appellate relief is not warranted because the conduct in question either was not improper or a curative instruction could have eliminated any prejudicial effect upon timely request. *People v Duncan*, 402 Mich 1, 15-17; 260 NW2d 58 (1977); *People v Turner*, 213 Mich App 558, 575; 540 NW2d 728 (1995). Further, viewed in context, the prosecutor's "Freudian slip" reference did not result in the denial of a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995).

Second, defendant claims that the trial court's comments to defense counsel and its questioning of witnesses unduly influenced the jury. We disagree. The record fails to disclose any conduct beyond the bounds of what imperfect men and women sometimes display. *Cain v Dep't of Corrections*, 451 Mich 470, 497, n 30; 548 NW2d 210 (1996). Further, the trial court's questions to the witnesses were neither intimidating, argumentative, prejudicial, unfair or impartial. *People v Davis*, 216 Mich App 47, 50-51; 549 NW2d 1 (1996); *People v Ross*, 181 Mich App 89, 91; 449 NW2d 107 (1989). The trial court's behavior was not improper.

Third, defendant claims that the trial court's handling of the jury's request for transcripts during deliberations was improper. This argument has some merit, but does not require reversal.

Early during the first day of deliberations, the jury sent the trial court a note inquiring of the availability of transcripts for certain witnesses. The note was given to the trial judge by the bailiff, who was instructed to return to the jury room and inform the jury that the transcripts would not be provided. Defense counsel subsequently became aware of the situation and lodged an objection. The judge thereafter called the jurors into the courtroom and explained her reluctance to provide the transcripts. However, she also stated that the transcripts would be provided if the jury felt it necessary and later provided the requested transcripts.

The trial judge's actions with respect to the decision to furnish the transcripts, and her attempts to persuade the jury to continue deliberating without them fell within the bounds of MCR 6.414(H) and did not constitute an abuse of discretion. *People v Carter*, 462 Mich 206, 218; 612 NW2d 144 (2000); *People v Howe*, 392 Mich 670, 675-676; 221 NW2d 350 (1974).

However, defendant correctly asserts that the trial court's *ex parte* communication with the jury was improper. MCR 6.414(A) provides:

> The trial court must control the proceedings during trial, limit the evidence and arguments to relevant and proper matters, and take appropriate steps to ensure that the jurors will not be exposed to information or influences that might affect their ability to render an impartial verdict on the evidence presented in court. The court may not communicate with the jury or any juror pertaining to the case without notifying the parties and permitting them to be present. The court must ensure that all communications pertaining to the case between the court and the jury or any juror are made a part of the record.

Nonetheless, an *ex parte* communication does not always require reversal. *People v France*, 436 Mich 138, 162-163; 461 NW2d 621 (1990). "A reviewing court must reverse the conviction if it determines that a defendant has been prejudiced by an *ex parte* communication with the jury." *Id.* at 163. When deciding whether an improper *ex parte* communication requires reversal, this Court must classify the nature of the communication and apply the analysis set forth in *France*, *supra*. A communication may be either substantive, administrative or housekeeping in nature. *Id.*

"Administrative communications include instructions regarding the availability of certain pieces of evidence and instructions that encourage a jury to continue its deliberations." *Id.* at 163. An administrative communication carries no presumption of prejudice; however, upon an objection, the burden of persuasion lies with the nonobjecting party to demonstrate that the communication lacked any prejudicial effect. *Id.* at 163-164. In contrast, "[t]he failure to object when made aware of the communication will be taken as evidence that the instruction was not prejudicial." *Id.* at 163.

In the instant case, it is clear that the *ex parte* nature of the communication was administrative and, therefore, is not presumed to have a prejudicial effect. *France, supra* at 163-164. Although defense counsel did object at trial to the *ex parte* communication made in response to the jury's note, and thus placed the burden of persuasion on the prosecution, we conclude that the *ex parte* communication that occurred here did not have any reasonable possibility of prejudicing defendant. *Id*. at 162-163. Nothing about the bailiff's contact or

communication with the jury is even remotely suggestive of having any impact on the jury's ultimate verdict. We reject defendant's claim that the length of the jury's deliberation is evidence of prejudice resulting from the *ex parte* communication. Defendant's argument attempts to piggyback the trial court's ultimate handling of the jury's request for transcripts or a certain witness's testimony with the *ex parte* communication. The two are, in fact, separate issues.

Because any arguable error in the above discussed issues raised by defendant was of little consequence, reversal of defendant's convictions is not warranted on the basis of cumulative error. See *People v Cooper*, 236 Mich App 643, 660; 601 NW2d 409 (1999).

Defendant also argues that trial counsel was ineffective for failing to call codefendant Horrison's mother as a witness, for failing to object to the addition of a second felony-firearm count, and for advising defendant not to testify in his own behalf. We disagree.

As defendant acknowledges, the ultimate decision to testify was his. *Rock v Arkansas*, 483 US 44, 53 n 10; 107 S Ct 2704; 97 L Ed 2d 37 (1987). The record indicates that defense counsel advised defendant not to testify so that the jury would not be presented with inconsistent testimony, a trial strategy used by defense counsel in the hope of obtaining a mistrial for misjoinder. The fact that this strategy did not work does not render its use ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Defendant has not met his burden as to this issue.

Next, contrary to what defendant argues, the record indicates that defense counsel did object to the addition of the second felony-firearm count. Thus, we reject defendant's claim that counsel was ineffective.

Regarding counsel's decision not to call codefendant Horrison's mother as a witness, considering the witness' apparent bias in favor of her codefendant son, the fact that she had given inconsistent statements concerning the offense, and her criminal record, we conclude that defendant has not overcome the presumption that counsel's decision not to call the witness constituted sound trial strategy. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997).

Next, considering the circumstances of the defense and defendant's prior criminal record, defendant's sentence for assault with intent to commit murder does not violate the principle of proportionality. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

Finally, defendant argues that the trial court erred in refusing to vacate his second felony-firearm conviction. A felony-firearm conviction properly may be predicated on a conviction of felon in possession of a firearm, *People v Mitchell*, 456 Mich 693, 698; 575 NW2d 283 (1998), and, contrary to defendant's argument, where a defendant commits more than one felony in a single transaction, he may be convicted of more than one count of felony-firearm, *People v Morton*, 423 Mich 650, 651; 655-656; 377 NW2d 798 (1985). Here, however, defendant was initially charged with just a single count of felony-firearm and the trial court allowed the prosecutor to amend the information to allege a second count of felony-firearm only after allowing the trial to be bifurcated with respect to the felon in possession charge. The parties and the trial court expressly voiced their understanding that, although the jury could separately

consider the felony-firearm charge in connection with the felon in possession charge, the judgment of conviction would reflect only a single felony-firearm conviction. Under the circumstances, therefore, we agree that the second felony-firearm conviction should be vacated. Defendant's remaining convictions and sentences are affirmed in all other respects.

Affirmed in part and vacated in part.

/s/ Martin M. Doctoroff
/s/ Joel P. Hoekstra
/s/ Jane E. Markey