STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 21, 2001
v	No. 223447 Wayne Circuit Court
RALPH BILLY PROCTOR, Defendant-Appellant.	Criminal Division LC No. 98-004885

Before: Murphy, P.J., and Neff and Hoekstra, JJ.

PER CURIAM.

Defendant, who was charged with two counts of first-degree murder, was convicted by a jury of one count of first-degree murder, MCL 750.316, and one count of second-degree murder, MCL 750.317. Defendant was sentenced to life imprisonment for the first-degree murder conviction and twenty-five to fifty years' imprisonment for the second-degree murder conviction. Defendant appeals as of right. We affirm.

This case arises out of a double homicide in a Detroit crack house. Defendant was tried jointly with a codefendant, Donald Smith, before separate juries. On appeal, defendant argues that the trial court erred in denying his motion for a separate trial from codefendant Smith. The decision whether to grant a separate trial is within the discretion of the trial court. *People v Hana*, 447 Mich 325, 331; 524 NW2d 682 (1994).

Defendant was charged as a principal in the death of one victim, a female, and as an aider and abettor in the death of the second victim, a male. Defendant essentially admitted killing the female victim, but argued that he had nothing to do with the male victim's death. Codefendant Smith admitted killing the male victim, but argued that defendant forced him to do so.

Severance is required only when the defenses are "mutually exclusive" or "irreconcilable." *Hana*, *supra* at 349. Similarly, "[i]ncidental spillover prejudice, which is almost inevitable in a multi-defendant trial, does not suffice." *Id.*, quoting *United States v Yefsky*, 994 F2d 885, 896 (CA 1, 1993).

Here, the trial court's decision to employ dual juries under proper instruction was sufficient to reduce the risk of prejudice from antagonistic defenses. *Hana*, *supra* at 351-352. Unlike a single jury confronted by mutually antagonistic defenses, separate juries can come to inconsistent conclusions regarding guilt, and are not forced to decide whether to believe one

defendant at the expense of the other. *Id.* at 360. Additionally, where the prosecutor charges one defendant as a principal and the other as an aider and abettor, "[f]inger pointing by the defendants . . . does not create mutually exclusive antagonistic defenses." *Id.* at 360-361. Rather, because an aider and abettor can also be held liable as a principal, both defendants can be convicted "without any prejudice or inconsistency." *Id.* at 361.

Further, by electing to testify on their own behalf, defendant and codefendant Smith waived their Fifth Amendment rights and became available as a witness in the other's trial. *Id.* Whether defendant would have testified had he been tried separately, or whether codefendant Smith would have testified had a separate trial taken place, is immaterial, because the question whether a defendant would be prejudiced by a joint trial is not to be determined by comparing the joint trial to what might have happened in separate trials. *Id.* Defendant's desire to exclude codefendant Smith's testimony, without more, also is not grounds for severance. *Id.* at 350. There is no due process right to exclude relevant, competent testimony merely because the witness is a codefendant. *Id.* at 362. Further, defendant does not argue that evidence was unfairly used against him which was only admissible against codefendant Smith, or that he was barred from presenting exculpatory evidence because it was unavailable in a joint trial. See *Id.* Thus, the trial court did not abuse its discretion in denying defendant's request for a separate trial.

Next, defendant argues that the trial court erred in failing to sua sponte instruct the jury on the inherent unreliability of accomplice testimony with respect to codefendant Smith's testimony. See CJI2d 5.6. In *People v McCoy*, 392 Mich 231, 240; 220 NW2d 456 (1974), our Supreme Court held that, "if the issue is closely drawn, it *may be* reversible error to fail to give . . . a cautionary instruction [regarding accomplice testimony] even in the absence of a request to charge" (emphasis added). In this case, however, the issue of defendant's participation was not "closely drawn" such that the trial court had an obligation to sua sponte instruct the jury on the dangers of accomplice testimony. The case was not merely a credibility dispute between defendant and codefendant Smith. Rather, there was another witness who observed the events and testified at trial regarding the participation of defendant and codefendant Smith. Also, codefendant Smith was not a prosecution witness who was testifying pursuant to a favorable deal, and credibility issues were explored through cross-examination, thereby diminishing the need for a cautionary instruction. See *People v Reed*, 453 Mich 685, 692-693; 556 NW2d 858 (1996). Thus, the trial court did not err in failing to sua sponte instruct the jury on the dangers of accomplice testimony. Furthermore, it is apparent that defendant was not prejudiced by the absence of a cautionary instruction. Had the jury believed codefendant Smith's testimony (that defendant forced Smith to strangle the male victim by threatening Smith with a gun), the appropriate verdict would have been to find defendant guilty of first-degree murder.

Defendant next argues that trial counsel was ineffective for failing to request a cautionary instruction on the dangers of accomplice testimony. To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To find prejudice, a court must conclude that there is a reasonable probability that the factfinder would have had a reasonable doubt respecting guilt absent the error. *Id.* at 312. A defendant must overcome the

presumption that the challenged conduct might be considered sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Here, the record reveals possible strategical reasons for not requesting a cautionary instruction. Defendant has failed to overcome the presumption that counsel engaged in sound trial strategy by not requesting the instruction. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Furthermore, as discussed previously, it is apparent that defendant was not prejudiced by the absence of a cautionary instruction. Therefore, defendant's ineffective assistance of counsel claim fails.

Next, defendant argues that witnesses should not have been allowed to testify that the female victim was tied at the time of her death because that testimony was contrary to objective verifiable facts. We find no merit to this issue. Apart from the questionable legal validity of defendant's argument, the factual predicate for defendant's argument is not supported by the record. Contrary to what defendant argues, the coroner testified that he could not be certain whether the marks on the female victim's neck were defensive wounds, or may have been caused by the perpetrator.

Lastly, defendant argues that the prosecutor committed misconduct during rebuttal by stating that defendant had admitted to tying up the female victim before strangling her. The test for prosecutorial misconduct is whether the defendant was deprived of a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995).

A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence. See *People v Fisher*, 193 Mich App 284, 291; 483 NW2d 452 (1992). We agree that defendant never admitted that he tied up the female victim. However, the prosecutor's reference to this act is vague at best. The prosecutor remarked that the victim was tied up, but then immediately stated that she "wasn't tied up." Whether or not defendant admitted this, there was other evidence at trial indicating that the female victim was tied up. Under the circumstances, the brief, ambiguous statement did not deprive defendant of a fair trial.

Affirmed.

/s/ William B. Murphy
/s/ Janet T. Neff
/s/ Joel P. Hoekstra