

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WAYNE D. HODGES,

Defendant-Appellant.

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UNPUBLISHED

April 23, 2002

No. 229706

Wayne Circuit Court

LC No. 99-010830

Before: Holbrook, Jr., and Jansen and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver 50 grams or more, but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii). Defendant was sentenced to a term of five to twenty years' imprisonment. He appeals as of right. We affirm.

Defendant first argues that the trial court erred by consolidating his trial with the trial of his codefendant, or alternatively, defendant argues that he should have been tried in a joint trial with two juries.

To be entitled to a separate trial or a joint trial with two juries, a defendant must provide the court with a supporting affidavit, or make an offer of proof, that the codefendant's defenses are so inconsistent, mutually exclusive, and irreconcilable that it clearly, affirmatively, and fully demonstrates that the defendant's substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice. *People v Hana*, 447 Mich 325, 331, 346; 524 NW2d 682 (1994). This Court reviews a decision regarding a motion for joint or severed trials for an abuse of discretion. *People v McGee*, 247 Mich App 325, 332; 636 NW2d 531 (2001).

Before trial, the prosecutor moved to consolidate defendant's case with that of his codefendant and the trial court granted the motion. Defendant did not object to the prosecutor's motion and did not provide the trial court with a supporting affidavit, or make an offer of proof, demonstrating that his substantial rights would be prejudiced because the defenses were so inconsistent, mutually exclusive, and irreconcilable. Therefore, this issue is unpreserved. Unpreserved error is evaluated for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, the defendant must show that the error was plain, i.e., clear or obvious, and affected the defendant's substantial rights by prejudicing the outcome of the proceedings. *Id.*

Defendant has not established that his substantial rights were prejudiced or that severance was necessary. *Hana, supra*, at 346-347. After a review of the record, we are satisfied that the testimony of the codefendant did not provide direct evidence that defendant possessed any cocaine. The codefendant's defense was that of mere presence and he denied knowing anything of a drug transaction or of witnessing a drug exchange. We also note that defendant impeached the codefendant's testimony with his previous conviction, his previous drug habit, and the jury was aware that the codefendant was the registered owner of the vehicle that defendant was driving at the time he and the codefendant were pulled over by the police. Accordingly, defendant has not established that he was substantially prejudiced because the defenses were not inconsistent, mutually exclusive, or irreconcilable.

Defendant also argues that the trial court erred when it denied his motion for a mistrial. Defendant argues that he was entitled to a mistrial on the basis that his codefendant testified in his own defense, and that the jury might have believed the codefendant's defense at the expense of defendant. The decision whether to grant a mistrial is reviewed for an abuse of discretion. *McGee, supra* at 332. A motion for mistrial should be granted only for an irregularity which is prejudicial to the rights of the defendant and which impairs the defendant's ability to get a fair trial. *People v Griffis*, 218 Mich App 95, 100; 553 NW2d 642 (1996).

In light of our conclusion that defendant has failed to establish that he was entitled to severance, inasmuch as the defenses were not inconsistent, mutually exclusive, or irreconcilable, we are satisfied that the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

Lastly, defendant argues several instances of ineffective assistance of counsel. To preserve the issue of ineffective assistance of counsel, a defendant must move for a new trial or an evidentiary hearing before the trial court. Defendant did not do so here, therefore, our review of this issue is limited to the existing record. *People v Sabin (On Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). To establish a claim of ineffective assistance of counsel, a defendant must prove that counsel's performance was deficient in that counsel's performance fell below an objective standard of reasonableness. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Defendant must also show that the deficient performance was prejudicial in that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 302-303.

Defendant first contends that defense counsel was ineffective by failing to file a pretrial motion for severance or to object to the prosecution's motion for consolidation. Because we have concluded that defendant has failed to establish that he was entitled to severance, defendant cannot prove that counsel was deficient or that counsel's failure to act in this regard was prejudicial. Consequently, defendant has failed to prove that he was denied the effective assistance of counsel because counsel failed to move for severance or failed to object to the motion for consolidation.

Defendant also argues that counsel was ineffective by failing to object to the codefendant's testimony that he had seen defendant with cocaine on two prior occasions and that had he known that defendant had cocaine on the day of the incident, he would not have gone with defendant to Livonia. Defendant contends that this was highly prejudicial and improper evidence, without elaborating as to why it was prejudicial and improper.

A review of the record reveals that the prosecutor's questions were designed to disparage the sincerity of the codefendant's testimony regarding his routine to allow defendant to use his vehicle without question. The prosecutor's questions were an attempt to undermine or discredit the codefendant's testimony that he would just "ride along" with defendant without questioning his motives or purpose. Additionally, the questions were probative and relevant of the codefendant's credibility because he stated that he was unaware that cocaine was inside the vehicle. Therefore, we cannot conclude that the codefendant's testimony was so prejudicial that defendant was denied a fair trial. Accordingly, defendant has not proven that counsel was ineffective for failing to object to the codefendant's testimony in this regard.

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Kathleen Jansen

/s/ Kurtis T. Wilder