STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK ANTHONY ALEXANDER,

Defendant-Appellant.

UNPUBLISHED
August 16, 2002

No. 226954
Oakland Circuit Court
LC No. 99-165365-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SEAN ANDREW PORTER,

Defendant-Appellant.

No. 227301
Oakland Circuit Court
LC No. 99-165334-FC

Before: Neff, P.J., and Griffin and Talbot, JJ.

PER CURIAM.

Defendants were tried jointly before separate juries. In Docket No. 226954, defendant Alexander was convicted of assault with intent to rob while armed, MCL 750.89, and was sentenced as a third habitual offender, MCL 769.11, to a prison term of three to twenty years. In Docket No. 227301, defendant Porter was convicted of assault with intent to rob while armed, MCL 750.89, and first-degree home invasion, MCL 750.110a. Defendant Porter was sentenced as a fourth habitual offender, MCL 769.12, to concurrent prison terms of fifteen to thirty years for the assault conviction, and ten to thirty years for the home invasion conviction. Both defendants appeal as of right. We reverse defendant Alexander's conviction in Docket No. 226954. We affirm defendant Porter's convictions in Docket No. 227301.

Both defendants argue that the trial court erred in refusing to instruct their juries on the purportedly applicable claim of right defense. This Court reviews jury instructions as a whole to determine if there is error requiring reversal. *People v Wess*, 235 Mich App 241, 243; 597 NW2d 215 (1999). A defendant may raise a claim of right defense if he had a good-faith belief

that he had a legal right to take the property at issue. *People v Cain*, 238 Mich App 95, 119; 605 NW2d 28 (1999).

Here, there was scant evidence to support a claim of right theory. Defendants assert that they were attempting to retrieve $30 that Stella, whom they had just met and believed to be a prostitute, told them had been stolen by a woman in the house. Defendants argue that they had a right, under an agency theory, to pursue Stella's money. According to the complainants, defendants did not say that they were there for Stella's money. Defendant Porter told the police, and defendant Alexander testified at trial, that defendant Porter merely asked complainants why they took Stella's money, whereupon there was "an exchange of words" and then defendants left the house. Defendant Alexander explained that defendant Porter "did not demand her money, he merely inquired about it." For his own part, defendant Alexander testified that he "wasn't basing nothing on what [Stella] said." Further, even assuming arguendo that the charged assaults began when defendants tried to obtain Stella's money under a third-party claim of right, there is no evidence that defendants or Stella had any legal right to the walking stick or cell phone that were in fact taken from the house. We find no error in the trial court's ruling that the claim of right defense did not apply on the facts of this case.

In Docket No. 226954, defendant Alexander also argues that the trial court erred in reading CJI2d 5.6 on accomplice testimony while his jury was present. We agree.

Because defendant Alexander did not raise this issue below, we review this matter for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-763, 766-767; 597 NW2d 130 (1999). Three requirements must be met to withstand forfeiture of unpreserved error under the plain error rule: (1) error must have occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights. *Id*. at 763. Reversal is necessitated only if plain error resulted in the conviction of an actually innocent defendant, or where the error seriously affected the fairness, integrity, or reputation of judicial proceedings. *Id*.; *People v Grant*, 445 Mich 535, 549-550; 520 NW2d 123 (1994).

In light of the obvious special interest that an accomplice may have in testifying for the prosecution, our courts have recognized that such testimony is suspect and must be received only with great care and caution. *People v McCoy*, 392 Mich 231; 220 NW2d 456 (1974); *People v Heikkinen*, 250 Mich App 322; 646 NW2d 190 (2002). Consequently, in *McCoy*, our Supreme Court held that a trial court may have an obligation to give a cautionary instruction sua sponte on accomplice testimony "if the issue is closely drawn." *Id*. at 240. This rule is motivated by the inherent weakness of accomplice testimony that is presented by the prosecution. *People v Reed*, 453 Mich 685, 691; 556 NW2d 858 (1996). However, in *Reed*, the Court held that the *McCoy* rationale for the obligation to instruct sua sponte did not apply where the accomplice was the codefendant in a joint trial before a single jury who voluntarily testified in his own defense, offering an account which differed from that of the defendant. The *Reed* Court explained that under the circumstances, not only was it not error to omit the instruction, but that, as to the codefendant, it would have been reversible error to have given it:

> [T]he problems with the accomplice's testimony in *McCoy* are not present here. Unlike the accomplice in *McCoy*, Mr. Servant was not a prosecution witness. Rather, he was a codefendant who voluntarily testified in his own defense. Because Mr. Servant was on trial for first-degree murder, he obviously

was not the beneficiary of any favorable deals from the prosecution. Thus, the rationale for the obligation to instruct sua sponte does not apply in this case.

Most importantly, the trial court properly could not have given a cautionary instruction such as CJI2d 5.6. Here, Mr. Servant took the stand in his own defense. Any cautionary instruction on accomplice testimony would have asked the jury to view Mr. Servant's testimony with suspicion and would have prejudiced his defense. Such an instruction in this case would certainly have been error requiring reversal. See *People v Hull*, 86 Mich 449, 463-465; 49 NW 288 (1891); *People v Beck*, 96 Mich App 633, 637; 293 NW2d 657 (1980). [*Id*. at 693-694 (footnote omitted, emphasis added).]

In examining the defendant's related claim that his counsel was ineffective in failing to request a cautionary accomplice instruction, the *Reed* Court, *supra* at 695, reiterated that

[D]efendant was not prejudiced. Even if defense counsel had requested a cautionary instruction, the court properly could not have granted the request. As discussed above, *any cautionary instruction on accomplice testimony would have undermined Mr. Servant's defense and would have been error requiring reversal.* [Emphasis added.]

In the instant case, defendant Alexander testified in his own behalf in this joint trial with defendant Porter. Porter did not testify. While they had separate juries, both juries were present when the trial court gave the cautionary accomplice instructions set forth in CJI2d 5.5 and 5.6, regarding the testimony of defendant Alexander. The court stated in pertinent part:

Before you may consider what the witness, Mark Alexander, said in court, you must decide whether he took part in the crime the Defendant is alleged with committing. The witness has not admitted to taking part in the crime, but there's evidence that could lead you to think that he did. A person who knowingly and willingly helps or cooperates with someone else in committing a crime is called an accomplice.

When you think about the witness's testimony, first decide if he was an accomplice. If after thinking about all of the other evidence you decide that he did not take part in this crime, judge his testimony as you judge that of any other witness. But if you decide that the witness was an accomplice, you must consider his testimony in the following way:

You should examine an accomplice's testimony closely and be very careful about accepting it. You may think about whether the accomplice's testimony is supported by other evidence because it may be more reliable. However, there is nothing wrong with the prosecutor's using an accomplice as a witness. You may convict the Defendant based only on the accomplice's testimony if you believe the testimony and it proves the Defendant's guilt beyond a reasonable doubt.

> When you decide whether you believe an accomplice, consider the following:
>
> Was the accomplice's testimony falsely slanted to make the Defendant seem guilty because of the accomplice's own interest, bias, or for some other reason?
>
> Would you all approach the bench? (Discussion at the bench, off the record.)
>
> *The Court*: This instruction I am reading right now applies only to the Porter jury.
>
> When you decide whether you believe an accomplice, consider the following:
>
> Was the accomplice's testimony falsely slanted to make the Defendant seem guilty because [of] the accomplice's own interest, bias, or for some other reason?
>
> . . . In general, you should a [sic] consider an accomplice's testimony more cautiously than you would that of an ordinary witness. You should be sure you have examined it closely before you base a conviction on it.

As noted above, the *Reed* Court expressly held that it is error requiring reversal to give such a cautionary instruction where a codefendant/accomplice being jointly tried before a single jury testifies in his own defense, because it asks the jury to view the codefendant's testimony with suspicion. *Reed, supra* at 694. Here, although there were separate juries for each defendant in this joint trial, under the circumstances the instruction was equally damaging to defendant Alexander, inappropriately casting doubt on his veracity and improperly shifting the burden of proof. Because defendant Alexander testified, the cautionary instruction on accomplice testimony was only relevant to defendant Porter's jury. Although Alexander's jury was instructed by the trial court that the accomplice instruction pertained only to defendant Porter's jury, this qualification was totally ineffectual because it came midway through the instruction, after the caution with regard to Alexander's testimony already had been substantially delivered by the court. Adding to the confusion, at other times during the trial, defendant's jury was removed when the proceedings only applied to codefendant Porter. Defendant was the only witness presented in his defense, and his credibility was therefore crucial. Accordingly, we conclude that the instruction to defendant Alexander's jury was not sufficient to protect his substantial rights. Furthermore, we hold that an instruction asking the jury to view defendant's testimony with suspicion seriously affected the fairness, integrity, and public reputation of the judicial proceedings. *Carines, supra*. Thus, we reverse defendant Alexander's conviction in Docket No. 226954.

In Docket No. 227301, defendant Porter argues for the first time on appeal that his dual convictions for assault with intent to rob while armed and first-degree home invasion violate the double jeopardy protection against multiple punishments for the same offense. An analysis of this double jeopardy challenge requires us to consider "whether there is a clear indication of

legislative intent to impose multiple punishment for the same offense. If so, there is no double jeopardy violation." *People v Mitchell*, 456 Mich 693, 696; 575 NW2d 283 (1998).

A defendant commits first-degree home invasion when he enters a dwelling without permission and either commits a felony or intends to commit a felony, if the defendant is armed with a dangerous weapon or another person is lawfully inside the dwelling. MCL 750.110a; *People v McCrady*, 244 Mich App 27, 31; 624 NW2d 761 (2000). To convict a defendant of assault with intent to rob while armed, there must be an assault, with an intent to rob or steal, and the defendant is armed. *People v Smith*, 152 Mich App 756, 761; 394 NW2d 94 (1986). It is apparent that these two crimes, which prohibit entry of a dwelling with the intent to commit a crime and an assault with the intent to rob, prohibit violations involving distinct social norms, thereby supporting a conclusion that defendant may be convicted of both offenses without violating the constitutional prohibition against double jeopardy. *People v Kulpinski*, 243 Mich App 8, 22-23; 620 NW2d 537 (2000). Furthermore, in enacting the home invasion statute, the Legislature specifically provided that a court "may order a term of imprisonment imposed for home invasion in the first degree to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction." MCL 750.110a(8). This provision clearly reflects the Legislature's intent that a defendant who commits first-degree home invasion and another criminal offense arising from that same criminal transaction may be convicted of both offenses without offending double jeopardy protections.

Defendant Porter also argues that he is entitled to a new trial because evidence of threats against a witness was introduced. Contrary to defendant Porter's claim, the evidence was not introduced and defendant's objections to the prosecutor's questions were sustained. Moreover, the jury was repeatedly instructed that the statements and questions of counsel were not evidence and to disregard anything that had been stricken by the court. We find no error.

Next, defendant Porter contends that he was denied a fair trial because of the prosecutor's misconduct in asking the questions about threats against a witness. Prosecutorial issues are decided case by case. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). This Court considers the alleged misconduct in context to determine whether it denied the defendant a fair and impartial trial. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999). Here, where defendant's objections to the prosecutor's questions were sustained and the jury was given an appropriate cautionary instruction, defendant was not denied a fair and impartial trial. *Id.*

Defendant Porter argues, again for the first time on appeal, that he was denied a fair trial because he was tried jointly—although with a separate jury—with defendant Alexander. The decision to hold a joint trial in this case was within the trial court's discretion. MCR 6.121. To find an abuse of that discretion, there must be an affirmative showing that the joint trial prejudiced the rights of at least one of the defendants. *People v Jones*, 126 Mich App 191, 201; 336 NW2d 889 (1983). Because defendant Porter did not object to a joint trial below, we review this issue for plain error affecting defendant's substantial rights. *Carines, supra.* We find no plain error here. Defendant Alexander testified and could therefore have been called to testify in a separate trial against defendant Porter. *People v Hana*, 447 Mich 325, 361; 524 NW2d 682 (1994), amended on rehearing on other grounds, 447 Mich 1203 (1994). Moreover, defendant Alexander denied telling the police that defendant Porter took a stick into the complainants' house, defendant Porter's jury was given a cautionary instruction regarding defendant Alexander's testimony, and it was the theory of both defendants that they never entered the

complainants' home without permission or demanded money. Thus, there has been no affirmative showing by defendant Porter that his substantial rights were affected by a joint trial. *Jones, supra.*

Defendant Porter argues that he was denied the effective assistance of counsel. Because defendant did not request a *Ginther*[1] hearing below, this Court's review is limited to mistakes apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). To establish ineffective assistance of counsel, the burden is on defendant to show that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment and that the deficient representation prejudiced the defense so as to deprive defendant of a fair trial. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Defendant's claims of ineffective assistance of counsel involve alleged deficiencies related to the issues previously raised by defendant on appeal. Consistent with our discussion of those issues, we find no serious errors that prejudiced the defense and deprived defendant of a fair trial.

Finally, defendant Porter argues that he was denied his right to a speedy trial. Defendant raised this issue below, arguing that he would be prejudiced because certain witnesses would not be produced. We review constitutional issues de novo. *Cain*, *supra.* Because the delay involved here was less than eighteen months, defendant must prove that he was prejudiced by the delay. *Id.* Defendant makes no showing of prejudice on appeal, but argued below that he would be prejudiced by the absence of witnesses Stella Catteuw, Tony Olds, Audrey Olds, Derrick Hayes, Colleen Writ, and "Roberta somebody." Derrick Hayes testified at trial. Tony Olds was expected to testify, but failed to appear and a bench warrant was issued. Olds told the prosecutor that he intended to ignore the subpoena because of threats that had been made to his life. Stella Catteuw was in Florida, had been stricken from the witness list, and was not requested by defense counsel. Audrey Olds, Colleen Writ, and Roberta were never included on the prosecutor's witness list. Accordingly, we conclude that defendant has not met his burden of showing prejudice in this case.

Although defendant Porter also alleges a violation of the statutory 180-day rule, MCL 780.133, as the prosecutor notes, there is no indication in the record, and defendant does not allege, that he was a state prisoner for purposes of that rule. Therefore, appellate relief is not available.

The conviction of defendant Alexander is reversed in Docket No. 226954, and the case remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Defendant Porter's convictions in Docket No. 227301 are affirmed.

/s/ Janet T. Neff
/s/ Richard Allen Griffin
/s/ Michael J. Talbot

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[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).