

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VINCENT DARNELL CAPITO, JR.,

Defendant-Appellant.

UNPUBLISHED

December 23, 2008

No. 275907

Oakland Circuit Court

LC No. 2006-208991-FC

Before: Davis, P.J., and Wilder and Borrello, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to murder, MCL 750.83. Defendant was sentenced to 15 to 30 years' imprisonment. Defendant appeals as of right. We affirm.

In May 2006, Merle Dean, Ophelia Jones and Ayanna Clark were at work at the T.G.I. Friday's Restaurant in Farmington Hills. While Dean was working in the kitchen, he had a verbal confrontation with Jones. According to Dean, the confrontation began when Jones told him and other members of the kitchen staff to shut up. Jones claimed that the dispute started when Dean pushed the brim of her hat down in a way that caused her pain and then threatened to have his girlfriend beat her up. Dean also allegedly mocked Jones's glasses as being out of style.

Following the conversation with Dean, Jones told Clark about the altercation. Clark then confronted Dean and another verbal confrontation resulted. During the confrontation, Clark told Dean that she was going to have some individuals come to the restaurant and that Dean was going to die. Later, three men came to the restaurant, and one asked to speak with Dean. Dean explained the situation to the man, and no violence occurred. The group of men left.

The following day, Dean, Jones and Clark were again working at the restaurant. According to Dean, when he arrived at 5:00 p.m., he passed by Clark, who told him that he was going to die that day. Later, Jones and Clark gave Dean the impression that people were coming to the restaurant to confront him. Three men later arrived at the restaurant. One of the men was wearing a white shirt, one wearing a blue shirt and one wearing a red shirt. Dean identified the man in the white shirt as defendant, and stated that the other two men were Talonnie Russell and Kenneth Thornton. When Dean walked out of the kitchen, he observed Clark point at him while she was speaking to the three men. Dean then went and told Brian Toro, a manager, that Clark had called people to come to the restaurant for him. Toro told him to punch out and go home.

As Dean was going to punch out, defendant approached him and began to throw punches at him. Dean began to fight back, and was subsequently aided by his brother, Antoine Dean, a fellow employee. The fight took the men into the kitchen, where Russell and Thornton began to throw glassware at employees. Dean found himself on top of defendant. Raymond High, one of Dean's coworkers, grabbed Dean and began to pull him from defendant. While Dean's arms were constrained by High, Dean began to feel pain. Dean looked down, and saw defendant was stabbing him in the stomach with a serrated knife. Defendant then fled. Dean raised his shirt, and observed that his intestines were coming out of his stomach. Dean suffered life-threatening injuries, and is no longer able to work.

Defendant first contends that the prosecutor denied him a fair trial when he unilaterally decided to strike Ayanna Clark from his witness list. We disagree. Pursuant to MCL 767.40(a)(4), a prosecutor may add to, or delete from, his witness list "upon leave of the court and for good cause shown or by stipulation of the parties." See *People v Perez*, 469 Mich 415, 420; 670 NW2d 655 (2003). On the first day of trial, the prosecution produced Clark, and moved to strike her from its witness list. Defendant's attorney stated:

No problem, your Honor. The only concern that I have is I imagine we'll have to have an attorney appointed for Ms. Clark in light of the fact the prosecutor has gave [sic] some indication that they may attempt to try to charge her as a conspirator of some sort. I don't know what charge, but that might be a concern so that we may have to appoint counsel for Ms. Clark prior to her taking the stand as a defense witness if we so proceed. [Emphasis added.]

The defense did not subsequently call Clark to testify, although it did later indicate that it was "disappointed" that the prosecution did not first consult the defense before striking Clark and several other witnesses. But when the trial court asked defense counsel whether she was asking for the prosecution to be forced to call Clark or produce Clark, she stated that she was not. Because defendant affirmatively approved striking Clark from the witness list, the issue is waived, and any error is extinguished. *People v Dobek*, 274 Mich App 58, 65; 732 NW2d 546 (2007).

Defendant next contends he was denied the effective assistance of counsel when his attorney failed to call Clark to testify. We disagree. Because defendant failed to preserve the issue of ineffective assistance, this Court is limited to reviewing errors that are evident on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). Defendant's claim that he was denied the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews the factual findings for clear error and the constitutional questions de novo. *Id.*

In order to prevail on an appeal based on ineffective assistance, defendant must establish that his attorney's assistance fell below an objective standard of reasonableness, and that this was so prejudicial to him that he was denied a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). There is a strong presumption that defense counsel's actions were sound trial strategy. *Id.* In order to demonstrate prejudice, defendant must establish that there is a reasonable probability that, but for the mistakes of his attorney, the result of the trial would have been different. *People v Mitchell*, 454 Mich 145, 167; 560 NW2d 600 (1997). The United States Supreme Court has further stated that the proper inquiry is whether, as a result of

counsel's performance, the outcome of the trial was fundamentally unfair, unreliable or prejudicial. *Lockhart v Fretwell*, 506 US 364, 369; 113 S Ct 838; 122 L Ed 2d 180 (1993).

There is no indication on the record that Clark would have testified favorably for defendant at trial. Furthermore, as defense counsel herself acknowledged, Clark may very well have demanded the assistance of an attorney if called to testify, as there was reason to believe she would be charged with a crime, based on her involvement in Dean's stabbing. Importantly, defendant has not shown how Clark's testimony could have overcome the strong testimonial evidence presented by various witnesses. Several witnesses besides Dean testified that defendant started the confrontation after Clark pointed at Dean, and that Clark stated various times that Dean was going to die. The evidence against defendant was overwhelming, and he cannot overcome the presumption that it was sound trial strategy to not call Clark, or establish that he was prejudiced by the decision.

Defendant next contends that he was prejudiced when he was tried jointly with Talonnie Russell, and that his attorney was ineffective for failing to move to sever. We disagree. In regard to the claim that he was prejudiced by the joint-trial, when not properly preserved, this Court reviews claims of alleged error for plain error affecting the substantial rights of the defendant. *Carines, supra* at 763-764. Because defendant failed to preserve the issue of ineffective assistance, this Court is limited to reviewing errors that are evident on the record. *Matuszak, supra* at 48.

As our Supreme Court explained in *People v Hana*, 447 Mich 325, 346-347; 524 NW2d 682 (1994):

the decision to sever or join defendants lies within the discretion of the trial court. 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. 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.

Therefore, because defendant failed to make a showing or an offer of proof, demonstrating that a joint trial would prejudice his substantial rights, he is only entitled to relief on the appellate level if there is a "significant indication" that such prejudice actually occurred.

Defendant cannot establish that his substantial rights were prejudiced as a result of being tried with Russell. While defendant asserts that the testimony regarding Russell throwing dishes and glassware at restaurant employees was highly inflammatory, and would not have been admissible had he not been joined with Russell at trial, we cannot agree that the evidence regarding Russell's behavior would have been inadmissible against defendant. Russell's behavior was relevant as his actions created a chaotic environment, that the prosecution could have utilized to explain minor discrepancies and contradictions in the testimony of various witnesses. Furthermore, even if the testimony regarding Russell was not relevant, defendant has failed to demonstrate that it was prejudicial. Even without testimony about Russell, it would still have been revealed at trial that Clark told several people that Dean was going to die, defendant

came to the restaurant, and after Clark pointed at Dean, defendant attacked him and stabbed him multiple times. The evidence of defendant's guilt was overwhelming.

Finally, at the close of trial, the court instructed the jurors that each defendant was to be treated independently, that the fact they were being tried together was not evidence of guilt, and that any evidence limited to one defendant could not be considered for another defendant. Jurors are presumed to follow instructions, and instructions are presumed to cure most errors. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Here, defendant cannot establish that the failure to sever was plain error that affected his substantial rights.

In regard to defendant's claim that he was denied the effective assistance of counsel where his attorney failed to move for severance, defendant is not entitled to relief, as he cannot establish that the trial court would have granted such a motion. As explained above, the trial court had no reason to sever, where the evidence admitted against Russell, was also relevant to the charges against defendant. Furthermore, as stated above, the evidence of defendant's guilt was overwhelming, even without reference to Russell's acts. Even if trial counsel had successfully moved to sever, the results of the trial would have been no different. Defendant is therefore not entitled to relief.

Finally, defendant contends that he is entitled to resentencing, because the trial court improperly scored several offense variables (OVs). We disagree.

Defendant was given a prior record variable score of five and an OV score of 145, resulting in the B-VI range of 126 to 210 months. Defendant alleges that OV 4, OV 9 and OV 10 should have each been scored at zero points. Even if this Court agreed, defendant would still have a total OV score of 110, and would still be in the B-VI range. Defendant would need to drop at least 11 more OV points in order to have his guideline range affected. As our Supreme Court has indicated, resentencing is not required where a scoring error does not alter the appropriate guidelines range. *People v Davis*, 468 Mich 77, 83; 658 NW2d 800 (2003). Therefore, it is unnecessary for this Court to address whether the lower court erred in scoring the variables at issue.

Affirmed.

/s/ Alton T. Davis
/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello