

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
August 20, 1996
ON REMAND

v

No. 192003
LC No. 91-002558

WILLIE SERVANT,

Defendant-Appellant.

Before: Doctoroff, C.J., and Murphy and Young, JJ.

PER CURIAM.

This case comes before us on remand from the Supreme Court. *People v Servant*, 450 Mich 902; 543 NW2d 308 (1995). In a previous decision, *People v Servant*, unpublished opinion per curiam by another panel of the Court of Appeals, issued January 11, 1995 (Docket No. 145405), this Court reversed defendant's convictions, finding that the trial court erred in admitting the codefendant's statement inculcating defendant at their joint trial. This Court also found that defendant's motion for separate trials should have been granted based on antagonistic defenses.¹ In lieu of granting the prosecutor's application for leave to appeal, the Supreme Court remanded the matter for our reconsideration in light of the Supreme Court's decision in *People v Hana*, 447 Mich 325; 524 NW2d 682 (1994). The Supreme Court also ordered that we provide a more complete explanation of our conclusion that the admission of the codefendant's statement was not harmless. Upon remand, we find that the trial court did not err in refusing to grant separate trials. Furthermore, after a careful review, we find that the trial court's error in admitting the statement of the codefendant was harmless. We affirm defendant's conviction.

In *Hana*, our Supreme Court held that *People v Hurst*, 396 Mich 1; 238 NW2d 6 (1976), has been erroneously applied as mandating severance whenever antagonistic defenses are alleged. Instead, the Court held that:

pursuant to MCL 768.5; MSA 28.1028, and MCR 6.121(D), 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. [*Hana, supra* at 346.]

The Court pointed out that the defenses must be not only inconsistent, but also mutually exclusive or irreconcilable. *Id.* at 349. In this case, defendant failed to make an offer of proof regarding his anticipated defense which would demonstrate that his defense and the defense of the codefendant were mutually exclusive. At the time of the motion for severance, the only statement available to the trial court was defendant's confession to the police in which he admitted to shooting the victim. This statement was consistent with the codefendant's defense and thus the defenses did not appear irreconcilable.

In addition, defendant failed to make a "significant indication on appeal that the requisite prejudice in fact occurred at trial," and thus, reversal of the joinder decision is precluded. *Id.* at 347. At trial, defendant testified that the codefendant suggested that they steal from the victim and kill him. However, defendant stated that he did not shoot the victim, he was not present during the shooting and he did not know who killed the victim. Defendant never testified that the codefendant shot the victim. This case is similar to *Hana* in which the codefendants did not make express cross-accusations and thus the Court found that the evidence was not "inherently antagonistic." *Id.* at 355. Defendant failed to make a "significant indication on appeal" that he was prejudiced by the joinder of his trial with that of the codefendant. *Id.* at 347. As in *Hana*, "the defenses did not rise to the level of mutual or irreconcilable antagonism," *Id.* at 356, and thus, the trial court's refusal to grant separate trials was not error.

In remanding this case to us, the Supreme Court requested that we "provide a more complete explanation" of the conclusion that the admission of the codefendant's statement was not harmless. *People v Servant*, 450 Mich 902; 543 NW2d 308 (1995). Upon reconsideration, we find the error was harmless.

The United States Supreme Court has stated that, when the improper evidence is merely cumulative and the admissible evidence overwhelming, a constitutional error may be deemed harmless. *Harrington v California*, 395 US 250; 89 S Ct 1726; 23 L Ed 2d 284 (1969). This Court follows the *Harrington* standard. *People v Thinel (On Remand)*, 164 Mich App 717, 721; 417 NW2d 585 (1987). Upon review of the record, we find that defendant's confession provided overwhelming evidence of his guilt and the codefendant's statement was merely cumulative of defendant's confession. In his statement to the police, the codefendant inculpated defendant by stating that defendant shot the victim. Although, pursuant to *People v Poole*, 444 Mich 151, 165; 506 NW2d 505 (1993), the statement should not have been admitted, any error was harmless, as the statement was merely cumulative of defendant's own confession to the police, in which he admitted that he committed the shooting. As stated by this Court, "[w]here the evidence supplied through the confession is merely cumulative and other evidence of defendant's guilt is overwhelming, the admission of a confession by a

nontestifying codefendant is harmless beyond a reasonable doubt.” *People v Passeno*, 195 Mich App 91, 101 (1992), quoting *People v Hartford*, 117 Mich App 413, 420 (1982). Because defendant confessed to shooting the victim, the evidence against him was overwhelming and the improperly admitted statement by the codefendant was merely cumulative. Thus, we find that the error was harmless beyond a reasonable doubt. Defendant’s conviction was proper.

Affirmed.

/s/ Martin M. Doctoroff

/s/ William B. Murphy

/s/ Robert P. Young, Jr.

¹ The appeal was consolidated with the appeal of the codefendant, whose convictions were also reversed. *People v Reed*, unpublished opinion per curiam of the Court of Appeals, issued January 11, 1995 (Docket No. 145406).