

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY WAYNE ALLEN,

Defendant-Appellant.

UNPUBLISHED

December 20, 1996

No. 179809

LC No. 93-129376

Before: Saad, P.J., and Griffin and M. H. Cherry,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to murder, MCL 750.83; MSA 28.278, possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), felon in possession of a firearm, MCL 750.224f; MSA 28.421(6), and possession of a firearm while on a restricted premises, MCL 750.237(a); MSA 28.434. Defendant subsequently pleaded guilty to habitual offender, third offense, MCL 769.12; MSA 28.1084. Defendant appeals and we affirm.

Defendant's convictions arose out of a shooting after an altercation during school hours at an Oak Park middle school. Defendant was engaged in a fight in a classroom when he and others attacked Jason George. The fight then escalated and moved to the parking lot where codefendant Felicia Willis allegedly handed defendant a gun after either defendant handed it to her or after she retrieved it from her car. Several witnesses observed defendant aim the gun and fire shots at the victim's head. Oak Park Police Officer Jankowski found two spent shell casings from a .25 caliber gun in the parking lot following the shooting.

I

On appeal, defendant contends that the trial court abused its discretion when denying his motion to sever the trial from that of codefendant Willis. The decision to sever a trial lies within the sound discretion of the trial court and this Court will not reverse a trial court's decision regarding severance absent an abuse of discretion. *People v Hana*, 447 Mich 325, 331; 524 NW2d 682 (1994).

The question of joinder and severance of the defendants in criminal prosecutions is addressed by statute. MCL 768.5; MSA 28.1028 provides that “[w]hen 2 or more defendants shall be jointly indicted for any criminal offense, they shall be tried separately or jointly in the discretion of the court.” Severance is also controlled by MCR 6.121(C), which mandates severance of trials only when a defendant demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying potential prejudice. See *Hana*, 447 Mich at 331. To make the required showing, the defendant must provide the court with a supporting affidavit or make 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 that prejudice. *Id.* at 346. This standard is not lessened where codefendants present antagonistic defenses. *Id.* at 347. Moreover, inconsistency of defenses is not enough to mandate severance; rather, the defenses must be “mutually exclusive or irreconcilable.” *Id.* at 349. In other words, the tension between defenses must be so great that a jury would have to believe one defendant at the expense of the other. *Id.* Nevertheless, where the defendant’s showing at trial with respect to the antagonistic nature of the codefendant’s defense is conclusory in nature and lacking in sufficient specificity to permit the trial court to accurately determine what the defenses will be, a motion for severance is properly denied. *Id.* at 355.

Defendant contends that his substantial rights were prejudiced because codefendant Willis’ defense at trial was antagonistic to his. We disagree. Defendant’s theory of the case, based upon Officer Jankowski’s testimony, was that Willis possessed one gun prior to the shooting and that the victim, Jason George, was in possession of another gun, which George ultimately fired. However, Willis testified that defendant handed her an object, which, unbeknownst to her, was a gun, and that seconds later, defendant took it back and fired it. Accordingly, it was Willis’ theory that while she did hand defendant a gun, defendant was the one who originally possessed it. We hold that defendant did not meet his burden of showing that his substantial rights would be prejudiced unless the trial court granted his motion for severance.

Moreover, defendant failed to make an adequate offer of proof regarding the purported antagonistic defense of Willis. In his memorandum of law in support of his motion, defendant merely stated that “it does appear that co-defendant [sic] Willis may testify to exculpate herself and incriminate defendant.” Furthermore, before trial, defense counsel stated that Willis’ testimony would implicate defendant. These allegations failed to indicate with specificity the nature of defendant’s and Willis’ testimony and did not present the required clear and affirmative showing that defendant’s substantial rights would be prejudiced. Nevertheless, even if this hurdle were overcome, we do not see how the codefendants’ theories were mutually exclusive or otherwise irreconcilable. Even if George possessed a gun and ultimately fired it, codefendant Willis’ testimony at trial did not attack this theory. Rather, Willis testified that defendant handed Willis a gun and that she handed it back to him. Willis was not aware of who fired the shots. The jury could arguably have believed: (1) that George possessed a gun, and (2) the testimony of Willis.

II

Next, defendant contends that the trial court erred by failing to sever the charge of felon in possession of a firearm from the other charges because it was prejudicial to admit into evidence defendant's prior conviction to prove the charge of felon in possession of a firearm. However, defendant did not move for severance on this basis. Therefore, this issue is unpreserved for our review. *People v Hoffman*, 205 Mich App 1, 19; 518 NW2d 817 (1994). Nevertheless, this issue lacks merit. Although defendant argues that MRE 609 requires severance of the charges, MRE 609 addresses evidence offered to attack the credibility of a witness. Because defendant was not a witness at trial, this rule of evidence is inapplicable.

III

Lastly, defendant contends that the prosecutor engaged in misconduct during his closing argument and rebuttal. The propriety of a prosecutor's conduct depends upon all the circumstances of a case and must be evaluated in context to determine whether the defendant was denied his right to a fair and impartial trial. *People v Minor*, 213 Mich App 682, 689; 541 NW2d 576 (1995). A prosecutor may not intentionally inject inflammatory arguments with no apparent justification except to arouse the prejudice of the jurors. *People v Lee*, 212 Mich App 228, 247; 537 NW2d 233 (1995). However, the prosecutor is an advocate who is entitled to argue the evidence and any reasonable inferences therefrom as they relate to his theory of the case. *People v McElhaney*, 215 Mich App 269, 284; 545 NW2d 18 (1996). Furthermore, a prosecutor may respond to arguments and comments made by defense counsel. See *id.*

Defendant contends that certain comments during the prosecutor's closing argument denied him a fair and impartial trial. First, he argues that the prosecutor denigrated his counsel by stating that defense counsel's closing argument did not coincide with his opening statement or with defendant's theory of the case that there were two guns involved. However, the prosecutor's comments, viewed in context, permissibly referred to the evidence adduced during trial to refute the representations of defense counsel about what defense counsel expected the evidence to show. Furthermore, the comments were neither a direct nor indirect attack on defense counsel -- the prosecutor merely took issue with defense counsel's version of what the evidence showed.

Next, defendant contends that certain comments during the prosecutor's rebuttal denigrated his counsel. Specifically, defendant takes exception to the prosecutor's comments that defense counsel's argument "offended" him, that his theory relied upon "magic testimony," that defense counsel made his theory up as he went along, that it was concocted only from the mind of defense counsel and finally that the theory was a "clever sophistry." While a prosecutor may not intentionally denigrate the role of defense counsel, *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988), he is not required to state his arguments or rebuttal in the blandest of terms. *People v Marji*, 180 Mich App 525, 541; 447 NW2d 835 (1989). The prosecutor may argue that the defendant's theory is unbelievable as long as the prosecutor's argument is based on the evidence. *Id.* Again, the record in this case, taken in context, could support the prosecutor's comments regarding defense counsel's

theory. Thus, the prosecutor's statements were a comment on the lack of evidence, rather than denigration of defense counsel.

Next, defendant contends that he was denied his right to a fair and impartial trial when, after defense counsel commented in his closing argument that defendant had been overcharged, the prosecutor objected and stated that he wanted his objection heard outside the hearing of the jury because in his view, defense counsel's comment regarding overcharging was "unethical." Defense counsel then stated that the prosecutor's comment was reprehensible. Considering the context in which this comment was made, the comment did not deny defendant of a fair and impartial trial.

Finally, defendant did not object during the prosecutor's rebuttal when he stated, "I ask you not to consider" the lesser included offenses. Therefore, we need only determine whether manifest injustice will result if this issue is not addressed or whether a cautionary instruction could have cured any prejudicial effect of this comment. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). The record reveals that during its instruction of the jury, the trial court told the jurors that they could consider the lesser included offenses. Furthermore, the jurors were told that they were to disregard statements of counsel since they were not evidence. This instruction served to cure any prejudicial effect created by the prosecutor's comment. Furthermore, no manifest injustice will result if we decline to consider this issue in light of the overwhelming evidence against defendant.

Affirmed.

/s/ Henry William Saad
/s/ Richard Allen Griffin
/s/ Michael H. Cherry