

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

QUENTIN DEE BETTY,

Defendant-Appellant.

UNPUBLISHED

June 6, 1997

No. 191988

Oakland Circuit Court

LC No. 95-137938-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

SPENCER JORY OLIVER,

Defendant-Appellee.

No. 192776

Oakland Circuit Court

LC No. 95-137939-FC

Before: Bandstra, P.J., and Griffin and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant Quentin Betty was convicted of first-degree felony murder, MCL 750.316; MSA 28.548, five counts of armed robbery, MCL 750.526; MSA 28.797, seven counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), conspiracy to commit armed robbery, MCL 750.157a; MSA 28.354(1), and assault with intent to rob while armed, MCL 750.89; MSA 28.284. Defendant was sentenced to life imprisonment on the first-degree felony murder conviction, twenty to sixty years' imprisonment for each of the armed robbery convictions, the conspiracy to commit armed robbery conviction, and the assault with intent to rob while armed conviction, and two years' imprisonment for each of the felony-firearm convictions. In Docket No. 191988, defendant Betty now appeals as of right. We affirm.

Following the same jury trial, defendant Oliver was convicted of first-degree felony murder, MCL 750.316; MSA 28.548, and four counts of armed robbery, MCL 750.529; MSA 28.797. Defendant was sentenced as a juvenile and placed in the custody of the Department of Social Services until he reaches twenty-one years of age. In Docket No. 192776, the prosecution appeals as of right the trial court's decision to sentence defendant Oliver as a juvenile. We affirm.

Defendants pushed their way into a private residence where a party was being held. Defendant Betty held a gun to the head of one of the guests, while both he and defendant Oliver demanded that people empty their pockets. At some point, a shot was fired. No one witnessed a bullet hitting the victim, but many witnessed the victim leaving the room. The victim's body was found on the front lawn of the private residence.

Docket No. 191988

Defendant Betty first argues that he was denied the effective assistance of counsel because his trial counsel failed to bring a motion to sever the trial or a motion for separate juries at a joint trial. We disagree.

To prove ineffective assistance of counsel, defendant must prove that trial counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for counsel's error, the outcome of trial would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Trial counsel is presumed competent, and defendant has the burden of proving that the complained of conduct is not within sound trial strategy. *Id.* A trial involving codefendants should be severed when the defendants' defenses are inconsistent and the defenses are "mutually exclusive" or "irreconcilable." *People v Hana*, 447 Mich 325, 349; 524 NW2d 682 (1994). The general rule is that a defendant does not have a right to a separate trial and a strong policy favors joint trials in the interest of judicial economy. *People v Hoffman*, 205 Mich App 1, 19-20; 518 NW2d 817 (1994).

A review of the record shows that the defenses of Betty and Oliver were not "mutually exclusive" or "irreconcilable." Both admitted they had gone to the house to get Betty's money or drugs. Both admitted that a shot was fired in the basement. The fact that defendant Betty testified that he shot the victim in self-defense outside of the house and Oliver's confession stated that Betty shot the victim in the shoulder in the basement does not raise the defenses to the level of being irreconcilable. Neither defendants nor the witnesses saw anyone fall as a result of the gunshot, and many of the witnesses saw the victim walk out of the room after the shot rang out. Furthermore, since the defenses were not antagonistic, defendant's contention that it was highly likely that the trial court would have granted a severance motion or a motion for separate juries is unfounded. Defendant has failed to show that such a motion would have been granted. Moreover, the record does not support defendant's contention that defendant Oliver's statements would not have come in at a separate trial. Finally, the trial court instructed the jury that each defendant's statements were admitted into evidence only against himself and the statements could not be used against the other defendant. Defendant has failed to

establish that counsel's failure to bring a motion to sever or a motion for separate trial denied him effective assistance of counsel.

Additionally, defendant's reliance on *Bruton v United States*, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968), is misplaced under the present facts. In *Bruton*, although the codefendant did not take the stand, a witness testified that the codefendant gave an oral confession implicating defendant Bruton. *Id.* at 124. Focusing on the fact that the codefendant's refusal to take the stand left the testimony about codefendant's confession unimpeached, the United States Supreme Court held that the admission of the codefendant's confession violated defendant Bruton's right of cross-examination. *Id.* at 126, 127-128. However, unlike *Bruton*, defendant Oliver did testify and defendant Betty's counsel cross-examined him. Therefore, defendant Betty was not denied cross-examination like the defendant in *Bruton*.

Defendant Betty also argues that he was denied a fair trial because the police officer testified that she obtained a picture of him for a photographic lineup from the department's identification section. Defendant Betty claims that her testimony implied that defendant had a police record. We note at the outset that defendant failed to object to the police officer's testimony.

A plain, unpreserved error may not be considered by an appellate court for the first time on appeal unless the error could have been decisive of the outcome or unless the prejudice is presumed or reversal is automatic. *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994). In the case at bar, the testimony was, at most, nothing more than a vague reference to a possible criminal record. *People v Eaton*, 114 Mich App 330, 337; 319 NW2d 344 (1982). Moreover, the other evidence was overwhelming against defendant. *Grant, supra* at 553. Therefore, since the testimony was not decisive of the outcome, we need not consider this issue on appeal.

Defendant seems to also argue that it was prosecutorial misconduct to ask the police officer what steps were taken to prepare the photographic lineup. As noted above, defendant did not object to the question or answer at trial, and he has not shown that manifest injustice would result from this Court's failure to review the alleged misconduct. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

Docket No. 192776

The prosecution argues that the trial court abused its discretion by sentencing defendant Oliver as a juvenile. We disagree.

This Court applies a bifurcated standard of review in reviewing a trial court's decision to sentence a minor as a juvenile or as an adult. *People v Cheeks*, 216 Mich App 470, 474; 549 NW2d 584 (1996). We review the trial court's findings of fact under the clearly erroneous standard and the ultimate decision to sentence the minor as a juvenile or as an adult for an abuse of discretion. *Id.*

Pursuant to MCL 769.1; MSA 28.1072, the trial court must conduct a juvenile sentencing hearing to determine if the best interests of the defendant and the public would be served better by

sentencing the juvenile as an adult. *Cheeks, supra* at 474. The trial court must consider a number of factors in making its determination to sentence the minor as a juvenile or an adult:

(3) A judge of a court having jurisdiction over a juvenile shall conduct a hearing at the juvenile's sentencing to determine if the best interests of the juvenile and the public would be served by placing the juvenile on probation and committing the juvenile to a state institution or agency described in the youth rehabilitation services act, Act No. 150 of the Public Acts of 1974, being sections 803.301 to 803.309 of the Michigan Compiled Laws, or by imposing any other sentence provided by law for an adult offender. The rules of evidence do not apply to a hearing under this subsection. In making this determination, the judge shall consider the following criteria giving each weight as appropriate to the circumstances:

(a) The prior record and character of the juvenile, his or her physical and mental maturity, and his or her pattern of living.

(b) The seriousness and the circumstances of the offense.

(c) Whether the offense is part of a repetitive pattern of offenses which would lead to 1 of the following determinations:

(i) The juvenile is not amenable to treatment.

(ii) That despite the juvenile's potential for treatment, the nature of the juvenile's delinquent behavior is likely to disrupt the rehabilitation of other juveniles in the treatment program.

(d) Whether, despite the juvenile's potential for treatment, the nature of the juvenile's delinquent behavior is likely to render the juvenile dangerous to the public if released at the age of 21.

(e) Whether the juvenile is more likely to be rehabilitated by the services and facilities available in adult programs and procedures than in juvenile programs and procedures.

(f) What is in the best interests of the public welfare and the protection of the public security. [MCL 769.1(3); MSA 28.1072.]

The prosecutor has the burden of proving by a preponderance of the evidence that the best interests of the juvenile and the public would be served by sentencing the juvenile as an adult offender. *Cheeks, supra* at 475.

The taking of a life, whether defendant Oliver was the shooter or not, was clearly the most serious offense defendant could have committed. However, defendant did not have a prior criminal

record or demonstrate any criminal conduct prior to the incident or since his incarceration in the Children's Village. This illustrates that the offenses for which defendant Oliver was convicted were not part of a repetitive pattern of behavior. Furthermore, based on the record, defendant appears to be amenable to treatment in the juvenile system and would not be disruptive to other juveniles also seeking treatment. Moreover, the probation officer testified that she thought defendant could be rehabilitated under the juvenile system, and if he responded to the treatment, it was less likely that he would be recidivous. Thus, based on the record, the trial court's findings of fact were not clearly erroneous and it did not abuse its discretion by sentencing defendant Oliver as a juvenile.

Affirmed.

/s/ Richard A. Bandstra

/s/ Richard Allen Griffin