STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL L. WHITE,

Defendant-Appellant.

UNPUBLISHED
December 19, 2000

No. 215411
Wayne Circuit Court
LC No. 97-007114

Before: Bandstra, C.J., and Saad and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of carjacking, MCL 750.529a; MSA 28.797(a), one count of armed robbery, MCL 750.529; MSA 28.797, and one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to two 5- to 20-year prison terms, and a two-year prison term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

This case arises out of a carjacking that occurred in Detroit on September 7, 1997. Defendant first argues that his convictions for armed robbery and carjacking violate his state and federal protections against double jeopardy. This Court has ruled contrary to defendant's position. *People v Parker*, 230 Mich App 337, 344-345; 584 NW2d 336 (1998). While defendant admits that *Parker* is controlling, he asks this Court to reconsider its decision in that case. See MCR 7.215(H). Because we find the reasoning employed in *Parker* persuasive, we will decline this request.

Defendant next argues that the trial court abused its discretion by denying his motion for severance. We disagree. The denial of a motion for severance is reviewed for an abuse of discretion. MCL 768.5; MSA 28.1028; *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994). 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. Defendant concedes that he did not provide a supporting affidavit or make a sufficient offer of proof to the trial court. Thus, "absent any significant indication on appeal that the requisite prejudice in fact occurred at trial," the trial court's decision must be affirmed. *Id*. at 346-347.

Defendant argues that his substantial rights were prejudiced at trial because he suffered "spillover prejudice" and "guilt by association" when the testimony of a witness, D'Estian Burton, called by his codefendant, Willie Webb, was so nonsensical that he essentially assured Webb's conviction. Thus, defendant contends, his substantial right "to present a defense" was effectively eliminated as a result of the trial court's denial of his motion to sever. Defendant does not claim that he was actually unable to present a defense to the jury. Rather, he contends that he had a substantial right to present a defense "unfettered by the blunders of co-defendant's witnesses and his counsel," and that this right was prejudiced by the trial court's refusal to grant his motion for severance. Defendant cites no authority to support his contention that such a right exists. Our Supreme Court has stated that defenses must be mutually exclusive or irreconcilable to mandate severance. *Hana*, *supra* at 349. In the present case, the defenses presented by defendant and codefendant Webb were neither mutually exclusive nor irreconcilable.

Both defendant and Webb argued that an individual named Moe committed the carjacking, and that the inconsistencies in the testimony of Lanette Aaron, the victim in this case, undermine the credibility of her identification of defendant and Webb as the perpetrators. Webb argued that although he drove the car knowing that it was stolen by Moe, he did not commit the actual carjacking. These defenses cannot be characterized as mutually exclusive or irreconcilable.

Defendant specifically argues that the testimony of Webb's witness Burton undermined his own defense. However, Burton's testimony was not contradictory to the testimony of defendant's alibi witnesses. Burton testified that Moe returned to his house from the store with the Mustang, and that Webb and Ross later drove off in the car. This testimony is not inconsistent with defendant's witnesses' testimony that he was picked up by Ross, Webb and Stackhouse in the Mustang while he was talking with Ray and Harris near his house. The jury could have believed both the testimony of Burton, and the testimony of Stackhouse, Ross, Harris and Ray.

Furthermore, Burton's testimony did not undermine defendant's defense of misidentification. Burton testified that Moe was of medium build, and was completely bald. Aaron testified that the carjacker standing near the back of her car, whom she identified as defendant, was "light to medium build," was wearing a hat, and had a light mustache. Burton's testimony regarding Moe's appearance neither eliminates nor substantially undermines the defense that Aaron misidentified defendant as one of the carjackers. Given the testimony of Burton and Aaron, the jury could have concluded that Moe was the carjacker standing near the back of the car, and that Aaron mistakenly identified defendant. Because the defenses of defendant and codefendant were neither mutually exclusive nor irreconcilable, we find that the trial court did not abuse its discretion by denying defendant's motion for severance.

Defendant also argues that defendant's counsel was ineffective "for failing to move for a mistrial when it became apparent that the tactics" of codefendant would "substantially prejudice his defense to the extent that he could not receive a fair trial." However, as explained above, codefendant Webb's defense did not contradict or negatively affect defendant's defense of misidentification, nor did it contradict or negatively affect the alibi testimony provided by defendant's witnesses. Thus, a motion for mistrial on the part of defendant's counsel would have

been futile. An attorney is not ineffective for failing to bring a futile motion. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). Defendant's argument is without merit.

Defendant next argues that the trial court erred by not instructing the jury that the crime of carjacking required a showing that defendant specifically intended to permanently deprive the victim of the motor vehicle. Defendant concedes that this Court, in *People v Terry*, 224 Mich App 447, 455; 569 NW2d 641 (1997), found that the plain language of the carjacking statute does not require such a showing of specific intent. However, defendant contends that *Terry* was incorrectly decided and that this Court should author an opinion disagreeing with *Terry* pursuant to MCR 7.215(H)(2). We believe, as this Court previously found in *People v Davenport*, 230 Mich App 577, 579; 583 NW2d 919 (1998), that *Terry* was correctly decided.

We affirm.

/s/ Richard A. Bandstra
/s/ Henry William Saad
/s/ Patrick M. Meter