STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STACY JONES,

Defendant-Appellant.

UNPUBLISHED
December 28, 2001

No. 225988
Wayne Circuit Court
LC No. 99-008569

Before: Saad, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions, following a jury trial, of assault with intent to commit murder, MCL 750.83, carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to concurrent terms of ten to twenty years' imprisonment for the assault conviction, and forty to sixty months' imprisonment for the CCW conviction, to be served consecutively to the mandatory two-year term for the felony-firearm conviction. We affirm.

This appeal arises from the shooting of William Bryant in Detroit on December 2, 1998. Defendant was tried jointly with codefendant Andre Benford before the same jury.[1] On appeal, defendant first argues that the trial court erred in denying his request for severance. This Court reviews a trial court's decision regarding a motion for severance for an abuse of discretion. MCL 768.5; *People v Hana*, 447 Mich 325, 331; 524 NW2d 682, amended 447 Mich 1203 (1994).

MCL 768.5 provides that when two defendants are jointly indicted for a criminal offense, "they shall be tried separately or jointly, in the discretion of the court." *Hana, supra* at 338. A defendant seeking severance must provide an offer of proof or supporting affidavit "that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced [by a joint trial] and that severance is the necessary means of rectifying the potential prejudice." *Id.* at 346. In other words, "[a] defendant must not only demonstrate that 'substantial rights' have been

[1] Benford was convicted of assault with intent to commit murder in violation of MCL 750.83. His appeal is also before the same panel of this Court in Docket No. 225991.

detrimentally affected, but also that severance is 'necessary,' i.e., that there is no other available avenue of relief." *Id*. at 345, quoting MCR 6.121(C).

We share the trial court's view that defendant failed to make the requisite offer of proof in the instant case. Specifically, defendant did not demonstrate, either through an offer of proof or with a supporting affidavit, that his substantial rights would be prejudiced if he were tried with Benford. *Id.* at 346. Although we recognize that defendant requested a separate jury in his motion to withdraw his waiver of a jury trial, a review of the record reveals that defendant did not provide an offer of proof or an affidavit that supported his request.[2] As Justice Griffin, speaking for the Court, observed in *Hana, supra* at 346-347:

> 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.

See also *People v Perez-Leon*, 224 Mich App 43, 59; 568 NW2d 324 (1997). After a careful review of the record, we are satisfied that defendant was not prejudiced at trial. Although defendant's and Jones' defenses may have been inconsistent, they were not mutually exclusive or irreconcilable to the extent that severance was required. *Hana, supra* at 347; *People v Cadle (On Remand)*, 209 Mich App 467, 469; 531 NW2d 761 (1995); *People v McCray*, 210 Mich App 9, 12; 533 NW2d 359 (1995).

Defendant next argues that the trial court abused its discretion in ruling that defendant could not recall Officer Patrick Mueller to testify regarding the contents of the Preliminary Complaint Report (PCR). We review a trial court's evidentiary decisions for an abuse of discretion. *People v Brownridge*, 459 Mich 456, 460; 591 NW2d 26, amended 459 Mich 1276 (1999).

Defendant initially maintains that the description of the shooter contained within the PCR was not hearsay and should have been admitted into evidence as a statement of identification. We disagree. A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is one of identification of a person made after perceiving the person. MRE 801(d)(1)(C); *People v Malone*, 445 Mich 369, 371; 518 NW2d 418 (1994); see also *People v Sykes*, 229 Mich App 254, 270; 582 NW2d 197 (1998).

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[2] We recognize that on the first day of trial, defendant's trial counsel argued that defendant and Benford had "hostile defenses." Trial counsel also hypothesized that Benford would testify in the following manner.

> "I didn't know what was going on. The co-defendant did everything. He's to blame, not me. Please acquit me; blame the other guy."

In our opinion, this is not a "offer of proof, that clearly, affirmatively, and fully demonstrates that [defendant's] substantial rights will be prejudiced . . . ." *Hana, supra* at 346.

In the instant case, during the prosecutor's case-in-chief, Officer Mueller testified that he spoke to three witnesses at the scene who provided a description of the assailant who shot Bryant.[3] Specifically, Mueller indicated that he spoke with an unnamed individual who worked at a nearby party store, an off-duty police officer who witnessed the shooting, and Kim Pierce, who also witnessed the shooting. However, Mueller was unable to recall specifically which witnesses gave him the information concerning the assailant's description contained in the PCR. Instead, Mueller testified that the assailant's description was gleaned from a combination of information from all three individuals, as well as Bryant.

We disagree with defendant that the trial court erred in concluding that this evidence was not admissible under MRE 801(d)(1)(C). Without specific information concerning which exact individuals identified the perpetrator, it was not possible to cross-examine the eyewitnesses regarding this information as required by the evidence rule. *Malone, supra* at 377. Although both Officer Young and Pierce testified at trial, the individual who worked at the party store did not. Further, during their testimony both Bryant and Pierce testified that they could not remember whether they gave a description of the shooter at the scene. Moreover, Officer Young could not remember what information he had given Officer Mueller that aided in the description in the PCR. Because the witnesses providing the identification were not subject to meaningful cross-examination at trial to ascertain what witnesses gave what information, the trial court did not abuse its discretion in disallowing this evidence.

In a related argument, defendant contends that the description of the assailant in the PCR should have been admitted into evidence as a present sense impression. "A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter, is admissible as an exception to the hearsay rule." MRE 803(1); *People v Hendrickson*, 459 Mich 229, 235; 586 NW2d 906 (1998) (Kelly, J.). As Justice Kelly, writing for the majority in *Hendrickson*, recognized:

> Present sense impressions are presumed to be trustworthy because (1) the simultaneous event and description leave no time for reflection, (2) the likelihood for calculated misstatements is minimized, and (3) generally, the statement is made in the presence of another witness who has the opportunity to observe and verify its accuracy. The admission of hearsay evidence as a present sense impression requires satisfaction of three conditions: (1) the statement must provide an explanation or description of the perceived event, (2) the declarant must personally perceive the event, and, (3) the explanation or description must be substantially contemporaneous with the event. [*Id.* at 235-236 (citations and footnote omitted) (internal quotation marks omitted).]

In our opinion, the trial court correctly concluded that the description given in the PCR did not qualify as a present sense impression. On the basis of the record before us, we are unable to conclude with any amount of certainty that the statements were "substantially

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[3] Mueller also stated that a fellow officer spoke with Bryant, who also provided a description of his assailant.

contemporaneous" with the shooting. *Id.* at 236. Accordingly, we are not persuaded that the trial court's decision to exclude this evidence amounted to an abuse of discretion.

Finally, defendant contends that he was denied the effective assistance of counsel. We disagree.

Defendant failed to properly preserve this issue for our review by moving for a new trial or a *Ginther*[4] hearing in the lower court. Therefore, our review is limited to errors apparent from the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000); *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999). To establish a denial of effective assistance of counsel, defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness and that he incurred prejudice as a result. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Further, defendant must overcome the presumption that the challenged action was the product of sound trial strategy. *Id.*

First, defendant claims that trial counsel's conduct regarding the motion for severance was deficient. After carefully reviewing the record, we conclude that defendant has failed to overcome the presumption that trial counsel's conduct was the result of trial strategy. Likewise, we reject defendant's claim that trial counsel's failure to object to Benford's counsel's "detrimental argument"[5] amounted to ineffective assistance of counsel. Trial counsel's decisions regarding whether to object during trial are generally considered matters reserved to trial strategy. See, e.g., *People v Reed*, 449 Mich 375, 400; 535 NW2d 496 (1995) (Boyle, J.). We will not second-guess counsel's trial strategy with the benefit of hindsight on appeal. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Affirmed.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Peter D. O'Connell

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[4] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[5] In his brief on appeal, defendant does not detail specifically what was detrimental about Benford's counsel's argument.