STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

DARRYL OWENS,

Defendant-Appellant.

UNPUBLISHED
January 22, 2002

No. 225961
Wayne Circuit Court
Criminal Division
LC No. 99-005892

Before: Hood, P.J., and Murphy and Markey, JJ.

PER CURIAM.

Defendant was convicted of carjacking, MCL 750.529a, and armed robbery, MCL 750.529,[1] for which he was sentenced to two concurrent terms of nine to twenty years' imprisonment. He appeals by right. We affirm.

Defendant first argues that the trial court erred in refusing to grant his motion for a separate jury. On the third day of trial, before jury selection was complete, defendant moved for a separate jury, arguing that he had learned new information that made his defense antagonistic to that of his codefendants. Defense counsel, however, could not articulate how defendant's defense was antagonistic to the codefendant's defense. In the absence of any legal authority to support the position that defendant was advocating, the trial court denied the motion for a separate jury. We review the trial court's decision for an abuse of discretion. *People v Hana,* 447 Mich 325, 346, 355; 524 NW2d 682 (1994).

"Severance is mandated under MCR 6.121(C) only when a defendant demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice." *Hana, supra* at 331. A defendant requesting severance 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 the potential prejudice." *Id.* at 346. "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." *Id.* at 346-347. Severance

[1] He was acquitted of a charge of possession of a firearm during the commission of a felony, MCL 750.227b.

is not automatically required where an argument of antagonistic defenses is presented. *Id.* at 347-348. In fact, "[i]nconsistency of defenses is not enough to mandate severance; rather, the defenses must be "mutually exclusive" or "irreconcilable." *Id.* at 349; see, also, *People v Perez-DeLeon*, 224 Mich App 43, 59; 568 NW2d 324 (1997). The use of separate juries is a "form of severance to be evaluated under the standard . . . applicable to motions for separate trials." *Hana, supra* at 351.

In this case, defendant failed to clearly, affirmatively, and fully demonstrate to the trial court that his substantial rights would be prejudiced without a separate jury. On appeal, we have reviewed the record and find that the requisite prejudice did not occur at trial. Defendant's defense was not antagonistic to the codefendant's defense. The codefendant argued that he did not believe a carjacking occurred and that the incriminating evidence against him was not credible. Similarly, defendant questioned whether a carjacking took place. Defendant also argued that he was not involved in the crimes. He stressed that other people, including a male of similar description to himself, were arrested in the stolen automobile. Neither defendant nor the codefendant attempted to escape liability by pointing the finger at the other. Because both pursued similar, compatible defenses, the defenses were not mutually exclusive or irreconcilable. We affirm the trial court's decision to deny separate juries.

We note that on appeal defendant's primary argument is that separate juries were necessary because then his jury would not have heard incriminating testimony that was admissible only against the codefendant, which violated his right to confrontation. This argument was not specifically articulated in the trial court. We also note that defendant never objected to the testimony at issue on the ground that it was inadmissible as substantive evidence against him. The argument is not properly preserved for appeal. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001); *In re Weiss*, 224 Mich App 37, 39; 568 NW2d 336 (1997). The plain error rule applies to unpreserved claims of constitutional and nonconstitutional error. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999).

Defendant argues that the testimony of Tanya Farrow, which implicated him in the crimes, was admissible only against the codefendant. Defendant argues that its admission as substantive evidence against him violated his right to confrontation. The codefendant made statements to Farrow that he carjacked a car and that defendant and Treveda Cooper were with him. Defendant does not argue that the statements were admissible against the codefendant as statements against the codefendant's penal interest. MRE 804(b)(3). Defendant argues, however, that the statements were not admissible against him. This argument has no merit.

In *People v Schutte*, 240 Mich App 713; 613 NW2d 370 (2000), this Court discussed a similar situation and stated:

> Generally, we presume that a codefendant's inculpatory hearsay statement against another codefendant is unreliable and therefore inadmissible under MRE 804(b)(3). The entire hearsay statement of an accomplice may be admissible against an accused, however, where the declarant's inculpatory statement is made in narrative form, by his own initiative, and is reliable because as a whole it is against the declarant's own interest.

> . . . Admission of a hearsay statement by an unavailable declarant will not violate a defendant's right to confront his accusers if the statement falls within a firmly rooted hearsay exception or if it bears adequate indicia of reliability. Because Michigan has not recognized a declaration against interest as falling within a "firmly rooted hearsay exception," . . . [the] statement must be examined to determine if it contains sufficient indicia of reliability.
>
> This Court is charged with looking at each case on an individual basis for sufficient indicia of the reliability of the declarant's statement. "The indicia of reliability necessary to establish that a hearsay statement has particularized guarantees of trustworthiness sufficient to satisfy Confrontation Clause concerns must exist by virtue of the inherent trustworthiness of the statement and may not be established by extrinsic, corroborative evidence." The Court in [*People v*] *Poole*, [444 Mich 151; 506 NW2d 505 (1993)] *supra* at 165, stated:
>
> "In evaluating whether a statement against penal interest that inculpates a person in addition to the declarant bears sufficient indicia of reliability to allow it to be admitted as substantive evidence against the other person, courts must evaluate the circumstances surrounding the making of the statement as well as its content.
>
> The presence of the following factors would favor admission of such a statement: whether the statement was (1) voluntarily given, (2) made contemporaneously with the events referenced, (3) made to family, friends, colleagues, or confederates – that is, to someone to whom the declarant would likely speak the truth, and (4) uttered spontaneously at the initiation of the declarant and without prompting or inquiry by the listener.
>
> On the other hand, the presence of the following factors would favor a finding of inadmissibility: whether the statement (1) was made to law enforcement officers or at the prompting or inquiry of the listener, (2) minimizes the role or responsibility of the declarant or shifts blame to the accomplice, (3) was made to avenge the declarant or to curry favor, and (4) whether the declarant had a motive to lie or distort the truth.
>
> Courts should also consider any other circumstances bearing on the reliability of the statement at issue. While the foregoing factors are not exclusive, and the presence or absence of a particular factor is not decisive, the totality of the circumstances must indicate that the statement is sufficiently reliable to allow its admission as substantive evidence although the defendant is unable to cross-examine the declarant." [*Id.* at 717-719 (citations omitted).]

In *Poole, supra* at 153, a codefendant made statements that implicated him and two other codefendants to his cousin. The Court specifically addressed the same question that is presented in this case:

> [W]hether a declarant's noncustodial, out-of-court, unsworn-to statement, voluntarily made at the declarant's initiation to someone other than a law

> enforcement officer, inculpating the declarant and an accomplice in criminal activity, can be introduced as substantive evidence at trial . . . . [*Id.* at 153-154.]

The Court ruled that the declarant's cousin could testify about the declarant's hearsay statements because the statements met the guarantees of trustworthiness. *Id.* at 157-159. The Court further determined that the admission of the statements did not violate the other codefendants' right to confrontation because the declarant was unavailable and the statement bore adequate indicia of reliability to establish that the hearsay statement had a particularized guarantee of trustworthiness. *Id.* at 162-166.

In this case, the totality of the circumstances supports the conclusion that the codefendant's statement possessed sufficient indicia of reliability to be admitted against defendant despite defendant's inability to cross-examine the codefendant about the statement. The statement was voluntarily made to Farrow, the codefendant's friend. The testimony demonstrated that the statement was uttered spontaneously, without prompting. The statement did not minimize the codefendant's role in the crime or shift blame to defendant. It was not made to exculpate the codefendant. There also is no evidence that the codefendant had reason to distort the truth when speaking to Farrow. Under the circumstances, the statement had a "sufficient indicia of reliability 'to provide the trier of fact a satisfactory basis for evaluating the truth of the statement' and thus to satisfy Confrontation Clause concerns." *Schutte, supra* at 719-720. Further, defendant, having declined to testify pursuant to his Fifth Amendment rights, was properly unavailable. See *Poole, supra* at 163.

Defendant also argues on appeal that there was insufficient evidence to convict him of armed robbery. His argument ignores the evidence presented at trial and hinges on his invalid claim that, because the jury acquitted him of felony-firearm charges, they must necessarily have determined that he was not armed with a dangerous weapon at the time of the crimes. If he was not armed with a dangerous weapon, he could not be guilty of armed robbery. This argument is erroneous because juries may reach inconsistent verdicts as a result of leniency, mistake or compromise. *People v Goss (After Remand)*, 446 Mich 587, 597-598 (Levin J.); 521 NW2d 312 (1994); *People v Lewis*, 415 Mich 443; 330 NW2d 16 (1982); see, also, *People v Duncan* 462 Mich 47, 54; 610 NW2d 551 (2000). A jury may reach different conclusions concerning an identical element of two different offenses in a criminal case. *Goss, supra* at 597 (Levin J.); *Lewis, supra.* In *People v Vaughn,* 409 Mich 463, 466; 295 NW2d 354 (1980), the Court stated:

> Juries are not held to any rules of logic nor are they required to explain their decisions. The ability to convict or acquit another individual of a crime is a grave responsibility and an awesome power. An element of this power is the jury's capacity for leniency. Since we are unable to know just how the jury reached their conclusion, whether the result of compassion or compromise, it is unrealistic to believe that a jury would intend that an acquittal on one count and conviction on another would serve as the reason for defendant's release. These considerations change when a case is tried by a judge sitting without a jury. But we feel that the mercy-dispensing power of the jury may serve to release a defendant from some of the consequences of his act without absolving him of all responsibility.

In this case, there were inconsistent verdicts on the armed robbery and felony-firearm charges. This does not mean, however, that the armed robbery conviction is invalid. A review of the evidence in a light most favorable to the prosecution supports that all of the elements necessary for an armed robbery conviction were proved beyond a reasonable doubt.

We affirm.

/s/ Harold Hood
/s/ William B. Murphy
/s/ Jane E. Markey