# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL LEE WALLS,

Defendant-Appellant.

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UNPUBLISHED
February 19, 2002

No. 228531
Wayne Circuit Court
LC No. 99-009102

Before: Talbot, P.J., and Gage and Wilder, JJ.

PER CURIAM.

Following a joint bench trial, defendant was convicted of assault with intent to commit murder, MCL 750.83, possession of a firearm during the commission of a felony, MCL 750.227b, first-degree home invasion, 750.110a(2), and second-degree home invasion, MCL 750.110a(3). Defendant was sentenced to two years' imprisonment for the felony-firearm conviction, to be served before and consecutive to his concurrent sentences of eleven years and three months to twenty years' imprisonment for the assault with intent to commit murder conviction, three to twenty years' imprisonment for the first-degree home invasion conviction, and three to fifteen years' imprisonment for the second-degree home invasion conviction. Defendant appeals as of right. We affirm.

Defendant argues on appeal that his and the codefendant's trials should have been severed, and that his counsel was ineffective in failing to insist on severance. Defendant maintains that the trial court's attempt to separate his action from that of the codefendant without actual severance resulted in prejudice and denied him a fair trial. We disagree.

Defendant has waived review of his claim that the trials should have been severed. Defendant initially requested severance or a separate jury trial on the basis of his concern that introduction of the codefendant's confession to the police would violate defendant's Sixth Amendment right to confrontation and cross-examination of witnesses pursuant to *Bruton v United States*, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968). However, at the final pretrial conference, defendant changed his strategy and expressly waived his right to a jury trial and agreed to proceed without severance. A party may not request a certain action of the trial court or waive objection to an issue and then argue on appeal that the resultant action was error. *People v Aldrich*, 246 Mich App 101, 111; 631 NW2d 67 (2001). See *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

We now turn to defendant's claim that his counsel was ineffective for failing to insist on severance. In order to establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). Effective assistance of counsel is presumed, and a defendant must overcome the strong presumption that assistance of his counsel was effective. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). Counsel's performance must be measured against an objective standard of reasonableness and without benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *Garza, supra*.

Defendant has failed to demonstrate ineffective assistance of counsel because the record does not indicate that defendant was entitled to severance, and counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). "There is a strong policy favoring joint trials in the interest of justice, judicial economy, and administration, and a defendant does not have an absolute right to a separate trial." *People v Etheridge*, 196 Mich App 43, 52; 492 NW2d 490 (1992). Pursuant to MCR 6.121(C), severance is required only where a defendant demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice. *People v Hana*, 447 Mich 325, 331, 346; 524 NW2d 682 (1994). In order to make this showing, a defendant must provide the court with a supporting affidavit, or make an offer of proof, that the defenses are so inconsistent, mutually exclusive, and irreconcilable that it "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.

In the instant case, the record is void of any suggestion that defendant's substantial rights were prejudiced or that severance was necessary. The record indicates no antagonistic, mutually exclusive or inconsistent defenses. Further, defendant's decision to waive his right to a jury trial and the question of severance was made after consultation with counsel, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *Garza, supra* at 255. Defendant's expression of confidence in the impartiality of the court and any eventual decision allows the reasonable conclusion that his decision was a deliberate strategic choice. The fact that a strategy ultimately proves unsuccessful does not render its use ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Further, we discern no prejudice to defendant. The court insisted that it could and would consider the cases separately in drawing its conclusions, and it would not consider the codefendant's statements to the police in deciding defendant's guilt. Notwithstanding defendant's assertions to the contrary, there is no indication that the court failed to do so. Unlike a jury, a judge acting as the factfinder possesses an understanding of the law that allows the

judge to ignore evidentiary errors and decide a case based solely on properly admitted evidence. *People v Taylor*, 245 Mich App 293, 305; 628 NW2d 55 (2001); *People v Butler*, 193 Mich App 63, 66; 483 NW2d 430 (1992).

Affirmed.

/s/ Michael J. Talbot
/s/ Hilda R. Gage
/s/ Kurtis T. Wilder