

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GERARD ELGIN FERGUSON,

Defendant-Appellant.

UNPUBLISHED
February 19, 2002

No. 228532
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 the 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.¹ Defendant appeals as of right. We affirm.

Defendant first argues that the trial court's decision to allow a joint trial and conceptually treat the cases as severed failed to protect his substantial rights to a fair trial. Defendant did not move for severance in the trial court. Accordingly, we review for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999).²

The decision to sever or join a defendant is within the discretion of the trial court. MCL 768.5; MCR 6.121(D); *People v Hana*, 447 Mich 325, 331, 346; 524 NW2d 682 (1994); *People*

¹ Because defendant committed the instant crimes while on parole, these sentences will not begin until he has completed his existing sentence(s) under the parole violation.

² Even if we agreed with defendant that this issue was preserved by the codefendant's motion to sever, that request was expressly abandoned without objection by defendant. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

v Cadle, (On Remand), 209 Mich App 467, 469; 531 NW2d 761 (1995). However, this discretion is not absolute, and policy concerns strongly favor joint trials in the interest of judicial economy. *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. *Hana, supra* at 346. 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.* “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.

The record contains no evidence to suggest that defendant’s substantial rights were prejudiced or that severance was necessary. The record indicates no antagonistic, mutually exclusive, or inconsistent defenses necessary to support severance because both defendants denied shooting the complainant. At no time did the codefendant’s theory suggest that defendant was responsible for the shooting. Their defenses were neither mutually exclusive nor irreconcilable; therefore severance was not required. *People v Perez-DeLeon*, 224 Mich App 43, 59; 568 NW2d 324 (1997); *Cadle, supra* at 469. Further, defendant received a bench trial. 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).

Likewise, defendant’s claim of ineffective assistance of counsel must fail because we have discerned no error and counsel is not required to advocate a meritless position, *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000), nor can he be deemed ineffective for failing to bring a futile motion. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

Defendant next argues that his pretrial identification was so unduly suggestive as irreparable misidentification that it denied him due process of law. We disagree.

Generally, photographic identification procedures can be so suggestive that they deprive the defendant of due process where the procedures give rise to a substantial likelihood of misidentification. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998); *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). Defendant did not object at trial to the admission of the photographic lineup identification or to the complainant’s in-court identification of defendant. Our review of this unpreserved issue is therefore limited to determining whether defendant has demonstrated a plain error that affected his substantial rights. *Carines, supra* at 763-764. *People v McCray*, 245 Mich App 631, 638; 630 NW2d 633 (2001).

Assuming arguendo that pretrial identification was unduly suggestive and impermissibly tainted, the in-court identification was still appropriate where an independent basis for the in-court identification existed that was untainted by the suggestive pretrial identification. *Gray, supra* at 114-115; *People v Kachar*, 400 Mich 78, 95-97; 252 NW2d 807 (1977).

The factors relevant to our present inquiry, as outlined in *Kachar, supra*, include: (1) the witness' prior knowledge of the defendant; (2) the witness' opportunity to observe the criminal during the crime; (3) the length of time between the crime and the disputed identification; (4) the witness' level of certainty at the prior identification; (5) discrepancies between the pretrial identification description and the defendant's actual appearance; (6) any prior proper identification of the defendant or failure to identify the defendant; (7) any prior identification of another as the culprit; (8) the mental state of the witness at the time of the crime; and (9) any special features of the defendant. *Gray, supra* at 116; *Kachar, supra* at 95-96; *People v Colon*, 233 Mich App 295, 304-305; 591 NW2d 692 (1998).

After reviewing the record we are satisfied that the *Kachar* factors clearly predominate in favor of an independent basis for the in-court identification untainted by the pretrial identification procedures. The complainant knew defendant before the assault; the complainant had the opportunity to view his assailants during their initial attack on his apartment from across the hallway where he had sought refuge; he was unwavering in his certainty of defendant's participation; he named defendant immediately after the assault and while in the hospital; and the fact that they were fighting brought the complainant and defendant within proximity of each other and thus afforded the complainant the opportunity to observe his assailants.

In order to establish that his counsel was ineffective, defendant must show that he was prejudiced by counsel's failure to object to the in-court identification arguably tainted by his pretrial identification, and that absent the error, there was a reasonable probability of a different outcome at trial. *People v Whitfield*, 214 Mich App 348, 351; 543 NW2d 347 (1995). Here, defendant failed to make this requisite showing because there was a sufficient independent basis supporting the in-court identification.

Affirmed.³

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

³ Defendant has withdrawn his third issue on appeal concerning his sentencing.