STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 19, 2002
v	No. 226748 Wayne Circuit Court
MARIO PETERSON, Defendant-Appellant.	LC No. 99-006375

Before: Talbot, P.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, under an aiding and abetting theory. He was sentenced as a third habitual offender, MCL 769.11, to twenty-five to fifty years' imprisonment. He appeals as of right. We affirm defendant's conviction and sentence, but remand for correction of the judgment of sentence to reflect 265 days of sentence credit.

Defendant's conviction arises from his involvement in the drive-by shooting of LaWranza Robertson. Codefendant William Martin shot Robertson from the rear side window of a passing car in which defendant was the driver, and another codefendant, Shawn Lundy, was a front-seat passenger.

The evidence against defendant consisted primarily of the testimony of Steven Brown, who was with Robertson, and defendant's statement to the police. Brown testified that he was walking Robertson home from a barbecue shortly after midnight on June 6, 1999, when a station wagon approached and slowed down at the intersection of Holmur and Chalfonte in Detroit. Although he did not recognize the car, Brown recognized the occupants as defendant, Martin and Lundy. As the car slowed down, Martin leaned out the back window and started shooting with a black handgun. Robertson was struck in the chest and died.

The defense theory was, in essence, that this was a tough neighborhood, that Brown and his associates wanted to control drug sales in the neighborhood, that Brown shot at the station wagon as part of a turf battle, and that Martin shot back in self-defense (mistakenly hitting Robertson). Brown denied being armed. Although a witness heard two sets of gunfire, all bullet shells found at the scene were fired from Martin's weapon.

Defendant, Lundy, and Martin were tried jointly—defendant and Lundy before one jury, and Martin before a separate jury. Defendant's jury heard custodial statements given by Lundy as well as himself, but was instructed that Lundy's statement could not be considered in determining his guilt, nor could his statement be considered in determining Lundy's guilt. In his statement, defendant said he, his brother and Martin were driving around earlier in the evening and heard approximately twenty-two gunshots. They went back to defendant's house; Martin left and returned later in a station wagon. Martin asked defendant and Lundy if they wanted to ride around, and they got in with him. When they were riding around, "Martin said he was wondering who was shooting at us," but defendant did not know Martin had a gun until they were riding down Holmur. Martin had a black automatic pistol and fired seven or eight shots without saying anything. Defendant said he asked Martin who he was shooting at because he did not see anyone on the street. Defendant told the police he had a dispute with Patrick Bryant about whether he (defendant) was selling drugs in Bryant's territory (the shooting occurred near Bryant's home). Also, a month earlier, Bryant had "sucker-punched" defendant, but defendant said he had not seen Bryant since that time.

The prosecutor generally characterized the shooting as a "plan" to "hunt" down Bryant or his associates. Defendant was asked about a plan, and responded (in his statement) as follows:

> Q. Did you, Shawn and Martin plan to hunt down Patrick, Dwayne, Steve and little Mo?
>
> A. Martin said if that's who was outside, that's who we were going to get.
>
> * * *
>
> Q. Did you, Martin, and Shawn make plans before the shooting?
>
> A. We said that we were going to ride around and look for whoever was outside.

Defendant raises ten issues in his principal brief and a supplemental brief filed *in propria persona*.

I. CONFRONTATION CLAUSE

Defendant first argues that he was denied his rights under the Confrontation Clause of the Sixth Amendment[1] by the introduction of codefendant Lundy's statement in their joint trial. The trial court allowed both statements into evidence, but instructed the jury to consider Lundy's statement only when deciding Lundy's case. Lundy did not testify and, therefore, was not subject to cross-examination regarding his statement.

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[1] "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." US Const, Am VI. The Confrontation Clause applies to the states. *Pointer v Texas*, 380 US 400, 406; 85 S Ct 1065; 13 L Ed 2d 923 (1965).

The prosecutor's closing argument was divided into two parts, one addressing the case against Lundy and one addressing the case against defendant. The Lundy statement was cited by name only during the Lundy portion of closing. Nonetheless, the prosecutor referred to some evidence established by the Lundy statement when discussing the evidence against defendant. Notably, the prosecutor twice referred to an earlier shooting "at" defendant, which came from Lundy's statement, although arguably it also was established by defendant's statement. No objection was raised.

We conclude that defendant's rights were violated, but that the error was harmless.

It is error to introduce a non-testifying codefendant's statement in a joint trial, even if a limiting instruction is given. *Bruton v United States*, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968). "[A] confession that incriminates an accomplice is so 'inevitably suspect' and 'devastating' that the ordinarily sound assumption that a jury will be able to follow faithfully its instructions could not be applied." *Lee v Illinois*, 476 US 530, 542; 106 S Ct 2056; 90 L Ed 2d 514 (1986).

The prosecutor argues that Lundy's statement was entirely exculpatory, so *Bruton* is inapplicable. We disagree. Lundy's statement inculpated defendant with respect to specific elements of the offense, indicating that he shared a plan to seek revenge for an earlier shooting.

Bruton also applies even though defendant's own confession was introduced against him. In *Cruz v New York*, 481 US 186, 188-189; 107 S Ct 1714; 95 L Ed 2d 162 (1987), the defendant was jointly tried with his brother, and was convicted of murder. His brother did not testify, but statements to the police from the defendant and his brother were introduced into evidence. *Id*. Because the *Bruton* Court had discussed the "devastating" effect an accomplice's confession has on the defendant's case, the lower courts in *Cruz* applied a "devastating effect" test and concluded that the accomplice's statement was not devastating to Cruz because he had also confessed. *Id*. at 189, 191.

The Supreme Court stated that it never intended to impose a case-by-case "devastating effect" test. *Id.* at 191-192. Rather, the devastating effect of a confession was one of the circumstances which led the *Bruton* Court to exclude accomplice confessions as an entire category. *Id.* at 191. The Court further cautioned that an accomplice's statement which corresponds in large part to a defendant's own confession will have a more devastating effect (not a less devastating effect) because the similarities will add credibility to the statements. *Id.* at 192. As a result, a jury would be less likely to obey a court's instruction to disregard the statement when considering the defendant's case, and if the jury disobeys the instruction the harm is likely to be more consequential. *Id.* at 193. Thus, the Court concluded, *Bruton's* prohibition applied equally to a case where the defendant's own confession was admitted into evidence. *Id*.

Here, the circuit court committed constitutional error when it permitted Lundy's statement to be introduced in a joint trial, even though a limiting instruction was given.

The *Cruz* decision affirms that the defendant's own confession could be compared with the accomplice's confession when determining whether the accomplice's statement had sufficient indicia of reliability to be used as direct evidence against the defendant (not applicable

here) or when determining whether admission of the non-testifying accomplice's statement was harmless error under *Harrington v California*, 395 US 250; 89 S Ct 1726; 23 L Ed 2d 284 (1969). *Cruz, supra* at 194. Accordingly, we must determine whether the error was harmless.

While the "devastating" effect of similarities in an accomplice's statement and a defendant's confession support excluding an accomplice's statement from evidence in a joint trial as a violation of the Confrontation Clause, *Bruton* and *Cruz*, *supra*, those same similarities may nonetheless lead to a conclusion that the constitutional violation was harmless. *Cruz, supra.*

Defendant argues that the use of Lundy's statement was not harmless because the prosecutor relied on Lundy's statement in closing argument, and Lundy's statement provided the only evidence that (1) there was a revenge motive based on an earlier shooting, (2) there was a "plan" to look for Bryant or his associates, and (3) the station wagon was a "crack rental," which buttressed the prosecutor's argument that the three defendants did not drive their own cars so they could have the element of surprise and facilitate an anonymous getaway. Defendant also argues that Lundy's statement "bolstered" details of Steven Brown's testimony that a station wagon was used, that defendant drove, that Lundy rode in front, and that Martin shot from the back seat.

Addressing the "bolstering" argument first, Lundy's statement was clearly harmless with regard to "bolstering" Brown's testimony that a station wagon was used and his identification of the driver and shooter. Not only was Brown's testimony in this regard undisputed, but defendant's own statement confirms that they used a station wagon, that defendant drove because he had a license, that Lundy was the front seat passenger, that Martin rode in back, and that Martin fired the gun from the back seat.

As to the elements of Lundy's statement that defendant maintains were injected into the case only through Lundy's statement, defendant's argument is almost as weak. It is true that Lundy's statement directly established a motive based on Patrick's earlier shooting at defendant. However, in his own statement, defendant admitted that he heard twenty-two shots when driving around with Martin earlier and that when driving around in the station wagon "Martin said he was wondering who was shooting at us." He also stated that he had a "beef" with Bryant based on an incident a month earlier in which Bryant "sucker-punched" him at a store. While Lundy's statement makes the dispute seem more immediate and clear, we conclude that those differences are merely a matter of degree.

Lundy was not the only one who outlined a plan. Defendant also spoke about a plan in his statement:

> Q. Did you, Shawn and Martin plan to hunt down Patrick, Dwayne, Steve and little Mo?
>
> A. Martin said if that's who was outside, that's who we were going to get.
>
> * * *
>
> Q. Did you, Martin, and Shawn make plans before the shooting?

> A. We said that we were going to ride around and look for whoever was outside.

This is similar to Lundy's own account:

> Ken said we were going to ride until they saw Patrick, Dwayne, Steve or Little Mo.
>
> * * *
>
> There was a plan. Ken was to be let out of the vehicle once he saw any of them . . . .

Finally, as to defendant's allegation that Lundy's statement provided the only evidence that the station wagon was a "crack rental," defendant's statement said that the station wagon "probably was a base rental." Those references are substantially identical, so we conclude there was no harm.

The prosecutor indeed relied on statements about the earlier shooting in closing argument against defendant, arguing:

> Let's talk about Mr. Peterson first. Mr. Peterson is the driver of the car. He gets into the car and agrees to drive the rented station wagon *after being shot at*, after a discussion takes place. [Emphasis added.]

and

> [T]here is no question of Mr. Peterson's intent when he agreed to drive that car was to get back because *he was just fired upon* 22 times. He was going to go back and do the same thing. They had a plan, and that's what they did. [Emphasis added.]

Defendant's statement indicated that he heard about twenty-two shots while riding around with his brother and Martin around 9:30 pm. Defendant did not directly state that he thought he had been fired upon, as Lundy stated; however, defendant did state that Martin wondered who was shooting at "*us*." Further, defendant's statement indicated that he had a "beef" with Bryant because of the "sucker-punch" a month earlier

We conclude that the prosecutor's argument was not improper because it was based on defendant's own statement and the legitimate inference that defendant believed himself to be a target of the earlier gunshots. Even though Lundy's statement makes the dispute sound more immediate, that distinction is not sufficiently material to require reversal. The prosecutor's reference to a "plan" is supported by defendant's own statement, which referred to a plan to drive around until they saw Bryant or his associates, so the prosecutor's use of the word "plan" is harmless. We note further that defendant did not object to the prosecutor's argument, and defendant's counsel himself expressly referred to Lundy's statement in closing arguments to buttress his argument that there was no plan to kill anybody. Accordingly, we find the admission of Lundy's statement during the joint trial to be harmless error.

II. JUROR MISCONDUCT

Defendant argues that the trial court should have granted his motion for a mistrial when a juror spoke out about delays in the trial. That juror later became the jury foreperson. Defendant argues that this indicates that the jury ignored the court's instructions by prematurely commencing deliberations (to his detriment) and electing a foreperson.

We review the denial of a motion for mistrial based on juror misconduct for an abuse of discretion. *People v Messenger*, 221 Mich App 171, 175; 561 NW2d 463 (1997). We find no error.

After opening statements, one juror asked to speak with the court. Outside the presence of the other jurors, the juror said that the jurors "have been very, very patient, and we are beginning to get a little frustrated with all the breaks and everything that's happening. We're all willing to do our duty, but it's really trying on us right now, and we would like to either move on or get out of here." The court acknowledged the delays caused by having two juries. The juror continued: "We understand and appreciate that there is the time schedule you said to follow, and we would all like to be on that same schedule because we got lives too." Defendant's motion for a mistrial was denied.

We agree with the trial court that defendant's motion was based on an unsupported assumption, i.e., that the jury had violated its instructions and that defendant was prejudiced. The juror's comments did not indicate that the jury had already elected a foreperson, nor did they convey that the jury had begun deliberating defendant's guilt. Moreover, we disagree with defendant's assumption that the jury was biased against defendant for the delay. Delay had been caused by the prosecutor's illness and by the procedures inherent in trying three defendants before two juries in a single proceeding. Defendant has not demonstrated that his right to a fair trial was prejudiced. *Messenger, supra*; *People v Crear*, 242 Mich App 158, 167-168; 618 NW2d 91 (2000).

III. SEVERANCE OF TRIALS

In an argument related to his first issue, defendant argues that the court erred in denying his motion to try him separately from codefendant Lundy. We disagree.[2]

A motion to sever filed under MCR 6.121 should be granted if the defenses are "mutually exclusive" or "irreconcilable." *People v Hana*, 447 Mich 325, 349; 524 NW2d 682 (1994). "The 'tension between defenses must be so great that a jury would have to believe one defendant at the expense of the other.'" *Id.*, quoting *United States v Yefsky*, 994 F2d 885, 897 (CA 1, 1993).

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[2] It is unclear from the record whether defendant properly argued and preserved this issue for review below. Because defendant has failed to provide this Court with a record of the lower court proceedings, this issue is not properly presented for appeal. *Kingston v Markward & Karafilis, Inc*, 134 Mich App 164, 176; 350 NW2d 842 (1984). Nonetheless, we find defendant's argument without merit.

In his motion to sever trials, defendant argued that it was "believed" that Lundy had made statements against him that the prosecutor would use at trial, so a separate trial was required. These general conclusions do not demonstrate "mutually exclusive" or "irreconcilable" defenses. In fact, at trial, defendants presented essentially the same theories in similar opening statements. They relied on each other's proofs in their own closing statements. In sum, they presented a joint defense.

Accordingly, we conclude that the trial court did not abuse its discretion when it denied the motion to sever trials. MCL 768.5; *Hana*, *supra* at 346.

IV. PREARRAIGNMENT DELAY

Defendant was not arraigned until nearly four days after his arrest. He argues that his statement to the police, given approximately twenty-three hours after his arrest, was therefore involuntary and should have been excluded. We disagree.

When reviewing the denial of a motion to suppress a confession, this Court reviews the record de novo, but reviews the trial court's factual findings under the clearly erroneous standard. *People v Adams*, 245 Mich App 226, 230; 627 NW2d 623 (2001). Prearraignment delay is only one factor to be considered when evaluating the voluntariness of a confession. *People v Cipriano*, 431 Mich 315, 319; 429 NW2d 781 (1988); *People v Spinks*, 184 Mich App 559, 562-563; 458 NW2d 899 (1990). Thus, we reject defendant's claim that the delay alone rendered his statement involuntary. Considering that defendant's police statement was given less than twenty-four hours after he was arrested, we find no error.

V. SUFFICIENCY OF THE EVIDENCE

Defendant argues that the evidence of shared intent and cause of death was insufficient to support his conviction. We must review the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979).

The prosecutor presented sufficient evidence from which the jury could *infer* a plan to kill. Defendant said the plan was to "get" whoever was outside. Although defendant denied knowing that Martin had a gun when they started driving, he admittedly learned that Martin had a gun while driving down Holmur Street. Defendant acknowledged that while they were riding around, there was talk about who was shooting at them. The evidence also indicated that defendant slowed down at the intersection, thereby supporting an inference that he did this to enable Martin to shoot. After the shooting, defendant did not merely ask why Martin had shot his gun. Instead, he asked why Martin shot *because he (defendant) didn't see anyone on the street*. This is consistent with the theory that they were hunting for someone. Examining the evidence in a light most favorable to the prosecutor, it could be inferred that defendant performed acts or gave encouragement that assisted the commission of a crime, and that he intended the commission of the crime or knew that the principal intended its commission at the time he gave aid and encouragement. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

Further, the medical examiner's testimony that the victim died from a gunshot wound was sufficient evidence of the cause of death. There is no factual support in the record for defendant's cursory argument that death was caused by inadequate medical care provided before the victim died. See *People v Flenon*, 42 Mich App 457, 202 NW2d 471 (1972).

VI. CUMULATIVE EFFECT OF ERROR

Defendant argues the cumulative effect of multiple errors deprived him of a fair trial. We find no combination of multiple errors depriving defendant of a fair trial. *People v Knapp*, 244 Mich App 361, 387; 624 NW2d 227 (2001).

VII. HABITUAL OFFENDER SENTENCE

Defendant argues that the court erred under MCL 769.13 and the Double Jeopardy Clause when it imposed a sentence for murder, and then vacated that sentence and imposed a new sentence under the habitual offender statute.[3]

Although the procedure employed by the trial court was proper under a former version of MCL 769.13,[4] that procedure was eliminated by 1994 PA 110. See *People v Green*, 228 Mich App 684, 699; 580 NW2d 444 (1998). Because the trial court was laboring under the misconception that the former procedure was still required, the initial sentence was invalid because it was based on a misconception of the law. *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997). Therefore, the court was entitled to correct the original sentence by imposing a sentence authorized under the habitual offender statute. *Id*. Furthermore, the statutory process of vacating the earlier sentence and imposing a new one did not violate the Double Jeopardy clause when the former version of the statute was in effect. *People v Anderson*, 210 Mich App 295, 298; 532 NW2d 918 (1995). Adherence to that process after the statute was amended similarly does not violate the Double Jeopardy clause.

VIII. SENTENCE CREDIT FOR TIME SERVED

Defendant argues that he was entitled to sentence credit under MCL 769.11b from the date of his arrest on June 6, 1999, to the date the judgment of sentence was entered on February 28, 2000, which is 268 days. However, he was awarded only 261 days of sentence credit. The prosecutor does not object to an award of seven additional days of sentence credit.

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[3] Although the sentences were identical, defendant argues that he is not entitled to certain disciplinary credits under the habitual offender statute.

[4] The prior version of MCL 769.13 provided, in part:

> [T]he court may sentence the offender to the punishment prescribed in section 10, 11, or 12, and shall vacate the previous sentence, deducting from the new sentence all time actually served on the vacated sentence if required.

Because defendant did not object below to an award of 261 days of sentence credit, the plain error standard applies to this claim of unpreserved error. *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002). We find that a plain error exists, which prejudiced defendant. We shall exercise our discretion to grant limited relief, but disagree that defendant is entitled to seven additional days of sentence credit.

Defendant was arrested June 6, 1999. He was sentenced on February 25, 2000. According to the judgment of sentence, defendant's sentence began on February 25, 2000, and awarded sentence credit for 261 days. The judgment was entered by the clerk three days later, on February 28, 2000.

Awarding sentence credit from the date of defendant's arrest on June 6, 1999, to the date he was sentenced on February 25, 2000, the date designated as the "date sentence begins," defendant is entitled to 265 days' credit. Although the judgment of sentence was not entered until three days later on February 28, 2000, defendant is not entitled to sentence credit for this three-day period because the judgment provides that the "date sentence begins" is February 25. Because defendant's prison term actually began on February 25, he would not be entitled to double credit for the three-day delay in entering the judgment.

We remand for correction of the judgment of sentence to reflect 265 days of sentence credit. *Brinson v Genesee Circuit Judge*, 403 Mich 676, 687; 272 NW2d 513 (1978).

IX. NEW *WALKER* HEARING

In his supplemental brief, defendant argues that he is entitled to a new *Walker*[5] hearing at which he can testify that he was coerced into making a statement, thus establishing that his statement should have been suppressed. Defendant has not submitted competent evidence to support the relief requested. We are not left with a definite and firm conviction that a mistake has been made. *Sexton*, *supra* at 752.

X. TESTIMONY AT *WALKER* HEARING

Finally, defendant argues that the circuit court improperly "chilled" his right to testify at the *Walker* hearing by ruling that the prosecutor could inquire into the truthfulness of the statement that he gave to the police. We disagree.

The court expressly stated that it would *not* permit the prosecutor to inquire into the truthfulness of particular statements given. The court did, however, state that the prosecutor would be permitted to cross-examine defendant about whether he made the statements attributed to him. See *People v Weatherspoon*, 171 Mich App 549, 553-555; 431 NW2d 75 (1988). We find no abuse of discretion in the court's decision regarding the scope of cross-examination. *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992).

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[5] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

Affirmed as modified and remanded for correction of the judgment of sentence to reflect 265 days of sentence credit. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald