

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY LEWIS,

Defendant-Appellant.

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UNPUBLISHED

September 11, 2003

No. 234418

Wayne Circuit Court

LC No. 99-003166-01

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY LEWIS,

Defendant-Appellant.

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No. 236428

Wayne Circuit Court

LC No. 99-003167-01

Before: Donofrio, P.J., and Bandstra and O'Connell, JJ.

PER CURIAM.

In two separate cases involving multiple victims, defendant was convicted by a jury of one count of second-degree murder, MCL 750.317, two counts of assault with intent to murder, MCL 750.83, and one count each of possession of a firearm during the commission of a felony, MCL 750.227b, possession of a firearm by a felon, MCL 750.224f, and possession of a loaded firearm in a vehicle, MCL 750.227c. He was sentenced as a third habitual offender, MCL 769.11, to prison terms of sixty to ninety years on the murder conviction, thirty-five to sixty years on the assault convictions, and four to ten years on the weapons possession convictions. Defendant was further ordered to serve the mandatory two-year term for felony-firearm before serving the other sentences. He filed separate appeals as of right from the judgments of sentence and those appeals were consolidated for our consideration. We affirm defendant's convictions, but remand for correction of the judgments of sentence.

This case arises from a shootout at a crowded gas station. At trial, the prosecution alleged that defendant initiated the shootout, during which he killed one person and wounded

two others, after seeing Charles Tillman standing at the station near one of the pumps. Tillman, who returned fire after being shot, was tried with defendant by the same jury.

## I

On appeal, defendant first argues that because he and Tillman both claimed that they fired their weapons in self-defense, the trial court erred by refusing to grant separate trials. We disagree. Whether to grant separate trials is within the trial court's discretion and this Court will not reverse absent an abuse of that discretion. *People v Cadle (On Remand)*, 209 Mich App 467, 469; 531 NW2d 761 (1995). We find no abuse of discretion here.

MCR 6.121(C) requires a trial court to grant separate trials when the defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively and fully demonstrates that the defendant's substantial rights will be prejudiced by a joint trial, and that severance is necessary to remedy the prejudice. *Cadle, supra*; see also *People v Hana*, 447 Mich 325, 346, 349; 524 NW2d 682 (1994). To meet this standard, the defenses at issue must not merely be inconsistent, but must be so antagonistic as to be mutually exclusive or irreconcilable. *Cadle, supra*. Here, the trial court properly ruled, based upon defendant's offer of proof, that the defenses at issue failed to meet this criteria.

Defendant contended that he was not the person who fired the shots toward the gas station and, although acknowledging that he fired his weapon while fleeing the station, could not identify Tillman as the initial aggressor. Tillman similarly admitted to firing his gun but did not identify defendant as even being involved in the offenses. Consequently, neither codefendant having implicated the other, we fail to see how their defenses were antagonistic. *Hana, supra*. The trial court did not abuse its discretion by refusing to sever the trials.

## II

Defendant next argues that the evidence at trial was insufficient to prove beyond a reasonable doubt that he was the person who fired the shots that killed sixteen-year-old Christy Beavers and wounded both Tillman and another gas station patron, James Gray. Again, we disagree.

In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). However, questions of credibility should be left to the trier of fact to resolve. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Moreover, circumstantial evidence and the reasonable inferences which arise from the evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). Further, all conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

Defendant argues that the prosecution's case was based only on circumstantial evidence, which he asserts is inherently unreliable, and that the prosecution generally relied on inference upon inference to prove that it was defendant who committed the charged offenses. That is not entirely accurate. Jamilah George, who was present near the station at the time of the shootout,

expressly testified that defendant was the first shooter. Although her identification of defendant was not wholly definitive, this was a matter of credibility for the jury to weigh. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). Viewed in a light most favorable to the prosecution, her testimony alone was sufficient to identify defendant as the shooter who killed Christy Beavers and wounded Tillman and Gray.

Moreover, our Supreme Court has recently rejected the argument that the elements of an offense cannot be proven with inferences. *People v Hardiman*, 466 Mich 417, 424-428; 646 NW2d 158 (2002). Instead, when reviewing the sufficiency of the evidence, courts should view all of the evidence, whether direct or circumstantial, in the light most favorable to the prosecution to decide if the prosecution sustained its burden. “It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences.” *Id.* at 428. There is no merit to defendant’s claim that circumstantial evidence, or inferences that could be drawn from the evidence, was insufficient as a matter of law to prove these offenses.

In any event, in addition to George’s testimony, Benny Campbell and Elisha Wilson each testified that defendant was at the scene of the shooting with a gun. Campbell also testified that defendant asked to be let out at the gas station after seeing Tillman, so that he could “fuck [Tillman] up.” When the testimony of these witnesses is considered together with the testimony of the remaining prosecution’s witnesses, there was sufficient evidence available for a rational trier of fact to find defendant guilty beyond a reasonable doubt. *Johnson, supra*.

### III

Defendant next argues the trial court abused its discretion by providing the jury with transcripts of the testimony of two witnesses, pursuant to the jury’s request. We disagree.

Defendant’s trial counsel waived this issue during the trial by agreeing that the jury should have the requested transcripts to review. *People v Carter*, 462 Mich 206, 214-219; 612 NW2d 144 (2000). However, because defendant argued in his motion for a new trial that his attorney was ineffective in so agreeing, we will review the merits of this issue on that basis.

To successfully assert a claim of ineffective assistance of counsel, a defendant must show that his counsel’s performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). To establish such prejudice the defendant must show there was a reasonable probability that, but for his counsel’s error, the result of the proceeding would have been different. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). The burden is on the defendant to produce factual support for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

MCR 6.414(H) provides:

If, after beginning deliberation, the jury requests a review of certain testimony or evidence, the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. The court may order the jury to deliberate further without the requested review, so long as the

possibility of having the testimony or evidence reviewed at a later time is not foreclosed.

Here, the trial court did not err in allowing the jury access to the requested testimony after it had twice instructed the jury that it should try to collectively recall the testimony in question before the court would provide transcripts of that testimony. When it was clear the jury still needed to review the testimony of the two witnesses, the court agreed to provide the transcripts of the testimony. On these facts, the trial court did not abuse its discretion. *People v Howe*, 392 Mich 670, 675-676; 221 NW2d 350 (1974). Indeed, because the jury's request was reasonable, the trial court was required to accommodate the request. MCR 6.414(H).

In reaching this conclusion we reject defendant's reliance on this Court's decision in *People v Williams*, 179 Mich App 15; 445 NW2d 170 (1989), rev'd on other grounds 434 Mich 894 (1990), for the proposition that the trial court should not have provided the jury with the actual transcripts of the witnesses' trial testimony. The facts of *Williams* do not support defendant's argument. Unlike that at issue here, the transcript in question in *Williams* involved testimony offered at the preliminary examination, not at trial, which had not been admitted into evidence. In any event, the *Williams* Court ultimately held that the defendant suffered no discernable prejudice as a result of the jurors having read the testimony in question themselves, rather than having it read to them. *Id.* at 22-23. On the facts of this case, we too can discern no prejudice stemming from the fact that the jury was provided with the transcripts from the trial, as opposed to having been read the testimony by the court. Accordingly, we do not conclude that counsel's failure to object to the jury's review of the transcripts affected the outcome of this case. Defendant therefore has fail to establish that his counsel was ineffective. *Pickens, supra*.

#### IV

Defendant next claims that the prosecutor engaged in misconduct during his closing argument by suggesting that Jamilah George failed to identify defendant in earlier proceedings because she feared defendant would retaliate against her. We find no merit to this argument.

Because defendant did not preserve this issue with an appropriate objection at trial, he must show plain error affecting his substantial rights. *Carines, supra* at 761-767; *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Moreover, reversal is not warranted if a cautionary instruction could have cured any prejudice resulting from the prosecutor's remarks. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Claims of prosecutorial misconduct are decided case by case, *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996), and the challenged comments must be read in context to determine whether the defendant was denied a fair trial, *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). In her testimony, George denied being afraid at the time she testified at the preliminary examination, or when she observed a police lineup (both times she failed to identify defendant). During his closing argument, the prosecutor argued that the witness observed a very frightening event, possibly explaining why she was unable to identify defendant earlier in these proceedings. Defendant claims this argument improperly allowed the jury to infer that the witness did not at first identify him because she feared retaliation by him. However, we do not believe that defendant's claim is supported by a reasonable interpretation of the prosecutor's argument. The prosecutor did not suggest that the witness was earlier concerned

that defendant would retaliate against her for identifying him. The prosecutor's comments were limited to the facts surrounding the instant offense, in which the witness observed multiple shootings. The prosecutor was permitted to argue, without prejudicing defendant's right to a fair trial, that the facts of this case were so frightening as to affect the witness' ability to recall what she observed, or her desire to willingly become involved. In any event, even if the comments were prejudicial, a curative instruction from the trial court would have remedied any prejudice, had defendant made a timely objection. *Stanaway, supra*. Accordingly, reversal is not required.

V

Finally, defendant argues that the judgments of sentence are inaccurate because both judgments indicate that he was convicted of felony-firearm. We agree. Although defendant was charged in both cases with felony-firearm, the jury convicted him of only a single count of felony-firearm. Consistent with that verdict, the trial court sentenced defendant on only one count of that particular weapons charge. Accordingly, because the judgments of sentence indicate that defendant was convicted of two counts of felony-firearm, we remand this matter for entry of an amended judgment of sentence deleting one of the convictions.

In addition, when the trial court prepared an amended judgment of sentence in LC No. 99-003166-01, it incorrectly added to the judgment that defendant was convicted of second-degree murder in that case. This too is inaccurate. Defendant was convicted of one count of second-degree murder only, in LC No. 99-003167-01. Accordingly, on remand the trial court should also correct the amended judgment to conform to the jury's verdict.

Defendant's convictions are affirmed, but the cases are remanded for the trial court to prepare amended judgments of sentence to conform to the jury's verdicts. We do not retain jurisdiction.

/s/ Pat. M. Donofrio  
/s/ Richard A. Bandstra  
/s/ Peter D. O'Connell