# STATE OF MICHIGAN

# COURT OF APPEALS

| | |
|---|---|
| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>May 18, 2004 |
| v<br><br>NATHAN D. JOHNSON,<br><br>Defendant-Appellant. | No. 244058<br>Wayne Circuit Court<br>LC No. 01-008884-01 |

| | |
|---|---|
| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | |
| v<br><br>ALVEN D. SHARP,<br><br>Defendant-Appellant. | No. 244059<br>Wayne Circuit Court<br>LC No. 01-008884-02 |

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

PER CURIAM.

Following a joint jury trial, defendants were each convicted of armed robbery, MCL 750.529, first-degree home invasion, MCL 750.110a(2), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant Johnson was sentenced to concurrent prison terms of ten to thirty years for the armed robbery conviction and 2-1/2 to 5 years for the felon in possession conviction, to be served consecutive to a term of five years for the felony-firearm conviction and consecutive to a term of two to twenty years for the home invasion conviction.[1] Defendant Sharp was sentenced to concurrent prison terms of six to twenty years for the armed robbery and home invasion convictions and two to five years for the felon in possession conviction, to be served consecutive

[1] It appears that defendant Johnson's judgment of sentence contains an internal inconsistency. We therefore remand for a correction as discussed in Part X of this opinion.

to a two-year term for the felony-firearm conviction. Both defendants appeal as of right. Their appeals have been consolidated for consideration by this Court. We affirm; however, we remand for administrative correction of the judgment of sentence.

I

This case arises from a home invasion that occurred on July 18, 2001, at approximately 1:30 a.m. Jason Schaifer was awakened when someone turned on his bedroom light. Two men came into the bedroom. One man hit Schaifer on the head with a handgun. The men asked for money, jewelry, and a leather coat. When Schaifer did not produce the items, he was hit repeatedly in the head with the gun. The men took Schaifer's wallet and watch. Before leaving, the men restrained Schaifer with duct tape and attempted to cover his eyes, but the tape would not stick because of the blood. Schaifer had never seen the men before, but as the men left, they said they would be back and knew about his girlfriend Yolanda.

Defendants were arrested shortly after the home invasion. The police stopped their car on the basis of a radio broadcast describing the car involved in the home invasion. Schaifer's wallet, watch, and jacket were found in the car. Police also found two guns and a partial roll of duct tape in the car.

Defendants denied any involvement in the home invasion and gave contradictory stories concerning their whereabouts that evening. Johnson testified that he knew Schaifer, he had previously been to Schaifer's home to buy marijuana, and was with him earlier in the evening shooting dice outside some apartments. Sharp was there also. Schaifer got into an argument over a drug deal and pulled a gun. Later, he left with Sharp to go to the store and they were stopped by the police.

Sharp denied knowing Schaifer. Sharp testified that he had been with Johnson the evening before the home invasion, but fell asleep in the back seat of the car while he and Johnson were driving around with a woman they had picked up. When he awakened, he heard the trunk of the car shut and then saw Johnson looking for something under the front seat. Sharp decided to drive, and shortly after that they were stopped by the police.

II

Johnson argues that a new trial is required because trial counsel was ineffective for failing to request an alibi instruction. We disagree.

Because Johnson did not raise this issue in an appropriate motion in the trial court pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), our review is limited to errors apparent on the record, *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

A trial court is required to give an alibi instruction upon request if a defendant provides his own alibi testimony, even if uncorroborated. *People v McGinnis*, 402 Mich 343, 345-347; 262 NW2d 669 (1978). Where a court properly instructs on the elements of the offense and the burden of proof, however, the absence of an alibi instruction does not have a reasonable

probability of affecting the outcome of the trial. *People v Sabin (After Second Remand)*, 242 Mich App 656, 660; 620 NW2d 19 (2000). Here, Johnson does not challenge the instructions concerning the burden of proof or the elements of the charged offenses. Accordingly, under the circumstances, Johnson has not demonstrated the requisite level of prejudice to prevail on his ineffective assistance of counsel claim. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

Johnson also claims that counsel was ineffective for failing to investigate and hire an expert to examine the bags of drugs that were found in Sharp's car. He claims that evidence of Schaifer's fingerprints on the bags would have corroborated defendant's version of the events and that counsel should have introduced this expert testimony.

Decisions regarding what evidence to present and whether to call witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Defendant has failed to overcome this presumption. There is no indication in the record, nor has Johnson demonstrated by offer of proof, that an expert witness, had one been called, could have provided favorable testimony in this regard. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Because defendant has not established the factual predicate for his ineffective assistance of counsel claim, he "has not established a reasonable probability that but for counsel's alleged error the result of the proceedings would have been different." *Id*. at 455-456.

III

Both defendants challenge the trial court's instructions concerning the intent requirement for aiding and abetting. Because defendants did not object to the court's aiding and abetting instructions at trial, this issue is not preserved for appellate review. *People v Carines*, 460 Mich 750, 761; 597 NW2d 130 (1999). Accordingly, we review this instructional issue for plain error in accordance with *Carines*, *supra* at 763-764.

The record discloses that the trial court's instructions were derived from the standard jury instructions on aiding and abetting. CJI2d 8.1(3)(c) and CJI2d 8.4. These instructions are consistent with *Carines, supra* at 757-760, wherein the Court recognized that a defendant's knowledge of the principal's intent is sufficient to establish the intent element of aiding and abetting. The recognition in *Carines* is consistent with earlier case law in this state. *People v King*, 210 Mich App 425, 430-431; 534 NW2d 534 (1995). Defendants have not shown plain error.

IV

Johnson also claims that the admission of Schaifer's in-court identification during trial was "plain error" because it was tainted by an impermissibly suggestive identification that occurred at the preliminary examination.

An identification procedure can be so suggestive and conducive to irreparable misidentification that it denies an accused due process of law. *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001), citing *Stovall v Denno*, 388 US 293, 301-302; 87 S Ct 1967; 18

L Ed 2d 1199 (1967). "The defendant must show that in light of the totality of the circumstances, the procedure used was so impermissibly suggestive as to have led to a substantial likelihood of misidentification." *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998). The relevant factors for evaluating the totality of the circumstances include:

> the opportunity for the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of a prior description, the witness' level of certainty at the pretrial identification procedure, and the length of time between the crime and the confrontation. [*Id*. at 304-305.]

If a trial court finds that a pretrial procedure was impermissibly suggestive, then evidence concerning that identification is inadmissible at trial, and the witness' in-court identification is allowed only if the prosecution "shows by clear and convincing evidence that the in-court identification will be based on a sufficiently independent basis to purge the taint of the illegal identification." *Id.*, citing *People v Kurylczyk*, 443 Mich 289, 303, 318; 505 NW2d 528 (1993); see also *People v Gray*, 457 Mich 107, 115-124; 577 NW2d 92 (1998).

In this case, Johnson asserts that the identification at the preliminary examination was impermissibly suggestive, but he fails to support this assertion under the relevant factors. Defendant states only that the identification was highly suggestive because defendant was presented as one of the accused at the defense table. Merely because an identification procedure was suggestive does not mean that it is constitutionally defective. *Colon, supra* at 304. Although a confrontation at a preliminary examination "does not necessarily mean that it cannot be considered unduly suggestive," *id*., citing *People v Leverette*, 112 Mich App 142, 154; 315 NW2d 876 (1982), this Court has repeatedly indicated that not all confrontations at a preliminary examination are impermissibly suggestive. *People v Hampton*, 138 Mich App 235, 238; 361 NW2d 3 (1984); *People v Flinnon*, 78 Mich App 380, 389-390; 260 NW2d 106 (1977); *People v Johnson*, 58 Mich App 347, 353; 227 NW2d 337 (1975).

Defendant has failed to establish plain error with regard to the preliminary examination identification and therefore has failed to show plain error with regard to the subsequent courtroom identification at trial. *People v Laidlaw*, 169 Mich App 84, 92-93; 425 NW2d 738 (1988). Even assuming that defendant could show plain error, we would conclude that he is not entitled to appellate relief. Defendant has failed to show that he was unduly prejudiced by any error or that reversal of his conviction is warranted. *Carines, supra* at 763. Other evidence clearly linked defendant to the crimes. He was stopped in the vicinity of the home invasion, shortly after it occurred, in a car matching the description provided to the police by Schaifer. Schaifer's watch, wallet, and jacket were found in the car. Although defendant's version of events accounted for some of this evidence, his version contradicted Sharp's version of events and was essentially unsupported by other evidence. Defendant has failed to show that any error was outcome determinative, resulted in the conviction of an actually innocent defendant, or seriously affected the fairness, integrity or public reputation of the judicial proceedings. *Id*.

For the same reasons, Johnson's corresponding claim of ineffective assistance fails. Johnson has not established a reasonable probability that but for trial counsel's failure to seek suppression of the identification at trial, the result of the proceedings would have been different. *Toma, supra* at 302-303.

V

Next, Johnson asserts that he is entitled to a new trial because of two instances of prosecutorial misconduct. Because Johnson did not object to the prosecutor's conduct at trial, we review this unpreserved issue for plain error in accordance with *Carines, supra. Ackerman, supra* at 448-449. Johnson first claims that the prosecutor improperly vouched for Schaifer's credibility by noting that his preliminary examination testimony was given under oath. We disagree. The prosecutor's comments did not amount to improper vouching because they did not suggest that the prosecutor had "some special knowledge or facts indicating the witness' truthfulness." *People v Bahoda*, 448 Mich 261, 276-277; 531 NW2d 659 (1995).

Johnson also argues that it was improper for the prosecutor to state that Johnson's alibi witnesses refused to testify in support of his defense because no evidence was admitted on that point. Again, we disagree. The record discloses that the facts concerning the witnesses' failure to testify in support of Johnson's defense were admitted through Johnson's own testimony. Therefore, the prosecutor's remarks were not improper. We likewise reject Johnson's contention that trial counsel was ineffective for failing to object to these remarks. Because the remarks were not improper, any objection would have been futile. Counsel is not required to make a futile objection. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).

VI

Johnson also argues that the trial court abused its discretion by denying his pretrial motion for severance. We disagree.

Severance of trials is governed by MCR 6.121 and MCL 768.5. *People v Hana*, 447 Mich 325, 331; 524 NW2d 682 (1994), amended 447 Mich 1203 (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 trial court's determination whether to sever is discretionary and is reviewed for an abuse of discretion. *Id*. at 346.

Here, the only motion for severance that appears in the lower court record was filed by Sharp. To the extent Johnson may have joined in that motion, the trial court did not abuse its discretion in denying it because the affidavit submitted in support of the motion was conclusory and neither defendant presented an adequate offer of proof establishing that his substantial rights would be prejudiced and that severance was the necessary means to rectify the prejudice. The failure to make that showing precludes reversal "absent any significant indication on appeal that the requisite prejudice in fact occurred at trial." *Id*. at 347.

On appeal, Johnson claims that he was prejudiced by Sharp's testimony, because it contradicted his own account of the events and implicated him in the charged crimes. However, the Court in *Hana* agreed with the United States Supreme Court's view that mere testimony of a codefendant is insufficient to establish the requisite prejudice:

> "[I]t is well settled that defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials. . . . While '[a]n important element of a fair trial is that a jury consider only relevant and

> competent evidence bearing on the issue of guilt or innocence,' . . . a fair trial does not include the right to exclude relevant and competent evidence. A defendant normally would not be entitled to exclude the testimony of a former codefendant if the district court did sever their trials, and we see no reason why relevant and competent testimony would be prejudicial merely because the witness is also a codefendant." [*Hana, supra* at 350, quoting *Zafiro v United States*, 506 US 534, 540; 113 S Ct 933; 122 L Ed 2d 317 (1993).]

Accordingly, Johnson is not entitled to relief on this basis.

VII

Johnson also argues that the cumulative effect of each of the alleged errors previously discussed warrants relief. We review this issue to determine whether the cumulative effect of multiple errors denied Johnson a fair trial. *People v Knapp*, 244 Mich App 361, 387; 624 NW2d 227 (2001). However, "only actual errors are aggregated to determine their cumulative effect." *Bahoda, supra* at 292 n 64. We have found no actual error with regard to most of the claims asserted, and therefore defendant was not denied a fair trial because of their cumulative effect.

VIII

Johnson lastly challenges the constitutionality of his determinate five-year sentence imposed for his second felony-firearm conviction. He argues that the Michigan Constitution authorizes the Legislature to prescribe only indeterminate sentences and, therefore, the Legislature lacked the authority to prescribe a determinate five-year sentence. We disagree. This Court considered and rejected this argument in *People v Cooper*, 236 Mich App 643, 660-664; 601 NW2d 409 (1999). Although the decision in *Cooper* specifically addressed only the two-year determinate sentence for a first-time felony-firearm conviction, the holding applies with equal force to Johnson's five-year sentence for a second conviction. Therefore, we find no merit to this issue.

IX

Defendant Sharp argues that Schaifer's "imprecise" testimony identifying Sharp as the perpetrator was insufficient to support Sharp's convictions. We disagree. The weight and credibility of the complainant's identification testimony was a matter for the jury to decide. *People v Barclay*, 208 Mich App 670, 676; 528 NW2d 842 (1995). This Court will not interfere with the factfinder's role in evaluating the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

X

It appears that defendant Johnson's judgment of sentence contains an internal inconsistency. The start dates of his respective sentences are inconsistent with the court's order of consecutive sentences for his felony-firearm and home invasion convictions and that his

felony-firearm sentence be served before the other sentences. We therefore remand for an administrative correction of the judgment of sentence to resolve any inconsistency.

Affirmed. Remanded for correction of the judgment of sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ Pat M. Donofrio