STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 10, 2004
v BOBBY ORICK, Defendant-Appellant.	No. 246801 Wayne Circuit Court LC No. 02-008338-02

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v KAHIL ANTON GREEN, Defendant-Appellant.	No. 246802 Wayne Circuit Court LC No. 02-008338-01

Before: Smolenski, P.J., and White and Kelly, JJ.

PER CURIAM.

In Docket No. 246801, defendant, Bobby Orick, appeals as of right his jury trial conviction of first-degree murder, MCL 750.316, for which he was sentenced to life in prison without possibility of parole. In Docket No. 246802, defendant, Kahil Anton Green, appeals as of right his convictions, by the same jury, of first-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. Green was sentenced to life in prison without possibility of parole, and a consecutive two-year term for the felony-firearm conviction. We affirm.

246801

Orick's sole claim on appeal is that the trial court erred in denying his motion for a separate trial. Orick argues that since his and Green's separate statements to the police were irreconcilable, his motion for a separate trial should have been granted. We disagree.

The decision whether to hold separate trials is within the discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion. The burden is on the accused to make an affirmative showing that a substantial right will be prejudiced in a joint trial. *People v Etheridge*, 196 Mich App 43, 53; 492 NW2d 490 (1992). "An abuse of discretion will be found only when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made." *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001).

The issue of severance is addressed both by statute and court rule. MCL 768.5 provides: "When two [2] or more defendants shall be jointly indicted for any criminal offense, they shall be tried separately or jointly, in the discretion of the court." MCR 6.121(C) provides: "On a defendant's motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant." MCR 6.121(D) provides in pertinent part: "[T]he court may sever the trial of defendants on the ground that severance is appropriate to promote fairness to the parties and a fair determination of the guilt or innocence of one or more of the defendants."

In denying both defendants' motions for separate trials, the trial judge stated that both Orick's and Green's statements to the police were against their own respective interests, and they gave "substantially the same version of what allegedly occurred." In addition, neither tried to minimize his role in the offense. The trial judge concluded, therefore, that "there is no basis for a severance."

"Inconsistency of defenses is not enough to mandate severance; rather, the defenses must be 'mutually exclusive' or 'irreconcilable.' Moreover, incidental spillover prejudice, which is almost inevitable in a multi-defendant trial, does not suffice. The tension between defenses must be so great that a jury would have to believe one defendant at the expense of the other." *People v Hana*, 447 Mich 325, 349; 524 NW2d 682 (1994), amended in part sub nom *People v Rode*, 447 Mich 1203 (1994), amended in part sub nom *People v Gallina*, 447 Mich 1203 (1994) (internal citations omitted). "[D]efenses are mutually exclusive within the meaning of this rule if the jury, in order to believe the core of the evidence offered on behalf of one defendant, must disbelieve the core of the evidence offered on behalf of the co-defendant." *Id.* at 349-350 (internal citations omitted).

The defenses presented by Orick and Green did not warrant separate trials under the *Hana* standard. Orick's argument incorrectly focuses on the alleged irreconcilability of his and Green's statements to the police, rather than on their overall defenses. *Hana, supra*, 447 Mich 349. Orick admitted driving the car in which the murder victim was taken to the place where he was shot. His defense was that he did not know beforehand that the victim was going to be killed. Green's defense was that he was not the "K.O." that shot the victim. Green further testified that the assertions in the statement he signed were not his, but those of the police, and that he signed the statement under coercion. These defenses are not irreconcilable, antagonistic, or mutually exclusive. In fact, Orick testified that Green was not the "K.O." mentioned in his statement. Consequently, it was not an abuse of discretion for the trial judge to deny Orick's motion for a separate trial.

Orick's argument focuses on Green's statement, rather than Green's defense, but the issue is presented as a severence issue, rather than a challenge to the admission of the statement.

We recognize that admission of Green's statement, unredacted and unaccompanied by a cautionary instruction, is problematic. However, just as the issue of the admission or use of Green's statement is not properly presented on appeal, it was not properly preserved below. When the motion to sever was denied, both counsel requested that the co-defendant's statement not be introduced. Because it was unclear at the time whether either or both of the defendants would be testifying, the court analyzed the issue under MCR 804(b)(3) (statement against penal interest of declarant unavailable as a witness) and *People v Dhue*, 444 Mich 151; 506 NW2d 505 (1993). Orick did not object when Detective Collins testified regarding Green's statement to police, nor did he request that the statement be redacted. When Green later testified that the statement was not his statement, but was prepared by Detective Collins, and that he signed it under duress, Orick did not request that the jury be instructed that Green's statement to police could not be used as substantive evidence against Orick. The actual instructions given were ambiguous regarding the permissible use of Green's statement. Applying the plain error standard of review, we find that defendant has not shown a plain error that affected his substantial rights; defendant has not shown that he is actually innocent or that error seriously affected the fairness, integrity or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

246802

Green first argues that the circuit court erred in failing to suppress his allegedly coerced post-arrest statement to the police. We disagree.

"This Court reviews de novo a trial court's ultimate decision on a motion to suppress evidence. Although this Court engages in a review de novo of the entire record, this Court will not disturb a trial court's factual findings with respect to a *Walker*[1] hearing unless those findings are clearly erroneous." *People v Akins*, 259 Mich App 545, 563-564; 675 NW2d 863 (2003).

A statement made by an accused during a custodial interrogation is inadmissible unless the accused voluntarily, knowingly and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966); *People v Abraham*, 234 Mich App 640, 644; 599 NW2d 736 (1999). Whether a waiver was voluntary, knowing, and intelligent is evaluated in light of the totality of the circumstances surrounding the interrogation. The burden is on the prosecutor to establish a valid waiver by a preponderance of the evidence. *Abraham, supra* at 644-645.

The court examined the voluntariness of Green's confession in a *Walker* hearing, at which the only testimony came from Green himself and Detective Collins, who questioned him. This was essentially a credibility contest between the Collins and Green. In holding that Green's statement was admissible, the court noted the neatness and uniformity of Green's signatures on the sheets on which the statement was written, Green's assertive demeanor while testifying, and the relative sizes of the Collins and Green. Collins provided testimony relevant to many of the factors listed in *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988), as relevant

[1] *People v Walker*, 374 Mich 331, 338; 132 NW2d 87 (1965).

to determining whether a statement is voluntary. All of them tended to show that Green's statement was voluntary. The testimony also indicated that defendant had the intelligence and capacity to understand the *Miranda* warnings he was given and that he knowingly and intelligently waived his *Miranda* rights. *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997).

Because there was testimony and physical evidence (Green's neat and uniform signature, made, according to Green while his other arm was being held behind his back) to support the court's resolution of the credibility issue, we are not left with a definite and firm conviction that the trial court has made a mistake. *Akins, supra*, 259 Mich App 563-564; *People v Snider*, 239 Mich App 393, 418; 608 NW2d 502 (2000); *People v Catey*, 135 Mich App 714, 721; 356 NW2d 241 (1984).

Green next claims that his warrantless arrest in his uncle's home violated his right to be free from unreasonable seizure, and that, consequently, his post-arrest statement should have been suppressed. Green makes two arguments regarding why his arrest was unconstitutional. First, he claims that his warrantless arrest was not supported by probable cause. Second, he argues that since it was effected without a warrant in a location where he had a reasonable expectation of privacy, it was per se invalid. We disagree with both claims.

Green's first argument is preserved, but his second argument is not because he first raises it on appeal. *People v Michael*, 181 Mich App 236, 238; 448 NW2d 786 (1989); *People v Lumsden*, 168 Mich App 286, 292; 423 NW2d 645 (1988). "To the extent that a lower court's decision on a motion to suppress is based on an interpretation of the law, appellate review is de novo. Factual findings made in conjunction with a motion to suppress are reviewed for clear error." *People v Kaslowski*, 239 Mich App 320, 323; 608 NW2d 539 (2000). "In reviewing a challenged finding of probable cause, an appellate court must determine whether the facts available to the arresting officer at the moment of arrest would justify a fair-minded person of average intelligence in believing that the suspected individual had committed the felony." *People v Kelly*, 231 Mich App 627, 631-632; 588 NW2d 480 (1998). This Court's review of Green's unpreserved claim is for a plain error that affected Green's substantial rights. *Carines*, *supra* at 774.

A peace officer, without a warrant, may arrest a person if a felony in fact has been committed and the peace officer has reasonable cause to believe the person committed it. An arresting officer must possess information demonstrating probable cause to believe that an offense has occurred and that the defendant committed it. Probable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. MCL 764.15; *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996).

The circuit court correctly determined that there was probable cause to arrest Green. The information supplied by Orick in his statement to police, and relied on by the arresting officer, was more than mere "rumor," which has been held insufficient to establish probable cause. *People v Oliver*, 417 Mich 366, 374; 338 NW2d 167 (1983). The arresting officer could not vouch for Orick's veracity, but this deficiency was outweighed by the basis of Orick's knowledge. *People v Faucett*, 442 Mich 153, 162; 499 NW2d 764 (1993). Orick was present

the night of the murder and saw nearly all the events surrounding the shooting, though not the shooting itself. He heard "K.O." claim responsibility for the murder and another participant refer to "K.O." as a "killer." He was also able to describe the shooter, tell that the shooter worked with the shooter's "uncle Roger," and lead the police to where the shooter lived. The arresting officer performed independent investigation to corroborate this information. When he got to the house Orick led him to, the arresting officer found Green, who fit the description of the shooter that Orick had given. These facts would justify a fair-minded person of average intelligence in believing that the suspected individual had committed the shooting. See *People v Richardson*, 204 Mich App 71, 79; 514 NW2d 503 (1994). Consequently, the arrest was supported by probable cause.

Green does not have standing to bring his second challenge to his arrest. The only basis for his claim to have a legitimate personal expectation of privacy in the area in which he was arrested was the familial relationship between him and his uncle, in whose home he was arrested. Standing alone, this relationship is insufficient. *People v Dalton*, 155 Mich App 591, 596-597; 400 NW2d 689 (1986). See also *People v Lombardo*, 216 Mich App 500, 504-505; 549 NW2d 596 (1996). Even assuming, arguendo, that Green does have standing, his claim still must fail, since the police entered the house where he was arrested with the consent of one of its residents, who signed the consent form that was produced at the hearing on Green's motion to determine probable cause. As long as the person who consented had actual *or apparent* authority to do so, her consent is valid. *People v Gary*, 150 Mich App 446, 453; 387 NW2d 877 (1986). Green presented no testimony regarding why a reasonable person would "question the consenting party's power or control over the premises or property." *People v Goforth*, 222 Mich App 306, 312; 564 NW2d 526 (1997). Consequently, the trial court did not commit plain error with regard to this claim.

Lastly Green claims that the trial court erred in denying his motion for severance. Green relies on *United States v Breinig*, 70 F3d 850 (CA 6, 1995), for his contention that he was denied his due process right to a fair trial under both US Const, Ams V and XIV, and Const 1963, art 1, § 17. He claims this denial occurred when, due to the joint trial, evidence relevant to Orick, which was inadmissible as to Green, was admitted at the joint trial. However, assuming the evidence was, indeed, inadmissible against Green, we fail to see how this testimony pertaining to Orick would have affected the jury's determination of Green's guilt.

Affirmed.

/s/ Michael R. Smolenski
/s/ Helene N. White
/s/ Kirsten Frank Kelly