STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 23, 2004
v BENITO IBARRA CAMPOS, Defendant-Appellant.	No. 249205 Wayne Circuit Court LC No. 03-001748-02

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v JEREMY MICHAEL MARCHANT, Defendant-Appellant.	No. 249217 Wayne Circuit Court LC No. 03-001748-01

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

PER CURIAM.

In these consolidated appeals, defendants appeal by right their convictions after a joint jury trial. Defendant Benito Campos was charged and convicted of armed robbery, MCL 750. 529. Defendant Jeremy Marchant was charged and convicted of armed robbery and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

In Docket 249205, defendant Campos argues that he was denied the effective assistance of counsel because counsel did not file a motion for separate trials on the basis of inconsistent defenses. We conclude that defendant has failed to meet his burden of establishing a reasonable probability that but for the alleged error the trial outcome would have been different or that his trial was fundamentally unfair or unreliable.

In Docket 249217, defendant Marchant argues that the prosecutor failed to prove beyond a reasonable doubt that he did not commit the offense under duress and that the trial court erred by instructing the jury on this defense. We find defendant failed to present sufficient evidence to

meet his burden of establishing a prima facie case of duress; therefore, the trial court was not required to instruct the jury on duress. Further, the trial court correctly ruled that to show a prima facie case of duress, defendant was required to produce evidence that he was not at fault or negligent in creating the situation giving rise to his claim. Thus, any error by the trial was in defendant's favor because the jury should not have been instructed on duress.

I. Docket 249205

A. Standard of Review

We review de novo, as a question of law, whether assistance provided in a particular case failed to meet the constitutional standard of assuring the defendant a fair trial. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Effective assistance of counsel is presumed, and defendant bears a heavy burden of proving otherwise. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To establish counsel's performance fell below constitutional standards, a defendant must first show that under the circumstances counsel's performance was deficient as measured against objective reasonableness according to prevailing professional norms. *Id*. at 687-688; *People v Pickens*, 446 Mich 298, 303, 338; 521 NW2d 797 (1994). Second, a defendant must show the deficiency was so prejudicial that he was deprived of a fair trial, a trial whose result is unreliable. *Id*. A finding of prejudice requires that there exist a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different. *Id*. at 694; *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). In sum, constitutional error does not exist unless counsel's error was so serious that it resulted in a fundamentally unfair or unreliable trial. *Pickens, supra* at 312, n 12.

B. Analysis

Defendant Campos's argument is based on two premises: (1) that severance was required; therefore, counsel seriously erred by not moving for separate trials and (2) that a reasonable probability exists that the trial outcome would have been different had severance been granted. Failure to establish either premise, error of counsel or prejudice, is fatal to his claim. *Strickland, supra* at 687, 697; *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003). Here, defendant has not established counsel seriously erred because severance was not required on the facts of this case. But even if a motion for severance would have been granted, defendant has not established prejudice because (a) codefendant Marchant might still have testified and (b) even without Marchant's testimony, defendant Campos' confession was sufficient to prove his guilt.

A defendant does not have a right to a separate trial, and there is a strong policy favoring joint trials in the interest of justice, judicial economy, and administration. *People v Etheridge*, 196 Mich App 43, 52-53; 492 NW2d 490 (1992). When two or more defendants are charged with the same offense, the trial court has discretion to join or sever the cases for trial. MCL 768.5; MCR 6.121(D); *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994), amended 447 Mich 1203 (1994). 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." Offenses are "related" if they are "based on (1) the same conduct, or (2) a series of connected acts or acts constituting part of a single scheme or

plan." MCR 6.120(B). Here, the charges against Campos and Marchant were "related." But our Supreme Court in *Hana, supra* at 346-347, stated:

> Severance is mandated under MCR 6.121(C) only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice. 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.

The *Hana* Court recognized that a joint trial of codefendants presenting antagonistic defenses has serious negative implications for the accused, but also held the same standard applied for that situation nevertheless. *Hana, supra* at 347. Thus, that defendants have antagonistic defenses is not itself sufficient to require severance. *Id*. at 348. The *Hana* Court explained:

> 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. Otherwise stated, defenses 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 (citations and internal punctuation omitted).]

The *Hana* Court noted that examples found in *Zafiro v United States*, 506 US 534; 113 S Ct 933; 122 L Ed 2d 317 (1993) are "transferable to the Michigan standard." *Hana, supra* at 346, n 7. The Court further explained that, "in practical terms, severance should be granted 'only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.'" *Hana, supra* at 359-360, quoting *Zafiro, supra,* 506 US 539. This might occur when "many defendants are tried together in a complex case and they have markedly different degrees of culpability," or when evidence is admitted that is probative of one defendant's guilt but inadmissible against another codefendant. *Zafiro, supra* at 539, citing *Kotteakos* v *United States*, 328 US 750, 774-775; 66 S Ct 1239; 90 L Ed 1557 (1946), and *Bruton* v *United States*, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968). Neither of these situations existed here. The instant case was not complex, and in Michigan an aider and abettor bears the same culpability as the principal. MCL 767.39; *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001). Further, because Marchant was subject to cross-examination, the admission of his prior testimonial

statement did not violate Campos' Confrontation Clause rights.[1] *Crawford v Washington*, 541 US ___ ; 124 S Ct 1354, 1369; 158 L Ed 2d 177, 197 (2004), citing *California v Green*, 399 US 149, 162; 90 S Ct 1930; 26 L Ed 2d 489 (1970). Moreover, "'[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.'" *Hana, supra* at 350, quoting *Zafiro, supra* at 540. In addition, a defendant normally would not be entitled to exclude the testimony of a former codefendant even if separate trials were ordered. *Id*.

Here, our application of the *Hana* standard is complicated because, contrary to Campos' argument on appeal, he did not argue or present evidence at trial to support a "mere presence" defense. Rather, he did not testify, presented no other evidence, and argued that the prosecution had not proved his guilt beyond a reasonable doubt. Thus, Campos' "insufficient proof" defense and Marchant's duress defense were not mutually exclusive as defined in *Hana* because Campos presented no evidence that the jury was required to disbelieve in order to believe the evidence offered by Marchant. *Hana, supra* at 350. Further, a defendant need only present a prima facie case that he acted under duress, *People v Lemons*, 454 Mich 234, 248-249; 562 NW2d 447 (1997), and the burden of proof shifts to the prosecution to prove beyond a reasonable doubt that the defendant did not act under duress, *People v Terry*, 224 Mich App 447, 453-454; 569 NW2d 641 (1997). Thus, the jury was not required to believe Marchant's testimony to find that the prosecution failed to disprove, beyond a reasonable doubt, he acted under duress. At the same time, it would not be inconsistent for the jury to conclude the prosecution failed to prove Campos' guilt beyond a reasonable doubt. Accordingly, Campos' and Marchant's defenses were not "irreconcilable" because the "'tension between defenses [was not] so great that a jury would have to believe one defendant at the expense of the other.'" *Hana, supra* at 350, quoting *United States v Yefsky*, 994 F2d 885, 897 (CA 1, 1993).

Furthermore, even if Campos had been granted a separate trial, there is no guarantee that Marchant may still have testified, either because he would not have asserted his Fifth Amendment right, or because he waived his right by already testifying at his own trial. See *Hana, supra* at 361. Nevertheless, a motion for severance might have been granted in this case on a showing that Marchant intended not only to point his finger at Campos as a participant in the robbery, but also intended to paint him as a member of a street gang that used drugs and killed people. MCR 6.121(D).[2] While Marchant's testimony concerning the Latin Counts was relevant to his duress defense and Campos' motive to commit the crime (the robbery was committed to raise bail money for a fellow gang member), it is likely under MRE 403 that such testimony would have been excluded at Campos' separate trial.

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[1] Neither defendant asserted below or in this Court that his constitutional right of confrontation was violated. Campos' rights were not because Marchant testified and any violation with respect to Marchant was harmless because the other evidence of guilt was overwhelming. Further, the jury was instructed that each defendant's statement could not be used as substantive evidence of his codefendant's guilt.

[2] MCR 6.121(D) provides, in part, "On the motion of any party, the 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."

But even if Campos had been granted a separate trial at which Marchant did not testify, Campos' ineffective assistance of counsel claim must still fail because he cannot demonstrate a reasonable probability a different outcome would have resulted. Contrary to his argument on appeal, Campos fully confessed to aiding and abetting armed robbery. In his statement, Campos twice admitted that he assisted the armed robbery and admitted that he knew before the offense that Marchant, and Mike [Maynard] intended to commit a robbery. Campos also admitted transporting Marchant and Maynard to and from the crime scene, admitted knowing Marchant was armed with the handgun, and admitted waiting at their request for Marchant and Maynard while they entered "the haircut place" where the robbery occurred. Campos further admitted that the robbery proceeds were spent on gas for the van and beer.

In general, "to convict a defendant of aiding and abetting a crime, a prosecutor must establish that '(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement.'" *People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004), quoting *People v Carines*, 460 Mich 750, 768; 597 NW2d 130 (1999). Further, "aiding and abetting" describes all forms of assistance rendered to the perpetrator of a crime and includes all words or deeds that support, encourage or incite the commission of a crime. *Moore*, *supra* at 63, citing *People v Palmer*, 392 Mich 370, 378; 220 NW2d 393 (1974).

> "Aiding and abetting means to assist the perpetrator of a crime. An aider and abettor is one who is present at the crime scene and by word or deed gives active encouragement to the perpetrator of the crime, or by his conduct makes clear that he is ready to assist the perpetrator if such assistance is needed." [*Moore*, *supra* at 63, quoting 21 Am Jur 2d, Criminal Law, § 206, p 273.]

Campos' statement, together with the other evidence the prosecutor presented, fully satisfied all of the elements of aiding and abetting armed robbery. Campos' counsel only argued at trial that the jury should not believe his statement because he was young and would have told the police anything to be released from custody. Thus, Campos has failed to meet his burden of establishing a reasonable probability that but for the alleged error of counsel the trial outcome would have been different. *Strickland*, *supra* at 695. His trial was not fundamentally unfair or unreliable. *Pickens*, *supra* at 312, n 12. Accordingly, we affirm Campos' conviction.

II. Docket No. 249217

A. Standards of Review

This Court reviews de novo a claim that evidence at trial was insufficient to support a conviction. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). The Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found all of the elements of the offense were proved beyond a reasonable doubt. *Jackson v Virginia*, 443 US 307, 319; 99 S Ct 2781; 61 L Ed 2d 560 (1979); *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), mod 441 Mich 1201 (1992). All of the elements of an offense may be proved beyond a reasonable doubt by circumstantial evidence and

reasonable inferences there from. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000); *Carines, supra* at 757. Moreover, the reviewing court must make all reasonable inferences and resolve all credibility conflicts in favor of the jury verdict. *People v Gonzalez*, 468 Mich 636, 640-641; 664 NW2d 159 (2003); *Wolfe, supra* at 514-515. "'Even in a case relying on circumstantial evidence, the prosecution need not negate every reasonable theory consistent with the defendant's innocence, but need merely introduce evidence sufficient to convince a reasonable jury in the face of whatever contradictory evidence the defendant may provide.'" *People v Hardiman*, 466 Mich 417, 423-424; 646 NW2d 158 (2000), quoting *People v Konrad*, 449 Mich 263, 273 n6; 536 NW2d 517 (1995). See, also, *Nowack, supra* at 400.

This Court reviews de novo jury instructions as a whole. *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003); *People v Kelly*, 423 Mich 261, 270-271; 378 NW2d 365 (1985). Imperfect instructions will not warrant reversal if they fairly present the issues to be tried and sufficiently protect the defendant's rights. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). When preserved, the defendant bears the burden of showing that as a result of the alleged error, when weighed against the facts and circumstances of the entire case, it affirmatively appears more probable than not that the error was outcome determinative. MCL 769.26; *People v Riddle*, 467 Mich 116, 124-125; 649 NW2d 30 (2002).

B. Analysis

"Duress is a common-law affirmative defense . . . applicable in situations where the crime committed avoids a greater harm." *Lemons, supra* at 245-246. Duress does not negate the required mental element of a crime but rather justifies otherwise criminal conduct "because [the offender] has thereby avoided a harm of greater magnitude." *Id*. at 246 n 16, quoting 1 LaFave & Scott, Substantive Criminal Law, § 5.3, p 615. Because of its rationale, duress will not excuse all offenses. *People v Gimotty*, 216 Mich App 254, 257; 549 NW2d 39 (1996). For example, a claim of duress will not justify a homicide, *id*., or a prisoner's possession of a weapon, *People v Andrews*, 192 Mich App 706; 481 NW2d 831 (1992).

To support instructing the jury on duress, a defendant bears the burden of producing "'some evidence from which the jury can conclude that the essential elements of duress are present.'" *Lemons, supra* at 246, quoting CJI2d 7.6, *commentary*. A defendant successfully meets this burden by introducing some evidence from which the jury could conclude the following:

> "A) The threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;
>
> B) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;
>
> C) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and
>
> D) The defendant committed the act to avoid the threatened harm." [*Lemons, supra* at 247, quoting *People v Luther*, 394 Mich 619, 623; 232 NW2d 184 (1975).]

In addition, a defendant claiming duress must present evidence from which the jury could conclude: (1) that the threatening conduct or act of compulsion was present, imminent, and impending (the threat of future injury is not enough) and that (2) the threat did not arise from the negligence or fault of the defendant asserting the defense. *Lemons, supra* at 247, citing *People v Merhige*, 212 Mich 601, 610-611; 180 NW 418 (1920). Moreover, a defendant may forfeit the defense of duress where the defendant fails to use a reasonable opportunity to escape if doing so would not expose the defendant unduly to death or serious bodily injury, and where the defendant does not end his conduct as soon as the claimed coercive effect of the duress ceases. *Lemons, supra* at 247, citing LaFave & Scott, *supra* at § 5.3, pp 619-620.

The parties agree that when a defendant satisfies the initial burden of production that the burden the shifts back to the prosecution to prove beyond a reasonable doubt that the defendant did not act under duress. *Terry, supra* at 453-454, citing *People v Field*, 28 Mich App 476, 478; 184 NW2d 551 (1970). Although MCR 7.215(I)(1) binds this Court on this point, it is worth noting that our Supreme Court did not address this issue in *Luther, supra*, and the *Lemons* Court specifically declined to address the issue while noting that due process would not be offended by placing the burden of persuasion on the defendant. *Lemons, supra* at 248 n 21. But here, Marchant failed to carry his burden of producing a prima facie case of duress. *Id*. at 246-247.

Marchant failed to testify about an actual, imminent and impending threat of death or serious bodily harm necessary a prima facie case of duress. *Id*. at 247. In fact, he testified that no one specifically threatened him to convince him to commit the offense. Rather, Marchant testified that he was motivated to commit the offense to help an acquaintance, an alleged fellow gang member, post bail to get out of jail. At most, Marchant's assertion of gang reprisal if he failed to commit the offense was a threat of future injury insufficient to support a duress defense. *Id*.; *People v Ramsdell*, 230 Mich App 386, 401; 585 NW2d 1 (1998).

In *Ramsdell*, the defendant was charged with being a prisoner in possession of contraband, MCL 800.281(4). The defendant claimed he possessed the packet the authorities found under duress. The trial court ruled that because the statute imposed strict liability, it precluded evidence of duress. *Id*. at 389-390. But the court allowed defendant to make an offer of proof outside the presence of jury. Tyrone Williams testified at the separate hearing that he was serving a life sentence and had "forced" the defendant to take a plastic bag containing white paper to another "chow hole." *Id*. at 390. Williams testified he did not tell the defendant what was in the packet, but said that, "if it don't get there, you can get hurt. Or, you gonna - - you know, you gonna have to pay for this." *Id*. Williams also added that if the defendant had thrown the packet down, "that doing so 'woulda cost him [and the defendant] woulda been in some trouble.'" *Id*. The defendant testified that, "if I refused to do what he wanted, then he would have - - he would not have any problem with either forcing me to pay an elaborate sum or money [sic], or that I could be stabbed - - that I could physically be stabbed." *Id*. This Court held that the defendant's offer of proof did not establish a prima facie case of duress because it showed only a mere threat of future harm, which was not present, imminent, and impending. *Id*. at 401. Similarly, here, defendant's testimony regarding fear of gang reprisal related only to future harm. It did not establish a present, imminent, and impending threat of death or serious bodily harm necessary for a prima-facie case of duress.

Moreover, the coercion about which defendant testified, possible gang retaliation, arose from defendant's voluntarily placing himself in a situation where he knew he would likely be called upon to commit illegal acts. Accordingly, the purported duress clearly arose from the defendant's own negligence or fault. *Lemons, supra* at 247; *Terry, supra* at 453.

Because Marchant failed to produce evidence on all the elements of a prima facie case of duress, he was not entitled to receive a jury instruction on that defense. *Lemons, supra* at 246-248; *Ramsdell, supra* at 401. Consequently, the burden of persuasion never shifted to the prosecutor to disprove defendant's duress defense. The evidence of defendant's guilt was overwhelming and clearly sufficient to sustain his conviction. *Wolfe, supra* at 514-515.

Finally, Marchant argues that the trial court erred when it read standard jury instruction CJI2d 7.6(2)(e) requiring that for the defense of duress to apply "the situation did not arise because of the defendant's fault or negligence." But we are bound by our Supreme Court's determination that the person claiming duress must establish his lack of fault or negligence in creating the coercive situation. *Lemons, supra* at 247. For the reasons discussed above, Marchant failed to produce a prima facie case of duress. Accordingly, the instructional error inured in defendant's favor because the jury should not have been instructed on duress.

We affirm.

/s/ E. Thomas Fitzgerald
/s/ Janet T. Neff
/s/ Jane E. Markey