

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CETRIC DEONDRAE SMITH,

Defendant-Appellant.

UNPUBLISHED

December 12, 2006

No. 263180

Wayne Circuit Court

LC Nos. 05-001102-01

05-001104-01

Before: Jansen, P.J., and Sawyer and Bandstra, JJ.

PER CURIAM.

In Wayne Circuit Court Docket No. 05-001102-01, defendant appeals as of right his jury-trial convictions of armed robbery, MCL 750.529, two counts of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. In Wayne Circuit Court Docket No. 05-001104-01, defendant appeals as of right his jury-trial convictions of armed robbery, MCL 750.529, possession of a firearm by a felon, MCL 750.224f, and felony-firearm, MCL 750.227b. Defendant was sentenced to 180 to 360 months' imprisonment for each of the armed robbery convictions, 32 to 48 months' imprisonment for each of the felonious assault convictions, 40 to 60 months' imprisonment for the felon in possession conviction, and two years' imprisonment for each of the felony-firearm convictions. We affirm.

Defendant first argues that the trial court erred in granting the prosecution's motion for joinder of the lower court files at trial. We disagree.

Nothing in the record before us indicates that defendant brought a motion for severance prior to the trial. It therefore appears that defendant failed to preserve this issue for appellate review. A defendant who does not move for severance or object in the trial court fails to preserve the issue for review. *People v Mayfield*, 221 Mich App 656, 660; 562 NW2d 272 (1997).¹ We therefore review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Reversal is warranted only if a plain error resulted in the conviction of an actually innocent defendant, or if the error seriously

¹ Although defendant contends that he objected to the prosecution's motion for joinder, the record indicates only that defense counsel requested additional time to review the file before the motion. This was not an objection on the merits of the prosecution's motion.

affected the fairness, integrity, or public reputation of the judicial proceedings, independent of defendant's innocence. *Id.*

Two or more informations against a single defendant may be consolidated for a single trial. MCR 6.120(A).² Upon a defendant's motion, the court must sever unrelated offenses for separate trials. MCR 6.120(B). As previously stated, nothing in the record indicates that defendant brought a motion to sever the offenses before trial. There are no severance motions contained within the lower court file, and defendant does not point to any evidence demonstrating otherwise. Although defendant contends that the trial court was required to sever any offenses not based on the same conduct, series of connected acts, or part of a single scheme or plan, defendant fails to mention the fact that defendant did not bring a motion for severance. In accordance with the plain language of the court rule, because defendant did not bring such a motion, the trial court was not required to sever any unrelated offenses for separate trials. Defendant is unable to demonstrate the existence of a plain error affecting his substantial rights in this regard.

Even assuming that defendant had objected to the prosecution's motion for joinder, defendant cannot demonstrate that error resulted from joinder of the cases. Before a court may discretionarily join related charges for trial, the court should consider "the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties' readiness for trial." See former MCR 6.120(C). The evidence in this case was certainly intertwined, in that defendant robbed the same witness on two occasions while she was working in the same store, during the same time frame, in the same manner, and within a relatively short period of time. Because defendant had robbed Michelle Lauzon previously, she quickly recognized him on the second occasion. Separate trials in this case would have essentially required Lauzon to provide identical testimony twice. Further, the testimony of each of the victims would have been admissible in each of the separate trials to prove defendant's intent, scheme, plan, or system, as well as to prove defendant's identity. MRE 404; *People v Ullah*, 216 Mich App 669, 674; 550 NW2d 568 (1996). Because evidence pertaining to each robbery would have been admissible in a separate trial concerning the other robbery, we find no error in the trial court's failure to sever the charges for trial. *People v Duranseau*, 221 Mich App 204, 208; 561 NW2d 111 (1997). Any technical error resulting from the joinder of these cases was harmless because it was not decisive to the outcome. See *People v Cornell*, 466 Mich 335, 363-364; 646 NW2d 127 (2002).

Defendant alternatively argues that trial counsel was ineffective for failing to object to the joinder of the cases and for failing to bring a motion for severance. We disagree.

Defendant failed to preserve this issue because he did not move for a new trial or evidentiary hearing below. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

² Effective January 1, 2006, MCR 6.120 was amended. Essentially, MCR 6.120(B) now relates to permissive joinder and severance, while MCR 6.120(C) now relates to mandatory severance. Because the trial court decided this issue before January 1, 2006, and the parties have argued the issue under the old rule, we will analyze this case in accordance with the rule in effect at the time the decision was made.

Review of unpreserved claims of ineffective assistance of counsel is limited to error apparent on the record. *Id.* at 659. If review of the record does not support the defendant's claims, he has effectively waived the issue of effective assistance of counsel. *Id.*

Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To establish ineffective assistance of counsel, "a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). With respect to the prejudice prong of the test, a defendant must "demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been different" *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001); see also *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). In addition, a defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997).

Here, defendant cannot establish that trial counsel's failure to request severance or to object to the prosecution's motion for joinder was not a matter of trial strategy. Further, defendant has failed to demonstrate a reasonable probability that the result of the proceedings would have been different in the absence of counsel's alleged errors. There was substantial evidence to support defendant's conviction on each charge. On the first occasion, defendant entered the restaurant in the early hours of the day. Both Lauzon and her mother, Donna Cieslak, were able to see defendant because the restaurant was well lit, and Lauzon stood in close proximity to defendant during the robbery. After taking the money from the cash drawer, defendant ordered Lauzon, Cieslak, and a customer to the back room where he demanded their cellular phones and physically ripped the phone cords out of the wall before leaving. On the second occasion, Lauzon was working alone when she noticed defendant enter the restaurant again. Lauzon immediately recognized defendant from the first incident, specifically remembering his eyes. Defendant stood closely to Lauzon as he took money from the cash drawer. Defendant then ordered Lauzon to the back of the restaurant and again exited the building. Based on this evidence, defendant is unable to establish that the result of the proceedings would have been different had he been tried separately for each charge. We perceive no ineffective assistance in counsel's failure to request severance or to object to joinder of the cases.

Finally, defendant argues that he was denied a fair trial because he was not provided notice of a photographic lineup used to identify him before trial, and because use of the photographic lineup was improper as he was already in custody at the time. We disagree. A trial court's decision whether to admit identification evidence is reviewed for clear error. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993).

"Under due process principles, the prosecution is obligated to disclose evidence that is both favorable to the defendant and material to the determination of guilt or punishment. Evidence is material only if there is a reasonable probability that the trial result would have been different, had the evidence been disclosed." *People v Fink*, 456 Mich 449, 453-454; 574 NW2d 28 (1998). Moreover, the prosecution's violation of a discovery order, even if done inadvertently in good faith, warrants reversal unless it is clear that the failure to comply with the order was harmless beyond a reasonable doubt. *People v McConnell*, 124 Mich App 672, 680;

335 NW2d 226 (1983). Even if the prosecution violated a discovery order and in fact failed to disclose evidence of the photographic lineup, the trial court did not commit error requiring reversal in denying defendant's motion. The trial court eliminated any potential prejudice by offering defendant additional time to prepare. Moreover, substantial independent evidence supported the identification of defendant as the perpetrator. Specifically, Lauzon independently picked defendant out of a corporeal lineup. We therefore cannot conclude that, absent Cieslak's identification of defendant during the photographic lineup, the outcome of the proceedings would have been different. Because the photographic lineup was not decisive to the outcome of the proceedings, the prosecution's failure to disclose it was not error requiring reversal. *Id.* at 680-681; *Fink, supra* at 453-454. The failure to notify defendant of the photographic lineup did not prejudice defendant, and any error in this regard was harmless.

Defendant also contends that the trial court erred in admitting the evidence because defendant was already in custody at the time of the photographic lineup. Ordinarily, an accused should not be identified by photograph if he is in custody unless a legitimate reason for doing so exists. *Kurylczuk, supra* at 298. While defendant contends that there was no evidence on the record regarding the reasoning behind the use of the photographic lineup, the prosecution informed the court that, on the date of the lineup, defendant was not available to the Detroit Police because another police agency had defendant in custody. Although defendant was in custody at the time, he was in custody for an unrelated offense, which is not "custody" for the purposes of a photographic lineup. *People v Wyngaard*, 151 Mich App 107, 113; 390 NW2d 694 (1986). Accordingly, the trial court did not commit clear error in admitting evidence of the photographic lineup.

Affirmed.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Richard A. Bandstra