

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID ALLEN BEAUDOIN,

Defendant-Appellant.

UNPUBLISHED

April 21, 2009

No. 282833

Oakland Circuit Court

LC No. 2007-217267-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER MICHAEL BILLER,

Defendant-Appellant.

No. 282835

Oakland Circuit Court

LC No. 2007-217005-FC

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

PER CURIAM.

In these consolidated appeals, defendant, David Allen Beaudoin, was convicted of armed robbery, MCL 750.529, and unlawfully driving away of a motor vehicle, MCL 750.413, and defendant, Christopher Michael Biller, was convicted of armed robbery, MCL 750.529. Defendants were both sentenced as fourth habitual offenders, MCL 769.12, to 15 to 40 years in prison. Defendants appeal as of right. We affirm.

On appeal, Beaudoin argues that the trial court's decision to conduct a joint trial with dual juries resulted in prejudice and the denial of his constitutional right to the effective assistance of counsel due to the failure of his trial counsel to file a motion for severance. We review Beaudoin's unpreserved severance argument for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Our review of Beaudoin's unpreserved ineffective assistance of counsel argument is limited to a de novo review of the existing record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

“A strong public policy favors joint trials in the interest of justice, judicial economy, and administration.” *People v Harris*, 201 Mich App 147, 152; 505 NW2d 889 (1993). 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.” *People v Hana*, 447 Mich 325, 346-347; 524 NW2d 682 (1994). In order to establish that his substantial rights will be affected absent the granting of separate trials, a defendant must either establish that he and his codefendant’s defenses are (1) inconsistent, mutually exclusive, and irreconcilable, *People v Cadle (On Remand)*, 209 Mich App 467, 469; 531 NW2d 761 (1995), or (2) that they are antagonistic, *Harris, supra* at 152. “A defense is deemed antagonistic when it appears that a codefendant may testify to exculpate himself and to incriminate the defendant.” *Id.* at 153. A conclusory statement of antagonistic defenses is insufficient, and a confession is not considered to be antagonistic if it incriminates both defendants. *Id.*

It is undisputed that Beaudoin did not provide the trial court with an affidavit or offer of proof. In fact, Beaudoin never made a motion for severance or posed an objection to the joinder of his trial, but actually stipulated to have a joint trial with dual juries. Consequently, Beaudoin can only establish that he is entitled to a new trial if he can demonstrate that having a joint trial was prejudicial. *Hana, supra* at 346-347.

Beaudoin argues that because his and Biller’s defenses were antagonistic and/or irreconcilable a joint trial was precluded. Contrary to Beaudoin’s assertion, the record shows that defendants presented the same defense (insufficient evidence to convict them due to a lack of prosecution witness credibility), and thus, defendant has failed to establish that the defenses were inconsistent, mutually exclusive, and irreconcilable. Additionally, although Biller’s out of court statements that were admitted into evidence incriminated Beaudoin by indicating that he aided and abetted an armed robbery, the statements also served to incriminate Biller. Because the defenses cannot be construed as antagonistic, *Harris, supra* at 153, the trial court did not commit plain error affecting substantial rights when it failed to sua sponte sever the trial. *Hana, supra* at 346-347, 351-352; *Cadle (On Remand), supra* at 469; *Harris, supra* at 152-153. In addition, trial counsel cannot be deemed ineffective for failing to file a motion to sever because it would have been futile. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Biller’s first argument on appeal is that the trial court abused its discretion when it allowed Jennifer Zeeb to present hearsay testimony that violated his right to confront his accuser. We review a trial court’s decision whether to admit evidence for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). “An abuse of discretion occurs . . . when the trial court chooses an outcome falling outside [the] principled range of outcomes.” *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

The prosecution elicited testimony from Zeeb that Beaudoin told her that he and Biller were planning on robbing Christopher McGinnis by having Biller take McGinnis’s money by force. Hearsay, which is generally inadmissible, is defined as “a statement, other than one made by the declarant while testifying at a trial or hearing, offered in evidence to prove the truth of the matter asserted.” MRE 801(c); MRE 802; *People v Tanner*, 222 Mich App 626, 629; 564 NW2d

197 (1997). Beaudoin, who did not testify at trial, made the statement in question, which was being offered to prove the truth of the matter asserted, i.e., that Beaudoin and Biller had a preconceived plan to rob McGinnis by force. Thus, the statement constitutes hearsay. *Tanner, supra* at 629.

The trial judge admitted the testimony under the statement against penal interest exception of the hearsay rule. Under MRE 804(b)(3):

A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Beaudoin's statement to Zeeb suggested that he was aiding and abetting Biller in robbing McGinnis. Thus, his statement clearly subjected him to criminal liability, and accordingly met the statement against penal interest hearsay exception. MRE 804(b)(3). In addition, non-testimonial statements are not subject to the protections afforded by the Confrontation Clause. *Crawford v Washington*, 541 US 36, 59, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). The challenged statements were voluntarily made to Zeeb, who was not working on behalf of the police. Because the statements are non-testimonial in nature they are not subject to the Confrontation Clause. *Id.*

Biller next asserts that the trial court erred when it refused to give the requested "addict informant" instruction. We review a trial court's determination whether to give a requested jury instruction for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

Our Supreme Court has held that, upon request, a cautionary instruction regarding the credibility of narcotic addicts should be given to a jury. *People v Atkins*, 397 Mich 163, 170-171; 243 NW2d 292 (1976). This Court has additionally held that an instruction regarding the special scrutiny to be given to the testimony of an addict-informant should be given only where the testimony of the informant "is the only evidence linking the defendant to the offense." *People v Griffin*, 235 Mich App 27, 40; 597 NW2d 176 (1999) rejected on other grounds by *People v Thompson*, 477 Mich 146 (2007); *People v McKenzie*, 206 Mich App 425, 432; 522 NW2d 661 (1994).

Although Zeeb was an admitted drug addict, her testimony was not "the only evidence linking" Biller to the charged offense because McGinnis testified that Biller assaulted him with a knife and took his money by force. Thus, even if Zeeb was considered an informant, Biller was not entitled to have the requested instruction read to the jury. *Griffin, supra* at 40; *McKenzie, supra* at 432. Accordingly, the trial court did not abuse its discretion when it refused to give the requested instruction. *Babcock, supra* at 269.

Biller next argues that there was insufficient evidence presented to support his armed robbery conviction. We review sufficiency of the evidence claims de novo, *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001), viewing the evidence presented in a light most favorable to the prosecution and determining whether a rational trier of fact could have found that the essential elements of the crime charged were proven beyond a reasonable doubt, *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

The elements of armed robbery are: (1) an assault, and (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a specified weapon or any article used or fashioned in a manner to lead the person assaulted to reasonably believe it to be a dangerous weapon. MCL 750.529; *People v Ford*, 262 Mich App 443, 458; 687 NW2d 119 (2004). McGinnis testified that shortly after Biller knocked him down to the floor and struck him in the face, Biller pulled out a knife and threatened to cut McGinnis's throat if he did not give him his money. Frightened, McGinnis complied with Biller's demand. Biller took the money and the keys to McGinnis's Jeep. Zeeb testified that Beaudoin told her that he and Biller were going to execute a plan whereby Biller would rob McGinnis by force. Zeeb also testified that she heard a loud noise shortly after McGinnis went upstairs to his bedroom and subsequently saw Biller give "Big Mike" \$30 for acting as a look out. Zeeb also observed Biller change out of a bloody shirt and overheard him tell Beaudoin that he needed "to get rid of the knife." Although defendant alleges that neither McGinnis nor Zeeb were credible witnesses, we must afford deference to the trier of fact's special opportunity and ability to determine the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Viewing the evidence presented in a light most favorable to the prosecution, a rational trier of fact could have found sufficient evidence existed to convict Biller of armed robbery. MCL 750.529; *Johnson*, *supra* at 723.

Biller next argues that the trial court abused its discretion when it ordered him to remove his shirt in front of the jury in order to aid McGinnis in his identification by allowing McGinnis to view Biller's tattoos. We review a trial court's decision whether to admit evidence for an abuse of discretion. *Katt*, *supra* at 278.

All relevant evidence is admissible, except as otherwise provided by the constitutions, rules of evidence, or other rules of the Supreme Court. MRE 402; *People v Taylor*, 252 Mich App 519, 521; 652 NW2d 526 (2002). McGinnis could not identify Biller as his assailant because his appearance had changed dramatically since the assault. Since McGinnis was accustomed to seeing Biller wearing a "beater," which exposed many of his tattoos, the trial court ordered Biller to remove his shirt at trial. The demonstrative evidence made it more probable than not that McGinnis would be able to identify Biller, and thus, was relevant. MRE 401; *Taylor*, *supra* at 521.

Biller argues that the evidence was "far more prejudicial than probative" because it "dehumanized" Biller and allowed the jury to see all of his tattoos and convict him on that basis. Thus, Biller asserts that even if the evidence was relevant it should have been excluded pursuant to MRE 403. However, because the jury had already heard evidence regarding Biller's tattoos,

having defendant remove his shirt to expose the tattoos was not prejudicial. Hence, the trial court did not abuse its discretion when it ordered Biller to remove his shirt. MRE 401; MRE 402; MRE 403; *Taylor, supra* at 521-522.¹

Biller's final argument on appeal, raised in his Standard 4 brief, is that he was denied his constitutional right to the effective assistance of counsel because his trial counsel failed to adequately impeach Zeeb. When reviewing a claim of ineffective assistance of counsel when an evidentiary hearing is not previously held, we conduct a de novo review of the existing record. *Rodriguez, supra* at 38.

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). To demonstrate that counsel's performance was below an objective standard of reasonableness, a defendant must overcome the strong presumption that his counsel's actions constituted sound trial strategy under the circumstances. *Id.* at 302. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). The failure to present additional evidence only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense that would have affected the outcome of the proceedings. *Id.*

Biller argues that his counsel could have attacked Zeeb's credibility by questioning her about her prior inconsistent statements, but fails to specify what statements should have been used and how such statements would have established that Zeeb was not credible. Moreover, the record establishes that Biller's counsel thoroughly attacked Zeeb's credibility on cross-examination by eliciting information that she (1) had two prior convictions involving dishonesty, which included a charge of stealing from her own parents, (2) had prior drug convictions, and (3) had smoked crack cocaine on the date of the incident in question. The record therefore establishes that Biller's trial counsel's performance in this regard did not fall below an objective standard of reasonableness.

Biller additionally contends that his counsel could have established Zeeb's bias by questioning her about an alleged incident that took place at his mother's residence. However, given that Zeeb's potential bias had already been brought out on direct examination when she testified that she did not like Biller, attempting to establish bias through the alleged incident at his mother's residence would have been merely cumulative. Furthermore, even assuming that the non-record facts contained in the proffered affidavit regarding the incident are true, not questioning Zeeb about the incident comprised sound trial strategy because the incident would have opened the door for Zeeb to testify that Biller assaulted her during the alleged encounter.

¹ We decline to address Biller's meritless argument that the trial court's order violated his equal protection rights because Biller not only failed to properly preserve that argument by raising it before the trial court, *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004), but has also failed to provide any authority for his position, *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001).

Given McGinnis's testimony that Biller assaulted him while armed with a knife in order to take his property, even if Biller's counsel had cross-examined Zeeb in the aforementioned manner, it would not have affected the outcome of the proceedings. Accordingly, Biller was not denied his constitutional right to the effective assistance of counsel. *Toma, supra* at 302-303.

Affirmed.

/s/ Jane M. Beckering

/s/ Michael J. Talbot

/s/ Pat M. Donofrio