STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 18, 2016
v JYMARIO DAVON DOOLEY, Defendant-Appellant.	No. 327942 Jackson Circuit Court LC No. 14-003524-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v DRESHAWN MARCELLES GLASPIE, Defendant-Appellant.	No. 327943 Jackson Circuit Court LC No. 14-003520-FC

Before: RIORDAN, P.J., and METER and OWENS, JJ.

PER CURIAM.

Following a jury trial, codefendants Jymario Dooley and Dreshawn Glaspie were convicted of first-degree felony murder, MCL 750.316(1)(b), conspiracy to commit assault with intent to rob while armed, MCL 750.89; MCL 750.157a, and assault with intent to rob while armed, MCL 750.89.[1] The trial court sentenced defendants to life imprisonment without the possibility of parole for the felony-murder convictions and to life imprisonment for the conspiracy and assault convictions.[2] Dooley appeals as of right in Docket No. 327942, and Glaspie appeals as of right in Docket No. 327943. We affirm in both appeals.

[1] Glaspie was sentenced as a second habitual offender, MCL 769.10.

[2] Glaspie was sentenced as a second habitual offender, MCL 769.10.

II. FACTUAL BACKGROUND

Defendants' convictions arise from the shooting death of Phillip Johnson, Jr., in the early morning hours of September 29, 2014, in Jackson, Michigan. At trial, Khalil Davenport and William Houston—both of whom testified pursuant to plea agreements that allowed them to plead guilty to unarmed robbery—described the events that led up to Johnson's death. Most significantly, Davenport and Houston testified that Glaspie asked them earlier in the evening if they wanted to rob Johnson, and that Houston called Dooley, who owned a gun, after Davenport, Houston, and Glaspie had developed a plan for the robbery and decided that they needed a gun to complete the deed. Later, Davenport, Houston, and Glaspie met up with Dooley, and all of the men agreed that Dooley would participate in the theft of a metal box where Johnson kept his marijuana.

At some point after 1:30 a.m., Davenport went to Johnson's house in order to hang out with Johnson, learn if anyone else was at the home, and find out where the metal box was located. After Davenport exchanged several text messages with Glaspie, the remaining conspirators went to Johnson's house and waited outside. At approximately 3:00 a.m., Johnson indicated that he needed to work in the morning, and Davenport stated that he would go home. Davenport walked to the door, with Johnson following him, and opened it. Outside stood Dooley and Glaspie, both wearing ski masks. Dooley was pointing a gun in Davenport's direction. Davenport and Johnson yelled in surprise. Davenport dropped to the ground—moving out of the way so that Dooley and Glaspie could move past him into the house—and ran out of the residence. As he ran away from the scene, he heard one or two gunshots. Similarly, Houston, who had remained in the driveway during the incident, testified that he heard a gunshot ring out from the front of Johnson's house, prompting him to run down the street.

III. DOCKET NO. 327942

A. SUFFICIENCY OF THE EVIDENCE

Dooley first argues that his convictions are not supported by sufficient evidence. We disagree.

1. STANDARD OF REVIEW

This Court reviews a challenge to the sufficiency of the evidence *de novo*. *People v Henderson*, 306 Mich App 1, 8-9; 854 NW2d 234 (2014). "We examine the evidence in a light most favorable to the prosecution, resolving all evidentiary conflicts in its favor, and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond reasonable doubt." *People v Dunigan*, 299 Mich App 579, 582; 831 NW2d 243 (2013) (quotation marks and citation omitted). "Circumstantial evidence and reasonable inferences arising [from the evidence] may constitute proof of the elements of [a] crime." *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010). This Court's review is deferential, as "the trier of fact, not the appellate court, determines what inferences may be fairly drawn from the evidence and the weight to be accorded those inferences." *People v Malone*, 287 Mich App 648, 654; 792 NW2d 7 (2010), overruled in part on other grounds by

People v Jackson, 498 Mich 246, 268 n 9 (2015). See also *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

2. ANALYSIS

i. EVIDENCE OF DOOLEY'S PRESENCE

First, Dooley argues that the evidence was insufficient to prove beyond a reasonable doubt that he was present at Johnson's house when Johnson was shot. In making this argument, Dooley contends that Davenport and Houston were unreliable witnesses, as demonstrated by contradictory aspects of their testimony and the alibi established by prosecution witness Gonze Hayes' testimony. He also argues that Hayes' testimony indicating that he was aware of Dooley's involvement in the crime should not be credited for various reasons. We disagree.

Davenport and Houston both testified in detail regarding the development of the conspiracy to rob Johnson, specifically explaining that Dooley became involved in the plot once they realized that they needed a gun. Additionally, Houston testified that Dooley went with him and Glaspie to Johnson's house while Davenport was hanging out with Johnson, and that Dooley ran toward the door with Glaspie when Davenport opened it. Similarly, Davenport testified that Dooley was standing outside, pointing a gun in his direction, when he opened the front door of Johnson's home, and that Dooley subsequently entered the house. Furthermore, the jury could infer from Davenport's testimony that Dooley was still inside Johnson's house when the gunshot was fired. Davenport testified that he looked back and saw Houston and Glaspie running in the opposite direction as he ran out of Johnson's house, and he heard a gunshot after seeing Houston and Glaspie behind him.

In addition to Davenport's and Houston's testimony, Deputy Kyle Ruge testified that he stopped Dooley, who was sweating profusely, at the intersection of Mansion Street and South Jackson Street at 3:33 a.m., which was only 10 minutes after Duane Gossett, Johnson's uncle, called 911. Detective Brett Stiles testified that the location of the stop was close to Davenport's house and only a half mile from Johnson's house. Hayes testified that Dooley told him on a later date (1) that he had gone into a house where he was supposed to grab marijuana and (2) that he grabbed the marijuana and ran after a gun went off and someone was shot. Viewing the testimony in the light most favorable to the prosecution, there was sufficient evidence for a rational trier of fact to conclude that the prosecution proved beyond a reasonable doubt that Dooley was at Johnson's house when Johnson was shot. See *Dunigan*, 299 Mich App at 582.

With regard to Dooley's credibility arguments, Davenport and Houston expressly acknowledged at trial that they had accepted favorable plea deals in exchange for their testimony. Additionally, as defendant emphasizes, there were inconsistencies in their testimony. For example, their testimony differed as to whether Glaspie mentioned a telephone conversation that he had with Johnson regarding money that he owed to Johnson; whether they ran from Johnson's house before or after they heard a gunshot; and the direction in which Davenport ran from Johnson's house. Despite these inconsistencies, the jury convicted Dooley and Glaspie. Thus, it is apparent that the jury found Davenport and Houston credible. The credibility of witnesses, including accomplices, and the weight to be attributed to the evidence presented at trial are questions for the jury. *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98

(2009); *People v Heikkinen*, 250 Mich App 322, 327; 646 NW2d 190 (2002). See also *People v Young*, 472 Mich 130, 143; 693 NW2d 801 (2005) ("Fundamentally, it is the province *of the jury* to assess the credibility of witnesses. In making that assessment, the jury should decide whether witnesses harbor any bias or prejudice."). By arguing that Davenport and Houston were unreliable witnesses, Dooley is, in effect, asking this Court to reweigh their credibility. We decline this invitation and reject Dooley's claim, as we will not interfere with the jury's role of determining the credibility of witnesses and the weight of the evidence. *People v Eisen*, 296 Mich App 326, 331; 820 NW2d 229 (2012).

We also reject Dooley's claim that reversal is warranted because Hayes' testimony gave him an alibi. Contrary to Dooley's characterization of the evidence, Hayes identified contradictory time frames throughout his testimony, and he expressly stated that he did not look at a clock when he spoke with Dooley on the night of the incident, so that any time frames identified during his testimony were mere estimates. Further, by arguing that Hayes gave him an alibi, such that his convictions are supported by insufficient evidence, Dooley asks this Court, once again, to reweigh Davenport's and Houston's credibility and to redetermine the weight that should be attributed to certain portions of Hayes' testimony. As previously explained, we will not interfere with the jury's role in deciding the credibility of witnesses and the weight that should be accorded to the evidence presented at trial. *Id.*

ii. EVIDENCE OF DOOLEY'S PARTICIPATION IN THE CONSPIRACY

Dooley also argues that there was insufficient evidence presented at trial for the jury to conclude that he participated in the conspiracy because the conspiracy was complete when Davenport, Houston, and Glaspie agreed to rob Johnson. We disagree.

"A criminal conspiracy is a partnership in criminal purposes, under which two or more individuals voluntarily agree to effectuate the commission of a criminal offense." *People v Jackson*, 292 Mich App 583, 588; 808 NW2d 541 (2011). "[T]he offense is complete upon the formation of the agreement." *Id.* Although Davenport and Houston testified that there was an initial agreement between them and Glaspie to rob Johnson before Houston called Dooley, "one who joins a conspiracy after it has been formed is as guilty as though he were an original conspirator." *People v Garska*, 303 Mich 313, 319; 6 NW2d 527 (1942). See also *People v Blume*, 443 Mich 476, 483-484; 505 NW2d 843 (1993) ("A defendant may become a member of an already existing conspiracy if he cooperates knowingly to further the object of the conspiracy[.]") (quotation marks, citation, and emphasis omitted). Thus, we reject Dooley's claim.

Additionally, viewing Davenport's and Houston's testimony, as summarized above, in the light most favorable to the prosecution, there was sufficient evidence for a rational trier of fact to conclude beyond a reasonable doubt that Dooley was aware of the conspiracy and that he voluntarily agreed with Davenport, Houston, and Glaspie to effectuate an assault with the intent to rob Johnson while armed. See *Jackson*, 292 Mich at 588 (discussing the degree of proof required for a conspiracy conviction); *Dunigan*, 299 Mich App at 582.

iii. INTENT REQUIRED FOR FELONY MURDER

Next, Dooley argues that the evidence was insufficient to prove that he had the requisite intent for felony murder. In particular, he contends that there was no evidence indicating "any intention to shoot [Johnson], much less any intent to kill or cause great bodily harm." We disagree.

As Dooley recognizes, "[t]he elements of felony murder are (1) the killing of a person, (2) with the intent to kill, do great bodily harm, or create a high risk of death or great bodily harm with the knowledge that death or great bodily harm was the probable result [*i.e.*, malice[3]], (3) while committing, attempting to commit, or assisting in the commission of an enumerated felony." *People v Lane*, 308 Mich App 38, 57-58; 862 NW2d 446 (2014). "[B]ecause it can be difficult to prove a defendant's state of mind on issues such as knowledge and intent, minimal circumstantial evidence will suffice to establish the defendant's state of mind, which can be inferred from the evidence presented." *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008). A trier of fact may infer a defendant's intent from his words and actions as well as the method used to commit the offense. *People v Carines*, 460 Mich 750, 759; 597 NW2d 130 (1999); *People v Harrison*, 245 Mich App 439, 458; 628 NW2d 105 (2001). Likewise, malice may be inferred "from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm," or "the use of a deadly weapon." *Carines*, 460 Mich at 759.

Viewing Davenport's and Houston's testimony in the light most favorable to the prosecution, as well as Dr. Pacris' testimony that Johnson died from a gunshot wound to the chest, there was sufficient evidence from which a reasonable trier of fact could conclude beyond a reasonable doubt that Dooley shot Johnson with the intent to kill or do great bodily harm, while committing an assault with the intent to rob Johnson while armed. See *Lane*, 308 Mich App at 57-58; *Dunigan*, 299 Mich App at 582; *Roper*, 286 Mich App at 84. Alternatively, a reasonable jury could conclude that Dooley acted with malice when the crime was committed based on Davenport's and Houston's testimony that Dooley brought a gun to the robbery and pointed it at Davenport and Johnson when they opened the door, and that a gunshot was subsequently fired. See *Lane*, 308 Mich App at 57-58; *Dunigan*, 299 Mich App at 582; *Roper*, 286 Mich App at 84.

Dooley's convictions were supported by sufficient evidence.

B. GREAT WEIGHT OF THE EVIDENCE

Next, Dooley argues that the jury's verdict was against the great weight of the evidence. We disagree.

1. STANDARD OF REVIEW

[3] "Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *People v Roper*, 286 Mich App 77, 84; 777 NW2d 483 (2009) (quotation marks and citation omitted). See also *People v Carines*, 460 Mich 750, 759; 597 NW2d 130 (1999).

We review "a trial court's grant or denial of a new trial on the ground that the verdict was against the great weight of the evidence" for an abuse of discretion, *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008), which occurs when the court "selects an outcome that does not fall within the range of reasonable and principled outcomes," *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007).

2. ANALYSIS

"A trial court may grant a motion for a new trial based on the great weight of the evidence only if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Unger*, 278 Mich App at 232, citing *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998); see also *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). "Conflicting testimony and questions of witness credibility are generally insufficient grounds for granting a new trial," as "[a]bsent exceptional circumstances, issues of witness credibility are for the trier of fact." *Unger*, 278 Mich App at 232. To warrant a new trial on such grounds, witness testimony must "contradict[] indisputable physical facts or laws," be "patently incredible or def[y] physical realities," be "so inherently implausible that it could not be believed by a reasonable juror," or have been "seriously impeached" in a "case marked by uncertainties and discrepancies," so that "there [is] a real concern that an innocent person may have been convicted or that it would be a manifest injustice to allow the guilty verdict to stand." *Lemmon*, 456 Mich at 643-644 (quotation marks and citations omitted). Additionally, in general, "a verdict may be vacated only when the evidence does not reasonably support it and it was more likely the result of causes outside the record, such as passion, prejudice, sympathy, or some other extraneous influence." *People v Lacalamita*, 286 Mich App 467, 469; 780 NW2d 311 (2009).

Dooley argues that the verdict was against the great weight of the evidence because Davenport and Houston, who were close friends and who testified pursuant to plea agreements, provided the only evidence indicating that he was present at Johnson's house. Again, questions concerning witness credibility are not grounds for granting a new trial. *Lemmon*, 456 Mich at 643; *People v Galloway*, 307 Mich App 151, 167; 858 NW2d 520 (2014), rev'd in part on other grounds 498 Mich 902 (2015). "When analyzing a great-weight challenge, no court may sit as the '13th juror' and reassess the evidence." *Galloway*, 307 Mich App at 167. As in *Galloway*, the witnesses' testimony "in this case was not so incredible or contradicted as to warrant judicial interference." *Id*. Further, the jury was aware that Davenport and Houston testified pursuant to favorable plea agreements and that Davenport and Houston were close friends (and not good friends with Dooley). The jury also had an opportunity to consider the discrepancies in Davenport's and Houston's testimony. Nonetheless, the jury deemed Davenport and Houston credible. We will not interfere with that assessment. *Lemmon*, 456 Mich at 643; *Galloway*, 307 Mich App at 167.

Dooley also claims that the verdict was against the great weight of the evidence because there was insufficient evidence to support the intent element of his felony murder conviction and because the conspiracy was complete before he was allegedly involved. However, as previously explained, the evidence was sufficient for the jury to find that Dooley had the intent necessary for felony murder. See *People v Brown*, 239 Mich App 735, 745-746, 746 n 6; 610 NW2d 234 (2000). Additionally, as already discussed, Dooley's argument that he cannot be guilty of

conspiracy in light of Davenport, Houston, and Glaspie's earlier agreement to rob Johnson is contrary to law, and there was sufficient evidence for the jury to conclude that Dooley joined the existing conspiracy and specifically agreed to "further, promote, advance, or pursue" the robbery of Johnson with the other three men. See *Jackson*, 292 Mich at 588. Likewise, there is no indication in the record that the jury's verdict likely resulted from causes outside the record. See *Lacalamita*, 286 Mich App at 469.

Accordingly, the trial court did not abuse its discretion when it denied Dooley's motion for a new trial. See *Unger*, 278 Mich App at 232; *Young*, 276 Mich App at 448.

IV. DOCKET NO. 327943

A. MOTION FOR A MISTRIAL

Glaspie first argues that the trial court erred when it denied his motion for a mistrial after Duane Gossett testified on the first day of trial, in response to the prosecutor's inquiry regarding how he knew Glaspie, that he met him when Glaspie was on parole. We disagree.

1. STANDARD OF REVIEW AND APPLICABLE LAW

We review for an abuse of discretion a trial court's decision on a motion for a mistrial. *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010). "A trial court should grant a mistrial only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *Id*. (quotation marks and citation omitted). Likewise, a mistrial should be granted only when the prejudicial effect of the error cannot be removed in any other way. *People v Horn*, 279 Mich App 31, 36; 755 NW2d 212 (2008).

2. ANALYSIS

The gravamen of defendant's claim is that Gossett's testimony constituted improper other-acts evidence in violation of MRE 404, such that the trial court's failure to grant a mistrial in light of this evidence violated his right to due process and a fair trial. It is undisputed that Gossett's testimony was not admitted for a proper noncharacter purpose under MRE 404(b)(1). *People v Knox*, 469 Mich 502, 510; 674 NW2d 366 (2004). However, Glaspie does not contend that the prosecutor's question to Gossett was improper or that the prosecutor should have expected Gossett to testify that he met Glaspie when Glaspie was on parole. As such, Gossett's statement was an unresponsive, volunteered answer to a proper question.

> It is well settled that evidence of a prior conviction may be prejudicial to the accused, the danger being that the jury will misuse prior conviction evidence by focusing on the defendant's general bad character[.] However, not every instance of mention before a jury of some inappropriate subject matter warrants a mistrial. Specifically, an unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial. [*People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999) (quotation marks and citations omitted), overruled in part on other grounds *People v Thompson*, 477 Mich 146 (2007).]

See also *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995) (stating same). Accordingly, we conclude that Gossett's brief, unresponsive remark did not warrant a mistrial.

Further, instructions are presumed to cure most errors. *Horn*, 279 Mich App at 36. See also *People v Mahone*, 294 Mich App 208, 213; 816 NW2d 436 (2011) ("[U]nresponsive answers . . . are generally not considered prejudicial errors unless egregious or not amenable to a curative instruction.") (quotation marks and citation omitted). At the beginning of the second day of trial, the trial court instructed the jury to disregard all of Gossett's testimony from the first day of trial. Glaspie has failed to establish that the instruction was insufficient to cure any prejudice that may have resulted from Gossett's brief reference the previous day.

Under these circumstances, the trial court did not abuse its discretion when it denied Glaspie's motion for a mistrial. See *Unger*, 278 Mich App at 217.

B. SUFFICIENCY OF THE EVIDENCE

Next, Glaspie argues that his convictions are not supported by sufficient evidence because the only evidence presented at trial connecting him to the shooting was the "self-serving" testimony of Davenport and Houston, which was not corroborated by any other direct evidence. We disagree.

As previously discussed, the credibility of witnesses, including accomplices, is a question for the jury, *Young*, 472 Mich at 143; *Harrison*, 283 Mich App at 378; *Heikkinen*, 250 Mich App at 327, and we will not interfere with the jury's role in determining the witnesses' credibility and the weight of the evidence, *Eisen*, 296 Mich App at 331. Furthermore, a jury may convict a defendant based on the uncorroborated testimony of an accomplice. *People v Barron*, 381 Mich 421, 424-425; 163 NW2d 219 (1968); *People v Sullivan*, 97 Mich App 488, 492; 296 NW2d 81 (1980); *People v Ochko*, 88 Mich App 737, 741; 279 NW2d 294 (1979) (recognizing "the long-standing rule in Michigan that a defendant may be convicted solely by the uncorroborated testimony of an accomplice").

Thus, we reject Glaspie's claim. Davenport's and Houston's testimony was sufficient to support his convictions.

C. SEPARATE TRIALS

Glaspie also argues that the trial court erred when it failed to sever the trials and give him a separate trial or jury. He similarly contends that defense counsel was ineffective because he did not move for a separate trial or jury. We reject Glaspie's claims.

1. STANDARD OF REVIEW

Because Glaspie did not move for a separate trial, we review this unpreserved claim for plain error. See *Carines*, 460 Mich at 763; *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). To demonstrate plain error, a defendant must show that (1) an error occurred, (2) the error was clear or obvious, and (3) "the plain error affected [the defendant's] substantial rights," which "generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Carines*, 460 Mich at 763. Even if a

defendant establishes a plain error that affected his substantial rights, "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id*. (quotation marks and citation omitted; second alteration in original).

Because Glaspie did not move for a new trial or a *Ginther*[4] hearing in the trial court,[5] our review of his ineffective assistance of counsel claim is limited to mistakes apparent from the record. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009); *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008). "A claim of ineffective assistance of counsel is a mixed question of law and fact. A trial court's findings of fact, if any, are reviewed for clear error, and this Court reviews the ultimate constitutional issue arising from an ineffective assistance of counsel claim de novo." *Petri*, 279 Mich App at 410, citing *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In order to prove that defense counsel provided ineffective assistance, a defendant must demonstrate that (1) " 'counsel's representation fell below an objective standard of reasonableness,' " and (2) defendant was prejudiced, *i.e.*, " 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *People v Vaughn*, 491 Mich 642, 669-671; 821 NW2d 288 (2012), quoting *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Likewise, the "[d]efendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." *Petri*, 279 Mich App at 411.

2. ANALYSIS

"There is no absolute right to separate trials, and in fact, [a] strong policy favors joint trials in the interest of justice, judicial economy, and administration." *People v Bosca*, 310 Mich App 1, 44; 871 NW2d 307 (2015), lv held in abeyance 872 NW2d 492 (2015) (quotation marks and citation omitted; alteration in original). Pursuant to MCL 768.5 and MCR 6.121(D), the decision to sever or join defendants for trial is within the discretion of the trial court. *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994), amended on reh sub nom *People v Gallina*, 447 Mich 1203 (1994). A defendant's right of severance is governed by MCR 6.121(C). Under that rule, "[s]everance is mandated . . . 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." *Hana*, 447 Mich at 346. If a defendant fails to make this showing in the trial court, reversal of a court's decision to join defendants for trial is precluded "absent any significant indication on appeal that the requisite prejudice in fact occurred at trial." *Id*. at 346-347. "Inconsistency of defenses is not enough to mandate severance; rather, the defenses must be 'mutually exclusive' or 'irreconcilable,' " meaning that "[t]he tension between defenses must be so great that a jury would have to believe one defendant

[4] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

[5] We denied Glaspie's motion to remand for a *Ginther* hearing. *People v Glaspie*, unpublished order of the Court of Appeals, entered February 19, 2016 (Docket No. 327943).

at the expense of the other." *Id.* at 349 (quotation marks and citations omitted). "[I]ncidental spillover prejudice, which is almost inevitable in a multi-defendant trial, does not suffice." *Id.* (quotation marks and citation omitted).

On appeal, Glaspie contends that his defense was irreconcilable with Dooley's defense—and that he faced substantial, unfair prejudice—because "Dooley brought the gun and shot Phillip Johnson, Jr., with no foreknowledge by any of the other actors in this case." Accordingly, he contends, "With separate trials, [he] would not have been lumped in with Dooley's actions that night." He also restates his claims regarding the unreliability of Davenport's and Houston's testimony, arguing that the jury was unable to accurately determine Glaspie's guilt or innocence in light of the testimony presented regarding Dooley's conduct.

Consistent with his arguments on appeal, Glaspie contended at trial that the only evidence linking him to the shooting was the testimony of Davenport and Houston, and that this testimony did not establish beyond a reasonable doubt that he was guilty of the crimes because (1) Davenport and Houston were permitted to plead guilty to unarmed robbery, (2) their testimony was not corroborated by any other evidence, and (3) their testimony was full of inconsistencies. Dooley argued below that he had no involvement in the charged crimes and that Davenport and Houston, who were actually present at Johnson's house in the early morning hours of September 29, 2014, had "suck[ed]" Dooley into the robbery in conjunction with their favorable plea deals. As such, it is clear that Glaspie's and Dooley's defenses were based on the same premise (*i.e.*, that Davenport and Houston were not credible witnesses) and were not mutually exclusive or irreconcilable.[6] See *Hana*, 447 Mich at 349. Thus, because they did not present mutually exclusive or irreconcilable defenses, the trial court did not plainly err when it failed to give Glaspie a separate trial, *Carines*, 460 Mich at 763, or a separate jury, see *Hana*, 447 Mich at 351.

Likewise, Glaspie has not established that defense counsel provided ineffective assistance when he failed to move for a separate trial or jury. Again, defense counsel advanced the same general defense as Dooley. Contrary to defendant's claim that "[i]n no sense did the joinder help Mr. Glaspie," it would have been reasonable for defense counsel to conclude that having one jury in a joint trial—during which Davenport and Houston would be subject to cross-

[6] In his brief on appeal, Glaspie also asserts that "[a] reasonable defense theory could have been that Dooley acted alone. However, because the two men were tried jointly, trial counsel could not pursue such a theory." We disagree. Relying on such a defense theory would not have been reasonable in this case, especially given the fact that the primary evidence presented by the prosecution against *both* defendants was Davenport's and Houston's testimony, which specifically indicated, as a fundamental fact of the case, that Glaspie played a prominent role in the offense. Further, in considering Glaspie's severance claim for plain error affecting his substantial rights, see *Carines*, 460 Mich at 763, the relevant inquiry is whether the trial court's failure to sever the trials, despite his failure to move for severance, actually prejudiced Glaspie. See also *Hana*, 447 Mich at 346. Given the evidence against Glaspie, there is not a reasonable probability that defense counsel's purported inability to pursue this defense theory, due to the joint trial, affected the outcome of the proceedings. See *Carines*, 460 Mich at 763.

examination by two attorneys who wanted to prove that they were not credible—provided the best chance of acquittal for Glaspie. Thus, on this record, Glaspie has not overcome the strong presumption that defense counsel's failure to move for a separate trial or jury was a sound trial strategy. *Id.*

Further, because Glaspie and Dooley did not present mutually exclusive or irreconcilable defenses, any motion for a separate trial or jury would have been futile. See *Hana*, 447 Mich at 349, 351-352. "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

V. CONCLUSION

In both appeals, Dooley and Glaspie have failed to establish that any of their claims warrant relief.

Affirmed.

/s/ Michael J. Riordan
/s/ Patrick M. Meter
/s/ Donald S. Owens