STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIE CHARLES SHIELDS,

Defendant-Appellant.

UNPUBLISHED
January 3, 1997

No. 186327
LC No. 95-051661-FC

Before: McDonald, P.J., and Bandstra and C.L. Bosman,* JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of first-degree premeditated murder, MCL 750.316(1)(a); MSA 28.548(1)(a), possession of a firearm during the commission of a felony, MCL 750.227b(1); MSA 28.424(2)(1), and two counts of assault with a weapon, MCL 750.82; MSA 28.277. We affirm.

Defendant argues that the trial court abused its discretion when it denied his motions for a separate trial and/or separate jury from codefendant Bell. We disagree. Severance is required 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." *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994). If this showing is not made in the trial court, then reversal of a joinder decision is not warranted unless there is a significant indication on appeal that the requisite prejudice occurred at trial. *Id.* at 346-347. This standard is not lessened when codefendants in a joint trial present antagonistic defenses. *Id.* at 347. Inconsistent defenses will only mandate severance when the defenses are mutually exclusive or irreconcilable. *Id.* at 349; *People v Cadle (On Remand)*, 209 Mich App 467, 469; 531 NW2d 761 (1995). The use of separate juries is a partial form of severance, and whether dual juries are required is evaluated under the same standard applicable to a motion for a separate trial. *Hana, supra* at 351.

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* Circuit judge, sitting on the Court of Appeals by assignment.

Here, the affidavit and arguments submitted by the defense supplied no concrete facts to support the motion. Additionally, with the benefit of hindsight, we find that the defenses presented by defendant and codefendant Bell were not mutually exclusive. *Id.* at 349, 355. At trial, defendant's theory was that "Boo" shot the victim; Bell's theory was that he did not aid or abet the shooting. The jury could have reasonably believed both of these defense theories and, accordingly, they were not mutually exclusive or irreconcilable. There is no indication that the requisite prejudice occurred at trial, and reversal is not warranted on this issue.

Defendant next argues that the court should have held a hearing to determine whether the defenses asserted by defendants were mutually exclusive. Defendant has abandoned this issue on appeal by failing to provide this Court with authority demonstrating that such a hearing is required. *People v Piotrowski,* 211 Mich App 527, 530; 536 NW2d 293 (1995).

Defendant also contends that he was denied effective assistance of counsel. However, there was no evidentiary hearing on this issue below. Therefore, appellate review is limited to the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). We have reviewed defendant's arguments and the lower court record and are neither persuaded that there was deficient performance on counsel's part nor that, but for counsel's alleged error, the outcome of the trial would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Defendant further argues that several instances of prosecutorial misconduct denied him a fair trial. However, it appears from the record that defendant failed to object to the conduct he now claims is improper. Therefore, appellate review of this unpreserved issue is foreclosed unless the failure to review the issue would result in a miscarriage of justice. *Id.* at 687; *People v Hoffman*, 205 Mich App 1, 21; 518 NW2d 817 (1994).

After reviewing defendant's arguments and the prosecutor's statements and conduct in context, we find no miscarriage of justice. See *Stanaway, supra; People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1989). Although defendant asserts that the prosecutor knew that witnesses Kennebrew and Johnson perjured their testimony at trial, this was not the case. The witnesses were questioned at trial regarding their statements made to the police and admitted that they had changed their stories regarding the shooting of the victim because they were scared. This does not constitute an instance, as defendant asserts, in which the prosecutor used perjured testimony to deny defendant a fair trial. Nor did the prosecutor vouch for the credibility of witnesses Kennebrew and Johnson, as argued by defendant. See *Stanaway, supra* at 686. Furthermore, defendant's argument is without merit that he was denied a fair trial because the prosecutor failed to produce defendant's statements to the Florida police that he did not shoot the victim. Defendant testified at trial that he did not shoot the victim, and the omission of the Florida statements did not deny defendant a fair trial. In any event, a timely objection could have cured any potential error. *Id.* at 687.

Finally, defendant asserts that the cumulative effect of the errors at trial resulted in an unfair trial. In view of our resolution of the preceding issues, this claim is without merit.

We affirm.

/s/ Gary R. McDonald
/s/ Richard A. Bandstra
/s/ Calvin L. Bosman