

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TOBY ROGER DAVIS,

Defendant-Appellant.

UNPUBLISHED

February 20, 1998

No. 189228

Saginaw Circuit Court

LC No. 94-009842-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HENRY LEE DILLARD,

Defendant-Appellant.

No. 189232

Saginaw Circuit Court

LC No. 94-009964-FC

Before: Hood, P.J., and MacKenzie and Murphy, JJ.

PER CURIAM.

Defendants were tried together in two separate trials arising out of two separate incidents, which occurred within hours of each other in July 1994. In the first trial, where defendants were charged with several crimes related to the murder of Donald Wright, both defendants were convicted of second-degree murder, MCL 750.317; MSA 28.549 and possession of a fire arm during commission of a felony, MCL 750.227b; MSA 28.424(2). In the second trial, where defendants were charged with several crimes related to the attempted robbery and shooting of Quentin Bledson, defendant Davis was convicted of assault with intent to rob while armed, MCL 750.89; MSA 28.284; assault with intent to murder, MCL 750.83; MSA 28.278; and felony-firearm, MCL 750.227b; MSA 28.424(2). Defendant Dillard was acquitted of all charges.

Davis was sentenced to two years' imprisonment for each of his felony-firearm convictions, forty to eighty years' imprisonment for second-degree murder, fifteen to thirty years' imprisonment for assault with intent to rob while armed, and twenty-five to fifty years' imprisonment for assault with intent to murder. Dillard was sentenced to two years' imprisonment for his felony-firearm conviction and twenty-five to forty years' imprisonment for second-degree murder. Both defendants appeal as of right from their convictions. We affirm, except with regard to Davis' conviction for assault with intent to rob while armed, MCL 750.89; MSA 28.284. We vacate that conviction and remand for further proceedings consistent with this opinion.

I

Both defendants contend that the trial court abused its discretion by failing to grant them separate murder trials. Each defendant made a pretrial motion requesting separate trials. During the murder trial, the motions were renewed and mistrial was requested on several occasions. The trial court denied each of these motions. We disagree that the trial court abused its discretion in failing to grant the defendants separate murder trials.

A trial court has discretion to try codefendants separately or jointly. MCL 768.5; MSA 28.1028; MCR 6.121(D). Severance is required only when a defendant shows that severance is necessary to avoid prejudice to his substantial rights. MCR 6.121(C). A defendant does not have an absolute right to a separate trial. *People v Etheridge*, 196 Mich App 43, 52; 492 NW2d 490 (1992). In fact, "[t]here is a strong policy favoring joint trials in the interest of justice, judicial economy and administration." *Id.*

In *People v Hana*, 447 Mich 325; 524 NW2d 682 (1994), the Court set forth numerous considerations for determining when separate trials for codefendants are required:

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. [*Id.* at 346-347.]

The Court recognized that there are serious negative implications for codefendants in a joint trial where each is presenting a defense that is antagonistic to the other. *Id.* at 347. Nevertheless, the Court imposed a very high standard when determining if severance is mandated. 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." *Id.* at 359-360.

Otherwise stated, "the defendant 'must show that the magnitude of the prejudice denied him a fair trial.' . . . [R]eversible prejudice exists when one of the defendant's

'substantive rights,' such as the 'opportunity to present an individual defense,' is violated." [*Id.* at 360, citing *United States v Tootick*, 952 F2d 1078, 1082 (CA 9, 1991).]

The Court further ruled:

Inconsistency of defenses is not enough to mandate severance; rather, the defenses must be "mutually exclusive" or "irreconcilable." Moreover, "[i]ncidental 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." [*Id.* at 349.]

Finger pointing is not a sufficient reason to grant separate trials. *Id.* at 355.

In this case, the trial court properly refused to grant separate trials. The pretrial motions did not provide any concrete facts or reasons to justify separating the proceedings. Defendants simply claimed that separate trials were warranted since each defendant would be blaming the other for firing the fatal shot at Wright. As the Court noted in *Hana, supra* at 355, finger pointing is an insufficient reason to mandate separate trials. This is especially so where, as here, defendants could not articulate any substantial rights that would be prejudiced if a consolidated trial was held. *Id.*

In addition, it was not an abuse of discretion to deny separate trials or a mistrial during the murder trial. First, the defenses in this case were not mutually exclusive such that separate trials were necessary. The jury did not have to believe one defendant at the expense of the other and in fact, it did not. Both were tried and charged as principals and aiders and abettors. Both were convicted of second-degree murder. In *People v Gallina* and *People v Rode*, the companion cases to *Hana*, the defendants were pointing fingers at each other. Each claimed the other killed the victim. One of the defendants was charged as an aider and abettor and the Court held that "[f]inger pointing by the defendants when such a prosecution theory is pursued does not create mutually exclusive antagonistic defenses." *Id.* at 360-361.

The properly instructed jury could have found both defendants similarly liable without any prejudice or inconsistency because one found guilty of aiding and abetting can also be held liable as a principal. [*Id.* at 361.]

Similarly, the finger pointing defenses in this case were not mutually exclusive, antagonistic defenses. The jury was instructed that each defendant could be guilty as a principal or as an aider and abettor, and there was sufficient evidence to convict both defendants. *Id.* at 350-351.

Second, we find no indication that either defendant was irretrievably prejudiced at trial. Neither defendant testified, so there were no direct cross-accusations to answer. *Hana, supra* at 355-356. In addition, the prosecutor would have been entitled to present the same evidence in each of two separate trials. There was no evidence heard by the jury that would have been inadmissible as to one of the co-defendants had he had a separate trial. *Id.* The strategy of each defendant was to elicit testimony

favorable to himself from the prosecution witnesses and then argue that, based on his interpretation of that testimony, the other defendant must have fired the fatal bullet. As was noted in *Hana, supra* at 355, the attorneys' "verbal tug of war" did not transform the proceedings into an unfair trial. Moreover, there has been no showing that the defendant's strategies would have been different had they had separate trials. In addition, although there was evidence that was antagonistic to each defendant in this case, it was equally antagonistic to both. The jury had sufficient evidence to conclude that either one fired the fatal bullet and that the other aided and abetted. Finally, the trial court cautioned the jury that each case had to be considered and decided separately and each case should be decided on the evidence. *Id.* at 351, 356. This case is really one of simple finger pointing and, as the Court noted in *Hana, supra* at 347-348, it is natural that codefendants will try to point the finger at each other and will end up being forced, to some extent to defend against their codefendant as well as the government. This reason is insufficient to justify separate trials where defendants were not restricted in any way from presenting their defenses and where they were not prejudiced.

II

Defendant Davis argues that the trial court erred by allowing evidence of the attempted robbery and shooting of Bledson (the second incident) into the first trial, which arose out of the shooting death of Wright (the first incident). We disagree.

The admissibility of other bad-acts evidence is within the trial court's discretion. *People v Catanzarite*, 211 Mich App 573, 579; 536 NW2d 570 (1995). MRE 404(b) provides:

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in this case.

In *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), the Court clarified the standard for the admission of evidence of other crimes or wrongs. The evidence must be relevant to an issue other than propensity under rule 404(b); must be relevant to an issue or fact of consequence; and must not be more prejudicial than probative under MRE 403. *Id.* at 74-75. In addition, the trial court may, upon request, provide a limiting instruction. *Id.* at 75.

In this case, the evidence of the second incident was relevant to identity and intent. Bledson, the victim at the second crime scene, identified Davis as being his assailant. Another witness, testifying under a grant of immunity, confirmed that Davis shot Bledson at the second crime scene. Forensic evidence matched the nine-millimeter bullet casings and bullets that were shot at the second crime scene to those from the murder scene. Thus, the evidence from the second crime scene was relevant to Davis' identity at the murder scene. It was also relevant to intent because the way Davis interacted with the second victim, specifically approaching the victim's vehicle, pulling a gun, stating his intention to rob him,

and shooting when the victim failed to comply, shows that more likely than not, Davis intentionally shot Wright under similar circumstances.

Davis also argues that even if the evidence was relevant, it was more prejudicial than probative and thus, it should not have been admitted. Again, we disagree. Contrary to defendant's claims, the record does not demonstrate that the evidence of the second incident was introduced early at trial or that it was given undue weight. Moreover, Davis makes no showing that the prejudicial nature of the evidence substantially outweighed its probative value. *People v Mills*, 450 Mich 61, 74-75; 537 NW2d 909 (1995). He merely argues that the evidence unfairly tainted the jury's impression of him. Unfair prejudice does not simply mean damaging. *Id.* at 75.

III

Davis also argues that his conviction for assault with intent to rob while armed, MCL 750.89; MSA 28.284, should be vacated. The prosecutor concedes that this conviction should be vacated and we agree.

The offense of attempted armed robbery is a lesser included offense of assault with intent to rob while armed. *People v Bryan*, 92 Mich App 208, 225; 284 NW2d 765 (1979). Davis requested that the trial court instruct the jury on the lesser offense of attempted armed robbery and the trial court refused. The trial court erred in refusing to instruct the jury on the lesser offense. See *People v Hendricks*, 446 Mich 435, 442; 521 NW2d 546 (1994).

We vacate Davis' conviction for assault with intent to rob while armed. On remand, the trial court shall enter judgment of conviction for the offense of attempted armed robbery or, if the prosecutor wishes, it may retry Davis on the greater offense. *Bryan, supra* at 225-226.

IV

Defendant Dillard argues that there was insufficient evidence to support his conviction for second-degree murder. We disagree.

In order to be convicted of second-degree murder, the following elements must be established beyond a reasonable doubt: that defendant caused a death with malice and without justification or excuse. *People v Neal*, 201 Mich App 650, 654; 506 NW2d 618 (1993). Defendant takes issue only with whether there was sufficient evidence from which the jury could have concluded that he caused the death of the victim. While much evidence pointed at Davis as being the shooter who delivered the fatal bullet, there was evidence pointing directly at Dillard, including that Dillard fired a second shot into the victim's car and claimed that he fired the fatal bullet. Dillard also bragged to a witness that he was the shooter at the second crime scene. The bullets from that crime scene matched the nine-millimeter bullet suspected to have caused Wright's death. The jury could have believed that Dillard, and not Davis, had the nine-millimeter gun responsible for the death. Moreover there was testimony that it was not impossible that the .22-caliber bullet caused the death. Therefore, even if Dillard had the .22-caliber gun and not the nine-millimeter gun, the jury could have believed that he fired

the fatal shot, especially where the jury could have inferred from other evidence that Davis' shot, the first shot, may have just hit Wright in the hand and not the head. Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have determined that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992).

More importantly, we note that Dillard could have been found guilty on an aiding and abetting theory as opposed to being found guilty as the principal. There was ample evidence to support his conviction as an aider and abettor. Dillard ignores this aspect of the case in its entirety when making his argument on appeal.

V

Dillard also argues that his sentence of twenty-five to forty years' imprisonment was disproportionate and amounted to cruel and unusual punishment. We disagree.

A sentence must be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). It is therefore appropriate for the sentencing court to review the nature of the offense and the background of the offender. *Id.* at 651. A sentence that falls within the sentencing guidelines is presumptively proper and proportionate. *People v Fisher*, 442 Mich 560, 582; 503 NW2d 50 (1993); *People v Albert*, 207 Mich App 73, 75; 523 NW2d 825 (1994). Only in unusual circumstances will a sentence falling within the guidelines be determined to be disproportionate. *Milbourn, supra* at 651.

The sentencing guideline range in this case for this offense was ten to twenty-five years. Although it was at the highest end, Dillard's sentence clearly falls within the guidelines. Dillard has failed to articulate any mitigating or unusual circumstances that would lead to a finding that this presumptively proper sentence was disproportionate. In addition, we note that at the time of sentencing, the trial court considered the proper criteria. The sentence was proportionate to the offense and the offender and we will not remand for resentencing. Moreover, because the sentence was proportionate in relation to the crime, it is not cruel or unusual. *People v Williams*, 198 Mich App 537, 543; 499 NW2d 404 (1993).

Affirmed in part, vacated in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Harold Hood

/s/ Barbara B. MacKenzie

/s/ William B. Murphy