

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID WAYNE GROSS,

Defendant-Appellant.

UNPUBLISHED

March 17, 2005

No. 251321

Ingham Circuit Court

LC No. 02-000123-FH

Before: Hoekstra, P.J., and Neff and Schuette, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree child abuse, MCL 750.136b(2), and sentenced to serve a term of seven to fifteen years' imprisonment. Defendant appeals as of right. We affirm.

Defendant's conviction arises from a charge of physical abuse involving his three-month-old daughter, for which he was tried jointly with the child's mother, Sheri Jackson. On appeal, defendant argues that his trial counsel was ineffective for failing to seek severance of the codefendants' trial, or in the alternative, separate juries. We disagree.

To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that this deficient performance prejudiced the defense, i.e., that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). In order to demonstrate that counsel's performance was deficient, the defendant must show that it fell below an objective standard of reasonableness under prevailing professional norms. However, in so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Strickland, supra* at 690-691; *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Severance is required only when a defendant shows that his substantial rights would be prejudiced and that severance is necessary to avoid such prejudice. See MCR 6.121(C). In challenging the performance of his trial counsel, defendant argues that severance of the codefendants' trials was required under MCR 6.121(C) to avoid the prejudice attendant a codefendant's inevitable attempt to shift blame for the charged crimes to another codefendant. However, our Supreme Court has stated that severance of a trial on these grounds is required

only where it is shown that the codefendants will present “mutually exclusive” or “irreconcilable” defenses. See *People v Hana*, 447 Mich 325, 349; 524 NW2d 682 (1994).¹ In other words, to warrant severance under such circumstances there must be a tension so great between the defenses of each codefendant that a jury would have to believe one defendant at the expense of another. *Id.* With respect to the likelihood of such prejudice in cases where, as here, responsibility for the charged crime is advanced by the prosecution under a theory of aiding and abetting, our Supreme Court has stated:

Finger pointing by the defendants when such a prosecution theory is pursued does not create mutually exclusive antagonistic defenses. 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. [*Hana, supra* at 360-361.]

Consequently, and considering the strong policy in favor of joint trials, see *id.* at 341, we find that severance on the ground asserted by defendant was not required. Accordingly, counsel for defendant was not ineffective for failing to seek severance on that ground. See *People v Riley (After Remand)*, 468 Mich 135, 142; 659 NW2d 611 (2003).

However, citing *Bruton v United States*, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968) and *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), defendant also argues that severance was required because the joint trial permitted into evidence certain statements of codefendant Jackson, which defendant asserts would not have been admissible in a trial involving only himself. However, we note that unlike the cases cited by defendant, the majority of the statements at issue here involved admissions inculcating only Jackson, which were used by defense counsel to place blame for the abuse suffered by the couple’s child on Jackson alone. That this strategy was ultimately unsuccessful does not render counsel’s assistance in this matter ineffective. See *People v Kevorkian*, 248 Mich App 373, 414; 639 NW2d 291 (2001); see also, *People v Jackson*, 158 Mich App 544, 556; 405 NW2d 192 (1987) (a confession that incriminates a codefendant and inculcates the defendant is not antagonistic for purposes of determining whether to sever a trial). Indeed, “[t]his Court will not assess counsel’s competence with the benefit of hindsight.” *People v Hill*, 257 Mich App 126, 139; 667 NW2d 78 (2003). Accordingly, defendant has failed to overcome the strong presumption that counsel’s failure to seek severance, or otherwise object to the admission of his codefendant’s statements, constituted sound trial strategy.² *Strickland, supra; Stanaway, supra.*

¹ Although defendant also argues that counsel was ineffective for failing to request a separate jury under MCR 6.121(C), “[t]he use of separate juries is a partial form of severance to be evaluated under the standard . . . applicable to motions for separate trials.” *Hana, supra* at 351.

² In reaching this conclusion, we reject defendant’s assertion that a decision by counsel to forgo severance in order to place Jackson’s self-inculpatory statements before the jury could not constitute sound trial strategy because such statements would have been admissible, as statements against the Jackson’s penal interest under MRE 804(b)(3), at a separate trial involving only defendant. Although such statements are generally admissible as an exception to the rule against hearsay, MRE 804(b)(3) expressly provides that where offered to “exculpate the

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In any event, even if we were to conclude that counsel's performance in this regard was deficient, defendant has nonetheless failed to demonstrate that, absent counsel's allegedly deficient performance, the result of the proceedings would have been different. *Strickland, supra*. At trial, Dr. Steven Guertin, M.D., testified that defendant's infant daughter had suffered a number of injuries, including a broken clavicle and bruising about her face and buttocks. Guertin further testified that when speaking with defendant regarding these injuries, defendant acknowledged that, despite understanding that any physical punishment of an infant was inappropriate, he had previously spanked his three-month-old daughter on the buttocks for having fallen asleep or otherwise been difficult during feeding. Consistent with this testimony, defendant's former neighbor, Brenda Hull, testified that during a telephone conversation with Jackson, she overheard defendant scream at the infant to "shut [her] fucking mouth" or he would spank her. Shortly thereafter, Hull heard the cry of the infant change its tone to a scream. Hull further testified that this was not the only such instance of abuse by defendant overheard by her, and that when she offered to intervene in the matter, Jackson begged her to not interfere.

During closing arguments, the prosecution conceded that Jackson had confessed to having herself inflicted the injuries discovered by Guertin, of which defendant testified he had no knowledge until being approached by the police. However, citing the foregoing testimony, the prosecution urged the jury to discredit defendant's testimony and find that defendant aided and abetted in the infliction of those injuries through his own abusive conduct toward the child, as well as his general acquiescence to the abusive conduct of Jackson. In making this argument, the prosecution relied solely on the testimony cited above and did not reference any statement attributable to Jackson herself, and tending to incriminate defendant in the abuse. Given that the evidence and arguments relied on by the prosecution were both properly admissible against defendant, see MRE 801(d)(2), and sufficient to support defendant's conviction on a theory of aiding and abetting, defendant has failed to demonstrate that, but for counsel's alleged error in failing to seek severance, or otherwise object to the admission of Jackson's statements, the result of the proceedings would have been different.³ *Id.*

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accused," such statements are "not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." In this case, there is nothing in the record to corroborate or otherwise indicate the trustworthiness of Jackson's inculpatory statements. To the contrary, the codefendants' former neighbor, Brenda Hull, testified that Jackson's decision to admit sole responsibility for the abuse was part of a scheme designed to permit defendant to regain custody of their daughter until the two could again be together.

³ For these same reasons, we reject defendant's claim that he is entitled to a new trial on the basis of the trial court's refusal to instruct the jury that Jackson's statements to Guertin, Hull, and Family Independence Agency social worker Colin Parks, could not be considered as substantive evidence against defendant. See *Bruton, supra*; see also CJI2d 4.2. As noted above, even assuming such instruction to have been appropriate, the prosecution neither emphasized nor relied on Jackson's statements to argue defendant's guilt. Accordingly, any error in the trial court's refusal to instruct the jury in this regard was harmless. See *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999); *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). Moreover, because we find any such error to have been harmless, we do not conclude that the trial court abused its discretion in declining to hold an evidentiary hearing pursuant to *People v*
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In reaching this conclusion we reject defendant's claim that, because there was no evidence that the codefendants "acted in concert" to commit any abusive act, the trial court erred by permitting the jury to deliberate defendant's guilt under an aiding and abetting theory. It is well settled that "aiding and abetting" describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999); see also *People v Smielewski*, 235 Mich App 196, 207; 596 NW2d 636 (1999). As argued by the prosecution at trial, defendant, by himself engaging in abusive conduct toward the child and in turn countenancing the abuse of the child's mother, supported or otherwise encouraged the infliction of injuries for which Jackson had acknowledged responsibility. Inasmuch as the prosecution's argument in this regard was supported by the testimony of Guertin and Hull, we find no error in the trial court's decision to instruct the jury on the theory of aiding and abetting and, thereby, permit the jury to consider defendant's guilt under that theory. *People v Mills*, 450 Mich 61, 81; 537 NW2d 909 (1995) (a trial court is required to instruct a jury on a theory of law that is supported by the evidence).

We similarly find no merit in defendant's assertion that his trial counsel was ineffective for failing to object to testimony elicited from Guertin regarding the results of a "family stress checklist" completed by the codefendants on the day their child's injuries were discovered. At trial, Guertin testified that the ten question checklist was designed to assess the future "risk of abuse or neglect" by a childcare giver, and that the results of the checklist for both codefendants were "poor." While also acknowledging that defendant's score was slightly worse than that of Jackson, Guertin refused to opine that this disparity resulted in a greater likelihood that it was defendant who had caused the injuries observed by Guertin. In challenging Guertin's testimony in this regard, defendant first asserts that Guertin, having been offered only as an expert in "child abuse trauma," was not qualified to discuss the results of the checklist. We disagree.

MRE 702, which governs the admissibility of expert testimony, provides that where specialized knowledge will assist the factfinder in understanding the evidence or determining a fact in issue, an expert witness may offer expert testimony, provided, among other factors, that "the testimony is based on sufficient facts or data." With respect to his qualifications to testify concerning the "family stress checklist," Guertin testified at trial that in addition to being the director of the pediatric intensive care unit at Sparrow Regional Children's Medical Center, he was a member of the center's Child Abuse Evaluation Team and also ran a clinic for abused children. Guertin further testified that as the physician member of the Child Abuse Evaluation Team he was routinely called upon to assess any injury to a child suspected to have been abused, and that as a result of this responsibility he had regularly assessed between 250 and 300 suspected abuse cases each year. With respect to the "family stress checklist" itself, Guertin testified that the checklist had been developed more than twenty years ago, had been validated by tests conducted by Yale University, and was regularly used by him when conducting an abuse

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Ginther, 390 Mich 436, 443; 212 NW2d 922 (1973). See *People v Mischley*, 164 Mich App 478, 482; 417 NW2d 537 (1987) (it is within a trial court's discretion whether to hold an evidentiary hearing).

evaluation. Given this testimony, we do not conclude that it was improper for Guertin to testify concerning the checklist.

Nor do we conclude that the testimony concerning the checklist was irrelevant to the issues at trial. Although defendant is correct that Guertin's testimony indicated that the checklist was designed to assess the *future* risk of abuse *or neglect*, given the close proximity in time between the injuries inflicted on the child and the codefendants' completion of the checklist, and the relationship between abuse and neglect, such evidence possessed the requisite "tendency" to make the existence of a fact that was of consequence to the determination at hand "more probable or less probable than it would be without the evidence." MRE 401. Moreover, although certainly prejudicial, the subject testimony was not so prejudicial as to warrant its exclusion under MRE 403, which requires that the danger of unfair prejudice associated with marginally relevant evidence "substantially outweigh" its relevancy. Indeed, any prejudice concerning the likelihood of past abuse was sufficiently allayed by Guertin's express refusal to, on the basis of the checklist scores, place blame on either defendant for the injuries at issue.

Defendant also asserts that his trial counsel was ineffective for failing to object to testimony offered by Hull, in which she indicated her understanding that defendant had chosen to purchase marijuana in lieu of a proper bed for his child. Although we agree that such testimony was irrelevant, we note that the remark was not solicited by any party at trial and, accordingly, do not conclude that counsel was ineffective in failing to object and draw further attention to remark. *Strickland, supra*.

We affirm.

/s/ Joel P. Hoekstra
/s/ Janet T. Neff
/s/ Bill Schuette