

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JUSTIN JOHN REINKE,

Defendant-Appellant.

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UNPUBLISHED  
November 25, 2003

No. 240336  
Saginaw Circuit Court  
LC No. 01-019965-FH

Before: Sawyer, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

Defendant appeals as of right from his jury-trial convictions of second-degree home invasion, MCL 750.110a(3), receiving and concealing stolen property, MCL 750.535(3)(a) (value of the stolen property is \$1,000 or more, but less than \$20,000), and possession of marijuana, MCL 333.7403(2)(d). He was sentenced as a second-offense habitual offender, MCL 769.10, to concurrent sentences of 88 months' to 22 years' imprisonment for the home invasion conviction, 3 to 7½ years' imprisonment for the receiving and concealing conviction, and one year in jail for the possession of marijuana conviction. We affirm.

Defendant first contends that the trial court erred in setting aside his guilty plea agreement because the prosecutor failed to comply with his promise to move defendant to an out-of-county jail for his protection from retaliation by a codefendant. We review for an abuse of discretion the decision of a trial court to vacate a guilty plea because of noncompliance with a plea agreement. MCR 6.310(C);<sup>1</sup> *People v Hannold*, 217 Mich App 382, 388-389; 551 NW2d 710 (1996).

The written plea agreement in this case states that among the things agreed to by the parties was that defendant "shall pass a polygraph examination verifying the truthfulness of his statement" and that defendant "will be moved to another jail facility." Defendant pleaded guilty in reliance on the terms of the agreement, but the prosecution moved to set aside the plea agreement at sentencing because the polygraph test results were inconclusive. Following

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<sup>1</sup> MCR 6.310(C) provides that "[o]n the prosecutor's motion, the court may vacate a plea before sentence is imposed if the defendant has failed to comply with the terms of a plea agreement."

hearings held in connection with that request, the trial court found that defendant failed to comply with the plea agreement and entered an order vacating defendant's guilty plea and setting aside the plea agreement.

On appeal, defendant does not challenge the trial court's finding that he failed to pass a polygraph examination as required by the plea agreement. Rather, he maintains that the prosecutor also breached the agreement by failing to have defendant moved to another jail facility, and, because of that breach, the trial court should not have vacated his plea or set aside the plea agreement. We disagree. Even assuming that the prosecution breached the agreement as defendant asserts, that does not excuse defendant's own substantial breach. Defendant's breach of the plea agreement constitutes grounds for setting aside the agreement. *People v Abrams*, 204 Mich App 667, 672; 516 NW2d 80 (1994). On the facts of this case, we conclude that the trial court did not abuse its discretion in vacating the plea and setting aside the plea agreement.

Defendant next argues that the trial court abused its discretion in denying his motion for a separate trial from that of his codefendant Dale Clark.<sup>2</sup> In the trial court, defendant claimed that their defenses would be inconsistent with Clark denying his participation in the home invasions while implicating defendant. This Court reviews for an abuse of discretion the trial court's decision to deny a motion for separate trials. *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994), amended 447 Mich 1203 (1994); *People v Harris*, 201 Mich App 147, 152; 505 NW2d 889 (1993).

MCL 768.5 provides generally that “[w]hen 2 or more defendants shall be jointly indicted for any criminal offense, they shall be tried separately or jointly, in the discretion of the court.” MCR 6.121(C) governs mandatory severance of codefendants being tried for related offenses and provides that “[o]n a defendant's motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant.” In *Hana, supra* at 346-347, our Supreme Court interpreted MCL 6.121(C) to require severance

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.

The *Hana* Court further emphasized that

[i]nconsistency of defenses is not enough to mandate severance; rather, the defenses must be “mutually exclusive” or “irreconcilable.” ... Moreover,

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<sup>2</sup> At trial, Clark was acquitted of both counts of home invasion and of conspiracy to commit home invasion, but was found guilty of, among other things, receiving and concealing stolen property and possession of marijuana.

“[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 (citations omitted).]

On appeal, defendant contends that Clark’s trial testimony supports defendant’s claim that the trial court’s decision to deny severance was an abuse of discretion. We acknowledge that a codefendant’s testimony is potentially a significant source of prejudice because the codefendant will generally have an inherent interest in shifting the blame from himself. See generally *Bruton v United States*, 391 US 123, 136; 88 S Ct 1620; 20 L Ed 2d 476 (1968) (“Not only are the incriminations [of a codefendant] devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others.”). But we conclude that in this case Clark’s and defendant’s defenses were not “mutually exclusive” or “irreconcilable.” *Hana, supra* at 349. Both defendant and Clark were charged with two counts of home invasion arising out of separate incidents at different locations and conspiracy to commit home invasion. In his trial testimony, Clark denied involvement with any home invasions, but in doing so he never implicated defendant with involvement in them. Rather, the primary evidence linking defendant to the home invasion charge for which he was convicted was the match of defendant’s DNA with blood found at the scene. Defendant, like Clark, was acquitted of the other home invasion charge and conspiracy to commit home invasion. At most, Clark’s testimony linked defendant with some of the stolen property taken during the burglaries. However, he did so while admitting his own involvement with some of the property, but denying any knowledge that it was stolen, a position that was equally consistent with defendant also having no knowledge as well. Consequently, Clark’s defense was not irreconcilable with that of defendant and his testimony did not prejudice defendant. *Id.* The trial court did not abuse its discretion in denying defendant’s motion to sever.

Finally, defendant challenges the scoring of offense variable (OV) 13 with regard to the home invasion conviction, and OVs 3 and 10 with regard to the receiving and concealing conviction. Without challenging the factual basis for the scoring of these OVs, defendant raises a constitutional objection to the trial court’s utilization of defendant’s admitted involvement in one of the home invasion offenses of which he was acquitted as the factual basis for the scoring of these factors. Citing *People v Ewing (After Remand)*, 435 Mich 443, 451-453; 458 NW2d 880 (1990) (Brickley, J.), defendant concedes that a sentencing court is permitted to take into consideration conduct for which a defendant was acquitted. But defendant argues that the continuing validity of *Ewing* “is doubtful in light of *Apprendi v New Jersey*, 530 US 466; [120 S Ct 2348; 147 L Ed 2d 435] (2000).”

In *Apprendi*, the United States Supreme Court addressed the question “whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt.” *Id.* at 469. The Court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Id.* at 490. In its opinion, the Court made clear that judges are permitted to exercise discretion based on various factors relating to both offense and offender in sentencing within the

range prescribed by statute, *id.* at 481, and that the validity of the federal Sentencing Guidelines were not before the Court, *id.* at 497 n 21. Nevertheless, defendant maintains, based on his analysis of the concurring opinion of Justice Thomas and to some extent the dissenting opinion of Justice O'Connor, that "if the United States Supreme Court is consistent, it will eventually have to confront the issue of whether guidelines factors that increase the actual sentence should be viewed in the same light as elements of the offense." That well may be the case, but presently the Court has not reached this issue and defendant concedes that no federal circuit court of appeals that has considered the issue has agreed with defendant. Nor has defendant cited us to any state court ruling in support of his claim. Further, defendant offers no argument in support of holding that the Due Process Clause of the Fourteenth Amendment renders the scoring of the disputed OVs unconstitutional. Thus, defendant has essentially abandoned his claim. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

Affirmed.

/s/ David H. Sawyer  
/s/ Joel P. Hoekstra  
/s/ Christopher M. Murray