

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROY DUANE CALHOUN,

Defendant-Appellant.

UNPUBLISHED
September 20, 2002

No. 231209
Genesee Circuit Court
LC No. 00-005503-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TARTHEON KAI GISTOVER,

Defendant-Appellant.

No. 231210
Genesee Circuit Court
LC No. 00-005505-FC

Before: O'Connell, P.J., and Griffin and Hoekstra, JJ.

PER CURIAM.

In these consolidated appeals, each defendant was convicted of armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b, following a joint jury trial. Defendant Calhoun was sentenced as a fourth-offense habitual offender, MCL 769.12, to concurrent prison terms of thirty to fifty years for the robbery conviction, and fifty-eight months to twenty-five years for the felon in possession conviction, plus a consecutive two-year term for the felony-firearm conviction. Defendant Gistover was sentenced as a third-offense habitual offender, MCL 769.11, to concurrent prison terms of twenty-five to forty years for the robbery conviction, and forty-three months to ten years for the felon in possession conviction, plus a consecutive two-year term for the felony-firearm conviction. Each defendant appeals as of right. We affirm.

I. Issues Raised by Defendant Calhoun in Docket No. 231209

A. Ineffective Assistance of Counsel

Because defendant Calhoun failed to make a testimonial record in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review of this issue is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.* A defendant must also overcome the presumption that the challenged action or inaction was trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Defendant Calhoun argues that he is entitled to a new trial because defense counsel was ineffective by failing to move for a *Walker*¹ hearing, and by failing to join in codefendant Gistover's motion to suppress all prior felony convictions.

Having considered each of defendant's contentions, we find that neither presents a cognizable claim for relief. First, there was no basis for defense counsel to move for a *Walker* hearing where there was no indication that defendant's statements were involuntary or coerced.² Defendant, as well as the officers who took his statements, testified at trial regarding the statements. It is undisputed that defendant was advised of his *Miranda* rights before he was questioned, indicated that he understood those rights, and signed the written waiver of his rights. There is no indication that the interview process was prolonged, or that defendant was threatened, abused, ill, intoxicated, or deprived of sleep, food, or drink. There is likewise no indication that defendant had any learning disabilities, psychological problems, or was otherwise unaware and not acting of his own free will. In fact, the record shows that defendant had previous experience with the police and the criminal process.

¹ *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

² Statements of an accused made during custodial interrogation are inadmissible unless the accused has voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602, 1612; 16 L Ed 2d 694 (1966). Whether a statement was voluntary is determined by examining police conduct, while the determination whether it was made knowingly and intelligently depends in part on the defendant's capacity. *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997). In determining whether a statement was admissible, courts consider the totality of the circumstances surrounding the making of the statement to determine whether it was freely and voluntarily made in light of the factors set forth in *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988).

Further, contrary to defendant's suggestion, his request for a prosecutor was not the "functional equivalent" of invoking the right to remain silent. Indeed, the testimony demonstrates that the request was associated with an attempt to negotiate a deal. It is undisputed that the officers informed defendant that they could not offer a deal in exchange for his statement. Also, defendant testified that he requested a prosecutor "because [he] wanted the prosecutor to hear exactly what [he] had to say," which belies his claim that he wished to remain silent. Under these circumstances, defendant has failed to demonstrate that defense counsel was ineffective for failing to move for a *Walker* hearing. "Trial counsel is not required to advocate a meritless position." *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

We likewise reject defendant Calhoun's claim that defense counsel was ineffective by failing to join in codefendant Gistover's motion to suppress his prior felony convictions. We initially note that the codefendant's motion was denied. In any event, the record shows that defense counsel and the prosecutor stipulated that the prosecutor would not impeach defendant by references to his prior convictions or delve into any specifics regarding those convictions and, in turn, the jury would be instructed that defendant had a felony conviction that made him ineligible to possess a firearm for purposes of the felon in possession charge. At the pretrial hearing, defense counsel stated that she was not bringing a motion in limine because of the parties' agreement. Given that defendant Calhoun was charged with being a felon in possession, defense counsel's decision not to bring a motion in limine and agree to the aforementioned stipulation was a matter of sound trial strategy.³ Accordingly, it is unlikely that, but for defense counsel's alleged inaction, the outcome would have been different.⁴ *Effinger, supra*. Therefore, defendant Calhoun is not entitled to a new trial on this basis.

B. Motion for Separate Trials

Defendant Calhoun argues that the trial court abused its discretion by denying his motion for a separate trial from codefendant Gistover's trial. During the pretrial hearings, defendant asserted that codefendant Gistover was the robber, whereas codefendant Gistover asserted that defendant was the robber and was lying to protect himself.

The decision to sever or join the trials of codefendants lies within the discretion of the trial court pursuant to MCL 768.5 and MCR 6.121. *People v Hana*, 447 Mich 325, 331; 524 NW2d 682 (1994). In general, a defendant does not have a right to a separate trial. *People v Hurst*, 396 Mich 1, 6; 238 NW2d 6 (1976). Indeed, a strong policy favors joint trials in the interest of justice, judicial economy, and administration. *People v Etheridge*, 196 Mich App 43, 52; 492 NW2d 490 (1992). Severance is mandated under MCR 6.121(C) only when a defendant demonstrates that his substantial rights will be prejudiced and that severance is the necessary

³ In order to prove defendant's guilt of felon in possession, the prosecution was required to establish that defendant was convicted of a felony as set forth in MCL 750.224f(2). *People v Nimeth*, 236 Mich App 616, 627; 601 NW2d 393 (1999). "In the absence of any evidence that defendant offered to admit or stipulate his prior felony conviction, the prosecutor was within his right to introduce the challenged evidence." *Id.* (citations omitted).

⁴ During trial, in accordance with the stipulation, the prosecutor did not delve into any specifics regarding defendant's prior convictions, or attempt to impeach him on that basis.

means of rectifying the potential prejudice. *Hana, supra* at 345. In order to make this showing, a defendant must provide the court with a supporting affidavit, or make an offer of proof, showing that the defenses are so inconsistent, mutually exclusive, and irreconcilable that it “clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice.” *Id.* at 346. Mere inconsistency of defenses is not enough to require severance; the defenses must be mutually exclusive or irreconcilable. *Id.* at 349. “Incidental spillover prejudice, which is almost inevitable in a multi-defendant trial, does not suffice.” *Id.* (Citation omitted.) Also, “finger pointing” is not a sufficient reason to grant separate trials. *Id.* at 360-361. In sum, 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.

We conclude that the trial court did not abuse its discretion in denying defendant’s motion for severance. Defendants’ joint trial involved several witnesses and substantially identical evidence. To hold two trials on these substantially identical cases would have been unnecessarily duplicative and excessive. As such, the interests of justice, judicial economy and orderly administration clearly called for a joint trial. Further, defendants did not provide any concrete facts or reasons in their pretrial motions to justify separating the proceeding, and failed to persuasively demonstrate that their substantial rights were prejudiced. The record also does not show “significant indication” that the requisite prejudice in fact occurred at trial. *Id.* at 346-347. Here, one defendant was charged as the principal and the other as an aider and abettor. Where the prosecutor charges one defendant as a principal and the other as an aider and abettor, “[f]inger pointing by the defendants . . . does not create mutually exclusive antagonistic defenses.” *Id.* at 360-361. Rather, because an aider and abettor can also be held liable as a principal, both defendants can be convicted “without any prejudice or inconsistency.” *Id.* at 361. Further, the jury did not have to believe one defendant at the expense of the other and, in fact, it did not. Both defendants were convicted of armed robbery and there was sufficient evidence to convict both defendants. In addition, the prosecutor would have been entitled to present the same evidence in each of two separate trials. *Id.* at 362.

Finally, the risk of prejudice from a joint trial may be allayed by a proper cautionary instruction. *Id.* at 351, 356. Here, the trial court instructed the jurors concerning reasonable doubt and the determination of guilt or innocence on an individual basis, and cautioned the jury that each case had to be considered and decided separately and on the evidence as it applied to each defendant. “It is well established that jurors are presumed to follow their instructions.” *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Accordingly, defendant Calhoun is not entitled to a new trial on the basis of the trial court’s refusal to sever the trial.

II. Issues Raised by Defendant Gistover in No. 231210

A. Motion for Separate Trials

In his first issue on appeal, defendant Gistover argues that the trial court abused its discretion by denying his motion for a separate trial from codefendant Calhoun. For the reasons discussed in part I(B) of this opinion discussing codefendant Calhoun’s appeal of this issue, we conclude that defendant Gistover is likewise not entitled to a new trial on the basis of the trial court’s refusal to sever the trial.

B. Identification Testimony

Defendant Gistover next argues that the trial court erred by denying his motion to suppress the complainant's in-court identification because it was tainted by impermissibly suggestive pretrial procedures. In this regard, defendant notes that he was the only person repeated in both the photo array and lineup, but was never identified by the complainant; moreover, while leaving the lineup, the complainant asked an officer if one of the people in the lineup might have changed their appearance and the officer responded, "yes."⁵ Five days after the lineup, the complainant identified defendant at the preliminary examination. The trial court ruled that there was nothing suggestive about the identification procedures, that there had been no identification at the lineup and, because defendant had changed his appearance, the officer's answer to the complainant's question did not suggest that defendant was in the lineup.

A trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous. *People v Kurylczyk*, 443 Mich 289, 303, 318; 505 NW2d 528 (1993). Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made. *Id.* The determination whether an identification procedure constitutes a denial of due process is made in light of the totality of the circumstances surrounding the pretrial identification. *People v Lee*, 391 Mich 618, 626; 218 NW2d 655 (1974).

We agree with the trial court that defendant failed to demonstrate that the pretrial procedure was unduly suggestive. Furthermore, even if the pretrial identification could be considered unduly suggestive and impermissibly tainted, an in-court identification is still appropriate where there is an independent basis for the in-court identification, untainted by the suggestive pretrial identification. *People v Kachar*, 400 Mich 78, 95-97; 252 NW2d 807 (1977); *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998). In determining whether an independent basis exist, the factors to be considered include: (1) the witness' prior knowledge of the defendant; (2) the witness' opportunity to observe the criminal during the crime; (3) the length of time between the crime and the disputed identification; (4) the witness' level of certainty at the prior identification; (5) discrepancies between the pretrial identification description and the defendant's actual appearance; (6) any prior proper identification of the defendant or failure to identify the defendant; (7) any prior identification of another as the culprit; (8) the mental state of the witness at the time of the crime; and (9) any special features of the defendant. *Id.*

After reviewing the record, we are satisfied that the relevant factors predominate in favor of an independent basis for the complainant's in-court identification. The complainant testified that his identification of defendant was based "on memory of having seen [defendant] before the robbery and during the robbery." Although the complainant never saw defendant before the day of the robbery, he had ample opportunity to observe defendant both before the offense during the daylight, and during the offense in the lit Laundromat. Before the robbery occurred, defendant walked slowly alongside the Laundromat window, coming face-to-face with the complainant,

⁵ The testimony showed that, at the time of the robbery and the photo array, defendant had hair on his head, a mustache, and hair under his lip, but, at the time of the lineup, defendant had shaved his head, and shaved off his facial hair.

and mouthing something to him twice. The complainant was suspicious and directed his employee to go to the door and ask defendant what he wanted. Shortly thereafter, during the robbery, the complainant and defendant had a face-to-face encounter while defendant directed the complainant to empty the cash drawer, empty his pockets, and empty a second drawer. The complainant handed the money to defendant. The complainant recognized defendant as the same man who was walking in front of the Laundromat window. Further, the complainant made no misidentifications. Although the complainant did not identify defendant at the lineup, he indicated that he was confused because defendant had shaved his head and facial hair, but had he known there had been a change of appearance, he would have identified number two, which was defendant. Therefore, even if the pretrial procedure was unduly suggestive, there was an independent basis to admit the in-court identification at trial and, thus, no error requiring reversal.

Defendant also argues that defense counsel was ineffective by failing to object to the in-court identification made by an employee of the Laundromat because she was first asked to identify defendant at trial. Because defendant failed to make a testimonial record in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review of this issue is limited to mistakes apparent on the record. *Ginther, supra; Sabin (On Second Remand), supra*.

We initially note that the record shows that the witness moved out of the area shortly after the robbery. In any event, the record demonstrates that there was a sufficient independent basis supporting the in-court identification and, therefore, defendant has failed to show that the outcome would have been different had defense counsel objected to the identification testimony. *Pickens, supra; Effinger, supra*. At trial, the witness testified that there was no doubt in her mind that defendant was the assailant, and that she "never forget[s] a face." On the day of the robbery, the witness had an opportunity to observe defendant when he walked alongside the Laundromat window during daylight only minutes before the robbery. The complainant sent the witness to speak with defendant, causing the witness and defendant to engage in a face-to-face conversation. Under these circumstances, defendant is not entitled to a new trial on the basis of ineffective assistance of counsel.⁶

C. Jury Instructions

Defendant Gistover next claims that he is entitled to a new trial because the trial court erroneously instructed the jury that it could consider that he had been convicted of a felony when determining whether he was a truthful witness. We disagree.

Because defendant did not object to the instruction, this Court reviews this unpreserved claim for plain error affecting defendant's substantial rights, i.e., that it affected the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Jury instructions are reviewed in their entirety to determine if error requiring reversal occurred. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Even if the instructions were

⁶ Defense counsel attacked the witness' identification during cross-examination and closing argument.

imperfect, reversal is not required as long as they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id.*

Here, a plain error occurred because the instruction should not have been given pursuant to the parties' stipulation that the prosecutor would not refer to defendant's prior convictions for purposes of impeachment. However, defendant has not shown the requisite prejudice necessary to warrant reversal because the error was not outcome-determinative in light of the strong evidence of defendant's guilt, including the eyewitness testimony and his taped confession. Further, viewed as a whole, the instructions given in this case fairly presented the issues to be tried and sufficiently protected defendant's rights. Accordingly, because defendant Gistover has not established outcome-determinative plain error, this issue does not warrant reversal.⁷

D. Prejudicial Evidence

Defendant Gistover argues that the trial court abused its discretion by allowing a police witness to testify that he was calling defendant's parole officer when defendant was attempting to recant his statements to the police. Defendant claims that the reference to his parole officer was more prejudicial than probative. We disagree.

We review a trial court's decision to admit evidence for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998); *People v Bartlett*, 231 Mich App 139, 158; 585 NW2d 341 (1998). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude there was no justification or excuse for the ruling. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

We agree with the trial court that, once defense counsel elicited testimony concerning defendant's attempt to recant his statements following the police interview, the circumstances and explanation regarding his motivation for doing so became relevant. See MRE 401. A defendant cannot complain of admission of testimony that he invited or instigated in an effort to support his defense. In other words, as the trial court concluded, defendant opened the door to the challenged evidence. See, generally, *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995); *People v Lipps*, 167 Mich App 99, 108; 421 NW2d 586 (1988). Moreover, contrary to defendant's suggestion, evidence is not inadmissible simply because the very nature of the evidence is prejudicial, and defendant has not demonstrated that he was unfairly prejudiced by the evidence. See MRE 403; *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995), modified 450 Mich 1212 (1995). As the trial court noted, pursuant to a stipulation, the jury was advised that defendant was previously convicted of a felony for purposes of the felon in possession charge, which belies his claim that the testimony that he had a parole officer was unduly prejudicial. See MRE 403. Accordingly, this issue does not warrant reversal.

⁷ Within this issue, defendant Gistover also argues that defense counsel was ineffective by failing to object to the improper jury instruction. However, because the instructional error was not outcome determinative, defendant has failed to establish that trial counsel was ineffective in failing to object to the instruction. *Effinger, supra.*

E. Cumulative Effect

We also reject defendant Gistover's final argument that the cumulative effect of multiple errors deprived him of a fair trial. Because no cognizable errors were identified that deprived defendant of a fair trial, reversal under the cumulative effect theory is unwarranted. *People v Sawyer*, 215 Mich App 183, 197; 545 NW2d 6 (1996).

Affirmed.

/s/ Peter D. O'Connell
/s/ Richard Allen Griffin
/s/ Joel P. Hoekstra