

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

v

ANDRE JERMALL MITCHELL,

Defendant-Appellant.

UNPUBLISHED

April 14, 2005

No. 253515

Jackson Circuit Court

LC No. 03-000905-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

v

DION DEMETRIUS MITCHELL,

Defendant-Appellant.

No. 253516

Jackson Circuit Court

LC No. 03-000907-FH

Before: Cavanagh, P.J., and Jansen and Gage, JJ.

PER CURIAM.

Defendant Andre Mitchell appeals as of right his jury conviction on two counts of resisting or obstructing an officer, MCL 750.81d(1), and defendant Dion Mitchell appeals as of right his jury conviction of one count of resisting or obstructing an officer. The verdicts were rendered after a two-day joint trial. We affirm.

On appeal, defendant Andre Mitchell argues that his counsel was ineffective because he failed to move to sever his trial from his codefendant's trial. We disagree. Because a hearing was not conducted pursuant to *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973), our review is limited to mistakes apparent on the record.

In general, a defendant does not have a right to a separate trial. *People v Hurst*, 396 Mich 1, 6; 238 NW2d 6 (1976). Under MCR 6.121(A), the trial court may order a joint trial with regard to two defendants charged with related offenses. Where “(1) there is a significant overlapping of issues and evidence, (2) the charges constitute a series of events, and (3) there is a substantial interconnectedness between the parties defendant, the trial proofs, and the factual and legal bases of the crimes charged,” joinder is permitted. *People v Missouri*, 100 Mich App 310, 349; 299 NW2d 346 (1980). These requirements are met here where the three defendants were arrested at the same place, at the same time, for the same reason. The defendants claimed that the police overreacted, and had targeted them by mistake. The same evidence, including witness testimony, would be presented to prove the cases. In sum, defendant was not entitled to a separate trial; thus, his counsel’s performance did not fall below an objective standard of reasonableness and this issue is without merit. See *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Defendant Andre Mitchell also argues that his counsel was ineffective for failing to object to the admission of a police video into evidence. The video shows a crowd of people standing in the street at night, but does not include any fighting between codefendants and police. Even if we assume, without deciding, that the video was inadmissible, defendant has not shown how he was substantially prejudiced by its admission. Absent such a showing, defendant cannot show that defense counsel was ineffective for failing to object to the videotape’s admission. See *id.*

Next, defendant Andre Mitchell argues that the trial court’s refusal to instruct the jury on the lesser included offense of assault and battery denied him a fair trial. Defendant Dion Mitchell argues that he was entitled to an instruction on simple assault. Because neither assault and battery nor simple assault are necessarily included offenses of a resisting or obstructing an officer offense, defendants were not entitled to these instructions. See MCL 768.32(1); *People v Cornell*, 466 Mich 335, 354; 646 NW2d 127 (2002). Further, a rational view of the evidence does not support such instruction. *Id.* at 357. Defendant Andre Mitchell’s claim that the trial court erred in denying his request for an instruction on specific intent is also without merit because resisting or obstructing an officer is a general intent crime. See *People v Rockwell*, 461 Mich 1007; 608 NW2d 811 (2000); *People v Chatfield*, 143 Mich App 542, 546; 372 NW2d 611 (1985). Thus, the trial court did not err in denying these requests.

Finally, defendant Dion Mitchell argues that a comment made by the prosecution during rebuttal denied him a fair trial. Because defendant objected to the comment, our review is de novo to determine whether he was denied a fair and impartial trial. *People v McLaughlin*, 258 Mich App 635, 644-645; 672 NW2d 860 (2003). The comment was as follows:

Again, I suggest to you that you’re not to consider punishment or penalty. That’s not to enter your consideration whatever. If you think this wasn’t a big deal but the law was violated, it’s up to the judge to decide, you know, suspended sentence, probation, \$100 fine. It’s his call to make within the penalties provided by law.

After considering the remark in context, it is clear that the prosecution was merely attempting to stress to the jury that it was only to consider whether defendants were guilty of the charged offenses, not any potential punishment. See *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). The statement was innocuous, and defendant has not shown that it deprived him of a fair and impartial trial.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Kathleen Jansen

/s/ Hilda R. Gage