

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAMONT K. MASON,

Defendant-Appellant.

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UNPUBLISHED  
February 11, 2003

No. 234900  
Wayne Circuit Court  
LC No. 00-009376

Before: White, P.J., and Kelly and R.S. Gribbs,\* JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for 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. Defendant was sentenced as an habitual offender-third, MCL 769.11, to concurrent terms of ten to twenty years for armed robbery, and three to ten years for felon in possession of a firearm, and to a consecutive ten year term for his felony-firearm conviction. We affirm.

Defendant first argues that the trial court erred in denying his motion to sever. We disagree. The decision to sever or join defendants lies within the discretion of the trial court. *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994).

MCR 6.121 allows severance 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. *Hana, supra*, 447 Mich 346. 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.*, 346-347. Inconsistency of defenses is not enough to mandate severance; rather, the defenses must be “mutually exclusive” or “irreconcilable.” *Id.*, 349. The tension between defenses must be so great that the jury would have to believe one defendant at the expense of the other. *Id.* Further, as the *Hana* court observed:

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\* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

As the *Zafiro* [*v United States*, 506 US 534; 113 S Ct 933; 122 L Ed 2d 317 (1993)] Court noted, ‘[a] defendant normally would not be entitled to exclude the testimony of a former codefendant if the district court did sever their trials, and we see no reason why relevant and competent testimony would be prejudicial merely because the witness is also a codefendant.’ *Zafiro, supra*, 122 L Ed 2d 326.” [*Hana, supra*, 447 Mich 361.]

The trial court correctly denied defendant’s motion to sever. Defendant did not show that his substantial rights were prejudiced by codefendant’s defense. While codefendant’s testimony tended to place defendant at the scene, codefendant did not try to point her finger at defendant or accuse defendant of the crime. Codefendant testified that she was asleep when they stopped briefly on a street near the scene of the crime, and she did not know what defendant did when he left the car for a few minutes. Defendant testified that codefendant was with him all evening, and that he did a variety of errands on his way to Fourteen Mile and I-75, finally stopping at a gas station, where he was arrested. Defendant testified that his gun was in codefendant’s purse and that money recovered from codefendant’s purse was his money from a dog fight. Defendant’s and codefendant’s defenses are not mutually exclusive, antagonistic or irreconcilable. Moreover, we are not convinced that having codefendant testify prevented a fair determination of the parties’ guilt. MCR 6.121(D). The timing of codefendant’s testimony is irrelevant as defendant was aware of the nature of the testimony at the beginning of the trial. Defendant was found in the vicinity of the robbery, with money and a gun consistent with the robbery, and eyewitnesses later identified him at a lineup. We find no abuse of discretion.

Defendant also argues that his sentences for felony-firearm and being a felon in possession of a firearm violate his double jeopardy protections. We disagree. A double jeopardy issue presents a significant constitutional question which will be considered on appeal regardless whether the defendant raised it before the trial court. *People v Colon*, 250 Mich App 59, 62; 644 NW2d 790 (2002). A double jeopardy claim presents a question of law which is reviewed de novo on appeal. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001).

This issue was resolved in *People v Dillard*, 246 Mich App 163; 631 NW2d 755 (2001), and need not be considered anew. In *Dillard*, the defendant was charged with being a felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon, MCL 750.227, and possessing a firearm during the commission of a felony, MCL 750.227b. *Dillard, supra*, 246 Mich App 164. There, a panel of this Court reiterated that the Legislature intended, with only a few narrow exceptions, for every felony committed by a person possessing a firearm to result in a felony-firearm conviction. *Dillard, supra*, 246 Mich App 167. The Legislature’s intent in drafting the felony-firearm statute was to provide for an additional felony charge and sentence whenever a person possessing a firearm committed a felony other than those four explicitly enumerated exceptions to the felony-firearm statute. *Id.* Had the Legislature wished to exclude the felon in possession charge as a basis for liability under the felony-firearm statute, it would have done so. *Id.*, 168. The language employed by the Legislature in the felony-firearm statute leaves no doubt that the Legislature intended to make the carrying of a weapon during a felony a separate crime and intended that cumulative penalties should be imposed. *Dillard, supra*, 246 Mich App 170.

Defendant next argues that the trial court erroneously instructed the jury that if it found a statement purportedly made by defendant was not in fact made by defendant, the jury *should not*

consider it, instead of telling the jury that it *must not* consider it. To preserve a jury instruction issue for review, a defendant must object at trial. *People v McCrady*, 244 Mich App 27, 30; 624 NW2d 761 (2000). Because defendant did not object at trial, this claim is unpreserved, and will be reviewed for plain error. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, error must have occurred, must have been plain, i.e., clear or obvious, and must have affected defendant's substantial rights. *Carines, supra*, 460 Mich 763. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. *Id.* Here, where the other evidence against defendant was overwhelming, we are not convinced that reversal is required.

Defendant next argues he was prejudiced because the court reporter did not transcribe the content of the video tape that was played in front of the jury, and because he does not have a transcript of codefendant's opening statement or closing argument. We disagree. Defendant's claim that the court reporter should have transcribed the video tape was not properly preserved because defendant did not raise it at trial. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Indeed, the trial court specifically asked counsel if they wanted to place anything on the record after the video tape was played for the jury, and all three attorneys declined. Defendant's claim will be reviewed for plain error. *Carines, supra*, 460 Mich 762-763.

The video tape was introduced as an exhibit at trial, and pursuant to MCR 7.210(A)(1), available as part of the record on appeal. Therefore, defendant's counsel could have requested access to the tape. Defendant was not prejudiced as a result of the video tape not being transcribed.

Defendant also argues that he was prejudiced because codefendant's opening statement and closing argument were not transcribed as part of defendant's record. The inability to obtain the transcripts of a criminal proceeding may impede a defendant's right to appeal to an extent that a new trial must be ordered. *People v Federico*, 146 Mich App 776, 799; 381 NW2d 819 (1985). However, the surviving record may be reviewed to determine whether it is sufficient to allow evaluation of defendant's claim on appeal. *Id.* We find a review of the record is sufficient to allow a complete evaluation of defendant's claims. Not having a transcript of codefendant's opening statement and closing argument did not prejudice defendant. Defendant's appellate counsel had the opportunity to review codefendant's trial testimony. Review of codefendant's testimony and of the entire record is sufficient to evaluate defendant's issues on appeal.

We note that defendant blames "the state" for the "incomplete and inadequate trial transcript." This claim is without merit because, pursuant to MCL 7.210(B)(1)(a), the appellant is responsible for securing the filing of the transcript.

In his final issue on appeal, defendant argues that his trial counsel provided ineffective assistance because he failed to request an alibi instruction. We disagree. Where, as here, defendant failed to seek a new trial or an evidentiary hearing below, our review is limited to the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the

representation so prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). Defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

Defendant has failed to show that trial counsel's performance fell below an objective standard of reasonableness. A defense attorney must enjoy great discretion in the trying of a case, especially with regard to trial strategy and tactics. *Pickens, supra*, 446 Mich 325. The decision not to request an alibi instruction in this case, where defendant acknowledged that codefendant was with him all night and codefendant testified that defendant left her waiting in the car on a side street near the crime scene, was clearly a matter of trial strategy. That the strategy counsel chose ultimately failed does not constitute ineffective assistance of counsel, and defendant was not denied a fair trial. *Id.*

Affirmed.

/s/ Helene N. White  
/s/ Kirsten Frank Kelly  
/s/ Roman S. Gribbs