

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

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
July 14, 2011

v

WALTER WIMB HARDEMAN,  
  
Defendant-Appellant.

No. 296806  
Oakland Circuit Court  
LC No. 2009-225193-FC

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Before: MURRAY, P.J., and FITZGERALD and RONAYNE KRAUSE, JJ.

PER CURIAM.

A jury convicted defendant of first-degree felony murder, MCL 750.316(1)(b), and the trial court sentenced defendant to life imprisonment without parole. Defendant appeals as of right. We affirm.

Defendant's conviction arises from the August 1985 shooting death of Ramniklal Doshi, a clerk at the Northlander Inn motel. Defendant's paternal uncle, codefendant Kenneth Holyfield, worked as a security guard at the motel. After the shooting, Holyfield told the police that he was talking to the victim outside the clerk's booth when someone put a gun to his back. Holyfield fled, heard gunshots, and saw the gunman leaving the motel. Holyfield provided a description of the shooter that was used to prepare a composite sketch. The description resembled defendant, but Holyfield did not identify defendant by name until 13 days later. Defendant was charged with murder, but the case was dismissed because the material witness—Holyfield—could not be located. In 2006, the case was reopened with the intent of using new technology to test hair and blood samples found at the crime scene. Mitochondrial DNA testing subsequently revealed that hairs found at the scene had a profile that was a match for defendant or a maternal relative. In 2008, defendant was again arrested and charged with murder. Holyfield was also charged as an aider and abettor. The two defendants were tried jointly, before separate juries. Holyfield testified at trial and identified defendant as the gunman. The defense argued that there was insufficient evidence that defendant was the gunman, that the scientific evidence was lacking, and that Holyfield was not credible.

## I. HOLYFIELD'S TESTIMONY BEFORE DEFENDANT'S JURY

### A. SEPARATE TRIALS

Defendant first argues that the trial court abused its discretion by denying his request for complete severance after Holyfield's midtrial decision to testify in his own defense. We disagree. The decision to sever or join the trials of codefendants lies within the sound discretion of the trial court. *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994), amended 447 Mich 1203 (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 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*, 447 Mich at 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.* at 346-347. The use of separate juries is a partial form of severance that allays the risk of prejudice. *Id.* at 351. An appellate court scrutinizes the dual-jury procedure under the same standard employed in reviewing a decision on a motion for severance, i.e., this Court must determine whether the procedure prejudiced the defendant's substantial rights. *Id.* at 351-352. "The precise issue is whether there was prejudice to substantial rights after the dual-jury system was employed." *Id.* at 352.

Separate trials in these cases would have been unnecessarily duplicative and excessive. The interests of justice, judicial economy, and the orderly administration clearly called for a joint trial. The trial court used separate juries to alleviate the concern that a single jury might be exposed to one defendant's arguments and exculpatory evidence that was inadmissible with respect to the other defendant. We disagree with defendant's argument that complete severance was necessary because his jury should have been barred from hearing Holyfield's testimony.

While the *Hana* Court recognized that a joint trial involving codefendants with antagonistic defenses may have serious negative implications for an accused, it nevertheless held that the standard for severance is not lessened in such a situation. *Hana*, 447 Mich at 347. The Court stated:

[I]t is well settled that defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials. . . . While "[a]n important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence," . . . a fair trial does not include the right to exclude relevant and competent evidence. 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. [*Id.* at 350 (citations omitted).]

In *People v Gallina* and *People v Rode*, companion cases to *Hana*, the defendants were tried jointly with separate juries. They were together with friends in a Chevrolet Camaro, drag racing with another car. At least one occupant of the Camaro fired gunshots at the other car, killing an occupant of that vehicle. At trial, each defendant denied firing the fatal shot and claimed that the other defendant had fired over the roof of the car, resulting in the victim's death. *Hana*, 447 Mich at 334-336. Our Supreme Court stated that "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 (citation omitted). The Court held that the defendants failed to identify which trial rights were violated or how the juries' determinations were unreliable. *Id.* at 360. The Court further observed that there was "no indication that either defendant was restricted in his presentation of a defense, nor was either jury exposed to evidence that would have been barred from their considerations in separate trials." *Id.* The Court further explained:

The risk of prejudice is reduced even more in [dual jury] cases by the significant fact that the prosecutor charged defendant Gallina as an aider and abetter . . . and did not contend that he fired the fatal shot. 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 principle.

Moreover . . . when each defendant testified before his own jury, he thereby waived his Fifth Amendment rights regarding the events in question. Therefore it became permissible for the prosecution to call that defendant as a witness in the trial of the codefendant . . . [a] defendant would normally 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. [*Id.* at 360-361.]

Thus, the Court recognized that all of the evidence admitted at the dual trial would have been available for use at both of the defendants' separate trials. *Id.* at 362. Finally, the Court reiterated that "a fair trial does not include the right to exclude relevant and competent evidence." *Id.* (citation omitted).

In this case, defendant has not established that evidence was presented to his jury that would have been excluded if he had been tried separately. Although the defendants in *Rode* and *Gallina* elected to testify, the Court's ruling was not dependent on that fact. Like any other witness, if Holyfield had relevant and competent testimony concerning the case, his testimony was not inadmissible at defendant's trial merely because he was a codefendant. Defendant had an opportunity to cross-examine Holyfield and there is no indication that defendant was restricted in his presentation of a defense. Although defendant claims that Holyfield's decision to testify effectively forced him to testify or accept the consequences of Holyfield's testimony, defendant indicated that he did not wish to testify and that no one forced him to make that decision. Defendant's arguments based on the jury's possible evaluation of the other evidence is

mere speculation and insufficient to mandate severance. *Hana*, 447 Mich at 361. The trial court did not abuse its discretion by denying defendant's request for complete severance.

#### B. "OTHER BAD ACTS"

In a related claim, defendant argues that inadmissible "other bad acts" evidence was permitted during Holyfield's testimony, contrary to MRE 404(b). Because defendant did not raise an objection based on MRE 404(b) at trial, this issue is unpreserved. *People v Bauder*, 269 Mich App 174, 177; 712 NW2d 506 (2005). Accordingly, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant contends that Holyfield implied that defendant and his attorney engaged in acts of obstruction of justice when Holyfield testified that (1) defendant's attorney visited Holyfield in jail in 1985, falsely represented himself as Holyfield's attorney, and instructed Holyfield not to say anything; and (2) defendant and his attorney picked up Holyfield to attend defendant's 1985 preliminary examination, but instead took Holyfield to the attorney's house where he remained for several hours until defendant's attorney returned and indicated that the case had been dismissed.

To the extent the challenged testimony involved evidence of other bad acts that fall within the purview of MRE 404(b)(1), that alone did not preclude the testimony. This Court has held that a defendant's attempt to dissuade or coerce a witness from testifying against him is admissible because it relates directly to the defendant's consciousness of guilt. *People v Mock*, 108 Mich App 384, 389; 310 NW2d 390 (1981). Evidence that is admissible for one purpose is not inadmissible because its use for a different purpose is precluded. *People v VanderVliet*, 444 Mich 52, 73; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

Defendant also cites Holyfield's counsel's inquiry regarding whether Holyfield had ever heard about defendant previously robbing an establishment or being in trouble before the 1985 incident. Defense counsel lodged a general objection to this testimony. But not only did Holyfield not answer, the apparent purpose of the inquiry, consistent with the immediately preceding questions and responses, was to show that Holyfield did not believe that defendant planned to rob the motel because he had never previously heard about defendant committing a robbery. Thus, Holyfield did not testify regarding a prior "bad act." Consequently, defendant has not established an error, plain or otherwise.

#### C. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant additionally argues that he was denied the effective assistance of counsel at trial. Because defendant did not raise an ineffective assistance of counsel claim in the trial court, our 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 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, defendant must show that counsel's performance fell

below an objective standard of reasonableness, and that there is a reasonable probability that the result of the proceeding would have been different but for counsel's error. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

We reject defendant's claim that defense counsel was ineffective for failing to file a pretrial motion for complete severance. As explained previously, defendant was not entitled to complete severance. Therefore, defendant cannot demonstrate a reasonable probability that the result of the proceeding would have been different had defense counsel filed a pretrial motion for severance. Counsel was not required to file a futile motion. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant also claims that defense counsel was ineffective for failing to request an instruction on the dangers of accomplice testimony, CJI2d 5.5, with respect to Holyfield's trial testimony. An "'accomplice' is a 'person who knowingly and willfully helps or cooperates with someone else in committing a crime.'" *People v Allen*, 201 Mich App 98, 105; 505 NW2d 869 (1993), quoting CJI2d 5.5. Whether to request a cautionary instruction is a matter of trial strategy. *People v Gonzalez*, 468 Mich 636, 645; 664 NW2d 159 (2003). In *Gonzalez*, our Supreme Court held that the defendant's trial counsel was not ineffective for not requesting a cautionary instruction regarding accomplice testimony because that instruction was inconsistent with the defendant's theory that he was not involved in the crime, it was not supported by the evidence, and the defendant did not overcome the presumption that not requesting it was sound trial strategy. *Id.* at 644-645.

Here, it is apparent that defense counsel's strategy was to argue that defendant was not involved in the crime, and that the prosecution had not met its burden of proof. With regard to Holyfield, defense counsel's arguments apprised the jury of the defense theory that Holyfield's testimony was not credible, inconsistent, and not worthy of belief. Considering the defense theory and arguments, it is not apparent that defense counsel's failure to request an accomplice instruction was objectively unreasonable. Indeed, defense counsel could have reasonably concluded that instructing the jury that Holyfield was an accomplice—which was consistent with the prosecution's theory—would be detrimental to the defense. Moreover, the prosecution principally relied on the physical evidence to establish defendant's identity as the gunman. Consequently, defendant cannot establish a claim of ineffective assistance of counsel with respect to this issue.

## II. ADMISSION OF DEFENDANT'S STATEMENT

Defendant next argues that the trial court erred in admitting his custodial statement. Defendant contends that the statement was not admissible because he did not waive his Fifth Amendment right to remain silent. We disagree. In reviewing an alleged violation of a defendant's right to remain silent, "[w]e review the record de novo, but the trial court's factual findings are reviewed under the clearly erroneous standard." *People v Adams*, 245 Mich App 226, 230; 627 NW2d 623 (2001).

Statements of a defendant made during a custodial interrogation are inadmissible unless the defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). If a defendant

invokes his right to remain silent after having been advised of his *Miranda* rights, his invocation of those rights must be “scrupulously honored,” and the police must discontinue interrogation. *Adams*, 245 Mich App at 230-231, quoting *Michigan v Mosley*, 423 US 96, 103-106; 96 S Ct 321; 46 L Ed 2d 313 (1975). To trigger the requirement that the police stop questioning, a defendant’s invocation of his right to remain silent must be unequivocal. *People v Davis*, 191 Mich App 29, 36; 477 NW2d 438 (1991). If the defendant’s assertion is equivocal, the police are permitted to seek clarification. *People v Catey*, 135 Mich App 714, 726; 356 NW2d 241 (1984).

The record refutes defendant’s claim that he did not waive his right to remain silent. Defendant’s interview was recorded and a DVD copy of the interview is part of the record. Sergeant Gary Miller read defendant his *Miranda* rights, explained them, and gave defendant the waiver form for him to review. The officer orally asked defendant several times whether he understood his rights, and defendant stated that he did. Defendant also stated that he did not wish to speak to an attorney and was not worried about answering questions. Upon reading the waiver form, defendant did not wish to sign it and had some questions. For example, defendant asked why he had to waive his rights just to answer questions, and whether he had to keep talking if he waived his rights. In response to defendant’s concerns, the detectives informed him that the police could not talk to him if he did not waive his rights, that they would leave if he chose not to waive his rights, that he could stop questioning at any time, and that he could choose to answer only select questions. Defendant was also advised that he only had to state that he was “done talking” and they would leave. Defendant was again asked if he understood his rights, and defendant stated that he did. The detectives then asked defendant if they could speak with him and ask him a few questions, and defendant unequivocally stated, “Yes.” Given defendant’s concerns, it was proper for the officers to seek clarification and ensure that defendant understood his rights, especially in light of the fact that defendant had waived his right to counsel and indicated that he would answer questions. Throughout the short interview, defendant appeared to understand the officers’ questions, and never stopped the interview or stated that he had a problem understanding.

Although defendant did not sign the waiver form, he concedes that his signature on the form was not a requirement for a valid waiver of his Fifth Amendment rights. Further, contrary to what defendant suggests, there is no requirement that the officers apprise a defendant of the charges against him in order to effectuate a voluntary and knowing waiver. See *People v Daoud*, 462 Mich 621, 643; 614 NW2d 152 (2000). Viewing the totality of the circumstances, defendant did not unequivocally assert his right to remain silent and, accordingly, the trial court did not err in admitting his custodial statement.

### III. JAIL GARB

Defendant also argues that the trial court abused its discretion by admitting the DVD recording of his statement because it showed him in jail attire, which defendant contends was unduly prejudicial. Again, we disagree. A trial court’s decision to admit evidence is generally reviewed for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008).

This claim is without merit. A defendant is entitled to wear civilian clothing rather than identifiable prison garb while in the presence of a jury at trial. *People v Shaw*, 381 Mich 467, 474-475; 164 NW2d 7 (1969). In this case, the jury did not see defendant in jail garb at trial. Defendant contends, however, that the DVD recording of his police interview depicts him wearing an orange jail jumpsuit. We have reviewed the DVD recording. It is not apparent that defendant was wearing jail garb, and he was not shackled or accompanied by a jail guard. Rather, the DVD incidentally shows that defendant is wearing a type of orange button-down shirt, with the top button undone. Because it is not apparent that defendant's attire was jail garb, defendant cannot establish prejudice. See *People v Horn*, 279 Mich App 31, 36; 755 NW2d 212 (2008).

#### IV. PROSECUTOR'S CONDUCT

Defendant lastly argues that a new trial is required because of misconduct by the prosecutor during trial. Because defendant did not object to the prosecutor's conduct at trial, this issue is unpreserved. Accordingly, we review this issue for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764. This Court will not reverse if the alleged prejudicial effect of the prosecutor's conduct could have been cured by a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Defendant contends that in response to the prosecutor's questions, Sergeant Miller impermissibly expressed his opinion regarding defendant's guilt when he made the following emphasized remarks on redirect examination:

*Q.* Yes. What was the purpose of the DNA evidence? What did it mean to you as an investigator?

*A.* When we had the DNA or when the results were back from the DNA?

*Q.* When the results came back.

*A.* That Walter Hardeman was responsible for the homicide at the Northlander.

\* \* \*

*Q.* [W]hat determination did you come to yourself and Sergeant Wurtz as far as the identification of the shooter in this case?

*A.* Well we had--I mean *we don't have any doubts whatsoever that Mr. Hardeman was the shooter in this case. I mean it's obvious.* [Emphasis added.]

Defendant also highlights the following testimony of Sergeant David Wurtz:

*Q.* Now you at some point you receive results from Doctor Melton as it relates to the hairs found at the scene and a known buccal swab from Mr. Holyfield, is that correct?

A. That's correct.

Q. And what were the results of that?

A. Holyfield was eliminated as being the donor of the hairs.

Q. All right. And did that confirm or did that conflict with your original determination as to the culpability in this case or who had what involvement?

A. No. *That was absolute confirmation of our beliefs.*

\* \* \*

Q. All right. Now how did obtaining the DNA evidence change this case as it relates to Mr. Holyfield?

A. Oh it was a huge factor. *It now gave us independent information that Mr. Hardeman was the shooter.* [Emphasis added.]

It is improper for a witness to provide an opinion regarding the guilt or innocence of a criminal defendant because that is a determination for the trier of fact. *People v Moreno*, 112 Mich App 631, 635; 317 NW2d 201 (1981); *People v Suchy*, 143 Mich App 136, 149; 371 NW2d 502 (1985). In this case, however, the prosecutor's questions and the resulting testimony were intended to explain preliminary or background information concerning the course and chronology of the police investigation that ultimately led to charging defendant in this 20-year-old case. The defense theory was that law enforcement placed too much confidence in the DNA testing, and that the police went forward and prosecuted defendant even though they lacked sufficient evidence. Defense counsel discussed the police investigation in opening statement and when questioning the detectives. Indeed, before the challenged testimony, defense counsel cross-examined Sergeant Miller at length about the actual effectiveness of mitochondrial DNA testing, how the charges against defendant were dismissed in 1985, and how the police had no new evidence against defendant other than the mitochondrial DNA testing performed in 2008. Regardless, to the extent that the challenged testimony could be considered improper, defendant must also establish that that his substantial rights were affected. *Carines*, 460 Mich at 763-764. Defendant bears the burden of showing actual prejudice, *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006), and reversal is only warranted if the error resulted in the conviction of an actually innocent defendant or if the error seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of the defendant's innocence. *Carines*, 460 Mich at 763-764.

Because the detectives were called as prosecution witnesses and a criminal prosecution was instituted against defendant, the jurors would have understood that the detectives considered defendant to be the perpetrator even without the disputed testimony. See *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007). Further, a timely objection to the questions and testimony could have cured any prejudice by obtaining an appropriate cautionary instruction. See *Watson*, 245 Mich App at 586. And even though defendant did not object, the trial court instructed the jury that it was to decide what to believe, that defendant was presumed innocent, that the prosecutor had to prove defendant's guilt beyond a reasonable doubt, and that testimony

of police officers should be judged by the same standards used to evaluate the testimony of any other witness. The instructions were sufficient to dispel any possible prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). It is well established that jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant also argues that the prosecutor impermissibly argued facts not in evidence when he stated during closing and rebuttal arguments that mitochondrial DNA evidence was better than fingerprints, a videotape, and eyewitness testimony. A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). But a prosecutor is not required to phrase arguments and inferences in the blandest possible terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). Viewed in context, the prosecutor's remark did not introduce facts not in evidence. Instead, the prosecutor responded to the defense assertion during trial and closing argument that there was no "physical evidence" that defendant was at the Northlander Inn in 1985, that the subsequent DNA testing was inconclusive of defendant's identity as the shooter, that the shooter could have been one of defendant's relatives, and that the DNA results should not be accepted. During trial, an expert testified at length about mitochondrial DNA testing and her report was admitted into evidence for the jury to consider. There was evidence that mitochondrial DNA testing could exclude a substantial portion of the population, and that hairs from the crime scene were a match to defendant or one of his maternal relatives. During the challenged remarks, the prosecutor urged the jury to consider the DNA test results in conjunction with the testimony that defendant was identified as being at the Northlander Inn. Viewed in context, the prosecutor's remarks regarding the strength of the mitochondrial DNA were not clearly improper.

Moreover, defendant cannot demonstrate that the remarks affected his substantial rights. *Carines*, 460 Mich at 763-764. Despite defendant's failure to object, the trial court specifically instructed the jury that the lawyers' statements and arguments are not evidence, that the jury was to decide the case based only on the properly admitted evidence, and that it was to follow the court's instructions. *Long*, 246 Mich App at 588. Defendant is not entitled to a new trial based on the prosecutor's conduct.

In a related claim, defendant argues that defense counsel was ineffective for failing to object to the prosecutor's conduct. As explained previously, the prosecutor's conduct did not deny defendant a fair trial. Further, the trial court's jury instructions were sufficient to dispel any possible prejudice. Therefore, defendant cannot demonstrate that there is a reasonable probability that, but for counsel's failure to object, the result of the proceeding would have been different. Thus, defendant's ineffective assistance of counsel claim cannot succeed.

Affirmed.

/s/ Christopher M. Murray

/s/ E. Thomas Fitzgerald

/s/ Amy Ronayne Krause