STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 26, 2011
v	No. 296777 Wayne Circuit Court
BISHOP PERRY, Defendant-Appellant.	LC No. 09-020825-FC

Before: CAVANAGH, P.J., and TALBOT and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of armed robbery, MCL 750.529, unlawful imprisonment, MCL 750.349b, two counts of assault with intent to do great bodily harm, MCL 750.84, felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We affirm.

Defendant argues that a remand is warranted because, following his trial, Lorenzo Allen signed an affidavit recanting his trial testimony. As a preliminary matter, we note that Allen's affidavit is not part of the lower court record. A defendant may not expand the record on appeal. *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999). Since Allen's affidavit is not part of the lower court record, we should not consider the proffered affidavit on appeal. Moreover, while the affidavit was signed, it was not properly made under oath or affirmation before a person having the authority to administer oaths, and again, we should not consider the affidavit. See *People v Budzyn*, 456 Mich 77, 92 n 14; 566 NW2d 229 (1997). Nonetheless, even if we considered the affidavit, this unpreserved issue is without merit. That is, defendant failed to establish plain error affecting substantial rights. See *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

The discovery that testimony introduced at trial was perjured may be grounds for a new trial. *People v Barbara*, 400 Mich 352, 363; 255 NW2d 171 (1977); *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994). A new trial may be granted on the basis of newly discovered evidence if a defendant shows that: "(1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial." *People v Cress*, 468 Mich 678,

692; 664 NW2d 174 (2003). "However, where newly discovered evidence takes the form of recantation testimony, it is traditionally regarded as suspect and untrustworthy." *People v Canter*, 197 Mich App 550, 559; 496 NW2d 336 (1992). As a result, courts are reluctant to grant new trials based on recanting testimony. *Id*. at 559-560. Additionally, newly discovered evidence is not a ground for a new trial where it would merely be used for impeachment purposes, *People v Davis*, 199 Mich App 502, 516; 503 NW2d 457 (1993), and conflicting testimony or a question regarding the credibility of a witness are not sufficient grounds for granting a new trial, *People v Lemmon*, 456 Mich 625, 634-635; 576 NW2d 129 (1998).

Defendant has failed to show that Allen's unsworn affidavit makes a different result probable on retrial. Allen's affidavit recants his trial testimony and is regarded as suspect and untrustworthy. Moreover, Allen's credibility at trial was highly questionable as he gave various accounts of the incident. Given these facts, it is difficult to conclude that the outcome in this case would have likely changed if the jury had heard Allen's more recent version of the facts, i.e., that Olantimon Brintley brought the gun into the van. Furthermore, the fact that Allen's affidavit impeaches Brintley's and Ronicka Perry's testimony is not a sufficient ground for a new trial. In sum, the record does not show that Allen's affidavit would make a different result probable on trial, thus, defendant has failed to establish plain error affecting his substantial rights.

Defendant next argues that the prosecutor engaged in misconduct by withholding evidence, thereby violating *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), and by presenting false testimony to secure a conviction. Again, defendant failed to preserve the issue, and we review for plain error affecting substantial rights. *Carines*, 460 Mich at 764.

A criminal defendant has a due process right to obtain exculpatory evidence possessed by the prosecutor if it would raise a reasonable doubt about the defendant's guilt. *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994), citing *Brady*, 373 US at 87. In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could the defendant have obtained it with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. *People v Lester*, 232 Mich App 262, 281-282; 591 NW2d 267 (1998).

Defendant's *Brady* claim fails because he does not show that the prosecution possessed and withheld evidence that Allen falsely testified and that Allen received a promise of leniency. Defendant does not contend that the prosecution was aware that Allen testified falsely at his trial. Also, other than the unsworn affidavit, defendant has not offered anything that corroborates Allen's claims that he was made promises of leniency. Accordingly, defendant failed to show that the prosecution withheld evidence that it was apprised of, and thus, defendant has failed to establish a *Brady* violation.

To the extent that defendant contends that the prosecutor presented perjured testimony, we find the argument meritless. The prosecution has a constitutional duty to report the false testimony of its witnesses and may not knowingly use false testimony to obtain a conviction. *Lester*, 232 Mich App at 276. However, absent proof that the prosecution knew that the trial

testimony was false, reversal is unwarranted. *People v Herndon*, 246 Mich App 371, 417-418; 633 NW2d 376 (2001). Again, a review of the record reveals that defendant has failed to demonstrate that the prosecutor knowingly presented false testimony.

Defendant also argues that the trial court abused its discretion by trying him jointly with codefendant, Romando Lewis, before separate juries. We disagree. The decision to sever or join the trials of codefendants lies within the discretion of the trial court. *People v Hana*, 447 Mich 325, 331, 346; 524 NW2d 682 (1994). Thus, we review a trial court's decision regarding the severance of trials for an abuse of discretion. *Id*.; *People v Hicks*, 185 Mich App 107, 117; 460 NW2d 569 (1990). "A trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes." *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007).

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 clearly and affirmatively demonstrates through an affidavit or offer of proof that his substantial rights will be prejudiced by a joint trial and that severance is the necessary means of rectifying the potential prejudice. *Hana*, 447 Mich at 345-346. "The use of separate juries is a partial form of severance to be evaluated . . . and . . . scrutinized with the same concern in mind that tempers a severance motion, i.e., whether it has prejudiced the substantial rights of the defendant. The precise issue is whether there was prejudice to substantial rights after the dual-jury system was employed." *Id*. at 351-352. Moreover,

> 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. Otherwise stated, the defendant must show that the magnitude of the prejudice denied him a fair trial . . . . Reversible prejudice exists when one of the defendant's substantive rights, such as the opportunity to present an individual defense, is violated. [*Id*. at 359-360.]

Defendant has failed to demonstrate what rights were violated by the dual-jury procedure or how his jury's determinations were unreliable. There is no indication that defendant was restricted in his presentation of a defense, or that his jury was exposed to evidence that would have been barred from its considerations in separate trials.

Still, defendant contends that separate trials were required because his defense and that of Lewis were mutually exclusive or irreconcilable.

> Where mutually antagonistic defenses are presented in a joint trial, there is a heightened potential that a single jury may convict one defendant, despite the absence of proof beyond a reasonable doubt, in order to rationalize the acquittal of another. That dilemma is not presented to dual juries. Each jury is concerned only with the culpability of one defendant; thus, they both can find the defendants innocent or guilty without the uneasiness of inconsistency that would be presented

> to a single jury in a joint trial. The chance for prejudice is therefore significantly lessened. [*Hana*, 447 Mich at 360.]

"Inconsistency of defenses is not enough to mandate severance; rather, the defenses must be 'mutually exclusive' or 'irreconcilable.'" *Id*. at 349 (citations omitted). Further, "incidental spillover prejudice, which is almost inevitable in a multi-defendant trial, does not suffice." *Id*. at 349 (citations omitted). 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. Moreover, "[f]inger pointing by the defendants when [an aider and abettor] theory is pursued, [as here] does not create mutually exclusive antagonistic defenses." *Id*. at 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*. Defendant and Lewis were jointly tried with separate juries; therefore, there is no concern that defendant's jury would have to believe one defendant's testimony "at the expense of the other." *Id*. at 349. Defendant's jury was concerned only with his culpability, and even when presented with Lewis' antagonistic defense there was little prejudice to defendant. See *id*. at 349.

Defendant contends that he was prejudiced because his jury heard Lewis' testimony. A fair trial does not include the right to exclude relevant and competent evidence. *Id*. at 362. Defendant failed to show that Lewis' testimony was not relevant or competent. Further, it is established that a defendant normally would not be entitled to exclude the testimony of a former codefendant if the court did sever their trials; therefore, relevant and competent testimony from a codefendant is not necessarily prejudicial. *Id*. at 367, quoting *Zafiro v United States*, 506 US 534; 113 S Ct 933; 122 L Ed 2d 317 (1993). In fact, all the evidence and testimony admitted at the dual trial, including Lewis' testimony, would have been available for use at defendant's separate trial. See *Hana*, 447 Mich at 362. Accordingly, defendant's contention that his substantive rights were prejudiced merely because his jury heard Lewis' testimony is meritless. In sum, defendant was given an opportunity to present defenses before his respective jury, and he failed to demonstrate how his jury's ability to render a fair decision was adversely affected.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael J. Talbot
/s/ Cynthia Diane Stephens