

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARLON CATHINGS,

Defendant-Appellant.

UNPUBLISHED

July 17, 2007

No. 269291

Wayne Circuit Court

LC No. 05-010366-02

Before: Meter, P.J., and Talbot and Owens, JJ.

PER CURIAM.

Defendant appeals his jury trial convictions for carjacking, MCL 750.529a, armed robbery, MCL 750.529, third-degree fleeing and eluding, MCL 257.602a(3), possession of a firearm during the commission of a felony, MCL 750.227b, and receiving and concealing a stolen motor vehicle, MCL 750.535. Defendant was sentenced to 54 months to 15 years in prison for the carjacking conviction, 54 months to 15 years in prison for the armed robbery conviction, two to five years in prison for the fleeing and eluding conviction, two years in prison for the felony-firearm conviction, and two to five years in prison for the receiving and concealing a stolen motor vehicle conviction. We affirm.

Defendant contends that he was denied a fair trial because he was tried with a codefendant. Because defendant failed to move for a separate trial or a separate jury, this issue is unpreserved. *People v Carines*, 460 Mich 750, 761-764; 597 NW2d 130 (1999). “To avoid forfeiture under the plain error rule, a defendant must show actual prejudice.” *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006). Under the plain error rule, 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, supra* at 763-764.

Defendant has not met his burden of establishing that the trial court’s failure to conduct a separate trial was prejudicial. Although defendant argues that the evidence presented against his codefendant was damaging to defendant’s case, any evidence submitted at a separate trial would have been virtually identical and sufficient to sustain defendant’s conviction. Notably, the individual who testified against defendant and his codefendant, pursuant to a plea agreement, would still have implicated defendant had a separate trial been conducted. This individual’s testimony demonstrated that defendant, at a minimum, aided and abetted the carjacking and robbery. In addition, this individual testified that defendant fled police while driving the stolen

vehicle, and that codefendant's handgun was accessible to defendant in the vehicle. Finally, a separate trial would not have altered the testimony of police officers that defendant was in the driver's seat of the stolen vehicle when it collided with their police car. Given the evidence, defendant has failed to demonstrate a reasonable probability that the outcome of a separate trial would have been different.

Defendant also argues that his trial counsel's failure to move for a separate trial or a separate jury constituted ineffective assistance of counsel. In order to preserve the issue of ineffective assistance of counsel, a defendant must move for a new trial or a *Ginther*¹ hearing before the trial court. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). Although this issue is preserved because defendant moved for a *Ginther* hearing, the trial court denied defendant's motion. Accordingly, our review is limited to mistakes apparent on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. "A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review a trial court's findings of fact for clear error and questions of constitutional law de novo. *Id.*

"Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise." *People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005). In order to overcome this presumption, defendant must "show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms." *Id.* Defendant must demonstrate that counsel's performance was so deficient that counsel was not functioning as the counsel guaranteed by the Sixth Amendment and that the "deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different." *LeBlanc, supra* at 582-583; *McGhee, supra* at 625. "The defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

While joint trials serve the important policy interest of judicial economy, *People v Hoffman*, 205 Mich App 1, 20; 518 NW2d 817 (1994), they are often disadvantageous to defendants. As the Michigan Supreme Court has recognized, "incidental spillover prejudice . . . is almost inevitable in a multi-defendant trial." *People v Hana*, 447 Mich 325, 349; 524 NW2d 682 (1994) (citation omitted). However, defendant has not shown that his trial counsel's failure to move for severance was prejudicial.

It is unlikely that the trial court would have granted a request by defendant for severance. Severance is only mandated under MCR 6.121(C) when defenses are "mutually exclusive or irreconcilable." *Pipes, supra* at 271 n 9; *Hana, supra* at 349. Severance would not have been mandated in this case because the defenses put forth by defendant and his codefendant were not in conflict. Defendant contends that, although he later fled police while driving the stolen

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

vehicle, he was not involved in the carjacking and robbery. In contrast, his codefendant asserts that he was misidentified. Specifically, the codefendant denied that he was the person who pointed the gun at the victim. In addition, the codefendant challenged the line-up identification procedure used by police. These defenses are not irreconcilable because it would have been possible for the jury to believe both that defendant was not involved in the crime and that someone other than the codefendant pointed the gun at the victim.

If MCR 6.121(C) does not mandate severance of the proceedings, then “the decision to sever or join defendants lies within the discretion of the trial court,” *Hana, supra* at 346; MCR 6.121 (D). “A strong policy favors joint trials in the interest of judicial economy,” *Hoffman, supra* at 20, and there was no basis for granting severance in this case. Two of the factors to be considered in deciding a motion for severance pertaining to “the drain on the parties’ resources” and “the convenience of witnesses,” MCR 6.121(D), favored conducting a joint trial. In addition, the conduct of a joint trial in this circumstance did not present a serious “potential for confusion or prejudice stemming from either the number of defendants or the complexity or nature of the evidence.” *Id.* Finally, defendant has failed to establish a reasonable probability that severance of the proceedings would have resulted in a different outcome.

Affirmed.

/s/ Patrick M. Meter
/s/ Michael J. Talbot
/s/ Donald S. Owens