S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 17, 2005
v MARCUS LAMAR RUSHELL, Defendant-Appellant.	No. 246022 Wayne Circuit Court LC No. 02-002708-02

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v KEVIN DWAYNE THERIOT, Defendant-Appellant.	No. 246023 Wayne Circuit Court LC No. 02-002708-01

Before: Gage, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

In this consolidated appeal, defendant, Marcus Lamar Rushell, and defendant, Kevin Dwayne Theriot, appeal as of right their jury trial convictions for two counts of first-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant Rushell and defendant Theriot were each sentenced to two years in prison for the felony-firearm conviction and life in prison for the first-degree murder convictions. We affirm.

I. DOCKET NO. 246022

On appeal, defendant Rushell first claims that he was denied his due process right to a fair trial when the trial court jointly tried both defendants. We disagree. Because defendant Rushell failed to move for a separate trial, this issue was not preserved for appeal. See *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). We review unpreserved errors for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). To show that his substantial rights were affected, a defendant must

demonstrate prejudice by establishing that an error affected the outcome of the proceedings. Reversal is warranted when the plain error results in the conviction of an innocent defendant or seriously affects the fairness, integrity or public reputation of the proceedings apart from the defendant's innocence. *People v McNally*, 470 Mich 1, 5; 679 NW2d 301 (2004).

A defendant does not have an automatic right to a separate trial. *People v Harris*, 201 Mich App 147, 152; 505 NW2d 889 (1993). A strong policy exists that favors joint trials in the interest of justice, judicial economy, and judicial administration. *Id*. The trial court has the discretion to determine whether to sever or join defendants. *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994). MCR 6.121(C) mandates severance when a defendant demonstrates that a separate trial is necessary to avoid prejudice to his substantial rights. *Id*. Severance is necessary when the defenses of multiple defendants are mutually exclusive or irreconcilable, not merely inconsistent. *Id*. at 349; *People v Perez-DeLeon*, 224 Mich App 43, 59; 568 NW2d 324 (1997). Furthermore, "incidental spillover prejudice, which is almost inevitable in a multi-defendant trial, does not suffice." *Hana*, *supra* at 349.

Co-defendant Theriot's theory of the case was that he shot the victims, Daniel Ashley and Jeremy Williams, in self-defense or in defense of his half-brother, defendant Rushell. Defendant Rushell's theory of the case was that he did not participate in or have advance knowledge of the shooting. Defendants did not accuse each other as part of their defenses. To support his argument on appeal, defendant Rushell cites co-defendant Theriot's trial testimony, in which he stated, "I shot them because I was scared. They been messing with me for a long time." Contrary to defendant Rushell's assertion that co-defendant Theriot's statement exculpated himself at the expense of incriminating defendant Rushell, co-defendant Theriot actually admitted that he was the shooter both in his prior statement to police and in his trial testimony. Co-defendant Theriot's statement and testimony minimized defendant Rushell's responsibility and role in the events. Co-defendant Theriot stated that he did not ask defendant Rushell for his gun because the gun was already on his person and that he never told defendant Rushell that he was about to shoot Ashley and Williams. Co-defendant Theriot also stated that defendant Rushell did not participate in the shooting and pleaded with him not to shoot. In light of this evidence, we conclude that their defenses were not mutually exclusive or even antagonistic.

Moreover, there was no evidence that joinder affected the outcome of the proceedings. Because defendant Rushell was charged under an aiding and abetting theory, the risk of prejudice to his case was reduced. See *Hana*, *supra* at 360 (the risk of prejudice diminishes when a codefendant is charged as an aider and abettor and the prosecutor does not assert that the codefendant fired the deadly shot). In addition, defendant Rushell's constitutional right of confrontation was not affected because co-defendant Theriot testified at trial and was subject to cross-examination. See *Crawford v Washington*, 541 US 36; 124 S Ct 1354, 1369; 158 L Ed 2d 177 (2004) (when a declarant is available for cross-examination at trial, a defendant's right to confront a witness is not violated by the use of the witness' prior testimonial statements). Furthermore, there was no indication that defendant Rushell was restricted in offering a defense. There was also no chance that the jury would be confused since the factual evidence pertained to both defendants. Because defendant Rushell failed to demonstrate that his substantial rights were prejudiced and that severance was necessary to prevent the prejudice, we hold that the trial court did not err by jointly trying defendants.

Next, defendant Rushell argues that he was denied his right to the effective assistance of counsel when defense counsel failed to object to trial consolidation or to move for severance. We disagree. The determination of whether a defendant was denied the effective assistance of counsel is a combined question of fact and constitutional law. We review a trial court's findings of fact for clear error and constitutional determinations de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Because the trial court did not hold an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and a reasonable probability that the outcome of the trial would have been different, but for trial counsel's error. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). A defendant bears the heavy burden of overcoming the presumption that counsel's representation was effective. *LeBlanc*, *supra* at 578. A defendant must also overcome the presumption that counsel's performance constituted sound trial strategy. *Riley*, *supra* at 140.

To demonstrate ineffective assistance of counsel, defendant Rushell must show that separate trials were required. We held that there was no basis for the trial court to grant severance. Because a motion to severe would have been futile, we conclude that defense counsel did not err by failing to request severance. See *Riley*, *supra* at 142.

Defendant Rushell also argues that he was denied his right to due process when the trial court failed to instruct the jury regarding the necessarily included lesser offense of voluntary manslaughter. We disagree. Defendant Rushell's trial counsel failed to join the request of co-defendant's trial counsel for an instruction on voluntary manslaughter or to independently request such an instruction. Therefore, this issue was not preserved for appeal. See *People v Fletcher*, 260 Mich App 531, 557-558; 679 NW2d 127 (2004). We review unpreserved instructional errors for plain error affecting a defendant's substantial rights. *Carines*, *supra* at 763-764.

To receive an instruction on a lesser offense, the lesser offense must be a necessarily included lesser offense that is supported by the evidence. *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). Unlike a cognate lesser offense, which includes some elements distinct from the greater offense, a necessarily included lesser offense is an offense that includes all elements of the greater offense. *People v Mendoza*, 468 Mich 527, 532 n 3, 4; 664 NW2d 685 (2003). In other words, it would be impossible to perpetrate the greater offense without first having perpetrated the lesser offense. *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001).

First-degree murder, as charged in this case, requires proof "that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate." *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998). To prove premeditation and deliberation, a prosecutor must establish that the defendant killed the victim after a sufficient time for a "second look." *Id*. Voluntary manslaughter contains the following elements: "(1) the defendant must kill in the heat of passion, (2) the passion must be caused by an adequate provocation, and (3) there cannot be a lapse of time during which a reasonable person could control his passions." *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998).

"Murder and manslaughter are both homicides and share the element of being intentional killings." *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991). However, to reduce murder to voluntary manslaughter, there must be sufficient evidence of adequate provocation, particularly provocation causing a reasonable person to act out of passion instead of reason. *Sullivan*, *supra* at 518. The elements of voluntary manslaughter are subsumed in murder, with murder having the added element of malice. *Mendoza*, *supra* at 540. Because the elements of manslaughter are included in the offense of murder, manslaughter is a necessarily included lesser offense of murder. *Id*. at 536, 540-541. However, an instruction on a necessarily included lesser offense is precluded unless it is supported by a rational view of the evidence. *Cornell, supra* at 357.

In this case, defendant Rushell was charged under an aiding and abetting theory as one who had knowledge that the principal intended for the crime to occur and gave assistance. See *Carines*, *supra* at 757. Defendant Rushell's charges under the aiding and abetting theory were related to co-defendant Theriot's charges as the principal. Co-defendant Theriot asserted a theory of the case that rested on a claim of self-defense and defense of others. According to co-defendant Theriot's testimony, he did not possess an intent to kill at the time of the shooting. Therefore, an instruction on voluntary manslaughter, which requires proof of an intentional killing, was not supported by co-defendant Theriot's own theory of the case. See *Pouncey*, *supra* at 388.

Moreover, the facts in evidence did not suggest any adequate provocation to negate the element of malice. There was evidence that co-defendant Theriot informed witnesses Jason Rusan and Tracey Cobbs that he was about to kill the victims. Rusan saw co-defendant Theriot drive to the side of the victims' car. He also observed the window of co-defendant Theriot's car come down, and defendant Rushell's seat move back. Rusan then saw co-defendant Theriot reach across defendant Rushell's seat and shoot five times at the victims. Similarly, Cobbs testified that she saw defendant Rushell put his seat back and co-defendant Theriot reach across and shoot about five or six times into the victims' vehicle. Officer Briggs testified that the evidence collected from the victims' vehicle included two jackets, a cellular phone and a bullet fragment. However, she did not testify to recovering a gun from the car. As the trial court noted, even if the jury believed co-defendant Theriot's testimony that one of the victims had a gun and shot first, co-defendant Theriot's reaction was self-defense, not provocation. Because a rational view of the evidence did not support a voluntary manslaughter instruction, the trial court did not err in failing to instruct the jury on the necessarily included lesser offense. See *Cornell*, *supra* at 357.

Furthermore, this Court has held that "where a defendant is convicted of first-degree murder, and the jury rejects other lesser included offenses, the failure to instruct on voluntary manslaughter is harmless." *Sullivan*, *supra* at 520. Although the trial court instructed the jury of the lesser offense of second-degree murder, the jury found defendant Rushell guilty of first-degree murder. Even assuming that the trial court erred in failing to instruct the jury on the necessarily included lesser offense of voluntary manslaughter, such error was harmless.

II. DOCKET NO. 246023

On appeal, defendant Theriot argues that the trial court committed an error requiring reversal when it admitted co-defendant Rushell's statement to police because it was a statement

by a non-testifying codefendant that inculpated defendant Theriot. We disagree. Because defendant Theriot failed to object to the admission of co-defendant Rushell's statement, we review this unpreserved constitutional claim for plain error affecting defendant's substantial rights. *Carines*, *supra* at 764-765.

A codefendant's confession is so "powerfully incriminating" that its presentation into evidence, apart from an opportunity to cross-examine the declarant, "intolerably compound[s]" the unreliability of the confession and is contrary to the protections afforded in the Confrontation Clause. *Bruton v US*, 391 US 123, 135-136; 88 S Ct 1620; 20 L Ed 2d 476 (1968). Therefore, to admit testimonial evidence against a defendant, the Confrontation Clause requires the unavailability of a witness and a prior opportunity for cross-examination. *Crawford v Washington,* 541 US 36; 124 S Ct 1354; 1374; 158 L Ed 2d 177 (2004).

Here, co-defendant Rushell gave a statement to police implicating defendant Theriot in the instant crimes. Therefore, co-defendant Rushell's statement was testimonial evidence. See *People v McPherson*, 263 Mich App 124, 132; 687 NW2d 370 (2004). Co-defendant Rushell was not subject to cross-examination because he did not testify at trial. Accordingly, we conclude that the trial court violated defendant Theriot's right of confrontation by admitting the testimonial statement of a non-testifying codefendant into evidence.

However, violations of the Confrontation Clause are reviewed in light of plain, outcome determinative error. *McPherson, supra*. To establish that his substantial rights have been affected, a defendant must show prejudice by demonstrating that the error affected the outcome of the proceedings. Carines, supra at 763. Here, co-defendant Rushell's statement was not the primary evidence supporting defendant Theriot's convictions. Defendant Theriot's own prior statement and trial testimony contained admissions to shooting the victims. Rusan and Cobbs testified that defendant Theriot told them that he was about to kill the victims. Rusan also testified to observing defendant Theriot drive to the side of the victims' car. Rusan then saw the window to defendant Theriot's car come down, and co-defendant Rushell's seat was pushed back. Rusan saw defendant Theriot reach across co-defendant Rushell's seat and shoot five times at the victims. Cobbs' testimony mirrored the testimony of Rusan. There was overwhelming evidence of defendant Theriot's guilt apart from co-defendant Rushell's statement. Given the eyewitness accounts of the shooting and defendant Theriot's own inculpatory statement, we conclude that the constitutional error was not outcome determinative. *McPherson, supra*.

Defendant Theriot also asserts that he was denied his constitutional right to present a defense when the trial court improperly instructed the jury that it could consider defendant Theriot's prior statement to police as evidence of guilt regardless of the truth or falsity of the statement. We disagree. We review de novo a claim of instructional error. *People v Hubbard*, 217 Mich App 459, 487; 552 NW2d 493 (1996). Jury instructions must be viewed in their entirety. *Daniel*, *supra* at 53. "The instructions must include all elements of the charged offense and must not exclude material issues, defenses, and theories, if there is evidence to support them." *Id*. "Even if somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights." *People v Wolford*, 189 Mich App 478, 481; 473 NW2d 767 (1991).

At trial, defendant Theriot testified that his prior statement to police as introduced into evidence contained information different from what he told the officer during the interview. Defendant Theriot contends on appeal that the jury instruction was improper because it failed to indicate that the jury could find that the statement was false and use that as evidence to support his theory that the statement as admitted did not reflect what he actually told the officer.

When read as a whole, the jury instructions fairly presented the issues raised by the parties and sufficiently protected defendant Theriot's rights. Specifically, the instructions did not deny defendant Theriot the opportunity to present his theory that the statement contained inaccuracies. The trial court instructed the jury that it was required to find that defendant Theriot actually made the statement before considering it as evidence of his guilt. Thus, if the jury agreed with defendant Theriot's theory that the statement contained inaccuracies, the jury would have found that defendant Theriot did not actually make the statement and precluded further consideration of the statement. Although the trial court might not have used the precise wording that defense counsel desired, the trial court's instructions adequately included the defense theory. Moreover, the trial court did not err by instructing the jury that, if it determined that defendant Theriot's statement was false, it could consider the statement as evidence of his guilt. See *Wolford*, *supra* at 481-482. Therefore, we conclude that the trial court did not deprive defendant Theriot of the opportunity to present a defense by instructing the jury that it could consider defendant Theriot's false statement as evidence of his guilt.

Defendant Theriot also argues that there was insufficient evidence to support his conviction for the first-degree murder of Williams. We disagree. We review the sufficiency of evidence in a criminal case in the light most favorable to the prosecution to determine whether a rational jury could find the essential elements of the crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). We must defer to the jury's findings by determining all reasonable inferences and credibility choices in favor of the jury's verdict. *Id*. at 400.

To convict a defendant of first-degree murder, the prosecutor must prove that the defendant intentionally killed the victim and performed the act with premeditation and deliberation. *Kelly*, *supra* at 642. A prosecutor must introduce sufficient evidence to justify a conclusion that the defendant was guilty of the crime beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). However, a prosecutor is not required to "negate every reasonable theory consistent with innocence." *Nowack*, *supra* at 400. Circumstantial evidence and reasonable inferences from the evidence may establish the elements of a crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). It is for the factfinder to determine what inferences should be drawn from the evidence and to determine what weight should be given to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

On appeal, defendant Theriot specifically cites Dr. Schmidt's testimony that one of Williams' three gunshot wounds was a near contact wound to his head, meaning that the gun would be fractions of an inch from the skin when it was discharged. Defendant Theriot asserts that he could not have fired such a close range shot when the evidence clearly indicated that he was in another car shooting into the car where Williams was seated.

Although Dr. Schmidt testified that Williams had a near contact wound, he determined that the cause of Williams' death was multiple gunshot wounds to the head. Dr. Schmidt also testified that he could not determine which of the three gunshot wounds was the fatal shot because they all contributed to Williams' death. Dr. Schmidt further explained that the only way to accurately determine the distance from which a gun was fired was to use the actual gun that was fired with ammunition of the same lot number and fire the gun at various distances and match the resulting pattern on a piece of paper with the markings on Williams. Moreover, there was eyewitness testimony from Rusan and Cobbs that defendant Theriot shot several times toward the vehicle with Ashley and Williams after having told both witnesses that he was about to kill the victims. In his statement to the police, defendant Theriot admitted that he shot Ashley and Williams because "[t]hey been messing with me for a long time." Although he testified otherwise at trial, he further admitted in his statement that he did not see either Ashley or Williams with a gun when they were shot. There was also evidence that Officer Briggs did not recover a gun when she collected evidence from Ashley's vehicle.

From this evidence, a rational jury could have found Rusan's and Cobbs' testimony credible and determined that defendant Theriot intended to kill Ashley and Williams. The jury could have also determined that Ashley did not have a gun in his possession, and therefore, defendant Theriot was the sole shooter. As the only gunman, the jury could have inferred that defendant Theriot was responsible for all three gunshot wounds to Williams' head. Alternatively, the jury could have determined that defendant Theriot was not responsible for the near contact wound to the back of Williams' head, but that the wound was only one of three gunshot wounds that cumulatively caused Williams' death. When viewed in the light most favorable to the prosecution, we conclude that a rational jury could have found that defendant Theriot was guilty of the first-degree murder of Williams beyond a reasonable doubt.

Affirmed.

/s/ Hilda R. Gage
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood