STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 4, 2014
v	Nos. 310870; 310872 Macomb Circuit Court
DAVID AARON CLARK, Defendant-Appellant.	LC Nos. 2011-001981-FH; 2011-002174-FC

Before: MURPHY, C.J., and DONOFRIO and FORT HOOD, JJ.

PER CURIAM.

In Docket No. 310870, defendant appeals as of right his jury trial conviction of first-degree home invasion, MCL 750.110a(2). The trial court sentenced defendant to 10 to 20 years' imprisonment for the conviction. In Docket No. 310872, defendant appeals as of right his jury trial conviction of conspiracy to commit first-degree murder, MCL 750.157a; MCL 750.316. The trial court sentenced defendant to life imprisonment with the possibility of parole for the conviction. We affirm defendant's convictions and prison sentences, but vacate the imposition of a $10,000 fine in Docket No. 310872, and remand to the trial court to exercise its discretion regarding the $10,000 fine in accordance with MCL 750.157a(a).

This case arises from a conspiracy involving Mallorie Wilson-Strat, Christina Sears, Kevin Sears, Jorden Powell, and defendant to have Kevin Sears's wife murdered. Wilson-Strat was the girlfriend of Kevin Sears at the time, and Christina Sears is Kevin's sister. Kevin Sears and his wife were in the process of obtaining a divorce when the conspiracy developed. Defendant and Powell were solicited by Wilson-Strat to commit the murder, with Christina Sears approving of the solicitation. Defendant and Powell failed to carry out the murder, as planned, during a home invasion of the victim's house after Wilson-Strat dropped them off at that location. Defendant and Powell were thwarted by a child-proof bedroom door handle and then left the victim's home, taking her purse and dropping a knife along the way, before being picked up by Wilson-Strat. However, the conspiracy to murder Kevin Sears's wife continued, but fortunately an undercover officer became involved through an anonymous individual. And the officer was solicited by Wilson-Strat to commit the murder, again with the approval of Christina Sears. The undercover officer's involvement eventually led to the arrest of those involved in the conspiracy, including defendant. Wilson-Strat was tried and convicted of first-degree home invasion, solicitation of murder, MCL 750.157b(2), and conspiracy to commit first-degree

murder, for which she received a life sentence with the possibility of parole. This Court recently affirmed her convictions. *People v Wilson-Strat*, unpublished opinion per curiam of the Court of Appeals, issued November 19, 2013 (Docket Nos. 310877 and 310879). Defendant and Christina Sears were tried jointly before a single jury; Christina was convicted of solicitation of murder and conspiracy to commit first-degree murder. Powell was separately tried and convicted of first-degree home invasion and conspiracy to commit first-degree murder. Kevin Sears is awaiting trial. Wilson-Strat was a key prosecution witness against Christina Sears, Powell, and defendant.

I. RIGHT OF CONFRONTATION

Defendant first argues that the trial court improperly limited his cross-examination of Wilson-Strat by not allowing him to elicit testimony regarding her potential criminal sentence relative to her convictions, thereby depriving defendant of his right of confrontation. On cross-examination, Wilson-Strat testified that she had been convicted for her involvement in the solicitation and conspiracy and that she was testifying in hope, without an expectation, that the parole board would look more favorably upon her given her cooperation. She received nothing from the prosecutor's office in exchange for her testimony; there was no plea bargain of any kind. Defendant wished to elicit information regarding the length of her potential sentence – she had not yet been sentenced on her convictions – in order to show that the hope of parole was a strong motivating force to testify against defendant, undermining her credibility. The trial court opined that the length of Wilson-Strat's potential sentence was unimportant for purposes of attempting to discredit her. The trial court was also concerned that the jury, if it heard testimony in regard to the general length of a sentence faced by Wilson-Strat, might assume that Christina Sears would face the same sentence upon conviction, creating the possibility of the jury assessing guilt or innocence outside the facts of the case. Implicit in the court's ruling, especially in light of the prosecutor's objection to testimony regarding the prospective sentence, was a worry that the prosecution could be prejudiced, as the jury might be hesitant to convict Christina Sears knowing that a life sentence could result from a conviction.

We review de novo a challenge under the Confrontation Clause. *People v Nunley*, 491 Mich 686, 696-697; 821 NW2d 642 (2012). In every criminal trial, the federal and state constitutions protect a defendant's right to be confronted with the witnesses against him. US Const, Am VI; Const 1963, art 1, § 20. Generally, a jury should not be informed of a possible punishment for conviction. *People v Mumford*, 183 Mich App 149, 151; 455 NW2d 51 (1990). "The 'fear' is that such information may cause the jury to 'compromise its integrity and render a verdict based on factors other than the evidence.'" *Id*. (citation omitted). On the other hand, "a defendant is entitled to have the jury consider any fact that may have influenced the witness' testimony." *People v McGhee*, 268 Mich App 600, 619; 709 NW2d 595 (2005) (citations and internal quotation marks omitted). "[A] limitation on cross-examination which prevents [defendant] from placing before the jury *facts* from which bias, prejudice or lack of credibility of a prosecution witness might be inferred constitutes denial of the [constitutional] right of confrontation." *Mumford*, 183 Mich App at 153 (citation and internal quotation marks omitted; emphasis and final two alterations in original). "Where an accomplice . . . has been granted immunity in order to secure his testimony, it is clear error for the court to deny the defendant the opportunity to elicit this information at trial." *People v Minor*, 213 Mich App 682, 684-685; 541

NW2d 576 (1995). However, "a claim that the denial of cross-examination has prevented the exploration of a witness' bias is subject to harmless error analysis." *Id*. at 688.

Defendant relies primarily on *Mumford*, in which the trial court denied the defendant's motion in limine to permit cross-examination of a prosecution witness, the defendant's former codefendant, on the sentencing consideration that the witness received as part of a plea bargain. *Mumford*, 183 Mich App at 150. The *Mumford* panel held that "the trial court abused its discretion when it denied defendant's motion to cross-examine [the witness] on all details of the plea bargain, including the sentencing consideration [the witness] received in return for his testimony." *Id*. at 154. This Court concluded that "[t]he sentencing consideration received in return for testimony is undeniably a fact which is relevant to a witness' credibility, because it is the crux of the plea agreement." *Id*. at 153 (citation, alteration, and internal quotation marks omitted).

The present case is factually distinguishable from *Mumford*. Wilson-Strat did not receive a plea bargain or anything in exchange for her testimony. Therefore, the trial court did not err in limiting the cross-examination and in recognizing that "[t]here was no promise, no reduction, [and] no negotiation with the prosecutor's office for any benefit" in exchange for Wilson-Strat's testimony. Defendant was not denied his right of confrontation. Moreover, we simply cannot conclude, assuming error, that defendant suffered any prejudice as a result, whether under plain-error or harmless-error analysis. MCL 769.26; *People v Shepherd*, 472 Mich 343, 348; 697 NW2d 144 (2005); *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

II. MOTION FOR SEPARATE JURIES

Defendant argues that the trial court erred in denying his motion for separate juries. We disagree. As noted above, defendant and Christina Sears were tried jointly by a single jury.

"The use of separate juries is a partial form of severance to be evaluated under the standard . . . applicable to motions for separate trials." *People v Hana*, 447 Mich 325, 351; 524 NW2d 682 (1994). "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." *Id*. at 346. Absent this showing in the trial court, and the failure of an indication that the requisite prejudice in fact occurred at trial, this Court will affirm the trial court's decision to deny the motion for separate juries. *Id*. at 346-347. "While . . . a joint trial of codefendants presenting antagonistic defenses has serious negative implications for the accused, the standard for severance is not lessened in this situation." *Id*. at 347. "Inconsistency of defenses is not enough to mandate severance; rather, the defenses must be 'mutually exclusive' or 'irreconcilable.'" *Id*. at 349. "The tension between defenses [offered at trial] must be so great that a jury would have to believe one defendant at the expense of the other." *Id*. (citation and internal quotation marks omitted).

In the trial court, defendant's trial counsel argued that defendant was entitled to a separate jury because the charges against him and Christina Sears did not necessarily arise out of the same set of circumstances or same transaction and the charges and evidence against Sears could prejudice the jury against defendant. The trial court concluded that there was no statement

made by defendant or Christina Sears that would inculpate the other and that the witnesses that were expected to be called at trial related to both defendants.

On appeal, defendant argues that "[t]he trial court's refusal to allow the cross-examination [of Wilson-Strat] prejudiced [his] substantial rights because it significantly limited the jury's ability to accurately evaluate the credibility of the prosecution's lead witness." Defendant contends that the trial court limited his cross-examination of Wilson-Strat regarding the potential sentence for her convictions based on the prospect of prejudice to Christina Sears. This is a mischaracterization of the record. Defendant and Sears both sought to cross-examine Wilson-Strat on the issue of her potential sentence, and the trial court did not permit defendant or Christina Sears to cross-examine Wilson-Strat on this issue. Had defendant been tried separately, the trial court may very well have reached the same ruling, as defendant himself, like Christina Sears, was also charged with conspiracy to commit first-degree murder, which is the crime that formed the basis for Wilson-Strat's life sentence with possibility of parole. We are not prepared to reverse based on speculation and, as indicated earlier, any assumed error did not prejudice defendant. Moreover, the trial court did not err in limiting Wilson-Strat's testimony given that Wilson-Strat was convicted by a jury and was not testifying in exchange for a plea bargain. In addition, defendant and Christina Sears did not present mutually exclusive defenses. Defendant claimed that he intended only to "rip off" Wilson-Strat. On the other hand, Christina Sears contended that she intended only to hurt, but not kill, the victim. Defendant failed to provide the trial court with a supporting affidavit, or make an offer of proof, that clearly, affirmatively, and fully demonstrated that his substantial rights would be prejudiced and that severance was the necessary means of rectifying the potential prejudice. See MCR 6.121(C); *Hana*, 447 Mich at 346-347, 351-352. And again, defendant also failed to establish that the requisite prejudice in fact occurred at trial. *Id.* at 346-347. Therefore, the trial court did not err in denying defendant's motion for separate juries.

III. $10,000 FINE

Defendant argues that the trial court plainly erred in imposing a $10,000 fine pursuant to MCL 750.157a, given that the court imposed the fine at sentencing on the mistaken belief that it was mandatory for the conspiracy conviction. The prosecutor concedes error. MCL 750.157a provides in pertinent part:

> Any person who conspires together with 1 or more persons to commit an offense prohibited by law, or to commit a legal act in an illegal manner is guilty of the crime of conspiracy punishable as provided herein:
>
> (a) Except as provided in paragraphs (b), (c) and (d) if commission of the offense prohibited by law is punishable by imprisonment for 1 year or more, the person convicted under this section shall be punished by a penalty equal to that which could be imposed if he had been convicted of committing the crime he conspired to commit and *in the discretion of the court* an additional penalty of a fine of $10,000.00 *may* be imposed. [Emphasis added.]

We agree with defendant and the prosecution that the trial court erred in imposing the fine, considering that MCL 750.157a(a) provides that the imposition of the $10,000 fine is within the discretion of the court and not mandatory.

We affirm defendant's convictions and prison sentences, but vacate the $10,000 fine in Docket No. 310872, and remand to the trial court for exercise of its discretion regarding the $10,000 fine in accordance with MCL 750.157a(a). We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood