STATE OF MICHIGAN
IN THE SUPREME COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

-*vs*-

Supreme Court
No. 129154

JULIAN DALE KEY,
Defendant-Appellee.

/

Court of Appeals No. 247719
Detroit Recorder's Court No. 04-01085

129154

SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF JURISDICTION AND NATURE OF RELIEF SOUGHT

On December 11, 2002, the trial court convicted Defendant of first-degree premeditated murder; on January 9, 2003, the court sentenced Defendant to life imprisonment.

On May 31, 2005, the Court of Appeals reversed Defendant's conviction in an unpublished opinion. The People filed this application on or about July 20, 2005, seeking reversal of the decision of the Court of Appeals, and reinstatement of Defendant's conviction and sentence. On November 10, 2005, this Court directed the Clerk to schedule the matter for argument, and invited the parties to submit supplemental briefs.

The Court has jurisdiction under MCL §770.12, and MCR §7.301-302.

SUPPLEMENTAL STATEMENT OF QUESTION

I. When making a preliminary ruling on a question of procedure, trial courts often must rely upon the representations of the parties concerning future events. Here, while the court was considering a motion for severance based upon the introduction of confessions by parties on trial, both co-defendants represented that they would assert their right to testify — which eliminated the need for a severance — rather than representing that they might assert their right *not* to testify, which would have resulted in a severance.

A. Did the representation by both defendants that they would take the witness stand waive any future confrontation claim concerning the admission of the co-defendant's statement?

Trial Court said:	*Yes*
Court of Appeals said:	*No.*
Defendant says:	*No.*
People say:	*No.*

B. Given the representation by both defendants that they would take the witness stand, was the trial court's ruling correct at the time when made?

Trial Court said:	*Yes*
Court of Appeals said:	*No.*
Defendant says:	*No.*
People say:	*Yes.*

C. Did the defendant's failure to move for a mistrial after his co-defendant decided not to testify waive any claimed confrontation or similar error in admitting the co-defendant's statement to police?

This question was not before the Trial Court said.

Court of Appeals said:	*No.*
Defendant says:	*No.*
People say:	*Yes.*

D. Given Defendant's own confession, was any error in admitting the co-defendant's statement harmless?

This question was not before the Trial Court said.

Court of Appeals said:	*No.*
Defendant says:	*No.*
People say:	*Yes.*

STATEMENT OF FACTS

The People rely upon the Statement of facts contained in the original application.

ARGUMENT

I.

WHEN MAKING A PRELIMINARY RULING ON A QUESTION OF PROCEDURE, TRIAL COURTS OFTEN MUST RELY UPON THE REPRESENTATIONS OF THE PARTIES CONCERNING FUTURE EVENTS. HERE, WHILE THE COURT WAS CONSIDERING A MOTION FOR SEVERANCE BASED UPON THE INTRODUCTION OF CONFESSIONS BY PARTIES ON TRIAL, BOTH CO-DEFENDANTS REPRESENTED THAT THEY WOULD ASSERT THEIR RIGHT TO TESTIFY — WHICH ELIMINATED THE NEED FOR A SEVERANCE — RATHER THAN REPRESENTING THAT THEY MIGHT ASSERT THEIR RIGHT NOT TO TESTIFY, WHICH WOULD HAVE RESULTED IN A SEVERANCE. THE TRIAL COURT DID NOT DENY THE DEFENDANT A FAIR TRIAL BY DENYING HIS REQUEST FOR SEVERANCE.

Standard of Review

The sole issue in this application remains the legal effect given the trial court's ruling admitting statements each co-defendant made to police, and denying the Defendant's motion for severance, given given the constraints facing it when it made its ruling. In considering the claim, this Court reviews the trial court's decision on the admissibility of the evidence for an abuse of discretion,[1] its application of the appropriate legal principles *de novo*,[2] and any error to see whether it was harmless beyond a reasonable doubt.[3]

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[1]MRE 403. *See, eg, People v Katt*, 468 Mich 272, 278 (2003); *People v Lukity*, 460 Mich 484, 488 (1999).

[2]*See, eg, People v Katt, supra; People v Starr,* 457 Mich 490, 494 (1998).

[3]*Neder v United States,* 527 US 1, 119 S Ct 1827, 144 L Ed 2d 35 (1999). *See, eg, People v Graves,* 458 Mich 1476, 482 (1998); *People v Anderson (After Remand),* 446 Mich 392 (1994); *People v Robinson,* 386 Mich 551 (1972); *People v Solomon*, 220 Mich App 527 (1996).

Discussion

The People will rely upon the original application for most of the basic arguments concerning the legal consequences of the unusual sequence of events in this case — stemming from the fact that both co-defendants in this case made statements to police, both moved for a severance on the basis of the other's statement, both insisted that they were going to testify, leading the trial court to deny the severance motions for lack of need, both later decided to not to testify at trial, and both are now claiming entitlement to a new trial, based upon the admission of the other's statement at trial.[4]

There are, however, a few aspects of this case which require additional thought and explanation, in light of this Court's expressed interest in the question of waiver:

A. Because a declarant cannot waive a defendant's right to confront witnesses, the representation by each co-defendants that he would take the witness stand cannot operate to waive the other's potential confrontation claim by concerning the admission of the co-defendant's statement.

This Court's primary interest appears to be the waiver analysis which the dissenting judge advanced in the Court of Appeals: by requesting separate trials while simultaneously insisting that they intended to testify, Judge Meter reasoned, the defendants "waived their right to claim error with regard to the issue of separate trials or separate juries." Rather, as their testimony rendered separate

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[4]A misanthrope might see calculation in the favorable confluence of events for the defense in this case, but the People are not quite so cynical: though possible in theory, it is doubtful that defendants with conflicting interests — or defense attorneys with conflicting loyalties — would be able to analyze both the law and future events so precisely as to bring about an appellate reversal on such arcane grounds; and the goal of most trial attorneys will be to win their case at trial — or to win a verdict on a lesser charge — rather than to establish grounds for a possible victory on appeal — which a win at the trial-court level would render unnecessary.

factfinders unnecessary, the reasoning goes, representing to the trial judge that they would testify "waived their ability to 'cry foul'" on appeal.[5] As the majority noted in its opinion, the prosecution did not advance this argument on appeal[6] — and, despite this Court's invitation to do so in this forum, cannot do so in good conscience here.

As this Court has noted in the past, a waiver is the knowing relinquishment of a known right — or, in some circumstances, the assertion of another right which is inconsistent.[7] The problem with applying waiver principles to this case is that it requires that we impose a waiver on one defendant for the actions of another: simply put, in this case, one co-defendant cannot waive the rights of the other; and a declarant cannot waive the right of a defendant on trial. To see why this is so, we need only imagine what would happen if there were only a single confession in this case:

Let us suppose that co-Defendant Pipes made a statement to police, implicating Defendant. Defendant, sensing prejudice from the admitting the hearsay statement, moves to sever the trials; but Pipes, upon inquiry from the court, indicates his intent to testify — which would cure any potential confrontation problem, since the declarant would be subject to cross-examination.[8] However, nothing Pipes does can operate to waive Defendant's own constitutional rights, which remain personal to the Defendant; and since Defendant cannot compel Pipes to take the witness stand, the

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[5]Slip Opinion, Dissent, p 2.

[6]Slip Opinion, p 5 n 1.

[7]See, eg, People v Carter, 462 Mich 206, 215 (2000).

[8]This would be the case whether the statement was admitted as substantive evidence against the Defendant, *Crawford v Washington*, 541 US 36, 124 S Ct 1354, 158 L Ed 2d 177 (2004), or — as here — merely against the maker. *Bruton v United States*, 391 US 123, 88 S Ct 1620 S Ct 1620, 20 L Ed 2d 476 (1968).

latter's decision to testify cannot waive the former's right to object.

Absent some actual evidence of complicity,[9] this analysis does not change merely because both co-defendants made statements. And since Defendant's rights cannot be waived by his co-defendant's actions, it regretfully appears to the People that the waiver analysis adopted by the dissent in this case cannot sustain the judgment below.

B. Given the representation by both defendants that they would take the witness stand, the trial court's ruling was correct at the time it was made.

Though largely unremarked by the Court of Appeals, the fact remains that a trial court cannot rule with the benefit of hindsight, and must base its rulings upon the information available to it. Accordingly, the correctness of the trial court's ruling on the motion to sever cannot turn on subsequent events, and a reviewing court must take care not to use the distorting effect of hindsight to find error when none truly exists.

As noted in the original application, in this case the trial court had no reason to grant a severance at the time it needed to rule on the severance motion: as both co-defendants represented

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[9]The People note that this analysis may change if it is proved that the two defendants conspired together — first to deceive the trial judge about their intentions, then in planting the error, and finally in making the error meaningful by the subsequent decision not to testify. In such a case, the error may well be waived by conduct of the defendants, in combining to achieve the ultimate result. In the absence of such a showing, however, we cannot presume a conspiracy; and without the intent to achieve the specific outcome, it seems to the People, we cannot impose a waiver on a party who is unable to alter the result.

that they would be testifying,[10] this eliminated the need for a severance.[11] As a reviewing court considers the record before the judge at the time, rather than after-the-fact,[12] in assessing the actions undertaken, it follows that there is no basis for a finding that the court erred in its ruling. And where a joint trial is properly underway — and the events leading to a *Bruton* error do not arise until after the evidence is properly admitted — it follows that the limiting instructions given should suffice to eliminate any incidental prejudice.

For the sake of brevity, the People rely upon the argument in the initial application for the remainder of this point of law.

C. The defendant's failure to move for a mistrial after his co-defendant decided not to testify waives any claimed confrontation or similar error in admitting the co-defendant's statement to police.

Over the past decade, in an attempt to bring order to what once was chaos, Michigan has developed a substantial body of case law dealing with issue preservation. Recognizing that the parties bear the primary responsibility for presenting their respective cases in an adversarial system of justice, case law distinguishes between a claimed error which is preserved by timely action of a

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[10]T, 9/12/02, 24-28.

While attorneys for the defense raised the question of severance again at the retrial, neither attorney altered the representation that both co-defendants were going to testify. (T, 12/2/02, 10-12).

[11]*Cf, Crawford v Washington, supra; Bruton v United States, supra.*

[12]*Cf, People v Cutler*, 73 Mich App 313 (1977)(Reviewing court looks to suppression hearing, not trial transcript, to decide whether court erred in admitting evidence).

party, and a claim which the party permits to pass without note during the course of the proceedings. Where a party permits an action by the court or another party to pass without a timely objection, a reviewing court will deemed the point forfeited for purposes of appellate review, and consider the point only if the appealing party can convince the court that the claim involved a plain error affecting a substantial right of the party, and resulted in discernible prejudice. Moreover, in such a case, a court will reverse a judgment only if the forfeited plain error resulted in a "manifest injustice" — or, in other words, the conviction of a defendant who is "actually innocent," or whose convictions rests upon an error which seriously calls into question "the fairness, integrity or public reputation" of the criminal justice system.[13] This is because courts recognize the importance of encouraging the participants "to seek a fair and accurate trial the first time around," and reject the notion that parties have a vested interest in vindicating abstract rules or procedures; as this Court observed in *People v Grant*, "nothing is so subversive of the real purposes of legal procedures as individual vested rights in procedural errors."[14] And it best advances the cause of justice to give parties a practical incentive to raise errors at a time when the trial court can correct them,[15] rather than permitting them to harbor error for use as an "appellate parachute" in the event of a loss.[16]

As a result, courts impose more favorable standards for a party raising a preserved claim of

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[13]*People v Carines*, 460 Mich 750, 763 (1999); *see also, People v Grant,* 445 Mich 535, 545-554 (1994).

[14]*People v Grant, supra* at 550, quoting Pound, *The Canons of Procedural Reform*, 12 ABA J 541, 543 (1926).

[15]*People v Grant, supra* at 551.

[16]*People v Carter*, 462 Mich 206, 214 (2000).

error: while reviewing a forfeited claim of error under the "plain error" standard,[17] the same court will review a properly preserved claim under a much more generous standard, reversing if *a non-constitutional* error results in a "miscarriage of justice,"[18] or unless the beneficiary of the error can demonstrate that a *constitutional* error was "harmless beyond a reasonable doubt."[19] And where a defendant's words or conduct operate to effect a waiver of the error as a point of law, the waiver extinguishes the error, and precludes relief on any related ground on appeal.[20]

In the unique factual setting of this case, we have seen that the trial court's ruling was not erroneous when made.[21] However, once the co-defendant decided not to take the witness stand, the factual predicate for the ruling fell, creating a situation where arguably constitutional error arose during the course of trial.[22] From the viewpoint of a reviewing court, this leaves us with two basic

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[17]*People v Carines, supra; People v Grant, supra. See also, United States v Olano,* 507 US 725, 113 S Ct 1770, 123 L Ed 2d 508 (1993).

[18]*People v Lukity*, 460 Mich 484, 497 (1999). As this Court explained in *Lukity*, in light of the harmless error statute, MCL §769.26, a "miscarriage of justice" occurs when the appealing party demonstrates that it is "more probable than not" that the error in question made a difference in the outcome of the case.

[19]*Arizona v Fulminante,* 499 US 297, 307-308, 111 S Ct 1246, 113 L Ed 2d 302 (1991); *Chapman v California*, 386 US 18, 24, 87 S Ct 824, 17 L Ed 2d 705 (1967); *People v Robinson*, 386 Mich 551 (1972).

[20]*See, eg, People v Riley*, 465 Mich 442, 448-450 (2001); *People v Carter,* 462 Mich 206, 215 (2000).

[21]See, T, 9/12/02, 24-28. *Compare, Bruton v United States, supra.*

[22]The People note that in many respects, this places the trial judge in an untenable position: since no severance is needed if the co-defendant testifies, and the co-defendant has indicated his intention to testify, the trial court reasonably found no reason to grant the severance and denied the defense motion for separate trials. The *Bruton*-error arose when the co-defendant elected *not* to take the witness stand — a fact which was under the control of neither the Defendant, nor the trial judge. Accordingly, the trial court's reasonable decision to follow the

options: either the pretrial decision, being correct, precludes the error; or the new development creates constitutional error which warrants a remedy, upon request. As the outcome was the admission of a co-defendant's statement in violation of the rule in *Bruton v United States*, however, the People cannot reasonably argue that no error occurred; but Defendant's actions upon the appearance of the error preclude this Court from granting relief on this basis.

As a criminal defendant enjoys the protection of the Double Jeopardy Clause as well as the Fifth Amendment, any mid-trial termination is largely within the control of the defendant: simply put, since a termination without the defendant's consent[23] results in a jeopardy bar to retrial,[24] in most cases a defendant who encounters a mid-trial error which calls the continuation of the proceedings into question enjoys the choice of proceeding to verdict with the existing factfinder, or seeking to

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state's preference for joint trials in the absence of a demonstrated need, *see, eg, People v Hana,* 447 Mich 325 (1994); *People v Hurst*, 391 Mich 1 (1976), became a pitfall, once the factual basis for the ruling changed.

As we shall see, Defendant's failure to move for a mistrial operated to waive the *Bruton* error in this case. However, the People recommend that this Court undertake to avoid the problem altogether in the future, by recognizing that a defendant's expressed intent to testify may change during the course of the trial, often for very legitimate tactical reasons — and, therefore, the rule that the People believe should come out of this case should be that a trial judge should not take into account a co-defendant's expression of intent to testify when ruling on a motion to sever — particularly in cases where there are statements coming into evidence which may be erroneously admitted if the co-defendant elects to assert his Fifth Amendment privileges.

This will not, of course, address cases in which someone makes a mistake during the course of the proceedings — in which case the ordinary principles of issue preservation will determine the outcome on appeal. But it should prevent most similar problems from arising in the first place.

[23]This "consent" may be express or implied — by way of a defense motion for mistrial, or by conduct attributable to the defense which requires a mistrial. *See, eg, United States v Dinitz,* 424 US 600, 96 S Ct 1075, 47 L Ed 2d 267 (1976)(Mistrial occasioned by misconduct of defense attorney is not a bar to retrial).

[24]*See, eg, Downum v United States*, 372 US 734, 83 S Ct 1033, 10 L Ed 2d 100 (1963); *United States v Dinitz, supra.*

terminate the proceedings by moving for a mistrial.[25]

Here, at the point at which they elected not to testify in their own defense, neither defendant made a motion for mistrial,[26] thereby electing to proceed with the empaneled factfinder. It was, after all, at this point in time when any error arose; and by electing to allow the case to proceed, they chose to assert their "valued right to have [the] trial completed by a particular tribunal,"[27] rather than raising the *Bruton*-problem that had just arisen, thereby waiving the error for purposes of appellate review, and extinguishing it as a possible ground for reversal.[28]

As we have seen, no error arose from the trial court's initial ruling, since it was correct at the time it was made. Error occurred only when the factual predicate for the ruling — the co-defendant's testimony — did not occur as anticipated. It was at this time that any trial court remedy was possible; and it was at this time that Defendant enjoyed the right to dictate the course of events: he could have moved for a mistrial, or he could continue to verdict. The choice to remain silent in the face of changing developments cannot, in a sane system of justice, enable him to have the best of both worlds; accordingly, his failure to move for a mistrial at the time operated a waiver of the issue for purposes of any future appellate review. It was, after all, at this point in time that the error

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[25]*Cf, Downum v United States, supra* at 372 US 736; *United States v* Jorn, 400 US 470, 484, 91 S Ct 547, 27 L Ed 2d 543 (1971)(Plurality opinion of Harlan, J)..

[26]T, 12/10/02, 11-18.

[27]*United States v Dinitz, supra* at 606.

[28]This analysis does not change if we deem any error forfeited by lack of objection at this point, rather than waived by asserting the Fifth Amendment privilege: as the trial court's ruling was correct at the time it was made, any error that arose from subsequent developments could not be "plain error" within the meaning of *Carines*; and as both co-defendants made statements, and the trial court's instructions clearly told the jury to consider each statement only against its maker, (T, 12/10/02, 123-124, 135, 144-145), there is no risk of any potential manifest injustice.

arose and any remedy could have been imposed; and it would be an odd system of justice that permitted a criminal defendant to hold the tribunal hostage, while claiming the benefit of both the claimed error, and the double jeopardy protection that disabled the court from intervening on its own.

Accordingly, as their actions extinguished the error,[29] there was no basis for reversing their convictions, and this Court should reverse the contrary decision of the Court of Appeals.

D. Given Defendant's own confession, any error in admitting the co-defendant's statement harmless.

For the sake of brevity, the People will largely rest upon the harmless error argument made in the initial application, and will not repeat the argument here.

The People note, however, that the harmless nature of interlocking confessions is well-established,[30] and that the correct application of these principles would recognize that a defendant who admits to facts his co-defendant told police suffers no harm, even when the co-defendant's statement is read to the jury.[31]

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[29]*Cf, People v Carter, supra.*

[30]*See, eg, Cruz v New York*, 481 US 186, 191-193, 107 S Ct 1714, 95 L Ed 2d 162 (1987); *People v Hamlin*, 71 NY2d 750, 759-760, 530 NYS2d 74 (1988); *Smith v State*, 699 So2d 629 (Fla, 1997); *Commonwealth v McGlone*, 716 A2d 1280 (Pa Super, 1999).

[31]*Cf, Cruz v New York, supra; People v Shepherd*, 472 Mich 343 (2005).

RELIEF

WHEREFORE, this Court should reverse the decision of the Court of Appeals, and reinstate Defendants' conviction and sentence below

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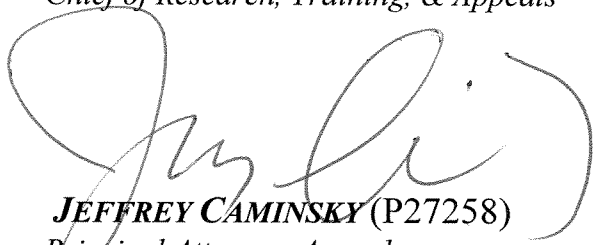

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