

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KORRY KINTA BERRY,

Defendant-Appellant.

UNPUBLISHED

December 18, 1998

No. 202410

Saginaw Circuit Court

LC No. 96-012703 FC

Before: Cavanagh, P.J., and Markman and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of first-degree murder,¹ MCL 750.316(1); MSA 28.548(1), one count of first-degree criminal sexual conduct (CSC I),² MCL 750.520b(1); MSA 28.788(2)(1), one count of conspiracy to commit armed robbery, MCL 750.157a; MSA 28.354(1) and MCL 750.529; MSA 28.797, one count of armed robbery, MCL 750.529; MSA 28.797, one count of first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2), one count of carrying a dangerous weapon with unlawful intent, MCL 750.226; MSA 28.423, and one count of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b(1); MSA 28.424(2)(1). Defendant was sentenced to a term of two years' imprisonment for the felony-firearm conviction, such sentence to be followed consecutively by concurrent terms of life in prison without parole for the murder convictions, life in prison for the conspiracy, armed robbery and CSC I convictions, ten to twenty years' imprisonment for the home invasion conviction, and three to five years' imprisonment for the carrying a dangerous weapon conviction. Defendant appeals as of right. We affirm.

In 1996, defendant and Eric Braddock perpetrated armed robbery on the inhabitants of a residence. During the robbery, defendant perpetrated CSC I on one of the female inhabitants. Almost immediately after fleeing the resident, defendant and Braddock encountered Jermaine Youngblood in a field and robbed him. When Youngblood indicated that he knew defendant, defendant killed Youngblood. Shortly thereafter defendant killed Braddock.

Defendant first argues that he had a right to separate murder trials because the killings were not either part of the "same conduct" or a "series of acts connected together or constituting parts of a single scheme or plan." Defendant contends that the failure to have separate murder trials thus denied him a

right to a fair trial. However, defendant concedes that he did not move for separate trials or otherwise make any sort of objection on this ground below. Thus, defendant has failed to preserve this issue for appeal. *People v Green*, 228 Mich App 684, 690-691; 580 NW2d 444 (1998). Accordingly, we will review this issue only if necessary to avoid manifest injustice. *Id.*

Defendant's argument implicates MCR 6.120(B), which provides as follows:

On the defendant's motion, the court must sever unrelated offenses for separate trials. For purposes of this rule, two offenses are related if they are based on

(1) the same conduct, or

(2) a series of connected acts or acts constituting part of a single scheme or plan.

As explained in *People v Tobey*, 401 Mich 141, 151-152; 257 NW2d 537 (1977):

"A series of acts connected together" refers to multiple offenses committed "to aid in accomplishing another, as with burglary and larceny or kidnapping and robbery." "A series of acts . . . constituting parts of a single scheme or plan" refers to a situation "where a cashier made a series of false entries and reports to the commissioner of banking, all of which were designed to conceal his thefts of money from the bank."

In this case, the killing of Youngblood aided the robbery of Youngblood while the killing of Braddock aided the killing and robbery of Youngblood. Alternatively, the killing of Youngblood was designed to conceal the robbery of Youngblood while the killing of Braddock was designed to conceal defendant's entire crime spree, including the robbery and killing of Youngblood. We conclude therefore that defendant had no right to separate murder trials. MCR 6.120(B)(2); *Toby, supra*. Thus, with respect to the first argument raised on appeal by defendant, we find no manifest injustice.

Next, defendant contends that the failure of his attorney to move for separate murder trials constituted ineffective assistance of counsel. However, as previously discussed, defendant had no right to separate murder trials under MCR 6.120(B). Under MCR 6.120(C), a trial court may sever offenses for separate trials under certain circumstances. However, the decision to do so is left to the trial court's discretion. *People v Duranseau*, 221 Mich App 204, 208; 561 NW2d 111 (1997). In this case, even if defense counsel had moved for separate murder trials, we cannot say that the trial court would have granted the motion. Thus, where defendant had no right to separate murder trials and we cannot say that the trial would have granted a motion for separate trials had defense counsel made such a motion, we conclude that defendant has failed to establish either that counsel's failure to move for separate murder trials constituted error or, assuming error, that such error prejudiced defendant. *People v Harris*, 201 Mich App 147, 154; 505 NW2d 889 (1993). Accordingly, we conclude that defendant has failed to establish that he was denied the effective assistance of counsel.

Finally, defendant argues that he was denied a fair trial when he was shackled toward the end of the trial. However, during trial defendant instigated a verbal altercation with a witness during which

defendant used profanity, shouted at and threatened to kill the witness. Defendant then threatened to kill a spectator in the courtroom. In light of these facts, we conclude that the trial court's decision that shackling defendant was necessary to maintain an orderly trial was not an abuse of discretion. *People v Dixon*, 217 Mich App 400, 404-405; 552 NW2d 663 (1996).

Affirmed.

/s/ Mark J. Cavanagh

/s/ Stephen J. Markman

/s/ Michael R. Smolenski

¹ One first-degree murder conviction was supported by two theories: (1) premeditated murder and (2) felony murder. MCL 750.316(1)(a) and (b); MSA 28.548(1)(a) and (b). The other first-degree murder conviction was supported by the single theory of premeditated murder. MCL 750.316(1)(a); MSA 28.548(1)(a).

² The CSC I count was supported by two theories: (1) that defendant engaged in sexual penetration with another person under circumstances involving the commission of another felony and (2) that defendant engaged in sexual penetration with another person while armed with a weapon. MCL 750.520b(1)(c) and (e); MSA 28.788(2)(1)(c) and (e).