

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DIARRA BRYANT,

Defendant-Appellant.

UNPUBLISHED
October 29, 1999

No. 203312
Recorder's Court
LC No. 96-001846

Before: Collins, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for felony murder, MCL 750.316; MSA 28.548, assault with intent to rob while armed, MCL 750.89; MSA 28.284, armed robbery, MCL 750.529; MSA 28.797, kidnapping, MCL 750.349; MSA 28.581, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to life imprisonment for the felony murder and kidnapping convictions, twenty to sixty years' imprisonment for the assault with intent to rob while armed and armed robbery convictions, which are to be served concurrently with the life sentences, but consecutive to two years' imprisonment for the felony-firearm conviction. We affirm, but remand for the trial court to vacate defendant's conviction and sentence for kidnapping.

Defendant first argues that there was insufficient evidence to support his felony-murder conviction. We disagree. "In reviewing the sufficiency of the evidence presented at trial in a criminal case, we view the evidence in a light most favorable to the prosecution and determine whether a rational factfinder could conclude that the essential elements of the crime were proved beyond a reasonable doubt." *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

In *People v Kelly*, 231 Mich App 627, 642-642; 588 NW2d 480 (1998), this Court set forth the elements of felony murder as

(1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or

assisting in the commission of any of the felonies specifically numerated in MCL 750.316; MSA 28.548.

The murder need not be committed contemporaneously with the enumerated felony. Rather, the defendant must intend to commit the underlying felony at the time of the homicide. *Id.* Defendant contends that the reason for the killing of Robert Allen was a mystery. In *Kelly*, the sister of the victim noticed that the victim's vehicle was missing. The victim's sister entered the home and discovered the victim's mutilated body. Telephone lines to the home had been cut. A compact disc player and discs were missing from the home. Four men were found driving the victim's vehicle. The driver told police that the defendant had loaned them the vehicle. Shortly after the killing, the defendant had approached potential buyers for the stolen property. This Court held that the above factual circumstances were sufficient for a reasonable jury to conclude that the defendant formed the intent to steal the victim's property before or at the time of the actual killing. *Kelly, supra*, 231 Mich App 643.

Examining the evidence in the light most favorable to the prosecution, defendant telephoned McKinley Allen and asked him to purchase drugs from defendant. The drugs would be provided in advance of payment, provided that McKinley Allen pay defendant interest on the advance of drugs. McKinley Allen refused. Shortly thereafter, defendant and Jon Turnbore appeared at the Allens' apartment. In a bedroom of the apartment, defendant proposed the drug transaction to McKinley Allen a second time. McKinley Allen refused. Defendant acted as if he was departing from the Allens' apartment when he turned and shot Robert Allen in the back of the head. Defendant then searched Robert Allen's pockets and retrieved a set of car keys. Once the keys were obtained, McKinley Allen was forced to sign over title to his vehicle to defendant. Admittedly, the request for money was made to McKinley Allen only. However, the factual circumstances indicate that defendant intended to obtain money from the Allens. Unable to voluntarily obtain money, one could infer that defendant shot Robert Allen in an attempt to obtain money and/or property from Robert Allen and to extort money and/or property from McKinley Allen. A reasonable jury could conclude that defendant formulated the intent to steal money or property from either Allen brother before or at the time of the killing. *Kelly, supra*, 231 Mich App 643.

Defendant next argues that the trial court erred in failing to provide a specific unanimity instruction. We disagree. Defendant did not object to the jury instructions given at trial, thereby failing to preserve this issue for appellate review. *People v Paquette*, 214 Mich App 336, 339; 543 NW2d 342 (1995). Accordingly, appellate review is waived absent manifest injustice. *Id.* "We read jury instructions in their entirety to determine if error occurred requiring reversal. Instructions which are somewhat imperfect are acceptable, so long as they fairly present to the jury the issues to be tried and sufficiently protect the rights of the defendant." *People v Gaydosh*, 203 Mich App 235, 237; 512 NW2d 65 (1994).

Defendant's rights were not violated as a result of the failure to provide the jury with a specific unanimity instruction because the charged offenses occurred in a continuous transaction such that the acts were not materially distinct and did not require distinct proofs or defenses. *People v Cooks*, 446 Mich 503; 521 NW2d 275 (1994)

Lastly, defendant contends that his double jeopardy rights were violated when he was convicted and sentenced for both the predicate felony and felony murder. When a defendant is convicted of both felony murder and the predicate felony, the appropriate remedy to preclude a double jeopardy violation is to vacate the conviction and sentence for the underlying felony. *People v Bigelow*, 229 Mich App 218, 221-222; 581 NW2d 744 (1998); *People v Gimotty*, 216 Mich App 254, 259-260; 549 NW2d 39 (1996). In *People v Biegajski*, 122 Mich App 215; 228-229; 332 NW2d 413 (1982), the trial court instructed the jury, but failed to separate the acts which constitute child cruelty from torture. Accordingly, on appeal, it was impossible to determine whether the jury returned a guilty verdict on the child cruelty charge based on torture or other acts. The trial court held that it was proper to vacate the defendant's conviction and sentence for child cruelty, while the convictions and sentences for criminal sexual conduct and child torture were affirmed. *Id.*

In the case at bar, we could perhaps remedy the problem merely by setting aside the kidnapping conviction. That conviction carried the highest penalty of the underlying felonies. It also represents the charge on which the jury expressed some confusion on whether it was only to consider the charge as a predicate felony to the felony-murder charge. In any event, the prosecutor's brief concedes that the "underlying felonies" must be set aside. Therefore, there should be no objection if we set aside the assault, robbery and kidnapping convictions. Thus, we are assured that the offense that the jury concluded was the predicate felony is, in fact, set aside. Ultimately, defendant still faces life in prison without parole.

Affirmed and remanded for the trial court to vacate the convictions and sentences for kidnapping, assault and robbery. We do not retain jurisdiction.

/s/ Jeffrey G. Collins

/s/ David H. Sawyer