

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UNPUBLISHED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.

CAVANAGH, J. (*concurring*).

I agree with the majority that there was sufficient evidence to support defendant's conviction of first-degree felony murder, MCL 750.316; MSA 28.548, and that defendant's rights were violated by convictions for both felony murder and the predicate felony. However, I respectfully disagree with the majority's conclusion that defendant was not entitled to a specific unanimity instruction. Nevertheless, because I conclude that the error was harmless, I concur in the result reached by the majority.

In *People v Cooks*, 446 Mich 503, 530; 521 NW2d 275 (1994), the Supreme Court held that "when the state offers evidence of multiple acts by a defendant, each of which would satisfy the actus reus element of a single charged offense, the trial court is required to instruct the jury that it must unanimously agree on the same specific act if the acts are materially distinct or if there is reason to believe that the jurors may be confused or disagree about the factual basis of the defendant's guilt."

In the instant case, the predicate felonies for the felony murder charge were kidnapping, armed robbery, and larceny. Unlike the multiple instances of sexual assault in *Cooks*, the acts alleged for kidnapping and robbery/larceny are materially distinct. Accordingly, the trial court should have given a unanimity instruction. Cf. *People v Yarger*, 193 Mich App 532, 536-537; 485 NW2d 119 (1992) (holding that the trial court erred by not providing a unanimity instruction where evidence of both fellatio and vaginal rape was presented because the jury could have found the defendant guilty of a single count of third-degree criminal sexual conduct without agreeing unanimously which sexual act occurred).

However, defendant did not request a unanimity instruction. Thus, this Court should reverse only if defendant establishes that he was prejudiced by the error or that the error seriously affected the

fairness, integrity, or public reputation of judicial proceedings. See *People v Carines*, 460 Mich 750, 773; 597 NW2d 130 (1999). Here, the error was harmless because the jury unanimously convicted defendant of both kidnapping and armed robbery. Under the facts of this case, the jury could not reasonably have found that the killing was entirely separate from the kidnapping and armed robbery. Thus, there is no possibility that some jurors voted to convict defendant of felony murder because they believed that he had committed an armed robbery but not a kidnapping, while other jurors voted to convict because they believed that he was guilty of kidnapping but not armed robbery. Accordingly, I concur in the result reached by the majority.

/s/ Mark J. Cavanagh