STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 14, 2009
v DEMITRAY LASHONE HODGE, Defendant-Appellant.	No. 279405 Genesee Circuit Court LC No. 06-018532-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v SHERMAN MARTINEZ BUGGS, Defendant-Appellant.	No. 279550 Genesee Circuit Court LC No. 06-018533-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v JERRY O'KEITH WALKER, Defendant-Appellant.	No. 279715 Genesee Circuit Court LC No. 06-018545-FC

Before: Murphy, P.J., and Sawyer and Whitbeck, JJ.

WHITBECK, J. (*concurring in part and dissenting in part*).

The majority concludes that joinder of trials for the Wedlow and Vondrasek murders was appropriate in this case based on its conclusion that the offenses were "related," as MCR 6.120(B) defines that term. I respectfully dissent. I would reluctantly reverse the convictions of

Jerry Walker and Sherman Buggs and remand for new separate trials on the Wedlow and Vondrasek murders. I concur in result only with the remainder of the majority's opinion.

I. Basic Facts And Procedural History

As stated in the majority opinion, the trial court joined for trial crimes that occurred at Green and Catherine Wedlow's home and crimes that occurred at Robert Vondrasek's home. The facts presented at trial established that on January 27, 2006, 74-year-old Catherine Wedlow and her husband, 75-year-old Green Wedlow, were found shot to death in their home. The front door had been forced open and various items were taken from the home. The weapon used during the incident was a .22 caliber revolver. On January 30, 2006, 75-year-old Robert Vondrasek was found dead in his home, which had been set on fire. Testimony revealed that the codefendants robbed Vondrasek and stole his car. Vondrasek's body was severely burned and his throat was cut. The medical examiner indicated that Vondrasek also had a fractured skull from a blunt force object and had multiple stab wounds from several knives, which were still in his back when he was found. Police also found a note that was signed, ".22 Caliber Killerz."

Walker was charged with 25 counts related to the Wedlow and Vondrasek incidents: three counts of first-degree premeditated murder,[1] two counts of conspiracy to commit first-degree premeditated murder,[2] three counts of first-degree felony murder,[3] three counts of armed robbery,[4] two counts of conspiracy to commit armed robbery,[5] two counts of first-degree home invasion,[6] two counts of conspiracy to commit first-degree home invasion,[7] two counts of carrying a concealed weapon,[8] two counts of felony-firearm,[9] one count of carjacking,[10] one count of conspiracy to commit carjacking,[11] one count of arson of a dwelling house,[12] and one count of conspiracy to commit arson of a dwelling house.[13]

---

[1] MCL 750.316(1)(a).

[2] MCL 750.157a; MCL 750.316(1)(a).

[3] MCL 750.316(1)(b).

[4] MCL 750.529.

[5] MCL 750.157a; MCL 750.529.

[6] MCL 750.110a(2).

[7] MCL 750.157a; MCL 750.110a(2).

[8] MCL 750.227.

[9] MCL 750.227b.

[10] MCL 750.529a.

[11] MCL 750.157a; MCL 750.529a.

[12] MCL 750.72.

[13] MCL 750.157a; MCL 750.72.

Buggs was charged with 27 counts related to the Wedlow and Vondrasek incidents: three counts of first-degree premeditated murder,[14] three counts of first-degree felony murder,[15] two counts of conspiracy to commit first-degree murder,[16] three counts of armed robbery,[17] two counts of conspiracy to commit armed robbery,[18] two counts of first-degree home invasion,[19] two counts of conspiracy to commit home invasion,[20] two counts of carrying a concealed weapon,[21] two counts of felon in possession of a firearm,[22] two counts of felony-firearm,[23] one count of carjacking,[24] one count of conspiracy to commit carjacking,[25] one count of arson of a dwelling house,[26] and one count of conspiracy to commit arson of a dwelling house.[27]

Walker and Buggs each moved for separate trials on the charges against them with regard to the two incidents; that is, they argued that the charges for the Wedlow murders should have been tried separately from the charges for the Vondrasek murder. With regard to Buggs's motion, the trial court ruled as follows:

> Buggs has asked for separate trials dealing with each of the allegations (grouped by victim) against him. As such, he desires one trial on the Wedlow allegations, [and] another trial on the Vondrasek allegations . . . . Determination of his request is controlled by MCR 6.120 and MCR 6.121[28] as well as cases interpreting these rules.
>
> As a threshold to the determination of Buggs' request, the Court first notes that the Court has already ordered separate juries for defendants. This, in essence,

---

[14] MCL 750.316(1)(a).

[15] MCL 750.316(1)(b).

[16] MCL 750.157a; MCL 750.316(1)(a).

[17] MCL 750.529.

[18] MCL 750.157a; MCL 750.529.

[19] MCL 750.110a(2).

[20] MCL 750.157a; MCL 750.110a(2).

[21] MCL 750.227.

[22] MCL 750.224f.

[23] MCL 750.227b.

[24] MCL 750.529a.

[25] MCL 750.157a; MCL 750.529a.

[26] MCL 750.72.

[27] MCL 750.157a; MCL 750.72.

[28] MCR 6.121 is not at issue in this appeal because Walker and Buggs are not here challenging the joinder of their trials with each other.

> is a form of severance designed to minimize or eliminate prejudice by tailoring the evidence each jury is to hear.
>
> Against this backdrop, the Court will determine Buggs' request.
>
> * * *
>
> In [the Wedlow and Vondrasek] matters, Buggs faces like charges, the People's theory is similar, the case facts are marked by similarity, witnesses are the same and/or overlap, and Buggs' defense is the same: alibi. Moreover, the Court has ruled earlier in this opinion that the evidence in each matter may be used as proof in the other matter under MRE 404(b) based to some degree on their similarities which led the Court to conclude Buggs was part of a common plan or scheme to rob and kill elderly people. The Court seeks [sic] little prejudice flowing to Buggs by allowing his own jury to pass on all charges involved regarding the Wedlows and Vondrasek. *People v Hanna* [sic], 447 Mich 325, 346 and 351 (1999).

Regarding Walker's motion, the trial court ruled as follows:

> [T]he Court is unpersuaded by Walker's request for separation of the counts in his information based on the different victims. This is especially so given the Court's previous determination as to the connections between those crimes. Moreover, the Court has heard no persuasive argument from Walker that his own jury will insufficiently address any perceived prejudice by any claimed inconsistent or mutually exclusive defenses,[18] contended to be irreconcilable.
>
> [18] While the Court is concerned that Buggs' alibi defense and Walker's duress defense would seem irreconcilably at odds, Walker does not suggest how separate juries will not solve this problem, as countenanced by *Hanna* [sic]. See also *People v Smith*, unpublished Court of Appeals opinion, released May 13, 2003, No. 231336.

The jury convicted Walker of four counts of second-degree murder,[29] two counts of conspiracy to commit first-degree premeditated murder,[30] one count of first-degree premeditated murder,[31] three counts of armed robbery,[32] two counts of conspiracy to commit armed robbery,[33] two counts of first-degree home invasion,[34] two counts of conspiracy to commit first-degree

[29] MCL 750.317.

[30] MCL 750.157a; MCL 750.316(1)(a).

[31] MCL 750.316(1)(a).

[32] MCL 750.529.

[33] MCL 750.157a; MCL 750.529.

[34] MCL 750.110a(2).

home invasion,[35] one count of first-degree felony murder,[36] one count of arson of a dwelling house,[37] and one count of carrying a concealed weapon.[38] The trial court sentenced Walker to 30 to 50 years for the four counts of second-degree murder, life without parole for the two counts of conspiracy to commit first-degree premeditated murder, 15 to 30 years for the three counts of armed robbery, 15 to 30 years for the two counts of conspiracy to commit armed robbery, three to 20 years for the two counts of first-degree home invasion, five to 20 years for the two counts of conspiracy to commit home invasion, life without parole for the one count of first-degree premeditated murder, life without parole for the one count of first-degree felony murder, five to 20 years for the one count of arson of a dwelling house, and nine months to five years for the one count of carrying a concealed weapon.

The jury convicted Buggs of three counts of first-degree premeditated murder,[39] three counts of first-degree felony murder,[40] two counts of conspiracy to commit first-degree murder,[41] three counts of armed robbery,[42] two counts of conspiracy to commit armed robbery,[43] two counts of first-degree home invasion,[44] two counts of conspiracy to commit home invasion,[45] three counts of carrying a concealed weapon,[46] one count of felon in possession of a firearm,[47] one count of felony-firearm,[48] one count of carjacking,[49] one count of conspiracy to commit carjacking,[50] and one count of arson of a dwelling house.[51] The trial court found Buggs to be a habitual offender second offense.[52] The trial court sentenced Buggs to life without parole for the six counts of first-degree murder, life without parole for the two counts of conspiracy to commit

---

[35] MCL 750.157a; MCL 750.110a(2).

[36] MCL 750.316(1)(b).

[37] MCL 750.72.

[38] MCL 750.227.

[39] MCL 750.316(1)(a).

[40] MCL 750.316(1)(b).

[41] MCL 750.157a; MCL 750.316(1)(a).

[42] MCL 750.529.

[43] MCL 750.157a; MCL 750.529.

[44] MCL 750.110a(2).

[45] MCL 750.157a; MCL 750.110a(2).

[46] MCL 750.227.

[47] MCL 750.224f.

[48] MCL 750.227b.

[49] MCL 750.529a.

[50] MCL 750.157a; MCL 750.529a.

[51] MCL 750.72.

[52] MCL 769.11.

first-degree murder, 45 to 80 years for the three counts of armed robbery, 45 to 80 years for the two counts of conspiracy to commit armed robbery, 20 to 40 years for the two counts of first-degree home invasion, 20 to 40 years for the two counts of conspiracy to commit home invasion, three to ten years for the three counts of carrying a concealed weapon, three to ten years for the one count of felon in possession of a firearm, 40 to 60 years for the one count of carjacking, 40 to 60 years for the one count of conspiracy to commit carjacking, and 20 to 40 years for the one count of arson of a dwelling house, all consecutive to two years for the one count of felony-firearm.

Walker and Buggs then brought their respective appeals, which this Court consolidated.

II. The Motions To Sever Of Walker And Buggs

A. Standard Of Review

As the majority states, in *People v Duranseau*,[53] this Court indicated that we review the trial court's ultimate ruling on a motion to sever for an abuse of discretion. However, that standard applies when, as in *Duranseau*, the trial court's decision is made under the obviously discretionary severance subsection of the court rule.[54] If the offenses are not "related" and have been joined for trial *solely* on the ground that they are of the "same or similar character," then severance is mandatory and the trial judge has no discretion to deny the request.[55] Whether a defendant's charges are related is a question of law that this Court reviews de novo.[56]

B. The Parties' Arguments

1. The Arguments Of Walker and Buggs

Walker and Buggs argue that the trial court should not have joined together the charges stemming from the Wedlow murders in a single trial with the charges stemming from the Vondrasek murder because the two incidents were not related within the meaning of MCR

---

[53] *People v Duranseau*, 221 Mich App 204, 208; 561 NW2d 111 (1997).

[54] MCR 6.120(B), formerly MCR 6.120(C) (stating that the court *may* sever offenses when appropriate). See *People v Abraham*, 256 Mich App 265, 272 n 4; 662 NW2d 836 (2003) (noting discretionary nature of severance under former MCR 6.120[C]). But see *People v Girard*, 269 Mich App 15, 17; 709 NW2d 229 (2005) (citing *Duranseau* abuse of discretion standard, but applying pre-amendment version of MCR 6.120[B], which stated that the court *must* sever unrelated offenses).

[55] MCR 6.120(C); *People v Tobey*, 401 Mich 141, 153 n 17; 257 NW2d 537 (1977); see also *People v Beets*, 105 Mich App 350, 353; 206 NW2d 508 (1981), citing *Tobey*, *supra* at 153 (noting that "[s]everance is not a matter within the trial court's discretion" when the offenses are joined solely because they are of the same or similar character).

[56] *Associated Builders & Contractors v Wilbur*, 472 Mich 117, 123; 693 NW2d 374 (2005) (stating that the interpretation and application of court rules presents a question of law that is reviewed de novo); see *Tobey*, *supra* at 153.

6.120(B)(1). More specifically, they argue that, although the two incidents were similar in nature and involved the same defendants, they were not the "same conduct" because each offense was completely concluded before the other was initiated and one incident involved a shooting and the other involved a stabbing and arson; they were not "connected" because there was no indication that the Wedlow murder was committed to facilitate or accomplish the Vondrasek murder; and they were not part of a "single scheme or plan" because there was no evidence that the two incidents were committed to contribute to a common goal not attainable by commission of either incident alone. According to Walker and Buggs, although they were involved in both incidents, the offenses were two separate and distinct occurrences that took place on different days and in different locations and, thus, were not "related" under MCR 6.120(B). They further contend that if separate juries had been presented with each incident, then more probably than not the outcome would have been different.

Walker additionally argues that the sheer number of counts, many of which were repetitive, inherently had a negative impact on the jury and likely caused them to convict him of all the offenses by reasoning that if he participated in one incident, then he must have participated in the other.

Buggs additionally argues that the trial court erred in its ruling because it did not properly adhere to the standards provided in MCR 6.120(B) when determining whether the two incidents were related. Buggs also points out that, contrary to the trial court's ruling, this Court has previously rejected the argument that mandatory severance is not necessary when the charged acts would nevertheless be admissible under MRE 404(b).[57]

2. The Prosecution's Argument

The prosecution argues that the trial court properly joined all the charges listed in the informations for Walker and Buggs for trial. According to the prosecution, the trial court properly found that the Wedlow and Vondrasek crimes involved "a like theory of prosecution and [were] marked by similar witnesses and defense claims." Moreover, according to the prosecution, the trial court properly found that the two incidents were connected and part of a common plan or scheme to rob and kill elderly people because they occurred only several days apart, and both involved conspiracies to commit home invasions, armed robbery, and homicides of elderly people. Additionally, the prosecution points out, the Wedlows were killed with a .22 caliber revolver and a note was found at the Vondrasek home identifying the murderers as the ".22 Caliber Killerz." Accordingly, the prosecution argues that the Wedlow and Vondrasek crimes "were of sufficient similarity in character, and involved substantial overlap justifying the trial court's order of joinder."[58]

---

[57] See *People v Daughenbaugh*, 193 Mich App 506, 511; 484 NW2d 690 (1992).

[58] I note that, in support of its argument, the prosecution relies on *People v Seaton*, 106 Mich App 234, 237; 307 NW2d 234 (1981) and *People v Missouri*, 100 Mich App 310; 299 NW2d 346 (1980) to argue that consolidation of charges was proper in this case. However, those two cases preceded adoption of MCR 6.120 and failed to consider *Tobey* or the ABA standards adopted by *Tobey*. Thus, the analyses in those cases are inapplicable to the present analysis.

C. MCR 6.120

MCR 6.120, which governs joinder and severance of charges against a single defendant, provides:

> (A) Charging Joinder. The prosecuting attorney may file an information or indictment that charges a single defendant with any two or more offenses. Each offense must be stated in a separate count. Two or more informations or indictments against a single defendant may be consolidated for a single trial.
>
> (B) Postcharging Permissive Joinder or Severance. On its own initiative, the motion of a party, or the stipulation of all parties, except as provided in subrule (C), the court may join offenses charged in two or more informations or indictments against a single defendant, or sever offenses charged in a single information or indictment against a single defendant, when appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense.
>
> (1) Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on
>
> (a) the same conduct or transaction, or
>
> (b) a series of connected acts, or
>
> (c) a series of acts constituting parts of a single scheme or plan.
>
> (2) Other relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties' readiness for trial.
>
> (3) If the court acts on its own initiative, it must provide the parties an opportunity to be heard.
>
> (C) Right of Severance; Unrelated Offenses. On the defendant's motion, the court must sever for separate trials offenses that are not related as defined in subrule(B)(1).

According to the 1989 staff comment to MCR 6.120, former subrule (B) (now subrule [C]), "pertains to the defendant's *unqualified* right to severance of unrelated offenses."[59] The staff comment then continues, stating that the standard for the subrule,

[59] Emphasis added.

> defining when two offenses "are related," is derived from ABA Standard 13—1.2, and a predecessor standard, ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Joinder and Severance (Approved Draft, 1968), Standard 1.1. Elaboration on this standard may be found in *People v Tobey*, 401 Mich 141 (1977).

D. *People v Tobey* And Its Progeny

1. *People v Tobey*

As stated by its staff comment, MCR 6.120 is a codification of the Michigan Supreme Court's decision in *People v Tobey*.[60] In *Tobey*, the Court held that the defendant was entitled to separate trials on charges related to two heroin sales that he made to the same undercover police agent 12 days apart.[61] In reaching this decision, the Court adopted the ABA Standards Relating to Joinder and Severance. Under those standards, joinder of offenses is permitted when the offenses are "'of the same or similar character,'" or "'based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.'"[62] However, according to the ABA standards, when offenses are joined "'solely on the ground that they are of the same or similar character, the defendant shall have a right to a severance of the offenses.'"[63] Thus, the *Tobey* Court held that if offenses are "not the 'same conduct,' or 'a series of acts connected together,' or 'a series of acts * * * constituting parts of a single scheme or plan,'" then severance of the offenses is required.[64] In other words, according to the Court,

> a judge *must* sever two or more offenses when the offenses have been joined for trial *solely* on the ground that they are of the "same or similar character" and the defendant files a timely motion for severance objecting to the joinder; and *a judge has no discretion to permit the joinder* for trial of separate offenses committed at

---

[60] *Tobey, supra*. See *Daughenbaugh, supra* at 509.

[61] *Tobey, supra* at 144, 145.

[62] *Id*. at 150, quoting ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Joinder and Severance (Approved Draft, 1968), Standard 1.1, which states:

> Two or more offenses may be joined in one charge, with each offense stated in a separate count, when the offenses, whether felonies or misdemeanors or both:
>
> (a) are of the same or similar character, even if not part of a single scheme or plan; or
>
> (b) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

[63] *Id*. at 151, quoting ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Joinder and Severance (Approved Draft, 1968), Standard 2.2(a), which states, "Whenever two or more offenses have been joined for trial solely on the ground that they are of the same or similar character, the defendant shall have a right to a severance of the offenses."

[64] *Id*.

> different times *unless* the offenses "are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan."[65]

Stressing the mandatory nature of severance when the necessary standard is met, the Court added:

> "[N]o man should be prejudiced in this manner when on trial for a capital offense. He has a right to be warned by the complaint and warrant of what he is accused, and ought not to be convicted of two different crimes, committed at different times, under one information, with the evidence of each confounded as a whole, and used indiscriminately to convict him of both. Such a proceeding violates every principle of justice, and places him at the mercy of the prosecutor; and, as, in this case, evidence not competent to prove one of the offenses, but admissible as to the other, is used to establish both crimes. Such a trial must necessarily be an unfair and illegal one."[66]

To illustrate circumstances under which joinder would be permissible, the Court cited several examples taken from the commentary to the ABA Standards Relating to Joinder and Severance:

> "[S]ame conduct" refers to multiple offenses "as where a defendant causes more than one death by reckless operation of a vehicle." "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."[67]

---

[65] *Id*. at 153, quoting ABA Standards Relating to Joinder and Severance, Standard 1.1 (emphasis added). See also *People v Thompson*, 410 Mich 66, 70-71; 299 NW2d 343 (1980) (noting importance of defense motion to sever); *People v Hill*, 402 Mich 272, 282; 262 NW2d 641 (1978) (noting a defendant's "right to separate trials"); *People v Smith*, 119 Mich App 431, 433-434; 326 NW2d 533 (1982) (stating that joinder may have been improper under *Tobey* but noting that the defendant did not directly object to joinder, but merely the premise for the joinder); *People v Smith*, 90 Mich App 20, 26-27; 282 NW2d 227 (1979) (noting that failure to request severance may be matter of trial strategy); *People v Ritchie*, 85 Mich App 463, 468; 271 NW2d 276 (1978) (concluding that joinder was improper).

[66] *Tobey*, *supra* at 153-154, quoting *People v Aikin*, 66 Mich 460, 472; 33 NW 821 (1887). See also *Beets*, *supra* at 353-354 (quoting *Aikin*, and concluding that the "[d]efendant had a right to severance. The trial court erred in denying his motion to sever and we are unable to find this error harmless.").

[67] *Tobey*, *supra* at 151, quoting ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Joinder and Severance (Approved Draft, 1968), Commentary to Standard 1.1(b), pp 12-13, which states:

> Thus, joinder is clearly allowed for offenses arising out of the same conduct, as where a defendant causes more than one death by reckless operation of a vehicle. . . . Joinder is allowed of offenses within a close time-space sequence, as with the killing of several people with successive shots from a gun or the successive

(continued…)

The Court added that another example of a "series of acts connected together" would be where "a person were to escape prison, steal an automobile and take hostages[.]"[68] Further, according to the ABA standards,

> "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[.]"[69]

Applying the ABA standards to the defendant, the Court then concluded that the two heroin sales, although "substantially similar conduct" of a "same or similar character," were not the "same conduct" because they transpired on two different dates.[70] The Court also concluded that the sales were not "a series of acts connected together" because, although they involved the same seller and buyer, they did not occur out of substantially the same transaction where proof of the acts committed was essential to a conviction on each of the counts, or out of a series of connected events committed to aid in accomplishing another.[71] Finally, the Court concluded that the sales were not "a series of acts constituting parts of a single scheme or plan" because, again, although the sales involved the same seller and buyer, there was no evidence of any scheme or

---

(…continued)

> burning of several structures, *e.g.*, *Scott v State*, 211 Wis 548; 248 NW 473 (1933). The same is true where one offense is committed to aid in accomplishing another, as with burglary and larceny or kidnapping and robbery, *e.g.*, *People v Koblitz*, 401 Ill 224; 81 NE2d 881 (1948).

See also *People v Burnett*, 166 Mich App 741, 752-753; 421 NW2d 278 (1988) (finding that even if counsel had made proper motion, severance was unlikely when the offenses occurred in succession and appear to have been prompted by the defendant's intent to retaliate against those who had allegedly disrespected him); *People v Solak*, 146 Mich App 659, 666-667; 382 NW2d 495 (1985) (no error in denying severance where the defendant hit a police officer while the officer was attempting to cite him for drunk driving); *People v Loukas*, 104 Mich App 204, 208; 304 NW2d 532 (1981) (holding that charges of reckless driving and resisting arrest were based on the same conduct because the defendant's driving was an act of recklessness at the same time that it constituted the method by which the defendant resisted arrest).

[68] *Tobey, supra* at 152.

[69] *Id*. at 151-152, quoting ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Joinder and Severance (Approved Draft, 1968), Commentary to Standard 1.1(b), pp 12-13, which states:

> Finally, joinder is allowed for offenses which are part of a single scheme, even if considerable time passes between them. Illustrative is *Ruth v State*, 140 Wis 373; 122 NW 733 (1909), 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.

[70] *Id*. at 149, 152.

[71] *Id*. at 152, citing *People v Johns*, 336 Mich 617; 59 NW2d 20 (1953).

plan for the defendant to make continuing sales to the officer.[72] The Court held that, for joinder purposes, "each sale is separate conduct, a separate act and transaction, and . . . a separate and distinct criminal offense."[73] Accordingly, because the only basis for joining the two offenses was that they were merely of the same or similar character, the Court concluded that the defendant had a right to severance of the charges.[74] Because the charges were not severed, the Court reversed the convictions and remanded the case for further proceedings.[75]

2. *People v McCune*

In *People v McCune*,[76] this Court relied on a revised version of the ABA standards to hold that joinder was proper against a defendant who was charged with 12 felonies arising out of five separate conspiracies and robberies. In a unique twist,[77] the defendant, a police officer, claimed that the charges should all be joined because they were all part of a common scheme or plan in which he was involved in the robberies of drug houses as an undercover agent seeking to gain information regarding drug activity for the benefit of the Grand Rapids Police Department.[78] In analyzing whether joinder was appropriate, like the *Tobey* Court, this Court first turned to the ABA Standards Relating to Joinder and Severance, which had been updated since the release of *Tobey*.[79] Under the current version of the ABA Standards, "Two or more offenses are related offenses if they are based upon the same conduct, upon a single criminal episode, or upon a common plan."[80] Unrelated offenses are those that are "not 'related.'"[81] This Court then briefly concluded that because the charges against the defendant were clearly not based on the same conduct or a single criminal episode, the salient question was whether they were part of a common plan.[82] This Court then turned to the commentary on ABA Standard 13—1.2 for further guidance on the types of situations that would constitute a "common plan":

---

[72] *Id*. at 153.

[73] *Id*. at 149.

[74] *Id*. at 151, 153.

[75] *Id.* at 154.

[76] *People v McCune*, 125 Mich App 100, 101; 336 NW2d 11 (1983) (internal quotation marks and citation omitted).

[77] See *id*. at 104 (noting that "[t]he vast majority of cases involving joinder and severance questions involve instances in which offense have been joined because of the prosecution's assertion that they were part of a common plan, to which the defendant objects.").

[78] *Id*. at 102.

[79] *Id*.

[80] *Id*. at 103, quoting American Bar Association Standards for Criminal Justice (2d ed), Joinder and Severance, Standard 13—1.2.

[81] *Id*., quoting American Bar Association Standards for Criminal Justice (2d ed), Joinder and Severance, Standard 13—1.3.

[82] *Id*.

> Common plan offenses are the most troublesome class of related offenses. These offenses involve neither common conduct nor interrelated proof. Instead, the relationship among offenses (which can be physically and temporally remote) is dependent upon the existence of a plan that ties the offenses together and demonstrates that the objective of each offense was to contribute to the achievement of a goal not attainable by the commission of any of the individual offenses. A typical example of common plan offenses is a series of separate offenses that are committed pursuant to a conspiracy among two or more defendants. Common plan offenses may also be committed by a defendant acting alone who commits two or more offenses in order to achieve a unified goal.[83]

This Court then concluded that the charges against the defendant were "related" based on the defendant's defense theory of a common plan.[84]

3. *People v Daughenbaugh*

In *People v Daughenbaugh*,[85] this Court was again able to consider the issue of joinder under the recently adopted joinder court rule[86] and hold that the defendant was entitled to separate trials on four armed robberies, which involved three different victims. The first of the four incidents occurred on July 4, 1988, when the defendant robbed a woman while she was working at a party store.[87] The second and third incidents occurred on July 17 and 22, 1988, when the defendant twice robbed a woman at the same gas station.[88] The fourth incident occurred on September 27, 1988, when the defendant robbed a man at an automotive store.[89] Although the defendant was dubbed the "Blue Bandit" because he allegedly wore a blue hooded sweatshirt and blue jeans when committing the robberies,[90] this Court stated that "[t]he acts here are even less closely related than were those in *Tobey*[,]" noting that the robberies involved different victims on different dates, and pointed out that there was "no indication that one robbery was committed to facilitate another."[91]

---

[83] *Id*.

[84] *Id*. at 104.

[85] *Daughenbaugh*, *supra* at 508, 511.

[86] MCR 6.120(B), adopted March 30, 1989, effective October 1, 1989.

[87] *Daughenbaugh*, *supra* at 508.

[88] *Id*.

[89] *Id*.

[90] *Id*.

[91] *Id*. at 510. Cf. *Abraham*, *supra* at 272:

> Severance was not mandatory in the present case because the shootings occurred within a couple of hours of each other in the same neighborhood, with the same weapon, and were part of a set of events interspersed with target shooting at various outdoor objects. Further, the same witnesses testified to a single state of

(continued…)

This Court then went on to reject the prosecution's argument that severance was not required because evidence of each of the other crimes would nevertheless be admissible in each of the separate trials under MRE 404(b).[92] In so ruling, this Court first noted that neither *Tobey* nor MCR 6.120 set forth any exception to a defendant's "absolute right to severance of unrelated offenses."[93] This Court then went on to stress the prejudicial difference between "charging a defendant with a crime and merely presenting evidence that the defendant committed another, uncharged (in that particular trial) offense."[94]

> The fact that a defendant is formally faced in the same trial with additional charges does have an effect greater than if evidence of other (uncharged) offenses are presented. The defendant is cast as a bad person by the sheer number of counts in the information. The jurors are afforded greater room for compromise by the larger number of counts (i.e., they might agree to convict on some counts and acquit on others, an option not readily available when fewer counts are presented for the jury's consideration). Finally, the amount of evidence that the prosecutor would be permitted to introduce may well be greater if the prosecutor is attempting to prove the defendant's guilt of the additional charge than if merely trying to show that the defendant committed the other (uncharged) bad act.[95]

Accordingly, this Court concluded that the trial court improperly joined the charges for trial.[96]

E. Analysis Of The Motions To Sever

I first note that it was perfectly permissible for the prosecutor to initially consolidate the charges against Walker and Buggs for a single trial under MCR 6.120(A).[97] The crux of this claim, however, is whether this case warranted a postcharging severance of the charges upon the requests of Walker and Buggs. As stated, "[o]n the defendant's motion, the court must sever for

---

(…continued)

> mind applicable to both offenses. In contrast, the two offenses that were severed in *Tobey*, *supra* at 144, arose out of events that occurred twelve days apart. In *Daughenbaugh*, *supra* at 510, the offenses occurred thirteen days apart. Thus, because the two incidents in the present case were "related" under MCR 6.120(B), severance was not mandatory.

[92] *Daughenbaugh*, *supra* at 510-511.

[93] *Id*. at 510.

[94] *Id*. at 511.

[95] *Id*.

[96] *Id*.

[97] See *People v Jankowski*, 408 Mich 79, 92; 289 NW2d 674 (1980) (citing *Tobey*, and stating, "[O]ur decision today should not be read to preclude the filing of a multiple-count information charging multiple offenses arising from the same transaction or a trial under such an information.").

separate trials offenses that are not related[.]"[98] Here, both Walker and Buggs moved to sever the charges for each of the two incidents at issue. Therefore, the trial court was required to sever the offenses if they were "not related" and were joined for trial *solely* on the ground that they are of the "same or similar character."[99]

I agree with the majority that the offenses in each incident were clearly of the "same or similar character" because they both involved homicides, robberies, and home invasion of elderly people.[100] However, I cannot agree with the majority's conclusion that the two incidents also involved the "same conduct" merely because both involved homicides, robberies, and home invasion of elderly people.[101] Like the incidents in *Tobey* and *Daughenbaugh*, the two incidents here were clearly not the "the same conduct or transaction" because they took place several days apart and involved different victims. Indeed, I respectfully believe that on this point the majority may have been erroneously employing a layperson's interpretation of "same conduct," which I concede would seem to be synonymous with "the same or similar character." However, this Court is bound to follow and employ the legally distinct definitions of the standards that our courts have provided.

Nor do I agree that the two incidents constituted "a series of connected acts together." They were not part of a series of multiple, connected events "committed 'to aid in accomplishing another, as with burglary and larceny or kidnapping and robbery'"[102] or where "a person were to escape[s] prison, steal[s] an automobile and take[s] hostages[.]"[103] Although each individual incident may have involved connected acts – namely armed robbery and murder – the two incidents were not connected to each other. The two incidents were perpetrated several days apart, and, most importantly, completion of one incident was in no way dependent on, or committed to aid in accomplishing, completion of the other.

The majority also apparently concludes that the two incidents were "a series of acts constituting parts of a single scheme or plan," because "[e]ach offense was to contribute to the achievement of the common goal to rob and murder elderly people."[104] Based on my review of the record, I reluctantly conclude that the two incidents were not "a series of acts constituting parts of a single scheme or plan."

---

[98] MCR 6.120(C).

[99] MCR 6.120(C); *Tobey*, *supra* at 153.

[100] Ante at ___.

[101] Ante at ___.

[102] *Tobey*, *supra* at 151, quoting ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Joinder and Severance (Approved Draft, 1968), Commentary to Standard 1.1(b), pp 12-13.

[103] *Id*. at 152.

[104] Ante at ___.

Flint police officer Shawn Ellis testified that he interviewed Walker after his arrest in January 2009, and that Walker told him that he, Buggs, and Hodge had gone to both the Vondrasek and Wedlow residences to "hit a lick," which, in street slang, meant they intended to commit a robbery. According to Officer Ellis, Walker also explained that they had decided to rob the Wedlows because "elderly people . . . had money." A friend of Buggs's, Willie Boone, testified that prior to the Wedlow incident Buggs had asked him if he wanted to rob "two old people" with him. Lamar Wright, a fellow jail inmate of Buggs's, testified that Buggs told him that he "prayed [sic] on elderly people" to get money for his drug habit. And Hodge told another fellow inmate, Floyd Bonds, that he killed the old people because they had been there "long enough, . . . it was time for them to go, they're taking up space."

Clearly, the evidence supported that the co-defendants specifically targeted elderly people as victims in each of these two incidents based in part on the reasoning that they were likely to have money. However, in *Daughenbaugh*, the defendant robbed several stores, ostensibly based on the reasoning that they were likely to have money. Yet, this Court in *Daughenbaugh* nevertheless found that the robberies were not part of a single scheme or plan because there was "no indication that one robbery was committed to facilitate another."[105] In other words, there can be no doubt that in both *Daughenbaugh* and the case at hand the defendants had a goal of committing robberies to get money. But for joinder purposes, "each [robbery was] separate conduct, a separate act and transaction, and . . . a separate and distinct criminal offense."[106]

I recognize that in *McCune* this Court stated that "[a] typical example of common plan offenses is a series of separate offenses that are committed pursuant to a conspiracy among two or more defendants,"[107] which would seem at first blush to apply to the facts here, especially considering that Walker and Buggs were each convicted of several counts of conspiracy. However, while there was evidence that the co-defendants might have had a conspiracy to commit each of the individual offenses, there was no evidence that they had a conspiracy to commit the series of separate offenses. They might have conspired to commit the Wedlow robbery and murders. And they might also have then conspired to commit the Vondrasek robbery and murder. But there was no evidence of any single conspiracy (that is, a single plan or scheme) to commit what would essentially amount to a robbery/murder spree. To state it yet another way, the record evidence supports only that once the Wedlow conspiracy was complete, the co-defendants conspired anew to commit the Vondrasek crimes. There was no evidence of a continuing, single plan that tied the offenses together and demonstrated that the objective of each offense was to contribute to the achievement of a unified goal not attainable by the commission of any of the individual offenses.[108]

---

[105] *Daughenbaugh*, *supra* at 510.

[106] *Tobey*, *supra* at 149.

[107] *McCune*, *supra* at 103.

[108] See *id*.

Moreover, in keeping with *Daughenbaugh*, the trial court erred to the extent that it denied the motions of Walker and Buggs to sever on the ground that the evidence of each of the other crimes would nevertheless be admissible in the separate trials under MRE 404(b).[109]

III. Conclusion

It has been said that murder is a crime like no other, and there was overwhelming evidence of defendants' guilt in these horrendous crimes. The majority concludes that, because the offenses were of the same or similar character, joinder was appropriate. I respectfully disagree. I observe that, at this level of analysis, joinder would be appropriate in almost every circumstance where two or more persons participated together in two or more crimes that were alike in their general character. In my view, binding precedent requires a more specific level of analysis. And the hard fact is that, when analyzed specifically, the two incidents here did not involve the "same conduct," as the relevant cases have defined such conduct, based only on the fact that both involved homicides, robberies, and home invasion of elderly people.

This observation provides no comfort whatever to—and may be perceived as offensive by—the grieving families and friends of the victims here. But if I am correct in my analysis and if the only basis for joining the charges from the two incidents in a single trial was that they were of the same or similar character, then the offenses were not related within the meaning of MCR 6.120(B) and *Tobey* and its progeny. Walker and Buggs therefore each had a right to severance, a right that our criminal justice system must safeguard. In my opinion, the trial court's decision on severance did not do that. Accordingly, I would hold that the trial court erred in denying Walker's and Buggs's motions for severance, reverse their convictions, and, reluctantly, remand for a new, separate trials on the two incidents.

/s/ William C. Whitbeck

[109] See *Daughenbaugh*, *supra* at 510-511.