

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SIMON PHILLIPS III,

Defendant-Appellant.

UNPUBLISHED

August 14, 2012

Nos. 298034; 307770

Washtenaw Circuit Court

LC Nos. 08-002139-FH;

08-002145-FC

Before: TALBOT, P.J., and WILDER and RIORDAN, JJ.

PER CURIAM.

In docket number 298034, Simon Phillips III appeals as of right his jury trial conviction of first-degree home invasion,¹ third-degree home invasion,² and domestic violence, third offense.³ In docket number 307770, Phillips appeals as of right his jury trial conviction of assault with the intent to commit great bodily harm less than murder,⁴ first-degree home invasion,⁵ discharge of a firearm in a building,⁶ and possession of firearm during the commission of a felony (“felony-firearm”).⁷ We affirm.⁸

The victim, Rose Hicks, dated Phillips for approximately four years. The two lived together during their relationship, but were not living together at the time of the incidents. On November 14, 2008, Hicks was watching television in her bedroom when she heard her front

¹ MCL 750.110a(2).

² MCL 750.110a(4).

³ MCL 750.81(2); MCL 750.81(4).

⁴ MCL 750.84.

⁵ MCL 750.110a(2).

⁶ MCL 750.234b.

⁷ MCL 750.227b.

⁸ Phillips was charged separately for offenses that occurred several days apart in November 2008. The trial court granted the prosecution’s motion for joinder.

door forced open. Hicks testified that Phillips had “kicked down” her door, entered her home, began hitting her in the face, and then left. On November 22, 2008, Hicks was in her apartment with her new boyfriend. Hicks awoke to someone knocking on her front door. When Hicks looked through the peephole, she saw Phillips. According to Hicks, Phillips was bleeding and yelling “Rose, Rose. Help me.” Hicks then heard a gunshot. Hicks’s new boyfriend then grabbed her by the hand and took her to the balcony to try and escape. Before Hicks could exit, Phillips grabbed her from behind. Phillips then pointed a gun at the right side of her neck and “clicked” it. Hicks testified that she then turned around, fell on top of Phillips and grabbed the gun. Phillips was bleeding profusely, and Hicks believed that he had lost consciousness. The police arrived shortly thereafter and Phillips was taken to the hospital for treatment of his injuries.

In docket number 298034, Phillips argues that the trial court erred when it joined the two cases pursuant to MCR 6.120.⁹ We disagree. Whether joinder is appropriate is a mixed question of fact and law.¹⁰ This Court reviews the trial court’s factual findings related to the joinder issue for clear error, and its interpretation of the court rules de novo.¹¹

The joinder of multiple criminal charges is allowable under Michigan law in circumstances prescribed by MCR 6.120, which provides in relevant part as follows:

(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

⁹ In his interpretation of the joinder rules, Phillips relies heavily on *People v Tobey*, 401 Mich 141; 257 NW2d 537 (1977). Phillips’s reliance is misplaced because *Tobey* was decided before the enactment of MCR 6.120 and is not dispositive on the issue of joinder. *People v Williams*, 483 Mich 226, 238; 769 NW2d 605 (2009). The Court in *Williams* observed that “the *Tobey* Court took a much narrower view of the circumstances in which joinder may be appropriate than that set forth in MCR 6.120.” *Id.* The Court held that *Tobey* was superseded by MCR 6.120 “[b]ecause the differences between *Tobey* and MCR 6.120 cannot be reconciled without undermining the plain language of the court rule.” *Id.*

Phillips also relied on *People v Daughenbaugh*, 193 Mich App 506; 484 NW2d 690 (1992). The analysis in *Daughenbaugh*, however, was also superseded by MCR 6.120. *Williams*, 483 Mich at 238-239 (“[W]e also reject the analysis of *Daughenbaugh* in accordance with the plain language of MCR 6.120.”).

¹⁰ *Williams*, 483 Mich at 231.

¹¹ *Id.*

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.

Here, the charges against Phillips are not based on the "same conduct or transaction." Both charges, however, stem from Phillips's conduct toward Hicks. Both offenses occurred at Hicks's apartment, and in both incidents Phillips used force to gain access to Hicks's apartment and physically assault her. Though the offenses occurred eight days apart, for purposes of the court rule, the charges were related as "a series of connected acts" that constituted "parts of a single . . . plan" to attack Hicks.¹²

Further, there was little potential for confusion, as all charges involved the same victim, the same location, and many of the same witnesses. Moreover, "in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts of domestic violence is admissible for any purpose for which it is relevant[.]"¹³ The prosecution filed a motion to admit other acts evidence in both cases, which the trial court granted. "[J]oinder of . . . other crimes cannot prejudice the defendant more than he would have been by the admissibility of the other evidence in a separate trial."¹⁴ As such, there was no error by the trial court.

In docket number 307770, Phillips argues that he was denied the effective assistance of counsel because defense counsel did not admit Phillips's medical records into evidence. We disagree. Specifically, Phillips argues that his medical records were necessary for the jury to properly evaluate his mental state and determine whether he had the intent necessary to be convicted of assault with the intent to commit great bodily harm less than murder and first-

¹² MCR 6.120(B)(1)(b) and (c).

¹³ MCL 768.27b.

¹⁴ *Williams*, 483 Mich at 237 (citation and quotation omitted).

degree home invasion. Phillips, however, failed to make an evidentiary record to support his claim.¹⁵ “Without record evidence supporting [Phillips’s] claim, the Court of Appeals generally has no basis for considering it.”¹⁶

Further, the issue of intent was examined during proofs and challenged during defense counsel’s closing argument. Therefore, contrary to Phillips’s assertion, counsel did provide a substantial defense based on lack of intent. There is nothing in the record to indicate that the medical records would further substantiate his claim. Thus, Phillips’s claim of ineffective assistance of counsel lacks merit.¹⁷

Affirmed.

/s/ Michael J. Talbot
/s/ Kurtis T. Wilder
/s/ Michael J. Riordan

¹⁵ See *People v Armstrong*, 124 Mich App 766, 770; 335 NW2d 687 (1983).

¹⁶ *Id.*

¹⁷ *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).