STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 28, 2004
v	No. 248291 Genesee Circuit Court
ANTHONY TANELL CHAPMAN, Defendant-Appellant.	LC Nos. 02-010209-FC; 02-010231-FH

Before: Neff, P.J., and Cooper and R.S. Gribbs*, JJ.

PER CURIAM.

Defendant Anthony Tanell Chapman appeals as of right his jury trial convictions for second-degree murder,[1] carrying a concealed weapon (CCW),[2] felon in possession of a firearm,[3] second-degree fleeing and eluding,[4] and possession of a firearm during the commission of a felony.[5] Defendant was sentenced as a third-habitual offender[6] to fifty-six to ninety years' imprisonment for his second-degree murder conviction, five to ten years' imprisonment for his CCW conviction, five to ten years' imprisonment for his felon in possession of a firearm conviction, seventy-nine months to ten years' imprisonment for his second-degree fleeing and eluding conviction, and two years' imprisonment for his felony-firearm conviction. We affirm.

[1] MCL 750.317. Defendant was actually charged with open murder. MCL 750.316.

[2] MCL 750.227.

[3] MCL 750.224f.

[4] MCL 750.479a.

[5] MCL 750.227b. Defendant was acquitted of discharging a firearm at an occupied building. MCL 750.234b.

[6] MCL 769.11.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

I. Factual Background

Defendant's convictions arose from two drive-by shootings, one resulting in the death of Marcus Wright, and a subsequent police chase resulting in a four-car accident. Defendant and Mr. Wright were members of rival gangs who sold drugs at locations in close proximity in the city of Flint. On May 14, 2002, defendant drove past Mr. Wright's home several times. At approximately 5:00 p.m., defendant drove by again with George and Robert Hodges. Mr. Wright was across the street from his home, outside a party store making a drug transaction. George Hodges began shooting from the front passenger window. One bullet fatally wounded Mr. Wright in the back.[7]

The members of Mr. Wright's family remained at the hospital until the early morning hours of May 15. Sometime between 1:00 and 2:00 a.m., defendant drove by in a white Impala with Kevin Brown.[8] One of the men opened fire on the Wright home. After receiving notice that a white Impala had been involved in a drive-by shooting, police officers began following defendant near the scene. When the officers attempted to effectuate a stop, defendant led them on a high-speed chase at over one hundred miles an hour. The chase ended when defendant rear-ended another vehicle and caused a four-car accident. Defendant and Mr. Brown were pulled from their burning vehicle.[9] Officers found a loaded Tech-Nine pistol in the back seat, matching casings found at the May 15 shooting scene,. They also found a black revolver on the ground about twenty feet from the car.

II. Joinder of Charges

Defendant argues that the trial court violated his due process right by granting the prosecution's motion to join the charges in his case. Specifically, defendant contends that he was only convicted of second-degree murder, a charge based on weak evidence, because it was tried with the stronger fleeing and eluding charge. We review a trial court's decision on a motion to join or sever charges for an abuse of discretion.[10]

Although a trial court is required to sever unrelated charges upon a defendant's motion,[11] the joinder or severance of related charges is permissive.[12] Furthermore, "[t]wo or more

---

[7] George Hodges was initially tried on the murder charge in a joint trial with a separate jury. Following a hung jury and a mistrial in a subsequent proceeding, Mr. Hodges later entered a guilty plea for second-degree murder.

[8] Mr. Brown was to be tried in the same proceeding, but entered a nolo contendre plea before trial.

[9] Various members of the Wright family witnessed both drive-by shootings. Mr. Wright's brother and a friend identified defendant as the driver in the first shooting and defendant was pulled from the driver's seat of the Impala involved in the second.

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

[11] MCR 6.120(B).

[12] MCR 6.120(C); *Duranseau*, *supra* at 208.

informations or indictments against a single defendant may be consolidated for a single trial."[13] Pursuant to the court 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."[14] Charges may also be joined or severed where the action "is appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense."[15]

> Relevant factors [to determine if joinder or severance is appropriate] 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 charges or the complexity or nature of the evidence, the potential for harassment, the convenience of the witnesses, and the parties' readiness for trial.[16]

We first note that the offenses in this case were related because they involved a series of connected acts or acts constituting part of a single scheme or plan under MCR 6.120(B)(2). The evidence tended to show that, on two separate occasions in a nine-hour period, defendant drove two separate vehicles past the Wright home. Shots were fired from those vehicles. Bullet casings from the scene of the second shooting matched a weapon found in the vehicle involved in defendant's fleeing and eluding and weapons charges. It is clear from the evidence that the charged offenses are related.

Furthermore, joinder was appropriate under MCR 6.120(C). The evidence pertaining to each of the charges would have been admissible in the other trials.[17] The witnesses in each trial would have been the same. Therefore, it would have been a waste of judicial time and resources to have separate trials. There was no potential for harassment or confusion by joining the cases because all of the evidence was relevant to each of the charges. Accordingly, the trial court properly granted the prosecution's motion to join the charges.

III. Unavailable Transcript

At defendant's trial, there was a technical problem with the court's video recording equipment and a record was not made of closing arguments, jury instructions and a later instruction given regarding a jury deadlock. Defendant originally challenged the lack of record for all three portions of the trial, arguing that he was entitled to a new trial or to a remand to settle the record. This Court remanded to the trial court to settle the record and create a settled

---

[13] MCR 6.120(A).

[14] MCR 6.120(B).

[15] MCR 6.120(C).

[16] *Id.*

[17] *Duranseau, supra* at 208. Defendant's fleeing and eluding charge would be admissible as evidence of flight, *People v Goodin*, 257 Mich App 425, 432-433; 668 NW2d 392 (2003), and his possession of multiple weapons would be relevant to prove premeditation and deliberation, MRE 401.

statement of facts to substitute for the unavailable portions of the transcript pursuant to MCR 7.210(B)(2).[18] Following evidentiary hearings on remand, the trial court settled the record and created a statement of facts. Both parties stipulated to the accuracy of this statement. Defendant now contends that due process requires a new trial as defense counsel did not recall the trial court giving the complete and correct deadlocked jury instruction. Whether the unavailability of a trial transcript denies a defendant his due process right to proper appellate review is a constitutional issue which we review de novo.[19]

MCR 7.210(B)(2), pertaining to unavailable transcripts on appeal, provides:

> When a transcript of the proceedings in the trial court or tribunal cannot be obtained from the court reporter or recorder, the appellant shall file a settled statement of facts to serve as a substitute for the transcript.
>
> * * *
>
> (c) The trial court or tribunal shall settle any controversy and certify a statement of facts as an accurate, fair, and complete statement of the proceedings before it.

Defendant claims that the settled record was an improper substitute for the full trial transcript because defense counsel did not recall if the trial court read the standard deadlocked jury instruction. A new trial is required when a defendant's right to appeal is impeded by the inability to obtain a transcript.[20] A reviewing court must determine whether the surviving transcript is sufficient to allow evaluation of the defendant's claims on appeal.[21] The burden is on the defendant to demonstrate that prejudice occurred as a result of the missing transcript.[22]

However, defense counsel conceded that there was no objection to the deadlocked jury instruction as given at trial. The prosecutor asserted that the court read the standard jury instruction and the trial court's notes indicated that the standard instruction was given verbatim on March 19, 2003, at 12:40 p.m. Furthermore, defendant signed the stipulation conceding that the statement of facts was an accurate representation of the trial transcripts. The settled statement of facts is deemed to represent an "accurate, fair, and complete statement of the proceedings"[23] and any doubts should be resolved in favor of the regularity of the lower court

---

[18] *People v Chapman*, unpublished order of the Court of Appeals, entered January 22, 2004 (Docket No. 248291).

[19] *People v Hickman*, 470 Mich 602, 605; 684 NW2d 267 (2004); *People v Horton (After Remand)*, 105 Mich App 329, 331; 306 NW2d 500 (1981).

[20] *Horton, supra* at 331.

[21] *People v Audison*, 126 Mich App 829, 834-835; 338 NW2d 235 (1983).

[22] *People v Carson*, 19 Mich App 1, 8; 172 NW2d 211 (1969).

[23] MCL 7.210(B)(2)(c).

proceedings.[24] Defendant may not now challenge that statement of facts, which are presumed accurate, when he earlier stipulated to their truth.[25]

Affirmed.

/s/ Janet T. Neff
/s/ Jessica R. Cooper
/s/ Roman S. Gribbs

[24] *Bute v Illinois*, 333 US 640, 671-672; 68 S Ct 763; 92 L Ed 987 (1948); *People v Iacopelli*, 141 Mich App 566, 568; 367 NW2d 837 (1985).

[25] Counsel may not harbor error as an appellate parachute. *People v Pollick*, 448 Mich 376, 387; 531 NW2d 159 (1995), quoting *People v Hardin*, 421 Mich 296, 322-323; 365 NW2d 101 (1984).