STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 22, 2009
v	No. 288377 Wayne Circuit Court
EDWARD DONALD BROWN, Defendant-Appellant.	LC No. 08-006603-FC

Before: Gleicher, P.J., and Fitzgerald and Wilder, JJ.

PER CURIAM.

A jury convicted defendant of three counts of felonious assault, MCL 750.82, and one count of possession of a firearm during the commission of a felony, MCL 750.227b(1), and acquitted him of five counts of criminal sexual conduct in the first degree and one count of second-degree child abuse. Defendant was sentenced to probation for felonious assault and to two years in prison for felony-firearm. Defendant appeals as of right. We affirm.

Defendant was charged with criminal sexual conduct and child abuse relative to his biological daughter. He was charged with two counts of felonious assault regarding an incident in which he swung a cane at both his daughter and her mother, hitting his daughter. He was also charged with felonious assault for threatening the mother with a gun; an inference could be drawn from the testimony that he did so when he was trying to keep her out of the basement so that he could sexually abuse his daughter there.

Defendant's sole argument on appeal is that the trial court should have granted his motion to sever the trial of his criminal sexual conduct and child abuse charges from the trial of his felonious assault and felony firearm charges. A determination of whether charges are sufficiently related to warrant joinder is reviewed de novo. *People v Williams*, 483 Mich 226, 231; 796 NW2d 605 (2009).

> MCR 6.120 provides in pertinent part:
> (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.

* * *

(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).

In arguing that the cases should have been severed, defendant relies on *People v Tobey*, 401 Mich 141; 257 NW2d 537 (1977), superceded by court rule as stated in *Williams, supra.* In *Tobey,* the Court adopted ABA standards for determining when a case should be joined or severed, and concluded that two sales of heroin 12 days apart were not the "same conduct," or "a series of acts connected together", or "a series of acts constituting parts of a single scheme or plan." Rather, they were only "of the same or similar character," and the defendant was entitled to severance. With regard to "a series of acts connected together", the *Tobey* Court indicated that the phrase refers to multiple offenses committed "to aid in accomplishing another."

The *Williams* Court held that *Tobey* had been superceded by the adoption of MCR 6.120[1] on October 1, 1989. It concluded that two drug transactions, one that occurred on November 4, 2004, and one that occurred on February 2, 2005, were part of "a single scheme or plan; namely, drug trafficking." The Court concluded:

> The charges stemming from both arrests were not "related" simply because they were "of the same or similar character." Instead, the offenses charged were related because the evidence indicated that defendant engaged in ongoing acts constituting parts of his overall scheme or plan to package cocaine for distribution. [*Williams, supra* at 235 (footnotes omitted).]

[1] The Court in *Williams* analyzed an earlier version of MCR 6.120. However, the only discernable differences between the two versions are that the second version is clearer, and the second version substitutes "the same conduct or transaction" for "the same conduct".

Here, defendant relies on the *Tobey* definition of the MCR 6.120 terms. Specifically, he posits that the offenses were not part of the "same conduct" because they did not flow from a single criminal act. He claims there was no "series of connected acts" because the multiple offenses were not committed to aid in accomplishing each other, were not part of a series, and were not "connected", as they were not close in time. Finally, defendant asserts that the acts were not part of a single scheme or plan, referencing MRE 404(b). Overriding all these arguments is the assertion that the assaults *in question* were not related to the alleged criminal sexual conduct or child abuse offenses.

We conclude that the felonious assaults were part of a series of connected acts. Under *Williams*, the temporal element of this analysis is ameliorated. This evidence was offered to show that defendant was abusive, which was pertinent to the reason why his daughter and her mother had not reported the criminal sexual conduct or the assault with the gun to the police.[2] In essence, it was used to show, by way of example, why complainants were in fear of defendant. Because defendant's acts of domestic violence were the means by which he kept the parties from going to the police so that he could repeat the crimes, all the crimes constituted a "series of connected acts".

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder

[2] Defendant does not challenge the admission of the evidence for this purpose on appeal.