

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES PRIOR,

Defendant-Appellant.

UNPUBLISHED

January 16, 1998

No. 181645

Jackson Circuit Court

LC No. 94-068714-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL ANTHONY FOSTER,

Defendant-Appellant.

No. 184024

Jackson Circuit Court

LC No. 94-068708-FC

Before: White, P.J., and Cavanagh and Reilly, JJ.

PER CURIAM.

Defendants were tried before a jury along with six other defendants for an attack on prison guards in the State Prison of Southern Michigan at Jackson. Defendants Prior and Foster were each convicted of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and prisoner in possession of a weapon, MCL 800.283 & 800.285; MSA 28.1623 & 28.1625. Defendant Foster was also convicted of habitual offender, second offense, MCL 769.10; MSA 28.1082, while defendant Prior pleaded guilty to the same. Both defendants received sentences of ten to fifteen years' imprisonment on the assault convictions and sixty to ninety months' imprisonment on the weapons convictions. The sentences were ordered to run consecutively. Defendants filed separate appeals as of right, which were consolidated for our review. We affirm defendants' convictions and sentences but remand for correction of the judgments of sentence.

Issues Raised by Both Defendants

I

Both defendants challenge the trial court's decision requiring that all eight defendants wear chains around their waists during the trial. We review the trial court's decision regarding shackling for an abuse of discretion under the totality of the circumstances. *People v Dixon*, 217 Mich App 400, 404-405; 552 NW2d 663 (1996).

A defendant's freedom from shackling is an important part of the right to a fair trial and, as a result, shackling of a defendant during a trial is permitted only under extraordinary circumstances. *Id.* at 404. Ordinarily, shackling should only be permitted to prevent escape, to protect bystanders or officers of the court from injury, or to maintain a quiet and peaceable trial. *People v Dunn*, 446 Mich 409, 426; 521 NW2d 255 (1994).

In the case at bar, all eight defendants were on trial together and all eight were convicted felons still serving prison sentences. In light of the charges in this case and defendants' past records of violent crimes, the trial court was justified in requiring defendants to remain shackled during the trial to prevent injury to court personnel and to maintain a peaceful and orderly trial. The court limited the use of chains so that defendants' hands were free to take notes. Accordingly, the trial court did not abuse its discretion.

II

Defendants argue that they were entitled to a mistrial when a prison guard communicated with the jury while the jury was visiting Jackson Prison. We disagree. Neither defendant was prejudiced by improper verbal communications between the guard and the jury. Any comments made by the guard were cumulative of evidence the jury had already heard regarding the operation of the prison cell doors. Accordingly, defendants were not prejudiced and a mistrial was not required. See *People v Lugo*, 214 Mich App 699, 704; 542 NW2d 921 (1995). Both defendants were present at the prison at the time of the jury view, although they were kept fifty feet away from the jurors during the view. They therefore were not denied their right to be present. See MCR 6.414(D).

III

Defendants argue that the trial court violated their right to a unanimous jury verdict by refusing to use a special verdict form. We reject defendants' argument because in both cases, neither party presented evidence that materially distinguished any of the alleged multiple acts from the others. *People v Cooks*, 446 Mich 503, 512; 521 NW2d 275 (1994). One continuous transaction occurred, rather than materially distinct acts, and both defendants defended on the basis that they were not present and were not involved in any part of the transaction. Further, defendants have not shown that the jurors could have been confused or in disagreement about the factual basis of defendants' guilt. *Id.* at 519. Under these circumstances, the trial court's general instructions to the jury about a unanimous verdict

were sufficient to protect defendants' right to a unanimous jury verdict. *Id.* at 530; see *United States v Bryan*, 868 F2d 1032 (CA 9, 1989).

IV

Defendants argue that the trial court improperly allowed the jury to consider the charge of conspiracy to commit assault with intent to murder because there is no such crime. Defendants contend that conspiracy to commit assault with intent to murder would require an agreement to fail to commit a murder. We disagree.

The elements of assault with intent to murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995). Thus, the crime of conspiracy to commit assault with intent to murder does not involve a plan to fail to commit murder. The conspiracy need only involve an actual intent to commit murder. Even though the victim is not actually killed, the intent to commit murder still exists and the conspiracy to commit the murder itself constitutes a completed offense.

Foster relies on *People v Strand*, 213 Mich App 100, 102-103; 539 NW2d 739 (1995), and *People v Hammond*, 187 Mich App 105, 107-109; 466 NW2d 335 (1991). However, these cases are distinguishable. The crime of assault with intent to murder is a completed offense, unlike the attempt to commit a crime, as was at issue in *Strand, supra*. Furthermore, assault with intent to commit murder is a specific intent crime, *People v Lipps*, 167 Mich App 99, 105; 421 NW2d 586 (1988), unlike second-degree murder, the object of the conspiracy in *Hammond, supra*. Defendants were both properly charged with the offense of conspiracy to commit assault with intent to murder. Further, any error was harmless, as both defendants were acquitted of the conspiracy charge and convicted of a lesser included offense on a second, separate charge. See *People v Swartz*, 171 Mich App 364, 379; 429 NW2d 905 (1988).

V

Defendants next argue that the warrants for their arrests were improperly issued. We disagree. There was probable cause presented to the magistrate to support issuing the warrants. See *People v Franklin*, 117 Mich App 393, 396; 323 NW2d 716 (1982); MCL 764.1a; MSA 28.860(1); MCR 6.102(A). The investigating officer's sworn testimony at the probable cause hearing provided the magistrate with sufficient facts to issue the warrants. See *People v Brown*, 21 Mich App 579, 581; 175 NW2d 782 (1970). Neither of defendants' attorneys was ineffective for not moving to quash the warrants as there were no grounds to challenge the warrants. See *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

Defendant Prior's Issues

VI

Defendant Prior first asserts that the trial court erred in not granting him a separate trial from his codefendants. However, defendant Prior failed to move on his own for a separate trial, and his

codefendants' motions for separate trials were inadequate to preserve this issue for review. See *People v Loy-Rafuls*, 198 Mich App 594, 600; 500 NW2d 480 (1993), rev'd in part on other grounds 442 Mich 915; 503 NW2d 453 (1993). Defendant Prior failed to provide the trial court with the necessary offer of proof on the issue regarding prejudice to his substantial rights by a joint trial. See *People v Cadle (On Remand)*, 209 Mich App 467, 469; 531 NW2d 761 (1995). As a result, this issue is waived on appeal. See *People v Hoffman*, 205 Mich App 1, 19; 518 NW2d 817 (1994). Nevertheless, we note that the defenses in this case were not mutually exclusive or irreconcilable and there would have been no basis for granting the motion. See *Cadle, supra*.

VII

Defendant Prior argues that the trial court improperly allowed religious issues to be presented into evidence. We conclude that the trial court did not abuse its discretion by allowing in evidence related to defendants' religious practices in the prison. See *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994). Membership in a religious organization became an issue in this case because it was the prosecution's theory that prison religious organizations were behind the plan to attack the guards. The trial court did not allow testimony regarding specific religious beliefs or opinions. Therefore, MRE 610 and MCL 600.1436; MSA 27A.1436 were not violated. See *People v Vasher*, 449 Mich 494, 499-500; 537 NW2d 168 (1995). Accordingly, we find no error requiring reversal.

VIII

Defendant Prior asserts that he was denied due process, equal protection, and his right to an impartial jury when he was judged by a jury in which African-Americans were under-represented.

A challenge to a jury array is timely if it is made before the jury has been impaneled and sworn. *People v Hubbard (After Remand)*, 217 Mich App 459, 465; 552 NW2d 593 (1996). Defendant concedes that he made no objection below. However, because the issue was raised below by counsel for a co-defendant, we address it here.

There was no evidence presented, either before or after trial, which would establish the third prong required for establishing a prima facie violation of the Sixth Amendment's fair cross-section guarantee:

1) that the group alleged to be excluded is a "distinctive" group in the community; 2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and 3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process. [*Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).]

Although defendant argues that "the vast majority of the county's largest city, where almost all of the county's black population lives, is systematically excluded from Circuit Court jury participation," defendant has presented no evidence to support that assertion. Because defendant failed to establish a

prima facie violation of the fair cross-section guarantee, he is not entitled to relief. See *Hubbard, supra* at 473.

IX

Defendant Prior argues that it was a violation of double jeopardy principles for the prosecutor to charge him with both assault with intent to murder, MCL 750.83; MSA 28.278, and assault of a prison employee, MCL 750.197c; MSA 28.394(3). The trial court agreed with this argument and granted a motion to dismiss the charge of assault of a prison employee against all defendants. The jury did not deliberate on the charge of assault of a prison employee. Because the trial court agreed with defendant's argument and dismissed one of the charges, this issue is moot. See *People v Greenberg*, 176 Mich App 296, 302-303; 439 NW2d 336 (1989).

X

In his next issue, defendant Prior contends that the trial court erred in refusing to exclude or limit Wilbert Robinson's testimony. Defendant Prior maintains that Robinson falsely identified another defendant as one of the mock fighters in the recreational yard. We find no abuse of discretion. See *McAlister, supra* at 505. Questions of the credibility of the witnesses are for the trier of fact. *People v Velasquez*, 189 Mich App 14, 16; 472 NW2d 289 (1991). The admission of the evidence was not unfairly prejudicial to defendant Prior. See *People v Fisher*, 449 Mich 441, 451-452; 537 NW2d 577 (1995).

XI

Defendant Prior also maintains that the trial court erred in admitting the testimony of fellow inmate Derrick Fountain about threats the latter received from other inmates as a result of his cooperation with the prosecution. We find no abuse of discretion. See *McAlister, supra*. Fountain did not identify any inmates that threatened him, and the court instructed the jury that the threats made to Fountain were not made by any of the defendants.

XII

Defendant Prior further asserts that the trial court erred in denying a motion for a directed verdict on the charge of conspiracy. In reviewing a trial court's decision regarding a motion for a directed verdict, this Court views the evidence presented up to the time the motion was made in the light most favorable to the prosecution to determine if a rational factfinder could find the essential elements of the crime proved beyond a reasonable doubt. *People v Peebles*, 216 Mich App 661, 664; 550 NW2d 589 (1996).

Viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence presented for the jury to have found defendant Prior guilty of conspiracy to commit assault with intent to murder and assault with intent to murder even though the jury ultimately acquitted him of the conspiracy charge and convicted him of a lesser assault offense. There was evidence that defendant Prior stabbed one of the guards while wearing a mask over his face, and that two or three co-defendants had also

worn masks at the time of the assault, and had wielded homemade knives. Moreover, there was circumstantial evidence of defendant Prior's participation in the conspiracy to assault the guards. See *People v Justice (After Remand)*, 454 Mich 334, 347; 562 NW2d 652 (1997). Furthermore, the prosecution was not required to prove that defendant Prior intended to assault all four guards, given that he was charged with only one count of assault with intent to murder. The evidence showed that the defendants intended to murder the guards on duty at the time the plan was implemented. See *Barclay, supra*.

XIII

Defendant Prior also contends that the trial court erred by failing to instruct the jury on all included offenses. We disagree. The trial court instructed the jury on felonious assault as a lesser included offense. There is nothing in the record to show that defendant Prior requested that the court instruct on the crime of simple assault. In the absence of a request for this instruction, the trial court was not required to instruct the jury on it as a lesser included offense. See *People v Hendricks*, 446 Mich 435, 440-442; 521 NW2d 546 (1994).

XIV

Next, defendant Prior argues that he was deprived of his rights when the trial court allowed in evidence about his previous conviction. We find no abuse of discretion. See *McAlister, supra*. Defendant Prior has not provided a citation to the record indicating where specific evidence of his previous conviction was admitted. All the defendants stipulated that they had prior criminal records, but the details of their convictions were not explained to the jury. The jury was obviously aware that defendant Prior had a criminal record because he was serving time at Jackson Prison when the crime at issue in this case was committed. Accordingly, defendant has not shown error requiring reversal.

XV

Defendant Prior argues that he was deprived of due process when the trial court considered an alleged lack of remorse on his part in determining his sentence. Defendant argues that his sentence may not be based, in whole or in part, on his refusal to admit guilt and that he may not be given a longer sentence on the basis that he maintains his innocence. We find no error requiring reversal.

The court's reference to and consideration of defendant's lack of remorse was proper under *People v Houston*, 448 Mich 312, 317; 532 NW2d 508 (1995). The court's reference to defendant's continuing to assert his innocence was made in the context of discussing the likelihood, or lack thereof, of rehabilitation, see *People v Wesley*, 148 Mich App 758, 762; 384 NW2d 783 (1985), and did not indicate that the trial court improperly enhanced defendant's sentence for refusing to admit guilt.

XVI

Defendant Prior next claims that the trial court erred in considering at sentencing letters written by persons other than the victims. We disagree. Such information is properly considered by a court at

sentencing in addition to the rights granted victims to address the court on sentencing. See *People v Kisielewicz*, 156 Mich App 724, 728-729; 402 NW2d 497 (1986).

XVII

In his next issue, defendant Prior argues that the trial court's recommendation that defendant Prior serve his sentences in administrative segregation or maximum security violated his constitutional right to be free from cruel and/or unusual punishment. See US Const, Am VIII; Const 1963, art 1, § 16. We find no merit to this argument. The trial court's recommendation did not qualify as punishment or a penalty imposed by it. Defendant Prior's placement within the corrections system was left to the Department of Corrections to decide. The trial court did not have the authority to penalize defendant by deciding his place of incarceration. See MCL 791.264; MSA 28.2324, MCL 791.267; MSA 28.2327. The constitutional prohibition against cruel or unusual punishment therefore is inapplicable to a review of the court's recommendation. See *People v Poole*, 218 Mich App 702, 715; 555 NW2d 485 (1996) ("In determining whether a sentence is cruel or unusual, we look to the gravity of the offense and the harshness of the penalty, comparing the penalty to those imposed for other crimes in this state as well as the penalty imposed for the same offense by other states and considering the goal of rehabilitation.").

XVIII

Defendant Prior argues that his sentence for assault with intent to do great bodily harm is disproportionate under *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990), because the trial court did not cite factors not already accounted for in the guidelines when departing therefrom. We conclude that this argument lacks merit because the trial court sentenced him as an habitual offender and the guidelines do not apply to habitual offenders. See *People v Hansford (After Remand)*, 454 Mich 320, 323; 562 NW2d 460 (1997). Defendant Prior may not therefore predicate sentencing error on the court's deviation from the sentencing guidelines. See *People v Yeoman*, 218 Mich App 406, 418-419; 554 NW2d 577 (1996). Defendant Prior's sentence of ten to fifteen years' imprisonment was otherwise proportionate. See *Milbourn*, *supra*.

XIX

Defendant Prior next argues that the trial court erred in imposing consecutive sentences. Because defendant committed this offense while he was a prisoner, consecutive sentencing was mandatory under MCL 768.7a(1); MSA 28.1030(1)(1). See *People v Weatherford*, 193 Mich App 115, 117-118; 483 NW2d 924 (1992). How much time defendant must serve on his prior sentences before he may begin serving these sentences is a matter for the Department of Corrections to decide.

We note that the trial court appears to have made a clerical error on the judgments of sentence in both cases when it ordered the sentences in these cases to be served consecutively. The sentences should have been ordered to run consecutive to the sentences defendants were serving when they

committed this offense, as the trial court correctly stated on the record at sentencing. Accordingly, we remand the case for the limited purpose of having the trial court correct the judgments of sentence. Resentencing is not required.

Defendant Foster's Issues

XX

Defendant Foster argues that the prosecutor engaged in misconduct by knowingly presenting the perjured testimony of two inmate witnesses. Defendant Foster did not raise this issue in the trial court, and the record does not support his claim that the prosecution knowingly presented perjured testimony. See *People v Canter*, 197 Mich App 550, 558; 496 NW2d 336 (1992). Thus, failure to further consider the issue will not result in a miscarriage of justice, and we therefore decline to further address it. See *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), cert den sub nom *Michigan v Caruso*, 513 US 1121 (1995).

XXI

Defendant Foster contends that his rights were violated when the trial court forced him to pick an anonymous jury. The impanelment of an anonymous jury is a drastic measure that should be undertaken only in limited circumstances. *United States v Sanchez*, 74 F3d 562, 564 (CA 5, 1996); *United States v Krout*, 66 F3d 1420, 1427 (CA 5, 1995), cert den ___ US ___; 116 S Ct 963; 133 L Ed 2d 884 (1996). In the present case, it is true that the trial court and the attorneys referred to the jurors by badge numbers on the record. However, the venire members filled out questionnaires before trial which were provided to the attorneys. Defendant Foster has not made an offer of proof that the questionnaires did not include personal information about the jury members. Accordingly, he has not shown that the individual identities of the jury members were kept from defendants and their attorneys. We decline to find that the trial court impaneled an anonymous jury on the limited record available.

XXII

Next, defendant Foster argues that the trial court erred in denying his request to represent himself at trial. However, while a defendant has the right to represent himself, the right is not absolute. *People v Dennany*, 445 Mich 412, 427; 519 NW2d 128 (1994) (Griffin, J.). There are three main requirements that should be met before a defendant's request to dismiss his counsel and proceed in propria persona is granted. *People v Adkins (After Remand)* 452 Mich 702, 721-722; 551 NW2d 108 (1996); *People v Anderson*, 398 Mich 361, 367; 247 NW2d 857 (1976). The defendant's request must be unequivocal; the defendant must assert his right to self-representation knowingly, intelligently, and voluntarily; and the trial judge must determine that the defendant's acting as his own counsel will not disrupt, unduly inconvenience, and burden the court and the administration of the court's business. *Id.* at 368.

Given the circumstances of defendant Foster's request, we conclude that the trial court did not err in denying his request because allowing him to represent himself would have unduly disrupted the proceedings.¹ While the trial court did not engage in the requisite on-the-record colloquy, see *Anderson, supra*, a court may deny a request for self-representation if it determines that the proceedings will thereby be disrupted. See also cases cited in Anno: *Accused's right to represent himself in state criminal proceeding—modern state cases*, 98 ALR 3d 13, § 18. We conclude that the trial court in the instant case denied defendant's request on that basis, that the record supports the court's determination, and that the court thus did not abuse its discretion in denying defendant's request.

XXIII

Defendant Foster also argues that error resulted from the admission of a statement by defendant Prior implicating all of the Muslim religious groups in this attack. Because defendant Foster was a member of one of these groups, he argues that his codefendant's statement should not have been admitted. Defendant Foster did not raise this issue below and he has not established that manifest injustice will result if the issue is not considered on appeal. See *People v Burton*, 219 Mich App 278, 292; 556 NW2d 201 (1996). Defendant Prior's statement was not made to police officials, and it did not directly implicate defendant Foster in this crime. See *People v Banks*, 438 Mich 408, 420-421; 475 NW2d 769 (1991), cert den 502 US 1065 (1992) (discussing the rationale for the rule prohibiting the admission of a non-testifying codefendant's custodial statements). Furthermore, the court preceded the testimony with a limiting instruction, cautioning the jury that the statements made by defendant Prior did not relate to any of the other defendants. Therefore, defendant Foster has not shown manifest injustice.

XXIV

Defendant Foster next argues that the trial court should have dismissed the charges against him because the prosecutor repeatedly asked a question of witnesses that the court had ruled was irrelevant. We disagree. While the prosecutor violated the court's ruling on the relevance of the matter, the court corrected any possible error with a cautionary instruction. The jury was told to disregard the question, and it did not hear any of the witnesses' answers to the question. Accordingly, dismissal or a mistrial was not warranted. See *Lugo, supra*.

XXV

Next, defendant Foster asserts that the charges against him should have been dismissed because there was an unjustified period of delay between the commission of the offenses and the filing of the information. We disagree. Defendant Foster has not shown substantial prejudice to his right to a fair trial from any delay or that the prosecutor intended to gain a tactical advantage by the delay. See *People v White*, 208 Mich App 126, 134-135; 527 NW2d 34 (1994). The record supports the prosecution's argument that a delay was necessary due to the complexity of this case and the number of witnesses that needed to be interviewed.

XXVI

Defendant Foster claims that he was prejudiced when the trial court refused to require an amended information or a bill of particulars. We find no error requiring reversal. While the trial court should have granted a timely request for a bill of particulars, defendant Foster has not shown prejudice from the court's error. See *People v Missouri*, 100 Mich App 310, 331; 299 NW2d 346 (1980). The information and the preliminary examination testimony were sufficient to provide defendant Foster with notice of the facts in support of the charges against him. See *People v Weathersby*, 204 Mich App 98, 104; 514 NW2d 493 (1994).

XXVII

Finally, defendant Foster argues that the twelve-day rule, MCL 766.4; MSA 28.922, was violated when his preliminary examination was held thirteen days from the date of arraignment. We find no error with the trial court's decision to deny the motion to dismiss on this ground. The preliminary examination was held within twelve days. See MCR 1.108.

Conclusion

Defendants' convictions and the lengths of their sentences are affirmed. However, the cases are remanded for the limited purpose of correcting the judgments of sentence to reflect that the sentences are to run concurrently to each other and consecutively to the sentences defendants were serving at the time they committed these crimes, assuming the corrections have not been made already. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Mark J. Cavanagh
/s/ Maureen Pulte Reilly

¹ Sometime during the initial two opening statements, which were of other defendants, the trial court ordered defendant Foster removed from the courtroom because of disruptive behavior. Following the two opening statements, during a break and outside the jury's presence, the court asked another defendant to ask Foster whether he would come back and be quiet. The other defendant returned shortly after and stated that Foster "has indicated that he wants to represent himself on his own behalf and that's the way all we come back in here." The trial court replied:

Okay. Of course, I'm going to require that he have counsel. If he doesn't want to come back in with counsel, then I'll have to have him remain out.

Thank you for communicating that. I appreciate it.

Defendant Foster returned to the courtroom after a third opening statement of a co-defendant was made. During a break in the first witness' testimony, Foster's counsel asked the court to allow defendant to represent himself. The trial court responded:

Well the issues in this case are too complex for an individual to represent himself. We're dealing with - I don't know how many witnesses. He is not qualified to represent himself without adequate legal training.

Defendant Foster later requested to make his own closing argument, and the trial court denied the request:

As I indicated to him before, I felt the issues in the case were too complex and I think the case itself has borne out the fact that it's too complex for him to handle his own defense.

Moreover, I think that Mr. Adams has done his usual exceptionally competent job in representing Mr. Foster. I still think that, based upon the instructions that the Court is going to give pertaining a conspiracy, aiding and abetting, et cetera, that the matters are still too complex for Mr. Foster to present his own final argument. And again, I know that Mr. Adams will do his usual good job. Therefore, I'm going to request that Mr. Adams provide the final argument for Mr. Foster.