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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Honorable Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2022-000239

THE STATE, ...RESPONDENT,

v.

ROBERT L. BAILEY,.....APPELLANT.

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

JULIANNA E. BATTENFIELD
Assistant Attorney General
S.C. Bar No. 103135

Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-6305

DAVID PASCOE
Solicitor, First Judicial Circuit

151 Docket Street
Orangeburg, South Carolina 29155
(803) 533-6252

ATTORNEYS FOR RESPONDENT

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APPELLANT'S STATEMENT OF ISSUE(S) ON APPEAL

1. Did the trial judge err in refusing to sever Appellant's trial from the trial of two other co-defendants when the denial of severance prevented Appellant from questioning co-defendant Smith about statements he made to the police about where he was on the night of the shootings and establishing that Smith eventually admitted to being present at the time of the shootings?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE(S) ON APPEAL

1. Whether the trial judge was within his discretion to deny the motion to sever when the Appellant only argued to exclude all codefendant Luther Smith's statements from introduction at trial, whether the issue is therefore even preserved for appellate review, and whether, had Smith waived his Fifth Amendment rights and Appellant had overcome the hearsay problem, the Appellant actually would have used the statements anyway because Smith directly implicated him in the crime?

STATEMENT OF THE CASE

Appellant Robert Bailey was indicted at the August 2006 term of the grand jury for Orangeburg County for four counts of murder, burglary first degree, and attempted murder. (2018-GS-38-01285, -01286, -01287, -01288, -01289, and -01292). Indictments. He had two other codefendants, Antly Scott (represented by Aimee J. Zmroczek and Richard E. Lackey) and Luther Smith (represented by Ola A. Johnson). Tr. 1. Appellant was prosecuted by solicitors David L. Osborne and Chelsea A. Glover and was represented by attorneys Mark A. Leiendecker and Ashley D. Chisolm. Tr. 1.

After extensive pre-trial hearings at which the codefendants' joint motion to sever was denied, Appellant proceeded to trial by jury from February 7th to 23rd, 2022, after which Appellant was found guilty as charged. January 27, 2022 Tr.; February 3, 2022 Tr.; Tr. 2175-2179. He was sentenced by the Honorable Edgar W. Dickson to life in prison for the murders and 30 concurrent years for each of the burglary first degree and attempted murder convictions. Appellant timely filed a notice of intent to appeal his convictions and sentence on February 28, 2022, and subsequently submitted a Brief in support of his Appeal. This Brief of Respondent follows.

STANDARD OF REVIEW

"A motion for severance is addressed to the trial court and should not be disturbed unless an abuse of discretion is shown." *State v. Anderson*, 318 S.C. 395, 398, 458 S.E.2d 56, 57-58 (Ct. App. 1995). "Denial of a severance motion is an abuse of discretion if unsupported by the evidence or controlled by an error of law." *State v. Barnes*, 421 S.C. 47, 51, 804 S.E.2d 301, 304 (Ct. App. 2017). "An appellate court should not reverse a conviction achieved at a joint trial in the absence of a reasonable probability that the defendant would have obtained a more favorable result at a separate trial." *Hughes v. State*, 346 S.C. 554, 559, 552 S.E.2d 315, 317 (2001).

ARGUMENT

I. This issue is not preserved for review. Even if it were, Judge Dickson wisely exercised discretion by allowing a joint trial as the State did not introduce codefendant statements that implicated the others. Also, the statements Appellant now says he wanted to use would have to have been be introduced in full if at all, and they directly implicated Appellant.

Criminal defendants who are jointly tried for murder have no right to be tried separately. *State v. Barnes*, 421 S.C. 47, 51, 804 S.E.2d 301, 304 (Ct. App. 2017); *State v. Dennis*, 337 S.C. 275, 281, 523 S.E.2d 173, 176 (1999); *State v. Kelsey*, 331 S.C. 50, 73-74, 502 S.E.2d 63, 75 (1998); *State v. Holland*, 261 S.C. 488, 201 S.E.2d 118 (1973); *State v. Crowe*, 258 S.C. 258, 188 S.E.3d 379 (1972). Severance is a decision left to the trial court's discretion. *State v. Nichols*, 325 S.C. 111, 481 S.E.2d 315 (1991). Appellant Robert Bailey argues the trial court erred by denying the three codefendants' joint motion to sever. He curiously argues, though, that the court erred *because* even though Appellant vehemently objected to Luther Smith's statements being introduced at trial at pretrial hearings,[1] he should have been able to cross-examine Smith about those very same statements at trial anyway even though the State never introduced any of Smith's statements that implicated codefendant Bailey.

Appellant's argument is very wrong for many reasons: **(1)** Appellant did not preserve this issue for appeal as he did not argue for severance *because he wanted to use* Smith's statements below but instead argued to keep them out; **(2)** There is no *Bruton*[2] problem here because the

[1] Appellant's trial counsel, *e.g.*: "These statements [by Luther Smith] that are going to be introduced are so replete with references to Bailey, that any attempt to redact them with deletions or long pauses or neutral phrases will result in leaving the jury, I believe, with the inescapable conclusion that Bailey is one of the persons, one of them, one of they, one of we, that is referred to. Additionally, the non-testifying codefendant's statements would be hearsay and would be damaging." January 27, 2022 Tr. 206, *e.g*. *See also* Tr. 207-212.

[2] *Bruton v. United States*, 391 U.S. 123 (1968) (holding that a codefendant's confession that implicates another non-testifying codefendant in a joint trial is inadmissible because it violates the Sixth Amendment right of cross-examination.)

State did not introduce any non-testifying codefendant's statement that implicated anyone else; **(3)** The inconsistencies Appellant argues he would have cross-examined Smith on (had Smith not hypothetically invoked the Fifth) came out at trial anyway; **(4)** Even if the motion to sever would have been granted, Smith likely would have invoked his Fifth Amendment rights and the statements could not be used anyway; and **(5)** Even if Smith were to testify at a separate trial of Bailey (eliminating any *Bruton* issue), all of Smith's many statements would then come in one way or the other. Plus, most of them directly implicated Appellant in the crime, only raising the level of prejudice against him that he now argues he incurred by not being able to use the statements in the first place. This Court should affirm.

The granting of a separate trial seldom outweighs the advantages to be found in a joint trial of codefendants.

> It would impair both the efficiency and the fairness of the criminal justice system to require in all these cases of joint crimes here incriminating statements exist, that prosecutors bring separate proceedings, presenting the same evidence, again and again requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last tried defendants who have the advantage of knowing the prosecution's case beforehand.
>
> Joint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of culpability – advantages which sometimes operate to the defendant's benefit.

Richardson v. Marsh, 481 U.S. 200, 210 (1987) (Scalia, J.) (emphasis added).

Even so, a trial judge must act cautiously when allowing a joint trial and must carefully consider problems that may arise such as redacted statements, the ability to confront witnesses, and whether the jury will be able to parse out the criminal culpability (or lack of it) of each codefendant. *Hughes v. State*, 346 S.C. at 558-559, 552 S.E.2d at 317. But "[t]he general rule allowing joint trials applies with equal force when a defendant's severance motion is based upon

the likelihood he and a co-defendant will present mutually antagonistic defenses, *i.e.*, accusing one another of committing the crime." *Id*.

> We reject the argument asserted by several of the appellants that the joint trial resulted in a 'spill over effect' from evidence admitted against other co-defendants. Because the State alleged the men conspired and acted in concert to commit the substantive crimes charged, all of the State's evidence admitted in their joint trial would have been admissible against each of them if they had been granted separate trials.

State v. Stuckey, 347 S.C. 484, 497, 556 S.E.2d 403, 410 (Ct. App. 2001) (emphasis added); *see also State v. Britt*, 235 S.C. 395, 111 S.E.2d 669 (1959) (upholding the denial of a motion to sever when codefendants accused each other of having committed the crime.)

In *Zafiro*, which Appellant cites throughout, the Supreme Court of the United States rejected the request to create a bright line rule "mandating severance whenever codefendants have conflicting defenses." *Zafiro v. United States*, 506 U.S. 534, 538 (1993). Appellant seems to possibly be arguing for such a rule here, though, (although it is generally unclear) besides essentially arguing the hand of one, hand of all doctrine prejudiced him. But "mutually antagonistic defenses are not prejudicial *per se*." *Id*.

Instead, severance should only be granted if "there is a serious risk that a joint trial would **compromise a specific trial right of one of the defendants** or prevent the jury from making a reliable judgment about guilt or innocence." *Id*. at 539; *Hughes*, 346 S.C. at 558-559, 552 S.E.2d at 317; *State v. Barnes*, 421 S.C. at 51-52, 804 S.E.2d at 304 (emphasis added). "Such a risk might occur when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a codefendant." *Zafiro*, 506 U.S. at 538-539. But "it is well settled that defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials." *Zafiro*, 506 U.S. at 540. "We will only reverse the denial of a severance motion when it is reasonably probably the

defendant would have received a more favorable outcome had he been tried separately." *Barnes*, 421 S.C. at 51-52, 804 S.E.2d at 304.

(1) The Issue is Not Preserved

Appellant first argues the "specific trial right" to cross-examine his co-defendant Luther Smith about statements he made that were not introduced at trial was violated. IBOA p. 1. The statements at issue were made by Luther Smith to law enforcement (all found to be voluntarily given by the trial judge) on September 14, 2016, September 15, 2016, September 20, 2016, September 26, 2016, September 30, 2016, October 4, 2016, October 6, 2016, October 21, 2016, October 31, 2016, and November 14, 2016. January 27, 2022 Tr. 85-200; February 3, 2022 Tr. 3-42.[3] In them, Smith at first denies being at the crime scene the night of the murders, but gradually admits more and more until he finally implicates himself and his codefendants in the crime. January 27, 2022 Tr. 85-200 (*see* Tr. 178).

Codefendant Luther Smith moved to suppress all codefendants' statements (Bailey and Scott talked too at various points) at pretrial hearings and the other two codefendants joined in on the motion and then raised it again throughout. January 27, 2022 Tr. 108, 122, 127, 134-135. Appellant Bailey told the court he filed a memorandum on severance with the court on March 19, 2019, but neither opposing counsel, the solicitor, or the Orangeburg County Clerk of Court's office have a copy of it but he did join in with codefendant Smith's January 9, 2022 motion to sever, which is before this Court. January 27, 2022 Tr. 133, 204. During his arguments for the motion to sever, Appellant argues how damaging Smith's statements would be to his client. January 27, 2022 Tr. 203-208. Antly Scott agreed: "And from the very first statement where Mr.

[3] There were other statements but Appellant did not include them in the Designation of Matter, so Respondent sees no need to include them either.

Smith is talking about codefendants, he starts naming my client as the one who planned it. And it . . . just gets worse and worse . . . he says my client kicks the door, my client shoots, and then says Mr. Bailey shoots." Tr. 208.

Appellant continued at the pretrial hearing on February 3, 2022 by objecting to certain portions of a Luther Smith statement the State proffered, stating, "I object too, yes. Which is why I talked severance. I didn't want to go into all that." Tr. 34-35. So, which is it? He wanted the statements in evidence and wanted to cross-examine Smith on the statements, or did he want the statements excluded? "Elicited things that Luther had told him about the night in question . . . which I find objectionable." February 3, 2022 Tr. 36. "And, specifically, he was asked, did Luther shoot anyone and the answer was, no, Luther didn't shoot anyone . . . Automatically, at least that portion of the confession means other people were there. Because we know that five people were shot that night . . . Again, that violates *Bruton* because it implies other people were there." February 3, 2022 Tr. 36-37. "I find it a basis for my mistrial motion." February 3, 2022 Tr. 37. Appellant argued the strongest and the longest to have the statements excluded. Now he is turning around and arguing the opposite? The issue has not been preserved for review.

(2) *Bruton* is Not Implicated

There is no *Bruton*[4] problem here, as Appellant contends. *Bruton* is only implicated when a codefendant's statement is introduced that inculpates another codefendant in the crime. *Bruton*, 391 U.S. at 126. The State told everyone pre-trial they were not planning on introducing any statement that implicated any other codefendant. January 27, 2022 Tr. 216-217, February 3, 2022

4 *Bruton v. United States*, 391 U.S. 123 (1968), held that an admission of a codefendant's confession was prejudicial error when when it implicated another codefendant at trial, but the constitutionally protected right of cross-examination of the confessor was not available due to the Fifth Amendment.

Tr. 3-4. Appellant, however, argues that he needed the ability to cross-examine Smith about how he changed his story to law enforcement over the course of many interviews and many months, even though the jury never got to hear said story, because that would somehow prove Appellant innocent, even though Smith eventually directly implicated Appellant in the crime. IBOA pp. 9-10. That simply makes no sense.

(3) What Would Highlighting Smith's Inconsistencies Have Achieved?

Appellant also argues he was prejudiced when he was "prevented from questioning Smith in order to establish that Smith was one of the shooters, not Appellant." IBOA p. 9. Appellant forgets that under hand of one, hand of all, it does not ultimately matter who the shooter was, at least not for criminal culpability determinations. If Smith had voluntarily taken the stand at either the joint trial or a separate trial[5] and Appellant had cross-examined him about who the shooter really was, what Smith said that implicated Appellant and the other codefendant Antly Scott in the crime would have been introduced in bulk. That testimony would have only further incriminated all three of them. What would highlighting Smith's inconsistencies have achieved?

Appellant also, lastly, argues he should have been about to "explore Smith's motive to name Appellant in order to minimize his own involvement in the shootings." IBOA p. 10. So, he *wanted* the jury to hear Luther Smith's statements that directly implicated him as an assailant? His trial attorney argued zealously to keep the statements *out* so that Appellant would *not* be implicated by Luther's statements. Usually, Respondent argues a piece of evidence is or was more probative than prejudicial, but here the prejudice of the group of statements certainly substantially outweighed their probative value for Appellant. Never mind Appellant proving a more favorable result at a separate trial by using them.

[5] Respondent does not concede the issue here.

The only statements by Luther Smith that ended up being introduced at trial through police officers were two conversations he had with an officer in a patrol car and a comment he made to a jail house informant where he only implicated himself in the crime. Tr. 1208-1219; Tr. 1749-1754. He said the odds were not in his favor, he only wanted the drugs, drugs made him do bad things, and he didn't mean to "off" the kids to an officer, and other inculpatory statements to the jailhouse informant. After objections, the trial court even instructed the jury to disregard the "odds were not in his favor" statement. Tr. 1210-1211. Appellant argues *Bruton* was implicated here, but it was not, as the State did not introduce the statements that incriminated him. But could the defense have introduced them?

(4) Fifth Amendment Privilege Against Self-Incrimination and Hearsay

There is no evidence in the record that shows Smith would have testified voluntarily in a codefendant's trial. Even so, a defendant is not entitled to severance as a matter of right even to make a codefendant available to testify. *State v. Thompson*, 279 S.C. 405, 308 S.E.2d 364 (1983); *State v. Crowe*, 258 S.C. 258, 188 S.E.2d 379 (1972). In fact, in the absence of any showing that a codefendant would in fact testify or testify favorably in a separate trial, any motion for severance is properly denied. *State v. Prince*, 316 S.C. 57, 447 S.E.2d 117 (1993).

In the trial in *State v. Crowe*, Crowe called a codefendant to testify but he refused by asserting his right against self-incrimination. "The fact that the refusal to sever resulted in the failure of Crowe to have his codefendant testify on his behalf did not constitute reversible error. The record fails to show that Wright would testify if a separate trial were granted or that his testimony would exculpate the codefendant Crowe." *Crowe*, 258 S.C. at 267, 188 S.E.2d at 383; *see also State v. Allen*, 269 S.C. 233, 240, 247 S.E.2d 64, 67 (1976) (trial court was within his discretion in denying severance even though a codefendant wanted to testify in a separate trial.)

Further, even if Smith were to voluntarily take the stand (again, eliminating *Bruton* issues), all three codefendants agreed at various points during pretrial hearings that Smith's statements would be inadmissible hearsay if not introduced by the State. January 27, 2022 Tr. 206, 209, *e.g*. And as the solicitor said, "you don't have the right to elicit hearsay. You don't have the right through cross examination to break rules." January 27, 2022 Tr. 217. The State also aptly stated during the January 27th hearing that, "We are [thinking about] introducing Luther Smith's statement under 801(d)(2) [SCRE] an admission by a party opponent.[6] It is not hearsay because it is being offered against a party. And it's the party's own statement . . . [t]here's no hearsay exception that allows [Luther Smith] to introduce Luther's own statement." Tr. 218. Therefore, even if the witness were to be made available, his prior statements likely could not be used by Appellant anyway. *See* Rule 613, SCRE (barring the use of prior statements if a witness admitted he made them while on the stand.)

Luther Smith's counsel did bring up maybe bringing in an expert in false confessions, but that would have meant Smith had to testify, which would eliminate all the issues Appellant is raising here. February 3, 2022 Tr. 5-6, 14-15. No such defense expert was called, however, and Smith did not testify rendering the point null and void.

(5) If the Defense Opened the Door to Some of the Statements, Appellant Would Be Further Incriminated, Further Prejudicing Him

Finally, as raised above, all three codefendants argued at various points that if some of Smith's statements at issue were introduced, then they *all* would have to be introduced to the jury due to the Rule of Completeness. January 27, 2022 Tr. 124-126, 131, 211-212, *e.g.* The

[6] It is worth underscoring here that had Appellant been granted the relief he desired, Smith would not be a party opponent at Appellant's severed trial. What hearsay exception would he then get the statements admitted under?

solicitor agreed and said, "it's *Cabrera*[7] . . . the Rule of Completeness . . . Cabrera's whole statement was, yeah, I killed her . . . the only way to effectively relay the statement accurately would have been to play the whole thing." January 27, 2022 Tr. 218-219; February 3, 2022 Tr. 5-6; Rule 106, SCRE. The parties all discussed *State v. Cabrera-Pena*, *State v. Oglesby*, *State v. Jackson*, *State v. Evans*,[8] and Rule 106, SCRE, which essentially all say if you use part of a statement, the whole thing is coming in, because "to require the State to totally redact anything that could be viewed in combination with other evidence. . . would 'unduly handcuff the government's ability to introduce evidence . . . against a declarant in a joint trial." February 3, 2022 Tr. 3-11, 39-40.

Therefore, even if the motion to sever had been granted and even if Smith freely testified and even if a hearsay exception were available, all his statements would then come in one way or the other through the defense opening the door. *State v. Page*, 378 S.C. 476, 482, 663 S.E.2d 357, 359 (2008). Our case law *does not even support reversal* for denials of motions to sever for codefendants to give testimony that would show how the other codefendant(s) *were innocent*. *Crowe*, 258 S.C. at 267, 188 S.E.2d at 383; *Allen*, 269 S.C. at 240, 237 S.E.2d at 67. Here, Smith directly *incriminated* his two codefendants in the crime. Yet Appellant is arguing he was prejudiced by just that: apparently, he wanted Smith to directly incriminate him on the stand. How would that have achieved a more favorable result for him at a separate trial? This Court should affirm.

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[7] *State v. Cabrera-Pena*, 361 S.C. 372, 379, 605 S.E.2d 522, 525 (2004).

[8] *State v. Oglesby*, 384 S.C. 289, 292-293, 681 S.E.2d 620 (Ct. App. 2009) (underscoring that "when part of a recorded statement is introduced, the opposing party may require the admission of other portions to ensure the partial statements are not taken out of context."); *State v. Jackson*, 410 S.C. 584, 765 S.E.2d 841 (Ct. App. 2014); *State v. Evans*, 316 S.C. 303, 450 S.E.2d 47 (1994).

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

JULIANNA E. BATTENFIELD
Assistant Attorney General
S.C. Bar No. 103135

DAVID PASCOE
Solicitor, First Judicial Circuit

BY: _s/Julianna E. Battenfield____
Julianna E. Battenfield
S.C. Bar No. 103135

Attorney for Respondent
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-6305

OFFICE OF THE ATTORNEY GENERAL

Columbia, South Carolina
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