STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2022-000266

THE STATE, ...RESPONDENT,

v.

ANTLY JERMAINE SCOTT,.....APPELLANT.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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

[2] *State v. Travis Latrell Lawrence*, Op. No. 28156 (S.C. Sup. Ct. filed June 7, 2023) (finding that a co-defendant cannot be compelled to testify in another's trial when the "hazards of self-incrimination" that would come from such testimony were openly apparent.)

TABLE OF AUTHORITIES

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in denying Appellant's motion to sever his trial from his co-defendants, where the state attempted to show guilt by association and relied on testimony that implicated only some of the co-defendants and thereby prejudiced Appellant's right to a fair trial?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON APPEAL

Whether the motion to sever issue is preserved for appellate review as the trial court never made a final ruling, but if it had been preserved, whether the evidence Appellant complains of would have come in at his separate trial anyway under hand of one, hand of all and the rules allowing evidence in furtherance of a conspiracy (including statements made after the conspiracy to conceal the crime) to be admitted against any co-defendant regardless of whether they had a separate trial?

STATEMENT OF THE CASE

Appellant Antly Jermaine Scott was indicted at the August 2018 term of the grand jury for Orangeburg County for four counts of murder, attempted murder, and burglary first degree. (R. 2404, 2018-GS-38-01301, -01302, -01303, -01304, -01305, and -01306). He was prosecuted by solicitors David L. Osborne and Chelsea A. Glover and was represented by Ola A. Johnson. Appellant was tried jointly with two other co-defendants: Robert Bailey (represented by Mark A. Leiendecker and Ashley D. Chisolm) and Luther Smith (represented by Aimee J. Zmroczek and Richard L. Lackey). R. 1.

After extensive pre-trial hearings at which the co-defendants' joint motion to sever was discussed but never ruled on, Appellant proceeded to a joint trial by jury with Bailey and Smith from February 7th to 23rd, 2022, after which all three were found guilty as charged. January 27, 2022 Tr.; February 3, 2022 Tr., R. 2382-2383. He and his co-defendants were sentenced by the Honorable Edgar W. Dickson to life in prison for the four counts of murder and burglary first degree convictions, and 30 concurrent years for the attempted murder conviction. R. 2392-2393, R. 2396, R. 2400. Appellant timely filed a notice of intent to appeal his convictions and sentences on March 4, 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. The motion to sever argument is not preserved for appellate review as the trial court did not rule on it. Even if the court had ruled, however, the evidence Appellant complains of would have been admissible at his separate trial anyway. This Court should affirm.

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), and appellate courts should only reverse a conviction from a joint trial when an Appellant proves there was a reasonable probability that he would have obtained a more favorable result at a separate trial. *Hughes v. State*, 346 S.C. 554, 552 S.E.2d 315 (2001). In other words, he must show he was prejudiced by the denial of the motion. *State v. Thompson*, 279 S.C. 405, 308 S.E.2d 364 (1983).

Appellant Antly Scott argues the trial court erred by denying the three co-defendants' joint motion to sever. However, he readily admits "no clear ruling was issued." IBOA p. 8. Therefore, the issue is not preserved because there is no clear ruling to appeal. Second, Appellant argues that the court erred by denying the motion (again, even though there was no clear ruling) because evidence was introduced against his two co-defendants at trial that caused the jury to find him guilty "by association." He maintains he was prejudiced because were he to have had his own trial, that that evidence would allegedly not have been admissible. IBOA pp. 9-10. Third, Appellant argues the trial court erred because were he to have had a separate trial, he would have had the opportunity to cross-examine co-defendant Luther Smith about his

statements (not introduced at trial) that eventually implicated himself, Appellant, and co-defendant Robert Bailey. IBOA p. 10.

Appellant's arguments are wrong for many reasons: **(1)** Appellant did not preserve the severance motion issue for appeal because he did not ensure the trial court made a ruling on the record; **(2)** Hand of one, hand of all evidence in furtherance of a conspiracy (before and after) is admissible against co-defendants in this state regardless of whether they have separate trials; **(3)** There is no *Bruton*[3] problem here because the State did not introduce any non-testifying co-defendant's statement that implicated anyone else at the joint trial, and even if the motion to sever would have been granted, Luther Smith likely would have invoked his Fifth Amendment rights and the statements could not be used anyway; and **(4)** Competent, independent evidence was introduced implicating Appellant only that was much stronger than the evidence he complains of so he cannot show prejudice. This Court should affirm.

Motions to Sever

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

> It would impair both the efficiency and the fairness of the criminal justice system to require in all these cases of joint crimes where 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.

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

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 co-defendant. *Hughes v. State*, 346 S.C. at 558-559, 552 S.E.2d at 317. But, as Appellant notes, "[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*.: IBOA p. 9 (emphasis added).

> We reject the argument asserted by several of the appellants that the joint trial resulted in a 'spillover 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) (overruled on other grounds by *State v. Torrence*, 406 S.C. 45, 406 S.E.2d 315 (1991)) (upholding the denial of a motion to sever when co-defendants accused each other of having committed the crime.)

In *Zafiro*, the Supreme Court of the United States rejected the request to create a bright line rule "mandating severance whenever co-defendants 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: "the state attempted to show guilt by association." IBOA p. 4. But "mutually antagonistic defenses are not prejudicial *per se*," *Id*., and hand of one, hand of all evidence is admissible against co-defendants regardless of whether they have joint trials. *Stuckey*, 347 S.C. at 497-498, 556 S.E.2d at 410 ("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 one of them if they had been granted separate trials.") Appellant's argument for severance does not cut it.

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 co-defendant." *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 probable 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. Independent and competent evidence was introduced against Appellant at trial such that he cannot show prejudice here. This Court should affirm.

To return to the above arguments and the facts of this case in further detail:

(1) The Issue is Not Preserved – The Trial Court Did Not Rule on the Motion to Sever

All the above would be more applicable had the trial court made a ruling on the record on the motion to sever. However, the court did not, and Appellant does not argue here that the trial court erred by *refusing to exercise* discretion. Thus, he has waived that argument. Instead, Appellant claims the court erred by *making* a ruling, even though he admits in his brief that no clear ruling was made. IBOA p. 8. It is impossible to determine on appeal whether Judge Dickson abused his discretion because Appellant did not ensure the ruling was placed in the record. *State v. Carlson*, 363 S.C. 586, 595-596, 611 S.E.2d 283, 287-288 (Ct. App. 2005)

(appellant must raise an issue and obtain a ruling to preserve an issue for review); *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-694 (2003) (issue must have been raised to and ruled on by the trial court to preserve an issue for appellate review). It was Appellant's burden to present a sufficient record for appellate review. *State v. Sterling*, 396 S.C. 599, 610-612, 723 S.E.2d 176, 182-183 (2012). He did not, so he cannot raise the issue here. This Court should affirm.

(2) Appellant is Essentially Arguing Hand of One, Hand of All is Unfair

Even if it were preserved, Appellant next argues his "specific right" to a fair trial was violated because evidence implicating his other two co-defendants was introduced at the joint trial, and he was thus "splashed with their guilt" because the State was allowed to show "guilt by association." He claims the court apparently erred because it allowed the State to rely "on testimony that implicated only some of the co-defendants and thereby prejudiced Appellant." IBOA p. 1. The testimony he specifically complains of is the following:

- Dreamzz Nelson, aged eight at the time, was one of the three children shot the night of the murders. He was the only one who survived, and he identified co-defendant Robert Bailey or "Pocket" as the one who shot him on the stand. R. 729-734.

- Bailey reached out to Dreamzz' Aunt Veronica Bryant after the murders to see what Dreamzz remembered and to try to make sure he did not talk to the police. Bailey finally stopped calling after Bryant told him Dreamzz did not remember anything. R. 1527-1540.

- Co-defendant Luther Smith made a statement to police that "specifically goes after [Appellant] as the ringleader, as the planner of this crime." January 27, 2022 Tr., R. 116-117, 190-191.

- Orangeburg County Sheriff's Deputy Everett Culpepper testified Luther Smith told her that Appellant (not Robert Bailey) shot Jerome Butler (who was found shot to death outside the home) and Dreamzz Nelson. February 3, 2022 Tr., R. 227-237.

First, Appellant chiefly relies on *State v. Gunn* to support his argument that the motion to sever should be granted, but that case involved thirty-three defendants who conspired to traffic

the drug Dilaudid across multiple counties. *State v. Gunn*, 313 S.C. 124, 437 S.E.2d 75 (1993). The Court also mostly focused on the language in the indictments, and whether the lower court should have directed verdicts of acquittal to some, but not all, of the co-defendants based upon the sufficiency of the evidence. *Id*. at 134-135, 437 S.E.2d at 81-82. *Gunn* does not relate to the case at hand at all. This was not a "mass crime of conspiracy;" this was three guys who went to get drugs and ended up killing four people and wounding another in a straightforward hand of one, hand of all case.

Regarding the statements Dreamzz made, his identification of Robert Bailey as the shooter was only part of his testimony, which also implicated the other two co-defendants. His testimony at the very least would be part of the res gestae of the crime and would be admissible at any other trial. Regarding the statements Robert Bailey made to Dreamzz' aunt, Rule 801(d)(2)(E), SCRE, renders admissible—as a "statement which is not hearsay"—any statement made by a co-defendant during the course of and in the furtherance of the conspiracy in any trial of any co-defendant. "When a conspiracy is proved, all acts and declarations in furtherance thereof, by any of the conspirators, to advance the common cause, are evidence against all, though not done or made in the presence of each other." *State v. Blackwell*, 220 S.C. 342, 352, 67 S.E.2d 684, 689 (1951).

A defendant does not have to be charged with the crime of conspiracy for a conspiracy to exist under Rule 801(d)(2)(E), SCRE, and the case law rendering co-conspirator statements admissible. *State v. Martin*, 111 S.C. 352, 98 S.E. 129 (1919). Statements by co-conspirators in furtherance of the conspiracy are admissible upon mere prima facie proof of the existence of the conspiracy. *Blackwell*, 220 S.C. at 353, 67 S.E.2d at 689. "There is no doubt that when persons have banded themselves together to accomplish some crime, every word or act of each

conspirator in furtherance of such accomplishment of the crime binds every other of the conspirators." *State v. Green*, 40 S.C. 328, 18 S.E. 933, 934 (1894). Statements made to conceal or cover up a crime after the fact count. Wharton's Criminal Evidence § 608 (1991); *United States v. Inadi*, 475 U.S. 387 (1986) (a subsequent declaration of a conspirator may be admissible against any co-conspirator if the conspirators were still concerned with the concealment of their criminal conduct or identity.) Here, Robert Bailey was attempting to find out what Dreamzz Nelson remembered and was trying to suppress anything he remembered. It does not matter if Appellant knew Bailey was doing this; the statements were admissible against him at any trial, whether joint or separate.

Regarding Luther Smith's statements, he also made at least twelve other statements to law enforcement that implicated himself, Appellant, and Robert Bailey in the crime. January 27, 2022 Tr., R. 67-182; February 3, 2022 Tr., R. 234-247. The first statement Appellant lists was not introduced at trial, but Appellant claims he should have been able to cross-examine Smith on it anyway. But Appellant fails to mention that had it been introduced at trial through the necessity of Smith taking the stand, *all* of Luther Smith's statements that implicated the co-defendants would have been admissible under Rule 106, SCRE, and the Rule of Completeness, as was discussed at length pre-trial. The State never did move to admit any of them (at least the ones that implicated the other two), but even if they had, the statements in full would have only further implicated Appellant in the crime so he cannot show prejudice here.

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

There is no evidence in the record that shows Luther Smith would have testified voluntarily in a co-defendant's trial. Therefore, any right Appellant would have had to cross-examine Smith would have been out of the trial court's hands anyways. Even so, a defendant is

not entitled to severance as a matter of right even to make a co-defendant 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 co-defendant 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). Therefore, even if the trial court had ruled on the motion to sever and hypothetically denied it, that decision would not have been an abuse of discretion under our case law.

Case in point is *State v. Lawrence*, which was just released by the South Carolina Supreme Court. *State v. Lawrence*, Op. No. 28156 (S.C. Sup. Ct. filed June 7, 2023). The Court held that a co-defendant cannot be made to testify in a co-defendant's separate trial under the Fifth Amendment[4] and Article 1, Section 12 of the South Carolina Constitution if the "hazard of incrimination" to the co-defendant was readily apparent. Here, there is nothing in the record to indicate what order Appellant or co-defendant Bailey would have been tried in had they had the option of a separate trial, so the hazard of self-incrimination to Smith is readily apparent and Appellant would not have been able to cross-examine him. Smith probably would have invoked his Fifth Amendment (and S.C. Const. art. I § 12) rights against self-incrimination and Appellant would have lost access to his statements anyway so the point is moot.

As further proof of the mootness of the argument, in the trial of *State v. Crowe*, Crowe called a co-defendant 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 co-defendant testify on his behalf did not constitute reversible error. The record fails to show that Wright would

[4] U.S. Const. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . .")

testify if a separate trial were granted or that his testimony would exculpate the co-defendant 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 co-defendant wanted to testify in a separate trial.)

Even if Smith were to voluntarily take the stand in Appellant's hypothetically separate trial (again, eliminating *Bruton* issues), all three co-defendants agreed at various points during pretrial hearings in the actual case that Smith's statements would be inadmissible hearsay if not introduced by the State. January 27, 2022 Tr. R. 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., R. 1990-200.

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.[5] 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." R. 200. Therefore, even if Smith 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.) This Court should affirm.

(4) Independent, Competent Evidence Proved Appellant was Guilty

Even if Appellant had ensured the trial court put a ruling on the record, none of the other evidence against Appellant's two co-defendants prejudiced him because a man named Derrick Coleman testified and said Appellant confessed to killing "five people" right after the shooting.

[5] 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?

R. 1745. In fact, Coleman affirmed it was Appellant's idea to go to the house to buy drugs and get the bikes in the first place. R. 1721, R. 1724-1728. Coleman detailed how Appellant ("Jackie Man") got out of the truck, went inside the house, then came back thirty to forty-five minutes later, "running because they slung the doors open really fast and shut them . . . [and] Jackie Man screamed at me to go! Go! Go! Go! Go!" R. 1730-1733.

Then, Appellant directed Coleman to drive to a boat landing where he burned something then "threw two objects in the water." R. 1743-1745. When Coleman asked what happened, Appellant "screamed at [Coleman] and he said, I just killed five f***ing people, quit giving me s***!" R. 1745-1746. Once they got back to the trailer the group had started the night at, Appellant was the one who pulled out the drugs they all originally went to retrieve. R. 1749-1750. That, along with other independent and competent evidence, proved Appellant was guilty of the crime all by himself. Therefore, he cannot prove prejudice here.

CONCLUSION

For all the foregoing reasons, the State respectfully requests that the judgments, convictions, and sentences of the lower court be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

This 9th day of August 2023.

s/*Julianna E Battenfield*
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