STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Orangeburg County

Honorable Edgar W. Dickson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANTLY JERMAINE SCOTT,

APPELLANT

APPELLATE CASE NO. 2022-000266

FINAL BRIEF OF APPELLANT

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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?

STATEMENT OF THE CASE

On or about August 1, 2018, an Orangeburg County indicted Appellant for four counts of murder, one count of attempted murder, and one count of burglary in the first degree. R. 2404. Following two pre-trial hearings, the case was called to trial before the Honorable Edgar W. Dickson and a jury on February 7, 2022. Ola Johnson represented Appellant.

Appellant was tried with two co-defendants, Robert Bailey and Luther Smith. Bailey was represented by Mark Leiendecker and Ashley Chisholm. Smith was represented by Aimee Zmroczek and Richard Lackey. David Osborne and Chelsea Glover appeared on behalf of the state.

Following a multi-week trial, the jury found Appellant guilty as indicted. R.2382, l. 4 – R. 2383, l. 7. Judge Dickson sentenced him to life on the burglary and murder charges as well as thirty years' imprisonment on the attempted murder offense. R. 2401 ll. 9 – 24.

This appeal 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). Trial judges should be "cautious in allowing joint trials" and must assure protection of a defendant's constitutional rights. State v. Singleton, 303 S.C. 313, 315, 400 S.E.2d 487, 488 (1991) (reversing conviction obtained in joint trial because defendant's Sixth Amendment right of confrontation was violated). "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)

ARGUMENT

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.

Relevant facts

By way of a written motion dated January 9, 2022, counsel for Appellant moved to sever Appellant's trial from his co-defendants. R. 364. He offered the following factual recitation in the motion:

> The Defendant is accused of participating in the killing of four people, and wounding a fifth on July 15, 2021. After more than a year, multiple people were arrested in connection with the incident including the Defendant. Notably, several co-defendants have made multiple statements to law enforcement during the investigation implicating not only themselves but others as well. Further, although the Defendant understood that the State did not intend to try the codefendants together when this trial was originally scheduled, the Defendant subsequently has been notified by the state that it now intends to try him alongside with co-defendants in this case.

Id.

The facts as adduced by the state at trial were that on the morning of July 15, 2015, at 6:48 a.m., officers were called out to a home in Holly Hill. R.480, l. 18 – R. 482, l. 3. Damien Clinton with the Orangeburg County Sheriff's Department was one of the first officers on the scene. R. 482, ll. 10 – 20. He observed a deceased male laying on the ground by a red car. R. 483, ll. 12 – 23. Clinton walked into the home through the back door. R. 485, ll. 2 – 4. He discovered three additional bodies as well as an eight-year-old boy who had been shot but was still alive. R. 486, l. 13 – R. 488, l. 22.

The home belonged to Christopher Wright, an admitted drug dealer. R. 507, ll. 20 – 25. Wright had not been at home the night of the shootings. R. 549, l. 23 – R. 551, l. 25. Wright identified the deceased male outside by the car as Jerome Butler. Id. Wright immediately called 911. R. 552 ll. 1 – 8.

Due to a recent exchange of dirt bikes and motorcycles, Wright suspected co-defendant Bailey was responsible for the murders. R. 524, ll. 2 – 23; R. 567, ll. 4 – 5; R. 706, ll. 11 – 14. Bailey's nickname was Pocket. The eight-year-old boy took the stand and identified Bailey as one of the assailants. R. 776, l. 10 – R. 781, l. 18.

After being shot, the eight-year-old boy spent time in the hospital. His aunt, Veronica Bryant, testified during the state's case-in-chief. R. 1527. She previously purchased marijuana from Bailey. R. 1534, ll. 2 – 6. Following the shooting, Bailey would routinely check with Bryant regarding her nephew's health and memory. R. 1535, l. 25 – R. 1537, l. 4; R. 1540, ll. 6 – 9. It was only after Bryant informed Bailey that her nephew could not remember anything that Bailey stopped asking about his status. R. 1540, ll. 16 – 23.

A different witness for the state connected Appellant to the shootings. Derrick Coleman had previously purchased marijuana from Bailey, same as Bryant. R. 1702, ll. 3 – 24. Coleman claimed to know Appellant, nicknamed "Jackie Man," as well. R. 1709, ll. 5 – 18. Coleman testified as to his recollections from July 14, 2015. R. 1710, ll. 4 – 7. Coleman was involved in the transaction involving Wright and Bailey. R. 1713, l. 23 – R. 1714, l. 25.

Later that night, Coleman, Appellant, and a few other people were hanging out together. R. 1720, ll. 9 – 19. The group discussed going to a strip club but instead decided to go purchase drugs, according to Coleman. R. 1720, l. 20 - R. 1521, l. 23. Coleman, Smith, and Appellant

supposedly rode in Coleman's truck to Bailey's house. R. 1724, ll. 19 – 25. They were unable to procure drugs at Bailey's house. R. 1728, ll. 8 – 20.

Smith and Bailey got out of the truck and were gone between thirty and forty-five minutes. R. 1731, ll. 1 – 25. When they got back to the truck, Coleman testified that they appeared to be out of breath and flung open the truck doors. R. 1733, ll. 14 – 25. Coleman claimed that Appellant yelled at him to "go go go." Id. Because Coleman was shaken, Smith began driving. R. 1737, ll. 3 – 24. They drove to a landing, where Coleman allegedly saw Appellant throw two objects into the water. R. 1745, ll. 1 – 3. Coleman testified that when Appellant got back into the truck, he admitted to killing five people. R. 1745, ll. 15 – 25.

When the group got back to the trailer where they had began their night, Appellant supposedly pulled out drugs from his pocket. R. 1749, ll. 1 – 24. Coleman indicated it was methamphetamine and cocaine. Id.

None of the three co-defendants testified after the state rested.

Regarding severance, trial counsels contended in his pre-trial written motion for severance that Appellant "cannot obtain a fair trial if his case is tried with his co-defendants, as there is a serious risk that this right to confrontation and cross-examination of his co-defendant accuser will be compromised." R. 364. Counsel provided citations to state and federal law, and the trial judge heard arguments pre-trial.

During a pre-trial hearing, counsel for Appellant argued in favor of the motion to sever. R. 333, l. 21 – R. 334, l. 10. According to counsel, Smith's statement to police "specifically goes after [Appellant] as the ringleader, as the planner of this crime." Id. At the same hearing, counsel for co-defendant Bailey argued "there's a serious risk that a joint trial will compromise the specific trial rights of the codefendant or prevent the jury from making a reliable judgment

about the co-defendant's [guilt]. There's always an inference when you sit in a courtroom with two or three other defendants that if they prove one defendant guilty you get splashed with the paint of that defendant." R. 421, l. 6 – R. 424, l. 16. Appellant's trial counsel joined in favor of the motion on his client's behalf:

> And from the very first statement where Mr. Smith is talking about codefendants, he starts naming my client as the one who plans it. And says Mr. Scott is the ringleader who planned it. And it keeps going back to that and it just [gets] worse and worse as they go in the video and the statement he says my client kicks the door, my client shoots, and then he says Mr. Bailey shoots.

R. 426, ll. 11 – 24.

Counsel then raised a concern about written statements. R. 427, l. 1 – R. 428, l. 22. Written statements seemingly mirrored Smith's verbal statements to the police. Id.

Smith's statements were explored at a different pre-trial hearing. On February 3, 2022, the trial court heard testimony from Everett Culpepper, a previous employee from the Orangeburg County Sheriff's Office. R. 227. Culpepper interviewed Smith on October 4, 2016. R. 227, ll. 14 – 16. According to Culpepper, Smith claimed Appellant shot Butler. R. 235, ll. 12 – 19. Culpepper also testified that Smith suggested Appellant was the one who shot the eight-year-old boy. R. 237, ll. 3 – 8.

In response, the trial judge indicated his intent to "keep out references to your clients that [Smith] says." R. 246, ll. 18 – 24. The state indicated its intent to try at least Smith:

> I would suggest that, one, Luther [Smith] is in the trial. We're going forward with Luther on this trial. ... But what I would ask is keep all three in until Monday morning. And then on Monday morning, we will pick between Luther and Bailey or Luther and Scott. And the reason why - - and I'm not playing games. I'm just going to be straight with the Defense. The reason why we need to do that without getting into all the details is that we need witnesses or a witness to go forward with one of these other two.

R. 222, l. 11 – R. 222, l. 23.

Although no clear ruling was issued, the state called all three defendants' cases to trial in February 2022.

Discussion

Criminal defendants who are jointly tried for murder are not entitled to separate trials as a matter of right. State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998); State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997); see also State v. Garrett, 350 S.C. 613, 567 S.E.2d 523 (Ct. App. 2002) (clarifying that codefendants are not entitled to separate trials as a matter of right). A motion for severance is addressed to the sound discretion of the trial court. State v. Harris, 351 S.C. 643, 572 S.E.2d 267 (2002); State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996); State v. Simmons, 352 S.C. 342, 573 S.E.2d 856 (Ct. App. 2002). The trial court's ruling will not be disturbed on appeal absent an abuse of that discretion. Tucker, 324 S.C. at 164, 478 S.E.2d at 265; State v. Prince, 316 S.C. 57, 447 S.E.2d 177 (1993); Simmons, 352 S.C. at 350, 573 S.E.2d at 860. An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law. State v. Lopez, 352 S.C. 373, 574 S.E.2d 210 (Ct. App. 2002).

There can be no clearly defined rule for determining when a defendant is entitled to a separate trial, because the exercise of discretion means that the decision must be based upon a just and proper consideration of the particular circumstances which are presented to the court in each case. State v. McIntire, 221 S.C. 504, 71 S.E.2d 410 (1952); State v. Castineira, 341 S.C. 619, 535 S.E.2d 449 (Ct. App. 2000), aff'd, 351 S.C. 635, 572 S.E.2d 263 (2002). A severance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a codefendant or prevent the jury from making a reliable judgment about a codefendant's guilt. Harris, 351 S.C. at 652–53, 572 S.E.2d at 273; State v. Dennis, 337 S.C. 275, 523 S.E.2d 173 (1999). 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, 552 S.E.2d 315 (2001).

A defendant who alleges he was improperly tried jointly must show prejudice before this court will reverse his conviction. Dennis, 337 S.C. at 281, 523 S.E.2d at 176; State v. Crowe, 258 S.C. 258, 188 S.E.2d 379 (1972); see also State v. Thompson, 279 S.C. 405, 308 S.E.2d 364 (1983) (noting that for reversal, a defendant who was tried jointly must show prejudice). The general rule allowing joint trials applies with equal force when a defendant's severance motion is based upon the likelihood he and a codefendant will present mutually antagonistic defenses, i.e., accuse one another of committing the crime. Hughes, 346 S.C. at 559, 552 S.E.2d at 317; Dennis, 337 S.C. at 281, 523 S.E.2d at 176. The rule allowing joint trials is not impugned simply because the codefendants may present evidence accusing each other of the crime. Dennis, 337 S.C. at 281, 523 S.E.2d at 176; State v. Smith, 359 S.C. 481, 597 S.E.2d 888 (Ct. App. 2004).

The trial judge must act cautiously in allowing a joint trial. Dennis, 337 S.C. at 281, 523 S.E.2d at 176. The judge must carefully consider problems that may arise from a joint trial, such as redacted statements, and must assure protection of each defendant's constitutional right to confront witnesses against him. Id. at 281–82, 523 S.E.2d at 176; State v. Singleton, 303 S.C. 313, 400 S.E.2d 487 (1991). A proper cautionary instruction may help protect the individual rights of each defendant and ensure that no prejudice results from a joint trial. Hughes, 346 S.C. at 559, 552 S.E.2d at 317; State v. Stuckey, 347 S.C. 484, 556 S.E.2d 403 (Ct. App. 2001); see also State v. Holland, 261 S.C. 488, 494, 201 S.E.2d 118, 121 (1973) (finding trial court's cautionary instructions to the jury in a joint trial "protected the rights of each individual appellant").

In Appellant's case, Bryant's testimony about how co-defendant Bailey only appeared to care about the eight-year-old boy's memory implicated a malicious attitude that was transferred to each of the co-defendants. Had Appellant been granted a separate trial, that testimony would have been irrelevant and inadmissible. Additionally, had the state attempted to put Smith on the stand in order to implicate Appellant, cross-examination would have been an option; Appellant would have been able to utilize his right of confrontation. However, as it stood, Appellant was convicted based in part on evidence that placed one of his codefendants—and not Appellant—in a bad light. This was both prejudicial and in error.

Although the underlying charges were different than the ones in the matter at bar, our Supreme Court reminded prosecutors of the pitfalls inherent in mass conspiracy trials: "It is always cumbersome to try a great number of defendants at one time... With such a large number [of defendants] there might be a danger of some of them being lost sight of by the jury, and their case considered by the jury in a vague way." State v. Gunn, 313 S.C. 124, 128, 437 S.E.2d 75, 83 (1993) (citing State v. McIntire, 221 S.C. 504, 71 S.E.2d 410 (1952)). In reversing multiple convictions, our Court remarked:

> As an appellate tribunal, we have had the opportunity to searchingly review the voluminous transcript generated by this prosecution, and to reflect upon the numerous issues raised. This was not a luxury afforded the trial judge or the jury. **Separate indictments, with separate trials**, and a sharper focus on the alleged conspirators' agreement, would have aided in the refinement of the State's case.

Gunn at 138-39, 437 S.E.2d 75, 83 (internal citation omitted and emphasis added).

The Gunn Court reiterated a holding from the United States Supreme Court opinion dating back to 1946:

> There are times when of necessity, because of the nature and scope of the particular federation, large numbers of persons taking part must be tried together or perhaps not at all, at any rate as respects some. When many conspire, they invite mass trial by their conduct. Even so, the proceedings are exceptional to our

> tradition and call for use of every safeguard to individualize each defendant in his relation to the mass. Wholly different is it with those who join together with only a few, though many others may be doing the same and though some of them may line up with more than one group.
>
> Criminal they may be, but it is not the criminality of mass conspiracy. They do not invite mass trial by their conduct. Nor does our system tolerate it. That way lies the drift toward totalitarian institutions. True, this may be inconvenient for prosecution. But our Government is not one of mere conveniences or efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trials. About them we dare not become careless or complacent when that fashion has become rampant over the earth.
> State v. Gunn, 313 S.C. 124, 139, 437 S.E.2d 75, 83 (1993)

Gunn at 124, 437 S.E.2d 75, 83 (quoting Kotteakos v. U.S., 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)).

Appellant was entitled to a trial by himself, severed from his co-defendants. The trial judge erred in denying the motion.

CONCLUSION

Based on the foregoing, Appellant respectfully requests this Court reverse his convictions and remand for a new trial, separate and apart from any co-defendants.

Sarah E. Shipe
Appellate Defender

ATTORNEY FOR APPELLANT

This 9th day of August, 2023.

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CERTIFICATE OF COUNSEL

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

August 9, 2023.

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