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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO ORANGEBURG COUNTY
Court of Common Pleas
Robert E. Hood, Post-Conviction Relief Judge
Maite Murphy, Trial Judge

Appellate Case No. 2019-000812

LEROY GLOVER, JR., SCDC #314746,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT PURSUANT TO WHITE V. STATE

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

APPELLANT'S STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in refusing to sever Petitioner's trial from the trial of his co-defendant brother because the co-defendant was going to present evidence that a purported confession by the co-defendant was actually a letter written by Petitioner and sent to the solicitor's office?

RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

Did the trial judge properly, in her broad discretion, deny Petitioner's motion for severance where the allegations raised against Petitioner and his co-defendant involved related and connected criminal conduct committed jointly by the pair, which made a joint trial a far more practical and justifiable way of trying their cases under the circumstances, and because no unfair or undue prejudice resulted to Petitioner as a result of the joint nature of the trial?

STATEMENT OF THE CASE

In November of 2013, the Orangeburg County Grand Jury indicted Petitioner, Leroy Glover, for murder, indictment #2013-GS-38-1624. (App. p. 770-771). On September 14, 2015, Petitioner, with his co-defendant and brother, Jason Glover, proceeded to jury trial before the Honorable Maite Murphy. Eduardo Curry represented Petitioner at trial. Michael Culler and Glen Walters represented the co-defendant. Donald N. Sorenson prosecuted the case. The jury found the co-defendant not guilty, but found Petitioner guilty. Judge Murphy sentenced Petitioner to life in prison. (App. p. 772). The notice of intent to appeal was not properly filed.

On January 25, 2016, Petitioner filed for post-conviction relief (PCR). (App. p. 773-779). The State filed a return on January 11, 2017. (App. p. 780-785). On May 23, 2017, an evidentiary hearing was held before the Honorable Robert E. Hood. Jonathan D. Waller represented Petitioner at the PCR hearing. Ruston W. Neely represented the State. In a written order signed November 13, 2017, Judge Hood granted relief pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974), but denied relief on all other grounds. (App. p. 831-838). PCR counsel did not receive a copy of the order until May 15, 2019. Petitioner filed his petition for writ of certiorari and brief pursuant to White on January 9, 2020. This brief of respondent pursuant to White follows.

STATEMENT OF THE FACTS

Applicant followed the victim into a trailer where he shot and killed the victim, who owed Applicant \$93. Afterwards, Applicant and his codefendant took the body and hid it in the woods. Law enforcement used cell phone location data from Applicant's phone to find the victim's body. Jeremy Bradley testified Applicant approached him after law enforcement began their murder investigation and asked him to provide a false alibi. The State also presented a video of Applicant, from a security camera outside a law enforcement officer's office, instructing a friend to give him an alibi and lie to law enforcement. David Williams testified he heard a gunshot and then saw a black male pull away quickly from the scene. Williams identified Applicant's codefendant out of a photo lineup as the driver. Applicant's codefendant introduced defense ex. 1 (letter), a statement allegedly signed by Applicant's codefendant. The letter, signed with Applicant's codefendant's name, purported to confess to the murder. However, an expert witness specializing in handwriting identification testified the letter appeared to be written by Applicant, not Applicant's codefendant. Applicant's codefendant testified Applicant shot the victim.

ARGUMENT

The trial judge did not abuse his broad discretion by denying Petitioner's motion for severance because the allegations raised against Petitioner and her co-defendant involved related and connected criminal conduct committed jointly by the pair, which made a joint trial a far more practical and justifiable way of trying their cases under the circumstances, and because no unfair or undue prejudice resulted to Petitioner as a result of the joint nature of the trial

Petitioner contends the trial judge abused her discretion by denying his severance motion and refusing to try him separately from his co-defendant. In support of that contention, Petitioner maintains the severance motion should have been granted because the co-defendant was going to present evidence that a purported confession by the co-defendant was actually a letter written by Petitioner and sent to the solicitor's office. To the contrary, a joint trial was warranted under the circumstances because Petitioner and his co-defendant were alleged to have committed the murder together, which made trying them together the most efficient and practical course of action. Additionally, Petitioner did not suffer any actual unfair prejudice as a result of the joint trial because his defense strategy incorporated the confession letter and because no inadmissible or improper evidence was introduced as a result of the joint trial. Furthermore, the trial judge's instructions to the jury in regard to the State's burden of proof and joint trials insured none of Petitioner's rights were compromised by the joint trial. Accordingly, the trial judge did not abuse her broad discretion by denying the severance motion. Petitioner's convictions should be affirmed.

In South Carolina, criminal defendants indicted for connected crimes are not entitled to separate trials as a matter of right and ordinarily may be jointly tried together. Hughes v. State, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); see also United States v. Chorman, 910 F.2d 102, 114 (4th Cir. 1990) ("Barring 'special circumstances,' the general rule is that defendants indicted together should be tried together." (citation omitted)). In fact, joint trials are preferred due to the

vital role they play in the criminal justice system. Zafiro v. United States, 506 U.S. 534, 537 (1993); see also State v.

, 337 S.C. 275, 282, 523 S.E.2d 173, 176 (1999) (recognizing the principles espoused by the United States Supreme Court in regard to joint trials are fully consistent with South Carolina law); see generally Kansas v.

, U.S., 136 S. Ct. 633, 645 (2016) (“Joint proceedings are not only permissible but are often preferable when the joined defendants’ criminal conduct arises out of a single chain of events.”). Specifically, joint trials are vital because they promote efficiency in the administration of justice. Zafiro, 506 U.S. at 537. Likewise, joint trials serve the interests of justice by avoiding inconsistent verdicts, preventing inequity, and enabling more accurate assessments of relative culpability in cases involving multiple defendants, which may operate to the advantage of some defendants. Richardson v. Marsh, 481 U.S. 200, 210 (1987).

However, even though joint trials are generally preferred, severance is warranted when there is a serious risk 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. Zafiro, 506 U.S. at 539; see United States v. Smith, 44 F.3d 1259, 1266 (4th Cir. 1995) (“[P]rejudice [warranting severance] may be shown **only** where 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.’ ” (citation omitted and emphasis added)). Situations in which a joint trial might potentially be improper include: (1) when prejudicial evidence that would not be admissible against one defendant is admitted against a co-defendant; (2) when there is a marked difference in the degrees of culpability between different defendants; and (3) when essential exculpatory evidence would be available to a defendant only if he or she was tried alone. Zafiro,

506 U.S. at 539. Importantly though, “less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice” that might result from a joint trial. Id.; see Hughes, 346 S.C. at 559, 552 S.E.2d at 317 (“A proper cautionary instruction may help protect the individual rights of each defendant and ensure that no prejudice results from a joint trial.”). Moreover, “defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials.” Zafiro, 506 U.S. at 539; see State v. Walker, 366 S.C. 643, 657, 623 S.E.2d 122, 129 (Ct. App. 2005) (“The rule allowing joint trials is not impugned simply because the codefendants may present evidence accusing each other of the crime.”).

In ruling on a motion for severance, a trial judge is vested with broad discretion. Nichols, 325 S.C. at 122, 481 S.E.2d at 124. When seeking severance, a criminal defendant bears an “exacting” burden and must make a strong showing to the trial judge prejudice would result from a joint trial. United States v. Martinez, 922 F.2d 914, 922 (1st Cir. 1991). Significantly, a trial judge should **only** grant severance when there is a serious risk a joint trial would compromise a specific trial right of one of the defendants or prevent the jury from reliably determining the guilt or innocence of one of the defendants. Hughes, 346 S.C. at 559, 552 S.E.2d at 317.

On appeal, a trial judge’s decision regarding a motion for severance will not be reversed without a showing of a prejudicial abuse of discretion. Dennis, 337 S.C. at 282, 523 S.E.2d at 176. Such an abuse of discretion will only be found when the trial judge’s denial of a motion for severance deprives the defendant of a fair trial and results in miscarriage of justice. Chorman, 910 F.2d at 114. Furthermore, an appellate court will not reverse a conviction achieved at a joint trial absent the presence of a reasonable probability the defendant would have obtained a more favorable result at a separate trial. Hughes, 346 S.C. at 559, 552 S.E.2d at 317; see also Martinez,

922 F.2d at 922 (“We add that ‘prejudice means more than just a better chance of acquittal at a separate trial.’ ” (citation omitted)).

Petitioner and his brother, Jason Glover, were charged in the fatal shooting of Richard Michael Carter, Senior. The two men were tried together. Prior to trial, counsel for co-defendant Jason Glover moved for a continuance in order to obtain a handwriting expert to determine if a letter, date January 3, 2014, sent to the solicitor’s office, purportedly written by Jason Glover, admitting guilt and stating that his brother, Petitioner, had nothing to do with the crime was actually written by Petitioner. (App. p. 10-14). The trial judge denied the motion for continuance. The expert was able to complete his examination and was called as a witness by the co-defendant. The witness opined that the January 2014, confession letter, signed by Jason Glover, was written by Petitioner.

Immediately following the denial of the motion for a continuance, Petitioner moved to sever his trial from the trial of his brother co-defendant. (App. p. 19, line 15-p.20, lines 1-13). The judge denied the severance motion stating:

All right. As all parties know, criminal defendants are jointly tried for murder, not entitled to separate trials as a matter of right, and the Court finds that a joint trial would not compromise a specific trial right of the co-defendant or prevent the jury from making a reliable judgment in this case. The Court will specifically instruct the jury to- make an individual instruction to protect the individual rights of each of the defendants to ensure that prejudice does not result from a joint trial, so your motion to sever is respectfully denied.

(App. p. 24, lines 8-18). The co-defendant, Jason Glover, initially admitted to an investigator that he shot Carter. (App. p. 472, line 2-p. 473, lines 1-24). Jason’s testimony at trial differed from the statement he initially gave the investigator. At trial, Jason claimed that Petitioner shot Carter in the back room of Petitioner’s trailer while Jason was in the living room playing games. (App. p. 620, line 1-p.621, lines 1-21). According to Jason, his only involvement was in helping to dispose

of the body. (App. p. 621-626). Jason denied writing the confession sent to the solicitor's office in January of 2014. (App. p. 675, lines 15-21). According to Jason, the handwriting was his brother's. (App. p. 675, lines 22-25). The January 2014, confession letter was marked as Defense Exhibit number one and admitted into evidence without objection. (App. p. 676, lines 1-9). Jason Glover, the co-defendant, was found not guilty by the jury. Trial counsel was asked at the evidentiary hearing as to his strategy concerning the confession letter. Counsel testified about allowing the letter into evidence to show that there was some conflict as to the statements and the version of the facts. (App. p. 806). Counsel elaborated that he believed that his strategy had worked and that absent Jason Glover testifying against his brother, it would've appeared that Jason was the primary and Petitioner would have been acquitted. (App. p. 808).

In Petitioner's case, the State alleged the brother co-defendants committed the murder jointly and the evidence against both defendants connected and intertwined. The evidence in the case was predominantly circumstantial, relying on cell phone positioning data and phone calls, many relating to both co-defendants. In denying the murder, Petitioner and his co-defendant both claimed the other committed the crime, however, a severance is not warranted simply because co-defendants present defenses that are antagonistic to one another. Further, no improperly or unfairly prejudicial evidence was admitted during the course of the joint trial that would have been inadmissible against either one of them during a separate trial. Petitioner contends the admission of the confession letter was improper bad act evidence, however, counsel testified he was able to use the letter as part of his trial strategy exculpating Petitioner and if the jury believed the letter then Petitioner would be found not guilty. Similarly, neither defendant was prevented from introducing essential exculpatory evidence that would have only been available if they had been tried individually. Under those circumstances, a joint trial was the most efficient and practical way

to try Petitioner and his co-defendant for their jointly-committed crimes, was fully warranted, and was necessary to avoid the needless repetition of the same evidence. See Dennis, 337 S.C. at 282-283, 523 S.E.2d at 176 (finding the trial judge properly denied a severance motion despite the fact Dennis’s defense involved accusing his co-defendant of the charged crime where the State was alleging Dennis and his co-defendant jointly participated in the crime, the trial judge gave a cautionary instruction, and neither defendant was able to identify a specific trial right prejudiced by the joint trial); see also Zafiro, 506 U.S. at 539 (instructing joint trials are preferred and recognizing situations in which one might be improper typically occur when prejudicial evidence that would not be admissible against one defendant is admitted against a co-defendant, when there is a marked difference in the degrees of culpability between different defendants, or when essential exculpatory evidence would be available to a defendant only if he or she was tried alone); cf. State v. Stuckey, 347 S.C. 484, 497, 556 S.E.2d 403, 410 (Ct. App. 2001) (“[H]ad the court granted the motions, the resulted would been multiple presentations of the State’s entire case, including the lengthy testimony of the two primary witnesses[.]”).

In arguing to the contrary, Petitioner contends the introduction of otherwise inadmissible bad act evidence by the co-defendant required severance as the situation presented more than antagonistic defenses. Initially, despite Petitioner’s contention to the contrary, the evidence was not improper and was actually potentially beneficial to his defense. The letter was properly admitted after being authenticated and the jury could have believed the confession letter was actually written by Petitioner’s co-defendant, thus exculpating Petitioner. See Dennis, 337 S.C. at 282-283, 523 S.E.2d at 176 (recognizing mutually antagonistic defenses generally involve each defendant accusing the other of the charged crime); see also Zafiro, 506 U.S. at 538 (“Mutually antagonistic defenses are not prejudicial per se.”). Likewise, Petitioner suffered no unfair or

improper evidentiary prejudice as a result of the trial. The only evidence Petitioner contends was unfairly prejudicial was the introduction of the confession letter which, as discussed above, was properly admitted and exculpated Petitioner on its face. As a result, to the extent Petitioner suffered any evidentiary prejudice as a result of the joint trial, the prejudice suffered was the appropriate prejudice that results from the admission of admissible and probative evidence of guilt, which would not serve as a proper basis upon which to grant a motion for severance. See State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (“The prejudice Gilchrist seeks to escape is the prejudicial impact any criminal defendant faces when the State produces relevant evidence that implicates guilt of a crime charged. ‘Unfair prejudice does not mean the damage to a defendant’s case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis.’ ” (citation omitted)); see also State v. Kelsey, 331 S.C. 50, 74, 502 S.E.2d 63, 75 (1998) (“At most, any prejudice was incidental and therefore insufficient to demonstrate an abuse of discretion on the part of the trial court in denying severance.”); cf. Zafiro, 506 U.S. at 540 (“[A] fair trial does not include the right to exclude relevant and competent evidence. A defendant normally would not be entitled to exclude the testimony of a former codefendant if the district court did sever their trials, and we see no reason why relevant and competent testimony would be prejudicial merely because the witness is also a codefendant.”).

Because a joint trial was warranted based on the connected and related nature of the allegations raised in the case and because Petitioner suffered no actual unfair prejudice as a result of the joint trial, the trial judge did not abuse his broad discretion in denying Petitioner’s severance motion after considering the circumstances before him. See State v. Page, 406 S.C. 272, 284, 750 S.E.2d 623, 630 (Ct. App. 2013) (finding no abuse of discretion occurs when a trial judge bases a

determination on whether to permit a joint trial upon just and proper consideration of the particular circumstances presented); see also United States v. Becker, 585 F.2d 703, 707 (4th Cir. 1978) (“Speculative allegations as to possible prejudice do not meet the burden of showing an abuse of discretion in denying a motion for severance.”). Likewise, as the trial judge presented an appropriate cautionary instruction to the jury regarding the joint nature of the trial while also thoroughly instructing the jury on the State’s burden of proof, the joint nature of the trial did not result in the burden of proof shifting to Petitioner or in the trial becoming fundamentally unfair. See State v. Halcomb, 382 S.C. 432, 442, 676 S.E.2d 149, 154 (Ct. App. 2009) (“The trial court’s cautionary instruction . . . helped protect Halcomb’s rights and ensured that no prejudice resulted from the joint trial with Cottrell.”); see also Foye v. State, 335 S.C. 586, 590, n.1, 518 S.E.2d 265, 267 (1999) (“A jury is presumed to follow instructions.”); State v. Queen, 264 S.C. 515, 521, 216 S.E.2d 182, 185 (1975) (“It is the duty of jurors to take the law from the court in the particular case on trial. It must be presumed that they do so.”). Accordingly, Petitioner’s convictions should be affirmed.

CONCLUSION

For all the foregoing reasons, this Court should affirm Petitioner’s conviction and sentence.

Signature on following page

Respectfully submitted,

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July 30, 2020



ALAN WILSON
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The Honorable Daniel E. Shearouse
Clerk of Court — SC Supreme Court
Post Office Box 11330
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(By Electronic Filing Only)

RE: Leroy Glover, Jr. v. State of South Carolina
Appellate Case No.: 2019-000812

Dear Mr. Shearouse:

Enclosed please find the Brief of Respondent Pursuant to White v. State in the above matter for filing. Please let me know if anything additional is needed.

Sincerely,

s/ Benjamin Limbaugh
Benjamin H. Limbaugh
Assistant Attorney General
S.C. Bar # 103334

BHL/jj
Enclosures

cc: Kathrine Hudgins, Esquire (by email only)

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO ORANGEBURG COUNTY

Robert E. Hood, PCR Judge
Maite Murphy, Trial Judge
Appellate Case No. 2019-000812

LEROY GLOVER, JR.,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PROOF OF SERVICE

Pursuant to the Supreme Court’s Order “RE: Operation of the Appellate Courts During the Coronavirus Emergency,” dated March 20, 2020, the undersigned hereby certifies a true copy of the Return to Petition for Writ of Certiorari has been served upon opposing counsel by sending to opposing counsel’s primary e-mail address as listed in the Attorney Information System (AIS):

Kathrine Hudgins, Esquire
khudgins@sccid.sc.gov

This 30th day of July, 2020.

s/ Benjamin Limbaugh
BENJAMIN H. LIMBAUGH
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From: Benjamin Limbaugh
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To: 'Hudgins, Kathrine'
Subject: Glover RPWC and BOR
Attachments: Glover RPWC (02339464xD2C78).pdf; Glover BOR (02339462xD2C78).pdf

Good afternoon Ms. Hudgins,

I hope you're doing well! Please find attached my RPWC and BOR pursuant to White for Mr. Glover. Please let me know if there is anything else you need.

Thank you,
Ben



Benjamin Limbaugh
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