

SC 90607

IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI,

Respondent,

v.

KELLEN C. McKINNEY,

Appellant.

Appeal from the Circuit Court of Jackson County, Missouri
16th Judicial Circuit, Division 16
The Honorable Marco A. Roldan, Judge

APPELLANT'S SUBSTITUTE BRIEF

FREDERICK J. ERNST # 41692
Assistant Appellate Defender
Office of the Public Defender
Western Appellate/PCR Division
920 Main Street, Suite 500
Tel: 816.889.7699
Fax: 816.889.2088

Counsel for Appellant

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JURISDICTIONAL STATEMENT

Appellant, Kellen C. McKinney, was convicted after a jury trial in the Circuit Court of Jackson County of two counts of murder in the first degree, two counts of armed criminal action, and one count of attempted escape from custody while under arrest for a felony. (L.F. 228-229). Mr. McKinney was sentenced to consecutive terms of life imprisonment without eligibility for probation or parole on the murder charges, consecutive terms of life imprisonment on the armed criminal action charges, and a consecutive term of four years' imprisonment on the charge of attempted escape from confinement. (L.F. 228-229; App. A1-A2). This is Mr. McKinney's direct appeal.

This Court ordered this case be transferred on March 2, 2010.

Jurisdiction over this cause lies with the Missouri Supreme Court pursuant to Mo. Const., Art. V, Sections 9 & 10.

STATEMENT OF FACTS

This is Kellen McKinney's appeal of his convictions after a jury trial. Mr. McKinney was initially charged with two counts of murder in the first degree and two counts of armed criminal action arising out of the deaths of John and Mildred Caylor in their store and apartment in Raytown, Missouri, on October 20, 2004. (Legal File, "L.F." 19-21). A charge of attempted escape from custody was later added after Mr. McKinney had allegedly attempted to escape from the Jackson County Detention Center in December of 2004. (L.F. 34).

After a jury trial, Mr. McKinney was convicted of two counts of murder in the first degree, two counts of armed criminal action, and one count of attempted escape. (L.F. 228-229; App. A1-A2). Mr. McKinney appeals. (L.F. 109-114).

The Caylors owned a small store in Raytown and lived in an apartment in the back of the store. (Transcript "Tr." 605). Both were in their seventies. (Tr. 644). John Caylor used two canes to walk around. (Tr. 582-583). Prior to their deaths, the Caylors were last seen at approximately 9:40 a.m. on October 20, 2004. (Tr. 582-586).

On October 20, 2004, Mr. McKinney had borrowed a car from Kendra Heard to go to a job interview. (Tr. 661-662). He picked it up around 9 a.m. and brought it back around 12:30 p.m. (Tr. 662). When he dropped off the car, Ms. Heard thought he looked agitated. (Tr. 666). He told her that he had gotten into a fight with some guys after his interview and that one of the guys had hit him with a crowbar. (Tr. 663-664). She also saw that his right ear was bleeding. (Tr. 664). She saw that he had a black leather jacket wrapped around what appeared to be crowbar on the floor of the car. (Tr. 664-665).

When dropping off the car, Mr. McKinney first took the jacket and started to throw it into a trash dumpster, but then put it back into the car and took it with him. (Tr. 665-666).

At about 3 p.m. on October 20, 2004, a customer went to the Caylor's store but the front door was locked. (Tr. 573-575). He looked in and saw someone's head lying on the floor and some blood. (Tr. 575). The customer called 911 and a police officer arrived. (Tr. 576, 588). The police officer broke open the door. (Tr. 576, 589). Both he and the customer went into the store found the bodies of Mildred and John lying in different locations in the store. (Tr. 576, 590-591). After discovering the bodies, both left. (Tr. 576, 591). They were in the store for approximately five minutes. (Tr. 577).

A number of law enforcement officials then went to the store and began collecting and analyzing evidence. (Tr. 591-592, 601-602). Generally, there were a number of metal racks tipped over and pamphlets and other items strewn throughout the store indicating that some type of struggle had occurred. (Tr. 589, 811-812). There was blood throughout the store and some in the residence. (Tr. 602-625, 684-688, 812). Included in the blood found and tested was some blood found on a book that did not match the Caylor's or Mr. McKinney. (Tr. 694).

John Caylor was found lying face up in a pool of blood. (Tr. 590). It was possible that he had been lying face down and rolled over. (Tr. 831-832). His throat had been cut twice while he was on the ground. (Tr. 716, 723-724, 830-832). Mr. Caylor also suffered multiple blunt force injuries, his neck was broken, he had serious injuries to his head, and had cuts on his hands and other defensive wounds. (Tr. 714-719). He died as the result of multiple blunt force trauma and sharp force injuries. (Tr. 737). The blood

splatter indicated that he was beaten while standing and while he was on the floor, and that his throat was cut while he was on the ground. (Tr. 830, 832).

Mildred Caylor was found lying face down. (Tr. 842). She had two cuts to her throat, which were made while she was on the ground. (Tr. 733, 842). She had been hit numerous times and had a broken jaw, bruises on her arms and in her mouth, fractured ribs and a fractured hyoid bone in her throat. (Tr. 730-735). She also died of multiple blunt force trauma and sharp force injuries. (Tr. 737).

A drop of blood found on a bag next to the cash register was tested and put through a database and matched the DNA of Mr. McKinney. (Tr. 622-623, 630-632). This drop of blood appears to have fallen straight down onto the bag. (Tr. 848).

Mr. McKinney was arrested for murder on November 4, 2004, at his job. (Tr. 633-635). At the time, he had a partially healed cut on his ear. (Tr. 639-640). The police also searched the shelter where Mr. McKinney was living and recovered a black jacket. (Tr. 654, 656). Blood stains on the right shoulder and the zipper of the jacket matched Mr. McKinney. (Tr. 692, 753-754). There was also blood on the lining and sleeves of the jacket that matched John Caylor. (Tr. 673).

Numerous shoe prints from the Caylor's store matched the shoes Mr. McKinney was wearing on the day of his arrest. (Tr. 794-805). Mr. McKinney's fingerprints and blood were found on the mat next to Ms. Caylor's head. (Tr. 785, 844). Blood on the cash register matched Mr. McKinney. (Tr. 686, 847-848).

Kendra Heard's car was searched. The police were able to develop a partial profile from a blood stain on the right floorboard that was consistent with John Caylor. (Tr. 676).

While in the Jackson County jail, a prisoner overheard Mr. McKinney talking with another prisoner. (Tr. 871). Mr. McKinney told this other prisoner that "she wouldn't shut up so he had to do it," "[t]hat she wouldn't shut up, even after the blood was bubbling in her throat," and that "he felt like a true devil." (Tr. 871-872). In talking with this prisoner, Mr. McKinney also made some stabbing gestures and noises. (Tr. 871-872). At another time in the jail, Mr. McKinney also made a comment that "they were looking for ghosts" while he was watching a news report about the homicides that was talking about finding more people in the homicide. (Tr. 872-873).

On December 24, 2004, jail guards searched the cell in which Mr. McKinney was housed and found a floor drain in a sock wrapped up in one of Mr. McKinney's jumpers. (Tr. 902-904). A latch on the seat in the cell was missing and the cage over a smoke detector had been tampered with. (Tr. 906). Guards found a sock and a screw and a number of bed sheets tied together underneath the bed. (Tr. 906, 908). The mortar around the cinderblocks around the window to the cell had been chiseled into and loosened. (Tr. 907). Mr. McKinney was moved to another cell and kept in administrative custody. (Tr. 912). A search of this cell on December 29 revealed that a light had been damaged. (Tr. 915). The guards searched his belongings and found a metal bracket, two screws and a hand-drawn map of the area surrounding the jail. (Tr. 917).

Mr. McKinney was originally charged with two counts of murder in the first degree and two counts of armed criminal action in connection with the deaths of Mildred and John Caylor. (L.F. 17-21). A charge of attempted escape from confinement was added. (L.F. 33-35). Mr. McKinney moved to sever the attempted escape charge due to improper joinder, and due to substantial prejudice. (L.F. 110-113; Tr. 282-284, 896). The State argued that joinder was proper because “the crimes ... are of the same or similar character in that the escape occurred because of the arrest for murder and were thus part of the same occurrence.” (L.F. 111). This motion was denied. (Tr. 284-285, 896). The case proceeded to a jury trial and Mr. McKinney was convicted of all counts. (L.F. 228-229). This appeal follows.

POINT ON APPEAL

The trial court erred in overruling Mr. McKinney’s motion for severance and improper joinder, and permitting the State to try all five counts in a single trial because this ruling violated Mr. McKinney’s rights under Rule 23.05 and Section 545.885, as well as his rights to be tried solely for the offense charges, and to due process and a fair trial as guaranteed by Article I, Sections 10, 17 and 18(a) of the Missouri Constitution and the Fifth and Fourteenth Amendments to the United States Constitution, in that joinder was improper because the charged offense of attempted escape from custody was not of the same or similar character, part of the same transaction, or part of a common scheme or connected with respect to the homicides in that the attempted escape charge allegedly occurred in a different location from and months after the murders and was not a part of a continuous chain of criminal conduct spanning back to the time of the murders; and prejudice arising from the improper joinder is presumed.

State v. McCrary, 621 S.W.2d 266 (Mo. banc 1981);

State v. Simmons, 815 S.W.2d 426 (Mo. banc 1991);

U.S. Const., Amends. V and XIV;

Mo. Const., Art. I, Secs. 10, 17 and 18(a);

Section 545.140 RSMo

Mo. S. Ct. Rule 23.05.

ARGUMENT ON APPEAL

The trial court erred in overruling Mr. McKinney's motion for severance and improper joinder, and permitting the State to try all five counts in a single trial because this ruling violated Mr. McKinney's rights under Rule 23.05 and Section 545.885, as well as his rights to be tried solely for the offense charges, and to due process and a fair trial as guaranteed by Article I, Sections 10, 17 and 18(a) of the Missouri Constitution and the Fifth and Fourteenth Amendments to the United States Constitution, in that joinder was improper because the charged offense of attempted escape from custody was not of the same or similar character, part of the same transaction, or part of a common scheme or connected with respect to the homicides in that the attempted escape charge allegedly occurred in a different location from and months after the murders and was not a part of a continuous chain of criminal conduct spanning back to the time of the murders; and prejudice arising from the improper joinder is presumed.

STANDARD OF REVIEW

In reviewing an improper joinder and failure to sever claim, an appellate court looks first to determine whether offenses were properly joined in the information. *State v. White*, 857 S.W.2d 344, 347 (Mo. App. E.D. 1993). The issue of whether joinder was proper is a question of law. *State v. Kelly*, 956 S.W.2d 922, 925 (Mo. App. W.D. 1997) Appellate courts review questions of law *de novo*. See *State v. Hoyt*, 75 S.W.3d 879, 882 (Mo. App. W.D. 2002).

In this case, McKinney filed a motion for severance of the offense of escape from custody from the murder and armed criminal action charges due to improper joinder because the escape charge was not of a similar character, was not of the same or similar character and was not a part of a common scheme or plan. (L.F. 108-109, ¶ 5; Tr. 896). In response to the motion, the State argued that joinder was proper because “the crimes ... are of the same or similar character in that the escape occurred because of the arrest for murder and were thus part of the same occurrence.” (L.F. 111, ¶ 5).

DISCUSSION

A. Joinder was Improper

The trial court erred in failing to sever the attempted escape count because it was improperly joined with the other charges in the information. McKinney moved for severance of the counts due to improper joinder prior to trial (L.F. 55-58), and moved for a new trial on the basis that the court erred in overruling his motion. (L.F. 131).

Appellate review of a claim of failure to sever charges involves a two-step analysis. *Kelly*, at 925. First, the court must determine whether the initial joinder of the offenses was proper. *Kelly*, at 925; *State v. Hyman*, 37 S.W.3d 384, 393 (Mo. App. W.D. 2001). If offenses are improperly joined, severance is mandatory rather than discretionary. *Kelly*, 956 S.W.2d at 924. Although liberal joinder of offenses is favored to promote judicial economy, “[j]udicial economy is not the highest good under the statute.” *State v. Simmons*, 815 S.W.2d 426, 428 (Mo. banc 1991).

Although it is often stated that a defendant has no constitutional right to be tried on only one offense at a time, *see State v. Clark*, 729 S.W.2d 579, 581 (Mo. App. E.D.

1987), the improper joinder of charges can result in a violation of a defendant's constitutional rights. Charges that are improperly joined raises concerns that evidence concerning one charge can bleed over and affect the jury's determination on another charge improperly joined. *See State v. Saucy*, 164 S.W.3d 523, 529 (Mo. App. S.D. 2005). This then impacts a defendant's constitutional rights to be charged solely for the offense charged as guaranteed by Article I, Sections 17 and 18(a) of the Missouri Constitution. *State v. Vorhees*, 248 585, 587-588 (Mo. banc 2008); *State v. Burns*, 978 S.W.2d 759, 760 (Mo. banc 1998). And such a violation would also impact the defendant's rights to due process and a fair trial under the constitutions of both the United States and Missouri. U.S. Const., Amends. V and XIV; Mo. Const., Art. I, Secs. 10 and 18(a)..

Joinder of offenses is governed by § 545.140 RSMo, and Rule 23.05. Under these provisions, multiple offenses may be joined in the same information or indictment if they are:

“[a.] of the same or similar character[;] or

[b.] based on two or more acts that are part of the same transaction[;] or

[c. based] on two or more acts or transactions that are connected or that constitute parts of a common scheme or plan.”

Rule 23.05; § 545.140 RSMo; *see also State v. Forister*, 823 S.W.2d 504, 509 (Mo. App. E.D. 1992)(adding punctuation absent from the rule and statute to aid in reading them). If joinder was improper, prejudice is presumed. *State v. Simmons*, 815 S.W.2d 426, 430

(Mo. banc 1991); *Kelly*, 956 S.W.2d at 924; *State v. Bird*, 1 S.W.3d 62, 65 (Mo. App. E.D. 1999).

1. The attempted escape was not of the same or similar character as the homicides.

The state has not apparently made the claim—either at trial or in the Court of Appeals—that joinder was proper because the escape attempt was of the same or similar character as the homicides. In its written response to the defendant’s motion to sever, the state did argue that “the crimes, while happening months apart, are of the same or similar character in that the escape occurred because of the arrest for murder and were thus part of the same occurrence.” (L.F. 110-111). This argument, however, appears to be based on an assertion that the escape and homicide charges were a part of the same occurrence—not that they are of the same character. Clearly, the attempted escape was of a very different character than the homicides.

2. The attempted escape was not the same transaction as the homicides.

In opposing the motion at trial, the State cited *State v. Jackson*, 645 S.W.2d 725, 728 (Mo. App. E.D. 1983) and argued that the crimes were of the same or similar character and thus part of the same occurrence. (L.F. 110-111). Because the attempted escape in this case was not closely related in time or place to the homicides, it cannot be considered part of the same transaction. For the same reason, this case is distinguishable from *Jackson* and other decisions in which the courts have held that escape charges were properly joined with other charges.

“To be part of the same transaction offenses must be clearly intertwined in time and purpose.” *State v. Ross*, 611 S.W.2d 296, 297-98 (Mo. App. E.D. 1980). Thus in *Jackson*, an escape charge was found to be part of the same transaction as the underlying offense where the escape was “so closely related as to time and place. . . .” 645 S.W.2d at 727. In *Jackson*, while the defendant was receiving treatment at a hospital a nurse noticed that he had a concealed weapon and called the police. *Id.* An officer arrived and arrested the defendant but waited as he continued to receive treatment. *Id.* The defendant then escaped through a window. *Id.*

In contrast to *Jackson*, McKinney’s alleged escape attempt occurred approximately nine weeks after the homicides and at a different location. (L.F. 34). The alleged escape attempt was a distinct event that was not a part of the same act or transaction of the apparent robbery and homicides, and was not a part of a common scheme or plan.

The present case is also distinct from situations in which crimes committed in the course of or arising out an escape are tried in connection with the charge for the actual escape. *See e.g., State v. Foerstel*, 674 S.W.2d 583 (Mo. App. W.D. 1984). In McKinney’s case, the alleged escape attempt was not made to elude police or avoid capture as he was leaving the scene. Rather, he was taken into custody without incident at his place of employment days after the homicide. (Tr.633-635, 641).

As noted by the Western District in this case,

All escapes and attempted escapes can be traced to an underlying charge which led to incarceration. But Rule 23.05 cannot be read to authorize

joinder of escape charges in all instances simply because the escape is predicated upon incarceration for another offense. *Jackson* illustrates the principle that there must be a true commonality of time and place in order for charges to compromise a single transaction. This is lacking in McKinney's case. . . . Therefore, joinder cannot be sustained on the basis of being part of the same transaction.

State v. McKinney, WD 69494, Slip Op. at 7 (Mo. App. W.D., October 27, 2009).

The alleged escape attempt was not a part of a continuing course of conduct and was not a part of the same transaction as the charges arising from the homicides. Joinder was improper.

3. The two acts or transactions giving rise to the two charges are not connected and do not constitute parts of a common scheme or plan .

The State has not raised any claim that the alleged escape attempt constituted a part of a common scheme or plan. Nor did the State initially argue in the Court of Appeals that the alleged escape attempt was connected to the homicides. However, in its motions for rehearing and transfer, the State now appears to rely on that claim. Because the alleged escape attempt was not factually or temporally connected to the homicides, joinder was not proper on this ground.

The question of whether charges have been properly joined solely because they were connected has been addressed by only a handful of decisions in Missouri. The primary one is this Court's decision in *State v. Morrow*, 968 S.W.2d 100 (Mo. banc

1998). The Court in *Morrow* concluded charges that arose during a three day crime spree fueled by the defendant's drug use and need to get money to buy drugs were properly joined because the charges arose out of a "continuous chain of criminal activity." *Id.* at 109.

In *Morrow*, the defendant repeatedly engaged a series of crimes in which he would steal a car, use the stolen car to commit robbery and to go steal another car, which he would then use to again commit additional robberies and steal another car. *Id.* at 104-105. He repeated this pattern five or six times over the course of three days primarily in the St. Louis metropolitan area, pausing only to buy and use drugs. *Id.* During two of the robberies, the defendant shot and killed two of the victims. *Id.* The decision does not indicate the extent to which the defendant slept during the spree, but does note that the defendant did not even change clothes during this period. *Id.*

Because the crime spree crossed county lines, charges were filed in both the city of St. Louis and St. Louis County. *Id.* at 105. One of the two murders occurred in St. Louis County, and this charge was joined with other offenses committed in the county: two robbery charges, two armed criminal action charges, and two theft charges. *Id.* This Court held that the charges were connected and properly joined because they were a part of "a continuous chain of criminal activity." *Id.* at 109. First, the Court noted that the charges were connected in time not only because they all occurred within a span of three days, but also because they were a part of a continuous and uninterrupted crime spree in which the defendant did not even take time to change his clothes. *Id.* The Court also noted that the crimes were connected in manner and were factually interrelated and

dependant on one another in that the defendant would steal a car that he would then use to commit a robbery and steal another car, and repeat the pattern. *Id.* And the Court noted that the crimes were connected in that they were all motivated by a single motive: the defendant's desire to get money to buy drugs. *Id.*

In contrast to *Morrow*, the alleged escape attempt and the homicides in this case were not a part of a continuous chain of criminal activity. The homicides occurred on October 20, 2004. McKinney left the scene and there was no evidence that he was engaged in any other criminal activity prior to his arrest on November 4, 2004. He was taken into custody without incident. (L.F. 633-635, 641). The first evidence concerning the alleged escape attempt was not discovered until December 24th (Tr. 902-904), a full 65 days after the homicides. Thus, the charges are not connected in time or a part of a continuous chain of criminal activity.

The offenses also were not committed for a single purpose. The homicides were committed as a part of an apparent robbery. The attempted escape was motivated by an attempt to avoid prosecution (but not with the purpose of evading capture in connection with the robbery and homicides). Finally, the attempted escape was not dependant on the homicides in the same manner as the crimes in *Morrow* were factually dependant on one another. Unlike the defendant in *Morrow*, McKinney did not commit the robberies or murders for the purpose of or to aid him in subsequently attempting to escape from custody. Thus, although the attempted escape charge is related to the homicides in that but for the homicides, McKinney would not have been in custody, the attempted escape charge was not factually dependant on or connected to the commission of the murders.

4. Joinder cannot be based on Evidentiary Issues.

In the Court of Appeals, the State argued that joinder was proper because “the State needed to prove beyond a reasonable doubt that [McKinney] had been under arrest for a felony when he attempted his escape, and [McKinney’s] attempted escape was relevant as evidence of his consciousness of guilty for the murders.” (*State v. McKinney*, WD 69494, Respondent’s Brief, 15). The State did not explain on what basis that joinder was proper due to these evidentiary issues. The notion that the trial or appellate courts should consider evidentiary issues when determining the propriety of joining offenses is contrary to sound Missouri practice. Further, this Court cannot determine that evidence concerning the escape would have been admissible in a separate trial on the murders as a matter of law.

The joinder rule does not expressly permit joinder of claims simply because evidence concerning one charge might be admissible in the trial on another. Rule 23.05; § 545.140 RSMo. And in applying the joinder statute, this Court has repeatedly stated that issues concerning the admissibility of evidence are distinct from issues concerning joinder. This Court addressed this issue in *State v. McCrary*, 621 S.W.2d 266, 271 n. 7 (Mo. banc 1981). There, the Court stated that although courts “analogize the joinder of offenses rule to the common law evidentiary rule excluding the admission of evidence of unrelated crimes to establish a defendant’s guilt of the crime charged,” “[t]he two rules deal with different questions, making the wholesale importation of the evidentiary rule into the law dealing with the joinder of offenses inappropriate.” *Id.* Issues concerning the potential admission of evidence is only relevant to determine whether the charges

should be severed even though properly joined. *Id.* The Court reaffirmed this principle in *Simmons*, stating that an argument that joinder was proper because evidence of one offense might be admissible in the trial of another “confuses the procedural question before the court with the rule permitting the admission of evidence of other crimes.” *State v. Simmons*, 815 S.W.2d 426, 430 (Mo. banc 1991). The courts of appeal have followed these pronouncements. *State v. Meder*, 970 S.W.2d 824, 830 (Mo. App. W.D. 1993); *State v. Forister*, 823 S.W.2d 504, 509 (Mo. App. E.D. 1992).

The distinction between the rules pertaining to joinder and those relating to the admission of evidence of other crimes is well founded. First, the evidentiary rules do not follow the joinder rules. Thus, they are not helpful in determining whether the two offenses fall within one of the three specific instances in which joinder is permitted. *See Simmons*, 815 S.W.2d at 430 (noting that an argument that evidence concerning the various offenses was admissible to show “the identity of the perpetrator” “has nothing to do with the presence or absence of a common scheme or plan for purposes of joinder under Section 565.004.1”). Second, the question of whether offenses have been properly joined must be addressed prior to trial and is not discretionary, whereas the question of whether evidence of other crimes is admissible can only be determined during trial and must be based on the court’s discretion in balancing the probative value of such evidence with its prejudicial effect based on the unique facts, circumstances and evidence in each case.

Any objection to the improper joinder of claims must be made prior to trial. *See State v. Bird*, 1 S.W.3d 62, 66 (Mo. App. E.D. 1999). In contrast, questions concerning

the admissibility of evidence—including evidence of other crimes—must be raised during trial. *State v. Boydston*, 198 S.W.3d 671, 674 (Mo. App. S.D. 2006). This rule is in place so that the trial court has an opportunity to consider the admissibility of the evidence “against the backdrop of the evidence actually adduced and in light of the circumstances that exist when the questioned evidence is actually proffered.” *Id.*

Second, the rules pertaining to joinder do not permit the court to exercise discretion. Joinder is either proper or it is not as a matter of law. If it is not proper, severance is required. *Simmons*, 815 S.W.2d at 430. However, evidence of other crimes, even if logically relevant, still may be admitted only if the trial court, in the exercise of its discretion, determines that probative value of the evidence outweighs its prejudicial effect. *State v. Bernhard*, 849 S.W.2d 10, 12 (Mo. banc 1993). Thus, while evidence may be excluded as a matter of law if it is not logically relevant, the converse is not true; it is never correct to say that evidence of other crimes—even if logically relevant—is admissible as a matter of law. Before admitting such evidence, the trial court must always balance the probative value of such evidence against its prejudicial effect in light of the evidence and circumstances that existed at the time the evidence is offered. Thus, the rules of evidence cannot be used to resolve the procedural issue of whether joinder was proper.

B. Evidence concerning one charge would not be admissible as a matter of law in the trial on another charge such that the error can be deemed harmless.

In its rehearing motion and motions to transfer, the State raised for the first time a claim that any error resulting from the improper joinder of the charges was harmless

because “evidence of the improperly joined crimes would have been admissible in any event in separate trials, [and] the presumptive prejudice should be deemed rebutted with regard to any offense that would have been tried with the same evidence.” (Respondent’s Application for Transfer, p. 9).

The State did not raise this issue when this case was in front of the Court of Appeals. There was no argument that improper joinder was subject to harmless error review, that any error in failing to sever improperly joined would be harmless based on considerations of what evidence would be admissible in the separately tried actions, or that the error was harmless in this case. Because this was an issue that was not raised in the Court of Appeals, the State’s attempt to raise it in this Court on transfer is contrary to the Court’s Rule 83.08(b), which precludes any party from altering the basis of any claim that was raised in the court of appeals brief.

Had this issue had been raised by the State in the Court of Appeals, it would have been found lacking.

First, it does not appear that harmless error review is appropriate under this Court’s decision in *State v. Simmons*, 815 S.W.2d 426, 430 (Mo. banc 1991). In *Simmons* this Court stated succinctly that “[w]here joinder is improper as a matter of law, prejudice is presumed and severance is mandated.” *Id.* The Court then ordered that the charges be retried separately. *Id.*

Although the Court in *Simmons* did not specifically address the question of harmless error review, the Court did consider and reject a similar argument similar to that set forth by the State in this case. Similar to the State’s argument here, the State in

Simmons argued that joinder of two murder charges was proper and the defendant suffered no prejudice because evidence concerning one murder would be admissible in the trial of the other to establish the identity of the perpetrator. *Id.* at 429. The Court rejected using such evidentiary considerations in determining whether joinder was proper, and then immediately stated that prejudice was presumed and reversal was required as the result of the improper joinder. *Id.* at 429-430. Clearly the Court understood that evidence concerning one charge might be admissible in a trial on the other; but it nevertheless held that prejudice was presumed. *Id.* To suggest that there would be no prejudice (or that the presumption of prejudice would be rebutted) based on such evidentiary issues is contrary to this Court's ruling in *Simmons*.

To support its argument that the presumption of prejudice can be rebutted, the State also cites to *State v. Saucy*, 164 S.W.3d 523 (Mo. App. S.D. 2005); *State v. Brown*, 954 S.W.2d 396 (Mo. App. E.D. 1997). Neither supports the State's argument. Although both of these courts did address the question of prejudice, they both ultimately concluded that they could not determine the degree to which a defendant was prejudiced by improperly joined charges without engaging in speculation and therefore were compelled to reverse the convictions. *Saucy*, 164 S.W.3d at 529; *Brown*, 954 S.W.2d at 398. As suggested by the court in *Saucy*, it is this inability to determine the degree to which the improperly joined charges prejudiced the defendant that gives rise to the presumption of prejudice and mandates reversal. 164 S.W.3d at 529 (citing *State v. Kelly*, 956 S.W.2d 922, 926 (Mo. App. W.D. 1997)). Thus, although the courts in *Saucy* and *Brown* contain a discussion concerning why prejudice is presumed, these decision do not support the

State's suggestion that the presumption of prejudice arising as a result of improperly joined claims can be rebutted and thereby render any error harmless.

Further, with respect to this case, the State is not correct in asserting that evidence concerning one charge would necessarily be admissible in a trial concerning the other charge.

First, evidence concerning the homicides would not be required or admissible in a trial on the escape charge. Citing to *State v. Willis*, 602 S.W.2d 9 (Mo. App. W.D. 1980), the State argued that joinder of the attempted escape count with the other counts was proper. The State's reliance on *Willis* and the argument premised on it is misplaced.

In *Willis*, the defendant had been tried and convicted of murder. *Id.* at 9. Because he was being confined pursuant to his murder conviction, the court concluded that the prior murder conviction was an essential element of the charge for escaping from that confinement. *Id.* at 11.

Unlike in *Willis*, Mr. McKinney was being held after having been arrested for murder. Thus, his guilt with respect to the murder was not a necessary element of the charge for escape. *See State v. Pace*, 402 S.W.2d 351, 352-353 (Mo. 1966). Whether Mr. McKinney actually committed the murders was irrelevant to the question of whether he was being legally held and was guilty of attempted escape.

Further, even if it might have been necessary or proper for the State to adduce evidence that Mr. McKinney was arrested on murder charges, it does not follow that the details of those offenses would be admissible. As noted by the court in *Willis*, "it would

be inappropriate to explore the details of the prior offense beyond identifying the crime for which the punishment was imposed.” 602 S.W.2d at 11.

Similarly, it is not correct to assert that evidence concerning the attempted escape charge would necessarily be admissible with respect to the homicide charges. In Missouri, to be admissible, evidence must be both logically and legally relevant. *State v. Anderson*, 76 S.W.3d 275, 276 (Mo. banc 2002). “Evidence is logically relevant if it tends to make the existence of a material fact more or less probable.” *Id.* Even if logically relevant, the trial court still must determine whether it is legally relevant. *Anderson*, 76 S.W.3d at 276; *Bernard*, 849 S.W.2d at 17. Legal relevance refers to the probative value of the evidence weighed against its costs, including unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or cumulativeness. *Anderson*, 76 S.W.3d at 276.

Typically, evidence of other crimes is excluded because it is considered to be neither logically nor legally relevant. *Bernard* 849 S.W.2d at 12. The admission of such evidence raises a host of concerns. “Evidence of other crimes, when not properly related to the cause on trial, violates [the] defendant’s right to be tried for the offense for which he is indicted.” *State v. Vorhees*, 248 S.W.3d 585, 587 (Mo. banc 2008); *State v. Burns*, 978 S.W.2d 759, 761 (Mo. banc 1998). And such evidence—even if admitted for a proper purpose—may nonetheless encourage the jury to convict the defendant based on his propensity to commit such crimes without regard for whether he is actually guilty of the charged offense. *Burns*, 978 S.W.2d at 761; *Bernard*, 849 S.W.2d at 16. Because of

the dangerous tendency and misleading probative force of this class of evidence, its admission should be subjected by the courts to rigid scrutiny. *Burns*, 978 S.W.2d at 761.

A number of decisions hold that a defendant's attempted escape may be logically relevant to show consciousness of guilt. *State v. Williams*, 97 S.W.3d 462, 469 (Mo. banc 2003). Although logically relevant, such evidence is not automatically admissible. Rather, the trial court must still exercise its discretion in determining whether, under the facts and circumstances of the particular case, the evidence is legally relevant. *Bernard*, 849 S.W.2d at 17.

There has developed a line of cases starting with *State v. Hughes*, 596 S.W.2d 723, 730 (Mo. banc 1980) that appear to permit evidence concerning a defendant's flight or escape without weighing the probative value and prejudicial effect of such evidence under the facts and circumstances in the particular case. To the extent that these decisions permit such evidence to be admitted without determining its legal relevance, they are contrary to the well established rules of evidence established by this court.

In Mr. McKinney's case, even if evidence of the alleged attempted escape was logically relevant to show consciousness of guilt for the murders of the Caylors, the evidence would not have necessarily been legally relevant. In his defense, McKinney all but admitted his guilt for the murders and his defense focused on whether he was guilty of murder in the second degree rather than murder in the first degree. (Tr. 978-1000). To support this defense, McKinney pointed to evidencing suggesting that there may have been other individuals who participated in the robbery in the homicides and it may not have even been McKinney who actually killed one or both of the Caylors. (Tr. 978-

1000). This included the drop of blood found in the store that did not match McKinney or the Caylor (Tr. 981), various unaccounted finger prints (Tr. 983-984), the improbability that a single person would be able to struggle with both Mr. and Mrs. Caylor in two different areas of the building without one or the other getting help (Tr. 981-983).

Although the attempted escape was probative of whether McKinney guilty of murder, such evidence has little—if any—probative value as to whether McKinney acted with deliberation and thus was guilty of murder in the first degree. Given that he was charged with multiple counts authorizing sentences of life and any number of years with no limit, McKinney faced substantial jail time even if he was innocent of murder in the first degree with respect to either Mr. or Mrs. Caylor. Mr. McKinney would have been equally motivated to escape under either scenario. Given the limited probative value of the evidence concerning the attempted escape on the primary issues in the case, it is not clear that evidence concerning the attempted escape charge would have been legally relevant in a separate trial on the homicide charges.

And to further complicate matters, it is impossible to know how the evidence would have played out had the charges been tried separately. Had the charges been separately tried, McKinney may have altered his position in one or both of the trials. He may have might have made admissions or entered into stipulations to prevent the disclosure of such evidence or limit the impact of such evidence. He might have testified in one of the trials. He might have been entitled to and received a limiting instruction to the extent that such evidence was admitted for a limited purpose. In short, this Court can

only speculate whether evidence of one charge would have been admissible in a separate trial on the other.

Thus, to the extent it is even appropriate for this Court to the State's belated harmless error argument, that argument must be rejected. Even if the Court were to conclude that a claim of improper joinder was subject to harmless error review, improper joinder cannot be found to be harmless simply by showing that evidence concerning one charge might be admissible in a separate trial on another charge. To do so would require the Court to engage in speculation about how a hypothetical trial would occur.

CONCLUSION

Based on the argument presented, Mr. McKinney respectfully asks this Court to reverse his convictions and sentences for murder in the first degree, armed criminal action and attempted escape from confinement and remand to the trial court for new trial with the attempted escape charge to be severed from the murder and armed criminal action charges.

Respectfully submitted,

FREDERICK J. ERNST # 41692
ASSISTANT APPELLATE DEFENDER
Office of the State Public Defender
Western Appellate Division
920 Main Street, Suite 500
Kansas City, Missouri 64105
Tel: 816.889.7699
Fax: 816.889.2088

Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing were sent by overnight delivery to Shaun J. Mackelprang, Chief Counsel, Criminal Appeals Division, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102, on the 31st day of March, 2010.

Frederick J. Ernst

CERTIFICATE OF COMPLIANCE AND SERVICE

I, Frederick J. Ernst, hereby certify as follows:

The attached brief complies with the limitations contained in Supreme Court Rule 84.06(b). The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service and the appendix, this brief contains 7,440 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan Enterprise program, which was updated on March 31, 2010. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

A true and correct copy of the attached brief and a disk containing a copy of this brief were sent by overnight delivery this 31st day of March, 2010, to Shaun J. Mackelprang, Chief Counsel, Criminal Appeals Division, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

Frederick J. Ernst

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