

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 REPLY BRIEF

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ARGUMENT

(1) Improper Joinder.

Attempting to anticipate the State's arguments, Mr. McKinney noted that the State's position at trial was not based on the connectedness of the acts, but rather on its assertion "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. 111, ¶ 5 (emphasis added)). And Mr. McKinney noted that on appeal, the State did not clearly articulate the connectedness provision of the joinder statute or rule to justify joinder of the charges. (*See State v. McKinney*, WD 69494, Slip Op. at *5-6 (Mo. App. W.D., October 27, 2009) ("Although the State argues that joinder was proper here as a matter of judicial economy, it is unclear which of the reasons listed in Rule 23.05 provide the basis for the State's argument.")) The State takes issue with this characterization. (Respondent's Brief, 23-24). This, however, is not a substantive issue in this appeal. Mr. McKinney does not argue that the trial court's ruling on the propriety of joinder must be sustained because the State did not assert that the acts were connected at trial.

In arguing that "crimes" are connected and thus properly joined if evidence concerning one crime is admissible in a trial on the other charge, the State fails to give effect to all of the language in the joinder rule. The State focuses exclusively on the word "connected" in its argument. (Respondent's Substitute Brief, 26-28). However, it is not sufficient merely for the crimes to be "connected." If this were the case, all crimes

allegedly committed by the same defendant would be “connected” simply by virtue of the fact that they were all committed by a single person.

The joinder rule is not that expansive. Rather, the rule limits joinder to situations in which the “acts or transactions” giving rise to the charges are “connected.” Rule 23.05. Any connection between the charges or between potential trials on the charges is not the issue. Rather, the issue is what the defendant was alleged to have done, not on what the evidence might be at trial.

Thus, this Court in *Morrow* found that the defendant’s **acts** were connected because they constituted a continuous and uninterrupted chain of criminal activity. *State v. Morrow*, 968 S.W.2d 100, 109 (Mo. banc 1998). Absent from the Court’s discussion was any mention that joinder would be proper simply because evidence concerning one charge might be admissible in the trial of another. *Id.*

The State also cites to *State v. Dizer*, 119 S.W.3d 156, 161 (Mo.App. E.D. 2003) for the proposition that a lapse in time does not automatically defeat joinder. However, the court in *Dizer* considered whether two offenses were similar in character, not whether one set of acts was connected to another set of acts. *Id.* When considering whether acts are connected, the temporal relationship is an important consideration. Thus, the lapse of time between acts giving rise to the various charges is one important way in which this case is different from that in *Morrow*. However, that it is not the only distinction. Unlike the situation in *Morrow*, the defendant’s alleged acts with respect to the homicides and his alleged acts in attempting to escape from prison were not a part of a continuous and uninterrupted chain of criminal activity.

In addition to *Morrow*, the State cites decisions from California, Ohio and federal circuit courts. These decisions either are not applicable or do not support the State's arguments.

In *People v. Valdez*, 82 P.3d 296, 313 (Cal. 2004) the court was construing language in the California joinder rule that is different from that in the Missouri rule. The California rule allows joinder where the “*offenses* are connected together in their commission.” *Id.* (emphasis added). Further, the California courts have determined that “offenses are connected” when they are “linked by a common element of substantial importance.” *Id.* This is different from the Missouri rule, which limits joinder to situations in which the *acts or transactions* giving rise to the charged offenses are connected or constitute parts of a common scheme or plan. Rule 23.05

The court in *State v. Hand*, 840 N.E.2d 151, 179-180 (Ohio 2006) did not actually consider whether charges were correctly joined. Rather, at issue was whether the defendant affirmatively showed that his rights were prejudiced and that the trial court abused its discretion in failing to sever the charges. *Id.*

The federal courts have held that under Rule 8(a), an escape charge can be joined with the underlying charges, but only if the charges are related in time. *See e.g., United States v. Peoples*, 748 F.2d 934, 936 (4th Cir. 1984). This is contrary to the State's argument that the offenses can be joined even though not related in time. (Respondent's Substitute Brief, 20-12, 25).

Reliance on federal cases is also complicated by the amendment of the federal joinder rule in 2002. The federal joinder rule was amended as a part of an effort to make

the rules easier to understand, but was not intended to result in any substantive changes. Fed. Rule Crim. Proc. 8, Advisory Committee Notes. Under the amended rule, two or offenses may be joined if the “offenses charged ... are connected with or constituted parts of a common scheme or plan.” Fed. R. Crim. P. 8(a). Thus, under this statement of the rule, it is not enough that the offenses be connected in some way. Rather, the offenses must be connected *with* a common scheme or plan. This revision of the federal rule would appear to be a rejection of the prior interpretation of the rule allowing joinder merely if the offenses are connected in some way.

In contrast to these decisions cited by the State, other courts have held that the act of escaping is not connected with the acts that gave rise to the underlying charges for which the defendant was incarcerated. The Indiana Court of Appeals in *Martin v. State* considered this issue under a rule similar to that in Missouri. *Martin v. State*, 488 N.E.2d 1160, 1161 (Ind. Ct. App. 1986). The court in *Martin* noted decisions applying the habitual offender statute in that state found that the act of escaping was separate and unrelated to the acts that gave rise to the offense for which the defendant was incarcerated. *Id.* at 1161-1162. Similarly, the court found the act of escaping was not connected with the acts giving rise to the underlying offense under the joinder statute. *Id.*

The Idaho Court of Appeals in *State v. Anderson* also rejected an argument similar to the State’s argument in considering a joinder under a rule identical to that in Missouri. *State v. Anderson*, 63 P.3d 485, 487 (Idaho Ct. App. 2003). In *Anderson*, the court held that a resisting arrest charge was not connected with a battery charge even though the resisting arrest charge arose out the arrest warrant on the battery charge. *Id.* at 487-488.

Critical to the court’s conclusion was that the two events occurred months apart and in different locations. *Id.* at 487-488. The court also rejected the notion that the offenses could be joined simply because evidence concerning one offense might be admissible in the trial of the other. *Id.*

In addition to citing decisions from other jurisdictions, the State argues—essentially—that the inclusion of the word “connected” in the joinder rule constitutes a reversal of the Court’s rulings in *State v. McCrary*, 621 S.W.2d 266 (Mo. banc 1981) and *State v. Simmons*, 815 S.W.2d 426 (Mo. banc 1991), pertaining to the distinction between the procedural issue of joinder and the rules of evidence. (Respondent’s Substitute Brief, 26-27).

The State basis this argument on its assertion that “much has changed since this Court decided *McCrary* and *Simmons*.” (Respondent’s Substitute Brief, 26). Actually, however, versions similar to—if not identical—the current Rule 23.05 and § 545.140 RSMo (2000) were on the books as of 1986. *See* Mo. S. Ct. Rule 23.05 (1997)¹ and § 545.140 RSMo (1986). While it is true that the Court in *McCrary* and *Simmons* considered joinder under the separate (and slightly different) provisions that controlled joinder of offenses involving homicides, the absence of the word “connected” in joinder rules for homicides was not a basis for the Court’s admonition to not incorporate the rules

¹ Prior to 2002, Rule 23.05 was last amended in 1986. Appellant cites to the 1995 version of the Rule as it is the oldest version available to counsel as of the writing of the brief.

of evidence into the procedural issue of joinder. And in the quarter of century since the joinder rule included the phrase “acts or transactions that are connected,” no decision in this State has interpreted that phrase to allow joinder when evidence touching on one charge might be admissible in a trial on another charge. Further, had this Court—or the legislature—intended to permit joinder when evidence concerning one charge might be admissible in a trial on another, it could have included such language in the rule.

The argument by the State is a call for a radical restructuring of Missouri law with respect to joinder. The sum of the State’s argument is that joinder should be permitted in the absence of a showing of actual prejudice to the defendant, such as when evidence concerning one charge might be admissible in a trial on the other. Such a rule would make a trial court’s ruling on joinder discretionary, based on the court’s view of the potential prejudice. *See Williams by and through Wilford v. Barnes Hosp.*, 736 S.W.2d 33, 37 (Mo. banc 1987) (noting, “Prejudice is a determination of fact for the trial court, its finding to be disturbed on appeal only for abuse of discretion.”) Although there may—perhaps—be some policy basis for such a restructuring of Missouri law with respect to joinder, that is not the legal structure as it exists today, and was not the structure that existed at the time of McKinney’s trial.

(2) Harmless Error Review

In the court of appeals, the State raised no claim that the presumption of prejudice arising as the result of improper joinder could be rebutted, was rebutted, or that as a result of such rebuttal, the trial court’s error was harmless. The State nonetheless asserts that it did raise this issue in its brief to the court of appeals, citing to pages 23 through 24 of its

original brief. (Respondent’s Substitute Brief, 32). These pages of the State’s original brief addressed the issue of whether the defendant made a sufficient showing of actual prejudice at trial such that the trial court’s decision to not sever properly joined claims constituted an abuse of discretion.

Rule 83.08(b) states: “A party may file a substitute brief, ... which shall include all claims the party desires this Court to review, [but] shall not alter the basis of any claim that was raised in the court of appeals brief.” The State argues that this rule only applies to the Appellant. (Respondent’s Brief, 32). Yet, the rule clearly refers to “a party,” not “an appellant.” The Court knows the difference between “a party” and “an appellant,” and if the rule was intended to apply only to an appellant, the Court would have used the word “appellant,” not “party.”

The State also incorrectly implies that this Court has interpreted the rule to apply only to appellants in *Blackstock v. Kohn*, 994 S.W.2d 947, 953 (Mo. banc 1999) and *Linzenni v. Hoffman*, 937 S.W.2d 723, 727 (Mo. banc 1997). Although both of those decisions did apply the rule in refusing to consider claims made by appellants, nothing in either of those decisions expresses any indication that the rule cannot be applied to a respondent.

Nor is it correct to state that a respondent does not assert claims. Typically, in any appeal the appellant has the burden to show that the trial court committed prejudicial error. Mr. McKinney showed that the trial court erred in failing to sever improperly joined charges. Because under *Simmons* the error is presumed to be prejudicial, Mr McKinney also satisfied his burden (or was relieved of the burden) of showing that the

error was prejudicial. Assuming that the presumption of prejudice was rebuttable, the burden of raising that issue and showing that the presumption was rebutted fell to the State. *See State v. Stephens*, 88 S.W.3d 876, 883 (Mo. App. W.D. 2002) (noting that the burden of rebutting the presumption of prejudice arising as a result of juror misconduct shifted to the party seeking to affirm the judgment); *see also State v. Leach*, 370 N.W.2d 240, 251 (Wis. 1985)(noting that *the state* may rebut the presumption arising by virtue of improper joinder on appeal by demonstrating the defendant has not been prejudiced by a joint trial). To the extent that the court of appeals “overlooked” the argument that the presumption of prejudice was rebutted when the court *sua sponte* considered the issue of harmless error, it did so because that issue was not briefed.

The apparent purpose of Rule 83.08(b) is to avoid the unnecessary time and expense of litigating issues in this Court that could have and should have been, but were not, addressed and potentially disposed of in the court of appeals. By failing to raise the issue with the court of appeals, the State waived it.

With respect to the substance of the State’s arguments, the State argues that the presumption of prejudice was rebutted, and thus any error was harmless, because evidence that Mr. McKinney was in custody on a felony charge of murder would be admissible in a trial on the escape charge. (Tr. 25-26, 33-34). These arguments were addressed in Appellant’s Substitute Brief, and will not be repeated here.

To further support its claim that harmless error review is appropriate, the State cites to federal decisions and decisions from other states. These decisions are not persuasive, however, as these jurisdictions do not employ a presumption of prejudice

arising as a result of improperly joined claims. The federal courts will reverse for improper joinder only if the misjoinder results in actual prejudice. *United States v. Lane*, 474 U.S. 438, 449 (1986); *United States v. Turner*, 500 F.3d 685, 688 (8th Cir. 2007). This is also the standard applied in a number of states. *Livingston v. State*, 565 So.2d 1288, 1290 (Fla. 1988); *State v. Hazelton*, 987 A.2d 915 (Vt. 2009); and *State v. Strickland*, 683 So.2d 218, 224-226 (La. 1996). A number of states employ the even more deferential abuse of discretion standard. *State v. Bunyard*, 133 P.3d 14, 20 (Kan. 2006); *State v. Jacobs*, 10 P.3d 127, 135 (N.M. 2000); *Tabish v. State*, 72 P.3d 584, 590 (Nev. 2003). Because these decisions do not address the question of whether harmless error review is appropriate when there is a prejudice is presumed, they are not persuasive. Because the State does not argue for the reversal of *Simmons*, Appellant does not address the question of whether the holding in *Simmons* that improper joinder is presumptively prejudicial should be retained.

Of the decisions cited by the State, only the Wisconsin Supreme Court's decision in *State v. Leach*, 370 N.W.2d 240, 251-254 (Wis. 1985), actually addresses the issue put forward by the State. The majority of that court held that improper joinder raised a presumption of prejudice at the trial level, but was subject to harmless error review on appeal. Notably, however, two justices dissenting, arguing that to apply harmless error review would essentially abrogate the limits placed on joinder to assure the accused a fair trial. *Id.* 370 N.W.2d at 256-257. Further, the majority in *Leach*, even in allowing harmless error review, did not adopt the standard advocated by the State of considering the possible admissibility of evidence to determine whether the error was harmless.

The State also argues that the evidence against Mr. McKinney was overwhelming. In addressing this assertion, the Court must examine the scope of the evidence supporting a conviction not only of murder, but of murder in the first degree with respect to both Mr. and Ms. Caylor. Although there was evidence that supported a finding the Mr. McKinney was present at the time of the murders, there was little evidence that he directly killed both of the Caylors, and did so after cool reflection. Other than the comments alleged made by Mr. McKinney overheard by another prisoner, there is virtually no direct evidence of exactly how the events unfolded leading to the homicides.

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.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing were sent by overnight delivery to Shaun Mackelprang, Assistant Attorney General, Criminal Appeals Division, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102, on the 12th day of May, 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 3,107 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

The floppy 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 May 11, 2009. 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 floppy disk containing a copy of this brief were sent by overnight delivery this 12 day of May 2010, to Shuan Mackelprang, Assistant Attorney General, Criminal Appeals Division, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

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