IN THE
MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
v.	)	WD69494
	)	
KELLEN C. McKINNEY,	)	Opinion Filed: October 27, 2009
	)	
Appellant.	)	

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
The Honorable Marco A. Roldan, Judge

Before Division Three: Harold L. Lowenstein, Presiding Judge,[1] Joseph M. Ellis, Judge and Lisa White Hardwick, Judge

Kellen McKinney appeals his convictions on two counts of murder in the first degree, two associated counts of armed criminal action, and one count of felony attempted escape from confinement. On appeal, McKinney argues that joinder of the attempted escape charge in the same indictment as the other charges was improper and that the trial court should have severed the charges to allow for separate trials. Because joinder was improper as a matter of law, we reverse and remand for new, separate trials.

[1] Lowenstein, J. was a member of this court at the time the case was argued and submitted but has since retired from the court.

John and Mildred Caylor operated a bookstore, which also served as their residence, in Raytown. On October 20, 2004, Darryl James, a regular customer, arrived at the store to find the door locked. He looked inside and saw a head with blood on it, at which time he called 911. Upon arrival, officers kicked in the door and entered. They found the dead bodies of both John and Mildred Caylor among many books and pamphlets that had been strewn about the store. Money had been taken from the cash register.

John Caylor was lying face up on the floor in a large pool of blood. An autopsy later revealed that he had suffered both blunt and sharp-force injuries to his head. His throat had been slit, although this injury did not cause him to die instantly. He suffered several lacerations behind his right ear, some fractured vertebrae, and a laceration to his head from blunt force. He also suffered several injuries to his hands and arms, apparently from a struggle.

Mildred Caylor also suffered several blunt and sharp force injuries. Her neck had been cut twice as she was lying face down on the ground. Her jaw had been broken on both sides and she suffered two broken ribs. Like her husband, Mildred also suffered defensive injuries to her hand. A hemorrhage on her head was likely caused by blunt force impact. Investigators determined that both Caylors died from multiple blunt and sharp-force injuries with the manner of death being homicide.

That morning, McKinney had borrowed the car of his girlfriend, Kendra Heard, for a job interview. He returned it to her in the afternoon, at which time McKinney explained to Heard that he had gotten into an altercation at the job interview. He showed her an injury to his right ear where he had been hit with a crowbar. Heard found a ripped

leather coat and a crowbar on the floor of her car. McKinney took these items to a dumpster to throw them away, but then decided not to and instead placed them in a box in the backseat of the car.

Criminalists collected blood and shoeprint samples from the scene. A drop of blood found near the emptied cash register matched McKinney. Blood samples taken from the cash register button, a place mat found near Mildred Caylor's head, and a spot on the floor also matched McKinney. McKinney's fingerprints were also found on the place mat.

McKinney was arrested the next day without incident. He had suffered a recent wound to his right ear and a scratch to his left leg. Shoeprints taken from the scene were compared to McKinney's size nine tennis shoes and were found to match. A warrant for McKinney's home was executed and his black leather jacket was recovered. John Caylor's blood was found on the jacket, as well as McKinney's. John Caylor's blood was also found on the carpet of Heard's car.

While being held in the Jackson County jail, McKinney told a fellow inmate about killing a woman, saying, "she wouldn't shut up even after blood was bubbling in her throat, so he had to do it." Later, while watching a news story about the murders in which police were looking for other persons, McKinney stated to an inmate that "they were looking for a ghost."

On December 27, 2004, while McKinney was being held in the Jackson County Jail, his cell was searched. A deputy found an orange jumper with holes in it and a shower drain wrapped in a sock. McKinney stated that these items were for his

protection. Under a mattress were found bed sheets tied together, a sock, and a screw. An officer discovered that some bricks on the wall had been chiseled out and were loose and deep gouges had been chiseled out of the area around the cell window. A latch was missing from the toilet seat and a cage surrounding a smoke detector had been pulled half-way off. Disassembled fingernail clippers were also found. Two days later, another search of the cell revealed a damaged night light with some pieces of Plexiglas missing. McKinney's property box contained a metal bracket, two machine screws, and a hand-drawn map of Kansas City with the location of the jail marked, "This is where we at."

McKinney was charged as a prior and persistent offender with 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. Prior to trial, McKinney filed a written motion to sever the attempted escape charge due to improper joinder. The trial court denied that motion, concluding that, because evidence of the escape was relevant to establish consciousness of guilt as to the other charges, joinder in the same indictment was proper and severance was not necessary. The jury found McKinney guilty on all counts. Appellant was sentenced to terms of life imprisonment without the possibility of parole on each of the murder counts, life imprisonment on each of the armed criminal action counts, and four years imprisonment on the attempted escape count.

In his sole point on appeal, Appellant contends that the trial court erred in denying his motion to sever the attempted escape count from the other charges

because joinder of those counts was improper under § 545.140[2] and Rule 23.05. "Appellate review of . . . claims of improper joinder and refusal to sever requires a two-step analysis." ***State v. Nichols***, 200 S.W.3d 115, 119 (Mo. App. W.D. 2006). "First, we must determine whether joinder was proper as a matter of law and, if so, only then do we consider whether the trial court abused its discretion in denying the motion to sever." ***Id***. "Joinder addresses what crimes can be charged in a single proceeding, while severance assumes that joinder is proper and gives the trial court discretion to determine whether substantial prejudice would result if the charges were tried together." ***Id***.

"A defendant does not have either a federal or state constitutional right to be tried on only one offense at a time." ***State v. Baker***, 524 S.W.2d 122, 126 (Mo. banc 1975). However, Rule 23.05 provides a prerequisite for joinder of charges in a single instrument:

> All offenses that are of the same or similar character or based on two or more acts that are part of the same transaction or on two or more acts or transactions that are connected or that constitute parts of a common scheme or plan may be charged in the same indictment or information in separate counts.

See also ***§ 545.140.2***. "In determining whether there has been a misjoinder of offenses, we consider only the State's evidence." ***State v. Holliday***, 231 S.W.3d 287, 293 (Mo. App. W.D. 2007). Liberal joinder of offenses is favored as a means of judicial economy. ***Id.***

Although the State argues that joinder was proper here as a matter of judicial

[2] All statutory references are to RSMo 2000 unless otherwise noted.

economy, it is unclear which of the reasons listed in Rule 23.05 provide the basis for the State's argument. In any event, the State makes no argument that the attempted escape charge is of the same or similar character as the murder charge. Nor do we think joinder can be based on that ground here. *Cf.* ***State v. Conley***, 873 S.W.2d 233, 238 (Mo. banc 1994) (where all charges involved illicit sexual contact with minors and all occurred within two year period, all were of same or similar character). It is enough to recognize that the charge of attempted escape is of a very different character than the murder and armed criminal action charges. Therefore, joinder was proper only if the charges stem from a common transaction, scheme or plan, or share some connection.

"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). An example where an escape charge was found to be part of the same transaction as the underlying offense is found in ***State v. Jackson***, 645 S.W.2d 725 (Mo. App. E.D. 1982). Jackson was injured in a car accident. ***Id.*** at 727. When he arrived at the hospital, a nurse called the police after she noticed that Jackson was carrying a concealed weapon. ***Id.*** An officer arrived, arrested Jackson, and then waited outside the X-ray room while a technician examined Jackson. ***Id.*** Jackson then managed to escape through a window. ***Id.*** The court in that case held that joinder of the escape charge with the concealed weapon charge was proper because the two charges "were so closely related as to time and place and. . . the escape occurred because of the arrest for the other charge." ***Id.*** at 728.

Unlike Jackson, McKinney's attempted escape is not closely related in time and place to the murder or armed criminal action charges. It cannot be considered part of

the same transaction. 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 comprise a single transaction. This is lacking in McKinney's case. The attempted escape stems from events which occurred approximately nine weeks after the murders and in another part of Jackson County. Therefore, joinder cannot be sustained on the basis of being part of the same transaction.

Similarly, joinder on the basis of a "common scheme or plan" is unsupported. A common scheme or plan exists only if two requirements are met: "First, that there be a plan or scheme, that is, a design or course of action determined in advance of the commission of the first offense for the purpose of achieving a preconceived result; and second, that each offense be consistent with and in furtherance of the plan. ***State v. Simmons***, 815 S.W.2d 426, 428-29 (Mo. banc 1991). Essentially, the joined offenses must be "products of a single or continuing motive." ***Id.*** at 429 (internal quotation marks omitted). It is not enough that the crimes have factual components in common. ***Id.*** "There must be some proof that prior to the commission of the offenses, the defendant intended to commit all of them." ***Id.*** The State presented no evidence that the attempted escape was part of some preconceived plan formed prior to, and in connection with, the murders. Therefore, the record does not support joinder based on a common scheme or plan.

There remains the possibility that the offenses were "connected" and, therefore, properly joined. The Missouri Supreme Court looked to dictionary definitions of "connected" and applied them in a Rule 23.05 context in ***State v. Morrow***, 968 S.W.2d 100 (Mo. banc 1998).

> "Connected" is defined as: "[j]oined; united by junction, by an intervening substance or medium, by dependence or relation, or by order in a series." *Black's Law Dictionary* 302 (6th ed.1990). In Webster's, "connected" is defined as: "joined or linked together a series, having the parts or elements logically related [in] view of the problem or continuous." *Webster's International* 480 (3d ed.1981).

Id. at 109.

In ***Morrow***, two robberies, two car thefts, and a murder were all found to be connected within the meaning of the rule. ***Id.*** The court found that they were connected in time as they were "part of a crime spree that lasted less than three days." ***Id.*** The court also found that the offenses were part of a "continuous chain of criminal activity, drug use, robbery, and murder." ***Id.*** Moreover, the offenses were found to be "connected in manner" because they were all characteristic of Morrow's actions over the short period in which the crimes were committed. ***Id.*** They were also connected because they were committed with a shared motive to procure cocaine. ***Id.*** Finally, the court found that the offenses were connected by their "dependence and relationship to one another," because a stolen car was used to commit one of the robberies and another car theft, which in turn led to yet another car theft, the latter car then being used to commit a further robbery and a murder. ***Id.***

In ***State v. Bechhold***, 65 S.W.3d 591 (Mo. App. S.D. 2002), the court held that, under the facts of that case, charges of felony tampering under § 569.080.1(2) and

felony attempt to manufacture methamphetamine under § 195.211 were properly joined because they were connected. There, the car that was the subject of the tampering charge was used by the defendant to get to his methamphetamine lab. ***Id.*** at 595. Joinder was held to be proper under the ordinary meaning of "connected" because the "[d]efendant was hiding in a closet in an apartment with the apparatus and ingredients for the manufacture of methamphetamine, it was obvious that methamphetamine had been 'cooked' in the apartment, and Defendant possessed and used a stolen car containing methamphetamine to get to the apartment." ***Id.***

It is apparent that the connection, if any, between McKinney's charges of murder (and armed criminal action) and attempted escape from custody is more tenuous than the connection in ***Morrow*** or ***Bechhold***. Unlike those cases, the State bases its arguments not on the factual relationship among the charged offenses but, rather, on the legal relationship.

The State argues that joinder is proper because the fact that McKinney was under arrest for a felony is an essential element of felony attempted escape. ***§ 575.200.2(2)***. The State relies on ***State v. Willis***, 602 S.W.2d 9 (Mo. App. W.D. 1980), in this regard. ***Willis*** involved a challenge to the admissibility of evidence of the defendant's murder conviction in his subsequent trial for escape from custody. ***Id.*** We held that, because the felonious nature of the murder conviction was an essential element of the escape charge, introduction of his conviction record at trial was proper. ***Id.*** at 10-11. However, we went on to state the very limited reach of that holding: "Of course, it would be inappropriate to explore details of a prior offense beyond identifying

the crime for which the punishment was imposed." ***Id***. at 11. Moreover, we explained the interplay between evidentiary considerations and the joinder rule in ***State v. Buford***, 582 S.W.2d 298 (Mo. App. W.D. 1979).

> To be properly joined, the offenses must be part of the same transaction or part of a common scheme or plan, because to join offenses otherwise would expose the defendant to prejudice by allowing proof of the commission of unrelated crimes. Thus, to avoid the emasculation of the evidentiary rule, the joinder rule must be construed so that joinder is permitted only when proof or evidence of the commission of one crime *must be necessary* to the proof of the commission of the other crime.

Id. at 302 (emphasis added)**.**

In this case, the fact of McKinney's arrest on felony charges could have been introduced in a separate trial for attempted escape in any number of ways. Indeed, McKinney may well have chosen to stipulate to that fact. Detailed evidence concerning the murders simply was not necessary to establish the bare fact of arrest on felony charges. Moreover, whether the evidence concerning murder and armed criminal action would have been *admissible* in a separate trial for attempted escape is a different question than whether the charges are connected in the first place. Nonetheless, ***Willis*** makes clear that such evidence was almost certainly inadmissible to establish attempted escape, thus eliminating any connection between the charges. The charges are not connected, for joinder purposes, simply on the basis that the State had the burden to establish the fact of arrest on felony charges.

The State next argues that, as the trial court found, joinder was proper because the attempted escape provides evidence of McKinney's consciousness of guilt of the other charges. The State cites ***State v. Williams***, 97 S.W.3d 462, 469 (Mo. banc 2003), where the court held that evidence of the defendant's escape was admissible as

bearing on his consciousness of guilt of murder and armed criminal action. But ***Williams*** does not involve a joinder issue. Again, whether evidence of one charge is admissible in the trial of another charge is, at best, marginally relevant to the issue of whether charges are sufficiently connected in order for them to be properly joined in the same indictment or information. Joinder is proper, under a theory of "connection," only where evidence of one charge "must be necessary" for conviction on another charge. ***Buford***, 582 S.W.2d at 302. That is not the case here.

In light of the foregoing, we can only conclude that the offense of attempted escape in this case was, as a matter of law, improperly joined with the offenses of first degree murder and armed criminal action. The attempted escape is not of the same or similar character as those offenses. It was neither part of the same transaction as, nor connected to, the first degree murder and armed criminal action charges. And the attempted escape charge was not part of a common scheme or plan involving the murders or armed criminal action.

We turn then to the issue of prejudice. Even though the evidence of McKinney's guilt on all of the counts was overwhelming, by trying these unrelated counts together, the State and the trial court have left us with no option but to reverse the convictions. This is so because the Missouri Supreme Court has declared that "[w]here joinder is improper as a matter of law, prejudice is presumed and severance is mandated." ***Simmons***, 815 S.W.2d at 430. The ***Simmons*** court relied on ***State v. Shubert***, 747 S.W.2d 165 (Mo. App. W.D. 1988), which explained the rationale for the rule:

> We would hold . . . that because improper joinder is a matter of law, severance is mandated where counts were improperly joined. This follows

> because, by definition, improper joinder links unrelated crimes, evidence of which will be adduced at trial. ***The consequence is necessarily prejudicial to the accused.*** It need not be separately alleged or proved.

Id. at 168 (emphasis added). All three districts of this Court have subsequently followed the ***Simmons*** rule that prejudice is presumed if there is an improper joinder. S*ee* ***Holliday***, 231 S.W.3d at 292; ***State v. Kelly***, 956 S.W.2d 922, 925 (Mo. App. W.D. 1997); ***State v. Johnson***, 231 S.W.3d 870, 874 (Mo. App. S.D. 2007); ***State v. Woodson***, 140 S.W.3d 621, 626 (Mo. App. S.D. 2004); ***State v. Spencer***, 62 S.W.3d 623, 625 (Mo. App. E.D. 2001); ***State v. Bird***, 1 S.W.3d 62, 66 (Mo. App. E.D. 1999).

Simmons is the most recent controlling decision of the Supreme Court of Missouri and therefore, we are constitutionally bound to follow that decision. ***State v. Aaron***, 218 S.W.3d 501, 511 (Mo. App. W.D. 2007). We observe, however, that there was no discussion or analysis of the issue in ***Simmons***. The Court simply stated that "[w]here joinder is improper as a matter of law, prejudice is presumed and severance is mandated," and cited ***Shubert***. ***Simmons***, 815 S.W.2d at 430. We further note that the United States Supreme Court has held that under federal joinder rules error resulting from misjoinder compels reversal only if the error had a "substantial and injurious effect or influence in determining the jury's verdict." ***United States v. Lane***, 474 U.S. 438, 449 (1986). Subsequently, even though ***Lane*** and its progeny were based on the federal rule, numerous state courts have followed the federal courts' lead in announcing that harmless error analysis applies and misjoinder requires reversal only if it results in actual prejudice. ***See e.g., Ex Parte Tisdale***, 990 So. 2d 280, 283 (Ala. 2007); ***Livingston v. State***, 565 So. 2d 1288, 1290 (Fla. 1988); ***State v. Anderson***, 63 P.3d

485, 488 (Idaho Ct. App. 2003); ***State v. Bunyard***, 281 Kan. 392, 402 (Kan. 2006); ***State v. Strickland***, 683 So. 2d 218, 226 (La. 1996); ***State v. Mason***, 834 A.2d 339, 347 (N.H. 2003); ***Tabish v. State***, 72 P.3d 584, 590 (Nev. 2003); ***State v. Hazelton***, No. 2008-113, 2009 WL 2569135, at * 10 (Vt. 2009). The Wisconsin Supreme Court reached the same result in a case pre-dating ***Lane***. ***State v. Leach***, 370 N.W.2d 240, 251-52 (Wis. 1985). Thus, among state courts addressing the issue in the years since ***Simmons*** was decided, the trend has been toward harmless error analysis as adopted by the federal courts in ***Lane***.

Since the evidence of McKinney's guilt on all counts in this case is so overwhelming, logic suggests that harmless error analysis would be appropriate. Based on the record before us, it is doubtful that the misjoinder of the attempted escape charge resulted in any prejudice to defendant on the murder and armed criminal action convictions, while actual prejudice likely would be found from the misjoinder of the murder and armed criminal action charges with the attempted escape count. The result then would be retrial of the attempted escape charge only. To paraphrase the Wisconsin Supreme Court, if the purpose of joinder is to promote efficient judicial administration and court fiscal responsibility, those laudatory goals are defeated if a defendant is entitled to separate new trials on previously misjoined offenses even when the defendant suffered no actual prejudice. ***Leach***, 370 N.W.2d at 252-53. Nevertheless, as observed *supra*, ***Simmons*** is still controlling authority and we are required to follow it.

For the foregoing reasons, we have no alternative but to reverse the circuit court's judgment of conviction on all counts, and to remand for new trials. Accordingly, the judgment of conviction on all counts is reversed, and the cause is remanded for retrial of the murder and armed criminal action counts together, and a separate retrial of the attempted escape count. In the latter case, limited evidence of the charges for which McKinney was incarcerated will be admissible to prove confinement, but details of those underlying offenses must be excluded.

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Joseph M. Ellis, Judge

All concur.