

No. SC90607

IN THE
Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

KELLEN C. MCKINNEY,

Appellant.

Appeal from the Jackson County Circuit Court
Sixteenth Judicial Circuit
The Honorable Marco A. Roldan, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from a Jackson County Circuit Court judgment sentencing Mr. McKinney to four consecutive terms of life imprisonment and a consecutive term of four years. Mr. McKinney had been found guilty of two counts of murder in the first degree, § 565.020, RSMo 2000, two counts of armed criminal action, § 571.015, RSMo 2000, and one count of attempted escape from custody, § 564.011, RSMo 2000. This Court transferred this case from the Court of Appeals, Western District, and has jurisdiction pursuant to Article V, section 10 of the Missouri Constitution.

STATEMENT OF FACTS

John and Mildred Caylor, a couple in their late seventies, owned and operated the Caylor Bible Bookstore at 10115 East 63rd Street in Raytown, Missouri (Tr. 573, 588, 644). Their residence was adjacent to and attached to the store (Tr. 602).

On October 20, 2004, at 9:10 a.m., John and Mildred Caylor both entered the Apple Market store at 11501 East 63rd Street in Raytown (Tr. 583-584). Mr. Caylor left at 9:20, while Ms. Caylor made a purchase and left at 9:29 a.m. (Tr. 583). At 9:29 a.m., Mr. Caylor entered the Dollar General store at 63rd Street and Woodson Road in Raytown; he left the store at 9:41 a.m.. (Tr. 582-583).

Darryl James was a regular customer at the Caylor's bible bookstore (Tr. 573-574). Around 3:30 p.m., Mr. James went to the bookstore and attempted to open the door, but the door was locked (Tr. 573-574). He looked inside and saw a head with blood on it (Tr. 575). Mr. James stepped away from the store and called 911 (Tr. 576). When Officer Steve Spandle of the Raytown Police Department arrived, Mr. James waved him down (Tr. 588). Officer Paul White also responded (Tr. 587, 591). Officer Spandle unsuccessfully tried the locked door, and then he kicked it in (Tr. 576, 589).

Inside, the officers found books and pamphlets strewn throughout the store (Tr. 589, 607-608). Mr. Caylor was lying face up, with a large pool of blood to his right side, and Ms. Caylor was lying about ten feet away, face up, in the hallway between the studio and the office (Tr. 576, 589-591, 611, 840). There were bloodstains

on Mr. Caylor's clothes, as well as on the books and papers on the floor nearby (Tr. 611). The cash register was empty except for small change (Tr. 621). The back door was open, and the curtain over the back window had been dislodged (Tr. 856).

At around 9:00 a.m. that morning, the appellant, Mr. McKinney, had gone to see Kendra Heard and asked to borrow her car for a job interview (Tr. 661-662). (Ms. Heard is the mother of Mr. McKinney's child (Tr. 660).) Mr. McKinney left in her car, and returned around 12:30 p.m. (Tr. 662-663). When he returned her car, Mr. McKinney had Ms. Heard come outside, where he explained to her that that he had gotten into an altercation at the job interview (Tr. 663-664). Mr. McKinney showed her an injury to his right ear that he claimed he had suffered when he had been hit in the head with a crowbar (Tr. 664). Ms. Heard noticed several items in her car, including a ripped leather coat on the floorboard and what appeared to be a crowbar (Tr. 664-665). Appellant took the coat and the crowbar to a dumpster and prepared to throw them in, but then he decided not to, and he put the items in a box in the back seat of Ms. Heard's car (Tr. 665-665). Ms. Heard took Mr. McKinney to a house on 6th Street, where she dropped off him with the box (Tr. 666).

Around 5:00 p.m., Kristine Olson, Senior Criminalist with the Kansas City Police Department, arrived at the crime scene (Tr. 597-598, 601-602). Part of her investigation involved taking elimination shoeprints from people who were known to be at the scene (Tr. 609-610). Ms. Olson collected blood from contact stains, which

were made when something bloody contacted a surface, and blood drops, which indicated blood falling from some height to the surface, making a circular stain. (Tr. 613, 615-616).

Blood samples were taken from both the store and the Caylor residence (Tr. 624). In the bathroom, a sample was taken from a contact stain on the wall, and one was taken from the floor directly in front of the toilet (Tr. 625, 629). Blood samples were taken from a bleach bottle on the floor by the back door, from the door and floor of the recording studio, from a book on a shelf near Ms. Caylor, from a drop of blood on a plastic bag behind the cash register, from the floor behind the cash register, from two blood drops from a child's desk, and from a smear on the counter (Tr. 615-619, 621-623, 629-630).

A drawer in the kitchen contained several knives (Tr. 626-627). Officer found two knife sheaths in the drawer. One of the sheaths was empty, and the missing knife was never found (Tr. 627-628, 855). Officers also collected the "cash" button from the register, Mr. Caylor's wallet with blood smears inside, a blood-stained receipt found near Mr. Caylor, a placemat with a blood drop found near Ms. Caylor, and a piece of tape that had been placed over the door bolt (Tr. 606-607, 611-612, 618-619, 621, 629-630, 832-833). DNA samples were taken from the victims, and Mr. Caylor's blood-stained overalls were collected (Tr. 613-615, 630). Mr. Caylor's AARP card, which had apparent blood dropped on it, was also collected (Tr. 612-613).

An autopsy of Mr. Caylor revealed that he had suffered both blunt and sharp-force injuries to his head (Tr. 714-715). He had a very long incised wound that cut through muscle and his external jugular vein (Tr. 715-716, 720). This injury, which was likely inflicted when he was on the ground, did not cause him to die instantly (Tr. 723-724, 832). He suffered a large laceration above his right ear and two other lacerations behind his right ear (Tr. 716, 721-722). Some of his vertebrae were fractured (Tr. 717). Mr. Caylor also had many defensive-type injuries to his hands and upper arms (Tr. 718-719, 722-723). A laceration to the top of his head was likely caused by blunt-force injury (Tr. 720-721).

The autopsy of Ms. Caylor showed that she had also suffered multiple blunt and sharp force injuries, including two incised wounds to her neck (Tr. 730-731). One incised wound started mid-line on her neck and cut through her strap muscles and both the external and internal jugular veins (Tr. 731). The wounds to her neck were inflicted as she lay face down on the ground (Tr. 842). Her jaw had been fractured on both sides, and she had suffered two broken ribs (Tr. 732, 733). She also suffered defensive injuries to her right hand (Tr. 732). A subarachnoid hemorrhage to the left side of her head was likely caused by blunt-force impact (Tr. 733-734). Both of the Caylor's died from multiple blunt and sharp-force injuries (Tr. 737).

The criminalist, Ms. Olson, tested the sample from the drop of blood found on a plastic bag behind the cash register (Tr. 630-631). She tested it because it was far

away from the other blood stains, and appeared to be an isolated drop (Tr. 631). She compared it to the DNA of the victims, but it did not match (Tr. 631). Next, she ran the DNA profile through their database, and, on November 3, 2004, the DNA profile was matched to Mr. McKinney (Tr. 631-632, 848).

Ms. Olson determined that the piece of tape that had been placed over the door bolt contained the blood of Ms. Caylor (Tr. 684, 854). She identified Mr. Caylor's blood from the samples from his AARP card, from the samples from the bathroom wall and from the bathroom floor near the toilet, from the bleach bottle found by the back door, and from his overalls pocket (Tr. 685). She identified Mr. McKinney's blood from the cash register button, from the sample from the placemat near Ms. Caylor's head, and from the sample from the floor by the studio door (Tr. 685-686, 847-848, 855). Additionally, Mr. McKinney's fingerprints were found on the place mat (Tr. 783-786). The bloodstains inside the wallet were matched to Mr. Caylor (Tr. 833).

Ms. Olson notified the Raytown Police Department of her findings (Tr. 632). The next day, November 4, 2004, Corporal Dyon Harper, who had learned that Mr. McKinney would be at his job at Gates Barbecue, made plans to arrest Mr. McKinney (Tr. 634). After meeting with the Kansas City Police Department for assistance, they went to Gates Barbecue (Tr. 634). Mr. McKinney was arrested without incident (Tr. 635). Corporal Harper noted that Appellant had suffered a

recent cut or wound to his right ear, as well as a scratch or cut to his left leg (Tr. 640). Later, Corporal Harper retrieved Appellant's belongings, including his size nine "Black Shaq" tennis shoes (Tr. 635-636, 638-639, 797, 804). Numerous impressions of shoeprints taken from the crime scene, including shoeprints left on the books and pamphlets that were strewn throughout the store, matched test impressions made from Mr. McKinney's shoes (Tr. 800-804).

Later that day, Crime Scene Investigator Thomas Wheeler went to the Shalom Catholic Worker House where Mr. McKinney had been living, to help execute a search warrant (Tr. 653-654). The officers searched Mr. McKinney's bed (Tr. 654-655). Mr. McKinney's bloodstained black leather jacket was recovered (Tr. 656). One of the blood stains matched the genetic profile of Mr. Caylor (Tr. 673). A stain from the right shoulder area proved to be a match for Mr. McKinney (Tr. 753-754).

The police also searched Kendra Heard's 1993 Honda Accord (Tr. 742-743). They collected samples from the steering wheel cover, and they collected a folded envelope and a folded piece of paper from the right front floorboard area, with possible blood spots on them (Tr. 744-745). They also collected two carpet cuttings and two swabs of the floor mat, as well as a sample from a small spot on the rear seat (Tr. 745-746). A blood stain from the carpet was consistent with Mr. Caylor's genetic profile (Tr. 676).

On November 4, 2004, the state filed a complaint charging Mr. McKinney

with two counts of murder in the first degree and two counts of armed criminal action (L.F. 15-18). On November 12, 2004, the state obtained an indictment on those charges (L.F. 19-20).

While Mr. McKinney was incarcerated at the Jackson County jail, he talked to a person named Ivan about killing a woman. He told Ivan how “she wouldn’t shut up even after the blood was bubbling in her throat, so he had to do it” (Tr. 871). Mr. McKinney made a stabbing gesture while saying this (Tr. 871). Mr. McKinney told Ivan that he felt like “a true devil” (Tr. 872). Another time, when he was watching a news story about the murders that discussed the police looking for other persons, Mr. McKinney told Justin Parker, another inmate, that “they were looking for a ghost” (Tr. 872-873).

On December 27, 2004, Mr. McKinney was incarcerated at the Jackson County Department of Corrections (Tr. 897-902). Deputy Terry Yancy was preparing to inspect Mr. McKinney’s cell, when Mr. McKinney ran into his cell from his day space and sat on the toilet (Tr. 903). Deputy Yancy went into the cell and picked up an orange jumper, and a shower drain with a sock wrapped around it fell out of the jumper (Tr. 903-904). When Deputy Yancy asked Mr. McKinney why he had this item, Mr. McKinney told him he was using it for protection (Tr. 904-905). Deputy Yancy contacted his floor sergeant and went back into Mr. McKinney’s cell for further inspection (Tr. 905-906). Under the mattress, Deputy Yancy found bed sheets

tied together and a sock and a screw (Tr. 906-908). He noticed that some bricks on the wall had been chiseled out and were loose, and that the area around the window pane had been chiseled out and had deep gouges in it (Tr. 906-908, 925). One of the latches was missing from a seat or stool in his cell, and the cage surrounding a smoke detector had been tampered with and pulled half-way off (Tr. 906). Deputy Yancy also found some disassembled fingernail clippers (Tr. 909).

After the search, Mr. McKinney was placed in a holding cell for awhile, and then placed in administrative segregation (Tr. 911-912). On December 29, 2004, Lieutenant Kenneth Cassway performed a cell check on Mr. McKinney's cell (Tr. 914-915). He found that the night-light in the cell had been damaged, with the Plexiglass lens pushed all the way up, and some pieces missing (Tr. 915-916). Inside Mr. McKinney's property box, he found a metal bracket, two machine screws, and a hand-drawn map of downtown Kansas City around the jail (Tr. 917). On the map was written "This is where we at" (Tr. 919).

Before searching Mr. McKinney's cell, the officers had placed Mr. McKinney in a clean cell that had no damage to it (Tr. 916-917). After they had finished searching Mr. McKinney's cell, the officers searched the cell where Mr. McKinney had been held during the search (Tr. 917). At that time, the officers found two metal strips from the night light beneath the toilet (Tr. 917-918).

On June 11, 2005, the state obtained a superseding indictment charging Mr.

McKinney with two counts of murder in the first degree, two counts of armed criminal action, and one count of escape or attempted escape from confinement while under arrest for a felony (L.F. 33-34).

About a month before trial, on January 30, 2008, Mr. McKinney filed a “Motion for Severance of Offenses Due to Improper Joinder and Substantial Prejudice” (L.F. 108-109). In its written response, the state pointed out that “Rule 23.05 states that ‘all offenses that are of the same or similar character . . . or based on . . . two or more acts or transactions that are connected . . . may be charged in the same indictment” (L.F. 110). The state asserted further “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).

On February 6, 2008, the trial court heard argument on Mr. McKinney’s motion to sever, and, having considered the written pleadings, overruled the motion; the court stated its ruling, in part, as follows:

[THE COURT:] In this case the defendant was in custody for the offenses of murder in the first degree and armed criminal action. The [escape] charges of the State occurred while the defendant was in custody for those offenses. The State has charged those offenses now with the underlying charges.

At this time I think that based on Missouri law the State is entitled to join those offenses as evidence in consciousness of guilty [sic], and the motion of the defendant to sever those offenses is overruled.

(Tr. 284-285).

Mr. McKinney's jury trial commenced on February 26, 2008 (Tr. 306). Mr. McKinney raised the issue of improper joinder again before opening statements, and the trial court again denied the request for severance (Tr. 562-563). (Mr. McKinney also objected before the beginning of testimony regarding his attempted escape. (Tr. 896, 913, 922).) The jury found Mr. McKinney guilty of all five counts (L.F. 183-187, Tr. 1014-1015).

On March 24, 2008, Mr. McKinney filed a "Motion for judgment of acquittal notwithstanding the verdict, or, in the alternative, for a new trial." (L.F. 208-224). The motion included Mr. McKinney's claim of improper joinder (L.F. 212-213). The trial court overruled the motion (Tr. 1021).

On March 27, 2008, the trial court sentenced Mr. McKinney to four terms of life imprisonment – one term for each count of murder and armed criminal action – and to a term of four years for attempted escape (Tr. 1035-1036; L.F. 228-229). The court ordered the sentences to run consecutively (Tr. 1035-1036, L.F. 228-229). On March 28, 2008, Mr. McKinney filed his notice of appeal (L.F. 55-56).

On October 27, 2009, the Court of Appeals, Western District, reversed Mr. McKinney's convictions and sentences, holding that joinder of the attempted escape charge with the murder and armed criminal action charges was improper. *State v. McKinney*, No. 69494, slip op. at 1 (Mo.App. W.D. Oct. 27, 2009). The Court of Appeals reasoned that the offenses were not "connected," because evidence of the murders was not "necessary" to prove the attempted escape, and, likewise, the evidence of the attempted escape (although admissible to prove Mr. McKinney's guilt of the murders) was not "necessary" to prove the murders. *Id.* at 8-11.

The Court of Appeals then considered whether Mr. McKinney was prejudiced, and the Court concluded that it was "doubtful that the misjoinder of the attempted escape charge resulted in any prejudice to defendant on the murder and armed criminal action convictions." *Id.* at 13. Nevertheless, although the Court of Appeals had not found any actual prejudice, the Court of Appeals concluded that, under *State v. Simmons*, 815 S.W.2d 426 (Mo. banc 1991), it had "no option but to reverse the convictions." *Id.* at 11. On March 2, 2010, this Court granted Respondent's application for transfer.

ARGUMENT

I. The trial court did not err or abuse its discretion in overruling Mr. McKinney's motion to sever, because the offense of attempted escape from custody while under arrest for a felony was properly joined with the offenses of murder in the first degree and armed criminal action, and Mr. McKinney did not suffer any substantial prejudice from the denial of severance.

Mr. McKinney asserts that the trial court erred in overruling his motion for severance (App.Sub.Br. 11). He argues that the offense of attempted escape "was not of the same or similar character, part of the same transaction, or part of a common scheme or connected" to the murders and armed criminal action (App.Sub.Br. 11). He asserts further that misjoinder of the escape charge gives rise to an irrebuttable presumption of prejudice and, thus, that he is entitled to a new trial on all charges (App.Sub.Br. 11, 21-28).

A. The standard of review

"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.*

“Whether joinder is proper or improper is a question of law.” *State v. Morrow*, 968 S.W.2d 100, 109 (Mo. banc 1998). “The propriety of joinder is fact dependent.” *State v. McQuary*, 173 S.W.3d 663, 670 (Mo.App. W.D. 2005). In determining whether there has been a misjoinder of offenses, only the State’s evidence is considered. *State v. Holliday*, 231 S.W.3d 287, 293 (Mo.App. W.D. 2007).

If joinder was proper, the trial court has discretion regarding whether to sever the offenses for trial. *State v. Warren*, 141 S.W.3d 478, 487 (Mo.App. E.D. 2004). A trial court does not abuse its discretion unless the ruling is “clearly against the logic and circumstances before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration.” *State v. Brown*, 939 S.W.2d 882, 883 (Mo. banc 1997). “[I]f reasonable persons can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.” *Id.*

B. Joinder of the offenses in this case was proper, and the trial court did not abuse its discretion in refusing to sever the offenses

Under Rule 23.05 and § 545.140.2, RSMo 2000, multiple offenses can be joined into a single indictment or information under any of four different circumstances: (1) when they are “of the same or similar character,” (2) when they are “based on

two or more acts that are part of the same transaction,” (3) when they are based on “two or more acts or transactions that are connected,” or (4) when they are based on two or more acts “that constitute parts of a common scheme or plan.”

Because joinder of criminal offenses is favored in the interest of judicial economy, joinder is appropriate when any of these circumstances exist. *State v. Chambers*, 234 S.W.3d 501, 508 (Mo. App. E.D. 2007). At issue in this case is the third circumstance – when two or more acts or transactions are “connected.”

1. The attempted escape was connected to the murders

In *State v. Morrow*, 968 S.W.2d 100, in analyzing whether crimes were “connected” so as to permit joinder, this Court adopted a broad definition of “connected” and relied on definitions from two dictionaries; this Court stated:

“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 a view of the problem or continuous.” Webster’s International 480 (3d ed.1981).

Id. at 109. This Court then described how the various crimes committed by the defendant in *Morrow* were “connected” in various ways. This Court pointed out that the crimes were connected by temporal proximity, by a similarity in the manner

they were committed, by the fact that all of the crimes occurred after Mr. Morrow had met his co-actor and discovered that the co-actor had a comfortable place to smoke cocaine, and by a common motive. *Id.* This Court also stated that the crimes were “connected by their dependence and relationship to one another.” *Id.*

In Mr. McKinney’s case, the crimes were still “connected by their dependence and relationship to one another.” Indeed, but for the murders, Mr. McKinney would not have been in custody, and he would have had no occasion to attempt to escape from custody. But for the murders, Mr. McKinney would have had no need and no motive to escape from custody. In other words, the attempted escape was related to the murders, as it was motivated by Mr. McKinney’s desire to avoid prosecution for the murders. The escape was also connected to the murders because it was proof of Mr. McKinney’s consciousness of guilt. *See State v. Williams*, 97 S.W.3d 462, 469 (Mo. banc 2003). *See generally State v. Jackson*, 645 S.W.2d 725, 729 (Mo.App. E.D. 1982). The fact that the connection crossed several weeks in time simply did not destroy the logical and factual connection between the murders and the attempted escape. *See generally State v. Dizer*, 119 S.W.3d 156, 161 (Mo.App. E.D. 2003) (in analyzing whether offenses of “same or similar character” were properly joined, the Court held that “A lapse in time between offenses [six years], without more, does not automatically defeat joinder[.]”).

Respondent is not aware of any Missouri case that has specifically held that a

charge of escape or attempted escape is “connected” to the offenses for which the defendant is incarcerated at the time of the escape. But other jurisdictions have analyzed the issue and concluded that such escapes are sufficiently connected so as to permit joinder of the escape charge. *See People v. Valdez*, 82 P.3d 296, 313 (Cal. 2004) (escape charge was properly joined with murder charge because “Although the murder itself occurred almost two years prior to defendant’s escape, the offenses were nonetheless connected because the escape occurred as defendant was being returned to ‘lock-up’ following his arraignment on the murder charge[, and] The apparent motive for the escape was to avoid prosecution for the murder.”); *State v. Hand*, 840 N.E.2d 151, 179-180 (Ohio 2006) (severance was not required, and the defendant was not prejudiced by joinder of attempted escape charge with murder charge, even though the murder had occurred nine months before the attempted escape); *United States v. Quinones*, 516 F.2d 1309, 1312 (1975) (“Moreover, the testimony of the agent revealed that the warrant’s execution, hence defendant’s custody, was a direct result of the happenings charged in the other counts for which he was tried. Thus they may be deemed ‘connected together,’ Fed.R.Crim.P. 8(a), and joinder was proper.”); *United States v. Peoples*, 748 F.2d 934, 936 (4th Cir. 1984) (“An escape and the underlying substantive offense are sufficiently connected to permit joinder under Fed.R.Crim.P. 8(a) if the offenses are related in time, the motive for flight was avoidance of prosecution on the substantive offense, and

custody derived directly from the substantive offense.”); *United States v. Ritch*, 583 F.2d 1179, 1181 (5th Cir. 1978) (“It is well established that a charge of bail jumping or escape may be deemed sufficiently ‘connected’ with a substantive offense to permit a single trial, at least where the charges are related in time, the motive for flight was avoidance of prosecution, and appellant's custody stemmed directly from the substantive charges.”).

In arguing that the crimes were not “connected,” Mr. McKinney makes several claims. First, he alleges that “the State initially [did not] argue in the Court of Appeals that the alleged escape attempt was connected to the homicides” (App.Sub.Br. 16). Second, he asserts that his case is distinguishable from *Morrow*, in that his crimes “were not a part of a continuous chain of criminal activity,” and they “were not committed for a single purpose” (App.Sub.Br. 18). And, finally, he argues that “Joinder cannot be based on Evidentiary Issues” (App.Sub.Br. 19). But none of these arguments has merit.

First, with regard to the state’s arguments in the court below, the relevant question is not whether the state made certain arguments at trial or on appeal; the relevant question is whether the trial court erred as a matter of law in concluding that joinder was proper. In any event, Mr. McKinney is incorrect, as the state did argue that the offenses were all “connected” as permitted by Rule 23.05.

In its brief to the Court of Appeals, the state quoted the language of the rule

and stated that “Rule 23.05 authorizes the joinder of crimes that are similar in character *or connected in some way*” (Resp.Br. 18). The state then pointed out certain evidentiary connections between the crimes, namely: first, that to prove the attempted escape (as charged in this case), the state would have to prove that Mr. McKinney was incarcerated for a felony; and second, that evidence of the attempted escape legitimately tended to prove Mr. McKinney’s guilt of the murders, as it showed Mr. McKinney’s consciousness of guilt (Resp.Br. 18-20). Accordingly, while the state did not reiterate that the crimes were “connected,” it is apparent that this was the state’s theory: joinder was proper because Mr. McKinney attempted to escape and avoid prosecution for the murders, and because evidence of the attempted escape tended to prove Mr. McKinney’s guilt of the murders.

More importantly, this theory of connection was the apparent basis for the trial court’s ruling. Here, the trial court stated that joinder was proper because “In this case the defendant was in custody for the offenses of murder in the first degree and armed criminal action[, and] The [escape] charges of the State occurred while the defendant was in custody for those offenses” (Tr. 284-285). The trial court further observed that joinder was proper because evidence of the escape would be admissible to prove Mr. McKinney’s consciousness of guilt for the other offenses (Tr. 284-285). Thus, while the trial court did not use the word “connected,” it is apparent that the trial court concluded that the crimes were all connected because of

their factual interdependence.

Mr. McKinney's arguments that his crimes "were not a part of a continuous chain of criminal activity," and "were not committed for a single purpose," also do not compel reversal. For, while the crimes in *Morrow* were more closely connected in time, there is no suggestion in *Morrow* that close temporal proximity is required for crimes to be "connected." Additionally, while the motive underlying the murders and the escape in this case were different, it is apparent that the murders themselves provided a motive for Mr. McKinney's escape. Thus, the crimes were "connected by their dependence and relationship to one another." *Morrow*, 968 S.W.2d at 109. If Mr. McKinney's contrary view requiring close temporal proximity is adopted, then "connected" crimes will apparently have to be part of a common scheme or plan, or part of the same transaction. But this does not comport with the rule or statute, which allow joinder when two acts are merely "connected" (and not necessarily part of a common scheme or plan or part of the same transaction).

Finally, it is not merely the admissibility of the evidence of the attempted escape that connects the escape to the murders. Rather, factually, the escape is dependent upon the murders; for, as stated above, Mr. McKinney would not have been incarcerated, and would not have needed to escape, if he had not committed the murders. Moreover, it is not apparent that the rules of evidence should always be irrelevant in determining whether joinder is proper.

It is true, as Mr. McKinney points out (App.Sub.Br. 19-20), that this Court in *State v. McCrary*, 621 S.W.2d 266, 271 n. 7 (Mo. banc 1981), and other cases has stated that it is inappropriate to decide questions of joinder by simply importing “wholesale” the rules governing the admission of evidence of uncharged crimes. For instance, in *State v. Simmons*, 815 S.W.2d 426, 430 (Mo. banc 1991), the state argued that joinder of two murders was proper because “factual commonality between the crimes goes to ‘the identity of the perpetrator.’” This Court rejected the state’s argument because the state’s argument “confuse[d] the procedural question before the court with the rule permitting the admission of evidence of other crimes.” *Id.* Accordingly, this Court concluded that “This identity argument has nothing to do with the presence or absence of a common scheme or plan for purposes of joinder under Section 565.004.1.” *Id.*

But much has changed since this Court decided *McCrary* and *Simmons*. When *Simmons* was decided in 1991 (*McCrary* was decided in 1981), the joinder statute for homicide (§ 565.004) only permitted joinder when all of the charged offenses arose “out of the same transaction or constitute part of a common scheme or plan.” § 565.004.1, RSMo 1986. By contrast, at present, the joinder statute for homicide cross-references § 545.140, and that section (like the present Rule 23.05) allows for joinder of all crimes that “are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or

constituting parts of a common scheme or plan.” §§ 565.004.1, 545.140.2, RSMo 2000.

In other words, now, the rule permitting joinder is much broader, and crimes may be joined when they are “connected;” thus, there may be situations, like this case, where the admissibility of the evidence illustrates a sufficient connection for joinder.

Here, since the attempted escape count was charged as a class D felony (L.F. 34), the state had to prove beyond a reasonable doubt that Mr. McKinney had been under arrest for a felony when he attempted his escape. In *State v. Jackson*, 645 S.W.2d at 728, the Eastern District cited the Western District’s earlier holding in *State v. Willis*, 602 S.W.2d 9 (Mo. App. W.D. 1980), which held that under § 575.200, proof of the elements of escape from custody requires proof of an underlying arrest for a crime, such that identification of that crime is essential since § 575.200 also provides for greater punishment when the underlying arrest is for a felony. The *Jackson* court held that evidence of the charge of carrying a concealed weapon necessarily would have come into Jackson’s trial on the charge of escape. *Jackson*, 645 S.W.2d at 728.

In *Willis*, the defendant was tried and convicted for escape from custody after a jury trial, in which the State presented evidence that he had been serving a sentence for murder in the second degree when he failed to return from a work release assignment. *Willis*, 602 S.W.2d at 9. The court held that:

The offense of escape from confinement is predicated on the existing condition of confinement lawfully imposed. Conviction,

sentence and entry into custody by prior operation of law are all essential elements of the crime of escape and must be proven. The state must therefore offer proof that the accused was, at the event of escape, lawfully confined. *State v. Rentschler*, 444 S.W.2d 453, 456 (Mo.1969). As a material element of the offense of escape, confinement must be shown beyond a reasonable doubt. *State v. Martin*, 395 S.W.2d 97, 102 (Mo.1965).

Id. at 10. Further, the court held that having concluded that proof of the prior conviction is an essential element in proving the charge of escape, it also must follow that the prohibition against evidence of unrelated crimes is not applicable to cases of escape. *Id.* at 11.

Here, as stated above, Mr. McKinney's attempted escape was also relevant in establishing his guilt for the murder and armed criminal action counts, as it was evidence of his consciousness of guilt. "Evidence of escape is admissible as bearing on defendant's consciousness of guilt as to pending charges." *State v. Williams*, 97 S.W.3d at 469. In short, because the escape would not have occurred but for the murders, because the escape was motivated by a desire to avoid prosecution for the murder, and because the escape was more serious in light of the seriousness of the offenses for which Mr. McKinney was incarcerated, the trial court did not err in concluding that the offenses were sufficiently "connected" to permit joinder.

2. The trial court did not abuse its discretion when it refused to sever the escape charge

Ordinarily, once the Court determines that joinder was proper, the analysis turns to whether the trial court abused its discretion in refusing to sever the charges. *See State v. Warren*, 141 S.W.3d at 487 (“Severance assumes that joinder was proper, and leaves to the trial court's discretion the determination of whether or not prejudice may or would result if the properly joined charges were tried together.”). Here, apparently relying entirely on his claim that joinder was improper, Mr. McKinney makes no alternative argument that if joinder was proper, the trial court abused its discretion in refusing to sever the charges. Nevertheless, respondent would note that the trial court did not abuse its discretion in refusing to sever the escape charge.¹

“Severance is proper only when the defendant shows that he or she will suffer substantial prejudice if the offenses are not tried separately and the trial court finds the existence of bias or discrimination requiring separate trials of the offenses.’ *Id.*

¹ Although he does not argue prejudice from the court’s failure to sever, Mr. McKinney does argue that a presumption of prejudice arose from the improper joinder of offenses (App.Sub.Br. 21-28). In the event that this Court agrees with Mr. McKinney on the issue of joinder, respondent has addressed the issue of presumptive prejudice below.

“Severance is a matter left to the discretion of the trial court.” *Id.* “There is no abuse of discretion in a trial court’s denial of a motion to sever if the motion does not state sufficient facts demonstrating a particularized showing of substantial prejudice as required by both section 545.885.2 and Rule 24.07(b).” *Id.*

Here, there is no reason to believe that Mr. McKinney suffered any “substantial prejudice” from trying the offenses in a single trial, particularly with regard to the charges of murder and armed criminal action. First, although Mr. McKinney point outs (in arguing against harmless error analysis) that evidence of his attempted escape would not have necessarily been admissible in a separate trial, it is well settled, as discussed above, that such evidence is admissible to prove consciousness of guilt. And, where evidence of a joined offense would have been admissible in a separate trial on the other offenses, it cannot be said that the defendant suffered any prejudice on the other offenses. *See State v. Allen*, 674 S.W.2d 606, 608 (Mo. App. E.D. 1984) (no prejudice from failure to sever because the same evidence would have been presented to the jury even if the charges were severed) (citing *State v. Williams*, 603 S.W.2d 562, 568 (Mo.1980)); *see also State v. Jacobs*, 10 P.3d 127, 135 (N.M. 2000) (“evidence of the escape, even if uncharged, would have been admissible to show consciousness of guilt”); *United States v. Turner*, 500 F.3d 685, 688 (8th Cir. 2007) (“If evidence that a defendant committed one offense would be admissible to prove that he committed a second offense, then misjoinder of the first

offense will not be prejudicial with respect to a conviction on the second.”).

With regard to the attempted escape, there is also no reason to believe that Mr. McKinney was prejudiced. The fact that Mr. McKinney was incarcerated, and the fact that he was incarcerated for a felony, were facts that would have been proved at a separate trial on the escape charge. Moreover, Mr. McKinney’s incarceration for multiple murders also would have been relevant at the trial for attempted escape, as it would have legitimately tended to prove just how desperate (or motivated) Mr. McKinney was to avoid prosecution.

Finally, given the strength of the evidence on both charges (as is discussed in greater detail below), and because the jury was instructed to consider each charge separately (L.F. 179), there is no reason to believe that the jury was unable to fairly differentiate the charges and find Mr. McKinney guilty based only on the evidence that legitimately tended to prove his guilt for each offense. Of course, here, as discussed above, because the evidence of the crimes was cross-admissible (in whole or in part) to prove the other crimes, the jury was allowed to consider some evidence of each crime in finding Mr. McKinney guilty of the other crime.

C. Even if joinder was improper, the “presumption” of prejudice that can accompany misjoinder was not present in this case

Initially, Mr. McKinney attempts to preclude a discussion of harmless error analysis by asserting that the state “did not raise this issue when this case was in

front of the Court of Appeals” (App.Sub.Br. 22). He cites Rule 83.08(b) for the proposition that parties are precluded “from altering the basis of any claim that was raised in the court of appeals brief” (App.Sub.Br. 22). But Mr. McKinney’s reliance on Rule 83.08(b) is misplaced for at least three reasons.

First, this Court has interpreted that rule as a restriction on an *appellant* who tries to alter the basis of any claim that was raised in the brief filed in the court of appeals. See *Blackstock v. Kohn*, 994 S.W.2d 947, 953 (Mo. banc 1999); see also *Linzenni v. Hoffman*, 937 S.W.2d 723, 727 (Mo. banc 1997). That makes sense, as respondents do not raise claims. Second, the state specifically argued in its brief below that there was no substantial prejudice from trying the attempted escape from custody count together with the counts for murder in the first degree and armed criminal action (See Resp.Br. 23-24). And, finally, even though it is true that the state in its motion for rehearing and applications for transfer refined its arguments regarding prejudice and harmless error analysis, such refinement was entirely proper in light of the Western District’s opinion, which overlooked material matters of fact and law. Indeed, bringing overlooked legal points to the appellate court’s attention is the very reason for having post-opinion motions.

And, in that regard, the state reiterates here what it argued in its post-opinion motion and applications for transfer: even if joinder was improper, a new trial should only be ordered if there was actually prejudice from the misjoinder.

In *State v. Simmons*, 815 S.W.2d 426, after concluding that two counts of capital murder had been improperly joined, this Court stated – without further explication – that “Where joinder is improper as a matter of law, prejudice is presumed and severance is mandated.” *Id.* at 430 (citing *State v. Shubert*, 747 S.W.2d 165, 168 (Mo.App. W.D. 1988)). Mr. McKinney argues that this Court’s holding means that that improper joinder creates an irrebuttable presumption that always necessitates a retrial of any improperly joined charge (App. Subs. Br. 10-11, 22-28).

But this Court did not state in *Simmons* that improper joinder raises an irrebuttal presumption of prejudice; nor did it hold that improper joinder is “structural error” that is not subject to harmless error analysis. Neither *Simmons* nor *Shubert* held that the presumption of prejudice was irrebuttable. To the contrary, while this Court’s opinion in *Simmons* is silent on the issue, the Western District’s opinion in *Shubert* suggests that the presumption is merely evidentiary and, thus, subject to rebuttal:

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.

Shubert, 747 S.W.2d at 168.

No Missouri case has ever concluded that the presumptive prejudice cannot be rebutted and that a duplicate retrial is always necessary after improper joinder. Several cases have stated the rule from *Simmons*, but because the courts found that joinder was proper in those cases, there was no occasion to discuss whether the presumption of prejudice was rebuttable. See *State v. Morrow*, 968 S.W.2d at 109; *State v. Love*, 293 S.W.3d 471, 476 (Mo. App. E.D. 2009); *State v. Johnson*, 231 S.W.3d 870, 874 (Mo. App. S.D. 2007); *State v. Holliday*, 231 S.W.3d 287, 292 (Mo. App. W.D. 2007); *State v. Woodson*, 140 S.W.3d 621, 626 (Mo. App. S.D. 2004); *State v. Dizer*, 119 S.W.3d at 161-162; *State v. Bechhold*, 65 S.W.3d 591, 594-595 (Mo. App. S.D. 2002); *State v. Spencer*, 62 S.W.3d 623, 625 (Mo. App. E.D. 2001); *State v. Joliff*, 867 S.W.2d 256, 259 (Mo. App. E.D. 1993); *State v. Jones*, 863 S.W.2d 353, 357 (Mo. App. W.D. 1993); see also *State v. Winfield*, 5 S.W.3d 505, 514 (Mo. banc 1999).

Because improper joinder is rare, there are very few cases that discuss whether harmless error analysis is appropriate. Usually, when a case is reversed for improper joinder, it is apparent that the case involved unrelated offenses, and that evidence of the unrelated offenses would not have been admissible in separate trials. See e.g. *State v. Simmons*, 815 S.W.2d 426 (two unrelated capital murders); *State v. Saucy*, 164 S.W.3d 523 (Mo. App. S.D. 2005) (two unrelated robberies); and *State v. Brown*, 954 S.W.2d 396 (Mo. App. E.D. 1997) (second-degree assault, shooting into a dwelling, and armed criminal action from one incident, and one unrelated count of

unlawful use of a weapon).

But in both *Saucy* and *Brown*, although the court ordered new trials, the Court of Appeals (Southern and Eastern Districts) indicated that harmless error analysis is appropriate after a finding of improper joinder. *See Saucy*, 164 S.W.3d at 529. More specifically, in *Saucy*, after finding improper joinder, the Court stated that “To determine that the evidence of the other crimes did not prejudice the defendant, this court must find beyond doubt that the tainted evidence did not affect the jury in its fact-finding process.” *See also Brown*, 954 S.W.2d at 398 (same).

As is evident, the presumption of prejudice arises from the jury’s exposure to, and consideration of, improper evidence of unrelated crimes. Accordingly, if it is apparent that a separate trial on one or more of the joined offenses would have included the presentation of identical evidence, the presumption should be deemed rebutted, and a duplicate retrial on those offenses should not be ordered. In other words, in Mr. McKinney’s case, because a retrial of the murder charges and armed criminal action charges would still include evidence of his subsequent attempted escape from custody, the “presumption of prejudice” that arose from the allegedly improper joinder (i.e., the prejudice from the jury’s consideration of the evidence of the attempted escape) should be deemed fully rebutted with regard to the murder and armed criminal action charges.

In short, because there can be no unfair prejudice from evidence that was

properly admitted (even if the charges should not have been tried together), this Court should not order a duplicate retrial on the murder and armed criminal action charges. *See generally State v. Allen*, 674 S.W.2d at 608 (no prejudice from failure to sever because the same evidence would have been presented to the jury even if the charges were severed); *United States v. Turner*, 500 F.3d at 688 (“If evidence that a defendant committed one offense would be admissible to prove that he committed a second offense, then misjoinder of the first offense will not be prejudicial with respect to a conviction on the second.”).

The United States Supreme Court, the Federal Circuit Courts, and various state courts, have adopted harmless error review for misjoinder. *See United States v. Lane*, 474 U.S. 438, 444-450 (1986); *see also, e.g., United States v. Rittweger*, 524 F.3d 171, 177 (2nd Cir. 2008); *United States v. Hawkins*, 589 F.3d 694, 700 (4th Cir. 2009); *United States v. Cody*, 498 F.3d 582, 587-588 (6th Cir. 2007); *United States v. Turner*, 500 F.3d 685, 688 (8th Cir. 2007); *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 (2003); *State v. Bunyard*, 133 P.3d 14 (Kan. 2006); *State v. Strickland*, 683 So.2d 218, 226 (La. 1996); *State v. Mason*, 834 A.2d 339, 347 (N.H. 2003); *State v. Jacobs*, 10 P.3d at 135 (N.M. 2000); *Tabish v. State*, 72 P.3d 584, 590 (Nev. 2003); *State v. Hazelton*, 987 A.2d 915 (Vt. 2009); and *State v. Leach*, 370 N.W.2d 240, 251-252 (Wis. 1985). Thus, among state courts addressing the issue in the years since *Simmons* was decided – including two

Missouri Court of Appeals cases – the trend has been toward harmless error analysis as adopted by the federal courts in *Lane*.

Indeed, there are compelling reasons to engage in harmless error analysis in a case like Mr. McKinney's. It is apparent – particularly with regard to the charges of murder and armed criminal action – that Appellant suffered no prejudice from joinder because the evidence against him on each count was overwhelming. Kendra Heard testified that Mr. McKinney borrowed her car the morning of the murders, (Tr. 661-662), and when he returned that afternoon, he explained to her that that he had gotten into an altercation at a job interview (Tr. 663-664). Mr. McKinney showed her an injury to his right ear that he claimed he had suffered when he had been hit in the head with a crowbar (Tr. 664). Ms. Heard testified that she noticed several items in her car, including a ripped leather coat on the floorboard and what appeared to be a crowbar (Tr. 664-665).

Mr. McKinney's DNA was found on a drop of blood on a plastic bag behind the cash register at the crime scene (Tr. 630-631). It was also found on the cash register button, the placemat near Mildred Caylor's head, and on the floor by the studio door (Tr. 685-686, 847-848, 855). Additionally, Mr. McKinney's fingerprints were found on the place mat (Tr. 783-786). Numerous impressions of shoeprints taken from the crime scene, including shoeprints left on the books and pamphlets that were strewn throughout the store, matched test impressions made of Mr.

McKinney's tennis shoes (Tr. 635-636, 638-639, 797, 800-804). One of the blood stains on Mr. McKinney's black leather jacket matched the genetic profile of John Caylor (Tr. 673). A blood stain from the carpet taken from Ms. Heard's car was consistent with Mr. Caylor's genetic profile (Tr. 676).

While in custody, Mr. McKinney made several incriminating statements, including how a woman that he had killed "wouldn't shut up, even after the blood was bubbling in her throat, so he had to do it" (Tr. 871). Mr. McKinney said that he felt like "a true devil" (Tr. 872), and that if police were searching for an accomplice to the murders, "they were looking for a ghost" (Tr. 872-873). And, of course, evidence that Mr. McKinney attempted to escape from incarceration showed Mr. McKinney's consciousness of guilt for the murders, and it would have been admitted in a separate murder trial.

Mr. McKinney asserts that "it is impossible to know how the evidence would have played out had the charges been tried separately" (App.Sub.Br. 27). But it is not impossible. Appellate courts routinely examine evidence and determine whether it was or would have been admissible. Moreover, here, the trial court concluded that evidence of the attempted escape would have been admissible in a separate murder trial (Tr. 284-285). Thus, if the trial court had severed the attempted escape charge in this case, the evidence of the attempted escape still would have been admitted in this murder trial. And, of course, the relevant question is whether

there was any prejudice in Mr. McKinney's trial.

Regarding the attempted escape count, Deputy Yancy searched Mr. McKinney's cell and found an orange jumper with holes in it, and a shower drain with a sock wrapped around it (Tr. 903-904). Under Mr. McKinney's mattress, he found bed sheets tied together, and a sock and a screw (Tr. 906-908). Bricks on the wall had been chiseled out and were loose, and the area around the window pane had been chiseled out and had deep gouges in it (Tr. 906-908, 925). In a later search, officers discovered that the night-light in Mr. McKinney's cell had been damaged, with the Plexiglass lens pushed all the way up, and some pieces missing (Tr. 915-916). Inside Mr. McKinney's property box, they found a metal bracket, two machine screws, and a hand-drawn map of downtown Kansas City and the vicinity of the jail, with the words "This is where we at" written on it (Tr. 917-919). And, of course, because Mr. McKinney was charged with escaping while incarcerated for a felony, and because the nature of his charges legitimately went to motive, evidence of Mr. McKinney's murders (at least to a limited extent) would have been admissible in a separate trial for the attempted escape.

In sum, where there is no actual prejudice, or where there is no actual prejudice only as to some misjoined offenses, a retrial should not be ordered for every misjoined offense. The better rule is to permit harmless error analysis. Such a rule will conserve valuable judicial resources, and it will avoid retrial of charges that

were fairly tried in the first instance. This point should be denied.

CONCLUSION

Mr. McKinney's convictions and sentences should be affirmed.

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Rule 84.06(b) and contains 8,528 words, excluding the cover, this certification, the signature block, and the appendix, as determined by Microsoft Word software; and
2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus free; and
3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this ____ day of April, 2010, to:

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