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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 08-1003
)
Appellee,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
CHARLES E. NEALY, JR.,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-008735-001 DT

The Honorable Pendleton Gaines, Judge

AFFIRMED

Terry Goddard, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Suzanne M. Nicholls, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Cory Engle, Deputy Public Defender
Attorneys for Appellant

T H O M P S O N, Judge

¶1 Charles E. Nealy, Jr. (defendant) appeals from the
trial court's denial of his motion to sever offenses, arguing

the denial deprived him of a fair trial. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 On October 10, 2007, Phoenix police officers conducted a lawful traffic stop of a vehicle being driven by defendant. The officers observed defendant switch seats with the female passenger. Defendant had prior felony convictions and was on parole at the time of the stop.¹ One of the officers conducted a search of defendant and discovered an empty 9mm gun magazine in defendant's pants pocket. A search of the vehicle revealed a loaded 9mm semi-automatic handgun under the front right passenger seat, a loaded 9mm magazine in the front passenger door map pocket, and a holster on the floor by the front passenger seat. The officers placed defendant under arrest.

¶3 Police then transported defendant to a Phoenix police precinct, approximately 15-20 minutes away from the location of the arrest. Upon arrival, as the transporting officer was entering a key code to open the precinct door, defendant fled. Defendant had slipped one hand out from the handcuffs prior to running from the officers, jumped a fence surrounding the precinct, and was eventually apprehended in a nearby park.

¹ Defendant was released from prison on August 27, 2007, approximately one month before his arrest.

¶14 On October 19, 2007, defendant was indicted with the following offenses:²

Count 1: unlawful imprisonment, a class 6 felony and domestic violence offense;

Count 2: aggravated assault, a class 6 felony and domestic violence offense;

Count 3: burglary in the first degree, a class 2 dangerous felony and domestic violence offense;

Count 4: aggravated assault, a class 3 dangerous felony and domestic violence offense;

Count 5: aggravated assault, a class 3 dangerous felony;

Count 6: misconduct involving weapons, a class 4 felony;

Count 7: misconduct involving weapons, a class 4 felony; and,

Count 8: escape in the second degree, a class 5 felony.

¶15 On February 19, 2008, defendant filed a motion to sever the offenses into three separate cases. Specifically, defendant requested that counts 1 and 2 be tried together because they were alleged to have occurred between September 23, 2007 and September 24, 2007. Counts 3, 4, 5, and 6 were alleged to have occurred on September 28, 2007. Finally, defendant

² The preceding factual summary only pertains to counts 7 and 8, which are the relevant offenses for purposes of this appeal.

requested counts 7 and 8 be tried together because the offenses allegedly occurred on October 10, 2007.

¶16 On April 18, 2008, Judge Klein heard oral argument and granted defendant's motion to sever. Counts 1 and 2 were severed from counts 3-6, and from counts 7 and 8, which resulted in three different trials. Defendant was found not guilty on counts 1 and 2 in the first trial. Defendant's second trial also resulted in not guilty verdicts for counts 3 through 6.

¶17 On August 1, 2008, before the third and final trial, defendant filed a motion to sever count 7 from count 8. Judge Gaines denied defendant's motion, noting that Judge Klein had already ruled on the issue. Judge Gaines also concluded that the two crimes were connected and offered to give the jury a limiting instruction pursuant to Rule 105 of the Arizona Rules of Evidence.³ Defendant filed a motion to reconsider, arguing the offenses were not so connected in their commission as to overcome the prejudice inherent in their joinder.

¶18 A jury trial of counts 7 and 8 commenced on September 8, 2008. Before trial began, the court addressed defendant's

³ Rule 105 provides as follows:

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

motion to reconsider the severance request and denied the motion. Defendant renewed the motion to sever several times during the trial, but was denied each time.

¶9 At the start of the trial, the trial court administered preliminary jury instructions. Among other instructions, the court instructed the jurors not to consider the charges against defendant as evidence of his guilt. The court also instructed that the state must prove every element of each charge beyond a reasonable doubt. The state reminded the jury in its opening statement that the two charges are separate and distinct from one another. Defendant also reminded the jury in his opening statement that the state has the burden to prove his guilt beyond a reasonable doubt on each separate charge.

¶10 Defendant testified on his own behalf. Prior to his testimony, the parties stipulated that he was a prohibited possessor with two prior felony convictions for which his rights had not been restored. Defendant admitted he was driving the vehicle but then switched seats with the passenger. He testified that he "had some things going on at the time from being released from DOC that happened in between those times that [he] knew about . . . and didn't want to be questioned by officers." Defendant testified he did not know a gun was in the car, or that a magazine was in the passenger door. He did, however, admit to seeing a clip on the center console and

slipping it into his pocket. Defendant further testified he did not want to go back to prison and he ran because he panicked at the police precinct.

¶11 After both sides rested, the trial court gave final jury instructions. The court reminded the jurors of the state's burden of proof and that charges are not evidence against the defendant. The court further instructed that "[e]ach count charges a separate and distinct offense" and separately explained the elements of proof required for the crime of misconduct and the crime of escape.

¶12 The jury returned guilty verdicts against defendant on both counts. The trial court sentenced defendant to ten years imprisonment with respect to the misconduct involving weapons conviction and five years imprisonment on the escape conviction, to be served concurrently. Defendant timely filed a notice of appeal. We have jurisdiction pursuant to the Arizona Constitution, Article VI section 9, and Arizona Revised Statutes (A.R.S.) §§ 12-120.21(A)(1)(2003), 13-4031 (2001), and -4033 (Supp. 2008).

DISCUSSION

¶13 We review a trial court's denial of a motion to sever offenses for abuse of discretion. *State v. Garland*, 191 Ariz. 213, 216, ¶9, 953 P.2d 1266, 1269 (App. 1998); *State v. Comer*, 165 Ariz. 413, 418, 799 P.2d 333, 338 (1990). In considering

whether the trial court erred in denying defendant's motion to sever, "we are mindful that the trial court exercises considerable discretion in determining whether, in light of the evidence then before the court, the defendant has made the requisite showing of prejudice." *State v. Van Winkle*, 186 Ariz. 336, 339, 922 P.2d 301, 304 (1996).

¶14 Joinder of offenses is governed by Rule 13.3(a) of the Arizona Rules of Criminal Procedure (Ariz. R. Crim. P.). Rule 13.3(a) provides that multiple charges may be joined against a defendant if they "(1) are of the same or similar character; or (2) are based on the same conduct or are otherwise connected together in their commission; or (3) are alleged to have been part of a common scheme or plan." If the offenses are joined only by virtue of Rule 13.3(a)(1), the defendant is entitled "as of right" to sever the offenses. Ariz. R. Crim. P. 13.4(b). Moreover, offenses must be severed if it is "necessary to promote a fair determination of the guilt or innocence" of the defendant. Ariz. R. Crim. P. 13.4(a). Otherwise, the offenses may be severed at the trial court's discretion. Ariz. R. Crim. P. 13.4(a).

¶15 The parties agree that in this case, the trial court allowed count 7 and 8 to be tried together under the "otherwise connected together in their commission" language of Rule 13.3(a)(2). Indeed, when the trial court denied defendant's

second motion to sever, it noted, “[t]here is a connectiveness between the two events” and further commented that in escape cases, the jury will often want to know why the defendant was in custody in the first place.

¶16 Joinder under Rule 13.3(a)(2) is proper where knowledge of the offenses helps to explain the circumstances surrounding the charges and completes the picture. *State v. Atwood*, 171 Ariz. 576, 613, 832 P.2d 593, 630 (1992). Furthermore, “knowledge of the complete story of the crime would assist the triers of fact in reaching their conclusion, and is admissible even if it reveals other crimes.” *State v. Ferguson*, 120 Ariz. 345, 347-48, 586 P.2d 190, 192-93 (1978).

¶17 Here, the weapons and escape charges were sufficiently connected together in their commission. Defendant committed the offenses within 20 minutes of each other and testified as to the entire series of events that transpired during his interaction with police. Defendant did not appear to have important testimony to give on one count and strong reasons for not testifying on the other count. *See Comer*, 165 Ariz. at 419-20, 799 P.2d at 339-40. To the contrary, defendant testified he switched seats with the passenger before the traffic stop to avoid being questioned by officers and that he slipped the magazine in his pocket, hoping the officers would not ask him any questions. As to the events surrounding his escape,

defendant reiterated during various parts of his testimony that he remembers thinking, "I don't want to go back to prison." Defendant's own testimony reveals that during the commission of both offenses he was thinking about how to avoid contact with police and avoid going back to prison.

¶18 Moreover, joining the two charges provided the jurors with the complete story and helped to explain the circumstances underlying defendant's conduct. The trial court anticipated that in considering the escape charge, the jurors would likely ask why defendant was in custody. The crimes were provable by much of the same evidence. The testimonies of the police officers were admissible to prove both the misconduct and the escape charges because the officers were the same officers who initiated the traffic stop, searched and arrested defendant, and transported defendant before he escaped. The gun, magazines, and holster were admissible to prove defendant's guilt in the misconduct charge, and would also have been admissible to prove defendant's arrest for a felony, which is one element of escape. See A.R.S. § 13-2503 (A)(2) (2007). Additionally, evidence of defendant's attempted escape would have been relevant to show his consciousness of guilt and would support a flight instruction. See *State v. Lujan*, 124 Ariz. 365, 604 P.2d 629 (1979). Accordingly, we find the offenses were connected in their commission and joinder was proper under Rule 13.3(a)(2).

¶19 Finally, in reviewing the record for abuse of discretion, we also evaluate whether defendant has "made the requisite showing of prejudice." *Van Winkle*, 186 Ariz. at 339, 922 P.2d at 304. Defendant argues he was prejudiced by the use of the other act evidence to prove his guilt and by the "spillover" or "rub-off" effect. As defendant notes, the spillover analysis is usually applied to cases where two defendants are tried jointly. See, e.g., *State v. Lawson*, 144 Ariz. 547, 698 P.2d 1266 (1985); *State v. Cruz*, 137 Ariz. 541, 672 P.2d 470 (1983). The test is whether, given the circumstances, the jury will be able to follow the court's admonitory instructions and appraise the independent evidence against the defendant on each count solely upon the acts, statements, and conduct related only to that offense. *Lawson*, 144 Ariz. at 556, 698 P.2d at 1275 (citation omitted).

¶20 In general, no prejudice exists where the jury is properly instructed that it has to consider each offense separately and the state has to prove each offense beyond a reasonable doubt. *Comer*, 165 Ariz. at 419, 799 P.2d at 339 (citing *State v. Martinez-Villareal*, 145 Ariz. 441, 446, 702 P.2d 670, 675 (1985)). Here, the trial court gave each of these instructions during the preliminary instruction phase and reminded the jurors of the same at the close of trial. The jury is presumed to follow the trial court's instructions. *State v.*

LeBlanc, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996). We reject defendant's argument that the trial court's instructions were inadequate.⁴

¶21 Accordingly, we find the trial court did not abuse its discretion in denying defendant's motion to sever.

CONCLUSION

¶22 For the foregoing reasons, we affirm.

/s/

JON W. THOMPSON, Judge

CONCURRING:

/s/

PATRICIA A. OROZCO, Presiding Judge

/s/

DIANE M. JOHNSEN, Judge

⁴In support of his contention that the instructions in this case did not eliminate the prejudice, defendant claims "a curative instruction may be inadequate to remedy the error of misjoinder," citing *State v. Runningeagle*, 176 Ariz. 59, 859 P.2d 169 (1993). We note that the Arizona Supreme Court in *Runningeagle* merely speculated, "[w]e recognize that there could be instances where a curative instruction may be inadequate, but this case is not one of them." *Runningeagle*, 176 Ariz. at 68, 859 P.2d at 178.