State v. Emery (Anthony Marquise, Jr.)
State v. Olson (Aaron Edward)

No. 86033-5

CHAMBERS, J. (concurring) — I concur in result. However, I write separately because, in my view, the trial court should have granted Aaron Edward Olson's repeated motions to sever the trials. Defendants are entitled to fair trials. Motions to sever should be granted when the defendants will present such mutually antagonistic defenses to the charges against them that there is a serious risk that the jury "will unjustifiably infer that this conflict alone demonstrates that both are guilty," rendering the trial unfair. *State v. Hoffman*, 116 Wn.2d 51, 74, 804 P.2d 577 (1991) (citing *State v. Grisby*, 97 Wn.2d 493, 508, 647 P.2d 6 (1982)). This is one of those cases.

The defenses in this case were plainly, mutually antagonistic. Olson contended that the police had arrested the wrong man for the crime and that he was not in the parking lot that night and did not attack the victim. Anthony Marquise Emery Jr. contended that both men were in the parking lot and that he, at least, had consensual sexual relations with the victim. These two defenses are so antagonistic to each other that the jury could easily have returned guilty verdicts, not because the State proved its cases beyond a reasonable doubt, but because the two incredibly different versions presented by the two men, reported to be friends, tainted the credibility of both and invited the jury to infer guilt from that inconsistency alone.

I concur, however, because while the jury might have unreasonably found

both men guilty based on their conflicting defenses alone, Emery and Olson bear the burden of showing specific prejudice on appeal, and neither has met that burden. *See Grisby*, 97 Wn.2d at 507 (citing *State v. Kinsey*, 20 Wn. App. 299, 579 P.2d 1347 (1978)). There was overwhelming evidence presented at trial supporting the jury's verdicts. Accordingly, I concur in result.

AUTHOR:
Justice Tom Chambers

WE CONCUR: