IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARK A GUESS,	)	
	)	No. 117, 2002
Defendant Below,	)	
Appellant,	)	Court Below: Superior Court
	)	of the State of Delaware in and
v.	)	for Sussex County
	)	
STATE OF DELAWARE,	)	Cr. ID. No. 0107018161
	)	
Plaintiff Below,	)	
Appellee.	)	

Submitted: December 3, 2002
Decided: January 6, 2003

Before **HOLLAND, BERGER** and **STEELE**, Justices.

O R D E R

This 6th day of January 2003 upon consideration of the briefs of the parties, it appears to the Court as follows:

(1) A Superior Court jury convicted the appellant, Mark A. Guess, of various charges related to a high speed chase with police, as well as several burglaries, and related conspiracies. In this appeal, Guess asserts three grounds of error: (i) the trial judge erred when he denied Guess' pre-trial motion to sever charges; (ii) joining Guess' and *pro se* co-defendant Jackie Jackson's trials denied Guess a fair trial; and (iii) the "package deal" plea offer contingent on a co-defendant's acceptance violated public policy. We conclude that the trial judge did not err in its various rulings and that the convictions should be affirmed.

(2) We conclude that the trial judge correctly denied the motion to sever the motor vehicle charges from the burglary-related charges. After leading the police on a high speed chase from Lewes, Delaware to Dover, Delaware in July 2001, police arrested Guess and his co-defendant Jackson and found stolen property from various hotels in Guess' vehicle. Before trial, Guess moved for severance of the burglary-related offenses from the driving offenses related to the high-speed chase. Guess alleged that the two sets of charges were not similar in character, and that joinder might prejudice him by encouraging the jury to infer a general criminal disposition and cause him embarrassment and confusion when he presented differing defenses. His alleged defense to the driving charges was that he fled because of a fugitive warrant for his arrest from Pennsylvania. In this appeal, Guess argues that the trial judge's denial of his severance motion prevented him from presenting a more aggressive and persuasive defense to the chase-related offenses.

(3) Superior Court Criminal Rule 8(a) allows for joinder of two or more offenses in the same indictment "if the offenses charged . . . are of the same or similar character or are based on the same act or transaction or on 2 or more acts or transactions connected together or constituting parts of a common scheme or plan."[1] If, however, the trial judge finds that joinder of offenses or of defendants

[1] Super. Ct. Crim. R. 8(a).

for trial will prejudice any of the parties, it may grant a motion for separate trials pursuant to Superior Court Criminal Rule 14. We review the denial of a motion to sever charges for an abuse of discretion.[2]

(4) We conclude that the driving offenses were linked to the burglary charges because Guess' capture led to the discovery of stolen property. "Where proof of more than one crime is 'so inextricably intertwined so as to make proof of one crime impossible without proof of the other,' the offenses should not be severed."[3]

(5) We also conclude that Guess has failed to carry his burden of demonstrating that prejudice resulted from the refusal to grant a severance of the charges. The trial judge instructed the jury not to cumulate the evidence and to consider the proceedings as two separate trials. The verdict reflected the jury's ability to follow the trial judge's instruction to distinguish the offenses, as shown by the jury's decision to acquit Guess of several charges. We disagree with Guess' claim that the trial judge's decision to grant a new trial for the attempted burglary charge demonstrated that prejudice resulted from the refusal to grant a severance. At the sentencing phase of the trial, the trial judge ordered a new trial on the attempted burglary charge that immediately preceded the car chase. The trial judge

[2] *Caldwell v. State*, 780 A.2d 1037, 1055 (Del. 2001).
[3] *Younger v. State*, 496 A.2d 546, 550 (Del. 1985) (quoting *McDonald v. State*, 307 A.2d 796, 798 (Del. 1973)).

reasoned that the introduction of evidence concerning the other burglary offenses without a *Getz*[4] instruction might have prejudiced the defendants concerning the element of proof of intent to commit a crime. The trial judge emphasized, however, that there had been no prejudice as a result of the jury hearing how the chase started. We agree with the sound reasoning of the trial judge. Accordingly, we affirm the trial judge's decision to deny the motion to sever.

(6) We find that the trial judge properly granted the State's motion to amend the indictment and join the defendants. The State initially charged Guess and his co-defendant separately with the intention of having a joint trial, possibly with separate jury panels if the State intended to introduce the defendants' statements. The State then decided, however, not to introduce the defendants' statements and requested a single jury. Guess objected, arguing that joining the offenders the morning of trial amounted to a substantive amendment of the indictment. Guess argued that the joinder might result in potential *Bruton*[5] problems, and that the defendants' defenses were antagonistic. However, Guess ultimately admitted that his co-defendant's decision to proceed *pro se* triggered the objection. Guess now claims that joinder with a *pro se* co-defendant prevented a

[4] *Getz v. State*, 538 A.2d 726 (Del. 1988). A "*Getz*-type" instruction, a term used by the parties, refers to a limiting instruction read by the trial judge to the jury prior to the jury entering deliberation. The instruction tells the jury that certain evidence of other crimes, wrongs or acts may only be used to help in deciding whether the defendant committed the crimes charged in the indictment. The instruction also warns the jury not to use the evidence as proof that the defendant is a bad person and therefore probably committed the crime.

[5] *See Bruton v. United States*, 391 U.S. 123 (1968).

fair trial because he could not prepare a defense with a *pro se* defendant, and that the *pro se* defendant adversely affected his arguments and trial tactics. Guess also asserts the trial judge's dismissal of juror number six establishes evidence of prejudice from working with a *pro se* co-defendant. The trial judge dismissed juror number six because of the juror's comments to other members of the jury regarding the culpability of the *pro se* co-defendant before deliberations.

(7) Superior Court Rule 7(e) states that the court may permit an indictment to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced. A defendant cannot be prejudiced if the original indictment, when viewed with the amendment, is sufficiently certain and understandable to enable the defendant to prepare his defense.[6] Guess cannot reasonably argue that the amended indictment did not provide adequate notice of the crime charged. Nor can Guess claim that the joinder of the defendants was improper. Under Superior Court Criminal Rule 8(b), two or more defendants may be charged in the same indictment, if they are alleged to have participated in the same act, or in the same series of acts. Superior Court Criminal Rule 13 permits the court to order two or more indictments or defendants to be tried together if they could have been joined in a single indictment. If, however, the trial court finds that the joinder of the

[6] *See Coffield v. State*, 794 A.2d 588, 593 (Del. 2002).

defendants for trial will prejudice any of the parties, it may grant a motion for separate trials.[7] A trial judge should "grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence."[8] The record reflects that Guess has failed to sustain his burden of establishing substantial injustice and unfair prejudice. Assuming for the sake of argument that juror number six's comments concerning the co-defendant may have prejudiced Guess, the trial judge's decision to dismiss the juror precluded any actual prejudicial effect.

(8) Finally, with respect to Guess' last argument, we conclude that the plea offer did not violate public policy. A condition attached to the plea offer by the State required that this be an all or nothing plea, or a "wired plea" or a "package deal." This requires all of the defendants to accept the plea. If one of the defendants rejects the plea, the offer is revoked as to all. Although we have not specifically addressed "package deal" plea offers, we have repeatedly stated that a prosecutor has broad discretion in the plea bargaining process.[9] We hold that

[7] Super. Ct. Crim. R. 14.
[8] *Zafiro v. United States*, 506 U.S. 534, 539 (1993).
[9] *Albury v. State*, 434 U.S. 357, 363-65 (1978).

included in this discretion is the prosecutor's ability to make a "package deal" plea offer provided that defendant's decision to forego a trial is otherwise voluntary.[10]

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court be, and the same hereby is, AFFIRMED.

BY THE COURT:

_/s/ Myron T. Steele_____
Justice

[10] *See United States v. Gonzales-Vasquez,* 219 F.3d 37, 43 (1st Cir. 2001) (prosecutor may condition plea bargain of codefendant's acceptance of "package deal" plea because prosecutor has no duty to enter into plea); *United States v. Gonzales*, 918 F.2d 1129, 1134 (3d Cir. 1990) (same); *United States v. Crain*, 33 F.3d 480, 487 (5th Cir. 1994) (prosecution may condition plea bargain on all codefendants' acceptance of guilty plea package); *Nguyen v. United States*, 114 F.3d 699, 704 (8th Cir. 1997) (prosecutor has prerogative to offer "package deal" or no deal at all).