2019 WL 2495748
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Court of Appeals of Minnesota.

Michelle Lee KOESTER,
petitioner, Appellant,
v.
STATE of Minnesota, Respondent.

A18-2083
|
Filed June 17, 2019
|
Review Denied August 6, 2019

Hennepin County District Court, File No. 27-CR-15-34795

Attorneys and Law Firms

Melissa Sheridan, Assistant Public Defender, Eagan, Minnesota (for appellant) Keith Ellison, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Rodenberg, Presiding Judge; Cleary, Chief Judge; and Bjorkman, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

***1** Appellant challenges the denial of postconviction relief, arguing that the postconviction court abused its discretion by denying her a new trial because her trial on numerous crime-spree charges was improperly joined with that of her codefendant. We affirm.

FACTS

During the afternoon of October 18, 2015, appellant Michelle Koester coordinated with Alvin McIntosh and Alvin Bell to "hit a lick."[1] She told Bell they would need a gun. Koester also asked Shannon Haiden to drive Koester's vehicle for them because Haiden had a valid driver's license.

1 To "hit a lick" means to rob someone.

Around 9:00 p.m., Haiden drove McIntosh and Koester to a Minneapolis apartment building, followed by Bell and Isiah Harper in a separate vehicle. Once there, Haiden and Koester remained in Koester's vehicle while McIntosh, Bell, and Harper robbed A.R. at gunpoint, taking his vehicle, cell phone, and wallet. The group drove to a gas station where McIntosh and Koester attempted to use A.R.'s debit card to withdraw cash and purchase gas. They abandoned A.R.'s vehicle near the gas station.

Haiden then drove Koester and McIntosh, with Bell and Harper following, to another Minneapolis neighborhood. McIntosh, Bell, and Harper attempted to rob J.M.-C. When he resisted, McIntosh shot him five times, causing his death. The men ran back to the vehicles.

The group proceeded to a third location. Koester and Haiden again remained in Koester's vehicle while McIntosh, Bell, and Harper entered the home of G.O. and C.W.H. They robbed the two at gunpoint in the presence of multiple children, taking G.O.'s wallet containing credit cards and identification; a safe containing personal documents, a passport, and money; four cell phones; C.W.H.'s purse containing her credit card, identification, and medical cards; and a PlayStation.

Thereafter, Koester drove Bell and Harper to Walmart to use the stolen credit and debit cards. Bell purchased an Xbox One, but the cards did not work when Koester and Harper tried to purchase other items. When they later met with McIntosh, Bell and McIntosh disputed who would keep the Xbox. McIntosh became angry and, while standing next to Koester's vehicle, shot at the vehicle Bell had been driving.

The following day, Koester discovered shell casings underneath her windshield wipers. She sent a text message to McIntosh with a photo of herself holding the casings. He told her to get rid of them, and she responded, "Done." Around

the same time, she contacted another person, trying to sell the Xbox.

Police discovered the vehicle with bullet holes and were able to link nearby shell casings to the gun used to shoot J.M.-C., and DNA in the vehicle to Bell and Harper. Further investigation led police to gas station surveillance footage depicting the whole group and Koester's vehicle.

Koester was charged with aiding and abetting first-degree aggravated robbery, aiding and abetting second-degree intentional murder, two counts of aiding and abetting first-degree burglary, second-degree felony murder, and two counts of aiding an offender after the fact. McIntosh was charged with the same offenses, except aiding an offender. Harper, Haiden, and Bell pleaded guilty to various offenses related to the crime spree,[2] and Harper and Haiden agreed to testify against Koester and McIntosh.

2 Harper pleaded guilty to second-degree felony murder. Haiden pleaded guilty to aiding an offender after the fact (second-degree murder). Bell pleaded guilty to first-degree aggravated robbery and second-degree felony murder.

***2** Over Koester's objection, the district court ordered a joint trial on the charges against Koester and McIntosh. After a three-week-long trial, a jury found Koester guilty of all charges except one aiding-an-offender count, and found McIntosh guilty of all charges.[3] The district court sentenced Koester to 386 months' imprisonment. She did not pursue a direct appeal. In July 2018, she petitioned for postconviction relief, arguing that the district court abused its discretion by ordering a joint trial. The postconviction court denied relief. Koester appeals.

3 McIntosh appealed his convictions, asserting multiple trial errors but not challenging the joint trial. We affirmed. *State v. McIntosh*, No. A17-0920 (Minn. App. June 18, 2018), *review denied* (Minn. Sept. 18, 2018).

DECISION

We review a postconviction court's denial of a petition for an abuse of discretion, analyzing legal issues de novo and factual findings to determine if there is sufficient evidentiary support in the record. *Pearson v. State*, 891 N.W.2d 590, 596 (Minn. 2017). The petitioner has the burden of producing facts that entitle her to relief. *Carridine v. State*, 867 N.W.2d 488, 492 (Minn. 2015).

Whether to join for trial multiple defendants "charged with the same offense[s]" is also within the district court's discretion. Minn. R. Crim. P. 17.03, subd. 2. There is no presumption for or against joinder. *State v. Johnson*, 811 N.W.2d 136, 142 (Minn. App. 2012), *review denied* (Minn. Mar. 28, 2012). The district court must consider: "(1) the nature of the offense charged; (2) the impact on the victim; (3) the potential prejudice to the defendant; and (4) the interests of justice." Minn. R. Crim. P. 17.03, subd. 2. When reviewing joinder decisions, we also inquire into "any substantial prejudice to defendants that may have resulted from their being joined for trial." *State v. Powers*, 654 N.W.2d 667, 674 (Minn. 2003) (quotation omitted). We consider each joinder factor in turn.

Nature of the Charged Offenses

This factor favors joinder when "the overwhelming majority of the evidence presented is admissible against both defendants, and substantial evidence is presented that codefendants worked in close concert with one another." *Johnson*, 811 N.W.2d at 142 (quotation omitted).

Substantial evidence showed Koester worked in close concert with McIntosh. She proposed and coordinated the robberies, provided her vehicle, suggested the use of a gun, and engaged a licensed driver. She drove McIntosh to meet with the other participants and accompanied him in her vehicle to each crime scene. And she actively participated in efforts to profit from the robberies. Koester and McIntosh faced almost identical charges, and Koester does not dispute that substantially the same evidence was admissible to prove both her and McIntosh's guilt. The postconviction court did not abuse its discretion by determining this factor favors joinder.

Impact on the Victims

A court should not order a joint trial merely for the convenience of witnesses but may consider the trauma to victims and eyewitnesses of having to testify at multiple trials. *State v. Blanche*, 696 N.W.2d 351, 371 (Minn. 2005).

Koester contends this factor could not favor joinder because "the state did not present any evidence ... that testifying at two trials would be particularly painful for the victims." She identifies no authority for the proposition that the state must affirmatively demonstrate that the victims would be adversely affected by testifying multiple times about the

violent crime committed against them. To the contrary, the supreme court has recognized that testifying about criminal violence likely is traumatic not only for direct victims but also for eyewitnesses. *See id.* (noting that vulnerable eyewitnesses could be traumatized by testifying at multiple trials). The series of crimes for which Koester and McIntosh were charged involved threatening and violent conduct. All of the direct victims, and the widow of one of the direct victims, testified at trial. The postconviction court did not abuse its discretion by determining that relieving these witnesses of the burden of repeatedly testifying about their traumatic experiences weighed in favor of a joint trial.

Potential Prejudice to the Defendant

***3** Codefendants may be prejudiced by joinder if their theories of defense are antagonistic. *Johnson*, 811 N.W.2d at 143. "Defendants have antagonistic defenses when the defenses are inconsistent and when they seek to put the blame on each other and the jury is forced to choose between the defense theories advocated by the defendants." *State v. Jackson*, 773 N.W.2d 111, 119 (Minn. 2009) (quotation omitted).

Koester argues that her defense was antagonistic to McIntosh's because her "best defense" was to focus on McIntosh's culpability and deny any knowledge or involvement in the crimes. But at the time of the joinder motion, both Koester and McIntosh asserted innocence as their theory of defense.[4] This did not force the jury to decide between conflicting defenses. McIntosh's culpability is not inconsistent with Koester's culpability, and Koester's denial of any knowledge or involvement is not inconsistent with McIntosh's culpability. Rather, as Koester's closing argument illustrated, any conflict was between Koester and Haiden—Koester sought to exonerate herself by arguing that it was Haiden, not she, who aided and abetted the offenses by driving the vehicle. Because Koester and McIntosh did not present antagonistic defenses, the postconviction court did not abuse its discretion by weighing this factor in favor of joinder.

4 Despite the district court's express invitation, Koester did not request severance during trial.

Interests of Justice

In determining whether the interests of justice favor joint or separate trials, the length of separate trials "is a legitimate factor." *Id.* The efficiency of one trial favors a joint trial "in the absence of substantial prejudice" to the defendant. *Id.*

Koester does not directly challenge the district court's determination that separate trials would "cause undue delay." Rather, she contends any evaluation of the interests of justice must focus on affording her a fair trial. But since none of the other joinder factors implicate fairness concerns, and she identifies no particular concern that weighs against the efficiency of a joint trial, we discern no abuse of discretion by the postconviction court in weighing this factor in favor of a joint trial.

In sum, the postconviction court did not abuse its discretion by denying Koester a new trial. The record reflects that a joint trial on Koester's and McIntosh's similar and interrelated charges was an appropriate exercise of the district court's discretion under Minn. R. Crim. P. 17.03. And, for the reasons noted above, we conclude that the joint trial did not substantially prejudice Koester.

Affirmed.

All Citations

Not Reported in N.W. Rptr., 2019 WL 2495748

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2012 WL 8525625 (Minn.Dist.Ct.) (Trial Order)
District Court of Minnesota.
First Judicial District
Dakota County

STATE OF MINNESOTA, Plaintiff,

v.

Armando n/m/n ARAIZA, Defendant,

and

Jamie David PINTOR-VELO, Defendant,

and

Aidan James Heine MELLGREN, Defendant,

and

Guillermo GARCIA-GUTIERREZ, Defendant,

and

Terry Darnell GILLIAM, Jr., Defendant.

No. 70CR1211842, 70-CR-12-11840, 70-CR-12-11841, 70-CR-12-11842, 70-CR-12-11843, 70-CR-12-12012.
October 31, 2012.

Order for Joint Trial and Dismissal of Count I

Patrice K. Sutherland, Judge.

***1** This matter came before the Court on September 13, 2012 at the Scott County Justice Center, Shakopee, Minnesota, for a consolidated Contested Omnibus hearing. Appearances were as follows:

Michael Groh, Assistant Scott County Attorney, on behalf of the State David Boyce, Esq., with and on behalf of Armando Araiza Laura Valentine, Esq., with and on behalf of Aidan James Heine Mellgren Jeffrey Kennedy, Esq., with and on behalf of Guillermo Garcia-Gutierrez Steve Bergeson, Esq,, with and on behalf of Terry Darnell Gilliam, Jr.

Jamie David Pintor-Velo and his attorney, Michael McDonald, did not appear at the hearing due to a conflict in Mr. McDonald's schedule. However, Pinter-Velo agreed to be bound by this Court's decision.

At the hearing, the State moved to join Defendants for trial. Each Defendant moved to dismiss Count I of the respective Amended Complaint for Jack of probable cause. Both issues were submitted to the Court based upon the probable cause packet. The record remained open for submissions until October 22, 2012.

Based upon the file, the record and Memoranda of Counsel, the Court makes the following:

ORDER

1. The State's motion to join Defendants for trial is GRANTED.

2. Count I of the Amended Complaints is DISMISSED.

3. The attached Memorandum is incorporated as Findings of Fact and Conclusions of Law.

Dated: October 31, 2012

BY THE COURT:

<<signature>>

Patrice K Sutherland

JUDGE OF DISTRICT COURT

MEMORANDUM

Armando Araiza (Araiza), Jamie David Pintor-Velo (Pintor-Velo), Aidan James Heine Mellgren (Mellgren), Guillermo Garcia-Gutierrez (Garcia-Gutierrez) and Terry Darnell Gilliam, Jr. (Gilliam) (collectively, "Defendants")[1] are each charged by separate complaints with, among other charges, one count of Burglary in the First Degree -Possession of a Dangerous Weapon. See *Amended Complaints*, it is alleged that Defendants acted in concert in burglarizing a home of an acquaintance of Defendant Pintor-Velo. *Id.* Among the items taken from the home was a locked safe. *Id.* After removing the items from the home, Defendants drove to another location where they repeatedly smashed the safe to the ground to gain access to its contents. *Id.* From inside the smashed-open safe, Defendants retrieved a handgun.I*d.* That handgun formed.the basis for Count I, Burglary in the First Degree - Possession of a Dangerous Weapon. *Id.* Defendants argue there is not probable cause for the charge because there is no evidence that any Defendant knew the safe contained a weapon. *Id.*

1 A sixth defendant was involved in the alleged burglary. That defendant, "S.A.", is a juvenile. He has already pled guilty to First Degree Burglary for the Benefit of a Gang and was adjudicated delinquent.

The State now requests joinder of Defendants for trial. Defendants request dismissal of Count I for lack of probable cause.

State's Motion For Joint Trial

The State seeks a joint trial of Defendants pursuant to Minn. R. Crim. P. 17.03, subd. 2(1). Under the 1975 version of that rule and case law applying it, a joint trial of defendants charged with a felony was strongly disfavored. See Minn. R. Crim. P. 17.03, subd. 2(1) (1975) ("When two or more defendants shall be jointly charged with a felony, they shall be tried separately provided, however, upon written motion, the court in the interests of justice and not solely related to economy of time or expense may order a joint trial."); *State v. Stock*, 362 N.W.2d 351, 352 (Minn. App. 1985) (citing *State v. Swenson*, 301 Minn. 199, 201, 221 N.W\2d 706, 708 (1974)) ("State policy favors strongly separate trials."). However, the present version of the rule is more permissible of joinder than its predecessor. *See Santiago v. State*, 644 N.W.2d 425, 446 (Minn. 2002) (noting that the current version of Rule 17.03, subd. 2(1) neither favors nor disfavors joinder). After the 1989 revision, the rule now reads in relevant part:

***2** When two or more defendants are jointly charged with a felony, *they may be tried separately or jointly in the discretion of the court*. In making its determination on whether to order joinder or separate trials, the court shall consider the nature of the offense charged, the impact on the victim, the potential prejudice to the defendant, and the interests of justice....In all cases any one or more of said defendants may be convicted or acquitted.

Minn. R. Crim. P. 17.03, subd. 2(1) (emphasis added). The rule expressly gives courts discretion to order joint felony trials if the balance of the factors so favored. In this matter, the Court finds that the balance of the factors favors joinder.

I. Nature of the Offense Charged

Courts have approved joint trials in cases where codefendants acted in "close concert" in committing an offense. *State v. Blanche*, 696 N.W.2d 351, 371 (Minn. 2005). In such cases, the courts emphasized the "identical nature of the charged offenses and the nearly identical evidence against each defendant" in support of the decision for joinder. *Id.; see also e.g., State v. Greenleaf*, 591 N.W.2d 488, 499 (Minn. 1999); *State v. Martin*, 773 N.W.2d 89, 99-100 (Minn. 2009) (quoting *Blanche*, 696 N.W.2d at 371) (Approving joinder where "substantial evidence was presented that both [defendants] worked in close concert with one another").

In this matter, the nature of the charged offenses and the evidence against each defendant is virtually identical.

According to the record, on June 8, 2012, Defendants were in Gilliam's vehicle in the parking lot of a store in Shakopee when they noticed the victim's car parked in the lot. (00317, 00330, 00392-94, 00424, 00427-28). They talked about burglarizing the victim's home and ultimately decided to carry out their plan. (00326, 00330). Gilliam drove co-Defendants to the residence, which they then forcibly entered. (00313, 00327, 00427-28, 00458). There is evidence that each Defendant went inside the home and removed items that were later reported missing. (00268, 00389, 00393, 00395, 00427, 00430-31, 00461-62). Although Gilliam denies entering the home, he admitted he drove them all there knowing they intended to commit a burglary, acted as a look-out while the crime was committed, and then drove co-Defendants and the stolen items to another location. (00326, 00330, 00313, 00327, 00315-16, 00347, 00333, 00337). Thereafter, Defendants repeatedly smashed the locked safe to the ground to gain access to its contents. (00429). Defendants retrieved a handgun from inside the broken safe. (00294). A short time later, Defendants were arrested together and some of the stolen items were found at the same location. *See Amended Complaints*.

The probable cause statements contained in the Complaints against Defendants are identical. They are all charged with the same offenses:[2]

2 Only two Defendants (Araiza and Garcia-Gutierrez) are charged with an additional offense due to their status as convicted felons (i.e. Felon in Possession of a Firearm).

1. Burglary in the First Degree - Possession of a Dangerous Weapon (Minn. Stat. 609.582, subd. 1(b)).

2. Burglary in the Second Degree - Dwelling (Minn. Stat. 609.582, subd. 2(a)(1)).

3. Theft Moveable Property - No Consent - Firearm (Minn. Stat 609.52, subd. 2(a), subd. 3(1)).

4. Theft Moveable Property - No Consent - $1,000 - $5,000 (Minn. Stat. 609.52, subd. 2(1), subd. 3(3)(a)).

***3** 5. Crime Committed for the Benefit of a Gang (Minn. Stat. 609.229, subd. 3(a)).

See *Amended Complaints*. Regarding the last charge, there is ample evidence that Defendants are members of the Latin Kings gang. (00119, 00109, 00120, 00135, 00125-28, 00089-92, 00068, 00291-92, 00295, 00337, 00350, 00396, 00404, 00405-06, 00237, 00240, 00247, 00026-27, 00448, 00548-58). It is the State's theory that the crimes were committed for the benefit of the gang.

The record contains substantial evidence that each Defendant played an important role in committing the charged offenses. Moreover, substantial evidence was presented that Defendants acted as a cohesive unit before, during and after the crimes, until the moment of their arrests. They are charged with the same offenses and the evidence against them is substantially the same.

This factor weighs strongly in favor of joinder.

II. Impact on the Victims

"Ordinarily a joint trial may not be ordered to spare the victim the trauma of testifying in multiple trials." *State v. Stock*, 362 N.W.2d 351, 352 (Minn. Ct. App. 1985). However, joint trials have been approved where the victim is particularly vulnerable. *State v. Gengler*, 294 Minn. 503, 504, 200 N.W.2d 187, 189 (Minn. 1972). The rationale is that joinder eases the possible trauma to the victim caused by having to testify in multiple trials. *Id.*

There is no evidence that the victims of the burglary are particularly vulnerable. However, it would be disingenuous to suggest that separate trials would have little or no impact on the victims. Separation would compel the victims to testify at five trials. Additionally, there is ample evidence that Defendants are members of the Latin Kings, a criminal organization known to engage in acts of violence. Defendants know where the victims live and work, and retaliation is known to be a "foundation for the gang culture." See e.g., *State v. Jackson*, 773 N.W.2d 111 (Minn. 2009).

If not weighing slightly in favor of joinder, this factor is neutral at the least.

III. Potential prejudice to Defendants

Joinder is not appropriate when it results in prejudice to the defendant. *Santiago v. State*, 644 N.W.2d 425, 446 (Minn.'2002). Substantial prejudice can be shown by demonstrating that codefendants presented "antagonistic defenses." *Id.* Antagonistic defenses occur when defenses are inconsistent and when defendants seek to put the blame on each other. *Id.*

No evidence was presented to demonstrate any irreconcilable or antagonistic defense amongst Defendants. *See State v. Powers*, 645 N.W.2d 667, 675 (Minn. 2003) (a defendant should make an offer of proof to identify inconsistent or antagonistic defenses in order to prove that joinder would prejudice the defendant). Although Defendants made incriminating statements against each other, all but Mellgren admitted to the burglary. Minnesota has consistently "recognized the ability of juries in joint trial to separate evidence that inculpates only one defendant from evidence that inculpates both." State v. Hathaway, 379 N.W.2d 498, 502 (Minn. 1985); *see e.g.*, State v. DeVerney, 592 N.W.2d 837 (Minn. 1999) (Where one jointly tried defendant asserted the defenses of duress and intoxication and did not shift the blame to the co-defendant, the defenses were different but not inconsistent to the substantial prejudice of the co-defendant.). Moreover, the statements made by Defendants are largely consistent with one another and with the evidence, and no Defendant has sought to point a finger at a co-Defendant. *See State v. Hathaway*, 379 N.W.2d 498, 503 (Minn. 1985) (holding no substantial prejudice where defendants did not present inconsistent defense theories and seek to shift blame to the other). Finally, procedures are available to address the potential for prejudice, should it later arise. See Minn. R. Crim. P. 17.03, subd. 3(2) (allowing exclusion of co-defendant statements, redaction of references to a defendant against whom a statement is received, or severance); *Blanche*, 696 N.W.2d at 367 (court may give limiting instruction to jury that a co-defendant's statement cannot be used against other defendants). But at this juncture, the evidence does not support a finding that joinder would prejudice Defendants. This factor weighs in favor of joinder.

IV. Interests of Justice

***4** This factor favors joinder. Separation of Defendants would compel at least 20 witnesses to testify at five trials. Sfafe *v. Martin*, 773 N.W.2d 89 (Minn. 2009) (interests of justice favored joinder because "separate trials would drag on for a lengthy period of time and ... the evidence is likely to be nearly the same in each trial."); Sfafe *v. Powers*, 654 N.W.2d 667, 675-76

(Minn.2003) (holding that the extended duration of multiple trials favored joinder). A joint trial promotes efficiency and serves the interest of justice by avoiding the scandal and inequity of inconsistent verdicts. *Zafiro v. U.S.*, 506 U.S. 534, 113 S. Ct. 933, 122 L. Ed. 2d 317 (1993).

At least three out of the four factors warrant joinder. Accordingly, the State's motion to join Defendants for trial should be granted. See *State v. Johnson*, 811 N.W.2d 136 (Minn. App. 2012).

Defendants Motion To Dismiss Count

Defendants request dismissal of Count I, Burglary in the First Degree - Possession of a Dangerous Weapon, for lack of probable cause.

Probable cause exists if there is "reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty." *Sipera v. State*, 286 Minn. 536, 175 N.W.2d 510 (1970). In making a probable cause determination, a court considers whether, given the facts in the record, it is "fair and reasonable...to require the defendant to stand trial." *State v. Florence*, 239 N.W.2d 892, 902 (1976). The determination involves a balance of the considerations of not forcing innocent persons to undergo expensive and demeaning trials only to be found not guilty, and not allowing trial on the merits to be delayed or aborted by excessive formalism. *Id.* at 902-03. In striking the appropriate balance, care must be exercised to avoid overemphasis on judicial efficiency or convenience. *Id.*

Count I of each Complaint charges the respective Defendant with Burglary in the First Degree under Minnesota Statutes § 609.582, subd. 1(b). In relevant part, that section provides that:

Whoever enters a building without consent and with intent to commit a crime, or enters a building without consent and commits a crime while in the building, either directly or as an accomplice, commits burglary in the first degree and may be sentenced to imprisonment for not more than 20 years or to payment of a fine of not more than $35,000, or both if...the burglar possesses, when entering or at any time while in the building...a dangerous weapon [or] any article used or fashioned in a manner to lead the victim to reasonably believe it to be a dangerous weapon....

Minn. Stat. § 609.582, subd. 1(b).

The State asserts the statute does not require knowing possession of a dangerous weapon. Defendants argue the State must show that a Defendant consciously possessed, either physically or constructively, the handgun that was retrieved from the locked safe. The term "possession" has long been extended to also include constructive possession, even when possession of weapons rather than drugs is at issue. *See State v. Olson*, 326 N.W.2d 661, 663 (Minn. 1982) (applying constructive-possession doctrine to charge of felon-in-possession-of-a-firearm and holding evidence that defendant "consciously exercised his dominion or control" over weapon was sufficient). The purpose of the statute is to reduce the risk of violence arising from burglaries. *State v. Herbert*, 601 N.W.2d 210, 212 (Minn. App. 1999).

The Court disagrees with the State's position and finds that there must be proof, as an element of possession of the gun, that a defendant knowingly possessed the gun, either physically or constructively.

***5** In State *v. Ndikum*, 815 NW2d 816 (Minn. 2012), the Minnesota Supreme Court held, in a case of possession of a gun in a public place, that the State is required to prove as an element of possession of the gun that the defendant knowingly possessed the gun. The defendant In *Ndikum* was charged with possession of a pistol in public. The defense credibly asserted that the defendant had no knowledge that his pistol had been placed in his brief case by his wife at some time before he took the brief case to work. The State argued that knowledge of the possession of the gun was unnecessary. In *Ndikum*, the Court focused on the requirement of knowledge of culpability or Mens *Rea* to establish liability for the possession of a handgun in public.

The court held that absent knowledge of the possession of the handgun, the Defendant could not be culpable for the crime of possessing a handgun in public.

In discussing the concept of *Mens Rea*, the *Ndikum* Court observed that the existence of a *Mens Rea* requirement is a rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence. See *Ndikum*, citing *United States vs. United States Gypsum Company*, 438 U.S. 422, 436 (1978). The Court concluded that there needed to be some positive indication of legislative intent before *Mens Rea* may be dispensed with. See e.g., *Staples v. United States*, 511 U.S. 600, 605 (1994).

In determining whether Mens Rea is required when the statute is silent regarding the requirement, the *Ndikum* Court also looked to its own earlier decision, *In Re CRM*, 611 N.W.2d 802, 805 (Minn. 2000). In *CRM*, the defendant was charged with having a dangerous weapon (a knife) on school property. The Court stated that although the statute was silent with regard to intent, the felony offense of possession of a weapon on school property necessarily contained a *Mens Rea* element requiring the State prove that the defendant knew he possessed the weapon. In *CRM* the court stated "we are guided by the public policy that if criminal liability, particularly gross misdemeanor or a felony liability, is imposed for conduct unaccompanied by fault, the legislative intent to do so should be clear. *In Re CRM* at 809, quoting *State v. Neisen*, 415 NW2d 326, 329 (Minn. 1987).

Criminal statutes which contain significant and serious punitive consequences such as the first degree burglary statute must impute a *Mens Rea* element to support the charge. Here, the mere physical existence of the handgun inside the locked safe, which was removed to another location in a different city, and which had to be smashed open to retrieve its contents, cannot support a finding of probable cause for the charge of First Degree Burglary - Possession of a Dangerous Weapon. There must be some evidence showing knowledge or control of, or immediate access to, the weapon contained in the safe to justify subjecting Defendants to the increased criminal sanctions of a First Degree Burglary charge. No such evidence was presented in this case. The record is wholly deficient to show that anyone other than the homeowner had any knowledge of the contents of the safe. And there is no evidence that any defendant consciously exercised dominion or control over the handgun during the course of the burglary. The gun was locked inside the safe and could not be accessed with ease. Because no reasonable juror could find otherwise, Count 1 of each Amended Complaint must be dismissed.

Conclusion

The balance of the factors found in Minn. R. Crim. P. 17.03, subd. 2(1) favors joinder of Defendants for trial. Accordingly, the State's motion is granted.

There is no evidence to support a finding that any Defendant had actual or constructive possession of the handgun retrieved from the locked safe. Accordingly, Defendants' motion is granted and Count I of the Amended Complaints is hereby dismissed.

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2017 WL 11486458 (Minn.Dist.Ct.) (Trial Order)
District Court of Minnesota.
Fourth Judicial District
Hennepin County

STATE of Minnesota, Plaintiff,

v.

Isaiah Rakeem WALLACE, Stevevontae Dellshawn Champion, Defendants.

Nos. 27-CR-17-18718, 27-CR-17-11978.
November 28, 2017.

Order Denying Motion for Joinder

Tamara G. Garcia, Judge.

*1 The above-entitled matter came before the Honorable Tamara Garcia on August 24, 2017 on the State's motion to join Defendants for trial.

APPEARANCES

Sarah Vokes & Leah Erickson, Assistant Hennepin County Attorneys, are the attorneys of record for the State of Minnesota.

Calandra Revering is the attorney of record for Isaiah Wallace, Defendant Wallace.

Emily Froehle & Paul Sellers, Assistant Public Defenders, are the attorneys of record for Stevevontae Champion, Defendant Champion.

Upon the evidence adduced, the arguments of counsel, and all files, records and proceedings herein, the Court makes the following:

FINDINGS OF FACT

1. Defendant Champion is charged with one count of Murder in the Second Degree in violation of Minn. Stat. § 609.19, subd. 1(1). Defendant Wallace is charged with one count of Aiding and Abetting Murder in Second Degree in violation of Minn. Stat §§ 609.19, subd. 1(1) & 609.05, subd. 1 & subd. 2.

2. The complaints allege the following relevant facts:

a. At about 12:45 p.m. on May 11,2017, officers of the Minneapolis Police Department were dispatched to a shooting on 37th Ave. N. and 6th St N. in Minneapolis. Upon arrival, officers found an adult male (Victim), lying in the street bleeding heavily through his shirt Victim was still breathing. Officers located a bullet wound to his chest and provided first aid, but Victim was declared dead after paramedics arrived. The Hennepin County Medical Examiner determined that Victim died as a result of a gunshot wound to the chest and that his death was a homicide.

b. Officers spoke to known witnesses on the scene. Witnesses told officers that a minivan drove through the intersection of 37th Ave. and 6th St and shot toward a group of people outside a home near that intersection. The gunshots came out of the sliding door of the minivan, which was open. One eyewitness told officers the minivan was light blue and that part of the license plate number was 741. An eyewitness reported seeing the blue minivan just past the intersection, driving slowly with a man in the backseat holding a gun. The gunman was wearing a black ski mask covering his face.

c. At the same time officers were arriving at the scene, other officers in the area observed a minivan matching that description driving on 37th Ave. N. at a high rate of speed. Officers observed that the sliding door of the minivan was open and a black male in the back seat was hanging onto the door. As the minivan passed the squad car, it slammed on its brakes and took an immediate left turn heading southbound on Colfax Ave. N. Officers followed the minivan and the minivan stopped in front of 3642 Colfax Ave. N. The minivan was a light blue Mazda minivan, Minnesota license number 741 RXC. An eyewitness later identified this minivan as the same minivan he saw the gunman sitting in.

d. The rear seat passenger fled from the minivan. Officers pursued him on foot, but did not apprehend him. The driver was identified as Defendant Wallace. The front-seat passenger was identified as a juvenile suspect, A.K.C.

*2 e. In a taped, *post-Miranda* statement, Defendant Wallace stated he was driving the minivan and the juvenile suspect was in the front passenger seat. Defendant Wallace claimed he did not know the backseat passenger, who he said was A.K.C.'s friend. Defendant Wallace initially denied being present at the scene of a shooting. Defendant Wallace then claimed that A.K.C. and his friend got out of the minivan and then he heard shots. He then said that the pulled over and someone outside the minivan began shooting at the minivan, so he drove off. Defendant Wallace denied knowing who the backseat passenger was but stated that this person was the one shooting from the minivan.

f. In a taped, *post-Miranda* statement, A.K.C. told officers he was the front passenger in the minivan during the shooting. He said that Defendant Wallace is his cousin and was the driver. He said that Defendant Wallace picked up a friend, who sat in the backseat A.K.C. denied knowing who the backseat passenger was, but said that he did some "weird shit" A.K.C. said they were driving slowly when the male in the back fired several shots out the rear sliding door, which was open. A.K.C. told police that no one had fired at the minivan. A.K.C. told police that the shooter ran out of the minivan when they saw police.

g. Officers recovered a 40 caliber, semi-automatic firearm with an extended magazine from the floor behind the driver's seat of the minivan. Nine discharged cartridge casings (DCC) were recovered in the street on 37th St. at the intersection with 6th St All were 40 caliber. These DCC's were later examined by the Crime Lab and determined to have been fired from the 40 caliber weapon found in the minivan.

h. The 40 caliber weapon was processed for DNA. A swabbing taken from the grip of the gun contained DNA from a mixture of four or more individuals. Both Defendant Wallace and A.K.C. were excluded from being contributors. Defendant Champion could not be excluded as a contributor to that mixture, while 89% of the world's population can be excluded.

i. Officers also recovered two 9mm semi-automatic weapons and a black ski mask from the minivan. The ski mask was analyzed by the Crime Lab for the presence of DNA. The mouth area of the ski mask contained a mixture of DNA from six or more individuals. The major male DNA profile developed matched that of Defendant Champion.

j. The minivan was also processed for fingerprints and DNA. A swabbing taken from a grab handle on the ceiling on the rear passenger side contained a mixture of DNA from four or more individuals. The major male DNA profile matches that of Defendant Champion.

k. In a taped, *post-Miranda* statement, Defendant Champion claimed he had never been in the blue minivan and that he had never worn the ski mask. He had no explanation for why his DNA was on the ski mask and inside the minivan. Officers obtained

a search warrant for the records pertaining to Defendant Champion's cell phone. These records show that Defendant Champion's cell phone was in the area of the murder, on the day and at time of the murder.

l. Cell phone records also show a phone conversation between Defendant Wallace and a known witness on the day of the murder. Officers spoke with this witness. The witness told officers that on the day of the murder, the witness spoke with Defendant Wallace via phone. Defendant Wallace told the witness that he was with A.K.C. and "my homeboy Tay Tay." The witness showed officers the Facebook profile of Tay Tay, which was under the name "Tay Tay Champion." Officers then showed the witness a confirmatory photo of Defendant Champion and the witness confirmed that Defendant Champion is "Tay Tay."

*3 3. On August 24, 2017, the State made a motion to join Defendants Wallace and Champion for trial. Defendants oppose that motion. Defendant Wallace submitted a brief in opposition on October 25, 2017 and Defendant Champion submitted a brief in opposition on November 6, 2017. The State submitted a reply brief on November 14,2017.

4. In its brief, the State indicates that there were a number of eyewitnesses to the shooting, including members of Victim's family.

CONCLUSIONS OF LAW

1. "When two or more defendants are charged with the same offense, they may be tried separately or jointly at the court's discretion. To determine whether to order joinder or separate trials, the court must consider: (1) the nature of the offense charged; (2) the impact on the victim; (3) the potential prejudice to the defendant; and (4) the interests of justice" Minn. R. Crim. P. 17.03, subd. 2.

2. First, the nature of the offense favors joinder "when codefendants act in close concert with one another." *State v. Powers*, 654 N.W.2d 667, 674 (Minn. 2003) (citation omitted). This factor also weighs in favor of joinder when the charges are identical and the evidence against each defendant is similar. *State v. Greenleaf*, 591 N.W.2d 488,499 (Minn. 1999).

3. In this case, the charges against both defendants are virtually identical. Both Defendants are charged with Murder in the Second Degree, albeit Defendant Wallace is charged as an accomplice. Defendants Wallace and Champion are alleged to have played distinctive roles; specifically that Defendant Wallace drove Defendant Champion to the site of the shooting, and then acted as his getaway vehicle, while Defendant Champion discharged his firearm at a group of people, presumably with the intention of striking at least one of them. Additionally, it appears the majority of evidence could be used against both defendants. Thus, this factor weighs in favor of joinder.

4. Second, "[p]otential trauma to either the victim or an eyewitness to a crime is a factor that weighs in favor of joinder." *State v. Martin*, 773 N.W.2d 89,100 (Minn. 2009) (citation omitted).

5. The actual victim of this offense is deceased and cannot be called to testify, however, there are a number of other eyewitnesses who will be called. According to the State, these eyewitnesses include family members of Victim. The Court acknowledges that witnessing a loved one being shot and watching them die is a traumatic experience. As is the experience of being shot at and or believing you may be shot Reliving these experiences may certainly be very painful for the witnesses and having to make time to testify is never convenient The Court concludes that this factor weighs in favor of joinder.

6. Third, potential prejudice to codefendants may include inconsistent or "antagonistic defenses," *Id.*, or evidence that is admissible against one defendant but not against the other, *State v. Blanche*, 696 N.W.2d 351,371 (*Minn.* 2005).

7. Defendant Wallace indicated in his brief that he intends to argue that he had never met the shooter prior to the shooting and that he was unaware the shooter was going to fire a weapon from his vehicle or just outside of his vehicle prior to it occurring. Defendant Champion has indicated that he plans on arguing that he was not present in the minivan at the time of the shooting

and had no involvement with this incident The Court concludes that these defenses may be antagonistic. In particular, while Defendant Champion's DNA is present in the minivan and on the firearm, no eyewitnesses have been able to identify him as the shooter or place him in the minivan at the time of the shooting. Defendant Wallace, however, may choose to do this. While Defendant Wallace claims to have not to have known the shooter, having been the driver of the vehicle it is possible that Defendant Wallace could now identify the shooter and may point the finger at Defendant Champion. This circumstance is even more likely given that there is now evidence suggesting Defendant Wallace admitted he was with Defendant Champion on the day of the murder.[1] Because the defenses are antagonistic, this factor weighs against joinder.

1 This information was included in the complaint charging Defendant Champion, but not in foe complaint charging Defendant Wallace.

*4 8. Lastly, in the interests of justice, the Court may consider the conservation of judicial time and resources as well as the potential that the State could not reproduce witnesses for a second trial. *See State v. Jackson*, 773 N.W.2d 111, 119 (Minn. 2009). The interests of justice may also favor joinder if publicity during the first trial could prejudice the jury pool for the second trial. *See Powers*, 654 N.W.2d at 675. In addition, the Court should consider whether or not a joint trial is necessary for the State to "be afforded a fair chance to present its case." *State v. Strimling*, 265 N.W.2d 423,432 (Minn. 1978).

9. While it is almost always true that it will take less of the court's time to go through one trial instead of two, all efficiency gained by having only one trial is lost and more time is wasted if the cases have to be severed mid-trial, which would occur if the Defendants' defenses prove to be antagonistic. There have been no representations from the State that it will be particularly difficult or impossible to produce the eyewitnesses for two trials. This case has received some media attention. Thus, it is possible that there might be some coverage of the trial, however, it is not likely to be of the nature or to the extent that would be expected to prejudice the potential jury pool for a subsequent trial of the second defendant. The State has also not provided any argument that a joint trial is necessary for the State to be "afforded a fair chance to present its case." This factor weighs against joinder.

10. After carefully considering all four factors, the Court determines that the risk of substantial prejudice to Defendants greatly outweighs the State's interests in joinder.

IT IS HEREBY ORDERED

I. The State's motion for joinder is DENIED.

Dated: *11/28/17*
jal

BY THE COURT:

<<signature>>

Tamara Garcia

Judge of District Court

Fourth Judicial District

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2009 WL 8603557 (Minn.Dist.Ct.) (Trial Order)
District Court of Minnesota,
Fourth Judicial District.
Hennepin County

State of Minnesota, Plaintiff,

v.

Doris Denise MEEKS, Defendant;

State of Minnesota, Plaintiff,

v.

Harmony Shavon Newman, Defendant.

Nos. 27 CR 09-850, 27 CR 09-8498.
April 29, 2009.

Order for Joinder of Defendants

Mark S. Wernick, Judge of District Court.

This matter is before the Court pursuant to the State's motion for joinder of Defendants. Assistant County Attorneys Jessica Bierwerth and Cheri Townsend represent the State. Craig Cascarano, Esq. represents Defendant Doris Meeks.-Richard Trachy, Esq. represents Defendant Harmony Newman. There were no appearances.

Based on the written submissions of the parties, the Court makes the following,

ORDER

1. The State's motion for joinder of Defendants is GRANTED.

2. The Memorandum below shall be made part of this Order.

Dated: April 29, 2009

<<signature>>

Mark S. Wernick

Judge of District Court

MEMORANDUM

On February 19, 2009, a Hennepin County grand jury returned separate indictments against Defendants Doris Meeks and Harmony Newman. Each indictment charges a Defendant with three counts of manslaughter in the second degree. All charges

arise from the August 2008 death of D.J.A.H., a 22 month old infant who was being cared for by the Defendants. The State is moving that the Defendants be joined for trial.[1]

1 The State's motion for joinder of Defendants is in effect a motion to consolidate the indictments for trial. Minn. R. Cr. P. 17.03, subd. 4.

I. Facts

In August 2008, Doris Meeks (Meeks) was a licensed day care operator who, with the help of her adult daughter, Harmony Newman (Newman), provided day care services at Meeks's home in Bloomington.

On August 28, 2008, during the morning hours, 23 children were at Meeks's home being cared for by Meeks and Newman. The children ranged in age from 9 months to at least 11 years. At approximately 10 am, Meeks left the home to purchase batteries for a cordless phone, leaving Newman as the only adult supervising the children. Meeks intended to return to the home later that morning to take 8 of the children on a field trip to Mall of America.

According to the State, at about the time Meeks left the home, either Meeks or Newman, or both, directed two children, A.N. and J.A., each approximately 10 years old, to put 22 month old D.J.A.H. down for a nap. A.N. and J.A. took D.J.A.H. to a downstairs room containing three playpens. At this time, there was one infant in each of two of the playpens. J.A. placed D.J.A.H. in a car seat located in the third playpen. A.N. then buckled D.J.A.H. into the car seat, using a strap that ran underneath D.J.A.H.'s chin. It was not uncommon for Meeks and Newman to have D.J.A.H. take naps while strapped into a car seat. A.N. and J.A. then left D.J.A.H. and the other two infants unattended in the downstairs room. Approximately thirty to sixty minutes later, Newman (still the only adult in the home) told A.N., J.A., and a third 10 year old child, T.F., to bring the three infants upstairs for lunch. When the three children entered the room with the three playpens, they saw that D.J.A.H. was motionless in the car seat, with spit all over his mouth. The three children immediately reported this to Newman, who then went to the room with the playpens. Newman took D.J.A.H. out of the car seat and directed the children to call 911. D.J.A.H. later died, apparently from having choked on the car seat strap.

During the police investigation, the three children, A.N., J.A., and T.F., gave statements describing the foregoing events.

Newman told law enforcement officers that it was she, and not the children, who put D.J.A.H. down for a nap. She said that she put D.J.A.H. in a play pen located between two other playpens in the room. She denied that any children were in the other two playpens at that time. Newman claimed that D.J.A.H. must have crawled out of the middle playpen, climbed into the playpen containing the car seat, and then choked after buckling himself into the car seat. The investigating officers accused Newman of lying, with one officer saying, "I don't know how naïve you think I am...." and "...you don't even care enough about this kid to tell the truth." CA 45-46.

Meeks told police officers that she believed it was Newman who put D.J.A.H. down for his nap, possibly with the help of some older children. Meeks claimed that D.J.A.H. is capable of crawling out of one playpen and climbing into another. Meeks acknowledged that D.J.A.H. sometimes takes naps while in a car seat.

Shortly before J.A. was scheduled to testify before the grand jury, Meeks telephoned J.A.'s mother and suggested that she have J.A. cry during his grand jury testimony so that he could avoid testifying. Meeks also told J.A.'s mother that she (Meeks) and A.N.'s mother have already talked A.N. into lying to the grand jury about what had happened. A.N. is Meeks's granddaughter and Newman's niece.

II. Analysis

The State's joinder motion is governed by Minn. R. Cr. P. 17.03, subd. 2(1), which provides in part:

When two or more defendants are jointly charged with a felony, they may be tried separately or jointly in the discretion of the court. In making its determination on whether to order joinder or separate trials, the court shall consider the nature of the offense charged, the impact on the victim, the potential prejudice to the defendant, and the interests of justice.

This rule became effective on January 1, 1990. The language of subdivision 2(1) is identical to Minn. Stat. § 631.03 (1987), "which removed the presumption in favor of separate trials contained in [the former] section 631.03." *Santiago v. State,* 644 N.W.2d 425, 440 (Minn. 2002). "[O]ur current version of subdivision 2(1) expresses neutrality on the issue of joinder." *Id.* at 446. *See State v. Powers,* 654 N.W.2d 667, 676 (Minn. 2003) ("Under Minnesota law ... there is no presumption that a joint trial will deny the defendant the right to a fair trial."). Accordingly, many pre 1990 Minnesota appellate court opinions regarding joinder have limited value when interpreting the current version of subdivision 2(1).

In deciding a joinder motion, subdivision 2(1) directs trial courts to consider 'the nature of the offense charged, the impact on the victim, the potential prejudice to the defendant, and the interests of justice.".

A. Nature of the Offense Charged

"Joinder is appropriate when codefendants act in close concert with one another." *State v. Powers,* 654 N.W.2d 667, 674 (Minn. 2003), citing *State v. DeVerney, 592* N.W.2d 837, 842 (Minn. 1999).

In this case, Meeks and Newman acted in close concert in supervising D.J.A.H. and the other children at Meeks's home in connection with her daycare business. Although Meeks and Newman are not charged as accomplices under Minn. Stat. § 609.05, this appears to be the case only because the State's theory of liability is negligence. In all significant respects, on August 28, 2008, Meeks and Newman were aiding and abetting each other in caring for D.J.A.H. This factor favors joinder.

B. The Impact on the Victim

Prior to 1990, when state law presumed severance, this factor weighed in favor of joinder only when the victim was particularly vulnerable or the crime was particularly terrorizing. *See e.g., State v. Swenson,* 221 N.W.2d 706, 708 (Minn. 1974) (robbery victims were aged and in poor health); *State v. Gengler,* 200 N.W.2d 187, 189 (Minn. 1972) (sexual assault victim was 14 years old); *State v. Southard,* 360 N.W.2d 376, 381 (Minn. App. 1985) (threats to rape victim and her daughter). Because severance is no longer presumed, no showing of particular vulnerability or unusual violence need be made in order for this factor to weigh in favor joinder. Consideration of "victim" impact includes consideration of the impact on witnesses who would have to testify at more than one trial. *State v. Blanche,* 696 N.W.2d 351, 371 (Minn. 2005).

In this case, three children, approximately 10 years old, will have to testify about having discovered the near lifeless body of D.J.A.H. Two of the children are responsible for having put D.J.A.H. in the dangerous condition which eventually led to D.J.A.H.'s death. One of the children has apparently been the target of witness tampering. The children should not have to endure testifying more than once. This factor weighs heavily in favor of joinder.

C. The Potential Prejudice to the Defendant

Joinder results in substantial prejudice to defendants when the defendants have "antagonistic defenses." *Santiago v. State,* 644 N.W.2d 425, 446 (Minn. 2002). Defenses are antagonistic when the defendants "seek to put the blame on each other and the jury is forced to choose between the defense theories advocated by the defendants." *Id.* When conflicting defense theories force a jury to convict one defendant in order to acquit the other, each defense lawyer in effect becomes a second prosecutor against each defendant. *Id.* at 449. As a result of each defendant facing two prosecutors, the state's burden to prove guilt beyond a

reasonable doubt against each defendant is diminished. *See Zafiro v. United States,* 506 U.S. 534, 543-44 113 S.Ct. 933, 940-41 (1993) (Stevens, J., concurring).

In ruling on a severance motion made before trial, subdivision 2(1) directs the trial court to consider the "potential" prejudice to a defendant. The potential for prejudice must be measured in light of the parties' offers of proof, recognizing the defendant's right to remain silent. *Santiago v. State,* 644 N.W.2d at 443.

Neither Meeks nor Newman has made an offer of proof in support of a particular defense. The statements made by Meeks and Newman to law enforcement authorities do not present "antagonistic defenses." According to those statements, the jury could conclude that neither Meeks nor Newman were negligent or that only one of them was negligent. The jury need not convict Newman in order to acquit Meeks, or convict Meeks in order to acquit Newman. Under these circumstances, joining Meeks and Newman for trial is not unfairly prejudicial to either of them. This factor weighs in favor of joinder.[2]

2 *State v. Flowers,* 27 CR 08-29634 and *State v. Thompson,* 27 CR 08-29636, are companion cases which reflect a classic example of antagonistic defenses. The defendants were separately indicted for aiding and abetting the murder of a mother and her 10 year old child. The defendants were the only people with the victims at the time of the murders. In post arrest statements, each defendant claimed that the other defendant was solely responsible for the murders. Because there was no dispute that both victims were murdered: and that no third person committed the murders; at a joint trial, the jury could not acquit either defendant without convicting the other. Accordingly, this Court denied the State's motion for joinder of defendants.

"[A] codefendant's out-of-court statement [which] refers to, but is not admissible against, the defendant..." may be admitted into evidence at a joint trial so long as "...all references to the defendant have been deleted [and] admission of the statement with the deletions will not prejudice the defendant...." Minn. R. Cr. P. 17.03, subd. 3(2)(b). *See State v. Blanche,* 696 N.W.2d 351, 366-370 (Minn. 2005).

In this case, Meeks told the police that Newman put D.J.A.H. down for a nap. This statement is admissible against Meeks, but is likely inadmissible hearsay as to Newman. Newman told the police that Meeks left the home to purchase telephone batteries, which left Newman responsible for supervising 23 children. This statement is admissible against Newman, but is likely inadmissible hearsay as to Meeks. It appears that both statements can be fairly redacted to eliminate the hearsay and confrontation problems. If not, the State must forgo use of the statements at a joint trial or agree to severance. Minn. R. Cr. P. 17.03, Subd. 3(2)(a) and (c). It is premature to require separate trials on this basis.

D. The Interests of Justice

There are no interests of justice factors not previously discussed which weigh heavily either in favor of or against joinder.

Because Meeks and Newman were acting in concert with respect to their supervision of the children in the home; because the child witnesses would be adversely impacted by testifying in more than one trial; and, because neither Meeks nor Newman would be unfairly prejudiced by a joint trial, the State's motion for joinder of Defendants is granted. If either Meeks or Newman becomes unfairly prejudiced during a joint trial, a request for severance can be granted at that time. Minn. R. Cr. P. 17.03, subd. 3(3).

MSW

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2000 WL 35486566 (Minn.Dist.Ct.) (Trial Order)
District Court of Minnesota,
Third Judicial District.
Mower County

STATE OF MINNESOTA, Plaintiff,

v.

Janea Larae-Nichole WEINAND a/k/a Pocahontas, Defendant.

State of Minnesota, Plaintiff,

v.

Scott Perry Christian, David Kenneth Christian Vernon Neal Powers, Defendants.

Nos. K4-00-1115, K0-00-1116, K2-00-1117, K6-00-1118.
December 28, 2000.

OMNIBUS ORDER

Patrick Oman, Mower County Attorney, 201 First Street NE, Austin, MN.

Stephen Erickson, Attorney for Jenea Weinand, 336 South Broadway, Albert Lea, MN.

Richard J. Smith, Rachael M. Drenckpohl, Attorneys for Scott Christian, 400 South Broadway Suite 204, Rochester, MN.

William F. Klumpp, Assistant State Attorney General, 525 Park Street Suite 500, St. Paul, MN.

Evan Larson, Attorney for David Christian, 201 South Main Street, Austin, MN.

Chester Swenson, Attorney for Vernon Powers, Albert Lea, MN.

DONALD E. RYSAVY, Judge.

*1 XXX YOU ARE HEREBY NOTIFIED THAT ON December 28, 2000, AN ORDER WAS DULY FILED IN THE ABOVE MATTER.
YOU ARE HEREBY NOTIFIED THAT ON, A JUDGMENT WAS DULY ENTERED IN THE ABOVE ENTITLED MATTER.

YOU ARE HEREBY NOTIFIED THAT ON, A JUDGMENT WAS DULY DOCKETED IN THE ABOVE ENTITLED MATTER IN THE AMOUNT OF $.

A true and correct copy of this Notice has been served by mail upon the parties named herein at the last known address of each, pursuant to Minnesota Rules of Civil Procedure, Rule 77.04.

The above-titled matters came before the Court for Omnibus Hearings on November 3, 2000, the undersigned presiding, at the Mower County Courthouse, Austin, Minnesota upon the motions of the State of Minnesota, Defendant Jenea Weinand, Defendant Scott Christian, Defendant David Christian, and Defendant Vernon Powers.

The State of Minnesota moved the Court for the following relief:
1. For an Order joining for trial the cases of Defendants, Scott Christian, David Christian, and Vernon Powers.

Defendant Weinand moved the Court for the following relief:
1. For an Order dismissing the Grand Jury Indictment in this matter.

2. For an Order suppressing her statement given to Special Agent Eugene Leatherman on July 1, 2000 on grounds that it was taken in violation of her 5th Amendment rights.

3. For an Order suppressing her statement given to Special Agent Eugene Leatherman on July 1, 2000, on grounds that the recording requirement set forth in *State v. Scales*, 518 N.W.2d 587 (Minn. 1994) was violated.

4. For an Order suppressing her statement given to Special Agents Jim Bakos and Jeff Hansen on July 3, 2000 on grounds that it was taken in violation of her 5th Amendment rights.

5. For an Order suppressing her statements given to Austin Police Officer Curt Rude.

Defendants Scott Christian, David Christian, and Vernon Powers moved the court for the following relief:
1. For an Order dismissing the Grand Jury Indictment in this matter.

2. For an Order denying the State's motion for joinder of all defendants in one trial.

The State appeared by and through Assistant State Attorney General William F. Klumpp, JR. and Mower County Attorney Patrick A. Oman. Defendant Weinand appeared personally and through Attorney Stephen R. Erickson of Albert Lea, Minnesota. Defendant Scott Christian appeared personally and through Attorney Rachael Drenckpohl of Rochester, Minnesota. Defendant David Christian appeared personally and through Attorney Evan H. Larson of Austin, Minnesota. Defendant Vernon Powers appeared personally and through Attorney Chester D. Swenson of Albert Lea, Minnesota.

The Court having considered the Motions, briefs and arguments of the parties, and being fully advised in the premises, does now hereby make and file the following:

ORDER

1. The State of Minnesota's motion to join Defendants Scott Christian, David Christian, and Vernon Powers for trial is hereby GRANTED.

2. Defendant Weinand's motion to dismiss the Grand Jury Indictment is hereby DENIED.

3. Defendant Weinand's motion to suppress her July 1, 2000 statement on 5th Amendment grounds is hereby DENIED.

***2** 4. Defendant Weinand's motion to suppress her July 1, 2000 statement as having been taken in violation of *State v. Scales*, 518 N.W.2d 587 (Minn. 1994), is hereby DENIED.

5. Defendant Weinand's motion to suppress her July 3, 2000 statement on 5th Amendment grounds is hereby DENIED.

6. The motion of Defendants Scott Christian, David Christian, and Vernon Powers for an Order dismissing the Grand Jury Indictment in this matter is hereby DENIED.

7. The motion of Defendants Scott Christian, David Christian, and Vernon Powers for an Order denying the State's motion for joinder of all defendants in one trial is hereby DENIED.

8. Matters relating to BCA analysis of DNA or ballistics/bullet identification are RESERVED, pending discovery production by the State.

9. Defendants herein shall appear before the Court for entry of plea on *January 9, 2000, at 11:00 AM.*

10. The Memorandum of law of the court is attached hereto and incorporated herein.

MEMORANDUM

I. DISSMISSAL OF GRAND JURY INDICTMENT

Defendants argue that the Grand Jury Indictment should be dismissed because of a variety of asserted errors. In the initial motion, Defendants argue that there are three errors which require a dismissal of the indictment. The errors asserted are: 1) that it was prosecutorial misconduct to advise the grand jury regarding sentencing consequences; 2) that it was prosecutorial misconduct to introduce evidence of Defendant's prior convictions; and, 3) that it was prosecutorial misconduct to not advise the grand jury regarding favorable treatment of a key witness, Tanisha Patterson. The Supplemental Motion filed by Defendant, Scott Christian, argues that there was no probable cause to support the charges of first degree murder, and alleged procedural and prosecutorial errors. These issues will be dealt with separately.

Minnesota requires that First Degree Murder be prosecuted by an indictment returned by a grand jury. Minn. R. Crim. P. 17.01. A grand jury proceeding is not a trial on the merits and jurors do not determine guilt or innocence but determine if there is probable cause to believe the accused has committed a particular crime. *State v. Greenleaf,* 591 N.W.2d 488, 489 (Minn. 1999). A presumption of regularity attaches to an indictment and it is a rare case where an indictment will be invalidated. *State v. Inthavong,* 402 N.W.2d 799, 801 (Minn. 1987); *State v. Scruggs,* 421 N.W.2d 707, 717 (Minn. 1988). A defendant seeking to overturn an indictment bears a heavy burden. *Scruggs*, 421 N.W.2d at 717; *State v. Moore,* 438 N.W.2d 101, 104 (Minn. 1989). Grand jury instructions will justify dismissal only when they are "so egregiously misleading and deficient that the fundamental integrity of the indictment process itself is compromised." *Inthavong,* 402 N.W.2d at 802.

All of the errors and arguments asserted by Defendants deal with alleged prosecutorial errors and/or misconduct. An indictment should be dismissed if the prosecutor knowingly engaged in misconduct that substantially influenced the grand jury's decision to indict and if a reviewing court gravely doubts that the decision to indict was free of any influence of the misconduct. *State v. Montanaro*, 463 N.W.2d 281, 281 (Minn. 1990). The effect of the prosecutor's misconduct on the grand jury proceedings must be judged after looking at all of the evidence received by the grand jury. *State v. Olkon*, 299 N.W.2d 89, 106 (Minn. 1980), cert. denied, 449 U.S. 1132, 101 S.Ct. 954, 67 L.Ed.2d 119 (1981). The fact that grand jurors may have heard inadmissible evidence is not sufficient to dismiss an indictment if there is sufficient admissible evidence to establish probable cause. *Greenleaf,* 591 N.W.2d at 498*citing**State v. O'Dell,* 328 N.W.2d 730, 731 (Minn. 1983).

***3** A. Sentencing Consequences (All Defendants)

Defendants argue that it was prosecutorial misconduct when the prosecutor "gave repeated instructions relating to the consequences of 'commitment to the Commissioner of Corrections for a specified minimum term of imprisonment' ". Defendants argue that this statement was made to influence the grand jury. Defendants also compare these facts to those in *State v. Gross,* 387 N.W.2d 182 (Minn. Ct. App. 1986), where the Court of Appeals held that a prosecutor's reference that the

defendant would receive a stay to the grand jury was inappropriate. The court held that this reference was irrelevant to the determination of probable cause and only served to prejudice the jury. *Id.* The facts in this case are very different.

A thorough reading of the grand jury transcript reveals that each time reference was made regarding a "minimum commitment", it was within the context of the prosecutor giving the grand jury instructions on each of the offenses to which the mandatory minimum sentence applies for the use or possession of a firearm pursuant to Mum. Stat. § 609.11, subd. 5. The prosecutor instructed the grand jury that if they found that there was probable cause to believe that the defendant or an accomplice possessed or used a firearm in the commission of the crime that fact should be specified in the indictment pursuant to the statute. This was followed by an instruction stating that if they did not find probable cause to believe that a firearm was used that fact should not be mentioned in the indictment. This instruction was given with regards to the homicide offenses and the first-degree assault offense. Grand Jury Transcript pp. 407, 409-410, 412, 414-417, 419-420. The actual minimum sentence to be served was never mentioned.

The instruction on a minimum commitment was intrinsically related to the grand jury's finding of probable cause of use or possession of a firearm for charging purposes under Mum. Stat. § 609.11, subd. 5. According to Minnesota Law and Rules, an indictment "shall state for each count the citation of the statute, rule regulation, or other provision of law which the defendant is alleged to have violated." Minn. R. Crim. P. 17.02, subd. 3. Including a finding of probable cause that the defendant used or possessed a firearm was appropriate to put the defendant on notice of possible consequences. *SeeState v. Owens*, 268 Minn. 321, 324, 129 N.W.2d 284, 286 (1964) (The purpose of an indictment is to inform the defendant of the nature of the particular offense with which he is charged so that he may intelligently defend against it). Reading the statements regarding a minimum commitment in context shows that there was no error or misconduct in the instructions that were provided to the grand jury on this charge.

B. Prior Convictions (Only applicable to Vernon Powers and Scott Christian)

Defendants next argue that it was prosecutorial misconduct to introduce evidence of defendant's prior convictions. One of the charges in the indictment was Possession of a Pistol by a Felon. As part of the elements of this crime the prosecution introduced evidence in the form of certified copies of conviction of Defendants' prior convictions. Defendants argue that this was error because the State entered more than one conviction into evidence, which was prejudicial, and that the prosecutor was in error in not giving a limiting instruction on the use of this evidence.

***4** Defendants were charged by indictment with one count of being a felon in possession of a pistol under Minn. Stat. § 624.713, subd. 1(b). One element of this offense is that the defendant have a prior conviction for a crime of violence. *Id.* The fact that Defendant was convicted of a crime of violence is a necessary fact which must be proved in order to indict or convict Defendant on this charge. Such evidence would clearly be admissible at a trial on this charge. The fact that the Prosecutor chose to introduce more than one prior conviction is not an abuse of his discretion. Although this information by it's very nature may be prejudicial towards a defendant, it is admissible for the purposes of meeting the elements of this charge. Outside of a stipulation by Defendant, the prosecution has to introduce evidence of a prior conviction of a crime of violence in order to meet the elements of the offense of possession of a pistol by a felon.

Defendants also argue that no limiting instruction was given with regards to the purpose of the prior convictions. Although the prosecutors did not specifically instruct the jury about the purpose of the information, they did instruct the jury, "you don't indict or disbelieve someone because they've been convicted of a crime, simply for that reason". Grand Jury Transcript, pp. 437-38. This instruction adequately instructs the jury to not use the information for an improper purpose. There was no error in providing the grand jury with certified copies of Defendants' prior convictions.

C. Favorable treatment of Tanisha Patterson (AH Defendant's)

Defendants' last argument in the original motion is that it was prosecutorial misconduct to not advise the grand jury regarding favorable treatment of 14-year-old Tanisha Patterson, who was a witness during the grand jury proceeding. The basis of Defendant's claim is that Ms. Patterson was not charged with any violations in relation with this case.

The major flaw in Defendant's argument is that there is absolutely no evidence suggesting that Ms. Patterson received favorable treatment. During the grand jury testimony, Ms. Patterson was explicitly questioned as to whether anyone had made any promises or threats in exchange for her testimony, any promises at all. Her response was no. Grand Jury Transcript, pp. 205-206.

Outside of Defendant's assertion that Ms. Patterson could have been charged with aiding and abetting, there is no other evidence to support the argument that Ms. Patterson received favorable treatment. The decision to charge someone is subject to prosecutorial discretion. The mere fact that Ms. Patterson was not charged with a crime is not equivalent to receiving favorable treatment. Defendant is unable to show that Ms. Patterson did in fact receive favorable treatment, so this argument fails.
D. Probable Cause (Scott Christian)

In Defendant's supplemental brief he argues that there was insufficient evidence to support a finding of premeditation to charge Defendant with Murder in the First Degree pursuant to Minn. Stat. § 609.185(1). Specifically, Defendant argues that there was not enough time to develop premeditation because they were only in the room for a few minutes and, "an inference can be made that panic set in which subsequently ended up in the use of weapons". Defendant's Supplemental Brief to Dismiss Indictment, p. 2. Defendant also argues that the prosecutor misled the jury regarding premeditation by suggesting that it can be formed in the time it takes to pull the trigger.

The amount of time required to form premeditation is not clear-cut. Extensive planning and calculated deliberations need not be shown in order to find premeditation in first-degree murder prosecution. *State v. Shepherd,* 477 N.W.2d 512, 515 (Minn. 1991). Premeditation need not involve extensive planning and calculated deliberation and can be formulated virtually instantaneously. *State v. Thomas,* 590 N.W.2d 755, 758 (Minn. 1999). Premeditation can be inferred in murder case from either number of gunshots fired into victim, or fact that killer armed himself with loaded gun in preparation for commission of lesser crime. *State v. Neumann,* 262, N.W.2d 426, 431-31 (Minn. 1978). Someone who prepares himself for a robbery by obtaining a loaded gun, thus preparing to shoot anyone who obstructs the robbery or his escape, raises an inference of premeditation and intent to shoot and kill. *State v. Campbell*, 281 Minn. 1, 13 161 N.W.2d 47, 55 (1968).

***5** The grand jury was presented with evidence that the victims were shot multiple times. There was also testimony from various witnesses that Defendant went to that specific motel room because there was a plan to rob the people inside. There was also testimony that prior to going to the motel room, there was a discussion between various people about a large amount of cash that was believed to be in to room. The grand jury was presented with enough evidence to find *probable cause* that Defendant's acted with premeditation. *SeeState v. Greenleaf,* 591 N.W.2d 488, 489 (Minn. 1999) (A grand jury proceeding is not a trial oh the merits and jurors do not determine guilt or innocence but determine if there is probable cause to believe the accused has committed a particular crime.)

In instructing the grand jury on the requirement of premeditation the prosecutor stated:
A premeditated decision to kill can be reached in a very short period of time. However, it's not an unconsidered or rash impulse, even though it may include an intent to kill. So, for example, a premeditated decision to kill, I would suggest to you, can be reached in the time it takes to pull the trigger of a gun, in the tune it takes to think, 'I'm going to pull that trigger and intend to kill that person', and so that question is that lapse of tune sufficiently determined or prepared to commit the act before they actually did it, and in this case we, of course, have evidence of multiple gunshot wounds or gunshots being fired, so the question is if there wasn't a premeditated decision to kill at the tune the first shot was fired, what happened between the first shot and second shot, was there a premeditation decision to kill at that point or between the second arid the third, fourth, fifth, sixth, seventh, or however many shots are being fired ...

Grand Jury Transcript p. 427. Although the statement that premeditation can be formed in an instant, taken out of context, may not be entirely correct, read in context, there does not appear to be any error in the prosecutor's instruction regarding premeditation. Taking the instructions as a whole, they were consistent with the law on premeditation. *SeeState v. Olkon*, 299 N.W.2d 89, 106 (Minn. 1980) (the effect of the prosecutor's misconduct on the grand jury proceedings must be judged after looking at all of the evidence received by the grand jury).

E. Procedural Errors and Misconduct (Scott Christian)

Defendant also asserts a number of procedural errors and misconduct by the prosecutor. Briefly, these were: 1) the jurors were not asked enough what they knew about the case or whether they knew any or the parties or witnesses; 2) that the prosecutor was in error in stating there were two witnesses who were 14-year-old girls; and 3) that the prosecutor did not advise the grand jury regarding inconsistent statements given by some witnesses.

Defendant argues that there was a procedural error in the grand jury process because the prosecutor did not ask the jurors if they knew the parties or witnesses. This argument is incorrect. The prosecutor specifically asked the grand jury, "Is there anyone here who anticipates that you will be a witness before this grand jury proceeding; in other words, because you have personal knowledge of the shooting that occurred at the Downtown Motel on the 30th of June, 2000 in which two people were killed and one man was injured". Grand Jury Transcript p. 22. This question covered the realm of whether or not anyone on the grand jury panel had any personal knowledge of the event. The prosecutor also asked the grand jury questions about their knowledge of the case from publicity and whether they would be able to put aside what they have heard outside of the proceedings and base their decision to indict only on the information presented during the proceeding. Grand Jury Transcript pp. 22-23. There was no response by any jury member to these questions which would indicate that any juror had any personal knowledge of the case or would be unduly prejudiced by the pre-trial publicity. A presumption of regularity attaches to an indictment and it is a rare case where an indictment will be invalidated. *State v. Inthavong*, 402 N.W.2d 799, 801 (Minn. 1987); *State v. Scruggs*, 421 N.W.2d 707, 717 (Minn. 1988).

***6** Defendant alleges that the prosecution was misrepresenting the facts by telling the grand jury that they would hear testimony from two 14-year-old girls, when in fact one of the witnesses was 17-years-old. It does not appear that this was a purposeful error, or that the grand jury was prejudiced by this inadvertent mistake. Additionally, the comment by the prosecutor during opening statement that handguns were taken by Ms. Patterson earlier in the week, when this evidence was not introduced to the grand jury appears also to have been an inadvertent mistake. An indictment should be dismissed if the prosecutor *knowingly* engaged in misconduct that substantially influenced the grand jury's decision to indict, and if a reviewing court gravely doubts that the decision to indict was free of any influence of the misconduct. *State v. Montanaro*, 463 N.W.2d 281, 281 (Minn. 1990). There is no evidence to suggest that the prosecutor *knowingly* engaged in misconduct, and it is unreasonable to assume that the grand jury was substantially influenced by these comments when the evidence presented, without any claim of taint, was more than sufficient to establish probable cause to indict.

Defendant's last argument is the assertion that the prosecutor purposely did not provide the grand jury with all instances of inconsistencies with statements by the witnesses. Although there may have been some inconsistencies between a statement given to the police before testifying and the actual testimony by some witnesses, none of the inconsistencies go toward the key issues to be determined by the grand jury. The grand jury is to determine whether or not there is *probable cause* to indict. The basics of what happened, where it happened, and who was involved did not change. The effect of the prosecutor's misconduct on the grand jury proceedings must be judged after looking at all of the evidence received by the grand jury. *State v. Olkon*, 299 N.W.2d 89, 106 (Minn. 1980), cert. denied, 449 U.S. 1132, 101 S.Ct. 954, 67 L.Ed.2d 119 (1981). Although there were inconsistencies between the statements to the police upon arrest and the testimony given to the grand jury, looking at those inconsistencies in relation to the all of the evidence presented, it does not appear at though the inconsistencies themselves would have made an impact on the decision to indict. Even if these two witnesses had not testified at all at the grand jury proceeding

the grand jury would have had enough evidence to find probable cause to indict outside of their testimony. The extent of the inconsistencies can be evaluated by the petit jury in their determination of reasonable doubt.

In summation, looking at the entire grand jury proceedings as a whole, there was not an error of the magnitude that would require a dismissal of the indictment. Defendants' motions to dismiss the indictment must be denied.

II. JOINDER OF TRIALS

A. Introduction/Background.

The State of Minnesota moves the court to join the trials of Vernon Neal Powers, Scott Perry Christian, and David Kenneth Christian. The State "out of an abundance of caution...further suggests that the Court should sever the remaining defendant (Jenea Larae-Nichole Weinand) because she gave a statement to the police that may be admissible in her trial but inadmissible in the codefendants' trial." (Memorandum in Support of State's Motion for Joinder, p. 2.)

Joinder of defendants for trial is governed by Minn. R. Crim. P. 17.03, subd. 2(1) and Minnesota Statute section 631.035. As amended in 1992, Minnesota statute § 631.035, subd. 1 reads:

Subdivision 1. Joinder of defendants. Two or more defendants may be jointly charged with a felony and tried if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense. The defendants may be charged in one or more counts and tried together or separately and all of the defendants need not be charged in each count.

Minn Stat. § 631.035 (2000).

Minn. R. Crim. P. 17.03, subd. 2(1) now reads:

Subd. 2 Joinder of Defendants.

(1) Felony and Gross Misdemeanor Cases.

*7 When two or more defendants are jointly charged with a felony, they may be tried separately or jointly in the discretion of the court. In making its determination on whether to order joinder or separate trials, the court shall consider the nature of the offense charged, the impact on the victim, the potential prejudice to the defendant, and the interests of justice. In cases other than felonies, defendants jointly charged may be tried jointly or separately, in the discretion of the court. In all cases any one or more of said defendants may be convicted or acquitted.

Minn. R. Crim. P. 17.03, subd. 2(1).

The trial court shall sever defendants during trial "upon a finding of manifest necessity" if the court finds severance is required to fairly determine a defendant's guilt or innocence. *State v. Santiago*, 617 N.W.2d 632, 636 (Minn. Ct. App. 2000) (citing Minn. R. Crim. P. 17.03, subd. 2.) Severance is proper if a defendant can show "that a jury could not reasonably be expected to compartmentalize the evidence as it relates to separate defendants." *Id.* (citing *United States v. Penson*, 62 F.2d 242, 244 (8th Cir. 1995).

Before a 1987 change in the joinder rule, the preference was that "two or more persons charged in a felony receive separate trials. See *State v. Stock*, 362 N.W.2d 351, 352 (Minn. Ct. App. 1985). The plain language of the current rule, however, eliminates this preference. *Santiago*, 617 N.W.2d at 636. The Minnesota Supreme Court addressed joinder and the current Minn. Crim. P. 17.03 in *State v. DeVerney*, 592 N.W.2d 837 (Minn. 1999), cert. denied, __ U.S. __, 120 S.Ct. 420, 145 L.Ed.2d 328 (1999)

and *State v. Greenleaf*, 591 N.W.2d 488 (Minn. 1999), cert. denied, __ U.S. __, 120 S.Ct 156, 145 L.Ed.2d 132 (1999). Neither *DeVerney* or *Greenleaf* involved mutually antagonistic defenses. Joinder in a case where mutually antagonistic defenses were presented was recently considered in the *Santiago* case.

a. Joinder where no antagonistic defenses are present.

The Minnesota Supreme Court has held that joinder is proper when two defendants act in close concert with one another. See *State v. Strimling*, 265 N.W.2d 423, 432 (Minn. 1978). Additionally, "substantial prejudice will not be inferred when defendants present different defenses that do not place blame on other defendant." *State v. DeVerney*, 592 N.W.2d 837 (Minn. 1999).

The *DeVerney* and *Greenleaf* cases are related in that the defendants in these cases were both part of a group of people involved in the assault and shooting death of another person. Both defendants were similarly charged in the assault, kidnapping, and murder. Evidence in both cases indicated that DeVerney and Greenleaf had "very similar involvement" in the murder. *DeVerney*, 592 N.W.2d at 842. Both defendants "either admitted assaulting Antonich (the victim) or were seen doing so, both admitted sitting in the front seat of Antonich's vehicle as they drove to the site of the murder, and both admitted attempting to wipe down Antonich's car for fingerprints in an effort to hide any evidence that would link them to the crime." *Id.* (language added). Both defendants appealed the trial court's decision to join their trials.

The facts cited in the preceding paragraph come directly from *DeVerney*. The *Greenleaf* court gave a similar account of the facts in stating: "The nature of the crime involved here is identical, as is the involvement of Greenleaf and DeVerney. Neither pulled the trigger, but both admitted almost identical roles in the assault, kidnap, and murder, and in the attempt to hide and evidence that would link them with the crime." *Greenleaf*, 591 N.W.2d at 499. In support of their approval of the trial court's decision, the court stated:

***8** The identical nature of the charged offenses and the nearly identical evidence against each defendant supports the trial court's decision to join Greenleaf and DeVerney for trial. Moreover, the trial court instructed the jury at the beginning and end of the trial that the cases were to be considered separately and that evidence regarding DeVerney's prior crimes and correspondence with Aubid was to be considered only as to DeVerney. See *State v. James*, 520 N.W.2d 399, 405 (Minn. 1994) (holding that if the evidence and the instruction are neither complex nor confusing, it must be presumed that the jury understood and followed the court's instruction). The trial court also properly redacted from each codefendant's statements any reference to the other codefendant. See Minn. R. Crim. P. 17.03, subd. 3(2).

Greenleaf, 591 N.W.2d at 499.

Both Greenleaf and DeVerney claimed that they suffered substantial prejudice from the joinder of their trials. The DeVerney court disagreed, stating "substantial prejudice is not simply whether the defenses presented were different, but whether the defenses were inconsistent, or whether the defendants sought, through their chosen defenses, to shift blame upon one another. See *State v. Hathaway*, 379 N.W.2d 498, 502 (Minn. 1985) (No substantial prejudice where: Although defendants did not always agree on trial strategy, one defendant did not seek to put the blame on the other, defendants regularly adopted the motions and objections of the other, the state did not introduce evidence showing only one of the defendants killed the victim, and the jury was not forced to believe either the testimony of one defendant or the testimony of the other).

Like the *DeVerney* court, the *Greenleaf* court found that the appellant failed to establish substantial prejudice by only suggesting that each defendant chose a different defense:

Greenleaf claimed intoxication, duress, and that he was innocent, while DeVerney simply claimed he was innocent. However, these defenses did not conflict and the jury was not forced to choose between the testimony of DeVerney or the testimony of Greenleaf to arrive at its verdicts. Instead, the jury was asked to choose between the state's theory of the case and each defendant's theory of the case. Therefore, Greenleaf did not suffer substantial prejudice when the trial court ordered a joint trial.

See *Hathaway*, 379 N.W.2d at 503 (stating that no substantial prejudice occurred where defendants did not present inconsistent defense theories and did not seek to shift blame to the other).

Greenleaf, 591 N.W.2d at 499-500.

Greenleaf also comments briefly on another factor a trial court must consider in deciding whether to join or separate the trials: "joint trials were clearly in the interests of justice because a majority of the prospective witnesses scheduled to appear in these cases lived in northeastern Minnesota and would be required to drive two to four hours to testify in each trial." *Id.* at 500.

The revised rule 17.03 was also considered in *State v. Warren*, 1997 WL 360591 (Minn. Ct. App.). In *Warren*, the court noted: Here, the district court granted the state's motion for a joint trial because (1) the defendants were involved in the same illegal acts, and the facts to prove each defendant's guilt are the same; (2) the same witnesses will be testifying at separate trials; (3) separate trials would negatively impact the victim when forced to testify at separate trials; and (4) joinder is in the best interests of justice and judicial resources.

b. Joinder where antagonistic defenses are present.

In *Santiago v. State*, 617 N.W.2d 632 (Minn. Ct. App. 2000), the court of appeals considered the joinder of two trials where the defendants respective defenses were "mutually antagonistic," a case of first impression in Minnesota. In *Santiago*, a second-degree murder/attempted second-degree murder case, one defendant (Rodriguez) claimed that he shot the gun because the appellant instructed him to do so. The Appellant claimed that he did not instruct Rodriguez or hand him the gun and was merely a bystander at the shooting. The court stated that "it is evident that appellant and Rodriguez are attempting to shift blame to one another." *Id.* at 637.

***9** Citing the rule 17.03 factors "which include the nature of the offense charged, the victim impact, the potential prejudice to the defendant, and the interests of justice," the *Santiago* court noted that the trial court "determined that, because both defendants were involved in the same events leading up to the shooting and the evidence would be the same, the jury would better understand each defendant's role by hearing all the evidence in one trial." *Id.* Additionally, the trial court gave specific instructions at the end of trial to lessen any risk of prejudice. The jury was instructed:
(1) to give separate and personal consideration to the case of each individual defendant;

(2) to evaluate the evidence with respect to each individual defendant leaving out of consideration any evidence admitted solely against the other defendant;

(3) that each defendant was entitled to have his case determined from evidence as to his own actions; and

(4) that finding one defendant guilty should not in any way affect the jury's verdict regarding the other defendant.

Id. at 637.

The postconviction court also weighed the interests of the victims and their families in having to suffer through two trials, finding that some of the witnesses were frightened and reluctant to testify even at one trial. *Id.* In balancing any potential prejudice to the defendants and the state's interests, the Santiago trial court concluded that there was no manifest necessity to sever and that no substantial prejudice existed to either defendant as a result of the joinder. The court of appeals found that "the joint trial gave the jury the best perspective on all of the evidence leading to the conviction" and that a jury could also reasonably

separate the evidence relating to appellant and to Rodriguez." *Id.* They therefore concluded that "the trial court properly used its discretion to order a joint trial." *Id.*

B. Powers/Christian/Christian Joinder

Two or more defendants jointly charged with a felony "may be tried jointly or separately, in the discretion of the court." Minn. R. Crim. P. 17.03, subd. 2. In making its determination on whether to order joinder or separate trials, the court shall consider the nature of the offense charged, the impact on the victim, the potential prejudice to the defendant, and the interests of justice. *Id.*

1. *Nature of the offense charged.*

The defendants in this case are all charged with multiple counts of first-degree and second-degree murder, including felony murder. A factor in determining whether to order joint trials over a defendant's objection is whether defendants acted in close concert such that a joint trial is needed to facilitate jury's comprehension and appreciation of each defendant's role. *State v. Stock*, 362 N.W.2d 351 (Minn. Ct. App. 1985).

The facts surrounding the murders and assault for which the defendants are to be tried do clearly revolve around a common plan or scheme where, according to the information in the file and before the court, the defendants acted "in concert" with one another to attempt a robbery which then "went bad" and resulted in gunplay. It seems quite likely that the facts to prove each defendant's guilt or innocence are the same (or at least come from the same series of events). Liability for crimes of another and aiding and abetting are at issue in the charges the defendants face. As such, a joint trial will help the fact-finder comprehend and appreciate each defendant's role or lack thereof in the robbery.

2. *Impact on the victim.*

As previously stated, defendants are charged with crimes for the murder of two people and the serious injury of a third. Needless to say, this case involves a very serious incident of violent crime. There would be some negative impact upon the surviving victim of the shooting by forcing him to testify at multiple separate trials. Additionally, other eyewitnesses to the shootings would be traumatized by being compelled to testify to the same facts on numerous occasions.

***10** 3. *Potential prejudice to the defendant.*

In determining whether codefendants have suffered substantial prejudice as a result of being tried jointly, the relevant inquiry is not simply whether defenses presented were different, but whether defenses were inconsistent, or whether defendants sought, through their chosen defenses, to shift blame to one another. *DeVerney*, 592 N.W.2d at 842. To show that joinder is prejudicial, a defendant must prove that he was denied a fair trial by showing irreconcilable defenses or that the jury could not separate the evidence relating to each defendant. *Santiago*, 617 N.W.2d at 636 (quoting *United States v. Shivers*, 66 F.3d 938, 940 (8th Cir. 1995)). None of the defendants has shown or identified any potentially antagonistic or inconsistent defenses to be asserted at trial. Regardless, "[m]utually antagonistic defenses are not prejudicial per se." *Santiago*, 617 N.W.2d at 636, (citing *Zafiro*, 506 U.S. at 539). In addition, the court may instruct the jury at the end of trial to lessen any risk of prejudice: "Even if a defendant might suffer prejudice from a joint trial, measures less drastic than severance, such as limiting jury instructions, often will be adequate to cure any risk of prejudice." *See Id.* The court also has the ability to address any potential prejudice that may arise at a joint trial with the power to sever defendants during trial "with the defendant's consent or upon a finding of manifest necessity, if the court determines severance is necessary to achieve a fair determination of the guilt or innocence of one or more of the defendants." Minn. R. Crim. P. 17.03, subd. 3(3).

4. *The Interests of justice.*

In *State v. Hathaway*, 379 N.W.2d 498 (Minn. 1985), the Minnesota Supreme Court, affirmed the decision to order a joint trial. *Hathaway* was decided before the rule and policy favoring separate trials was changed to the current rule and policy leaving joinder to the discretion of the trial court. One of the factors the trial court cited in ordering a joint trial was "the fact this would be a complex trial involving a large number of witnesses," and that "there may be one trial followed by a second one, and the prejudicial publicity which the state has characterized would fall out of the first trial, might influence the jurors on the second." Joinder in this case is in the best interests of judicial resources, if not justice itself (separate trials would drag on for a long time and potentially prejudice potential jurors through the publicity related to each trial). Separate trials of the defendants Would also involve some difficulty with the potential witnesses as many are foreign nationals and law enforcement personnel who would need to travel to Austin from the St. Paul BCA.

Defendant David Kenneth Christian argues that "it is absolutely essential" that he "retain the right to call these individuals (Vernon Neal Powers and Scott Perry Christian) as witnesses in his defense." (Letter brief in opposition to State's motion for joinder, p. 2.) This argument carries little weight insofar as the codefendants whom David Christian contends he must call in his defense have given no indication whatsoever that they intend to testify that "there was no involvement of David Christian in the planning or contemplation of the robbery of the other individuals at the hotel." Regardless, such an argument presumes that David Christian's codefendants will get on the stand and waive their fifth amendment right against self-incrimination in order to testify on Mr. Christian's behalf. Joining or severing the trials will have no particular effect upon the likelihood of their willingness to give exculpatory testimony on behalf of Mr. Christian. Should the trials be severed, each of the co-defendants would retain any 5th Amendment rights though the expiration of respective periods of appeal, which may be years in the future.

***11** Based upon a thorough consideration of the factors set out in Minn. R. Crim. P. 17.03, subd. 2, and the briefs and arguments of the parties, joinder of the trial of defendants Vernon Neal Powers, David Kenneth Christian, and Scott Perry Christian is appropriate and is so ordered.

III. WEINAND STATEMENTS

A. Background/Issues.

Defendant Weinand made numerous motions involving several issues at her Omnibus hearing on November 3, 2000. Defendant joined in the Motions of Defendants Scott Christian, Perry Christian, and Vernon Powers to dismiss the grand jury indictment (addressed above). Defendant Weinand also moved to suppress all or a part of statements given to law enforcement officers, stating issues as follows:

1. Whether the defendant effectively waived her 5th Amendment right with respect to her statement given to Special Agent Eugene Leatherman on July 1, 2000.

2. Whether the failure to record the entire statement of the defendant made on July 1, 2000 renders inadmissible that portion of the statement which *was* recorded.

3. Whether the defendant effectively waived her 5th Amendment rights with respect to her statement given to Special Agents Jim Bakos and Jeff Hansen on July 3, 2000.

4. Whether non-recorded statements, without benefit of *Miranda*, given to Austin police officer Curt Rude during transport of Defendant Weinand to Austin, are admissible.

B. Defendant's alleged waiver of 5th Amendment rights on July 1, 2000.

Defendant raises the issue of whether she effectively waived her 5th Amendment rights with respect to her statement (Omnibus Exhibit 2) given on July 1, 2000. Under the Fifth Amendment to the United States Constitution, no person may be compelled

to be a witness against oneself. Prior to custodial interrogation, the police must warn an individual of the Fifth Amendment right to remain silent and to have counsel present during the interrogation. *Miranda v. Arizona*, 384 U.S. 436, 467-73, 479, 86 S.Ct. 1602, 1624-27, 16 L.Ed.2d 694 (1966). No statement concerning an accused's connection with, or participation in, a crime adduced as the result of an interrogation of the accused while in police custody is admissible at a subsequent trial of the accused unless the state can demonstrate that prior to giving the statement the accused knowingly and intelligently waived this fifth amendment right. *Miranda v. Arizona*, 384 U.S. at 475, 86 S.Ct. at 1628. Likewise, before such a statement is admissible, the state must show that it was freely and voluntarily given. See *Haynes v. Washington*, 373 U.S. 503, 512-13, 83 S.Ct. 1336, 1342-43, 10 L.Ed.2d. 513 (1963); *State v. Campbell*, 367 N.W.2d 454, 458 (Minn. 1985); *State v. Kivimaki*, 345 N.W.2d 759, 762 (Minn. 1984); *State v. Linder*, 2668 N.W.2d 734, 735 (Minn. 1978).

At least since *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), it has been clear that custodial interrogation initiated by police after an accused has invoked his right to counsel violates an accused's fifth amendment right, and any statement or confession ensuing as the result of that interrogation may not be introduced in evidence at the trial of the accused. *State v. Robinson*, 427 N.W.2d 217, 222 (Minn. 1988). In *Edwards*, the court indicated the request for counsel must be clear and unequivocal. *Id.*, See *Edwards*, 451 U.S. at 484-85, 101 S.Ct. at 1884-85. When a suspect indicates by an equivocal or ambiguous statement, which is subject to a construction that the accused is requesting counsel, all further questioning must stop except that narrow questions designed to "clarify" the accused's true desires respecting counsel may continue. *Robinson*, 427 N.W2d at 223.

***12** A waiver of Miranda rights may be either express or implied. *Miranda*, 384 U.S. at 475, 86 S.Ct. at 1628; *State v. Merrill*, 274 N.W.2d 99 (Minn. 1978); *Matter of Welfare of M.A.*, 310 N.W.2d 699 (Minn. 1981); *State v. Smith*, 374 N.W.2d 520 (Minn. Ct. App. 1985). An explicit statement of waiver is not invariably necessary to support a finding that the defendant waived the right to remain silent or the right to counsel. *North Carolina v. Butler*, 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1977); *State v. Johnson*, 277 N.W.2d 346 (Minn. 1979); *State v. Howard*, 324 N.W.2d 216 (Minn. 1982), cert. denied459 U.S. 1172, 103 S.Ct. 818, 74 L.Ed.2d 1016 (1983).

Ordinarily, the state will be deemed to have met its burden of proving a knowing, voluntary, and intelligent waiver of Miranda rights if it shows that Miranda warnings were given and that the individual stated that he or she understood those rights and then gave a statement. *State v. Camacho*, 561 N.W.2d 160, 168 (Minn. 1997) (citing *State v. Linder*, 268 N.W.2d 734, 735 (Minn. 1978)). But if there is other evidence indicating that the waiver was not knowing, voluntary, and intelligent, the district court must make a subjective factual inquiry to determine whether, under the totality of the circumstances, the waiver was knowing, voluntary and intelligent. *Id.* When making its inquiry, the court may consider such factors as age, maturity, intelligence, education, experience, and ability to comprehend; the lack or adequacy of warnings; the length and legality of the detention; the nature of the interrogation; physical deprivations; and limits on the individual's access to counsel, friends, and others. *Id.* Courts may also consider other factors such as familiarity with the criminal system, physical and mental condition, and language barriers. *Id.* (citing Twenty-Fifth Annual Review of Criminal Procedure, 84 Geo. L.J. 641, 861-63 (1996), and cases cited therein).

On July 1, 2000, defendant Jenea Larae Nichole Weinand (hereinafter "Weinand") gave a tape-recorded statement to Special Agent Eugene Leatherman ("Leatherman") of the Minnesota Bureau of Criminal Apprehension and Sergeant Mark Kempe ("Kempe") of the St. Paul Police Department. The transcript of the July 1, 2000 interview clearly shows that Kempe read the Miranda rights to Weinand. (Omnibus Exhibit 2, p. 2) Kempe read the rights to Weinand from a St. Paul Police Department form in compliance with *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966). (Omnibus Exhibit 1) Weinand initialed each of her rights and signed the form indicating that (1) her rights had been read to her; (2) she had initialed each paragraph to show that she understood each of her rights; and (3) that she had received a copy of the form upon which her rights were printed and which she had initialed. *Id.* After her rights were read to her and she signed the form so indicating, Weinand asked Kempe and Leatherman the following question: "So are you supposed to be my attorneys?" (Omnibus Exhibit 2, p. 2) In response, Kempe and Leatherman informed Weinand that they were not her attorneys and that they were police officers. *Id.* At no time did Weinand ever state or indicate that she did not wish to speak with Kempe and Leatherman or that she wished to speak with

an attorney. Weinand then gave a statement to Kempe and Leatherman which gave details of her involvement in the crimes for which she is now charged. (Omnibus Exhibit 2).

***13** During the July 1, 2000 interview Weinand clearly and unequivocally indicated that she understood her Miranda rights. (Omnibus Exhibit 1, 2) At the time, Weinand already had some experience with the criminal justice system, as indicated by her statements in the transcript. (Omnibus Exhibit 2, p. 15-16) Weinand makes no claim to have been suffering from lack of food or sleep during the interview. In addition, Kempe' testified that Weinand was not suffering from any extreme lack of food or sleep during the interview nor was she physically restrained by handcuffs or shackles. Kempe also testified that no promises or threats were made to Weinand. Weinand makes no such claim, and has not demonstrated herself to be of anything less than at least average general maturity and intelligence; she has completed her GED requirements through Shakopee High School. (Omnibus Exhibit 2, pp. 1-2.)

Waiver will be determined by the "totality of the circumstances." *People v. Hill*, 39 Ill.2d 125, 233 N.E.2d 367 (1968), cert. denied392 U.S. 936, 88 S.Ct. 2305, 20 L.Ed.2d 1394; *State v. Reilly*, 269 N.W.2d 343 (Minn. 1978); *State v. Linder*, 268 N.W.2d 734 (Minn. 1978); *State v. Andrews*, 388 N.W.2d 723 (Minn. 1986); *State v. Ture*, 353 N.W.2d 502 (Minn. 1984); *Matter of L.R.B.*, 373 N.W.2d 334 (Minn. Ct. App. 1985); *State v. Campbell*, 367 N.W.2d 454 (Minn. 1985). The state need only prove a voluntary waiver by a preponderance of the evidence. *State v. Buchanan*, 431 N.W.2d 542 (Minn. 1988) (citing *Colorado v. Connelly*, 479 U.S. 157, 168, 107 S.Ct. 515, 522, 93 L.Ed.2d 473 (1986)).

The totality of circumstances in this case indicates as follows: (1) before the July 1, 2000 interview started, full Miranda warnings were given to and understood by the defendant and the defendant thereafter elected to give a statement to police; (2) the defendant is at least of average intelligence and maturity, and was not suffering from any severe lack of sleep of food at the time of the interview; (3) officers Kempe and Leatherman made no threats or promises to the defendant; (4) at no point during the July 1, 2000 interview did the defendant ever clearly or unequivocally assert her right against self-incrimination or her right to counsel; (5) at no point during the July 1, 2000 interview did the defendant make any indication that she wished to speak with an attorney. Under the totality of circumstances, the court therefore finds that the State of Minnesota has proven by a preponderance of the evidence that defendant Weinand made a knowing, voluntary and intelligent waiver of her Miranda rights prior to her statement of July 1, 2000.

C. Admissibility of Defendant's statement of July 1, 2000 in light of *State v. Scales*, 518 N.W.2d 587 (Minn. 1994).

Defendant raises the issue of whether the failure to record the entire statement of the defendant made on July 1, 2000 renders inadmissible that portion of the statement that *was* recorded. In the landmark case of *State v. Scales*, 518 N.W.2d 587 (Minn. 1994), the Supreme Court of Minnesota created a "recording requirement" in an exercise of its "supervisory power to insure the fair administration of justice." Specifically, the *Scales* court held:

...all custodial interrogation including any information about rights, any waiver of those rights, and all questioning shall be electronically recorded where feasible and must be recorded when questioning occurs at a place of detention. If law enforcement officers fail to comply with this recording requirement, any statements the suspect makes in response to the interrogation may be suppressed at trial, the parameters of the exclusionary rule applied to evidence of statements obtained in violation of these requirements must be decided on a case-by-case basis. Following the approach recommended by the drafters of the Model Code of Pre-Arraignment Procedure, suppression will be required of any statements obtained from the defendant in violation of the recording requirement if the violation is deemed "substantial." This determination is to be made by the trial court after considering all relevant circumstances bearing on substantiality, including those set forth in § 150.3(2) and (3) of the Model Code of Pre-Arraignment Procedure. If the court finds a violation not to be substantial, it shall set forth its reason for such finding.

***14** *Scales*, 518 N.W.2d at 592.

Section 150.3(2) and (3) of the Model Code of Pre-Arraignment Procedure provide as follows:

(2) Violations deemed substantial. A violation shall in all cases be deemed substantial if one or more of the following paragraphs is applicable:

(a) The violation was gross, willful and prejudicial to the accused. A violation shall be deemed willful regardless of the good faith of the individual officer if it appears to be part of the practice of the law enforcement agency or was authorized by a high authority within it.

(b) The violation was of a kind likely to lead accused persons to misunderstand their position or legal rights and to have influenced the accused's decision to make the statement.

(c) The violation created a significant risk that an incriminating statement may have been untrue.

(3) Circumstances deemed to be considered in determining substantiality. In determining whether a violation not covered by Subsection (2) is substantial, the court shall consider all the circumstances including:

(a) the extent of deviation from lawful conduct;

(b) the extent to which the violation was willful;

(c) the extent to which the violation was likely to have led the defendant to misunderstand his position or his legal rights;

(d) the extent to which exclusion will tend to prevent violations of this Code;

(e) whether there is a generally effective system of administrative or other sanctions which makes it less important that exclusion be used to deter such violations;

(f) the extent to which the violation is likely to have influenced the defendant's decision to make the statement;

(g) the extent to which the violation prejudiced the defendant's ability to support his motion, or to defend himself in the proceeding in which the statement is sought to be offered in evidence against him.

Model Code of Pre-Arraignment Procedure, Section 150.3(2) and (3).

Insofar as part of the interview of defendant Weinand of July 1, 2000 was not recorded, the recording requirement as set out in *Scales* was violated. However, the question remains as to the substantiality of the violation and whether the exclusionary rule shall apply to the situation.

The *Scales* court "imposed the recording requirement in an effort to avoid factual disputes underlying an accused's claims that the police violated his constitutional rights." *State v. Williams*, 535 N.W.2d 277, 289 (Minn. 1995) (citing Scales, 518 N.W.2d at 592). In this case it is clear that the failure of the recording equipment did not lead the defendant to misunderstand her position or her legal rights because the defendant's waiver of her rights was recorded and has been proven to the court by the preponderance of the evidence.

The case of *State v. Miller*, 573 N.W.2d 661 (Minn. 1998) is similar to the fact situation in this case. In *Miller*, the police failed to record the final 45 minutes of an interrogation because the officer misunderstood the manner in which the recording equipment was operated. *Id.* at 668. Citing *Williams* for the proposition that the rationale for the recording requirement "was to prevent factual disputes underlying an accused's claims that the police violated his constitutional rights," (See *Williams*, 535 N.W.2d at 289) the *Miller* court observed that the portion of the interrogation which was recorded did capture the defendant's rights

being read and the defendant stating several times that he understood his rights. *Miller*, 573 N.W.2d at 674-5. Additionally, the defendant in *Williams* made no claim that the unrecorded gap contained any exculpatory evidence. *Id.* at 675. There was no evidence that the police purposefully failed to record part of the interview. *Id.* Also of note with regard to *Williams* is the fact that riot only was the trial court's ruling to allow the recorded portion of the interrogation into evidence upheld, but testimony as to the unrecorded portion by the officer who conducted the interview was also ruled to have been properly admitted by the trial court. *Id.* at 674.

***15** In *State v. Critt*, 554 N.W.2d 93 (Minn. Ct. App. 1996), rev. denied (Minn. Nov. 20, 1996), the court of appeals found that a "gap" in the recording of defendant's statement did not violate the *Scales* requirement because it did not significantly deprive the trial court of an accurate record and the "gap" in the tape was not done intentionally.

In this case, the testimony of Sergeant Kempe indicates that he started the recording equipment before the interview of defendant Weinand on July 1, 2000 and that he fully expected that the normal operation of the recording equipment would result in a full recording of the interview. The evidence before the court indicates that it is the standard practice of the St. Paul Police Department to record all custodial interviews. The recording equipment normally operates automatically (switches from one tape to another) after the operator first turns on the equipment. There is no dispute as to the fact that the great majority of the interview was indeed recorded (only the last few minutes were not recorded). There is no evidence that the failure of the recording equipment was the result of any willful act on the part of the police. Kempe testified that all custodial interviews are recorded and that in his experience, the recording equipment has always worked properly (the equipment the failure of the equipment to switch from one tape to the other seems to be an anomalous mechanical failure). Defendant makes no claim (and the evidence does not indicate) that the few unrecorded minutes of the interview contained exculpatory evidence. Considering all relevant circumstances, the *Scales* violation on July 1, 2000 was not substantial.

Defendant moves the court to suppress the *recorded* portion of the July 1, 2000 interview based on the *Scales* violation, but cites no authority under which the court could make such a ruling. The court has likewise failed to find any such authority. In light of all relevant circumstances and in particular: (1) that the recorded portion of the July 1, 2000 interview did clearly capture defendant Weinand's voluntary, knowing, and intelligent waiver of her rights at the beginning of the interview; (2) the anomalous, unintentional failure of the recording equipment; (3) the unrecorded portion of the interview is at the end of the interview and comprises a short time period in relation to the recorded portion; and (4) the court's resulting determination that the *Scales* violation at issue was not substantial and will not invoke the application of the exclusionary rule; the defendant's motion to suppress the portion of the July 1, 2000 interview which was recorded is denied.

D. Defendant's alleged waiver of 5th Amendment rights on July 3, 2000.

On July 3, 2000, Special Agents Jeffrey Hansen ("Hansen") and James Bakos ("Bakos") of the Minnesota Bureau of Criminal Apprehension executed a search warrant on the body of the defendant Weinand for saliva samples for use in DNA analysis and conducted an interview with Weinand. As discussed above, Weinand was previously given her Miranda rights and signed a Miranda warning form before being interviewed on July 1, 2000 (Omnibus Exhibit 1, 2). As the interview of July 3, 2000 started, Bakos asked Weinand if she remembered being given her rights at the July 1, 2000 interview. (Omnibus Exhibit 3, p. 6-7). Weinand's statements in the interview indicate that she did remember the interview and remembered signing the Miranda warning form. (Omnibus Exhibit 3, p. 6-8). Regardless, Bakos did read Weinand her Miranda rights at the beginning of the July 3, 200 interview. (Omnibus Exhibit 3, p. 7-8). When Bakos then asked Weinand if she understood her rights, Weinand stated "yes." (Omnibus Exhibit 3, p. 8).

***16** Ordinarily, the state will be deemed to have met its burden of proving a knowing, voluntary, and intelligent waiver of Miranda rights if it shows that Miranda warnings were given and that the individual stated that he or she understood those rights and then gave a statement. *State v. Camacho*, 561 N.W.2d 160, 168 (Minn. 1997) (citing *State v. Linder*, 268 N.W.2d 734, 735 (Minn. 1978)). Waiver will be determined by the "totality of the circumstances." *People v. Hill*, 39 Ill.2d 125, 233 N.E.2d 367 (1968), cert. denied392 U.S. 936, 88 S.Ct. 2305, 20 L.Ed.2d 1394; *State v. Reilly*, 269 N.W.2d 343 (Minn. 1978); *State v. Linder*,

268 N.W.2d 734 (Minn. 1978); *State v. Andrews*, 388 N.W.2d 723 (Minn. 1986); *State v. Ture*, 353 N.W.2d 502 (Minn. 1984); *Matter of L.R.B.*, 373 N.W.2d 334 (Minn. Ct. App. 1985); *State v. Campbell*, 367 N.W.2d 454 (Minn. 1985). The state need only prove a voluntary waiver by a preponderance of the evidence. *State v. Buchanan*, 431 N.W.2d 542 (Minn. 1988) (citing *Colorado v. Connelly*, 479 U.S. 157, 168, 107 S.Ct. 515, 522, 93 L.Ed.2d 473 (1986)).

After Bakos advised Weinand of her rights on July 3, 2000, Weinand expressed some doubt about answering the questions of Bakos and Hansen in stating "I don't know about answering any questions, but I'll listen to you." (Omnibus Exhibit 3, p. 8). Weinand then asked if her responses to the questions were going to be used in court and was informed that they would be so used. (Omnibus Exhibit 3, p. 9). Weinand thereafter continued to respond to the questions asked of her. (Omnibus Exhibit 3). Weinand did not assert her right against self-incrimination or her right to counsel. There is no evidence of any promises or threats made to defendant or that the defendant was suffering from lack of sleep or food. The totality of the circumstances indicates that defendant Weinand was clearly informed of her rights, made a knowing, voluntary, and intelligent waiver of her rights, and provided a statement to police. As such, the Court finds that the State of Minnesota has, by a preponderance of the evidence, proven that defendant Weinand made a knowing, voluntary and intelligent waiver of her Miranda rights prior to her statement of July 3, 2000.

E. Admissibility of Statements of Defendant given by Defendant to Officer Curt Rude during transit to Austin.

Statements made to Officer Curt Rude were made during an early morning transport of the Defendant from incarceration in the Metro area to the Austin jail. The status of Defendant as "in custody" is not in question. Officer Rude candidly admitted that the Defendant was not given a *Miranda* warning, and that his sole purpose in engaging her in conversation was to get her to "talk" in hopes that she might lead law enforcement to the firearms involved. The conversation was not recorded. Both *Miranda* and *Scales* were violated, and the State concedes that the statements are inadmissible. The Court ruled from the bench that any of these statements or fruits thereof, are inadmissible, and reiterates that ruling here.

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2017 WL 8780999 (Minn.Dist.Ct.) (Trial Order)
District Court of Minnesota.
Fourth Judicial District
Hennepin County

STATE of Minnesota, Plaintiff,

v.

Asleys ACOSTA, Wilbur Armando Perez-Soca, Roilan Garriga, Defendants.

Nos. 27CR1629742, 27-CR-16-29743, 27-CR-16-29752.
May 2, 2017.

Order Granting Motion for Joinder

Lisa K. Janzen, Judge.

INTRODUCTION

1** This matter came before the Honorable Lisa K. Janzen on the State's *Motion for Joinder.* A hearing on this motion was held on March 15, 2017, in the District Court of Hennepin County. The court has reviewed the evidence and arguments of the parties, and now finds that the motion shall be ***granted.

APPEARANCES

The State of Minnesota is represented by Morgan Kunz, *Assistant Hennepin County Attorney.* The Defendant, Asleys Acosta, is represented by Melvin Welch. The Defendant, Wilbur Armando Perez-Soca, is represented by Catherine Turner. The Defendant, Roilan Garriga, is represented by Arthur Martinez.

CASES ON CONSIDERATION FOR JOINDER

On November 16, 2016, the State filed complaints against Asleys Acosta (27-CR-16-29743), Wilbur Armando Perez-Soca (27-CR-16-29752), and Roilan Garriga (27-CR-16-29742). Each complaint leveled the same five charges against each defendant:
1. Identity Theft-Transfer/Possess/Uses Identity of Other Person, in violation of Minn. Stat. Ann. § 609.527.2;

2. Identity Theft-Transfer/Possess/Uses Identity of Other Person, in violation of Minn. Stat. Ann. § 609.527.2;

3. Identity Theft-Possess scanning device or reencoder with intent to commit, aid or abet unlawful activity, in violation of Minn. Stat. Ann. § 609.527.5b(b);

4. Identity Theft-Possess scanning device or reencoder with intent to commit, aid or abet unlawful activity, in violation of Minn. Stat. Ann. § 609.527.5b(b);

5. Possession of burglary or theft tools in violation of Minn. Stat. Ann. § 609.59. On February 6, 2017, the State moved to join each defendant's cases.

FINDINGS OF FACT

At 2:48 in the morning of November 12, 2016, police received a 911 call that several men were tampering with gas pumps at a service station in Minneapolis. When officers arrived, they found a white minivan parked by the pumps with defendants Acosta, Perez-Soca, and Garriga inside. Officers reported that the men started behaving in a strange manner after they noticed the police presence.

Police began investigating the area and saw that the inside of the defendants' van contained a computer, five cell phones, and a small yellow drill, all in plain view from the outside. The officers spoke with a witness who reported that the three defendants had just used a small tool to open one of the nearby gas pumps. The witness also reported that once the pump was open, the men began manipulating the machinery inside.

Hearing this, the officers tested the defendants' small yellow drill on one of die gas pumps. The drill successfully opened the pump door, exposing its machinery. Police then inspected the rest of the station and found two credit card skimming devices on five of the pumps at the station. All three defendants were arrested.

In their *post-Miranda* interviews, Defendants Perez-Soca and Roilan made voluntary statements, but Defendant Asleys did not. Perez-Soca revealed that he rented the white minivan in Florida and drove all three defendants to Minnesota. He also revealed that die three men were staying together in a nearby hotel. Defendant Roilan told officers that he was asleep the entire ride from Florida to Minnesota and was unaware of any criminal activity.

CONCLUSIONS OF LAW

***2** When two or more defendants are charged with the same offense, the trial court may allow a joint trial. MINN. R. CRIM. P. 17.03 sub. 2. However, the trial court must consider the following four factors when making its decision:

1. The nature of the offense charged;

2. The impact on the victim;

3. The potential prejudice to the defendant; and

4. The interests of justice.

MINN. R. CRIM. P. 17.03 subd. 2. The court will discuss each factor below.

1. The nature of the offense charged favors joinder

"The nature of the offense charged favors joinder when the overwhelming majority of the evidence presented is admissible against both defendants, and substantial evidence is presented that codefendants worked in close concert with one another." *State v. Johnson*, 811 N.W.2d 136, 142 (Minn. App. 2012) (citing *State v. Martin*, 773 N.W.2d 89, 99-100 (Minn. 2009)).

Joinder is appropriate in this case. All three defendants are charged with the same five criminal counts originating from the same underlying facts. All three defendants are alleged to have aided and conspired with each to install credit-skimming devices on these gas station pumps and use the information they obtained for fraudulent purposes. According to the State's allegations, all three defendants are seen on video acting in concert to install these skimmers. And all three defendants allegedly drove together from Florida to Minnesota, stayed in the same motel, and used the stolen credit card numbers together to buy merchandise.

The State claims that it "expects to present nearly identical evidence against all three Defendants." (*State's Brf.* at 5). Based on the alleged underlying facts, the presence of the same counts charged, and the implication that the defendants worked in close concert with one another, the court believes that the nature of the offenses favors joinder.

2. Separate trials would not necessarily cause potential trauma to the victim and eyewitnesses

"Potential trauma to either the victim or an eyewitness to a crime is a factor that weighs in favor of joinder." *Martin*, 773 N.W.2d at 100. Here, the State identifies eleven possible victims who are prepared to testify. Additionally, there are a variety of eyewitnesses that the State intends to call at trial in addition to these witnesses. Without a joint trial, the State argues, these victims and witnesses would be burdened with providing the same testimony in three separate cases.

However, Minnesota's appellate courts favor a finding of "trauma" on the victims and witnesses in this analysis. For instance, in *State v. Martin*, the Minnesota Supreme Court concluded that forcing the family members of a murder victim, and a 10-year-old who witnessed the murder, to testify in multiple trials would be traumatic, favoring joinder under the "potential trauma" analysis. *Id.* at 100. Similarly, in *State v. Powers*, the Supreme Court held that the survivors of a shooting in a hotel room, including a 14-year-old boy, would be traumatized by testifying in multiple trials; this finding also favored joinder. 654 N.W.2d at 675. And in *State v. Blanche*, the Supreme Court found trauma and upheld joinder where "two of the witnesses were young children who saw the shooting and watched their young friend and cousin die." 696 N.W.2d 351, 371 (Minn. 2005).

***3** By contrast, the Court of Appeals declined to say whether an aggravated robbery victim's case either favored or disfavored joinder in *State v. Johnson*, 811 N.W.2d 136, 143 (Minn. App. 2012). In that case, the trial court noted that there were "no indications that [the victim] is a particularly vulnerable victim," continuing, "I'm sure [the robbery] was upsetting, but I don't know that it was particularly. And it was traumatic for the victim, but I don't know that he'd appreciate reliving it at least two times, two separate trials." *Id.* On appeal, the Court of Appeals held that it would not be "cavalier" about "the lack of any impact on an aggravated-robbery victim [...] being required to testify in separate trials," but concluded that "this factor neither favored nor disfavored joinder." *Id.*

In the cases before this court, there is no indication that asking the victims and eyewitnesses to testify at multiple trials would be traumatic. While this would certainly be inconvenient, Minnesota precedent favors a heightened finding of "trauma" for this factor to tip the scales in favor of joinder. For this reason, the court concludes that this factor neither favors nor disfavors joinder.

3. The potential prejudice to the defendant

"Joinder is not appropriate when there would be substantial prejudice to the defendant, which can be shown by demonstrating that codefendants presented antagonistic defenses." *State v. Johnson*, 811 N.W.2d 136, 143 (Minn. App. 2012). "Antagonistic defenses occur when the defenses are inconsistent, and the jury is forced to choose between the defense theories advocated by the defendants." *Id.* Substantial prejudice "is not simply whether the defenses presented were different, but whether the defenses were inconsistent, or whether the defendants sought, through their chosen defenses, to shift blame to one another." *State v. DeVerney*, 592 N.W.2d 837, 842 (Minn. 1999).

A classic antagonistic defense can be seen in *Santiago v. State*, 644 N.W.2d 425 (Minn. 2002). *Santiago* was a murder case where the two defendants "pointed the finger at each other" in their defense strategies. *Id.* at 446. The result was that each defendant "sought to shift the blame for the shooting to the other." *Id.* The Minnesota Supreme Court held that this was a "classic example[] of antagonistic defenses," that warranted severance into two trials. *Id.*

The current cases do not present the type of antagonistic defense risk seen in *Santiago, supra.* As of this order's date, no defendant has noticed an affirmative defense. Additionally, the cases themselves do not involve a centralized act, such as the firing of a weapon in *Santiago.* Instead, the three cases before us are an accretion of multiple alleged acts of identity theft, undertaken

in association with one other to fraudulently purchase goods and services. There is no indication that the defendants intend to present antagonistic defenses, and no showing of substantial prejudice. For these reasons, this factor weighs in favor of joinder.

4. The interests of justice.

The last factor requires the court to weigh "the interests of justice." This factor cannot be "solely related to economy of time or expense," but it does require "that the state, representing the collective interest of the people, be afforded a fair chance to present its case." *State v. Higgins*, 376 N.W.2d 747, 748 (Minn. Ct. App. 1985) (quoting comment; *State v. Strimling* 265 N.W.2d 423, 431-32 (Minn. 1978)).

In *State v. Strimling* Minnesota's Supreme Court confronted alleged misappropriations at several nursing home facilities by multiple defendants. 265 N.W.2d 423 (Minn. 1978). The Court ultimately upheld joinder of these defendants, writing that,
[I]n a prosecution for a "white-collar" crime where the defendants have acted in concert to spin a complex web of legal and illegal entrepreneurial activity, we think justice requires that the members of the jury be confronted with both participants in order to facilitate their fullest comprehension of the alleged wrongdoing and the accompanying proofs and defenses. We conclude, therefore, that a joint trial was not only allowable, but also well-suited to the unusual demands of this prosecution.

***4** *Id.* at 432. More recent Minnesota cases have interpreted *Strimling's* holding as favoring joinder in the "interests of justice" under the following circumstances:

i. Where two or more defendants act in concert with one another,[1]

1 See *State v. DeVerney*, 592 N.W.2d 837, 842 (Minn. 1999); *State v. Greenleaf*, 591 N.W.2d 488, 499 (Minn. 1999).

ii. When the defendants' overall endeavor paints a "complex" and "intricate" crime,[2] and

2 See *Garrido v. State*, 2000 WL 1869579, at *3 (Minn. Ct. App. Dec. 26, 2000).

iii. Generally, in complex, white-collar cases.[3]

3 See *State v. Eaton*, 292 N.W.2d 260, 265 (Minn. 1980).

Weighing this guidance, this court concludes that the interests of justice favor joinder in these cases. All three cases involve multiple defendants acting in concert with each other to carry out a complex and intricate white-collar crime. The State identifies eleven potential victims of these crimes and overlapping eyewitnesses who are prepared to testify. It seems to the court that joining these defendants affords the State a "fair chance to present its case." *Higgins, supra* at 748.

For all the reasons discussed in this order, the court believes that joinder is appropriate in these cases.

IT IS HEREBY ORDERED:

The State's *Motion for Joinder* is **GRANTED.**

Date: May 2, 2017.

BY THE COURT:

<<signature>>

Lisa K. Janzen

Judge of District Court

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2016 WL 8711385 (Minn.Dist.Ct.) (Trial Order)
District Court of Minnesota.
Fourth Judicial District
Hennepin County

STATE of Minnesota, Plaintiff,

v.

Albert MCINTOSH, Michelle Koester, Defendants.

No. 27CR1534795.
July 7, 2016.

Order Granting Joinder Motion

Daniel H. Mabley, Judge.

*1 The above-entitled matter came duly on June 27, 2016, before Judge Daniel H. Mabley pursuant to the State's Motion for Joinder of Defendants.

Therese Galatowitsch and Peter Mason, Assistant Hennepin County Attorneys, appeared in person and submitted a written memorandum on behalf of the Plaintiff, the State of Minnesota.

Emmett Donnelly and Shauna Kieffer, Assistant Hennepin County Public Defenders, appeared on behalf of defendant, Albert Mcintosh.

Nancy Laskaris and Keshini Ratnayake, Assistant Hennepin County Public Defenders, appeared in person and submitted a written memorandum on behalf of defendant, Michelle Koester.

Based upon all the files, records, arguments of counsel, and the Court being fully advised in the premises, the Court makes the following:

STATEMENT OF FACTS

1. According to the criminal complaints filed by the Hennepin County Attorney's Office, on October 18, 2015, Defendant McIntosh and Defendant Koester went to a home in St. Paul. Defendant Koester drove Defendant McIntosh in her black Chevrolet Suburban. Defendant Koester and Defendant McIntosh were accompanied by Alvin Bell and Isiah Harper in a stolen silver Toyota 4Runner.

2. Around 8:16 P.M., the same vehicles, along with Defendant McIntosh, Defendant Koester, Bell, and Harper, were captured on a surveillance video at a Holiday Gas station in Minneapolis.

3. At approximately 9:18 P.M., Minneapolis police were dispatched to 2652 Bloomington Avenue South on a report of a robbery at gunpoint Victim A was approached by three black males wearing hoods. Victim A was held at gunpoint by Defendant McIntosh while Harper and Bell searched Victim A's pockets. Victim A had his white Chevrolet Impala, wallet, cash, bank card, ID card, and phone stolen.

4. At approximately 9:22 P.M., the black Chevrolet Suburban, stolen silver Toyota 4Runner, and stolen white Chevrolet Impala, as well as Defendant McIntosh, Defendant Koester, Bell, and Harper, were captured on video at a Super America gas station in Minneapolis. The white Chevrolet Impala was abandoned near the Super America.

5. At approximately 10:00 P.M., Minneapolis police were dispatched to 3701 1st Avenue South on a call of shots fired. Victim B was pronounced dead at the Hennepin County Medical Center of multiple gunshot wounds. Officers recovered four 9mm cartridge casings which matched a homicide scene in St. Paul. Witnesses described three black males matching the descriptions of Bell, Defendant McIntosh, and Harper.

6. At approximately 11:17 P.M., Minneapolis police were dispatched to 3022 19th Avenue South on a report of a home invasion burglary. Victim C, his wife and four children, reported that they were home when three black males crashed through the door of their house, demanded property, and brandished a short-barreled gun and a hand gun. These individuals matched the descriptions of Bell, Defendant McIntosh, and Harper. These individuals took several items, a wallet, cash, and a safe containing the family members' identification and credit cards.

*2 7. On October 19, 2015, at approximately 12:30 A.M., Bell, Defendant Koester, Defendant McIntosh, and Harper were captured on surveillance at a Walmart in Brooklyn Center. They were observed using a victim's credit card to purchase an X-Box.

8. At approximately 1:40 A.M., Minneapolis police responded to a Shot Spotter report of shots fired in the area of 8th Avenue North and Penn Avenue. Responding officers recovered the stolen silver Toyota 4Runner from that location. The vehicle had several bullet holes in it and police recovered six shell casings from the scene. Those shell casings matched the gun used in the two previous homicides.

9. On October 20, 2015. a search warrant was executed at Defendant Koester's home. Officers recovered stolen items from Victim A, Victim C and his family, and a receipt for the X-Box purchased with Victim C's credit card.

10. In a statement to police, Harper said that he, Defendant McIntosh, Bell, and Defendant Koester met up to perform robberies. Harper implicated Defendant McIntosh, Bell, and Defendant Koester in the crimes against Victim A, Victim B, and Victim C. Harper stated that Defendant McIntosh killed Victim B and fired shots at Bell and Harper, hitting the stolen Toyota 4Rurmer.

11. On December 11, 2015, Defendant McIntosh, Bell, Defendant Koester, and Harper were charged with aiding and abetting two counts of Burglary in the First Degree, one count of Burglary in the Second Degree, one count of Aggravated Robbery in the First Degree, and one count of Murder in the Second Degree.

12. On April 4, 2016, Harper pled guilty to Murder in the Second Degree pursuant to Minn. Stat. § 609.19, subd. 2(1). On May 10, 2016, Bell pled guilty to Aggravated Robbery in the First Degree pursuant to Minn. Stat § 609.245, subd. 1 and Murder in the Second Degree pursuant to Minn. Stat. § 609.19, subd. 2(1).

13. At the motion hearing and in the tiled memorandum, Defendant Koester states that there is no evidence she participated in any of the robberies, the shooting, or used any of the stolen credit cards. Defendant Koester provided a transcript from an interview with S.H. who told police that she was the driver of Defendant Koester's vehicle and that Defendant Koester never left the vehicle during any of the crimes that were committed. Defendant Koester argues that her role in the crimes was not identical to Defendant McIntosh and that her defense is antagonistic to Defendant McIntosh.

14. Defendant McIntosh argued at the motion hearing that the defenses of Defendant McIntosh and Defendant Koester are antagonistic because both parties allege the other's culpability.

CONCLUSIONS OF LAW

1. The Minnesota Rules of Criminal Procedure provide that:
When two or more defendants are jointly charged with a felony, they may be tried separately or jointly in the discretion of the court. In making its determination on whether to order joinder or separate trials, the court shall consider:

(1) The nature of the offense charged;

(2) The impact on the victim;

(3) The potential prejudice to the defendant; and

(4) The interests of justice.

Minn. R. Crim. P. 17.03, subd. 2(1).

Nature of the Offense Charged

2. Defendants may be joined "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense." Minn. Stat. § 631.035, subd. 1. Joinder is appropriate when the nature of the alleged offenses is such that the State claims codefendants have acted in close concert with each other. *State v. DeVerney*, 592 N.W.2d 837, 842 (Minn. 1999). A related factor is whether the evidence presented at trial will be admissible against all defendants. *State v. Blanche*, 696 N.W.2d 351, 371 (Minn. 2005).

***3** 3. Here, it is alleged that Defendant Koester acted in close concert with Defendant McIntosh. According to the State, Defendant McIntosh rode with Defendant Koester in her vehicle to the robbery of Victim A. Defendant Koester drove her vehicle with Defendant McIntosh to a Super America gas station where Defendant McIntosh and Bell used Victim A's credit cards. Defendant McIntosh left in Defendant Koester's vehicle to the next location where Defendant McIntosh shot and killed Victim B. Defendant Koester, Defendant McIntosh, Bell, and Harper all traveled to the residence of Victim C where Defendant McIntosh, Bell, and Harper robbed the family at gun point. Following the finally burglary, Defendant Koester, Defendant McIntosh, Harper, and Bell all went to the Walmart where they used the stolen credit cards. Stolen property was then recovered from Defendant Koester's residence.

4. Both defendants are charged identically. The evidence admissible at trial would be the same against either Defendant Koester or Defendant McIntosh. The facts alleged involve four individuals working closely to complete a series of actions that resulted in burglary, robbery, and murder. The nature of the offense charged favors joinder.

Impact on the Victims

5. The main concern with regard to impact on the victims is the potential trauma multiple trials would cause the victims. *State v. Martin*, 773 N.W.2d 89, 100 (Minn. 2009). "[W]here [...] eyewitnesses were vulnerable and could be traumatized by having to testify at several trials, a court may consider the potential trauma to the eyewitness." *Blanche*, 696 N.W.2d at 371.

6. Here, Victim A, Victim B's widow, Victim C, and Victim C's family would suffer additional trauma if they were required to testify at two separate trials. Victim A was the victim of an armed robbery where he was held at gunpoint. Victim B's widow would provide testimony about her recently murdered husband. Victim C was burglarized by forced entry into his house, while

the intruders brandished guns, which contained his wife, teenage daughter, and three minor children. Requiring these parties to testify at multiple trials would result in additional trauma to the victims. This factor favors joinder.

Prejudice to the Defendants

7. When assessing whether joinder is prejudicial, Minnesota courts require more than potential prejudice; "substantial prejudice is not simply whether the defenses presented were different, but whether the defenses were inconsistent, or whether the defendants sought their chosen defenses to shift blame to another." *De Verney*, 592 N.W.2d at 842. Further, joinder is not proper when the defendants allege antagonistic defenses. *State v. Martin*, 733 N.W.2d 89, 100 (Minn. 2009). "Antagonistic defenses occur when the defenses are inconsistent, and the jury is forced to choose between the defense theories advocated by the defendants." *Id.* (internal citations omitted).

8. Both defendants argue that joinder would be improper because they are relying on antagonistic defenses. Defendant McIntosh's defense is innocence. Defendant McIntosh argues that this is antagonistic because Defendant Koester will try and shift the blame to him. Defendant Koester's defense is that she was not involved with the crimes.

9. The defenses articulated by Defendant Koester and Defendant McIntosh are essentially the same. Defendant Koester is stating that she is innocent because she was not involved with the crimes. Defendant McIntosh's defense is that he is also innocent. In this instance, the jury would not be asked to choose between the theories put forth by Defendant McIntosh or Defendant Koester. The jury could find that both defendants' theories are accurate. At this time, Defendant Koester and Defendant McIntosh are not presenting antagonistic defenses. Should antagonistic defenses arise during trial, Defendants Koester and McIntosh can request severance.

*4 10. Prejudice to the defendants is limited and therefore favors joinder.

Interests of Justice

11. With regard to the interests of justice, courts should consider judicial economy and whether multiple trials would cause undue delay. *State v. Powers*, 654 N.W.2d 667, 675 (Minn. 2003). Here, joinder would prevent undue delay caused by calling the same witnesses and entering the same evidence in three separate trials. The interests of justice favor joinder.

IT IS HEREBY ORDERED

1. The State's Motion for Joinder of Defendants is **GRANTED.**

2. That Defendant Michelle Koester's case is assigned to Judge Quaintance.

3. That the parties shall contact Judge Quaintance's chambers to schedule a future hearing for this matter.

Date: July 7, 2016

BY THE COURT:

<<signature>>

Daniel H. Mabley

Judge of District Court

End of Document

2013 WL 9792447 (Minn.Dist.Ct.) (Trial Order)
District Court of Minnesota.
Fourth Judicial District
Hennepin County

State of MINNESOTA,

v.

Virginia Marie CARLSON, et al.

No. 27CR1129606.
August 1, 2013.

Findings of Fact, Conclusions of Law, Order & Memorandum

William R. Howard, Judge.

*1 The above-entitled matter came before the Honorable William R. Howard, Judge of District Court, on the State's Motion for Joinder. The motion was submitted on the written arguments only. The Defendant was represented by Albert Goins, Hennepin County Public Defender. The State was represented by Assistant Hennepin County Attorney Benedict J. Schweigert. Based on the submissions of the parties, the Court now makes the following:

FINDINGS OF FACT

1. On September 22, 2011, the State charged Defendants Philip Lee Carlson and Virginia Marie Carlson (Defendants) each with four felony counts of Theft by Swindle over $35,000 under Minn. Stat. § 609.52, Subd. 2(4), Subd. 3(1), Subd. 3(5); § 609.05, and one count of Attempted Theft by Swindle over $35,000 under Minn. Stat. § 609.52, Subd. 2(4), Subd. 3(1) Subd. 3 (5); § 609.05; § 609.17. Both complaints are identical.

2. Defendants owned and operated a general contracting company named Interspace West Inc. (Interspace). The State alleges that the Defendants committed the charged criminal conduct through their involvement in a real estate project known as Amber Woods. First Commercial Bank of Bloomington, Minnesota (First Commercial) authorized loans and letters of credit for the project. Interspace was to act the general contractor and enter into contracts with subcontractors to perform work on the project. The subcontractors would send invoices to Interspace and Interspace would then submit a "draw request" to First Commercial for the issuances of checks to make payments. The State alleges that as project managers for Amber Woods, the Defendants created a series of fraudulent invoices in order to request and receive checks from their lender First Commercial.

3. The State alleges that the Defendants failed to pay the full proceeds from the checks to the proper subcontractors that were listed on the invoices, and retained part or all of the funds.

4. All of the charges against the Defendants arise from the same set of facts and evidence.

5. At their first court appearance on October 21, 2011, both Defendants appeared together. They also appeared together at an evidentiary hearing held before Judge Janet Poston, where both Defendants testified. On October 5, 2012, both Defendants agreed to a trial date set for June 17, 2013. At no time throughout this period did either Defendant object on the record to the treatment of their cases as joined.[1]

[1] The Defendants have failed to offer any evidence to contradict the assertions of the State.

6. On September 17, 2012, Philip Carlson discharged his previous counsel and hired Frederick J. Goetz.

7. On April 19, 2013, the Court reassigned the cases to Judge Pamela Alexander. On April 25, 2013, Defendant Philip Carlson filed a Notice to Remove Judge Alexander, and the case was reassigned to Judge Richard S. Scherer.

8. The State filed a Motion for Joinder on May 31, 2013 to bring the cases back before a single judge.

9. The following statements were made by Philip Carlson (PC) and Virginia Carlson (VC) to Bloomington Police Department Detective, Cory Cardenas during two separate interviews at the Bloomington Police Department:

***2** a. PC: But I don't do the bookkeeping. Most of this you're going to have to get from Gina. *Exhibit I*, 2.[2]

[2] The Court has considered Exhibits 1 and 2 attached to Defendant's brief.

b. Detective: OK. So who would be the person that would do the invoices?

PC: Well my wife does all the paperwork. *Id.* at 3.

c. Detective: Ok so you have no idea about the invoices as far as how they were submitted, you have no working knowledge of that whatsoever?

PC: No.

Detective: Ok so Gina would know of this?

PC: She did all the paperwork. *Id.*

d. Detective: Do you have any working knowledge of your bank accounts?

PC: No. *Id.* at 4

e. Detective: So simply you're blaming your wife for the swindle? I mean that's a simple question.

PC: No I'm not blaming because I'm along with her. *Id.* at 13

f. PC: I do subcontracting is what I wanted to say and I go out and get all the stuff to get the bids and bring them in and then I give all those numbers to my wife, show her an invoices, or not invoices, and then she puts them on a spreadsheet and she writes it all out.

Detective: So you don't do any of it?

PC: No. *Id.* at 16.

g. Detective: Gina, she's the mastermind, right?

PC: She does all the paperwork. *Id.* at 20

h. VC: Interspace as general contractor has charges too. As general contractor, we have the job site supervision. *Exhibit 2*, 13

i. VC: But what I'm telling you is that we did not steal money from this project. *Id.* at 14.

j. Detective: So do you think all this money that's missing is… who… who has it?

VC: There's no missing money. All the money that went for the project went for the project. *Id.* at 15

k. VC: I am not doing anything illegal. I'm not doing anything wrong. I am totally feel justified. [Unintelligible] and I can point out every single check that was paid out towards this project. *Id.* at 16

l. Detective: Okay. Here's the problem that you're gonna be running into… as general contractor, cause that's your title through Interspace, whether you like it or not, you're guilty by association.

VC: I'm not guilty of anything.

Detective: Well…

VC: I didn't do anything wrong… I didn't do anything wrong. *Id.* at 18

m. Detective: Are you saying you've never made a fake invoice?

VC: Correct. *Id.* at 28

n. Detective: Gina, the problem is, you're submitting a fake contract for [unintelligible].

VC: I am not submitting fake… they… I didn't do anything wrong. *Id.* at 41.

o. Detective: I've done this for 14 years and you've done what you've done for a long time.

Okay. And I…

VC: I didn't do anything wrong. *Id.* at 48.

CONCLUSIONS OF LAW

1. Minnesota Rule of Criminal Procedure 17.03, subd. 2 controls the joinder of defendants.

The rule states:
When two or more defendants are charged with the same offense, they may be tried separately or jointly at the court's discretion. To determine whether to order joinder or separate trials, the court must consider:

(1) the nature of the offense charged;

(2) the impact on the victim;

(3) the potential prejudice to the defendant; and

(4) the interests of justice.

2. Joinder may be granted where defendants "acted in close concert with one another." *Stale v. Jackson, 113* N.W.2d 111, 118 (Minn. 2009). In joining such cases, an emphasis is placed on "the similarity of the charges and evidence." *Id.* As admitted by both Defendants, the similarity of the nature of the offenses charged support a grant of joinder.

***3** 3. The victim in this matter is First Commercial, a financial institution. The witnesses set to testify did not witness nor were they involved in a crime of violence. There would be no harmful impact to the victim or trauma to any of the witnesses. This factor does not favor joinder.

4. "[A] defendant suffers prejudice when "he and his codefendant present antagonistic defenses." *Santiago v. State*, 644 N.W.2d 425, 446 (Minn. 2002). At this point, there is insufficient evidence of prejudice to either defendant. If prejudice develops, a motion for severance would be considered by this Court.

5. The interests of justice support a grant of joinder due to the potential waste of judicial resources of having two trials due to the complexity of the case.

6. Viewed as a whole, the Court finds that the evidence provided supports a grant of joinder.

ORDER

1. The State's Motion for Joinder is **GRANTED.**

2. The following memorandum is hereby incorporated into this Order.

DATED: *8/1/13*

BY THE COURT:

<<signature>>

William R. Howard

Judge of District Court

MEMORANDUM

Minnesota Rule of Criminal Procedure 17.03, subd. 2 controls the joinder of defendants. The rule states:
When two or more defendants are charged with the same offense, they may be tried separately or jointly at the court's discretion. To determine whether to order joinder or separate trials, the court must consider:

(1) the nature of the offense charged;

(2) the impact on the victim;

(3) the potential prejudice to the defendant; and

(4) the interests of justice.

The charges against the Defendants are identical counts of Theft by Swindle involving the same set of facts and evidence. Joinder may be granted where Defendants "acted in close concert with one another." *State v. Jackson*, 773 N.W.2d 111, 118 (Minn. 2009). In joining such cases, an emphasis is placed on "the similarity of the charges and evidence." *Id.* The nature of the charges of this case, as both the State and Defendant admit,[3] support a grant of joinder.

3 Memorandum of Law in Support of State's Motion for Joinder, 6; Defendant's Memorandum of Law in Opposition to State's Motion for Joinder, 10.

Impact on the victim has supported joinder when the victims or witnesses would be subjected to trauma through multiple trials. *Id.* at 119 (stating that the trauma to a 10-year-old eyewitness of a murder was significant); *State v. Powers*, 654 N.W.2d 667, 675. However, the language of Rule 17.03 includes the word "impact," not the narrower word "trauma". Impact may include things other than emotional trauma suffered by the victim or witnesses. Nevertheless, the State has failed to demonstrate a sufficient impact on the victim that would support joinder. The victim here is a sophisticated financial institution. Though requiring the Bank to prepare for two trials would present additional expenses, these expenses do not rise to the level of impact that would support a grant of joinder. However, the absence of impact to the victim or the testifying witnesses is not necearrily dispositive of the decision to grant joinder; all of the factors must be considered as a whole.

Evidence of prejudice to a defendant is a heavily weighted factor in the consideration of whether to grant or deny joinder. Under Minnesota law, a defendant suffers prejudice when "he and his codefendant present antagonistic defenses... Defendants have antagonistic defenses when the defenses are inconsistent and when they seek to put the blame on each other and the jury is forced to choose between the defense theories advocated by the defendants." *Santiago v. State*, 644 N.W.2d 425, 446 (Minn. 2002); *State v. DeVerney*, 592 N.W.2d. 837, 842 (Minn. 1999). Here the Defendants have failed to show that the joining of these cases would produce prejudice. The statements made by Defendants to Detective Cardenas do not establish antagonistic defenses.[4] Mr. Carlson repeatedly denies any knowledge of the thefts or any involvement with the allegedly fraudulent invoices. Mrs. Carlson repeatedly denies any wrong doing, claims she never made a fake invoice, and states that no money was stolen. These statements are not inconsistent and would not force a jury to believe one over the other. Additionally, there is no evidence of finger pointing between the Defendants. When asked if he was blaming his wife for the thefts, Mr. Carlson replied no. However, it is still early in the course of litigation, and the defense theories may not be fully formed. If antagonistic defenses are presented, or if prejudice develops against one of the defendants, a motion for severance may be considered.

4 Defendant Phillip Carlson additionally argues that he will be denied his right to confrontation as guaranteed by the Sixth Amendment. Specifically, he argues Virginia Carlson may exercise her right not to testify at the joint trial. However, as the Court has found that the evidence before it does not suggest antagonistic defense strategy, the Court does not believe Phillip or Virginia Carlson's right to confrontation will be compromised due to the granting of joinder. If after the Defendants' defense strategies are further developed and due indeed become antagonistic, the Court would revisit this issue of confrontation.

***4** It is in the interest of justice to not expend unnecessary judicial resources. Carrying out two virtually identical trials would be such an unnecessary expenditure. The evidence and witnesses for both trials will largely be the same and will pose an undue burden on the State and Court system. Additionally, the involvement of multiple sophisticated parties, including various contractors and a bank, contributes to the complexity of the case. The alleged fraud involves a web of fraudulent transactions related to the various parties. This complexity, as well as the unnecessary expenditures that will be required if two trials are performed, support a grant of joinder.

To determine if joinder is appropriate in any given situation, the four factors of joinder must be considered as a whole. When viewed as a whole, the nature of the offenses charged and the interests of justice support a grant of joinder; the lack of impact on the victim and prejudice to the defendants disfavor joinder. Overall, the Court finds the evidence supports a grant of joinder.

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2008 WL 7650412 (Minn.Dist.Ct.) (Trial Order)
District Court of Minnesota,
Fourth Judicial District.
Hennepin County

State of Minnesota, Plaintiff,

v.

Andrae BELLFIELD, Marlin Terrell Pratt, Defendants.

Nos. 27-CR-07-127152, 27-CR-07-127157.
July 2, 2008.

Order Denying Motion to Dismiss for Lack of Probable Cause and Motion for Severance

George F. McGunnigle, Judge of District Court.

I. Appearances

Tom Fabel, Esq. appeared on behalf of Plaintiff. Leonardo Castro, Esq. appeared on behalf of Defendant Andrae Bellfield ("Bellfield"). Charles Hawkins, Esq. appeared on behalf of Defendant Marlin Terrell Pratt ("Pratt").

II. Introduction

The above-captioned matter came on for hearing before the undersigned Judge of District Court on May 9, 2008 on the Motions to Sever and Motions to Dismiss for Lack of Probable Cause filed by Defendants Bellfield and Pratt.

III. Factual Background

Defendants Bellfield and Pratt are charged with being parties to a complex mortgage fraud scheme connected with their employment with Universal Mortgage, Inc. ("Universal"). Bellfield and Pratt allegedly worked as loan officers for Universal by finding individuals with good credit who were interested in purchasing investment properties, and assisting them with the necessary loan applications. The State alleges that Bellfield and Pratt submitted loan applications that they knew to be materially false in several ways. For example, many applications allegedly contained fraudulent documentation of the applicant's income or assets. Bellfield and Pratt also allegedly instructed some of the applicants to sign occupancy affidavits for their investment properties to have the homes designated as primary residences. Several applications also allegedly failed to disclose the ownership of other properties by the applicants. Bellfield, Pratt, and Universal benefited from these transactions by receiving loan origination and processing fees and commissions from lenders. The State also alleges that in many of these transactions Pratt profited from selling his own properties at an inflated price.

IV. Legal Analysis of Probable Cause

Minnesota Rule of Criminal Procedure 11.03 (2006) provides in pertinent part:
A finding by the court of probable cause shall be based upon the entire record including reliable hearsay in whole or in part. Evidence considered on the issue of probable cause shall be subject to the requirements of Rule 18.06, subd. 1. "Probable cause

exists where the facts would lead a person of ordinary care and prudence to hold an honest and strong suspicion that the person under consideration is guilty of a crime." *State v. Ortiz,* 626 N.W.2d 445, 449 (Minn. Ct. App. 2001) (citing *State v. Carlson,* 267 N.W.2d 170, 173 (Minn. 1978)).

V. Discussion of Motion to Dismiss for Lack of Probable Cause

A. Universal as a Criminal Enterprise

There is sufficient probable cause to label Universal as a criminal enterprise. Minnesota's racketeering statute, Minn. Stat. §609.903, requires Universal to be an enterprise, which is defined under Minn. Stat. §609.902 Subd. 3. This statute defines enterprise broadly, and this definition was further delineated in *State v. Huynh,* 519 N.W.2d 191, 196 (Minn. 1994). The Minnesota Supreme Court interpreted enterprise to mean an entity (1) having a common purpose among the involved individuals, (2) having an ongoing and continuing existence with members functioning under some sort of structure, and (3) having activities extending beyond the underlying criminal acts, either to coordinate those acts or to engage in other activities. *Id.* As a sophisticated corporate mortgage broker, Universal easily meets the requisite criteria to be considered an "enterprise" under Minnesota law.

B. Funds Invested

There is sufficient probable cause to believe that funds obtained from illegal activity were invested in Universal. Another requirement of Minnesota's racketeering statute under Minn. Stat. §609.903 Subd. 1(3), is that proceeds from illegal activity be invested in the enterprise. The State's Probable Cause Submission contains closing documents of each real estate transaction for which the defendants have been charged. These closing documents list, among other things, all of the fees and commissions paid to Universal in its capacity as the mortgage broker. These closing documents combined with the fraudulent loan applications discussed below suffice to establish probable cause that some illicit proceeds were invested in Universal.

C. Participation of Bellfield and Pratt

There is probable cause to believe that defendants Bellfield and Pratt participated in a pattern of criminal activity. According to the Complaint, Bellfield and Pratt recruited straw buyer Mark Ross to begin buying investment property through Universal. His loan applications, which were allegedly handled by Bellfield and Pratt, misstated Ross's income and included an occupancy affidavit signed by Ross even though he did not intend to live in the homes. Ross stated in an interview that the defendants had knowledge of his true income in the form of a W-2 statement, and that Bellfield and Pratt told him that the properties would be rented out and managed by Universal. Ross further stated that Bellfield and Pratt told him not to worry about the falsities on the loan application. Of the five properties Mark Ross allegedly bought through Universal, two were purchased directly from Bellfield.

The pattern laid out by Mark Ross is typical of transactions that other straw buyers described in the Complaint. Gretchen Stanford, related to defendant Pratt through marriage, states that she was recruited to buy six properties through Universal (two directly from Pratt) and had similar falsities on her loan application including inflated income and assets. Pratt also allegedly provided the down payments for some of the sales. Straw buyer Dametrice Walker met Defendant Pratt through her acquaintance with Defendant Bellfield, and subsequently purchased two properties owned by Bellfield through allegedly fraudulent loan applications. Together these interviews, affidavits, and sworn statements of the straw buyers combined with the allegedly falsified loan applications signed by Bellfield and Pratt form sufficient probable cause that Bellfield and Pratt participated in a pattern of criminal activity.

D. Theft by Swindle

Loan applications falsified by defendants provide probable cause to believe that defendants committed theft by swindle of over $35,000. Defendant Bellfield claims that in order to be guilty of theft for falsifying loan applications the value of the property needs to have been inflated. He argues that a lender that approves a loan under a fraudulent application will own the land in the event of a default and foreclosure. Bellfield argues that because lenders have the value that they loaned out, there is no net loss unless the bank paid more than it should have for the property in the first place. The State points to *State v. Lone,* 361 N.W.2d 854 (Minn. 1985) where the Minnesota Supreme Court rejected the idea that swindle required a pecuniary loss. The defendant in that case, William Lone, argued that he was not guilty of theft by swindle because his customers ended up receiving something of value. The Court disagreed and held that "[o]nce the victim had parted with her money in reliance on false representations, it was immaterial whether whatever she got in return was equal in value to that which she surrendered." *Id.* at 859-860. The lenders in the case before this Court decided to extend credit to the straw buyers in reliance on materially false loan applications. Since, under *Lone,* parting with something of value as a result of misrepresentation is all that is needed for theft by swindle, the fraudulent loan applications are sufficient probable cause for the charges of theft by swindle.

VI. Legal Analysis of Motion to Sever

Minnesota Rule of Criminal Procedure 17.03 (2006) states in pertinent part:
When two or more defendants are jointly charged with a felony, they may be tried separately or jointly in the discretion of the court. In making its determination on whether to order joinder or separate trials, the court shall consider the nature of the offense charged, the impact on the victim, the potential prejudice to the defendant, and the interests of justice. In cases other than felonies, defendants jointly charged may be tried jointly or separately, in the discretion of the court. In all cases any one or more of said defendants may be convicted or acquitted.

"A defendant suffers substantial prejudice when he and his codefendant present antagonistic defenses...Defendants have antagonistic defenses when the defenses are inconsistent and when they seek to put the blame on each other and the jury is forced to choose between the defense theories advocated by the defendants. *Santiago v. State,* 644 N.W.2d 425, 446 (Minn. 2002). When considering a pretrial motion for severance, the district court should first determine whether the proffered evidence is sufficiently specific and whether there is anything in the record to indicate a lack of good faith. *Id.* at 443.

VII. Discussion of Motions to Sever

A. Bellfield's Motion

Bellfield brings a motion for severance on the grounds that: 1) joinder would be improper because of the nature of the cases; 2) severance would not have a substantial impact on the victim; 3) the Defendant would be greatly prejudiced by a joint trial; and 4) separate trials are in the interest of justice.

Bellfield alleges that joinder would be inappropriate due to the nature of the cases. He argues that the cases are too different in fact and nature for a joint trial because different co-defendants worked with different straw buyers to purchase different homes. While it is true that the circumstances of each individual sale differ, many of the sales allegedly had similarities. For example, the complaint includes allegations that: 1) straw buyers were recruited by Universal loan officers to purchase investment properties based on promises of wealth or financial security, 2) applicants were instructed to lie or Universal loan officers intentionally disregarded financial information resulting in submission of loan applications with falsified income or assets, and 3) agents of Universal temporarily transferred their own funds into an applicant's bank account to give the appearance that the applicant had more assets than he or she did. Also, all of the transactions described in the Complaint allegedly took place under the authority of the Universal Mortgage corporate entity

Bellfield asserts that separate trials would not have a substantial impact on alleged victims. There is no evidence in the record to support this claim. The Court can infer, however, that having multiple trials might require the victims to produce witnesses (e.g. employees of lenders) and testify in as many as five separate trials.[1] This would presumably be expensive in both travel costs and lost wages or other earned income. The victims would also likely have to wait longer for the resolution of many separate trials than they would for one joined trial. While the victims in this case are large, sophisticated corporate lenders who may be better equipped than most to handle these inconveniences, this does not mean that they would not feel a significant impact from having to appear in several trials.

1 Defendant Cleveland Brown Fields pled guilty to charges in a companion case, *State v. Cleveland Brown Fields* Court File No. 27-CR-07-127153, but will not be sentenced until disposition of other cases.

Bellfield claims that he will be greatly prejudiced in a joint trial. He fails, however, to allege any facts from which the Court could infer substantial prejudice, and offers no evidence to meet the *Santiago* standard. Not only has Bellfield failed to provide specific allegations of potential prejudice that are supported by appropriate proof, he has failed to provide any evidence of potential prejudice beyond vague speculation. Bellfield speculates on the possibility that the different defendants could offer antagonistic defenses, and that the varied "finger-pointing" will lead to substantial prejudice against him. There has been no indication yet that the various defendants are seeking to blame each other, especially since they are charged only for the specific transactions in which they participated. Bellfield cites *Santiago*, *State v. Hathaway*, 379 N.W.2d 498 (Minn. 1985), *State v. Greenleaf*, 591 N.W.2d 488 (Minn. 1999), and *State v. DeVerney*, 592 N.W.2d 837 (Minn. 1999), for the proposition that defendants can be prejudiced if codefendants offer antagonistic defenses. Significantly, all of these were murder cases, where multiple defendants were on trial and each sought to absolve himself by blaming the other.

By contrast, this case alleges a sophisticated white-collar crime involving mortgage fraud and racketeering, and there has been no indication that any defendant will seek to absolve himself or herself by blaming another defendant. In *State v. Strimling*, 465 N.W.2d 423 (Minn. 1978), the Minnesota Supreme Court held that a joint trial was "well-suited" to complex white-collar crime prosecution so that the jury could see all the evidence on the full scope and scale of the criminal enterprise being alleged.[2] The Supreme Court also noted that jury instructions adequately separated the different charges for the different defendants. *Id.* at 432.

2 It is telling that this opinion was rendered when Minnesota favored individual trials, yet the Court still concluded that joinder was appropriate in this circumstance.

Bellfield finally asserts that separate trials are in the interest of justice for all the reasons discussed above. However, because separate trials would have a detrimental impact on victims and here Bellfield has not produced any evidence that he would be significantly prejudiced, severance would not be in the best interest of justice in this case.

B. Pratt's Motion

Pratt brings a motion for severance on the grounds that: 1) Pratt may be prejudiced by the State pitting the defendants against each other; 2) Pratt may be prejudiced by a joint trial arising out of inconsistent and antagonistic defenses among the multiple Defendants; 3) Pratt may be prejudiced if a co-defendant is prevented from testifying on Pratt's behalf because of Fifth Amendment concerns; 4) Evidence, including statements by other defendants, may be introduced against those other defendants, but be inadmissible against Pratt; 5) A joint trial will not be in the interest of judicial economy because of the evidentiary issues that will be presented to a joint trial; and 6) the interest of justice requires separate trials for the Defendants.

Most of Pratt's arguments are concerns of potential prejudice he might suffer in a joint trial. This Court has already discussed prejudice arguments in its analysis of Bellfield's motion, above. Like Bellfield, Pratt makes speculative statements which are not

accompanied by any facts that would tend to show the likelihood of prejudice. This is not enough to meet the *Santiago* standard. There is also no evidence before the Court that would suggest antagonistic defenses or "finger-pointing" among the defendants.

Pratt also asserts a number of evidentiary arguments in his motion. In cases with multiple defendants jury instructions usually address issues of how the jury should apply different pieces of evidence to the various defendants. The Minnesota Supreme Court has recognized the ability of juries in joint trials to separate evidence that inculpates one defendant from evidence that inculpates both. *State v. Hathaway,* 379 N.W.2d 498, 502 (Minn. 1985); see also *Strimling* at 432, cited above.

Finally Pratt argues that separate trials are in the interest of justice. This Court has already discussed the interest of justice in regards to Bellfield's motion, above. As in Bellfield's motion, severance is against the best interest of justice in this case because the victims would likely be negatively impacted by separate trials, and because Pratt has offered no specific facts to indicate that he would be significantly prejudiced by a joint trial in this case.

ORDER

1. The Motion of Defendant Bellfield to Dismiss for Lack of Probable Cause is DENIED.

2. The Motion of Defendant Pratt to Dismiss for Lack of Probable Cause is DENIED.

3. The Motion of Defendant Bellfield to Sever is DENIED.

4. The Motion of Defendant Pratt to Sever is DENIED.

Dated: July 02, 2008

BY THE COURT:

.....

George F. McGunnigle

Judge of District Court

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2010 WL 5071271
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Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,

v.

Ali Abdulkadir MOHAMED, Appellant.

No. A09–2238.
|
Dec. 14, 2010.
|
Review Denied Feb. 15, 2011.

West KeySummary

1 **Criminal Law** ⚿ Inevitable discovery

Criminal Law ⚿ Evidence wrongfully obtained

Defendant's guilt could have been conclusively proven without the gun, wallet, and identification, which were erroneously admitted into evidence under the inevitable discovery exception to warrant requirement, and thus district court's decision to admit these items seized from defendant's apartment during search was harmless error in prosecution for armed robbery. The victim positively identified the defendant as one of the three men who had robbed him. Both the victim and the eyewitness testified that one of the men had used a small handgun during the offense, and the victim's two cell phones had been discovered in defendant's possession. U.S.C.A. Const.Amend. 4.

Hennepin County District Court, File No. 27–CR–09–11520.

Attorneys and Law Firms

Lori Swanson, Attorney General, St. Paul, MN; and Michael O. Freeman, Hennepin County Attorney, Paul R. Scoggin, Assistant County Attorney, Minneapolis, MN, for respondent.

David W. Merchant, Chief Appellate Public Defender, Melissa V. Sheridan, Assistant Public Defender, St. Paul, MN, for appellant.

Considered and decided by KLAPHAKE, Presiding Judge; HALBROOKS, Judge; and CONNOLLY, Judge.

UNPUBLISHED OPINION

KLAPHAKE, Judge.

*1 This criminal appeal is one of three separate appeals before this court involving three codefendants who were tried jointly and convicted of committing first-degree robbery at a Minneapolis apartment building on March 6, 2009. In this appeal, Ali Abdulkadir Mohamed challenges the district court's decisions to permit trial joinder, to deny his request for appointment of substitute counsel, to admit identification evidence of a police show-up, to admit evidence obtained by police without a search warrant, and to impose an upward durational departure at sentencing. Because the district court did not err or otherwise abuse its discretion in any of its decisions, we affirm.

DECISION

I. Joinder

Minn. R.Crim. P. 17.03, subd. 2, permits the court "at [its] discretion" to order trial joinder of two or more defendants. In reviewing a joinder issue, we conduct "an independent inquiry into any substantial prejudice to defendants that may have resulted from their being joined for trial." *State v. Blanche*, 696 N.W.2d 351, 370 (Minn.2005). An "erroneous" joinder decision is subject to the harmless error rule. *Id.*; *Santiago v. State*, 644 N.W.2d 425, 450 (Minn.2002). In determining whether to order joinder, "the court must consider: (1) the nature of the offense charged; (2) the impact on the victim; (3) the potential prejudice to the defendant; and (4) the interests of justice." Minn. R.Crim. P. 17 .03, subd. 2; *see State v. Jackson*, 773 N.W.2d 111,

118 (Minn.2009) (stating that joinder rule "neither favors nor disfavors joinder").

Nature of the Offense

Here, the codefendants acted in close concert in committing the crime. *See Jackson,* 773 N.W.2d at 118 (acting in close concert is proper consideration in evaluating nature of charged offense). Two of the codefendants entered the subject apartment building vestibule together with the victim, C.J., and all three threatened the victim, assaulted the victim, took the victim's personal property, and remained in a group after the robbery, acting in a cohesive unit until they were discovered by police. In addition, the codefendants were charged with the same offense, and the evidence against all three was substantially the same. *See id.* at 118–19 (noting in granting joinder motion that defendants were charged with same offense and majority of evidence was admissible against both); *see also Blanche,* 696 N.W.2d at 371 (approving joinder decision when "the great majority of the evidence presented was admissible against both" defendants). This factor thus favors trial joinder.

Impact on the Victim

This factor includes consideration of the impact on the victim as well as on eyewitnesses. *State v. Powers,* 654 N.W.2d 667, 675 (Minn.2003). Here, C.J. endured a beating and was placed in fear of his life by having a gun pointed at him throughout his lengthy encounter with the codefendants. An eyewitness, A.S., observed the violent encounter and initially expressed some concern about becoming involved in these proceedings. The impact on these individuals of having to testify in separate trials thus favors joinder.

Potential Prejudice to the Defendant

***2** Appellant asserts that he was prejudiced because his defense was antagonistic to codefendant Jama Suleiman Ahmed's when both he and Ahmed claimed that they did not participate in the crime. *See State v. DeVerney,* 592 N.W.2d 837, 842 (Minn.1999) (holding that prejudice does not mean merely that joined defendants had different defenses, "but whether the defenses were inconsistent, or whether the defendants sought, through their chosen defenses, to shift blame to one another"). However, as appellant did not testify and relied on a defense that the state failed to prove its case, his defense was not antagonistic to his codefendant's defense. *See State v. Martin,* 773 N.W.2d 89, 100 (Minn.2009) (stating that defendants did not have antagonistic defenses when they used identical motions and objections and jury was "not forced to choose between" the defenses); *State v. Greenleaf,* 591 N.W.2d 488, 499 (Minn.1999) (permitting joinder even though one defendant claimed innocence and another defendant claimed intoxication and duress).

Appellant also claims that he was prejudiced by the district court's limitation of the defense to six peremptory strikes of jurors, rather than the five he would have received if appellants had been tried separately. As noted by respondent, appellant did not show what defense strategy he intended to pursue by use of peremptory strikes or how it varied from his codefendants' strategies. *See Powers,* 645 N.W.2d at 675 (a defendant should make an offer of proof to identify inconsistent or antagonistic defenses in order to prove that joinder would "substantially prejudice" the defendant). Under these circumstances, potential prejudice to appellant does not weigh against joinder.

Interests of Justice

Consideration of the length of separate trials is proper in assessing the interests of justice. *See id.* at 675–76 (using extended duration of multiple trials as basis for joinder). The district court primarily relied on the savings of time and money in considering this factor. However, an additional basis includes the potentially evanescent nature of C.J.'s and A.S.'s availability to testify. *See Blanche,* 696 N.W.2d at 372 (using witness availability in consideration of interests of justice factor for joinder analysis). This factor also supports joinder.

Because all of the Minn. R.Crim. P. 17.03, subd. 2 factors support joinder, we conclude that the district court did not err in ordering appellant to be tried with his two codefendants.

II. Substitution of Counsel

A defendant's request for substitute counsel will be granted only when "exceptional circumstances" exist, when the demand is reasonable, and when it is timely made. *State v. Vance,* 254 N.W.2d 353, 358 (Minn.1977). Exceptional circumstances "are those that affect a court-appointed attorney's ability or competence to represent the client," and mere dissatisfaction with the court-appointed attorney does not constitute exceptional circumstances. *State v. Gillam,* 629 N.W.2d 440, 449 (Minn.2001) (declining to adopt a more stringent federal standard). "The decision to appoint

a substitute attorney is within the discretion of the district court." *Id.*

***3** Appellant claims that the district court abused its discretion and committed reversible error by denying his request at the beginning of trial for appointment of substitute counsel. Appellant told the district court that his counsel was not "helping me," was not "fighting for my case," and did not "come and see me."

The thrust of appellant's argument is that the district court failed to conduct an inquiry into whether there were exceptional circumstances that mandated appointment of new counsel. However, the court was aware of appellant's counsel's performance because appellant's attorney fully participated in several pretrial proceedings decided by the court. While appellant may have been dissatisfied with his lack of personal contact with his attorney, the court was aware that the attorney was capable. Under these circumstances, appellant's allegation was insufficient to mandate further inquiry by the court. *See State v. Clark,* 722 N.W.2d 460, 464 (Minn.2006) (requiring serious allegation of inadequate representation). Further, although appellant's attorney had represented him for months, appellant sought substitute counsel on the first day of trial, which was untimely given the circumstances of this case. *See id.; State v. Worthy,* 583 N.W.2d 270, 278–79 (Minn.1998) (rejecting defendant's request for appointment of substitute counsel based, in part, on the fact that defendant sought new counsel on the eve of trial).

The district court did not abuse its discretion by declining to grant appellant's request for substitute counsel.

III. Admission of Show-up Evidence

After police apprehended appellant and his two codefendants in an apartment, police took each codefendant; separately, to the front of the building to be identified by C.J. and another witness[1] as they sat in a police squad car. Appellant claims that this show-up procedure was unnecessarily suggestive, should have been suppressed, and necessitates reversal of his conviction.

1 The other witness did not cooperate with police or appear at trial.

District courts apply a two-part test to determine whether to suppress pretrial identification evidence. *State v. Ostrem,* 535 N.W.2d 916, 921 (Minn.1995). First, the court determines whether the identification procedure was "unnecessarily suggestive"; next, it determines whether under the totality of the circumstances the identification was reliable despite its suggestive nature. *Id; In re Welfare of M.E.M.,* 674 N.W.2d 208, 214–15 (Minn.App.2004). On appeal, this court independently reviews the facts to determine whether such evidence must be suppressed as a matter of law. *State v. Taylor,* 594 N.W.2d 158, 161 (Minn.1999). Absent an abuse of discretion, we will affirm. *State v. Amos,* 658 N.W.2d 201, 203 (Minn.2003).

In this case, we agree with appellant that the police show-up was unnecessarily suggestive. Following his detention, appellant was brought in handcuffs with an officer escort out of the building where the victim believed that the men who robbed him were located. He was placed in front of a squad car spotlight where he could be fully illuminated, and with a police officer standing beside him, the victims were asked by another police officer whether or not they could identify appellant from their vantage point in a squad car about 20 feet away. This type of show-up has routinely been found unnecessarily suggestive in other cases. *See, e.g., M.E.M.,* 674 N.W.2d at 215 (finding show-up unnecessarily suggestive when police presented handcuffed defendant, alone, to victim for identification); *State v. Anderson,* 657 N.W.2d 846, 851 (Minn.App.2002) (finding show-up unnecessarily suggestive when police drove defendant to crime scene, pulled him out of squad car, and presented him in handcuffs to appellant for identification, stating that defendant matched the description of the perpetrator).

***4** Nevertheless, we conclude that admission of the show-up identification evidence was proper considering the totality of the circumstances test. Consideration of the totality of the circumstances includes:

> 1. The opportunity of the witness to view the criminal at the time of the crime;
>
> 2. The witness' degree of attention;
>
> 3. The accuracy of the witness' prior description of the criminal;
>
> 4. The level of certainty demonstrated by the witness ...;
>
> 5. The time between the crime and the confrontation.

Ostrem, 535 N.W.2d at 921.

Here, C.J. had ample opportunity to view appellant at the time of the crime. Appellant stood on the sidewalk in front of the apartment building when C.J. arrived, and C.J. spoke with appellant and codefendant Muhammed Sharif Maye at length during negotiations of a marijuana sale and repackaging of the marijuana for sale. C.J. noticed the separate actions that the three men took during his physical attack, which lasted for some duration. C.J. had the opportunity to view the defendants after the attack when he peeked through a door at them several times. Further, the accuracy of appellant's description shows that C.J. was particularly attentive to appellant's appearance. C.J. provided a very accurate and detailed description of appellant, which included that he was an 18–20 year old "Som[a]lian male, approx. 5 ft. 8[in.]," who had a "light build," "short hair with short curls," and a "short mustache/goatee." Appellant was wearing a "white t-shirt under [a] dark jacket" and "dark pants." Appellant's appearance matched this description. C.J. stated to police that he was "very positive" of the identification. Finally, the time between the crime and the identification strongly favors the reliability of the identification. Although it is unclear exactly how much time elapsed between the crime and appellant's show-up, police responded to the dispatch reporting the crime within minutes and appellant and his codefendants were apprehended soon after.

Under the totality of these circumstances, we conclude that the state demonstrated an "adequate independent origin" for the identification, and the district court did not abuse its discretion by denying appellant's motion to exclude the identification evidence obtained from the police show-up. *See Ostrem*, 535 N.W.2d at 922; *see also State v. Lushenko*, 714 N.W.2d 729, 732–33 (Minn.App.2006) (affirming admission of show-up identification involving man who encountered burglar in his home, conversed with the burglar, and attempted to keep the burglar in home while notifying police; admission of evidence based on totality of circumstances that included victim's opportunity to view defendant during conversation, heightened degree of victim's attention due to suspicious circumstances; accuracy of the victim's description; victim's positive identification and certainty of it; and show-up conducted within three hours of initial encounter), *review denied* (Minn. Dec. 12, 2006).

IV. Admission of Evidence Obtained during Warrantless Search

***5** Whether the district court erred by declining to suppress this evidence is a question of law, which this court reviews de novo. *State v. Harris*, 590 N.W.2d 90, 98 (Minn.1999). Appellant challenges the district court's basis for admitting certain evidence obtained during the search of the apartment, including C.J.'s wallet, his identification, and the gun used during the crime. The district court ruled that the officers legally entered the apartment, and appellant does not challenge this ruling. Rather, appellant challenges the district court's decision that the three items were admissible under the doctrine of inevitable discovery. *See State v. Richards*, 552 N.W.2d 197, 204 n. 2 (Minn.1996) (the inevitable discovery exception to the exclusionary rule applies when "police would have inevitably discovered the evidence, absent their illegal search.").[2]

2 *See also Murray v. United States*, 487 U.S. 533, 539, 108 S.Ct. 2529, 2534, 101 L.Ed.2d 472 (1988) ("The inevitable discovery doctrine ... is in reality an extrapolation from the independent source doctrine: *Since* the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered").

The burden is on the state to show that the inevitable discovery exception applies, which "involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment." *State v. Licari*, 659 N.W.2d 243, 254 (Minn.2003) (quotation omitted). This exception does not apply if police could have obtained a search warrant but did not: "Such an application of the 'inevitable discovery' rule would render the Fourth Amendment protection meaningless. A prosecutor would usually be able to show, through hindsight, that a warrant would have been issued and the evidence would have eventually been discovered." *State v. Hatton*, 389 N.W.2d 229, 234 (Minn.App.1986), *review denied* (Minn. Aug. 13, 1986); *see Richards*, 552 N.W.2d at 204 n. 2 (requiring police to "preserve[ ] the integrity of the scene while waiting for a readily-obtainable warrant" and declining to permit legitimate police presence in an area to circumvent warrant requirement to conduct search beyond that allowed by law, noting that such conduct would "beg the question" of application of the inevitable discovery rule).

In *Hatton*, police were called to a motel where the victim had been sexually assaulted by two men. They arrested one suspect as he left the room. The other suspect was arrested by an officer who had been left to "watch the room"; the officer noticed the suspect moving under a bed. 389 N.W.2d at 232.

The supreme court ruled that the officers' post-arrest search of the motel room without a warrant was illegal, but the court upheld the suspects' convictions because, consistent with the harmless error rule, there was other admissible evidence that conclusively proved the suspects' guilt. *Id.* at 234.

Here, the officers' decision to seek a warrant was motivated by evidence they had discovered during their illegal search, particularly discovery of the towel-wrapped gun, which only then prompted police to "freeze" the scene in order to obtain a search warrant. This describes the could-have-obtained-a-warrant-but-did-not conduct that was prohibited in *Hatton.*[3] *See Richards,* 552 N.W.2d at 204 n. 2. Thus, the district court erroneously ruled the wallet, identification, and gun were subject to inevitable discovery exception to the exclusionary rule.

3 We also note that the independent source rule does not apply in this case because at the time of the search of the subject apartment, there was no separate police investigation that would have independently led to discovery of the evidence. *See Richards,* 552 N.W.2d at 204; *see also Hatton,* 389 N.W.2d at 233 (noting that exceptions to exclusionary rule apply only if police were independently pursuing lawful means to discover subject evidence at time of its seizure).

***6** However, the harmless error rule applies to erroneous admission of evidence at trial: "If a defendant's guilt can be conclusively proven without considering the evidence admitted erroneously, the trial court's error will be considered harmless." *Hatton,* 389 N.W.2d at 234 (applying harmless error rule to evidence erroneously admitted under inevitable discovery doctrine). In this case, even without evidence of the gun and C.J.'s wallet and identification, there was strong evidence to support appellant's conviction for armed robbery. C.J. positively identified appellant as one of the three men who robbed him, and both he and A.S., the eyewitness, testified that one of the men used a small black handgun during the offense. In addition, C.J.'s two cell phones were lawfully discovered in the possession of the defendants, one during a search incident to appellant's arrest and the other at the feet of Maye as he was apprehended in the apartment. Further, during a search of Ahmed's person incident to his arrest, police found the bag of marijuana that had been in C.J.'s possession when he was robbed.

Thus, the erroneously admitted evidence, while probative, was cumulative of other admissible evidence that conclusively proved appellant guilty of armed robbery. Under these circumstances, we conclude that the erroneous admission of the evidence of the gun, C.J.'s wallet and C.J.'s identification does not entitle appellant to a new trial.

V. Duration of Prison Sentence

Finally, appellant argues that the district court abused its discretion by imposing a 12–month upward durational departure from the presumptive 48–month prison sentence. The district court's basis for appellant's upward departure was that "[t]he offender committed the crime as part of a group of three or more persons who all actively participated in the crime." Minn. Sent. Guidelines II.D.2(b)(10). "Generally, appellate courts review sentences that depart from the presumptive guidelines range for an abuse of discretion." *Dillon v. State,* 781 N.W.2d 588, 595 (Minn.App.2010), *review denied* (Minn. July 20, 2010); *see State v. Kindem,* 313 N.W.2d 6, 7 (Minn.1981).

Appellant does not dispute that three people participated in the aggravated robbery or that this is a valid basis for a durational departure. Rather, he argues that the fact that three persons were involved in the aggravated robbery did not make it more serious than the typical offense. However, all three suspects beat the victim, searched his person for items to steal, and made it difficult or impossible for him to defend himself or escape. These facts support the district court's decision to impose an upward durational departure in this case. *See Dillon,* 781 N.W.2d at 596 (stating that "we have found no case in which this court or the supreme court has overturned a district court's decision to depart ... when adequate departure grounds exist").

Affirmed.

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