

IN THE CIRCUIT COURT OF COLE CITY
STATE OF MISSOURI

STATE OF MISSOURI,)	Cause No. 16AC-CR02868-01
Plaintiff)	
)	Division No. 3
v.)	
)	
BRANDON JAMES RAPIER,)	
Defendant)	
)	

MOTION FOR SEVERANCE OF OFFENSES

COMES NOW Brandon Rapier, by counsel, and moves this Court for severance of offenses and an order granting Mr. Rapier a separate trial on Count V, aggravated stalking. Mr. Rapier makes this request pursuant to Missouri Supreme Court Rules 23.05 and 24.07 and Sections 545.140 and 545.885, RSMo Supp. 2017. In support, Mr. Rapier states as follows:

1. Mr. Rapier is charged by Supersedeas Indictment with murder in the first degree (Counts I and III), armed criminal action (Counts II and IV), and aggravated stalking (Count V). Counts I-IV are offenses alleged to have been committed on November 9, 2016, whereas Count V is an offense that allegedly commenced in November 16, 2014, and includes allegations such as that in 2014, two years before the offenses charged in Counts I-IV, Mr. Rapier allegedly threatened Ciera Kolb with messages from a falsely named email

account, he repeatedly communicated directly to her while being instructed not to, and he assaulted another person, who is not involved in Counts I-IV.

2. Claims of improper joinder and failure to sever charges involve a two-step analysis. *State v. Love*, 293 S.W.3d 471, 475 (Mo. App. E.D. 2009). First, the court must determine whether joinder of the charges is proper as a matter of law. *State v. Roberts*, 465 S.W.3d 899, 903 (Mo. banc 2015). If joinder was not proper, prejudice is presumed and severance of the charges is mandatory. *Love*, 293 S.W.3d at 475.

Thus, there are two steps in analyzing a claim for failure to sever charges. *State v. Saucy*, 164 S.W.3d 523, 528 (Mo. App. S.D. 2005). The first is determining whether the initial joinder was proper, and, if so, the second question is “whether the trial court abused its discretion in refusing to sever the offenses.” *Id.*

Improper joinder

3. Joinder of offenses is governed by Rule 23.05, which states:

All offenses that are of the same or similar character or based on two or more acts that are part of the same transaction or on two or more acts or transactions that are connected or that constitute parts of a common scheme or plan may be charged in the same indictment or information in separate counts.

Thus, joinder is proper where offenses: (1) are of the same or similar character; (2) are based on the same act or transaction; or, (3) are based on

two or more transactions (a) connected together or (b) constituting parts of a common scheme or plan. Rule 23.05. *In accord*, section 545.140.2, RSMo Supp. 2017. *Also see*, *State v. Bird*, 1 S.W.3d 62, 66 (Mo. App. E.D. 1999).

Count V does not meet any of these options when compared to the other counts.

First, Count V was not based on the same act or transaction as the other counts. “To be part of the same transaction offenses must be clearly intertwined in time and purpose.” *State v. Ross*, 611 S.W.2d 296, 297-98 (Mo. App. E.D. 1980). Here, some of the elements of Count V occurred two years prior to the offenses charged in Counts I-IV. Count V was not based on the same act or transaction alleged in the other counts.¹

Nor was Count V a part of a common scheme or plan with the other counts. A common scheme or plan exists only if: (1) there is a plan or scheme, that is, a design or a course of action determined *in advance of the commission of the first offense* for the purpose of achieving a preconceived result; and (2) each offense is consistent with and in furtherance of the plan. *State v. Simmons*, 815 S.W.2d 426, 428-429 (Mo. banc 1991). Essentially, the joined offenses must be products of a single or continuing motive. *Id.* at 429.

¹ The State cannot subvert this requirement by attempting to allege the charged homicides occurring in 2016 as an act of harassment for a course of conduct that allegedly commenced in 2014.

It is not enough that the joined crimes have factual components in common. *Id.* “There must be some proof that prior to the commission of the offense, the defendant intended to commit all of them.” *Id.*

Here, as noted above, the first instances of the alleged stalking occurred two years prior to the alleged homicides, and some of the allegations involve a different victim, Mr. Rapiet was sent to prison after some of the acts alleged in the stalking count, and the acts involved in the other counts did not occur until after he was released from prison. There was no evidence that the homicides occurring two years later were in furtherance of a stalking plan allegedly occurring two years prior. “[T]o join offenses which are not part of a common scheme or plan exposes a defendant to prejudice by allowing proof of the commission of unrelated crimes.” *Saucy*, 164 S.W.3d at 529.

The aggravated stalking also was not of the same or similar character as the two homicides. “In this context, the term ‘similar’ has been defined to mean ‘[n]early corresponding; resembling in many respects; somewhat alike; have general likeness.’” *State v. St. George*, 497 S.W.3d 308, 311 (Mo. App. S.D. 2016) (quoting *State v. Harris*, 705 S.W.2d 544, 549 (Mo. App. E.D. 1986)). Although the tactics need not be identical, the manner in which the crimes were committed should be so similar that it is likely the same person

committed all of the charged offenses. *Love*, 293 S.W.3d at 476. The aggravated stalking charge, which alleged such things as threatening messages from an email account, stabbing another person, and communicating directly with one of the victims, does not satisfy this test.

Finally, all of the acts or transactions giving rise to Count V are not connected to the other counts. The question of whether charges have been properly joined solely because they were connected has been addressed by only a handful of decisions in Missouri. The primary one is the Missouri Supreme Court's decision in *State v. Morrow*, 968 S.W.2d 100 (Mo. banc 1998).

In *Morrow*, the Court noted definitions of "connected" for purposes of reviewing the propriety of joinder:

"Connected" is defined as: "[j]oined; united by junction, by an intervening substance or medium, by dependence or relation, or by order in a series." Black's Law Dictionary 302 (6th ed.1990). In Webster's, "connected" is defined as: "joined or linked together [in] a series, having the parts or elements logically related..." Webster's International 480 (3d ed.1981).

968 S.W.2d at 109.

The Court in *Morrow* concluded charges that arose during a three day crime spree fueled by the defendant's drug use and need to get money to buy drugs were properly joined because the charges arose out of a "continuous

chain of criminal activity.” *Id.* at 109. The Court noted that the charges were connected in time not only because they all occurred within a span of three days, but also because they were a part of a continuous and uninterrupted crime spree in which the defendant did not even take time to change his clothes. *Id.* The Court also noted that the crimes were connected in manner and were factually interrelated and dependent on one another in that the defendant would steal a car that he would then use to commit a robbery and steal another car, and repeat the pattern. *Id.* And the Court noted that the crimes were connected in that they were all motivated by a single motive: the defendant's desire to get money to buy drugs. *Id.*

In contrast to *Morrow*, the alleged aggravated stalking in Count V and the homicides charged in the other counts in this case were not connected in time or a part of a continuous chain of criminal activity.

Even if joinder is proper, severance is warranted

4. Even if this Court believes joinder is permissible, the counts still should be severed. The fact that joinder is permissible does not mean that joinder is proper. *Roberts*, 465 S.W.3d at 903. Severance may still be required to prevent substantial prejudice to the defendant if the charges are not tried separately. *Id.* Severance of offenses should be granted if their joinder for trial would result in "substantial prejudice" to the accused.

Severance is governed by § 545.885 and Rule 24.07. *Love*, 293 S.W.3d at 476. Rule 24.07 states:

When a defendant is charged with more than one offense in the same indictment or information, the offenses shall be tried jointly unless the court orders an offense to be tried separately. An offense shall be ordered to be tried separately only if:

(a) A party files a written motion requesting a separate trial of the offense;

(b) A party makes a particularized showing of substantial prejudice if the offense is not tried separately; and

(c) The court finds the existence of a bias or discrimination against the party that requires a separate trial of the offense.

Rule 24.07. *In accord*, Section 545.885.2, RSMo Supp. 2017. “Substantial prejudice,” justifying severance of offenses, means “a bias or discrimination against the defendant ... which is actually existing or real and not one which is merely imaginary, illusionary or nominal.” Section 545.885.2, RSMo Supp. 2017.

5. Joinder of Count V to the other offenses for trial would result in substantial prejudice to Mr. Rapier because the jury would consider admissible evidence of guilt on Count V, which would be inadmissible as evidence of guilt on the other charges.

For instance, Count V alleges such things as: Mr. Rapier “stabbed T.B.” in 2014, he violated his parole, and he previously was found guilty of the felony of assault in the second degree in 15AC-CR00179.² None of this is admissible in the State’s guilt phase of the homicide charges in this case. Mr. Rapier’s prior conviction and the fact that he was on parole would be inadmissible evidence of other crimes as to the other counts if Mr. Rapier does not testify, which is a decision Mr. Rapier cannot knowingly make until the State presents its evidence.

Thus, Mr. Rapier can show a particularized showing of substantial prejudice if Count V is not tried separately. *See State v. Townes*, 941 S.W.2d 756 (Mo. App. E.D. 1997) (defendant was entitled to a hearing as to whether trial counsel was ineffective for failing to request a severance of unlawful possession of concealable firearm charge from robbery charge, which resulted in admission of evidence of defendant’s prior robbery conviction); *State v. Cook*, 673 S.W.2d 469 (Mo. App. E.D. 1984) (prejudicial effect of evidence of prior conviction with respect to charge of unlawful possession of a firearm

² The Supersedeas Indictment erroneously alleges that Ciera Kolb was the victim in that prior 2014 case. The victim in that case was Timothy Bullion. Aggravated Stalking under section 565.225.3(5), in effect at the time of the charged crime, requires that the stalking victim in the present charge was also the victim in the prior crime, which resulted in a prior finding of guilty. But the victim alleged in the 2014 offense was Bullion, not Kolb.

upon issue of defendant's guilt or innocence of other charges outweighed achievement of judicial economy underlying permissible joinder rule; thus, denial of defendant's motion for severance of possession of fireman charge was error).

Admitting evidence of other crimes not properly related to the cause on trial violates Mr. Rapier's right under the Missouri Constitution, Article I, Sections 17 and 18(a), to be tried for the offense with which he is charged by the information. *State v. Burns*, 978 S.W.2d 759, 760 (Mo. banc 1998). Here, the State has added the aggravated stalking charge with the clear design to inform the jury that two years prior to the charged homicide, Mr. Rapier stabbed another person, and as a result he was convicted of assault, and was subsequently granted parole. Prejudice is inherent in the fact that the some of the evidence of the alleged aggravated stalking count would be inadmissible propensity evidence in a trial of the other counts, if they are tried separately. The substantial prejudice is actually existing and real; it is not one that is merely imaginary, illusionary or nominal. Section 545.885.2, RSMo Supp. 2017.

6. Denial of Mr. Rapier's motion will be an abuse of the Court's discretion, and will violate Mr. Rapier's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I,

Sections 10, 17, and 18(a) of the Missouri Constitution and the laws of the State of Missouri, as well as Missouri Supreme Court Rules 23.05 and 24.07 and Sections 545.140 and 545.885, RSMo Supp. 2017.

WHEREFORE, Mr. Rapier requests that this Court enter an order granting severance of Count V from the other offenses.

Respectfully submitted,

/s/ Thomas Marshall

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Certificate of Service

I hereby certify that on this 13th day of January, 2020, an electronic copy of the foregoing was sent through the Missouri e-Filing system to counsel of record.

/s/ Heather Vodnansky

Heather Vodnansky