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Idaho Supreme Court
Karel Lehrman, Clerk of the Court
By: Brad Thies, Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,

Plaintiff-Respondent.

vs.

JUSTIN ROY BOOTH,

Defendant-Appellant,

S.Ct. No. 46454-2018
Kootenai CR-2017-6184

OPENING BRIEF OF APPELLANT

Appeal from the District Court of the First Judicial District of the State of Idaho
In and For the County of Kootenai

HONORABLE SCOTT WAYMAN
Presiding Judge

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II. STATEMENT OF THE CASE

A. *Introduction*

This Court should reverse the order denying the motion to sever counts and remand the case for further proceedings pursuant to the conditional plea agreement.

B. *Statement of the Case*

On October 22, 2016, Amanda Kirk reported to the police that her husband, William "Bo" Kirk, was missing. Amanda said she was also concerned because there had been three $300 withdrawals from their bank account, but from two different banks. Mr. Kirk's burnt truck was found in Hayden, ID. Mr. Kirk's body was discovered in a different location, down an embankment, just below the edge of the road. His hands were bound with zip ties and he had been shot several times. PSI, pg. 3.

On October 28, 2016, Mr. Booth voluntarily spoke to the FBI and local police. He was accompanied by his attorney, Clayton Anderson, and his wife. Defense counsel explained that the Booths were concerned that David Hutto was a danger to them and their family. Confidential Documents ("CD"), pg. 166, 173. There was no immunity agreement reached between the prosecutor and defense counsel. Mr. Booth was Mirandaized and waived his right to remain silent. CD pg. 168-169.

Mr. Booth told the police that he and Mr. Hutto were driving to the convenience store when Mr. Kirk drove up quickly behind them in his truck,

tailgating them with his bright lights on. This angered Mr. Hutto. He directed Mr. Booth to follow the truck, yelling "Follow him. Follow that guy." CD pg. 191.

Mr. Kirk pulled into his driveway and got out of his truck. Mr. Booth pulled in behind. Mr. Hutto got out and it looked like they were going to fight when Mr. Hutto pulled out a gun. CD pg. 195. Mr. Hutto forced Mr. Kirk back into his truck. Mr. Booth followed them as they drove off. CD pg. 197. When they parked, Mr. Hutto pulled Mr. Kirk out of his truck and threatened to shoot him. Mr. Hutto directed Mr. Booth to frisk Mr. Kirk. Mr. Booth did so, taking Mr. Kirk's wallet and telephone. CD pg. 198.

Mr. Hutto took zip ties out of his pockets and directed Mr. Booth to restrain Mr. Kirk. CD pg. 199. Mr. Hutto put Mr. Kirk back into the truck. CD pg. 200. Mr. Hutto was in the driver's seat. Mr. Booth got in the backseat. Mr. Hutto drove to a secluded area, got Mr. Kirk out of the truck and shot him many times. CD pg. 221-222. Mr. Hutto made Mr. Booth reload the weapon and continued to shoot Mr. Kirk. CD pg. 227-228; 232.

Mr. Hutto threatened to kill Mr. Booth if he said anything. CD pg. 235. Mr. Hutto drove the stolen truck to two banks where he withdrew money from the ATMs. Mr. Hutto knew Mr. Kirk's PIN number. CD pg. 241-242. During this time, Mr. Hutto was talking about returning to the Kirk residence to kill Ms. Kirk, but Mr. Booth talked him out of it. CD pg. 248. Mr. Booth then went home to get some gasoline, which Mr. Hutto later used to set the stolen trunk on fire. CD pg. 253-254; 256-57.

As a result of Mr. Booth's information and the evidence collected during the investigation, he and David Hutto were arrested. PSI, pg. 4.

C. *Proceedings Below*

Justin Booth was charged by Superseding Indictment with First-Degree Murder, Second-Degree Kidnapping, Robbery, First-Degree Arson, and Unlawful Possession of a Firearm. R 186. He pleaded not guilty to all counts. R 223.

On April 11, Mr. Booth moved to continue the April 24 trial setting because he had received additional discovery from the state on April 4 and 6. His counsel averred that he could not adequately prepare for trial in light of that disclosure. R 454. On that same day, Mr. Booth moved to sever the murder count from the remaining counts. The basis of that motion was that he had a duress defense to the kidnapping, robbery, arson and unlawful possession of a weapon charges, but not to Count I. R 458. Thus, he would wish to testify in support of that defense to those counts, but assert his right to remain silent as to the remaining count. R 459.

The court denied both the motion to continue and to sever counts after a hearing. R 463-465. On April 23, 2018, the parties reached a settlement agreement where Mr. Booth would plead guilty to Counts I (first-degree murder) and III (robbery) of an Amended Superseding Indictment. R 486.

The Amended Superseding Indictment was filed. R 490. Count I alleged Mr. Booth committed murder by aiding another (David Hutto) in shooting William "Bo" Tyrus John Kirk in the back with a handgun by holding and re-loading the handgun before and after Mr. Kirk was shot. R 491. There was no Count II, but Count III

alleged Mr. Booth committed robbery by aiding another in the taking Mr. Kirk's pickup truck and/or a financial transaction card belonging to Mr. Kirk. *Id.* Mr. Booth pleaded guilty to those charges. R 495. As part of the settlement agreement, Mr. Booth "specifically reserve[d] his right to appeal the rulings on pretrial motions, including, but not limited to, the denial of the Defendant's Motion to Sever, any sentence in this matter and any claims to ineffective assistance of counsel." R 488. This agreement was signed by all parties. R 489.

Mr. Booth was sentenced to two concurrent indeterminate life sentences with 30 years fixed. R 533-535.

A timely notice of appeal was filed. R 544.

A motion to reduce sentenced pursuant to I.C.R. 35(b) was also filed. R 555. That motion has not yet been ruled upon.[1]

III. ISSUE PRESENTED ON APPEAL

Did the court abuse its discretion in denying the motion to sever counts as it did not give reasoned consideration to the prejudice Mr. Booth would suffer by having to either choose to testify in support of his duress defense and incriminate himself as to the murder count or not present that defense in order to remain silence as to the murder count?

[1] See iCourt Portal (last visited 5/28/2019)

IV. ARGUMENT

The trial court abused its discretion in denying the motion to sever.

A. *Facts pertaining to claim*

Mr. Booth requested that the court give the jury Idaho Criminal Jury Instruction 1509, the pattern instruction on the Threats and Menaces defense. [2] The state filed a motion objecting to Mr. Booth putting on a duress defense at trial. R 448. It argued that while the "request was premature" as to most of the charges, duress was not a defense to murder under any circumstances. It wrote: "Importantly, duress is never a defense to murder. The comment to ICJI 1509 states that 'this instruction cannot be used the crime is punishable with death.' First degree murder surely is one such crime, and therefore the ICJI cannot be used." R 449. [3]

---

[2] ICJI 1509 is based upon I.C. § 18-201. The statute provides that "[a]ll persons are capable of committing crimes, except those belonging to the following classes:

> . . . .
> 4. Persons (unless the crime be punishable with death) who committed the act or made the omission charged, under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused.

[3] Here, Count I alleged both premediated and felony murder theories. R 187. It is an open question whether a duress defense may be presented as a defense to a felony murder charge. *See State v. Eby*, 136 Idaho 534, 540 n.1, 37 P.3d 625, 631 (Ct. App. 2001) ("Eby acknowledges that under I.C. § 18-201(4), a threats and menaces defense does not apply to first degree murder, which is punishable by death. However, Eby argues that such an exclusion should not apply here because, in order for the jury to find him guilty of felony murder, it had to first find him guilty of attempted robbery, a crime that is not excluded from I.C. § 18-201(4). We deem it unnecessary to address this issue.").

In response, Mr. Booth moved to sever the Second-Degree Kidnapping, Robbery, First-Degree Arson, and Unlawful Possession of a Firearm charges from the Murder charge. R 458. When considering I.C.R. 14 motions to sever, Idaho courts have generally considered three potential sources of prejudice:

> (1) the jury may confuse and cumulate the evidence, and convict the defendant of one or both crimes when it would not convict him of either if it could keep the evidence properly segregated; *(2) the defendant may be confounded in presenting defenses, as where he desires to assert his privilege against self-incrimination with respect to one crime but not the other*; or (3) the jury may conclude that the defendant is guilty of one crime and then find him guilty of the other because of his criminal disposition.

State v. Abel, 104 Idaho 865, 867-68, 664 P.2d 772, 774-775 (1983) (emphasis added), *quoting United States v. Foutz*, 540 F.2d 733, 736 (4th Cir. 1976).

Mr. Booth argued that he would be confounded in presenting defenses because he may want to assert his right to remain silent as to the murder case, noting:

> The Defendant has [a] valid defense under I.C. §18-201(4) to the charges of kidnapping the second degree, robbery, arson in the first degree, and unlawful possession of a weapon but, depending upon the Court's ruling on the [state's] Motion in Limine, may not have a defense to Count I. The potential is that Defendant could very well be prejudiced should trial proceed as to all counts as the Defendant may be confounded in presenting a duress defense as to Counts II-V and not be allowed to present this defense as to Count I. If this is the case the Defendant may wish to assert his Fifth Amendment privilege respect to Count I but not the others. The joinder of offenses for trial is prejudicial and warrants severance since the Defendant will be forced testify about a count on which the Defendant has a right to remain silent.

R 459-60.

At the hearing, Mr. Booth repeated his argument that even if the duress defense was not available to the murder charge it would still be available to the other charges. In that case, he might need to testify as to those charges, but may not wish to testify in relation to the murder charges. T pg. 33, ln. 22 – pg. 34, ln. 5.

The court rejected Mr. Booth's argument, reasoning as follows:

> The defendant has asserted that there may be -- he may be confounded in presenting defenses. And here we've got multiple charges. And again they're all arising out of the same set of circumstances. And while there is the idea that a duress defense cannot be utilized as a defense to murder, I don't find that that particular legal position necessarily will result in presenting confounding defenses.
>
> Juries can be instructed as to what defense applies to which charge and those legal matters can be argued to the jury. The strategic decisions that counsel makes regarding whether or not to testify or assert a privilege of self – against self-incrimination are part of the trial process. And in this case I don't find there has been a sufficient showing that there is going to be a circumstance that will prejudice the defendant in presenting his defense.

T pg. 49, ln. 7-23.

B. *Why relief should be granted*

An abuse of discretion standard is applied when reviewing the denial of a motion to sever charges for trial pursuant to I.C.R. 14. *State v. Field*, 144 Idaho 559, 564, 165 P.3d 273, 278 (2007). When a trial court's discretionary decision is reviewed on appeal, the appellate court determines: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the lower court reached

its decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989).

Here, the court abused its discretion because it did not act consistently with the applicable legal standards nor was the decision reached by an exercise of reason. Mr. Booth's dilemma was that he needed to testify to establish his defense to Counts II-V, but did not want to testify as to the murder. All the court said about this is that "[t]he strategic decisions that counsel makes regarding whether or not to testify or assert a privilege of self – against self-incrimination are part of the trial process. And in this case I don't find there has been a sufficient showing that there is going to be a circumstance that will prejudice the defendant in presenting his defense." T pg. 49, ln. 17-23. As explained below, that conclusion was not arrived by the application of the applicable standard nor in an exercise of reason.

Severance may be proper to relieve the defendant from the decision of whether to testify to establish a defense to one count at the risk of incriminating himself as to another. Consequently, the fact that in other situations the defendant must decide whether to testify cannot serve as the basis to deny a motion to sever counts. "A court may sever properly joined counts when the defendant "Makes a convincing showing that he has both important testimony to give concerning one count and strong need to refrain from testifying on the other."' *United States v. Kinsella*, 530 F. Supp. 2d 356, 365 (D. Me. 2008), *quoting United States v. Alosa*, 14 F.3d 693, 695 (1st Cir. 1994) (citations and quotations omitted).

Here, the court knew, but failed to take into reasoned consideration, the fact that Mr. Booth had important testimony to give concerning his duress defense. "Under the law, a defendant is not guilty of a crime if the defendant committed the act or made the omission charged under threats or menaces sufficient to show that the defendant had reasonable cause to and did believe the defendant's life would be endangered if the defendant refused." ICJI 1509. Only Mr. Booth could testify about the threats and menaces at the time the offenses because only he, Mr. Hutto, and the victim were present.[4] And only he could testify that he "did believe [his] life would be endangered" if he failed to submit to Mr. Hutto.

A federal trial court granted a motion for severance in an analogous situation. *United States v. Kinsella*, 530 F. Supp. 2d 356 (D. Me. 2008). In *Kinsella*, the defendant was charged with drug offenses and with failure to appear. He was entitled to sever the failure to appear count because defendant's reason for his failure to appear could be admissible to rebut an inference of consciousness of guilt in connection with drug charges, but was likely inadmissible in connection with failure to appear count, and a joint trial would prejudice his Fifth Amendment right not to testify by forcing him to choose between incriminating himself as to the failure to appear charge and testifying as to drug charges. As here, only Kinsella could present "direct evidence of his 'subjective belief'" and that was a factor which

[4] At the time of the motion hearing, Mr. Hutto had been sentenced to fixed life for first-degree murder, robbery, and kidnapping. Mr. Hutto's attorney told the court that the case was still on appeal and that he would not allow Mr. Hutto to testify at Mr. Booth's trial. T pg. 30, ln. 9 – pg. 31, ln. 10.

militated in favor of severance. 530 F.Supp. at 365. Similarly, severance should have been granted in a case where only the defendant was able to testify as to his "good-faith" defense to charges of income tax evasion but did not wish to testify in the mail fraud, wire fraud and money laundering counts. *United States v. Jordan*, 112 F.3d 14, 17 (1st Cir. 1997) ("Only he can supply testimony of his subjective belief as permitted by *Cheek* [*v. United States*, 498 U.S. 192, 203-04(1991)], forthrightly subjecting himself to cross-examination."). The prejudice to Count I from testifying to the justification defense to Counts II-V is obvious. Mr. Booth had to admit his presence at and participation in the offenses, which would seriously incriminate himself as to Count I. As explained in *Cross v. United States*, 335 F.2d 987, 989 (D.C. Cir.1964), prejudice may develop when an accused wishes to testify on some but not all of the counts.

> His decision whether to testify will reflect a balancing of several factors with respect to each count: the evidence against him, the availability of defense evidence other than his testimony, the plausibility and substantiality of his testimony, the possible effects of demeanor, impeachment, and cross-examination. But if the two charges are joined for trial, it is not possible for him to weigh these factors separately as to each count. If he testifies on one count, he runs the risk that any adverse effects will influence the jury's consideration of the other count. Thus he bears the risk on both counts, although he may benefit on only one. . . . Thus he may be coerced into testifying on the count upon which he wished to remain silent. It is not necessary to decide whether this invades his constitutional right to remain silent, since we think it constitutes prejudice within the meaning of Rule 14.

335 F.2d at 989.

Here, the court did not exercise reason in accord with the applicable legal standards. It merely observed that "[t]he strategic decisions that counsel makes

regarding whether or not to testify or assert a privilege of self – against self-incrimination are part of the trial process." But that observation was not a reasoned consideration of the dilemma Mr. Booth was facing. The normal trial process does not require a defendant to incriminate himself as to one charge in order to assert of defense as to others. Nor was it an application of the correct legal standard. The court was required to consider whether Mr. Booth's testimony in support of a duress defense to the non-homicide counts would confound his defense to the murder count. *State v. Abel*, 104 Idaho at 867-68, 664 P.2d at 774-775 (1983). Its failure to do so means the denial was not the result of an exercise of reason nor the application of the correct legal standard to the question before it, and consequently an abuse of its discretion. *State v. Hedger*, *supra*.

V. CONCLUSION

The order Denying the Motion to Sever should be reversed and the matter remanded for further proceedings consistent with the conditional guilty plea.

Respectfully submitted this 29th day of May, 2019.

/s/ Dennis Benjamin
Dennis Benjamin
Attorney for Appellant

CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email address(es):

Idaho State Attorney General
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Dated and certified this 29th day of May, 2019.

/s/Dennis Benjamin
Dennis Benjamin