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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 46454-2018**
Plaintiff-Respondent,	)	
	)	**Kootenai County Case No.**
v.	)	**CR-2017-6184**
	)	
JUSTIN ROY BOOTH,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

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Nature Of The Case

Justin Roy Booth appeals from the judgment entered upon his conditional guilty plea to first degree murder and robbery. On appeal, Booth challenges the district court's denial of his motion to sever.

Statement Of The Facts And Course Of The Proceedings

Booth and David Hutto murdered a random stranger, William "Bo" Kirk, on October 22, 2016. (PSI, pp.3-4.) When Kirk did not come home from work that night, and when mysterious charges appeared on his bank account, Kirk's wife called police. (Id., p.3.) That same night, police found Kirk's abandoned and burned truck. (Id.)

Two nights later, Kirk's body was found in an embankment. (Id.) His hands were zip tied behind his back and he had been shot eight times. (Id.)

On October 28, Booth, his wife Heather Booth, and his attorney met with law enforcement to give an interview. (10/28/16 Tr.)[1] Booth told police that he and Hutto were driving together the night of October 22 when Kirk purportedly tailgated them—Kirk's truck "was, like, right on us." (Id., p.27, L.4 – p.29, L.1.) Booth told police that they followed Kirk to his driveway and that Hutto abducted Kirk at gunpoint. (Id., p.30, L.17 – p.32, L.10.) Booth explained that Hutto sat in the passenger seat of the victim's truck and forced him to drive to a construction site; meanwhile, Booth drove his own vehicle. (Id., p.32, L.15 – p.34, L.3) Booth

[1] The transcript of Booth's interview with police appears in several places in the record on appeal, including pages 25 through 120 of the Clerk's Record, and pages 165 through 284 of the confidential documents. For ease of reference, citations to the interview transcript will be to the pages of the transcript itself.

told police that Hutto then ordered Kirk out of his truck and that Booth frisked and zip tied Kirk at Hutto's behest. (Id., p.34, L.14 – p.35, L.19.) Booth also stated that the group eventually traveled to an "embankment," but at that point, following Hutto's instructions, he "went back to the house and … got gas." (Id., p.40, Ls.5-19.) Booth told police that Hutto "told me later on that he shot [Kirk]," but Booth "[did not] know" the circumstances of the shooting. (Id., p.54, L.4 – p.55, L.21.)

This was a lie. Halfway through the interview Booth changed his story; he now admitted that he had been "in the truck" with Hutto and Kirk—Kirk was sitting "in the passenger front seat" and Booth "was behind him." (Id., p.55, L.22 – p.56, L.25.) Booth also admitted that the three of them stopped on the side of the road (id., p.59, Ls.14-22), and that "[Hutto] went and got [Kirk]" (id., p.61, Ls.8-17). After telling Kirk, "'Keep your eyes closed and you'll see your wife again," Hutto "emptied the clip on him"—shooting Kirk "five or six times" in the back. (Id., p.62, L.4 – p.63, L.12.) Booth then stated that Hutto "made me reload" the gun, and affirmed that after he "reloaded it" for Hutto, Hutto "shot again." (Id., p.63, L.12 – p.64, L.3; p.69, Ls.2-3.) Booth and Hutto left Kirk "on the side of road." (Id., p.63, Ls.8-10; p.71, Ls.2-6.)

Booth told police that he and Hutto drove to at least two banks and withdrew money using Kirk's financial transaction cards. (Id., p.77, L.1 – p.78, L.9.) Booth also said that he bought gas, per Hutto's request. (Id., p.89, Ls.1-5.) According to Booth they then abandoned Kirk's truck, and Hutto poured gasoline inside it and lit it on fire. (Id., p.92, L.24 – p.93, L.14.) The two returned to Booth's house and they burned their clothing in "a fire pit in the backyard." (Id., p.99, L.16 – p.100, L.7.)

The state charged Booth[2] by superseding indictment with first degree murder, second degree kidnapping, robbery, first degree arson, and unlawful possession of a firearm. (R., pp.186-88.) Booth moved to sever the charges because he would purportedly be "confounded in presenting a duress defense." (R., p.459.) According to Booth, he "could very well be prejudiced should trial proceed," because he purportedly had a duress defense to the non-murder counts, but could be statutorily prohibited from presenting that defense to the murder count. (R., p.459; 4/12/18 Tr., p.33, L. 7 – p.34, L.5 (citing Idaho Code § 18-201(4)).) Booth argued that severance was justified because "he may not wish to testify in relation to the Murder charges, "especially if" the statute prohibited him from "presenting a duress defense." (4/12/18 Tr., p.33, L.25 – p.34, L.5.) The state objected, arguing 1) that Booth's motion to sever was untimely, and 2) that it failed on the merits. (Id., p.37, L.5 – p.42, L.10.) The district court denied Booth's motion on the merits and did not sever the counts. (Id., p.46, L.17 – p.50, L.14.)

Pursuant to a settlement agreement between the parties, Booth pleaded guilty to first-degree murder and robbery, and the remaining counts were dismissed. (R., pp.486, 490-91, 495.) Booth's conditional plea reserved the "right to appeal the [district court's] ruling[s] on pretrial motions, including, but not limited to, the denial of the Defendant's Motion to Sever." (Id., p.488.) The district court sentenced Booth to concurrent life sentences, fixing 30 years. (Id., p.535.) Booth timely appealed. (Id., pp.544-46.)

[2] Prior to charging Booth, the state charged Hutto with first degree murder (to which Hutto entered an Alford plea) and first degree kidnapping and robbery (to which Hutto pleaded guilty); the Idaho Court of Appeals affirmed his judgment of conviction and sentence in an unpublished opinion. State v. Hutto, 2018 WL 4140727, Docket No. 45127 (filed August 30, 2018).

ISSUES

Booth states the issue on appeal as:

> 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 [silent] as to the murder count?

(Appellant's brief, p.4)

The state rephrases the issues as:

I. Because Booth's motion to sever was untimely, and because he has shown no good cause excusing the delay, was it properly denied?

II. In any event, has Booth failed to show the district court erred in denying his motion to sever, because he fails to show any prejudice would have resulted from a trial on all the counts?

ARGUMENT

I.
Booth's Motion To Sever Was Untimely And Booth Showed No Good Cause Or Excusable Neglect To Justify The Delay; As Such, It Was Properly Denied

As explained herein the district court correctly denied Booth's motion to sever on the merits. However, denial was proper on another, threshold basis: Booth's motion was plainly untimely.[3] And he has shown no good cause or excusable neglect to justify the delay.

Idaho Criminal Rule 14 allows parties to move for severance "[i]f it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in a complaint, indictment, or information." But parties must comply with Idaho Criminal Rule 12(d), which sets forth that Rule 12(b) motions—such as severance motions— "must be filed within 28 days after the entry of a plea of not guilty or seven days before trial whichever is earlier." I.C.R. 12(b)(4), (d). While a court "may relieve a party of failure to comply with this rule," it can only do so "for good cause shown or for excusable neglect." I.C.R. 12(d).

These timelines are not optional. Parties must show good cause or excusable neglect to properly file a Rule 12(b) motion; otherwise, "[a]llowing untimely [Rule 12(b)] motions to be heard because they appear meritorious eviscerates the purpose of the rule." State v. Dice, 126

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[3] The district court did not address the state's timeliness argument; instead, it went straight to the merits. (See 4/12/18 Tr., p.46, L.17 – p.50, L.14.) If the court overlooked the timeliness issue this was an error under State v. Dice (requiring courts to "determine[] whether good cause or excusable neglect was shown based on the reasons given"). 126 Idaho 595, 597, 887 P.2d 1102, 1104 (Ct. App. 1994). Alternatively, to the extent the district court's merits consideration was an implicit denial of the state's timeliness argument, this likewise was an error; the motion was plainly untimely and Booth failed to establish good cause or excusable neglect, as explained herein. In any event, the state specifically argued that the motion to sever was untimely. (4/12/18 Tr., p.39, Ls.3-16.) As such, "both the issue and the party's position on the issue" were unmistakably "raised before the trial court." State v. Gonzalez, 165 Idaho 95, __, 439 P.3d 1267, 1271 (2019). This issue is therefore "properly preserved for appeal" and the district court's ruling can be upheld on this basis. Id.

Idaho 595, 597, 887 P.2d 1102, 1104 (Ct. App. 1994). Courts must therefore entertain explanations for the delay and must "determine[] whether good cause or excusable neglect was shown based on the reasons given." Id. "If no good cause or excusable neglect was established to the satisfaction of the district court," a Rule 12(b) motion "should not [be] heard," much less granted. Id. And where a trial record "is devoid of any evidence presented … showing that there was good cause or excusable neglect for the late filing," a motion to sever is appropriately denied. State v. Eguilior, 137 Idaho 903, 908, 55 P.3d 896, 901 (Ct. App. 2002); see also U.S. ex rel. Tarallo v. LaVallee, 433 F.2d 4, 6 (2d Cir. 1970) ("The exigencies of a trial and the need for orderly procedure require that the motion to sever be made at the earliest possible moment. There seems to be no reason why appellant could not have moved for severance on this ground before trial. More than seven months elapsed between appellant's indictment and the trial, and appellant had counsel some time before the trial began.").

Booth's motion was plainly untimely under Rule 12(d). As the state pointed out below, Booth pleaded not guilty to the charges in the superseding indictment on May 22, 2017. (R., p.223; 4/12/18 Tr., p.39, Ls.3-11.) His motion to sever was filed nearly a year later, on April 11, 2018. (R., pp.398-99.) Booth's motion did not even attempt to establish any good cause or excusable neglect for the late filing; indeed, it never mentioned the fact that it was time barred. (See id.)

Furthermore, Booth failed to establish good cause or excusable neglect at the hearing on his motion. The state pointed out that the motion to sever was impermissibly late, despite the fact that Booth's then-counsel had "been on the case for six months now." (4/12/18 Tr., p.39, Ls.3-16.) Booth's counsel attempted, for the first time, to confront the issue:

> I do wish to address timeliness first. As I said, I made a record of that we had requested a—we'd requested information related to statements given by Heather Booth.
>
> When I got the case in December, we received a two page response. We then received a response in March from an interview that occurred in October of 2016 that lasted approximately an hour and 45 minutes with Ms. Booth. That interview contains information that we did not have that bolsters a duress defense.
>
> At that point, we may not of [sic] had information that would have allowed a duress defense to be presented and corroborated by another party other than my client. That's why this information was so crucial. That we could then—we—Mr. Booth and Mrs. Booth have since divorced. Ms. Booth has not been cooperative without investigative efforts to make statements. So it was a crab [sic] shoot, quite frankly, as to what was gonna be said should we subpoena her. This interview then gave me information that I could utilize to impeach her, should she testify to something different.

(Id., p.42, L.18 – p.43, L.14.)

Booth's counsel thought that "really the two people that could testify to Mr. Hutto's actions, the threat and the menace that he presented, were Heather Booth and Justin Booth." (Id., p.43, Ls.16-18.) Heather could testify "as to [Hutto's] demeanor, as to how uncomfortable she felt in the household, as to other various threats," which, counsel thought, was "the epitome of a duress defense." (Id., p.43, Ls.21-24.) Counsel further explained that "until we had the ability to impeach Ms. Booth, have that transcript, our ability to truly present and corroborate a duress defense was very limited":

> So as to timeliness, the ability to present a duress defense really came into focus once we were able to get that transcript, review it, and realize[] what we had. And now I can try to subpoena Ms. Booth. Now I can impeach her if I need to, if she testifies to anything different.

(Id., p.43, L.25 – p.44, L.13.) In other words, Booth blamed his failure to timely move to sever on the state's purported failure to timely disclose an interview transcript. This claim is meritless for several reasons.

Booth's argument is meritless, first, because the interview transcript did not contain any new information to the defense. Booth framed the interview as one "that occurred in October of 2016 that lasted approximately an hour and 45 minutes with Ms. Booth." (Id., p.42, L.24 – p.43, L.1.) This half-correct account of the interview understates, beyond recognition, what it actually was: it was an interview of Booth *himself* (see 10/28/16 Tr.), which Heather happened to be present for portions of (see 10/28/16 Tr., p.56, Ls.2-8 (where Heather was instructed to "step outside" because Booth thought she would not "want to hear" his admissions about the murder, and because she was "going to have a panic attack")). Booth knew exactly what he, his wife, and everyone else said during his interview—he was sitting there. (See 10/28/16 Tr.) Thus, trial counsel's dog-ate-my-homework excuse that the "interview contains information that we did not have" misstates reality. (Id., p.43, Ls.1-2.) Long before Booth entered his plea, he had complete knowledge of everything that was said at his own interview. As such, Booth's purported lack of access to the transcript could not have conceivably justified his failure to timely file his motion to sever.

Moreover, Booth fails to show why the interview transcript was even relevant to severance. Booth argued that the transcript mattered because it "gave me information that I could utilize to impeach [Heather], should she testify to something different." (Id., p.43, Ls.12-14.) But this has zero bearing on the issue here: that Booth is purportedly confounded because he *himself* would want to testify. Booth could have taken the stand and testified about purported duress regardless of whether he could have effectively impeached Heather. This is especially true because, as he now puts it, "Only Mr. Booth could testify about the threats and menaces at the time [of] the offenses because only he, Mr. Hutto, and the victim were present." (Appellant's

brief, p.9.) Booth thus necessarily fails to show why the purportedly late disclosure of Heather-impeaching information (that he already knew about) prevented him from moving to sever.

This brings up the final flaw with Booth's argument. It is entirely speculative. Booth did not establish below what Heather would have testified to. (10/28/16 Tr., p.43, Ls.7-14.) Much less did he establish that Heather *would have* contradicted her interview statements. Instead, Booth's counsel admitted that it was all guesswork: "it was a crab [sic] shoot, quite frankly, as to what was gonna be said should we subpoena her." (Id., p.32, Ls.8-14.) Thus, even assuming Heather-impeaching information would have been relevant to Booth's duress defense, Booth failed to make an offer of proof that the interview actually had any impeachment value. See State v. Young, 136 Idaho 113, 120, 29 P.3d 949, 956 (2001) ("Error may not be based upon a ruling that excludes evidence unless a substantial right of the party is affected and the substance of the evidence was made known to the court by offer of proof."). This fails to show, again, why the purportedly late receipt of the interview transcript prevented Booth from timely moving to sever the charges.

Booth's only justification for his untimely filing was that he did not have access to a transcript. But it was a transcript of an interview he sat through, with only speculative impeachment value, and with no new information or discernible relevance to Booth's own testimony. This falls far short of showing good cause or excusable neglect for Booth's failure to move to sever charges within 28 days of his not guilty plea. Because Booth's motion to sever was inexcusably untimely it was properly denied.

II.
Alternatively, Booth Fails To Show The District Court Erred By Denying His Motion To Sever, Because He Fails To Establish Facts Demonstrating Any Prejudice

A. Introduction

In the alternative, Booth fails to show the district court abused its discretion by denying his severance motion on the merits. Booth contends that the joinder of counts here prejudiced him "because he may" have "want[ed] to assert his right to remain silent as to the murder case"—where a duress defense would be statutorily prohibited. (Appellant's brief, p.6.) Despite that, he claims he may have wanted to testify in support of a duress defense as to the other counts. (Id.) In other words, his purported "testimony in support of a duress defense to the non-homicide counts would confound his defense to the murder count." (Id., p.11.)

This argument fails because Booth failed to establish below, and fails to show on appeal, any facts demonstrating he was prejudiced by the joinder of counts. In particular, he fails to make a convincing factual showing that he would have been confounded in presenting a duress defense. As such, Booth fails to show the district court erred in denying his motion to sever.

B. Standard Of Review

A district court's denial of a severance motion is reviewed under "an abuse of discretion standard." State v. Orellana-Castro, 158 Idaho 757, 760, 351 P.3d 1215, 1218 (2015); State v. Field, 144 Idaho 559, 564, 165 P.3d 273, 278 (2007).

C. Booth Fails To Establish Facts Showing He Would Have Been Confounded In Presenting Defenses And Therefore Fails To Show The District Court Erred In Denying His Motion To Sever

Motions to sever are governed by Idaho Criminal Rule 14, which provides in relevant part:

> If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in a complaint, indictment or information or by such joinder for trial together, the court may order the state to elect between counts, grant separate trials of counts, grant a severance of defendants, or provide whatever other relief justice requires.

"When reviewing an order denying a motion to sever, the inquiry on appeal is whether the defendant has presented facts demonstrating that unfair prejudice resulted from a joint trial, which denied the defendant a fair trial." State v. Eguilior, 137 Idaho 903, 901, 55 P.3d 896, 908 (Ct. App. 2002) (citing State v. Cierelli, 115 Idaho 732, 734, 769 P.2d 609, 611 (Ct. App. 1989)). The "potential sources of prejudice" that have been recognized by Idaho's appellate courts include:

> (a) the possibility that the jury may confuse and cumulate the evidence, rather than keeping the evidence properly segregated; (b) the potential that the defendant may be confounded in presenting defenses; and (c) the possibility that the jury may conclude the defendant is guilty of one crime and then find him or her guilty of the other simply because of his or her criminal disposition, *i.e.* he or she is a bad person.

Eguilior at 901, 55 P.3d at 908 (citation omitted). The Idaho Supreme Court, quoting a Fourth Circuit case, further defined how a defendant could be "confounded" in presenting defenses: "where he desires to assert his privilege against self-incrimination with respect to one crime but not the other." State v. Abel, 104 Idaho 865, 867, 664 P.2d 772, 774 (1983) (quoting United States v. Foutz, 540 F.2d 733 (4th Cir. 1976)).

The state is unaware of Idaho authority addressing this precise issue. But Booth approvingly cites to Cross v. United States, 335 F.2d 987, 990 (D.C. Cir. 1964), which examined this exact scenario: where a defendant was confounded because he purportedly "wished to testify on Count II and remain silent on Count I." Id. at 990. There, the defendant was charged with "robbery of a tourist home" and "robbery of a church rectory," respectively. Id. at 988. Cross

wanted to testify on Count II because he had a highly convincing defense (that the jury ultimately believed) "that he was a victim and not a cohort of the armed robbers who entered the tourist home behind him." Id. at 990. On the other hand, Cross was not enthused about testifying on Count I. Id. There, his defense was "that he had been drinking heavily and did not know his whereabouts at the time of the church robbery." Id. Deploying the heavy-drinking defense for the church robbery, beyond being "plainly evasive and unconvincing," led to some regrettable questioning "concerning his generally tawdry way of life and his prior convictions." Id.

The Cross Court concluded that Cross had been confounded in presenting a defense:

> Thus it would appear that Cross had ample reason not to testify on Count I and would not have done so if that count had been tried separately. In a separate trial of that count the jury would not have heard his admissions of prior convictions and unsavory activities; nor would he have been under duress to offer dubious testimony on that count in order to avoid the damaging implication of testifying on only one of the two joined counts.

Id. at 990–91.

Soon after Cross was issued, however, the D.C. Circuit clarified that Cross had not established an easily surmountable, defendant-driven test for prejudice. In Baker v. United States, 401 F.2d 958, 976-77 (D.C. Cir. 1968), the court explained that the defendant had to do more than simply indicate a desire to testify on some counts, and stand silent on others, to show prejudice. There, the appellant argued that Cross only required the defendant to show "'a timely and bona fide election by the accused to testify as to some counts and not as to others," and that showing a mere election to testify separately "*requires* a Rule 14 severance.'" Id. at 976 (emphasis added).

The Baker Court sensibly rejected this reading of its prior opinion as "far too broad." Id. "Such a rule," the court first noted, "would divest the court of all control over the matter of

severance and entrust it to the defendant." Id. (footnote omitted). The court acknowledged that "because of the unfavorable appearance of testifying on one charge while remaining silent on another, and the consequent pressure to testify as to all or none, the defendant may be confronted with a dilemma: whether, by remaining silent, to lose the benefit of vital testimony on one count, rather than risk the prejudice (as to either or both counts) that would result from testifying on the other." Id. But, "[o]bviously[,]no such dilemma exists where the balance of risk and advantage in respect of testifying is substantially the same as to each count." Id.

As such, the D.C. Circuit clarified that the defendant had the burden to prove potential prejudice with a "convincing showing" of facts:

> Thus unless the "election" referred to by appellant is to be regarded as conclusive— and we think it should not be— no need for a severance exists until 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.

Id. at 976-77 (footnote omitted). Moreover, to make a "convincing showing," "it is essential that the defendant present enough information—regarding the nature of the testimony he wishes to give on one count and his reasons for not wishing to testify on the other—to satisfy the court that the claim of prejudice is genuine and to enable it intelligently to weigh the considerations of 'economy and expedition in judicial administration' against the defendant's interest in having a free choice with respect to testifying." Id. (footnote omitted).

Numerous state and federal courts have adopted the D.C. Circuit's post-Cross reasoning and its heightened "convincing showing" standard. For example, in Com. v. Williams, 467 N.E.2d 481, 483 (Mass. App. Ct. 1984), "the defendant did not present any information" at the severance motion hearing "as to the nature of the testimony he proposed to give in the Marshfield case or any reason for desiring to remain silent in the Pembroke case." Instead, "defense counsel

only asserted that her client 'might very well' testify and that the defendant 'can't take the stand on that one [Marshfield] if it's going to cause a problem with the second incident [Pembroke].'" Id. This was insufficient to show prejudice insofar as "[t]hese representations were ephemeral and did not meet the 'convincing showing' standard of *Baker*." Id. Courts relying on Baker have similarly required defendants to "make a particularized showing of what testimony would be offered." United States v. Huff, No. 2:08-CR-371, 2009 WL 197521, at *3 (D. Utah Jan. 27, 2009); see also United States v. Weber, 437 F.2d 327, 334 (3d Cir. 1970); State v. Schroff, 503 A.2d 167, 169 (Conn. 1986) (holding the defendant "complete[ly] fail[ed] to substantiate his claim of prejudice" because "although the defendant did declare that he wanted to testify with respect to the first three counts but not on the firearms counts, he at no time disclosed the substance of his expected testimony, and he demonstrated no reason for his not wanting to testify on the other counts"); Holmes v. Gray, 526 F.2d 622, 626 (7th Cir. 1975) (finding "severance is not mandatory every time a defendant wishes to testify to one charge but to remain silent on another"); United States v. Werner, 620 F.2d 922, 930 (2d Cir. 1980); United States ex rel. Tarallo v. LaVallee, 433 F.2d 4, 6 (2d Cir.1970); United States v. Sampson, 385 F.3d 183, 191 (2d Cir. 2004).

Applying the foregoing heightened standards here, Booth has failed to show the district court abused its discretion when it concluded that Booth failed to make "a sufficient showing that there is going to be a circumstance that will prejudice [him] in presenting his defense." (4/12/18 Tr., p.49, Ls.20-23.) First, Booth presented no evidence in support of his severance motion. (See R., pp.458-59.) His notice of intent to seek a duress defense likewise alleged that Booth "acted under the direct menace and threat of David Hutto," but he never made a "particularized showing" as to what threats were issued, or how he was menaced. (Id., pp.398-99.)

Similarly, at the hearing in support of his severance motion, Booth only discussed the potential "duress defense" in the vaguest of terms. Booth only made the following statement regarding what duress, specifically, he was referring to:

> As the Court is aware in handling this case, the—really the two people that could testify to Mr. Hutto's actions, the threat and the menace that he presented, were Heather Booth and Justin Booth. They lived in this tiny rental house. Mr. Hutto was there for several months. Ms. Booth testifies—or, excuse me, makes statements that as to his demeanor, as to how uncomfortable she felt in the household, as to other various threats. That is the epitome of a duress defense, the information that will be utilized for that.

(4/12/18 Tr., p.43, Ls.15-25.)

Here again, oblique concern about prior "threat and menace," or household discomfort, does not establish that Booth was acting under duress the night of the murder. Moreover, this particular statement only establishes that Heather Booth purportedly felt threated and/or uncomfortable—not that Booth himself did. (See id.) This is nowhere near a "convincing showing" of Booth's "strong need" to refrain from testifying as to the murder case or that he had "important testimony to give" concerning duress for the other counts. Baker, 401 F.2d at 976-77.

Finally, Booth's citation to the interview transcript, both below and on appeal, fails to make a convincing showing that Booth had a duress defense to give. Below Booth argued that "the ability to present a duress defense really came into focus once we were able to get that transcript." (4/12/18 Tr., p.44, Ls.8-11.) Booth similarly argues on appeal that "Mr. Booth had important testimony to give concerning his duress defense," and all of his purported facts of the case are taken from the interview transcript. (See Appellant's brief, pp.1-2, 8.)

This argument fails, first, because the interview transcript does not establish that Booth had a legitimate duress defense. During the interview, Booth did not state that, on the night of the murder, Hutto forced him to commit any of the charged crimes. (See 10/28/16 Tr., pp.1-

120.) On appeal Booth points out that Hutto purportedly threatened Booth to "keep [his] mouth shut," or otherwise Booth would "stay here with" the recently-murdered Kirk. (Appellant's brief, p.2 (citing 10/28/16 Tr., p.71, Ls.4-10).) However, this could not have shown duress to commit the murder, kidnapping, robbery, or unlawful possession charges—because the purported threat happened after all those crimes had been committed.[4] (See 10/18/16 Tr., p.71, Ls.2-10.) Moreover, this purported threat—like Hutto's purported request that Booth "hurry" and get gasoline "or else"—had, at best, minimal bearing on the arson charge. (Id., p.89, Ls.1-2.) Booth made the trip to get the gasoline for the arson *alone*, and returned home to find Hutto was not there. (Id., p.89, Ls.1-7.) Booth therefore had ample opportunity to flee from Hutto and/or protect his family, who he claimed to think were in danger. (See id., p.89, Ls.1-4.)

This leaves Booth's statement that Hutto "made [Booth] reload" the gun. (Id., p.63, Ls.10-12.) Here too, Booth did not state that Hutto threatened or coerced him—just that Hutto tried to reload the gun, was unsuccessful, "and [Hutto] goes, 'Reload this.'" (Id., p.64, Ls.1-3.) Even if this polite request to load the weapon would qualify as duress, it would have only gone towards the murder charge—not any of the other charges that Booth sought to sever in the first place.

Moreover, the interview transcript was unreliable. During the first half of the interview Booth supplied a fictional story. (See id., p.32, L.5 – p.55, L.21.) Booth maintained, among other things, that he was not there when Hutto murdered Kirk. (See id., p.40, Ls.14-24; p.42, L.3 – p.43, L.1; p.45, L.24 – p.47, L.21; p.54, L.4 – p.55, L.21.) This was a lie. When Booth was

[4] Likewise, Hutto's purported threats to kill Booth's wife or "whole family" happened after the entirety of the charged conduct; by chronological necessity these purported threats could not have caused Booth to commit any of the charged crimes under duress. (See 10/28/16 Tr., p.100, Ls.12-22; p.101, Ls.1-2; p.102, Ls.15-22.)

confronted by police, he admitted the truth: that he and Hutto murdered Kirk together. (Id., p.56, Ls.2-8; p.62, L.14 – p.63, L.12.) While Booth's new version of the facts claimed that he did not pull the trigger, but only loaded the gun at Hutto's behest (id., p.67, Ls.4-13), this new version of the story eroded any stock one could place in the interview. In light of the shifting stories and falsehoods that permeated the interview, Booth fails to show that any purported facts drawn from it were credible, much less that they convincingly showed he had important testimony to give about duress.

Lastly, the interview transcript only established that many of Booth's "fears" of Hutto could not have been genuine, and were in fact absurd. This is one of many exchanges that demonstrate that:

> [Booth's counsel]: This guy [Hutto] is junkyard mean.
>
> [Officer]: Okay.
>
> [Booth]: Could I add something, please?
>
> [Booth's counsel]: Sure.
>
> [Booth]: David Hutto says that he is a Blackwater agent. He is a trained sniper for them with 95 confirmed kills.
>
> [Officer]: Okay.
>
> [Booth]: He acts very military. He acts very calm and very quick.
>
> [Heather]: He is very quiet.
>
> [Booth]: He is very heavy, but fast and strong.
>
> [Officer]: Okay.

(Id., p.10, Ls.12-24.)

Needless to say, regardless of whether Hutto was very calm, quick, quiet, heavy, fast, and/or strong, there is no credible evidence in the record showing that Hutto was "a Blackwater agent" or a trained paramilitary sniper "with 95 confirmed kills." (See R.) And Booth's wild stories about Hutto's "signature kill mark" and "sniper crew" dealings were supplied to police during his fictional first version of what took place that night. (10/28/16 Tr., p.55, Ls.5-19.) In particular, the tall tales about Hutto's mercenary-commando double life accompanied the falsehood that Booth "remember[ed] [Hutto] telling me that he had to reload"—which Booth later admitted was false. (Id., p.55, Ls.5-19; p.67, Ls.10-13.) In sum, to the extent Booth's purported fears of Hutto were either based on flights of fancy, or were packaged with his false claims about what happened that night, those fears could not have been genuinely held. Either way, the interview transcript does not *convincingly* show that Booth had any important testimony to give about any purported duress he was under on the night of the murder. Baker, 401 F.2d at 976-77.

"[S]everance is not mandatory every time a defendant wishes to testify to one charge but to remain silent on another." Holmes, 526 F.2d at 626. Furthermore, Booth failed to make a convincing showing—either through an offer of proof or by reference to the interview transcript—that he had a "strong need" to refrain from testifying as to the murder case or that there was the "important testimony to give concerning" the other counts. Baker, 401 F.2d at 976-77. Booth presented no facts to support his motion, other than an interview transcript that did not show any duress, undermined Booth's credibility, and revealed that Booth's generalized "fears" of Hutto were unfounded. As a result, the district court correctly concluded that Booth failed to make "a sufficient showing that there is going to be a circumstance that will prejudice the

defendant in presenting his defense." (4/12/18 Tr., p.49, Ls.20-23.) Booth fails to show that this was an abuse of discretion.

CONCLUSION

The state respectfully requests this Court affirm the district court's denial of Booth's motion to sever.

DATED this 20th day of August, 2019.

/s/ Kale D. Gans
KALE D. GANS
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 20th day of August, 2019, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

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