

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Shane Anthony Shumate,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

May 4, 2021

Court of Appeals Case No.
20A-CR-1450

Appeal from the Delaware Circuit
Court

The Honorable Marianne L.
Vorhees, Judge

Trial Court Cause No.
18C01-1810-F1-6

Tavitas, Judge.

Case Summary

- [1] Shane Anthony Shumate brings this interlocutory appeal from the trial court's discretionary denial of his second amended motion for separate trials. Our review of the record reveals that the State joined three offenses for trial that are based on a series of acts that are connected together, pursuant to Indiana Code Section 35-34-1-9(a)(2); thus, the trial court did not commit clear error in denying Shumate's motion for severance. Accordingly, we affirm.

Issue

- [2] The lone issue on appeal is whether the trial court committed clear error in denying Shumate's second amended motion for separate trials.

Facts

- [3] On January 30, 2018, a domestic disturbance occurred at the Eaton, Indiana, residence shared by Shumate, Yelenna Shumate ("Yelenna"), and their then-two-year-old child. Shumate allegedly battered Yelenna in the presence of the child and left the residence with Yelenna's cell phone. Yelenna called the police from her parents' neighboring home and, in reporting the alleged battery, mentioned Shumate's mental health issues as well as the presence of several weapons in the home.

- [4] Approximately two hours later, the police responded to the scene¹ and observed Shumate inside the residence. Five officers surrounded the home, including an officer who knocked at the front door. Shumate emerged, armed, from the rear of the residence; he ignored commands to drop his gun and fired his gun directly at Delaware County Sheriff's Deputy Derrick² Marvin.
- [5] On October 30, 2018, the State charged Shumate with attempted murder of a law enforcement officer, a Level 1 felony; domestic battery, a Level 6 felony; and interference with the reporting of a crime, a Class A misdemeanor. On May 15, 2019, Shumate filed a motion to bifurcate the proceedings, and the State subsequently filed its objection thereto. On July 3, 2019, Shumate filed a motion to separate the domestic battery and interference charges from the attempted murder of a law enforcement officer charge. Shumate amended the motion on July 31, 2019. The State subsequently filed an objection.
- [6] Also on July 31, 2019, the trial court conducted a hearing on all pending motions. Regarding the motion for severance, Shumate argued that the three charged counts were improperly joined and that the denial of severance would deny him a fair trial. The State countered that Shumate was not entitled to severance because the charged offenses are so inextricably intertwined that evidence of the domestic battery/interference offenses is bound to be introduced

¹ Law enforcement officers from various agencies responded to Shumate's residence.

² The record alternately identifies Sheriff's Deputy Marvin as "Derick" and "Derrick"; we defer to the State's final witness list and use "Derrick" herein. *See* Amended App. Vol. II p. 89.

in the course of prosecuting the attempted murder of a law enforcement officer offense.

[7] On August 1, 2019, the trial court issued its order on the pending motions, wherein it denied Shumate's motion for severance as follows:

5. [Shumate's] Motion to Sever: the offenses were properly joined pursuant to Indiana Code § 35-34-1-9(a)(2). The State has alleged [Shumate] committed a domestic battery, and two hours later [Shumate] attempted to shoot a law enforcement officer trying to arrest him for the offense. The State has alleged a series of acts connected together.

The issue then become [sic] whether severance is mandatory. Under IC. § 35-34-1-11(a), severance is not mandatory. The State has not joined the offenses solely because they are similar or the same in character.

The next issue is whether the court should exercise its discretion to sever the offenses. I choose to exercise my discretion against severance. The jury should hear the reasons why the officers were at [Shumate]'s house attempting to arrest him. [Jurors] need the perspective. The time is relatively short (two hours) between the alleged domestic battery offense and the arrest.

The alleged offense that led to the arrest will give the jury perspective, otherwise they might be trying the case in an artificial vacuum, lacking necessary facts.

Finally, in looking at Evidence Rule 403, I find the probative value of the domestic incident greatly outweighs the danger of any potential prejudice, undue delay, cumulative evidence, or confusing or misleading the jury. The crime of domestic violence is not an offense, such as child molesting, where some jurors

have an undue prejudice against an accused person simply on the basis of the offense. The trial should conclude in four days or less. The evidence is separate and not cumulative. The jury will receive clear instructions on the issues before them, so they will not be misled or confused by trying all counts at once.

The Motion to Sever is not well taken and [] is denied.

Amended App. Vol. II p. 92.

[8] On July 15, 2020, Shumate filed a second motion for severance, which he subsequently amended, wherein he moved to separate the “domestic battery/interference proceedings from the attempted murder of law enforcement officer proceedings[.]” *Id.* at 76. Shumate argued, inter alia: (1) there was no basis to try the three counts together, where they “did not rise from a single ongoing scheme and the series of acts did not constitute parts of the scheme”; (2) the offenses were “separated by hours of time” and consist[ed] of “totally different and separate acts”; (3) “the only purpose for the State to wish to try these cases together is to unduly prejudice [] Shumate”; and (4) the State [would] not [be] prejudiced “by separation” or “delaying” of the proceedings. *Id.* at 78, 79. The State filed a response in opposition. The trial court summarily denied the motion for severance on July 22, 2020.

[9] On July 31, 2020, Shumate filed a motion to certify for interlocutory appeal the order denying the second motion for severance. In support of the motion for certification, Shumate sought to separate the domestic battery/interference proceedings from the attempted murder of a law enforcement officer

proceedings in order to avoid undue prejudice to Shumate. The trial court granted the motion for certification on August 3, 2020. This Court accepted jurisdiction on September 3, 2020. Shumate now appeals from the denial of his motion for severance.

Analysis

[10] Shumate argues that the trial court erred in denying his motion for severance. Specifically, Shumate maintains that he is entitled to severance because: (1) “the domestic battery/interference charges and the attempted murder of a law enforcement officer charge did not arise from a single ongoing scheme[,] and the series of acts did not constitute parts of the same scheme” and “are not of the same or similar character”; (2) “the only purpose for the State to wish to try these cases together is to unduly prejudice [Shumate]”; and (3) “[t]he State is not prejudiced [] by separation of the proceedings” Shumate’s Br. pp. 14, 15.

[11] The degree of deference owed to a trial court’s ruling on a motion for severance depends on the basis for joinder. Where the offenses have been joined *solely* because they are of the same or similar character, a defendant is entitled to severance as a matter of right. Ind. Code § 35-34-1-11(a) (2008). The trial court thus has no discretion to deny such a motion, and we will review its decision de novo. But where the offenses have been joined because the defendant’s underlying acts are connected together, we review the trial court’s decision for an abuse of discretion.

Pierce v. State, 29 N.E.3d 1258, 1264 (Ind. 2015) (internal citations and footnote omitted). See *Ben-Yisrayl v. State*, 690 N.E.2d 1141, 1146 (Ind. 1997) (quoting

Davidson v. State, 558 N.E.2d 1077, 1083 (Ind. 1990): “Accordingly, whether to sever multiple charges is a matter within the trial court’s discretion, taking into account the three factors listed in [subsections 11(a)(1) through (3)], and a denial of severance will be reversed only upon a showing of clear error.”).

[12] Indiana Code Section 35-34-1-9(a) provides in relevant part:

Two (2) or more offenses may be joined in the same indictment or information, with each offense stated in a separate count, when the offenses:

(1) are of the same or similar character, even if not part of a single scheme or plan; or

(2) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

Subsection 9(a)(1) refers to the nature of the charged offenses, and subsection 9(a)(2) refers to the operative facts underlying those charges. *Pierce*, 29 N.E.3d at 1265.

[13] As noted, *supra*, in our discussion of the applicable standard of review:

[in] [i]nterpreting these statutes, [our Supreme Court] ha[s] required severance of offenses as a matter of right under [Indiana Code Section 35-34-1-]11(a) only when the offenses are joined *solely* because of the reason listed in [Indiana Code Section 35-34-1-]9(a)(1), i.e., that the offenses are of the same or similar character. However, when the offenses are joined under subsection 9(a)(2), the court must grant a severance only if it determines that it is “appropriate to promote a fair determination

of the defendant's guilt or innocence," based on [Indiana Code Sections 35-34-1-]11(a)(1) through [(a)](3).

Ben-Yisrayl, 690 N.E.2d at 1145 (internal citations omitted).

[14] Here, Shumate challenges the trial court's discretionary denial of his motion for severance, pursuant to Indiana Code Section 35-34-1-9(a)(2).³ When a defendant files a motion for severance regarding offenses that are joined under Indiana Code Section 35-34-1-9(a)(2), the trial court, in its discretion:

shall grant a severance of offenses whenever the court determines that severance is appropriate to promote a fair determination of the defendant's guilt or innocence of each offense considering:

- (1) the number of offenses charged;
 - (2) the complexity of the evidence to be offered; and
 - (3) whether the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense
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Ind. Code § 35-34-1-11.

[15] We find *Moore v. State*, 545 N.E.2d 828 (Ind. 1989), persuasive here. During Moore's robbery of a gas station, he battered the attendant and a patron. When

³ Shumate does not argue that the State joined the domestic battery count with the attempted murder of a law enforcement officer count solely based on the same or similar character of the charges; thus, he does not contend that he is entitled to severance as a matter of right.

a police officer attempted to arrest Moore approximately three days after the robbery, Moore physically attacked the officer. Moore was subsequently charged with robbery, a Class A felony, and resisting law enforcement, a Class D felony. The trial court denied Moore's ensuing motion for severance of the charges, and Moore appealed. In affirming the trial court, our Supreme Court reasoned as follows:

The two counts of robbery and resisting arrest were not joined on grounds that they were of the same or similar character. They obviously were joined because they were based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan pursuant to IC 35-34-1-9(a)(2). Therefore, Moore had no absolute right to severance. It was within the trial court's discretion to determine whether severance of the offenses was proper. The trial court needed to take into consideration the number of offenses charged, the complexity of the evidence to be offered, and whether the trier of fact would be able to distinguish the evidence and apply the law intelligently as to each offense. IC 35-34-1-11(a). Appellant points out no such complexity here nor do we detect any. The fact the jury might be influenced by damaging testimony showing the commission of both crimes does not necessarily warrant severance where, as here, both crimes are connected by a continuous series of acts, and at least a substantial amount of the evidence of both would be presented in the trial of either.

Moore, 545 N.E.2d at 830.

[16] Shumate's challenge to the trial court's discretionary denial of the motion of severance must fail. Severance is not necessary to promote a fair determination of Shumate's guilt or innocence for each charged offense. *See Ben-Yisrayl*, 690

N.E.2d 1141 (providing that a court, reviewing the discretionary denial of a motion to sever, must consider the factors enumerated in Indiana Code section 35-34-1-11(a)(1)-(3) to determine whether severance is required to promote a fair determination of the defendant’s guilt or innocence).

[17] Regarding the first Indiana Code section 35-34-1-11 factor—the number of offenses charged—we note that there were only three offenses charged. *See* I.C. § 35-34-1-11(a)(1). We cannot say that the fact that Shumate faces three charges weighs in favor of severance. *See Heinzman v. State*, 895 N.E.2d 716 (Ind. Ct. App. 2008) (finding no clear error from the discretionary denial of a motion for severance, where the defendant was “charged in twenty-nine various counts with at least five offenses”), *trans. denied*. This factor weighs against severance.

[18] In considering the second factor—the complexity of the evidence to be offered—Shumate does not raise a complexity concern, and we find no basis from which to conclude that the anticipated presentation of evidence qualifies as “complex.” The anticipated evidence will likely include the 9-1-1 call; testimony from Yelenna and law enforcement witnesses, including Deputy Marvin; and ballistics evidence. *See* I.C. § 35-34-1-11(a)(2). *See Kahlenbeck v. State*, 719 N.E.2d 1213, 1216 (Ind. 1999) (holding that evidence consisting of the testimony of surviving victims, ballistics evidence, and defendant’s statement, was not considered “complex”). Thus, the second factor also weighs against severance.

[19] With respect to the third factor—whether the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense—we anticipate that the evidence to be presented in support of the domestic battery charge and the attempted murder of a law enforcement officer charge will be intertwined, but straightforward. We can reasonably anticipate that the trial court will: (1) give jury instructions that clearly define each charged offense; and (2) admonish the jury to consider each count independently based on the law and the evidence relating to that count.

[20] Given what promises to be an uncomplicated presentation of evidence by the State, we do not foresee a significant risk of juror confusion and harbor few doubts about the jury’s ability to distinguish the evidence and apply the law intelligently to each offense. *See Heinzman*, 895 N.E.2d at 721-22 (affirming discretionary denial of motion for severance despite the “sheer volume” of the charges brought against defendant, where the jury was able to distinguish the evidence and apply the law intelligently to each offense”).

[21] Based on the foregoing, we find no clear error from the discretionary denial of Shumate’s motion for severance. *See Moore*, 545 N.E.2d at 830 (finding that the fact that the jury “might be influenced by damaging testimony showing the commission of the [charged] crimes does not necessarily warrant severance where, [] [the charged] crimes are connected by a continuous series of acts, and [] a substantial amount of the evidence of both would be presented in the trial of either”).

Conclusion

[22] The trial court did not commit clear error in denying Shumate's motion for severance. We affirm.

[23] Affirmed.

Najam, J., and Pyle, J., concur.