STATE OF NORTH CAROLINA
COUNTY OF GUILFORD

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

FILED
1998 APR 21 PM 12:00
GUILFORD COUNTY, C.S.C.

97CRS39580;39581
97CRS23654;23656

STATE OF NORTH CAROLINA

v.

THEODORE MEAD KIMBLE,
RONNIE LEE KIMBLE,
Defendants

MOTION TO JOIN CASES AND DEFENDANTS

NOW COMES THE STATE OF NORTH CAROLINA and Moves this Court to join the above referenced cases and defendants for trial during the term of August 3,1998. In support of this Motion, the State alleges:

1. That each defendant is charged with the same offenses, the murder of Patricia Kimble and the arson of her home, which occurred on October 9, 1995.
2. That each defendant is charged with Conspiracy to commit that murder and arson, which was formed prior to October 9, 1995 and continued until the arrest of both defendants.
3. That their will be evidence that Theodore Mead Kimble decided to kill or have his wife killed due to allow him to be with other women and for the pecuniary gain. Specifically that he forged her signature to a large life insurance policy shortly before her death and attempted to collect the proceeds.
4. There will be evidence that Ronnie Lee Kimble admitted that he killed his brother's wife and that the motivation was the insurance proceeds.
5. There will be evidence that prior to the death of Patricia Kimble, Theodore Mead Kimble was experiencing financial difficulties and that after the death of Patricia Kimble Theodore Mead Kimble began spending money and shopping for expensive items in anticipation of collecting the insurance proceeds, and in a manner that was inconsistent with the normal actions of a person who's spouse had just been murdered.
6. That these acts, which constitute and are evidence of the conspiracy were so closely connected in time, place and occasion that it would be difficult to separate proof of one from proof of the others.
7. That in any conspiracy case, it is essential that the State of North Carolina be allowed to produce evidence of the acts of each conspirator to the same jury.
8. That there will be direct evidence of the conspiracy, but that the State will rely largely upon "a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, point unerringly to the existence of a conspiracy." State v. Whiteside, supra, 204 N.C. at 712, 169 S.E. at 712.
9. That the State of North Carolina will use the same lay witnesses and the same expert witness to prosecute each case.
10. That judicial economy requires the joinder of these cases. (Public policy compels consolidation as the rule rather than as the exception where each defendant is sought to be held accountable for the same crime or crimes. State v. Wilson, 108 N.C. App. 575 (1993) 424 S.E.2d 454 at page 582)

IN ANSWER TO the defendants' Motion to Sever these cases, the State of North Carolina contends:

N.C.G.S. 15A-926(B)(2)(A) PROVIDES FOR JOINDER OF DEFENDANTS WHERE, AS HERE, THE STATE SEEKS TO HOLD EACH DEFENDANT ACCOUNTABLE FOR THE SAME OFFENSES.

In State v. Pickens, 335 N.C. 717 (1994) 440 S.E.2d 552 at Page 724, the Supreme Court discussed the law that is to be applied to motions to join and motions to sever:

> The defendants filed motions to sever prior to trial. These motions were denied and the State's motion for joinder was allowed. Both defendants renewed their motions to sever at various times throughout the trial and these motions were also denied. Both defendants identify numerous evidentiary rulings which they contend resulted in the denial of a fair trial for each of them. N.C.G.S. 15A-926(b)(2)(a) provides for joinder of defendants where, as here, the State seeks to hold each defendant accountable for the same offenses. The propriety of joinder depends upon the circumstances of each case and is within the sound discretion of the trial judge. "Absent a showing that a defendant has been deprived of a fair trial by joinder, the trial judge's discretionary ruling on the question will not be disturbed." State v. Nelson, 298 N.C. 573, 586, 260 S.E.2d 629, 640 (1979), cert. denied sub nom. Jolly v. North Carolina, 446 U.S. 929, 64 L.Ed.2d 282 (1980).

THE EXISTENCE OF ANTAGONISTIC DEFENSES WILL NOT, STANDING ALONE, WARRANT A SEVERANCE.

In this case, there is every indication that the defendants will not present antagonistic defenses. All pretrial discussions have indicated that these defendants, who are brothers, will testify that they had nothing to do with the murder and that to their knowledge their brother had nothing to do with the murder. However, in the event that certain portions of their testimony tends to be antagonistic, that fact will not require severance. In State v. Lowery, 318 N.C. 54, 59, 347 S.E.2d 729, 734 (1986). The Supreme Court stated:

> "On the other hand, the fact that the evidence may be substantial against a defendant will not preclude severance where joinder denies a defendant a fair trial. See State v. Boykin, 307 N.C. 87, 296 S.E.2d 258 (1982); State v. Alford, 289 N.C. 372, 222 S.E.2d 222, death penalty vacated sub nom. Carter v. North Carolina, 429 U.S. 809, 50 L. Ed. 2d 69 (1976). "The test is whether the conflict in defendants' respective positions at trial is of such a nature that, considering all of the other evidence in the case, defendants were denied a fair trial." Lowery, 318 N.C. at 59, 347 S.E.2d at 734, quoting Nelson, 298 N.C. at 587, 260 S.E.2d at 640. As we said in Nelson: Prejudice would ordinarily result where codefendants' defenses are so irreconcilable that `the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty.' Rhone v. United States, 365 F.2d 980, 981 (D.C. Cir. 1966). Severance should ordinarily be granted where defenses are so discrepant as to pose an evidentiary contest more between defendants themselves than between the state and the defendants. See ABA Standards Relating to Joinder and Severance 41 (Approved Draft 1968). To be avoided is the spectacle where the state simply stands by and witnesses `a combat in which the defendants [attempt] to destroy each other.' People v. Braune, 363 Ill. 551, 2 N.E. 2d 839, 842 (1936).

In State v. Burton, 119 N.C. App. 625 (1995) at page 630 the Court of Appeals makes it clear that the focus is on whether the defendants have suffered prejudice, not on whether their respective positions contradict each other. This supports the State's position that the Court cannot make an

informed decision until all of the State's evidence has been presented, and that the Motion to Sever should be heard at that time.

> First, the defendant contends that his defense and Burton's defense were so antagonistic that a fair trial could not be had. The existence of antagonistic defenses alone, however, does not necessarily warrant severance. Id. at 582, 356 S.E.2d at 332. The test under section 15A-927(c)(2) is whether the conflict in the defendants' respective positions at trial is such that, in light of all of the other evidence in the case, the defendants were denied a fair trial. Id. at 582-83, 356 S.E.2d at 332. Thus, the focus is on whether the defendants have suffered prejudice, not on whether they contradict each other. Id. at 583, 356 S.E.2d at 332. No prejudice results where the State presents plenary evidence of the defendant's guilt, apart from the co-defendant's testimony, and where the defendant has the opportunity to cross-examine the co-defendant. Id.

In State v. Green, 321 N.C. 594 (1988) 365 S.E.2d 587 at Page 601 the Supreme Court explains that even if the respective positions of the defendants are antagonistic, it is not error to join the cases where, as in this case, the State has adequate evidence independent of the defendants' testimony to convict each defendant.

> Unquestionably, Blankenship's testimony was inimical to defendant's defense in important respects. Blankenship testified to defendant's admission that he had killed three people, to his destruction of evidence, to his having stains on his dungarees which may have been blood, and to his flight to evade arrest. But Blankenship's testimony was not entirely antagonistic to defendant. She testified that he told her that he had been attacked, taken by surprise by a blow to the head by a bottle or a gun, and that this attack began the fight in which he shot three people. Her testimony suggested at least provocation and perhaps self-defense and supported defendant's denial that he was guilty of murder with premeditation and deliberation. Nor did the state stand by and rely on Blankenship's testimony to prove its case. Various patrons of the Chief's Club contributed to the state's being able to show, independently of Blankenship's testimony, that defendant was at the club in the early morning hours of 12 February, that he was armed with two guns, and that he and Blankenship remained at the bar after all others save the murdered three had left. Forensic evidence established that the guns these witnesses saw in defendant's possession could have fired the murderous bullets. A Daytona Beach law enforcement officer testified that defendant's response to the Florida's officers' early morning appearance was to hide in a closet with a sawed-off shotgun at the ready. Relatives of Debra Blankenship testified that defendant had admitted to each of them that he, not Debra, had been responsible for the deaths. Independent of Blankenship's testimony, the state presented sufficient evidence from which a jury could have concluded that defendant was guilty of murder in the first degree. Finally, neither prosecutorial stratagem nor the operation of court rules impaired defendant's ability to defend himself. Defendant had the opportunity, and availed himself of it, to fully cross-examine Blankenship. State v. Lake, 305 N.C. 143, 286 S.E.2d 541 (1982). Nor was this a case in which defendant was prevented from giving exculpatory testimony or deprived of the opportunity to present the inculpatory testimony of his codefendant. See State v. Boykin, 307 N.C. 87, 296 S.E.2d 258 (1982); State v. Alford, 289 N.C. 372, 222 S.E.2d 222, death penalty vacated sub nom. Carter v. North Carolina, 429 U.S. 809, 50 L.Ed.2d 69 (1976).

THE JOINDER OF THESE MATTERS WOULD NOT VIOLATE N.C.GEN.STAT. 15A-927 OR THE HOLDINGS OF BRUTON V. UNITED STATES, 391 U.S. 123.

In State v. Wilson, 108 N.C. App. 575 (1993) 424 S.E.2d 454 at page 582 the court addresses the defendants' concern that evidence tendered against one brother will be prejudicial to the other and held that a proper limiting instruction is sufficient to safeguard each defendants rights.

"In his next assignment or error, Defendant Wilson argues the trial court erred in joining his trial with that of Co-defendant Clark. We first note that public policy compels consolidation as the rule rather than as the exception where each defendant is sought to be held accountable for the same crime or crimes. State v. Paige, 316 N.C. 630, 643, 343 S.E.2d 848, 857 (1986). A trial court's decision on the question of joinder of two defendants is a discretionary ruling. State v. Paige at 641, 343 S.E.2d at 855. Absent a showing that a defendant has been deprived of a fair trial by joinder, the trial court's decision on that matter will not be disturbed.... According to Defendant Wilson, he was prejudiced by joinder of the two trials since certain testimony adduced was admissible only against his co-defendant. Patricia Ann Parks testified that sometime in late December of 1988, Defendant Clark entered her attic and returned with some ski masks. She also testified that Defendant Clark made the statement to her son, "did he hear about you know Rigsbee getting knocked off." The trial court instructed the jury that Ms. Parks' testimony was not admissible as against Defendant Wilson.... It is not uncommon where two defendants are joined for trial that some evidence will be admitted which is not admissible as against both defendants. Our Courts have recognized that "limiting instructions ordinarily eliminate any risk that the jury might have considered evidence competent against one defendant as evidence against the other." State v. Paige, 316 N.C. at 643, 343 S.E.2d at 857. Here, the trial court properly instructed the jury that they could consider Ms. Parks' testimony only as to Defendant Clark and not as to Defendant Wilson.... Despite the fact that the trial court gave a proper limiting instruction, Defendant Wilson contends that under Bruton v. United States, 391 U.S. 123, 20 L.Ed.2d 476 (1968), this instruction did not alleviate any prejudice. In Bruton, there was a joint trial and the trial court admitted a co-defendant's confession which implicated the defendant. The trial court instructed the jury that this confession could not be used as evidence in determining the defendant's guilt or innocence. The Supreme Court held that despite the curative instruction given, allowing the co-defendant's confession violated Defendant Bruton's Sixth Amendment right of cross-examination. In the present case, unlike Bruton, Defendant Clark's remark to Ms. Park's son is in the nature of a question asking whether Ms. Park's son had heard that a crime had been committed; this remark is not in the nature of a confession. Therefore, since there was no "confession" implicating Defendant Wilson, Bruton is inapplicable. See Richardson v. Marsh, 481 U.S. 200, 95 L.Ed.2d 176 (1987). Further, since a proper limiting instruction was given, Defendant Wilson has made no showing that he was prejudiced by this testimony. Accordingly, as to Defendant Wilson, the trial court did not abuse its discretion in joining the two defendants for trial."

THE JOINDER OF THESE MATTERS WOULD NOT VIOLATE BRUTON V. UNITED STATES, 391 U.S. 123.

The State of North Carolina contends that the majority of the incriminating statements offered against the defendants were made prior to arrest and at a time that the conspiracy to commit murder and arson was still in effect.

In State v. Barnes, 345 N.C. 184 (1997) at Page 217, the Supreme Court noted:

"In State v. Willis, 332 N.C. 151, 420 S.E.2d 158 (1992), we reaffirmed that the statement of a coconspirator during the course of and in furtherance of the conspiracy is admissible and is not barred by Bruton. Id. at 167-68, 420 S.E.2d at 165. Blakney's statements were therefore admissible against Barnes, and this argument is without merit.

In State v. Willis, 332 N.C. 151 (1992) 420 S.E.2d 158 at page 168, the Supreme Court makes it clear that if the State of North Carolina establishes a prima facie case of conspiracy and admits statements of the co-defendants, Bruton does not apply.

If the State establishes a prima facie case of a conspiracy to commit a crime independently of the declarations sought to be admitted, a statement by a co-conspirator during the course and in furtherance of the conspiracy is admissible and not barred by Bruton. State v. Nichols, 321 N.C. 616, 365 S.E.2d 561 (1988). N.C.G.S. 8C-1, Rule 801(d)(e) (1988). In this case, there was ample evidence, independent of the statements to which Willis now takes exception, of an agreement between Cox and Willis to kill Mr. Richardson. The testimony of Owens that he heard Willis say, "[y]ou do your part and . . . I'll take care of the rest[,]" as well as the testimony by Grooms that after Cox had complained when the first attempt at killing Mr. Richardson had aborted that Willis said, "[d]on't worry, Baby, it will get done[,]" were admissible under this rule. This assignment of error is overruled.

Further, the law gives the State of North Carolina the option of sanitizing any statements which are not admissible as statements made in the course of the conspiracy. In State v. Rasor, 319 N.C. 577 (1987), 356 S.E.2d 328 at page 582, the Supreme Court stated:

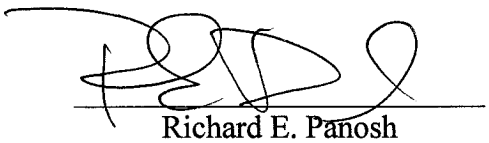
"Here the state complied with the statute by sanitizing Giles' extrajudicial statements. All references to defendant were removed, and redacted versions of the statements were offered into evidence through the testimony of Deputy Donald Cole, the officer to whom they had been made.

And, Rasor makes it clear that there would be no Bruton violation if both defendants testify and are subject to cross-examination, as previously indicated, there is no indication that the defendant s will not testify in this case.

"However, even if the state had not sanitized the statements, no Bruton violation would have occurred Bruton applies only to the extrajudicial statements of a declarant who is unavailable at trial for full and effective cross-examination. Nelson v. O'Neil, 402 U.S. 622, 29 L.Ed.2d 222 (1971). Where the declarant can be cross-examined, a codefendant implicated by extrajudicial statements has been fully accorded his right to confrontation. State v. Brower, 289 N.C. 644, 224 S.E.2d 551 (1976), reh'g denied, 293 N.C. 259, 243 S.E.2d 143 (1978); State v. Jones, 280 N.C. 322, 185 S.E.2d 858 (1972); State v. Fox, 274 N.C. 277, 163 S.E.2d 492. Here the declarant Giles took the stand and was vigorously cross-examined by defendant as to all aspects of his testimony. The trial court did not abuse its discretion in denying defendant's motion to sever based on Bruton." State v. Rasor, 319 N.C. 577 (1987).

BASED UPON THE AFOREGOING, the State of North Carolina **MOVES** this Court to find pursuant to N.C. Gen.Stat. 15A-926, that joinder is required in these matters and to issue an order joining these cases for trial. Further, the State of North Carolina **MOVES** this Court to find that the motion of each of the defendant does not require that these cases be severed for trial and that the motions should be denied without prejudice to the defendants to renew the motion pursuant to N.C. Gen.Stat. 15A-927. (If a defendant's pretrial motion for severance is overruled, he may renew the motion on the same grounds before or at the close of all the evidence.)

This Thursday, April 30, 1998.



Richard E. Panosh
Assistant District Attorney

CERTIFICATE OF SERVICE

I, Richard E. Panosh, Assistant District Attorney for the Eighteenth Prosecutorial District, hereby certify that I have served a copy of the attached document on the counsel for the Defendant this date by:

( ) Placing said copy in an official depository of the United States Post office with the first-class postage prepaid and with the same addressed to:

Mr. John B. Hatfield
Attorney at Law
Hatfield and Hatfield
219 West Washington St.
Greensboro, NC 27401

Mr. W. David Lloyd
Attorney at Law
Suite 301
101 South Elm St.
Greensboro, NC 27401

Mr. John Bryson
Attorney at Law
Wyatt Early Harris & Wheller, L.L.P.
Suite 400
1912 Eastchester Drive
High Point, NC 27265

Mr. Robert McClellan
Attorney at Law
Ivey, McClellan, Gatton & Talcott, L.L.P.
P.O. Box 3324
Greensboro, NC 27402-3324

This Friday, May 01, 1998.

Richard E. Panosh,
Assistant District Attorney