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Case Number 683,2013

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ALAN FOWLER,	)	
	)	
Defendant Below-Appellant,	)	No. 683, 2013
	)	
v.	)	Court Below---Superior Court
	)	of the State of Delaware
STATE OF DELAWARE,	)	in and for New Castle County
	)	ID No. 110800561A; 1108000561B
Plaintiff Below-Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS iv

NATURE OF PROCEEDINGS 1

SUMMARY OF ARGUMENT 4

STATEMENT OF FACTS 5

ARGUMENT 11

I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED MR. FOWLER'S MOTION FOR RELIEF FROM UNFAIR PREJUDICE AND PREJUDICAL JOINDER 11

A. QUESTION PRESENTED 11

B. SCOPE OF REVIEW 11

C. MERITS OF THE ARGUMENT 12

Applicable Legal Precepts 12

Neither the State nor the Superior Court were Concerned with Judicial Economy 15

The Denial of the Motion for Relief from Unfair Prejudice and Prejudicial Joinder Resulted in Substantial Injustice to Mr. Fowler 17

CONCLUSION 19

EXHIBITS

EXHIBIT A – *State v. Fowler*, Del. Super., ID No. 110800561, Slights, J. (February 6, 2012) (ORDER).

EXHIBIT B – *State v. Fowler*, Del. Super., Sentence Order, Toliver, J. (November 22, 2013.

TABLE OF CITATIONS

Federal Cases

Drew v. United States, 331 F.2d 85 (U.S.App.D.C. 1968)..... 13

State Cases

Bates v. State, 386 A.2d 1139 (Del. 1978) 11,13

Getz v. State, 538 A.2d 726 (Del. 1988)..... 16

Lampkins v. State, 465 A.2d 785 (Del. 1983)..... 11

State v. McKay, 382 A.2d 260 (Del. Super. 1978) 13, 14

State v. Siple, 1996 WL 528396 (Del. Super.)..... 14, 15

Wiest v. State, 542 A.2d 1195 (Del. 1988) 11, 12

Winer v. State, 950 A.2d 642 (Del. 2008)..... 11

Younger v. State, 496 A.2d 546 (Del. 1985)..... 11

Rules

Superior Court Criminal Rule 8..... 12

Superior Court Criminal Rule 14..... 12

NATURE AND STAGE OF PROCEEDINGS

This case stems from two separate incidents. The first, which took place on July 2, 2011, arose out of a shooting resulting in a number of charges, including multiple counts of Attempted Murder First Degree.[1] A second, unrelated shooting, took place on July 31, 2011 that led to the police charging Mr. Fowler with Attempted Murder First Degree, two counts of Reckless Endangering First Degree, and weapons charges.[2] Both cases were later consolidated under case number 1108000561.[3]

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[1] The original case number for these charges was 1108000561.

[2] The original case number for these charges was 1108009702.

[3] A1 - Docket Item ("D.I.") 1; A23-28. This marked the beginning of a long and winding road regarding Mr. Fowler's representation. From the time of his arrest to trial, seven attorneys represented Mr. Fowler's interests in varying capacities. Mr. Fowler initially retained Joseph Hurley, Esquire to defend him in both cases. However, a conflict with a witness prevented Mr. Hurley from representing Mr. Fowler on the charges related to the July 2nd incident. In an effort to go forward, the State agreed to sever the conflicting charges. D.I. 24; A29-30. The State's agreement to sever this case will be discussed in detail later in this brief. However, by June 11, 2012, Mr. Hurley filed a Motion to Withdraw as Counsel, which the Superior Court granted. D.I. 43. Subsequent to Mr. Hurley's exit from Mr. Fowler's case, the Court appointed Ralph Wilkinson, Esquire of the Public Defender's Office to represent Mr. Fowler. D.I. 44. His representation was short lived, however, as he declared a conflict of interest in representing Mr. Fowler shortly after his appointment. D.I. 44. Consequently, the Court assigned Patrick Collins, Esquire to represent Mr. Fowler. D.I. 51. In a matter of weeks, Mr. Fowler hired new counsel. Gordon McLaughlin, Esquire moved for the admission of Fortunato Perri, Esquire *pro hac vice* on August 10, 2013. D.I. 52. The Honorable Jerome O. Herlihy granted the Motion for Admission *Pro Hac Vice* on August 20, 2012. Mr. McLaughlin then moved to withdraw as local counsel on November 28, 2012 over a fee dispute. D.I. 88. The Superior Court partially granted Mr. McLauglin's motion. On December 4, 2012, Mr. Fowler moved to dismiss Mr. Perri as counsel, citing a breakdown in the attorney-client relationship. D.I. 91; A50-58. The Superior Court initially denied Mr. Fowler's motion. A58. But after an alleged altercation between Mr. Perri and Mr. Fowler's brother, the Superior Court allowed Mr. Perri to withdraw as counsel. A76-88. Without the means to secure counsel, the Superior Court re-appointed the undersigned on December 18, 2012 and appointed co-counsel on January 7, 2013. D.I. 98; 104.

On December 19, 2011, Joseph Hurley, Esquire, filed a Motion for Relief from Unfair Prejudice and Prejudicial Joinder.[4] On February 6, 2012, the Honorable Joseph R. Slights, III granted in part and denied in part Mr. Fowler's motion.[5] Although the trial court severed person prohibited charges, it held that "[t]he defendant has failed to establish a reasonable probability that trial of the July 2nd and July 31st charges together will result in actual prejudice or substantial injustice. The hypothetical prejudice posed by the cumulative effect of the charges is not sufficient to justify severance of the charges and separate trials."[6]

Notwithstanding its original position that these two incidents should be tried together,[7] the State agreed to voluntarily sever Mr. Fowler's charges and only proceed on the charges related to the July 31st incident to remedy a conflict Mr. Hurley had with a witness in the July 2nd incident.[8] Even so, Mr. Hurley later withdrew his representation[9] and the State moved to re-consolidate Mr. Fowler's

[4] A34-39.

[5] Exhibit A.

[6] Exhibit A.

[7] D.I. 1; A23-28.

[8] D.I. 24; *see also* A86-87.

[9] D.I. 43.

charges.[10] The Honorable Calvin L. Scott, Jr. granted the State's motion on October 16, 2012.[11]

Prior to trial, Fortunato Perri, Esquire confirmed that the Superior Court's decision to deny Mr. Hurley's severance motion and to later consolidate the cases was the "law of the case."[12] The undersigned also confirmed the same.[13]

Trial proceedings in this case began on May 7, 2013 and continued through May 16, 2013. The jury returned a guilty verdict on all counts.[14] Following its decision on Mr. Fowler's Post-Trial Motion for Judgment of Acquittal, the trial court sentenced Mr. Fowler on November 22, 2013.

A timely Notice of Appeal followed. This is Mr. Fowler's Opening Brief.

[10] D.I. 61.

[11] D.I. 65.

[12] A70.

[13] A112-113.

[14] D.I. 132.

SUMMARY OF THE ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED MR. FOWLER'S MOTION FOR RELIEF FROM UNFAIR PREJUDICE AND PREJUDICIAL JOINDER.

The Superior Court's denial of Mr. Fowler's motion forced him to defend against two separate sets of charges linked to separate incidents on different days. Although his charges involved shootings, the nature and circumstances of each incident was very different.

As a result, Mr. Fowler endured prejudice that manifested itself in the form of having to subtly present different defenses to the jury for separate charges, the jury assigning a general criminal disposition to Mr. Fowler, and accumulating the evidence to find Mr. Fowler guilty. This is precisely the scenario in which charges should be severed, and therefore, Mr. Fowler's conviction should be reversed.

STATEMENT OF FACTS[15]

The State charged Alan Fowler for conduct in two unrelated cases. A few facts overlapped between the two cases – Brett Chatman's involvement, Alan Fowler's gold Honda Accord, and the use of a .32 caliber handgun – but everything else, the motive, parties involved, civilian witnesses, and location of the incidents, were different.

The July 2nd Incident.

The State's theory at trial regarding the July 2, 2013 incident was that Alan Fowler turned a planned fight over a girl into a shooting. The State sought to paint Mr. Fowler as a hot-head who lost his cool and overreacted following a trivial argument.

A. Brett Chatman's Testimony.

Alan Fowler, Brett Chatman, Danielle Maslin, and Tammi Boyd were hanging out on the night of July 2, 2011[16] drinking, listening to music, and passing the time.[17] Chatman, Maslin, and Boyd had all known each other "for while."[18]

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[15] The facts set forth in this brief are comprised of trial excerpts and do not constitute admissions or concessions by Mr. Fowler.

[16] A493-494.

[17] A495.

[18] Danielle Maslin testified that she had been hanging out with Chatman "for awhile." A285-286; Tammi Boyd testified she had been hanging out with Chatman "[m]ostly every weekend" for a

As the evening progressed, Maslin received a phone call that left her in an "uptight, aggravated" mood.[19] The dispute between Maslin and the caller, later identified as Michael Welcher, persisted. Mr. Fowler intervened on her behalf[20] and the conversation quickly deteriorated.[21] The decision was made to confront Welcher[22] in a neighboring community, Robscott Manor.[23]

Mr. Fowler drove to Robscott Manor in his Honda Accord[24] and approached 2 Myers Road, where Welcher was waiting. Chatman recalls seeing six to seven people on the porch as Mr. Fowler slowly drove by the house.[25] Despite being heavily outnumbered, Chatman testified that he had no reservations about fighting

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year. A351. Chatman established that he had known Boyd for approximately a year and a half. A610.

[19] A497.

[20] A498-499.

[21] A500-501. According to Welcher, he told Mr. Fowler to "come through and fight me like a man." A221.

[22] A217.

[23] A115; A164.

[24] A493.

[25] A506.

beside Mr. Fowler.[26] According to Chatman, however, Mr. Fowler turned the corner, rolled his window down, and opened fire.[27]

B. Michael Welcher's Testimony.

Michael Welcher waited at 2 Myers Road for a fight. Welcher stood up as a gold or silver Honda arrived and turned the corner. Then he saw the driver's side window go down[28] and then heard a pop with muzzle flash.[29] He and his childhood friend, Steven Fleck, dove for cover. When asked if anything stood out about the shooter, Welcher stated that the driver had tattoos on his lower arm,[30] specifically noting that the shooter had a full sleeve tattoo (meaning that the shooter's whole arm was covered in tattoos).[31]

Later that night Police recovered five .32 millimeter handgun shell casings in that area.[32]

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[26] A504; 508.

[27] A508-509.

[28] A256.

[29] A229.

[30] A232; A259. Mr. Welcher acknowledged that he could see the sleeve tattoo "clear as day." A259.

[31] A237. For more on what constitutes a "sleeve" tattoo, please refer to http://en.wikipedia.org/wiki/Sleeve_tattoo.

[32] A166.

C. Detective Michael Eckerd's Testimony.

Detective Eckerd testified that, unlike the full sleeve tattoo Michael Welcher saw "clear as day" on the night of the July 2nd shooting, Mr. Fowler had a partial sleeve tattoo on his upper left arm.[33] He later described that tattoo as "start[ing] halfway up his forearm and go[ing] up to his shoulder area."[34]

Brett Chatman's tattoos, on the other hand, covered "his whole entire arm … so it would probably be what everybody calls a full sleeve tattoo."[35] When asked about Chatman's other arm, Detective Eckerd acknowledged that Chatman's right arm was also covered in a sleeve tattoo.[36]

The July 31st Incident.

On the night of July 30, 2013, Kyle Fletcher attacked Kenneth Fowler, Jr, Alan Fowler's brother, at the Deer Park Tavern. What started as a fistfight[37] turned into Fletcher attacking Kenneth with a knife, leaving him with severed fingers and

[33] A449.

[34] A452.

[35] A453.

[36] A454; *see also* A301.

[37] A521.

severe lacerations on his arm.[38] Unlike the July 2nd incident, the State presented Mr. Fowler as a man on a mission, out to exact revenge on his brother's attacker.

Brett Chatman was at the Deer Park Tavern that night and witnessed the initial altercation. As he was driving home, he saw Kenneth Fowler surrounded by police on the side of the road with serious injuries.[39] Chatman called Mr. Fowler to let him know that his brother was injured.[40]

Chatman and Jonathan Duarte, also known as "Argentina,"[41] testified that Mr. Fowler met up with them on the morning of the 31st. Chatman claimed that Mr. Fowler forced him and Duarte to get into his car and make phone calls to find out who attacked his brother.[42] Chatman called a "Leon" who knew nothing about the incident to "throw a distraction."[43] But Chatman and Duarte eventually told Mr. Fowler that Fletcher was responsible and pointed out where Fletcher lived.[44] Kyle Fletcher did not reside at 49 Martindale Drive, however.

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[38] A159; A379-380.

[39] A522; 524; 526.

[40] A526.

[41] A658.

[42] A533.

[43] A534.

[44] A598; A671.

Chatman testified that Mr. Fowler and his unidentified passenger both had guns.[45] When Mr. Fowler approached the residence, he looked into a window and began kicking the front door.[46] He then moved towards the front door and shot into the door and window with a .32-millimeter handgun[47] as the unidentified man also fired shots.[48] Duarte testified that he and Chatman did not see anyone fire shots – rather, they only heard shots - because they both started walking back to the car as soon as Mr. Fowler started "making a move."[49]

One of those bullets hit Linda Lerdo in the leg.[50]

[45] A157.

[46] A163.

[47] A162.

[48] A168.

[49] A711.

[50] A161.

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED MR. FOWLER'S MOTION FOR RELIEF FROM UNFAIR PREJUDICE AND PREJUDICIAL JOINDER.

A. Question Presented:

Whether the trial court abused its discretion and permitted substantial injustice to Mr. Flower by denying Mr. Fowler's Motion for Relief from Unfair Prejudice and Prejudicial Joinder? Mr. Fowler preserved this issue by way of his December 14, 2011 motion[51] and subsequent inquiries by trial counsel.[52] The trial court denied Mr. Fowler's motion on February 6, 2012.

B. Scope of Review:

A trial court's denial of a Motion for Relief from Unfair Prejudice and Prejudicial Joinder is reviewed for an abuse of discretion.[53] The denial will be reversed if the defendant establishes a reasonable probability that the joint trial created substantial injustice,[54] or in other words, a showing of prejudice is made.[55]

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[51] A35-39.

[52] A70; A112-113.

[53] *Wiest v. State*, 542 A.2d 1193, 1195 (Del. 1988); *Younger v. State*, 496 A.2d 546, 549-50 (Del. 1985); *Lampkins v. State*, 465 A.2d 785, 794 (Del. 1983); *Bates v. State*, 386 A.2d 1139, 1141 (Del. 1978).

[54] *Winer v. State*, 950 A.2d 642, 648 (Del. 2008).

[55] *See Wiest*, 542 A.2d at 1195 (other citations omitted).

C. Merits of the Argument:

Applicable Legal Precepts

Superior Court Criminal Rule 8(a) allows two or more offenses to be joined in the same indictment if one of the following circumstances exist: (1) the offenses are of the same or similar character; (2) the offenses are based on the same act or transaction; (3) the offenses are based on two or more connected acts or transactions; or (4) the offenses are based on two or more acts or transactions constituting parts of a common scheme or plan.[56] The option to join offenses exists to "promote judicial economy and efficiency, provided that the realization of those objectives is consistent with the rights of the accused."[57] In that vein, the Superior Court may sever offenses in cases where the offenses were properly joined if it appears that the defendant will suffer prejudice as a result of the joinder.[58]

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[56] *Wiest v. State*, 542 A.2d 1193, 1195 (Del. 1988). Superior Court Criminal Rule 8(a) provides:

> Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on 2 or more acts or transactions connected together or constituting parts of a common scheme or plan.

[57] *Wiest*, 542 A.2d at 1195 (citing *Mayer v. State*, 320 A.2d 713, 717 (Del. 1974)).

[58] *Wiest*, 542 A.2d at 1195 (citing *State v. Mckay*, 382 A.2d 260, 262-63 (Del. 1978)). *See also* Superior Court Criminal Rule 14, which states:

> If it appears that a defendant or the State is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the Court may order an

Courts have recognized three common situation in which prejudice arises:

> (1) the defendant was subject to embarrassment or confusion in attempting to present different defenses to different charges; (2) the jury may improperly infer a general criminal disposition on the part of the defendant from the multiplicity of charges and (3) the jury may accumulate evidence presented on all offenses charged in order to justify finding guilt of particular offenses.[59]

These areas of concern are always weighed against judicial economy concerns.[60]

The Court also assesses whether the evidence of one crime would be admissible in the trial for the other crime.[61]

In *State v. Mckay*, eight separate incidents of robbery and rape in the City of Wilmington involving nine different victims led to a lengthy indictment. The defendant moved to sever his charges on the premise that the number of incidents and offenses would lead the jury to accumulate the evidence against him and assume a general criminal disposition.[62] The Superior Court granted severance after giving consideration to the prejudicial effect that the presentation of

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election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the Court may order the attorney for the State to deliver to the Court for inspection in camera any statements or confessions made by the defendants which the State intends to introduce in evidence at the trial.

[59] *State v. McKay*, 382 A.2d 260, 262 (Del. Super. 1978)(citing *Drew v. United States*, 331 F.2d 85 (U.S. App.D.C. 1964)).

[60] *See McKay*, 382 A.2d at 263.

[61] *Bates v. State*, 386 A.2d 1139, 1142 (Del. 1978).

[62] *McKay*, 382 A.2d at 262.

numerous robberies and rapes would have on the defendant[63] and expressing concern that the jury would not be able to resist accumulating the evidence.

In *State v. Siple*, the defendant moved to sever a 32 count indictment, effectively seeking seven different trials for seven separate incidents.[64] The State opposed, arguing that judicial economy necessitated one trial, and even the charges were severed, it intended to introduce evidence of the other crimes under D.R.E. 404(b) to show identity and *modus operandi*.[65]

In denying the defendant's motion, the Superior Court began its analysis by focusing on the effect seven separate trials would have on the judiciary:

> Judicial economy would obviously be best served (other considerations aside) by a single trial on all of the charges. Defendant does not dispute that the seven victims were in fact sexually assaulted by someone. The State will rely on DNA evidence as part of its case-in-chief, and a single trial on all counts of the indictment means that only one jury will have be to educated about the science of DNA and the statistical significance of a DNA match. A severance would (again, other considerations aside) result in an enormous expenditure [of] judicial resources, because if evidence relating to all of the incidents were to be admitted under D.R.E. 404(b) in each separate trial, then seven different victims will testify to very traumatic events on seven different occasions, resulting in 49 court appearances for all victims' testimony, whereas a single trial would result in only seven such court appearances, saving the victims the potential embarrassment and anxiety of having to testify in seven trials. Severance as Defendant requests would also result in great

[63] *McKay*, 382 A.2d at 262, 263.

[64] 1996 WL 528396, at *1 (Del. Super.).

[65] *Id*.

> inconvenience to FBI experts, police officers, and other State and defense witnesses.[66]

The Superior Court also noted that the defendant did not intend to present different defenses for each incident, rather, the only issue for the jury's consideration was that of identity.[67]

Neither the State nor the Superior Court were Concerned with Judicial Economy.

This Court should not consider the preference for judicial economy when considering whether the Superior Court abused its discretion in denying Mr. Fowler's motion. The State, nor the Superior Court for that matter, was clearly not concerned about calling witnesses or victims in two separate cases when the State voluntarily severed Mr. Fowler's charges so that Mr. Hurley could continue representing Mr. Fowler. Even when the State presented its case-in-chief, it presented each case separately. Indeed, the only overlapping witnesses for each case were Brett Chatman and police officers. This case was built for two separate trials. Thus, the State's stipulation to sever the charges eradicates any argument that judicial economy, or the State's desire to minimize embarrassment or anxiety on the part of its witnesses, necessitated one trial.

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[66] *Id*. at *2.

[67] *Id*. at *3.

Further, unlike *Siple*, severing Mr. Fowler's case would have only resulted in two separate trials as opposed to seven. There was no DNA or fingerprint testimony presented and a question of identity was limited to the first incident.

Moreover, it is unlikely that had the charges been severed that evidence of the first incident would have been admissible at trial for the second incident, or vice versa. In a joint trial, all relevant attempted murder evidence would be admissible by operation of D.R.E. 401 and 402. By contrast, in a severed scenario, the attempted murder evidence would only be admissible if it met the requirements of an exception to D.R.E. 404(b). The State would be required to prove that the evidence was plain, clear, and conclusive, and that the probative value of the attempted murder evidence was not outweighed by considerations of unfair prejudice and misleading or confusing the jury.[68]

In the first incident, a legitimate question exists as to who fired the shots. Although three witnesses inside of the car testified that Mr. Fowler fired the shots, not a single one of those witnesses called the police. Nobody gave a statement about the incident until after they were contacted by the police following the July 31st incident. Michael Welcher, the witness who, begrudgingly, spoke with the police immediately after the incident, testified that the shooter had a full-sleeve tattoo that he saw "clear as day." Trial testimony established that only Brett

[68] *Getz v. State*, 538 A.2d 726, 730 (Del. 1988).

Chatman had full-sleeve tattoos; Mr. Fowler's sleeve covered the upper portion of his left arm. The motivations for each shooting should have been considered separately to avoid unfair prejudice and assigning a criminal disposition to Mr. Fowler.

Given the nature of this evidence as compared to the evidence in the July 31st incident, it is not likely that the evidence would have been admissible.

The Denial of the Motion for Relief from Unfair Prejudice and Prejudicial Joinder Resulted in Substantial Injustice to Mr. Fowler.

The denial of Mr. Fowler's motion created the prejudicial environment found in McKay and its progeny: it permitted the jury to use evidence from each case to infer a general criminal disposition. For example, even if the jury questioned the identity of the shooter in the July 2nd incident, the fact that the State accused Mr. Fowler of committing second shooting within the same month in the same trial made it highly probable that the jury considered the evidence in the aggregate and used it to convict Mr. Fowler for both sets of charges.

In addition to the highly prejudicial nature of joining two sets of attempted murder charges in a case with two separate victims, the joinder also placed Mr. Fowler in an untenable position to defend himself. As previously stated, there was a legitimate defense regarding the identity of the shooter in the July 2nd case. Welcher, a witness independent of the group in the car who all knew and partied with Brett Chatman, identified the shooter as having a full-sleeve tattoo. Alan

Fowler did not have a full-sleeve tattoo. His defense was limited, however, due to the very nature of the second set of charges. It forced him (and counsel) into the unenviable position of presenting inconsistent defenses on two sets of charges with overwhelming evidence from the second incident influencing the jury's decision. That is the very definition of subjecting a defendant to embarrassment or confusion in attempting to present different defenses to different charges.

The prejudice suffered by Mr. Fowler in this case was the direct result of joining his charges into one trial and its inherent prejudice.

Given the lack of judicial economy concerns and the separate and serious nature of the charges in this case, Mr. Fowler respectfully requests that this Court find the Superior Court abused its discretion by denying the Motion for Relief from Unfair Prejudice and Prejudicial Joinder and grant a new trial.

CONCLUSION

For the foregoing reasons, Alan Fowler respectfully requests that this Court reverse the trial court's decision to deny Mr. Fowler's motion for relief from prejudicial joinder and remand for a new trial.

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