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IN THE SUPREME COURT OF THE STATE OF DELAWARE

ALAN FOWLER,	)	
	)	
Defendant Below,	)	
Appellant,	)	
	)	
v.	)	No. 683, 2013
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee.	)	

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

STATE'S ANSWERING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

Appellant Alan Fowler ("Fowler") was arrested on September 8, 2011, and indicted on November 21, 2011. (A1, D.I. 1; A2, D.I. 3). On December 19, 2011, Fowler filed a "motion for relief from unfair prejudice and prejudicial joinder." (A2, D.I. 7; A34-37). On February 6, 2012, Superior Court granted Fowler's motion in part and denied it in part, severing two charges of Possession of a Firearm by a Person Prohibited ("PFPP") but not severing the remaining charges that arose out of two different incidents. (A3, D.I. 9; Op. Br. Ex. A). Fowler was reindicted on March 5, 2012. (A1; A4, D.I. 12; A23-28).

Fowler's counsel had a conflict of interest with a witness to one of the incidents. In order to proceed to trial, the State stipulated to severing the charges from the two incidents. (A5, D.I. 24; A86-87). Fowler's counsel moved to withdraw on May 30, 2012, and Superior Court granted that motion on June 11, 2012. (A7, D.I. 41, 43). On October 10, 2012, the State moved to reconsolidate the charges from the two incidents. (A10, D.I. 61; B1-10). Fowler did not file any opposition, and Superior Court granted the State's motion on October 16, 2012. (A11, D.I. 65). Superior Court confirmed the charges were consolidated on December 12, 2012, and May 7, 2013. (A69-70, A112-13).

Beginning on May 7, 2013, Superior Court held a seven-day jury trial. (A17, D.I. 132). Superior Court denied Fowler's motion for a judgment of acquittal with leave to renew it based on a closer reading of the record. (A929-31). The jury found Fowler guilty of each indicted charge: two counts of first degree attempted murder, first degree reckless endangering as a lesser included offense of first degree attempted murder, two other counts of first degree reckless endangering, five counts of possession of a firearm during the commission of a felony ("PFDCF"), and criminal mischief. (A1; A17, D.I. 132). Superior Court found Fowler guilty of two PFPP charges. (A1119-1120).

Fowler renewed his motion for a judgment of acquittal with regard to the first charge of first degree attempted murder and the accompanying PFCDF charge on September 4, 2013. (A18, D.I. 138). Superior Court granted that motion prior to sentencing on November 22, 2013. (A19, D.I. 143).

Superior Court sentenced Fowler as follows: for first degree attempted murder, forty years at Level 5 suspended after twenty-five years for decreasing levels of supervision; five years at Level 5 for each of two PFDCF charges, and three years at Level 5 for each of the remaining two PFDCF charges; five years at Level 5 suspended after two years for each of

two reckless endangering first degree charges; one year at Level 5 suspended for one year at Level 3 for criminal mischief; and eight years at Level 5 suspended for two years at Level 3 for each of two PFPP charges.

Fowler appealed to this Court. This is the State's Answering Brief.

SUMMARY OF THE ARGUMENT

I. DENIED. Superior Court properly exercised its discretion in denying severance, where Fowler was not prejudiced by trying together two instances of driving to a house and shooting at it. Fowler's attempt to pursue an identity defense for one event but not the other was foiled not by joinder, but by the overwhelming evidence that he was the driver and shooter. The jury was instructed to consider each charge independently, and followed that instruction as evidenced by the conviction of a lesser included offense for the first event. Evidence of one event would have been admissible in a trial of the other event.

STATEMENT OF FACTS

On July 2, 2011, Fowler hosted Brett Chatman, Danielle Maslin, and Tammi Boyd at his unfurnished house for an evening of drinking and listening to music. (A284, 286). Maslin had recently broken up with her boyfriend, Michael Welcher. (A217-18, A287-88). While Maslin was at Fowler's house, she and Welcher got into an argument over the phone. (A219-21, 288-89). The phone was on speakerphone, so Fowler, Chatman, and Boyd all heard Maslin's conversation. (A228). Even though Fowler had only met Maslin that day, he interjected himself and began arguing with Welcher. (A220-21, 288-89, 327-30). Fowler became extremely angry. (A332). Fowler and Welcher agreed to meet to engage in a fistfight. (A221-22, 226, 290, 261-63). There was no mention of any guns. (A262-63, 504.) Fowler left his companions, went into a back bedroom, returned, and suggested everyone get into Fowler's car to meet Welcher. (A332, 500-502).

Fowler, Chatman, Maslin, and Boyd got into Fowler's gold Honda Accord, and Fowler drove them to 2 Myers Road, where Welcher's friend Steven Fleck lived with his grandmother. (A222, 261, 334, 290-91). Chatman rode in the front passenger seat, Maslin rode in the back seat behind Chatman, and Boyd rode behind Fowler. (A291, 333). Welcher,

Fleck, and Fleck's girlfriend were waiting on the front porch, unarmed. (A223, 252, 293, 334). As Fowler drove up, he asked Chatman, "Should I do it?" and Chatman responded, "No, it's not worth it." (A334).

Fowler slowed down, rolled down the driver's side window, and fired five shots at the house where Welcher and Fleck waited on the porch. (A227, 265, 294, 334, 506-07, 509). Bullets lodged in Fleck's grandmother's mattress and bedframe. (A192-93, 198, 783). Boyd, seated behind Fowler, was burned by a casing that flew through Boyd's open car window and landed on her lap. (A336-38). Fowler sped off and told his friends not to tell anyone what he had done, and chastised Boyd for throwing the hot casing back out the window. (A297-98, 341-42, 363, 513). All the shell casings found at 2 Myers Road came from the same .32 caliber gun. (A842).

A few weeks later, on July 30, 2011, Chatman and Jonathan Duarte, also known as "Argentina," were at the Deer Park Tavern in Newark. (A515-17). Chatman and Duarte observed some tension and a physical altercation between Fowler's brother Ken Fowler and another man, Kyle Fletcher. (A519-21). Later that evening, Chatman and Duarte saw Ken Fowler bleeding on the side of the road with police. (A522-23, 526-27, 664-65). Chatman called Fowler, who was at the beach, and told him his brother

was seriously injured. (A521, 526-27). Fowler became enraged and ordered Chatman and Duarte to wait for him, and drove back from the beach and picked them up in his gold Honda. (A527-29). A black man, who neither Chatman nor Duarte knew, was in Fowler's car. (A530-31). Fowler's unstable rage made Chatman reluctant to get in the car. (A531, 537, 540). Chatman saw that Fowler and the black man each had a gun. (A542-43).

After Chatman and Duarte got in the back of Fowler's car, Fowler drove around aimlessly and pressed them for information as to who injured his brother and where the person lived. (A532-33, 538, 542). Fowler's rage was getting worse, and Chatman was afraid for his life and of what Fowler might do. (A541-42, 545-46). Chatman called a friend, pretending to be investigating, in order to prevent Fowler from learning who injured Ken. (A533-34). Eventually, Fowler learned from Chatman and Duarte that Fletcher injured Ken and that Fletcher lived at 49 Martindale Drive in Newark. (A598-99, 670-71).

At around four in the morning, Fowler drove to 49 Martindale Drive and got out of the car brandishing his gun. (A544-47). The unnamed black man also got out with a gun. (A544-45). Chatman and Duarte stood off to the side in the driveway. (A547-48). Fowler tried to kick in the front door, and when he was unable to do so, fired several shots through the door and

living room window. (A550-51, 674-75, 779). Then Fowler walked down to the bedroom window, aimed downward in order to hit anyone who might be sleeping in the bedroom, and fired several more shots. (A551, 675-76, 770). His unidentified companion also fired several shots into the house. (A552). The ten .32 caliber shell casings found at 49 Martindale Drive matched the shell casings found at 2 Myers Road. (A771-75, 842-45). Police also found two 9 millimeter casings. (A775).

Fletcher did not live at 49 Martindale Drive; Linda Lerdo and her family did. (A392). At four in the morning on July 31, 2011, Lerdo's husband was out of town, and she and her two children were all sleeping in the front bedroom. (A392-94, 405). Fowler shot Lerdo in the leg and arm, and a bullet just missed Lerdo's ten-year-old daughter's head. (A395-98, 407-8).

After the shooting, the four men got back into Fowler's car. (A553-54). Fowler announced he needed to leave Delaware, and Chatman suggested they go to his aunt's house in Florida. (A560, 562-63, 606-7). Fowler dropped off Duarte, who had to attend a court proceeding regarding his son, and Fowler and Chatman drove to Florida. (A559, 561-62). Duarte, Fowler's girlfriend, and another woman eventually joined Fowler and Chatman in Florida. (A564, 681-82, 730-31). As law enforcement closed

in, Fowler attempted to prevent Chatman from cooperating with police, and ditched his gold Honda in Florida after attempting to wipe all fingerprints off of it. (A564-67, 630, 687-88, 742). Fowler then left Florida and hid in Maryland, then in Pennsylvania, where he was apprehended. (A444, 687, 742, 744).

I. TRYING FOWLER'S TWO SHOOTINGS TOGETHER DID NOT PREJUDICE HIM.

QUESTION PRESENTED

Whether Superior Court abused its discretion in denying Fowler's motion to sever charges from two separate shootings that were close in time and similar in nature.

STANDARD OF REVIEW

This Court reviews a trial court's denial of a motion to sever for abuse of discretion.[1]

MERITS

Twice in one month, Fowler inserted himself into an argument between two third parties and responded by loading his friends into his gold Honda, driving to a house to find the aggravating third party, and firing several shots at the house with a .32 caliber gun. Fowler was not prejudiced by trying these similar events together, and Superior Court properly exercised its discretion in denying severance.

Superior Court Criminal Rule 8(a) permits the joinder of two or more offenses in the same indictment if the offenses are: "of the same or similar character;" or "based on the same act or transaction or on two or more acts

[1] *Jackson v. State*, 990 A.2d 1281, 1285 (Del. 2009).

or transactions connected together or constituting parts of a common scheme or plan." Superior Court Criminal Rule 14 allows the trial court to sever offenses and hold separate trials if it appears that a defendant will be prejudiced by the joinder of offenses. To determine whether the joinder of offenses is proper, Superior Court Criminal Rules 8 and 14 must be read together.[2] Such a determination involves a two-part inquiry: First, were the charges properly joined under Rule 8(a)? Second, should the offenses have been severed as prejudicial under Rule 14? Accordingly, Fowler must establish that a violation of either Rule 8 or 14 occurred, and then must establish a reasonable probability that the joint trial created substantial injustice.[3]

Fowler does not dispute that joinder was proper under Rule 8(a) because the offenses charged are of the same or similar character. Twice in one month, Fowler responded to a third party's injury with retaliatory rage; loaded his friends, including Chatman, into his gold Honda in the middle of the night; drove to a house to exact revenge; and fired several shots into the house with a .32 caliber gun. After each incident, Fowler urged his friends

[2] *Id.*
[3] *Id.* at 1286-87.

to keep quiet. The similar charges arising out of these similar incidents were properly joined and their joinder advanced judicial economy.[4]

The Court next considers whether joinder created sufficient prejudice that the Superior Court *should* have severed the charges under Rule 14.[5] This Court has described the following three types of prejudice to a defendant that will weigh against joinder:

> (1) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find;
> (2) the jury may use the evidence of one of the crimes to infer a general criminal disposition of the defendant in order to find guilt of the other crime or crimes; and
> (3) the defendant may be subject to embarrassment or confusion in presenting different and separate defenses to different charges.[6]

A hypothetical assertion of prejudice is not enough to meet the defendant's burden.[7] If the defendant makes an unsubstantiated claim of prejudice, the defendant's interests are outweighed by the interest of judicial economy.[8] "[A] defendant is not entitled to a separate trial simply because he might

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[4] The severing stipulation that preceded consolidation advanced judicial economy by allowing at least some of the charges to be tried on the original trial date. (A29-30; B4). After Fowler obtained new counsel, the State continued to pursue judicial economy by seeking reconsolidation. (B4-6).

[5] *Id.* at 1287.

[6] *Id.* at 1286 (citing *Wiest v. State*, 542 A.2d 1193, 1195 (Del. 1988)).

[7] *Id.* at 1287.

[8] *Id.*

then stand a better chance of being acquitted."[9] A joint trial is not unfairly prejudicial where evidence from one incident would be admissible in a separate trial of the other incident.[10]

Fowler claims that because he pursued an identity defense for the July 2 event and not the July 31 event, he suffered all three types of prejudice that indicate joinder was improper. Fowler asserts his identity defense could not be successful because the jury accumulated evidence against him and inferred Fowler had a general criminal disposition, and the jury was confused. Fowler was not prejudiced by joinder; rather, his identity defense was unsuccessful because of the overwhelming evidence that he fired the shots at Welcher and Fleck on July 2.

Fowler's identity defense for the July 2 events was based entirely on Welcher's testimony that the shooter had tattoos covering his entire arm, like Brett Chatman's, while Fowler only has tattoos on his upper arm. (Op. Br. at 16; A232, 237, 259, 449, 451-53). In closing, Fowler's counsel called Welcher's statement "the most important evidence."[11] (A1039-40). But Welcher's recollection of a brief glimpse of an arm that was unexpectedly

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[9] *Bradley v. State*, 559 A.2d 1234, 1241 (Del. 1989).

[10] *Monroe v. State*, 28 A.3d 418, 426 (Del. 2011).

[11] Fowler did not argue an identity defense in his motion for judgment of acquittal for the first degree murder charge based on the July 2 incident, but focused on the intent element instead. (B18-20).

shooting at him, in the middle of the night, was overwhelmed by the evidence that Fowler was the July 2 driver and shooter.

Maslin, Boyd, and Chatman were in the car on July 2 and each testified that Fowler drove his car and fired the shots. Maslin, Boyd, and Chatman all saw and heard Fowler interject himself into Welcher's argument with Maslin and agree to meet Welcher to fight. Boyd saw Fowler disappear into another room for a moment before the group left to meet Welcher. En route to Welcher's house, Fowler asked Chatman, "Should I do it?" After the shooting, Fowler warned his companions not to talk to police, and chastised Boyd for throwing the hot shell casing that landed on her lap out the window. Fowler's vague assertion of joinder-based prejudice against his identity defense fails in light of the overwhelming evidence that he shot at Welcher, Fleck, and Fleck's girlfriend on July 2.

Fowler's other assertions of prejudice – inconsistent defenses, juror confusion, accumulation of evidence, and inference of a criminal disposition – also fall short. Fowler's identity defense for the July 2 event is not inconsistent with his witness credibility defense for the July 31 event. (A1042-54). In order for the July 2 identity defense to be successful, the jury would have to find Fowler's companions were not credible, just as Fowler urged for the July 31 event. Indeed, the number of witnesses that

Fowler brought along in his car for each event limited the options for his defense, and necessarily made an identity defense synonymous with arguing that those witnesses were not credible.

If Fowler's identity defense for the July 2 event confused the jury, it did so because it flew in the face of the overwhelming evidence that Fowler was the July 2 shooter. Any identity evidence accumulated from the July 31 event would be superfluous and would not affect the jury's conclusion on identity for the July 2 event. Finally, the jury did not blindly accumulate evidence from the two incidents or infer a general criminal disposition, but rather, properly considered the evidence. The jury did not convict Fowler of the first degree attempted murder charge pertaining to Fleck, and instead convicted him of the lesser included offense of first degree reckless endangering.[12] (A1; A17, D.I. 32; A24).

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[12] *Massey v. State*, 2008 WL 383192, *6 (Del. Feb. 12, 2008) ("[H]ad the jury believed that the defendant had a general criminal disposition, it likely would have found him guilty as charged on all counts.").

Superior Court later granted Fowler's motion for judgment of acquittal on the attempted first degree murder charge and accompanying firearm possession charge pertaining to the shots Fowler fired at Welcher. (A19, D.I. 143). Fowler's claim that his July 2 convictions were prejudicially derived from joinder is therefore effectively limited to first degree reckless endangering, related PFDCF, PFPP, and criminal mischief. (A1, A24-25, A974-77).

Fowler was also not prejudiced by joinder because the evidence from one event would have been admissible in the trial for the other.[13] If Fowler relied on an identity defense for the July 2 shooting, the State would have called Chatman and Duarte to testify about the July 31 shooting and link the car and gun used in the July 2 shooting to Fowler. Fowler's repeated use of the same car and same gun to drive to a house and shoot at it, and subsequent attempt to sanitize and abandon the car, are probative of identity.

Any prejudice from joinder was cured by Superior Court's jury instructions against accumulating evidence, and to consider each charge independently:

> Ladies and Gentlemen, the defendant is charged with the eleven criminal offenses which are reflected in the indictment which I have just read to you.
>
> You are instructed that each charge and the evidence pertaining to it should be considered separately.
>
> Stated differently, you must consider each count and the charge contained therein independently of the others, and return a separate verdict as to each.
>
> Further, just because you reach a conclusion as to one count or charge does not mean that the same conclusion would apply to the other counts or charges. Again, each must be considered separately.

[13] Fowler's Motion before the Superior Court did not assert the evidence of one act was inadmissible in the trial of the other. (A35-37).

(A981-82). The jury is presumed to have followed these instructions, and the conviction of the lesser included offense for shooting at Fleck indicates they did follow the instructions, mitigating any potential prejudice.[14]

In sum, because Fowler has not shown a reasonable probability that the joint trial created substantial injustice, he cannot prevail on this appeal. Fowler's assertion that joinder destroyed his identity defense for the July 2 incident crumbles under the overwhelming evidence that Fowler fired the shots that day. The jury found Fowler not guilty of one count of first degree attempted murder, and instead convicted him of first degree reckless endangerment, indicating the jury followed Superior Court's instructions and did not accumulate the evidence or infer any criminal disposition. The July 2 incident would have been admissible in a trial of the July 31 incident, and vice versa. Joinder properly served the prevailing concern of judicial economy. Superior Court did not abuse its discretion in denying severance.

[14] *See Monroe v. State*, 28 A.3d 418, 428 (Del. 2011) (citing *Capano v. State*, 781 A.2d 556, 589 (Del. 2001)).

CONCLUSION

The judgment of the Superior Court should be affirmed and the matter remanded accordingly.

/s/ Morgan T. Zurn

August 18, 2014

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CERTIFICATION OF SERVICE

The undersigned certifies that on August 18, 2014, she caused the attached *State's Answering Brief* to be delivered to the following persons in the form and manner indicated:

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