COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff	:	**CASE NO. 2015 CR 00316**
vs.	:	**Judge McBride**
KAILI FITZGERALD	:	**DECISION/ENTRY**
Defendant	:	

STATE OF OHIO	:	
Plaintiff	:	**CASE NO. 2015 CR 00317**
vs.	:	**Judge McBride**
MICHAEL FITZGERALD	:	**DECISION/ENTRY**
Defendant	:	

Carol A. Rowe, assistant prosecuting attorney, for the state of Ohio, 76 S. Riverside Drive, 2nd Floor, Batavia, Ohio 45103

Aaron J. Manter, Attorney at Law, LLC, Aaron J. Manter, attorney for the defendant Kaili Fitzgerald, 6124 Corbly Road, Cincinnati, Ohio 45230

Kroener Hale Inc., Jeffrey S. Hale, attorney for the defendant Michael Fitzgerald, 60 North Second Street, Batavia, Ohio 45103

This cause is before the court for consideration of the state's motion to consolidate filed on September 14, 2015. The court heard arguments on the motion on November 4, 2015. At the conclusion of the oral arguments, the court took the issues raised by the motions under advisement.

Upon consideration of the motions, the record of the proceeding, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE

Both defendants, Michael Fitzgerald and Kaili Fitzgerald, are accused of child endangerment in violation of R.C. 2919.22(A), a third degree felony. The state alleges that on or about August 29, 2014 through January 5, 2015, the defendants failed to care for, protect, support, and feed Z.K., who is their infant son. Z.K. was born on June 5, 2014, and was diagnosed with failure to thrive on January 9, 2015. He weighed 7 lbs. 1 oz. at birth and only 12 lbs. 6 oz. by January 9, 2015.

Pursuant to Crim.R. 13, on September 14, 2015, the state moved to consolidate the defendants' cases, *State of Ohio v. Kaili Fitzgerald*, Case No. 2015-CR-000316 and *State of Ohio v. Michael Fitzgerald*, Case No. 2015-CR-000317. Both defendants oppose joining the two cases. The defendants assert that their defenses are antagonistic to each other, and as such the cases against the two defendants should be severed under Crim.R. 14.

LEGAL ANALYSIS

"The court may order two or more indictments or informations or both to be tried together, if the offenses or the defendants could have been joined in a single indictment or information. * * *"[1] Crim.R. 8(B) governs the joinder of defendants: "Two or more defendants may be charged in the same indictment, information or complaint if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses, or in the same course of criminal conduct. * * * "[2]

Generally, joining defendants and avoiding more than one trial is favorable to holding separate trials.[3] "Joinder conserves judicial and prosecutorial time, lessens the not inconsiderable expenses of multiple trials, diminishes inconvenience to witnesses, and minimizes the possibility of incongruous results in successive trials before different juries."[4] In short, joint trials serve judicial economy.[5]

---

[1] Crim.R. 13; *State v. Gilbert*, 12th Dist. No. CA2010-09-240, 2011-Ohio-4340, ¶ 75. See, also, R.C. 2945.13, providing: "When two or more persons are jointly indicted for a felony, except a capital offense, they shall be tried jointly unless the court, for good cause shown on application therefor by the prosecuting attorney or one or more of said defendants, orders one or more of said defendants to be tried separately." The burden of showing good cause for severance is upon the applicant for the order requesting a separate trial. *State v. Perod*, 15 Ohio App.2d 115, 118-19, 239 N.E.2d 100, 44 O.O.2d 249 (11th Dist. 1968).

[2] Crim.R. 8(B).

[3] *Gilbert*, 2011-Ohio-4340, at ¶ 75. See *State v. Price*, 8th Dist. Cuyahoga No. 81604, 2003-Ohio-1840, ¶ 12; *State v. Walters*, 10th Dist. Franklin No. 06AP-693, 2007-Ohio-5554, ¶ 21.

[4] *Gilbert*, 2011-Ohio-4340, at ¶ 75, quoting *State v. Thomas*, 61 Ohio St.2d 223, 225, 400 N.E.2d 401, 15 O.O.3d 234 (1980). When there are multiple defendants, the risk of incongruous results arises, and when the evidence is the same against both defendants, there is a risk of inconveniencing the witnesses. *State v. Echols*, 128 Ohio App.3d 677, 685, 716 N.E.2d 728 (1st Dist. 1998).

If all the prerequisites set forth in Crim.R. 8(A) are met for joinder, the defendants may "obtain a severance" if they can "demonstrate that the joinder was prejudicial within the meaning of Crim.R. 14."[6] Specifically, Crim.R. 14 provides: "If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment, information, or complaint, or by such joinder for trial together of indictments, informations or complaints, the court shall order an election or separate trial of counts, grant a severance of defendants, or provide such other relief as justice requires."

The court should "grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence."[7] Defendants do not have a specific right to "severance merely because they have a better chance of acquittal in separate trials."[8] Furthermore, defendants are not entitled to a separate trial simply because they intend to call their codefendant to testify.[9]

A defendant who claims his defense is antagonistic to the codefendant's defense may have grounds for severance under Crim.R. 14. An antagonistic defense is one where the defendant tries to "exculpate himself and inculpate his co-defendant."[10]

---

[5] *Walter,* 2007-Ohio-5554, at ¶ 30.
[6] *Thomas*, 61 Ohio St.2d at 225. See *State v. Allen*, 5th Dist. Delaware No. 2009-CA-13, 2010-Ohio-4644, ¶ 55 ("In order to obtain severance, the defendant needed to affirmatively demonstrate prejudice by the joinder."); *State v. Parker*, 72 Ohio App.3d 456, 460, 594 N.E.2d 1033 (3rd Dist. 1991), citing *State v. Torres*, 66 Ohio St.2d 340, 421 N.E.2d 1288, 20 O.O.3d 313 (1981) (holding that the defendant has "the burden to affirmatively show[] his rights were prejudiced by the joinder" in order to be granted a severance).
[7] *Zafiro v. U.S.*, 506 U.S. 534, 539, 113 S.Ct. 933, 122 L.Ed.2d 317, 61 USLW 4147 (1993). See *Allen*, 2010-Ohio-4644 at ¶ 57, quoting *United States v. Saadey*, 393 F.3d 669, 678 (6th Cir. 2005) ("Thus, to prevail on his severance argument, an appellant must show 'compelling, specific, and actual prejudice from [the] court's refusal to grant the motion to sever.").
[8] *Walters*, 2007-Ohio-5554, at ¶ 38, citing *Zafiro v. U.S.*, 506 U.S. at 540.
[9] *Perod*, 15 Ohio App.2d at 120.
[10] (Citation omitted.) *State v. Daniels*, 92 Ohio App.3d 473, 486, 636 N.E.2d 336 (1st Dist. 1993).

"Antagonistic defenses may be so prejudicial that they can deny a fair trial, nonetheless severance is not mandated."[11]

Although an antagonistic defense may provide grounds for severance, the court is not required to sever co-defendants "whenever co-defendants have conflicting defenses."[12] "Rule 14 does not require severance even if prejudice is shown; rather it leaves the tailoring of the relief to be granted, if any" to the trial court's sound discretion.[13]

Indeed, even when "risk of prejudice is high," a trial court may still be able to use "less drastic measures, such as limiting instructions * * * to cure any risk of prejudice."[14] "[J]uries are presumed to follow their instructions."[15] For instance, the instruction to consider the guilt of the codefendants separately may suffice to curb prejudice.[16] When juries can "properly compartmentalize the evidence as it relates to the appropriate defendants," severance is unwarranted.[17]

It is only when the codefendants' defenses are "antagonistic to the point of being irreconcilable and mutually exclusive" that severance is required.[18] The defenses must

---

[11] *Gilbert*, 2011-Ohio-4340, at ¶ 75, citing *State v. Humphrey*, 2nd Dist. No. 2002-CA-30, 2003-Ohio-3401, ¶ 68. *See Daniels*, 92 Ohio App.3d at 486 (holding same).
[12] *Daniels*, 92 Ohio App.3d at 486, quoting *Zafiro*, 506 U.S. 534. *See Zafiro* at 534 (holding that mutually exclusive defenses are not *per se* prejudicial and do not automatically require severance).
[13] *Zafiro*, 506 U.S. 534 at 538-39.
[14] Id. at 539, citing *Richardson v. Marsh*, 481 U.S. 200, 211, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987). *See Walters*, 2007-Ohio-5554, at ¶ 37.
[15] *Zafiro*, 506 U.S. at 540 quoting *Richardson*, 481 U.S. at 211; *State v. Fears*, 86 Ohio St.3d 329, 334 (holding same).
[16] *See Walters*, 2007-Ohio-5554, at ¶ 44.
[17] *Allen*, 2010-Ohio-4644, at ¶ 57, quoting *United States v. Causey*, 834 F.2d 1277, 1287 (6th Cir. 1987).
[18] *Walters*, 2007-Ohio-5554, at ¶ 23.

be "antagonistic at their core," such that there is the substantial possibility the "jury will unjustifiably infer that this conflict alone demonstrates that both are guilty."[19]

By contrast, "mere finger pointing between co-defendants, i.e., the familiar 'he did, not I' defense, normally is not a sufficient ground for severance based upon mutually antagonistic defenses."[20] Shifting the "blame to another defendant does not mandate separate trials" because codefendants often attempt to "'point the finger, to shift the blame, or to save himself at the expense of the other.' "[21]

The risk of prejudice associated with antagonistic defenses will "vary by the facts of each case."[22] The risk of prejudice may be heightened when defendants are tried jointly "in a complex case and they have markedly different degrees of culpability."[23] In addition, prejudice may be higher when the defendant is prohibited from presenting "essential exculpatory evidence" that would have been admissible had the defendant been tried in a separate trial.[24]

Moreover, "evidence that is probative of a defendant's guilt but technically admissible only against a codefendant also might present a risk of prejudice."[25] Generally, however, when a co-defendant's prior statement "is introduced only against the declarant-co-defendant, and not against the complaining co-defendant, the latter

---

[19] (Citation omitted.) *Walters*, 2007-Ohio-5554, at ¶ 23.
[20] Walters, 2007-Ohio-5554, at ¶ 39, quoting *State v. Bunch*, 7th Dist. Mahoning No. 02 CA 196, 2005 -Ohio- 3309, ¶ 43.
[21] Id. quoting *United States v. Flores*, 362 F.3d 1030, 1039-1040 (C.A.8, 2004).
[22] *Zafiro*, 506 U.S. at 539.
[23] Id. citing *Kottekaos v. United States*, 328 U.S. 750, 744-775, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946).
[24] *Zafiro*, 506 U.S. at 539, citing *Tifford v. Wainwright*, 588 F.2d 954 (CA5 1979).
[25] *Zafiro*, 506 U.S. at 539, citing *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

has suffered no violation of his Sixth Amendment Confrontation Clause rights."[26] However, a "defendant's right to cross-examination, secured by the confrontation clause of the Sixth Amendment, is violated in a joint trial with a codefendant who does not testify, by the admission of the codefendant's statements *inculpating* the defendant. * * * "[27]

In *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), the United States Supreme Court held that, in a joint trial, the admission of a co-defendant's confession that implicated the defendant, where the co-defendant did not take the stand, denied the defendant the constitutional right of confrontation and constituted prejudicial error. "The rationale in *Bruton* was that the introduction of a potentially unreliable confession of one defendant which implicates another defendant without being subject to cross-examination deprives the latter defendant of his right to confrontation guaranteed by the Sixth Amendment."[28]

In reliance upon *Bruton*, the Ohio Supreme Court has also held that "[a]n accused's right of cross-examination secured by the confrontation clause of the Sixth Amendment is violated in a joint trial with a non-testifying codefendant by the admission of extrajudicial statements made by the codefendant inculpating the accused."[29]

---

[26] *Allen*, 2010-Ohio-4644, at ¶ 37, quoting *United States v. Vasilakos*, 508 F.3d 401, 407 (6th Cir. 2007).
[27] (Emphasis added.) *State v. Hall*, 8th Dist. No. 90365, 2009-Ohio-461, ¶ 53, citing *Bruton*, 391 U.S. 123. See *Price*, 2003-Ohio-1840 at ¶ 12 ("Where co-defendants present conflicting, antagonistic defenses, severance *may* be required.") (Emphasis original.)
[28] *Gilbert*, 2011-Ohio-4340, at ¶ 78.
[29] *State v. Mortiz*, 63 Ohio St.2d 150, 407 N.E.2d 1268, 17 O.O.3d 92 (1980), paragraph one of the syllabus.

The rule applies with equal force to statements that "tend significantly to incriminate a co-defendant, whether or not he is actually named in the statement."[30] In such a situation, when the "contested statement is not incriminating to a defendant on its face, but is only so when linked with other evidence at trial, a trial court's limiting instruction is enough to restrain the jury from considering the statement for a purpose that would violate the defendant's right to confrontation."[31] "Thus, a *Bruton* problem arises in a joint trial of two or more defendants when the trial court admits into evidence a confession or statement by a nontestifying defendant that implicates the other defendant(s) in criminal activity."[32]

The defendants are both charged with violating R.C. 2919.22(A), which provides:

> "(A) No person, who is the parent, guardian, custodian, person having custody or control, or person in loco parentis of a child under eighteen years of age * * * shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support."

The defendants both argue that their defenses are antagonistic to one another and that therefore they should receive separate trials. Mrs. Fitzgerald claims that she regularly fed the infant when she was with Z.K. during the day. Rather than failing to feed Z.K., Mrs. Fitzgerald alleges that the baby had reflux difficulties and spit up in excess. The state intends to introduce statements by Mrs. Fitzgerald about her feeding habits of Z.K.[33] The parties have represented to this court that Mrs. Fitzgerald initially told investigators that she feeds the baby every few hours, and later she backtracked

---

[30] *Mortiz*, 63 Ohio St.2d at 155, quoting *Fox v. State*, 384 N.E.2d 1159, 1170 (Ind.App 1979).
[31] *Allen*, 2010-Ohio-4644, at ¶ 39.
[32] *Hall*, 2009-Ohio-461, at ¶ 53.
[33] In Mrs. Fitzgerald's response, she states that she does not have a fully formed defense, but there is a likelihood that her defense will be antagonistic to Mr. Fitzgerald. K.F. Resp. at pg., 1. In oral argument, her proffered defense is that the baby's inability to keep sustenance down caused the failure to thrive, not her neglect in feeding him.

and claimed that sometimes she may forget to feed the baby and the time in between feedings is longer.

Mr. Fitzgerald claims he worked outside the home, but when he was home he also fed Z.K.[34] He therefore thought the baby was receiving adequate nutrition during the daytime when the baby was with Mrs. Fitzgerald.

The state intends to argue that both parents should have known that Z.K. was malnourished when he failed to gain significant weight and eventually fell to the third percentile for infants his age for weight. The defendants initially brought Z.K. to multiple doctors' appointments, but then the defendants stopped taking him to the doctors altogether, until he was hospitalized for malnourishment. Under the state's view, even if Mr. Fitzgerald and Mrs. Fitzgerald believed that Z.K. was receiving feedings throughout the day and evening, they should have still observed that Z.K. was failing to thrive due to his failure to gain weight.

The two cases against the defendants may be joined under Crim.R. 13 if the state could have originally joined them under Crim.R. 8. Under Crim.R. 8, the two defendants could have been charged together if they "participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses, or in the same course of criminal conduct."[35]

Indeed, the defendants are alleged to have engaged in the same course of conduct, namely failing to take Z.K. to doctors' appointments and failing to feed him

---

[34] In Mr. Fitzgerald's response, he articulated that "it is not far reaching to *assume* that each codefendant may seek to exculpate himself [sic] by blaming his [sic] codefendant." (Emphasis added.) M.F. Resp. at pg. 2. In oral argument, Mr. Fitzgerald's proffered defense is that he fed the baby when he returned home from work and assumed Mrs. Fitzgerald was adequately feeding him during the day.

[35] Crim.R. 8(B).

properly. For that reason, the evidence, witnesses, expert testimony, and arguments against both defendants are largely the same.

Nevertheless, the defendants argue that they should be tried separately pursuant to Crim.R. 14, which permits severance when a defendant is prejudiced by the joinder. The defendants bear the burden of showing good cause for the severance.[36] The defendants argue that they are prejudiced because their defenses are antagonistic to one another.

The defenses involved are not "antagonistic to the point of being irreconcilable and mutually exclusive," such that severance is required.[37] Mrs. Fitzgerald's defense is that she fed the baby, but the baby suffers from reflux. Mr. Fitzgerald's defense is that he did not know whether Z.K. was fed during the day, but when he was at home he did feed Z.K. As courts have cautioned, "mere finger pointing between co-defendants, i.e., the familiar 'he did, not I' defense, normally is not a sufficient ground for severance based upon mutually antagonistic defenses."[38]

In the instant case, the defendants have not articulated antagonistic defenses, which are defenses where the defendant tries to "exculpate himself and inculpate his co-defendant."[39] Even if the court treats these defenses as antagonistic, they do not amount to any more than mere finger pointing.

Furthermore, to the small extent the defenses are antagonistic, this court can instruct the jury to consider the guilt of the codefendants separately to prevent any

---

[36] *See Allen*, 2010-Ohio-4644, at ¶ 55 ("In order to obtain severance, the defendant needed to affirmatively demonstrate prejudice by the joinder.");
[37] *Walters*, 2007-Ohio-5554, at ¶ 23.
[38] Id. at ¶ 39, quoting *Bunch*, 2005 -Ohio- 3309 at ¶ 43.
[39] (Citation omitted.) *Daniels*, 92 Ohio App.3d at 486.

potential prejudice.[40] This is also not a "complex case," nor is it one involving "different degrees of culpability," where the jury will be easily confused or will inappropriately assume both parties are guilty because the two cases have been brought together.[41]

Additionally, Mr. Fitzgerald contends "[p]rejudice will arise" because he intends to call Mrs. Fitzgerald as a witness.[42] However, the defendants are not entitled to a separate trial simply because they intend to call their codefendant to testify.[43]

In addition, Mr. Fitzgerald argues that his right to cross examination under the confrontation clause of the Sixth Amendment is infringed by permitting the jury to learn of Mrs. Fitzgerald's statements made to law enforcement. Such a "problem arises in a joint trial of two or more defendants when the trial court admits into evidence a confession or statement by a nontestifying defendant that implicates the other defendant(s) in criminal activity."[44]

However, Mrs. Fitzgerald's statements that she fed the baby, that the baby spit up often, and that she sometimes forgot to feed every few hours is not tantamount to accusing Mr. Fitzgerald of neglecting Z.K. In other words, Mrs. Fitzgerald's statements, as they were represented to the court, do not implicate the defendant, therefore avoiding a *Bruton* problem of confrontation. Furthermore, there is no reason to believe that the jury will be unable to "properly compartmentalize" Mrs. Fitzgerald's statements, and only use them to assess her guilt or lack thereof.[45]

---

[40] *See Walters*, 2007-Ohio-5554, at ¶ 44.
[41] *Zafiro*, 506 U.S. at 539, citing *Kottekaos*, 328 U.S. at 744-775.
[42] M.F. Resp. at pg.2.
[43] *Perod*, 15 Ohio App.2d at 120.
[44] (Emphasis added.) *Allen*, 2010-Ohio-4644, at ¶ 39.
[45] *Allen*, 2010-Ohio-4644 at ¶ 57, quoting *Causey*, 834 F.2d at 1287.

Based on the above analysis, the court finds that the defendants would not be prejudiced by joinder and, consequently, consolidation is appropriate.

CONCLUSION

Based on the analysis set forth above, the court grants the state's motion to consolidate the cases of *State of Ohio v. Kaili Fitzgerald*, Case No. 2015-CR-000316 and *State of Ohio v. Michael Fitzgerald*, Case No. 2015-CR-000317.

IT IS SO ORDERED.

DATED: 12-14-15

Judge Jerry R. McBride

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Decision/Entry were e-mailed on this 14th day of December 2015 to Thomas W. Scovanner, at tscovanner@clermontcountyohio.gov, Carol A. Rowe, at crower@clermontcountyohio.gov, and Lara Baron, at lbaron@clermontcountyohio.gov, assistant prosecuting attorneys; to Jeffrey S. Hale, at jeffreyshale@gmail.com, attorney for the defendant Michael Fitzgerald; and to Aaron Manter, at aaronjmanter@manterlaw.com, attorney for the defendant Kaili Fitzgerald.

Bailiff to Judge McBride