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CLERMONT COUNTY, OHIO

**COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO**

STATE OF OHIO	:	
Plaintiff	:	CASE NO. 2016 CR 00704
vs.	:	Judge McBride
BOBBY CROOKS	:	DECISION/ENTRY
Defendant	:	

**Matt E. Wiseman and Lara Baron, assistant prosecuting attorneys for the state of Ohio,
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**Robert A. Herking, attorney for the defendant Bobby Crooks, 202 Main Street, Batavia,
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This cause is before the court for consideration of the motion for severance of charges filed by the defendant Bobby Crooks on March 15, 2017. The motion was supported by a memorandum outlining the factual and legal basis for the motion.

The court established a briefing/hearing schedule with respect to the motion and gave the state an opportunity to submit a written memorandum and gave the defendant an opportunity to submit a reply memorandum. Neither side submitted any memorandum other than the memorandum that was filed initially by the defendant with

his motion. Oral arguments were then heard as to the motion on April 6, 2017. Following the conclusion of the oral arguments of counsel, the court took the motion under advisement.

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

PROCEDURAL BACKGROUND

The defendant Bobby Crooks was indicted on December 6, 2016, on the following charges: (1) aggravated robbery in violation of R.C. 2911.01(A)(1), a felony of the first degree; (2) carrying a concealed weapon in violation of R.C. 2923.12(A)(2), a felony of the fourth degree; and (3) receiving stolen property in violation of R.C. 2913.51(A), a felony of the fourth degree. These three charges stem from two different events, as is made clear from the arguments of counsel and the bill of particulars filed by the state on January 10, 2017.

Counts 2 and 3, involving charges of carrying a concealed weapon and receiving stolen property, arose from an incident on August 23, 2016. A law enforcement officer conducted a traffic stop of the defendant. The state alleges that the defendant had a firearm in the vehicle at the time which was either loaded or for which the defendant had ammunition ready at hand. Once the law enforcement officer performed a records check with respect to the serial number on the firearm, he determined that it was stolen.

Upon interrogating the defendant, the defendant allegedly admitted that it was his firearm and that the firearm was stolen.

Count 1, involving a charge of aggravated robbery, arose from an event which occurred several months later, on November 28, 2016. The state alleges that the defendant, in attempting to commit or in committing a theft offense, had a deadly weapon or about his person or under his control and either displayed the weapon, brandished it, indicated that he possessed it, or used it. Specifically, the state alleges that the victim pizza delivery driver handed a pizza, which had been ordered, to the codefendant. At the same time, the driver felt a firearm pressed to the back of his neck and the defendant demanded money from him. The victim took \$600 from his pocket and gave it to the defendant. The pizza, or a similar pizza, was later found in the residence where the defendant and codefendant were then located.

On March 15, 2017, the defendant filed a motion to sever Count 1 from Counts 2 and 3. The defendant argues that he will be prejudiced with respect to the aggravated robbery count because the jury will know he had access to a firearm from hearing evidence regarding the charges for carrying a concealed weapon and receiving stolen property, as the defendant admitted to those charges that he had received a stolen firearm. Because the jury will know that he had access to a firearm, the defendant maintains that the jury will unfairly use that evidence as making it more likely that he placed a firearm to the victim's neck when considering the aggravated robbery charge.

LEGAL ANALYSIS

Crim.R. 8(A) governs the joinder of offenses:

“Two or more offenses may be charged in the same indictment, information or complaint 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 are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct.”¹

Joinder of multiple offenses in a single trial is favored² and is liberally permitted in order to “conserve judicial resources, reduce the chance of incongruous results in successive trials, and diminish inconvenience to witnesses.”³

In the present case, the defendant does not deny that the charges of carrying a concealed weapon and receiving stolen property are properly joined together because they are part of the same course of criminal conduct, i.e. they both arise from the defendant having a stolen gun in his vehicle. Rather, the defendant posits that those two charges are not properly joined with the aggravated robbery charge.

However, aggravated robbery and receiving stolen property are both theft offenses that have been found to be properly joined in the same indictment under

¹ Crim.R. 8(B).

² *State v. Lott*, 51 Ohio St.3d 160, 163, 555 N.E.2d 293 (1990), citing *State v. Torres*, 66 Ohio St.2d 340, 421 N.E.2d 1288 (1981).

³ *State v. Schalm*, 65 Ohio St.3d 51, 58, 600 N.E.2d 661 (1992). See *State v. Morsie*, 12th Dist. Warren No. CA2012-07-064, 2014-Ohio-172, ¶ 28 (Citations omitted.) (“It is well-established that ‘[t]he law favors joining multiple offenses in a single trial under Crim.R. 8(A) if the offenses charged ‘are of the same or similar character.’ As a result, ‘[j]oinder is liberally permitted to conserve judicial resources, reduce the change of incongruous results in successive trials, and diminish inconvenience to the witnesses.’”).

Crim.R. 8(A) as they are charges of the same or similar character.⁴ Accordingly, joinder of all three charges in this case is proper under Crim.R. 8(A).

Even when similar offenses are properly joined pursuant to Crim.R. 8(A), "Crim.R. 14 permits a defendant to request severance of the 'counts on an indictment on the grounds that he or she is prejudiced by the joinder of multiple offenses.'"⁵

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."⁶

Whether offenses should be joined or severed is "a matter in the trial court's discretion."⁷ Moreover, the defendant "bears the burden of proving prejudicial joinder."⁸ "A claim of prejudice depends on whether the advantages of joinder and avoidance of multiple trials are outweighed by the right of a defendant to be fairly tried on each charge."⁹

⁴ See *State v. Woodard*, 8th Dist. Cuyahoga No. 35480, 1997 WL 201158, *3 (Feb. 10, 1977) ("It is apparent that the charges of aggravated robbery * * * and the three counts of receiving stolen property can be tried together, as all of these felonies are of the same or similar character, namely theft offenses.").

⁵ *State v. Spaulding*, — N.E.3d —, 2016-Ohio-8126, ¶ 62, quoting *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 166, ¶ 49. See *Schalm*, 65 Ohio St.3d at 58 (explaining that a defendant "can still move to sever the charges pursuant to Crim.R. 14 if their consideration will prejudice her or her rights."

⁶ Crim.R. 14

⁷ *Morsie*, 2014-Ohio-172 at ¶ 27, citing *State v. Matthews*, 12th Dist. Butler No. CA2012-09-175, 2013-Ohio-3482, ¶ 35.

⁸ *Morsie*, 2014-Ohio-172 at ¶ 29, citing *State v. Moshos*, 12th Dist. Clinton No. CA2009-06-008, 2010-Ohio-735, ¶ 79. See *Spaulding*, 2016-Ohio-8126, ¶ 62, quoting *State v. Torres*, 66 Ohio St.2d 340, 343, 421 N.E.2d 1288 (1981) (stating that "the defendant 'has the burden of furnishing the trial court with sufficient information so that it can weigh the considerations favoring joinder against the defendant's right to a fair trial.'").

⁹ *Robinson*, 2010-Ohio-4713 at ¶ 24, citing *Torres*, 66 Ohio St.2d at 343.

If the defendant shows that joinder would cause prejudice, the state has two methods available to rebut the prejudice claim: the “other acts” test and the “joinder” test.¹⁰ The “court must determine (1) whether evidence of other crimes would be admissible even if the counts were severed, and (2) if not, whether the evidence of each crime is simple and distinct.”¹¹

Under the first test, the “other acts” test, if “evidence of other crimes would be admissible at separate trials, any ‘prejudice that might result from the jury’s hearing the evidence of the other crime in a joint trial would be no different from that possible in separate trials,’ and a court need not inquire further.”¹²

The second test, the “joinder” test, does not require the state to meet the “stricter” other acts test.¹³ Instead, the state is “merely required to show that evidence of each crime joined at trial is simple and direct.”¹⁴ If this test is satisfied, the defendant “is not prejudiced by joinder regardless of the nonadmissibility of evidence of these crimes as ‘other acts’ under Evid.R. 404(B).”¹⁵ “Simply stated, ‘[t]he joinder test only requires that the evidence of each joined offense is simple and distinct and ensures that a jury would be capable of segregating the proof for each test.’¹⁶

¹⁰ *Lott*, 51 Ohio St.3d at 163. See *Matthews*, 2013-Ohio-3482 at ¶ 38 (explaining that the state may negate the defendant’s claim of prejudice through either the other acts test or the joinder test).

¹¹ *Schaim*, 65 Ohio St.3d at 59, citing *State v. Hamblin*, 27 Ohio St.3d 153, 158-59, 524 N.E.2d 476, 481-82 (1988).

¹² *Schaim*, 65 Ohio St.3d at 59, quoting *Drew v. United States*, (C.A.D.C.1964), 331 F.2d 85, 90.

¹³ *Moshos*, 2010-Ohio-735 at ¶ 80.

¹⁴ *Lott*, 51 Ohio St.3d at 163, citing *State v. Roberts*, 62 Ohio St.2d 170, 175, 405 N.E.2d 247 (1980).

¹⁵ *Lott*, 51 Ohio St.3d at 163, citing *Roberts*, 62 Ohio St.2d at 170.

¹⁶ *Morsie*, 2014-Ohio-172 at ¶ 29, quoting *State v. Kaufman*, 187 Ohio App.3d 50, 2010-Ohio-1535, ¶ 180 (7th Dist.).

As discussed, in the instant case, joinder is proper under Crim.R. 8(A). However, the defendant argues that he is prejudiced by this joinder and is therefore entitled under Crim.R. 14 to have Count 1 tried separately from Counts 2 and 3. The defendant argues that, if the jury knows the defendant admitted to having a stolen firearm in August 2016, then the jury can infer that he had access to a firearm in November 2016, when it is alleged that he placed a firearm to a pizza delivery person's neck and robbed him of \$600.

The defendant has failed to satisfy his burden of showing prejudice. There are multiple reasons that the facts surrounding the weapons and stolen property charges will not prejudice the defendant with respect to the aggravated robbery charge. First, the fact that the defendant had a stolen firearm in his vehicle in August 2016 is not highly incendiary or sensational. Courts have previously found that testimony showing that a defendant had a firearm, as a result of evidence relating to one charge, does not necessarily prejudice the defendant with respect to a second charge in which the defendant was also alleged to have a firearm.¹⁷ Secondly, the police presumably retained the stolen weapon and did not return it to the defendant. As such, the jury is unlikely to incorrectly infer that the defendant used the firearm from August 2016 for a robbery in November 2016. Indeed, the state submitted at oral argument that it will not be arguing that the defendant used the stolen firearm from August 2016 in the November 2016 robbery.

¹⁷ See *State v. Hodge*, 10th Dist. Franklin No. 02AP-1358, 2003-Ohio-5492, ¶¶ 28-30 (finding that the defendant did not show that he was prejudiced by a trial court's failure to sever counts when the defendant claimed he was prejudiced because testimony from a witness regarding one count, attempted robbery, would show the defendant had a firearm in his possession shortly before he allegedly shot and killed a person, which related to a count of aggravated murder).

However, even if the defendant had satisfied his burden of showing prejudice, the state satisfactorily rebutted the claim of prejudice under the “joinder” test, thus permitting all three counts to be tried together.¹⁸ Under the “joinder” test, evidence is simple and direct “where the evidence relative to the various charges is direct and uncomplicated, so that the jury is believed capable of segregating the proof on each charge.”¹⁹ Indeed, “Ohio appellate courts routinely find no prejudicial joinder where the evidence is presented in an orderly fashion as to the separate offenses or victims without significant overlap or conflation of proof.”²⁰

“A showing by the state that the evidence relating to each crime is simple and direct negates any claims of prejudice and renders joinder proper.”²¹ Courts presume that “with a proper charge, the jury can easily keep such evidence separate during * * * deliberations and, therefore, the danger of the jury’s cumulating the evidence is substantially reduced.”²² Even so, “because there is always some danger that the jury may cumulate evidence of offenses that are tried jointly, both the trial court and counsel must conduct such a trial with ‘vigilant precision in speech and action far beyond that required in an ordinary trial.’”²³

Turning to the case at bar, the state has shown that under the “joinder test” the defendant will not be prejudiced. The evidence as to Count 1 and as to Counts 2 and 3

¹⁸ The state submitted in oral argument that it does not claim that the “other acts” test permits the joinder of the defendant’s charges.

¹⁹ *Roberts*, 405 N.E.2d at 251.

²⁰ *Robinson*, 2010-Ohio-4713 at ¶ 51, quoting *State v. Lewis*, 6th Dist. Lucas Nos. L-09-1224, L-09-1225, 2010-Ohio-4202, ¶ 33.

²¹ *Morsie*, 2014-Ohio-172 at ¶ 30, quoting *State v. Bice*, 12th Dist. Clermont No. CA2008-10-098, 2009-Ohio-4672, ¶ 53.

²² *State v. Ashcraft*, 12th Dist. Butler No. CA2008-12-305, 2009-Ohio-5281, ¶ 18, quoting *Drew*, 331 F.2d at 90.

²³ *Ashcraft*, 2009-Ohio-5281 at ¶ 18 quoting *Drew*, 331 F.2d at 94.

is separate and distinct and involves a separation of three months. The parties have not argued that any of the evidence or the witnesses will overlap. Count 1 also involves different elements from Counts 2 and 3, making it less likely that the jury will confuse the evidence when considering the cases. On the whole, there is no reason to believe that the jury will be unable to segregate the proof as to each charge.

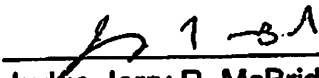
Furthermore, the court can instruct the jury members that they are not allowed to cumulate evidence of separate crimes, nor are they allowed to consider the defendant's prior bad acts (e.g. receiving and carrying a stolen firearm) to determine whether he acted in conformity with his bad character. It can also be required, and in fact the court will so require, that the state must also organize its witnesses, evidence, and arguments so that there is no overlap between Count 1 with Counts 2 and 3. Because the court has determined that the defendant will not be prejudiced by trying all three counts together, the court will not sever the charges.

CONCLUSION

For the foregoing reasons, the court finds the defendant's motion for severance of charges is not well-taken and shall be denied.

IT IS SO ORDERED.

DATED: 4-22-17



Judge Jerry R. McBride