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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-1481-22**

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

WILL EL-BEY,

Defendant-Respondent.

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Submitted May 10, 2023 – Decided June 22, 2023

Before Judges Accurso, Firko, and Natali.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Cumberland County, Indictment No. 19-02-0141.

Jennifer Webb-McRae, Cumberland County Prosecutor, attorney for appellant (Charles J. Wettstein, Assistant Prosecutor, of counsel and on the brief).

Helmer, Conley & Kasselmann, PA, attorneys for respondent (Jack J. Lipari, of counsel and on the brief).

PER CURIAM

We granted the State's motion for leave to appeal the trial court's December 7, 2022 order granting defendant Will El-Bey's motion to sever his trial from that of two co-defendants, Eugene Cosby and Clifton D. Bailey, and granting defendant's motion for a non-jury trial. On February 20, 2019, defendant, as well as Cosby, Tyrell J. Hart, Genea E. Hughes-Lee, Hakeem L. Smith, and Bailey, were charged in a seventeen-count indictment with crimes associated with the murder of Joseph Jones, and subsequent attempts to hinder and obstruct the investigation.

Of particular relevance, defendant, Cosby, and Bailey were charged with the conspiracy and murder of Jones. Defendant and Cosby were also charged with conspiracy to hinder apprehension, obstruction, and witness tampering. Hughes-Lee, Hart, and Smith have entered into plea agreements with the State and have been sentenced to varying terms of probation. Defendant, Cosby, and Bailey are presently awaiting trial.

Before us, the State argues:

POINT I<sup>1</sup>

THE TRIAL COURT ERRED IN GRANTING  
DEFENDANT'S REQUEST FOR A BENCH TRIAL  
AND MOTION FOR SEVERANCE.

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<sup>1</sup> We have renumbered the Point headings to facilitate our discussion of the State's substantive arguments.

- A. The Trial Court Abused Its Discretion In Granting Defendant's Motion For Severance.
- B. The Trial Court Abused Its Discretion In Granting Defendant's Request For A Bench Trial.
- C. The Trial Court Did Not Make Findings Or Address The Legal Factors Sufficiently To Make Its Findings.

Having reviewed the arguments advanced in light of the governing law, we reverse the court's order granting defendant's motion for severance and for a bench trial.

I.

According to the State, on August 9, 2018, at 8:14 p.m., Jones was discovered in a car parked at Lakeside Middle School in Millville, breathing but unconscious, as a result of being shot ten times. He was transported to a nearby hospital and died thirty minutes later. When Officer Joshua Smith arrived at the scene, he was notified that two shooters fled towards the north entrance of the parking lot.

At the time of the shooting, Detective Sergeant William Carew was in the school's parking lot conducting an unrelated investigation. Carew observed a tall, thin black male with dreadlocks in the area of the shooting. Carew heard the gunshots and saw a different black male running toward the rear passenger

door of a red, four door Pontiac Grand Prix with tinted windows and no front license plate but with a rear license plate. The driver of the Pontiac drove towards North 2nd Street. While Carew pursued the Pontiac, an occupant opened the rear driver's door and shot at Carew before speeding away.

Police obtained surveillance videos from a number of businesses that captured the Pontiac and an Acura traveling in the same direction. The Acura was registered to Hughes-Lee, Cosby's paramour. Detectives learned the Pontiac's license plate was registered to Manuel A. Roldan who was deceased. Manuel's<sup>2</sup> son, Luis Roldan, lived in Vineland where his father had resided. Luis indicated his father kept a lot of old license plates in a shed, which was searched by police after Luis gave his consent. The detectives were unable to locate the license plate for the Pontiac. According to Luis, he knew Cosby and worked on his cars, including an Acura, which matched the car in the surveillance footage. Luis claimed the car belonged to Cosby. Luis identified Cosby via a photograph shown to him by investigators.

In August 2018, Luis recalled Cosby contacted him asking for a set of license plates. Cosby, a different individual known to Luis as "LA," and a third

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<sup>2</sup> To prevent confusion and intending no disrespect, we use first names for the individuals sharing a common surname.

individual drove to a location to meet Luis, who gave the license plates and a pair of pliers to Cosby. The record shows during the course of their investigation, detectives suspected that LA's true identity was defendant. A Facebook social media account was discovered with the name "Will El-Bey" and noted "HS-LA" in parentheses on the user's page. An unknown individual then drove up in a Pontiac, which Luis indicated had only one license plate mounted on the rear of the vehicle.

Luis gave the investigators consent to extract data from his cellular phone. Cosby's phone number came up and showed he contacted several numbers utilizing a cellular phone tower about 1,700 feet from the area of Jones's murder. In addition, defendant activated a new phone number for his phone the day after Jones's murder and Cosby deactivated one of his phone numbers after the murder. The police later obtained a wiretap for Cosby's and defendant's phones.

Investigators monitored a conversation between defendant and Cosby in early October 2018. During the conversation, Cosby stated they "have to get that shit up out of there" and if defendant wanted to meet with Cosby, they could throw "it" in the lake. Cosby lives 700 feet from Malaga Lake. Investigators monitored the movement of defendant's device, which placed him in the vicinity of Cosby's residence. On October 9, 2018, Luis gave an additional interview

and explained that he met defendant through Cosby several months before the shooting and frequently remained in contact with him. Luis described defendant "as a skinny light-skinned black or Hispanic male in his early [twenties], approximately 5'6" [to] 5'8" in height, with a tattoo over his right eye." Luis was shown a photograph from the stated Facebook page and identified defendant as "LA."

Hughes-Lee sold the Acura to Denise Palmer. Cosby learned about the transaction and became concerned because investigators were inquiring about the car. The police also intercepted calls between defendant and Cosby, who advised that "she" is going to say she was in the Pontiac and asked defendant if he could get someone to say they were in the car with her.

A few days later, additional phone calls were intercepted between defendant and Cosby discussing an alibi. Defendant allegedly contacted Hart, who agreed to tell the police he was driving the Acura. Detectives interviewed Hughes-Lee, who stated Hart was in possession of the Acura on the night of the murder. Hart was then interviewed and admitted to being in possession of the Acura, and that Hughes-Lee was with him. Cosby placed a call to a female individual, who said she was going to tell detectives that she was driving the

Acura at the time of the shooting. During another intercepted call, defendant explained to Cosby that everyone needed to get their stories straight.

The police intercepted an additional call between defendant and Cosby discussing Smith in which defendant mentioned he "hit" Hart and Smith "with bread." Afterwards, Hart and Smith indicated to detectives the two were in the Acura at Lakeside Middle School at the time of the shooting. The investigation revealed Bailey's phone number was shown to be in frequent communication with Cosby on the day of Jones's murder. Hughes-Lee was arrested and during a police interview, she stated she lives with Cosby, who told her that he was involved in Jones's shooting. Hughes-Lee advised the officers she owned the Acura and had allowed Cosby and defendant to operate it.

According to Hughes-Lee, Cosby described to her how he shot Jones. Cosby did not implicate anyone else in the crime. Hughes-Lee explained Cosby told her to tell the investigators she was driving the Acura the evening of the shooting. She admitted to lying to detectives that Hart had the car at the time.

During a walk Hughes-Lee went on with Cosby near his home, he threw a bag into Malaga Lake. Hughes-Lee claimed she did not know what was in the bag. A State Police dive team uncovered the lower receiver of an assault-type rifle from the lake.

During their investigation, the police learned the Pontiac they saw at the murder scene had been purchased a little over a week before the murder by Bailey's paramour at the Philadelphia Auto Mall. Motor vehicle records show the Pontiac was later re-registered to another individual in late September 2018. On October 4, 2018, investigators also traveled to Delaware to speak with the newly registered owner of the Acura, Denise Palmer. She stated that she purchased the car from Hughes-Lee. On October 10, 2018, defendant was arrested.

Defendant filed a motion to sever his trial from his co-defendants due to his conflicting defenses, including duress, and the danger of "spillover evidence" tainting his trial and persuading a jury to convict him of more serious crimes through association with his co-defendants, in particular based on "Cosby's bad acts before, during, and after the shooting." Defendant also contended Cosby and Bailey had a longstanding vendetta against Jones. Defendant asserted he had "no involvement" with the homicide, and he was "coerced into participating after the fact" by Cosby and Bailey, "whom he knew and feared."

The State opposed defendant's motion to sever contending there was an insufficient showing of prejudice to defendant and "the interest in judicial



economy weighs heavily in favor of denying severance." The State also argued defendant's duress defense does not "create a sphere of antagonism mandating severance."

Defendant also moved to waive his right to a jury trial pursuant to Rule 1:8-1(a) and proceed with a bench trial to avoid testifying in front of co-defendants. Defendant's attorney represented to the court that defendant was prepared to fill out the Waiver of Criminal Jury Trial form pursuant to Rule 1:8-1(a), but the record seems to indicate the court rendered its decision before defendant completed and signed the form because the court stated its questions would be premised "upon its being satisfied at the end of this proceeding that [d]efendant El-Bey has filled out this form." The State also opposed defendant's motion to waive a jury trial, claiming it was not made in good faith and was instead a stratagem to obtain an "impermissible procedural advantage."

Following a hearing, the court granted both motions. In its oral opinion, the court first addressed defendant's motion to waive a jury. The court stated defendant is "in a different position from the two defendants . . . [who] the State seemingly can prove pulled triggers with regard to this event." The court

acknowledged the Dunne<sup>3</sup> three-prong test for determining when it's appropriate to allow a defendant to waive a jury, and found the jury waiver form "covers all of the [Dunne] factors." The court also noted the differences between Rule 1:8-1(a) and Federal Rule of Criminal Procedure 23(a),<sup>4</sup> noting the State does not have a veto over a defendant's request to waive a jury trial as in federal court.

The court stated it would "assume" defendant "knowingly, voluntarily and competently" waived his right to a jury trial once defendant completed the Waiver of Criminal Jury Trial form. The court also "assume[d] that the waiver is tendered in good faith and consider[ed] the relevant factors." But, the court also stated it "agree[d] with Justice Handler's dissenting opinion" in Dunne, where the Justice wrote that "the majority seems oblivious to Patton's<sup>5</sup> holding that a constitutional right to a trial by jury was meant to confer a right upon the accused, which he may forego at his election." Again, noting the prosecutor has no veto over a defendant's decision to waive a jury under our Rules, the court

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<sup>3</sup> State v. Dunne, 124 N.J. 303, 314-15 (1991).

<sup>4</sup> Federal Rule of Criminal Procedure 23(a) states: "If the defendant is entitled to a jury trial, the trial must be by jury unless: (1) the defendant waives a jury trial in writing; (2) the government consents; and (3) the court approves."

<sup>5</sup> Patton v. United States, 281 U.S. 276, 298 (1930).

concluded that so long a defendant "fill[s] out this form appropriately . . . then this defendant has the right to waive a jury trial."

The court then stated:

Now, the question is, upon the waiver of that right to a trial by jury, does [it] require in a multi-[d]efendant case that severance be granted? It might be an issue of first impression, but I find that it does.

That you can't effectively have, in a multi-[d]efendant case, have one [d]efendant waive his constitutional right to a jury trial and proceed by bench trial, and have two other [d]efendants assert their right to a jury trial, as they probably should, and have those things tried simultaneously.

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When he decides to forego his right to a jury trial, that severance has to happen automatically.

## II.

In Point IA, the State maintains defendant's severance motion should have been denied. Otherwise, the State contends the vast majority of its numerous witnesses would need to be presented at a separate trial; and evidence would be overlapping. In addition, the State notes three of the six defendants originally charged in connection with Jones's homicide have been detained pretrial for the past four years. In the State's view, severance would "only further delay the resolution of this case." The State also points out defendant's counsel would

ultimately request transcripts of the "dozens of witnesses" who will testify in the jury trial with co-defendants, presuming the jury trial will take place first, to ensure proper cross-examination at the second trial. The State avers defendant's newly minted defense of duress "does not equate to the defense being antagonistic, mutually exclusive, or irreconcilable."

In addition, the State emphasizes defendant is being prosecuted in part under a theory of accomplice liability regarding Jones's homicide. The State also contends defendant failed to make a sufficient showing of prejudice to support his motion for severance. Further, the State avers if the court's severance order is upheld, it would "significantly hamper" and cause "irreparable harm" to its trial strategy.

Defendant counters Cosby and Bailey will likely try to blame him for the murder and that he was coerced by them to assist in escaping and covering up the crime after the fact, justifying severance of his trial from co-defendants as "compelling." Defendant asserts the undue prejudice is based on the "tremendous" weight of the evidence against him as compared to Cosby and Bailey. The State does not allege defendant fired one of the guns that resulted in Jones's death, and defendant contends the taint of this evidence will unduly prejudice a jury against him. Defendant also argues the alleged existence of two

conspiracies will potentially prejudice and confuse a jury and it is unlikely jury charges could mitigate any resulting harm.

We disagree with all of these arguments and reverse the order under review. The court erred in following a Supreme Court dissent instead of the majority, which the Court has never repudiated, resulting in its failure to apply critically the Dunne factors to defendant's request for a bench trial. That error led it to sever defendant's trial contrary to well-established law, which mandates these cases be tried together.

The applicable law of severance is clear. "Two or more defendants may be tried jointly '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.'" State v. Brown, 170 N.J. 138, 159-60 (2001) (quoting R. 3:7-7). Courts generally prefer to try co-defendants jointly, "particularly when 'much of the same evidence is needed to prosecute each defendant.'" Id. at 160 (quoting State v. Brown, 118 N.J. 595, 605 (1990)). "That preference is guided by a need for judicial efficiency, to accommodate witnesses and victims, to avoid inconsistent verdicts, and to facilitate a more accurate assessment of relative culpability." Ibid.

A single joint trial, however, may not take place at the expense of a defendant's right to a fair trial. State v. Sanchez, 143 N.J. 273, 290 (1996). When considering a motion for severance, a trial court should "balance the potential prejudice to defendant's due process rights against the State's interest in judicial efficiency." Brown, 118 N.J. at 605 (quoting State v. Coleman, 46 N.J. 16, 24 (1965)).

Courts apply a rigorous test for granting severance. Brown, 170 N.J. at 160. A mere claim of prejudice is insufficient to support a motion to sever. State v. Moore, 113 N.J. 239, 274 (1988). A defendant also does not have the right to severance simply because a separate trial "would offer defendant a better chance of acquittal." State v. Johnson, 274 N.J. Super. 137, 151 (App. Div. 1994) (quoting State v. Morales, 138 N.J. Super. 225, 231 (App. Div. 1975)).

Although the decision to sever is discretionary, State v. Weaver, 219 N.J. 131, 149 (2014), deference is not appropriate when the trial court has misunderstood or misapplied the controlling law, as here. The law is well settled that "[w]hen the crimes charged arise from the same series of acts, and when much of the same evidence is needed to prosecute each defendant, a joint trial is preferable." Brown, 118 N.J. at 605. "The danger by association that inheres in all joint trials is not in itself sufficient to justify a severance, provided that by

proper instructions to the jury, the separate status of co-defendants can be preserved." Ibid.

Having reviewed the record, we are convinced the State is correct that defendant has not established his right to be tried separately from his co-defendants. See State v. Sanchez, 224 N.J. Super. 231, 245 (App. Div. 1988). First, much of the evidence, including the witnesses who will testify for the State against defendant, phone records, wiretapped conversations, vehicular information pertaining to the Pontiac and Acura, and the relationship between defendant, co-defendants, and Jones, will be the same in both trials. Defendant, Cosby, and Bailey were indicted on conspiracy to commit murder and murder charges. Defendant and Cosby were also indicted for conspiracy to hinder apprehension, obstruction, and tampering with witnesses.

Although defendant, Cosby, and Bailey are not indicted on identical charges, the fact that some evidence will be admissible only as to one defendant does not in and of itself amount to grounds for severance. State v. Scioscia, 200 N.J. Super. 28, 42 (App. Div. 1985) (stating "the potential for prejudice inherent in the mere fact of joinder does not of itself encompass a sufficient threat to compel a separate trial"). While the "danger of guilt by association underlies all

joint trials," the court can mitigate this peril by "forceful instructions to the jury to consider each defendant separately." Id. at 43 (citations omitted).

The indictment alleges the crimes were committed close in time and place. The State will be calling multiple witnesses to testify at trial. Substantively speaking, the same facts will be advanced as to each defendant. Defendant, Cosby, and Bailey have also been detained for the past four years. Under these circumstances, we are convinced defendant was improperly severed from co-defendants because the considerations of trial efficiency clearly outweigh defendant's interest in a separate trial.

"Joint trials also offer advantages to our criminal justice system other than judicial economy." Ibid. Critically, they "generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability—advantages which sometimes operate to the defendant's benefit." Richardson v. Marsh, 481 U.S. 200, 210 (1987). Joint trials "spare witnesses and victims the inconvenience and trauma of testifying about the same events two or more times." Sanchez, 143 N.J. at 282 (citing Richardson, 481 U.S. at 210).

Moreover, defendant's prospective duress defense and the danger of "spillover evidence" does not amount to prejudice necessitating severance.



While courts have "generally held that defendants cannot be tried together fairly when their defenses are antagonistic and mutually exclusive or irreconcilable, . . . [t]he mere existence of existence of hostility, conflict, or antagonism between defendants is not enough." Brown, 118 N.J. at 605-06. To be granted severance, defendants must "present defenses that are antagonistic at their core." Id. at 606 (citations omitted). Defendant fails to meet this requirement. We note defendant's counsel has not filed a written notice pursuant to Rule 3:12-1<sup>6</sup> regarding defendant's duress defense, and there has been no discovery request relating to such based on our review of the record.

We are also satisfied the charges will not be so complex that a jury would be unable to differentiate between evidence attributed to defendant as opposed to co-defendants. And defendant fails to articulate a "reason to believe the jury in this case will be unable to comply with the court's instructions." See State v. Wilkins, 219 N.J. Super. 671, 678 (Law Div. 1987); see also Scioscia, 200 N.J. Super. at 43 (noting "[a]lthough the danger of guilt by association underlies all

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<sup>6</sup> Rule 3:12-1 provides: "A defendant shall serve written notice on the prosecutor if the defendant intends to rely on [Duress, 2C:2-9(a)] . . . of the Code of Criminal Justice." Also, Rule 3:12-1 states "[n]o later than seven days before the Initial Case Disposition Conference that is scheduled pursuant to [Rule] 3:9-1(e) the defendant shall serve on the prosecutor a notice of intention to claim any of the defenses listed herein."

joint trials, this peril can generally be defeated by forceful instructions to the jury to consider each defendant separately.") (internal citations omitted). Defendant has failed to show a genuine claim of prejudice by participating in a joint trial with co-defendants. Accordingly, we reverse the court's order granting severance and order defendants be tried jointly.

### III.

In Point I.B., the State contends the court erred in granting defendant's request for a bench trial. We stress the right to a jury trial is a fundamental right afforded by both the New Jersey and United States constitutions. See U.S. Const. amend. VI; N.J. Const. art. I, ¶ 9; see also Dunne, 124 N.J. at 316 (explaining that a "trial by jury is fundamental to the American system of criminal justice"). To maintain confidence in the criminal justice system, "[t]rial by jury is the normal and with occasional exceptions, the preferable mode of disposing of issues of fact." Id. at 310. Accordingly, any waiver of that right must be made "voluntarily, knowingly, and competently." Id. at 317; see also State v. Campbell, 414 N.J. Super. 292, 301 (App. Div. 2010) (noting that a waiver cannot be presumed).

Under Rule 1:8-1(a), which governs jury trial waivers, criminal matters are required to be tried by a jury "unless the defendant, in writing and with the

approval of the court, after notice to the prosecuting attorney and an opportunity to be heard, waives a jury trial." When considering a waiver request, trial courts must:

- (1) determine whether a defendant has voluntarily, knowingly, and competently waived the constitutional right to jury trial with advice of counsel;
- (2) determine whether the waiver is tendered in good faith or as a stratagem to procure an otherwise impermissible advantage; and
- (3) determine, with an accompanying statement of reasons, whether, considering all relevant factors, . . . it should grant or deny the defendant's request in the circumstances of the case.

[Dunne, 124 N.J. at 317.]

Relevant factors include but are not limited to: "the judiciary's obligation 'to legitimately preserve public confidence' in the administration of justice"; the "gravity of the crime" and "complexity" of the case; "the position of the State"; "the amenability of the issues to jury resolution, [and] the existence of a highly-charged emotional atmosphere." Id. at 315, 317 (quoting In re Commitment of Edward S., 118 N.J. 118, 148 (1990)). The decision to permit a defendant to waive a jury trial "rest[s] in the sound discretion of the trial court." Id. at 318. In making the determination, "a court must consider the competing factors that argue for or against jury trial." Id. at 315.

Here, the State concedes defendant's waiver was voluntary, knowing, and competently waived under prong one of Dunne. The State contends, however, defendant failed to satisfy the second prong under Dunne, that is, "the waiver wasn't tendered in good faith, but as a stratagem to procure an otherwise impermissible advantage."

In contrast, defendant argues a bench trial would not erode public confidence. Defendant contends there is no "plausible concern" that any additional time involved in his bench trial could be a "dispositive consideration" in co-defendants' potential speedy trial applications. According to defendant, his constitutional rights would be violated by not providing him with a safe environment to testify and shielding him from "likely repercussions of truthful testimony." We disagree.

In State v. Jackson, 404 N.J. Super. 483 (App. Div. 2009), we upheld the trial court's denial of a defendant's request for a new trial, after he had waived his right to a jury trial and was subsequently found guilty in a bench trial of murder and other offenses. Id. at 485-86. The defendant argued that the trial court had misapplied the Dunne factors when granting his request to waive a jury trial. Ibid. As we explained in rejecting the defendant's argument:

Dunne makes it clear that the factors a trial court is required to consider in determining whether to grant a

defendant's request for waiver of a jury trial, with the exception of [the first factor], . . . are primarily designed to provide assurance that the grant of the waiver will not undermine the public's confidence in the criminal justice system.

[Id. at 490.]

This "public confidence" aspect is a key component in evaluating a particular defendant's request for a non-jury trial. See ibid.

In our view, the court misapplied its discretion in granting defendant's motion to waive a jury trial. Defendant simply makes no showing and presents no compelling reason weighing against a jury trial. Applying the second Dunne factor, we stress defendant is facing two first-degree crimes—conspiracy to commit murder and murder—thereby weighing in favor of a jury trial. See Dunne, 124 N.J. at 314-15 ("[W]e believe that the more serious the crime, the greater the 'gravity' of the offense . . . the greater the burden on the defendant to show why there should be a non-jury trial") (internal citation omitted). Further, the record does not indicate that a fair and impartial jury could not be empaneled for the case. See id. at 316 (finding the validity of a defendant's request for a non-jury trial is "better shown after voir dire of prospective jurors").

We are satisfied defendant's right to testify freely would not be restricted in a joint jury trial, as he maintains. Defendant's mere preference to not face

individuals who he could accuse of coercing him after the shooting to obstruct the investigation does not override the clear historical public interest in having a jury determine the outcome of the case. Defendant's arguments are speculative and conclusory and therefore do not support a jury waiver.

To the extent we have not expressly addressed any other arguments made on the State's behalf, we have determined they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Reversed and remanded for further proceedings consistent with our opinion. We do not retain jurisdiction.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.



CLERK OF THE APPELLATE DIVISION