

JOINDER, CONSOLIDATION AND SEVERANCE

**Tenn. R. Crim. Pro. 8, 13 & 14
and *State v. Garrett***

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IF BY CONSENT, MAKE A CLEAR RECORD

Although the prosecution stated that the parties had an informal understanding

that the indictments would be tried together, the simple fact is that the record does not reflect that the prosecution made a written or oral motion for consolidation prior to trial or that the parties had entered into an agreed order of consolidation prior to the first day of trial. *See Spicer v. State*, 12 S.W.3d 438, 444 n.6 (Tenn. 2000) (indicating that a motion for consolidation should be filed "sometime earlier than the day of the trial when the jury is waiting in the hall"). Because of the prosecution's tardiness in moving to consolidate the indictments, the State must share responsibility with the defendant for the absence of a clear agreement and the lack of clarity in the record. that the indictments are consolidated if by consent.

State v. Toliver, 117 S.W.3d 216, 227 (Tenn. 2003).

WHICH RULE DO YOU USE? WHOSE BURDEN? WHAT STANDARD?

The holding in *State v. Dotson*, 254 S.W.3d 378, 386-87 (Tenn. 2008):

In order to consolidate separate indictments under Rule 8(b) of the Tennessee Rules of Criminal Procedure, the offenses need only be "of the same or similar character," an easily achievable standard in many instances. Tenn. R. Crim. P. 8(b)(2). A defendant, however, has a right under Rule 14(b)(1) of those rules to the "severance of offenses permissively joined [under Rule 8(b)(2)], unless the offenses are parts of a common scheme or plan and the evidence of one offense 'would be admissible upon the trial of the others.'" *Spicer v. State*, 12 S.W.3d 438, 443 (Tenn. 2000) (quoting Tenn. R. Crim P. 14(b)(1)).

In *Spicer*, we confirmed that "when a defendant objects to a pre-trial consolidation motion by the state, the trial court must consider the motion by the severance provisions of Rule 14(b)(1) [of the Tennessee Rules of Criminal Procedure], not the 'same or similar character' standard of Rule 8(b)." *Id.* "The primary inquiry into whether a severance should have been granted under Rule 14 is whether the evidence of one crime would be admissible in the trial of the other if the two counts of indictment had been severed." *State v. Burchfield*, 664 S.W.2d 284, 286 (Tenn. 1984). When there is an objection to a motion to consolidate, the State bears the burden of producing evidence to establish that the consolidation is proper. *State v. Toliver*, 117 S.W.3d 216, 228 (Tenn. 2003) (citing *Spicer*, 12 S.W.3d at 447).

The procedure is well established. Before a trial court may deny a severance request, it must hold a hearing on the motion and conclude from the evidence and argument presented at the hearing that (1) the multiple offenses constitute parts of a common scheme or plan; (2) evidence of one of the offenses is relevant to some material issue in the trial of the other offenses; and (3) the probative value of the evidence of the other offenses is not outweighed by the prejudicial effect that admission of the evidence would have on the defendant. *Spicer*, 12 S.W.3d at 445; *see also* Tenn. R. Evid. 404 (b)(3).

STATE v. JEREMY GARRETT, 331 S.W.3d 392 (Tenn. 2011)

Recently, our Supreme Court revisited the issues of which rule applies, who has the burden of proof and the duties of the trial court. In *Garrett*, the defendant committed an aggravated robbery on March 28, 2004. The next day, he committed another aggravated robbery; however, during the second robbery, the victim was shot and killed. In July 2004, the Grand Jury indicted the defendant for the first aggravated robbery. In September 2004, the Grand Jury indicted the defendant for felony murder and especially

aggravated robbery. Months later, the State moved to consolidate the indictments "on the grounds that the offenses charged constitute parts of a common scheme or plan and/or the offenses charge are of the same or similar character." The defendant objected to the consolidation. Without holding an evidentiary hearing, the trial court granted the State's motion. The trial court's order granting the State's motion simply stated, "the offenses charged in the captioned indictments constitute parts of a common scheme or plan and/or the offense charged are of the same or similar character." The defendant was convicted on all counts.

In reversing the decision of the trial court, our Supreme Court took the "opportunity to emphasize, once again, the proper procedure." Again, the Court reminded us that

Where the State initially seeks to consolidate separate indictments, it must establish only one thing: that the offenses are *either* (1) "parts of a common scheme or plan," *or* (2) that the offenses are "of the same or similar character." Tenn. R.Crim. P. 8(b). *See also Spicer*, 12 S.W.3d at 443. If the defendant objects to the consolidation of offenses that would otherwise be permissible under Rule 8(b), however, the offenses may *not* be tried together unless *two* criteria are met: (1) "the offenses are parts of a common scheme or plan *and* " (2) "the evidence of one would be admissible in the trial of the others." Tenn. R.Crim. P. 14(b)(1) (emphasis added). *See also Denton*, 149 S.W.3d at 12–13. "Consequently, when a defendant objects to a pre-trial consolidation motion by the [S]tate, the trial court must consider the motion by the severance provisions of Rule 14(b)(1), not the ... [provisions] of Rule 8(b)." *Spicer*, 12 S.W.3d at 443. Therefore, where a defendant seeks to prevent the consolidation of offenses,

the "primary issue" to be considered ... is whether evidence of one offense would be admissible in the trial of the other[s] if the ... offenses remained severed. *See State v. Burchfield*, 664 S.W.2d 284, 286 (Tenn.1984). In its most basic sense, therefore, any question as to whether offenses should be tried separately pursuant to Rule 14(b)(1) is "really a question of evidentiary relevance." *State v. Moore*, 6 S.W.3d 235, 239 (Tenn.1999); *see also Shirley*, 6 S.W.3d at 248.

Spicer, 12 S.W.3d at 445.

The Court also reminded us that

If the State seeks the consolidation of offenses under Rule 13(a) and the defendant objects, "the prosecution bears the burden of producing evidence to establish that consolidation is proper." *Toliver*, 117 S.W.3d at 228 (citing *Spicer*, 12 S.W.3d at 447). And, the trial court *must* hold a hearing in order to gather the information necessary to adjudicate the

issue:

Before consolidation is proper, the trial court must conclude from the evidence and arguments presented at the hearing that: (1) the multiple offenses constitute parts of a common scheme or plan, Tenn. R.Crim. P. 14(b)(1); (2) evidence of [one] offense is relevant to some material issue in the trial of all the other offenses, Tenn. R. Evid. 404(b)(2); *Moore*, 6 S.W.3d at 239; and (3) the probative value of the evidence of other offenses is not outweighed by the prejudicial effect that admission of the evidence would have on the defendant, Tenn. R. Evid. 404(b)(3).

Spicer, 12 S.W.3d at 445 (as clarified by *Dotson*, 254 S.W.3d at 386 n. 5). *See also Dotson*, 254 S.W.3d at 387 (recognizing that the procedure a trial court must follow upon a defendant's request that offenses be severed is "well established" and includes the requirement of an evidentiary hearing). Given the analysis that a trial court must undertake in order to determine whether separate offenses may be consolidated for trial over the defendant's objection, the necessity of a hearing is obvious. Moreover, by holding a hearing and issuing findings of fact and conclusions of law, a trial court ensures that, on review, the appellate courts will have an adequate record from which to determine whether the trial court erred upon an allegation that it improperly consolidated offenses. *See Spicer*, 12 S.W.3d at 445. Accordingly, we emphasize both the need for a hearing and the equally important requirement that the trial court support its ensuing ruling with findings of fact and conclusions of law. *See id.*

State v. Garrett, 331 S.W.3d 392, 403 (Tenn.,2011)

MANDATORY JOINDER OF OFFENSES

All crimes based on the same conduct, or arising from the same criminal episode known to the state within the jurisdiction, must be tried at the same time, unless severed pursuant to Rule 14. For example, when six men are robbed at the same time in the same place, the state can't try the defendant for each robbery in a separate trial. *See Ashe v. Swenson*, 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970). *See also State v. Ramsey*, 903 S.W.2d 709, 713 (Tenn. Crim. App. 1995) for other cases and examples of offenses consolidated or "merged," and the proper analysis for the court to follow, and *State v. Hall*, 976 S.W.2d 121, 146 (Tenn. 1998) for a good discussion of this topic.

All crimes arising from the same incident that are not lesser included offenses of another crime charged in the indictment must be charged in separate counts of that indictment (or separate indictments tried at the same time.) Failure to do so precludes the state from later retrying the defendant for crimes not charged in the original indictment. *State v. Gilliam*, 901 S.W.2d 385, 389 (Tenn. Crim. App. 1995).

STATE V. CEDRIC JOHNSON, ___ S.W.3d ___ (Tenn. 2011), 2011 WL 2039718.

Recently, in *State v. Cedric Johnson*, the Tennessee revisited the issue of

mandatory joinder. In Johnson, the defendant called police and told them that he vehicle had been stolen. When the officers came to his home to take the report, the defendant, after much questioning by the officers and his mother, conceded that his car had not been stolen and claimed that "he had loaned his automobile to a friend and that his friend had called to tell him that there was a problem with the automobile and to suggest that he report the automobile had been stolen." Based on this information and the officer's suspicion that the vehicle could have been used in a robbery, the officer arrest the defendant for initiating a false police report.

Two days later, the defendant was identified in a photographic lineup as one of two men that committed a robbery the day before the defendant made the false report concerning his vehicle. Based on the identification by the victim of the robbery, the defendant was arrested for aggravated robbery. He later confessed to the robbery.

On December 11, 2007, the defendant was indicted for initiating a false police report. On January 8, 2008, he pleaded guilty to the offense.

On January 15, 2008, the defendant was indicted for aggravated robbery. He moved to dismiss the indictment claiming that Rule 8(a)(1)(A) required consolidation of the offenses because they arose from the same criminal conduct. Judge Chris Craft concluded that the two offenses were part of the same criminal episode and, therefore, these two offenses should have been consolidated in one indictment. Judge Craft then dismissed the aggravated robbery indictment. The State appealed and the Court of Criminal Appeals, minus the dissent of Judge Glenn, affirmed Judge Craft's dismissal of the aggravated robbery indictment.

Our Supreme Court accepted the State's application to appeal and reversed the decisions of Judge Craft and the Court of Criminal Appeals. In reaching this conclusion, the Court adopted the criteria for a "single criminal episode" found in the ABA Standard for Criminal Justice. According to the Standards,

"Single criminal episode" offenses normally are generated by separate physical actions. The actions may be committed by separate defendants. In other respects, however, they are similar to same conduct offenses: they occur simultaneously or in close sequence, and they occur in the same place or in closely situated places. A critical characteristic of single episode offenses, particularly in cases involving otherwise unrelated offenses or offenders, is the fact that proof of one offense necessarily involves proof of the others.

The Court went on to hold that for Tenn. R. Crim. P. 8(a)(1)(A) to apply, the acts to be included in the same criminal episode must occur simultaneously or in close sequence and must occur in the same place or in closely situated places. A break in the action may be sufficient to interrupt the temporal proximity required for a single criminal episode to exist. *See 9 Tennessee Criminal Practice and Procedure* § 17:17, at 601. The judicial decisions, however, do not reflect adequate emphasis on the requirement that in order for a single criminal episode to exist, the "proof of one offense necessarily involves proof of the others." 2 ABA Standards for Criminal Justice § 13-1.3 cmt., at 13@10. This means that the proof of one offense must be "inextricably connected" with the proof of the other, *see State v. Shepherd*, 902 S.W.2d 895, 904 (Tenn. 1995), or that the proof of

one offense forms a "substantial portion of the proof" of the other offense. See *United States v. Montes-Cardenas*, 746 F.2d 771, 776 (11th Cir. 1984). While the offenses need not be based solely on the same facts, requiring a substantial interrelationship between the evidence required to prove each of several offenses "properly focuses the trial court's inquiry on the degree to which the defendant is harassed and judicial resources wasted by successive prosecutions." *People v. Rogers*, 742 P.2d 912, 919 (Colo. 1987) (en banc). As the Colorado Supreme Court has pointed out, separate trials for crimes that do not share a substantial factual nexus do not prejudice the defendant. *People v. Rogers*, 742 P.2d at 919. However, when "the proof or defense of one charge necessarily involves the proof or defense of another charge, sequential prosecutions of the two charges burden both the defendant and the state with repetitive presentation of evidence." *People v. Rogers*, 742 P.2d at 919.

PERMISSIVE JOINDER OF OFFENSES

Crimes separated by time which constitute parts of a common scheme or plan or are of the same or similar character may be tried at the same time. However, before two offenses may be joined under TRCP 8(b), TRCP 14(b) requires that the judge find that Tenn. R. Evid. 404(b) is complied with procedurally. Generally, evidence of other crimes is inadmissible because the evidence lacks relevance and may lead the jury to make an improper inference of guilt. *State v. Hallock*, 875 S.W.2d 285, 290 (Tenn. Crim. App. 1993). However, such evidence is relevant if admitted to show motive, intent, guilty knowledge, identity, absence of mistake or accident, or "a common scheme or plan for commission of two or more crimes so related to each other that proof of one tends to establish the other." *State v. Hoyt*, 928 S.W.2d 935, 944 (Tenn. Crim. App. 1995); *State v. Edwards*, 868 S.W.2d 682, 691 (Tenn. Crim. App. 1993); *But cf. State v. Hallock, supra*, at 292 (finding that the mere existence of a common scheme or plan is not a proper justification for admitting evidence of other crimes); *State v. Shirley*, 6 S.W.3d 243 (Tenn. 1999) (the use of a black ski mask, gloves and a gun is simply not so unusual that would be distinct modus operandi making them signature crimes.) .

In order to determine whether the evidence falls under any of these exceptions, the judge must hold a pre-trial hearing. Following the hearing, the judge must state the reason for allowing the evidence and then must conduct a balancing test weighing the probative value of the evidence against its unfair prejudicial effect. Tenn. R. Evid. 404(b). See also *State v. McKnight*, 900 S.W.2d 36, 51 (Tenn. Crim. App. 1994). Making a good record is especially important in cases involving sexual offenses, as proof of other sex crimes is always extremely prejudicial. See, i.e., *State v. Hoyt*, 928 S.W.2d 935, 944 (Tenn. Crim. App. 1995), finding consolidation to be error because the times of sex abuse offenses were too vague, and *State v. Schaller*-975 S.W.2d 313, 319 (Tenn. Crim. App. 1997), upholding consolidation because the facts were so similar.

DEFINITION OF "COMMON SCHEME OR PLAN" AND "CONTINUING PLAN OR CONSPIRACY"

State v. Hoyt, 928 S.W.2d 935, 943 (Tenn. Crim. App. 1995) describes the three types of common scheme or plan evidence, "signature crimes," "continuing plan or conspiracy" and "same transaction" crimes, defining and elaborating on each one with cases cited. "Signature crimes" is discussed in some detail in *State v. Moore*, 6 S.W.3d

235, 239-40 (Tenn. 1999).

State v. Denton, 149 S.W.3d 1 (Tenn. 2004), rejects the state's "continuing plan or conspiracy theory" as a reason to consolidate multiple sexual offenses-

Consolidation of multiple offenses against a single defendant for a single trial is governed by Rules 8, 13, and 14 of the Tennessee Rules of Criminal Procedure. The interaction of these rules has been previously analyzed by this Court in a recent line of cases. See *State v. Toliver*, 117 S.W.3d 216 (Tenn. 2003) (involving a defendant charged with child abuse in two separate indictments, with the trial court consolidating these indictments for a single trial); *Spicer v. State*, 12 S.W.3d 438 (Tenn. 2000) (defendant charged under two separate indictments which were consolidated in a single trial); *State v. Moore*, 6 S.W.3d 235 (Tenn. 1999) (involving a single indictment charging multiple offenses, with the defendant requesting that certain offenses be severed and tried separately); *State v. Shirley*, 6 S.W.3d 243 (Tenn. 1999) (defendant charged with multiple offenses in single indictment and requested offenses be tried separately)." "Turning to the first part of the test under Rule 14(b), there are three types of common scheme or plan evidence: (1) offenses that reveal a distinctive design or are so similar as to constitute "signature" crimes; (2) offenses that are part of a larger, continuing plan or conspiracy; and (3) offenses that are all part of the same criminal transaction. Shirley, 6 S.W.3d at 248 ." "We have previously held that the test for finding "signature" crimes is "not whether there was evidence that a defendant committed both crimes, but whether there was a unique method used in committing the crimes." Moore, 6 S.W.3d at 241 (quoting *Young v. State*, 566 S.W.2d 895, 898 (Tenn. Crim. App. 1978)) . Under such circumstances, "the modus operandi employed must be so unique and distinctive as to be like a signature." Id. at 240 (quoting *State v. Carter*, 714 S.W.2d 241, 245 (Tenn. 1986)) . The evidence of the other offenses must have such unusual particularities and be "so unique that proof that the defendant committed the other offense fairly tends to establish that he also committed the offense with which he is charged." Id. (quoting *Bunch v. State*, 605 S.W.2d 227, 231 (Tenn. 1980)) . However, simply because the defendant may have committed a series of crimes "does not mean that they are part of a common scheme or plan." Id. at 231 (quoting *State v. Peacock*, 638 S.W.2d 837, 840 (Tenn. Crim. App. 1982)) ." "even assuming arguendo that these offenses were all "signature crimes," they still could not be consolidated unless evidence of one was admissible upon the trial of the others. Tenn. R. Crim. P. 14(b)(1). Indeed, we have previously held that when the theory of common scheme or plan is grounded upon a distinctive design or "signature" crime, usually the only reason to allow admission of other offenses is to establish the identity of the defendant. Moore, 6 S.W.3d at 239 . In the case before us identity is not an issue. Therefore, instead of using the signature crime theory to establish that the defendant was the perpetrator of the crimes, the State apparently sought consolidation of the offenses simply in an effort to bolster the testimony of each individual victim through the accumulated testimony concerning other unrelated allegations." "The State also argues, for the first time in this Court,

that the defendant's acts constitute a common scheme or plan because they are part of a larger, continuing plan or conspiracy. Although the crimes all involved sexual misconduct and contained some similarities, a larger, continuing plan or conspiracy "involves not the similarity between the crimes, but [rather] the common goal or purpose at which they are directed." *State v. Hoyt*, 928 S.W.2d 935, 943 (Tenn. Crim. App. 1995) overruled on other grounds, *Spicer*, 12 S.W.3d at 447 . The State submits that the defendant's acts were part of a larger plan that had one single goal-that of achieving sexual release. The argument that sex crimes can be construed as part of a continuing plan or conspiracy merely by the fact that they are committed for sexual gratification has previously been rejected. See *Moore*, 6 S.W.3d at 240 (stating that two offenses of child rape do not create a larger conspiracy); *State v. Hallock*, 875 S.W.2d 285, 290 (Tenn. Crim. App. 1993) (holding that mere fact that crimes were committed for sexual gratification is insufficient to constitute a continuing plan or conspiracy). A larger plan or conspiracy in this context contemplates crimes committed in furtherance of a plan that has a readily distinguishable goal, not simply a string of similar offenses.

SEVERANCE OF DEFENDANTS

TRCP 14(c)(2) dictates that the judge should sever defendants before trial if it is deemed necessary to protect a defendant's right to a speedy trial (*i.e.*, when one defendant needs a continuance and another has been in jail a long time) or it is deemed appropriate to promote a fair determination of the guilt or innocence of one or more defendants. The judge may sever during trial with consent of the defendant to be severed.

"The test to be applied by this Court in determining whether the trial court abused its discretion is whether the Defendant was "clearly prejudiced."" *State v. Dotson*, 254 S.W.3d 378, 390-91. Similarly, the state is entitled to have the guilt determined and punishment assessed in a single trial where two or more persons are charged jointly with a single crime, unless to do so would unfairly prejudice the rights of the defendants. *State v. Howell*, 34 S.W.3d 484, 491 (Tenn. Crim. App. 2000).

1. Inconsistent pleas

In *Goosby v. State*, 917 S.W.2d 700, 704-05 (Tenn. Crim. App. 1995), the issue of whether to sever when one co-defendant intends to plead guilty in front of the jury, without a plea-bargain agreement, is discussed, with a list of cases.

2. Bruton problems

Under TRCP 14(c), a defendant may request severance if the co-defendant's statement refers to the defendant, but is inadmissible against him (*Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), holding the admission of a co-defendant's confession implicating the defendant in a joint trial violates the defendant's constitutional right of confrontation.) In such a case, the judge must either exclude the statement, delete references to the defendant (redaction) in order to hold a joint trial, or grant a severance. A motion to sever is discretionary with the trial court, and the court's decision will not be reversed unless it clearly prejudiced the defendant. *State v. Hutchison*, 898 S.W.2d 161, 166 (Tenn. 1994), citing *State v. Coleman*, 619 S.W.2d 112, 116 (Tenn.1981).

Although former law held that if two confessions were "interlocking," they were

both admissible against each defendant even if one or both failed to testify, *Cruz v. New York*, 481 U.S. 186, 193, 107 S. Ct. 1714, 1719 (1987) has eliminated the "interlocking" confession exception, reasoning that a co-defendant's confession may be "devastating" to the defendant and violative of the Confrontation Clause, even if it overlaps material facts in a confession made by the defendant. Therefore, "where a non-testifying co-defendant's confession incriminating the defendant is not directly admissible against the defendant, ... the Confrontation Clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant's own confession is admitted against him." *King v. State*, 989 S.W.2d 319, 328-29 (Tenn. 1999).

3. **Mutually antagonistic defenses or different evidence**

"While 'mutually antagonistic' defenses may mandate severance in some circumstances, they are not prejudicial per se. Due to the difficulty in establishing prejudice, relatively few convictions have been reversed for failure to sever on these grounds. Mere attempts to cast the blame on the other will not, standing alone, justify a severance on the grounds that the respective defenses are antagonistic. The defendant must go further and establish that a joint trial will result in compelling prejudice, against which the trial court cannot protect, so that a fair trial cannot be had." *State v. Ensley*, 956 S.W.2d 502, 509 (Tenn. Crim. App. 1996).

Disparity in the evidence against the defendants is not alone sufficient to warrant the grant of a severance. *State v. Howell*, 34 S.W.3d 484, 491 (Tenn. Crim. App. 2000), cited in *State v. Mickens*, 123 S.W.3d 355, 382-83 (Tenn. Crim. App. 2003).

SEVERANCE OF OFFENSES

See **Permissive Joinder of Offenses**, and **Definition of "Common Scheme or Plan"** above. TRCP 14(b) mandates that a defendant's offenses be severed unless 1) the offenses are part of a common scheme or plan and 2) evidence of one is admissible against the other in the state's case in chief. If the offenses are already consolidated in an indictment, the defendant has the burden of showing they should be severed. If the offenses are contained in separate indictments, the state has the burden of showing they should be consolidated.

While severance of defendants is ordinarily a matter which rests within the sound discretion of the trial court, that general rule is not necessarily applicable to the severance of offenses. To qualify as "parts of a common scheme or plan" and be joined for a single trial, the offenses must be so similar in modus operandi and occur within such relative close proximity in time and location to each other that there can be little doubt that the offenses were committed by the same person. First the offenses must appear to constitute a common scheme or plan. Secondly, the circumstances must fall within the exception to the general rule prohibiting evidence of other crimes (Tenn. R. Evid. 404(b)) in that they are so related to each other that proof of one tends to establish the others. *State v. McKnight*, 900 S.W.2d 36, 50 (Tenn. Crim. App. 1994).