

IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARENCE J. STEWART,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 53100

**FILED**

OCT 22 2010

ORDER OF REVERSAL AND REMAND

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of conspiracy to commit a crime, one count of conspiracy to commit kidnapping, one count of conspiracy to commit robbery, one count of burglary while in possession of a deadly weapon, two counts of first-degree kidnapping with the use of a deadly weapon, two counts of robbery with the use of a deadly weapon, and two counts of assault with a deadly weapon. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

Appellant Clarence Stewart was found guilty in connection with an armed confrontation in a Las Vegas hotel room, during which codefendant Orenthal James Simpson and five other men attempted to regain what Simpson believed was his personal property. The district court sentenced Stewart to a maximum of 33 years in prison, with the possibility of parole after 9 years.

In this appeal, we address whether the district court abused its discretion in failing to sever Stewart's trial from Simpson's trial. We conclude that the district court did abuse its discretion when it denied the motion to sever because it prejudiced Stewart by having a substantial and injurious effect on the verdict, and we therefore reverse the judgment of conviction and remand for further proceedings. The parties are familiar

with the facts, and we do not recount them here except as necessary to our disposition.<sup>1</sup>

Standard of review

“[T]he decision to sever a joint trial is vested in the sound discretion of the district court and will not be reversed on appeal unless the appellant carries the heavy burden of showing that the trial judge abused his discretion.” Chartier v. State, 124 Nev. 760, 764, 191 P.3d 1182, 1185 (2008) (internal quotations omitted). Once a district court denies a motion to sever, it has a continuing duty throughout the entire trial to grant a severance should it become clear that prejudice exists. Id. at 765, 191 P.3d at 1185-86.

This court has “long recognized that some level of prejudice exists in a joint trial, [and therefore] error in refusing to sever joint trials is subject to harmless error review.” Id. at 764-65, 191 P.3d at 1185. Under that analysis, the appellant has the heavy burden of showing that the prejudice which resulted was so “substantial and injurious” that it affected the verdict. Id. at 765, 191 P.3d at 1185.

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<sup>1</sup>We have considered Stewart’s claim that there was insufficient evidence to support the verdict and conclude that it lacks merit. See Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) (explaining that, in determining the sufficiency of evidence, “[t]he relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt”) (internal quotations omitted). Because we are reversing the judgment based on the severance issue, we decline to address the other issues raised on appeal.

## Severance

Stewart contends that the district court's denial of his motion to sever deprived him of a fair trial. In making this argument, Stewart sets forth two reasons justifying a severance from codefendant Simpson's trial—the spill-over prejudice from Simpson's notoriety and the antagonistic defenses presented by the codefendants. We conclude that the spill-over prejudice from Simpson's notoriety warranted severance, and therefore, we reverse the conviction.

### Spill-over prejudice

In Nevada, NRS 174.165(1) provides the guidelines for granting relief in instances when a joint trial is prejudicial:

If it appears that a defendant or the State of Nevada is prejudiced by a joinder of offenses or of defendants in an indictment or information, or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

In determining whether any action is warranted pursuant to NRS 174.165(1), a district court must look at the facts of each case. Chartier, 124 Nev. at 765, 191 P.3d at 1185. Demonstrating spill-over prejudice alone is not sufficient to demonstrate substantial prejudice. See Lisle v. State, 113 Nev. 679, 689-90, 941 P.2d 459, 466 (1997), overruled on other grounds by Middleton v. State, 114 Nev. 1089, 1117 n.9, 968 P.2d 296, 315 n.9 (1998). In looking at the facts, the district court should grant a severance “only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.” Chartier,

124 Nev. at 765, 191 P.3d at 1185 (quoting Marshall v. State, 118 Nev. 642, 647, 56 P.3d 376, 379 (2002)).

The facts of this case, specifically, that Simpson was Stewart's codefendant, compromised Stewart's right to a fair trial and prevented the jury from making a reliable judgment. Arguably, Stewart was tried with one of the most notorious public figures in this country—Simpson, the subject of a highly publicized murder prosecution and a civil wrongful death trial following accusations that he entered his ex-wife's Los Angeles condominium and stabbed her and her friend to death. While the question of whether Simpson has lost his shock value is debatable, there is a significant indication that the general public views the former football great as a criminal.<sup>2</sup> Therefore, it is reasonable to conclude that any codefendant of Simpson's would suffer from spill-over prejudice.

As spill-over prejudice by itself is not sufficient to support a grant of severance, we further determine that there is other evidence showing that Stewart was substantially prejudiced by the district court's denial of his motion to sever. First, a review of the trial transcript reveals that from the jury questionnaires to closing arguments, the focus of the trial was Simpson. The jury questionnaires primarily focused on the

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<sup>2</sup>See United States v. Lentz, 58 F. App'x 961, 966 (4th Cir. 2003) (stating that "a reference to O.J. Simpson is modern-day shorthand for suggesting that someone has gotten away with murder"). Despite Simpson's acquittal, opinion polls show that the majority of Americans continue to believe he murdered his ex-wife and her friend. See id. (noting that a poll taken by Zogby International in 2001 found that 72 percent of Americans continue to believe that O.J. Simpson is guilty of the murders of his ex-wife and her friend).

prospective jurors' possible bias towards Simpson by asking prospective jurors about their thoughts on the criminal and civil proceedings in California. Indeed, the trial transcript shows that the voir dire proceedings were dominated by questions about the verdicts in California, with both sides questioning prospective jurors about their knowledge and thoughts on the criminal and civil cases.

Next, the entire case revolved around ownership of Simpson's memorabilia and whether Simpson had the requisite intent to take the property of another when he believed he was simply retrieving his own personal property. The State and Simpson questioned witnesses extensively about the history of the items in question and Simpson's state of mind with regard to the memorabilia. The testimony regarding the memorabilia focused on its history, which inevitably brought up the California murder and civil wrongful death cases because the family of one of the stabbing victims had a turnover order against Simpson that implicated the items at issue. These dueling theories of ownership dominated the proceedings—so much so that Stewart's theory of defense was never clear or at the forefront of the proceedings.

Finally, the State's key piece of evidence against both defendants was the audio recording of the incident made by a key witness for the prosecution. The audio recordings were the centerpiece of the trial. Stewart and Simpson had wholly opposite positions on the admission of these tapes, with Stewart opposed to their admission and Simpson in favor. Stewart opposed admitting the tapes into evidence because he believed that they were not trustworthy. Simpson wanted the tapes

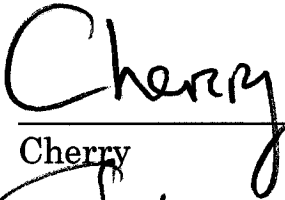
admitted into evidence because he believed that they were exculpatory. The tapes were admitted.<sup>3</sup> Having listened to the tapes, we determine that they may have been a major factor in the jury's verdict. Simpson's distinct, at times raspy, voice is heard throughout the recordings. As Stewart was not a public figure and was simply described as having a deep voice, the recordings were not as incriminating against Stewart. Accordingly, we conclude that the jury could not have reasonably been expected to weigh the individual pieces of evidence against each defendant. See U.S. v. Fernandez, 388 F.3d 1199, 1241 (9th Cir. 2004) (explaining that one of the most important factors in considering the issue of severance is determining "whether the jury may reasonably be expected to collate and appraise the individual evidence against each defendant"). The jury convicted both defendants on all the charges, despite the fact that the bulk of the testimony and evidence revolved around Simpson. See U.S. v. Sullivan, 522 F.3d 967, 982 (9th Cir. 2008) (explaining that a jury's selective verdicts against codefendants demonstrate that each defendant received individual consideration).


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<sup>3</sup>We note that the issue of the audio recordings is also the crux of Stewart's argument that, because of the antagonistic defenses between himself and Simpson, severance was warranted. However, we need not reach the merits of that argument because we base our decision to reverse on the issue of spill-over prejudice.

We therefore conclude that the district court abused its discretion in denying Stewart's motion to sever his trial from Simpson's trial. Accordingly, we

ORDER the judgment of the district court REVERSED and REMAND this matter to the district court for proceedings consistent with this order.

  
\_\_\_\_\_, J.  
Cherry

  
\_\_\_\_\_, J.  
Saitta

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Jackie Glass, District Judge  
E. Brent Bryson, Ltd.  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk