IN THE COURT OF APPEALS OF THE STATE OF NEVADA

NATHAN ALLEN MEADERS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 71703

FILED

MAY 08 2018

ELIZABETH A. BROWN
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ORDER OF REVERSAL AND REMAND

Nathan Allen Meaders appeals from a judgment of conviction, pursuant to a jury verdict, of three counts of battery by a prisoner. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

Meaders was charged with one count of battery by a prisoner after an incident that took place on April 26, 2015.[1] On the day of the incident, Meaders had been arrested for disturbing the peace and transported to the Washoe County Jail. While Meaders was in a holding cell during the intake process, a physical struggle took place between him and the sheriff's deputies guarding the cells in the intake area of the jail. According to the deputies, they entered the holding cell to move Meaders into a cell with a camera because they could not see him in the original holding cell and were concerned he would harm himself. Meaders testified that he was asleep on a bench behind a privacy half-wall covering the cell's toilet. The deputies testified that, after they entered his cell to move him to another cell, Meaders attacked them by surprise. According to Meaders, the deputies attacked him immediately after entering his cell.

[1]We do not recount the facts except as necessary to our disposition.

Meaders was later charged with two counts of battery by a prisoner after a subsequent incident on August 7, 2015. On that date, Meaders was being held in solitary confinement based on the battery charge from the April 26 incident. The deputy sheriff guarding that part of the jail during dinner service was unable to retrieve Meaders' food tray because Meaders' food slot was jammed. The deputy testified that Meaders jammed his food slot with an article of clothing. That deputy asked a second deputy to accompany him to go into Meaders' cell and retrieve the food tray. According to both deputies, as soon as the first deputy entered Meaders' cell, Meaders attacked him. Another physical struggle ensued, which ended with one deputy striking Meaders in the head with his knee and punching him three or four times causing Meaders to lose consciousness for some time. Meaders testified that one of the deputies attacked him first and he fought back in self-defense.

The State moved to join the April case and the August case because Meaders' alleged crimes demonstrated a "clear common plan" where Meaders lured deputies into his cell with inappropriate behavior and then attacked them. Meaders opposed the State's motion. Without holding a hearing, the district court granted the motion finding that "given the nature of the alleged crimes committed by [Meaders] here (drawing deputies into his cell so as to attack them by surprise), pursuant to NRS 174.155, these charges could have indeed been joined in a single indictment or information" and "the alleged actions of [Meaders] may properly be construed as constituting a common scheme or plan, and therefore, joinder of the cases is appropriate under NRS 173.115 and NRS 174.155." Meaders did not move to sever the charges after the district court granted the State's motion despite a later hearing which revealed he suffered from a serious mental health condition.

On appeal, Meaders argues the district court abused its discretion by granting the State's motion to join his cases and that this improper joinder permitted the jury to infer Meaders' guilt in each case by reference to evidence from the other. The State responds by repeating that the two incidents demonstrate a common scheme to lure deputies into a cell to attack them because Meaders harbors animosity toward law enforcement.

We review a district court's decision to join or sever criminal cases for an abuse of discretion. *See Tabish v. State*, 119 Nev. 293, 302, 72 P.3d 584, 589-90 (2003). Moreover, misjoinder only requires reversal of a conviction if the error due to misjoinder has a "substantial and injurious effect or influence in determining the jury's verdict." *Mitchell v. State*, 105 Nev. 735, 739, 782 P.2d 1340, 1343 (1989) (quoting *United States v. Lane*, 474 U.S. 438, 449 (1985)).

In *Farmer v. State*, 133 Nev. ___, 405 P.3d 114 (2017), the Nevada Supreme Court clarified NRS 173.115(2),[2] which permits the joinder of separate offenses based on two or more acts or transactions, *inter alia*, "constituting parts of a common scheme or plan," by holding "the words 'scheme' and 'plan' as used in NRS 173.115(2) have different implications and ground different theories of joinder." *Id.* at ___, 405 P.3d at 120. It specified that separate offenses constitute parts of a "common plan" when they are "related to one another for the purpose of accomplishing a particular goal," whereas separate offenses constitute parts of a "common scheme" when they "share features idiosyncratic in character." *Id.* (quoting *Scott v. Commonwealth*, 651 S.E.2d 630, 635 (Va. 2007)).

[2]NRS 173.115 was amended in 2017. *See* 2017 Nev. Stat., ch. 235, § 1, at 1242. These amendments are not relevant to this appeal.

Given the district court's emphasis on the common features of Meaders' alleged conduct in both of his cases, we conclude that the district court granted the State's motion to join Meaders' cases based on the "common scheme" theory of joinder recognized in *Farmer*. *See id.* However, "the fact that separate offenses share some trivial elements is an insufficient ground to permit joinder as parts of a common scheme." *Id.* at ___, 405 P.3d at 120-21. "[W]hen determining whether a common scheme exists, courts ask whether the offenses share such a concurrence of common features as to support the inference that they were committed pursuant to a common design." *Id.* at ___, 405 P.3d at 121. While "[n]o one fact is dispositive, and each may be assessed different weight depending on the circumstances," this court has considered the following features relevant to the common scheme joinder analysis: "(1) degree of similarity of offenses; (2) degree of similarity of victims; (3) temporal proximity; (4) physical proximity; (5) number of victims; and (6) other context-specific features." *Id.* (internal citations omitted).

The April case and the August case were 104 days apart and they do not share common victims (though all three were deputies working in the jail), common locations, or common situations. In the April case, Meaders was in a holding cell for a few hours as part of the routine intake process. However, the deputies sought to relocate him because they inferred that Meaders might be at risk of harming himself since they could not see him—though the deputies did not testify that they believed Meaders was actively hiding from them. Meaders apparently was sleeping in his cell at the time. In the August case, Meaders had been in solitary confinement for 103 days. On the day of the incident, Meaders jammed his food slot, or it became inoperable after a deputy closed it, because Meaders was acting out, which gave rise to the deputies' need to enter Meaders' cell to retrieve his food tray.

Consequently, we conclude that these offenses do not "share such a concurrence of common features as to support the inference that they were committed pursuant to a common design." *Id.* Accordingly, we conclude that the district court abused its discretion by granting the State's motion to join these two cases as elements of a "common scheme" pursuant to NRS 173.115(2).

Moreover, we conclude that this error was not harmless. Even where joinder is proper and not unduly prejudicial, "the district court *must* still consider whether the evidence of either charge would be admissible for a relevant, nonpropensity purpose in a separate trial for the other charge." *Rimer v. State*, 131 Nev. 307, 322, 351 P.3d 697, 708-09 (2015) (emphasis added).[3] While the district court instructed the jury each count charged a

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[3]Our dissenting colleague contends that the district court did not abuse its discretion in granting the State's motion to join the charges against Meaders because of the fact-specific nature of the joinder inquiry coupled with the deference afforded to the district court in making this decision. While we agree that the joinder analysis is fact-specific and we review a district court's decision to join (or sever) charges for an abuse of discretion, our analysis does not end with a review of the district court's reasoning for joining the charges in this case—we must also consider the district court's rationale for why the prejudicial effect joinder would have on Meaders was not so great that the charges could be tried together. *See Rimer*, 131 Nev. at 322, 351 P.3d at 708-09.

We conclude that joinder in this case was unduly prejudicial as it permitted the State to draw the jury's attention to facts from both discrete situations and did not properly protect Meaders from being convicted based upon inadmissible prior bad acts evidence. *See id.* While our dissenting colleague concludes that any error in joining the charges here was harmless because "[i]nmate attacks on corrections officers are generally pretty easy to prove," *see post* at ___, we find the reasoning behind this observation wanting.

separate and distinct offense that must be evaluated on its own evidence, the State framed its prosecution around both offenses and highlighted the similarities between them as though Meaders followed a pattern in each incident, even though whether Meaders committed the April battery is entirely unrelated to and independent of whether he committed the August battery. Consequently, we conclude that the district court's misjoinder had a "substantial and injurious effect or influence in determining the jury's verdict," *Mitchell*, 105 Nev. at 739, 782 P.2d at 1343, and the prejudice stemming from this error warrants reversal. *See Tabish*, 119 Nev. at 304-05, 72 P.3d at 591-92. Accordingly, we

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No matter how easy it is to prove a particular charge on its own, it is improper to prove that charge with highly prejudicial and irrelevant evidence relating only to some other, separate criminal conduct. In particular, in presenting evidence of other crimes at trial, "the jury may believe a person charged with a large number of offenses has a criminal disposition, and as a result may cumulate the evidence against him or her or perhaps lessen the presumption of innocence . . . ." *Rimer*, 131 Nev. at 323, 351 P.3d at 709 (quoting 1A Charles Alan Wright & Andrew D. Leipold, FEDERAL PRACTICE AND PROCEDURE § 222 (4th ed. 2008)). The Nevada Supreme Court has recognized this error may occur when "charges in a weak case have been combined with charges in a strong case to help bolster the former." *Id.* While generally the relief that a criminal defendant should be afforded when this kind of error occurs is a matter within the district court's discretion, severance may be required where the simultaneous trial of the offenses renders the trial fundamentally unfair. *See id.* For these reasons, we will not disregard the improper joinder in this case simply because the charges against Meaders may be easy to prove.

ORDER the appellant's convictions REVERSED AND REMAND this matter to the district court for new, separate trials consistent with this order.[4]


_____, C.J.
Silver


_____, J.
Gibbons

TAO, J., dissenting:

The issue in this appeal isn't whether we think Meaders' crimes were, or were not, committed as part of a "common scheme" under NRS

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[4]We have considered Meaders' remaining arguments and decline to address them in light of our disposition. Still, we caution the district court that *Robey v. State*, 96 Nev. 459, 461-62, 611 P.2d 209, 210-11 (1980), held that instructing a jury that "willfully" implies only a "purpose or willingness to commit the act or to make the omission in question" is reversible error because such an instruction would make it possible for a person to commit a crime without "any conscious awareness of the wrongful act."

Further, we are troubled by the prosecution's decision to not turn over video evidence from the August incident. While we acknowledge that the prosecutor's determination that a piece of evidence need not be turned over pursuant to *Brady* is final at this stage of the proceedings, *see Jaeger v. State*, 113 Nev. 1275, 1281, 948 P.2d 1185, 1188 (1997), we see no reason why the prosecution should withhold such information *on the basis* that the defense did not expressly request it before knowing it existed. Nevertheless, we conclude there was no reversible error here, as it stands. *See Bradley v. Eighth Judicial Dist. Court*, 133 Nev. ___, ___, 405 P.3d 668, 673 (2017) ("There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one." (quoting *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977)).

173.115. The issue is whether any reasonable judge could have thought so. If any reasonable judge could have reached that conclusion, even if others might disagree, then by definition no "abuse of discretion" occurred and we must affirm. *See Leavitt v. Simms*, 130 Nev. 503, 509, 330 P.3d 1, 5 (2014) (an abuse of discretion occurs only "when no reasonable judge could reach a similar conclusion under the same circumstances"). The only way we can reverse is if we can confidently say that no reasonable judge would have joined these charges the way that the judge below did. Because I don't think we can say that, I respectfully dissent.

I.

The statute at issue, NRS 173.115, is a peculiar one, embodying an approach followed by a minority of only three other states (Idaho, Massachusetts, and North Carolina[5]). The vast majority of states (thirty-two of them[6]) follow the approach taken in Federal Rule of Criminal Procedure 8(a), which allows offenses to be joined if they "are of the same or similar character, or are based on the same act or transaction, or are connected with

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[5]I.C.R. 8; Mass. R. Crim. P. 9; N.C.Gen.Stat.Ann. § 15A-926.

[6]Ala.R.Crim.P. Rule 13.3; Ariz.R.Crim.P. 13.3; Ark.R.Crim.P. 21.1; Colo.R.Crim.P. 8; Del.Super.Ct.Crim.R. 8; Fla.R.Crim.P. 3.150; Hawaii R.Penal P. 8; Ill.Comp.Stat.Ann. ch. 725, § 5/111-4; Ind.Code Ann. § 35-34-1-9; Kan.Stat.Ann. § 22-3202; Ky.R.Crim.P. 6.18; La.Code Crim.Proc. art. 493; Me.R.Crim.P. 8; Md.Rules, Rule 4-203; Mo.R.Crim.P. 23.05; Mont.Code Ann. § 46-11-404; Neb.Rev.Stat. § 29-2002; N.J.Ct.R. 3:7-6; N.M.Dist.Ct.R.Crim.P. 5-203; N.D.R.Crim.P. 8; Ohio R.Crim.P. 8; Or.Rev.Stat. § 132.560; R.I.Super.R.Crim.P. 8; S.D.Codified Laws Ann. § 23A-6-23; Tenn.R.Crim.P. 8; Tex.Penal Code Ann. § 3.02; Utah Code Ann. § 76-1-402; Vt.R.Crim.P. 8; Wash.Super.Ct.Crim.R. 4.3; W.Va.R.Crim.P. 8; Wis.Stat.Ann. § 971.12; Wyo.R.Crim.P. 8.

or constitute parts of a common scheme or plan." Fed. R. Crim P. 8(a). *See* 1A Charles Alan Wright et al., Federal Practice and Procedure: Federal Rules of Criminal Procedure § 143 (4th ed. 2017). But Nevada's statute pointedly omits the prong that permits offenses of the "same or similar character" to be joined. Thus, guidance from other states or from federal courts on the question of joinder is of extraordinarily limited value.

As articulated by the Nevada Supreme Court, the test for classifying whether similar crimes represent a "common scheme" is whether the features that the crimes share with each other are "idiosyncratic" or merely "trivial." *Farmer v. State*, 133 Nev. ___, ___, 405 P.3d 114, 120-21 (2017). On one hand, "the fact that separate offenses share some trivial elements is an insufficient ground to permit joinder as parts of a common scheme." *Id.* But on the other hand, separate offenses can constitute a common scheme when they "share features idiosyncratic in character." *Id.* In determining whether a set of crimes is one or the other, Nevada courts consider such things as "(1) degree of similarity of offenses; (2) degree of similarity of victims; (3) temporal proximity; (4) physical proximity; (5) number of victims; and (6) other context-specific features." *Id.* at ___, 405 P.3d at 121.

But asking whether features of crimes are similar to each other in either "trivial" or "idiosyncratic" ways isn't asking one question; it's asking several related but very different ones. Consider these: (1) of the myriad "features" of a crime, which similarities or differences should count in the analysis; (2) for the features that count, how qualitatively similar or different must they be to each other to matter; and (3) given the number of features with similarities and their degree of similarity, how are they all to be weighed against the features that are different; and (4) in that weighing process, is the focus on the quantity or the quality of the similarities and differences?

And overarching these questions is the most important question of all: who makes each of these decisions? Are they questions of law or fact, and do appellate courts give deference to the district court's answers to these questions, or do they not?

Though the *Farmer* court didn't parse out these questions individually in the way that I have, the answer is stated there pretty clearly nonetheless. In *Farmer*, the court affirmed the district court's joinder of crimes, stating that "[e]ven if reasonable minds might differ as to whether joinder was appropriate in this case, we cannot state that the trial court abused its discretion in making its joinder decision under the circumstances." 133 Nev. at ___, 405 P.3d at 122. I interpret that to mean that, on appeal, we do not ask whether the district court's joinder decision was correct or not. We ask only the much more limited question of whether reasonable minds could differ on the answer. If reasonable minds could differ, then the matter lies within the district court's discretion and no "abuse of discretion" occurred.

Let's illustrate why this approach makes sense by breaking down the *Farmer* analysis along the lines I propose, and then applying it to the case at hand.

II.

Which similarities or differences count?

Any human endeavor can be characterized by a number of features, large and small: location, clothing, time of day, whether other people were present, what was done, what was said, what everyone felt, what everyone intended, what everyone had for lunch; anything and everything else relating to anything that might have happened. Of the countless features associated with any endeavor, the threshold question is identifying which

qualities make one endeavor "similar" to another when some things about them may appear the same but other things may appear quite different.

This isn't always easy to do because "crimes" may consist of many unrelated activities that can be committed in wholly different ways. There are violent crimes against individuals (homicide, battery, mayhem); victimless crimes (possessing illegal narcotics, soliciting prostitution); sex crimes (sexual assault, lewdness with a minor); non-violent sex crimes in which the victim may even have putatively given consent (statutory sexual seduction, incest); crimes against real property (trespass, arson); crimes arising from the taking of personal property (larceny, theft, grand larceny auto); deception-related crimes against individuals (fraud, forgery); deception-related crimes against financial institutions (bank fraud, passing bad checks); crimes against animals (animal cruelty or neglect); crimes against the judicial process (perjury, witness tampering); crimes against the political process (voter fraud, failure to file campaign finance reports); crimes against the environment (illegal dumping of hazardous waste); crimes of public morality (open and gross lewdness, public intoxication); crimes against peace and order (disturbing the peace); regulatory crimes (failure to obtain a business license; failure to register a vehicle with the DMV); crimes against civic responsibility (tax evasion, failing to register for the draft, failing to appear for jury duty).

What "features" of these crimes count when deciding whether different crimes ought to be joined? Crimes falling into different categories will be defined by very different "features" that may not bear any relationship to other types of crimes. For example, some crimes target human victims, some involve no victims at all (like prostitution- or drug-related offenses), some target animals or pets, and in certain types of crimes the "victim" is the general public as a whole (voter fraud, environmental pollution crimes). Some

types of crimes require proof of the defendant's specific criminal intent (for example, burglary), others require only proof of general intent (for example, battery), while some crimes can result from negligence or recklessness (for example, involuntary manslaughter) or even strict liability with no showing of mens rea whatsoever (like many environmental or regulatory-licensing crimes). In some types of crimes, the victim's consent mitigates the crime (larceny-type crimes) while the victim's consent is legally irrelevant to the commission of other crimes (homicide, statutory sexual seduction). Some crimes require completed acts, while others can be inchoate (conspiracy, soliciting a crime, attempt crimes).

Even when comparing crimes of similar categories against each other, the list of similarities and differences will be limitless, bounded only by the depraved ingenuity of the criminal mind. Some of them may have been highly significant to the suspect when he planned the crime, while others may have been matters of pure chance or circumstance that had no significance to the suspect's thinking. As described by criminologists, some features might represent "signatures" of the crime, others might have been elements of mere "modus operandi," while other features might have been entirely accidental or coincidental. "Signature" features lie at the heart of a crime and always remain the same; they are the reasons why the crime was committed. "Modus operandi" represents aspects of the crime that are intentionally planned but can change from crime to crime; M.O. is how the criminal chooses as a practical matter to carry out his "signature" and it can often evolve as the criminal learns over time, but it could also remain the same. Features that are accidental have nothing to do with the criminal's planning and thus can easily change from crime to crime, but could also remain the same for reasons of pure coincidence. *See* Robert K. Ressler et al., *Crime Classification Manual: The Standard System for Investigating and Classifying Violent*

Crimes 259-68 (1992) (Ch. 5: "Modus Operandi and the Signature Aspects of Violent Crime"); John Douglas & Mark Olshaker, *The Anatomy of Motive* 58-62 (1999).

Of these countless features, which similarities or differences are the "signal" that we should focus on, and which are merely "noise" that we ought to filter out and ignore?

Statisticians refer to concepts called "overfitting" and "underfitting" in distinguishing whether sets of data are producing a meaningful pattern or whether the data is just creating meaningless noise. Say you give a combination lock to an accomplice and direct him to learn how to pick it in order to prepare for a burglary. A few days later he comes back and tell you he's figured out how to open it: just dial in the combination 34-7-15. Technically speaking, that's a correct solution, because it successfully opened the lock. But it's a solution that's "overfitted," meaning too narrow and specific to be of general use for other locks. *See* Nate Silver, *The Signal and the Noise: Why So Many Predictions Fail—but Some Don't* 163 (2012).

At a certain level of generality, all crimes are "similar" to each other in that, in all of them, a defendant acted with criminal intent in violation of some law. But that's a comparison that "underfits" the problem by describing it too broadly. At a certain level of specificity, no crimes are similar to each other whatsoever, because something about any crime will be different from every other crime, whether the time of day, the clothes the criminal wore, or the day of the week on which the crime was committed. But that can be a solution that "overfits" the problem by describing it too narrowly. When comparing crimes for "idiosyncratic" similarities or "trivial" differences, the challenge lies in properly choosing the correct level of generality or specificity at which the analysis is supposed to be conducted, so that the solution properly fits the nature of the crimes.

Say, for example, a defendant committed the exact same crime (say, selling drugs) on more than one occasion, but on different days weeks apart while wearing different clothes and in different parts of town. Or, say another defendant committed very different crimes (say, selling drugs one day and stealing cars the next), but wore the same shirt during each crime, committed each crime in the same neighborhood, and committed the crimes on consecutive days. Which, if any, of these crimes should be joined?

These examples may seem funny at first, but let's pick them apart. Wearing the same shirt during different crimes may seem a laughably irrelevant matter, or it may matter quite a lot. For many crimes, the answer is probably that it's irrelevant, because for certain crimes (like selling drugs), the defendant's clothes were likely the result of mere happenstance unrelated to any criminal planning or motive. The criminal might not have thought twice about what clothes he should wear when he committed his crime. But suppose we add a new fact: the drug dealer's clothes weren't randomly picked but were purposely selected to identify gang affiliation. Then clothing becomes a marker of how the dealer identifies himself to buyers and to rival dealers from other gangs, and therefore pretty central to the commission of the crime. Alternatively, change the word "shirt" into "ski mask," and the crime from "drug-dealing" to "armed robbery." Then the defendant's clothing matters a great deal from crime to crime. Or take the example of a criminal who intentionally wears the same dark, non-reflective clothes while committing a series of nighttime burglaries. In that case, the clothing becomes more than just what the suspect happens to be wearing and almost akin to a tool of the crime itself.

Change a few facts and clothes matter either much more or much less. The same goes for just about any other feature of a crime: whether the choice of victim matters (maybe more if the suspect singled out and stalked

the victim, maybe less if the victim just happened to be nearby during a crime of opportunity); whether the time of day matters (maybe no for a suspect who sells drugs on a corner all day long to whomever asks, maybe yes if the suspect needs cover of darkness for his crimes); whether the prevailing weather matters (maybe yes for a car thief who prefers to steal on rainy days when fewer people are out and about to witness his crimes, maybe no for an armed robber who desperately needs money to get high immediately); whether the age and gender of the victim matters (maybe yes to a rapist or child molester, maybe no to someone who enters a convenience store intending to rob anyone who happens to be inside); whether the crime took place in a particular neighborhood (maybe yes to a gang banger protecting his turf, maybe no to a serial killer who cruises around in his car searching for victims far and wide wherever he can find one); whether the crimes were clustered together in time (maybe yes for a drug-addicted armed robber who hits convenience stores every day for drug money to get high, maybe no to someone like the Unabomber who needs months between crimes to painstakingly assemble his intricate homemade bombs by hand); whether the number of victims changed from crime scene to crime scene or stayed the same (maybe yes for a serial rapist who always preys on a single isolated female victim, maybe no for a nighttime burglar who doesn't care how many people are sleeping in the house as long as he stays quiet).

And then there's the element of chance. Intricately planned and premeditated crimes might have to be adjusted on the fly to account for unforeseen circumstances—a victim who didn't follow his normal routine, an unexpected passerby situated to witness the crime, an accomplice who gets cold feet at the last minute. Even serial killers, those criminals who plan their crimes most meticulously and carefully, must wait for the right victim to come along in a situation where few witnesses are around before they can

strike. Because even they can't always choose the moment of opportunity no matter how carefully they plan, their crimes may look somewhat different from each other despite there being no question about their schemes and intentions.

It's a military axiom that no battle plan survives first contact with the enemy; that's simply because no general, no matter how brilliant, can really plan for how the enemy is going to respond. The same holds true for crimes, even ones that were intentionally planned to be idiosyncratically similar; if something doesn't go according to plan, then the crimes will start to have features that look different no matter how similar they were originally intended to be. But focusing on differences caused by random acts of chance is classic "overfitting"; those differences don't negate that there was always intended to be a common scheme.

The fundamental point here is that the process of identifying which features matter to the existence of a common scheme under NRS 173.115 isn't just a matter of listing randomly selected things about various crimes that seem similar or different, like weather, or time of day, or whatnot. The selection process itself has to arise from the application of reason to the nature of the crimes at issue to determine whether any particular feature was a matter of signature, modus operandi, or mere happenstance. And that process doesn't always lead to a single obvious result.

III.

How similar must two features be to count as "similar" under Farmer?

The second question embedded in *Farmer* is this: after identifying which features should count in the analysis (using whatever criteria we decide to employ), how similar must they be to meet the test?

Two crimes may have certain features that seem "similar," but the degree or quality of these similarities can be great, middling, or slight. If a defendant uses the exact same pistol to commit different crimes, then the similarity in the weapon used is extremely high: it's the same *one*. But if a defendant uses different pistols to commit different crimes, but the pistols are of the same caliber and he loaded them with the same brand of ammunition, then the similarities are less great, but still considerable. Alternatively, if a defendant uses two different caliber weapons—or a pistol in one but a shotgun in another—then the crimes are still similar in that a firearm was used in both, but the degree or quality of similarity is far less. Alternatively, a defendant who commits one crime with a gun and another with a knife has committed two offense similar in the sense that some kind of dangerous weapon was used in both, but the weapons weren't the same at all.

How much similarity does it take for a common feature to migrate from being merely "trivially" similar to "idiosyncratically" so and meet this test?

IV.

How must the similarities and differences be weighed?

The third question is, given a number of similarities and a number of differences between two crimes, how should a district court weigh them against each other to determine whether joinder is warranted?

Take a highly oversimplified example: say a killer shoots a male victim in the head on Tuesday one week, then stabs a male victim in the head on Tuesday the next week. There are similarities in that both crimes were committed against male victims, both involved violence with weapons, both involved attacks to the head, and both were committed on the same day of the week only a few days apart. But there are differences too: the victims were not the same person nor were they connected to each other, the crimes

involved entirely different weapons, and the crimes were committed during different weeks.

What prevails here: the similarities or the differences, and what criteria are courts supposed to weigh in order to answer that question? In the example here, some common features are exactly the same, for example, the day of the week on which the crime was committed. Others are only vaguely alike, for example, that some kind of weapon was used in both crimes. But we get different results if we decide that a small number of high-quality matches count more in the final analysis than a larger number of lower-quality differences, than if we decide to do the exact opposite. The question becomes how quantity and quality ought to be balanced against each other, and that can vary from one set of crimes to another.

A related inquiry: how many crimes are needed to show enough of a pattern before the similarities or differences become either qualifiable or quantifiable? It seems reasonable to conclude that if a defendant committed a large number of crimes, joinder could be based on a smaller number of similarities that span each and every crime across the data set of crimes. Likewise, it seems reasonable to conclude that if only a small handful of crimes are at stake, then for joinder one might require either (a) a far greater quantity of similarities between the features of the crimes; or (b) a closer quality of match (perhaps "idiosyncratic-ness") between the similarities that exist between the crimes. But what's far less clear is what metrics courts are supposed to use to weigh all of this.

V.

What about the range of choices available?

There's another thing to consider: the number of choices that were available to make in the first place. If the range of options in how to commit a crime is narrow, then the number and scope of any "idiosyncratic"

features is likely to be narrow as well. But whether that makes the test easier to meet, or more difficult, can vary as well.

There are some crimes that are intrinsically similar whether they were ever intended to be part of a common scheme or not. For example, I know of only four ways to steal a car: turn the ignition with a stolen key, a duplicate key, or some improvised surrogate of a key; manipulate the ignition wires inside the steering column; manipulate the ignition from under the hood; or physically tow the car away. When there are so few ways to naturally commit the crime in the first place, many crimes will look similar to each other even when they were never intended or planned to represent a common scheme. But that doesn't mean that all car thefts committed by the same defendant must be joined together in the same trial just because they share these features along with every other car theft ever committed by anyone anywhere in the world.

In contrast, some crimes can be committed in numerous ways. Murder, for example, can be committed in countless ways, including either with a weapon (shooting, stabbing, beating) or without a weapon (strangulation, drowning, pushing a victim off a tall building). When there are many more different ways available to naturally commit a certain kind of crime, many of those crimes might look a little different even when they were most certainly intended or planned according to a definite common scheme. For example, serial killers—who notoriously operate according to schemes so uniquely idiosyncratic that they gave rise to the FBI's concept of a criminal "signature" —follow distinct patterns but also have been known to vary the particular method by which they kill different victims. Serial killer Ted Bundy is suspected to have kidnapped, raped, tortured, and killed perhaps a hundred young women. But he didn't kill all of his victims the same way; he strangled some, bludgeoned some, asphyxiated some, and stabbed others.

Part of his variance depended on whether the victims screamed and fought back or instead complied quietly with his demands. But just because his crimes differed in apparently very significant ways (in ways that car thefts typically can't differ from each other) doesn't mean that they all must therefore be the subject of separate trials; what a tremendous waste of resources that would be.

VI.

The challenge with these examples, as well as in the case at hand, is this: the ways that crimes can be committed is bounded only by the depraved imagination of the criminal mind. Consequently, I would think that in this arena appellate courts ought to be exceedingly careful in second-guessing trial courts. Those underlying questions—identifying which features of crimes are important to the analysis, measuring whether any similarities or differences between them ought to be called "idiosyncratic" or "trivial," and figuring out how to weigh all of the similarities and differences against each other—seem to me the quintessential example of the types of ad hoc, fact-based, case-by-case decisions that we leave to trial courts to make because they aren't easily amenable to guidance through broad, generalized rules of law. What may appear trivial to one judge (i.e., what one might call "noise") may appear extremely significant to another (i.e., what one might call the "signal"). Likewise, what may appear "idiosyncratic" to one judge may appear quite mundane and commonplace to another.

These decisions strike me as the paradigm example of decisions we ought to give extraordinarily broad leeway to the trial judge to make, to be second-guessed on appeal only when it's manifestly clear that "no reasonable judge" could have done things that way. *See Farmer*, 133 Nev. at ___, 405 P.3d at 122 ("Even if reasonable minds might differ as to whether

joinder was appropriate in this case, we cannot state that the trial court abused its discretion in making its joinder decision under the circumstances.").

VII.

In this case, there are multiple differences in the way Meaders committed his crimes, as the majority notes. There are multiple similarities as well, as the district court noted. But it seems to me that reversal is in order only if we can say that "no reasonable judge" could have answered the three question at issue here in the same way that this district judge did.

Which features of Meaders' crimes count and which should be disregarded? Meaders didn't attack his victims at the exact same time of day. One could say that the time of day of the attacks matters, or one could say that it doesn't because Meaders couldn't control when his guards would enter his cell. Meaders didn't use a weapon in either incident. One could say that the lack of a weapon was a common and important feature, or one could say that it doesn't matter because inmates have no access to weapons and thus no choice in the matter. Meaders' crimes took place in different cells. One could say this marks a significant difference, or one could say that location is irrelevant because inmates do not choose where they are housed or where or when they are moved around. Meaders didn't attack the same person in his crimes. One could say that the identities of his victims therefore matters, or one could say that he had no choice in who was assigned to guard him and attacked whoever was there. If reasonable minds could differ on what features even matter, then the district court did not abuse its discretion in choosing the features that it did.

Of the features that count in the analysis, how "similar" must they be to satisfy *Farmer*? Meaders attacked three corrections officers who

entered his cell, but they were not the same person. One could say that the identity of the victims was the "same" for purposes of this analysis because they were all corrections officers as opposed to other inmates, or one could say that the identities were "different" because they were different individual people. Meaders attacked the victims when they entered the cell in which he was being held, but they were not the same cell. One could say that the location of the offenses was the "same" for purposes of this analysis because both crimes were committed in his cell as opposed to the hallway or the shower; or one could just as easily say that the locations were "different" because they were different cells. Reasonable minds could differ on all of this.

How do we weigh any features that are similar against others that are different? One could give more weight to the fact that the crimes were committed against uniformed corrections officers than to the fact that they were committed several weeks apart. Or one could just as easily do the opposite. One could give more weight to the fact that in both offenses Meaders lured guards into his cells under pretext, or one could give more weight to the fact that the pretexts were not identical. Or one could just as easily do the opposite. Reasonable minds could differ on all of this.

In the end, it seems to me that there are two reasonable alternative ways to describe just about every relevant feature of Meaders' crimes. One could say that Meaders engaged in a highly idiosyncratic pattern of intentionally luring guards into his cell under some pretext (hiding in a corner or damaging his food slot so that it needed repair) and then attacking them in similar ways with his bare hands when the opportunity arose after they entered his cell. One could say that Meaders merely attacked different guards on different days many weeks apart while housed in different cells in ways that are only trivially similar.

The question before us is whether one of these descriptions is so clearly and unequivocally the one that must govern this appeal that adopting the other represents an "abuse of discretion." My answer to that is negative; both seem to me to represent equally reasonable ways to describe Meaders' crimes. It all depends on what features we choose to focus on; whether those features differ in ways either "trivial" or "idiosyncratic"; and how we weigh those features against every other feature of the crimes. Precisely because there are two ways to reasonably characterize the crimes, each of which leads to a different conclusion regarding joinder, I would conclude that no abuse of discretion occurred because the judge did not act unreasonably in choosing one alternative over the other. I would therefore affirm.

VIII.

Even if we could say that joining the crimes was "unreasonable" because there was only one way to describe them as a matter of law, I would further conclude that any error was harmless. Inmate attacks on corrections officers are generally pretty easy to prove. There's no question of identity, as inmates don't usually have alibis in crimes like this and can't blame it on someone else (the SODDI "some other dude did it" defense). Such attacks are crimes of only general intent. The crimes were both committed against living eyewitnesses who were both available to testify and the prosecutor's case didn't need to be pieced together through questionably long chains of ambiguous circumstantial evidence. Accordingly, in my view Meaders would almost certainly have been easily convicted of both crimes based on the evidence presented below even had the crimes been tried separately. Reversal is therefore not warranted even if we could legitimately say that any "abuse of discretion" occurred in trying the crimes together.

IX.

For all of these reasons, I would affirm the conviction and therefore respectfully register my dissent.

_____, J.
Tao

cc: Chief Judge Scott N. Freeman, Second Judicial District
Second Judicial District Court, Dept. 9
Washoe County Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk