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Joinder of Criminal Offenses in Nebraska: Judicial Discretion v. Fair and Impartial Trial: *State v. Nance*, 197 Neb. 95, 246 N.W.2d 868 (1976)

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Note

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State v. Nance, 197 Neb. 95, 246 N.W.2d 868 (1976).

I. INTRODUCTION

In *State v. Nance*,[1] the Supreme Court of Nebraska, over the dissent of Justice McCown,[2] held that two or more separate criminal offenses may be joined in the same information and indictment, and tried in the same proceeding when the offenses charged are of the "same or similar character." Although the defendant in *Nance* moved for severance of the offenses, the supreme court held that the trial court had complete discretion in deciding whether to grant or deny such a motion absent a showing of "actual" prejudice to the defendant. In applying such a strict rule on severance, the supreme court has given Nebraska trial courts even broader discretion in trying criminal cases, at the expense of the defendant's right to a fair and impartial trial. This note will discuss the impact of *Nance* upon the criminal process, and will explore the policies which militate against allowing such broad discretion in joinder cases.

II. THE FACTS

The defendant in *Nance* was charged in a seven count information with the commission of three separate robberies,[3] and moved

1. 197 Neb. 95, 246 N.W.2d 868 (1976).
2. *Id.* at 105, 246 N.W.2d at 873. Justice McCown's dissent will be discussed in greater detail in part IV of the text.
3. In count I of a seven count information, the defendant, Edgar L. Nance, was charged with the robbery of Daniel Short on May 28, 1975, under section 28-414, R.R.S. 1943. Count II charged the defendant with the use of a firearm in the commission of that robbery under section 28-1011.21, R.R.S. 1943. Counts III and IV charged the defendant with the robbery of Mary West on May 29, 1975, and with the use of a firearm in the commission of that robbery. Counts V and VI charged the defendant with being an habitual criminal under section 29-2221, R.R.S. 1943.
   Id. at 96, 246 N.W.2d at 869.

to sever the counts relating to each individual offense.[4] The trial court partially granted the motion by severing the charges relating to one of the robberies but consolidating the other two for trial.

The jury found the defendant guilty on the two joined counts of robbery,[5] and he was sentenced to serve five to seven years for each. The sentences were to run concurrently, but consecutive to a four year sentence imposed in an earlier trial on the severed robbery count. On appeal, the defendant made two assignments of error: (1) that the district court committed reversible error in allowing evidence of a one-man showup to be presented to the jury; and (2) that the district court committed reversible error in partially overruling the defense motion for severance of the offenses.[6]

III. THE COURT'S DECISION

The Nebraska Supreme Court affirmed the decisions of the trial court in their entirety. In denying the first assignment of error relating to the evidence obtained in the one-man showup and used in the trial on the severed robbery count, the court applied the legal principles of *Neil v. Biggers*.[7] *Neil* stated that the critical issue in such a case is whether the showup procedure was so unnecessarily suggestive and conducive to irreparable mistaken identification that the defendant was denied due process.[8] The court

4. NEB. REV. STAT. § 29-2002(4) (Reissue 1975), provides:

> If it appears that a defendant or the state would be prejudiced by a joinder of offenses or of defendants in an indictment, information, or complaint, or by such joinder of offenses in separate indictments, informations, or complaints for trial together, the court may order an election for separate trials of counts, indictments, informations, or complaints, grant a severance of defendants, or provide whatever other relief justice requires.

5. The trial court had dismissed the charge of using a firearm in the commission of the Short robbery after the close of the State's case; and the jury found the defendant not guilty of the charge of using a firearm in the commission of the West robbery. Upon defendant's motion, the trial court dismissed Count VII of the information, which charged the defendant with being an habitual criminal.
197 Neb. at 96-97, 246 N.W.2d at 869.

6. *Id.* at 97, 246 N.W.2d at 869. The first assignment of error related only to testimony in the earlier separate robbery trial, and did not challenge the identification procedure used in the trial on the joined robbery counts. A "showup" is a process used to identify a single defendant. Unlike a "lineup," only one person is presented for identification.

7. 409 U.S. 188 (1972).

8. The United States Supreme Court concluded, in *Neil*, that it "is the likelihood of misidentification which violates a defendant's right to

concluded that there was "no substantial likelihood of misidentification in this case"[9] and that admission of the identification obtained in the one-man showup was proper because it was the best method of identification available under the circumstances.[10]

The court based its decision concerning the second assignment of error, which related to the joinder of the two separate offenses, upon section 29-2002(1) of the Nebraska statutes,[11] holding that the two robberies were joined properly under the statute because they were of the "same or similar character."[12] In support of its holding, the court cited a New Jersey case[13] which upheld the joinder of two separate counts of selling heroin under a court rule which, like section 29-2002(1), allowed joinder of offenses of the "same or similar character."[14] It also cited the Nebraska cases of *State v. Rod-*

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due process . . . . [T]he admission of evidence of a showup without more does not violate due process." *Id.* at 198.

9. 197 Neb. at 101, 246 N.W.2d at 871. The court reached this conclusion based upon the following facts: (1) The witness, who had been in close proximity with the criminal for more than thirty minutes, made a positive unequivocal identification, and had given a generally accurate description to the police prior to the showup, including reference to a green shirt and medallions of the type later found in the possession of the defendant; (2) the showup was held only one day after the crime took place; and (3) the defendant's own statements to the police indicated that he had committed the crime, and his statement of the events that occurred was substantially the same as the witness's.
10. It was the defendant's own refusal to be in a lineup that necessitated the use of a showup. On this point the court stated as follows:

> The purpose of a rule barring evidence of unduly suggestive confrontations is to deter the police from using a less reliable procedure when a more reliable one may be available. Neil v. Biggers, *supra.* In this case, the purpose of the rule would not be fulfilled by excluding the evidence, for the police were prevented from conducting a more reliable identification procedure due to the defendant's own recalcitrance.

Id. at 101-02, 246 N.W.2d at 871.

11. NEB. REV. STAT. § 29-2002(1) (Reissue 1975), provides:

> Two or more offenses may be charged in the same indictment, information, or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors, or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

12. "We are of the opinion that the two robberies referred to were 'of the same or similar character' under the Nebraska statute referred to above, notwithstanding the fact that the offenses were committed against two individuals, and with approximately 19 hours intervening between the commission of the offenses." 197 Neb. at 103-04, 246 N.W.2d at 872.
13. State v. Baker, 49 N.J. 103, 228 A.2d 339 (1967).
14. Concerning the New Jersey rule, the court stated:

> The New Jersey rule on joinder, like the Nebraska statute,

gers,[15] in which the court held it was not an abuse of discretion for the trial court to refuse to sever two counts of robbery involving separate service stations, and *State v. McDonnell*,[16] in which the court refused to overturn the trial court's decision to try two separate burglary counts jointly.

Nance's contention that it is inherently prejudicial to be forced to defend on several unrelated counts at the same time because they tend to reinforce each other, was rejected by the court.[17] Reasoning that the proper test in this case was whether or not "actual" prejudice had in fact occurred, the court stated that the defendant had "made no actual showing of how he was, or may have been, prejudiced."[18] On this basis, the court held that severance was a matter of judicial discretion[19] rather than a matter of right where no "actual" prejudice had been shown, upheld the trial court's refusal to grant a severance of the offenses,[20] and rejected the defendant's second assignment of error.[21] Thus, the Nebraska Supreme Court ruled that a decision to try criminal offenses jointly if they are of the "same or similar character" and have been charged in the

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permits joinder of offenses of the "same or similar character." In that case, the defendant was charged with the sale of heroin in two indictments. Each indictment charged a single sale, one to a federal agent on January 10, 1963; and one to a Newark officer on March 4, 1963, almost two months later. The court held that the two offenses were of the "same or similar character," under its rules, and a joint trial of the separate indictments for the offenses was authorized.

197 Neb. at 104, 246 N.W.2d at 872-73.

15. 186 Neb. 633, 185 N.W.2d 488 (1971).
16. 192 Neb. 500, 222 N.W.2d 583 (1974).
17. *See* NEB. REV. STAT. § 29-2002(4) (Reissue 1975), *supra* note 4, which allows severance where the defendant would be prejudiced by joinder.
18. 197 Neb. at 105, 246 N.W.2d at 873. In support of its holding that no "actual" prejudice to the defendant had been shown, the court stated that "[t]he evidence on each robbery was distinct and simple. The trial court separately instructed the jury on the elements of each count, and a further instruction provided: 'The material elements of each count will be considered separately by you and separate determination made as to each Count.'" *Id.*
19. "The question of election between counts and the advisability of joint or separate trials is one directed to the sound discretion of the trial court." *Id.* at 104, 246 N.W.2d at 873.
20. In refusing to allow severance the court held: "It is clear, under our procedure, that severance is not a matter of right, and a ruling of the trial court with regard thereto will not be disturbed on appeal in the absence of a showing of prejudice to the defendant." *Id.* at 105, 246 N.W.2d at 873.
21. "We conclude that the consolidation of the counts in this case was not an abuse of discretion, and the defendant's second assignment of error is without merit." *Id.*

same information and indictment, can be overturned only upon a strong showing by the defendant of "actual" prejudice to him.

IV. JUDICIAL DISCRETION V. FAIR, IMPARTIAL TRIAL

Imposition upon criminal defendants of such a strict standard effectively lessens the likelihood that such a defendant will receive a fair and impartial trial. As pointed out by Justice McCown in his dissent to the majority opinion: "[I]n this case the two robberies which were joined were completely separate offenses. They involved different victims, different locations, different property, and different witnesses. They did not even occur on the same day."[22] In spite of the complete lack of any connection between the two offenses, other than the fact that they both involved robberies and were alleged to have been committed by the same defendant, the prosecution was permitted to present all evidence relating to both offenses to the same jury. The evils inherent in allowing joinder of separate, distinct criminal offenses for trial in the same proceeding are, however, patently apparent.

In a criminal proceeding, the jury cannot help but be influenced by the weight of the overall evidence presented. In fact, the introduction of evidence pertaining to offenses other than that for which the defendant is being tried might very well be treated, consciously or subconsciously, as cumulative by the individual trier of fact, thereby creating, in his mind, a more compelling case for conviction than would the presentation of evidence relating only to the relevant single crime. It is noteworthy that the Nebraska Supreme Court has recognized the prejudice which can result to a criminal defendant when evidence of other unconnected crimes is admitted by the trial court. *State v. Casados*[23] exemplified the concern of the court on this matter when it held that "proof of another distinct substantive crime is not admissable in a criminal prosecution unless there is some legal connection between the two upon which it can be said that one tends to establish the other or some essential fact or issue."[24] *Casados* restated a widely accepted rule of evidence and procedure in criminal cases.[25] It is based on the notion that

22. *Id.*
23. 188 Neb. 91, 195 N.W.2d 210 (1971).
24. *Id.* at 95, 195 N.W.2d at 213.
25. As stated in 1 S. GARD, JONES ON EVIDENCE § 4:18, at 417 (6th ed. 1972):

> Peculiarly applicable to criminal cases is the rule which prohibits the introduction of evidence of other wholly independent offenses as the basis for an inference that the defend-

evidence of another unrelated crime might be given too much weight by the jury or might otherwise unduly prejudice the defendant's case.[26]

Allowing joint trial of separate criminal offenses of the "same or similar character" at the almost total discretion of the trial court provides an effective means for circumventing the rule that evidence of other crimes inadmissible. It does so by condoning the admission of evidence pertaining to crimes which the defendant is merely alleged to have committed.[27] If the admission of evidence pertaining to crimes of which the defendant has been convicted is improper due to the prejudice which might result to the defendant's case, then how much more compelling should be the policy behind refusing to allow the admission of evidence pertaining to crimes of which the defendant has merely been accused! Since a defendant is deemed to be innocent of crimes with which he is charged until proven guilty, the evidence admitted into trial on the unrelated criminal offense, where two or more offenses have been joined, is evidence relating to a crime of which the defendant is,

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ant is guilty of the offense for which he is being tried. Otherwise stated, it is not proper, to show by proof of previous bad conduct that he has a propensity for committing the crime, and because he committed other crimes on previous occasions he probably committed the crime in question.

This rule will be referred to in the text as the "other crimes" rule. For other evidence of the widespread acceptance of the "other crimes" rule, see 2 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 302 (3d ed. 1940).

26. Although it has been treated as a rule of relevancy, and is here so classified, the rule is recognized, not because the evidence of previous offenses is irrelevant, but for other more plausible reasons. One basic reason for the rule is that such evidence is apt to be given too much weight, rather than too little, by the jury, thus resulting in the conviction of a defendant because he is a bad man and not because of his specific guilt of the offense with which he is charged.

It is a sound rule of public policy and therefore exclusionary in the sense that it keeps out relevant evidence for justifiable reasons. Besides the highly prejudicial character of such evidence there are the considerations that a defendant is entitled to be tried only for the crime charged against him, that he is entitled to notice and the right to prepare his defense to any charges brought against him free from surprise, that the evidence of collateral crimes would tend to confuse the jury and divert them from the real issues, that bad character cannot be proved by evidence of specific acts, and that the state is not entitled to attack the character of the accused until he has offered evidence of his good character.

1 S. GARD, *supra* note 25, at 418-19.

27. Justice McCown pointed out that "the same reason exists for holding that a trial for unconnected separate crimes should be separated if requested." 197 Neb. at 106, 246 N.W.2d at 874.

at least at that point in time, innocent. Yet, such evidence cannot help but affect the jury's estimation of the defendant's propensities to commit either or both crimes, regardless of how carefully the trial judge might instruct on each particular count.

This fact has been recognized in a number of federal cases involving the joinder issue, which hold that a defendant is automatically prejudiced when the basis for joinder is the mere fact that the offenses charged are of the "same or similar character" and that the defendant is therefore entitled to severance as a matter of right.[28] United States Attorneys, like Nebraska prosecutors, are permitted to charge offenses of the "same or similar character" in one indictment,[29] and federal district courts likewise are governed by a provision which allows severance of the offenses if the defendant is prejudiced by such a joinder.[30] In *United States v. Foutz*,[31] the defendant was charged with robbing the same bank twice within a two and one-half month period. The United States Court of Appeals for the Fourth Circuit required severance of the offenses, using the rationale of the "other crimes" rule, on the grounds of prejudice to the defendant. This was done in spite of the fact that no "actual" prejudice to the defendant's case had been demonstrated.[32]

28. *See, e.g.*, United States v. Foutz, 540 F.2d 733 (4th Cir. 1976); Drew v. United States, 331 F.2d 85 (D.C. Cir. 1964). *Contra*, United States v. Riley, 530 F.2d 767 (8th Cir. 1976).

29. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

FED. R. CRIM. P. 8(a).

30. If it appears that a defendant or the government 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.

FED. R. CRIM. P. 14.

31. 540 F.2d 733 (1976).

32. The court, in *Foutz*, did not require evidence of "actual" prejudice, but noted that:

> One inevitable consequence of a joint trial is that the jury will be aware of evidence of one crime while considering the defendant's guilt or innocence of another. If the rationale of the "other crimes" rule is correct, it would seem that some degree of prejudice is necessarily created by permitting the jury to hear evidence of other crimes.

Id. at 736. For additional authority in support of this view, see 8 MOORE'S FEDERAL PRACTICE ¶ 8.05 (2d ed. 1968); 1 WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 143 (1969).

In ruling that it was an abuse of discretion for the district court not to grant severance,[33] the *Foutz* court adopted a test for prejudice which is consonant with, rather than violative of, the "other crimes" rule. The court held that the test for prejudice, under the joinder rule, was whether the evidence purported to have been prejudicial to the defendant's case could properly have been admitted if the offenses had been tried separately.[34] It then concluded that where joinder is based solely on the fact that the offenses are of the "same or similar character," such evidence is generally inadmissible when the crimes are tried in separate proceedings, and is, therefore, prejudicial under the "other crimes" test for prejudice.[35]

Founding the test for prejudice, in motions for severance of criminal offenses upon the admissibility of the evidence under the "other crimes" rule strikes a much fairer balance between the interests of the state in joining such offenses, on the one hand, and the defendant's constitutional right to a fair and impartial trial on the other. The requirement that the defendant show "actual" prejudice before severance will be granted results in a technical application of the rule on severance which is inherently unfair. It is impossible for the defendant to prove what went through the mind of each individual juror as he or she heard the evidence presented and formulated a conclusion concerning the defendant's guilt or innocence.

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33. "The granting of a severance under Rule 14 is committed to the discretion of the district court. . . . In this case, we believe it was an abuse of discretion not to grant a severance." 540 F.2d at 736 (citations omitted).

34. Realizing that not all evidence relating to other separate offenses is inadmissible, the court in *Foutz* stated:

> Although the law does not allow consideration of other crimes as evidence of a defendant's criminal disposition, evidence of other crimes is admissible for certain other purposes because its probative value is then thought to outweigh its prejudicial effect. In those instances where evidence of one crime is admissible at a separate trial for another, it follows that a defendant will not suffer any additional prejudice if the two offenses are tried together.

Id.

35. In so ruling, the court in *Foutz* distinguished between offenses joined because they are based on the same transaction and offenses joined simply because they are of the "same or similar character":

> When offenses are joined under Rule 8 on the ground that they "are based on the same transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan," it is manifest that evidence of one offense would ordinarily be admissible at a separate trial for the other. When offenses are joined because they "are of the same or similar character," however, admissibility at separate trials is not so clear.

Id. at 737.

Thus, it would be extremely difficult, if not impossible, to prove that "actual" prejudice resulted to the defendant in most cases.

The objective test for prejudice espoused in *Foutz*, on the other hand, would preclude the state from being able to violate the spirit of the "other crimes" rule merely by affecting a joinder of separate offenses for trial in a single proceeding. Furthermore, since it is based upon whether or not such evidence would be admissible if the joined offenses had been tried separately, the defendant could show no prejudice if such evidence would have been admissible and joinder would be appropriate. Such a result seems obviously to be more in the interests of fair play and justice than does the wooden application of an "actual" prejudice test.

Allowance of severance as a matter of right in cases where a joinder of offenses has been effectuated because they are of the "same or similar character" has also found favor in the ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO JOINDER AND SEVERANCE. Although the rule on joinder in section 1.1 of these STANDARDS is very similar to the rule in Nebraska, permitting a joinder of similar offenses,[36] section 2.2(a) allows severance as a matter of right in any situation where offenses have been joined solely on that basis.[37] The commentary to section 2.2(a),[38] states that "joinder together for one trial of two or more offenses of the same or similar character when the offenses are not part of a single scheme or plan has been subjected to severe criticism over the years . . . ."[39] The same section also notes that the "test for whether joinder is proper involves a weighing of the possible prejudice to the defendant from joinder against the public interest in avoiding duplicitous, time-con-

36. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO JOINDER AND SEVERANCE § 1.1, at 5 (final draft 1968), states:

> Two or more offenses may be joined in one charge, with each offense stated in a separate count, when the offenses, whether felonies or misdemeanors or both:
>
> (a) are of the same or similar character, even if not part of a single scheme or plan; or
>
> (b) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

37. "Whenever two or more offenses have been joined for trial solely on the ground that they are of the same or similar character, the defendant shall have a right to a severance of the offenses." *Id.* § 2.2(a), at 7.

38. *Id.* § 2.2(a) at 29.

39. *Id.*

suming trials in which the same factual and legal issues must be litigated."[40]

As pointed out by the commentary, joinder of separate, distinct offenses is difficult to justify on the basis of this test. Although the time spent where similar offenses are joined may be lessened by virtue of the fact that it is necessary to impanel a jury and to set the defendant's background only once, such gain is minimal when one considers that trial of each distinct offense is likely to require its own evidence and witnesses. When the possibility of the defendant being convicted by the cumulative weight of the evidence presented in such a trial is weighed against the slight gain in terms of time saved at trial, joinder of separate offenses fails to advance the state's interest to any sufficiently significant degree. In fact, as noted by Justice McCown in his dissent, separate trials on each offense may actually save the court's time in many cases because "if the defendant should be found not guilty on one count, the other counts may be prosecuted or dismissed as circumstances warrant."[41] Because the state's interest in joining separate offenses is only minimally perpetuated by such a rule, a rule on severance which protects significant constitutional rights of the defendant in a criminal proceeding would certainly seem justified.

V. CONCLUSION

Considering the obvious prejudice which results to a defendant when separate, distinct criminal offenses are joined for trial merely because they are of the "same or similar character," the negative aspects of joinder completely overshadow the slight advantage gained by the state in allowing it. Demanding that a defendant show "actual" prejudice before he will be allowed severance of the offenses joined places an unfairly heavy burden upon him. The end result is that the defendant is precluded from fully exercising his right to a fair and impartial trial at the discretion of the trial court. A test for prejudice based upon the admissibility of the evidence under the "other crimes" rule would provide a better guarantee for the rights of the defendant, while protecting the interests of the state in having a rule on joinder. Justice McCown best summed up the reasons for adopting such a test in joinder cases when he stated the following:

> It seems to me better judicial policy to grant a defendant's motion for separate trials when the only connection between the two counts is that they are both robberies or both burglaries. The pos-

40. *Id.*
41. 197 Neb. at 107, 246 N.W.2d at 874.

sibility of prejudice is obvious and the constitutional guaranty of a fair trial should not have to rest on a technical interpretation of a joinder statute. Neither should the effectiveness of the constitutional right to a fair trial be dependent upon an exercise of judicial discretion in granting or denying a motion for separate trial in a case like this.[42]

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42. *Id.*