STATE OF IDAHO)
County of KOOTENAI)ss
FILED 4/19/19
AT 3:35 O'clock P. M
CLERK, DISTRICT COURT
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO,

Plaintiff,

vs.

JORDAN AVERY ERICKSON,

Defendant.

Case No. **CR28-19-4042**

MEMORANDUM DECISION AND ORDER GRANTING PLAINTIFF'S MOTION FOR JOINDER

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO,

Plaintiff,

vs.

NATHANIEL KA WETT JONES,

Defendant.

Case No. **CR28-19-4027**

MEMORANDUM DECISION AND ORDER GRANTING PLAINTIFF'S MOTION FOR JOINDER

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY.

These two cases are before this Court on plaintiff's Motion for Joinder filed in each of these two cases on March 22, 2019. These two cases are assigned to the undersigned. That motion cited Idaho Criminal rules 8 and 13 as the legal basis, and simply stated the motion was, "based on the fact that all the cases involve the same evidence and witnesses

and in the interest of judicial economy it would be more efficient for the matters to be joined for the Jury Trial." Mot. for Joinder, 1.

The indictments in each of these two cases were filed on March 3, 2019. According to those indictments, on February 26, 2019, Jordan Avery Erickson (Erickson) and Nathaniel Ka Wett Jones (Jones), allegedly conspired with each other and with one other person (Nolan Mullen-Huber) to batter and rob Terrell Fruechtl (Fruechtl). Indictment, 1--2. Nolan Mullen-Huber (Mullen-Huber) has been similarly charged, but that case is not assigned to the undersigned, and that case is not sought to be joined. Both Erickson and Jones are charged with one count of Battery With the Intent to Commit Robbery, Idaho Code Section 18-903 and 18-911, and one count of Conspiracy to Commit Robbery, Idaho Code Section 18-6501 and 18-1701. *Id.*

The Motion for Joinder was scheduled for hearing on April 4, 2019, but at that hearing the plaintiff requested the matter be rescheduled to April 11, 2019. On April 10, 2019, counsel for Erickson filed his Objection to Plaintiff's Motion for Joinder, which simply contended in its entirety, "Mr. Erickson and Mr. Jones having opposing and conflicting interests and to try the two in the same case [sic] of action and/or before the same jury will result in undue prejudice and a violation of Mr. Erickson's right to a fair trial and due process of law." Obj. to Pl.'s Mot. for Joinder, 1–2. No other argument was made, legal or factual. On April 12, 2019, the plaintiff filed State's Brief in Support of the Motion for Joinder. At the April 11, 2019, hearing, the Court heard argument from counsel for the plaintiff, counsel for Erickson and counsel for Jones. Due to the limited legal argument that had been presented to the Court at that time, the Court gave all parties until April 17, 2019, to file memorandum on the joinder issue. On April 12, 2019, the plaintiff filed State's Brief in Support of the Motion for Joinder in the Erickson matter. On April 16, 2019, counsel for

Jones filed his Memorandum in Opposition to Joinder of Defendant's [Defendants]. On April 17, 2019, counsel for Erickson filed his Memorandum in Opposition of Motion for Joinder. Each party having filed a memorandum, the joinder issue is ready to be decided.

II. STANDARD OF REVIEW.

Whether the trial court improperly joined offenses pursuant to Idaho Criminal Rule 8 is a question of law, over which the appellate court exercises free review. *State v. Field*, 144 Idaho 559, 564, 165 P.3d 273, 278 (2007). "In contrast, an abuse of discretion standard is applied when reviewing the denial of a motion to sever joinder pursuant [Idaho Criminal Rule] 14; however, that rule presumes joinder was proper in the first place." *Id.* at 564–65, 165 P.3d at 278–79. To determine whether the trial court abused its discretion, the appellate court considers: "whether the lower court correctly perceived the issue as one of discretion, acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it, and reached its decision by an exercise of reason." *State v. Williams*, 163 Idaho 285, 293, 411 P.3d 1186, 1194 (Ct. App. 2018), review denied (Feb. 15, 2018) (citing *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989)). This is now a four part test under *Lunneborg v. My Fun Life*, 163 Idaho 856, 863-64, 421 P.3d 187, 194-95 (2018).

III. ANALYSIS.

Idaho Criminal Rule 8(b) reads:

> **Joinder of Offenses and of Defendants. (b) Joinder of Defendants.** Two or more defendants may be charged on the same complaint, indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. The defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Idaho Criminal Rule 13 reads:

Trial Together of Complaints, Indictments and Informations
The court may order that two or more complaints, indictments or informations be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single complaint, indictment or information. The procedure is the same as if the prosecution were under a single complaint, indictment or information.

Counsel for Erickson claims there are issues under *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1970). Mem. in Opp'n of Mot. for Joinder, 4–5. Counsel for Erickson argues *Bruton* "protects a defendant from incriminating out-of-court statements of a co-defendant being used against him in a joint trial where the co-defendant does take the stand and thereby becomes subject to cross-examination. *State v. Gamble*, 146 [Idaho] 331, 337 [193 P.3d 878, 885] (Ct. App. 2008)." *Id.*, 4. While counsel for Erickson has correctly quoted that specific phrase of the *Gamble* decision, counsel for Erickson is either misreading *Bruton* or misunderstanding *Bruton*. Counsel for Erickson expresses concern that Jay may testify that "Mullen told him [Jay] got on top of the complaining witness [Fruechtl] and started beating him. Tr. P. 49 line 25 and p. 50 lines 1-3." *Id.*

As mentioned in *State v. Bean*, 109 Idaho 231, 233, 706 P.2d 1342, 1344 (1985), "*Bruton* pertains to situations where the confessing co-defendant does not take the stand and the implicated co-defendant does not have the opportunity to confront or cross-examine." The Court has reviewed the transcript of the March 13, 2019, grand jury proceedings. At the grand jury, the alleged victim Fruechtl testified, as did Mullen-Huber's roommate Zachary Jay (Jay). The Court finds that there is no evidence at present that either Erickson or Jones have made a confession.

Jones' attorney makes the following argument:

FACTS

Terrel Fruechtl reported being beaten up by three men. In his report to the police, he indicated he could identify one of his attackers as

Mullen-Huber because he recognized Mullen-Huber's voice. The faces of all three men were obscured and Fruechtl could not identify the other two men. Some period of time after the attack Zachary Jay contacted the police and indicated his roommate Mullen-Huber had made admissions/confessions to him that he had pistol whipped a man. Mullen-Huber implicated Erickson and Jones in the crime. Upon further questioning by a Detective at a latter time, Jay indicated that Erickson and Smith had made admissions/confessions to being involved in the crime along with the others.

ARGUMENT

Obviously, the alleged statements to Jay implicate the right to confrontation as articulated by the Supreme Court in *Bruton v. U.S.* 391 U.S. 123 (1968). The statements of the Defendants' which are not their own are prejudicial and inadmissable against that defendant. In it's argument, the State indicates that there are no confessions/admissions, this is only accurate if the State does not produce the alleged statements made to Mr. Jay in the State's case.

CONCLUSION

The procedural history makes the joinder of Mullen-Huber impossible with the trial of Mr. Jones; further, Mullen-Huber's alleged statements to Jay would make such a joinder unconstitutional. The alleged statements to Mr. Jay by Erickson preclude a fair trial for Mr. Jones if his trial is joined with Erickson.

Mem. in Opp'n to Joinder of Defs., 1–2. Jones' attorney also misreads or misunderstands *Bruton*. At the grand jury, Jay testified that Mullen-Huber, Erickson and Jones (and two females) left Jay's apartment, then came back about two hours later. Tr. 46. L. 25 – 48, L. 4. Jay testified:

> Q. Did —— when they came back, did a number of them make statements about where they had just been?
> A. Uh, yeah, no, they all came back very – I would say on adrenaline. They were all super-excited what they had just done. Um, I was not.
> Q. So I want to break it up into what anybody said when they came back in that particular state and who they were.
> A. Um—hmm.
> Q. Did you hear Mr. Mullen-Huber make any statements about what had happened when he was gone?
> A. Uh, yeah no. He, uh -- he came in, and he was super pumped about it. I guess he had gone to meet up with ——
> Q. Tell me what he -- what you remember him saying.
> A. Yeah, uh, no, so he came up to me, and he was like, "Hey, Zach," and I was, like, "Yeah." He was, like, "Guess what I just did," and I'm, like, "What did you just do?" He's, like, "I just pistol-whipped a kid," and I looked at him and I'm, like, "You did what?" And he's, like, "I pistol-

> whipped him." I was, like, "Why?" He's, like, "He owed me a thousand bucks from three years ago," and I was, like, "That's a really long grudge, dude," and he's, like, "Well yeah, but I'm ——" he's like, "But I got it back," and I was like -- I was like, "Okay, so what did you do," and he's, like —— and then he proceeded to tell me what he did, and he's, like, uh —— he's, like, "I went up to, uh, the view." I guess the view is a popular hangout spot for teenagers. I've never been there so obviously it's not too popular, but, um, I was —- yeah, he's, like, "I went up to the view," and he's, like, "This kid thought he was —— he was gonna, like, meet up with a girl there." I was like, "Oh, okay, cool," and he's, like, "Yeah, but instead we waited for him to get out of his car and he was smoking a cigarette and we all walked up and then we decided to gang beat him," and then Nolan went into tell me the details about it, um, about how they walked up to him, and they told him that -- that he needed -- that he should put his cigarette down and how they grabbed him and then pistol—whipped him and then threw him to the ground, and then Jordan [Erickson] got on top of him and then continually beat Terrell in the face with his fists, and then as they were -- and then Jordan got off of him, and then they told him to, uh, take his clothes off. As he continued to do so, they continued to either pistol—whip him or throw more punches on top of him, kind of laying on a beating that was unnecessary in my eyes to begin with, but they just continued to brag about how they ——

Tr. 48, L. 8 - 50, L. 7. From this testimony, Mullen-Huber is obviously implicated by Jay's testimony, and the use of the word "they" implicates other people, as does the fact that Erickson and Jones left with Mullen-Huber and returned with Mullen-Huber when Mullen-Huber related his exciting story to Jay. Erickson is obviously implicated by Jay's re-telling of what Mullen-Huber told him. However, as stated above, neither Erickson nor Jones have made a statement that implicates either himself or the other. Therefore, because there has been no confession by either Erickson or Jones, *Bruton* is not implicated in this matter.

The United States Supreme Court in *Bruton* stated the precise inquiry in that case: "This case presents the question, last considered in *Delli Paoli v. United States*, 352 U.S. 232, 77 S.Ct. 294, 1 L.Ed.2d 278, whether the conviction of a defendant at a joint trial should be set aside although the jury was instructed that a codefendant's confession inculpating the defendant had to be disregarded in determining his guilt or innocence." 391

U.S. at 123--24. Bruton and Evans were both criminal defendants in a joint trial for armed postal robbery. *Id.* at 124. "A postal inspector testified that Evans orally confessed to him that Evans and petitioner committed the armed robbery." *Id.* Both Evans and Bruton were convicted; the trial judge set aside Evans' conviction on the ground that his oral confession could not be used against him. "However, the [trial] court, relying upon *Delli Paoli*, affirmed petitioner's [Bruton's] conviction because the trial judge instructed the jury that although Evans' confession was competent evidence against Evans it was inadmissible hearsay against petitioner and therefore had to be disregarded in determining petitioner's guilt or innocence. 375 F.2d, at 361—363." *Id.* The United States Supreme Court then discussed whether a limiting instruction cures the problem, and found it did not. The United States Supreme Court wrote:

> In joint trials, however, when the admissible confession of one defendant inculpates another defendant, the confession is never deleted from the case and the jury is expected to perform the overwhelming task of considering it in determining the guilt or innocence of the declarant and then of ignoring it in determining the guilt or innocence of any codefendants of the declarant. A jury cannot 'segregate evidence into separate intellectual boxes.' * * * It cannot determine that a confession is true insofar as it admits that A has committed criminal acts with B and at the same time effectively ignore the inevitable conclusion that B has committed those same criminal acts with A.
>
> In addition to [Justice] Jackson [in *Delli Paoli*] , our action in 1966 in amending Rule 14 of the Federal Rules of Criminal Procedure also evidences our repudiation of *Delli Paoli's* basic premise. Rule 14 authorizes a severance where it appears that a defendant might be prejudiced by a joint trial. The Rule was amended in 1966 to provide expressly that '(i)n ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.' The Advisory Committee on Rules said in explanation of the amendment:
>
> > 'A defendant may be prejudiced by the admission in evidence against a co-defendant of a statement or confession made by that co-defendant. This prejudice cannot be dispelled by cross-examination if the co-defendant does not take the stand. Limiting instructions to

> the jury may not in fact erase the prejudice. * * *
> 'The purpose of the amendment is to provide a procedure whereby the issue of possible prejudice can be resolved on the motion for severance. * * *'

Id. at 131-32.

Erickson and Jones are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting the offense or offenses. *See* ICR 8(b). Therefore, Erickson and Jones may be tried together since they, and the offenses they have been charged with, could have been joined in a single complaint, indictment or information. *See* ICR 13.

Neither Erickson nor Jones have made a confession which has been brought to the attention of the Court. Neither Erickson nor Jones have made a statement which has been brought to the attention of this Court. While Mullen-Huber has made statements to Jay, *Bruton* is not implicated because Mullen-Huber is not going to be tried along with Erickson and Jones. If Jay testifies (in the joint trial of Erickson and Jones) that Mullen-Huber told him (Jay) that "Jordan [Erickson] got on top of him and then continually beat Terrell in the face with his fists, and then as they were -- and then Jordan got off of him, and then they told him to, uh, take his clothes off", *Bruton* is not implicated.

If, between now and trial, it comes to light that either Ericson or Jones have made a confession which implicates the other, or a statement which implicates the other, then there may be a *Bruton* issue. However, at present no such issue has been brought to the Court's attention.

The Court appreciates that this is a matter committed to its discretion, the Court believes it is acting within the bounds of that discretion, the Court is acting consistently with the legal standards applicable to the specific choices available to it, and has reached its decision by the exercise of reason. *Lunneborg,* 163 Idaho at 863-64, 421 P.3d at 194-95.

IV. ORDER.

IT IS HEREBY ORDERED THAT plaintiff's Motion for Joinder is GRANTED, but only as to a joint trial. The jury trial currently set in both cases to begin on May 20, 2019, will be a joint trial. The attorneys are directed to continue to make all filings in their own respective case. In other words, this case will not proceed forward as one case from this moment on, and counsel in one case are not required to copy counsel in the other case on anything they might file in their own respective case (though they are encouraged to do so out of professional courtesy).

DATED this 19th day of April, 2019

JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of April, 2019 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Jed Nixon, defense attorney for Erickson
Jonathan Hull, defense attorney for Jones
Deputy Prosecuting Attorney – Arthur Verharen

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY:_____
Deputy