ADVANCE SHEET HEADNOTE
May 6, 2024

2024 CO 26

No. 22SC520, *Washington v. People*—Joinder or Severance of Counts—Standards of Reversal—Harmless Error Review.

The supreme court holds that the improper joinder of charges is a trial error that requires nonconstitutional harmless error review. The supreme court further holds that *Norman v. People*, 496 P.2d 1029 (Colo. 1972), did not announce a rule of automatic reversal for erroneous joinder, so it was not overruled by the limitation of automatic reversal described in *People v. Novotny*, 2014 CO 18, 320 P.3d 1194. In Washington's case, the supreme court assumes without deciding that joinder was erroneous but holds that it was harmless. Thus, the judgment of the court of appeals is affirmed, albeit on slightly different grounds.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2024 CO 26

Supreme Court Case No. 22SC520
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 19CA1332

Petitioner:

Joseph Wayne Washington,

v.

Respondent:

The People of the State of Colorado.

Judgment Affirmed
en banc
May 6, 2024

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JUSTICE HART delivered the Opinion of the Court, in which **CHIEF JUSTICE BOATRIGHT**, **JUSTICE MÁRQUEZ**, **JUSTICE HOOD**, **JUSTICE GABRIEL**, **JUSTICE SAMOUR**, and **JUSTICE BERKENKOTTER** joined.

JUSTICE HART delivered the Opinion of the Court.

¶1 This case requires us to determine whether the improper joinder of charges is structural error requiring reversal of a criminal conviction or trial error that can be reviewed for harmless error. Joseph Wayne Washington argues that we answered this question more than fifty years ago in *Norman v. People*, 496 P.2d 1029 (Colo. 1972), and that he is entitled to reversal of his convictions because his charges for murder, drug possession, witness tampering, violation of a protection order, and solicitation of murder should not have been tried together.

¶2 We now clarify that *Norman* did not create a rule of automatic reversal and that harmless-error review applies to misjoinder. And we conclude that if there was any error in joining the various charges in Washington's case, that error was harmless. We accordingly affirm the division's decision, albeit on slightly different grounds.

I. Facts and Procedural History

¶3 In August 2017, Joseph Washington; his girlfriend, Samantha Grat; and Jackson Chavez attended a barbecue in Cherry Creek State Park hosted by Washington's friend, Jason Pope. After Chavez grabbed a woman during an argument, Pope and Washington approached him and asked him to leave. Chavez swung at them, clipping Washington and either dazing Pope or knocking him unconscious. Washington turned and walked about twenty feet away to retrieve

a handgun from a backpack. Washington turned back, and when he was about ten feet away, shot Chavez twice in the chest. Chavez died.

¶4 Washington and Grat left the park and went to Washington's home in Aurora, where they packed the backpack from the park and a second backpack with changes of clothes and an assortment of drugs. Washington contacted two friends to whom he had sold drugs in the past to help with the couple's flight. One friend drove Washington and Grat around on the evening of the murder and the next day. The other friend accepted some cocaine from Washington in exchange for booking the couple a hotel room downtown, where Washington and Grat stayed that night. The next morning, the police intercepted Washington at a gas station and arrested him. He was charged with first degree murder and placed under a protection order that prohibited him from having contact with any witness to the murder, including Grat.

¶5 Upon searching the backpacks and Washington's home and car, the police found a variety of drugs and drug distribution paraphernalia. The prosecution amended the complaint against Washington to include eleven counts of possession of a controlled substance with the intent to sell or distribute.

¶6 While he was in custody awaiting trial, Washington called Grat and wrote her a letter encouraging her to "play dumb" in her interactions with the police.

The prosecution added charges of violation of a protection order and witness tampering to the complaint.

¶7 During the pretrial period, a jailhouse informant accused Washington of offering drugs or drug money to two fellow inmates if they would kill Grat to keep her from testifying.[1] The prosecution amended the complaint a final time to add two counts of solicitation of murder.

¶8 Before trial, Washington moved to sever the charges into four cases. He argued that keeping them consolidated in one trial violated Colorado Rule of Criminal Procedure 8(a)(2) because the types of charges against him were varied and the evidence required to prove them did not sufficiently overlap. He further argued that he was entitled to a discretionary severance under Colorado Rule of Criminal Procedure 14 because trying all the charges together would cause a jury to make prejudicial character inferences that would blur the distinctions between the different charges. The trial court disagreed, ruling that joinder was proper under Rule 8 because all seventeen charges were "part and parcel . . . of the same incident" and "interrelated and interconnected in a number of ways." The court did not grant a discretionary severance under Rule 14.

[1] Grat was not killed, and she did testify for the prosecution at trial.

¶9 The case proceeded to one trial on charges of homicide, drug possession, violation of a protection order, witness tampering, and murder solicitation. Washington did not testify at trial, but argued through counsel that he shot Chavez in self-defense and that the drugs did not belong to him. The jury found Washington guilty of second degree murder, ten drug possession counts, violation of a protection order, and witness tampering. He was acquitted of first degree murder, one of the drug possession counts, and the murder solicitation charges.

¶10 Washington appealed, arguing that his convictions should be reversed because he was prejudiced by misjoinder under Rule 8(a)(2). He cited *Norman* for the proposition that misjoinder requires automatic reversal. He also argued that, even if joinder did not violate Rule 8, the trial court's refusal to grant a severance under Rule 14 was an abuse of discretion.

¶11 A division of the court of appeals affirmed Washington's conviction, concluding that if *Norman* did lay out a rule of automatic reversal for misjoinder, it had been overruled by *People v. Novotny*, 2014 CO 18, 320 P.3d 1194. *People v. Washington*, 2022 COA 62, ¶ 3, 517 P.3d 706, 708. In *Novotny*, this court announced: "[W]e overrule our prior holdings to the contrary and conclude . . . that reversal of a criminal conviction for other than structural error, in the absence of express legislative mandate or an appropriate case specific, outcome determinative analysis, can no longer be sustained." ¶ 2, 320 P.3d at 1196.

¶12 The division determined that misjoinder is not structural error, so without an "express legislative mandate" to the contrary—which does not exist—misjoinder requires the same harmless-error review that applies to other trial errors. *Washington*, ¶¶ 23, 30, 517 P.3d at 710. The division then assumed, without deciding, that there had been a Rule 8 misjoinder in Washington's case, and it proceeded to apply harmless-error review. *Id.* at ¶ 20, 517 P.3d at 709. It found that misjoinder was harmless because the evidence against Washington was "overwhelming," the jury had been properly instructed to consider the charges separately, and the split verdict indicated that misjoinder did not contribute to the outcome of the case. *Id.* at ¶¶ 33–55, 517 P.3d at 711–14. The division also assumed, without deciding, that the trial court had abused its discretion by refusing to sever under Rule 14. *Id.* at ¶ 57, 517 P.3d at 714. It found that error harmless, too, for the same reasons that applied to the assumed Rule 8 error. *Id.* at ¶¶ 56–59, 517 P.3d at 714–15.

¶13 Washington petitioned this court for review, and we granted certiorari to determine whether (1) *Novotny* implicitly overruled *Norman*, (2) misjoinder requires harmless-error review rather than automatic reversal, and (3) the trial court's consolidation of the murder and drug charges was erroneous.[2]

[2] Specifically, we granted certiorari to review:

II. Analysis

¶14 All the issues presented in this case are questions of law, which we review de novo. *Howard-Walker v. People*, 2019 CO 69, ¶ 22, 443 P.3d 1007, 1011. We assess the issues in the order presented to us and conclude that (1) *Norman* did not establish a rule of automatic reversal for improper joinder; (2) misjoinder is a nonstructural, nonconstitutional error that requires a harmless-error standard of reversal; and (3) any misjoinder in Washington's case was harmless.

A. *Novotny* Did Not Overrule *Norman* Because *Norman* Did Not Announce a Rule of Automatic Reversal

¶15 *Norman* involved facts so unusual that it is hard to draw much from the opinion for future cases. In *Norman*, two fraudulent schemes were joined and tried together, even though they involved different defendants, occurred on different dates, and alleged entirely distinct factual circumstances. 496 P.2d at 1030. The only similarity between the two schemes was the identity of the victims. *Id.* Moreover, the district attorney moved to amend the original information—which

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1. [REFRAMED] Whether the court of appeals erred in holding that *People v. Novotny*, 2014 CO 18, 320 P.3d 1194, implicitly overruled *Norman v. People*, 496 P.2d 1029 (Colo. 1972).
2. [REFRAMED] Whether the court of appeals erred in utilizing a harmless-error standard of reversal for the misjoinder of charges for trial.
3. [REFRAMED] Whether the trial court erred in consolidating petitioner's murder charge with his drug-related charges.

charged only one of the schemes—to add the second scheme just a week before trial. *Id.* This court reversed the convictions, holding that joinder was inappropriate under Rule 8 and that the trial court's refusal to sever had "breached the constitutional concepts of fundamental fairness." *Norman*, 496 P.2d at 1030.

¶16 In reaching this conclusion, we noted that the trial raised numerous additional concerns, including the prosecuting district attorney's failure to disqualify himself even though he was being sued in a civil action by some of the defendants. *Id.* at 1031. But we declined to go into detail about other irregularities, concluding that it "would serve only to unnecessarily lengthen this opinion, and would not be of any precedential value." *Id.*

¶17 Ultimately, *Norman* included almost no fact-specific analysis and nothing resembling a harmless-error assessment. It did not announce or apply a general rule of automatic reversal. *Norman* did make the uncontroversial statement that "[a] fair trial is necessary to satisfy [the] due process requirements of the federal and state constitutions." *Id.* at 1030. Beyond that, the opinion carefully limited itself to its facts, requiring reversal "under such circumstances" and "on the combination of counts above set forth." *Id.* In other words, the misjoinder that occurred in *Norman* was so erroneous that it amounted to a breach of due process, and we reversed the convictions in that case accordingly. We did not hold that every misjoinder requires automatic reversal. *Norman* was therefore unaffected

by our opinion in *Novotny*, which explicitly overruled our prior precedents that required a standard of automatic reversal "for other than structural error." *Novotny*, ¶ 27, 320 P.3d at 1203.

B. Misjoinder Is Reviewed for Harmless Error

¶18 We have never directly confronted the question of whether the erroneous joinder of claims is structural error requiring reversal or whether it is subject to harmless-error review. Today we do, and we conclude that misjoinder does not belong among the small number of errors that require automatic reversal because it does not seriously impair "the framework within which the trial proceeds." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). Instead, misjoinder is like other errors whose impact on the trial outcome can be assessed by a reviewing court.

¶19 Structural errors are constitutional errors that require automatic reversal of a conviction because they are so poisonous to the entire trial process that the extent to which they affected the verdict cannot be determined. *Hagos v. People*, 2012 CO 63, ¶ 10, 288 P.3d 116, 119. The short list of errors that have been recognized as structural includes the complete deprivation of counsel, a trial before a biased judge, and the unlawful exclusion of people of the defendant's race from a grand jury. *Id.*

¶20 The U.S. Supreme Court rejected the argument that misjoinder of defendants was always reversible error—i.e., was structural error—in *United*

States v. Lane, 474 U.S. 438 (1986).[3] In *Lane*, the defendants argued that they had been impermissibly tried together on mail fraud charges in violation of Federal Rule of Criminal Procedure 8(b). *Id.* at 442. They urged the Court to adopt the view held by most federal circuits at the time that misjoinder required reversal because it "is inherently prejudicial." *Id.* at 444 (quoting *United States v. Lane*, 735 F.2d 799, 804 (5th Cir. 1984)).

¶21 The Supreme Court rejected this argument, concluding that harmless-error review was more appropriate than a standard of automatic reversal, in part because "the specific joinder standards of [federal] Rule 8 are not themselves of constitutional magnitude." *Id.* at 446. The Court observed that "misjoinder would rise to the level of a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial." *Id.* at 446 n.8. This is the type of severe misjoinder that happened in *Norman*, where the defendants were deprived of due process. *Norman*, 496 P.2d at 1030. Short of that level of constitutional violation, the *Lane* Court held that misjoinder requires reversal only if it "results in actual prejudice because it 'had substantial and

[3] The term "structural error" had not yet been used when *Lane* was decided; that term was introduced in the early 1990s. *Fulminante*, 499 U.S. at 290 (using the term "structural defect"); *see also Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 896 (1991) (Scalia, J., concurring in part and concurring in the judgment) (using the term "structural error" for the first time).

injurious effect or influence in determining the jury's verdict.'" *Lane*, 474 U.S. at 439 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). In other words, unless it amounts to a due process violation, misjoinder is a non-structural error that requires nonconstitutional harmless-error review.[4]

¶22 We find the Supreme Court's analysis of misjoinder under Federal Rule of Criminal Procedure 8 persuasive and reach the same conclusion in considering improper joinder under Colorado's Crim. P. 8.

¶23 Washington points out that his case is about the joinder of *charges*, whereas *Lane* was a case about the joinder of *defendants*. He argues that misjoinder of charges is a structural error distinct from the nonstructural misjoinder of defendants. We are not persuaded. Misjoinder of charges does not "defy analysis by 'harmless-error' standards" in the same way that structural errors infect "the entire conduct of the trial from beginning to end." *Fulminante*, 499 U.S. at 309–310. In a case like Washington's, the extent of harm caused by the misjoinder can be estimated by examining the record and applying reasoning commonly employed in assessing evidentiary questions. Trial courts deciding the admissibility of

[4] Washington urges us, as an alternative, to find that constitutional harmless-error review should apply to misjoinder. Under that standard, a conviction will be reversed unless the prosecution can prove, beyond a reasonable doubt, that the error was harmless. *Hagos*, ¶ 11, 288 P.3d at 119. But constitutional harmless-error review only applies to "errors of constitutional dimension." *Id.* Misjoinder is not, except in rare circumstances, such an error.

evidence under, for example, CRE 403 or CRE 404(b), regularly make judgments about whether a jury can hear a given piece of evidence for its proper purpose while keeping separate issues appropriately cordoned off from one another. In harmless-error analysis, a reviewing court applies a similar assessment, considering factors like evidentiary cross-admissibility, the appropriateness of jury instructions, and whether there is any indication that the jury blended the issues in considering their verdict. Indeed, that is precisely the type of assessment the division conducted when Washington appealed his conviction.

¶24 In short, misjoinder is not a structural error, and the division correctly applied a harmless-error standard of reversal to the misjoinder of Washington's charges.

C. Any Misjoinder Here Was Harmless

¶25 We, like the division, will assume without deciding that joinder of the drug charges and the murder charges was error. We then determine whether it was harmless; that is, whether "there is no reasonable probability that it contributed to the defendant's conviction." *Crider v. People*, 186 P.3d 39, 42 (Colo. 2008). Harmlessness is a case-by-case, totality-of-the-circumstances assessment that includes not only the strength of the evidence supporting the verdict but also the nature of the error and its potential prejudice. *Id.* at 43.

¶26 Washington argues that evidence about the drug charges prejudiced the jury against his self-defense claim. He notes that drugs are commonly associated with violence and that one of the drugs at issue in this case is specifically associated with date rape. He argues that when the jury was considering whether he shot Chavez in self-defense, its decision was influenced by the drug evidence and by the prosecution's references to him as a "large scale poly drug" distributor. In other words, the drug evidence caused the jury to infer that Washington had a criminal character and to conclude that he shot Chavez aggressively rather than in self-defense. Washington asserts that if separate trials had been held for the drug and homicide charges, (1) information about the drugs found in his home, car, and backpacks would have been irrelevant, and therefore inadmissible, in the homicide case; and (2) the prosecution would not have been able to refer to drugs in their characterizations of him.

¶27 As the division noted, evidence does not have to be cross-admissible for joinder to be appropriate. *Washington*, ¶ 32, 517 P.3d at 711*; see also Bondsteel v. People*, 2019 CO 26, ¶ 44, 439 P.3d 847, 854. Moreover, any misjoinder here was still harmless for three reasons: (1) the evidence against Washington on each of the charges was overwhelming; (2) the jury was properly instructed to consider the charges separately; and (3) the split verdict indicated that misjoinder did not contribute to the convictions.

¶28 The evidence at trial established that Chavez was not carrying a weapon, Washington turned away from Chavez and walked to his backpack to retrieve the handgun, and Washington then turned back toward Chavez before shooting him from a distance of ten feet. Washington argues, accurately, that an aggressor's fists can be deadly weapons. *See People v. Ross*, 831 P.2d 1310, 1313 (Colo. 1992) ("[F]ists may be deadly weapons if in the manner they are used or intended to be used they are capable of producing death or serious bodily injury."), *abrogated on other grounds by Montez v. People*, 2012 CO 6, ¶ 16, 269 P.3d 1228, 1231. And at trial, there was conflicting evidence about whether Chavez continued to pursue Washington even after the gun was in view.

¶29 But the evidence against Washington's self-defense claim was more than sufficient to support his second degree murder conviction. Washington had time to walk away and retrieve the gun before turning toward Chavez and shooting him from a short distance. Chavez may or may not have been approaching Washington at the time he was shot, but Washington is the one who introduced a weapon into an altercation that had, until that point, been a very brief fistfight.

¶30 Washington argues that acquittal under a theory of self-defense would not have been unreasonable, and that the drug-related evidence may have caused the jury to make unfair inferences about him. But the existence of a plausible

affirmative defense is not enough to show that misjoinder "substantially influenced the verdict," as harmless-error review requires.

¶31 Moreover, the trial court properly instructed the jury to consider each charge separately. The jury was instructed that "[e]ach count charges a separate and distinct offense, and the evidence and the law applicable to each count should be considered separately, uninfluenced by your decision as to any other count." Absent evidence to the contrary, we presume the jury understood and followed the court's instructions. *Leonardo v. People*, 728 P.2d 1252, 1255 (Colo. 1986). That presumption may be rebutted, however, if the jury affirmatively shows that it has fundamentally misunderstood an instruction, indicating "that it does not understand an element of the offense charged or *some other matter of law central to the guilt or innocence of the accused*." *Id.* at 1256 (emphasis added).

¶32 For example, in *Leonardo*, the presumption of jury understanding was rebutted when the deliberating jury asked the trial judge to clarify the meaning of the mens rea of the offense. *Id.* at 1254. The jury asked whether "suspecting" satisfied the requirement that the defendant acted with the required mental state of "knowing or believing"; this demonstrated a fundamental misunderstanding of the elements of the offense. *Id.* at 1254–56. By contrast, we have found that the presumption is *not* rebutted when the jury asks a question related to a factual or

evidentiary issue rather than a legal issue. *Boothe v. People*, 814 P.2d 372, 375 (Colo. 1991).

¶33 In this case, jurors submitted several drug-related questions for witnesses who had been called for the purpose of testifying about the homicide. They asked Grat about the extent of her knowledge of the whereabouts of Washington's drugs on the day of the homicide, whether she worked with Washington in his drug distribution efforts, and whether she and Washington were "high on drugs" when they went to the park. They asked Pope whether Washington supplied him with drugs. Washington argues that those questions demonstrated that the jurors were struggling to keep the drug charges separate from the homicide charge. The division disagreed, holding that the questions were relevant and simply indicated that the jurors were engaged in the trial. *Washington*, ¶ 54, 517 P.3d at 714.

¶34 We agree that these questions demonstrate juror engagement rather than confusion. The jurors' questions were raised while the witnesses were testifying. So even if the questions indicate some early tendency to blur the issues, that tendency was addressed before the jury deliberated, when the court issued its "separate and distinct offense" instruction. Further, these factual questions do not relate to "an issue central to the determination of guilt or innocence," and they do not rebut the presumption of jury understanding because they do not

"affirmatively indicate[] that [the jury] has a fundamental misunderstanding of an instruction it has been given." *Leonardo*, 728 P.2d at 1255.

¶35 A final reason for finding any misjoinder harmless is that the jury issued a split verdict, acquitting Washington of some charges while convicting him of others. Specifically, the jury chose a lesser degree of murder, acquitted Washington of one of the drug charges, and acquitted him of soliciting murder. While a split verdict does not conclusively decide the harmlessness question, it is "an indication that the jurors exercised some discretion in their deliberations" and that the error did not cause them to "blindly convict the defendant." *Martin v. People*, 738 P.2d 789, 795–96 (Colo. 1987).

¶36 Considered in combination with the strength of the evidence against Washington and the presumption that the jury understood and applied the trial court's "separate and distinct charges" instruction, the split verdict lends additional support for the conclusion that any misjoinder was harmless.

D. Denial of a Rule 14 Severance Was Not an Abuse of Discretion

¶37 Crim. P. 14 provides that if either the defendant or the prosecution would be prejudiced by joinder of offenses, "the court *may* order . . . separate trials of counts." (Emphasis added.) We will overturn a court's refusal to sever charges into multiple proceedings only for an abuse of discretion. *People v. Pickett*, 571 P.2d 1078, 1082 (Colo. 1977). The discretionary nature of a Rule 14 decision creates a

high bar for a defendant hoping for reversal. The defendant bears the burden of demonstrating (1) "actual prejudice" caused by the joinder and (2) "that the trier of fact was unable to separate the facts and legal principles applicable to each offense." *Bondsteel*, ¶ 59, 439 P.3d at 856. Washington has not met this burden.

¶38 We explained above that even if joinder in this case was erroneous under Rule 8, it was harmless. A trial court's decision that is harmless is, naturally, not prejudicial.[5] Here, the evidence against Washington was more than sufficient to support the guilty verdicts; he did not show "actual prejudice." *Bondsteel*, ¶ 59, 439 P.3d at 856. And the jury instructions and split verdict indicate that the jury was able to separate the issues.

¶39 We therefore conclude that the trial court did not abuse its discretion when it refused Rule 14's offer of a discretionary severance because joinder was not prejudicial.

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[5] The division assumed, without deciding, that the trial court's refusal to sever the charges under Rule 14 was an error. *Washington*, ¶ 57, 517 P.3d at 714. In other words, the division assumed that the court should have exercised its discretion to sever the charges because joinder was prejudicial. The division then proceeded to hold that the error was harmless. *Id.* at ¶ 59, 517 P.3d at 715. This implies that there can be a harmless prejudicial error. To avoid that conclusion, we have reviewed the trial court's Rule 14 decision for an abuse of discretion rather than assuming error.

III. Conclusion

We affirm the judgment of the court of appeals, albeit on slightly different grounds: *Novotny* did not overrule *Norman* because *Norman* did not announce a rule of automatic reversal. Harmless-error review applies to misjoinder, and any error in this case was harmless.