STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 KA 0534

STATE OF LOUISIANA

VERSUS

TERRY J. DAVIDSON

Judgment Rendered: November 9, 2011

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On Appeal from the
22nd Judicial District Court,
In and for the Parish of St. Tammany,
State of Louisiana
Trial Court No. 499511

Honorable William J. Burris, Judge Presiding

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BEFORE: CARTER, C.J., PARRO, AND HIGGINBOTHAM, JJ.

HIGGINBOTHAM, J.

Defendant, Terry J. Davidson, a/k/a James Allen Couch, was charged by felony bill of information with first degree robbery and unauthorized entry of an inhabited dwelling, violations of La. R.S. 14:64.1 and 14:62.3, respectively. The bill of information jointly charged Andrea Matherly with the same offenses. After defendant pled not guilty, he was scheduled to be tried jointly with Matherly. On the date set for trial, defendant filed a motion to sever and to order that Matherly be tried first so that she would be available to testify on his behalf at his subsequent trial. The trial court granted the portion of the motion requesting severance, but denied the request that the state be ordered to try Matherly first.

Thereafter, pursuant to a plea agreement, defendant withdrew his not guilty pleas and entered pleas of guilty as charged to both counts, reserving the right to appeal, pursuant to **State v. Crosby**, 338 So.2d 584 (La. 1976), the trial court's denial of his request that his codefendant be tried first.[1] In accordance with the plea agreement, the trial court sentenced defendant to twenty-eight years at hard labor, without benefit of parole, probation, or suspension of sentence, for the first degree robbery and a concurrent sentence of six years at hard labor for the unauthorized entry into an inhabited dwelling. The state also agreed not to file a habitual offender bill of information against defendant. Defendant now appeals, alleging as his sole assignment of error that the trial court erred in refusing to order that his codefendant be tried before him. For the following reasons, we affirm defendant's convictions and sentences.

FACTS

Since defendant pled guilty following defense counsel's stipulation that a

[1] At the same time that defendant entered his guilty pleas, Matherly also pled guilty to first degree robbery. The trial court sentenced her to twenty-eight years at hard labor, without benefit of parole, probation, or suspension of sentence. Additionally, the state dismissed the charge against her for unauthorized entry of an inhabited dwelling.

factual basis existed for the pleas, the facts surrounding the instant offenses were not fully developed. The following facts are derived from a police report introduced into evidence by defense counsel at the hearing on defendant's motion to sever and to order his codefendant to be tried first.

On October 28, 2010, a white female gave a teller at the Citizens Savings Bank in Covington, Louisiana, a note stating, "This is a robbery. I have a gun." The woman placed the money the teller gave her into her purse and left the bank. The bank manager followed her to an area behind a nearby Auto Zone store and observed her getting into a vehicle driven by a white male, which then left the scene. The vehicle was stopped by the police a short while later, and defendant and Matherly were identified by the bank manager as the individuals he had observed. Additionally, the money stolen from the bank was recovered.

In her initial statement to the police, Matherly claimed that defendant, her boyfriend, did not know she intended to rob the bank. She said she merely told him to park at the Auto Zone while she went into the bank to apply for a loan. When detectives questioned her about defendant's entering the bank prior to her, she insisted that he had not done so and had nothing to do with the robbery.

However, later in the interview, she gave an entirely different account. She indicated that after she had earlier unsuccessfully attempted to rob a bank in Hammond, defendant told her that "he would rob the next bank." Further, she stated that defendant had entered the bank in Covington, but returned saying that he could not rob the bank because he loved his kids too much. He had a note in his possession that he had written inside the bank. At that point, Matherly cursed at defendant and said she would rob the bank.

After robbing the bank, Matherly jumped into the car and told defendant to drive. They were both unfamiliar with Covington, and drove around attempting to avoid the police. At one point, defendant entered a residence without permission,

purportedly to ask for gas because his gas tank was empty. That incident formed the basis of the charge against him for unauthorized entry of an inhabited dwelling.

In his own statement to the police, defendant admitted entering the Citizens Savings Bank and writing a note on a deposit slip indicating it was a robbery. Nevertheless, he denied having any intention of actually robbing the bank. He claimed he told Matherly he would do so just to make her be quiet. According to defendant, he merely returned to the car after writing the note and advised Matherly that it was not a good idea to rob the bank because there were too many people inside. Defendant claims he drove off, but that Matherly demanded that he return to the Auto Zone so that she could go rob the bank.

ASSIGNMENT OF ERROR

In his sole assignment of error, defendant contends that the trial court erred in denying his motion to have his codefendant tried first, since that was the only means of preserving his constitutional right to confrontation and to present a defense. Specifically, defendant argues that, had Matherly been tried before he was, he could have compelled her testimony at his subsequent trial, because then there no longer would have been any basis for her to assert her Fifth Amendment right against self-incrimination. Defendant further asserts that Matherly's testimony would have exculpated him by showing that she was the instigator of the robbery, that he initially was unaware of her intentions, and that he expressed reluctance to complete the robbery.

Under Louisiana law, the district attorney has entire charge and control of every criminal prosecution instituted or pending within his district, and determines whom, when, and how he shall prosecute. See La. Const. art. V, § 26(B); La. R.S. 16:1(B); La. Code Crim. P. art. 61; **State v. Perez**, 464 So.2d 737, 744 (La. 1985). Nevertheless, because an accused has a constitutional right to compel the attendance of witnesses and to present a defense, the denial of a motion to sever

may constitute an abuse of discretion if the defendant establishes that his codefendant would give exculpatory testimony at a separate trial. See U.S. Const. amend. VI; La. Const. art. I, § 16; **State v. Webb**, 424 So.2d 233, 237 (La. 1982); **State v. Barkley**, 412 So.2d 1380, 1382 (La. 1982). However, there is limited Louisiana jurisprudence on the issue of trial sequence once a severance is granted on this basis.[2]

One case that deals with this issue is **State v. Walland**, 555 So.2d 478 (La. App. 4th Cir. 1989). As in the instant case, the trial court in **Walland** granted the defendant's motion to sever, but denied his request that his codefendant be tried first so that he could give exculpatory evidence on defendant's behalf at a subsequent trial. The defendant's motion to sever was supported by an affidavit from his codefendant to the effect that he would testify on defendant's behalf at a separate trial, but not at a joint trial due to concern for his right against self-incrimination. **Walland**, 555 So.2d at 479. Under these circumstances, the Fourth Circuit concluded that granting a motion for severance, while denying the defendant's request that his codefendant be tried first, frustrated the purpose of granting the severance. It reasoned that the district attorney's authority to control the prosecution could not supersede the defendant's constitutional right to present a defense and to call his witness. Therefore, it reversed the trial court's ruling and ordered that defendant's trial be held after that of his codefendant. **Walland**, 555 So.2d at 482-83.

In **State v. Adamo**, 97-80 (La. App. 5th Cir. 10/28/97), 702 So.2d 1, the trial court denied a defense motion requesting that defendant be tried after his

[2] Federal jurisprudence is more abundant on this issue. In general, federal courts have held that matters of severance and trial sequence are within the discretion of the trial court, and that a defendant has no inherent right to a particular trial sequence. See **Mack v. Peters**, 80 F.3d 230, 234-36 (7th Cir. 1996); **United States v. DiBernardo**, 880 F.2d 1216, 1228-29 (11th Cir. 1989). In determining whether a defendant is entitled to a particular trial sequence, courts have looked to the following factors: (1) whether the defendant has a bona fide need for the codefendant's testimony; (2) the substance of the testimony; (3) the exculpatory nature and effect of the testimony; and (4) the likelihood that the codefendant will testify on the defendant's behalf. **Taylor v. Singletary**, 122 F.3d 1390, 1393 (11th Cir. 1997).

codefendant. The defendant indicated that he intended to call his codefendant as a witness to testify as to defendant's intoxication at the time that the crimes were committed, since specific intent was an essential element of the crimes charged. The **Adamo** court upheld the trial court's ruling. It specifically distinguished **Walland** on the basis, among other grounds, that the defendant failed to provide an affidavit from his codefendant indicating his willingness to testify on defendant's behalf, as well as the fact that the proposed testimony did not have the exculpatory value claimed by defendant. **Adamo**, 702 So.2d at 3-5.

The analysis utilized in **Adamo** is consistent with the approach taken by courts in reviewing the denial of a severance sought in order to allow a codefendant to testify at a separate trial. Considering the close similarity of the issues, particularly the fact that each implicates the defendant's constitutional right to present a defense, we believe it is logical to utilize the same analysis in dealing with related trial sequence issues.[3] Under Louisiana jurisprudence, in order to be granted a severance to allow a codefendant to testify at a separate trial, a defendant must establish that his codefendant would, in fact, testify at a separate trial, as well as the exculpatory nature of the proposed testimony. **State v. Turner**, 365 So.2d 1352, 1354 (La. 1978); **Barkley**, 412 So.2d at 1382. Thus, the denial of a severance is proper if the defendant fails to meet the burden of establishing that a codefendant would be willing to testify in an exculpatory fashion at a separate trial. See **Turner**, 365 So.2d at 1354; **State v. Dukes**, 609 So.2d 1144, 1155 (La. App. 2d Cir. 1992), writs denied, 618 So.2d 402 (La. 1993), and 93-1421 (La. 12/15/95), 664 So.2d 435.

In the present case, defendant filed his motion requesting a severance and an order that his codefendant be tried first on the day his joint trial with Matherly was

[3] Similarly, in dealing with trial sequence issues, federal courts also have looked to the analysis employed when reviewing issues involving severances that are sought in order to obtain a codefendant's testimony. See **Taylor**, 122 F.3d at 1393; **Mack**, 80 F.3d at 235.

scheduled to commence. In support of the motion, defense counsel introduced the police report detailing the two conflicting accounts given by Matherly regarding defendant's participation in the robbery. In the motion, defense counsel stated that it was his understanding from Matherly's counsel that she would like to testify, but would not do so in order to protect her right against self-incrimination. In view of the exculpatory nature of her initial statement to the police, defense counsel argued that defendant was entitled to compel Matherly's testimony if she were tried first.

During the motion hearing, defense counsel for Matherly stated that she would assert her right against self-incrimination if called to testify at that time. However, neither her defense counsel nor Matherly herself gave any indication that she would be willing to testify if she were tried before defendant. Additionally, it was not established whether, if she did testify at a separate trial, her testimony would be consistent with the first exculpatory account she gave to the police or with the second inculpatory account of events she gave.

Under the circumstances, we find that the trial court did not abuse its discretion in denying defendant's motion that Matherly be tried first. Defendant failed to clearly establish either that Matherly would be willing to testify on defendant's behalf or that her testimony would have been exculpatory in nature. Although defendant asserted in his motion that Matherly would be willing to testify on his behalf, no support was offered for this assertion. At the motion hearing, neither Matherly nor her defense counsel was questioned on this issue. Moreover, unlike the case in **Walland**, defendant presented no affidavit from Matherly stating her willingness to testify at a trial subsequent to her own. Accordingly, defendant failed to establish that Matherly actually intended to testify at a subsequent trial. See **Adamo**, 702 So.2d at 4-5.

In view of the inconsistent statements given by Matherly, defendant also failed to establish that her testimony would have been exculpatory in nature if she

had testified. Matherly initially gave an account of the robbery that exculpated defendant, but subsequently gave a second account that incriminated him. Thus, while defendant might hope and expect that she would give testimony exculpating him, the record is devoid of any evidence that she would have done so. See **Mack v. Peters**, F.3d 230, 236 (7th Cir. 1996).

Additionally, we find no merit in defendant's contention that even the second account served to exculpate him because it showed that Matherly was the instigator of the robbery, that he initially was unaware of her intentions, and that he was reluctant to commit the crime. According to the second account given by Matherly, defendant drove her to the bank knowing she intended to rob it, parked the car behind a building to conceal it, waited while she robbed the bank, and then drove her away from the scene while attempting to avoid the police. Therefore, had Matherly so testified, the evidence clearly would have established defendant's guilt as a principal to the robbery, since he aided and abetted in the commission of the robbery by acting as a getaway driver. See La. R.S. 14:24. The driver of a getaway car is a principal to the crime committed. **State v. Dotson**, 2004-1414 (La. App. 3d Cir. 3/2/05), 896 So.2d 310, 315; **State v. Falkins**, 2004-250 (La. App. 5th Cir. 7/27/04), 880 So.2d 903, 913, writs denied, 2004-2220 (La. 1/14/05), 889 So.2d 266, and 2004-2171 (La. 5/20/05), 902 So.2d 1045. Hence, even assuming that Matherly was the instigator of the robbery, that defendant did not originally know her intent, and that he was reluctant to commit the robbery, these facts are irrelevant to his guilt since he ultimately chose to participate in the robbery by acting as Matherly's getaway driver.

For the above reasons, the defendant's assignment of error lacks merit. Thus, we affirm the defendant's convictions and sentences.

CONVICTIONS AND SENTENCES AFFIRMED.