

COURT OF APPEALS OF VIRGINIA

Present: Judges Elder, Annunziata and Lemons*
Argued by teleconference

CHRISTOPHER J. STROPE

v. Record No. 1549-98-4

COMMONWEALTH OF VIRGINIA

MEMORANDUM OPINION** BY
JUDGE DONALD W. LEMONS
APRIL 18, 2000

FROM THE CIRCUIT COURT OF STAFFORD COUNTY
David F. Berry, Judge Designate

Michael T. Leibig (Zwerdling, Paul, Leibig,
Kahn, Thompson & Wolly, P.C., on briefs), for
appellant.

Jeffrey S. Shapiro, Assistant Attorney
General (Mark L. Earley, Attorney General, on
brief), for appellee.

Christopher J. Strobe appeals his conviction of nine counts of charitable contribution fraud, in violation of Code § 57-57. On appeal, Strobe contends (1) that the trial court erred by granting the Commonwealth's motion to join his trial with a codefendant and (2) that his conviction violates his constitutional right to freedom of association under the First Amendment to the United States Constitution. Finding no error, we affirm his convictions.

* Justice Lemons prepared and the Court adopted the opinion in this case prior to his investiture as a Justice of the Supreme Court of Virginia.

** Pursuant to Code § 17.1-413, recodifying Code § 17-116.010, this opinion is not designated for publication.

I. BACKGROUND

Christopher Strobe was the Executive Director of the Virginia Coalition of Police and Deputy Sheriffs ("VCOPS"), an organization comprised of police and deputy sheriffs' organizations and unions across the Commonwealth. In 1995, Strobe entered into a contract retaining Atlantic Telemarketing, Inc. ("ATI") to conduct telephone solicitations on behalf of VCOPS.

Between November 21 and December 1, 1996, ATI telemarketers made several calls to Stafford County residents to solicit donations for VCOPS using a written script approved by Strobe and the president of ATI, James Bell. The callers claimed to be either from the Stafford County Sheriff's Department or calling on its behalf and said they were trying to raise money for the families of slain officers, a battered women's shelter, a homeless children's shelter and to purchase bulletproof vests. Citizens were assured that their contributions would be used solely in Stafford County. Several suspicious residents reported these calls to the Stafford County Sheriff's Department, which was not part of the campaign.

On December 2, 1996, in a telephone conversation between Strobe and Deputy Sheriff Timothy O'Leary, Strobe confirmed that ATI was currently soliciting donations for VCOPS, and assured O'Leary that he was monitoring the callers and that they were doing everything required of them. Strobe gave O'Leary conflicting information as to where the collected funds were being allocated, whether Stafford County residents were targeted for solicitation and whether donors were to be given receipts.

Strope and Bell knew as early as September, 1996, that Stafford County was an intended target of this telemarketing campaign. Strope and Bell knew that the solicitors were representing themselves as being from the Stafford County Sheriff's Department. Similar complaints had been made in the past. Strope and Bell did not discipline a single caller for making misleading statements during this campaign. Of the \$322,000 raised by the campaign, less than 4% actually went to a charitable purpose.

Strope and Bell were charged with identical counts of attempted embezzlement, conspiracy, attempted false pretenses, attempted charitable contributions fraud, misuse of funds and charitable contributions fraud.¹ The trial court granted the Commonwealth's motion to join the trials of Strope and Bell. At trial, the Commonwealth presented evidence that Strope and Bell worked together to prepare a script for telemarketers that was misleading. It also presented evidence that they were in contact with one another regarding media coverage of incidents of telemarketer misrepresentations. The jury convicted both men on the nine counts of charitable contributions fraud and acquitted both men on the remaining charges.

II. MOTION FOR JOINDER

Code § 19.2-262.1 provides that:

On motion of the Commonwealth, for good cause shown, the court shall order persons charged with participating in contemporaneous and related acts or occurrences or in a series of

¹ The trial court sustained the defendants' motions to strike the conspiracy charges, the attempted embezzlement charges, and one count of attempted charitable contribution fraud.

acts or occurrences constituting an offense or offenses, to be tried jointly unless such joint trial would constitute prejudice to a defendant. If the court finds that a joint trial would constitute prejudice to a defendant, the court shall order severance as to that defendant or provide such other relief justice requires.

We have recognized that "prejudice may result when evidence inadmissible against a defendant, if tried alone, is admitted against a codefendant in a joint trial." Adkins v. Commonwealth, 24 Va. App. 159, 163, 480 S.E.2d 777, 779 (1997). Nevertheless, "[t]he risk of prejudice will vary with the facts in each case, and the decision to permit a joint trial is entrusted to the sound discretion of the trial court." Id. (citations omitted).

On appeal, Strobe argues that a joint trial prejudiced him because (1) it denied his right to compel his codefendant to testify, (2) his defenses were unfairly entangled with his codefendant's defenses, (3) the complexity of the case hindered the jury's ability to distinguish the evidence relevant to each defendant, (4) he and his codefendant had different degrees of culpability and (5) he and his codefendant had "antagonistic defenses." At trial, however, Strobe only argued that he would be prejudiced by a joint trial because (1) evidence concerning his codefendant would be introduced before a conspiracy was proven, (2) two codefendants may have "antagonistic defenses" and (3) it would allow a codefendant's statement to be improperly admitted if it was made after completion of the conspiracy. Strobe never argued to the trial court that he was

prejudiced by evidence that was admitted against Bell in their joint trial but would have been inadmissible against him if tried alone.

In his reply brief, appellant notes that a document entitled "Virginia Coalition of Police and Deputy Sheriff's Script," that was downloaded from an ATI computer drive by the police and did not include a portion identifying the caller as a paid solicitor, would have been inadmissible against him if his trial had not been joined with Bell's and, since it was prejudicial, the Commonwealth's motion for joinder should have been denied. At trial, however, Strobe objected to this exhibit on entirely different grounds from those he asserts on appeal. When the Commonwealth introduced the script, Bell's counsel stated, "I don't have an objection, but I may have." He explained that on March 31, 1996, the law changed and unions were required "to comply with the provisions of the section of the code of charitable solicitations that dealt with having the fund raiser identify themselves [sic] as paid fund raisers [sic]." Since the Commonwealth was "not in a position to prove the date on that script" and whether it was used before or after the law change, it would be prejudicial and mislead the jury. The Commonwealth stated that it was in a position to provide a date. Strobe's counsel then stated that he had "an objection also" on grounds of relevance since "of all the witnesses who have testified, none of them have testified to receiving the

- that this script was read to them." The court allowed the Commonwealth's witness to identify and authenticate the document without admitting it into evidence. The next day, the court admitted the document into evidence as Commonwealth's Exhibit 14 without objection. Accordingly, with respect to this exhibit, the only ground that is preserved is relevance, and Strobe does not argue this ground on appeal. Pursuant to Rule 5A:18, the only "prejudice" argument that we may consider on appeal is that Strobe and Bell had "antagonistic defenses."

On appeal Strobe must demonstrate that "actual prejudice would result from a joint trial." Goodson v. Commonwealth, 22 Va. App. 61, 71, 467 S.E.2d 848, 853 (1996) (citation omitted). "Actual prejudice results only when 'there is a serious risk that a joint trial would compromise a specific trial right of [defendant], or prevent the jury from making a reliable judgment about guilt or innocence.'" Adkins, 24 Va. App. at 163, 480 S.E.2d at 779. "[P]rejudice does not exist merely because a codefendant has a better chance of acquittal if tried separately," Barnes v. Commonwealth, 22 Va. App. 406, 412-13, 470 S.E.2d 579, 582 (1996), nor does it exist because codefendants may have positions that are hostile to one another. See Adkins, 24 Va. App. at 163, 480 S.E.2d at 779; Goodson, 22 Va. App. at 71, 467 S.E.2d at 853. Consequently, the fact that Strobe and Bell may have had "antagonistic defenses" is insufficient alone to prove actual prejudice.

Furthermore, the assertion of antagonistic defenses is unsupported in the record of this case. At trial, Strobe argued

to the court and to the jury that the script he and Bell jointly approved was not misleading and that the individual solicitors who were tried separately were responsible for any misrepresentations made to callers. Strobe never claimed that Bell was responsible. Bell presented the same defense. During closing arguments, both Bell and Strobe blamed a few "renegade" solicitors. Accordingly, the record clearly establishes that Strobe and Bell did not use "antagonistic defenses." The trial court did not err by joining the trial of Strobe and Bell pursuant to Code § 19.2-262.1.

III. FREEDOM OF ASSOCIATION CLAIM

Strope maintains that his conviction pursuant to Code § 57-57(L)² violates his right of freedom of association protected by the First Amendment to the United States Constitution. Strope notes that he was found guilty only of attempting to obtain money by misrepresentation and, according to Strope, the only evidence supporting that charge was based on his being associated with VCOPS. As the Executive Director of VCOPS, Strope was the signatory to the contract with ATI, which, incidentally, called for honest solicitation. Strope claims that ATI employees violated the contract by misrepresenting themselves. Thus, Strope contends that his conviction violates the First Amendment because it infringes on his freedom of association.

In support of his contention, Strope cites Riley v. Nat'l Fed'n of the Blind of North Carolina, 487 U.S. 781 (1988). In Riley, the United States Supreme Court declared unconstitutional a North Carolina charitable solicitations statute that defined a prima facie "reasonable fee" that a professional fundraiser may charge as a percentage of the funds solicited. Id. at 785-95. The Court held that the statute violated the First Amendment since it sometimes required the fundraiser to rebut a prima facie case that the solicitor's fee was unreasonable. See id. at 793-95.

² Code § 57-57(L) provides that "No person shall employ in any solicitation or collection of contributions for a charitable purpose any device, scheme or artifice to defraud or obtain money or property by any misrepresentation or misleading statement." Violation of this chapter is a misdemeanor. See Code § 57-59.

Here, in contrast to Riley, there was no prima facie case of unreasonableness that appellant had to rebut; in other words, Code § 57-57 does not shift the burden of proof to the fundraiser. While the jury may have considered the percentage of the contributions that actually went toward the stated uses for purposes of determining fraud, Code § 57-57 does not mandate such a percentage-based inquiry, nor is fraud "presumed by a surrogate and imprecise formula" within the statute. Id. at 794 n.8. Quite simply, the jury engaged in a lawful finding of fact by considering the allocation of the solicited funds to the purposes stated by the solicitors.

Viewing the evidence in the light most favorable to the Commonwealth, Strobe was found guilty of misrepresentation not merely because he entered into a contract with ATI and a few "renegade" ATI solicitors misrepresented who they were and where the solicited funds would be allocated. Strobe intended for Stafford County to be a target of this telemarketing campaign. He knew that the solicitors were misrepresenting themselves as being from the Stafford County Sheriff's Department and that they had been accused of similar conduct in the past. He participated in writing the script from which those callers read during the campaign that misrepresented how the funds were to be allocated. Furthermore, the evidence established that Strobe's telemarketing campaign resulted in over \$322,000 in donations. Of this money, less than 4% was distributed to the purported charitable causes.

IV. CONCLUSION

We hold that there was no violation of Strobe's right of freedom of association under the First Amendment to the United

States Constitution. For the reasons stated herein, we affirm
Strope's convictions.

Affirmed.