COURT OF APPEALS
DECISION
DATED AND FILED

November 5, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1229-CR **Cir. Ct. No. 2011CM5751**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EVAN K. SAUNDERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELLEN R. BROSTROM, Judge. *Affirmed.*

¶1 BRENNAN, J.[1] Evan K. Saunders appeals from a judgment of conviction entered upon a jury's verdict, convicting him of four counts of fourth-degree sexual assault and four counts of disorderly conduct, and from the trial

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

court's order denying his motion for postconviction relief. On appeal, Saunders complains that there was insufficient evidence to support the jury's verdict and that the trial court improperly denied his motion for severance. We disagree on both grounds and affirm.

BACKGROUND

¶2 On September 13, 2011, the State filed a criminal complaint, charging Saunders with four counts of fourth-degree sexual assault and four counts of disorderly conduct. An amended complaint was later filed, changing the offense date on counts five and six from February 18, 2011, to February 10, 2011.

¶3 The amended complaint alleged that Saunders, a gynecologist, sexually assaulted four women during gynecological examinations. The allegations involved four different women, on four different dates. Counts one (fourth-degree sexual assault) and two (disorderly conduct), allegedly occurred on September 19, 2008, and involved victim C.D.[2] Counts three (fourth-degree sexual assault) and four (disorderly conduct), allegedly occurred on November 30, 2010, and involved victim A.S. Counts five (fourth-degree sexual assault) and six (disorderly conduct), allegedly occurred on February 10, 2011, and involved victim D.C. Counts seven (fourth-degree sexual assault) and eight (disorderly conduct), allegedly occurred on February 18, 2011, and involved victim R.S.

[2] Although our rules do not require the parties to shield the identity of the victims or alleged victims of sexual assault in their briefs, we believe the better practice is to do so. As such, we identify the victims here only by their initials for their privacy and protection, and we encourage the parties to do so in the future.

¶4 On February 23, 2012, Saunders filed a motion for severance, arguing that joinder was improper because each alleged incident was not connected to the others and that the complaint did not otherwise allege that each incident was part of a common scheme or plan. Furthermore, Saunders argued that, even if joining the counts was permissible, doing so would substantially prejudice his right to a fair trial. The trial court denied Saunders' motion for severance and permitted joinder of the counts.[3]

¶5 On September 17, 2012, a jury trial commenced. All four victims testified, as did several experts. On September 21, 2012, the jury returned guilty verdicts on all eight counts.

¶6 The trial court sentenced Saunders to ninety days consecutive on counts two, four, six, and eight, and imposed and stayed nine-month consecutive sentences on counts one, three, five, and seven. The trial court then placed Saunders on probation for a term of three years.

¶7 On March 15, 2013, Saunders filed a postconviction motion, requesting that the trial court overturn the verdicts on sufficiency-of-the-evidence grounds. In the alternative, Saunders requested a new trial on the basis that the charges were not properly joined. The trial court issued a written order denying Saunders' postconviction motion. Saunders appeals.

[3] The Honorable Rebecca F. Dallet presided over pretrial motions and denied Saunders' motion for severance. The Honorable Ellen R. Brostrom presided over trial, sentencing, and all postconviction motions.

¶8 Additional facts are included in the discussion section as necessary.

DISCUSSION

¶9 On appeal, Saunders argues that: (1) there was insufficient evidence to support all four of his sexual assault convictions because, according to Saunders, the evidence produced at trial only showed that he touched the victims for medically-necessary reasons, and not for sexual gratification or degradation, and also that there was insufficient evidence to support all four of his disorderly conduct convictions because, according to Saunders, there was no evidence that the conduct was "otherwise disorderly" or that it provoked a disturbance; and (2) the trial court improperly denied his motion for severance. We address each complaint in turn.

I. There was sufficient evidence produced at trial from which a reasonable jury could convict Saunders of all eight counts.

¶10 Saunders first argues that the State failed to produce sufficient evidence at trial to support the jury's guilty verdict on both the fourth-degree sexual assault and disorderly conduct charges. In particular, Saunders alleges that there was no evidence presented by the State that Saunders touched the victims with an intent to become sexually aroused or gratified or that Saunders touched the victims with the intent to sexually degrade or humiliate them. Instead, Saunders argues that the evidence merely demonstrated that Saunders was "insensitive or abrupt in his bedside manners and when discussing gynecological related issues." We disagree.

¶11 When reviewing an insufficiency-of-the-evidence claim, we give great deference to the jury's determination and view the evidence in the light most favorable to the State. *See* ***State v. Hayes***, 2004 WI 80, ¶57, 273 Wis. 2d 1,

681 N.W.2d 203. If more than one inference can be drawn from the evidence, we must adopt the inference that supports the conviction. ***State v. Hamilton***, 120 Wis. 2d 532, 541, 356 N.W.2d 169 (1984). We will not substitute our own judgment for that of the jury unless the evidence is so lacking in probative value and force that no reasonable jury could have concluded, beyond a reasonable doubt, that the defendant was guilty. ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

A. Fourth-Degree Sexual Assault.

¶12 First, Saunders argues that there was insufficient evidence presented at trial to convict him of fourth-degree sexual assault with respect to any of the victims. Before a jury can find a defendant guilty of fourth-degree sexual assault, the State must prove that: (1) the defendant had sexual contact with the victim; and (2) the victim did not consent to the sexual contact. WIS. STAT. § 940.225(3m); *see also* WIS JI—CRIMINAL 1219. The Wisconsin Jury Instructions define "sexual contact" as:

> an intentional touching by the defendant of the (name intimate part) of (name of victim). The touching may be of the (name intimate part) directly or it may be through the clothing. The touching may be done by any body part or by any object, but it must be an intentional touching.
>
> Sexual contact also requires that the defendant acted with intent to [either:] cause bodily harm to (name of victim)[;] become sexually aroused or gratified[; or] sexually degrade or humiliate (name of victim).

Id. (footnotes omitted and some formatting altered). The pattern jury instructions explicitly inform the jury that: "[y]ou cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances bearing upon intent." ***Id.***

¶13 Saunders admits that the evidence produced at trial demonstrates that he touched an intimate body part of each of the victims. However, he argues that the evidence only demonstrates that he did so as part of their medical examinations, and that the State produced no evidence demonstrating that he touched any of the victims with the intent to either cause bodily harm to the victims, become sexually aroused or gratified, or to sexually degrade or humiliate the victims. Our review of the victims' testimony belies his assertions.

¶14 At trial, C.D., whose appointment with Saunders formed the basis of counts one and two, testified to the following:

- C.D. saw Saunders because of complaints of vaginal discharge, abdominal pain, and diarrhea. She was not seeing Saunders for any type of sexual issue and, in fact, told Saunders that she was not currently sexually active.

- While C.D. was in the examining room alone with Saunders, he performed a vaginal examination. During the examination, Saunders asked C.D. whether she had troubles having an orgasm and whether she masturbated. Saunders then began rubbing C.D.'s clitoris and asked her if she felt pleasure. C.D. testified that she began wondering, "Why is this-- Why is this going on? Is there a problem?"

- While Saunders' finger was on her vagina, he pushed on a "certain spot" and told her that is where her boyfriend should have his penis and that is how she would start to have a climax.

- At Saunders' direction, they then moved to a different examination room. While in that room, Saunders told her that he wanted to check to see if she had a loss of feeling or sensation in her vagina/clitoris because she did not have an orgasm in the prior exam room. She and Saunders were the only people in the room.

- In both examination rooms, Saunders, in one room with his fingers on the outside and inside of her vagina, and in the other room with the ultrasound probe inside of her, told C.D. that she should be climaxing.

- Saunders then put an object on C.D.'s clitoris (identified later in the trial as a nerve distractor) and C.D. started to feel vibrations. Saunders did not show or explain to her what the object was. C.D. was wondering what was going on and was shaking because she was nervous. She told Saunders that she was uncomfortable.

- Saunders continued to move the nerve distractor on C.D.'s clitoris for about five minutes and asked her if she was being pleasured. Saunders told her that she should be having an orgasm and that other women he has done this to normally have at least two orgasms within ten minutes. C.D. continued to think, "[W]hen is he going to stop? Why is he doing this?"

- C.D. did not schedule another appointment with Saunders and when she left she felt violated. She testified that

> I just felt like violated. I felt like if I keep insisting to telling him I can feel everything he's doing, and he's telling me I have loss of sensation. And to get him to stop from the first room, I had to close my legs for him to stop. In the second room I had to lift my own body up for him to stop. Something just didn't seem right. And I did not come to that appointment for anything except for a little abdominal pain and discharge. There was no discussion ever about not having any -- having any trouble orgasming or anything.

¶15 Saunders' examination of A.S. formed the basis for counts three and four of the complaint. A.S. testified to the following:

- A.S. had an ectopic pregnancy in November 2010, and Saunders performed the surgery to remove the pregnancy. She met with Saunders on November 30, 2010, a few days after the surgery for a post-surgery check-up.

- At the follow-up examination, while A.S. was alone with Saunders, she was on the examination table and her feet were in the stirrups. Saunders moved both of his hands up the sides of her body (one hand on each side), and then put his hands under her breasts so that he was cupping, from the bottom, each of her breasts. He then rolled her nipples through his index finger and thumb. A.S. gasped and thought it was "weird." A.S. had not experienced other medical professionals touching her in that manner and she thought, "[W]hat was that?"

- After touching her breasts, Saunders began an internal examination. A.S. felt Saunders feeling inside her vaginal cavity. He then removed his hand,

and put his hands on the inside of her thighs, near her vaginal area. He then rubbed his thumb over her clitoris.

- When A.S. described Saunders touching her clitoris she said, "It wasn't a brush. It was a firm touch."

- When Saunders touched her clitoris A.S. "scooted back on the exam table" using her feet in the stirrups. Her reaction was "[W]hat just happened?" "What is going on?" She thought, "I got to get out of here." "Because it was uncomfortable and I was alone, and I felt like something is -- something's not right."

- Saunders then said to her, "I'm sure you want to know when you can have sex again. Right away, huh?" A.S. had not asked Saunders any questions about sexual activity.

¶16 Saunders' examination of D.C. formed the basis for counts five and six of the complaint. D.C. testified as follows:

- In 2010, D.C. saw Saunders because of vaginal dryness and he prescribed a cream for her. On February 10, 2011, she saw him for a follow-up appointment. She told him that the cream was working but she still had some issues with lack of sensitivity.

- The February 2011 appointment began with a breast examination. During the examination, D.C. was alone with Saunders. At the end of the breast

examination, Saunders pinched/twisted her nipples in a way that D.C. had never experience before during a breast examination.

- Saunders then began the pelvic examination. During the examination, he began to stroke D.C.'s clitoris in a circular motion, something that had never happened to her during an examination before. As Saunders was stroking her clitoris, he asked her if she was feeling pleasure.

- D.C. began to wonder "whether or not he was touching himself at the same time that he was rubbing my clitoris" "[b]ecause of the way he was talking. … It was more of the way I would expect my husband to talk to me when we would be in an intimate situation."

- Because she was uncomfortable, D.C. began counting how long the touching was happening. By her estimate, Saunders touched her vaginal area and clitoris for one and one-half minutes. During that time, Saunders was asking her if she was experiencing pleasure, how long it would take her to get aroused, and how long it would take for her to reach climax. D.C. felt as though Saunders was trying to make her reach a climax.

- D.C. felt as though Saunders was trying to stimulate her during the examination, stating "as the exam went on, it was becoming more and more of a sexual experience and I was becoming a little bit -- I was intimidated. I was a little bit afraid. I'm in his environment."

- When D.C. left Saunders' office, she was flustered, embarrassed and feeling shameful. She said that she "knew for a fact that I left there and something just did not feel right."

¶17 Counts seven and eight of the complaint were based on Saunders' examination of R.S. She testified as follows:

- R.S. made an appointment with Saunders for the purpose of a pap smear. She had not seen him before and was seeing him because of a change in her insurance.

- During her pelvic examination, only she and Saunders were in the room, and he asked her if she had a boyfriend and if she had trouble in bed with him. R.S. did not know what to say in response to those inquiries, and Saunders then said: "I can show you ways that what he could do to you so you can orgasm."

- Saunders then began making motions on R.S.'s vagina, touching her vagina, labia, and "just every part down -- every part" and asked her how it felt. As a result of Saunders' actions, R.S. was in "complete shock." She testified that she did not know what to do.

- Saunders also performed a breast examination of R.S., but she testified that it was unlike any prior breast exam. Saunders mentioned her nipples and told her that she might have trouble breastfeeding. He started rubbing her

nipples and doing things that were "obviously inappropriate." He was rubbing right on the nipple in a circular motion. At one point, Saunders put lubricant on his hands for the breast examination and told R.S. he wanted to see if her nipples would harden. R.S. felt disgusted and knew it was wrong.

- R.S. testified that "it didn't feel right. It made me very uncomfortable. I felt taking -- taken advantage of. I was so embarrassed I didn't even -- I didn't even tell my mom. I couldn't even talk about it until a couple of weeks after it happened. I was ashamed more of what had happened than -- it was embarrassing."

¶18 In addition to the victims' testimony, the State presented the testimony of Dr. Fredrik Broekhuizen, an obstetrician gynecologist. Dr. Broekhuizen testified that it is important to explain to patients what you, the examining doctor, are going to do. During his testimony, Dr. Broekhuizen was also asked to assume four different factual scenarios that mirrored the reason(s) each of the victims saw Saunders. After asking Dr. Broekhuizen to assume those factual scenarios, he was asked whether there was a reasonable medical explanation for Saunders' conduct, as described by each victim. Dr. Broekhuizen testified with respect to each factual scenario that there was no reasonable medical explanation for Saunders' actions and statements to the victims.

¶19 Reasonable jurors, hearing that testimony, could easily conclude that Saunders made sexual contact with each of the victims with the intent to either "become sexually aroused or gratified" or "sexually degrade or humiliate" the victims. *See* WIS JI—CRIMINAL 1219. While Saunders cites to testimony from

Dr. Broekhuizen and another doctor, as well as his own testimony, which he argues explains that all of his actions were medically necessary based on patient history and complaints, the jury was free to reject that testimony and accept the testimony of the victims and Dr. Broekhuizen's testimony cited above. *See* ***Poellinger***, 153 Wis. 2d at 506 (questions of witness credibility are left to the jury to decide). In short, we conclude that a reasonable jury could infer from the evidence that Saunders had the intent necessary to find him guilty of all four fourth-degree sexual assault charges.

B. Disorderly Conduct.

¶20 Second, Saunders complains, in an undeveloped argument, that the evidence was insufficient to establish he committed all four counts of disorderly conduct. To prosecute a defendant for disorderly conduct, the State must prove two elements. ***State v. Douglas D.***, 2001 WI 47, ¶15, 243 Wis. 2d 204, 626 N.W.2d 725. "First, it must prove that the defendant engaged in violent, abusive, indecent, profane, boisterous, unreasonably loud, or similar disorderly conduct." ***Id.*** "Second, it must prove that the defendant's conduct occurred under circumstances where such conduct tends to cause or provoke a disturbance." ***Id.***

¶21 Saunders merely argues that the only reasonable inference from the evidence produced at trial was that all sexual contact with the victims was medically necessary. As such, he argues that "if the Court agrees that the evidence was insufficient to support the guilty verdicts for Fourth Degree Sexual Assault, then there would also be insufficient evidence to support the guilty verdicts for Disorderly Conduct." However, as set forth above, we do not agree that the evidence was insufficient to support the fourth-degree sexual assault charges. In fact, we find the evidence in support of the jury's verdict quite abundant. For the

same reasons we set forth above, a reasonable jury could conclude, from the victims' testimony and from that of Dr. Broekhuizen, that Saunders' actions with each of the victims were indecent and intended to provoke a disturbance. ***Id.*** As such, the jury acted within its authority when it found Saunders guilty of all four counts of disorderly conduct.

II. The trial court did not erroneously exercise its discretion when it denied Saunders' motion for severance.

¶22 In the alternative, Saunders argues that the trial court erroneously exercised its discretion when it denied Saunders' motion for severance. To determine whether a trial court's refusal to sever charges was proper we must engage in a two-step analysis. ***State v. Locke***, 177 Wis. 2d 590, 596, 502 N.W.2d 891 (Ct. App. 1993). First, we must determine whether the charges were properly joined under WIS. STAT. § 971.12(1). ***Locke***, 177 Wis. 2d at 596. Second, even if the initial joinder was proper, we look to whether the defendant was unfairly prejudiced by the joinder under WIS. STAT. § 971.12(3). ***Locke***, 177 Wis. 2d at 596-97.

1. *Joinder was proper under WIS. STAT. § 971.12(1).*

¶23 WISCONSIN STAT. § 971.12(1) allows two or more crimes to be joined and charged under the same complaint if the crimes "are of the same or similar character." Case law clarifies the meaning of "same or similar character" and provides that it requires that: (1) the crimes must be the same types of offenses; (2) the offenses must occur over a relatively short period of time; and (3) the evidence as to each must overlap. ***State v. Hamm***, 146 Wis. 2d 130, 138, 430 N.W.2d 584 (Ct. App. 1988). Whether charges were properly joined is a question of law that we review *de novo*. ***Locke***, 177 Wis. 2d at 596. We are to construe the statute broadly, in favor of initial joinder. ***Id.***

¶24 To begin, we conclude that the crimes were certainly the same type of offense. *See* ***Hamm***, 146 Wis. 2d at 138**.** Each incident resulted in a charge of fourth-degree sexual assault and disorderly conduct, stemming from an improper gynecological examination. In each instance, the victim alleged that Saunders touched her sexually in a way that did not comport with what the victim was expecting from the examination given the reason for her visit, and in each instance, the victim left Saunders' office feeling violated.

¶25 We also conclude that the offenses occurred over a relatively short period of time. *See* ***id.*** Counts one and two occurred on September 19, 2008; counts three and four occurred on November 30, 2010; counts five and six occurred on February 10, 2011; and counts seven and eight occurred on February 18, 2011. While Saunders complains that the two and one-half years between the first and last charge is not a relatively short period of time, we do not find the time period problematic.

¶26 Whether a time gap between two offenses is a "relatively short period of time" for purposes of joinder is determined on a case-by-case basis, and the more similar the offenses, the longer the permissible gap. *See* ***id.*** at 139-40. Here, the incidents reported by each of the victims were very similar. Each involved a gynecological exam, during which the victim found herself alone with Saunders. In each instance, the victim alleged that Saunders used his position as the victim's doctor to touch the victim sexually in a way that did not comport with the medical care requested by the victim and left the victim feeling uncomfortable and violated. Furthermore, the types of acts performed by Saunders and the invasive, personal questions he asked were consistent among all the victims. Under these circumstances, given the similarities between each of the victim's

reports, the two and one-half year time period is a relatively short period of time. *See* ***id.***

¶27 Finally, the evidence of each of the instances overlapped. Dr. Broekhuizen testified regarding the medical necessity of Saunders' acts with regard to each patient. And as we will see below, the testimony of each of the victims would have been permissible at the trial of each of the others as other acts evidence.

¶28 In sum, all eight counts were properly joined.

2. *Saunders was not unfairly prejudiced by joinder of all eight counts under WIS. STAT. § 971.12(3).*

¶29 Saunders argues that even if the counts were properly joined, the trial court erroneously exercised its discretion when it denied his severance motion because he was substantially prejudiced by the victims' collective testimony. If a court finds that initial joinder of the charges was proper, the court may nonetheless order separate trials if it appears that the defendant is prejudiced by a joint trial. WIS. STAT. § 971.12(3); ***Locke***, 177 Wis. 2d at 597. The court must weigh the prejudice that would result from a joint trial against the public interest in conducting a trial on multiple counts. ***Locke***, 177 Wis. 2d at 597. The question of whether joinder is likely to result in prejudice to the defendant is left to the discretion of the trial court, and this court will find an erroneous exercise of discretion only if the defendant can establish that failure to sever the counts caused "substantial prejudice." ***Id.***

¶30 In evaluating the likelihood of prejudice, "courts have recognized that, when evidence of the counts sought to be severed would be admissible in separate trials, the risk of prejudice arising because of joinder is generally not

significant." ***Id.*** As a result, the joinder analysis leads to an analysis of other acts evidence under WIS. STAT. § 904.04(2). *See* ***Locke***, 177 Wis. 2d at 597.

¶31 To determine whether, if tried separately, evidence from one trial would be admissible as other acts evidence in the other, the court must apply the following three-part test: (1) whether the other acts evidence is "offered for an acceptable purpose" under WIS. STAT. § 904.04(2), such as to establish "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident"; (2) whether the other acts evidence is relevant under WIS. STAT. § 904.01; and (3) whether the probative value of the other acts evidence is "substantially outweighed by the danger of unfair prejudice" under WIS. STAT. § 904.03. ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998).

¶32 Looking to the first element—whether the victim's testimony would be offered for a permissible purpose—the trial court found that each victim's testimony would be properly admissible to show intent as well as absence of mistake. As the trial court noted:

> [T]he fact that this happened not only once allegedly but to others as well in the exact same setting does, in fact, go to intent. … It's not offered to show solely that Mr. Saunders is a bad person or things that other acts are not allowed for, but it is offered or would be offered for the purpose of showing that it's not a mistake, it's not an accident. It's the intent of Mr. Saunders to do this.

¶33 We agree with the trial court's conclusion that each victim's testimony would be permissible to demonstrate intent and absence of mistake or accident, and we would add that the testimony would also be admissible to demonstrate plan. Collectively, the victims' testimony demonstrates that Saunders did not accidently touch them and speak to them inappropriately and that each victim was not mistaken in her perception of Saunders' actions. Rather,

collectively, the testimony of each of the victim's is admissible to show that Saunders' plan and intent was to abuse his position as each victim's doctor to sexually exploit each of the victims.

¶34 With respect to the second element, the trial court did not erroneously conclude that the victims' testimony would be relevant and probative. As we set forth above, in order to prove fourth-degree sexual assault, the State was required to show that Saunders acted with an intent to cause bodily harm to the victim, become sexually aroused, or sexually degrade or humiliate the victim. *See* WIS JI-CRIMINAL 1219. Each victim's testimony was certainly relevant on that point. Furthermore, the victims' testimony regarding the reasons for their visit with Saunders, the manner in which he touched them, the invasive questions he asked them, and the way his actions made them feel are highly probative with respect to the question of intent.

¶35 Finally, the trial court did not erroneously conclude that the probative value of the victims' testimony was substantially outweighed by the danger of unfair prejudice. As we set forth above, each victim's testimony was highly relevant and probative on the issue of intent, and further, the evidence rebutted Saunders' defense that his actions were medically necessary and misperceived by each of the victims. While the victims' collectively testimony may have been prejudicial, that prejudice did not substantially outweigh the probative value.

¶36 Because we conclude that, if tried separately, the testimony of each of the victims would have been admissible in the trials of the others as other acts evidence, Saunders has not established that he was substantially prejudiced by

joinder of the charges. As such, the trial court did not erroneously exercise its discretion when it denied Saunders' motion to sever.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.