COURT OF APPEALS
DECISION
DATED AND FILED

April 21, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2686-CR **Cir. Ct. No. 2010CF542**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LUIS C. SALINAS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: MARC A. HAMMER, Judge. *Reversed and cause remanded*.

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. Luis Salinas appeals a judgment of conviction for two counts of intimidation of a victim and one count each of repeated sexual assault of a child, second-degree sexual assault with use of force, and second-degree sexual assault of a child. The sexual assault charges all involved a single

victim. The intimidation counts involved two victims, one of whom was the victim in the sexual assault charges. Salinas argues the trial court improperly joined for trial the intimidation counts with the sexual assault counts. We agree with Salinas and reverse and remand for new trials.

BACKGROUND

¶2 This case involves three sets of crimes and two victims, although only two sets of crimes are directly implicated in the appeal. The first set of crimes, which is not at issue here, involved domestic abuse that occurred on October 26, 2009. Regarding that set of crimes, Salinas pled guilty to strangulation and suffocation—domestic abuse and to battery with use of a dangerous weapon—domestic abuse. As part of the plea deal, charges of physical abuse of a child and disorderly conduct—domestic abuse were dismissed and read in. The primary victim in that case was Salinas's girlfriend, M.S. The other victim was M.S.'s then fifteen-year-old daughter, V.G. M.S. also had three sons, one of whom was Salinas's son. M.S. and her children lived with Salinas.

¶3 Salinas was sentenced in the domestic abuse case on May 11, 2010. M.S. and V.G. both spoke on Salinas's behalf, and sentence was withheld in favor of probation. Salinas was ordered to serve nine months' conditional jail time, but he received 197 days' credit for time served.

¶4 Two days after the sentencing hearing, V.G. reported to police that Salinas had sexually assaulted her over a two-and-one-half-year period, most recently on the day of the domestic abuse incident. Salinas was then charged with the three sexual assault counts.

¶5 Three to four months after the sentencing hearing, police translated from Spanish and listened to old recorded jail calls from Salinas to M.S. In those calls, Salinas had sought to influence M.S.'s and V.G.'s testimony at his sentencing in the domestic abuse case. These jail calls led to the two victim intimidation charges. One count named M.S. as the victim and the other named V.G.

¶6 On the State's motion and over Salinas's objection, the trial court joined the victim intimidation charges with the sexual assault charges. Because the domestic abuse incident was deemed relevant to the intimidation charges, the domestic abuse evidence was introduced at the trial on the joined sexual assault/victim intimidation cases.

¶7 At trial, the State addressed the domestic abuse incident in its opening statement, explaining:

> You'll also hear from [M.S.] today. And where this story begins in terms of [M.S.], it really begins October 26, 2009, although it dates back further than that but that is the date that [M.S.] will tell you she came home from work. The defendant was angry, indicated he had hit [V.G.], that he was mad at her, wanted her to send her away. [M.S.] disagreed with this. They got into an argument. That is the day … that the defendant strangled [M.S.], that he did that in front of [V.G.], that in the kitchen she was struggling to get away from him, that she yelled to [V.G.] get out, call the police, that she was able to get away from the defendant, that she ran out herself, and when she turned around, what did she see? More violence and intimidation. She saw the defendant standing with his 4-year-old son, [A.], to one side and a knife to the other telling [A.], "Tell your mother to come back inside."

¶8 The State's first witness was V.G. V.G. testified that Salinas sexually assaulted her "more than like 40 or 50 times" over the two and one-half years charged in the first count. She said he hit her on a number of those

occasions, primarily during the latter year and one half. V.G. then testified about the events underlying the second and third sexual-assault counts, charged as occurring early in the morning on October 26, 2009. The State then inquired about the domestic abuse incident involving M.S. that had occurred later that same day. V.G. testified:

> I heard it. I sat in my room and just listened for [what] seemed like a long time.
>
> ….
>
> I heard him throw something or something being thrown in the living room and then I heard them both get up into the kitchen, and I saw … Salinas had both his hands around my mother's throat choking in the kitchen against the calendar against the door in the kitchen.
>
> ….
>
> Both his hands were on her throat, and they were right next to the door because I think she was about to leave.
>
> ….
>
> [S]he couldn't get away because he was strangling her, and I was trying to get him to stop and he wouldn't.
>
> ….
>
> I told him to let go of her because he was hurting her, and he said, he said, "What? Are you going to make me?"
>
> ….
>
> [H]e didn't stop, and my mother told—yelled at me to leave the house and go. And from there I … went across the street to my friend's house to have her mom give me the phone to call the police.

¶9 V.G. further testified that Salinas had spoken with her once on the phone from jail, and had called M.S. repeatedly, trying to get V.G. to attend his sentencing in the domestic abuse case and testify that he had not struck V.G. and that she and her brothers wanted Salinas to come home. V.G. explained she

attended the sentencing hearing and told the court "my family had gone through a lot for the time he had been gone and me and my brothers missed him and wanted him home."

¶10 On redirect, the State returned to the domestic abuse incident, over defense counsel's relevance objection.

> Q: The attorney asked you questions about the defendant hitting your mother. You saw far more than him hitting your mother on that October date; is that correct?
>
> A: Yes.
>
> ….
>
> Q: In fact, you describe that he was, in fact, choking her when you were in the home and you saw that?
>
> A: Yes, I saw that.
>
> Q: And, in fact, he was convicted of strangulation as a result of that; is that correct?
>
> A: Yes, that's true.

¶11 The State's next witness was M.S., who described the domestic abuse incident in detail, over defense objections that the testimony was irrelevant and overly prejudicial. M.S. testified as follows:

> [Salinas] grabbed something made out of glass like a candle and then he hit my head with it.
>
> ….
>
> Yes, [the object caused pain] because he hit me hard.
>
> ….
>
> He stood up. He grabbed the computer chair and he said you have to decide. You are going to send [V.G.] to Mexico or you want to stay with your son, otherwise I'm going to kill you.
>
> ….

Yes, he ran after me [to the kitchen] and he tried to grab one of the knives, but he didn't grab it.

….

He grabbed my neck and he started to strangle me and then [V.G.] came out of the room when she heard we were fighting.

….

[Salinas choked me with] both hands on my neck.

….

I ran to the door. I tried to close the door, but he stopped me right before that I could open the door.

….

I just wanted us to leave the house. We were really afraid of him.

….

His hair was loose so I grabbed—I grabbed him from the hair and then I escaped.

….

[After M.S. and V.G. left the house, Salinas] was in the door, and he woke up the boy, and he asked the boy to call me.

….

[Salinas] was asking him, "Tell your mom to come back home. Ask her to come inside."

….

Yes, he had a knife [in his hand], but he was not pointing that knife to the boy.

….

He was asking me to come back inside the house and to ask [V.G.] to hang up the [neighbor's] phone, otherwise he was going to kill the boy and he was going to kill himself.

¶12 M.S. next spoke about the jail phone calls from Salinas, explaining, "[H]e said change the part where you said that I strangled you and also change the part where I said that I was going to kill you." She further testified that he wanted V.G. to change V.G.'s statement that he had struck her in the face. M.S. also recounted various threats Salinas made, including that he would take her son away, he would kill M.S. and the children, something bad would happen, and he would kill himself. Finally, she stated Salinas "pressure[d] me to pressure [V.G.] so she could go to the courthouse and make him look good. But she did go because I was pressuring her."

¶13 On cross-examination, M.S. stated she did not communicate any of the telephone threats to V.G., and she agreed Salinas had told her to offer V.G. a phone or a phone card to get V.G. to make a statement at sentencing. Later in the State's case, an interpreter read excerpts of the jail phone calls, which included multiple threats and substantial vulgarity.

¶14 Salinas testified in his defense and denied ever having sexual contact with V.G. He acknowledged entering pleas and serving jail time for hitting V.G. and M.S. on October 26, 2009. Salinas also described his version of that day's events.

¶15 Salinas stated he had been very ill with the flu. As M.S. was preparing to go to work, V.G. took too long to get ready to accompany M.S., and M.S. left without V.G. This led to an argument with V.G., and Salinas "backhand[ed]" her. He did so because V.G. said that if Salinas's son had not been born, V.G. would not have to follow his rules and discipline. Salinas "lost it" then, because he was sick, and sick of V.G. Salinas testified that when M.S. returned from work, he told her he was "really tired" of V.G., and if M.S. did not

do something about the situation, he would leave M.S. and take his son with him. Salinas said the object that he threw was a Vicks inhaler. Shortly thereafter, "everything turned into chaos[.]"

¶16 Salinas testified he never threatened V.G. to change her statement before sentencing. He also asserted that M.S. introduced the idea of buying V.G. a phone card to induce her to come to court. On cross-examination, Salinas conceded he had made the jail phone calls and said the things that were read to the jury.

¶17 In closing, the State recounted the domestic abuse incident:

> [V.G.] waits and she goes out and she sees the defendant choking her mother and she's yelling. Her mother is yelling "get out, get out." She's able to go to the front door. Her mother is able to get away from the defendant and go out the side.
>
> And, ladies and gentlemen, I would submit at this point the defendant is very concerned. To this point he's been able to keep them from calling the police. He's been able to intimidate them, use threats, use violence to make sure the police don't get involved. But this time they're out of the house. And what does he do in a last [d]itch effort and desperation? He takes a knife and he takes his little boy, the little boy he claims to love more than anything. He has a knife in one hand and he's telling [M.S.] get back in the house. He's telling the little boy, "Tell your mother to get back in the house or I'm going to kill myself and I'm going to kill the boy."

The State then read back some of the excerpts of the threatening and vulgar jail phone calls that the interpreter had read.

¶18 The jury found Salinas guilty on all counts. He now appeals.

DISCUSSION

¶19 Salinas argues the trial court erroneously joined the sexual assault charges with the victim intimidation charges.[1] Joinder of charges is governed by WIS. STAT. § 971.12(1),[2] which provides:

> Two or more crimes may be charged in the same complaint [or] information … in a separate count for each crime if the crimes charged, whether felonies or misdemeanors, or both, are of the same or similar character or are based on the same act or transaction or on 2 or more acts or transactions connected together or constituting parts of a common scheme or plan.

To be of the "same or similar character," crimes must be the same type of offenses occurring over a relatively short period of time and the evidence as to each must overlap. ***State v. Hamm***, 146 Wis. 2d 130, 138, 430 N.W.2d 584 (Ct. App. 1988).

¶20 Whether the initial joinder of offenses is proper is a question of law that we review de novo, though the statute is construed broadly in favor of initial joinder. ***State v. Locke***, 177 Wis. 2d 590, 596, 502 N.W.2d 891 (Ct. App. 1993). If the offenses do not meet the criteria for joinder, it is presumed that the defendant will be prejudiced by a joint trial. ***State v. Leach***, 124 Wis. 2d 648, 669, 370 N.W.2d 240 (1985). The presumption can be rebutted, and misjoinder found harmless, on appeal. ***Id.***

¶21 Salinas argues the victim intimidation charges and sexual assault charges should not have been joined under WIS. STAT. § 971.12(1) because they

[1] Judge Mark Warpinski granted the State's joinder motion, but he recused himself before trial. The case was then transferred to Judge Marc Hammer.

[2] All references to the Wisconsin Statutes are to the 2013-14 version.

were neither "of the same or similar character," nor based on two or more acts either "connected together" or "constituting parts of a common scheme or plan." We agree.

¶22 The intimidation and sexual assault charges were not of the same or similar character because they were not the same type of offenses and there is little or no overlapping evidence. *See* ***Hamm***, 146 Wis. 2d at 138. Making phone calls threatening or coaxing M.S., resulting in V.G. giving a positive statement at sentencing and receiving a phone card, was not the same type of offense as either a repeated or singlular sexual assault. The charged offenses were not rendered similar merely because the defendant and one victim, V.G., were the same in both cases.

¶23 Further, the only potentially overlapping evidence was indirectly connected, via the underlying domestic abuse case. V.G and Salinas both agreed that he struck V.G. early in the morning on October 26, 2009. Later that day, Salinas and M.S. argued about V.G. The argument escalated, and Salinas was arrested and charged with several counts of domestic abuse. V.G. later asserted Salinas hit her early that morning because she had tried to resist his sexual advances. That is the sole evidence that connects one of the sexual assault charges to the one read-in domestic abuse charge involving V.G., which in turn is connected to the one intimidation charge concerning V.G. Further, Salinas's *reason* for striking V.G. in the domestic abuse case—as opposed to the fact he had struck her, making her a victim—would not have been relevant in the intimidation case.

¶24 The intimidation and sexual assault charges also were not "based on the same act or transaction or on 2 or more acts or transactions connected

together." *See* WIS. STAT. § 971.12(1). There was no connection between the jail phone calls and the sexual assault allegations. The coercive phone calls were related only to sentencing in the domestic abuse case. Indeed, the sexual assault allegations and charges did not arise until after the domestic abuse case sentencing hearing had concluded.

¶25 Similarly, the victim intimidation and sexual assault charges were not based on two or more acts or transactions constituting parts of a common scheme or plan. Salinas was not charged with victim intimidation related to the sexual assault allegations, and V.G. did not allege Salinas had threatened to physically harm her. His specific, lethal threats to M.S. were of an entirely different character than any attempts to manipulate V.G. to make a statement at sentencing in the domestic abuse case. There were no recorded jail calls in which Salinas was berating or threatening V.G. as he had M.S. Further, M.S. testified she did not relay Salinas's telephone threats to V.G., and V.G. told police she only spoke favorably of Salinas at the sentencing hearing because M.S. asked her to do so.

¶26 Further, the inducement for V.G. to speak positively about Salinas at sentencing was the receipt of a gift, ultimately, a phone card. That sort of buying influence was never alleged as a modus operandi in the sexual assault case. V.G. did not tell police or the jury that Salinas had ever offered gifts to ensure her silence with respect to the sexual assault allegations.

¶27 The State, for its part, recites WIS. STAT. § 971.12(1), but fails to identify which component of the statute it relies on to argue joinder was appropriate. Instead, it baldly asserts:

> The charges were of similar character, involved connected acts and related to a common plan. To wit, the charges all related to Salinas' abuse, threats and manipulation of V.G. and M.S. The charges are all related to Salinas' modus operandi and the ways in which he sought to control V.G. and M.S. … The charges all contain common factors of substantial importance: Salinas' abuse and manipulation of V.G. and M.S.

The State's underdeveloped argument paints with too broad a brush, and it fails to actually identify any common factors or evidence between the intimidation charges and the sexual assault charges. The argument also ignores the differing allegations with respect to the two victims. It appears the State may believe it was appropriate to join the cases because the victim intimidation and sexual assault allegations generally demonstrated Salinas's character trait of being manipulative. If so, that does not satisfy the joinder requirements of § 971.12(1).

¶28 Having concluded the trial court erroneously joined the victim intimidation and sexual assault charges, we next consider whether that error was harmless. *See* ***Leach***, 124 Wis. 2d at 669. Regarding prejudice, our supreme court has explained:

> [T]he defendant suffers a risk of prejudice when he [or she] is tried on the basis of an information containing multiple counts. The risk of prejudice arising under these circumstances is related to the prejudice which arises when evidence of other crimes or wrongful acts is admitted improperly at trial. … When a jury is informed of the accused's previous wrongful conduct, it is likely that it will consider that the defendant is a "bad person" prone to criminal conduct. It is also possible that the jury will confuse the issues and will be incapable of separating the evidence. Therefore there is a serious risk that a conviction will result without regard to the facts proven relative to the crime charged. Similarly, when some evidence is introduced to prove the commission of multiple criminal acts joined in one information, there is a risk that the defendant will be convicted not because the facts demonstrate guilt beyond a reasonable doubt but because the jury may conclude that the accused is predisposed to

> committing crimes and that "some" evidence is "enough" evidence to return a conviction. In a trial on joint charges, there is also the possibility that the jury will cumulate the evidence of the crimes charged and find guilt when it otherwise would not if the crimes were separately tried.

State v. Bettinger, 100 Wis. 2d 691, 696-97, 303 N.W.2d 585 (1981) (citations omitted).

¶29 However, the ***Bettinger*** court further recognized that "when evidence of both counts would be admissible in separate trials, the risk of prejudice arising due to a joinder of offenses is generally not significant." ***Id.*** at 697. The court explained, "The simple logic behind this rule is that when evidence of one crime is relevant and material to the proof of a second crime, virtually identical evidence will be submitted to the jury whether or not one crime or both crimes are being tried." ***Id.*** Accordingly, the prejudice analysis may require an other-acts analysis under WIS. STAT. § 904.04(2) and ***State v. Sullivan***, 216 Wis. 2d 768, 781, 576 N.W.2d 30 (1998). Alternatively, "misjoinder may … be harmless when evidence of the defendant's guilt of each offense is overwhelming." ***Leach***, 124 Wis. 2d at 672-73.

¶30 Here, there was no other-acts analysis in the trial court. However, the issue was addressed hypothetically at a pretrial hearing. Salinas's counsel suggested Salinas might plead guilty to the victim intimidation counts so as to keep the evidence of those charges out of the trial on the sexual assault charges. The trial court surmised that the State would then file an other-acts motion, and that the evidence would then come in regardless of any pleas.[3] The court explained:

[3] The judge at the pretrial conference was not the same judge who had ordered joinder.

> [T]his may fall into the admission of other acts when I run that three prong analysis in my brain. I can give the curative instruction so they don't convict in theory or base a conviction on other acts, but, boy, I think it goes to plan, scheme, intent basis. I think it's relevant. It meets both prongs of the relevance standard.
>
> Is it prejudicial? Sure, it is. But is it overly prejudicial? I'm not prepared to conclude at this point in time it is. [The prosecutor] hasn't filed a motion. She hasn't even asked about it. I put those words in [the prosecutor's] mouth, but I don't want you to be caught off guard … [by] enter[ing] a plea in the belief this would be excised from the trial. Don't assume that.

¶31 The State summarizes its harmless error argument as follows:

> First, although Salinas argues that the intimidation charges and the crimes underlying the intimidation charges were irrelevant to the sexual assault charges, he has failed to explain how that evidence would have been impermissible for the State to introduce as other acts evidence. Second, as Salinas admits, the evidence against him was overwhelming.

The State's harmless error arguments fail on multiple grounds.

¶32 First, the State ignores the standard of review set forth in ***Leach***, the very case the State relies on to assert the harmless error doctrine applies. As mentioned above, ***Leach*** provides that improper joinder is presumptively prejudicial, and that the State is required to rebut that presumption by proving the error harmless. ***Leach***, 124 Wis. 2d at 672-73. Thus, Salinas had no obligation to demonstrate that any evidence would not be admissible as other-acts evidence. That burden instead falls on the State.

¶33 Regardless, we reject the State's argument that the misjoinder was harmless because all of the objectionable evidence would have been admissible under an other-acts analysis. The State's argument is inadequately developed and fails to adequately respond to Salinas's argument. *See* ***State v. Flynn***, 190

Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994) (appellate court need not address undeveloped arguments); ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded). The State utterly fails to address individual facts and apply those facts to the legal standards. Rather, its argument consists of generalities and conclusory legal assertions. Even on the merits, however, we are satisfied that certain highly prejudicial evidence was inadmissible under an other-acts analysis, as a matter of law.

¶34 As the State initially recognizes, "Salinas argues that the intimidation charges *and* the crimes underlying the intimidation charges were irrelevant to the sexual assault charges …." (Emphasis added.) However, even the State's general, underdeveloped argument *fails to address* the admission of the substantial evidence concerning the domestic abuse incident underlying the intimidation charges, much less to *assert* that admission of that underlying evidence was harmless. *See* ***Charolais***, 90 Wis. 2d at 109. The evidence concerning the domestic abuse incident with M.S. was not relevant to the charges of sexually assaulting V.G. Yet, the jury heard repeatedly, in the State's opening and closing statements and from multiple witnesses, about how Salinas strangled M.S. and then threatened to kill their son while holding a knife. Thus, aside from whether any evidence relating to the joined intimidation charges would have been admissible as other-acts evidence, the misjoinder was prejudicial because it resulted in the admission of the highly prejudicial domestic abuse evidence underlying the intimidation charges. Introduction of that evidence alone renders the misjoinder not harmless.

¶35 We next address whether the evidence of guilt was overwhelming on each of the charges. The State repeatedly contends that Salinas concedes the

sexual assault evidence was overwhelming. That assertion is astonishing and absurd. The passage in Salinas's brief referenced by the State is not reasonably susceptible to such an interpretation.[4] The assertion therefore does not merit further consideration.

¶36 In any event, the sexual assault evidence against Salinas was not overwhelming. This was a classic "he-said, she-said" case with no physical evidence or witnesses. It is the nature of such cases that they turn on the jury's perceived credibility of the defendant and victim. Additionally, V.G. did not report the sexual assault allegations until just after she and her mother learned Salinas would be released from jail relatively soon on the domestic abuse case. Further, on cross-examination, V.G. gave a detailed chronological account of the events and her whereabouts preceding and following the sexual assault, but was then unable to recall where in the house the sexual assault occurred. Salinas therefore had a viable fabrication argument.[5] Thus, given the weaknesses of the

[4] As relevant, Salinas's brief provides:

> This extremely prejudicial information—Mr. Salinas' treatment of M.S., including threats to kill her and their son—was irrelevant to the sexual assault allegations made by V.G. And the prejudicial effect was not negated by overwhelming evidence supporting the sexual assault charges. There was no physical evidence, and no third-party witnesses to any assaults. V.G. testified that she was sexually assaulted; Mr. Salinas denied the accusations. A jury trying to decide who is telling the truth is not likely to credit a defendant who was said to be willing to kill his own child. That is why the improper joinder of [the sexual assault case] and [the intimidation case], which necessarily included [the domestic abuse case], was not just presumptively but demonstrably prejudicial.

[5] We understand that memory may be imperfect, especially regarding traumatic events, and intend to suggest no inference as to the veracity of the victim's account. Rather, we merely recognize the weaknesses of the prosecution's case.

State's case, we cannot say, beyond a reasonable doubt, that the highly prejudicial evidence—some plainly irrelevant—had no effect on the outcome of the case. *See* ***State v. Deadwiller***, 2013 WI 75, ¶41, 350 Wis. 2d 138, 834 N.W.2d 362 ("For an error to be harmless, the party who benefitted from error must show that 'it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'") (quoted source omitted).

¶37 The victim intimidation charges and sexual assault charges were misjoined, and that misjoinder was not harmless. Accordingly, Salinas is entitled to a new trial on each set of charges.

By the Court.—Judgment and order reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.