COURT OF APPEALS
DECISION
DATED AND FILED

October 28, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2757-CR **Cir. Ct. No. 2011CF1184**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEWAYNE D. KNIGHT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County: WILBUR W. WARREN, III, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 PER CURIAM. Dewayne D. Knight appeals from a judgment of conviction entered after a jury found him guilty of three offenses, including two counts of robbery stemming from separate incidents. Knight argues that the evidence at trial was insufficient to sustain the jury's verdict on count three, and

that the trial court erred in denying his motion to sever charges. We disagree and affirm.

¶2 On December 7, 2011, while walking down the street, C.J. was approached by two male pedestrians traveling in the opposite direction. Seconds after they passed C.J., one of the men knocked C.J. to the ground and rifled through his pockets. C.J. told police the man stole his wallet, and provided a physical description of his attacker. Less than two days later, while responding to a separate robbery, police spotted Knight and observed that he matched the description provided by A.G., the victim in the second robbery. Knight fled from police but was quickly apprehended. In Knight's possession, police found C.J.'s state identification, bank debit and social security cards, a store gift card belonging to C.J., and A.G.'s smart phone. When shown a photo array, C.J. identified Knight as his attacker.[1] The State filed a three-count complaint charging Knight with armed robbery (count one) and obstructing an officer (count two) in connection with the December 9, 2011, incident involving A.G. Count three alleged the robbery of C.J. by use of force, as a party to the crime.

¶3 Knight moved to sever count three from counts one and two, alleging that the two incidents were improperly joined and that absent severance, he would suffer prejudice due to the "danger that the cumulative effect of the joined charges may suffice to convince the jury of the defendant's guilt whereas one charge would not." The trial court denied the motion, determining that the

[1] In conjunction with the photo array, C.J. wrote a note stating: "I believe this to be the man that assaulted me and stole my belongings. I'm about 75 percent sure this is the person." At trial, C.J. directly identified Knight and testified he was 90% certain that Knight was his attacker. C.J. explained he was more certain of his in-court identification because "in person, you know, he looks like what he looked like the night I saw him. Pictures always look a little different."

initial joinder was proper and Knight had not established substantial prejudice from a joint trial on all charges.

¶4 At trial, Knight did not dispute that he was found in possession of items stolen from both C.J. and A.G. He testified that he found C.J.'s bank and identification cards shortly after noon on December 8, 2011, in "a parking space right next to the door" of a local deli, and placed the cards in his own wallet. Similarly, Knight testified that he found A.G.'s smart phone lying on the ground shortly after midnight on December 9, 2011, just before he observed and ran from the police. He said he attempted to flee because there was "a warrant out for [his] arrest."

There was sufficient evidence to support the jury's guilty verdict on count three.

¶5 Knight challenges the sufficiency of the evidence on count three, the robbery of C.J. He does not dispute that a robbery occurred, but asserts that the evidence was insufficient to prove he was the perpetrator. We review the sufficiency of the evidence de novo, but in the light most favorable to sustaining the conviction. ***State v. Hanson***, 2012 WI 4, ¶15, 338 Wis. 2d 243, 808 N.W.2d 390. We will sustain a conviction unless the evidence is so insufficient "that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). "If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it." ***Id***. at 507.

¶6 We conclude that ample evidence supported the jury's guilty verdict. Soon after the robbery, C.J. provided a detailed description of his attacker and identified Knight through a photo array. At trial, pursuant to his in-court identification, C.J. testified he was 90% certain that Knight was the perpetrator. Less than twelve hours after the robbery, after attempting to elude law enforcement, Knight was found in possession of the items stolen from C.J.[2] Viewing the evidence in the light most favorable to the state, a reasonable juror could have found beyond a reasonable doubt that Knight was guilty of count three.

¶7 Knight argues that C.J.'s "marginally reliable identification" and Knight's possession of C.J.'s property were the "only two bits of evidence" linking him to the robbery, and that neither established his guilt beyond a reasonable doubt. He asserts that C.J.'s direct eyewitness testimony was insufficient because C.J. viewed the photo array twice and even then stated he was only 75% certain Knight was his attacker. As to his possession of C.J.'s property, Knight contends that he offered a plausible innocent explanation and, citing ***State v. Johnson***, 11 Wis. 2d 130, 139, 104 N.W.2d 379 (1960), that the mere possession of stolen property "raises no inference of guilt." We are not persuaded.

¶8 First, in reviewing the sufficiency of the evidence, we do not examine evidentiary "bits" in isolation, but look to the totality of the evidence. *See* ***State v. Smith***, 2012 WI 91, ¶¶34-36, 342 Wis. 2d 710, 817 N.W.2d 410. The jury was presented with evidence concerning both C.J.'s identification of Knight and Knight's possession of stolen property, as well as C.J.'s description of his

[2] The jury was permitted to consider Knight's flight from police as evidence of his consciousness of guilt. *See* ***State v. Quiroz***, 2009 WI App 120, ¶18, 320 Wis. 2d 706, 772 N.W.2d 710.

attacker, the ways in which Knight matched that description, and Knight's attempt to elude law enforcement. Second, it is the jury's function to decide the credibility of witnesses and it "alone is charged with the duty of weighing the evidence." ***State v. Below***, 2011 WI App 64, ¶4, 333 Wis. 2d 690, 799 N.W.2d 95. The jury was informed that C.J. was only 75% certain of his photo identification, and heard Knight's testimony about how he came to possess C.J.'s items. The jury was not required to accept Knight's explanation, and, contrary to his argument on appeal, Knight's possession of recently stolen property permissibly supports the inference that he robbed C.J. *See* ***Johnson***, 11 Wis. 2d at 139 (the "unexplained possession of recently stolen goods raises an inference of greater or less weight, depending upon the circumstances that the possessor is guilty of the theft" or other offense during which the items were stolen).

The charges were properly joined in the charging document and the trial court did not err in declining to sever the counts for purposes of trial.

¶9 Knight argues that the trial court erred in denying his motion to sever count three from counts one and two. WISCONSIN STAT. § 971.12(1) (2013-14),[3] provides in pertinent part that two or more crimes may be charged in the same complaint or information if they "are of the same or similar character …." Whether charges are properly joined in a single charging document presents a question of law subject to de novo review. ***State v. Hoffman***, 106 Wis. 2d 185, 208, 316 N.W.2d 143 (Ct. App. 1982). The statute is to be construed broadly in favor of initial joinder. ***State v. Locke***, 177 Wis. 2d 590, 596, 502 N.W.2d 891

[3] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

(Ct. App. 1993). After initial joinder, the court may order separate trials "[i]f it appears that a defendant or the state is prejudiced by a joinder of crimes …." WIS. STAT. § 971.12(3). A motion for severance is addressed to the trial court's discretion and "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." ***Locke***, 177 Wis. 2d at 597.

¶10 We first conclude that the charges were properly joined under WIS. STAT. § 971.12(1), because they were of the same or similar character. To be of the same or similar character, "crimes must be the same types 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). Here, the offenses occurred less than thirty hours apart and both involved violent street robberies of strangers after dark. Following the second robbery, Knight attempted to elude law enforcement and, when arrested, was in possession of items stolen from both victims. At a minimum and as Knight concedes, the testimony of both the arresting officer and the lead investigator overlapped the two cases. This alone justifies joinder. *See* ***State v. Linton***, 2010 WI App 129, ¶¶16-17, 329 Wis. 2d 687, 791 N.W.2d 222 (in a case involving two homicides, the testimony of the medical examiner concerning both victims' autopsies along with the "scant" testimony of a detective concerning the statement of a single witness satisfied the overlapping evidence requirement). Additionally, because Knight was carrying items stolen from C.J. as well as A.G., testimony concerning his flight from police was probative of his consciousness of guilt as to both offenses, constituting a further evidentiary overlap.

¶11 Having determined that the charges were properly joined, we address the trial court's decision denying Knight's motion to sever. Given the

propriety of the initial joinder, it is presumed that Knight suffered no prejudice. ***Id.***, ¶20. He must show he was substantially prejudiced by the trial court's denial of his severance motion. ***Locke***, 177 Wis. 2d at 597. Knight asserts he was "substantially prejudiced by having Count Three joined with Counts One and Two where the jury heard testimony of an armed robbery at gunpoint and evasive actions to avoid detection; none of which occurred with regards to Count Three."

¶12 We conclude that the trial court properly exercised its discretion in denying Knight's motion to sever after it determined that evidence of both offenses would have been admissible at separate trials as other acts evidence under WIS. STAT. § 904.04(2).[4] *See* ***Locke***, 177 Wis. 2d at 597-98. Knight was found in possession of items stolen from both victims and, as to each robbery, testified he found the loot on the ground. Evidence of one robbery would have been admissible to prove Knight's intent and identity as the perpetrator of the other robbery. *See* Sec. 904.04(2). Further, evidence of both would have been admissible at separate trials to establish what the trial court deemed "absence of mistake or accident," meaning that it would undermine Knight's innocent explanation for possessing the stolen property. *See* ***State v. Sullivan***, 216 Wis. 2d

[4] WISCONSIN STAT. § 904.04(2)(a) provides that:

> [E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In ***State v. Sullivan***, 216 Wis. 2d 768, 771-73, 576 N.W.2d 30 (1998), the court established a three-step framework for determining the admissibility of other acts evidence which asks (1) whether the evidence serves an acceptable purpose under the statute, (2) if it is relevant, and (3) whether its probative value is substantially outweighed by the danger of unfair prejudice.

768, 784, 576 N.W.2d 30 (1998) (other acts evidence admissible "if it tends to undermine an innocent explanation for an accused's charged criminal conduct."). Given the similarities between the temporally proximate offenses along with the overlapping evidence concerning Knight's possession of both victims' property, his explanation therefor, and his flight from police, the evidence on counts one and two was relevant to count three, and vice versa. ***Id***. at 785-88. Evidence of each incident was highly probative of Knight's identity in the other, and Knight has not demonstrated either a sufficient danger of unfair prejudice under ***Sullivan***, or the substantial prejudice required by ***Locke***.

By the Court.—Judgment affirmed.

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