COURT OF APPEALS
DECISION
DATED AND FILED

July 17, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal Nos. 2006AP2893-CR
2006AP2894-CR

Cir. Ct. Nos. 2004CF6158
2005CF1273

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY BOLDEN,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 CURLEY, J. Anthony Bolden appeals the judgments, entered in two separate cases that were tried together, convicting him of one count of felony murder, two counts of armed robbery and one count of attempted armed robbery,

as a party to the crime, contrary to WIS. STAT. §§ 940.03, 943.32(2), 939.32 and 939.05 (2003-04).[1] Bolden contends that his convictions should be overturned and a new trial granted because the trial court erred when it granted the State's motion for joinder. We disagree and affirm.

I. BACKGROUND.

¶2 On November 13, 2004, Bolden was charged with one count of felony murder while attempting to commit armed robbery, as a party to a crime, for a shooting at a Shell gas station and Quick Mart on the northwest side of Milwaukee on October 29, 2004, which led to the death of Wisconsin Department of Justice Agent John Balchunas. The evidence which led to his being charged came predominantly from Bolden's confession. According to the complaint, Bolden told the police that, some time after 6 p.m. on October 28, 2004, he was at the gas station for the purpose of committing a robbery with Dionny Reynolds.[2] At this time they decided to rob a "white guy" who had just entered the store. Bolden grabbed Balchunas and held him while Reynolds pointed a gun at Balchunas. Bolden then began searching Balchunas for something to steal when he felt a gun. Bolden told Reynolds that Balchunas had a gun and Reynolds shot Balchunas twice. After Reynolds shot Balchunas, Bolden let go of him and ran away. Balchunas died a week later.

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] Bolden told police that they rode around for several hours before going to the gas station, and that when they observed that the cashier was in a glass-enclosed office, they decided to rob someone else.

¶3 Several months later, on March 11, 2005, Bolden was charged in a separate case with two counts of armed robbery and one count of attempted robbery, all as a party to the crime. Again, the link between these crimes and Bolden was his earlier confession, given some time after his arrest on November 9, 2004. These three crimes occurred at separate fast food restaurants. The first armed robbery occurred on September 7, 2004, at a Burger King restaurant on the northwest side of Milwaukee. The manager of the restaurant reported to the police that she was working on some paperwork in the early evening when she was approached by a black man wearing a "doo rag" who was holding a silver and black gun. He told her to empty the registers and open the safe, and fearing for her life, she complied.

¶4 The attempted armed robbery occurred on September 11, 2004. According to the manager of a Checkers restaurant, located on the northwest side of Milwaukee, she was in the process of closing up the restaurant at about 2 a.m. when she saw a man with something over his face jump through the drive-through window. He was pointing a gun at her and the other employees, including Bolden, who was working that evening, and ordered her to turn off the lights. As the manager moved towards the back of the store where the light switches were located, she heard a "bang" coming from the kitchen. The noise distracted the robber, and she slipped out one of the doors and ran away. The robber ran after her and asked her for the keys. She had the keys in her hand and said, "Here you go." However, he then told her to be quiet and he approached a car while she ran and hid until she saw the police. It was later reported that no money was obtained by the robber because it had already been locked up.

¶5 The next armed robbery occurred on September 20, 2004, at a Dairy Queen store located on the northwest side of Milwaukee. The people inside the

store reported that at approximately 8 p.m., two black males entered with one of them touting a silver handgun. The robbers were wearing "doo rags" over their faces. They emptied the registers and left. However, before doing so, one of the robbers referred to the other as "Tony."

¶6 In confessing to his involvement in these three offenses, Bolden explained that he and Reynolds planned the Quick Mart robbery, and he, Reynolds and two others helped plan the other robberies. As an example, he said that while he did not attempt to rob the Checkers restaurant, he supplied information about the operation of the Checkers restaurant to the actual robber, and he was present when the attempt to rob it was made. A month after the robbery charges were issued, the State filed a motion seeking to join those charges with the felony murder charge. Bolden filed a response opposing the joinder. The trial court determined that joinder was appropriate and granted the motion. Bolden filed a motion for reconsideration, which was denied. The cases were tried together and Bolden was found guilty of all counts by a jury. This appeal follows.

II. ANALYSIS.

¶7 Bolden relies on the holding in ***State v. Hamm***, 146 Wis. 2d 130, 138, 430 N.W.2d 584 (Ct. App. 1988), which states: "To be of the 'same or similar character' under sec. 971.12(1), Stats., crimes must be the same type of offenses occurring over a relatively short period of time and the evidence as to each must overlap." ***Id.*** (citing ***State v. Hoffman***, 106 Wis. 2d 185, 208, 316 N.W.2d 143 (Ct. App. 1982)).

¶8 Bolden argues that the trial court erred because it "failed to consider the second part of the 'same or similar character' analysis" that the evidence in these two cases must overlap. He also contends that the offenses were not so

similar to permit joinder. Finally, he claims that the joinder was unfairly prejudicial. We disagree with all three contentions.

¶9 WISCONSIN STAT. § 971.12(1) and (4) permit the joining of separate criminal cases under certain circumstances. The statute reads:

> **(1)** JOINDER OF CRIMES. Two or more crimes may be charged in the same complaint, information or indictment 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….
>
> ….
>
> **(4)** TRIAL TOGETHER OF SEPARATE CHARGES. The court may order 2 or more complaints, informations or indictments to be tried together if the crimes ... could have been joined in a single complaint, information or indictment. The procedure shall be the same as if the prosecution were under such single complaint, information or indictment.

"Whether the ... joinder was proper is a question of law that we review without deference to the trial court, and the joinder statute is to be construed broadly in favor of the ... joinder." ***State v. Locke***, 177 Wis. 2d 590, 596, 502 N.W.2d 891 (Ct. App. 1993).

¶10 We first explore the question of whether the two cases could have been joined in a single complaint. This necessitates our looking to see whether the crimes fall within the ambit of WIS. STAT. § 971.12(1).

¶11 Admittedly, the armed robberies were carried out by different members of the group and in several different manners; however, Bolden and his accomplices committed crimes that all had the same *modus operandi*. All were

planned out ahead of time. They were not committed on the spur of the moment. Their plans always started as a robbery that would be carried out with an actual gun or a BB gun that looked like a real gun, with the robbers usually disguising themselves by wearing "doo rags" over their faces. All four sites of the crimes were similar. Three were exclusively fast food restaurants and the fourth was a gas station with an attached fast food mart. In addition, the crimes all took place in either the evening or early morning and were in the same general vicinity, the northwest side of Milwaukee.

¶12 Most importantly, the crimes took place within a very short period of time. The first was committed on September 7, 2004, and the final one on October 29, 2004. In two of the crimes, including the site of the murder, two people went into the targeted restaurant or store. In the store where Bolden worked, only one of the robbers appeared, while Bolden pretended to be a surprised employee. In the Burger King store, one of the accomplices entered and took the money, while the other three waited outside or in the car.

¶13 In making its findings, the trial court said:

> [T]rial courts have to deal with this issue: is there a common scheme or plan. Is there any of the other exceptions here because any of this evidence, obviously, is prejudicial. You don't want to convict a defendant merely because he's been involved in other armed robberies.
>
> But to me the similarities here are just too common, too close in nature. We're talking about closeness in time, September and October; we're talking about fast food restaurants; we're talking about a common scheme or plan.
>
> ….
>
> … We're talking about the northwest side of Milwaukee.
>
> They occurred at small, fast food services….

> ….
>
> As I'm pointing out, though, when a place is robbed, be it a Quick Mart which sells food and gas nowadays, and these small restaurants, is that – it's the type of business, is that a robbery – people don't rob banks any more [sic] because it becomes federal offenses. They don't rob supermarkets it seems any more [sic] where there's a lot of cash. It's the quick hits at the places that are assessable [sic].
>
> The similarity, though, is it's a series of events. It's the timing and the planning that has to go into these; and, if you're masked in one and not masked in another, it does not mean that they're not similar in nature.
>
> I think the State has a right to show a common plan or scheme….
>
> ….
>
> … I think it is clearly a common scheme or plan as I said based upon the timing and the location of the robberies.

¶14 Crimes are "parts of a common scheme or plan" when they "have a common factor or factors of substantial factual importance, E.g., time, place or Modus operandi." ***Francis v. State***, 86 Wis. 2d 554, 560, 273 N.W.2d 310 (1979). The facts here all have common factors: time, place, and *modus operandi*. Consequently, the trial court appropriately found that the crimes constituted parts of a common scheme or plan.

¶15 Bolden next argues that, in order to join these cases, there was a need for overlapping evidence and none exists here.[3] We disagree.

[3] Bolden states in his brief that the evidence must overlap. He cites ***State v. Davis***, 2006 WI App 23, ¶13, 289 Wis. 2d 398, 710 N.W.2d 514, which is quoting from ***State v. Hamm***, 146 Wis. 2d 130, 138, 430 N.W.2d 584 (Ct. App. 1988), which cites ***State v. Hoffman***, 106 Wis. 2d 185, 208, 316 N.W.2d 143 (Ct. App. 1982). In ***Hoffman***, there is a footnote that advises that:

(continued)

¶16 As the State counters in its brief:

> [Bolden's] argument ignores a very significant piece of overlapping evidence in both cases: [his] statements that he carried out the crimes in both cases with Dionny Reynolds, at times with both of them involved in the planning and preparations (*see* an uncharged Burger King robbery; Dairy Queen at 6520 W. North Ave.; Burger King on Green Bay Road; Checkers Restaurant on West Capitol Drive). In his statements about the murder[,] Bolden describes Reynolds as the initiator of the planned robbery, and as the principal whom he assisted.
>
> …. The fact that Bolden admitted to the crimes in the two cases in separate statements made to different detectives would make the statements in each case admissible in a separate trial of the other because it supports the credibility of the statements. The evidence of their prior relationship and joint participation in other similar crimes also provides context for the crimes and makes more credible Bolden's statement that he and

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> The similarities between the federal and Wisconsin rules governing joinder and severance have been recognized by the supreme court. *Francis v. State*, 86 Wis. 2d 554, 557, 273 N.W.2d 310, 312 (1979). Federal cases therefore provide guidance to our resolution of these state court issues.

Hoffman, 106 Wis. 2d at 208 n.8.

Another footnote warns:

> The requirement of overlapping evidence does not appear to be imposed by all circuits. *See, e.g.*, *Hill v. United States*, 418 F.2d 449, 450 (D.C. Cir. 1968). For the purpose of this opinion only, we assume without deciding that overlapping evidence is a prerequisite to the finding that two crimes are of the same or similar character for the purpose of joinder.

Id. at 208 n.9.

Hamm does not contain the footnotes and assumes that there must be overlapping evidence. In ***Davis***, we noted that the trial court pointed out that the federal courts have permitted joinder even in the absence of overlapping evidence. ***Davis***, 289 Wis. 2d 398, ¶19. However, we see no need to decide whether the joinder statute requires overlapping evidence because such evidence existed here.

> Reynolds participated together in the attempted robbery that ended with the murder.

(Record citations omitted.)

¶17 We adopt the State's arguments. Here, Bolden's confession connects the dots between all the charges. Without his inculpatory statement, there was no evidence that would have shown his involvement with the planning of and participation in the armed robberies and the murder. His confession regarding the planning and execution of all the robberies, including the one resulting in the shooting death, would have been admissible in both cases had joinder not been granted because it provides context for the crimes and makes his statements more credible. Consequently, there is overlapping evidence.

¶18 Finally, Bolden argues he is prejudiced by the joining of the two cases for trial. We disagree. Bolden was not prejudiced. As noted, Bolden's role in the common scheme to commit robberies and his inculpatory statements to the police could have been introduced at both trials. Whether there had been one or two trials, the evidence would have been the same; therefore, he was not prejudiced by the joinder of the cases.

> The reason for the lack of prejudicial joinder in such cases is that, even if there were separate trials on each crime, the same evidence that would be admissible at the joint trial would also be admissible at the separate trial, and so there is no ground for claiming prejudice.

Peters v. State, 70 Wis. 2d 22, 30, 233 N.W.2d 420 (1975), *disapproved on another ground by* ***State v. Poellinger***, 153 Wis. 2d 493, 505-06, 451 N.W.2d 752 (1990). Moreover, the trial court specifically instructed the jury to consider the charges independently and not to let the verdict in one case affect their verdict on another count. Thus, we are satisfied that the prejudice was not substantial.

¶19 For the reasons stated, the judgments are affirmed.

By the Court.—Judgments affirmed.

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