COURT OF APPEALS
DECISION
DATED AND FILED

July 1, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1929-CR **Cir. Ct. No. 2011CF1038**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL E. VEGA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. *Affirmed*.

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

¶1 PER CURIAM. Daniel Vega appeals a judgment convicting him of two counts of intentionally abusing thirteen-month-old L.M.T. The jury acquitted Vega of first-degree reckless homicide of L.M.T. for a separate incident. Vega contends the charges were improperly joined for trial and the court erroneously

exercised its discretion when it denied his motion to sever the physical abuse charges from the homicide charge. We reject those arguments and affirm the judgment.

¶2 L.M.T. died on August 19, 2011, as a result of head injuries caused by blunt force trauma. Her treating physician noticed many bruises over her forehead, nose, face, chin, back and buttocks. He concluded she was the victim of intentional abusive trauma, possibly occurring multiple times. The doctor who conducted the autopsy concluded L.M.T. died from violent shaking or being thrown across a room. She also observed L.M.T.'s multiple bruises and concluded L.M.T. was the victim of abusive treatment rather than accidental bruising.

¶3 As a result of these conclusions, police conducted an investigation and identified two witnesses who observed Vega abuse L.M.T. Alex Olivero testified he observed Vega pick up L.M.T. by her feet, turn her upside down until she turned blue, slap her face and drop her on the couch. On another occasion, Olivero witnessed Vega choke L.M.T. around the neck and then drop her on her butt. Sandra Marotz testified that a week or two before L.M.T. was killed, she witnessed Vega choking L.M.T. These incidents occurred when L.M.T.'s mother left Vega alone with L.M.T.

¶4 On appeal, this court's review of joinder is a two-step process. *See* ***State v. Locke***, 177 Wis. 2d 590, 596, 504 N.W.2d 891 (Ct. App. 1993). First, this court must review whether the initial joinder was proper under WIS. STAT. § 971.12(1) (2011-12),[1] which allows joinder if the crimes charged "are of the

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

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." That statute is construed broadly in favor of initial joinder. ***Id.*** For crimes to be of the same or similar character, they must be the same type of offense 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). Whether the charges are properly joined is a question of law that we decide without deference to the trial court. ***State v. Hoffman***, 106 Wis. 2d 185, 209, 316 N.W.2d 143 (Ct. App. 1982). After charges are properly joined, a defendant may request severance if he or she can establish prejudice from the joinder. Whether the defendant will suffer prejudice is a matter that involves the exercise of the trial court's discretion that is reviewed with deference. *See* ***State v. Hall***, 103 Wis. 2d 125, 141, 307 N.W.2d 289 (1981).

¶5 The physical abuse and homicide charges were properly joined because the crimes were of a similar character, they occurred over a short period of time, and the medical evidence of each crime overlapped. The three offenses occurred between August 1 and August 19, 2011. They involved intentional abuse of L.M.T. causing varying degrees of injury, and ultimately her death. The crimes involved the same victim in the same location under the same circumstance when L.M.T.'s mother left her with Vega. The medical evidence overlapped because L.M.T.'s injuries came to light only after she suffered the fatal blunt force trauma to her head.

¶6 Vega contends the homicide count was not connected to the physical abuse counts because they did not constitute parts of a common plan or scheme. Focusing on the strangulation incidents, he contends the injury causing L.M.T.'s death was so different in kind that it cannot be considered part of a common

scheme or plan. We disagree. L.M.T.'s injuries cannot be so neatly separated, and Vega ignores the fact that strangulation, dropping the child, and throwing her are all evidence of a common scheme or plan to silence her when she cries.

¶7 Vega was not prejudiced by the joinder because the evidence of the abuse that lead to L.M.T.'s death could have been introduced at a separate trial on the physical abuse charges.[2] The nearness of time, place and circumstance of the three offenses was probative to establish the identity of the perpetrator. Vega's modus operandi of intentionally abusing L.M.T. when her mother was away would assist the jury in determining the perpetrator of L.M.T.'s injuries. As the prosecutor explained in his closing argument, Vega had a history of becoming angry when L.M.T. cried, losing his temper and hurting her. Most people do not harm a thirteen-month-old baby. That is a distinct factor that helps identify the perpetrator.

¶8 The evidence of each of these offenses was also admissible to show context. The medical evidence of L.M.T.'s injuries and the discovery of the eye-witnesses to the physical abuse would not have made sense to the jury without providing the context of the homicide.

¶9 Evidence as to each of the charges also would have been admissible at separate trials to establish the absence of accident or mistake. The recurrence of a like act lessens by each instance the possibility that a given instance could be the result of inadvertence, accident, or other innocent intent. ***State v. Roberson***, 157 Wis. 2d 447, 455, 459 N.W.2d 611 (Ct. App. 1990). Because the State had to

[2] Vega concedes the evidence of physical abuse could have been introduced at the homicide trial.

prove Vega's intent to cause bodily harm under WIS. STAT. § 948.03(2)(d), it was required to negate accident or inadvertence. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 784, 576 N.W.2d 30 (1998).

¶10 Vega contends the evidence of L.M.T.'s death was likely to arouse the jury's instinct to punish him and would provoke the jury's sense of horror and inflame the jury. The jury's acquittal on the homicide charge refutes that argument.

¶11 Finally, the State argues that any error in conducting a single trial on these charges was harmless because there is no evidence that the jury became confused about which evidence related to which crime or failed to consider the crimes separately. *See* ***State v. Leach***, 124 Wis. 2d 648, 672, 730 N.W.2d 240 (1985). The State also argues the joinder was harmless because the evidence of Vega's guilt is overwhelming, and any potential prejudice was also presumptively cured by the jury instruction to consider each of the charges separately. ***Id.*** at 673. Vega does not address the State's harmless error analysis, effectively conceding the issue. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App 1979).

By the Court.—Judgment affirmed.

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