COURT OF APPEALS
DECISION
DATED AND FILED

January 22, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-3062-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ALFONSO L. MERRIWEATHER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: HON. JOHN W. ROETHE, Judge. *Affirmed.*

Before Eich, C.J., Vergeront and Roggensack, JJ.

PER CURIAM. Alfonso L. Merriweather appeals from a judgment convicting him of substantial battery, contrary to § 940.19(3), STATS.; possession of cocaine, contrary to § 161.41(3m), STATS., 1993-94, within a prohibited distance from a park, contrary to § 161.495, STATS., 1993-94; as well as possession of drug paraphernalia as a second or higher offense, contrary to

§ 161.573(1), STATS., 1993-94. He also appeals from a postconviction order denying his motion for postconviction relief. He argues that (1) joinder of the charges was improper, and that failure to sever the drug charges from the battery charges prejudiced him; (2) the State failed in its pretrial obligation to give the defense a medical report relating to the victim's injuries; and (3) the circuit court erred in failing to hold an evidentiary hearing on his postconviction motion. We affirm. We conclude that joinder was proper and the trial court did not erroneously exercise its discretion in denying the motion to sever; that the medical report was not exculpatory, and therefore the State did not err in failing to present it to the defense; and that the circuit court did not err in handling the postconviction motion.

BACKGROUND

In the early morning of September 11, 1996, police arrested Merriweather a few blocks from the home he shared with Laurie DuBois, his girlfriend, and DuBois' sister, Lynn Quillins. Quillins called the police on DuBois' complaint that during an altercation Merriweather hit her, choked her and stomped on her.

When apprehended, police saw Merriweather toss something away, which he claimed was a cigarette, but was later found to be a small plastic bag of cocaine. Merriweather was also in possession of a straw which a prosecution expert trial witness later testified had been used to snort cocaine. After being given ***Miranda*** warnings, Merriweather admitted to police he had been using cocaine.

At trial, DuBois testified that Merriweather came home early on the morning of September 11, that he was loud and mad, and that he woke her up and

began an argument which ultimately resulted in Merriweather battering her. After having her recollection refreshed,[1] she testified that she believed Merriweather was under the influence of cocaine at the time.

Lynn Quillins testified that she witnessed Merriweather's arrival at home, but not the battery to DuBois, and also witnessed DuBois' condition—a scratched neck, inability to talk and an apparent pain in her side—after the altercation. Quillins also corroborated various details, such as Merriweather's condition and his anger.[2]

DuBois' doctor testified that DuBois' injuries included a collapsed lung, which occurred when a broken rib punctured her lung. The defense did not receive a copy of the doctor's report until the time of trial.

ANALYSIS

Joinder and Severance

Merriweather argues that he was prejudiced because the drug charges and the battery charges were joined, and because the circuit court denied his motion to sever the drug charges from the battery charges. He argues that the

[1] DuBois could not remember that, in the police report generated at the time of the incident, she indicated Merriweather was high on cocaine. At trial, she testified that he had been drinking. Only after being shown the report form did she recollect that she believed Merriweather was high on cocaine. Merriweather complains that the level of refreshment was improper, because DuBois suffered a lack of knowledge, not a memory default. We, however, do not consider this matter further, because Merriweather fails to offer legal analysis on what level of refreshment is permissible. *See* ***State v. Shaffer***, 96 Wis.2d 531, 545-46, 292 N.W.2d 370, 378 (Ct. App. 1980), and ***In re Balkus***, 128 Wis.2d 246, 254, 381 N.W.2d 593 (Ct. App. 1985) (we will generally not consider arguments unsupported by legal authority).

[2] Quillins also testified that Merriweather showed her a .38 hollow point bullet. When Merriweather was apprehended, he was in possession of three such bullets.

jury heard drug evidence on the battery charge which they would not have heard in a trial on the battery charges alone, and that the jury heard evidence of battery which they would not have heard in a separate trial on the drug charges.

Although Merriweather conflates them, joinder and severance are two distinct issues. Joinder of several offenses in the same complaint is permitted when the acts are "connected together or constitut[e] parts of a common scheme or plan." Section 971.12(1), STATS. Whether joinder is proper is a question of law. ***State v. Hoffman***, 106 Wis.2d 185, 208, 316 N.W.2d 143, 156 (Ct. App. 1982).

The drug acts and the battery acts here were "connected together" in at least two ways. First, evidence suggests that Merriweather was under the influence of drugs when the battery occurred. Second, the police found the drugs when they searched Merriweather incident to his arrest on battery charges. As a matter of law, joining these charges together in one complaint was proper.

Severance is governed by § 971.12(3), STATS., which permits motions to sever properly joined offenses "if it appears that a defendant is prejudiced" by joinder. Whether severance should be granted lies within the discretion of the circuit court. ***State v. Nelson***, 146 Wis.2d 442, 455, 432 N.W.2d 115, 121 (Ct. App. 1988). In order to show erroneous exercise of discretion, a defendant must show "substantial prejudice" from failure to sever. ***State v. Hoffman***, 106 Wis.2d at 209, 316 N.W.2d at 157.

There was no "substantial prejudice" here for two reasons. First, the drug evidence was relevant to the battery charges. Merriweather's defense to the battery charges was that the legacy of multiple hip replacement surgeries would have caused him great pain had he battered DuBois as she claimed. However, the prosecution undercut this theory with medical testimony that cocaine has a

stimulating and pain relieving effect. Evidence of cocaine usage was also relevant to the battery charges to help explain Merriweather's erratic and angry behavior.

The second reason Merriweather could not show "substantial prejudice" from joinder relates to the overpowering evidence of Merriweather's drug use. Most incriminatingly, Merriweather himself admitted to police he had used drugs. Further, he was found with drug paraphernalia on him which an expert testified had been used to inhale cocaine; the police found a bag of cocaine he tossed away; and DuBois testified that she believed he was high on cocaine when he battered her. In light of this evidence, absence of battery evidence would not have affected his conviction on drug charges.

Medical Report

Merriweather argues that the State failed in its pretrial obligation to give the defense a medical report relating to the victim's injuries, because the report was exculpatory. ***Brady v. Maryland***, 373 U.S. 83 (1963). The medical report showed only a minor puncture of DuBois' lung, which healed spontaneously within a day. Merriweather implies that with sufficient time to prepare, defense counsel could have minimized DuBois' injuries.

We reject this argument. Proof of substantial battery under § 940.19(3), STATS., requires an act done to another with intent to cause substantial bodily harm, further defined as injury which causes "any fracture of a bone." *See also* WIS J I—CRIMINAL 1223. Under this standard, the significance of the lung puncture is not its extent, but that it occurred from the jagged edge of a broken bone.

Merriweather also argues that the medical report was exculpatory because the estimated time of the injury conflicts with DuBois' evidence on when the injury occurred, and further conflicts with evidence tending to show that Merriweather was sleeping at the time the medical report estimates the injury occurred. Merriweather and the State differ strongly on this point, with the State arguing that an exact chronology is irrelevant under the loose timetable for injury established by DuBois' and Quillins' testimony.

We have carefully read the evidence. Merriweather is correct that contradictions can be established about what time the injury occurred. However, these contradictions also exist without the use of the medical report. Counsel never sought to make an issue of the chronology, despite the fact that DuBois and Quillins both testified in a vague and potentially contradictory manner about the timetable of events. It appears that DuBois and Merriweather both went to sleep after the fight with DuBois only later realizing the extent of her injuries.[3] This is not a case where an exact chronology was ever sought to be, or ever could have been established, regardless of the medical report.

Hearing

Merriweather brought a postconviction motion for sentence modification. He also claimed that the evidence was insufficient to sustain the conviction on the battery charge.[4] The court denied his motion without a hearing.

[3] For example, DuBois testified that "it was around three or four o'clock in the morning" when she awoke from her post-altercation sleep. Quillins testified that Merriweather came home around 3:00 a.m., that she had a conversation of unspecified length with him, that he went to bed downstairs, and that "about an hour later" Quillins became aware that DuBois had been injured.

[4] Merriweather further challenged failure to sever, misjoinder and the prosecution's failure to disclose the medical record. Because we have already considered these matters, we do not consider them again here.

Merriweather argues that the circuit court erred in failing to hold an evidentiary hearing.

Not every defendant who brings a postconviction motion has the unqualified right to a hearing: whether to hold a hearing or not is within the court's discretion. ***State v. Bentley***, 201 Wis.2d 303, 309-11, 548 N.W.2d 50, 53 (1996). If the motion is deficient, the circuit court may deny it. ***Id***. We review the motion de novo to determine whether sufficient facts are set forth which would entitle the defendant to relief. ***Id***. at 310-11, 548 N.W.2d at 53. A motion is deficient if it: (1) fails to allege sufficient facts, (2) presents only conclusory allegations, or (3) the record shows conclusively that the defendant is not entitled to relief. ***Id***. A circuit court's decision to deny a hearing is subject to deferential appellate review. ***Id***.

We conclude that Merriweather is not entitled to relief on any of his theories. Specifically, the sentence was not a misuse of circuit court discretion, although the maximum sentence was imposed. The circuit court properly took into account Merriweather's extensive criminal record, his history of assault, drug use and other undesirable behaviors, his previous failures on probation, and this crime, in which the victim was severely injured. These are proper factors under ***Cunningham v. State***, 76 Wis.2d 277, 282, 251 N.W.2d 65, 67-68 (1977), and ***State v. Iglesias***, 185 Wis.2d 117, 128, 517 N.W.2d 175, 178, *cert. denied*, 115 S. Ct. 641 (1994). Further, the court made the sentences in all three counts concurrent.

Merrriweather's placement in a medium security facility did not entitle him to sentence modification. A security classification is not a "new factor" as that term is defined in case law. *See* ***State v. Michels*** 150 Wis.2d 94,

99, 441 N.W.2d 278, 280 (Ct. App. 1989) (a sentence may be modified upon a showing of a "new factor." The new factor must be not only previously unknown, but must strike at the very purpose for the sentence selected by the trial court.).

We also reject Merriweather's claim that there was insufficient evidence to convict him of battery. DuBois' and Quillins' testimonies were credible evidence for a jury to find Merriweather guilty. ***Vonch v. American Standard Ins. Co.***, 151 Wis.2d 138, 151, 442 N.W.2d 598, 603 (Ct. App. 1989).

We conclude that the circuit court did not err in failing to hold an evidentiary hearing. Further, because we reviewed the postconviction motion de novo, ***State v. Bentley***, 201 Wis.2d at 310-11, 548 N.W.2d at 53, any possible error by the circuit court in failing to hold a hearing is harmless.

By the Court.—Judgment and order affirmed.

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