COURT OF APPEALS
DECISION
DATED AND FILED

July 23, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0401-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLES E. PHINISEE,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Jefferson County: LEE S. DREYFUS, JR., Judge. *Affirmed.*

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

PER CURIAM. Charles E. Phinisee appeals from a nonfinal[1] order denying his motion for severance, and from two additional orders denying his

[1] This court granted Phinisee's petiton for leave to appeal and for a stay on April 10, 1997.

motions for reconsideration of that issue. He claims the trial court erred when it concluded that an obstruction of justice count could be properly joined with two counts of criminal negligence against him. Alternatively, he argues that the trial court erroneously exercised its discretion when it refused to sever the charges on the grounds of prejudice. For the reasons discussed below, we disagree and affirm the orders of the trial court.

On November 11, 1994, the thirteen-ton dump truck Phinisee was driving struck the rear end of a pickup truck that was waiting in an intersection to make a left-hand turn. The impact propelled the pickup truck into oncoming traffic, where it was struck a second time by a third vehicle, killing the pickup-truck driver and seriously injuring the driver of the third vehicle. Phinisee stated that he must have nodded off momentarily, perhaps due to his diabetes. Although Phinisee did not appear impaired to the police officers who responded to the accident, they arranged to have a sample of his blood tested because a fatality was involved.

The blood test showed trace amounts of THC, the psychoactive chemical found in marijuana. Although the level of THC in Phinisee's blood would ordinarily not be enough to cause impairment, investigators wondered if the drug might have some interactive effect with diabetes. When the police questioned Phinisee—nearly two months after the accident—about the source of the THC in his blood, he responded that he had been exposed to second-hand marijuana smoke at a concert on October 31, 1994. Toxicologist Thomas Neuser of the State Laboratory of Hygiene informed the police that second-hand smoke ingestion would not show up in a blood test and that Phinisee's test results indicated recent use. This discrepancy led the police to conclude that Phinisee had lied to them, and the State then filed a criminal complaint charging Phinisee with

homicide by negligent use of a motor vehicle based on the accident, and obstruction of justice based on his subsequent interview with the police. The information was later amended to include an additional count of causing great bodily harm by negligent operation of a motor vehicle.

Phinisee first contends that the obstruction and negligence counts fail to meet the statutory criteria for joinder. Section 971.12(1), STATS., provides in relevant part:

> 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.

Whether two or more crimes meet the statutory joinder criteria is a question of law which this court may determine without deference to the trial court. ***State v. Locke***, 177 Wis.2d 590, 596, 502 N.W.2d 891, 894 (Ct. App. 1993).

We agree with the State that the crimes charged against Phinisee were "connected together." The defendant relies upon ***Francis v. State***, 86 Wis.2d 554, 273 N.W.2d 310 (1979), for the proposition that crimes are only "connected" within the meaning of the statute when "evidence of each crime is relevant to establish a common scheme or plan that tends to establish the identity of the perpetrator." ***Id***. at 560, 273 N.W.2d at 313. We reject that reading of ***Francis***, however, because the passage cited by the defendant merely lists factual similarities between the crimes as one interpretation of the connected phrase, "inter alia," and because the case viewed as a whole chose to adopt a broad, rather than narrow, reading of the joinder statute. ***Id***. at 560 and 558-59, 273 N.W.2d at

313 and 312. Other cases establish that charges may also be connected when one arose out of the investigation of the other, as was the case here. *See, e.g.,* ***Peters v. State***, 70 Wis.2d 22, 29, 233 N.W.2d 420, 424 (1975). We therefore conclude that the initial joinder was proper.

The joinder of charges in a single information does not automatically require a joint trial, however. ***Francis***, 86 Wis.2d at 557, 273 N.W.2d at 311. Section 971.12(3), STATS., provides in relevant part:

> RELIEF FROM PREJUDICIAL JOINDER. If it appears that a defendant or the state is prejudiced by a joinder of crimes or of defendants in a complaint, information or indictment or by such joinder for trial together, the court may order separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

The severance determination lies within the trial court's discretion, and we will not disturb it so long as the trial court applied the proper standard of law to the facts of record to reach a reasonable result. *See* ***State v. Locke***, 177 Wis.2d 590, 597, 502 N.W.2d 891, 894 (Ct. App. 1993). The proper legal standard involves a two-part analysis in which the court first considers what, if any, prejudice the defendant would suffer as the result of a joint trial, and then weighs that potential prejudice against the public interest in consolidating the charges into a single trial with multiple counts. ***Id***. No substantial prejudice results from a joint trial if evidence of each crime would have been admissible as other crimes evidence in separate trials. ***State v. Bettinger***, 100 Wis.2d 691, 697, 303 N.W.2d 585, 588 (1981).

Other crimes evidence "is not admissible to prove the character of a person in order to show that he acted in conformity therewith." Section 904.04(2), STATS. However, evidence of other crimes "is admissible to complete the story of

the crime on trial" by explaining the defendant's motivation, for instance. ***Bettinger***, 100 Wis.2d at 697, 303 N.W.2d at 588. It is also well established "that evidence of criminal acts of an accused which are intended to obstruct justice or avoid punishment are admissible to prove a consciousness of guilt of the principal criminal charge." ***Id***. at 698, 303 N.W.2d at 589.

Evidence of Phinisee's possible negligence in regard to the accident would be admissible at a trial on the obstruction charge to show that the interrogating officer was acting in an official capacity and with lawful authority when Phinisee lied to him, and would further explain Phinisee's motive to lie to avoid a possible homicide charge. The fact that Phinisee might also be motivated to lie to avoid a possession of marijuana charge does not in any way negate the relevance of the evidence.

Similarly, the fact that Phinisee lied to the police about having ingested marijuana shortly before the accident would be admissible at a trial on the negligence charges because it could evince consciousness of impairment at the time of the accident.[2] Contrary to Phinisee's assertion, we believe that a defendant's subsequent indication of some consciousness of guilt is always relevant because it makes that guilt more likely, regardless of whether the underlying crime included an element of intent. In addition, evidence of obstruction could also show that Phinisee was willing to lie to protect himself, which could be used for impeachment if he were to testify.

[2] The State offered expert testimony at the preliminary hearing that the THC in Phinisee's blood had the potential to impair his driving ability. The expert stated that the time frame for ingestion ranged from about two to twelve hours prior to testing, and that marijuana tends to impair balance, muscle strength and reflex time within the first twenty minutes after ingestion.

Phinisee contends that the trial court erroneously exercised its discretion because it failed to articulate the proper analysis before reaching its determination. However, a careful examination of the court's decision reveals that it considered the offenses properly joined because they were connected through the investigation, because evidence of each would be admissible in the trial of the other, and because the elements of each were sufficiently distinct that the risk of jury confusion was low. The trial court's additional finding that most jurors consider marijuana use to be a relatively minor matter is not clearly erroneous, and further supports the court's implicit conclusion that the obstruction evidence would be more probative than prejudicial.

Phinisee next argues that his Fifth Amendment rights would be adversely affected by a joint trial. In order to prevail on such a claim, a defendant must make "a convincing showing that he has both important testimony to give concerning one count and strong need to refrain from testifying on the other." ***Homes v. State***, 63 Wis.2d 389, 398 n.12, 217 N.W.2d 657, 662 n.12 (1974) (quoting ***Baker v. United States***, 401 F.2d 958, 977 (D.C. Cir. 1968)).

Phinisee has explained the general nature of the testimony he would give with respect to the homicide charge, including how he felt physically and mentally the morning of the accident and what he did to avoid the collision. We agree that such details could constitute important testimony. However, his assertion that he has a strong need to refrain from testifying on the obstruction charge is based on conclusory allegations that he could incriminate himself if cross-examined regarding the obstruction charge and prejudice could result. Phinisee offers no explanation of what specific questions might trigger this problem or why other remedies such as a cautionary instruction would be inadequate to deal with the situation. Rather, Phinisee's argument seems to rely

upon the erroneous assumption that evidence of his arguably recent marijuana use and false statement to the police would be inadmissible in the negligence trial if the charges were separated. Since that is not the case, the defendant would face the same cross-examination dilemma in a separate negligence trial as he would in a joint trial.

Phinisee also asserts that the trial court failed to exercise its discretion on this point because it was operating under the erroneous impression that a defendant's desire to testify on one charge, but not another, could *never* provide a basis for severance. However, the trial court's decision could also be read to mean that a defendant's desire to testify on just one count is not *by itself* a sufficient basis for severance. Since Phinisee did not provide the trial court with more specific factors, he was not entitled to have the trial court consider anything more.

Finally, there is nothing in the record to support Phinisee's claim that he will suffer racial discrimination if the charges are not severed. The trial court properly exercised its discretion when it denied his motion for severance.

By the Court.—Orders affirmed.

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