COURT OF APPEALS
DECISION
DATED AND FILED

February 23, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

Nos. 97-3778-CR &
97-3780-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROGER P. BARBER,

DEFENDANT-APPELLANT.

APPEAL from judgments and orders of the circuit court for Milwaukee County: DIANE S. SYKES, Judge. *Reversed.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Roger P. Barber appeals from judgments of conviction entered after a jury found him guilty of burglary as a party to a crime,

see §§ 943.10, 939.05, STATS., and armed burglary, *see* § 943.10(2), STATS.[1] He also appeals from the trial court's orders denying his motions for postconviction relief. Barber argues that the trial court erred in preventing him from presenting evidence that the police had a motive to fabricate the evidence against him. We agree, and, therefore, we reverse.[2] Barber also argues that the trial court erred in concluding that the burglary and armed burglary charges could be tried together. This issue may recur if the State pursues a retrial; therefore, we address the issue and conclude that the two charges may be tried together.

BACKGROUND

At about 5:30 p.m. on June 24, 1994, George and Marlene Kalb left their South Milwaukee home. They returned at about midnight and noticed that their front door was ajar. They closed the door and went to bed. When they awoke the next morning, they noticed that a sliding door to their closet had been knocked off of its track. The Kalbs then searched their home and discovered that their VCR, some cameras and some jewelry were missing. They also discovered that the screen from their rear patio door had been removed, and that the rail they had placed in the track of the door to prevent the door from sliding open was bent and was no longer in the track.

The police inspected the Kalbs' home and determined that a burglar had entered through the patio door after removing the screen and then forcing the

[1] The burglary and armed burglary charges were tried together and have been consolidated for appeal.

[2] Barber raises additional issues that we do not reach because this issue is dispositive. *See* ***Gross v. Hoffman,*** 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (if a decision on one point disposes of an appeal, the appellate court will not decide the other issues raised).

sliding door open. The police dusted for fingerprints around the point of entry and throughout the home. They identified a fingerprint that had been left on the patio screen door as Barber's fingerprint.

On July 24, 1994, Milwaukee Police Officer Frank Heinrich left his Milwaukee home and went out of town for a few days. On July 26, 1994, Heinrich's mother stopped at Heinrich's home and found a stone and some pieces of glass on the floor in the rear bedroom; she then noticed that a lamp had been knocked to the floor, and that a window had been broken. Heinrich spoke to his mother the next day and asked her if his gun was missing from the closet. He told her that he left the gun in its holster on his belt, which he hung on a hook in the closet and covered with some clothes. Heinrich's mother checked the closet and found that the gun was missing. Upon his return, Heinrich discovered that a rifle, a watch and some coins were also missing, and that the screen to the broken bedroom window had been removed.

The police viewed Heinrich's home and determined that a burglar had entered through the bedroom window after removing the screen, and breaking a small section of glass in the top part of the window through which the burglar unlocked the window. The police dusted the scene for fingerprints, and took Heinrich's holster to the crime lab to be tested for fingerprints using a fuming process that was appropriate for textured surfaces. A fingerprint identification expert determined that a fingerprint on the holster was Barber's.

On September 22, 1994, the State charged Barber, in separate informations, with burglary of the Kalbs' home, and with armed burglary of Heinrich's home. The two charges were joined for trial, over Barber's objection, and Barber was tried by a jury in September of 1996. At trial, Barber testified that

he was charged with and framed for the armed burglary of Officer Heinrich's home because the Milwaukee police disliked him. Specifically, Barber testified that he had previously worked for the Milwaukee police as a drug informant and had helped them apprehend a large cocaine distributor. Barber further testified that the cocaine distributor was a major customer of his employer's business, Ace Auto Salvage, and that the arrest of the distributor upset Barber's employer. Barber testified that the arrest also caused some members of the Milwaukee Police Department to dislike him because they were friends of Barber's employer, who purchased all of the vehicles for his auto salvage business from police auctions. In defense to the Kalb burglary, Barber attacked the thoroughness of the investigation by the South Milwaukee police, highlighting that they failed to analyze an unidentified footprint that had been left in the Kalbs' flower garden. Barber also challenged the accuracy of the fingerprint identification evidence, and raised the possibility that he may have touched the screen to the Kalbs' patio door when trespassing through their yard to visit a relative. The trial resulted in a hung jury.

Barber was retried before a jury in January of 1997. Barber moved to sever the charges for trial, but the trial court denied the motion and the charges were again tried together. At the 1997 trial, Barber attempted to again testify that his work as a police informant caused the Milwaukee police to dislike him and provided a motive for them to fabricate the evidence against him in the Heinrich armed burglary. The trial court, however, excluded Barber's testimony, holding that it was irrelevant. The jury convicted Barber of burglary and armed burglary, and the trial court entered judgment accordingly.

DISCUSSION

Barber argues that the trial court erred in excluding his testimony that his work as a confidential informant and its effect on his employer's auto salvage business supplied the Milwaukee police with a motive to fabricate evidence against him. Barber argues that the exclusion of this evidence violated his right to present a defense, in violation of the Sixth Amendment to the United States Constitution and Article I, section 7 of the Wisconsin Constitution.[3] We agree.

"Evidentiary rulings generally are reviewed with deference to determine whether the [trial] court properly exercised discretion in accord with the facts of record and with accepted legal standards." ***Michael R. B. v. State***, 175 Wis.2d 713, 720, 499 N.W.2d 641, 644 (1993). Whether the trial court's evidentiary ruling denied the defendant of his or her right to present a defense "is a question of constitutional proportion, however, and as such involves 'constitutional facts' which this court may review *de novo*." ***Id.***

> The constitutional right to present evidence is grounded in the confrontation and compulsory process clauses of Article I, Section 7 of the Wisconsin

[3] The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor ….

Article I, section 7, of the Wisconsin Constitution provides in relevant part:

> In all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel;… to meet the witnesses face to face; to have compulsory process to compel the attendance of witnesses in his behalf ….

> Constitution and the Sixth Amendment of the United States Constitution….
>
> The rights granted by the confrontation and compulsory process clauses are fundamental and essential to achieving the constitutional objective of a fair trial. The two rights have been appropriately described as opposite sides of the same coin and together, they grant defendants a constitutional right to present evidence. The former grants defendants the right to "effective" cross-examination of witnesses whose testimony is adverse, while the latter grants defendants the right to admit favorable testimony. The right to present evidence is not absolute, however. Confrontation and compulsory process only grant defendants the constitutional right to present relevant evidence not substantially outweighed by its prejudicial effect.

State v. Pulizzano, 155 Wis.2d 633, 645–646, 456 N.W.2d 325, 330 (1990) (citations omitted); *see also* §§ 904.02, 904.03, STATS.[4] We conclude that the testimony Barber offered was "relevant evidence not substantially outweighed by its prejudicial effect," and consequently, that the trial court denied Barber his right to present a defense by excluding the evidence.

"Relevant evidence is evidence that has any tendency to make the existence of a fact that is of consequence to the determination of the action more

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[4] Section 904.02, STATS., provides:

> **Relevant evidence generally admissible; irrelevant evidence inadmissible.** All relevant evidence is admissible, except as otherwise provided by the constitutions of the United States and the state of Wisconsin, by statute, by these rules, or by other rules adopted by the supreme court. Evidence which is not relevant is not admissible.

Section 904.03, STATS., provides:

> **Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.** Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

or less probable." ***State v. Richardson***, 210 Wis.2d 694, 705, 563 N.W.2d 899, 903 (1997); *see also* § 904.01, STATS.[5] Barber's testimony that his actions as a confidential informant caused the Milwaukee police to dislike him and to fabricate evidence against him in the Heinrich burglary is relevant because this evidence has a tendency to negate the evidence that Barber burglarized Heinrich's home. *See* ***Richardson***, 210 Wis.2d at 706, 563 N.W.2d at 903 (evidence that witnesses conspired to fabricate the evidence against the defendant was intended to suggest that the defendant did not commit the crime, and was thus relevant). Similarly, the evidence also has a tendency to disprove that Barber committed the Kalb burglary because the jury's analysis of Barber's role in the Heinrich burglary is relevant to their determination of his role in the Kalb burglary; the testimony that the police fabricated the evidence against Barber in the Heinrich burglary has a tendency to make more probable Barber's explanation that he innocently touched the screen to the Kalbs' patio door while trespassing through their yard. Indeed, the fact that the jury from Barber's first trial was unable to convict Barber of either burglary suggests that the fabrication evidence may have strengthened Barber's defense to the Kalb burglary. The prejudicial effect to the State of this evidence does not substantially outweigh its probative value to Barber because the evidence neither has a tendency to substantially mislead the jury nor has a substantial tendency to influence the jury to decide the case on an improper basis that substantially outweighs its probative value. *See* ***State v. Patricia A. M.***, 176 Wis.2d 542, 554, 500 N.W.2d 289, 294 (1993) (evidence that misleads the jury or influences the

[5] Section 904.01, STATS., provides:

> **Definition of "relevant evidence".** "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

jury to decide the case on improper grounds is unduly prejudicial). We therefore reverse Barber's convictions and the trial court's orders denying Barber's motions for postconviction relief.

Barber also argues that the trial court erred in allowing the burglary and armed burglary charges to be tried together. We conclude that the charges were properly joined, and that the trial court did not erroneously exercise its discretion in denying Barber's motion to sever the charges. Whether separate charges can properly be joined for trial is governed by § 971.12, STATS., which provides in relevant part:

> **(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 and the defendants, if there is more than one, could have been joined in a single complaint, information or indictment.

Two crimes are of the same or similar character only if the crimes are the same type of offense, the crimes occur over a relatively short period of time, and the evidence as to each crime overlaps. *See* ***State v. Hamm***, 146 Wis.2d 130, 138, 430 N.W.2d 584, 588 (Ct. App. 1988). Whether the initial joinder of separate charges for trial was proper is a question of law that we review without deference to the trial court. *See* ***State v. Hoffman***, 106 Wis.2d 185, 208, 316 N.W.2d 143, 156 (Ct. App. 1982). "The joinder statute is to be construed broadly in favor of initial joinder." ***Id.***

We conclude that the Heinrich armed burglary and the Kalb burglary were of the same or similar character within the meaning of § 971.12, STATS, and that the charges were thus properly joined. Both crimes were residential burglaries, and they occurred within a relatively short period of time, approximately one month apart. The evidence as to the two crimes overlaps because the two crimes involved similar modes of entry, removing a screen and then forcibly opening a glass door or window in the rear of the residence, and because Barber's fingerprints were left at both burglary scenes. *See* ***Hamm***, 146 Wis.2d at 138, 430 N.W.2d at 588 (evidence overlapped where similarities between the facts of each crime tended to establish the identity of the perpetrator).

After charges have been joined for trial, the trial court "may order separate trials of the charges if it appears that a defendant is prejudiced by a joinder of the counts." ***State v. Locke***, 177 Wis.2d 590, 597, 502 N.W.2d 891, 894 (Ct. App. 1993); *see also* § 974.12(3), STATS. ("RELIEF FROM PREJUDICIAL JOINDER. If it appears that a defendant or the state is prejudiced by a joinder of crimes or defendants in a complaint, information or indictment or by such joinder for trial together, the court may order separate trials of counts…."). When a defendant moves for severance, "the trial court must determine what, if any, prejudice would result from a trial on the joined offenses." ***Locke***, 177 Wis.2d at 597, 502 N.W.2d at 894. The trial court must weigh the potential prejudice to the defendant against the interests of the public in conducting a joint trial on the offenses. *See* ***id.*** The determination of whether the motion for severance should be granted is within the trial court's discretion, and we will not find an erroneous exercise of discretion unless the failure to sever the charges caused substantial prejudice to the defense. *See* ***id.***

> "Any joinder of offenses is apt to involve some element of prejudice to the defendant, since a jury is likely to feel that a [defendant] charged with several crimes must be a bad individual who has done something wrong. However, if the notion of involuntary joinder is to retain any validity, a higher degree of prejudice, or certainty of prejudice, must be shown before relief will be in order."
>
> The danger of prejudice arising from the jury's exposure to evidence that the defendant committed more than one crime is minimized when the evidence of both counts would be admissible in separate trials. "The simple logic behind this rule is that when evidence of one crime is relevant and material to the proof of a second crime, virtually identical evidence will be submitted to the jury whether or not one crime or both crimes are being tried."

Hoffman, 106 Wis.2d at 209–210, 316 N.W.2d at 157 (citations omitted) (brackets in original). Whether the evidence of both crimes would have been admissible in separate trials is governed by § 904.04(2), STATS., which provides:

> **Other crimes, wrongs, or acts.** Evidence 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.

If the other acts evidence is offered for a proper purpose under § 904.04(2), and the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice to the defendant, then the evidence is admissible. *See* ***State v. Bustamante***, 201 Wis.2d 562, 569, 549 N.W.2d 746, 749 (Ct. App. 1996); § 904.03, STATS.

We conclude that the trial court properly denied Barber's motion to sever the trials on the two charges because the evidence of both crimes would have been admissible pursuant to § 904.04(2), STATS., in separate trials. As noted, Barber's defense to the Heinrich burglary was that the police fabricated the evidence against him, and his defense to the Kalb burglary was that he may have

innocently touched the screen to the patio door when passing through the Kalbs' yard. The evidence indicating that Barber committed the Heinrich burglary is relevant to negate Barber's claim that he innocently touched the screen to the Kalbs' patio door because it tends to show that Barber had criminal intent when he touched the screen. *Cf.* ***State v. Plymesser***, 172 Wis.2d 583, 593, 493 N.W.2d 367, 372 (1992) (evidence of defendant's prior sexual assault conviction was relevant to his motive and intent when he touched victim of later sexual assault). Similarly, the evidence indicating that Barber committed the Kalb burglary is relevant to negate Barber's claim that the police fabricated the evidence against him in the Heinrich burglary because the similarities between the mode of entry into the two homes, and the fact that Barber left fingerprints at both homes, tend to establish Barber's identity as the perpetrator of both burglaries. Thus, pursuant to § 904.04(2), the evidence of each crime would have been admissible in separate trials to establish Barber's identity and intent. Further, the probative value of this evidence is not substantially outweighed by the danger of unfair prejudice to Barber. The evidence is highly probative in establishing Barber's identity and intent, and does not create a great risk that the jury will decide the charges against Barber on improper grounds. We therefore conclude that the trial court did not err in refusing to order separate trials on the burglary and armed burglary charges.

CONCLUSION

In sum, we conclude that the trial court erred in excluding the evidence that the police had a motive to fabricate evidence against Barber. We, therefore, reverse Barber's convictions and the trial court's orders denying his

motions for postconviction relief. We further conclude that the burglary and armed burglary charges can be properly joined for trial.[6]

By the Court.—Judgments and orders reversed.

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

[6] Although Barber does not argue that the evidence was insufficient to convict him of the two crimes, his constitutional right against double jeopardy would be violated if he were retried and if the evidence presented at the first trial was insufficient to support his convictions. *See* ***State v. Ivy***, 119 Wis.2d 591, 607–610, 350 N.W.2d 622, 631–632 (1984) (constitutional right against double jeopardy prohibits retrial unless the evidence is sufficient to support the conviction). On our review of the record, we conclude that the evidence was sufficient, and, therefore, Barber's right against double jeopardy would not be violated by a retrial.