COURT OF APPEALS
DECISION
DATED AND FILED

March 24, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP333-CR **Cir. Ct. No. 2010CF2134**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JERRY V. COLE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: REBECCA RAPP ST. JOHN and STEPHEN EHLKE, Judges. *Affirmed.*

Before Lundsten, Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Jerry V. Cole appeals a judgment of conviction entered on a jury's verdict of one count of uttering a forgery and an associated

count of felony bail jumping, and the order denying his motion for postconviction relief.[1] The jury also acquitted Cole of a separate count of forgery and a bail jumping charge associated with that forgery count. Cole seeks a new trial on three grounds: (1) the charges were misjoined for trial and the court erroneously exercised its discretion in denying Cole's pretrial motion to sever the charges; (2) he received the ineffective assistance of trial counsel; and (3) in the interest of justice. For the reasons explained below, we affirm the judgment of conviction.

BACKGROUND

¶2 Cole was charged in a criminal complaint with uttering a forgery and a companion bail jumping charge for conduct on December 8, 2010, and a forgery, and a companion bail jumping charge for conduct occurring on December 20, 2010. The charges stem from allegations that Cole attempted, on two occasions, to cash a forged check at the same bank.

¶3 The criminal complaint alleged that on December 8, Cole presented an endorsed check to a teller employed by Dane County Credit Union drawn from a checking account owned by H.R. The teller did not cash the check.

¶4 On December 20, Cole returned to the credit union to cash a check drawn from a closed checking account that once belonged to J.W. Cole gave the teller the endorsed check but the account had been closed and the teller did not cash the check.

[1] Judge Rebecca Rapp St. John presided over the trial and sentencing and entered the judgment of conviction of Clark. Judge Stephen Ehlke presided over the postconviction motion hearing and entered the order denying Clark's postconviction motion.

¶5 Police went to the credit union after receiving reports from dispatch about a person attempting to pass a fraudulent check. Police made contact with Cole at the credit union and recovered evidence in a search of Cole's pants pockets including a second but blank check from the same account of J.W., and a subpoena. Police went to J.W.'s residence and J.W. informed police that he did not write Cole the check. Cole was placed under arrest.

¶6 Prior to trial, Cole filed a motion to sever the December 8 charges from the December 20 charges, and the court denied the motion. A trial to a jury was held, after which the jury found Cole not guilty of forgery and bail jumping relating to December 8, but guilty of uttering a forgery and the associated bail jumping charge relating to December 20.

¶7 Cole filed motions for postconviction relief requesting a new trial on the grounds that he received ineffective assistance of counsel or, in the alternative, in the interest of justice. After motion hearings, the court denied Cole's motions. Cole appeals.

DISCUSSION

¶8 Cole argues that initial joinder of the December 8 charges and the December 20 charges was improper, and that the court erroneously exercised its discretion in denying severance. Cole also argues that his trial counsel was ineffective in two respects, and that he is entitled to a new trial in the interest of justice. For the reasons that follow, we reject Cole's arguments.

I. Joinder and severance

¶9 Cole contends that the December 8 charges of forgery and the December 20 charges of uttering a forgery were improperly joined,[2] and that the circuit court erroneously exercised its discretion in denying Cole's motion for severance. We disagree.

¶10 Multiple charges may be joined in a criminal complaint or information if:

> [T]he crimes charged … 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 ….

WIS. STAT. § 971.12(1) (2013-14).[3] We focus our inquiry on whether the charges are of "same or similar character," because both parties focus their respective arguments on this basis for joinder.

¶11 "To be of the 'same or similar character' … crimes must be the same type of offenses 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) (citation omitted). Whether the charges are properly joined is a question of law that we review without deference to the circuit court, and we are to construe the joinder statute broadly to favor initial joinder. ***State v. Locke***, 177 Wis. 2d 590, 596, 502 N.W.2d 891 (Ct. App. 1993).

[2] Cole does not challenge joinder of the two counts of felony bail jumping.

[3] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

A. Joinder

¶12 Cole cannot reasonably deny that the alleged crimes were similar in nature, at the same location, and occurred close in time. Nonetheless, he contends that joinder was improper because the crimes of forgery and uttering a forgery are not the same, which we understand to mean that the elements of each charge are not the same. However, in Wisconsin, to be of the same character, crimes need not violate the same statute. ***State v. Hoffman***, 106 Wis. 2d 185, 208, 316 N.W.2d 143 (Ct. App. 1982). Cole also contends that the offenses are not the same because the victims of the crimes were different and that Cole did not know one of the victims, but he knew the other victim. This argument is seemingly based on the proposition that the only victims were the persons whose checks Cole tried to cash at the credit union. Cole does not explain why the credit union would not have been potentially liable to cover the amount of the checks if its employees had given Cole money. Moreover, even if the only victims were the persons whose names were on the checks, Cole does not explain how this fact supports his argument that the offenses are not the same.

¶13 In sum, Cole falls far short of persuading us that the charges were improperly joined.

B. Severance

¶14 Even if joinder is proper, as it is in this case, a defendant may move to sever the charges on the basis of prejudice. *See* WIS. STAT. § 971.12(3). On a motion to sever, the court must determine what, if any, prejudice would come to the defendant if the joined charges are tried together and then weigh the potential prejudice against the interests of the public in conducting a trial on the multiple counts. ***Hoffman***, 106 Wis. 2d at 209; ***State v. Linton***, 2010 WI App 129, ¶15,

329 Wis. 2d 687, 791 N.W.2d 222. A motion to sever charges is directed to the court's exercise of discretion. ***Locke***, 177 Wis. 2d at 597.

¶15 In order to establish that the court erroneously exercised its discretion, the defendant must demonstrate that failure to sever caused "substantial prejudice." ***Id.*** Still, if joinder is deemed proper under the pertinent statutory criteria, a rebuttable presumption exists that the defendant will not suffer prejudice by joinder. *See* ***State v. Leach***, 124 Wis. 2d 648, 669, 370 N.W.2d 240 (1985). The risk of "substantial prejudice" is minimized when evidence of the charges to be severed are admissible in separate trials. ***Id.*** at 671-72. Thus, to determine whether severance is required to avoid "substantial prejudice" to the defendant, the court is required to conduct an "other acts" analysis under ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). *See* WIS. STAT. § 904.04(2).

¶16 Turning to the question whether the circuit court properly exercised its discretion in denying Cole's motion to sever the charges, we must determine whether evidence of the December 8 charges would have been admissible as "other acts" evidence with respect to the December 20 charges, and vice versa. *See* ***Sullivan***, 216 Wis. 2d at 772-73.

¶17 In determining whether "other acts" evidence is admissible, we apply the three-step analytical framework set forth in ***Sullivan***: (1) is the evidence offered for a proper purpose, such as intent and motive; (2) is the evidence relevant; and (3) is the probative value of the evidence "substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury." ***Id.*** at 772-73; WIS. STAT. § 904.04(2)(a). We conclude that evidence of each crime would have been admissible at separate trials as other acts evidence.

¶18 Here, Cole does not contest the circuit court's finding that the evidence was offered for the acceptable purpose of intent. Intent is an element in both charges. *See* WIS. STAT. § 943.38(1)(a), (2). The evidence of each charge was also properly offered to establish a scheme or plan.

¶19 Cole argues only that the circuit court erred in concluding that the evidence was relevant and that its probative value was not substantially outweighed by the danger of unfair prejudice or confusion. We disagree.

¶20 Relevant evidence is evidence that relates to a fact or proposition that is of consequence to the determination of the action and that has probative value. *See* WIS. STAT. § 904.01. The circuit court in this case concluded that "[e]vidence that the defendant on another occasion attempted to cash a check under fraudulent circumstances does tend to show knowledge and intent and therefore it's probative and relevant."

¶21 Cole argues that the evidence was not relevant because "[w]hether or not Cole forged the [J.W.] check would not make it more or less probable that he knew that the [H.R.] check … was forged." Cole takes a narrow view of what evidence is relevant in this case by asking only whether the evidence is relevant to the element of knowledge. However, the evidence is relevant for the element of intent. That is, whether or not Cole forged the J.W. check is relevant as to whether Cole intended to utter a forgery for the H.R. check and vise versa. By focusing his relevancy argument solely on knowledge, Cole's argument misses the broader picture and falls flat.

¶22 Cole then argues that, "even if the other acts evidence was relevant, the dangers of unfair prejudice and confusion of the issues substantially outweighed its probative value." In support, Cole points to factors for the court to

consider in its balancing test, such as "the consideration of the jury basing its decision on something other than the established facts," "concerns about the jury cumulating evidence," and the "danger that the jury would confuse the issues." The problem with Cole's "arguments" is that he merely lists the factors that support a finding of unfair prejudice without arguing how the court here failed to consider and afford those factors the proper weight. We reject Cole's argument on this basis.

¶23 In sum, Cole fails to overcome the presumption that joinder was proper.

II. Ineffective assistance of counsel

¶24 Cole argues that trial counsel provided ineffective assistance by failing to investigate and call three witnesses to testify at the trial, and for failing to move to suppress evidence. We reject Cole's arguments.

¶25 To succeed on a claim of ineffective assistance of counsel, Cole must demonstrate that counsel's representation was deficient and that the deficiency prejudiced him. *See* ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). Both deficient performance and prejudice present mixed questions of fact and law. ***State v. Jeannie M.P.***, 2005 WI App 183, ¶ 6, 286 Wis. 2d 721, 703 N.W.2d 694. We uphold the circuit court's factual findings unless clearly erroneous. ***State v. Thiel***, 2003 WI 111, ¶ 21, 264 Wis. 2d 571, 665 N.W.2d 305. However, we review de novo whether counsel's performance was deficient or prejudicial. ***Jeannie M.P.***, 286 Wis. 2d 721, ¶ 6.

¶26 To prove deficient performance, Cole must show that, under all of the circumstances, counsel's specific acts or omissions fell "outside the wide range

of professionally competent assistance." ***Strickland v. Washington***, 466 U.S. 668, 690 (1984). We review counsel's strategic decisions with great deference because a strong presumption exists that counsel was reasonable in his or her performance. ***Id.*** at 689.

¶27 To prove prejudice, Cole must establish a reasonable probability that, "but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694. If the court concludes that the defendant has not proven one prong of this test, it need not address the other. *See* ***id.*** at 687.

A. Failure to investigate and call witnesses

¶28 Cole complains that trial counsel should have investigated and called to testify at the trial Christopher Davis, Charles R., and Wallace Weaver. Cole contends that these witnesses would have been able to "complete the narrative," bolster Cole's credibility, and "corroborate Cole's trial testimony." We are not persuaded.

¶29 Trial counsel testified extensively at the ***Machner***[4] hearing held on this case. Counsel testified that he attempted to contact Weaver and Charles R., but was unsuccessful. According to counsel, neither individual would have been able to provide any helpful evidence in support of the defense's theory that Cole did not know that the check he was attempting to cash on December 8, 2010, H.R.'s check, was forged. Counsel reached this decision after reading all of the

[4] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

pertinent police reports, including statements taken by Davis, Charles R., and Weaver. Counsel testified that, not only did these witnesses have nothing to say that was germane to the defense theory, but he believed that the witnesses, especially Davis, would have likely provided testimony that would have been very damaging to Cole.

¶30 At the conclusion of the ***Machner*** hearing, the circuit court found that trial counsel performed competently and that, assuming deficient performance, Cole failed to demonstrate that he was prejudiced. As for Davis, the court acknowledged that certain aspects of Davis' testimony may have helped Cole's defense, but that, "on balance," Davis' testimony "would have hurt Mr. Cole greatly." For these reasons, the court concluded that trial counsel's strategy of not further investigating and calling Davis, Charles R., and Weaver to testify was a "reasonable decision to make."

¶31 The circuit court also addressed the prejudice prong and concluded that Cole did not even come "close" to demonstrating prejudice, even assuming trial counsel's performance was deficient. The court expressed the view that "[i]t [was] a total crap shoot as to what would have happened if all of these other pieces of evidence would have come in [obviously referring to testimony from Davis and Charles R[.]" The court forecasted that "[i]t may have been even worse for Mr. Cole" had Davis and Charles R. testified.

¶32 We conclude that the record supports the circuit court's well-reasoned decision that trial counsel provided effective assistance to Cole. Counsel's decision not to further investigate Davis, Charles R., and Weaver was reasonable in light of the potential harm that their testimony would have had on Cole's defense.

¶33 Cole's contention that Davis, Charles R., and Weaver would have corroborated Cole's version of events is speculative and defies common sense. Assuming Davis' testimony would have been consistent with the statements he gave the police regarding the uttering of H.R.'s check, Davis' testimony would have strongly implicated Cole, not corroborate Cole's version of the uttering. As for Charles R. and Weaver, Cole does not fully explain what testimony these witnesses could possibly have offered that would have corroborated Cole's testimony and supported Cole's theory of defense.

B. Failure to move to suppress evidence

¶34 Cole argues that trial counsel was ineffective for failing to move to suppress the blank check from J.W.'s checking account and the subpoena, both found in Cole's pocket during the search of Cole's pockets before he was placed in the squad car.[5] Cole argues that counsel was deficient by not challenging the constitutionality of the search as a violation of the Fourth Amendment. He argues that the search was not grounded in any recognizable exception to the Fourth Amendment prohibition against unreasonable searches and seizures. The State's position is that the search was conducted pursuant to an arrest, an exception under the Fourth Amendment.

¶35 We need not resolve this dispute because a motion to suppress the two pieces of paper would have been properly denied under the inevitable discovery doctrine.

[5] Officer Krause testified that during his search of Cole, Krause found two slips of paper—a blank check purportedly from J.W.'s checking account, and a subpoena for a court appearance with certain notations on it.

¶36 Under the inevitable discovery doctrine, the fruits of an illegal search nonetheless may be admitted if the tainted fruits inevitably would have been discovered by lawful means. ***State v. Kennedy***, 134 Wis. 2d 308, 317, 396 N.W.2d 765 (Ct. App. 1986). To prevail, the proponent of the doctrine must demonstrate:

> (1) a reasonable probability that the evidence in question would have been discovered by lawful means but for the police misconduct; (2) that the leads making the discovery inevitable were possessed by the government at the time of the misconduct; and (3) that prior to the unlawful search the government also was actively pursuing some alternate line of investigation.

State v. Schwegler, 170 Wis. 2d 487, 500, 490 N.W.2d 292 (Ct. App. 1992).

¶37 The first prong under the inevitable discovery doctrine has been met. Taking Cole's position at face value that he was not under arrest until after the detective made contact with J.W. at his residence, Cole does not challenge that arrest and therefore the evidence he seeks to suppress would still have been discovered.

¶38 As for the second and third prong, the record reflects that Officer Krause and Detective Fischer planned to transport Cole to J.W.'s residence to determine whether the check was forged *prior* to searching Cole. That is, the leads making the discovery inevitable (the decision to contact J.W.) were possessed prior to the search. In addition, the officers' decision to contact J.W. to verify the authenticity of the check also represents an alternative line of investigation. Thus, the second and third prongs of the inevitable discovery doctrine are satisfied.

¶39 Because Cole failed to demonstrate that trial counsel's performance was deficient, we need not address whether Cole was prejudiced. *See* ***Strickland***, 466 U.S. at 687. Accordingly, Cole's argument that trial counsel was ineffective for failing to move to suppress the evidence falls flat.

III. New trial in the interest of justice

¶40 Finally, Cole argues that the real controversy was not fully tried and therefore he is entitled to a new trial in the interest of justice. The State argues that Cole merely reiterates his arguments that trial counsel was ineffective in support of his argument that a new trial is warranted in the interest of justice. We agree with the State and say no more on this topic.[6]

CONCLUSION

¶41 For the above reasons, we conclude that Cole has failed to establish that a new trial is warranted on any of the grounds he advances. Therefore, we affirm the judgment of conviction and the order denying Cole's motions for postconviction relief.

By the Court.—Judgment and order affirmed.

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

[6] A court has the discretion to set aside a verdict and order a new trial in the interest of justice where "it appears from the record that the real controversy has not been fully tried, or that it is probable that justice for any reason has been miscarried." ***State v. Harp***, 161 Wis. 2d 773, 776, 469 N.W.2d 210 (Ct. App. 1991) (quoted source and emphasis omitted).