COURT OF APPEALS
DECISION
DATED AND FILED

December 28, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2016AP2019-CR
2016AP2020-CR

Cir. Ct. Nos. 2015CM893
2015CF937

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EDWARD CINTRON,

DEFENDANT-APPELLANT.

APPEALS from judgments of the circuit court for Milwaukee County: M. JOSEPH DONALD, Judge. *Affirmed*.

Before Lundsten, P.J., Blanchard and Kloppenburg, JJ.

¶1 PER CURIAM. Edward Cintron appeals one criminal judgment convicting him of attempted first-degree sexual assault of a child under twelve, and another criminal judgment convicting him of two counts of fourth-degree sexual assault and two counts of disorderly conduct. The sole issue on appeal is whether the two cases were properly joined for trial. We conclude that they were and affirm.

BACKGROUND

¶2 The first-degree sexual assault charge was based upon allegations that, on the evening of February 19 or early morning hours of February 20, 2015, Cintron laid down without wearing any pants or underwear upon a three-year-old girl who resided in his residence and was sleeping on a loveseat, with his penis touching or very near to the child's mouth. That complaint also contained charges of resisting arrest, and disorderly conduct for returning to the house through a window after being released from custody, but the jury acquitted Cintron on the disorderly conduct charge and reduced the first-degree sexual assault charge to attempt.

¶3 The fourth-degree sexual assault and disorderly conduct charges were based upon allegations that, between June 10, 2013 and February 16, 2015, Cintron engaged in a course of conduct toward another girl who resided in his household, who was about eighteen when the conduct began, that included touching the girl's breasts and buttocks, making sexual comments, attempting to get into her locked bedroom on multiple occasions, and on one occasion, breaking into her locked bedroom completely naked and trying to climb on top of her in her bed.

STANDARD OF REVIEW

¶4 A circuit court's decision on joinder presents a question of law that we review independently. ***State v. Salinas***, 2016 WI 44, ¶30, 369 Wis. 2d 9, 879 N.W.2d 609.

DISCUSSION

¶5 There is a two-step process for determining whether joinder is proper. First, the court must determine whether the statutory criteria have been satisfied. The statute permits joinder of two or more crimes that are "of the same or similar character," or are "based on the same act or transaction[s]," or are connected as "parts of a common scheme or plan," regardless whether the crimes were charged in one or more complaint. WIS. STAT. § 971.12(1) and (4). Crimes are of the same or similar nature when they are the same type of offense occurring over a relatively short period of time, with overlapping evidence. ***State v. Hamm***, 146 Wis. 2d 130, 138, 430 N.W.2d 584 (Ct. App. 1988). Crimes may be considered part of a common scheme when they share common factors of substantial factual importance, such as time, place, or modus operandi. ***Francis v. State***, 86 Wis. 2d 554, 560, 273 N.W.2d 310 (1979). Other factors relevant to the common scheme analysis may include whether one charge arose out of the investigation of another or was committed to prevent punishment for another crime. ***Salinas***, 369 Wis. 2d 9, ¶43.

¶6 Second, even if joinder would be otherwise permissible under the statute, the court may direct that charges be severed and tried separately to avoid prejudice to the defendant. WIS. STAT. § 971.12(3). The risk of prejudice is generally not significant when the evidence relating to each charge would be

admissible at trial on the other charges as other acts evidence. ***State v. Bettinger***, 100 Wis. 2d 691, 697, 303 N.W.2d 585 (1981).

¶7 Here, Cintron acknowledges that the charged offenses overlapped in time, occurred at the same place, involved the same witnesses, and were all based upon inappropriate sexual conduct. He nonetheless contends that the offenses were not of the same or similar character or part of a common scheme or plan, because the victims were different ages, and the incident with the three-year-old occurred only once, while the conduct with the teenager occurred over a period of two years and involved verbal abuse as well as sexual contact. We disagree.

¶8 First, the incident in which Cintron entered the teenager's room naked and tried to climb on top of her in bed is remarkably similar in character to the incident in which he lay down without pants on top of the three-year-old. Both evince a common motive for sexual gratification. Additionally, although the victims were of different ages, both were residents of Cintron's household and in a familial-type relationship with him, suggesting that opportunity played a role in victim selection. Finally, it was during the investigation of the incident with the three-year-old that the conduct involving the teenager was disclosed, linking the investigations, which also involved the same witnesses—i.e., other household members. We conclude that the criteria for joinder set forth in WIS. STAT. § 971.12(1) and (4) were satisfied.

¶9 The State suggests that our analysis need not go any further, because Cintron did not file a separate motion for severance explicitly invoking WIS. STAT. § 971.12(3). However, we are satisfied that Cintron sufficiently argued prejudice in his response to the State's consolidation motion to preserve the issue, regardless of the label Cintron placed on his submission to the circuit court. Nonetheless, we

agree with the circuit court that there was no prejudice from joinder under WIS. STAT. § 971.12(3) because evidence from each case would have been admissible in the other under the greater latitude rule for other evidence in sexual assault cases. *See* ***State v. Marinez***, 2011 WI 12, ¶20, 331 Wis. 2d 568, 797 N.W.2d 399.

By the Court.—Judgments affirmed.

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