COURT OF APPEALS
DECISION
DATED AND FILED

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Sheila T. Reiff
Clerk of Court of Appeals

Appeal Nos. 2017AP817-CR
2017AP818-CR

Cir. Ct. Nos. 2014CF2303
2014CF4351

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RUBIN E. ARDS,

DEFENDANT-APPELLANT.

APPEALS from judgments of the circuit court for Milwaukee County: MICHELLE ACKERMAN HAVAS, Judge. *Affirmed*.

Before Brennan, P.J., Brash and Dugan, JJ.

¶1 PER CURIAM. Rubin E. Ards appeals judgments of conviction entered following a consolidated jury trial in Milwaukee County case Nos. 2014CF2303 and 2014CF4351. On appeal, Ards contends that the circuit court erroneously joined the two cases for trial and that he was prejudiced as a result. We affirm.

BACKGROUND

¶2 In case No. 2014CF2303, which underlies appeal No. 2017AP817-CR, the State filed a criminal complaint alleging that on May 28, 2014, Ards and his girlfriend T.W. were together in their home when Ards accused T.W. of stealing his cocaine. According to the complaint, Ards then punched T.W. multiple times in the head and attacked her with a screwdriver, causing puncture wounds, lacerations, and bruises. In case No. 2014CF4351, which underlies appeal No. 2017AP818-CR, the State filed a complaint alleging that on September 9, 2014, while a warrant was pending against Ards for the May 2014 incident, Ards again attacked T.W. Specifically, the State alleged that T.W. and Ards, who maintained a relationship but no longer lived together, were in Ards's home smoking crack cocaine when Ards accused T.W. of taking his cigarettes. Ards then punched T.W. repeatedly in the face, opened a gash in her head, and stabbed her with a hair pick.

¶3 Based on the foregoing, the State charged Ards in case No. 2014CF2303 with one felony count of substantial battery and one felony count of aggravated battery by use of a dangerous weapon, all as acts of domestic abuse.

See WIS. STAT. §§ 940.19(2), (6) (2013-14),[1] 939.63(1)(b), 973.055(1), 968.075(1)(a). In case No. 2014CF4351, the State charged Ards with one misdemeanor count of battery and one felony count of substantial battery, all by use of a dangerous weapon and as acts of domestic abuse. *See* WIS. STAT. §§ 940.19(1)-(2), 939.63(1)(c), 968.075(1)(a). As to all of the felony counts, the State further alleged that Ards acted as a repeat offender. *See* WIS. STAT. § 939.62(1)(b)-(c).

¶4 At a pretrial hearing, the State moved to join the two cases for trial. In support of the motion, the State argued that the cases involved the same victim, similar charges, and similar conduct, and had occurred within a span of only a few months. The State also argued that a joint trial would further the interest of judicial economy because the evidence in each case would be admissible at a trial of the other case. Ards objected, asserting that the four-month period separating the two criminal episodes rendered them remote from each other, that the evidence as to each incident was different with the exception of the complaining witness, and that he would be prejudiced in the eyes of the jury by the cumulative evidence presented in the two cases. The circuit court agreed with the State and granted the joinder motion.

¶5 The matters proceeded to a jury trial in June 2016. Ards was found guilty of the four counts against him. He appeals, challenging the decision to try the two cases jointly.

[1] All references to the Wisconsin criminal code are to the 2013-14 version. All other references to the Wisconsin statutes are to the 2015-16 version.

DISCUSSION

¶6 WISCONSIN STAT. § 971.12 addresses joinder and provides that two or more crimes may be charged together if, *inter alia*, they "are of the same or similar character." *See* § 971.12(1). The statute further provides that crimes charged separately may be joined for trial if they could have been charged in a single complaint, indictment, or information. *See* § 971.12(4). Whether joinder was proper under the statute is a question of law that we review *de novo*. *See* ***State v. Locke***, 177 Wis. 2d 590, 596, 502 N.W.2d 891 (Ct. App. 1993). We construe the statute broadly in favor of initial joinder to further '"the purposes of joinder, namely trial convenience for the State and convenience and advantage to the defendant."' *See* ***State v. Salinas***, 2016 WI 44, ¶31, 369 Wis. 2d 9, 879 N.W.2d 609 (citation omitted).

¶7 Crimes are of the same or similar character within the meaning of WIS. STAT. § 971.12 when they are "the same type of offenses occurring over a relatively short period of time" and the evidence as to each overlaps. *See* ***State v. Hamm***, 146 Wis. 2d 130, 138, 430 N.W.2d 584 (Ct. App. 1988). The charges that Ards faced in each criminal episode fully satisfy the criteria set out in ***Hamm***.

¶8 Each crime in this case was of the same type. T.W. was the victim each time, and in each incident, Ards attacked her in his home, using a sharp object to stab her. The attacks occurred under similar circumstances: in each incident, Ards accused T.W. of stealing from him and became enraged about the thefts. As Ards acknowledges, both sets of attacks caused "gruesome injuries" to T.W. and required her hospitalization.

¶9 The offenses in the two cases occurred over a relatively short period of time. "[A]cts two years apart can be considered as 'occurring over a relatively

short period of time.'" ***Locke***, 177 Wis. 2d at 596 (citation omitted). Here, less than four months separated the crimes that arose in late May 2014 from the crimes that arose in early September that same year.

¶10 Additionally, the evidence in the two criminal episodes overlapped because the victim, T.W., was a key witness in both matters. Ards asserts that no other witnesses were common to both episodes, but his contention shows only that the evidence for one case was not identical to the evidence for the other. ***Hamm*** requires that evidence overlap, *see* ***id.***, 146 Wis. 2d at 138, not that it be exactly the same.

¶11 In light of the foregoing, we are satisfied that the charges in this case were properly joined. The crimes satisfied the statutory criteria for joinder, and joinder permitted a single trial that furthered the statutory goals of convenience and efficiency. Ards's claim of improper joinder therefore fails.

¶12 Pursuant to WIS. STAT. § 971.12(3), "[i]f it appears that a defendant ... is prejudiced by a joinder of crimes ... the court may order separate trials of counts." Whether to sever otherwise properly joined charges on grounds of prejudice is within the [circuit] court's discretion, and we review the circuit court's decision on that issue for an erroneous exercise of discretion.[2] ***State v. Nelson***, 146 Wis. 2d 442, 455-56, 432 N.W.2d 115 (Ct. App. 1988). We conduct our review in light of the presumption that a defendant suffers no prejudice from

[2] The State suggests that Ards forfeited the claim that joinder prejudiced him because, says the State, he did not sufficiently raise the issue of prejudice in circuit court. Upon review of the record, however, we conclude that Ards preserved the issue for appeal.

joinder that is proper under WIS. STAT. § 971.12(1) & (4). *See* ***State v. Leach***, 124 Wis. 2d 648, 669, 370 N.W.2d 240 (1985).

¶13 "In evaluating the potential for prejudice, courts have recognized that, when evidence of the counts sought to be severed would be admissible in separate trials, the risk of prejudice arising because of joinder is generally not significant." ***Locke***, 177 Wis. 2d at 597. Therefore, we assess the prejudice in joining two criminal cases by analyzing whether evidence of one criminal episode would be admissible in a separate trial of the other criminal episode. *See* ***id.***

¶14 "[E]vidence 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." *See* WIS. STAT. § 904.04(2)(a). The statute, however, "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." ***Id.*** Admissibility of evidence under § 904.04(2)(a) is governed by a familiar three-step inquiry to determine whether: (1) the evidence is offered for a permissible purpose, as required by § 904.04(2)(a); (2) the evidence is relevant within the meaning of WIS. STAT. § 904.01; and (3) the probative value of the evidence is substantially outweighed by the concerns regarding unfair prejudice, confusion, and delay enumerated in WIS. STAT. § 904.03. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998).

¶15 Additionally, in matters such as those at issue here, which involve crimes of domestic abuse, "WIS. STAT. § 904.04(2)(b)1. permits circuit courts to admit evidence of other, similar acts of domestic abuse with greater latitude, as that standard has been defined in the common law, under ***Sullivan***." *See* ***State v. Dorsey***, 2018 WI 10, ¶35, 379 Wis. 2d 386, 906 N.W.2d 158. The greater latitude

rule operates "to 'facilitate the admissibility of the other acts evidence under the exceptions set forth in WIS. STAT. § 904.04(2)(a).'" *See* ***Dorsey***, 379 Wis. 2d 386, ¶33 (citation and two sets of brackets omitted). Accordingly, where the rule is applicable, "circuit courts should admit evidence of other acts with greater latitude under the ***Sullivan*** analysis to facilitate its use for a permissible purpose." ***Dorsey***, 379 Wis. 2d 386, ¶33.

¶16 Here, the circuit court found that the evidence of Ards's domestic violence in each of the two cases would likely be admitted as evidence in a separate trial of the other case. Although the circuit court reached this conclusion without conducting a thorough analysis on the record of each ***Sullivan*** factor, our obligation is to "independently review the record to determine whether it provides a basis for the circuit court's exercise of discretion." *See* ***id.***, 216 Wis. 2d at 781.

¶17 The first step of the ***Sullivan*** analysis is not demanding and requires only an acceptable purpose for the proffered evidence. *See* ***State v. Payano***, 2009 WI 86, ¶63, 320 Wis. 2d 348, 768 N.W.2d 832. Here, the circuit court found that the two criminal episodes were similar, and thus the evidence of each criminal episode serves the permissible purpose of demonstrating Ards's *modus operandi*, his intent, and the absence of mistake or accident in regard to the other episode. *See* WIS. STAT. § 904.04(2)(a). The second step was also satisfied because the evidence was relevant for these purposes. *See* ***State v. Hall***, 103 Wis. 2d 125, 144-45, 307 N.W.2d 289 (1981) (evidence of separate similar criminal episodes relevant to intent and *modus operandi* in each occurrence).

¶18 The third step of the ***Sullivan*** analysis requires that the probative value of the proffered evidence outweigh the risks enumerated in WIS. STAT. § 904.04(3), including unfair prejudice. *See* ***Sullivan***, 216 Wis. 2d at 772-73.

Ards focusses on this step, asserting that each of the two criminal episodes resulted in "gruesome injuries" that "could have played to a jury's prejudice," a circumstance he believes would have been avoided by excluding evidence of one episode in a trial of the other. Unfair prejudice, however, refers to '"whether the evidence tends to influence the outcome of the case by improper means."' ***State v. Marinez***, 2011 WI 12, ¶41, 331 Wis. 2d 568, 797 N.W.2d 399 (citations and some quotation marks omitted). Ards therefore must demonstrate that the evidence improperly influenced the jury even though the evidence served permissible purposes. He fails to make such a showing. To the contrary, each episode involved the same victim, occurred under similar circumstances in similar locations, and was of similar character. Particularly in light of the greater latitude rule, these similarities "render the other crimes evidence highly probative, [and] outweigh[] the danger of prejudice." *See* ***State v. Davidson***, 2000 WI 91, ¶¶75, 80, 236 Wis. 2d 537, 613 N.W.2d 606.

¶19 Moreover, the record shows that the circuit court instructed the jury that each count charged a separate crime and that the jury must consider each count separately. The circuit court went on to instruct the jury explicitly that its "verdict for the crime charged in one count must not affect [the] verdict on any other count." We presume that juries follow instructions, and we view limiting instructions as "an effective means to reduce the risk of unfair prejudice." ***Marinez***, 331 Wis. 2d 568, ¶41.

¶20 We conclude that the ***Sullivan*** test demonstrates the admissibility of each criminal episode as evidence in a trial of the other. Accordingly, Ards fails to show that he suffered the prejudice necessary to obtain severance of the two sets of charges in these cases. We affirm.

By the Court.—Judgments affirmed.

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