COURT OF APPEALS
DECISION
DATED AND FILED

February 20, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0369-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

REGINALD MOTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Reginald Moton appeals from a judgment of conviction after a jury found him guilty of six counts of kidnapping, while concealing identity, and while possessing or threatening to use a dangerous weapon; seven counts of first-degree sexual assault while concealing identity; one

count of attempted first-degree sexual assault, while concealing identity; four counts of second-degree sexual assault of a child; two counts of armed robbery, while concealing identity; one count of armed robbery; and one count of substantial battery, while concealing identity, and while possessing or threatening to use a dangerous weapon.

¶2 Moton raises two issues: (1) whether the trial court erroneously exercised its discretion when it denied his motion to sever; and (2) whether the trial court erroneously exercised its discretion when it allowed the State to introduce certain "other acts" evidence. Because the trial court did not erroneously exercise its discretion in denying severance, and because the admission of the "other acts" evidence was harmless error, we affirm.

BACKGROUND

¶3 The twenty-two charges against Moton stemmed from six separate victims on six distinct dates. As germane to this appeal, we are concerned with the crimes committed against victims Dayna V., Amanda R., and Kimberly V., on May 5, 1998, May 9, 1998, and May 10, 1998, respectively. These crimes were joined in an information, which also included crimes allegedly committed against Cortney T., Joan S., and Nicole B.

¶4 Prior to trial, Moton moved to sever the two counts involving Dayna V., the two counts involving Amanda R., and the two counts involving Kimberly V., from the counts relating to Cortney T., Joan S., and Nicole B. The trial court denied the motion. The State also moved to allow "other acts" evidence relating to an assault upon Elizabeth W., which Moton opposed. The trial court granted the State's motion.

DISCUSSION

A. Motion to Sever.

¶5 Moton first contends that the trial court improperly joined the counts involving Dayna V., Amanda R., and Kimberly V., with the counts involving three other sexual assault victims; i.e., Cortney T., Joan S., and Nicole B. We are not persuaded.

¶6 Review of joinder is a two-step process. ***State v. Locke***, 177 Wis. 2d 590, 596, 502 N.W.2d 891 (Ct. App. 1993). First, we examine the initial joinder determination, which is a question of law, reviewed independently. ***Id.*** WISCONSIN STAT. § 971.12(1) permits joinder of crimes if they 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." Joinder is appropriate if the offenses are committed close together in time and location, and are committed in a similar manner. ***State v. King***, 120 Wis. 2d 285, 291, 354 N.W.2d 742 (Ct. App. 1984). But, "[i]t is not sufficient that the offenses involved merely the same type of criminal charge." ***State v. Hamm***, 146 Wis. 2d 130, 138, 430 N.W.2d 584 (Ct. App. 1988).

¶7 Second, if a motion for severance has been made, as in this instance, we review motions denying severance subject to the erroneous exercise of discretion rule. ***State v. Bettinger***, 100 Wis. 2d 691, 696, 303 N.W.2d 585 (1981). When an accused is tried on the basis of an information containing multiple-joined counts, there is a risk of prejudice arising when evidence of other crimes or wrongful acts is admitted improperly at trial. ***Id.*** at 696-97. "Severance is a remedy directed at curing this type of prejudice." ***Id.*** at 697. The supreme court, however, has consistently recognized that "when evidence of both counts would

be admissible in separate trials, the risk of prejudice arising due to a joinder of offenses is generally not significant." ***Id.*** The rationale for the 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." ***Id.*** "The test for failure to sever thus turns into an analysis of other crimes." ***Locke***, 177 Wis. 2d at 597.

¶8 We thus must focus on whether, under ***State v. Sullivan***, 216 Wis. 2d 768, 772, 576 N.W.2d 30 (1998) and WIS. STAT. § 904.04(2), "other crimes or wrongful acts" are introduced for acceptable purposes such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Next, the other acts evidence must be relevant under WIS. STAT. § 904.01. ***Sullivan***, 216 Wis. 2d at 772. Lastly, the evidence must be admissible under WIS. STAT. § 904.03; i.e., the probative value of the other acts evidence must not be substantially outweighed by the danger of unfair prejudice. ***Sullivan***, 216 Wis. 2d at 772-73.

¶9 To be admissible for the purposes of identity, the other acts evidence should have such a concurrence of common features and so many points of similarity with the crime charged that it can be reasonably said that the other acts and the present act constitute the footprint of the defendant. ***State v. Fishnick***, 127 Wis. 2d 247, 263-64, 378 N.W.2d 272 (1985). "The threshold measure for similarity with regard to identity is nearness of time, place, and circumstance of the other act to the crime alleged." ***State v. Kuntz***, 160 Wis. 2d 722, 746-47, 467 N.W.2d 531 (1991). "Whether there is a concurrence of common features is generally left to the sound discretion of the trial courts." ***Id.*** at 747.

¶10 Based on the foregoing standards, we conclude that the trial court did not err in rejecting the motion to sever. The crimes were of the same or similar character, and the evidence involving Dayna V., Amanda R., and Kimberly V. would have been admitted as other acts evidence in the trial of Cortney T., Joan S., and Nicole B., if the cases had been tried separately. Therefore, no prejudice was caused by the joinder.

¶11 It is evident from the record that each incident was intended for sexual gratification in one form or another; the degree of achievement differing only by the relative resistance offered by each of the six victims. The victims who did not resist were sexually assaulted. All six incidents occurred within the period from March 20, 1998, to May 10, 1998. All of the victims were young woman ranging in ages from fourteen to thirty-two. All of the victims were strangers to Moton, and were accosted late at night on public streets while alone. With the exception of the incident involving Amanda R., the assailant made efforts to conceal his identity. In the instances of Cortney T., Joan S., Dayna V., and Kimberly V., the assailant pointed a handgun at their heads. He also used the phrase "Shut-Up" when assaulting Amanda R., Kimberly V., Cortney T., and Joan S.

¶12 The record reveals that the cases involved overlapping evidence. The victims provided the police with a description of both the assailant and the types of cars he drove during the incidents. The maroon vehicle, used during Cortney T.'s assault, had been loaned to Moton. In addition, on May 10, 1998, a police detective, while on patrol in the 700 block of East Clark Street between Garfield and Chambers Streets—the respective sites of Dayna V.'s and Nicole B.'s assaults—located a gold Buick Le Sabre, which matched Joan S.'s

description of Moton's car. The police confirmed with the Department of Transportation that the gold Buick Le Sabre was registered to Moton.

¶13 In searching Moton's residence and car, the police discovered: (1) Amanda R.'s Blockbuster card, which her assailant stole during the assault; (2) Kimberly V.'s key chain, which was in her purse and was taken by the assailant; and (3) Nicole B.'s necklace, which had been taken by her assailant during the assault. Joan S., who had been assaulted in the gold Buick Le Sabre, told the police that her assailant had cleaned her vaginal area after the assault with a white towel. A white towel was found in the Buick. Joan S. identified the gold-colored Buick Le Sabre as the car in which the assailant assaulted her. Cortney T., Joan S., Nicole B., and Kimberly V. told the police that their assailant wore thick glasses or goggles. Similar-type eyepieces were found in Moton's residence. Amanda R. stated that her assailant wore tan khaki pants. Nicole stated that her attacker wore beige Dockers and black gloves. Police found a pair of tan Dockers and a set of black gloves in Moton's residence.

¶14 From these circumstances, we can arrive at no other conclusion, but that the crimes perpetrated against these six young women were of a same or similar character and were properly joined.

¶15 We next address whether the other acts evidence involving Dayna V., Amanda R., and Kimberly V. would have been admissible in a trial involving Cortney T., Joan S., and Nicole B., and vice versa, to determine whether the likelihood of prejudice warrants severance. As indicated earlier in this decision, this process requires a three-step analysis. ***Sullivan***, 216 Wis. 2d 772-73.

¶16 First, under WIS. STAT. § 904.04(2), the purpose for introducing the evidence must be proper. We briefly set forth several of the stated purposes and evidence supporting these purposes. In each of the six instances there is either direct evidence or circumstantial evidence from which it can be reasonably inferred that the motive for Moton's contact with the victims was either to gain complete control over his victim for the purpose of either taking the victim's personal property and/or committing acts of a sexually assaultive nature. The similarity of personal characteristics described by the victims, either initially or at trial, clearly established identity.

¶17 Second, there can be no dispute that this body of cumulative evidence would have been relevant in both sets of trials. Third, although Moton attempted to create significant distinctions between the six incidents, they do not amount to that degree of prejudice that is unfair. He tries to distinguish the cases based on the age of victims, pointing out that the sexual assault victims were in their teens, but Dayna V. and Amanda R. were in their early twenties, and Kimberly V. was in her early thirties. This distinction is insignificant. All of the victims were young and female.

¶18 Moton also attempts to distinguish Dayna V.'s case, pointing out that she described the gun used as grey or silver, not dark, like the other victims. This distinction is not significant enough to cause unfair prejudice. The victim's identification of the gun used as a different color as the other victims is insignificant in light of other similar factors—common time, place, and other similar circumstances involved. Moton also attempts to distinguish Kimberly V.'s case on the ground that the assailant was carrying a garbage bag. This distinction is also not significant enough to cause unfair prejudice. The garbage bag was incidental to the crime committed.

B. Other Acts Evidence.

¶19 Moton next claims the trial court erroneously exercised its discretion by admitting evidence that he sexually assaulted and robbed a woman by the name of Elizabeth W. to show identification, motive, plan, and intent. Again, we begin our analysis by examining the criteria set forth in ***Sullivan***.

¶20 At the outset, it is clear that intent and motive were not an issue in this case. There is no dispute that the forceful seizure of personal property and sexual gratification was the basis for these criminal acts. The circumstances of the assault upon Elizabeth W. are not substantially similar so as to suggest a common plan or scheme.

¶21 Thus, the only purpose to examine is identification. "The threshold measure for similarity with regard to identity is nearness of time, place, and circumstance of the other act to the crime alleged." ***Kuntz***, 160 Wis. 2d at 746-47. The Elizabeth W. assault occurred in 1985. This thirteen-year time spread eliminates any proximity of time. Regarding place, the Elizabeth W. assault occurred on the east side, as did the Amanda R. incident. The other five assaults in this case, however, did not. Further, in five of the six incidents, Moton attempted to conceal his identity. In the instance of Elizabeth W., however, no effort was made to do the same. Thus, we conclude that the Elizabeth W. evidence was not relevant to identity, motive, or plan and, therefore, was erroneously admitted.

¶22 Nevertheless, we conclude there is no possibility that the erroneous admission contributed to Moton's conviction. ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985). Accordingly, we need not reverse his convictions on this basis.

¶23 The admission of the Elizabeth W. other acts evidence was harmless because of the overwhelming evidence indicating Moton's guilt. All six victims gave clear, concise, and graphic accounts of their encounters with Moton. Sexual gratification and/or the confiscation of personal property were the basis for each incident. Cortney T., Joan S., and Dayna V. identified Moton in a line-up. The cars that Moton used in these assaults were located and connected to him. More damning were the items of personal property taken from the victims found in Moton's residence and in his car. The sum of this evidence is overwhelming. There is no possibility that the erroneous admission of the other acts evidence relating to the Elizabeth W. incident resulted in Moton's convictions of the crimes charged here. The other evidence in the record was more than sufficient to prove beyond a reasonable doubt that Moton was guilty of all the charged crimes.

By the Court.—Judgment affirmed.

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