COURT OF APPEALS
DECISION
DATED AND FILED

June 17, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1688-CR **Cir. Ct. No. 2004CF6133**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CORY MENDRELL WELCH,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: MICHAEL B. BRENNAN and WILLIAM W. BRASH, Judges. *Affirmed.*

Before Wedemeyer, Fine and Kessler, JJ.

¶1 WEDEMEYER, J. Cory Mendrell Welch appeals from judgments and an order following two trials in which a jury found him guilty on all four counts in the first trial and eight of the twelve counts in the second trial.[1] Welch claims in this appeal that the trial court erroneously exercised its discretion when it: (1) granted the State's motion to sever the sixteen-charged counts into two separate trials; and (2) allowed other-acts evidence to be admitted at both trials. Because the trial court did not erroneously exercise its discretion in rendering the severance or evidentiary rulings, we affirm.

BACKGROUND

¶2 Welch was ultimately charged with sixteen counts in an information dated November 10, 2004. Count 1 was armed robbery with threat of force occurring on January 20, 2004. Count 2 was armed robbery with threat of force occurring on January 21, 2004. Count 3 was attempted armed robbery with threat of force occurring on March 5, 2004. Counts 4 and 5 each were armed robbery with threat of force occurring on March 7, 2004. Count 6 was armed robbery with threat of force occurring on March 8, 2004. Count 7 was armed robbery with threat of force occurring on March 29, 2004. Count 8 was attempted armed robbery with threat of force occurring on April 4, 2004. Count 9 was armed robbery with threat of force occurring on May 17, 2004. Count 10 was armed robbery with threat of force occurring on June 6, 2004. Count 11 was armed robbery with threat of force occurring on June 22, 2004. Count 12 was armed robbery with threat of force occurring on July 11, 2004. Counts 13, 14, 15 and 16

[1] The jury convicted Welch on the eight counts submitted to it in the second trial. The other four charged counts were dismissed at the conclusion of the presentation of the evidence.

all occurred on July 27, 2004: conspiracy to commit armed robbery; fleeing an officer and two counts of misdemeanor bail jumping.

¶3 On November 10, 2004, Welch's counsel filed a request for a speedy trial. At the scheduling conference, Welch's counsel advised the trial court that he would be out of the state and unavailable from January 25, 2005 through March 2, 2005. Thus, to comply with the speedy trial request, the trial court attempted to locate a court date, wherein the trial could be completed by January 24th. The trial court then set trial for January 18th. On January 13, 2005, the State filed a motion seeking to sever counts 13 through 16 from counts 1 through 12 due to the time constraints available for trial. The State indicated that due to the number of witnesses, the amount of evidence to be presented and complexity of the case, it would be unable to complete the entire trial within the time allotted.

¶4 Defense counsel objected to the severance of the counts. The trial court conducted a hearing and granted the State's motion to sever, ruling:

> Well, the Court here consults Wisconsin Statute 971.12, severance of crimes. We're obviously not talking about severance of defendants because [the co-defendant's] case has been adjourned.
>
> Normally in these circumstances defendants are objecting to the joinder of counts as potentially prejudicial.
>
> Here [defense counsel], on behalf of Mr. Welch, is taking the position that he's objecting to the motion to sever counts because he wants to try all of them in a short period of time.
>
> The Court would also note under State of Wisconsin Statute 906.11, the Court exercises reasonable control over the mode and order of interrogating witnesses and presenting evidence such as to make the interrogation and presentation effective for the ascertainment of the truth, avoid needless consumption of time and protect witnesses from harassment or undue embarrassment.

> This is a circumstance in which should the case go forward in its current iteration of 16 counts, it's very probable that we would begin today and not finish until Friday, January 28. That would be about nine trial days.
>
> ….
>
> Given the state of that calendar, that is why the Court put parties on notice that it would be very difficult for the Court to go forward with so many counts in these circumstances.
>
> This is a circumstance where the defendant is at less jeopardy rather than more jeopardy because there are fewer counts upon which Mr. Welch could be found guilty, rather than more counts.
>
> So the Court doesn't find it prejudicial to Mr. Welch.
>
> ….
>
> I'm going to grant the State's motion to sever the counts.

¶5 Based on the trial court's ruling, the State presented evidence to a jury at the first trial on counts 13 through 16. During that trial, the State also presented other acts evidence relating to some of the crimes charged in counts 1 through 12. The jury, however, was not aware that Welch was charged with sixteen counts; rather, the jury was asked to determine his guilt only with respect to counts 13 through 16, which were referred to as counts 1 through 4 during the jury trial. The jury returned a verdict of guilty on all four counts.

¶6 The second trial commenced on November 28, 2005, on the remaining counts 1 through 12. This trial took nine days to complete. At the close of evidence, the State dismissed counts 4 through 7 and the jury was asked to determine guilt on counts 1 through 3, and 8 through 12. The jury returned a guilty verdict on all eight counts. Welch was subsequently sentenced and judgments were entered. He filed a postconviction motion seeking a new trial on

the basis that the trial court erroneously exercised its discretion by severing the counts. He asserted that the trial court applied an inaccurate legal standard and that he was prejudiced by the severance due to the State's use of other acts evidence during both trials. The trial court denied the motion, ruling:

> The court has reviewed the transcripts in this case and stands by its respective decisions. Accordingly, for the reasons set forth on the record, the court does not perceive an erroneous exercise of discretion or an erroneous application of the legal standard. The court also notes that trial counsel's argument not to sever the counts comprised his belief that the entire trial (16 counts) could be done in four days; however, the trial on counts 13-16 took four days and the trial on counts 1-12 took nine days. Counsel had a scheduled vacation on January 25, 2005 and could not have continued the trial past January 24, 2005. The court attempted to accommodate the defendant's speedy trial demand by doing a partial jury trial prior to trial counsel's scheduled vacation. The court perceives no prejudice to the defendant due to the manner in which his case proceeded.

Welch now appeals.

DISCUSSION

A. Severance.

¶7 Welch contends that the trial court erroneously exercised its discretion when it granted the State's motion to sever counts 1 through 12 from 13 through 16. He argues that the only reason for the severance was to "fit the number of counts to be tried to the limited time available to the court's calendar rather than grant an adjournment that would have allowed the defendant to be tried on all counts."

¶8 In reviewing decisions on severance, we will reverse the decision of the trial court only if it erroneously exercised its discretion. *See* ***State v. Locke***,

177 Wis. 2d 590, 597, 502 N.W.2d 891 (Ct. App. 1993). A trial court properly exercised its discretion if it "contemplates a process of reasoning based on facts that are of record or that are reasonably derived by inference from the record," and renders "a conclusion based on a logical rationale founded upon proper legal standards." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

¶9 We are not persuaded by Welch's contention that "the trial court erroneously exercised its discretion because the State failed to prove it would be prejudiced from a failure to sever." Welch argues that the language in the joinder statute prohibits severance unless the moving party demonstrates that it would be substantially prejudiced. We are not convinced by Welch's argument. WISCONSIN STAT. § 971.12(3) (2003-04)[2] provides in pertinent part:

> RELIEF FROM PREJUDICIAL JOINDER. If it appears that a defendant or the state is prejudiced by a joinder of crimes or of defendants in a complaint, information or indictment or by such joinder for trial together, the court may order separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

From this, Welch contends that a court may grant severance only on a showing of substantial prejudice. Neither the statute, nor the ***Locke*** case compels such a conclusion. *See* ***Locke***, 177 Wis. 2d at 597 (a court may not deny severance if a defendant shows substantial prejudice).

¶10 In reviewing the facts and circumstances presented in this case, the trial court's decision to grant the State's motion to sever was not about prejudice to the State. Rather, the basis for granting the motion was compliance with

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

Welch's speedy trial request combined with his defense counsel's vacation plans. This is clear from the trial court's decision. The context of the instant case was not such that prejudice was the reason for the motion to sever. Rather, the context of this case required the motion to sever because the court's calendar, the speedy trial request, and the defense counsel's vacation schedule would not allow a trial on all sixteen counts at once. Context is an important consideration when applying the plain language of the statutes to the facts and circumstances of the case. *See* ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110.

¶11 Here, ultimately, the trial on all sixteen counts took *thirteen* days (four days for the first trial and nine days for the second trial). In order to comply with the defense speedy trial request and defense counsel's vacation schedule, the only spot available on the court's calendar was January 18th. The trial court, however, logically determined that there was not enough time to complete a trial on all sixteen counts because of defense counsel's planned vacation. Thus, the only reasonable action under such circumstances was exactly what occurred here—separating the counts and holding two trials. Accordingly, we cannot hold that the action taken here constituted an erroneous exercise of discretion. As the trial court noted, additional authority besides WIS. STAT. § 971.12 (2003-04) also permits the severance which occurred here. A court has the ability to control the conduct of trials pursuant to WIS. STAT. § 906.11 and has the inherent authority to control its calendar and the disposition of cases on its docket. *See* ***Neylan v. Vorwald***, 124 Wis. 2d 85, 94, 368 N.W.2d 648 (1985).

¶12 Welch does not contend in this appeal that the delay in trying him on counts 1 through 12 caused him delay by violating his speedy trial rights. Rather,

he claims the severance prejudiced him because the State was allowed to introduce "other acts" evidence from some of the severed counts. We reject this contention.

¶13 The jury was not aware that the counts had been severed nor was the jury advised to "assume" that the other acts had occurred. Rather, the jury was instructed that: "Evidence has been presented in this trial regarding other conduct of the defendant for which the defendant is not on trial…. [I]f you find that this conduct [the other acts] did occur, you should consider it only on the issues of intent, preparation or plan and identity." Thus, the jury was instructed to treat the "other acts" evidence only on "the issues of intent, preparation or plan and identity." This is the standard other-acts evidence instruction and Welch did not object to the instruction at trial. Accordingly, his argument in this regard is without merit.

¶14 In addition, he contends that the other acts evidence relative to counts 2, 9, 10 and 11 were erroneously admitted because the State did not have to prove that these acts occurred beyond a reasonable doubt. Such is not required of other acts evidence. Rather, proving those counts occurred in the second trial. We agree with the State that Welch's arguments in this regard are disingenuous. If we accept Welch's contention and require that all sixteen counts be tried together, all the other acts evidence he complains was erroneously admitted would have been presented to the jury. The jury could have relied on that evidence to convict on certain counts, even if it decided to acquit on other counts. ***State v. Landrum***, 191 Wis. 2d 107, 117, 528 N.W.2d 36 (Ct. App. 1995). Thus, we are not convinced that Welch was prejudiced by the severance of the counts, nor do we believe that the admission of the other acts evidence alleviated the State of the required burden of proof on counts 13 through 16 in the first trial.

B. Admission of Other Acts Evidence.

¶15 Welch also argues that the trial court erroneously exercised its discretion in allowing into evidence the other acts evidence. We are not convinced.

¶16 To allow the introduction of other acts evidence, a court must determine whether the evidence is admissible under WIS. STAT. § 904.04(2).[3] "The general rule is to exclude evidence of other bad acts to prove a person's character in order to show that the person acted according to his character in committing the present act." ***State v. Fishnick***, 127 Wis. 2d 247, 253, 378 N.W.2d 272 (1985). Other acts evidence should be used sparingly and only when reasonably necessary. ***Whitty v. State***, 34 Wis. 2d 278, 297, 149 N.W.2d 557 (1967).

¶17 A trial court decides the admissibility of other acts evidence by applying a three prong test. ***State v. Sullivan***, 216 Wis. 2d 768, 772, 576 N.W.2d 30 (1998). First, the court must determine whether the evidence is offered for an acceptable purpose. ***Id.*** Second, the court must determine whether the proposed other acts evidence is relevant; i.e., whether the evidence is related to a fact or proposition that is of consequence to the determination of the action, and whether the evidence has a tendency to make the consequential fact or proposition more

[3] WISCONSIN STAT. § 904.04(2) provides:

> [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. 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.

probable or not than it would be without the evidence. ***Id.*** Third, the court must determine whether the prejudicial effect of the other acts evidence substantially outweighs its probative value. ***Id.*** at 772-73.

¶18 The first step necessitates the offering of evidence for an acceptable purpose. The testimony of an individual's "other acts" is not admissible to prove the character of the individual in order to show the individual acted in conformity therewith. The list, however, of acceptable purposes set forth in WIS. STAT § 904.04(2) is to be viewed as illustrative and by no means exclusionary. ***State v. Shillcutt***, 116 Wis. 2d 227, 236, 341 N.W.2d 716 (Ct. App. 1983). Additional acceptable purposes noteworthy for the purpose of our current analysis are to show the context in which the charged crimes took place or to show the full presentation of the case. ***Id.*** Another acceptable purpose is to complete the story of the crime on trial by proving its immediate context of happening. ***State v. Bettinger***, 100 Wis. 2d 691, 697, 303 N.W.2d 585 (1981).

¶19 The second step is the requirement of relevancy. Evidence is relevant if it relates to a fact or proposition of consequence to the determination of the action and that the evidence has the tendency to make the consequential fact or proposition more or less probable. ***Sullivan***, 216 Wis. 2d at 785-86.

¶20 The last of the three-pronged test is whether the danger of unfair prejudice substantially outweighs the probative value of the evidence. ***Id.*** at 789; ***State v. Speer***, 176 Wis. 2d 1101, 1114, 501 N.W.2d 429 (1993).

¶21 Here, the record clearly demonstrates that the trial court considered each of the ***Sullivan*** factors in determining whether to admit the other acts evidence. The trial court found acceptable purposes—plan or scheme and intent—found the evidence relevant, and found that the probative value outweighed any

unfair prejudice. Thus, the trial court did not erroneously exercise its discretion in admitting the other acts evidence at the first trial.

¶22 Welch also contends that the trial court erroneously exercised its discretion by allowing into evidence conduct relating to counts 13 through 16 on which he had been convicted into evidence as "other acts" evidence in the second trial. Specifically, he argues that evidence of flight and arrest from the counts in the first trial should not have been admitted in the second trial, because the second trial involved all robberies, but had nothing to do with flight/arrest. We reject his contention for three reasons.

¶23 First, as noted, Welch wanted all these charges tried together. If that had happened, the jury would have heard about the conduct he now claims should not have been admitted. Second, he did not object to this evidence at the time of trial and therefore has waived his right to raise it now. ***State v. Edwards***, 2002 WI App 66, ¶9, 251 Wis. 2d 651, 642 N.W.2d 537. Third, the evidence of flight and arrest was relevant to the robbery charges for the purpose of proving identity, common scheme or plan and to explain context to the jury of his arrest and statement he gave to police.

¶24 Based on the foregoing, we hold that the trial court did not erroneously exercise its discretion in granting the State's severance motion, nor did it erroneously exercise its discretion in admitting other acts evidence. Accordingly, we affirm.

By the Court.—Judgments and order affirmed.

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