COURT OF APPEALS
DECISION
DATED AND FILED

October 1, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2465-CR **Cir. Ct. No. 2011CF502**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL D. HATTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: DAVID M. REDDY, Judge. *Affirmed.*

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Michael D. Hatton appeals from a judgment of conviction entered after a jury found him guilty of second-degree recklessly endangering safety and disorderly conduct and from an order denying his motion

for postconviction relief.[1] He argues that the trial court erred in denying his motion to sever improperly joined charges and that he is entitled to a new trial because the record fails to establish that the jury panel was administered a truth-telling oath prior to voir dire. We disagree and affirm.

¶2 On November 5, 2011, Hatton was arrested following a domestic dispute at the residence he shared with his longtime girlfriend M.R. At trial, M.R. testified that she had hidden her money from Hatton so he would not use it to buy drugs. When she realized her money was missing, M.R. confronted Hatton and told him she needed the money to pay for food and bills. Hatton refused to return the money. M.R. suspected that he had placed it in a safe they used for storing documents. She then discovered that the safe key was missing and threw the safe against the ground to crack it open. Hatton heard the crash and entered the room.

¶3 The two wrestled on the floor for the money. M.R. testified that Hatton grabbed her, threw her onto the bed, and had "his hands on my chest to like hold me down, and I was swinging at him trying to get him off of me." She testified that he was holding her down "with pressure" and that he slapped her with an open hand and struck her with a closed fist. As Hatton held her down on the bed, their thirteen-year-old daughter walked in and jumped onto Hatton's back. Hatton flung the girl back into a dresser. M.R. hit him in response.

¶4 The State filed a criminal complaint charging Hatton with disorderly conduct. The complaint also charged Hatton with second-degree reckless endangerment in connection with an incident alleged to have occurred more than

[1] The Honorable Robert J. Kennedy presided at the jury trial and denied the motion to sever. The Honorable David M. Reddy presided at sentencing and postconviction proceedings.

four years earlier, on July 7, 2007.[2] M.R. testified that she and Hatton had been out drinking together and that when they returned home, Hatton passed out on the couch. Hatton woke up suddenly and seemed disoriented. He went into the kitchen and grabbed a knife, and M.R. became afraid and ran outside to a neighbor's house. The neighbors went to check on Hatton while M.R. followed behind. Hatton was sitting on the front porch clutching a knife as the neighbors tried to persuade him not to hurt himself. He held the knife to his arm where there was a tattoo of M.R., and said "[M.R.], where are you?" M.R. felt Hatton was implying that he wanted to kill her.

¶5 At some point that same 2007 morning, Hatton got into a white van and began to chase M.R. around the backyard. She hid in a nearby cornfield and called the police. Though at trial M.R. testified that she could not recall various details, she wrote in her initial statement to police that Hatton tried to run her over with the van and that "[h]e was chasing me around the house with the van. I ran by the door so he wouldn't hit me with it." When police arrived, they found Hatton apparently asleep in the yard and placed him under arrest.

¶6 Hatton filed a motion to sever the charges, alleging that they were improperly joined. The State opposed the motion. The trial court ruled that the charges were properly joined under WIS. STAT. § 971.12(1) (2011-12),[3] because they were "of the same or similar character" and were "connected together." The trial court acknowledged that the legal charges were different but explained that

[2] The record establishes that the 2007 incident was charged but dismissed on the State's motion because it was unable to serve M.R. with a subpoena.

[3] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

they were similar in character because both involved acts of domestic violence against the same victim. In determining that the two counts were connected together, the trial court reasoned that in deciding whether Hatton committed disorderly conduct in 2011, the jury should be able to consider what happened back in 2007 "[b]ecause if the victim's response to what was happening [in 2011] was motivated at least in part by what happened in 2007 and the violence to her, that is additional circumstances that make it disorderly conduct under all the facts and circumstances."[4] Hatton proceeded to trial and the jury found him guilty of both charges.

¶7 Thereafter, Hatton filed a postconviction motion for a new trial arguing that the record failed to establish that prior to voir dire, the jury panel was administered an oath to truthfully answer all questions. At the postconviction hearing, the State called as a witness Kristy Secord, the court office supervisor in the clerk of courts office. Secord testified that her job included the supervision and training of office employees, including the training of jury clerks. Secord testified that the judges in Walworth county had delegated the management of jurors to the clerk of courts office and had established procedures to be followed in every case. These procedures included having prospective jurors take an oath of competency prior to voir dire, under which they swore to answer truthfully all questions asked by counsel or the court concerning their competency to act as jurors in the case. Secord testified that the oath of competency is administered off

[4] The trial court was referring to the element of disorderly conduct requiring that the defendant's actions occur "under circumstances in which the conduct tends to cause or provoke a disturbance." WIS. STAT. § 947.01(1).

the record, that clerk Margo Grabner handled this trial, and that Grabner was trained to follow the established procedures.

¶8 The trial court denied Hatton's postconviction motion, concluding that trial counsel's failure to object to the alleged error waived any appellate claim:

> [Trial counsel] … never objected to the fact that an oath wasn't given, and whether he knew or not is not the issue. He didn't object. And nor did he object once the jurors were sworn in after being selected—or before being sworn in, there wasn't an objection to that. So at least implicitly he agreed to this panel. So the failure to object, I think, did constitute a waiver on behalf of the defendant.

¶9 Additionally, the trial court found as a matter of historical fact that prospective jurors were given the oath of competency off the record in this case:

> Secord testified that the procedure that's being followed here; that is, that the jury be sworn in off the record, is a procedure that she's followed, based upon rules and procedures established by the judge.
>
> That being the case, I believe that based upon her testimony that jurors are sworn in and the Oath of Competency is given and in that Ms. Grabner was trained in that procedure and she's experienced in following that procedure, I believe a presumption can be made by this court that it was, in fact, done in this case. There is, therefore, in this county a system in place to comply with the statutory requirements, and I believe they were complied with.

Joinder of charges

¶10 WISCONSIN STAT. § 971.12(1) provides that two or more crimes may be charged in the same complaint or information 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."[5] Whether charges are improperly joined in a single charging document presents a question of law subject to independent review. ***State v. Hoffman***, 106 Wis. 2d 185, 208, 316 N.W.2d 143 (Ct. App. 1982).

¶11 Hatton maintains that the 2007 and 2011 incidents were neither "of the same or similar character," nor "connected together" for purposes of the joinder statute. We need not decide whether the two charges were improperly joined because even if we assume that the joinder was improper, any error was harmless. ***State v. Leach***, 124 Wis. 2d 648, 671-72, 370 N.W.2d 240 (1985). The test for harmless error requires the State to demonstrate that "there is no reasonable possibility that the error contributed to the conviction." ***Id***. at 674. "[T]here is no prejudice from misjoinder when the several counts are logically, factually and legally distinct, so that the jury does not become confused about which evidence relates to which crime and considers each of them separately." ***Id***. at 672. Misjoinder may also be harmless "when evidence of the defendant's guilt of each offense is overwhelming." ***Id***.

¶12 First, owing to the legal and factual differences between the two offenses as well as the State's chronological presentation of the evidence, there is no reasonable possibility that the jury confused the evidence or conflated the charges. The two charges were legally distinct and the essential elements did not overlap. The offenses were factually distinct in that they were separate in time,

[5] WISCONSIN STAT. § 971.12(3), a separate subsection, is entitled Relief from prejudicial joinder and provides: "If it appears that a defendant or the state is prejudiced by a joinder of crimes … the court may order separate trials of counts … or provide whatever other relief justice requires." Issues of misjoinder under § 971.12(1) and severance under § 971.12(3), are analytically distinct and implicate different standards of review.

and while one involved a knife and an outdoor vehicle chase, the other involved an indoor physical altercation over money. Additionally, the State introduced evidence of the crimes chronologically and separately from each other. M.R. testified about the two incidents in chronological order. The State's next three witnesses testified about the 2007 incident. The next set of witnesses testified about events during and after the 2011 incident. This linear presentation further minimized any risk that jurors would confuse the evidence.

¶13 Second, the jury was expressly instructed to consider each count separately, and not to let Hatton's guilt or innocence on one count affect its verdict on the other. *See* ***id.*** at 673. Jurors are presumed to follow the court's instructions. ***State v. Searcy***, 2006 WI App 8, ¶59, 288 Wis. 2d 804, 709 N.W.2d 497. The court's instruction reminded the jury to keep the charges separate. It also minimized the danger that the jury would base its decision on a perception that Hatton was predisposed to commit crimes rather than the evidence presented at trial. *See* ***Leach***, 124 Wis. 2d at 672-73.

¶14 Third, the evidence against Hatton on each offense was overwhelming. As to the 2007 incident, Officer Eric Anderson testified that when he arrived at the scene, he saw tire tracks all over the backyard. He testified that the tracks appeared to be fresh and that he observed equally fresh mud in the wheel well of the van. Anderson testified that M.R. reported being chased by the van "from the south side of the residence to the west side of the residence, around to the north and then in a sense around to the west side" until Hatton pulled off and parked the van. Police officers also corroborated M.R.'s testimony that she was deeply upset after the incident. For example, Anderson testified that M.R. was "crying and could barely talk to me when I was asking her questions."

¶15 Similarly, M.R.'s testimony concerning the 2011 disorderly conduct offense was corroborated by the police officers' observations. M.R. testified that Hatton threw her onto the bed, pinned her down, and slapped and punched her. Officer Bacca testified that M.R. had a blood blister inside her lip and a red abrasion on her neck after the incident. Lieutenant Strohm testified that he observed a blood blister inside M.R.'s lip and that she told him that Hatton had hit her with a semi-closed fist. Strohm also described the "pretty long scratch mark" on M.R.'s neck.

¶16 Additionally, the State introduced letters and telephone calls from Hatton imploring M.R. not to cooperate with the State and suggesting ways she could avoid testifying against him at trial.[6] For example, in one call to M.R., Hatton stated:

> Did you explain that we didn't even call the police … that somebody else did just because we were arguing … they can't do anything if you're not there. If you don't testify, then I mean that there's nothing they can do….

And:

> Even if you get subpoenaed, all you have to do is plead the 5th, you know, like the right to remain silent. You don't have to talk in court, you don't have to testify.… You have the kids to support you know.… I miss you so much… If I get messed up with all this stuff, I'm going to be on

[6] Some of the recorded jail telephone calls were made from Hatton to unidentified individuals. In one such call, Hatton told the listener:

> They are trying to charge me … from 2007…. They got up to 7 years I guess to charge me… [M.R.] didn't testify the first time… so they're trying to get her to testify this time… If [M.R.] doesn't testify then I'm fine, then they're going to drop everything….

In another call, he told the listener: "Well, the only thing that is going to help me tomorrow is if she says she doesn't remember shit, so…."

> probation, I can't move, it's going to cost us so much money, like thousands of dollars it's gonna cost… I love you.

¶17 This evidence is probative of Hatton's consciousness of guilt. *See* ***State v. Bettinger***, 100 Wis. 2d 691, 698, 303 N.W.2d 585, *modified,* 100 Wis. 2d 691, 305 N.W.2d 57 (1981) ("It is generally acknowledged that evidence of criminal acts of an accused which are intended to obstruct justice or avoid punishment are admissible to prove a consciousness of guilt of the principal criminal charge."); s*ee also* ***State v. Neuser***, 191 Wis. 2d 131, 144-45, 528 N.W.2d 49 (Ct. App. 1995) (evidence of threats made to a victim were admissible not as other acts evidence, but to prove the defendant's consciousness of guilt).

¶18 In sum, due to the factual and legal differences between the charges, the court's admonitory instruction and the overwhelming evidence on each count, the State met its burden to demonstrate that any misjoinder in this case was harmless error.

The Oath of Competency

¶19 It is undisputed that the trial record does not reflect whether, prior to voir dire, prospective jurors took an oath to truthfully answer the questions asked by the court and counsel regarding their competency. Hatton contends that in the absence of any record indication that prospective jurors were administered a competency oath prior to voir dire, it must be assumed that the oath was never given.

He argues that this constitutes a structural error requiring reversal in favor of a new trial.[7]

¶20 We reject Hatton's claim that he is entitled to a new trial for two reasons. First, trial counsel never raised this issue below and it is deemed forfeited. *See, e.g.*, ***State v. Huebner***, 2000 WI 59, ¶¶10-11, 235 Wis. 2d 486, 611 N.W.2d 727. Trial counsel was in the courtroom prior to voir dire and made no inquiry when the competency oath was not administered to the jury. Here, assuming trial counsel believed that the oath was not administered, a proper objection would have easily remedied the problem. *See* ***id.***, ¶¶11-12 & n.2 (the forfeiture rule gives the parties and court notice of the issue and a fair opportunity to address the objection). Hatton did not call trial counsel to testify at the postconviction hearing. Perhaps trial counsel would have testified that the oath was administered off the record or that he elected not to raise the issue. Perhaps he would have conceded that the issue never occurred to him in the bustle of trial. Regardless, Hatton has failed to persuade us that the doctrine of forfeiture is inapplicable or inappropriate.

¶21 Second, reaching the merits of Hatton's claim, we conclude that the trial court did not err in finding that the competency oath was administered off the record, prior to voir dire. Through the testimony of Secord, the State established

[7] In support, Hatton asserts that the oath of competency is implicitly mandated by WIS. STAT. § 805.08(1), which provides that:

> The court shall examine on oath each person who is called as a juror to discover whether the juror is related by blood, marriage or adoption to any party or to any attorney appearing in the case … or has expressed or formed any opinion, or is aware of any bias or prejudice in the case. If a juror is not indifferent in the case, the juror shall be excused.…

that the responsibility for giving prospective jurors an oath prior to voir dire falls to the Walworth County Clerk of Courts under a delegation of authority pursuant to WIS. STAT. § 756.001(5).[8] Secord testified that there are established policies concerning jury management to be followed in every case, including the administration of the oath of competency to prospective jurors off the record.[9] A presumption exists that public officers have properly discharged their official duties. ***State v. McCoy***, 2007 WI App 15, ¶19, 298 Wis. 2d 523, 728 N.W.2d 54. Absent evidence to the contrary, there is a presumption that official acts are performed in an honest, efficient, and regular manner. *See* ***Martin v. Smith***, 239 Wis. 314, 325, 1 N.W.2d 163 (1941). Hatton failed to rebut this presumption.

¶22 Furthermore, even without this presumption, the trial court's finding of historical fact must be upheld on appeal. ***State v. Robinson***, 2010 WI 80, ¶22, 327 Wis. 2d 302, 786 N.W.2d 463. The trial court was entitled to believe Secord and to infer from her testimony that the competency oath was, in fact administered off the record prior to voir dire. Hatton failed to produce any evidence to the

[8] WISCONSIN STAT. § 756.001(5), provides that judges may delegate responsibility for administering the jury system to the clerk of the circuit court. Where delegation occurs, the clerk of circuit court is responsible to "select and manage juries under policies and rules established by the judges in that circuit court." ***Id.***

[9] Secord testified about the established procedures followed in every case:

> Once the jurors report to the courthouse, they first check in with bailiffs down in the jury assembly room. The jury clerk will then meet with them just to go over general information about where to park, not to talk to employees of the courthouse and just general information like that. Then, um, one of two things happen. Either the clerk who's handling the trial comes down to the jury assembly room to take attendance and swear in the jurors or the bailiffs will bring the jurors up to the courtroom and the clerk will take attendance up in the courtroom and swear in the … jurors then.

contrary and the trial court's finding that the oath was given is not clearly erroneous.

By the Court.—Judgment and order affirmed.

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