COURT OF APPEALS
DECISION
DATED AND FILED

November 24, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2014AP2899-CR
2014AP2900-CR

Cir. Ct. Nos. 2011CF000810
2011CF001332

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERIC CHRISTOPHER BELL,

DEFENDANT-APPELLANT.

APPEALS from judgments of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed*.

Before Curley, P.J., Brennan, J., and Daniel L. LaRocque, Reserve Judge.

¶1 BRENNAN, J. Eric Christopher Bell appeals from two judgments of conviction entered after a jury found him guilty of multiple sex crimes

involving five different children. The judgments arose from two Milwaukee County cases that were consolidated for trial. On appeal, Bell argues that the cases were improperly joined pursuant to WIS. STAT. § 971.12 (2013-14)[1] and that he was substantially prejudiced by the joinder. Because we conclude that the cases were of the same or similar character and, as such, were properly joined as a matter of law, and because the trial court did not erroneously exercise its discretion when it determined that Bell was not substantially prejudiced by the joinder, we affirm.

BACKGROUND

¶2 In February 2011, the State filed a complaint in Milwaukee County Circuit Court Case No. 2011CF810. In the complaint, the State charged Bell with two counts of second-degree sexual assault of a child under the age of sixteen. The victims of the sexual assaults were two thirteen-year-old girls: Victim 1 and Victim 2.[2]

¶3 Victim 1 testified that in January 2011, when she was thirteen years old, she left school early with a friend to meet Bell at his home on Fond du Lac Avenue in Milwaukee. Once there, a number of people present began discussing the Vice Lords gang,[3] and Victim 1 indicated that she wanted to join. Bell's

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise stated.

[2] In order to better protect the privacy and dignity interests of crime victims, our supreme court recently created WIS. STAT. RULE 809.86 (2015), requiring practitioners to identify crime victims by their initials in briefs. We have adopted a similar practice when identifying crime victims in our opinions. However, given the number of victims in this case, identifying the victims by their initials was particularly cumbersome. As such, for ease of reading, we have chosen to identify the victims by number.

[3] One of the people Victim 1 testified was at the home was one of Bell's daughters, who is identified later in this opinion as Victim 3.

daughters told Victim 1 that to join the gang, she had to have sex with their dad, who they also identified as "the Chief." Bell sent for Victim 1 to come to his room. Bell laid a towel down on the bed and engaged in penis-to-vagina sexual intercourse with Victim 1. Victim 1 testified that she was crying and scared.

¶4 Victim 2 testified that in February 2011, when she was thirteen years old, she left school early with a girl from school and met Bell at his Fond du Lac Avenue residence. Victim 2 testified that she knew two of Bell's daughters who lived at that address and saw them when she arrived.[4] The girl from school took Victim 2 into a bedroom and began talking to her about the Vice Lords gang. The girl then left Victim 2 alone, and Bell, who Victim 2 had been told to call "the Chief," approached Victim 2 and told her to take off her clothes. Victim 2 laid on a towel on the bed, and Bell had penis-to-vagina intercourse with Victim 2.

¶5 During the course of the police investigation into the crimes against Victims 1 and 2, the investigating detective interviewed three of Bell's daughters—Victims 3, 4, and 5—all of whom reported that they too had been sexually assaulted by Bell. Consequently, in March 2011, the State filed Milwaukee County Circuit Court Case No. 2011CF1332, charging Bell with acts of sexual assault involving three of his daughters, Victims 3, 4 and 5.

¶6 With respect to Victim 3, the State charged Brown in the second case with: sexual assault of a child under thirteen years of age; repeated sexual assault of a child; and incest with a child. Victim 3 testified that Bell began sexually assaulting her when she was nine years old, while the family lived on

[4] Victim 2 identified Bell's daughters by name; we later identify those daughters as Victims 3 and 4.

29th Street in Milwaukee. She stated that Bell had penis-to-vagina intercourse with her regularly at both his 29th Street and Fond du Lac Avenue residences. Victim 3 told the jury that she told police about the abuse during their investigation into the assaults on Victims 1 and 2 because she "just wanted him to stop[]."

¶7 With respect to Victim 4, the State charged Brown with: sexual assault of a child under thirteen years of age; repeated sexual assault of a child; and incest with a child. Victim 4 reported to police that Bell began sexually assaulting her when she was nine years old, while the family was living in Illinois. She told police that Bell had sex with her "almost every night" while they were living in Illinois. The family moved from Illinois to the 29th Street residence in Milwaukee in June 2006. Victim 4 recounted for police her first day at the 29th Street residence, when Bell put a towel on the floor, told her to lay down, and performed penis-to-vagina sexual intercourse on her. Victim 4 stated that Bell had penis-to-vagina intercourse with her more than thirty times at the 29th Street house. The last time occurred at the Fond du Lac Avenue residence in September 2010 when Victim 4 was sixteen years old.[5]

¶8 With respect to Victim 5, the State charged Brown with: one count of repeated sexual assault of a child and one count of second-degree sexual assault of a child under the age of sixteen. Victim 5 testified that, beginning when she was eleven years old, Bell engaged in numerous acts of penis-to-vagina intercourse with her at both the 29th Street and Fond du Lac Avenue residences.

[5] At trial, Victim 4 testified that everything she had told police was untrue. Her statements to police were entered into evidence as prior inconsistent statements.

Bell told Victim 5 that she should "just do it" because "every female in [the] family went through it." Victim 5 testified that the last assault occurred in December 2010.

¶9 Three weeks after filing the second complaint, the State filed a motion to join the two cases for trial.[6] The State asserted that joinder was proper under WIS. STAT. § 971.12(1) and (4) because the charged crimes were "of the same or similar character" and exhibited a similar *modus operandi*. The State also noted that Victims 3, 4, and 5 were fact witnesses in the charges against Victims 1 and 2, and the State believed that testifying in two trials would be "extremely traumatizing for these girls."

¶10 The trial court granted the State's motion, noting that each of the alleged assaults took place at one of Bell's homes, that all of the victims were close in age, and that each of the cases involved penis-to-vagina intercourse. The court also discussed the fact that one of Bell's daughters was a classmate of Victim 1 and Victim 2 and that all of Bell's daughters were fact witnesses in the case against Victim 1 and Victim 2. Additionally, the court determined that the daughters' testimony was offered "to show the same plan of the defendant, to put everything in context" and that their testimony was "certainly relevant" in the case involving Victim 1 and Victim 2. The court also took into consideration the idea that failing to join the cases would require the daughters to testify at two trials. The court admitted that the evidence was prejudicial, but concluded that it was not *unfairly* prejudicial. To cure any potential prejudice, the court stated that it would

[6] In its motion, the State did not limit the facts to those included in the complaint, but also argued that joinder was appropriate based upon the victims' anticipated trial testimony.

instruct the jurors that they must consider each of the cases and all of the counts separately.

¶11 The trial court instructed the jury as follows:

> It is for you to determine whether the defendant is guilty or not guilty of each of the offenses charged. You must make a finding as to each count of the Information. Each count charges a separate crime, and you must consider each one separately. Your verdict for the crime charged in one count must not affect your verdict on any other count.

The jury found Bell guilty on all ten counts. Bell appeals.

DISCUSSION

¶12 The only issue Bell raises on appeal is whether the cases were properly joined for trial. He claims that the charges concerning Victims 1 and 2 were not sufficiently similar to those charges concerning Victims 3, 4, and 5, and that the trial court's decision to join the two cases was based solely on "violations of the same statute." Furthermore, Bell argues that even if the cases were properly joined in the first instance, he was substantially prejudiced by their joinder. We disagree.

¶13 WISCONSIN STAT. § 971.12 governs joinder of crimes for trial. It provides, as relevant here:

> **(1)** JOINDER OF CRIMES. Two or more crimes may be charged in the same complaint, information or indictment in a separate count for each crime if the crimes charged, ... 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.
>
> ….

> **(4)** TRIAL TOGETHER OF SEPARATE CHARGES. The court may order 2 or more complaints, informations or indictments to be tried together if the crimes … could have been joined in a single complaint, information or indictment. The procedure shall be the same as if the prosecution were under such single complaint, information or indictment.

We interpret statutes independently from the trial court. *See* ***State v. Williams***, 2002 WI 58, ¶8, 253 Wis. 2d 99, 644 N.W.2d 919. Whether the initial joinder was proper is a question of law that we review *de novo*. ***State v. Locke***, 177 Wis. 2d 590, 596, 502 N.W.2d 891 (Ct. App. 1993). The "joinder statute is to be construed broadly in favor of the initial joinder." ***Id.***

¶14 WISCONSIN STAT. § 971.12(4) permits crimes in two or more complaints to be joined for trial if the charged crimes could have been joined in a single complaint. Section 971.12(1) permits two or more crimes to be charged in a single complaint, as relevant here, when the crimes charged "are of the same or similar character." ***Id.*** "To be of the 'same or similar character' under [§] 971.12(1), crimes must be the same type of offense occurring over a relatively short period of time and the evidence as to each must overlap." ***State v. Hamm***, 146 Wis. 2d 130, 138, 430 N.W.2d 584 (Ct. App. 1988). That the charges involve the same type of criminal charge, alone, is not sufficient. ***Id.***

¶15 Bell argues that the charges against Victims 1 and 2 are not sufficiently similar to the charges against Victim 3, 4, and 5; he contends that the trial court based joinder solely on "violations of the same statute." We disagree. The record reveals that there were many similarities between the two cases beyond the statutory violations, several of which were noted by the trial court.

¶16 First, the record shows that charges against all of the victims were for the "same type of offenses" and not just similar statutory violations. *See* ***id.*** For instance:

- Each incident involved penis-to-vagina sexual intercourse.

- The victims were all young girls of a similar age. Victims 1 and 2 were thirteen at the time of Bell's assault. Bell engaged in sexual intercourse with Victim 3 when she was between the ages of nine and fifteen, with Victim 4 between the ages of nine and sixteen, and with Victim 5 between the ages of eleven and seventeen.

- All of the incidents took place at Bell's home.

- Victims 1, 2, and 4 testified that Bell had them lie on a towel before he had penis-to-vagina intercourse with them.

- All of the victims reported that Bell used a condom. As the State notes, that similarity is significant because the police found unopened condom packages in Bell's jacket, and the woman with whom Bell and his daughters were living testified that she and Bell did not use condoms.

- All of the incidents involved Bell making statements to the victims about how they had to engage in a sexual act either because it was a right of passage in the family or into the gang.

¶17 Additionally, Bell sexually assaulted all of the girls over a relatively short period of time. Victims 1 and 2 were assaulted on January 19, 2011, and February 4, 2011, respectively. Victim 3 indicated that Bell was still assaulting her at the time she was interviewed by police in March 2011, stating that she "just wanted him to stop[]." Victim 4 reported that Bell had assaulted her as recently as September 2010, and Victim 5 told the jury that Bell had last assaulted her in December 2010. The supreme court has concluded that the "relatively short period of time" fact is satisfied when fifteen to eighteen months separate charged sexual assaults. *See* ***Hamm***, 146 Wis. 2d at 139-40. That is certainly the case here.

¶18 Third, the evidence in each of the cases overlaps. Some of Bell's daughters were present in the home and spoke to Victims 1 and 2 on the days of their respective assaults, making them fact witnesses in that case. And we have already explained that many of the details of the assaults were similar. As we set forth in more detail below, all of that testimony was admissible in the trials for each of the victims as other acts evidence. *See* WIS. STAT. § 904.04(2).

¶19 Consequently, we conclude as a matter of law that the charges regarding each of the victims were of the "same or similar character" and therefore could have been joined in a single complaint. *See* WIS. STAT. § 971.12(1) & (4). As such, the trial court did not err in joining the cases for trial in the first instance.

¶20 In the alternative, Bell argues that, even if the charges against all five victims were properly joined for trial, he was substantially prejudiced by joinder. Again, we disagree.

¶21 If a trial court finds that initial joinder of the charges was proper, the court may nonetheless order separate trials if it appears that the defendant is

prejudiced by a joint trial. WIS. STAT. § 971.12(3); ***Locke***, 177 Wis. 2d at 597. The court must weigh the prejudice that would result from a joint trial against the public interest in conducting a trial on multiple counts. ***Locke***, 177 Wis. 2d at 597. The question of whether joinder is likely to result in prejudice to the defendant is left to the discretion of the trial court, and this court will find an erroneous exercise of discretion only if the defendant can establish that failure to sever the counts caused "substantial prejudice." ***Id.***

¶22 In evaluating the likelihood of 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." ***Id.*** As a result, the joinder analysis leads to an analysis of other acts evidence under WIS. STAT. § 904.04(2). *See* ***Locke***, 177 Wis. 2d at 597.

¶23 To determine whether, if tried separately, evidence from one trial would be admissible as other acts evidence in the other, the court must apply the following three-part test: (1) whether the other acts evidence is "offered for an acceptable purpose" under WIS. STAT. § 904.04(2), such as to establish "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident"; (2) whether the other acts evidence is relevant under WIS. STAT. § 904.01; and (3) whether the probative value of the other acts evidence is "substantially outweighed by the danger of unfair prejudice" under WIS. STAT. § 904.03. ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998).

¶24 ***Sullivan*** provides "the general framework that governs the admissibility of other crimes evidence in all Wisconsin cases." ***State v. Davidson***, 2000 WI 91, ¶36, 236 Wis. 2d 537, 613 N.W.2d 606. "However, alongside this general framework, there also exists in Wisconsin law the longstanding principle

that in sexual assault cases, particularly cases that involve sexual assault of a child, courts permit a 'greater latitude of proof as to other like occurrences.'" ***Id.*** (citation omitted). "[I]n sexual assault cases, especially those involving assaults against children, the greater latitude rule applies to the entire analysis of whether evidence of a defendant's other crimes was properly admitted at trial." ***Id.***, ¶51. "The effect of the rule is to permit the more liberal admission of other crimes evidence in sex crime cases in which the victim is a child." ***Id.*** We address each of the ***Sullivan*** factors in turn.

¶25 First, the trial court did not erroneously exercise its discretion when it found that the testimony from each of the victims would be admissible at the trial for the others for the permissible purpose of showing Bell's plan or scheme. *See* ***Davidson***, 236 Wis. 2d 537, ¶60 ("Evidence of other crimes may be admitted for the purpose of establishing a plan or scheme when there is a concurrence of common elements between the two incidents."). As we have shown, the crimes were all very similar and shared a number of characteristics: each incident involved penis-to-vagina sexual intercourse; the victims were of similar age; all of the incidents took place in Bell's home; all of the victims reported that Bell used a condom; all of the incidents involved Bell leveraging his position of power over the victim as either a father or as "the Chief"; and the assaults were all relatively close in time.

¶26 Second, the trial court did not erroneously exercise its discretion by concluding that each victims' testimony would be relevant and probative in the trial of the others. When reviewing the relevancy of other acts evidence in ***Sullivan***, our supreme court held that:

> The probative value of the other acts evidence … depends on the other incident's nearness in time, place and

> circumstances to the alleged crime or to the fact or proposition sought to be proved. Since it is the improbability of a like result being repeated by mere chance that carries probative weight, the probative value lies in the similarity between the other act and the charged offense. The stronger the similarity between the other acts and the charged offense, the greater will be the probability that the like result was not repeated by mere chance or coincidence. In other words, "[I]f a like occurrence takes place enough times, it can no longer be attributed to mere coincidence. Innocent intent will become improbable."

Id., 216 Wis. 2d at 786-87 (internal citation omitted; brackets in ***Sullivan***). That is the case here.

¶27 Finally, we conclude that the trial court did not erroneously exercise its discretion by concluding that the probative value of the victims' testimony substantially outweighed the danger of unfair prejudice to Bell. "Unfair prejudice does not mean damage to a party's cause since such damage will always result from the introduction of evidence contrary to the party's contentions." ***State v. Doss***, 2008 WI 93, ¶78, 312 Wis. 2d 570, 754 N.W.2d 150 (quotation marks and citation omitted). "Rather, unfair prejudice results where the proffered evidence, if introduced, would have a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case." ***Id.*** (citation omitted).

¶28 The trial court noted that there was certainly some prejudice to Bell by having all of the victims testify, but also took into consideration the similarities between all of the assaults and the closeness in time. The court found that any prejudice would be mitigated by the jury instruction directing the jury to consider each charge separately on its own merits and to not let its decision on one charge influence its decision on the others. The court also noted the public interest in

limiting the trauma to Bell's young victims who would be forced to testify in multiple trials if the cases were not joined. The trial court's reasoned and thoughtful decision demonstrates a proper exercise of discretion.

¶29 In so holding, we reject Bell's argument that the evidence against him "was not overwhelming" and that the sum of the victims' testimony was unfairly prejudicial. That argument is conclusory and undeveloped. While Bell cherry-picks some testimony over the course of the four-day trial that can be seen as beneficial to his defense, he presents that testimony without any attempt to discuss the evidence presented by the State. This court does not consider undeveloped arguments. *See* ***State v. O'Connell***, 179 Wis. 2d 598, 609, 508 N.W.2d 23 (Ct. App. 1993).

¶30 We also reject Bell's argument that he was unfairly prejudiced because the legal allegations with respect to each victim were similar and that the evidence regarding each victim was interspersed throughout the trial, potentially causing confusion for the jury. Setting aside the fact that Bell's assertion in this regard is conclusory and pure speculation—falling far short of establishing "substantial prejudice"—we conclude that any potential confusion was overcome by the jury instructions. *See* ***State v. Hoffman***, 106 Wis. 2d 185, 213, 316 N.W.2d 143 (Ct. App. 1982) ("'The danger of prejudice in the trial together of two ... charges can be overcome by the giving of a proper cautionary instruction.'") (citation omitted; omission in ***Hoffman***).

¶31 The trial court instructed the jury, consistent with WIS JI—CRIMINAL 484, stating:

> It is for you to determine whether the defendant is guilty or not guilty of each of the offenses charged. You must make a finding as to each count of the Information.

> Each count charges a separate crime, and you must consider each one separately. Your verdict for the crime charged in one count must not affect your verdict on any other count.

Id. In other words, "[t]he jury was instructed that each count charged a separate crime and must be considered separately, and that defendant's guilt or innocence as found with respect to one crime must not affect the verdict on the other count." *See* ***Hoffman***, 106 Wis. 2d at 213. Our supreme court has held that such instructions "presumptively cure[] any prejudice which defendant may have suffered from joinder of the two counts." *See* ***id.*** And Bell has set forth no evidence to overcome that presumption. *See* ***id.***

¶32 For the foregoing reasons, we affirm the trial court.

By the Court.—Judgments affirmed.

Not Recommended for Publication in the Official Reports.