COURT OF APPEALS
DECISION
DATED AND FILED

June 14, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal Nos. 2017AP1673-CR
2017AP1674-CR

Cir. Ct. Nos. 2013CF1305
2013CF1838

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRIS HOLLAND,

DEFENDANT-APPELLANT.

APPEALS from judgments of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed*.

Before Lundsten, P.J., Sherman and Fitzpatrick, JJ.

¶1 PER CURIAM. Chris Holland appeals two judgments of conviction that were joined for trial and consolidated for appeal. In Milwaukee County Case No. 2013CF1305, Holland was convicted of burglary and aggravated battery. In Milwaukee County Case No. 2013CF1838, Holland was convicted of robbery with use of force. Holland argues that the circuit court erred in joining these two cases for trial. We reject Holland's arguments and affirm.

BACKGROUND

¶2 According to the complaint in Case No. 2013CF1305, an eighty-eight year old victim reported that at around 3:00 a.m. one morning, she woke up to hear someone ringing her doorbell, banging on her side door, and then entering her home. The victim recognized Holland because Holland had previously done work on her home. Once inside, Holland attacked one of the residents of the home and stole property. Holland was initially charged with burglary (battery to a person), and an amended information added a charge for aggravated battery.[1] We refer to this incident as "the burglary."

¶3 The events giving rise to Case No. 2013CF1838 occurred two weeks later. According to that criminal complaint, an eighty-seven year old victim reported that Holland visited his home in the afternoon in order to complete some work. Holland asked the victim for change for a $50 bill, so that he could buy a necessary part for the remaining work. When the victim hesitated, Holland began wrestling with the victim, knocked the victim to the ground, and left with the

[1] The amended information also charged Holland with robbery (use of force). However, the State dismissed this charge during trial.

victim's wallet. Holland was charged with robbery (use of force) for this offense. We refer to this incident as "the robbery."

¶4 The State moved to join the burglary and robbery for trial, and the circuit court granted the motion after a hearing. A jury found Holland guilty of all charges. Holland appeals.

DISCUSSION

¶5 Holland argues that the circuit court should not have joined the burglary and robbery for trial. The circuit court's initial decision to join charges for trial is a question of law that we review de novo. ***State v. Salinas***, 2016 WI 44, ¶30, 369 Wis. 2d 9, 879 N.W.2d 609.

¶6 Joinder is governed by WIS. STAT. § 971.12 (2015-16).[2] The State's motion to join the two complaints is governed by subsection (4), which provides:

> The court may order 2 or more complaints, informations or indictments to be tried together if the crimes and the defendants, if there is more than one, 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.

WIS. STAT. § 971.12(4). In turn, two or more crimes may be charged together:

> if the crimes charged, whether felonies or misdemeanors, or both, 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.

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

WIS. STAT. § 971.12(1). This "statute is to be broadly construed in favor of initial joinder." ***Salinas***, 369 Wis. 2d 9, ¶31.

¶7 The circuit court determined that the burglary and robbery could be joined because the offenses were sufficiently similar in terms of the modus operandi and evidenced a common scheme. In addition, the burglary and robbery occurred two weeks apart, which was sufficiently close in time. The court also noted that if it held two separate trials, evidence of each crime could potentially be admissible as other acts evidence. The fact that there would be overlapping testimony about Holland's alleged scheme, plan, or motive further weighed in favor of joinder.

¶8 Holland argues that the similarities between the two crimes are not a sufficient basis for joinder because the similarities are limited to two facts: (1) each of the victims was known to Holland because he had done work for them, and (2) each of the victims were elderly. Instead, Holland argues that our analysis should focus on the differences between the burglary and robbery. Specifically, Holland points out that the crimes occurred seven miles apart, and the robbery occurred during the daytime, while the burglary occurred in the middle of the night. Holland further contends that the robbery and the burglary are in fact "the opposite of a common scheme or plan" because the robbery was perpetrated by someone who was invited into the victim's home and attempted to obtain property by subterfuge, while the burglary involved a perpetrator who broke into the victim's home and obtained property through the use of force. Holland contends that these differences preclude the conclusion that these crimes were of the same or similar character or part of a common scheme or plan, as required by WIS. STAT. § 971.12(1).

¶9 We disagree. At the outset, we note that Holland's argument overstates the differences between the burglary and robbery. For example, contrary to his argument, both the burglary and the robbery involved the use of force against elderly victims. In addition, the fact that the burglary began with Holland ringing the doorbell and banging on a door suggests that Holland may have initially planned to use subterfuge to gain access to the home, but then forcibly entered the home when no one answered. Accordingly, we reject Holland's contention that the burglary and robbery are so dissimilar that they could not possibly be considered part of a common scheme or plan.

¶10 To the contrary, the fact that both the burglary and robbery involved elderly victims for whom Holland had performed handy work suggests a common scheme or plan to target vulnerable victims in order to steal from them.[3] *See* ***Francis v. State***, 86 Wis. 2d 554, 560, 273 N.W.2d 310 (1979) (a finding of "a common scheme or plan" does not require identical crimes but rather only requires "a common factor … of substantial factual importance"). Here, the similarities between the elderly victims' ages and connections to Holland are common factors of sufficient factual importance to support a finding of a common scheme or plan.

¶11 Holland also argues that this case is analogous to ***State v. Davis***, 2006 WI App 23, 289 Wis. 2d 398, 710 N.W.2d 514, in which we held that separate eyewitness identifications of the same defendant were not sufficient to

[3] Holland also argues that there is no evidence that the burglary victims were specifically targeted, and that it is possible that the first crime was just "a random night time burglary." Under this scenario, the similarities shared by the victims could have been "mere coincidence." This argument makes little sense, in view of the fact that both sets of elderly victims identified Holland as the perpetrator, and Holland concedes that he had prior contacts with both. These are relevant facts for the joinder analysis.

join several burglary charges with an armed robbery charge for trial. ***Id.***, ¶22. We disagree that ***Davis*** applies here because, as explained above, the similarities between the two sets of charges in the present case go well beyond the mere fact that two sets of victims identified Holland as the perpetrator. We also note that the circuit court's joinder determination in ***Davis*** relied in part on factual errors. ***Id.***, ¶19. In contrast, Holland does not allege that the circuit court made any factual errors in his case.

¶12 Finally, even if we were to find that the circuit court erred in joining the burglary and robbery for trial, we must still determine whether the error was harmless. *See* ***State v. Leach***, 124 Wis. 2d 648, 671, 370 N.W.2d 240 (1985) (improper joinder is subject to harmless error analysis). Holland argues that the joinder was not harmless because the two sets of eyewitness identifications bolstered each other, and strengthened the prosecution's case despite the absence of any physical evidence tying him to either crime. However, this argument ignores the circuit court's determination that even if the two crimes were tried separately, the evidence of each crime would potentially be admissible as other acts evidence in both cases. The State argues that because the jury would have heard the same testimony about both crimes regardless of joinder, this means that Holland was not harmed by the joinder. *See* ***Davis***, 289 Wis. 2d 398, ¶21 (an error is harmless if "'there is no reasonable possibility that the error contributed to the conviction'") (quoted source omitted). Holland does not respond to this aspect of the State's harmless error analysis. Accordingly, we deem him to have admitted this point. *See* ***Fischer v. Wisconsin Patients Comp. Fund***, 2002 WI App 192, ¶1 n.1, 256 Wis. 2d 848, 650 N.W.2d 75 ("An argument asserted by a respondent on appeal and not disputed by the appellant in the reply brief is taken as admitted.").

We therefore conclude that even if the circuit court erred in its joinder determination, any error was harmless.

CONCLUSION

¶13 For the foregoing reasons, we affirm the judgments of conviction.

By the Court.—Judgments affirmed.

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