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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2013AP2686-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LUIS C. SALINAS,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE BROWN COUNTY CIRCUIT COURT, THE HONORABLE MARC A. HAMMER PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case can be resolved on the briefs by applying well-established legal principles to the facts; accordingly, the State requests neither oral argument nor publication.

STATEMENT OF THE CASE: FACTS AND PROCEDURAL HISTORY

Defendant-Appellant Luis C. Salinas' statement of the case is sufficient to frame the issue for review. As Respondent, the State exercises its option not to present a full statement of the case, but will supplement facts as needed in its argument. *See* Wis. Stat. § (Rule) 809.19(3)(a)2.

ARGUMENT

THE CIRCUIT COURT PROPERLY DENIED SALINAS' OBJECTION TO JOINDER.

A. Standard of review.

"Whether charges are properly joined in a criminal complaint is a question of law." *State v. Hamm*, 146 Wis. 2d 130, 138, 430 N.W.2d 584 (Ct. App. 1988) (citation omitted). An appellate court reviews a question of law de novo. *See State v. Warbelton*, 2009 WI 6, ¶18, 315 Wis. 2d 253, 759 N.W.2d 557.

B. Relevant law on joinder.

Joinder of charges is addressed in Wis. Stat. § 971.12(1), in relevant part, as follows:

> 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, 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.

"A broad interpretation of the joinder provision is consistent with purposes of joinder, namely trial convenience for the state and convenience and

advantage to the defendant." *Francis v. State*, 86 Wis. 2d 554, 558, 273 N.W.2d 310 (1979).

"To be of the 'same or similar character' under sec. 971.12(1), Stats., crimes must be the same type of offenses occurring over a relatively short period of time and the evidence as to each must overlap." *Hamm*, 146 Wis. 2d at 138 (citing *State v. Hoffman*, 106 Wis. 2d 185, 208, 316 N.W.2d 143 (Ct. App. 1982)). "It is not sufficient that the offenses involve merely the same type of criminal charge." *Id.*

"In determining whether the offenses are based on acts or transactions connected together a significant consideration is whether joinder would serve the goals of trial economy and convenience." *Francis*, 86 Wis. 2d at 560.

> [T]he phrase 'connected together or constituting parts of a common scheme or plan' has been interpreted to mean *inter alia* that the crimes charged have a common factor or factors of substantial factual importance, *e.g.*, time, place or *modus operandi*, so that the evidence of each crime is relevant to establish a common scheme or plan that tends to establish the identity of the perpetrator.

Id.

"[J]oinder [of charges] will be allowed in the interest of the public in promoting efficient judicial administration and court fiscal responsibility in conducting a trial on multiple counts in the absence of a showing of substantial prejudice." *State v. Hall*, 103 Wis. 2d 125, 141, 307 N.W.2d 289 (1981).

Improper joinder is subject to harmless error review. *State v. Leach*, 124 Wis. 2d 648, 671, 370 N.W.2d 240 (1985); *State v. Davis*, 2006 WI App 23, ¶21, 289 Wis. 2d 398, 710 N.W.2d 514.

C. Joinder of the charges was appropriate.

Salinas argues that it was improper to try the sexual assault counts and the victim intimidation counts together. He argues that the two different crimes are not of similar character, not connected together and not of a common plan. Salinas' Br. at 32-34. The State disagrees.

The allegations against Salinas were the following:

- In May 2010, V.G., who was then sixteen years old, told police that her mother's boyfriend, Salinas, began sexually assaulting her when she was thirteen years old and continued to rape her until October 2009 (1:1-3);

- V.G. told police that the last time Salinas raped her was on October 26, 2009, when he was arrested for strangling her mother and hitting V.G.(1:1-3; 143:4-5);

- V.G. told police that if she tried to resist Salinas' sexual assaults, he would hit her (1:2);

- V.G. told police that Salinas told her that if she told her mother about the assaults, he would blame V.G. and tell her mother that V.G. had come on to him (1:2);

- V.G. told police that Salinas told her that if she told the police about the assaults, the police would take her brothers away from her mother (1:2);

- V.G. told police that the assaults would occur when her mother was at the Laundromat or at work (1:2);

- V.G. told police that if her brothers were at home, Salinas would tell them to go outside (1:2);

- V.G. told police that the assaults would happen between six to twelve times a month (1:2);

- V.G. told police that Salinas did not usually ejaculate inside of her, but would pull his penis out of her and ejaculate on a washcloth (1:2);

- V.G. told police that she did not tell anyone previously because she did not want anyone to know about it, but told her boyfriend who made her tell her mother (1:2);

- In May 2010, V.G.'s mother, M.S., told police that on the recent day when she and V.G. learned that Salinas may be released from jail shortly, V.G. did not come home and M.S. believed that this was because V.G. was afraid Salinas would start assaulting her again (1:2);

- In May 2010, M.S. told police that for the past three years, V.G. has told her that she

does not want Salinas living with them anymore (1:2);

- M.S. told police that Salinas asked her to have V.G. live elsewhere (1:2);

- V.G. told police that since Salinas was in jail on the strangulation charge, he has called M.S. and pleaded with her to have him released (1:3);

- V.G. told police she was worried that her statement of abuse would conflict with her recent request to the court to have Salinas released, but that she only made the request because M.S. asked her to do so (1:3).

As a result of these allegations, the State charged Salinas with the repeated sexual assault of a child, second degree sexual assault and second degree sexual assault of a child under sixteen (1; 8).

Later, after telephone calls from Salinas to M.S. were discovered, the following allegations surfaced:

- M.S. and V.G. both told police that after Salinas was arrested for strangulation, he repeatedly called them and wrote them letters (143:3-4);

- M.S. told police that Salinas threatened to kill himself if V.G. did not write him a letter (143:3);

- M.S. told police that Salinas threatened her and pressured her to change what she had

told authorities about the strangulation (143:3);

- M.S. told police that Salinas told her to offer V.G. anything in order to have V.G. come to court and say that Salinas had not hit her (143:3);

- V.G. told police that Salinas pressured her to change what she had told authorities had happened regarding the night of strangulation (143:3).

As a result of these allegations, the State charged Salinas with two counts of victim intimidation: one count with respect to M.S. and one count with respect to V.G. (143). It is these two sets of allegations that were joined for trial (121:4-5).

Salinas' argument that the charges should not have been joined because they were not of similar character, were not based on acts connected together and were not part of a common plan is incorrect. The charges were of similar character, involved connected acts and related to a common plan. To wit, the charges all related to Salinas' abuse, threats and manipulation of V.G. and M.S.

The charges are all related to Salinas' modus operandi and the ways in which he sought to control V.G. and M.S. *See Francis*, 86 Wis. 2d at 560. The charges all contain common factors of substantial importance: Salinas' abuse and manipulation of V.G. and M.S. *See id.* In addition to the fact that joinder was appropriate under the statute and the relevant law interpreting the

statute, joinder was appropriate to promote judicial efficiency. To allow separate trials on charges so closely related would be against the public interest. *See Hall*, 103 Wis. 2d at 141.

In sum, the joinder of the charges in this case was proper.

D. Any error from joinder was harmless.

Should this court find that the initial joinder was error, it should nonetheless affirm the judgment of conviction because any error was harmless. First, although Salinas argues that the intimidation charges and the crimes underlying the intimidation charges were irrelevant to the sexual assault charges, he has failed to explain how that evidence would have been impermissible for the State to introduce as other acts evidence. Second, as Salinas admits, the evidence against him was overwhelming. Salinas' Br. at 30.

1. The evidence relating to the intimidation charges would have been admissible as other acts evidence at a sexual assault trial.

"In Wisconsin the admissibility of other acts evidence is governed by Wis. Stat. §§ (Rules) 904.04(2) and 904.03." *State v. Sullivan*, 216 Wis. 2d 768, 781, 576 N.W.2d 30 (1998). Other acts evidence "is not admissible to prove the character of a person in order to show that the person acted in conformity" with that character. Wis. Stat. § 904.04(2)(a). Other acts evidence may, however, be admitted to show "motive,

opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.* "This list is not exhaustive or exclusive." *Sullivan*, 216 Wis. 2d at 783.

To determine whether other acts evidence should be admitted, courts employ a three-step analysis. *Id.* Courts ask (1) whether the evidence is offered for a permissible purpose under § 904.04(2); (2) whether the evidence is relevant under § 904.01; and (3) whether the probative value of the evidence outweighs any prejudice or confusion, as contemplated by § 904.03. *See Sullivan*, 216 Wis. 2d at 783-90.

Here, the intimidation evidence meets all three steps of the other acts inquiry. Salinas argues that the intimidation of V.G. and M.S. was related solely to the strangulation and child abuse charges because they were the only charges filed at the time that Salinas intimidated V.G. and M.S. Salinas ignores, though, that the intimidation evidence is relevant to his ongoing efforts to ensure V.G. did not tell anyone about the sexual assaults. Thus, it would have been offered for the permissible purpose of showing Salinas' plan, intent and knowledge. It is clearly relevant evidence because it shows that Salinas manipulated and threatened V.G. Finally, its probative value in demonstrating why V.G. did not report the abuse earlier, why she reported it when she did, and Salinas' ongoing abuse and manipulation of her would outweigh any undue prejudice to Salinas or confusion for the jury.

Further, Salinas misstates the record in support of his claim that he was prejudiced by the joinder. Salinas argues that the trial court was

skeptical of the earlier ruling on joinder. Salinas' Br. at 35. This is incorrect. At a status conference at which pleading guilty to the misdemeanor intimidation charges was discussed, the State indicated that even if the defendant pled to those charges, the State would still seek to present evidence of the intimidation because it was relevant to the whole course of conduct at issue (133:5). At that point, Salinas objected, arguing that the intimidation was "completely separate" from the sexual assault charges (133:5-6). The court then asked the State how the intimidation facts would be relevant to the sexual assault charges (133:6-7). After the State offered its reasoning, the court asked Salinas why the facts were not relevant other acts evidence (133:7-8). In sum, the court told Salinas that it would allow him to plead to the intimidation charges, but "[t]hat doesn't necessarily mean once you pled it that [the State] can't talk about it" (133:8). The court went on to opine,

> I'm telling you today I anticipate [the State's] going to request an other acts evidence ruling and this may fall into the admission of other acts when I run that three prong analysis in my brain. I can give the curative instruction so they don't convict in theory or base a conviction on other acts, but, boy, I think it goes to plan, scheme, intent basis. I think it's relevant. It meets both prongs of the relevance standard.

(133:8-9). Thus, it is not true – as Salinas argues – that the court "was initially skeptical" of the joinder ruling. Salinas' Br. at 35. Instead, the court merely inquired into the appropriateness of the use of the intimidation evidence as other acts evidence and, while it did not reach a conclusion and it need not have reached a conclusion because the trial went forward on all counts, the court

seemed to indicate the evidence would have been admissible.

Had the charges not been joined, all of the intimidation evidence would have been presented to the jury at a sexual assault trial. Thus, Salinas has not been harmed by the joinder.

2. The evidence against Salinas was overwhelming.

Salinas argues that the joinder was harmful, although he admits the evidence against him was overwhelming. Salinas' Br. at 30. The State submits any error was harmless beyond a reasonable doubt.

V.G. testified that Salinas moved in with her family when she was around eight years old (134:68). V.G. stated that after she turned thirteen years old, Salinas raped her and sexually harassed her (134:68). The first time she remembered being raped, she was in her home's bathroom and Salinas took off her pants and underwear and put his penis into her vagina (134:69). V.G. remembered that she had been wearing black sweatpants and a pink shirt (134:71). V.G. testified that the assaults continued and occurred in the living room and her mother's bedroom (134: 72-73). V.G. stated that usually when Salinas raped her in the living room, he stood behind her so that he could look out the window to see if anyone was coming home (134:73). If V.G. told Salinas she did not want to have sex with him, he would threaten to take her little brother away or to send her away (134:76). V.G. testified that after her family and Salinas moved to a different house when she was fourteen years old, the sexual abuse

continued (134:76-77). V.G. testified that Salinas hit her (134:76, 78). V.G. stated that Salinas did not ejaculate in her, but instead pulled his penis out and ejaculated on a rag that he then made her wash (134:79).

V.G. testified that she did not tell her mother about the assaults because she was ashamed and because Salinas told her that if she did, he would blame her for coming on to him (134:80). V.G. also stated that she did not tell her mother because Salinas threatened to leave and take her little brother with him or threatened to send her to Mexico or California (134:80). V.G. testified that Salinas also told her that if she went to the police, she and her brother would be taken away from their mother (134:81). V.G. testified that, in total, Salinas assaulted her more than forty times (134:82).

M.S. testified that she used to work at a cheese factory from approximately 5 a.m. until 2 p.m. and then at a cleaning place from 5 p.m. until 9 p.m. or 11 p.m. (134:132). While M.S. was working, Salinas would take care of the children (134:133). After the family moved to the new house, M.S. took a new job and worked 11 p.m. until 7 a.m. (134:134). In the fall of 2009, M.S. worked on a farm in which her hours were 2:30 a.m. until 8:30 a.m. or 9:00 a.m. (134:134-35).

M.S. testified that for two years, Salinas would not allow her to take V.G. out of the house with her (134:158). M.S. also testified that in the fall of 2009, Salinas forced her to take V.G. out of school for a month in order to send her to Mexico, but V.G. did not go to Mexico (134:158-59).

V.G.'s boyfriend, Elias, testified that on May 13, 2010, he and V.G. were together and he noticed that "she was very grim and shy, a bit scared and shaky, like she wouldn't explain anything [to him] because she wanted to tell [him something" (134:171, 173-75). Elias tried to get V.G. to tell him what was wrong, but it took some time (134:175). Eventually, V.G. revealed her allegations of assault (134:175-76). Elias convinced V.G. to tell her mother about her allegations (134:177-78).

Given all of this evidence, it is clear that the verdict would have been the same had the joinder not occurred: Salinas would still have been found guilty on all three sexual assault charges.

Similarly, the evidence of intimidation was overwhelming. M.S. testified that while Salinas was in jail, he frequently attempted to contact her (134:146). M.S. stated that Salinas told her that she should change her statement regarding the strangulation and that V.G. should change her statement regarding the physical abuse (134:147-48). M.S. testified that Salinas threatened to take her son away and threatened that "something bad was going to happen" if she did not change her statement (134:148). M.S. testified that she believed Salinas was threatening to kill her and the children (134:149). M.S. stated that she appeared at Salinas' sentencing in May 2010 because she felt he forced her to do so (134:151).

Natalia Sidon, Hispanic community liaison of the Green Bay Police Department, testified that she translated telephone calls between Salinas and M.S. made from the jail (134:188-90). Zidon read from her translation that in one call, Salinas

told M.S., "If I get out, if I get out, you are going to be sorry, my darling" (134:192).

Given this evidence, it is clear that the verdict would have been the same on the intimidation counts had the joinder not occurred: Salinas would still have been found guilty on the two misdemeanor charges.

CONCLUSION

For the foregoing reasons, the State respectfully requests this court affirm the judgment of conviction.

Dated this 26th day of August, 2014.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2986 words.

_____
Katherine D. Lloyd
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 26th day of August, 2014.

_____
Katherine D. Lloyd
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