STATE OF WISCONSIN

IN SUPREME COURT

No. 2013AP2686-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

LUIS C. SALINAS,

Defendant-Appellant.

ON PETITION FOR REVIEW FROM A DECISION OF THE WISCONSIN COURT OF APPEALS REVERSING A JUDGMENT OF CONVICTION OF THE BROWN COUNTY CIRCUIT COURT, THE HONORABLE MARC A. HAMMER, PRESIDING

REPLY BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

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INTRODUCTION

For the reasons set forth in the State's brief-in-chief, as well as in this reply brief, the State respectfully requests that this Court reverse the decision of the court of appeals, which reversed Luis C. Salinas's conviction and remanded the case for new trials.

ARGUMENT

The Legislature permits the State to join crimes in one trial if the crimes are based on acts that are connected together or that are acts that are part of a common scheme or plan. *See* Wis. Stat. § 971.12(1). This Court has insisted that the joinder

statute must be interpreted broadly. *Francis v. State*, 86 Wis. 2d 554, 558, 273 N.W.2d 310 (1979). Here, the court of appeals erred in reversing the circuit court's decision allowing the State to join the sexual assault and victim intimidation charges. Further, the court of appeals erred in finding that even if the circuit court's decision was wrong, the evidence against Salinas was not so overwhelming that any error was clearly harmless.

I. The circuit court properly joined the crimes for trial.

Salinas argues that the court of appeals correctly reversed the circuit court's order granting the State's request to join the sexual assault and intimidation charges. Salinas states that the court of appeals' "decision resulted from a straightforward application of well-settled law to the unique facts of this case."[1] In support of his position that the circuit court improperly joined the crimes, Salinas quotes the court of appeals' decision at length.[2] Salinas's argument all but ignores the State's.

In its brief-in-chief, the State argued that the circuit court properly joined the two sets of charges because the acts were "connected by Salinas's common plan to abuse, manipulate, intimidate and harm MS and VG."[3] In addition, the events were all connected together. Instead of demonstrating how Salinas's ongoing abusive actions against MS and VG were not part of his common plan, Salinas argues that his threats to MS "were of an entirely different character than any attempts to manipulate V.G. to make a statement at sentencing" and his "buying influence" of VG "was not alleged as a modus operandi in the

[1] Salinas's Br. at 19.

[2] Salinas's Br. at 21-24.

[3] State's Br. at 8.

sexual assault case[.]"[4] Salinas criticizes the State's position that Salinas's intimidating behavior was part and parcel of his overall abuse as overbroad, stating that the State's position "seems to be that there should be little or no restriction on the joinder of multiple charges against a defendant."[5] But this is of course nonsense.

The State's position is neither overbroad nor boundless, as Salinas suggests. On October 26, 2009, Salinas hit VG and raped her (134:64, 84-86). When Salinas told MS later that day that he had hit VG, MS became angry (134:87-88, 136-37). Salinas and MS then argued and Salinas threw an object at MS, hitting her in the head (134:137). Salinas grabbed MS's neck and choked her (134:140). VG ran out of the house and called the police (134:141-44). The police came to the house and arrested Salinas (134:144-46). While in jail, Salinas then attempted to intimidate MS and VG from testifying against him at his trial for the October 26 physical abuse (134:91-93, 146-49). These events are all connected together. It is not just that they involve the same defendant or "geographic proximity" or "recklessness" as Salinas suggests,[6] but that they are based on acts that are all part of Salinas's plan to abuse VG and MS. These crimes all occurred as part of Salinas's efforts to control, manipulate, harm and exploit his wife and stepdaughter. And they all occurred in a fluid succession; they are as separate and distinct as the court of appeals and Salinas believe them to be.

Salinas's implication that the victim intimidation charges are so divorced from the sexual assault charges because Salinas had not yet been charged with the sexual assaults ignores reality. Salinas's attempt to procure favorable testimony from

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[4] Salinas's Br. at 24-25.

[5] Salinas's Br. at 25.

[6] Salinas's Br. at 25.

MS and VG in order to lessen his sentence to more quickly return home is certainly related to Salinas's assaults on VG. Salinas's argument to the contrary ignores the facts of the case and the liberal construction that courts must afford joinder. Salinas, like the court of appeals, downplays "the sole fact that connects one of the sexual assault charges to the domestic violence" charges and, hence, the intimidation charges.[7]

Salinas's argument boils down to this: he does not like that the jury heard "the horrifying accusation that [he], holding a knife, threatened to kill his and M.S.'s young son."[8] But whether charges were improperly joined does not turn on what the distasteful nature of the evidence that was received. The fact that Salinas committed a "horrifying"[9] crime does not change the fact that the crimes were connected and were therefore properly joined.

Because the offenses met the criteria for joinder, it is presumed that Salinas would suffer no prejudice as a result of one trial on all of the charges. *See State v. Linton*, 2010 WI App 129, ¶20, 329 Wis. 2d 687, 791 N.W. 2d 222. A defendant who believes he will be prejudiced by charges that have been properly joined may move for severance under Wis. Stat. § 971.12(3). It does not appear from the record that Salinas moved for such relief below. Despite this, Salinas now seems to complain that the joinder prejudiced him.[10] To the extent that Salinas now makes this argument, it is forfeited. *See State v. Bannister*, 2007 WI 86, ¶42, 302 Wis. 2d 158, 734 N.W. 2d 892. Further, joinder will necessarily involve some level of prejudice to the defendant, but a high showing of prejudice is required in

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[7] Salinas's Br. at 20.

[8] Salinas's Br. at 19.

[9] Salinas's Br. at 3.

[10] Salinas's Br. at 25-26.

order to obtain relief on a claim that properly joined charges should have been severed. *State v. Hoffman*, 106 Wis. 2d 185, 316 N.W. 2d 143 (1982).

Finally, Salinas criticizes the State for failing to cite more than two cases in Section I.B. of its argument.[11] Salinas argues that the first case cited by the State in this section, *Francis*,[12] is "inapposite" and the second case, *Locke*,[13] is "controlling" and was applied by the court of appeals.[14] First, the State is unaware of any authority to support Salinas's implication that the State must cite a certain number of cases in order to prevail. Second, although Salinas correctly notes that *Francis* was concerned with the identity of the perpetrator of the crimes, which is not at issue here, this distinction does not make the case irrelevant.

In *Francis*, this Court considered whether the "crimes charged were based on two or more acts or transactions 'connected together or constituting parts of a common scheme or plan' as that phrase is used in sec. 971.12(1)." 86 Wis. 2d at 558. This is precisely the issue here. In *Francis*, the defendant urged this Court to interpret the joinder statute narrowly, but this Court rejected the defendant's request, concluding that a broad interpretation "is consistent with the purposes of joinder, namely trail convenience of the state and convenience and advantage to the defendant." *Id.* This Court looked at the manner in which federal courts applied the federal rule of joinder, noting that when those courts determined "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." *Id.* at 560.

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[11] Salinas's Br. at 17.

[12] *Francis v. State*, 86 Wis. 2d 554, 273 N.W. 2d 310 (1979).

[13] *State v. Locke*, 177 Wis. 2d 590, 502 N.W. 2d 891 (Ct. App. 1993).

[14] Salinas's Br. at 17.

Salinas highlights the portion of the decision in which this Court applied the above-principles to the facts.[15] This Court stated that the acts at issue were "connected together or constitute[d] parts of a common scheme or plan that tends to *establish the identity of the perpetrator*." *Id.* at 561 (emphasis added). But this Court used that language because the identity of the perpetrator was the question. This does not mean that a common scheme or plan may be established *only* when identity the question. In fact, this Court stated, immediately preceding the section of the decision Salinas highlighted, that "the 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.* at 560. In other words, this Court stated that this is but one example of what "connected together" means. That *Francis* concerned joinder of crimes that were connected together because they tended to establish the identity of the perpetrator does not make its analysis of Wis. Stat. § 971.12(1) irrelevant here.

II. Any error in joinder was harmless beyond a reasonable doubt.

"The potential problem as a result of a trial on joinder charges is that a defendant may suffer prejudice since a jury may be incapable of separating the evidence relevant to each offense or because the jury may perceive a defendant accused of several crimes is predisposed to committing criminal acts." *State v. Leach*, 124 Wis. 2d 648, 672, 370 N.W. 2d 240 (1985). Here, Salinas does not appear to make any challenge to the

[15] Salinas's Br. at 17-18.

former concern.[16] Instead, although he does not cite authority for it,[17] or name it as such, he seems to focus his argument on the latter concern.[18]

"An 'error is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *State v. LaCount*, 2008 WI 59, ¶ 45, 310 Wis. 2d 85, 750 N.W. 2d 780 (quoting *State v. Harvey*, 2002 WI 93, ¶49, 254 Wis. 2d 442, 647 N.W.2d 189 (citation omitted)). The State bears the burden of establishing the harmlessness of the error. *State v. Travis*, 2013 WI 38, ¶66, 347 Wis. 2d 142, 832 N.W. 2d 491.

Salinas argues that the court of appeals correctly concluded that any error in joining the charges was not harmless because "the state cannot point to evidence corroborating the alleged sexual assaults" and "[*a*]*ll of the sexual-assault evidence came directly from V.G., or indirectly from others she had spoken to*."[19] But these statements fail to apply harmless error review to his claim.

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[16] Despite this, Salinas criticizes the State for what he implies is an inconsistent argument. Salinas's Br. at 25. In its brief-in-chief, the State argued that the charges were properly joined because they were connected as part of Salinas's ongoing effort to manipulate and abuse the females with whom he lived. State's Br. at 8-9. The State then argued that the charges were different from one another so that there was no risk of confusion; i.e., the jury was not likely to mix-up the sexual assault with the intimidation and convict on one or the other (or both) because it could not differentiate between them. State's Br. at 15-16. There is nothing inconsistent about these arguments.

[17] Salinas cites extensively to the court of appeals decision in this case. Salinas's Br. at 26-29.

[18] Salinas's Br. at 26-29.

[19] Salinas's Br. at 27 (emphasis in original).

Although the State bears the burden of establishing that any error was harmless, Salinas has failed to refute the State's position that any error did not contribute to the verdict. While there may not have been "third-party witnesses to sexually assaultive behavior"[20] this does not mean that the error was not harmless. Salinas seems to believe that because the evidence of the domestic violence was so "horrifying," it necessarily affected the verdict.[21] This is not so. In addition to this argument having no support in the law, it also ignores the evidence against him. VG's testimony was strong and credible. VG testified that that the first time Salinas raped her, she was in her home's bathroom (134:69). She testified that she had been wearing black sweatpants and a pink shirt (134:71). She testified that the assaults continued and occurred in the living room and her mother's bedroom and 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 (134:72-73). VG testified that if she told Salinas that 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). VG testified that when Salinas raped her, he did not ejaculate in her, but instead pulled his penis out and ejaculated on a rag that he then made her wash (134:79). It is not reasonable to suggest that the jury convicted Salinas of the sexual assaults because they heard evidence of the domestic violence; the sexual assault evidence was overwhelming.

In its brief-in-chief, the State argued that the evidence of the intimidation and the underlying domestic abuse incident would have come in at a stand-alone sexual assault trial as contextual other acts evidence.[22] Salinas refutes this argument,

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[20] Salinas's Br. at 27.

[21] Salinas's Br. at 3, 26-37.

[22] State's Br. at 13-16.

but cites no authority for his position other than the court of appeals case below.[23] For the same reasons it outlined in its brief-in-chief, the court of appeals misapplied other acts law and arrived at the wrong conclusion. The State reaffirms its position that the evidence of the other acts would have been admissible in a sexual assault trial so its inclusion at this trial was necessarily harmless.

Salinas also attempts to distinguish the cases cited by the State in support of its position that, alternatively, the evidence of the other crimes would have been admissible as panorama evidence.[24] Salinas reads these two cases too narrowly.

In *Jensen*, the court concluded that the evidence at issue was admissible against the defendant – either as other acts evidence or as panorama evidence – because it tended to show motive or context. *State v. Jensen*, 2011 WI App 3, ¶84, 331 Wis. 2d 440, 794 N.W. 2d 482. Salinas argues that the *Jensen* court concluded that all of the disputed evidence "went to motive for the murder, and linked Jensen to internet searches showing intent."[25] But this is not quite true. Certainly the *Jensen* court concluded that the challenged evidence was relevant to establish Jensen's motive, but Salinas ignores that the court also expressly stated that "[f]or the finder of fact to arrive at the truth, it [is not proper] to limit the evidence to a frame-by-frame presentation." *Id.* ¶86.

Although motive was at issue in *Jensen*, and Jensen's defense was that his wife killed herself, there is nothing in the decision that limits the discussion and analysis of other acts and panorama evidence to cases in which motive and intent is

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[23] Salinas's Br. at 29-32.

[24] Salinas's Br. at 32-37.

[25] Salinas's Br. at 33-34.

at issue. *See id.* ¶¶37, 83-87. In Salinas's case, the question is whether the sexual assaults and victim intimidation crimes occurred. To that end, evidence of the events leading up to Salinas's arrest, including the last time that VG was assaulted as well as why that was the last time, and the timing of her disclosure are relevant to tell the whole story of the case. Thus, for the jury to arrive at the truth, it was necessary not to limit the evidence of the events surrounding the crimes. *Id.* ¶86.

In *Dukes*, the court stated that panorama evidence is evidence that is "needed to completely describe the crime that occurred and is thereby inextricably intertwined with the crime." *State v. Dukes*, 2007 WI App 175, ¶28, 303 Wis. 2d 208, 736 N.W. 2d 515. The court held that the disputed evidence was properly admitted because it was relevant to an element of one of the crimes charged. *Id.* ¶30. Salinas argues that *Dukes* does not support the State's position that the domestic abuse events in October 2009 would have been admitted at the sexual assault trial because they were not "inextricably intertwined."[26] Salinas states that "[t]he single thread tangentially connecting the two cases was the slap of V.G. [and] that evidence would necessarily have been introduced in [both cases.]"[27] This argument again minimizes the "single thread" and downplays the fluidity of the events. It also again ignores that the State is not required to introduce evidence in a patchwork manner and is allowed to provide context for its story. *See Jensen*, 331 Wis. 2d 440, ¶86.

Finally, Salinas asks, under the State's view of panorama evidence, how such evidence differs "from, say, the details of a defendant's criminal record, which a jury is generally barred

[26] Salinas's Br. at 36.

[27] Salinas's Br. at 36.

from considering?"[28] Salinas's question is silly. Panorama evidence is evidence "needed to completely describe the crime that occurred and is thereby inextricably intertwined with the crime." *State v. Dukes*, 2007 WI App 175, ¶28, 303 Wis. 2d 208, 736 N.W.2d 515. Obviously a defendant's criminal history is going to be rarely, if ever, necessary to completely describe the crime. Thus, Salinas's effort to equate panorama evidence with other evidence that a jury may not consider falls flat.

CONCLUSION

For the foregoing reasons, as well as the reasons in its brief-in-chief, the State respectfully requests that this Court reverse the decision of the court of appeals.

Dated this 20th day of November, 2015.

Respectfully Submitted,

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[28] Salinas's Br. at 37.

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 2,924 words.

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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 20th day of November, 2015.

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