STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Case Numbers Case No. 2014AP002900 - CR and
2014AP002899 - CR Consolidated

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

ERIC CHRISTOPHER BELL,
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF
CONVICTION, AND SENTENCE ENTERED IN THE
CIRCUIT COURT FOR MILWAUKEE COUNTY
THE HONORABLE REBECCA DALLET, PRESIDING

REPLY BRIEF

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Eric Christopher Bell should be granted a new trial because joinder of case files 11 CF 801 and 11 CF 1332 for trial was improper under s. 971.12, Wis Stats., and because he was substantially prejudiced in violation his due process rights to a fair trial under Fifth and Fourteenth Amendments of the United States Constitution and Article I, § 8 of the Wisconsin Constitution.

I. The cases were improperly joined under the statute.

Same or similar character

In it's motion to consolidate these cases for trial, the state claimed that the cases were of the "same or similar character". (2900: 6:3).

"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." ***State v. Hamm***, 146 Wis.2d 130, 138, 430 N.W.2d 584 (Ct.App.1988) (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.

A. The alleged offenses were not the same.

Here the incidents involved in 11 CF 810 were not the same type of offenses involved in 11 CF 1332. In 810, the charges involved alleged sexual intercourse as part of a gang initiation. The victims were unrelated to Bell , indeed there was no evidence that the alleged victims had any type of previous relationship with Bell. The complaint alleged one second degree sexual assault of each victim - one in January, 2011 and the other in February, 2011. There was no suggestion that Bell assaulted either victim more than once.

The sexual assaults involved in 1332 were allegations of incest. They involve claims of repeated sexual assaults of Bell's daughters over a period from 2005 to the Spring of 2010. The daughters were said to have been as young as nine years old when the assaults began.

The way the alleged assaults happened were not the same. The daughters talked about Bell placing blindfold over their faces and that he took their pants down. (MB1 2009:51:20; MB2 2009: 51:68,69)[1]. SL and LB never said anything about a blindfold. SL and LB said they undressed themselves.(LB 2900:66:97; SL 2900:67:57).

B. There was no helpful overlapping evidence.

Notably, ***Hamm,*** 146 Wis. 2d at 138, holds that overlapping evidence is a **prerequisite to joinder** of crimes under the same or similar character. Indeed, concern that Bell's daughters would have to testify at two trials was a main reason the state said consolidation was necessary and a chief concern of the judge in joining the cases for trial.(2900: 46:7, 8).

However, there was no real overlapping evidence. While there were a few overlapping witnesses, their testimony did not overlap. For example, MB1, when asked, denied she ever saw SL or BL go into bedroom with Bell.(2900-51:57) She gave no other testimony about allegations in 11 CF 810. MB2 said she knew SL and LB from school.(2900-66:38). She said she saw LB in living room dancing. She also said she was not aware of LB leaving room.(Id. 39) She was not at home when SL was allegedly there.(Id).

MB1 and MB2 were not necessary witnesses for any issue in 11CF 810. The state had other witnesses to corroborate that SL and BL were at the Bell home. For example, Jamelia Reed testified that she was at Bell's house when LB was there.(2900: 66:123). She also

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[1] TB denied that Bell ever sexually assaulted her.(2900 :67:114). She did not testify about 11 CF 810.

testified that on February 4, 2011, she went with SL to Bell's house.(2909:67:20-21).

The state should not be allowed to argue that the potential trauma to Bell's daughters - whose testimony was unnecessary for 11 CF 810- provides a justification for consolidating the two cases for trial.

Further, SL and BL gave no testimony about charges in 11 CF 1332.

C. Given dissimilarity of offenses and lack of overlapping evidence alleged crimes were not close in time.

Finally, ***State v. Hamm***, 146 Wis.2d at 139-140 holds that,

> the time-period factor is to be determined on a case-by-case approach; there is no per se rule on when the time period between similar offenses is so great that they may not be joined. Indeed, that is why we have referred to a 'relatively short period of time' between the two offenses. The time period is relative to the similarity of the offenses, and the possible overlapping of evidence.

(Quoting ***United States v. Rodgers***, 732 F.2d 625, 629 (8th Cir.1984))

The time period between the alleged offenses in 1332 and 810 was approximately one year. Not close in time given the fact that the cases were not very similar and there was no overlapping evidence.

Connected or constituted parts of a common scheme or plan

At the joinder hearing, the state also argued that the cases should be joined because they were part of a "common scheme or plan." (46:4).

Francis v. State, 86 Wis.2d 554, 560, 273 N.W.2d 310 (1979), points out that the purpose of "scheme or plan" is to establish the identity of the perpetrator.

> Thus 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.

Identity of the alleged perpetrator was not an issue in this case. The state mischaracterizes Bell's closing argument to suggest identity was an issue.(State's brief at 15). However, Bell's position throughout - from the openings statement to the closing argument - was that the alleged victims were lying about being assaulted - not that they were mistaken about who assaulted them.(2900:50:122-124; 56:62-77). This is not a "who done it" case, it is a who is lying case.

Where identity was not an issue, presenting repeated claims that Bell alleged sexually assaulted minors, only shows a propensity to engage in certain conduct, it adds nothing else.

II. Even if the cases were properly joined under s.971.12(1) and (4), Wis. Stats., Bell was substantially prejudiced.

"[I[f the offenses do not meet the criteria for

joinder, it is presumed that the defendant will be prejudiced by a joint trial." ***State v. Leach*** 124 Wis.2d 648, 669, 370 N.W.2d 240 (1985).

Even if a court finds that joinder of the charges is proper, the court must weigh the prejudice that would result from a joint trial against the public interest in conducting a trial on multiple counts. ***State v. Locke***, 177 Wis.2d 590, 597, 502 N.W.2d 891, (Ct. App. 1993). 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.

"The term `substantially' indicates that if the probative value of the evidence is close or equal to its unfair prejudicial effect, the evidence must be admitted." ***State v. Payano,*** 2009 WI 86, ¶ 80, 320 Wis. 2d 348, 768 N.W.2d 832.

Other acts evidence must be entered to prove a fact at issue in the trial and cannot be entered merely to prove propensity. While the greater latitude rule does allow a more liberal admission of other crimes evidence does not absolve judges from determining whether evidence is admissible under the same framework it uses for other evidence. ***State v. Davidson***, 2000 WI 91, 51-52, 236 Wis. 2d 537, 613 N.W.2d 606.

As Professor Blinka points out,

> The Wisconsin Supreme Court elaborated upon the great latitude rule in ***State v. Marinez*** (2011), [2] which now stands as the prime case on the subject. It seems

[2] 2011 WI 12, 331 Wis 2d, 568, 797 N. W. 2d 399.

> clear from ***Marinez*** admissibility demands much more than the invocation of greater latitude rule; the phrase is not a talisman. Rather, prosecutors must carefully assess the permissible purpose of the evidence along with the relevance and probative value.

7 Daniel D. Blinka, Wisconsin Practice Series: Wisconsin Evidence § 404.7 at 222 (3d ed. 2008 & Supp. 2015).

In this case, the state claimed the evidence in the two cases were "indicative of Bell's motive and intent in each case," and so would be admissible under s. 904.04, Stats.(2900:6:4). In state's motion, in its argument to the trial court and to this court, and in the judge's decision it is never made clear just how and why the evidence in 11 CF 1332 or in11 CF 810 was relevant to establishing Bell's motive or intent in the other case.

Simply incanting a reason - i.e. motive- for admitting other acts evidence is not sufficient. The state must answer the question, "How does the other act help the trier of fact to understand why the person acted as he did?" Blinka, supra, § 404.7, at 204.

That one allegedly engages in incest with even prepubescent daughters does not necessarily add anything to explain why one would engage is sex with an unrelated nubile girl. Conversely, the allege sex with two strangers adds nothing to explain why Bell allegedly engaged in incest.

The state had to show relevance. Without such a showing, the jury was left with the idea that Bell must be a bad guy and guilty because"where there is so much smoke there must be fire."

There was no showing that the other acts allegations were probative of Bell's motive in either case. The joinder resulted in unfair prejudice to Bell.

CONCLUSION

For the reasons stated above and in his brief-in-chief, Eric Christopher Bell ask this court to reverse his convictions in both files and to remand for to the circuit court for separate new trials in each case.

Dated: June 12, 2015

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CERTIFICATIONS

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is proportional serif font, minimum printing resolution of 200 dots per inch, 14 point body text,11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of the brief is 2195 words.

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Patricia A.FitzGerald

I hereby certify that with this brief, either as a

separate document or as a part of this brief, is an appendix that complies with § 809.19 (2)(a) and that contains at a minimum : (1) a table of contents; (2) the findings or opinion of the trial court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, an final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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Patricia A. FitzGerald

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

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