

FILED
02-19-2025
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case Nos. 2024AP001923-CR, 2024AP001924-CR,
2024AP001925-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MAX E. BELL,

Defendant-Appellant.

On Appeal from Judgments of Conviction Entered
in Dane County Circuit Court, the Honorable
Josann M. Reynolds, Presiding

BRIEF OF
DEFENDANT-APPELLANT

DAVID J. SUSENS
Assistant State Public Defender
State Bar No. 1099463

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-2124
susensd@opd.wi.gov

Attorney for Max E. Bell

TABLE OF CONTENTS

	Page
ISSUE PRESENTED	6
POSITION ON ORAL ARGUMENT AND PUBLICATION.....	6
STATEMENT OF THE CASE AND FACTS	6
ARGUMENT.....	13
The circuit court erred by joining three cases for trial cases that allegedly occurred over the course of 29 months, alleged different crimes, involved separate witnesses, and had no overlapping evidence.	13
A. The circuit court erred by incorporating the standard for severance in the decision to join the cases.....	14
B. The charged crimes were not “of the same or similar character,” were not “connected together,” and were not part of a “common scheme or plan.”	16
1. The charges were dissimilar and occurred over a lengthy period of time.	17
2. The charges involve distinct alleged victims and witnesses and there is no overlapping evidence or common scheme.....	18

C. The circuit court erred by ordering the cases joined despite a significant risk of prejudice to Mr. Bell..... 20

CONCLUSION 26

CASES CITED

State v. Bettinger,
100 Wis. 2d 691, 303 N.W.2d 585 (1981)..... 23

State v. Hamm,
146 Wis. 2d 130, 430 N.W.2d 584
(Ct. App. 1988) 18

State v. Hoffman,
106 Wis. 2d 185, 316 N.W.2d 143
(Ct. App. 1982)13 passim

State v. Leach,
124 Wis. 2d 648, 370 N.W.2d 240 (1985).. 20, 21

State v. Locke,
177 Wis. 2d 590, 502 N.W.2d 891
(Ct. App. 1993) 13, 15

State v. Prescott,
2012 WI App 136, 345 Wis. 2d 313,
825 N.W.2d 515..... 20

State v. Salinas,
2016 WI 44, 369 Wis. 2d 9,
879 N.W.2d 609..... 13, 17, 20

State v. Scott,
2018 WI 74, 382 Wis. 2d 476,
914 N.W.2d 141 24

State v. Sullivan,
 216 Wis. 2d 768, 576 N.W.2d 30 (1998) 24

State v. Watkins,
 2021 WI App 37, 398 Wis. 2d 558,
 961 N.W.2d 884..... 16, 17, 18

STATUTES CITED

Wisconsin Statutes

904.01 24

904.03 24

904.04 15, 24

904.04(2)(b)..... 10, 14

971.12(1)14 passim

971.12(1) and (4) 13

971.12(3) 14, 20, 25

OTHER AUTHORITIES CITED

Andrew D. Leipold & Hossein A. Abbasi, *The Impact of Joinder and Severance on Federal Criminal Cases: An Empirical Study*, 59 Vand. L. Rev. 349 (2006) 23

Edie Green & Brian H. Bornstein, *Nudging the Justice System Toward Better Decisions*, 103 J. Crim. L. & Criminology 1155 (2013) 23

James Farrin, Rethinking Criminal Joinder: An
Analysis of the Empirical Research and
its Implications for Justice, 52 Law &
Contemp. Probs. 325 (1983) 23

ISSUE PRESENTED

During 2019 and 2020 the state charged Max E. Bell in three separate criminal cases. In the criminal complaints of those cases, Mr. Bell was accused of crimes in three separate complainants that were alleged to have involved separate witnesses and to have occurred over a period of more than 29 months. .

Did the circuit court err by joining the cases for trial?

Over Mr. Bell's objection, the circuit court joined the cases for trial after finding that the charges were sufficiently related and that joinder would not unduly prejudice Mr. Bell.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Mr. Bell does not request oral argument or publication. The parties can address the issues in full in the briefs and this Court can resolve those issues by applying established legal principles to these facts.

STATEMENT OF THE CASE AND FACTS

On July 25, 2022, the Dane County circuit court convened a single panel of jurors for trial in three

separate criminal cases against Max Bell. (R.167:5).¹ The court instructed the jurors that there were seven counts against Mr. Bell in three separate cases—Dane County Case Nos. 19CF1525, 20CF2585, and 20CF2958. (R.167:7-10; R.64:1-6; App. 27-32). Three days later, the empaneled jurors returned guilty verdicts on all seven counts charged in those three cases. (R.63:1-2, 2020CF2585-R:64:1-3, 2020CF2958-R:48:1-2).

About six months before the trial—following the state’s motion for joinder and an oral ruling, the circuit court issued a written order joining those three cases and a fourth case that was ultimately dismissed before trial—Dane County Case No. 20CF767—for a single trial. (R.30:1-18, R.39:1, R.158:11-14; App. 13-16, 20).

Starting on July 3, 2019, the state charged Mr. Bell with strangulation and suffocation and solicitation/pandering in 19CF1525. The charges were based on an incident occurring on February 14, 2018. (R.1:1). According to the complaint, a “potential client” responded to an advertisement on backpage.com posted by AMT who “admitted to being a prostitute.” (R.1:2). The phone number used to correspond with AMT ended in 3383 and was connected to Mr. Bell. (R.1:2).

The complaint alleged that AMT arrived at 102 Paoli Street in Verona before Mr. Bell escorted her

¹ Unless otherwise identified by case number, citations to the record refer to the document number in Dane County Case No. 19CF1525.

to the basement of another building at 100 Paoli Street. (R.1:2). AMT told police that Mr. Bell placed his arm around her neck and she had difficulty breathing. (R.1:2). AMT was able to speak to Mr. Bell and he eventually lightened the pressure before they engaged in finger to vagina intercourse and penis to vagina intercourse while she was face down on a mattress. (R.1:2-3). AMT told police that at some point, Mr. Bell penetrated her anus and she told him “it hurts.” (R.1:2-3). After Mr. Bell ejaculated, he stood up and AMT ultimately left. (R.1:3). AMT explained that she was meeting Mr. Bell for sex but “did not agree for it to go down the way it did.” (R.1:3).

On November 20, 2020, the state charged Mr. Bell with substantial battery and felony bail jumping in 20CF2958. (20CF2958-R.2:1-2). On September 17, 2019, according to the complaint, ARM arranged to meet with a person named “Justin” through an advertisement on the “Skip the Games website.” (20CF2958-R.2:4). The complaint alleged that “Justin” and ARM agreed to meet outside a residence in Madison. (20CF2958-R.2:2). ARM told police that after she was dropped off by friends, she followed Justin’s instructions to walk between two houses on the south side of the street when she was struck in the head repeatedly by “a white male in his mid-20’s to early 30’s, with short dark hair, approximately 6’1” in height and with no facial hair.” (20CF2958-R.2:2). ARM sustained lacerations to her head that required several stitches. (20CF2958-R.2:3). ARM later told police that she identified Mr. Bell as the person who struck her in the head on October 26,

2020, when she saw a story about Mr. Bell covered on Madison.com. (20CF2958-R.2:4).

On October 13, 2020, the state charged Mr. Bell with second degree sexual assault and two counts of felony bail jumping in 20CF2585. (20CF2585-R.2:1). According to the complaint, on July 15, 2020, KLE agreed to have “consensual” sexual contact with a man who responded to her website advertisement from a “text now number” ending in 4339. (20CF2585-R.2:2-3). KLE did not know the man’s name but she agreed to meet with him on Toribrooke Lane in Madison. (20CF2585-R.2:3). According to KLE, she performed oral sex on the man and they engaged in penis to vagina sexual intercourse in a silver sedan while her friend stayed nearby in the car KLE arrived in. (20CF2585-R.2:3).

The complaint alleged that the man asked “if he could get a little rough” and KLE agreed. (20CF2585-R.2:3). Eventually, when the man could not “climax” KLE told him to “get the fuck off me” and attempted to push him away. (20CF2585-R.2:3). KLE told police that the man then held her down and engaged in anal intercourse—to which she did not consent—for around 3 minutes. (20CF2585-R.2:3-4). The next day, KLE went to Meriter Hospital for a SANE exam and returned to Toribrooke Lane to find the man’s vehicle. (20CF2585-R.2:3). KLE described the man “as being 30’s to early 40s, 170 pounds, with an average build.” (20CF2585-R.2:4). Mr. Bell was eventually identified as the source of DNA located from a swab of KLE’s

underwear and a hair found in KLE's underwear. (20CF2585-R.2:5).

When issuing its decision to join the cases, the circuit court explained that the charges were all "closely related in terms of the disclosures" and that "four years with this much similarity in the actual allegations is a long period of time for crimes of this magnitude." (R.158:12; App. 14). The court also found that "the victims are very similarly situated" and "start with some type of consensual sexual contact." (R.158:12; App. 14). According to the court, the cases "all have a similar scheme, plan" which is "relevant to show there is some motive and intent." (R.158:12; App. 14). The court found that "they all involve anal rape" that was forced, violent, aggressive, and caused injuries. (R.158:13; App. 15).

While the court acknowledged that the defense's "best argument" was about unfair prejudice, the court dismissed any concerns about prejudice by finding that Wis. Stat. § 904.04(2)(b), "the greater latitude" rule, means that if the cases weren't joined, "we're going to be hearing about each case in each other case because of the similarities and the conduct at issue and the greater latitude that is now part of the law as of 2014." (R.158:6; App. 8). Ultimately the court concluded that joinder was appropriate and without joinder "we would be hearing the same facts repeatedly in the other cases." (R.158:13; App. 15).

After dismissing 20CF767, the state moved forward with a trial on the three remaining cases. The state called separate witnesses—including separate investigating officers, separate medical witnesses, and separate DNA analysts—during the singular trial.

The state first presented its evidence in 19CF1525. On top of testimony largely consistent with information presented in the criminal complaints, trial testimony showed that AMT did not suffer any apparent injuries to her neck despite alleging that Mr. Bell strangled her to the point of “crushing” her neck. (R.167:176, 180-81). The DNA analyst testified that Mr. Bell’s DNA was not found on AMT’s “choker” and it was possible that Mr. Bell’s DNA was transferred from AMT’s skirt to the collar of her shirt when it was placed in the same bag. (R.165:69-73). According to testimony, Mr. Bell admitted to having sex with AMT but denied strangling and suffocating her. (R.165:16-17, 26).

In 20CF2585—in addition to testimony that tracked the facts from the criminal complaint—the evidence showed that there was no physical evidence supporting KLE’s claim that she suffered any anal injuries. (R.165:150-51). The DNA evidence also showed that semen was found on swabs taken from KLE’s anus and vagina that did not belong to Mr. Bell. (R.164:23). Thus, even if KLE was injured, the injury may have resulted from anal sex with others on the same day the state claims Mr. Bell had sex with her. The evidence also established that KLE’s friend, JF, did not hear any screaming or struggle despite being

parked near the car when KLE claimed to be screaming. (R.149:49-64; 165:115-16). Finally, the evidence raised inferences about KLE's motive to falsely accusing Mr. Bell after figuring out that he had shorted her on the agreed upon fee for their consensual sex. (R.165:119-20).

Finally, in 20CF2958, alongside testimony about the facts contained in the criminal complaint, the testimony showed that there was no evidence—no blood, no DNA, and no witnesses—to corroborate ARM's identification of Mr. Bell as her assailant. In fact, testimony showed that ARM's assailant used the name "Justin," invited her to an address that did not belong to Mr. Bell, claimed to have children, and used a telephone number that was never connected to Mr. Bell. (R.164:93-96).

After the close of evidence and closing arguments, the court instructed the jury on the elements of each count and cautioned the jurors that if they found Mr. Bell guilty in one case, they "may not use this finding to draw the conclusion that [he] has a certain character or character trait and that he acted in conformity with that trait or character in other cases." (R.64:8-9; App. 34-35). The court instructed the jury that it could only consider Mr. Bell's conduct in one case "on the issues motive, opportunity, intent, and plan." (R.64:9; App. 35). The court instructed the jury to "consider the evidence as to each case, and each count separately" and that "[y]our verdict in one case must not affect your verdict in the other case." (R.64:9; App. 35).

Mr. Bell was found guilty on all seven counts in the three cases. (R.63:1-4; 20CF2585-R.64:1-6; 20CF2958-R48:1-4). Mr. Bell was sentenced to prison on each count. (R.166:37-38). Mr. Bell now appeals.

ARGUMENT

The circuit court erred by joining three cases for trial cases that allegedly occurred over the course of 29 months, alleged different crimes, involved separate witnesses, and had no overlapping evidence.

The state charged Mr. Bell in four separate cases that alleged four separate criminal episodes, involved four separate sets of witnesses, and occurred over the course of four years. Under these circumstances, this Court's review of the circuit court's decision to join charges is a two-step process. *State v. Locke*, 177 Wis. 2d 590, 597, 502 N.W.2d 891, 894 (Ct. App. 1993).

First, the initial joinder decision is based on an application of the alleged facts to the statutory requirements of Wis. Stat. § 971.12(1) and (4). *State v. Hoffman*, 106 Wis. 2d 185, 208, 316 N.W.2d 143 (Ct. App. 1982). A claim of misjoinder is a legal determination that this Court reviews de novo. *State v. Salinas*, 2016 WI 44, ¶30, 369 Wis. 2d 9, 879 N.W.2d 609.

Next, even if the cases are properly joined, this Court must engage in the “analytically distinct” task of determining whether the cases should be severed under Wis. Stat. § 971.12(3). *Hoffman*, 106 Wis. 2d at 208. It is the circuit court’s task to weigh potential prejudice to the defendant against the interest of the public in joinder and exercise its discretion to sever otherwise properly joined charges. *Id.* at 209. Appellate courts review severance decisions to determine if the circuit court abused its discretion. *Id.*

Here the circuit court erred in its initial decision to join the charges by conflating the standards for joinder and severance and by relying on factual errors to justify joinder. Additionally, the circuit court erroneously exercised its discretion by denying severance based on a finding that Mr. Bell would not be substantially prejudiced by joinder. Based on either error or both errors, this Court should reverse and remand with an order to sever the charges and try Mr. Bell separately on each of the three remaining cases.

- A. The circuit court erred by incorporating the standard for severance in the decision to join the cases.

Before ever engaging in the question of whether the charges met the statutory standard for joinder under Wis. Stat. § 971.12(1), the circuit court focused its attention on the question of whether the “greater latitude” rule in Wis. Stat § 904.04(2)(b) was “overriding” the argument that Mr. Bell would be

unfairly prejudiced by joinder. (R.158:6; App. 8). As the court explained, “it seems to me that if I didn’t join these, we’re going to be hearing about each case in each other case because of the similarities and the conduct at issue and the greater latitude that is now part of the law as of 2014.” (R.158:6; App. 8).

As discussed above, the questions of misjoinder and severance are distinct. While an “other acts” analysis may be one factor in assessing the risk of prejudice under the severance standard, it is irrelevant to distinct standard for initial joinder. *Locke*, 177 Wis. 2d at 597. Yet, in joining the charges, the circuit court explained that evidence in each case is “relevant to show there is some motive and opportunity and intent” that “would be admissible in the other.” (R.158:12; App. 14). In other words, the circuit court erred by conflating the tests for joinder and severance and basing its joinder decision on whether the evidence passes the “other acts” test under Wis. Stat. § 904.04.

The test for joinder is not whether evidence in one case is relevant to show motive, opportunity, and intent in another case. Rather, the test—based on the plain statutory language—is whether the joined crimes: (1) are of the “same or similar character;” (2) are based on the “same act or transaction;” (3) constitute “2 or more acts or transactions connected together;” or (4) constitute “parts of a common scheme or plan.” Wis. Stat. § 971.12(1).

In other words, even if the court was correct in concluding that some evidence in “each would be admissible in the other,” that conclusion is not sufficient to justify joinder under Wis. Stat. § 971.12(1). Thus, the circuit court erred by failing to determine whether the cases were properly joined in the first place. Because the cases involve separate crimes, separate alleged victims, separate witnesses, and occurred over a 29 month period, this Court should find that the cases were misjoined and reverse.

- B. The charged crimes were not “of the same or similar character,” were not “connected together,” and were not part of a “common scheme or plan.”

While the circuit court determined that the crimes were “closely related,” the court never grappled with the legal standard for whether the crimes were “of the same or similar character” or “connected together.” (R.158:11; App. 13). Crimes are of the same or similar character when they involve the “same type of offenses, occurring over a relatively short period of time, *and* the evidence as to *each count* overlaps.” *State v. Watkins*, 2021 WI App 37, ¶24, 398 Wis. 2d 558, 961 N.W.2d 884. (emphasis added).

Here there is no basis to conclude that the charged crimes were “based on the same act or transaction.” Thus, to determine whether crimes are “connected together” or part of a “common scheme or plan,” this Court looks to several factors:

(1) are the charges closely related; (2) are there common factors of substantial importance; (3) did one charge arise out of the investigation of the other; (4) are the crimes close in time or close in location, or do the crimes involve the same victims; (5) are the crimes similar in manner, scheme, or plan; (6) was one crime committed to prevent punishment for another; and (7) would joinder serve the goals and purposes of § 971.12.

Id., ¶24; *Salinas*, 369 Wis. 2d 9, ¶43.

Unlike in *Hoffman*, where this Court held that first degree murders occurring 3 months apart were “of the same or similar character,” the crimes charged here were distinct and relatively distant in time. *Hoffman*, 106 Wis. 2d at 209. And unlike in *Watkins* where this Court held that the crimes were “connected together” by 2016 murder-for-hire and witness intimidation schemes aimed to prevent testimony about 2015 sexual assaults, the crimes charged here did not arise out of the other, were not committed to escape punishment, did not involve the same victims or witnesses, and were not connected together by any common scheme or plan. *Watkins*, 398 Wis. 2d 558, ¶¶26-35.

1. The charges were dissimilar and occurred over a lengthy period of time.

In 19CF1525, Mr. Bell was charged with strangulation and suffocation and soliciting prostitution based on events allegedly occurring in his basement on Paoli Street in Verona on February 14,

2018. (R.1:1-3). In 20CF2958, Mr. Bell was charged with substantial battery and bail jumping based on events occurring between two homes on Toribrooke Lane on September 17, 2019. (20CF2958-R.5:1-5). In 20CF2585, Mr. Bell was charged with second degree sexual assault and bail jumping based on events allegedly occurring in a car parked on Toribrooke Lane in Madison on July 15, 2020. (2020CF2585-R.2:1-6).

To show that crimes are the same or similar character, “it is not sufficient that the offenses involve merely the same type of criminal charge.” *State v. Hamm*, 146 Wis. 2d 130, 138, 430 N.W.2d 584 (Ct. App. 1988). Unlike the charges in *Hamm*, which occurred 15 to 18 months apart, the charges here occurred more than 29 months apart. *Id.* at 138-39 (R.30:1-4). The factual distinctions between the three cases and the lack of overlapping evidence mean that the 29-month span between the offenses was not a “relatively short period of time.” *Id.* at 140.

2. The charges involve distinct alleged victims and witnesses and there is no overlapping evidence or common scheme.

Unlike in *Hoffman* and *Watkins*, where the crimes were connected by conspiracies to suppress witness testimony and avoid punishment, there is no similar common scheme here. Here there is no allegation that the crimes were committed to suppress witness testimony or avoid punishment. The crimes

here were alleged to have occurred across a longer period of time, involved different sets of witnesses, and alleged victims that were—at most—tangentially related through their sex work. (R.30:1-4).

Unlike 20CF2585, neither 19CF1525 nor 20CF2958 charge Mr. Bell with sexual assault. (R.30:1-4). And while all three alleged victims acknowledged that they were sex workers, 20CF2958 involves no sexual conduct or exchange of money at all. (R.30:1-4). Thus, contrary to the circuit court's conclusion, the three offenses do not all “start with some type of consensual sexual contact” and do not “all involve an anal rape.” (R.158:12-13; App. 14-15).

There are also no overlapping witnesses or common facts that were vital to meet the elements of the disparate charges in the three cases. Thus, the circuit court also erred by concluding that separate juries “would be hearing the same facts repeatedly in the other cases.” (R.158:13; App. 15). Even the circuit court's reliance on ARM's identification of Mr. Bell from the press release in 20CF2585 as a basis for joinder also misses the mark. (R.158:12; App. 14). How ARM identified Mr. Bell does nothing to connect the underlying facts of those otherwise dissimilar cases to each other and does nothing to connect those two cases to 19CF1525.

Likewise, because bail jumping does not require any evidence about the facts of the underlying cases that placed Mr. Bell on bond, the bail jumping charges do not connect the cases in any way that is meaningful

to the initial joinder decision. At any rate, the parties entered stipulations that Mr. Bell was released from custody on bond and the jury was instructed that they must find Mr. Bell guilty of the substantive charge in each case before finding him guilty of bail jumping. (R.64:5-6; App. 31-32).

Because the offenses were distinct, the evidence did not overlap, the individual offenses were not part of an ongoing plan or scheme, and the offenses were alleged to have occurred over a relatively lengthy time period, the cases could not—as a matter of law—be joined under any theory for joinder under Wis. Stat. § 971.12(1). The burden is thus on the state to prove that the error was harmless beyond a reasonable doubt. *State v. Leach*, 124 Wis. 2d 648, 671, 370 N.W.2d 240, 253 (1985).

C. The circuit court erred by ordering the cases joined despite a significant risk of prejudice to Mr. Bell.

Even if this Court concludes that the cases were properly joined under Wis. Stat. § 971.12(1), joinder substantially prejudiced Mr. Bell and he is entitled to severance under Wis. Stat. § 971.12(3). Severance is appropriate when the defendant shows “substantial prejudice” to the defense. *State v. Prescott*, 2012 WI App 136, ¶13, 345 Wis. 2d 313, 322, 825 N.W.2d 515, 519. As noted above, the decision to sever charges is reviewed for an erroneous exercise of discretion. *Salinas*, 2016 WI 44, ¶30.

One of the principle dangers of joinder is that “the jury may perceive a defendant accused of several crimes is predisposed to committing criminal acts.” *Leach*, 124 Wis. 2d at 672. The risk of prejudice from the appearance of a “predisposition” is mitigated when “evidence of the defendant’s guilt of each offense is overwhelming.” *Leach*, 124 Wis. 2d at 672. But here, the evidence in each case was far from overwhelming and the defense to each charge was distinct and independent from the defense advanced in the other cases.

For example, in 19CF1525, Mr. Bell admitted to having sex with AMT but denied strangling and suffocating her. (R.165:16-17, 26). Trial testimony showed that AMT did not suffer any apparent injuries to her neck despite alleging that Mr. Bell strangled her to the point where she could not breathe. (R.167:176, 180-81). The DNA analyst testified that no DNA was found on AMT’s choker and it was possible that Mr. Bell’s DNA was transferred from AMT’s skirt to the collar of her shirt when it was placed in the same bag. (R.165:69-73).

In 20CF2585, the evidence showed that there was no physical evidence supporting KLE’s claim that she suffered any anal injuries. (R.165:150-51). The DNA evidence also showed that male DNA was found on KLE’s anus that did not belong to Mr. Bell. (R.164:23). The evidence also established that KLE’s friend, JF, did not hear any screaming or struggle despite being parked near the car when KLE claimed to be screaming. (R.149:49-64; 165:115-16). Finally,

the evidence raised inferences about KLE's motive to falsely accusing Mr. Bell after figuring out that he had shorted her on the agreed upon fee for their consensual sex. (R.165:119-20).

Finally, in 20CF2958, the defense conceded that there was no doubt that ARM was physically assaulted and did not contest that ARM believed Mr. Bell was her assailant. (R.164:199). But there was no evidence—no blood, no DNA, and no witnesses—to corroborate ARM's identification of Mr. Bell as her assailant. In fact, testimony showed that ARM's assailant used the name "Justin," invited her to an address that did not belong to Mr. Bell, claimed to have children, and used a telephone number that was never connected to Mr. Bell. (R.164:93-96).

Even if it was true that publication of Mr. Bell's arrest 20CF2585 triggered ARM's identification of Mr. Bell as her assailant, it was Mr. Bell's picture in the news—not the details of the underlying allegation in 20CF2585—that enabled identification. In other words, the evidence against Mr. Bell and Mr. Bell's defense in each case existed independently of the other cases. Yet to the jury, access to the facts of each distinct case naturally gave the impression that Mr. Bell was simply a dangerous person and invited the jury to make impermissible "propensity" inferences.

"In a trial on joint charges, there is also the possibility that the jury will cumulate the evidence of the crimes charged and find guilt when it otherwise

would not if the crimes were separately tried.” *State v. Bettinger*, 100 Wis. 2d 691, 696–97, 303 N.W.2d 585, 588 (1981). By presenting the jury with distinct cases alleged to have occurred over a lengthy period of time with distinct alleged victims, distinct witnesses, and no overlapping evidence, the danger of prejudice was particularly high because “jurors attribute multiple instances of wrongdoing to a defendant’s criminal disposition” and “confuse evidence” of multiple charges. Edie Green & Brian H. Bornstein, *Nudging the Justice System Toward Better Decisions*, 103 J. Crim. L. & Criminology 1155, 1163 (2013).

The consequences of that risk have been established in several studies. Joinder’s empirical prejudicial impact is simple: “A cumulative compilation of all the joinder research findings shows that the effect of joinder of offenses is robust; there is a significantly greater likelihood of conviction for defendant.” James Farrin, *Rethinking Criminal Joinder: An Analysis of the Empirical Research and its Implications for Justice*, 52 Law & Contemp. Probs. 325, 330-31 (1983) *see also* Andrew D. Leipold & Hossein A. Abbasi, *The Impact of Joinder and Severance on Federal Criminal Cases: An Empirical Study*, 59 Vand. L. Rev. 349, 383 (2006).

Another factor for determining whether substantial prejudice exists is the extent to which evidence supporting all charges would be admissible in separate trials. *Bettinger*, 100 Wis. 2d at 696–97. This was the only severance factor that the court considered when deciding the state’s joinder motion.

In any event, the court's decision that *all* the evidence admissible in one case would be admissible in the other to provide "motive, opportunity, and intent" was made without a full *Sullivan* analysis under Wis. Stat. §§ 904.01, 904.03, and 904.04, and was clearly erroneous. (R.158:12; App. 14).

As discussed above, the facts underlying each case operated independently of the facts in the other cases. The facts in any given case would not have been admissible in a separate trial in the other cases. To be admissible, they would have had to pass the three-part "other acts" test laid down in *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998). In other words, to be admissible, they must be offered for permissible purpose under Wis. Stat. § 904.04; must be relevant under Wis. Stat. § 904.01; and the probative value must not be substantially outweighed by the risk of unfair prejudice under Wis. Stat. § 904.03.

While "motive," "opportunity," and "intent" are proper purposes under Wis. Stat. § 904.04, the court did not explain why full descriptions of each separate crime against separate victims were relevant to prove Mr. Bell's motive, opportunity, or intent in the context of the other cases.

A proper exercise of discretion requires a record showing that the circuit court "examined the relevant facts, applied a proper standard of law, and used a rational process to arrive at a conclusion that a reasonable judge would make." *State v. Scott*, 2018 WI 74, ¶39, 382 Wis. 2d 476, 914 N.W.2d 141. The court

must “explain on the record its reasons for its discretionary decision to ensure the soundness of its own decision making and to facilitate judicial review.” *Id.*, ¶38. (internal citation omitted). Here the circuit court failed to properly apply the legal standard for “other acts” evidence under *Sullivan*, relied on erroneous facts, and ultimately failed to explain its reasons for its ultimate decision to admit *all* evidence in *all* the cases in a joint trial.

In other words, the circuit court did not properly exercise its discretion when ruling on Mr. Bell’s opposition to joinder and argument in favor of severance. In fact, the court conflated the joinder and severance standards and issued a decision that combined the “analytically distinct” tasks of determining whether the cases should be joined under Wis. Stat. § 971.12(1) and severed under Wis. Stat. § 971.12(3). *Hoffman*, 106 Wis. 2d at 208.

To the extent that the court’s rulings on the other act grounds for joinder can be construed as a ruling on severance, the court incompletely applied the incorrect legal standard by applying the “greater latitude” rule to 20CF2958 and 19CF1525 and only considering one of many prejudice factors. Moreover, the court’s conclusory statements about the admissibility of the evidence in *all* cases relied on the erroneous finding that all the cases involved anal rape. Finally, the court did not adequately explain the basis of its decision.

Because, as discussed above, joinder was inappropriate as a matter of law, the cases were misjoined from the start. Even if the cases were properly joined, the circuit court erroneously exercised its discretion when failing to sever the charges. Either way, Mr. Bell is entitled to a new trial on each case.

CONCLUSION

For the reasons stated above, Mr. Bell respectfully asks this Court to reverse the circuit court and remand with an order to sever the charges and grant him separate trials on each case.

Dated this 19th day of February, 2025.

Respectfully submitted,

Electronically signed by

David J. Susens

DAVID J. SUSENS

Assistant State Public Defender

State Bar No. 1099463

Office of the State Public Defender

Post Office Box 7862

Madison, WI 53707-7862

(608) 267-2124

susensd@opd.wi.gov

Attorney for Max E. Bell

CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 4,671 words.

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit 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 or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and 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 one or more initials or other appropriate pseudonym or designation 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.

Dated this 19th day of February, 2025.

Signed:

Electronically signed by

David J. Susens

DAVID J. SUSENS

Assistant State Public Defender