STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

CASE NO. 2024AP1923-CR, 2024AP1924-CR,
& 2024AP1925-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

REPLY BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ARGUMENT

I. The three cases were improperly joined for trial and joinder resulted in a significant risk of prejudice to Mr. Bell.

While both the initial joinder decision and the decision to properly sever charges are governed by Wis. Stat. § 971.12, joinder and severance are "analytically distinct" decisions. *State v. Hoffman,* 106 Wis. 2d 185, 208, 316 N.W.2d 143 (Ct. App. 1982). Here, the circuit court conflated the legal standard for joinder and severance, relied on factual errors in justifying joinder, and failed to fully analyze whether Mr. Bell would be prejudiced by joinder under the severance standard. As a result, this Court should reverse and remand to the circuit court with an order to sever the charges and grant Mr. Bell separate trials in each case.

A. Initial joinder was improper.

The parties agree on the legal standard for joinder and agree on the standard of review for the initial joinder decision. But while the state concedes that joinder and severance are "distinct considerations," (Resp. Br. 8), the state never disputes that the circuit court erred by conflating the two standards and basing its joinder decision, in large part, on whether the "greater latitude" rule for "other acts" defeated the argument that he would be unfairly prejudiced by joinder. (R.158:6).

Nor does the state dispute that the circuit court erred by relying on the erroneous findings that all three offenses "start with some type of consensual sexual contact" and "all involve anal rape." (R.158:12-

13). When a joinder decision is "based on factual errors," the "decision to try the[ ] matters together rests on very shaky ground." *State v. Davis,* 2006 WI App 23, ¶20, 289 Wis. 2d 398, 710 N.W.2d 514. But even without the factual errors, joinder was inappropriate based on the factual differences between the three cases and the lengthy time period the cases spanned.

The state's response glosses over the factual differences between the three cases, repeats the circuit court's factual error by claiming that all three cases were "sexual assaults," and claims—without reference to any authority—that 29 months is a "relatively short" period of time to argue that the crimes were of "the same or similar character." (Resp. Br. 11-12). For all the reasons discussed in Mr. Bell's appellant's brief, the crimes are dissimilar and occurred over a lengthy period of time. The state's reference to *State v. Hamm,* 146 Wis. 2d 130, 430 N.W.2d 584 (Ct.App. 1988), does not move the needle on this analysis.

In *Hamm,* three offenses occurred within a 15-18-month period that was considered "relatively short" because they led to identical charges (armed burglary and first-degree sexual assault) with nearly identical facts (early morning entries into adjoining or nearby apartments through windows facing the same wooded area, disguised with towels taken from the premises, armed with knives taken from the premises). *Hamm,* 146 Wis. 2d at 138. While a time period can be "relatively short" compared to the similarities of the offenses and overlap in the evidence, here the alleged crimes occurred over a 29-month period, resulted in different charged offenses, and contained no evidence that overlapped "as to *each*

count." *Id.* at 139. (emphasis added). The state's response ignores the fact that for crimes to be "of the same or similar character," evidence must overlap "as to each count" but this Court should not. *Id.*

The crimes were also not "connected together" under the factors discussed in *State v. Watkins,* 2021 WI App 37, ¶24, 398 Wis. 2d 558, 961 N.W.2d 884, and were not part of a "common plan or scheme." The state focuses heavily on what it alleges to be Mr. Bell's "modus operandi" and the fact that bail jumping charges in two cases arose from the bond in the other. (Resp. Br. 13-14). Here again, the state glosses over the differences between the three cases and relies on a case that establishes a connection and a "common scheme or plan" based on two identical charges arising from nearly identical facts. *Francis v. State,* 86 Wis. 2d 554, 560-61 273 N.W.2d 310 (1979).

In both incidents in *Francis,* the perpetrator forced his way in as a lone woman in her mid-20s started her car. *Id.* at 555. In both incidents the perpetrator pulled a dark knit hat over the woman's eyes, "forced her to lie down on the car seat with her head on his right leg and her hands under his right leg as he drove the car." *Id.* In one case, he succeeded in physically and sexually assaulting the victim. *Id.* In the other, though he did not accomplish it, he indicated his purpose was the same as in the other case. *Id.* at 561. The crimes also occurred within a span of 35 days and two blocks. *Id.* True, like here, the allegations in *Francis* involved different victims. But, as discussed in Mr. Bell's appellant's brief, the allegations here do not establish a connection or a common scheme or plan that tended to establish Mr. Bell's identity. *Id.* And, as

discussed below, evidence of each crime would not be admissible in separate trials.

Thus, 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).

B. Severance is properly before this Court.

As discussed above, while "the initial joinder decision and a decision to sever properly joined charges are distinct considerations that require different standards of review," the circuit court incorporated the standard for severance in the decision to join the cases. *State v. Salinas,* 2016 WI 44, ¶30, 369 Wis. 2d 9, 879 N.W.2d 609. Yet, ignoring the reality of what happened in the circuit court, the state relies on *Salinas* to claim that severance is not before this Court because "Bell never asked the circuit court to engage in a severance analysis." *Id.* (Resp. Br. 8-9). The state's claim is factually misleading and its reliance on *Salinas* is misplaced.

The state's argument is based on the unsupported claim that a defendant must "*file* a motion to sever joined charges" for this Court to consider prejudice and severance on appeal. (Resp. Br. 8) (emphasis added). This claim overstates the holding in *Salinas* and is at odds with both the plain language of Wis. Stat. §§ 974.02 and 971.12(3) and the substance of the record. Under Wis. Stat. § 974.02(2), what matters on appeal is whether the question before this Court was "previously raised." And here, the record

shows that the question of whether the circuit court erroneously exercised its discretion to "order separate trials" because "it appears that" Mr. Bell was "prejudiced by a joinder of crimes" was previously raised. Wis. Stat. § 971.12(3).

In claiming that Bell never raised the issue, the state ignores the substance of the circuit court record and wrongly claims that "this case is just like *Salinas.*" (Resp. Br. 8). But unlike in *Salinas,* where the defendant never argued for severance based on prejudice in the circuit court, Mr. Bell went beyond merely making "an objection to the initial joinder decision." (Resp. Br. 8). By arguing that—even if there was a legal basis for joinder—the court should order separate trials because joinder would be unfairly prejudicial, Mr. Bell "asked the circuit court to engage in a severance analysis." (R.32:3-4; R.158:3,5-6) (Resp. Br. 9). Likewise, the state's motion for joinder prompted the circuit court to engage in the severance analysis by citing the legal standard and arguing that Mr. Bell "is not substantially prejudiced by joinder." (R.30:6, 8).

Thus, the question of whether the circuit court erroneously exercised its discretion under Wis. Stat. § 971.12(3) is properly before this Court because Mr. Bell raised prejudice in both the circuit court and in his appellate brief. (Appellant's Br. 20-25) *Cf. Francis v. State,* 86 Wis. 2d 554, 561-62, 273 N.W.2d 310 (1979) (holding that severance and prejudice were not before the court because the defendant did not argue prejudice in the circuit court or the court of appeals).

C. The circuit court erroneously exercised its discretion by failing to sever the charges.

The parties agree that "[a]ny joinder of offenses is apt to involve some element of prejudice to the defendant." *State v. Linton,* 2010 WI App 129, ¶21, 329 Wis. 2d 687, 791 N.W.2d 222. The parties also agree that the decision to sever charges is reviewed for an erroneous exercise of discretion. *Salinas,* 369 Wis. 2d 9, ¶30. Because the jury was presented with distinct cases alleged to have occurred over a lengthy period of time with distinct alleged victims, distinct witnesses, and no overlapping evidence, this Court should find that Mr. Bell has shown "more than some" prejudice stemming from the circuit court's joinder decision. *Linton,* 329 Wis. 2d 687, ¶21.

The circuit court's prejudice analysis and the state's defense of that decision both rest entirely on a cursory "other acts" analysis. 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. Here, the circuit court failed to apply the legal standard in *State v. Sullivan,* 2016 Wis. 2d 768, 576 N.W.2d 30 (1998), relied on erroneous facts, and failed to explain its blanket decision to admit all evidence in all cases in a joint trial.

The state's other acts analysis never contends with the circuit court's erroneous findings of fact that all the cases "start with some type of consensual sexual contact" and "all involve anal rape." (R.158:12-

13). Nor does the state explain why, in a case involving no sexual contact, the "greater latitude" rule should apply. Instead, the state merely asserts that "greater latitude" applies to all three cases and summarily concludes that all the evidence in all the cases would be admissible in all the other cases under *Sullivan*. (Resp. Br. 17-18). Likewise, the state concludes without analysis that "[n]one of the facts from the other crimes would unfairly prejudice Bell any more than the facts each jury would be considering in an individual case." (Resp. Br. 18). But, "given the correct facts, it is unlikely that [one charge] would be admissible as other acts evidence in a trial of the [other charges]." *Davis,* 289 Wis. 2d 398, ¶20.

Even assuming that—as the state alleges—some evidence of how ARM identified Mr. Bell would be admissible in that trial, neither the state nor circuit court explain how all of the evidence in each case would be admissible in separate trials in each of the other cases. Nor does the state endeavor to distinguish the prejudicial effect of other acts evidence from the prejudicial effect of joinder. Instead, the state relies on *State v. Dorsey,* 2018 WI 10, 379 Wis. 2d 386, 906 N.W.2d 158, a case involving domestic violence that has nothing to do with joinder, to claim that "greater latitude" applies and that a jury instruction on other acts would cure "potential prejudice from the three cases being tried together." (Resp. Br. 18).

As discussed below and in Mr. Bell's appellant's brief, the state and circuit court's cursory analysis of other acts and the prejudice of joinder completely ignore the factual differences between the cases and the risk of a jury confusing the evidence or cumulating the evidence to convict Mr. Bell based on a perception

of his criminal disposition. *See State v. Bettinger,* 100 Wis. 2d 691, 696-97, 303 N.W.2d 585 (1981); *see also Salinas,* 369 Wis. 2d 9, ¶¶75-77 (Abrahamson, J. dissenting) (cataloging "empirical studies describing the prejudice to defendants who face joinder of multiple charges" and case law that "echoes these concerns"). On this record, the court erred by allowing the cases to proceed to trial together.

II. Initial joinder and failure to sever were not harmless errors.

The parties agree that a joinder decision is subject to harmless error analysis. *Davis,* 286 Wis. 2d 398, ¶21. It is the state's burden to prove that an error was harmless by showing "beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *State v. Nelson,* 2014 WI 70, ¶44, 355 Wis. 2d 722, 849 N.W.2d 317 (internal citation omitted). Here, like in *Davis,* the state did not meet its burden to prove that "there is no reasonable possibility that the error contributed to the conviction." *Davis,* 286 Wis. 2d 398, ¶21 (citation omitted).

The state's response does not contest the physical evidence (or lack of physical evidence) in each case cited by Mr. Bell that—in the absence of joinder and the collective evidence heard by jury—could have led to an acquittal in separate trials. (Appellant's Br. 21-22). Instead, the state cites other facts and concludes that "Bell was convicted on strong evidence across all three cases." (Resp. Br. 19). At best this shows that there is a clear dispute between the parties about the strength of the state's evidence. This dispute does not prove that harmlessness was "demonstrated

by overwhelming evidence of guilt." *Id.* (internal citation omitted).

Beyond the clear dispute between the parties on the strength of the state's evidence in each case, the state's harmless error argument rests on the faulty presumption that "there is no reasonable basis to argue that the trial court would not have admitted the facts of the other crimes as other acts in separate trials." (Resp. Br. 20). For the reasons discussed above and in the appellant's brief, the disparate facts in each case fell short of establishing a similar scheme and modus operandi in all of the cases. Likewise, the circuit court's reliance on faulty factual determinations, faulty other acts analysis, and conflation of the legal standards all show that the record falls short of establishing that all the evidence in each case would be admissible in all the other cases.

Citing *State v. Hunt,* 2003 WI 81, ¶34, 263 Wis. 2d 1, 666 N.W.2d 771, the state asks this Court to overlook the multitude of circuit court errors and affirm "if the facts of record would support the circuit court's decision." (Resp. Br. 22). The reliance on *Hunt*—another case that has nothing to do with joinder—repeats the circuit court's faulty assumption that if some evidence in "each case would be admissible in the other," the cases should be joined and should not be severed. (R.158:12). This Court should not assume the same.

Contrary to the state's ultimate conclusion, neither the disputed strength of the evidence nor the possible admission of other acts evidence proves that "harmlessness is demonstrated by overwhelming evidence of guilt" or that "the errors did not influence

the jury or had but very slight effect." *Davis,* 289 Wis. 2d 398, ¶21. Like in *Davis,* where there was no overwhelming evidence of guilt in any of the cases, the joint trial "greatly enhanced [Bell's] chances of being found guilty" in the other cases. *Id.*, ¶22. Like in *Davis,* seeing all the witnesses together in one location and hearing evidence that would be inadmissible in separate trials made it much more likely that the jury would convict Mr. Bell based on the cumulative evidence against him rather than proof beyond a reasonable doubt in each case. *Id.*

The state asks this Court to find harmless error because the jury was instructed not to use a determination of guilt in one case to find guilt in another case and to limit consideration of the facts to certain issues. (Resp. Br. 18, 21). True, a cautionary instruction may limit unfair prejudice stemming from the admission of other acts evidence. *Dorsey,* 379 Wis.2d 386, ¶55. But the question in this case is not simply whether the probative value of other acts was substantially outweighed by the risk of unfair prejudice in admitting other acts. *Id.,* ¶56. The relevant question is whether joining all three cases for trial created a risk of prejudice. Because the jury was allowed to hear evidence of factually distinct crimes that involved separate alleged victims and occurred over a 29-month period, "the curative instruction given by the court was not sufficient to eliminate the *potential* prejudice" that resulted from the circuit court's erroneous joinder decision. *Davis,* 289 Wis. 2d 398, ¶22 (emphasis added).

This Court should reverse.

CONCLUSION

For the reasons stated above and in the appellant's brief, 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 3rd day of June, 2025.

Respectfully submitted,

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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 2,801 words.

Dated this 3rd day of June, 2025.

Signed:

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