

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

August 20, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0727-CR

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**JOHN M. MAGO,**

**Defendant-Appellant.**

APPEAL from a judgment of the circuit court for Eau Claire County: GREGORY A. PETERSON, Judge. *Affirmed.*

MYSE, J. John M. Mago appeals a judgment of conviction for disorderly conduct as a repeater. Mago contends that the trial court erred by refusing to separate his trial for disorderly conduct from an unrepresented co-defendant, Calvin Morrison, who was charged with one count of disorderly conduct arising from the same incident underlying the charges against Mago. Mago contends the court's failure to sever his trial from Morrison's denied him a fair trial because prejudicial evidence otherwise inadmissible against Mago was introduced at trial due to its relevance against Morrison. Mago further contends that Morrison's self-representation and his lack of understanding of the judicial process undermined Mago's efforts to defend himself. Because this court concludes the trial court properly exercised its discretion by refusing to

sever the two trials and that Mago was not prejudiced by his co-defendant's failure to be represented by counsel, the judgment is affirmed.

Mago was charged with disorderly conduct arising from an incident in the City of Eau Claire involving Mago directing racial slurs against a group of persons, including several African-Americans. The group to whom the racial slurs were directed attempted to walk away when Calvin Morrison, Mago's co-defendant, struck one of the victims. Fights involving both Mago and Morrison broke out with members of the antagonized group.

Mago filed a motion to sever, contending that he desired to call Morrison as a witness in his own defense. The motion was denied based on the trial court's finding that Mago made no showing that Morrison's testimony was either relevant or required in his defense. On appeal, Mago now contends that the motion for severance should have been granted because evidence inadmissible against Mago compromised his right to a fair trial.

The State suggests that Mago waived this issue because he failed to present it as a basis for the severance to the trial court. Because this issue was raised for the first time on appeal, the State contends that this claim has not been properly preserved for appellate review. *See Evjen v. Evjen*, 171 Wis.2d 677, 688, 492 N.W.2d 361, 365 (Ct. App. 1992). While there is merit to the State's contention, this court exercises its prerogative to address the merits of the appeal, notwithstanding Mago's failure to present this basis for severance to the trial court. *See DOR v. Mark*, 168 Wis.2d 288, 293 n.3, 483 N.W.2d 302, 304 n.3 (Ct. App. 1992).

We now set forth the standard with which to review a grant or denial of motion to sever. Two defendants who are charged with the same offense may be tried together. *State v. Brown*, 114 Wis.2d 554, 559, 338 N.W.2d 857, 860 (Ct. App. 1983); § 971.12(2), STATS. A severance may be required, however, when either of the defendant's rights to a fair trial is compromised by the State's refusal to sever the two trials. *Haldane v. State*, 85 Wis.2d 182, 189, 270 N.W.2d 75, 79 (1978). The grant or denial of a severance is left to the sound discretion of the trial court. *State v. Jennaro*, 76 Wis.2d 499, 505, 251 N.W.2d 800, 803 (1977). A court's exercise of discretion is reviewed with deference and will be affirmed unless the court made an error of law or the basis of the court's

exercise of discretion cannot be determined from the record or the conclusion reached by the court was unreasonable. *Oostburg State Bank v. United S&L Ass'n*, 130 Wis.2d 4, 11-12, 386 N.W.2d 53, 57 (1986).

Because the evidence described a single event involving a series of individuals, the evidence involving the conduct of either Morrison or Mago is relevant against both defendants. The jury has a right to understand the entire transaction and the conduct of all involved in the altercation. See *State v. Peters*, 192 Wis.2d 674, 694-95, 534 N.W.2d 867, 875 (Ct. App. 1995). Since the evidence as to Morrison's conduct would have been admissible to show the extent of the altercation in the case against Mago, there is no merit to his present contention that severance was required. In a single incident involving the conduct of a variety of individuals, the nature of the entire altercation, including the conduct of each of the individuals, is necessary for the jury to have a fair and complete understanding. Mago's contention to the contrary is without merit.

Mago further asserts that his right to a fair trial was prejudiced because of Morrison's decision to represent himself. Mago contends Morrison's ineptitude and inability to properly frame questions to voir dire the jury and otherwise present a persuasive defense affected Mago's right to a fair trial. We disagree. The jury was instructed that the conduct of each defendant had to be proven by the State beyond a reasonable doubt. All relevant matters in defense were available to Mago's attorney. Morrison's failure to be represented may have adversely affected his ability to present his case to the jury, but it cannot be said to have in any way affected the jury's consideration of the evidence involving Mago's conduct.

Because this court finds no merit to Mago's contention that he was denied a fair trial by the trial court's failure to sever his trial, the judgment is affirmed.

*By the Court.* — Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.