COURT OF APPEALS
DECISION
DATED AND RELEASED

FEBRUARY 4, 1997

NOTICE

No. 96-2276-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANNY W. FILTER,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Shawano County: THOMAS G. GROVER, Judge. *Affirmed in part; reversed in part, and cause remanded with directions.*

Before Cane, P.J., LaRocque and Myse, JJ.

CANE, P.J. Danny Filter appeals a judgment of conviction for second-degree sexual assault of a child, contrary to § 948.02(2), STATS., obstructing an officer, contrary to § 946.41(1), STATS., and manufacturing marijuana, contrary to § 161.41(1)(h)1, STATS., all as a repeater, and two counts of selling alcohol to a minor, contrary to § 125.07(1)(a)1, STATS. Filter argues that

the trial court's refusal to grant a separate trial on the drug charge violated § 971.12(1) or (3), STATS., and his constitutional right to a fair trial.[1]

The State concedes that the trial court erred by permitting the drug charge to be joined with the other four counts for trial, but argues that the error was harmless. We agree that the court erred. However, we conclude that the improper joinder of the sexual assault charge with the other charges resulted in prejudice to Filter. Because the evidence on the obstructing, drug, and alcohol charges was overwhelming, we affirm those convictions but remand for a new trial on the sexual assault charge.

On September 1, 1995, Michael A., his daughter Erika A., age thirteen, and her thirteen-year-old friend Sasha K., arrived for the weekend at the larger of two cottages on Michael's lake property. Filter rented the smaller cottage on the property. Late that evening, Michael and Filter left the girls at Michael's cottage and went to a bar. Erika and Sasha testified that as the men left, Filter told them that they could have the beer in his cottage. Each of the girls drank some beer. Filter later returned to Michael's cottage and gave them another six-pack of beer.

Michael returned after bar time and fell asleep in his room, adjacent to the room in which the girls shared a bed. A short while later, Filter tapped on the bedroom window and asked the girls to bring the beer to the pontoon boat docked in front of Michael's cottage. The girls drank more beer on the boat. They sat and talked with Filter, and Filter kissed Erika. The girls returned to Michael's cottage and went back to sleep.

Sasha testified that about fifteen or twenty minutes later, Filter came into the room and sat on the edge of the bed. He touched Sasha's vagina over her underpants and touched her breasts. She scratched his lip when he tried to kiss her. Erika testified that she did not witness the touching, but saw

[1] We do not address § 971.12(3), STATS., because we conclude that the initial joinder was inappropriate. *See* ***State v. Locke***, 177 Wis.2d 590, 597, 502 N.W.2d 891, 894 (Ct. App. 1993) ("Section 971.12(3) provides that even after initial joinder, the court may order separate trials of the charges if it appears that a defendant is prejudiced by a joinder of the counts.").

Filter sitting on the bed. Both girls testified that Filter then stepped out onto the porch and returned in a few minutes to the foot of the bed, where he sat and rubbed their feet and ankles.

Sasha pretended to be ill and asked Erika to go to the bathroom with her. Erika testified at trial that Sasha told her that Filter touched her breasts and had his hand under her shorts. The girls then went into Michael's bedroom, but did not wake him. They took the dog outside and went for a walk. When they returned to the cottage, they saw Filter standing by his car and spoke with him before going back inside. They did not tell Michael about the alleged assault. However, Sasha told her mother about it several days later and they reported it to the police.

Filter was arrested for the sexual assault on September 15, 1996. He was charged with obstructing an officer because he gave a false name to the police during questioning. The evidence was uncontradicted that Filter initially identified himself to the officer as Matthew Gulzcynski instead of Danny Filter, and admitted furnishing beer to the girls. Filter gave a statement, in which he admitted providing the girls with beer, drinking with them on the boat, and kissing Erika. He said that when he went into their room to wake them up, he nudged Sasha's shoulder, but denied any other touching. Filter did not testify at trial, but his statement was admitted.

On September 16, 1995, while Filter was in custody, Michael told the police that he found marijuana plants growing in a closet of the cottage Filter rented. The police conducted a search and found five marijuana plants and a pipe. An officer testified that when he questioned Filter about the plants, Filter admitted they were his.

The court denied Filter's motion to sever the drug charge from the other charges. Filter was tried on all five counts in a single trial, and the jury found him guilty of sexual assault, obstructing an officer, and manufacturing

marijuana. The court found him guilty of the two alcohol offenses.[2] He now appeals the judgment of conviction on all charges.

The issue on appeal is whether the trial court's refusal to grant a separate trial on the drug charge violated § 971.12(1), STATS., and his constitutional right to a fair trial. Whether charges were properly joined is a question of law that we review de novo. ***State v. Locke***, 177 Wis.2d 590, 596, 502 N.W.2d 891, 894 (Ct. App. 1993). The first step in our review of joinder issues is to consider whether the joinder of charges was appropriate. ***Id.***

The joinder of charges is appropriate only if the crimes "are of the same or similar character or are based on the same act or transaction or on 2 or more acts or transactions connected together or constituting parts of a common scheme or plan." Section 971.12(1), STATS. Crimes are of the same or similar character if they are "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, 588 (Ct. App. 1988).

In order to be connected or to constitute parts of a common scheme or plan, "the crimes charged [must] 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." ***Francis v. State***, 86 Wis.2d 554, 560, 273 N.W.2d 310, 313 (1979). The State concedes that the court erred when permitted the drug charge to be joined with the other four counts for trial. Because we are satisfied that the drug charge was an entirely separate and unrelated offense to the other charged offenses, we agree that the court erred when it denied severance of the charges.

Next, we must consider whether the trial court's refusal to grant a separate trial on the drug charge resulted in prejudice to Filter. According to our supreme court, "if the offenses do not meet the criteria for joinder, it is presumed that the defendant will be prejudiced by a joint trial. The state may

[2] The court decided the alcohol offenses because Filter never paid jury fees for those offenses, which were civil forfeitures.

rebut the presumption on appeal by demonstrating the defendant has not been prejudiced by a joint trial." ***State v. Leach***, 124 Wis.2d 648, 669, 370 N.W.2d 240, 251 (1985). If the state shows that "there is no reasonable possibility that the error contributed to the conviction of the defendant as to any of the separate charges," the court's error is harmless. ***Id.*** at 674, 370 N.W.2d at 254.

The determination whether joinder causes prejudice is significant for two reasons. The jury may not be able to separate the evidence relevant to each offense, or the jury may infer that the defendant has a predisposition to commit crimes because he or she is accused of several crimes. ***Id.*** at 672-73, 370 N.W.2d at 253. However, misjoinder may be harmless if the charges are "logically, factually and legally distinct, so that the jury does not become confused about which evidence relates to which crime," or there is overwhelming evidence that the defendant is guilty of each offense. ***Id.*** at 672, 370 N.W.2d at 253.

The State argues that misjoinder was harmless because the evidence of the drug charge was presented separately from the evidence of the other charges, the court instructed the jury to consider each crime separately, and the evidence of guilt as to each charge was overwhelming. We disagree. First, because the jury heard testimony from eleven witnesses regarding different occurrences at each of the cottages on the lake property on September 1, 15, and 16, 1995, it may have been difficult to separate the evidence relevant to the drug charge from the evidence relevant to other charges. One witness testified to facts relevant to both the drug and other charges.

More significantly, the jury may have perceived Filter as a person predisposed to criminal activity because he was charged with five offenses, including the drug charge. The misjoinder of a drug charge, because of the nature of that charge, may be especially prejudicial to the defendant. *See* ***United States v. Terry***, 911 F.2d 272, 277 (9th Cir. 1990). The risk 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" is particularly strong here because the evidence of the drug charge was overwhelming. *See* ***State v. Bettinger***, 100 Wis.2d 691, 696-97, 303 N.W.2d 585, 588 (1981).

Whereas the parties concede that the evidence of guilt as to the drug charge was overwhelming, the evidence as to the sexual assault charge was not. There was no physical evidence of the assault, Filter denied any sexual contact with Sasha, and there were no independent witnesses to the alleged touching. The girls did not wake Michael to tell him about the assault, and did not report it to the police until days later. Although this evidence may have been sufficient to support a finding of guilt, we conclude that it was not overwhelming and, therefore, not harmless error.

The State is correct to point out that the jury was properly instructed to consider the charges separately, in accordance with WIS J I—CRIMINAL 484. *See* ***Leach***, 124 Wis.2d at 673, 370 N.W.2d at 253. In ***Leach***, our supreme court decided: "Only cynicism would suggest this instruction was disregarded by the jury since the proof of the defendant's guilt as to each crime was overwhelming as proven by separate evidence." ***Id.*** Unlike the circumstances in ***Leach***, however, the evidence regarding Filter's guilt was not overwhelming as to each offense. We are not persuaded that the cautionary instruction, in and of itself, eliminated the reasonable possibility that the misjoinder contributed to Filter's conviction on any of the separate charges.

We conclude that the court erred when it permitted the drug charge to be tried with the other charges against Filter. However, because the evidence of guilt on the obstructing, drug, and alcohol charges was overwhelming, we affirm those convictions. As to the sexual assault charge, we reverse and remand for retrial.

By the Court.—Judgment affirmed in part; reversed in part, and cause remanded with directions.

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