COURT OF APPEALS DECISION DATED AND FILED

June 7, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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Nos. 97-3487-CR
97-3488-CR

STATE OF WISCONSIN — **IN COURT OF APPEALS DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLES HOECHERL,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Winnebago County: BRUCE SCHMIDT, Judge. *Affirmed.*

Before Nettesheim, Anderson and Snyder, JJ.

¶1 NETTESHEIM, J. Charles Hoecherl appeals from judgments of conviction for two counts of battery by a prisoner as a repeat offender pursuant to

WIS. STAT. §§ 940.20(1) and 939.62(1)(b) (1995-96).[1] He raises two arguments on appeal. First, Hoecherl claims that the trial court erred in denying his motion to strike a potential juror for cause who said on voir dire that he could "[p]ossibly" put aside his opinion that prisoners were treated "[w]ay too well." He argues that these statements demonstrated a subjective bias on the part of the prospective juror. Second, Hoecherl claims the trial court erred in granting the State's motion to consolidate the two counts of battery for trial to a single jury.

¶2 Based upon the totality of the voir dire examination and the trial court's better position to assess a potential juror's alleged subjective bias, we hold that the court's finding that the challenged prospective juror was not subjectively biased is not clearly erroneous. We also hold that the charges were properly joined because they were part of a common scheme or plan and Hoecherl was not prejudiced by the joinder.

FACTS

¶3 The two charges of battery by a prisoner in this case arose out of two different incidents in the segregation unit at Oshkosh Correctional Institution involving Hoecherl. The first incident occurred on October 15, 1996. That morning Hoecherl and others were creating a disturbance by banging on the doors of their cells. As punishment, Hoecherl and another prisoner were denied their shower privileges.

¶4 After lunch that same day, Hoercherl refused to return his lunch tray because he felt that he had been unfairly singled out for his part in the disturbance that morning. Hoecherl discussed the matter for a while with Officer Chad Martin

[1] All references to the Wisconsin Statutes are to the 1995-96 version.

before telling him, "I will give you the tray, open the trap [door on the cell]." When Martin opened the trap door, Hoercherl bent over and picked up a cup of urine and threw it at the officer, striking him in the chest and face. Afterward, Hoecherl laughed and yelled, "I got your pun[k] ass with piss, you mother fucker." Martin required medical attention because his eye was "red and irritated."

¶5 The second incident occurred on November 26, 1996. On that day, Hoecherl was upset about disciplinary action taken against him on an unrelated matter. In response, Hoecherl covered the window of his cell with paper and refused to remove it when he was asked to do so. Hoecherl also refused to come to the door and put his hands through the trap door so officers could handcuff him. Correctional officers then used "C.N." gas three times and "C.S." gas once to try to gain Hoecherl's compliance with their orders. After this failed as well, a cell extraction team was assembled to enter the cell and remove Hoecherl.

¶6 Once the extraction team entered the cell, Hoercherl was ordered to show his hands and stop resisting. The officers' goal was to take Hoecherl to the floor in order to subdue him. Officer Thomas Koenig was assigned to control Hoecherl's left arm. In the course of the ensuing struggle, Koenig grabbed Hoecherl's left arm in order to force him down to the floor of the cell. When Koenig did this, Hoecherl grabbed the officer's wrist with his right hand and attempted to roll under the bed with him. This maneuver, plus a cell floor flooded with water, caused Koenig to lose his balance and fall. Koenig sustained a bruised elbow and a strained shoulder.

¶7 The State filed separate criminal complaints against Hoecherl as a result of the two incidents. Each complaint alleged that Hoecherl had committed battery by a prisoner and further alleged that Hoecherl was a repeat offender.

¶8 After arraignment and preliminary hearings on both matters, the State moved to join the cases for trial. Hoecherl objected to the motion for joinder, claiming that such action would be unfairly prejudicial. After a hearing on the matter, the trial court granted the State's motion. The court held that joinder was appropriate because it made "economic and administrative sense" and because Hoecherl would not be "unduly prejudiced."

¶9 The matter went to jury trial on March 4, 1997. Voir dire began with the trial court asking various questions of the jury pool to determine the existence of any bias. Satisfied with the prospective jurors' responses, the court turned the questioning over to the parties. Hoecherl's attorney then asked if any of the prospective jurors felt that "prisoners are treated too well in our system." Three of the potential jurors raised their hands. One of them, Samuel Schaffer, thought prisoners were treated "[w]ay too well." When asked if that opinion would affect his ability to be impartial, Schaffer replied: "It's hard to say." Hoecherl then asked the court to strike Schaffer for cause. Before ruling on the request, the court explained to Schaffer that he was entitled to his opinions and that what he was being asked to do was listen to testimony and base his decision on the evidence. When the court asked if he could do that, Schaffer replied: "Possibly." The court then denied Hoecherl's motion to strike Schaffer for cause. The court stated that "Schaffer indicated more than likely he could put that [opinion] aside and would probably be able to base his decision on the testimony and evidence that comes in." Hoecherl then removed Schaffer by peremptory strike.

¶10 The jury ultimately found Hoecherl guilty of both counts, and he appeals.

DISCUSSION

1. Subjective Juror Bias[2]

¶11 Hoecherl contends that Schaffer was subjectively biased and that the trial court erred by failing to grant his motion to strike Schaffer for cause.[3]

¶12 Subjective bias is "bias that is revealed through the words and the demeanor of the prospective juror" during voir dire. ***State v. Faucher***, 227 Wis. 2d 700, 717, 596 N.W.2d 770 (1999). In this search, we look to "the prospective juror's state of mind." ***Id***. As with any inquiry into a person's state of mind, this is an especially difficult determination to make because there are rarely occasions where there is direct proof in the form of a juror explicitly admitting to a prejudice or an inability to set aside a prejudice. *See* ***State v. Jimmie R.R.***, 2000 WI App 5, ¶16, 232 Wis. 2d 138, 606 N.W.2d 196, *review denied*, ___ Wis. 2d ___, 609 N.W.2d 474 (Wis. Feb. 22, 2000) (No. 98-3046-CR). Usually, the only evidence of a prospective juror's subjective bias appears in his or her demeanor. *See* ***id***. Therefore, the determination often turns on a prospective juror's "responses on *voir dire* and a circuit court's assessment of the individual's honesty and credibility, among other relevant factors." ***Faucher***, 227 Wis. 2d at 718. The circuit court's ability to assess the demeanor and disposition of a prospective juror by observing nonverbal signals that do not appear in a written record puts it in a superior position to make such a determination. *See* ***id***. Therefore, a circuit court's factual finding

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[2] Hoecherl does not contend that Schaffer was statutorily biased or objectively biased. *See* ***State v. Kiernan***, 227 Wis. 2d 736, 744-45, 596 N.W.2d 760 (1999).

[3] Besides addressing this issue on the grounds asserted by Hoecherl, the State also recasts the issue in terms of ineffective assistance of trial counsel. But Hoecherl never made this claim in the trial court and did not seek a hearing under ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). We do not decide the issue on this ground.

that a prospective juror is or is not subjectively biased will be upheld on appeal unless it is clearly erroneous.[4] *See* ***id***.

¶13 Hoecherl argues that Schaffer explicitly admitted to a prejudice or an inability to set aside a prejudice. He also argues that, unlike the trial court in ***State v. Erickson***, 227 Wis. 2d 758, 596 N.W.2d 749 (1999), *cert. denied,* 120 S. Ct. 987 (Jan. 24, 2000), the court here did not establish a record sufficient to support its ultimate conclusion that Schaffer could "more than likely" put aside his bias and "probably be able to base his decision on the testimony and evidence." Hoecherl also contends that Schaffer's responses reveal that he was unlikely to be open-minded to Hoecherl's proffered defense, which "reflected protest of his perceived mistreatment, not an intent to inflict physical pain on the prison staff." Finally, Hoecherl cites to ***State v. Mendoza***, 227 Wis. 2d 838, 596 N.W.2d 736 (1999), for the proposition that the trial court erred by not following the supreme court's suggestion to "liberally grant requested strikes for cause to avoid the appearance of bias." ***Id***. at 861.

¶14 We set out the relevant portions of the voir dire examination. Hoecherl put the following question to Schaffer:

> **[Defense Counsel]:** … The Judge and [the district attorney] have already asked, to those of you who have

[4] When the trial court made its juror bias ruling in this case, it did not have the benefit of the line of recent supreme court cases that clarified the law of juror bias. *See* ***State v. Ferron***, 219 Wis. 2d 481, 579 N.W.2d 654 (1998); ***State v. Faucher***, 227 Wis. 2d 700, 596 N.W.2d 770 (1999); ***State v. Kiernan***, 227 Wis. 2d 736, 596 N.W.2d 760 (1999); ***State v. Erickson***, 227 Wis. 2d 758, 596 N.W.2d 749 (1999), *cert. denied*, 120 S. Ct. 987 (Jan. 24, 2000); ***State v. Mendoza***, 227 Wis. 2d 838, 596 N.W.2d 736 (1999). As a result, the court never made a determination regarding whether Schaffer was "subjectively biased" because that was not the language then in use. However, the determination that the court did make was essentially one regarding subjective bias. *See* ***State v. Jimmie R.R.***, 2000 WI App 5, ¶26, 232 Wis. 2d 138, 606 N.W.2d 196, *review denied*, ___ Wis. 2d ___, 609 N.W.2d 474 (Wis. Feb. 22, 2000) (No. 98-3046-CR).

> toured the prison or seen news footage or any movies about prisons, but I guess more realistically, what you personally know about the prison, is there anyone who feels that prisoners are treated too well in our system, that they have too much, whether it's education, meals, any aspect of the prison that you feel they are treated too well.
>
> Mr. Schaffer, you would agree with that, you think prisoners are treated too well?
>
> **[Schaffer]:** Way too well.
>
> **[Defense counsel**]: Does your feelings about that, do you feel that you would not be able to be impartial here today?
>
> **[Schaffer]:** It's hard to say.

¶15 After Hoecherl questioned another potential juror who had responded to the question, the trial court probed the matter further with Schaffer:

> **The Court:** Mr. Schaffer, you have some feelings about how prisoners are treated within the prison by the correctional system itself. And you're entitled to your opinions, but what we are asking you to do today as a juror, is to listen to, to the evidence and the testimony as it comes in and base your decision on, on that evidence and that testimony. Do you feel you could do that sir?
>
> **[Schaffer]:** Possibly.

¶16 Later, the court ruled as follows:

> **The Court:** I'm going to deny [the defense's] motion to strike for cause Mr. Schaffer. I think all of the individuals who raised their hands and answered yes to that question have indicated that they could put that aside. Mr. Schaffer indicated more than likely he could put that aside and would probably be able to base his decision on the testimony and evidence that comes in.

¶17 When viewed in isolation, these passages from the cold transcript lend support to Hoecherl's argument. However, a deeper examination of the voir dire suggests otherwise. During its preliminary questioning of the jury pool, the trial court asked the following question:

> Any of you have any bias or prejudice towards the defendant in this case? Any of you feel simply because Mr. Hoecherl is an inmate in the Correctional System, that he is

> not entitled to a fair trial and that, that the State does not have to prove beyond a reasonable doubt his guilt to these two crimes that are charged?

None of the potential jurors indicated such a bias. Later, after identifying the potential witnesses—primarily corrections officers and inmates—the court asked if there was anyone "who feels that you would give greater weight or lesser weight, to the credibility of a corrections officer[], simply because they are a corrections officer?" None of the potential jurors responded affirmatively. Finally, the court asked the potential jurors if, after hearing the facts of the case, there was anyone who "could not preside over this case and hear this case without any bias or prejudice" or "[knew] any reason why you could not sit as an honest, fair and impartial juror in this case?" Again, none of the potential jurors responded affirmatively.

¶18 These portions of the voir dire examination detract from Hoecherl's claim that Schaffer was subjectively biased. In making its subjective bias determination, the trial court properly considered not just the isolated exchanges between Hoecherl and Schaffer to which Hoecherl cites, but also the responses—or lack thereof—to the questions the court had asked of the panel. In some cases, the responses to the court's questions may be the most telling. As we observed in ***Jimmie R.R.***, 2000 WI App 5 at ¶30, the dynamics of the voir dire process are such that skillful lawyers for both parties will often be able to elicit contradictory responses from prospective jurors supporting their competing positions through the use of leading questions. So it may very well be that the most reliable responses may come from questions asked by the court. This is also why appellate courts "defer to the trial court's better position to assess the prospective juror's credibility and honesty." ***Id***.

¶19 We also note that prospective jurors need not utter "magical words" for determinations of subjective bias to be upheld on appeal. *See* ***State v. Ferron***, 219 Wis. 2d 481, 501, 579 N.W.2d 654 (1998). They also "need not respond to voir dire questions with unequivocal declarations of impartiality." ***Erickson***, 227 Wis. 2d at 776. For example, in ***Erickson***, a case involving sexual assault of a child, the challenged prospective juror had been a victim of sexual assault many years earlier when she was a child. *See* ***id***. at 762. When asked during voir dire whether that experience would make it difficult for her to be fair and impartial, the juror responded: "I'm not sure. It's really hard to tell." *See* ***id***. at 763 n.3. When later asked if she could uphold her oath to be fair and impartial and follow the instructions of law, the juror responded: "I think so." *See* ***id***. at 763 n.4. Our supreme court ultimately upheld the circuit court's determination that the juror was not subjectively biased. *See* ***id***. at 776-77.

¶20 Similarly, in ***State v. Oswald***, 2000 WI App 3, ¶2, 232 Wis. 2d 103, 606 N.W.2d 238, *review denied*, ___ Wis. 2d ___, 609 N.W.2d 473 (Wis. Feb. 22, 2000) (Nos. 97-1219-CR, 97-1899-CR), the defendant challenged several prospective jurors as subjectively biased based upon their exposure to widespread media coverage of the case. In response to questions whether they could set aside this information, the prospective jurors gave answers such as, "Probably, yeah," "As a juror I know I would have to" and "I would try to do my best." *See* ***id***. at ¶¶15-17. On appeal, this court upheld the circuit court's finding that these prospective jurors were not subjectively biased. *See* ***id***. at ¶19. Hoecherl attempts to distinguish Schaffer's "possibly" from "probably," which we upheld in ***Oswald***. *See* ***id***. But this amounts to hairsplitting, and it reinforces why the supreme court has said that "magical words" are not necessary. *See* ***Ferron***, 219 Wis. 2d at 501.

¶21 Finally, we observe that Schaffer's beliefs about the treatment of prisoners did not directly touch upon any important aspect of this case whether viewed from the State's theory of prosecution or Hoecherl's theory of defense. *See* ***Jimmie R.R.***, 2000 WI App 5 at ¶19. Nor do Schaffer's beliefs reflect a "firmly held negative predisposition … regarding the justice system that precludes the juror from fairly and impartially deciding the case." ***Id***. We have already recognized this idea in the objective bias context, *see* ***id.***, and see no reason why the same factors should be relevant in a subjective bias analysis.[5]

¶22 The trial court's follow-up questions to Schaffer refocused on what was truly relevant in this case: did Schaffer's beliefs about the treatment of prisoners preclude him from fairly judging this case on its specific facts? And the court was in a better position than we to assess whether Schaffer's equivocal responses reflected subjective bias. We hold that the trial court's finding that Schaffer was not subjectively biased was not clearly erroneous.

2. Joinder of Charges

¶23 Hoecherl argues that the trial court erred in granting the State's motion to join the two battery by a prisoner charges for trial to a single jury. He claims that the joinder order violated WIS. STAT. § 971.12(1) and (4). Hoecherl reasons that the charges did not meet the criteria for joinder under subsec. (1). Therefore there is a presumption of prejudice which the State did not rebut. Even if the charges were properly joined, Hoecherl further contends that the trial court

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[5] We have also recognized this principle in the context of analyzing the effect of a juror's lack of candor at voir dire. In deciding whether to award a new trial, the first thing a litigant must demonstrate is "that the juror incorrectly or incompletely responded to a *material* question on *voir dire*." ***State v. Wyss***, 124 Wis. 2d 681, 726, 370 N.W.2d 745 (1985) (first emphasis added).

erred in its discretionary determination that the danger of prejudice was outweighed by the public interest in consolidating them for trial.

¶24 Circuit courts address joinder in one of two ways under WIS. STAT. § 971.12: in the context of a motion to join separate charges under subsec. (4); or in the context of a motion to sever joined charges due to prejudicial effect under subsec. (3).

¶25 The propriety of an order joining charges presents a question of law that we review without deference to the circuit court, keeping in mind that the joinder statute is to be construed broadly in favor of the initial joinder. *See* ***State v. Locke***, 177 Wis. 2d 590, 596, 502 N.W.2d 891 (Ct. App. 1993). WISCONSIN STAT. § 971.12(1) directs that joinder is appropriate when two or more crimes "are of the same or similar character or are based on the same act or transaction … or constitut[e] parts of a common scheme or plan." Crimes are of the "same or similar character" when they are the same types of offenses occurring over a relatively short period of time and the evidence of each overlaps. *See* ***State v. Hamm***, 146 Wis. 2d 130, 138, 430 N.W.2d 584 (Ct. App. 1988). Crimes are "parts of a common scheme or plan" when they "have a common factor or factors of substantial factual importance, *e.g.*, time, place or *modus operandi*." ***Francis v. State***, 86 Wis. 2d 554, 560, 273 N.W.2d 310 (1979).

¶26 Hoecherl concedes that "the two offenses were of the same type and they occurred only 42 days apart." His complaint is that the evidence did not overlap to a significant extent because the only common witnesses were himself and the prison registrar who testified to his status as an inmate. Citing ***Francis***, Hoecherl also contends that the two incidents do not constitute "parts of a common scheme or plan" under WIS. STAT. § 971.12(1).

¶27 We disagree. The obvious connection between the two incidents is that both charges were identical—battery by a prisoner, the targets in both cases were corrections officers, and both episodes occurred in the same institution. In addition, the State's theory of prosecution contended that both incidents represented examples of Hoecherl's desire to maintain some semblance of autonomy and control over his environment. This notion was borne out by Hoecherl's trial testimony admitting that he felt unfairly singled out when he was denied a shower for his part in a disturbance on the morning of the first incident. He further admitted that his purpose in throwing the cup of urine on Martin was to "humiliate him." Hoecherl similarly admitted that what he perceived as an unjust disciplinary proceeding against him precipitated the second incident. As a result, he covered the window and barricaded himself in his cell, which necessitated the intervention of a cell extraction team, because he was angry.

¶28 The autonomy and control themes were demonstrated by the following exchanges between Hoecherl and the district attorney at trial:

> Q: If you want to cause a disturbance at that prison, you will do that; isn't that correct?
>
> A: That is my option.
>
> Q: Is it your option, and it's your option to throw urine in a guard's face; is that correct?
>
> A: Yes
>
> Q: It's your option to hurt a guard at the Oshkosh Correctional Institut[ion]; isn't it?
>
> A: Everyone has options.

¶29 Later, the district attorney questioned Hoecherl about his desire to maintain control over his environment:

> Q: You wanted to show them that you were in control, correct?

> A: You can't be in control when you're in segregation, I mean.
>
> Q: You tried your best?
>
> A: You can do minor things, yes.

¶30 Finally, the district attorney questioned Hoecherl about his desire to be an autonomous individual:

> Q: You are your own person?
>
> A: Yes, I am.
>
> Q: And that is what you tried to get across to the guard by throwing urine in [his] face, correct?
>
> A: Sure.
>
> Q: Barricading yourself in your cell, correct?
>
> A: Sure.
>
> Q: By resisting the officers when they tried to take you into custody, correct?
>
> A: I suppose.
>
> Q: And by inflicting pain upon the prison guards when they attempt to cross you; isn't that correct?
>
> A: No.
>
> Q: Because you indicated to the guards that, that when they attempt to cross you, you will get your revenge; isn't that correct?
>
> A: I said it, but not my meaning to hurt them.
>
> Q: So you did indicate, if they cross you they will get what is coming; isn't –
>
> A: I stated, she crossed me. I didn't say – I said, I would get revenge.
>
> Q: And by throwing the urine in the guard's face, was that getting revenge?
>
> A: Humiliation.
>
> Q: So you were trying to get revenge when –
>
> A: Trying to humiliate him.
>
> Q: Barricading and resisting the officer, you were getting revenge; isn't that correct?
>
> A: I'm sorry. It makes them waste their time, yes.

> Q: And that is what you are about, making them waste their time?
>
> A: It's not what I am about. It was a way to, to, I guess use your word, rebel.
>
> Q: That gives you some satisfaction in making the prison guards waste their time; is that correct?
>
> A: Yes.

¶31 Therefore, we conclude that the evidence of each incident bears out the State's claim that Hoecherl's actions evidenced a common scheme or plan.

¶32 Even if the charges were properly joined, Hoecherl argues under WIS. STAT. § 971.12(3), that the trial court should have severed the charges due to unfair prejudice. We first take note that Hoecherl did not bring a formal severance motion as contemplated by the statute. This may well explain the trial court's terse holding that Hoecherl would not be "unduly prejudiced" by the joinder and that an appropriate jury instruction would sufficiently address Hoecherl's prejudice concerns. Nonetheless we choose to address Hoecherl's severance issue on the merits because he did raise prejudice arguments under § 971.12(3) when he resisted the State's joinder motion pursuant to § 971.12(1).

¶33 Once it has been established that the charges satisfy the criteria for joinder, "it is presumed that the defendant will suffer no prejudice from a joint trial." ***State v. Leach***, 124 Wis. 2d 648, 669, 370 N.W.2d 240 (1985). This is a presumption that the defendant can rebut by proving prejudice in his or her particular case. *See* ***State v. Nelson***, 146 Wis. 2d 442, 455, 432 N.W.2d 115 (Ct. App. 1988) ("[I]n making its decision the trial court must balance any potential prejudice to the defendant against the public's interest in avoiding unnecessary or duplicative trials."). Furthermore, our supreme court has previously recognized the propriety of a court's use of a proper cautionary instruction to overcome the

danger of prejudice. *See* ***Peters v. State***, 70 Wis. 2d 22, 31, 233 N.W.2d 420 (1975).

¶34 A motion for severance requires the circuit court to determine what, if any, prejudice would result from joinder of charges. *See* ***Locke***, 177 Wis. 2d at 597. Then, the court weighs this potential prejudice against the public interest in conducting a single trial on the joined charges. *See* ***id***. When such a motion is made, it is addressed to the circuit court's discretion, and we will not find an erroneous exercise of this discretion in balancing these interests unless the defendant establishes that failure to sever caused "substantial prejudice." *See* ***id***.

¶35 In assessing potential prejudice, it is well established that "when evidence of both counts would be admissible in separate trials, the risk of prejudice arising due to a joinder of offenses is generally not significant." ***State v. Bettinger***, 100 Wis. 2d 691, 697, 303 N.W.2d 585 (1981). Thus, the test for failure to sever requires us to apply the law of other acts evidence. *See* ***Locke***, 177 Wis. 2d at 597. Our supreme court has laid out this framework as follows:

> (1) Is the other acts evidence offered for an acceptable purpose under Wis. Stat. § (Rule) 904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident?
>
> (2) Is the other acts evidence relevant, considering the two facets of relevance set forth in Wis. Stat. § (Rule) 904.01? The first consideration in assessing relevance is whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action. The second consideration in assessing relevance is whether the evidence has probative value, that is, whether the other acts evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence.
>
> (3) Is the probative value of the other acts evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by

> considerations of undue delay, waste of time or needless presentation of cumulative evidence?

State v. Sullivan, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998) (footnote omitted).

¶36 We deal with the first two factors in a single discussion. Not only were the two events committed in the same institution and against corrections officers and separated by only forty days, more importantly, they served to demonstrate Hoecherl's common motive and intent—to make the officers pay for any punishment which might be, or had already been, meted out to Hoecherl. This was in keeping with the State's theory that Hoecherl, despite his prisoner status, sought to control the institution and its correctional officers instead of the other way around—a matter not really disputed by Hoecherl in his testimony. Thus, evidence of each event related to Hoecherl's motive and intent as to the other. Likewise, each event related to "a fact or proposition that [was] of consequence to the determination of the action." ***Id.*** at 785.

¶37 Finally, the facts of this case did not create a situation where the probative value of the evidence of each crime was substantially outweighed by the danger of unfair prejudice. "Unfair prejudice results when the proffered evidence has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case." ***Id***. at 789-90. While the facts surrounding each incident were different, we see nothing about either which would cause the jury to use the evidence for an improper purpose.

¶38 We uphold the trial court's discretionary determination that the joinder of the two charges did not unduly prejudice Hoecherl.

CONCLUSION

¶39 Based on our review of the entire voir dire proceedings and the trial court's better position to assess Schaffer's demeanor evidence, we hold that the court's determination that Schaffer was not subjectively biased was not clearly erroneous. We also hold that the trial court properly joined the two charges because they were parts of a common scheme or plan. Finally, we hold that the joinder did not unfairly prejudice Hoecherl.

By the Court.—Judgments affirmed.

Not recommended for publication in the official reports.