COURT OF APPEALS DECISION DATED AND FILED

November 20, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 02-0852-CR **Cir. Ct. No. 00-CF-497**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

COREY LEE FONDON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: WAYNE J. MARIK, Judge. *Affirmed.*

Before Nettesheim, P.J., Brown and Anderson, JJ.

¶1 BROWN, J. Corey Lee Fondon appeals from a judgment of conviction for nine counts of sexual assault arising out of five separate incidents involving three different sixteen- and seventeen-year-old females. Fondon argues that the trial court improperly joined the multiple sexual assault charges, or, alternatively, that they should have been severed. We conclude the counts were

properly tried together and that severance was not warranted. Accordingly, we affirm the judgment of conviction.

¶2 The facts are as follows. In June 2000, the State charged Fondon with five counts of having sex with a child age sixteen or older, in violation of WIS. STAT. § 948.09 (1999-2000),[1] two counts of second-degree sexual assault/sex organ injury, in violation of WIS. STAT. § 940.225(2)(b) (later reduced to charges of third-degree sexual assault), and two counts of third-degree sexual assault, in violation of § 940.225(3), on the basis of alleged sexual assaults on three minor victims between October 1999 and March 2000.

¶3 The first minor testified that she met Fondon in August 1999 and that she and her friends would go to his residence and purchase drugs from him on a weekly basis. She testified that when they went to his house, they drank, smoked marijuana, watched television, and listened to music. She stated that in October, she went to Fondon's apartment with a friend where they drank alcohol and smoked marijuana. Later that evening, Fondon and the minor went into his bedroom and engaged in sexual intercourse. She testified that she went to Fondon's apartment fifteen to twenty times after that encounter. Sometime in November, she went to Fondon's to buy marijuana and accompanied him when he left the apartment to sell marijuana. While in Fondon's car, she declined Fondon's requests that she have sex with him, but Fondon proceeded to engage in nonconsensual sexual intercourse with the minor. One week later, the minor tested positive for chlamydia.

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶4 The second minor testified that after she met Fondon in October 1999, through one of the other victims and another friend, she would visit his apartment to purchase and use marijuana on a weekly basis. She testified that she would go to his residence to smoke marijuana and watch movies. In February 2000, while she was visiting Fondon's apartment, he called her into the bathroom, turned up the music, shut off the lights and, without her consent, engaged in sexual intercourse. She further testified that in March 2000, she returned to Fondon's apartment to buy marijuana, whereupon Fondon asked her to come into his bedroom and the two engaged in sexual intercourse.

¶5 The third minor, a cousin of one of the other victims, also went to Fondon's apartment several times in order to buy marijuana. She testified that she would go to Fondon's residence to listen to music and watch television. In March 2000, Fondon called her and asked her to come over to watch a movie and have pizza. After she arrived, Fondon invited her into his bedroom to talk and, despite her protests, he engaged in sexual intercourse. About a week later, the third minor discovered she had herpes.

¶6 Fondon subsequently filed a motion to sever the charges by victim. The trial court denied the motion, finding that the counts were properly joined under WIS. STAT. § 971.12(1) and that Fondon had not demonstrated prejudice sufficient to warrant severance. Fondon appeals from his subsequent conviction and sentence.

¶7 When considering a motion for joinder, the court essentially follows a two-step process. First, the court examines the propriety of the initial joinder under WIS. STAT. § 971.12(1), which is a question of law that we review de novo. ***State v. Hamm***, 146 Wis. 2d 130, 138, 430 N.W.2d 584 (Ct. App. 1988). Second,

if the court determines that joinder was proper, it examines whether the defendant is nonetheless entitled to severance. ***State v. Locke***, 177 Wis. 2d 590, 597, 502 N.W.2d 891 (Ct. App. 1993). A motion for severance is addressed to the trial court's discretion, and the trial court's denial of the motion will not be overturned on appeal unless the defendant can demonstrate that the failure to sever caused substantial prejudice. ***Id.***

¶8 WISCONSIN STAT. § 971.12(1) governs whether separate charges can be properly joined for trial and is to be construed broadly in favor of the initial joinder. ***Locke***, 177 Wis. 2d at 596. According to the statute, joinder is proper if (1) the combined charges "are of the same or similar character," or (2) "are based on the same act or transaction," or (3) are based on "2 or more acts or transactions connected together or constituting parts of a common scheme or plan." Sec. 971.12(1). In order for charges to be of a same or similar character, the crimes (1) must be of the same type of offense, (2) must be occurring over a relatively short period of time, and (3) the evidence as to each must overlap. ***Hamm***, 146 Wis. 2d at 138.

¶9 Fondon concedes that the crimes alleged are the same type of offense but argues that the crimes, which occurred between October 1999 and March 2000, did not occur over a relatively short period of time and the evidence as to each crime does not overlap. Fondon asserts that the approximately five-month period during which the alleged acts occurred is not a relatively short period of time within the meaning of the joinder test. We reject this argument. First, we note that the period of time between each of the individual acts was very short and, thus, the complaint contained an allegation of ongoing and similar criminal behavior during that approximately five-month period. Second, and more importantly, in both ***Locke*** and ***Hamm***, we concluded that a period of two years

was sufficiently short to justify joinder. ***Locke***, 177 Wis. 2d at 596; ***Hamm***, 146 Wis. 2d at 140. Fondon has not offered any reason why a different conclusion is mandated in his case.

¶10 Fondon next argues that the evidence as to each crime does not overlap. The trial court found that in each case Fondon would woo and seduce the minor through the provision of drugs in order to develop a relationship of trust and confidence, and then, by creating a party-like atmosphere, would lure them into a more secluded area, including a bedroom, bathroom and automobile, in order to engage in the assaultive behavior. The trial court concluded that the similarities in the actions taken by Fondon prior to his sexual assaults on the three girls were sufficient to support an inference that he followed a common plan with respect to each, and, as a result, the evidence as to each victim would be admissible at separate trials pursuant to the "plan" exception to WIS. STAT. § 904.04(2).

¶11 WISCONSIN STAT. § 904.04(2) provides that evidence of other acts of misconduct may be offered for limited purposes of showing proof of a plan. Evidence of crimes may be admitted to establish a plan where it establishes a definite prior design, plan or scheme, which includes the doing of the act charged. ***State v. Spraggin***, 77 Wis. 2d 89, 99, 252 N.W.2d 94 (1977). There must be "such a concurrence of common features that the various acts are materially to be explained as caused by a general plan of which they are the individual manifestations." ***Id.*** (citation omitted). Here, as the trial court explained, the basic facts surrounding Fondon's modus operandi demonstrate that he would groom the minors by supplying them with drugs and then lure them into compromising situations so as to facilitate sexual activity. Thus, the evidence demonstrates a strong concurrence of common features sufficient to show a plan and the evidence of each crime would be admissible at separate trials pursuant to § 904.04(2). The

evidence from each crime therefore overlaps. Because the charges against Fondon satisfy the three prongs of the "same or similar character" test set forth in WIS. STAT. § 971.12(1), we conclude they were properly joined.

¶12 We next address whether the trial court erred in denying Fondon's motion for severance. WISCONSIN STAT. § 971.12(3) provides that even after initial joinder, the court may order separate trials for the charges if it appears that a defendant is prejudiced by a joinder of the counts. In ***Locke*** we explained, "In evaluating the potential for prejudice, courts have recognized that, when evidence of the counts sought to be severed would be admissible in separate trials, the risk of prejudice arising from joinder is generally not significant." ***Locke***, 177 Wis. 2d at 597. The same factors that rendered joinder of the charges appropriate support the trial court's discretionary determination not to sever the charges. As discussed above, the evidence from the counts Fondon seeks to sever would be admissible in separate trials under the "plan" exception to WIS. STAT. § 904.04(2). *See* ***id***. Because evidence of each crime would be admissible in separate trials, the trial court did not misuse its discretion when it denied Fondon's motion for severance. We therefore affirm the judgment of conviction and sentence.

By the Court.—Judgment affirmed.

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