

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**September 28, 2010**

A. John Voelker  
Acting Clerk of Court of Appeals

**NOTICE**

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

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 Nos. 2009AP1775-CR  
2009AP1776-CR  
2009AP1777-CR**

**Cir. Ct. Nos. 2007CF3467  
2007CF4808  
2007CF4814**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DONALD LEE COOPER,**

**DEFENDANT-APPELLANT.**

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APPEAL from judgments of the circuit court for Milwaukee County:  
JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. In separate Criminal Complaints, the State charged Donald Lee Cooper with the first-degree intentional homicide of Eugene Chaney, as party to a crime, and with the kidnapping and aggravated battery of Leopodium

Ford, as party to a crime. The latter Complaint also charged Cooper with possession of cocaine, more than forty grams, with intent to deliver, as party to a crime. The only issue on appeal is whether the Complaints were properly joined for trial. Because joinder was appropriate under the law and facts of these cases, we affirm.

## **BACKGROUND**

¶2 At trial, several co-actors of Cooper testified as part of the State’s case. The following factual summary is derived from that testimony, and from the testimony of the kidnapping victims.

¶3 In the weeks before April 7, 2000, Michael Lock had his uncle, Carl Davis, and another man dig a grave next to a house that Lock owned at 4900 West Fiebrantz Street. Lock was the leader of the Body Snatchers, a criminal gang involved in drug dealing, robbery, and prostitution. The defendant, Donald Lee Cooper, was the “muscle” for Lock’s gang—his nickname was “Killer Coop.”

¶4 On April 7, 2000, Eugene Chaney went to a house located at 4720 North 53rd Street to meet with Lock. Chaney was a drug dealer, and he and Lock had been talking for about one month about pooling resources to purchase a large amount of drugs. Lock had directed another gang member, Louis Jackson, to “stake” out Chaney before the deal to make sure that Chaney was not a police informant. After learning that Chaney had “got popped off in Oak Creek for like \$178,000,” Jackson told Lock that Chaney “was truly working with the Feds.”

¶5 When Chaney arrived at the 53rd Street house, he was met by Lock, Cooper, and another man, Rodney Lee. The men took the money that Chaney had brought with him for the deal, bound his hands and feet with duct tape, and forced

him onto the kitchen floor. Chaney repeatedly begged for his life, telling the men that they had his money, and assuring them that he would not tell anyone if they just let him go.

¶6 Lock told Lee and Davis to get rid of Chaney's car, and they drove it to a parking lot several miles west of the house and abandoned it. Davis took Lee home. When Davis returned to the 53rd Street house, Lock told him to back his vehicle up to the back door. Lock and Cooper put Chaney into the back seat of Davis's Chevrolet Suburban. Chaney was still bound, and he continued to beg for his life until Cooper hit him in the face. Davis drove the men to the Fiebrantz Street house where he had previously dug the grave. Davis pulled the Suburban into the garage. After Chaney was pulled from the vehicle, Cooper put a plastic bag over Chaney's head, and he told Lock and Davis to leave and close the garage door. They did so. Davis testified that after he left the garage, he could hear the sound of someone struggling for air. Lock told Davis to "be cool."

¶7 After about fifteen to twenty minutes, Cooper came out of the garage. Cooper had put Chaney's body into the grave that Davis had dug. Davis finished covering Chaney's body with dirt and poured a concrete slab over the body.

¶8 On May 11, 2002, Leopodium Ford, another drug dealer, went to the 53rd Street house to sell one-half kilogram of cocaine to Ed Hankins, a member of Lock's gang. Ford's cousin, Desha Cox, was with him. When they entered the house, Hankins locked the door behind them, and he told Ford that his money was in the kitchen. When Ford got to the kitchen, Hankins pulled a gun on him, and Ford and Cox were jumped from behind by two men. The men used duct tape to tie Ford's ankles together. Ford's hands were tied behind his back with duct tape

and a hanger, and his eyes were blindfolded with duct tape. Cox's eyes were taped shut and his hands were tied with duct tape. The men took Ford's cocaine from him and started beating him and demanding that he tell them where he kept his money and drugs. Ford told the men that they already had all of his money and drugs. They continued to beat Ford. Hankins told Ford that they had been "watching" and "following" Ford and knew he had more money. Cooper ripped open Ford's pants and poured hot chicken grease on his legs and arms.

¶9 When Ford asked the men why they were doing this, Hankins said that they were the "Body Snatchers," explaining that they torture and kill people for a living. Ford testified that he heard Cooper, whose voice he recognized, suggest that Cox be sent to get more money from Ford's house. Ford also testified that he heard Lock's voice, which he recognized from "gambles" he had attended.

¶10 After Cooper poured the hot chicken grease on Ford, he took Cox into the basement where Davis was standing guard. Cox told Cooper that he knew where Ford had some money back at Ford's house. Cox and Lock went to Ford's house and Cox got about \$3,000 and gave it to Lock. Eventually, Ford convinced his captors that he would "put something together" and the men eventually released Ford and Cox.

¶11 As noted, the State filed separate Criminal Complaints and then moved for joinder, arguing that the crimes were factually similar. The State noted that each victim was a drug dealer who had been set up by Lock or someone acting at Lock's direction; each victim had been restrained in a similar fashion; the house on 53rd Street was involved in both crimes, and Cooper and Lock were involved in each incident. Cooper opposed the motion. The circuit court granted the motion noting that each incident had "the issue of the robbing of drug dealers, the

restraint of [them], ... the abuse of [them], some commonality of witnesses, [and] the residence.”<sup>1</sup>

## DISCUSSION

¶12 The jury found Cooper guilty of Chaney’s murder and of Ford’s kidnapping and aggravated battery. The only issue raised by Cooper on appeal is whether the Complaints were properly joined for trial.

¶13 WISCONSIN STAT. § 971.12 addresses joinder, and provides:

(1) JOINDER OF CRIMES. Two or more crimes may be charged in the same complaint, information or indictment in a separate count for each crime if the crimes charged, whether felonies or misdemeanors, or both, 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 ....

....

(4) TRIAL TOGETHER OF SEPARATE CHARGES. The court may order 2 or more complaints, informations or indictments to be tried together if the crimes ... could have been joined in a single complaint, information or indictment. The procedure shall be the same as if the prosecution were under such single complaint, information or indictment.

“To be of the ‘same or similar character’ under ... § 971.12(1), crimes must be the same type of offenses occurring over a relatively short period of time and the

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<sup>1</sup> The circuit court denied joinder as to a racketeering charge that had been filed against Lock. That ruling, and Cooper’s guilty plea to a third Complaint alleging he was a felon in possession of a firearm, are not involved in these appeals.

evidence as to each must overlap.” *State v. Hamm*, 146 Wis. 2d 130, 138, 430 N.W.2d 584, 588 (Ct. App. 1988).

¶14 Appellate review of a joinder ruling is a two-step process. *State v. Locke*, 177 Wis. 2d 590, 596, 502 N.W.2d 891, 894 (Ct. App. 1993). First, this court “reviews the initial joinder determination. Whether the initial joinder was proper is a question of law that we review without deference to the trial court, and the joinder statute is to be construed broadly in favor of the initial joinder.” *Ibid.*

¶15 We conclude that the initial joinder was proper. The contextual similarity between the crimes is striking. In both cases, a drug dealer was chosen as a victim by Lock and his gang, and considerable time was spent setting the victim up and luring him into a drug transaction. Both drug deals were to occur at the house on 53rd Street. In both instances, the victim was bound with duct tape and forced to beg for mercy. Crimes that involve acts exhibiting the same *modus operandi* tend to establish a common scheme or plan and are properly joined. *See Francis v. State*, 86 Wis. 2d 554, 560–561, 273 N.W.2d 310, 313 (1979). Lock’s violence-driven attempt to corner the drug-dealing market in Milwaukee and Cooper’s role as the “muscle” in that plan was the “common scheme or plan” plainly evident from these facts.

¶16 Additionally, the participants in the crimes overlap—Lock and Cooper were main players in both the murder of Chaney and the kidnapping and aggravated battery of Ford. Davis was also a participant in both incidents, and he testified at length about both crimes. Overlapping evidence supports a conclusion that joinder is proper. *See Hamm*, 146 Wis. 2d at 138, 430 N.W.2d at 588.

¶17 The two-year gap between Chaney’s murder and Ford’s kidnapping and aggravated battery is not problematic. Whether a time gap between two offenses is a “relatively short period of time” for purposes of joinder is determined on a case-by-case basis, and the more similar the offenses, the longer the permissible gap. *See id.*, 146 Wis. 2d at 139–140, 430 N.W.2d at 589 (quotation marks omitted). In *Hamm*, sexual assaults committed eighteen months apart were held to be properly joined because the “incidents [we]re greatly similar and the [evidence] overlap [wa]s substantial.” *Id.*, 146 Wis. 2d at 140, 430 N.W.2d at 589. Here, Cooper and others were engaged in an ongoing criminal enterprise. Although the end results of the incidents differed, in the sense that Chaney was killed and Ford was not, the other circumstances surrounding the crimes were sufficiently similar as to support joinder.<sup>2</sup> Therefore, the initial joinder of the two Complaints was proper.

¶18 The next question is whether Cooper was prejudiced by the joinder such that the circuit court should have ordered separate trials. *See Locke*, 177 Wis. 2d at 597, 502 N.W.2d at 894; *see also* WIS. STAT. § 971.12(3) (“If it appears that a defendant ... is prejudiced by a joinder of crimes ... the court may order separate trials of counts, grant a severance ... or provide whatever other relief justice requires.”). “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 because of joinder is

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<sup>2</sup> Cooper contends that murder is “not like any other crime,” suggesting that murder should rarely, if ever, be joined with other crimes. We reject Cooper’s suggestion. The facts of the crimes drive a joinder analysis. If the facts of the crimes are sufficiently similar, or another statutory joinder criterion is met, the fact that one of the crimes is murder does not preclude joinder.

generally not significant.” *Locke*, 177 Wis. 2d at 597, 502 N.W.2d at 894. Thus, this court’s consideration of whether joinder was prejudicial “turns to an analysis of other crimes evidence under *Whitty v. State*, 34 Wis. 2d 278, 149 N.W.2d 557 (1967).” *Locke*, 177 Wis. 2d at 597, 502 N.W.2d at 894.

¶19 “[E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith.” WIS. STAT. § (RULE) 904.04(2)(a). However, other acts evidence is admissible “when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” *Ibid.*

¶20 When determining the admissibility of other acts evidence, courts employ a three-step “analytical framework:”

(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? *See* WIS. STAT. § (RULE) 904.03.



*State v. Payano*, 2009 WI 86, ¶60, 320 Wis. 2d 348, 386–387, 768 N.W.2d 832, 850–851 (discussing the “definitive” case of *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998)).

¶21 The other acts evidence was offered for a proper purpose. The State was obligated to prove Cooper’s intent in all of the crimes that he was charged with—first-degree intentional homicide, kidnapping, aggravated battery, and possession of cocaine with intent to deliver. The evidence of the murder and the kidnapping would have been cross-admissible at separate trials to establish that Cooper’s conduct was not an accident or a mistake. Moreover, as the State aptly notes, “evidence of both the kidnapping and murder charges at hypothetical separate trials would have provided a context in which the jury could understand the Body Snatcher’s particularly violent lifestyle and Cooper’s motive for kidnapping, killing, and torturing his victims.” We agree the evidence was offered for a proper purpose.

¶22 Further, the evidence was relevant. Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” WIS. STAT. § (RULE) 904.01. As noted above, the other acts evidence provided context and motive for Cooper’s conduct.

¶23 The probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, confusion or delay. The other-acts evidence involved in this case was certainly inflammatory and gruesome—Cooper’s smothering of Chaney and his pouring of hot chicken grease on Ford are particularly chilling. However, as we have observed throughout this opinion, the crimes against Chaney and against Ford were similar in time, place, and

circumstances. That similarity “render[s] the other crimes evidence highly probative, [and] outweigh[s] the danger of prejudice.” *State v. Davidson*, 2000 WI 91, ¶75, 236 Wis. 2d 537, 574–575, 613 N.W.2d 606, 624. Accordingly, the potential prejudice did not substantially outweigh the probative value and relevance.

*By the Court.*—Judgments affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

