COURT OF APPEALS
DECISION
DATED AND RELEASED

January 30, 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, 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. 94-2308-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

EUGENE KEELER,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed*.

Before Sullivan, Fine and Schudson, JJ.

PER CURIAM. Eugene M. Keeler appeals from a judgment of conviction, following a jury trial, on three counts of sexual assault of a child, contrary to § 948.02(2), STATS.; two counts of sexual intercourse with a child over sixteen years of age, contrary to § 948.09, STATS.; and one count of theft as a party-to-a-crime, contrary to §§ 939.05 and 943.20(1)(a) and (3)(c), STATS. Keeler was sentenced to thirty-one years in prison. On appeal, Keeler argues that: (1)

the trial court erred when it refused to sever counts one and two from counts three through six; (2) the trial court's failure to record the voir dire was plain error; and (3) the trial court erred in concluding that he was not entitled to an evidentiary hearing on his postconviction motion regarding jury tampering. Keeler also requests that even if the trial court properly denied his motion for an evidentiary hearing, this court should, nonetheless, remand for a hearing. The trial court ruled that Keeler's postconviction motion regarding jury tampering was insufficient because it contained only general allegations. Keeler explains in his brief that the names of the detective who allegedly tampered with the jury and the jurors who were tampered with were deliberately not disclosed in the postconviction motion because he wanted to be able to subpoena the testimony of the parties involved without disclosing in advance everything that his investigation revealed. We affirm.

The charges against Keeler were joined in the amended complaint. During the pre-trial proceedings, Keeler moved for the severance of counts one and two (sexual assaults involving Keeler's daughter) from counts three through six (sexual assaults involving one fifteen-year-old and one sixteen-year-old friend of Keeler's daughter and felony theft from the mother of the sixteen-year-old). The trial court found that the charges were properly joined and, therefore, denied Keeler's motion to sever the charges. The trial court determined that the offenses were all part of a "long-term kind of scheme," and that the twenty-eight month period in which the crimes were committed was a relatively short period of time. The trial court also determined that Keeler was not prejudiced by the joinder. The trial court stated, however, that the jury would be given careful instructions on how to assess the evidence. *See* ***Peters v. State***, 70 Wis.2d 22, 31, 233 N.W.2d 420, 425 (1975) (danger of prejudice in a trial together with multiple charges can be overcome by the giving of a proper instruction).

Keeler contends that the trial court erred by joining for trial counts one and two with counts three through six. Section 971.12(1) and (3), STATS., provides in pertinent part:

> **(1)** JOINDER OF CRIMES. Two or more crimes may be charged in the same complaint ... in a separate count for each crime if the crimes charged ... 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....
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> ....
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> **(3)** RELIEF FROM PREJUDICIAL JOINDER. If it appears that a defendant or the state is prejudiced by a joinder of crimes ... in a complaint ... or by such joinder for trial together, the court may order separate trials of counts ... or provide whatever other relief justice requires....

"To be of the same or similar character under § 971.12(1), STATS., crimes must be 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). There is no per se rule concerning what is a "relatively short period of time." ***Id.***, 146 Wis.2d at 139-140, 430 N.W.2d at 589. The permissible time period is dependent upon the similarity of the offense and the extent the evidence overlaps. ***Id.***, 146 Wis.2d at 140, 430 N.W.2d at 589. Whether charges are properly joined is a question of law, reviewed *de novo*. ***State v. Hoffman***, 106 Wis.2d 185, 208, 316 N.W.2d 143, 156 (Ct. App. 1982).

The victims of the sexual assaults were all teenage girls who were promised "magical benefits" by Keeler if each girl would have sexual relations with him. Keeler presented himself as a warlock to the three teenage girls, who wanted to create a "clan-like" atmosphere of young people who were required to do whatever Keeler asked of them. The crimes were properly joined under § 971.12(1), STATS.

Keeler also argues that the trial court erroneously exercised its discretion when it denied his motion to sever because of the danger of prejudice to his defense. Even where joinder is proper, a defendant may move to sever counts based on prejudice. Section 971.12(3), STATS. A motion to sever presents a discretionary decision requiring the trial court to weigh the potential for prejudice to the defendant against the public's interest in avoiding multiple trials. ***Hoffman***, 106 Wis.2d at 209, 316 N.W.2d at 157. In order for an appellate court to conclude that the trial court erroneously exercised its discretion in

denying a motion to sever, a defendant must establish that the failure to sever the counts raised substantial prejudice to his or her defense. ***Id.*** We review the evidence to determine if evidence of each joined crime would be admissible in each trial if the crimes were tried separately. ***Id.***, 106 Wis.2d at 208-210, 316 N.W.2d at 157. This test requires that we review the evidence of the separate offenses for its admissibility as other-acts or other-crimes evidence under RULE 904.04(2), STATS.[1] ***Hoffman***, 106 Wis.2d at 210, 316 N.W.2d at 157.

While evidence of other acts or other crimes is not admissible to prove a defendant's character, it is admissible if offered for other purposes, such as motive, plan or intent. *See* RULE 904.04(2), STATS. When deciding to admit evidence of other crimes or acts, the trial court must first determine if the evidence is admissible under § 904.04(2). ***State v. Kuntz***, 160 Wis.2d 722, 746, 467 N.W.2d 531, 540 (1991). If so, the trial court must then determine whether the probative value is substantially outweighed by its prejudicial effect. ***Id.*** Here, as indicated by our discussion regarding joinder, evidence from the assaults was relevant as to motive and plan. The evidence involving all three victims established Keeler's plan and motive to get sexual satisfaction from young teenage girls while claiming to have some magical witch-like influence that he would share with them in exchange for sex. Clearly, evidence from the three assaults would be cross-admissible under § 904.04(2). Also, the probative value of such evidence was not substantially outweighed by the danger of unfair prejudice. *See* RULE 904.03, STATS. Further, the trial court appropriately instructed the jury that each count charged a separate crime and must be considered separately. Keeler was not prejudiced by the joinder and we affirm the trial court's decision not to sever the counts.

Keeler also argues that the trial court erred when it refused to record all of the voir dire. He contends that SCR 71.01(2)(a) requires the trial court to record the voir dire. SCR 71.01(2)(a) states that "[a]ll testimony" "shall

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[1] RULE 904.04(2), STATS., provides:

> OTHER CRIMES, WRONGS, OR ACTS. Evidence 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. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

be reported." Contrary to Keeler's assertions, SCR 71.01(2)(a) does not require the trial court to record the voir dire. Jury-selection proceedings are not "testimony" within the meaning of the rule. "Testimony" is "[e]vidence given by a competent witness under oath or affirmation." BLACK'S LAW DICTIONARY 1476 (6th ed. 1990). Clearly, potential jurors are not witnesses and do not present evidence under oath. *Cf.* RULE 906.06(1), STATS. (a juror may not testify as a witness in the same trial).

Finally, Keeler argues that the trial court should have granted an evidentiary hearing on his postconviction motion, which alleged that a police officer who was present in the courtroom during trial improperly influenced the jurors by making contact with some of the jurors. In order to warrant an evidentiary hearing on a postconviction motion, counsel must allege facts which, if true, warrant the relief sought; general and conclusory allegations are insufficient to warrant a hearing. ***State v. Washington***, 176 Wis.2d 205, 214-215, 500 N.W.2d 331, 335-336 (Ct. App. 1993). Keeler's motion for an evidentiary hearing was not supported by an affidavit regarding the facts surrounding the jury tampering allegations. This court will only consider evidence presented in sworn affidavits on the affiant's own knowledge when considering whether an evidentiary hearing should be granted. *See* ***State v. Bruckner***, 151 Wis.2d 833, 864, 447 N.W.2d 376, 389 (Ct. App. 1989) (A defendant must submit affidavits or sworn or otherwise reliable statements of witnesses in support of a motion for an evidentiary hearing.). Therefore, Keeler's postconviction motion was insufficient to entitle him to an evidentiary hearing.

Keeler, however, argues that even if the trial court was justified in denying an evidentiary hearing on this issue, this matter should, nonetheless, be remanded in light of the information presented in his brief. As noted, Keeler states that the names of the detective who allegedly tampered with the jury and the jurors who were tampered with were not identified in the postconviction motion because he did not want to jeopardize his ability to subpoena the testimony of the parties involved. According to Keeler, such advance disclosure would have compromised his own investigation. We decline to accept Keeler's proposal to remand this matter, noting that our review is based upon the record Keeler created at trial. *See* ***State v. Burke***, 148 Wis.2d 125, 127 n.1, 434 N.W.2d 788, 789 n.1 (Ct. App. 1988), *rev'd on other grounds*, 153 Wis.2d 445, 451 N.W.2d 739 (1990).

By the Court.—Judgment and order affirmed.

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