COURT OF APPEALS
DECISION
DATED AND RELEASED

December 26, 1995

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(1), 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. 95-1851-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent.

v.

MICHAEL L. SELLERS,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: ROBERT O. WEISEL, Reserve Judge. *Affirmed.*

WEDEMEYER, P.J.[1] Michael L. Sellers appeals from a judgment entered after a jury convicted him of one count of battery, contrary to § 940.19(1), STATS. He claims that the trial court erred in joining two separate battery complaints for one trial. Because the trial court did not err in joining the two separate battery counts for one trial, this court affirms.

[1] This appeal is decided by one judge pursuant to § 752.31(2), STATS.

I. BACKGROUND

Sellers was charged with two counts of battery in separate complaints. The first charge stemmed from an incident that occurred on August 29, 1993. Sellers's girlfriend, Debra Bates, alleged that he "slapped and choked her, causing pain." The second charge stemmed from an incident that occurred eight months later, on May 1, 1994. Bates again alleged that Sellers struck her numerous times to the face, knocked her to the floor and kicked her. Both incidents occurred at 1736 North 36th Street in the City of Milwaukee.

The State moved to join the two separate complaints for trial. Sellers objected to joinder claiming that trying the complaints together would prejudice his defense because he claimed the August battery never happened, but that the May battery occurred in self-defense. The trial court granted the State's motion for joinder and the case was tried to a jury. The jury convicted Sellers of the battery stemming from the May 1 incident, but acquitted him of the alleged battery relating to the August 29 incident. Sellers now appeals.

II. DISCUSSION

This court's review of a trial court's decision to join separate crimes is a question of law reviewed *de novo*. *See* ***State v. Hoffman***, 106 Wis.2d 185, 208, 316 N.W.2d 143, 156 (Ct. App. 1982). The joinder statute provides that separate crimes can be joined for trial if they are of the "same or similar character." Section 971.12, STATS.[2] "Crimes are of the same or similar character if they are 'the same type of offense occurring over a relatively short period of time, and the evidence as to each count overlaps.'" ***Hoffman***, 106 Wis.2d at 208, 316 N.W.2d at 156 (citation and footnote omitted).

In reviewing the two counts of battery that were joined in the instant case, this court notes that both incidents alleged blows to the victim's face; both incidents occurred at the same location; both incidents involved the same victim; and the eight-month lapse between the incidents satisfies the "relatively short period of time" requirement. *See* ***State v. Hamm***, 146 Wis.2d 130, 138-40, 430 N.W.2d 584, 588-89 (Ct. App. 1988). Based on these observations, the two separate battery charges appear to be of the same or similar character.

In addition, as amply stated by the trial court, the evidence as to each battery overlaps:

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[2] Section 971.12(1) and (4), STATS., 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.
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> ....
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> (4) TRIAL TOGETHER OF SEPARATE CHARGES. The court may order 2 or more complaints, informations or indictments to be tried together if the crimes and the defendants, if there is more than one, could have been joined in a single complaint, information or indictment.

> The acts of battery alleged on one date would be admissible in relation to the other to prove the critical element of intent. It may also be motive, but clearly intent being an issue in both, and particularly in light of the fact that you've indicated that self-defense may be an issue in one of these cases, the intent of a prior wrongful act in a battery certainly is relevant to both the defendant's state of mind, as well as whether or not he really was defending himself or intended to harm the individual identified in the complaint.

Accordingly, this court concludes that the requirements for joinder were sufficiently satisfied and, therefore, the trial court did not err in granting the State's motion seeking joinder.

Sellers claims that he was prejudiced by the joinder because his defense was different with respect to the charges, i.e., his defense to the August incident was that it never happened and his defense to the May incident was it occurred in self-defense. Sellers indicated he therefore would testify in the self-defense case, but exercise his right to remain silent in the other. This court is not persuaded by this argument. Wisconsin courts do not find joinder improper merely because a defendant wishes to testify on one charge, but not the other. *See* ***Hamm***, 146 Wis.2d at 140, 430 N.W.2d at 589. If this were the controlling factor, joinder decisions would be decided by defendants rather than trial courts. ***Id.***

Sellers also claims that he was prejudiced by the joinder because of jury confusion. This court does not agree. An instruction was given, directing the jury to consider each charge separately, and to not let the verdict on one count affect the verdict on the other count. Absent any specific evidence to the contrary, this court presumes that the jury followed this instruction. *See* ***State v. Deer***, 125 Wis.2d 357, 364, 372 N.W.2d 176, 181 (Ct. App. 1985).

By the Court. – Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.