

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

July 3, 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**

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**No. 95-1900-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**GEORGE T. WOLFER,**

**Defendant-Appellant.**

APPEAL from a judgment of the circuit court for Jefferson County:  
JOHN M. ULLSVIK, Judge. *Affirmed.*

Before Eich, C.J., Sundby and Vergeront, JJ.

EICH, C.J. George Wolfer appeals from a judgment convicting him of wiretapping--taping telephone conversations between his estranged wife, Billie Wolfer, and Lowell Bollinger. He was acquitted on two other wiretapping charges and on a charge of murdering Bollinger.

He raises a single issue: whether the trial court erroneously exercised its discretion when it denied his motion to sever the homicide and wiretapping charges. He concedes that the charges are "technically joinable" under the joinder statute. He challenges only the trial court's determination that joining the charges would not result in substantial prejudice to his case. Wolfer has not persuaded us that the court misused or exceeded its discretion in ruling as it did, and we therefore affirm the judgment.

The underlying facts are undisputed and may be briefly stated. Although Wolfer and his wife had been separated for years and had decided to divorce, they remained friends and lovers, frequently spending the night with each other. Bollinger was a friend of the Wolfers and Billie's attraction to him was known by Wolfer. Wolfer had taped Billie's telephone conversations for years--both while she was at his residence and while she was in her own home. She was aware of the taping at Wolfer's home, but not at hers.

The jury acquitted Wolfer of two of the wiretapping charges--those involving taps at his own residence--and convicted him of the single charge relating to taps at Billie's house. As indicated above, he was also acquitted of the murder charge.

Prior to trial, Wolfer moved for severance. He claimed not only that joinder was legally improper--a claim which, as indicated, he does not pursue on appeal--but also that he would be prejudiced by joinder because he wished to testify in support of an alibi with respect to the homicide charge, but remain silent on the wiretapping charges because he felt his testimony would be incriminating as to those charges.

The trial court denied the motion in what the State concedes is an "ambiguous" decision--ruling that wiretapping evidence would be admissible on the homicide charge to show intent and plan, but that, if the wiretapping charge were to be tried separately, "the Court would not allow the [jury] to know that the [other] crime was homicide so as to avoid undue prejudice or passion in the case." The court also concluded that

to sever these crimes would be an inefficient use of the legal system, inconvenien[t] to witnesses, and the Court is not sufficiently persuaded that the Defendant would incriminate himself on the wiretapping charge if he was compelled to testify in the homicide charge in order to defend himself against it.... And, therefore, the Defendant's motion to sever is denied.

A motion to sever asks the trial court to determine what, if any, prejudice would result from a joint trial and to weigh any potential undue prejudice against the interests of the public in conducting a joint trial. *State v. Locke*, 177 Wis.2d 590, 597, 502 N.W.2d 891, 894 (Ct. App. 1993). On appeal, we will not find an erroneous exercise of discretion in the balancing of these competing interests unless the defendant can establish that the failure to sever caused "substantial prejudice." *Id.* It is essentially a *Whitty*, or "other-wrongs," analysis: "First, the court must find that the evidence fits within one of the exceptions in sec. 904.04(2), Stats. Second, the trial court must exercise its discretion to determine whether any prejudice resulting from such evidence outweighs its probative value."<sup>1</sup> *Id.* at 597-98, 502 N.W.2d at 894-95.

Wolfer's argument is two-fold. He claims first that trying of the charges together forced him to offer incriminating testimony on the wiretapping charges through cross-examination by the prosecutor when he took the stand to testify in support of his alibi defense to the homicide charge. He also argues that the wiretapping case was substantially prejudiced by evidence of Bollinger's "brutal killing."

The second point need not detain us long, and we consider it first. If, as Wolfer contends, evidence of Bollinger's murder was so inflammatory that it would cause the jury to convict him of wiretapping even in the absence of adequate evidence, we do not see how the jury could--as it did--acquit him not only on the murder charge but also on two of the three wiretapping charges.

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<sup>1</sup> Section 904.04(2), STATS., provides that evidence of other acts of misconduct may be offered for only limited purposes, including proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

We reject his argument that his defense to the wiretapping charges was substantially prejudiced by evidence admitted on the murder charge.<sup>2</sup>

Wolfer's other argument is that, having necessarily taken the stand in his own defense with respect to the homicide charge, he was forced to submit to cross-examination in which the prosecutor was able to elicit his own admissions that he had "purchased, hooked up and tested the eavesdropping equipment at Billie's residence without her permission ... [and] then taped her telephone conversations." He claims that substantial prejudice must necessarily have resulted because "[t]he state's case was essentially proved by [his own] testimony."

It is true, as the Court of Appeals for the Seventh Circuit observed in *United States v. Archer*, 843 F.2d 1019, 1022 (7th Cir.), *cert. denied*, 488 U.S. 837 (1988), that "sometimes circumstances can coerce a defendant into testifying on a count upon which he wishes to remain silent," and that "[i]n such cases, severance may be necessary." It is also true, however, that before we may reverse for claimed error in the trial court's denial of Wolfer's motion in this case, he must satisfy us that substantial prejudice resulted from his cross-examination testimony. *Locke*, 177 Wis.2d at 597, 502 N.W.2d at 894. He has not done so.

Wolfer's testimony was not the only evidence of his guilt on the wiretapping charge. Billie Wolfer testified that he had played tapes for her of several telephone calls he had intercepted at her house. She said that on one occasion he produced five or six two-hour tapes--at least one of which he had made by tapping into the telephone line at her house in order to record her conversations with Bollinger (without Billie's or Bollinger's knowledge or

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<sup>2</sup> Wolfer also challenges the trial court's "balancing" of the murder evidence's probative value against its possible prejudice, claiming that the record shows that the court never exercised its discretion in this regard. It is true, as he suggests, that the record made by the trial court on this point is inadequate. But, as we said in *State v. Locke*, 177 Wis.2d 590, 598, 502 N.W.2d 891, 895 (Ct. App. 1993), even where the court does not undertake the balancing test on the record, we will look to the record ourselves to consider whether reasons exist to sustain the court's ruling. And, as we have said, we are satisfied that Wolfer's claim that substantial prejudice resulted from the receipt of evidence of the homicide is belied by the jury's actual verdicts in the case.

consent). And while she was cross-examined at considerable length by defense counsel, she was never questioned about this incident.

The prosecutor also introduced testimony from Wolfer's current girlfriend, Virginia Banach, who recounted Wolfer's statements to her that he had been taping Billie's telephone conversations "in two places." A police detective testified that, in executing a search warrant at Wolfer's residence, he recovered four recording devices and about fifty tapes, and a recording of a police interview was played to the jury in which Wolfer admitted to making tapes of conversations between Billie and Bollinger.

Thus, while Wolfer confirmed in his own testimony that he secretly intercepted Billie's telephone calls, that evidence was cumulative to the unchallenged testimony of Billie Wolfer and Virginia Banach, as well as the physical evidence seized at his home and his admissions to the police.

We agree with the State that the joint trial of the homicide and wiretapping charges did not result in substantial prejudice to Wolfer with respect to the sole wiretapping charge on which he was convicted. The jury's verdict indicates that it was able to separately consider the several charges, and we are satisfied that Wolfer's trial testimony was cumulative as to the wiretapping charge and was not critical to the determination of his guilt on that charge.

*By the Court.*— Judgment affirmed.

Not recommended for publication in the official reports.