COURT OF APPEALS
DECISION
DATED AND RELEASED

April 18, 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. 95-2468-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KENNETH L. CHAMPION,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Dane County: P. CHARLES JONES, Judge. *Affirmed*.

Before Eich, C.J., Gartzke, P.J., and Dykman, J.

EICH, C.J. Kenneth L. Champion appeals from a judgment convicting him of multiple counts of burglary, robbery and false imprisonment.

The charges stem from two incidents in which Champion broke into the victims' apartments, beating and robbing them, and he argues on

appeal that the trial court erred when it denied his motion to sever the two sets of charges. Specifically, he challenges the court's determination that he would not be "substantially prejudiced" by having the charges tried together. We conclude that the trial court did not erroneously exercise its discretion in denying the severance motion and we affirm the convictions.

The first set of charges alleged in the criminal complaint involved an elderly couple, Bernita and Cyril Fahltersac. According to the complaint, in the late evening hours of July 17, 1993, Champion entered the Fahltersacs' residence through an unlocked door and, confronting the couple, demanded money, threatened to kill them and robbed them, beating and throwing the eighty-one-year-old Bernita Fahltersac to the floor.

The second set of charges arose out of a similar incident occurring approximately a month later in the same general neighborhood. According to the complaint, Champion gained entry to the residence of sixty-six-year-old Elaine Meyer in the late evening hours of August 13, 1993, where, after threatening to kill her and demanding money, he robbed and beat her.

Prior to trial, Champion, through his counsel, moved to sever the two sets of charges, claiming that a joint trial would be prejudicial because the evidence of the two offenses was "distinct and [did] not adequately overlap" and, further, that he "may wish to testify on his own behalf as to one ... and retain his right not to testify as to the other."

Before any hearing was scheduled on the severance motion, Champion appeared in court with his attorney seeking to withdraw the motion for "strategic" reasons.[1] After hearing counsel's reasons for the withdrawal and ascertaining Champion's understanding of and agreement with the request, the court granted it.

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[1] Champion's attorney explained that while he and Champion initially believed it would be best to have the two incidents tried separately, subsequent events--most notably a series of DNA tests--had caused them to change their minds. His attorney stated that he and Champion had counted on the tests to indicate the presence of an unknown third party at the scene of one of the robberies, and when the tests came back ruling out that possibility, "it ... change[d] the defendant's view as to how to proceed in this ma[tt]er."

Then, on the eve of the trial, Champion sent a handwritten letter to the trial judge stating that he wanted to "reinstate" the severance motion. The court notified the prosecutor and defense counsel of the letter and, after holding a hearing on Champion's request, ruled that it should not be granted. The court concluded that: (1) Champion had knowingly and voluntarily withdrawn the severance motion and would not be permitted to proceed *pro se* in the case while also being represented by counsel;[2] and, alternatively (2) he had failed to establish that he would be substantially prejudiced by having the several charges tried together.

Champion was tried and convicted of a total of six counts: burglary/battery,[3] robbery and two counts of false imprisonment at the Fahltersac residence, and burglary/battery and robbery at the Meyer residence. The trial court, adding repeater enhancements to all counts, sentenced Champion to a net total of seventy-six years in prison.

Section 971.12(1), STATS., allows joinder of charges when the crimes charged are of a "similar character" or "constitut[e] parts of a common scheme or plan." Champion concedes that this "initial" test was met. He argues, however, that he was entitled to severance under § 971.12(3), which states that "[i]f it appears that a defendant ... is prejudiced by a joinder of crimes ... the court may ... grant a severance ...," and that the trial court erred in denying his motion.

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[2] The trial court relied on ***State v. McDonald***, 50 Wis.2d 534, 539, 184 N.W.2d 886, 888 (1971), where the supreme court rejected the defendant's claim that he should not be held to his counsel's withdrawal of his own *pro se* suppression motion, stating, "In the conduct of a criminal case, the trial court cannot satisfy both the client who proceeds pro se and counsel who disagrees.... The accused has no more right to control his attorney and the conduct of the trial than he has to dictate to his surgeon how to perform the operation." The court concluded: "The procedure contended for by McDonald, if allowed, would give every defendant an opportunity to have his cake and eat it too." ***Id***. at 539-40, 184 N.W.2d at 889.

[3] Under §§ 943.10(1)(a) and 943.10(2)(d), STATS., one who intentionally enters a dwelling without the owner's consent and with the intent to steal, and who, "[w]hile in the burglarized enclosure commits a battery upon a person lawfully therein," is guilty of a Class B felony.

A motion for severance is addressed to the sound discretion of the trial court. ***State v. Locke***, 177 Wis.2d 590, 597, 502 N.W.2d 891, 894 (Ct. App. 1993).

> Whether to sever otherwise properly joined charges on grounds of prejudice is within the trial court's discretion, and in making its decision the ... court must balance any potential prejudice to the defendant against the public's interest in avoiding unnecessary or duplicative trials.

State v. Nelson, 146 Wis.2d 442, 455, 432 N.W.2d 115, 121 (Ct. App. 1988) (citation omitted). We will not find an erroneous exercise of that discretion unless the defendant is able to establish that failure to sever the counts caused him or her "`substantial prejudice.'" ***Locke***, 177 Wis.2d at 597, 502 N.W.2d at 894 (quoted source omitted).

Where, as here, the defendant claims that severance is necessary because he or she will suffer prejudice if the counts are tried together, "`it is essential that the defendant present enough information ... to satisfy the court that the claim of prejudice is genuine and to enable it intelligently to weigh the [applicable] considerations ....'" ***Nelson***, 146 Wis.2d at 458, 432 N.W.2d at 122 (quoting ***Baker v. United States***, 401 F.2d 958, 976 (D.C. Cir. 1968)).

Champion's pretrial severance motion was unaccompanied by any affidavits or other evidentiary materials, and he did not testify at the motion hearing. As we have indicated above, the motion itself claimed only very briefly--and very generally--that joinder would be prejudicial because the two sets of charges were "distinct" and that he might wish to testify as to one and not the other; his counsel did not argue the issue to the court at the motion hearing.[4]

[4] Champion's initial severance motion was accompanied by a motion to suppress evidence related to his identification by one or more of the victims. The suppression motion was withdrawn along with the severance motion, and Champion's subsequent *ex parte* letter to the trial court asked that both motions be revived. At the hearing on the motion, defense counsel limited his argument to the suppression issues, never mentioning the severance motion or discussing what, if any, prejudice he felt might arise in a joint

In denying the motion for lack of any indication of prejudice, the trial court quoted from ***Holmes v. State***:

> The defendant, opposing consolidation or urging severance, is required to present enough information, including the nature of the testimony he wishes to give on one count that would not be admissible on the other count or counts, to enable the trial court to intelligently weigh the opposing factors to be weighed and balanced.

Holmes v. State, 63 Wis.2d 389, 398, 217 N.W.2d 657, 662 (1974). The ***Holmes*** court went on to conclude that the defendant in that case had not met that burden:

> In the case before us, the defendant [offered] only his statement of intention to testify on one charge only, and the very generalized and conclusory statement that testimony by him on the one charge was essential and testimony by him on the other would be highly prejudicial. If no more than that were required, control as to consolidation or severance of charges would clearly pass out of the hands of the trial court and into the complete control of the defendant.

Id. at 398-99, 217 N.W.2d at 662 (footnote omitted).

We think that is the case here. It is axiomatic that "[r]eview [of a severance motion] is limited to the state of the record at the time the motion ... was made." ***Stomner v. Kolb***, 903 F.2d 1123, 1127 (7th Cir. 1990) (applying Wisconsin law). As we have noted above, whether to grant severance is committed to the trial court's discretion, ***Locke***, 177 Wis.2d at 597, 502 N.W.2d at 894; and we have often said that an appellate court will not find an erroneous exercise of discretion where the complaining party never asked the trial court to exercise its discretion in the first place. ***State v. Gollon***, 115 Wis.2d 592, 604, 340

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trial.

N.W.2d 912, 918 (Ct. App. 1983). Here, the only basis provided by Champion for the trial court's exercise of discretion was a broad and unsupported assertion of prejudice and we cannot say that the trial court erroneously exercised its discretion in denying the motion on that basis.[5]

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[5] Because the type of prejudice that would require severance does not occur where the same evidence that would be admissible at the joint trial would also be admissible at the separate trial, the test for failure to sever usually turns on an "other-acts-evidence" analysis as discussed in ***Whitty v. State***, 34 Wis.2d 278, 149 N.W.2d 557 (1967), *cert. denied,* 390 U.S. 959 (1968), and similar cases. That, too, is a determination invoking the trial court's discretion, ***State v. C.V.C.***, 153 Wis.2d 145, 161-62, 450 N.W.2d 463, 469 (Ct. App. 1989), and the trial court was simply never provided with any factual basis upon which to exercise that discretion.

Champion argues on appeal that he was prejudiced with respect to the Fahltersac case when a photograph showing Elaine Meyer after the reconstructive facial surgery she was required to undergo as a result of her beating was admitted into evidence. He also argues that evidence of the Fahltersacs' advanced age "could not but have affected the jury in deliberating on the Meyer crime," and that joinder allowed the State to improperly "reinforce" the Fahltersacs' "weak identification [of him] with emotional evidence from the Meyer offense"--particularly the playing of Meyer's 911 call reporting the burglary and assault. But he never objected to either Meyer's testimony about her injury or the admission of the photograph--or to the playing of the 911 tape. Nor did he renew his severance motion when any of the evidence about which he now complains was admitted. ***State v. Nelson***, 146 Wis.2d 442, 432 N.W.2d 115 (Ct. App. 1988), is particularly appropriate here. In that case, the defendant was charged with sexually assaulting two children on separate occasions and the counts were tried together. He claimed he was prejudiced by the joinder because it allowed allegedly prejudicial evidence admissible only in one of the cases to be heard by the jury empaneled to hear both. We rejected the argument.

> Nelson also argues that the trial court's joinder ruling opened the door to prejudicial testimony from one of the witnesses in the T.M. case.... Nelson argues that the court abused its discretion in failing to order severance so that this testimony could be kept from the jury in its consideration of the B.R. case. But he never sought severance on this ground prior to trial and, when the witness's testimony was offered, he failed to renew his earlier severance motion. As a result, he waived any error and we need not consider the argument further.

Id. at 457, 432 N.W.2d at 122 (citation omitted).

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

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