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DISTRICT III

June 14, 2022

To:

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Circuit Court Judge
Electronic Notice

Sandra Paitl
Clerk of Circuit Court
Ashland County Courthouse
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Christopher A. Liegel
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You are hereby notified that the Court has entered the following opinion and order:

2021AP297-CR State of Wisconsin v. Michael Dwayne Sweet, Sr.
(L. C. No. 2018CF184)

Before Stark, P.J., Hruz and Gill, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Michael Sweet appeals from a conviction for first-degree intentional homicide while armed with a dangerous weapon, as a party to a crime. The sole issue on appeal is whether the circuit court erroneously exercised its discretion by denying Sweet's motion to sever his trial from that of a co-defendant. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. We reject Sweet's arguments, and we summarily affirm the judgment. *See* WIS. STAT. RULE 809.21 (2019-20).[1]

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[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

The State jointly charged Sweet and Brian Nelis with stabbing Shane Cadotte to death. According to the complaint,[2] Sweet and Nelis had observed Cadotte walking away from the house of Sweet's former girlfriend, April Blaker, shortly after midnight on September 23, 2017. Sweet entered Blaker's house, demanded to know who was outside, and he then stated, "That fucker's dead," as Nelis led Sweet out of Blaker's house. This interaction was observed by an occupant of Blaker's house. Later that day, two other people saw Sweet and Nelis pull Cadotte out of a car and then punch and kick him while he was on the ground. One of those witnesses heard Sweet ask Cadotte why he had been around Blaker's house; observed that Sweet had a large hunting or combat knife in his waistband before the confrontation; and said that she heard a "squishy noise" that sounded different than a punch while Sweet was standing over Cadotte.

The complaint further alleged that police recovered a watch Sweet had been observed wearing on a gas station surveillance tape on September 23, 2017, and an abandoned, stolen car near the site where Sweet and Nelis had been seen beating Cadotte. Analysis of blood found on the watch showed a mixture of Sweet and Cadotte's DNA profiles, while blood in the car matched Cadotte's DNA profile. In addition, police found both Sweet's and Nelis's fingerprints on the car's windows.

Sweet moved for severance on the ground that he and Nelis would have antagonistic defenses. In support of the motion, Sweet asserted at a severance hearing that he planned to take the stand in his own defense and that his own testimony would "likely focus on the culpability of

[2] Both Sweet and the State describe additional facts set forth at trial. However, given that those facts were not before the circuit court when it made its decision, we do not consider them here.

Mr. Nelis." Sweet claimed that he would offer an alibi defense, and he separately filed a "Notice of Alibi" listing Nelis as one of eight people who would testify that Sweet had been at the residence of friends, in the presence of others, at the time of the murder. Sweet did not identify any potential evidence against Nelis that would not also be admissible at Sweet's own trial. The circuit court denied the motion, agreeing with the State that Sweet had failed to establish that he and Nelis would have antagonistic defenses.

WISCONSIN STAT. § 971.12(3) provides that a court may order separate trials of defendants initially joined for trial if it appears that a defendant would be prejudiced by a joint trial. "[I]n making its decision the [circuit] 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 (Ct. App. 1988). The statute further provides that a court *shall* grant severance to any defendant if, prior to trial, the district attorney advises the court that it plans to use at trial "the statement of a co[-]defendant which implicates another defendant in the crime charged." Sec. 971.12(3). Severance is also required when the defendants intend to advance conflicting or antagonistic defenses or there would be presented at the trial an entire line of evidence relevant to the liability of only one defendant. ***State v. Shears***, 68 Wis. 2d 217, 234-35, 229 N.W.2d 103 (1975). We review a circuit court's decision on severance under the erroneous exercise of discretion standard. ***Id.*** at 234.

On appeal, Sweet contends the circuit court erroneously exercised[3] its discretion in two ways by denying his severance motion. First, Sweet asserts that the court was required under WIS. STAT. § 971.12(3) to grant severance in response to Nelis's separate motion to sever the charges based upon Sweet's three incriminating statements: "That fucker's dead," made at Blaker's house upon seeing Cadotte; Sweet's question to Cadotte outside Blaker's house, "Are you scared?"; and a third statement allegedly made when Sweet was punching Cadotte in the back of the car, "What the fuck were you doing at [Blaker]'s." However, we agree with the State that Sweet has no standing to claim error with respect to Nelis's severance motion. *See* ***State v. Rundle***, 166 Wis. 2d 715, 732, 480 N.W.2d 518 (Ct. App. 1992) (a defendant cannot rely upon a co-defendant's argument for severance without establishing his or her own prejudice).[4] Sweet's own incriminating statements would be admissible against him at a separate trial as an admission by a party opponent. *See* WIS. STAT. § 908.01(4)(b)1; *see also* ***Cranmore v. State***, 85 Wis. 2d 722, 744, 271 N.W.2d 402 (Ct. App. 1978). Therefore, Sweet had no stake in Nelis's motion to sever the charges to avoid the introduction of Sweet's statements in Nelis's trial, and Sweet was not prejudiced by the denial of Nelis's motion. Only Nelis could raise Sweet's incriminating statements as a basis for his severance motion.

[3] We note that Sweet uses the outdated terminology of "abusing" discretion rather than the current terminology of "erroneously exercising" discretion. We reframe his argument in accordance with the current terminology.

[4] Sweet attempts to distinguish ***State v. Rundle***, 166 Wis. 2d 715, 480 N.W.2d 518 (Ct. App. 1992), on the grounds that the defendant there did not bring her own severance motion, thus waiving any right to review of her severance claim on appeal. The issue of waiver is entirely distinct from that of standing, however. The fact that Sweet filed his own motion does not give him standing to raise arguments that apply solely to his co-defendant.

Next, Sweet contends the circuit court erroneously exercised its discretion by failing to apply the correct law set forth in ***Shears*** regarding antagonistic defenses and by making its ruling on severance before Sweet had an opportunity to produce additional facts relevant to antagonistic defenses. We disagree on both points.

In ***Shears***, the court determined that severance was not required for co-defendants who had been involved in a conspiracy. *See* ***Shears***, 68 Wis. 2d at 234-38. From that premise, Sweet argues that—because there was no evidence of a preplanned conspiracy here—not all lines of evidence "automatically" applied to both Sweet and Nelis. But the circuit court did not hold that all lines of evidence automatically applied to both Sweet and Nelis. Rather, it found that Sweet's motion had failed to identify *any* line of evidence that would be admissible against Nelis but not against Sweet, given the facts of this case. We agree with the court that merely asserting that Sweet and Nelis would have antagonistic defenses without explaining how they were conflicting or antagonistic was insufficient to warrant severance. We are further satisfied that the court did not erroneously exercise its discretion by adopting the State's argument in this regard without repeating the applicable law.

Sweet provides no authority that would have compelled the circuit court to allow him to correct the deficiency in his motion by presenting additional evidence at the severance hearing. In any event, he can demonstrate no harm from the asserted lack of opportunity to present additional evidence at the severance hearing because no separate lines of evidence were introduced at trial or are identified in this appeal.

Upon the foregoing,

IT IS ORDERED that the judgment is summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals