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DISTRICT I

January 24, 2023

To:

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Circuit Court Judge
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Milwaukee County Safety Building
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You are hereby notified that the Court has entered the following opinion and order:

2020AP1205-CR

State of Wisconsin v. Michael R. Cooper (L.C. # 2017CF965)

Before Brash, C.J., Dugan and White, 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 R. Cooper appeals a judgment convicting him of one count of first-degree intentional homicide and one count of unlawfully possessing a firearm after being convicted of a felony. Cooper argues that the circuit court erroneously exercised its discretion when it refused to sever charges against him for trial. After review of the briefs and record, we conclude at conference that this appeal is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).¹ We affirm.

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

Cooper was charged with one count of first-degree intentional homicide and one count of felon in possession of a firearm for the shooting death of Michael Patton. He was also charged with two counts of attempted first-degree intentional homicide as to victims S.H. and V.L., whom the State argued Cooper attempted to kill because they were potential witnesses to the homicide. The State moved to join the cases pursuant to WIS. STAT. § 971.12(4). Cooper opposed the motion and asked the circuit court to consider his response as a counter-motion for severance under § 971.12(3). The circuit court granted the State’s motion to join the cases and denied Cooper’s motion to sever the cases. After a jury trial, Cooper was convicted of felon in possession of a firearm and first-degree intentional homicide for Patton’s death, but he was acquitted of two counts of attempted first-degree intentional homicide as to S.H. and V.L.

Two or more criminal cases may be joined together for trial in any of the following situations: (1) if they “are of the same or similar character;” (2) if they “are based on the same act or transaction;” or (3) if they are based on two or more “acts or transactions connected together or constituting parts of a common scheme or plan.” WIS. STAT. § 971.12(1). We review the circuit court’s initial joinder determination *de novo*. See *State v. Salinas*, 2016 WI 44, ¶30, 369 Wis. 2d 9, 879 N.W.2d 609 (citation omitted). After initial joinder, the circuit court “may order separate trials of the charges if it appears that a defendant is prejudiced by a joinder of the counts.” *Id.* (citation omitted); § 971.12(3). We will affirm the circuit court’s decision denying a motion for severance unless the circuit court erroneously exercises its discretion. *Salinas*, 369 Wis. 2d 9, ¶30.

Cooper raises only one argument. He contends that the circuit court erred in denying his motion to sever the charges for trial. Cooper contends that joinder of the cases unfairly prejudiced him because the jury might have concluded that he was a bad person due to the

number of crimes charged against him. He also contends that joining the charges prevented him from pursuing a defense that there was a third-party perpetrator.

A circuit court properly exercises its discretion when it relies on the facts of record and the applicable law to reach a reasonable decision using a demonstrated rational process. *State v. Doss*, 2008 WI 93, ¶19, 312 Wis. 2d 570, 754 N.W.2d 150. Here, the circuit court first considered the applicable statute and relevant case law. The circuit court then explained why it concluded that the motion to sever should be denied based on the facts of this case:

Certainly in any case the more charges that are present, the more likely a jury is to think the defendant is just a bad person and to, therefore, not look at the evidence and simply conclude that the defendant should be convicted. Now, that is a risk. It is a small risk, but it is a realistic risk.

In this particular case I don't see much other prejudice that exists toward the defendant here. That small amount of prejudice can be addressed and frankly is significantly addressed by the standard jury instructions where the jury is told to set aside prejudice, passion and other things and to focus specifically on the evidence and the elements of the crime. An additional curative instruction can be given if it were necessary. So there is a small amount of potential unfair prejudice. That small amount could be addressed.

That's balanced against what I think is highly probative evidence of both of these cases. Motive certainly is—being able to define an individual's motive certainly is compelling evidence, and being able to demonstrate that after a crime is committed a person did things that could be viewed as an attempt to coverup that crime is also fairly persuasive evidence. I do not believe that the probative value is substantially outweighed by the risk of unfair prejudice. I don't think it is outweighed at all by unfair prejudice—by the potential of unfair prejudice.

What that results in then is that the evidence of the attempted homicides could be admissible in the First Degree Intentional Homicide case if these matters were not joined and evidence of the First Degree Intentional Homicide could be admitted in the attempt[ed] homicide case[s] if these matters were not joined. Because of that fact, that means there is no prejudice to

the joinder. The jury in both instances would hear that testimony anyway so there is no[t] any prejudice toward the defendant.

The circuit court acknowledged that there was a small risk that the jury might think Cooper was a bad person and convict him for that reason, but concluded that the compelling probative value of the evidence regarding Cooper's motive and consciousness of guilt was not substantially outweighed by the small risk of prejudice, which could be ameliorated by standard jury instructions. The circuit court's decision shows that it made a reasonable decision using a demonstrated rational process and, as such, it properly exercised its discretion. As for Cooper's claim about the third-party perpetrator defense, this argument is unpersuasive because Cooper has not provided any cogent reason that the circuit court should have known this was a potential problem when it ruled on his motion.

IT IS ORDERED that the judgment of the circuit court is summarily affirmed. *See* 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