COURT OF APPEALS
DECISION
DATED AND FILED

June 9, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP742-CR **Cir. Ct. No. 2001CF16**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RENATE C. NELSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Richland County: EDWARD E. LEINEWEBER, Judge. *Affirmed.*

Before Deininger, P.J., Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Renate Nelson appeals a judgment convicting her of two counts of child abuse. The issues are: (1) whether Nelson's right to a speedy trial was violated, and (2) whether the circuit court should have granted Nelson's motion for a new trial based on juror bias. We affirm.

¶2 Nelson first argues that her right to a speedy trial was violated. We use a four part balancing test to determine whether a defendant's right to a speedy trial has been violated. ***State v. Borhegyi***, 222 Wis. 2d 506, 509, 588 N.W.2d 89 (Ct. App. 1998). We consider: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right to a speedy trial, and (4) prejudice to the defendant. ***Id.*** We accept the circuit court's findings of historical fact unless they are clearly erroneous, but decide the ultimate constitutional question of whether the right to a speedy trial was violated de novo. ***State v. Williams***, 2004 WI App 56, ¶32, 270 Wis. 2d 761, 677 N.W.2d 691.

¶3 Turning to the first part of the test, we must determine when the right to a speedy trial attached in order to determine the length of the delay. We have recently held that the right to a speedy trial attaches at the time of the arrest, which is when the first official accusation on the underlying charges occurred. ***Borhegyi***, 222 Wis. 2d at 511. Nelson was arrested on the child abuse charges on January 17, 2001. The trial did not commence until May 20, 2002. "[C]ourts have generally found postaccusation delay 'presumptively prejudicial' … as it approaches one year." ***Id.*** at 510 (quoting ***Doggett v. United States,*** 505 U.S. 647, 652 n.1 (1992)). As conceded by the State, the sixteen-month delay between Nelson's arrest on the charges and the trial was presumptively prejudicial.

¶4 Next, we turn to the reason for the delay. "When considering this factor, differing weights are assigned to reasons that may be given for the delay." ***Id.*** at 512. "A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government." ***Id.*** (quoting ***Barker v. Wingo***, 407 U.S. 514, 531 (1972)). "A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be

considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." ***Id.***

¶5 There was a two-month period between Nelson's arrest to the date of the initial appearance, March 14, 2001. The court set the date for the initial appearance on a date when Nelson would already have to be in court for another case. This period of time is not attributable to the State because the delay was for Nelson's convenience. There was a five-month period between the initial appearance and the preliminary hearing, which was held August 9, 2001. Nelson waived the time limit for the preliminary hearing and did not object to the date the hearing was scheduled. Although the delay was attributable to the circuit court's schedule, we do not weight it heavily against the State because Nelson affirmatively waived the time limit and acquiesced in the delay.

¶6 We also do not weigh the delay between August 9 and the September's arraignment against the State because the September 5 hearing was scheduled at a time that was convenient for Nelson's attorney, and, again, Nelson did not object to the delay. Between September 5 and November 19, the date originally set for trial, the parties held a pretrial hearing to resolve the charges, held a status hearing, and were addressing discovery matters. Because this time was reasonably necessary for the orderly administration of justice, we conclude that this period of time should not be weighted against the State. Finally, there was a six-month period from the first trial date to Nelson's trial in May 2002. This delay occurred because the circuit court bumped Nelson's case for a three-week medical malpractice case and failed to promptly reschedule Nelson's trial. The circuit court conceded that this delay was entirely its fault, and we conclude that this six-month period should be weighted against the State, but not heavily.

¶7 Turning to the third part of the test, Nelson asserted her right to a speedy trial twice. She first demanded a speedy trial on September 5, 2001, and again brought up her demand on October 10, 2001. This factor weighs in favor of Nelson's claim that her right to a speedy trial was violated.

¶8 Finally, we look at prejudice to Nelson. When analyzing prejudice in a trial context, we focus on whether the defendant was incarcerated prior to trial, whether the defendant experienced anxiety and concern by virtue of having the charges unresolved, and the impairment of the defense. ***State v. Ziegenhagen***, 73 Wis. 2d 656, 671, 245 N.W.2d 656 (1976). Nelson contends that she was prejudiced in two ways. First, she was distressed by the fact that the charges were pending against her. We attribute to this contention some weight. Second, she contends that her anxiety was exacerbated by the fact that she was separated from her daughter, the victim of her abuse, while the charges were pending. Addressing the latter contention, we agree with the State that the trial's delay had little bearing on Nelson's separation from her daughter. While the charges were pending, Nelson was permitted to see her daughter with supervision. However, it appears that Nelson did not see her daughter because her daughter is estranged from her, and Nelson stated to the circuit court during sentencing that she doubted she would see her daughter again until she was an adult. Therefore, we reject Nelson's claim of prejudice with regard to seeing her daughter.

¶9 Considering the four factors together, we conclude that Nelson's right to a speedy trial was not violated. While six months of delay is attributable solely to the circuit court's error in failing to schedule the trial, Nelson did not bring the scheduling omission to the circuit court's attention for several months and, once she did so, the circuit court promptly scheduled the trial. The delay was not an attempt by the prosecution to hamper the defense and, in fact, Nelson's

defense was not prejudiced by the delay. She was also not personally prejudiced by the delay except for the fact that the charges remained unresolved for an additional period of time, causing her unease. Under these facts, we cannot conclude that the delay in Nelson's trial rises to the level of a constitutional violation.

¶10 Nelson next argues that the circuit court should have granted her an evidentiary hearing on her motion for a new trial based on juror bias. To be entitled to a new trial based on that fact that a juror lacked candor during voir dire, a defendant must show that "a juror incorrectly or incompletely responded to a material question on voir dire and … it is more probable than not that under the facts and circumstances surrounding the particular case, the juror was biased against the moving party." *See* ***State v. Faucher***, 227 Wis. 2d 700, 726, 596 N.W.2d 770 (1999). A juror is subjectively biased if he or she cannot act as "a reasonable person who is sincerely willing to set aside any opinion or prior knowledge that the juror might have." ***State v. Kiernan***, 227 Wis. 2d 736, 745, 596 N.W.2d 760 (1999).

¶11 Nelson contends that one of the jurors failed to candidly answer when the circuit court asked, "Have any of you expressed or formed any opinion with respect to this case; if so, would you please raise your hands?" Nelson maintains that the juror in question should have answered affirmatively because he told Bernadette Lynn Allbaugh before he commenced jury duty that if the case "pertains to a child, we have to protect the children." We conclude that the juror's comment that the law must protect children was not inconsistent with the fact that he did not answer "yes" when the circuit court asked if any of the jurors had formed an opinion about this particular case. The juror's comment does not show that he would not judge the case based on the facts and law presented. It shows

only that he believed the law should protect children, a statement most reasonable people would agree is true. The circuit court did not misuse its discretion in denying Nelson's motion without an evidentiary hearing because she failed to allege facts that, if true, would support a finding of bias. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.