COURT OF APPEALS
DECISION
DATED AND FILED

April 25, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2005AP2768-CR **Cir. Ct. No. 1999CF950**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTONIO G. RAMIREZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: WILBUR W. WARREN III, Judge. *Affirmed*.

Before Snyder, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Antonio G. Ramirez appeals from a judgment of conviction arising from two sexual assaults of a child and from an order denying his motion for postconviction relief. He claims that he was denied his constitutional right to a speedy trial, that charges should not have been joined for

trial, that there were prosecutorial misconduct and evidentiary errors, that the evidence was insufficient to convict him, and that trial counsel was constitutionally deficient. He also challenges his sentence as an erroneous exercise of discretion. We reject his claims and affirm the judgment and order.

¶2 Ramirez was arrested on September 5, 1999, when his wife, Cynthia, reported that she found him standing at the door of her daughter's room pulling up his pants. Ramirez's eight-year-old stepdaughter reported to her mother that Ramirez had touched her "like he's not suppose to." The victim reported to a police officer that when her mother left the house that evening, Ramirez told her to go into her bedroom, that he removed her shorts and underwear, and that he touched her butt with his penis. The victim also revealed that a vaginal injury that sent her to emergency room on November 8, 1998, was not a bathtub accident as originally reported but that Ramirez "did that to me." Ramirez was charged with first-degree sexual assault of a child under age thirteen by a person responsible for the child's welfare and first-degree sexual assault causing great bodily harm for the 1998 assault. As a result of the 1999 assault and domestic fight that followed, Ramirez was charged with child enticement, first-degree sexual assault of a child under age thirteen by a person responsible for the child's welfare, intentionally causing bodily harm to a child (the victim's brother), battery and false imprisonment of Cynthia, and resisting an officer. The jury found him guilty on the three sexual assault charges and the child enticement charge.

¶3 We first address the claim that Ramirez was denied his constitutional right to a speedy trial.[1] Our review of an issue of constitutional dimensions is de novo. ***State v. Borhegyi***, 222 Wis. 2d 506, 508, 588 N.W.2d 89 (Ct. App. 1998). The trial court's findings of historical facts are upheld unless clearly erroneous, but we decide the ultimate constitutional issue without deference to the trial court's conclusion. ***Id.*** at 508-09.

¶4 On a case-by-case basis the conduct of both the prosecution and the defense are weighed and balanced to determine if a defendant's right to a speedy trial has been denied. ***Scarbrough v. State***, 76 Wis. 2d 87, 94, 250 N.W.2d 354 (1977). We consider a four-part balancing test: (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant asserted the right to a speedy trial; and (4) whether the defense was prejudiced by the delay. ***Barker v. Wingo***, 407 U.S. 514, 530 (1972); ***Borhegyi***, 222 Wis. 2d at 509.

¶5 The first inquiry is whether the length of delay has crossed the threshold dividing ordinary from "presumptively prejudicial" delay thereby triggering inquiry into the other ***Barker*** factors. *See* ***Borhegyi***, 222 Wis. 2d at 510. Delay is presumptively prejudicial as delay between the time of arrest and trial approaches one year. *See* ***id.*** Ramirez's trial commenced March 5, 2001. The State concedes that the eighteen-month gap is presumptively prejudicial.

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[1] Ramirez cites WIS. STAT. § 971.10(2)(a) (2005-06), providing that the "trial of a defendant charged with a felony shall commence within 90 days from the date trial is demanded by any party in writing or on the record." He does not develop an appellate argument based on the statute. We address his claim only as an alleged violation of his constitutional right to a speedy trial. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (we will not address arguments inadequately briefed).

All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶6 The next ***Barker*** factor to consider is the reason for the delay. Differing weights are assigned to reasons for the delay. ***Borhegyi***, 222 Wis. 2d at 512. We heavily weigh against the State "[a] deliberate attempt to delay the trial in order to hamper the defense." ***Barker***, 407 U.S. at 531. Less weight is applied when "[a] more neutral reason such as negligence or overcrowded courts" is the reason for delay. ***Id.*** Where there is "a valid reason, such as a missing witness," appropriate delay is justified and not weighed against the State. *See* ***id.***

¶7 The trial court made the following findings. The original trial date was February 7, 2000. Although Ramirez told his attorney at the arraignment that he wanted a speedy trial demand, the attorney failed to request it. At the January 25, 2000, pretrial conference the State indicated that DNA testing at the State Crime Laboratory had not been completed.[2] Ramirez's attorney then moved for a competency evaluation. The request for a competency evaluation prevented the case from proceeding to trial until February 4, 2000, when the court found Ramirez competent to proceed. Trial was then set for April 1, 2000, but that date was adjourned when the crime lab's written report wasn't finished. Ramirez made a pro se written demand for a speedy trial in May 2000. Delay occurred between April 6 to August 7, 2000, at the request of the defense so that it could obtain its own DNA expert. Ramirez's attorney moved to withdraw and that motion was granted June 23, 2000. Newly appointed counsel asked that the August trial date be changed to a pretrial conference. Counsel died unexpectedly and therefore did not appear at the August 14, 2000 pretrial. New counsel was appointed and as of October 3, 2000, counsel was not prepared for trial. The trial was set for

[2] In fact, evidence was not sent to the crime lab until Ramirez rejected the plea offer just weeks before the original trial date.

January 17, 2001. Thereafter the defense filed motions to dismiss and for the appointment of a special prosecutor. The pending motions were resolved on December 15, 2000. When the parties appeared for the trial in January 2001, four witnesses subpoenaed by the prosecution did not appear. A material witness warrant was sought to compel Cynthia's appearance. The matter was reset and trial commenced on March 5, 2001.

¶8 With these findings in place, we agree with the State's summation that only a few months of delay should be heavily weighed against the State. Time weighed lightly against the State includes the minimal delay after arrest and until the preliminary hearing because of the difficulty finding an attorney to represent Ramirez and a little more than a one-month delay in hearing motions between November and December 2000 caused by the prosecutor's schedule. Although waiting for the crime lab's DNA results and written report caused delay, it is not weighed against the State because both parties were waiting for evidence integral to the case. There was delay in getting the evidence to the crime lab because it was necessary for the prosecution to obtain a warrant to take a sample of Ramirez's blood and that was not accomplished until mid-January 2000. During the time awaiting crime lab results, Ramirez filed a motion for a competency evaluation which prevented the prosecution from proceeding to trial until resolved. After the crime lab report was done, Ramirez sought an adjournment to obtain his own DNA expert. Delays caused by counsel's motion to withdraw, the appointment of new counsel, the death of new counsel, and the appointment of a third attorney are not attributable to the State. After appointment of new counsel, trial counsel needed time to review the case and then filed two motions that had to be addressed before trial. Finally, the delay caused by the nonappearance of witnesses at the January 17, 2001 trial date is not weighed

against the State because it was related to the availability of a key witness. There was no deliberate attempt to delay the trial or hamper the defense.

¶9 The next ***Barker*** factor is whether the defendant asserted the right to a speedy trial. The State contends Ramriez's pro se demand for a speedy trial was improper because it was filed while he was represented by counsel. *See* ***Robinson v. State***, 100 Wis. 2d 152, 164-65, 301 N.W.2d 429 (1981) (a defendant has the right to be represented by counsel or to proceed pro se but not both). It is true that the motion was dated May 30, 2000, while counsel was still of record. However, the next day counsel prepared his motion to withdraw on the grounds that because of Ramirez's dissatisfaction, counsel's services had been terminated as of May 16, 2000. Indeed one of Ramirez's complaints about counsel was that a demand for a speedy trial had not been asserted. We deem significant that although Ramirez asserted his desire for a speedy trial pro se, at all times he sought the representation of counsel. His one pro se motion is an anomaly. Also, at the time he was demanding a speedy trial he was also forcing the appointment of new defense counsel which necessarily caused delay. There is no other formal demand for a speedy trial in the record, although at the adjournment of the trial in January 2001, defense counsel stated without objection that a speedy trial demand was made on October 3, 2000.[3] Even so, defense counsel subsequently made motions to dismiss, for the appointment of a special prosecutor, and to sever charges which, if successful, were inconsistent with a demand to bring the case to trial in a timely manner. Ramirez did not consistently assert a speedy trial demand.

[3] The transcript of the October 3, 2000 status conference does not reflect a speedy trial demand.

¶10 Ramirez claims prejudice from the denial of a speedy trial because he was in custody the entire time awaiting trial. Although lengthy pretrial incarceration and anxiety awaiting trial are forms of prejudice, the most important concern is the impairment of the defense. ***Scarbrough***, 76 Wis. 2d at 97-98. Impairment of the defense exists if witnesses die or disappear, witnesses are unable to recall the events accurately, or the defendant is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare a defense. ***Id.*** at 98. There was no evidence that Ramirez's defense was impaired by the loss of witnesses or other evidence. While Cynthia and her mother claimed to not remember incriminating details, that did not serve to prejudice Ramirez.

¶11 Upon balancing the factors, we conclude Ramirez was not denied his right to a speedy trial. There was minimal delay attributable solely to the State and there was no real prejudice to the defense.

¶12 Turning to Ramirez's claim regarding joinder of the crimes from 1998 and 1999, we must first point out that Ramirez misstates that the trial court granted the prosecution's motion for joinder. These crimes were charged together from the outset. Ramirez moved to sever the charges but does not specifically argue that the trial court erroneously exercised its discretion in denying that motion. *See* ***State v. Nelson***, 146 Wis. 2d 442, 455-456, 432 N.W.2d 115 (Ct. App. 1988) (whether to sever otherwise properly joined charges is within the trial court's discretion).

¶13 Joinder of charges is favored. ***Francis v. State***, 86 Wis. 2d 554, 559, 273 N.W.2d 310 (1979). Joinder of charges is proper when two or more crimes are of the same or similar character and occur over a relatively short amount of time, or when they arise from the same act or transaction. ***State v. Locke***, 177

Wis. 2d 590, 596, 502 N.W.2d 891 (Ct. App. 1993). Acts that occurred two years apart have been considered to have occurred over a relatively short amount of time. ***Id.***

¶14 Here the assaults involved the same victim, occurred only ten months apart, and shared a common place and modus operandi because they occurred in the victim's home when her mother was out. There are sufficient common factors to support joinder. *See* ***Francis***, 86 Wis. 2d at 560 (joinder is proper if the crimes charged have a common factor or factors of substantial factual importance, e.g., time, place or modus operandi, so that the evidence of each crime is relevant to establish a common scheme or plan that tends to establish the identity of the perpetrator). Further, if the crimes had not been joined, evidence of one event would have been admissible in the trial of the other. *See* ***State v. Hunt***, 2003 WI 81, ¶¶58-61, 263 Wis. 2d 1, 666 N.W.2d 771 (other-acts evidence may be admitted to show the context of the crime and provide a complete explanation of the case, and as evidence of the defendant's motive, opportunity and purpose in committing a sexual assault). Thus, no prejudice results from joinder of the crimes. *See* ***State v. Gollon***, 115 Wis. 2d 592, 604, 340 N.W.2d 912 (Ct. App. 1983) (when evidence of the count sought to be severed is admissible in a separate trial, the risk of prejudice due to joinder is generally not significant).

¶15 Ramirez claims evidentiary error in admitting the statements of Cynthia and the victim because they were inadmissible hearsay. The only statement that Ramirez identifies is the statement Cynthia made to her mother in

the car identifying Ramirez as the alleged assailant.[4] This and other statements Cynthia and the victim made to police and hospital personnel were admitted as excited utterances. *See* WIS. STAT. § 908.03(2).

¶16 We review the trial court's determination to admit hearsay under the excited utterance exception for an erroneous exercise of discretion and give deference to the trial court's determination because it is best situated to weigh the reliability of the circumstances surrounding the declaration. ***State v. Gerald L.C.***, 194 Wis. 2d 548, 555, 535 N.W.2d 777 (Ct. App. 1995). Admissibility is dependent on the existence of a startling event and spontaneity of the statements while under the stress of the event. *See* ***State v. Moats***, 156 Wis. 2d 74, 97, 457 N.W.2d 299 (1990).

¶17 Ramirez complains there is no showing of how much time passed between the alleged assault and the statement made in the car. Although the time between the triggering event and the utterance is the key factor, "'time is measured by the duration of the condition of excitement rather than mere time elapse from the event or condition described.'" ***Id.*** (quoted source omitted). Cynthia summoned her mother to pick her up from the apartment as her fight with Ramirez was still in progress. A police officer testified that when he interviewed Cynthia at her mother's home she was very emotional, sad and crying. Cynthia and the victim were taken to the hospital within the hour and both were described by hospital personnel as distraught, and very upset. This is a sufficient showing that the statements were made while still under the stress of the assault and its

[4] Cynthia's mother told the police that when Cynthia got into the car, Cynthia stated that when she arrived home she saw Ramirez pulling up his shorts and the victim reported that he had touched her butt.

discovery. There was no error in the admission of Cynthia's and the victim's statements made in the hours following the assault.

¶18 Ramirez filed a pretrial motion to dismiss based on alleged prosecutorial misconduct. He alleged that the prosecutor attempted to badger or pressure the victim's 1998 treating doctor into admitting that the vaginal injury was really the result of a sexual assault despite the doctor's written report that the injury resulted from a fall. He also alleged that the prosecutor had informed Cynthia that the doctor had not done a good job and she should sue the doctor for misdiagnosis. At an evidentiary hearing, the doctor testified that he would not change his testimony based on the conversation with the prosecutor. The trial court denied the motion to dismiss concluding that the prosecutor had not engaged in conduct that attempted to get the doctor to change his testimony.

¶19 On appeal Ramirez complains generally about prosecutorial misconduct, particularly pressure that may have been put on Cynthia to testify at trial and a perjury charge brought against Cynthia after trial. Prosecutorial misconduct violates a defendant's due process rights only when it poisons the entire atmosphere of the trial. ***State v. Lettice***, 205 Wis. 2d 347, 352, 556 N.W.2d 376 (Ct. App. 1996). The offending conduct must deprive the defendant of a fair trial. *See* ***State v. Ruiz***, 118 Wis. 2d 177, 201, 347 N.W.2d 352 (1984).

¶20 Ramirez has not established that any conduct by the prosecutor denied him a fair trial. The doctor disavowed the suggestion that his testimony changed after his conversation with the prosecutor or because of the prosecutor's criticism of his evaluation of the 1998 incident. Cynthia, even if pressured to testify, testified in favor of Ramirez. She was impeached by excited utterances

made well before she had contact with the prosecutor. We are not persuaded that there was prosecutorial misconduct requiring a new trial.

¶21 There is no merit to Ramirez's claim that the evidence was insufficient to convict him of the sexual assault charges. We may not reverse a conviction on the basis of insufficient evidence "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt."[5] ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

¶22 The jury heard the description of events Cynthia and the victim gave to the police and hospital personnel on the night of the September 1999 assault. The victim indicated that Ramirez took off her pants, took off his pants, and put his "pee-pee" by her butt while he was lying on top of her. Medical records described a milky discharge from the victim's vaginal area that was not normal for a young child and seminal fluid all over her thighs. The DNA results closely linked Ramirez to fluid obtained by a vaginal swab of the victim and residue on the victim's underwear. The doctor's review of the November 1998 hospital record reflected a laceration to the vaginal area consistent with sexual misuse. An expert testified that the laceration was inconsistent with a straddle injury because it was an internal injury. This is sufficient evidence to support the convictions.

[5] In stating the standard of review, the State cites to an unpublished decision. It is a violation of WIS STAT. RULE 809.23(3) to cite an unpublished opinion of the court of appeals.

¶23 Ramirez's review of the evidence rests on the assertion that certain evidence should have been excluded.[6] In determining the sufficiency of the evidence we consider the evidence that was actually presented to the jury. We also reject Ramirez's contention that there was not enough physical evidence to convict him. Physical evidence is not required. There was seminal fluid found on the victim and even without a DNA link the presence of that fluid is evidence of an assault. Pictures were taken of the broken chain on the door corroborating Cynthia's statement to police that she broke the chain to gain entrance to the apartment. There was a physical injury corresponding to the November 1998 assault.

¶24 Ramirez points to conflicting evidence and evidence of his intoxication as negating the ability to commit the assault. He also suggests that because the jury acquitted him of the charges arising from his fight with Cynthia upon her discovery of the 1999 assault, the jury did not believe the statements of Cynthia and the victim's brother.[7] We draw no conclusion from the acquittal on certain charges. "We are obliged to look for any credible evidence which will uphold the jury's verdict and may not substitute our view of the persuasiveness of the evidence for the jury's view." ***State v. Bodoh***, 220 Wis. 2d 102, 112, 582 N.W.2d 440 (Ct. App. 1998). The jury, as ultimate arbiter of credibility, has the power to accept one portion of a witness's testimony, reject another portion and assign historical facts based upon both portions. ***O'Connell v. Schrader***, 145 Wis.

[6] Specifically, Ramirez contends that the crime lab's DNA results should have been excluded because there was no evidence of the chain of custody.

[7] The victim's brother gave the police a statement that Ramirez choked him on September 5, 1999, and that he saw Ramirez in bed with the victim without his shorts on and that there were "white boogers" on the bed.

2d 554, 557, 427 N.W.2d 152 (Ct. App. 1988). A jury can find that a witness is partially truthful and partially untruthful. ***Id.*** The bottom line is that the evidence the jury was entitled to believe and rely on supports the convictions.

¶25 Ramirez claims trial counsel was ineffective for not retaining a DNA expert, for not refuting the testimony of the 1998 treating doctor who opined that the vaginal injury was consistent with sexual assault, and for not timely objecting to the admission of the crime lab report.[8] "The benchmark for judging whether counsel has acted ineffectively is stated in ***Strickland v. Washington***, 466 U.S. 668 (1984). That requires the ultimate determination of 'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' ***Id.*** at 686." ***State v. Johnson***, 153 Wis. 2d 121, 126, 449 N.W.2d 845 (1990). The ***Strickland*** Court set forth a two-part test: the first part requires the defendant to show that his counsel's performance was deficient; the second part requires the defendant to prove that his defense was prejudiced thereby. *See* ***Johnson***, 153 Wis. 2d at 127. The test for prejudice is whether our confidence in the outcome is sufficiently undermined. *See* ***Strickland***, 466 U.S. at 694. The ineffective assistance test presents mixed questions of fact and law. ***Johnson***, 153 Wis. 2d at 127. The trial court's findings of fact as to what happened will not be overturned unless clearly erroneous. ***Id.*** The ultimate determination of whether counsel's performance was deficient and prejudicial to the defense are questions of law which this court reviews independently. ***Id.*** at 128.

[8] The argument heading in Ramirez's brief also asserts that trial counsel was ineffective for not fully investigating the matter and for failing to object to the prosecution's misconduct in calling Cynthia as a hostile witness. These two claims are not further developed and we do not address them. *See* ***Pettit***, 171 Wis. 2d at 646.

¶26 With respect to the failure to retain a DNA expert for the defense, we conclude that Ramirez has not established prejudice. Ramirez merely asserts that if an expert had been retained, a reasonable doubt could have been established. There is no showing that testing by a defense DNA expert would have produced different results from the crime lab's report. "Self-serving assertions by a defendant based on mere speculation cannot serve as the ground for a finding of actual prejudice." ***State v. Davis,*** 95 Wis. 2d 55, 60, 288 N.W.2d 870 (Ct. App. 1980). *Cf.* ***State v. Leighton***, 2000 WI App 156, ¶38, 237 Wis. 2d 709, 616 N.W.2d 126 (a defendant who alleges a failure to investigate on the part of his or her counsel must allege with specificity what the investigation would have revealed). On the performance prong of the ineffective test we note that counsel indicated that theory of defense was to suggest that Cynthia concocted the assault because she was angry. The DNA evidence was relatively unimportant because the theory of defense was not that it wasn't Ramirez's DNA. A trial attorney may select a particular strategy from the available alternatives, and need not undermine the chosen strategy by presenting inconsistent alternatives. *See* ***State v. Hubanks***, 173 Wis. 2d 1, 28, 496 N.W.2d 96 (Ct. App. 1992).

¶27 The claim that the 1998 treating doctor was not properly impeached is not supported by the record. First of all, the doctor never testified that he misdiagnosed the source of the victim's injury. He merely indicated that the vicitm's injury was consistent with a possible penetrating injury. The doctor did not change his diagnosis and there was no point on which trial counsel could have directly impeached the doctor. Trial counsel subjected the doctor to pointed cross-examination during which the doctor indicated that at the time of the injury, he did not believe it was the result of abuse. During cross-examination the doctor also indicated that it was possible a fall on a very narrow object, such as a handle to a

toilet plunger, could have caused the laceration and that a vaginal culture and pap smear at the time of the injury revealed no seminal fluid. Finally, the prosecution presented expert testimony based on review of the medical records. Trial counsel's performance with respect to the treating doctor's testimony was neither deficient nor prejudicial.

¶28 The remaining claim is that trial counsel should have timely objected to the admission of the crime lab report on the ground that the chain of custody was not established.[9] Again Ramirez has not established prejudice. If the objection had been made, the prosecution would have had the opportunity to establish the chain of custody. The trial court found that the prosecution had the evidence regarding the chain of custody. At the postconviction stage, the prosecution offered the supplemental police report establishing the chain of custody of Ramirez's blood sample from the time it was drawn and sent to the crime lab. The evidence would have been admitted. Further, Ramirez was not prejudiced because the evidence was sufficient to convict him without the DNA link. Ramirez was not denied the effective assistance of trial counsel.

¶29 The trial court imposed a sentence totaling fifty years and imposed a consecutive thirty-year prison term which was stayed in favor of thirty years' probation. Sentencing is a discretionary act and this court presumes that the sentencing court acted reasonably. ***State v. Scherreiks***, 153 Wis. 2d 510, 517, 451

[9] At the conclusion of the evidence, trial counsel moved to exclude the testimony and evidence from the crime lab analyst. Trial counsel then brought a postconviction motion for a new trial alleging in part ineffective assistance of counsel for the failure to timely object. Defense counsel's belief that an objection should have been made does not conclusively establish ineffective assistance of counsel. *See* ***State v. Kimbrough***, 2001 WI App 138, ¶35, 246 Wis. 2d 648, 630 N.W.2d 752.

N.W.2d 759 (Ct. App. 1989). This court will honor the strong policy against interfering with the discretion of the sentencing court unless no reasonable basis exists for its determination. *See* ***id.*** Inherent in the sentencing court's exercise of discretion is a consideration of numerous factors. The primary ones to be considered are the gravity of the offense, the character of the offender, and the need to protect the public. ***Id.*** The court also may consider other factors, and the weight to be accorded each factor is within the sentencing court's discretion. ***Id.***

¶30 Ramirez argues that the trial court failed to consider the following mitigating circumstances: his consistent claim of innocence backed up by Cynthia's testimony that she made up the assault and believed he did not commit the assault, that he was working at the time of the offense and supporting his family, that he had a supportive family who believed in his innocence, and that he had an alcohol problem at the time of the offense but was addressing it with the assistance of his family and pastor. The trial court considered Ramirez's claim of innocence but did not accept it as a mitigating factor. Rather, the court found the offenses to be aggravated in that Ramirez abused a position of trust with the young victim. It also found that because there were two offenses, the behavior could not be viewed as an isolated incident of bad judgment. The sentence was based on the seriousness of the offenses and the need to protect the public. These are proper sentencing factors and entitled to the weight placed on them by the trial court. We are not persuaded that the trial court erroneously exercised its discretion in imposing the sentence.

By the Court.—Judgment and order affirmed.

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