**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**March 12, 2003**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 02-0425-CR** **Cir. Ct. No. 94-CF-706**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**RICHARD A. DODSON,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Kenosha County: S. MICHAEL WILK, Judge. *Affirmed.*

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

¶1 ANDERSON, J. Richard A. Dodson appeals from a judgment of conviction for three counts of first-degree sexual assault of a child contrary to WIS. STAT. § 948.02(1) (2001-02).[1] His contention is that both his constitutional

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

right to a speedy trial and his statutory right to a speedy trial were violated. We disagree. Therefore, we affirm.

¶2 **Background.** In 1995, Dodson was convicted of three counts of first-degree sexual assault of a child. Dodson appealed and we affirmed. After further appeal, the supreme court filed a remittitur on July 24, 1998, in which it affirmed in part and reversed in part our decision and ordered the cause remanded to the circuit court for a new trial. Dodson's new trial ultimately began twenty-eight months later in November 2000. Dodson claims that his right to a speedy trial was violated; this claim requires the examination of pretrial events between the date of the supreme court's remittitur and the November 2000 trial. Therefore, we only briefly recount the trial evidence leading to Dodson's conviction.

¶3 At the second trial, Brian S. testified that on multiple occasions between February 29, 1992, and August 31, 1992, Dodson had sexual contact and anal intercourse with him while the two were at Dodson's residence in Kenosha, Wisconsin. Brian was eight years old when the assaults began.

¶4 In addition to Brian's testimony, the State introduced expert medical testimony that Brian had an anal tag, a physical condition consistent with anal penetration and tearing. The State also introduced other acts evidence, including the testimony of two young men who had allegedly been assaulted by Dodson in a similar manner when Dodson resided with his parents in Illinois. Finally, the State introduced testimony from Brian that Dodson first began assaulting him in Illinois by having Brian perform fellatio on him. Dodson maintained throughout trial that he did not assault Brian. At the conclusion of trial, a jury once again found Dodson guilty of three counts of first-degree sexual assault of a child. Dodson appeals.

¶5 The right to a speedy trial has two components: (1) a constitutional right to a speedy trial based on the Sixth Amendment to the United States Constitution and article I, section 7, of the Wisconsin Constitution[2] and (2) a statutory right to a speedy trial based on WIS. STAT. § 971.10. Section 971.10 provides for trial within ninety days after demand but does not define the constitutional boundaries of the right to speedy trial. Sec. 971.10(2); ***Day v. State***, 60 Wis. 2d 742, 744, 211 N.W.2d 466 (1973). Rather, § 971.10 merely was intended to provide for an orderly and flexible manner of court administration which the State or an accused might make use of to expedite trial. ***Day***, 60 Wis. 2d at 744. Thus, violation of the statute does not as a matter of law violate the state or federal constitution. ***Id.*** In addition, a defendant must demand that his or her case be brought on for trial as a condition precedent to requesting dismissal of the charge on the ground that he or she has been denied his or her constitutional

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[2] The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy trial and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

In turn, art. I, § 7, of the Wisconsin Constitution provides:

> **Rights of accused.** Section 7. In all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process to compel the attendance of witnesses in his behalf; and in prosecutions by indictment, or information, to a speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed; which county or district shall have been previously ascertained by law.

right to a speedy trial. ***State v. Kwitek***, 53 Wis. 2d 563, 570, 193 N.W.2d 682 (1972), *cert. denied*, 409 U.S. 1047 (1972). While this appeal implicates both components of a speedy trial, it focuses on the constitutional right to a speedy trial, which is where we begin our analysis.[3]

¶6 **Constitutional Right to a Speedy Trial.** The right to a speedy trial is found in the Sixth Amendment to the United States Constitution and article I, section 7, of the Wisconsin Constitution. Whether a defendant has been denied the right to a speedy trial is a constitutional question that this court reviews de novo. ***State v. Leighton***, 2000 WI App 156, ¶5, 237 Wis. 2d 709, 616 N.W.2d 126. The trial court's underlying findings of historical fact, however, will be upheld unless they are clearly erroneous. ***Id.***

¶7 Dodson argues that he was denied his constitutional right to a speedy trial. We disagree. The record reveals that Dodson waived this right. At the initial status hearing on September 2, 1998, Dodson diligently asserted his right to a speedy trial but later, at that same hearing, he waived this right. The State indicated that it would be ready to proceed within a few weeks. But for reasons not in the record, the parties agreed to a trial date of December 14, 1998, three and one-half months later. After agreeing to this trial date, Dodson's attorney informed the court, "I talked to Mr. Dodson during the break here. I would

[3] The record indicates that Dodson positively asserted the right to a speedy trial on September 2, 1998, at a bond motion hearing. It is unclear which speedy trial right he intended to assert at that time—constitutional or statutory; however, we will assume without deciding that this assertion was both a constitutional and a statutory assertion of the right to a speedy trial. *See* ***State v. Kwitek***, 53 Wis. 2d 563, 570, 193 N.W.2d 682 (1972), *cert. denied*, 409 U.S. 1047 (1972) (a defendant must demand that his or her case be brought on for trial as a condition precedent to requesting dismissal of the charge on ground that he or she has been denied a constitutional right to a speedy trial).

withdraw the speedy trial demand." The trial court then specifically asked, "Mr. Dodson, do you waive your speedy trial demand," to which Dodson replied, "Yes."

¶8 Thereafter, Dodson never expressly reasserted the right to a speedy trial. Nonetheless, Dodson seems to argue that his waiver only lasted until the December 14, 1998 trial date. Dodson cites no authority to support the proposition that a waiver expires and a constitutional speedy trial demand reinstates automatically when a scheduled trial date is delayed. Moreover, we have found no authority to support a line of argument that rests on an ongoing, implied or unspoken right to a speedy trial once a defendant has expressly waived that right.

¶9 We hold that a defendant, once he or she has expressly waived the right to a speedy trial, must thereafter expressly place another demand before the court and before the State. In this way, the court and the State are aware of their renewed obligation to honor that constitutional right. We add that in a "length-of-delay" analysis, the date of the reasserted demand after waiver is the significant start date for purposes of determining whether the delay was presumptively prejudicial.

¶10 Having determined that Dodson waived his constitutional right to a speedy trial, we nonetheless address the three other elements of a speedy trial analysis as it applies to this case. We do so for three reasons: First, we wish to avoid having to discuss and decide the retroactivity or prospectivity of this new rule and whether the announcement of this new rule should be applied to Dodson. Second, the past history of this case has a published track record both in the court of appeals and the supreme court. Therefore, we have an interest in the policy of

completeness. Third, a complete recitation of the facts will, we hope, help to show the value of reasserting a speedy trial demand if given up somewhere along the way.

¶11 Under both the United States and Wisconsin Constitutions, to determine whether a defendant has been denied the right to a speedy trial, a court must consider: "(1) the length of the delay; (2) the reason for the delay, i.e., whether the government or the defendant is more to blame for the delay; (3) whether the defendant asserted the right to a speedy trial; and (4) whether the delay resulted in any prejudice to the defendant." ***Leighton***, 2000 WI App 156 at ¶6. We have already answered the third factor—assertion of the right to a speedy trial—against Dodson. We will now discuss the remaining factors in order.

¶12 **A. The Length of the Delay.** The first factor, the length of the delay, is a threshold consideration—the court must determine that the length of the delay is presumptively prejudicial before inquiry can be made into the remaining three factors. ***Doggett v. United States***, 505 U.S. 647, 651-52 (1992) ("[T]o trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay."); ***Hatcher v. State***, 83 Wis. 2d 559, 566-67, 266 N.W.2d 320 (1978). In ***Doggett***, 505 U.S. at 652 n.1, the United States Supreme Court recognized: "Depending on the nature of the charges, the lower courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year." Here, there was a twenty-eight month delay from the time of remittitur in July 1998 to Dodson's trial date in November 2000. We conclude that this amount of time is presumptively prejudicial and turn to the remaining three factors. *See* ***Leighton***, 2000 WI App 156 at ¶8 (where the court

concluded that a twenty-six month delay from the filing of the criminal complaint to the defendant's trial was presumptively prejudicial).

¶13 **B. The Reason for the Delay.** In ***State v. Borhegyi***, 222 Wis. 2d 506, 588 N.W.2d 89 (Ct. App. 1998), this court recognized that the reasons for the delay are assigned differing weights:

> A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. 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.*** at 512 (quoting ***Barker v. Wingo***, 407 U.S. 514, 531 (1972)).

¶14 Here, the State argues that "virtually all" of the delay in bringing Dodson's case to trial was directly attributable to the defense. After the circuit court received the remittitur on July 24, 1998, on September 2, 1998, it conducted a bond hearing and scheduled the trial. Dodson is patently wrong in his assertion that the circuit court had the authority to schedule a conference or hearing as soon as it found out that the conviction was reversed by the supreme court. Under WIS. STAT. § 808.08(2), the circuit court cannot act until it has received the remitted record; in fact, the actions a circuit court is permitted to take during the time a criminal appeal is pending are very limited, WIS. STAT. § 808.075(4)(g), and do not include setting further proceedings before the record is remitted by the supreme court. Thus, there was no "court delay" as Dodson argues in the time between the supreme court reversal and the circuit court's receipt of the remittitur. The circuit court scheduled the first status conference for September 2, 1998, approximately forty days from the date of remittitur—this is hardly unreasonable.

¶15 As noted earlier, Dodson made a speedy trial demand at the September 2, 1998 bond hearing. The State indicated that it would be ready to proceed within a few weeks. The parties agreed to a trial date of December 14, 1998. At that point, Dodson's attorney (Attorney Backes) said, "I talked to Mr. Dodson during the break here. I would withdraw the speedy trial demand." This was a delay of about three and one-half months and the trial court specifically asked, "Mr. Dodson, do you waive your speedy trial demand," to which Dodson indicated that he did waive his speedy trial demand and that the December date was "fine." The record does not disclose why this trial date was chosen, but the State proffers that a reasonable inference is that it was intended to accommodate discovery, trial preparation, and the calendars of court and counsel. We agree that this is a reasonable inference and further hold that the time span of three and one-half months is reasonable and is not chargeable against either the State or Dodson. *See* ***Hatcher***, 83 Wis. 2d at 567 (where the court observed that a delay of five months after charging "was necessary for the orderly preparation of the case for trial and thus not delay which could be charged against either the state or defendant.").

¶16 Subsequently, on November 17, 1998, at what was supposed to be the final pretrial, Backes requested an adjournment. Dodson indicated that he supported his attorney's request for an adjournment. A new trial date of February 15, 1999, was set.

¶17 On January 25, 1999, the State filed a motion to adjourn the February trial date. Two days later, Backes filed a motion to withdraw as counsel and a motion to adjourn the trial date. On February 4, 1999, the court first heard the defense motion. Backes explained that he was not receiving payment from Dodson or his family, and, therefore, requested permission to withdraw. Dodson

indicated that he had requested counsel to adjourn the matter because the defense was not yet prepared for trial. The court granted Backes's motion to withdraw and ordered that the public defender be notified that Dodson needed representation. The court next considered and granted the parties' motions for adjournment, noting that it was in Dodson's interest for this matter to be adjourned. The court then indicated that Dodson's case was considered a "high priority" and set a February 12, 1999 status hearing to pick a new trial date with Dodson's new attorney present. At the hearing, with defense Attorney Hans Koesser present, the court set a trial date of March 29, 1999. We attribute this delay to both the defense and the State because both requested adjournments of the February 15, 1999 trial date.

¶18 On March 2, 1999, the district attorney indicated that he was ready to proceed to trial on the scheduled date of March 29, 1999. Dodson's attorney stated that he did not think he could be ready for trial and requested an adjournment. He indicated that the earliest he could be ready was May 17, 1999. Working around the availability of the victim and the schedules of both attorneys and the court, the trial was set for July 19, 1999. We deem this delay attributable to the defense.

¶19 Thereafter, in early April, Dodson sent a letter to the court indicating that he had discharged Koesser as counsel. The need for the appointment of replacement counsel necessitated another delay, which cannot be attributable to the State.

¶20 In addition to Dodson's letter to the court indicating that he had discharged Koesser as counsel, Koesser filed a motion to withdraw as counsel on April 1, 1999. On April 23, 1999, both Koesser and Attorney Denise Hertz-

McGrath appeared. Hertz-McGrath stated that she had been appointed as replacement counsel, but had not "even started looking at [the file]." The court granted Dodson's request to discharge Koesser but did not adjourn the July trial date, expressing that it "did not want to lose that trial date."

¶21 Later, at a May 14, 1999 status conference, the court learned that because Hertz-McGrath did "not have the time to do this matter properly," the public defender's office had appointed Attorney Robert Bramscher. Then, at a May 20, 1999 status conference, Bramscher requested a one-month adjournment until August because he had a scheduling conflict with the July trial date. At this time, the court confirmed that there was not any speedy trial demand on the record. The court then scheduled a new trial date of August 16, 1999. On the record, Dodson expressed his approval of Bramscher's request to adjourn. Thus, the eight months between the first scheduled trial date and the August 16, 1999 date represents delay due to several substitutions of defense counsel—this delay is not attributable to the State.

¶22 On July 23, 1999, the defense filed a motion to introduce evidence pursuant to ***State v. Pulizzano***, 155 Wis. 2d 633, 638-39, 456 N.W.2d 325 (1990).[4] The defense motion asserted that Delores Dodson, Dodson's aunt, would testify that the victim had told her that a person named "Bobby" (Robert Moore), Dodson's nephew had sexually assaulted him, and that this testimony would demonstrate an alternative source of the victim's knowledge of sexual behavior.

[4] ***State v. Pulizzano***, 155 Wis. 2d 633, 638-39, 456 N.W.2d 325 (1990), established that in a sexual assault case, "evidence of the prior sexual assault of the child complainant for the limited purpose of establishing an alternative source for [the child's] sexual knowledge" is admissible. This type of evidence has come to be called ***Pulizzano*** evidence.

Then, at a pretrial proceeding on August 5, 1999,[5] Bramscher expressed concern with Delores's availability for trial on August 16, 1999, because she had previously told the defense investigator that she did not feel that she could come to Kenosha from Illinois to testify. At this time, the court asked Bramscher what Dodson's opinion was regarding a delay—Bramscher replied that Dodson had told both him and the investigator that he wanted the trial done right, even if there needed to be a delay.

¶23 Because Dodson was not present at the August 5, 1999 proceeding and it was the court's intent to maintain the August 16, 1999 trial date, the court scheduled another proceeding for August 10, 1999, to further address the issue of the ***Pulizzano*** evidence, as well as the State's motions. At this proceeding, Bramscher informed the court that he was not prepared to go to trial on August 16, 1999. The district attorney indicated that he too wanted an adjournment of the proceeding because he had obtained information that called into doubt Dodson's representation of what Delores would testify to if given the opportunity. The district attorney recapped the fact that Dodson's reversal in part by the court of appeals and again by the supreme court was based on an offer of proof made by Dodson's appellate attorney regarding the testimony that would be provided by Delores allegedly relating admissions or statements that the victim had made to her in 1990 or 1991.

[5] Because Dodson was not present at this proceeding and it was the court's intent to maintain the August 16, 1999 trial date, the court scheduled another proceeding for August 10, 1999, to further address the issue of the ***Pulizzano*** evidence, as well as the State's motions.

¶24 The district attorney informed the court that he went to Gurnee, Illinois, to the residence of Delores and interviewed her on videotape. He said that at that time Delores confirmed that she had indicated to Bramscher or a representative that she did not wish to come to Wisconsin because she was in ill health. She reiterated that she had never told anyone that the victim had said the things to her that Dodson represented she would testify. She also said that the only member of the Dodson family she can remember that had actually visited her regarding this matter was Dodson's brother, Mark. She said that Mark tried to get her to lie about this, and that she had refused to do that.

¶25 In response, Bramscher told the court that he believed he could establish that Delores was having a "memory failure of convenience so she doesn't have to come [to Wisconsin] and doesn't have to cooperate." At this time, the court said, "[With] these different and new developments … it appears it is unreasonable to expect this matter to go to trial Monday." Bramscher agreed and replied that he was "[a]bsolutely, without equivocation" requesting an adjournment on behalf of Dodson.

¶26 The subsequent delay from August 1999 through March 2000 was due to the need to resolve the question of the admissibility of the statement allegedly made by Delores regarding the victim being sexually assaulted by another individual. Given that one of the grounds for reversing Dodson's convictions after his first trial was due to the exclusion of this particular ***Pulizzano***

evidence, it was reasonable to give both parties the opportunity to adequately prepare for and present the issue to the court.[6]

¶27 Thereafter, on December 13, 1999, Delores testified before the court at a motion hearing. The trial court made a finding that Delores was "clearly competent." Delores testified that she was never told by Brian[7] that he had been sexually assaulted by Bobby. She related that she never told Brian's mother that Brian had been sexually assaulted and that in fact she had never told anyone that Brian had been sexually assaulted by Bobby. The district attorney then showed Delores a document—Exhibit 1[8]—with writing on it and asked her if she had signed it. She stated that she did not sign the document *when it had any writing on it*. She testified that she was asked by Mark Dodson (Dodson's brother) to sign a blank piece of paper in order "to help Richard." She said that she signed the blank piece of paper he gave her but that she did not sign a document with writing on it.

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[6] After a hearing in which Delores Dodson was present to clarify her position, the court denied Dodson's motion to introduce ***Pulizzano*** evidence.

[7] The transcript from the December 13, 1999 hearing refers to the victim as "Jeffrey S." rather than Brian S. Nowhere in the record or in either party's briefs is this confusing name change explained. Furthermore, we can find no other reference to "Jeffrey" as the victim in the record. We do glean from the record that Brian's mother's name and "Jeffrey S.'s" mother's name are one in the same. We also know that the evidence presented at the December 13, 1999 hearing is the same evidence that the district attorney told the court it learned from Delores when he interviewed her regarding *the victim* before the hearing. Also, at a subsequent motion hearing, the district attorney references the December 13, 1999 testimony of Delores as proving that if she were to testify at trial the State would show "that the *victim in this case* never made such a statement to Delores Dodson." (Emphasis added.) All this leads us to assume that "Jeffrey" is Brian and we will refer to him as such.

[8] This document related that Brian had told Delores that Bobby had sexually assaulted him. This was the basis of the defense's ***Pulizzano*** evidence, which it sought to offer as evidence relating to prior sexual knowledge of the victim.

¶28 It appears that this seven-month delay, initially based on Dodson's motion to admit ***Pulizzano*** evidence, may have been "necessary for the orderly preparation of the case for trial." *See* ***Hatcher***, 83 Wis. 2d at 567. At any rate, we are persuaded by the State's assertion that this "was not due to any negligence by the State, or any intentional effort to stall the trial date."

¶29 Despite the fact that the court offered several trial dates beginning as early as March, the trial date was set for June 19, 2000, to accommodate Dodson's attorney. The record demonstrates that Bramscher had scheduling conflicts until this time and that he and Dodson discussed this. Furthermore, the court specifically asked Dodson, "[D]o you have any questions about this calendaring that we're doing?" Dodson replied, "No." Thus, this three-month delay is not attributable to the court or to the State.

¶30 On May 16, 2000, Dodson filed a motion for substitution of counsel and a motion to adjourn the June 19, 2000 trial date. Dodson sought to adjourn the trial because of "inactions of [his] defense counsel" in failing to properly prepare for the case and because more time was needed to "investigate, collect, and locate information, evidence and witnesses and … put together a defense." Dodson also stated that he did not have access to all of his boxes of legal material while at the Kenosha County Jail. Bramscher agreed with Dodson that additional time was needed to find and interview one of the potential witnesses and to prepare for trial. The court then granted the defense motion to adjourn and set a new trial date of August 21, 2000. Despite Dodson's arguments to the contrary, he is responsible,

with one exception,[9] for delays resulting from substitution of counsel, each of whom would need time to become familiar with the case. Neither the State nor the court can be faulted for Dodson's changes in counsel.

¶31 Finally, contrary to Dodson's assertion, the adjournment of the August 21, 2000 trial date was also at the request of the defense. The State informed Dodson that two of the State's witnesses were unavailable for the August 21, 2000 trial date, but that it intended to use videotaped depositions for both witnesses. Dodson's attorney stated that although Dodson wanted the trial to go in August, Dodson felt it "essential" that the witnesses appear at the trial in front of the jury.[10] Dodson requested that the witnesses appear in person and agreed, without objection, to a delay to accommodate his request. The court rescheduled the trial for November 27, 2000, the date upon which the trial did in fact begin.

¶32 We agree with the State that "virtually all" of the delay in bringing Dodson's case to trial was directly attributable to the defense. We therefore conclude that the reasons for the delays were not "a deliberate attempt to delay the trial in order to hamper the defense." *See* ***Borhegyi***, 222 Wis. 2d at 512 (quoting ***Barker***, 407 U.S. at 531). Additionally, though we recognize that the ultimate responsibility for "negligence or overcrowded courts" rests with the government

[9] We note that one of Dodson's attorneys died before trial; neither the State nor the court is responsible for the delay caused by the death of Dodson's counsel. In fact, we conclude that delay with regard to this occurrence is the fault of neither party.

[10] The defense did not argue that videotaped depositions would violate Dodson's right to confrontation. The use of videotaped depositions are permissible in criminal trials under WIS. STAT. § 967.04. Moreover, a defendant's right to confrontation is met because the statute provides for the personal attendance of the defendant at a videotaping. Sec. 967.04(4).

rather than with the defendant, the record does not reveal that either of these circumstances existed. *See* ***id.*** The record before us strongly indicates that Dodson did not want a speedy trial given that an overwhelming majority of the delays must be laid at his own feet.

¶33 **C. Prejudice.** The final factor to be considered in evaluating a claimed violation of a defendant's speedy trial right is whether the delay resulted in prejudice to the defendant. ***Id.*** at 514. This factor is assessed in light of a defendant's interests, which the speedy trial right is designed to protect. ***Id.*** There are three interests to consider: (1) preventing oppressive pretrial incarceration; (2) minimizing the accused's anxiety and concern; and (3) limiting the possibility that the defense will be impaired. ***Id.*** Reviewing those factors in this case, we are led to the ineluctable conclusion that no prejudice has been established.

¶34 First, Dodson was not subject to oppressive incarceration while his trial was pending because, as it turned out, he was again sentenced to lengthy incarceration in his subsequent retrial. *See* ***United States v. Antoine****,* 906 F.2d 1379, 1382 (9th Cir. 1990) ("[W]hether [the defendant's] incarceration is unjustified and thus oppressive depends upon the outcome of [his] appeal on the merits, or subsequent retrial, if any. If his conviction was proper, there has been no oppressive confinement: he has merely been serving his sentence as mandated by law.").

¶35 Second, there is no substantial proof offered by Dodson that his anxiety and concern awaiting his retrial were any more significant than any other prisoner awaiting trial. *See* ***id.*** at 1383 (finding prisoner's failure to show any unique manifestation of anxiety makes the second prejudice factor noncompelling). Dodson asserts that the delay of his case left him unable to

attend his brother's funeral and that this distressed him. However, the record reveals that the court granted his request to attend his brother's funeral and that Dodson thereafter withdrew his request. Thus, Dodson's withdrawal of his request, not his incarceration due to delay, caused him to miss his brother's funeral. Dodson chose to remain incarcerated during his brother's funeral; any anxiety he experienced because of this is as a result of his choice. He also asserts that he experienced anxiety because of his placement at Columbia Correctional facility.[11] In both instances, he fails to provide any documentation supporting his assertions of emotional stress.

¶36 Finally, there is no showing of any limitation that the delay in question has caused in connection with past or future litigation. Dodson claims that the passage of time "resulted in the loss of the testimony of eighty-three-year old Delores, who deteriorated over time from cancer and other health problems to the point that she was not a competent or accurate witness any longer." Dodson claims that Delores would have presented admissible ***Pulizzano*** testimony—the grounds upon which the supreme court reversed Dodson's convictions after his first trial were due to the exclusion of this alleged ***Pulizzano*** evidence. However, Delores gave sworn testimony in a December 13, 1999 hearing. This was only twelve months after the original retrial date—the time at which Dodson claims Delores would have been able to provide ***Pulizzano*** evidence. His claim that he lost evidence because she "deteriorated over time" is suspect given that the time

[11] Dodson's argument that he was kept at the Columbia Correctional facility as a punishment for "winning" on appeal is unsupported by the record. Such argument is nothing more than histrionics. This type of exaggerated argument is not persuasive. We caution defense counsel to stick to the record.

was only twelve months and that the trial court made a specific ruling that Delores was "competent" on the date of her testimony.

¶37 The court then heard Delores's testimony repudiating the substance of the writing in the document and her further testimony that she signed the document when it was blank. After thorough consideration, the court ruled that "under the Pulizzano case, the defendant has not stated a case to demonstrate that the prior acts clearly occurred." The court therefore did not permit the defense to introduce at trial the document containing alleged ***Pulizzano*** evidence.

¶38 Like the trial court, we need not ignore the fact that Delores's testimony at the motion hearing did not at all demonstrate what Dodson said it would. Dodson's claim of actual impairment to his case fails.

¶39 Dodson's constitutional right to a speedy trial was not violated. The particular circumstances resulting in each delay—the fact that most of the delays were at the request of the defense, that many of the delays were the result of motions filed on Dodson's behalf, Dodson's explicit waiver of his speedy trial right after he had asserted it, and Dodson's explicit and implicit consent to delays even after the rescheduled December 1998 trial date (the date he claims his waiver expired and his speedy trial demand reinstated), combined with the lack of any demonstrable prejudice to his defense—nullify his claim of a violation of his constitutional right to a speedy trial.[12]

[12] Here, we note Dodson's reply brief assertion that "the demand for reasonable bail, or a modification of bail, is the functional equivalent of a demand for a speedy trial." This is not the law in Wisconsin and we choose not to entertain his citations to federal Circuit Court of Appeals decisions not authoritative to our state law.

¶40 **Statutory Right to a Speedy Trial.** The chronology set out above also supports a finding that Dodson's statutory right to a speedy trial was not violated. WISCONSIN STAT. § 971.10 provides in relevant part:

> **(2)**(a) 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*. If the demand is made in writing, a copy shall be served upon the opposing party. The demand may not be made until after the filing of the information or indictment. (Emphasis added.)

Although Dodson made a speedy trial demand on the record on September 2, 1998, he withdrew that demand on that very same date. He never again made a demand in writing or on the record, as is required by § 971.10(2)(a).

¶41 Furthermore, Dodson's claim that dismissal of all charges is appropriate because the statute "does not explicitly mandate a proper remedy" for a violation of a statutory speedy trial right is simply wrong. The statute expressly provides a remedy in subsec. (4):

> Every defendant not tried in accordance with this section shall be discharged from custody but the obligations of the bond or other conditions of release of a defendant shall continue until modified or until the bond is released or the conditions removed.

WIS. STAT. § 971.10(4). Dodson is not entitled to relief under § 971.10.

¶42 Dodson has failed to prove any violation of his statutory or constitutional right to a speedy trial.

*By the Court.*—Judgment affirmed.

Not recommended for publication in the official reports.