COURT OF APPEALS
DECISION
DATED AND FILED

August 28, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2477-CR **Cir. Ct. No. 97-CF-2417**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DARYL O. NORRIS,

DEFENDANT-APPELLANT.

APPEAL from judgments and orders of the circuit court for Dane County: ANGELA B. BARTELL, Judge. *Affirmed.*

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

¶1 PER CURIAM. Daryl Norris appeals judgments convicting him of three drug-related misdemeanors and of being a felon possessing a firearm. He contends that his constitutional speedy trial right was violated; that he received ineffective assistance of counsel; that the trial court allowed the prosecutor to conduct improper cross-examination of defense witnesses; that the trial court erred

by refusing to sever the drug counts from the firearm charge; and that he should receive a new trial in the interest of justice. We affirm on all issues.

¶2 The State commenced this prosecution in December 1997. Early on in the proceeding Norris appeared by several different attorneys. His trial was first scheduled for February 1998 and then postponed until April 1998 when defense counsel moved to withdraw. The court again postponed the trial until May 1998 because Norris again changed attorneys. The court later rescheduled it to July 1998 for reasons not clear from the record.

¶3 The trial was subsequently rescheduled for September 1998 at defense counsel's request. However, defense counsel withdrew in August. The trial court then cancelled the trial date at the State's request, although the State remained willing to try the case in September. Early in September, Norris told the court he hoped to reach a plea agreement before selecting a replacement counsel. The trial court did not select a new trial date.

¶4 Norris failed to appear (by phone) at the next scheduled hearing, a status conference in February 1999. The conference was then rescheduled for June 1999. During the June conference Norris asked for new counsel, and subsequently received appointed counsel.

¶5 In August 1999, Norris entered no contest pleas to the drug charges, and received a September 1999 trial date on the weapons charge. However, at defense counsel's request, the trial court rescheduled the trial for October. In September, Norris moved to withdraw his pleas and to discharge counsel. These requests caused postponement of the October trial.

¶6 With new counsel, Norris received a trial date in February 2000. Shortly before that trial date, he renewed his plea withdrawal motion and filed other substantive motions as well, including one to suppress evidence. He also requested postponement of the trial because a witness was unavailable. The trial court allowed him to withdraw his plea to the drug charges in April 2000. Scheduling conflicts and unavailable State witnesses delayed completion of the hearing on the suppression motion until October 2000. The court denied the suppression motion in November 2000.

¶7 The trial was then scheduled for February 2001, but was "bumped" until May 2001, when it finally occurred. The charges were tried together after the trial court denied Norris's motion to sever the gun count. Norris asserted that he wanted to testify on that charge without subjecting himself to cross-examination on his prior drug use.

¶8 During the trial, defense counsel called as a witness his paralegal to impeach a witness who testified inconsistently with pretrial statements the witness had made to her. During cross-examination of the paralegal, the prosecutor demanded and received her notes from the witness interview. However, counsel inadvertently also turned over her notes of interviews with three other defense witnesses. Over Norris's objection, the court allowed the prosecutor to use the notes in cross-examining those witnesses.

¶9 After the guilty verdict and subsequent conviction, the trial court denied postconviction relief on the issues concerning a speedy trial, counsel's inadvertent disclosure of Lauber's notes, and the prosecutor's subsequent use of those notes.

¶10 We first address Norris's argument that his constitutional right to a speedy trial was denied. Whether a defendant's constitutional speedy trial right has been violated is a question this court reviews de novo. *See* ***State v. Ziegenhagen***, 73 Wis. 2d 656, 664, 245 N.W.2d 656 (1976). This court will, however, uphold the trial court's findings of historical fact unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2) (2001-02);[1] ***State v. Clappes***, 136 Wis. 2d 222, 235, 401 N.W.2d 759 (1987). The factors bearing on the speedy trial analysis are: (1) the length of the delay between charging and trial; (2) 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 prejudiced the defendant. *See* ***Doggett v. United States***, 505 U.S. 647, 651 (1992); ***Day v. State***, 61 Wis. 2d 236, 244, 212 N.W.2d 489 (1973). The first inquiry is always whether the delay 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).

¶11 Here, the delay of forty-two months was undisputedly "presumptively prejudicial." However, the delay was, as the trial court noted, overwhelmingly due to Norris. He repeatedly switched attorneys, failed to appear at a scheduling conference, and asked at one point to delay matters in hopes of negotiating a plea bargain. He entered pleas on some charges, and then withdrew them and filed substantive motions shortly before one of the scheduled trial dates. Other delays were due to defense counsel's scheduling conflicts. In contrast, the delays attributable to the State, or to the trial court's schedule, were far less

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

significant. Additionally, Norris never asserted his speedy trial right on the record, and demonstrated no prejudice from the delay. Beyond the threshold factor, he satisfies none of the criteria for showing a constitutional speedy trial violation.

¶12 We also conclude that counsel's inadvertent release of the paralegal's notes did not prejudice Norris. The weapons charge concerned a shotgun police found in a closet in Norris's home that contained his clothes. Norris's girlfriend testified that the gun was hers, and that she put it in the closet without his knowledge. Using the paralegal's notes, the prosecutor elicited the girlfriend's admission that she may have told the paralegal that Norris knew she owned the gun. The prosecutor also used the notes to elicit an admission from Norris's daughter that she told the paralegal she thought her father owned a gun because he liked to hunt.

¶13 However, in both instances, the cross-examination was of limited value to the State. The prosecutor's cross-examination did not address or elicit any information from the girlfriend as to whether Norris actually possessed the shotgun for WIS. STAT. § 941.29(2) purposes. *See* ***State v. Black***, 2001 WI 31, ¶19, 242 Wis. 2d 126, 624 N.W.2d 363 (defining "possession" for § 941.29(2) purposes as knowingly having actual physical control of a firearm). Evidence that Norris knew his girlfriend owned the shotgun does not measurably help prove possession.

¶14 Nor did Lauber's notes prove significantly helpful to the State in cross-examining Norris's daughter. In response to other questions, the daughter admitted that she told several people other than the paralegal about her father's gun. Consequently, the evidence of her statement to the paralegal was cumulative

at best. A defendant claiming ineffectiveness must show prejudice from counsel's act or omission. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 232, 548 N.W.2d 69 (1996). Norris failed to meet this burden with regard to disclosure of the paralegal's notes.

¶15 For much the same reason, we need not determine whether the trial court erred by allowing the prosecutor to use the notes over Norris's objection. Allowing the cross-examination was harmless, even if it was error. Beyond any reasonable doubt, a reasonable jury would have reached the same verdict had the court barred their use. *See* ***State v. Harvey***, 2002 WI 93, ¶¶44-47, 254 Wis. 2d 442, 647 N.W.2d 189.

¶16 Finally, we conclude that the trial court properly denied Norris's motion to sever the drug charges from the firearm charge. The trial court may sever charges that are otherwise properly joined, if joinder is substantially prejudicial to the defendant. WIS. STAT. § 971.12(3); ***State v. Hoffman***, 106 Wis. 2d 185, 209, 316 N.W.2d 143 (1982). Where, as here, the defendant wants to testify on one charge, but avoid testifying on the others, the defendant must show that he or she "has both important testimony to give concerning one count and strong need to refrain from testifying on the other." ***State v. Nelson***, 146 Wis. 2d 442, 458, 432 N.W.2d 115 (Ct. App. 1988), quoting ***Baker v. United States***, 401 F.2d 958, 977 (D.C. Cir. 1968). The decision to sever is discretionary. ***Nelson***, at 455-56.

¶17 Here, Norris wanted to testify on the gun charge to deny that he knew the shotgun was in his closet. However, he asserted that if the court did not sever the counts, the State could then cross-examine him on his prior drug use as a means of proving the drug charges. However, he offered nothing in support of this

conclusory assertion. He made no showing that the State intended to question him on his prior drug use, or that the trial court would admit such evidence, which was only potentially admissible as an exception to the other acts prohibition. *See* WIS. STAT. § 904.04(2). Neither did Norris demonstrate in any meaningful way that there was a strong need to avoid answering questions concerning his prior drug use, even if the court would have allowed them. Consequently, the trial court reasonably determined that Norris failed to meet his burden under WIS. STAT. § 971.12(3).

¶18 Norris also asks this court to exercise its discretion under WIS. STAT. § 752.35 to grant him a new trial in the interest of justice. He contends that the trial court's decision to deny his motion to sever deprived him of the opportunity to testify on the firearm charge, so that the real controversy was not fully tried. He also asks this court to consider the prosecutor's use of Lauber's notes as further tainting the trial. We have determined, however, that the court did not err in denying the motion to sever, and that the use of Lauber's notes did not prejudice Norris. Norris's decision not to testify was knowing and voluntary under the circumstances, and we do not conclude that it precluded a full and fair trial of the firearm charge.

By the Court.—Judgments and orders affirmed.

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