COURT OF APPEALS
DECISION
DATED AND FILED

January 12, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP1965-CR **Cir. Ct. No. 2007CF359**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY EDWARD OLSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: RALPH M. RAMIREZ and ROBERT G. MAWDSLEY, Judges. *Affirmed.*

Before Neubauer, P.J., Anderson and Reilly, JJ.

¶1 PER CURIAM. A jury convicted Jeffrey Edward Olson of three counts of second-degree sexual assault of two family members when the victims

were minors. Olson appeals pro se from the judgment of conviction and from the order denying his motions for postconviction relief after hearing held pursuant to ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). He asserts: (1) he was deprived of his right to represent himself at trial; (2) the State's use of other-acts evidence violated his constitutional right not to be placed in double jeopardy; (3) the State violated his statutory and/or constitutional right to a speedy trial; (4) the assistant district attorney (ADA) engaged in prosecutorial misconduct; and (5) trial counsel rendered ineffective assistance. We reject his arguments and affirm the judgment and order.

¶2 This Waukesha county case is intertwined with Milwaukee county case number 05CF6674 because, during the relevant time periods, Olson and the victims lived for a time in each county. In the Milwaukee county case, Olson initially was charged with repeated sexual assault of a child under the age of sixteen, contrary to WIS. STAT. § 948.025(1)(b) (2005-06),[1] a class C felony. It came to light that during the two-year period over which the assaults were alleged to have been perpetrated, some may have occurred in Waukesha county. Efforts to consolidate the offenses into one county did not come to fruition. Olson entered an ***Alford***[2] plea to reduced charges—two misdemeanor counts of fourth-degree sexual assault—in Milwaukee county and was placed on probation.

¶3 The Waukesha county ADA wanted to be certain the charges she filed were provable. Interviews of the youngest of the two victims were not complete until August 2006. Then in January 2007 the ADA came into possession

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless noted.

[2] *See* ***North Carolina v. Alford***, 400 U.S. 25, 37-38 (1970).

of letters Olson had written to his ex-wife and the victims expressing his remorse and feelings of guilt for "what [he] did to" them. Olson gave the letters, each in an envelope addressed to the recipient, to his probation agent for delivery to them. Because the letters directly flouted his no-contact orders, the agent turned them over to the State. The prosecutor construed the letters' virtual admissions to be key evidence. A complaint charging Olson with three counts of second-degree sexual assault was filed on March 29, 2007. Olson was incarcerated at the time, his Milwaukee county case probation having been revoked.

¶4 On April 10, Olson filed four pro se motions. A month later, the public defender's office appointed the first of a series of attorneys to represent him. More facts will be supplied as necessary.

Right to Self-Representation

¶5 Olson first contends that he was denied his right to represent himself and that his defense was irreparably harmed by the succession of attorneys "forced" on him by the State and the court. The Sixth Amendment impliedly guarantees the right to represent oneself. *See* ***State v. Darby***, 2009 WI App 50, ¶16, 317 Wis. 2d 478, 766 N.W.2d 770; *see also* ***Faretta v. California***, 422 U.S. 806, 819 (1975). To invoke that right, a defendant must "clearly and unequivocally" declare a desire to proceed pro se. ***Darby***, 317 Wis. 2d 478, ¶24.

¶6 Olson contends he "clearly demonstrated" his wish to proceed pro se in April 2007 when he filed his first pro se motions. On these facts, we disagree. Olson filed those motions while still unrepresented but accepted the counsel appointed for him soon after. When that appointment was withdrawn due to the lawyer's noncompliance with CLE requirements, Olson wrote the court asking it "to allow me to represent myself" and enclosing several more pro se motions.

That request, however, was embedded in a letter of apology to the court for an apparent outburst sparked by learning of his lawyer's disqualification.

¶7 In addition, Olson did not protest the appointment of new counsel, Attorney Michael Jakus, the very next day. Indeed, Olson expressly told the court that he had filed the pro se motions to protect his rights. The court replied, "Very good. Listen to my question. Do you want to proceed in this case with Mr. Jakus as your attorney?" Olson answered, "Yes."

¶8 Jakus later moved to withdraw. At the hearing on the motion, the court advised Olson:

> All right. There's a reason that I'm appointing an attorney to represent you. This is a serious case. The State is represented by a very experienced prosecutor. Mr. Jakus notes that some of the problems and concerns he has in representing you is your filing of motions … If you need to—it's your right to represent yourself if you want to, sir, but you need to listen and take advantage of the opportunity to have an attorney.

Olson did not indicate that he wished to proceed pro se. New counsel Donna Kuchler represented Olson throughout trial and sentencing. Olson did not protest her appointment or raise the subject of going pro se again until postconviction.

¶9 We conclude that, in the face of his other actions, Olson's filing pro se motions did not clearly and unequivocally declare his wish to proceed pro se. He was not denied the right to represent himself.

Other-Acts Evidence and Double Jeopardy

¶10 The trial court permitted evidence to be introduced relating to Olson's sexual assault of one victim and his attempted sexual contact with the other when they were living in Milwaukee county. Olson claims the State's use of

other-acts evidence violated his constitutional protection against double jeopardy because the Milwaukee county court already had determined his guilt on them such that the Waukesha county proceedings amounted to a second prosecution.

¶11 Other-acts evidence may be used when offered for proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. WIS. STAT. § 904.04(2). Whether Olson's double jeopardy guarantees were violated is a question of law that we review de novo. *See* ***State v. Gruetzmacher***, 2004 WI 55, ¶15, 271 Wis. 2d 585, 679 N.W.2d 533.

¶12 The first prong in a double jeopardy inquiry is whether the multiple charges are identical in law and in fact. ***State v. Nommensen***, 2007 WI App 224, ¶6, 305 Wis. 2d 695, 741 N.W.2d 481. Charges are not the same in fact if each requires proof of a fact that the other does not. ***Blockburger v. U.S.***, 284 U.S. 299, 304 (1932); *see also* ***State v. Kurzawa***, 180 Wis. 2d 502, 524, 509 N.W.2d 712 (1994). The "identical in fact" inquiry involves a determination of whether the charged acts are "separated in time or are of a significantly different nature." ***State v. Koller***, 2001 WI App 253, ¶31, 248 Wis. 2d 259, 635 N.W.2d 838 (citation omitted). Multiple offenses are significantly different in nature if each requires "a new volitional departure in the defendant's course of conduct." ***State v. Anderson***, 219 Wis. 2d 739, 750, 580 N.W.2d 329 (1998) (citation omitted).

¶13 The trial court found that despite the incidents' similar time frame, their occurrence and prosecution involved two separate geographic units. Conduct occurring in different counties necessarily occurs at different times and thus represents the requisite "new volitional departure" in Olson's course of conduct. *See* ***Nommensen***, 305 Wis. 2d 695, ¶9. This case illustrates a classic use of other-acts evidence, not double jeopardy.

¶14 Olson also looks to the doctrine of issue preclusion, which bars the relitigation of issues that have actually been decided in a previous case between the same parties. *See* ***id.***, ¶19. The Waukesha county incidents were not litigated in the Milwaukee county case and so were not "relitigated" in this case, nor were the Milwaukee county "other acts" relitigated here.

Speedy Trial

¶15 Olson was arrested in March 2006 but, due to initial uncertainty about the strength of some of the proof, a charging decision was not made until March 29, 2007. On April 10, 2007, Olson filed a pro se demand for a speedy trial pursuant to WIS. STAT. § 971.10. This demand did not trigger the ninety-day period for commencing his trial, however, because "[t]he demand may not be made until after the filing of the information or indictment." Sec. 971.10(2)(a). The information was filed on May 21, 2007.

¶16 Attorney Jakus orally requested a speedy trial at an August 27, 2007 motion hearing. The court began the statutory ninety-day period running on that date and set the trial to begin on October 30. On October 25, however, Jakus withdrew without objection by Olson. Attorney Kuchler, appointed the same day, advised the court on October 29 that she needed more time to review discovery materials and was awaiting transcripts from the Milwaukee county matter ordered at Olson's direction. The court found that good cause existed to set the trial date over to December 17, 2007. At the defense's request, the court subsequently continued that trial date and the next one, the latter "with great reluctance." Trial ultimately commenced on May 6, 2008.

¶17 The trial court has the discretion to grant a continuance under WIS. STAT. § 971.10(3) if it states on the record its reasons for finding that, by granting

a continuance, the ends of justice served outweigh the public's and the accused's interests in a speedy trial. ***State v. Davis***, 2001 WI 136, ¶15, 248 Wis. 2d 986, 637 N.W.2d 62. Here, changes in counsel, waits for transcripts and completing Olson's psychological examination in anticipation of a possible NGI plea led to unavoidable delays. Olson, through counsel, expressed his willingness to toll the speedy trial time limits to undergo the psychological exam. The court carefully balanced Olson's speedy trial demand against his need for thorough discovery and to explore all possible defenses, and explained its reasoning on the record. We conclude Olson's statutory right to a speedy trial was not violated.

¶18 Olson also complains that his constitutional right to a speedy trial was violated. To make that determination, we consider in the context of the particular circumstances: (1) the length of the delay; (2) the reason for the delay; (3) whether Olson asserted his right to a speedy trial; and (4) whether he was prejudiced by the delay. *See* ***Barker v. Wingo***, 407 U.S. 514, 530-32 (1972); *see also* ***State v. Borhegyi***, 222 Wis. 2d 506, 509-10, 588 N.W.2d 89 (Ct. App. 1998). A post-accusation delay that approaches one year is "presumptively prejudicial." *See* ***Borhegyi***, 222 Wis. 2d at 510. We review the claim de novo. *See* ***id.*** at 508.

¶19 Here, Olson technically was arrested on March 2, 2006, but was incarcerated on his Milwaukee county case. In part because of initial uncertainty about the strength of the claims, the Waukesha county ADA proceeded cautiously and did not file the complaint until March 29, 2007. Olson later made a speedy trial demand. Trial commenced on May 6, 2008.

¶20 As noted, the delay primarily was caused by cautious investigation, Olson's series of attorneys, the additional time his new counsel needed to familiarize herself with the case and to obtain transcripts, and Olson's

psychological exam, for which he agreed to toll the time limits. Olson does not show that the continuances, often at the defense's request and cautiously granted by the court, were for an inordinate length or an unacceptable reason.

¶21 Still, Olson alleges prejudice. He contends:

> Olson was in custody the entire time. Witnesses moved, one even died, memories "faded" or were contaminated by others, including the alleged victims and their mother, notebooks used by police were "lost," vital exculpatory evidence was destroyed, all of Olson's tools and property were stolen by the "victims" (which is the reason the allegations were made in the first place), Olson suffered extreme anxiety based on the fact that he did not know what was going on except from snippets of information from his attorney, and there was also the extreme frustration of the court's denial of this right to present his own defense.

¶22 We disagree. Already in jail on his Milwaukee county probation revocation, the pretrial detention relevant to this case began with Olson's initial appearance, on May 7, 2007. He leaves us to guess at the evidence impacted by absent witnesses and faded memories, what the lost police notebooks or destroyed exculpatory evidence would have shown and how stolen property ties in to the promptness of his trial. In short, Olson does not show prejudice. He thus fails to establish a violation of his constitutional right to a speedy trial.

Alleged Prosecutorial Misconduct

¶23 Olson next asserts that prosecutorial misconduct deprived him of a fair trial. The underlying question in such an inquiry is whether the prosecutor's conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." ***State v. Neuser***, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995) (citation omitted).

¶24 Olson contends that the Waukesha county prosecutor first delayed filing the complaint against him so as to gather evidence from his probation agent and then impermissibly used the letters to his family at trial because they were "legal mail" meant for his lawyer and therefore wrongly confiscated. *See* WIS. ADMIN. CODE § DOC 328.21(3)(e). On this record, we conclude that the ADA proceeded cautiously so as to file a complaint comprising provable charges. The trial court found the agent's testimony that Olson asked her to deliver the letters more credible than Olson's testimony that he asked her to give the letters to his lawyer, and that she had a duty to turn the letters over to the State. Those findings are not clearly erroneous.

¶25 Olson also levies vague claims that the ADA took contradictory pretrial positions regarding the pace of proceedings, asked improper questions during cross-examination about his motivation for writing the letters and, during closing argument, made an unfounded statement "designed to inflame the jury's conscience" that he failed to seek medical advice for an injury he claimed left him incapable of some of the alleged sex acts. Our review of the record reveals no hint of prosecutorial misconduct. Also, Olson's failure to object at the time of the alleged improprieties waives their review. *See* ***State v. Goodrum***, 152 Wis. 2d 540, 549, 449 N.W.2d 41 (Ct. App. 1989). Olson's contentions are without merit.

Alleged Ineffective Assistance of Counsel

¶26 As a final claim of error, Olson contends that all of his appointed counsel were ineffective for the novel reason that "[a]ny assistance rendered by counsel forced on an accused is therefore 'ineffective' and prejudice need not be shown." Offered without further development or the support of legal authority, we need not address that argument any further. *See* ***State v. Pettit***, 171 Wis. 2d 627,

646, 492 N.W.2d 633 (Ct. App. 1992). He also tenders a "nowhere complete" list of ways in which he contends his trial counsel was ineffective. He asserts she did not: interview all potential witnesses he suggested or call all those that she subpoenaed; make necessary objections; choose a viable defense strategy; and advance the defense he wanted to present.

¶27 To establish ineffective assistance of counsel a defendant must show that counsel's performance was deficient and that such performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). After the ***Machner*** hearing, the trial court found that in terms of investigation, defense efforts, objections, choice of witnesses and trial strategy, trial counsel was "on the attack from the beginning." The record supports these findings. We therefore affirm them as not clearly erroneous. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). And because we agree with the trial court that counsel's performance was "clearly not deficient," we need not address the prejudice component. *See* ***Strickland***, 466 U.S. at 697.

By the Court.—Judgment and order affirmed.

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