COURT OF APPEALS
DECISION
DATED AND FILED

September 4, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-3316-CR **Cir. Ct. No. 01-CM-621**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

COREY R. SAXBY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jefferson County: JOHN M. ULLSVIK, Judge. *Affirmed.*

¶1 LUNDSTEN, J.[1] Corey R. Saxby appeals a judgment of the circuit court convicting him of criminal damage to property in violation of WIS. STAT.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2001-02). All further references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

§ 943.01(1). Saxby argues that his constitutional speedy trial right was violated, that the trial court erroneously refused to allow a portion of a transcript of a prior hearing into the jury room, that a jury instruction misled the jury, and that other acts evidence (evidence of Saxby's parole status) was improperly admitted. We reject all four of these claims and affirm.

Background

¶2 On February 2, 2001, police were dispatched to an apartment in Watertown in response to a reported disturbance. Becky Biwer lived in the apartment with the permission of the renter. Biwer testified that her roommate's ex-boyfriend, Corey Saxby, entered the apartment without permission and engaged in various acts, including punching a wall and, when he reentered at one point in time, damaging a door.

¶3 On February 8, 2001, a parole hold was placed on Saxby. He was not charged in connection with the events in the apartment until August 28, 2001. At that time, Saxby was charged with criminal trespass, disorderly conduct, and criminal damage to property.

¶4 On October 8, 2001, Saxby appeared by counsel and demanded a speedy trial. A trial date was set for December 3, 2001. On November 19, 2001, Saxby's attorney, Dan Grable, informed the court that he would not be prepared for a December 3 trial date and that Grable would contact Saxby to see if Saxby would waive his speedy trial right. On December 20, 2001, Attorney Grable filed a motion to withdraw, which the court granted that same day.

¶5 Saxby's new counsel was appointed on January 15, 2002. The trial date was set for February 7, 2002. At a status conference on January 24, 2002,

Saxby's trial was set over to March 18, 2002. Trial commenced on that date. Saxby was acquitted of the criminal trespass and disorderly conduct charges, but found guilty of the criminal damage to property charge.

Discussion

Speedy Trial

¶6 Saxby contends he was denied his constitutional right to a speedy trial. The trial court's findings of historical fact are subject to review under the clearly erroneous standard, but the application of those facts to constitutional standards and principles is determined without deference to the trial court's conclusion. ***State v. Borhegyi***, 222 Wis. 2d 506, 508-09, 588 N.W.2d 89 (Ct. App. 1998).

¶7 In determining whether a defendant's constitutional right to a speedy trial has been violated, we look to the four-part balancing test in ***Barker v. Wingo***, 407 U.S. 514, 530 (1972): (1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant. The constitutional right to a speedy trial is not subject to bright-line determinations and must be considered based upon the totality of the circumstances that exist in any specific case. ***Id***. at 530-31. The appellate court must look to the totality of the circumstances; if, after doing so, the court finds that the defendant was denied the benefit of his constitutional right to a speedy trial, dismissal of the charges is required. *See* ***id***. at 522.

¶8 We first consider the length of the delay. The thirteen-month delay in this case was presumptively prejudicial. *See* ***Green v. State***, 75 Wis. 2d 631, 636, 250 N.W.2d 305 (1977) (delay between a preliminary examination and trial

of nearly one year was presumptively prejudicial). Thus, we turn to consideration of the remaining three factors.

¶9 We next consider the causes of the delay. *See* ***Barker***, 407 U.S. at 530. As far as reasons attributed to the actions or inactions of the prosecution:

> [D]iffering weights are assigned to reasons that may be given for the delay:
>
> > 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.

Borhegyi, 222 Wis. 2d at 512 (quoting ***Barker***, 407 U.S. at 531). Likewise, any delay that is "attributable to accommodating the demands of the defendant" cannot be considered "in determining whether there has been a delay in trial such as to be presumptively prejudicial to his right to a speedy trial." ***Beckett v. State***, 73 Wis. 2d 345, 349, 243 N.W.2d 472 (1976).

¶10 The delays here were caused by actions by the defense, the prosecution, and the court. The initial seven-month gap between arrest and charging, from February 8, 2001, to August 28, 2001, was caused by the State.

¶11 After charging in August 2001, Saxby would have proceeded promptly to trial on December 3, 2001, but a second delay occurred when defense attorney Grable informed the court that he was not prepared to proceed. Further, on December 20, 2001, Attorney Grable moved to withdraw. Saxby's new counsel was appointed January 15, 2002, and a new trial date set for February 7,

2002. Consequently, the two-month delay from December 3, 2001, to February 7, 2002, was caused by the defense.

¶12 A subsequent five-week delay was caused by the circuit court's busy calendar when Saxby's February 7 trial was "bumped" to March 18.

¶13 Accordingly, apart from the delay caused by the defense, this case was delayed about eight months. In the world of constitutional speedy trial rights, this was a very short delay. And, there is no indication that any delay was caused by an attempt to gain an unfair advantage.

¶14 The third factor is whether Saxby asserted his right to a speedy trial. ***Barker***, 407 U.S. at 530. The State does not dispute that Saxby asserted that right.

¶15 The last factor we consider is whether the defendant suffered prejudice as a result of the delay. ***Id***. In assessing this factor, the court should look to the interests of the defendant that the speedy trial right is designed to protect. ***Id***. at 532. The three interests identified by the ***Barker*** Court are: (1) preventing oppressive pretrial incarceration; (2) minimizing the accused's anxiety and concern; and (3) limiting the possibility that the defense will be impaired. ***Barker***, 407 U.S. at 532; ***Borhegyi***, 222 Wis. 2d at 514. We conclude there was no prejudice. In particular, there is no evidence that Saxby's ability to defend himself was impaired. Saxby does nothing more than speculate that the delay may have affected the memory of two witnesses.

¶16 In summary, the delay was sufficient to trigger consideration of the second, third, and fourth ***Barker*** factors. However, Saxby was not denied his constitutional right to a speedy trial because the delay was short, there is no

indication that any delay was caused by the prosecutor in an attempt to gain an unfair advantage, and there is no reason to suspect resulting prejudice.

Trial Court's Refusal to Submit Transcript to the Jury Room

¶17 Saxby's next argument, that the circuit court erred when it refused the jury's request for a transcript during deliberations, is difficult to follow. He seems to be arguing that the circuit court should have submitted a redacted version of the transcript from a prior hearing. Testimony from that transcript was used by the defense at trial in an attempt to impeach Biwer. However, Saxby fails to specify which portion of the transcript should have been submitted to the jury. More problematic, Saxby does not explain why it was important that the jury receive a redacted portion of this transcript or why the failure to provide such might have harmed his defense.

¶18 Saxby either ignores or fails to understand that the transcript of the prior proceeding was not trial evidence. The transcript was not presented to the jury. Rather, Saxby's attorney read portions of that transcript to Biwer and asked her questions regarding her testimony, all in an attempt to impeach Biwer. The fact that the transcript was marked as an exhibit and "accepted" by the court does not transform it into trial evidence if it was not presented to the jury during the evidentiary portion of the trial. At best, Saxby would have been entitled to have part of the *trial* testimony (that part where Saxby's attorney used Biwer's prior testimony in an attempt at impeachment) read to the jury.

¶19 But this is much ado about nothing. The trial testimony at issue here is the part where Saxby's attorney attempted to show that Biwer had been inconsistent about the timing and content of phone calls from Saxby's parole agent and some inconsequential events near in time to the charged conduct. That Biwer

had given inconsistent testimony, however, was not a significant issue. The prosecutor readily conceded that Biwer was confused about the timing of the events and whether Saxby had spoken with the agent. Further, the prosecutor convincingly explained why Biwer's inconsistency on these points did not undermine her general credibility. Simply stated, Biwer's inconsistencies in no way suggested that Biwer had falsely accused Saxby. Rather, her testimony was completely consistent with the proposition that Biwer had been upset by Saxby's behavior and had trouble remembering specifics.

Jury Instruction on Criminal Damage to Property

¶20 Saxby contends the jury was improperly instructed on the elements of criminal damage to property. His argument is both confusing and poorly developed. Saxby first appears to direct our attention to the third element of criminal damage to property: that the damaged property belonged to another person. Saxby asserts that the person alleged by the State to be the "owner," Biwer, did not have a lawful possessory interest in the property. Saxby, however, provides no factual or legal argument in support of this assertion. Rather, he merely asserts that the "interest" required for purposes of criminal damage to property is different than the interest required for purposes of criminal trespass.

¶21 Saxby then segues to element four of criminal damage to property: that the damage was without consent. Without specifying the particular offending language of the instruction, Saxby asserts: "Absent the incorrect instruction that it was Biwer's consent at issue on the criminal damage charge, the jury would have been required to weigh Burns' testimony that Saxby was free to come and go as he pleased, and that the door had pre-existing damage in evaluating defense

arguments regarding the absence of proof that Saxby had intentionally caused the damage, if he caused it at all."

¶22 We are left to guess what Saxby means by all of this, and then develop his argument for him. We will not do so. *See* ***State v. Curtis***, 218 Wis. 2d 550, 557, 582 N.W.2d 409 (Ct. App. 1998) ("This court need not review issues inadequately briefed.").

¶23 There is an alternative reason to reject Saxby's jury instruction argument. We agree with the State that any instructional error was harmless. *Cf.* ***State v. Harvey***, 2002 WI 93, ¶47, 254 Wis. 2d 442, 647 N.W.2d 189 (instruction that the jury must accept the judicially-noticed elemental fact as true was harmless error). There was no factual dispute that the damaged door was the "property of another." Saxby did not dispute that fact at trial, and he does not do so on appeal. There was also no dispute that Saxby did not have consent of any party or entity to damage the property. Finally, contrary to Saxby's "argument," it is readily apparent that the instruction *on ownership and lack of consent* did not affect the jury's ability to weigh the testimony that the door had pre-existing damage.

Evidence of Saxby's Parole Status

¶24 Saxby argues that evidence of his parole status at the time of the alleged crimes was improperly admitted. This evidence consisted of testimony about telephone calls to and from his parole agent. Evidence of Saxby's status as a parolee is, in effect, other bad acts evidence because it effectively informed the jury that Saxby has a prior criminal conviction.

¶25 A court's decision to admit other acts evidence is discretionary. We will affirm if the other acts evidence was offered for an acceptable purpose under

WIS. STAT. § 904.04(2) and if a reasonable judge could conclude that the other acts evidence is relevant and the probative value of the evidence substantially outweighs the danger of unfair prejudice, confusion of the issues, or undue delay. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998).

¶26 The State contends that the parole agent telephone call evidence was needed to support its theory that Saxby broke the door, thereby committing the charged criminal damage to property, because he was agitated about being summoned by his parole officer during the first phone call. Saxby responds that this theory is "illogical" because the trial evidence showed that the phone call from the parole agent occurred *after* the door was damaged. The State responds that the trial evidence can be interpreted as supporting the view that the parole agent phone call occurred *prior* to Saxby damaging the door. We find this road to admissibility complicated and we need not address it because there is a simpler route. The parole agent phone call evidence was admissible to show Saxby's motive for the disorderly conduct charge.

¶27 Saxby was tried on three charges, including disorderly conduct. The charged disorderly conduct related to Saxby punching a wall in the apartment. The State's theory regarding motive for the disorderly conduct was that Saxby was agitated and angry in part because of the call from his parole agent.

¶28 The parole agent testified that she called and spoke first with Biwer and then with Saxby. The agent called to tell Saxby that Saxby needed to come into her office. She believed, but was not positive, that she told him he was going to jail. Approximately three to four minutes after that phone conversation ended, the agent received a phone call from Biwer. The parole agent testified that Biwer was "really upset, … frightened, kind of hysterical" and that Biwer told her that

Saxby had punched the wall and that "she had asked him to leave twice." Parts of Biwer's testimony support this sequence of events.

¶29 Thus, the evidence of the phone call from the parole agent summoning Saxby to her office was relevant to Saxby's motive when he became disruptive inside the apartment. Further, since the jury was not informed of the nature of Saxby's prior conviction, evidence of his parole status carried with it relatively low prejudice. And, the jury was given an other acts limiting instruction. We assume that juries follow limiting instructions. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 644-45 n.8, 369 N.W.2d 711 (1985). Further, during closing arguments, the State emphasized the jury's duty to follow the instruction.

By the Court.—Judgment affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4 (2001-02).