COURT OF APPEALS
DECISION
DATED AND FILED

November 4, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0246-CR **Cir. Ct. No. 01-CF-580**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LAWRENCE NORTHERN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Eau Claire County: ERIC J. WAHL, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Lawrence Northern appeals a judgment of conviction entered upon a jury verdict finding him guilty of possession with intent to deliver of 15-40 grams of cocaine and 100 grams of cocaine, contrary to WIS. STAT. §§ 961.41(1m)(cm)3 and 5. Northern claims the State violated its discovery obligations in three ways, thus hampering his defense and violating his due

process rights. We conclude Northern has failed to preserve these issues for appellate review and therefore affirm the judgment.

Background

¶2 Northern was charged on September 24, 2001. Fourteen other individuals were also charged in the complaint, some in separate counts and some in the same counts as Northern. A day after the October 2 preliminary hearing, Northern's attorney served a discovery demand on the State. The demand sought, among other things, a copy of the criminal records of the State's witnesses, a summary of any of the witnesses' oral statements that would be used, and written disclosure of any promises made to any witnesses in exchange for testimony.

¶3 At Northern's October 19 arraignment, his attorney reported that the district attorney had informed him that discovery materials were available. On November 28, however, the defense attorney withdrew from the case. Northern was appointed a new public defender on December 7, who filed a new discovery demand on December 18. On January 2, 2002, Northern renewed the discovery demand.

¶4 On January 7, one of the other individuals charged in the complaint, Hollie Peterson, entered into a plea agreement in exchange for her testimony. She provided a short written statement, then a more detailed oral recitation. Later, Peterson was allowed to visit her daughter, although this was not a term of the plea agreement. On January 8, the State informed Northern and three co-defendants of the plea and its terms. The State provided Peterson's written statement, but did not mention any oral statements.

¶5 Also on January 8, the parties were in court for various pretrial procedures. At this hearing, Northern complained that the State had provided only a list of the number of prior convictions as to each of its witnesses but not the actual detailed criminal records. The trial court essentially denied this objection, noting that no one had explained why the number was insufficient in light of the standard colloquy of whether the witness had ever been convicted of a crime and, if so, how many times.

¶6 One co-defendant objected to the timing of the State's disclosure of Peterson's plea terms. The court offered to adjourn the January 9 trial date until March if the defendants were willing to waive their speedy trial rights. Following a conference with their attorneys, the defendants, including Northern, agreed to proceed to trial on January 9, where Northern and his co-defendants apparently first learned that Peterson had given the State an oral statement after she had provided her written statement. Northern was convicted of two possession with intent to deliver charges.

¶7 Northern now appeals, contending the State breached its discovery obligations by providing only the number, not the nature, of the witnesses' prior convictions; by failing to timely and fully disclose the terms of Peterson's plea agreement; and by failing to disclose the contents of Peterson's oral statements. Because we hold that Northern failed to preserve these issues for review, we do not address his further contention that he was prejudiced by these errors.

Discussion

¶8 Whether the State has provided sufficient information to comply with its discovery obligations under WIS. STAT. § 971.23 is a question of law that we review de novo. ***State v. Schroeder***, 2000 WI App 128, ¶8, 237 Wis. 2d 575,

613 N.W.2d 911. However, it is axiomatic that to preserve any trial court error for review, trial counsel or the party must timely object to the error with specificity to allow the trial court to review and correct any potential error. ***State v. Nielsen***, 2001 WI App 192, ¶11, 247 Wis. 2d 466, 634 N.W.2d 325. Absent such procedure, we may invoke the administrative waiver rule and determine an issue has not been preserved for appeal. ***Id.***

Witness Records

¶9 When Northern complained about receiving only the number of convictions for the State's witnesses, the trial court responded that under normal circumstances, the only relevant question of a witness is whether he or she has been convicted of any crimes and, if so, how many. This is because Wisconsin is a "counting" state—the number, not the nature, of the crimes is the only relevant evidence. ***State v. Smith***, 203 Wis. 2d 288, 297, 553 N.W.2d 824 (Ct. App. 1996).

¶10 Northern now complains that failure to receive information on the nature of the crimes prevented him from asking witnesses about "other acts" evidence, an exception to the counting rule. When the court explained that it believed the attorneys would, in any event, be limited to asking about only the number of crimes, Northern failed to raise this "other acts" argument before the

trial court. Thus, it has been waived because it was not properly preserved for appellate review.[1] *See* ***id.***

¶11 Although Northern argues that ***State v. Agnello***, 226 Wis. 2d 164, 172-73, 593 N.W.2d 427 (1999), does not require an objection to be as specific as possible, the case does require the party "object in such a way that the objection's words or context alert the court of its basis." ***Id.*** at 174. Here, Northern knew the court overruled the objection on the basis of the counting rule. Northern could have objected again, informing the court of the specific basis for his objection, arguing he was being precluded from impeaching witnesses with other acts evidence. He did not, and we will not now consider his complaint for the first time on appeal. ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980).

Timing and Completeness of Plea Disclosure

¶12 Peterson's plea agreement had been somewhat unexpected and inconveniently timed, coming at the eleventh hour before trial. The morning after she had made her agreement, at the January 8 pretrial hearing, each of the four defendants including Northern complained about the timing of disclosure of the agreement. The court offered the defendants the option of proceeding the next day or adjourning the trial until mid-March. The defense attorneys conferred with

[1] Even if we were to address this issue's substance, Northern's arguments would still fail. While the State is normally required to disclose defendants' criminal records upon demand, WIS. STAT. § 971.23(1)(f), the supreme court has held that there is no discovery violation unless the information is in the State's exclusive control. ***State v. Armstrong***, 110 Wis. 2d 555, 580, 329 N.W.2d 386 (1983). As the State points out, nothing precluded Northern from inquiring at the clerk of court's office regarding the witnesses, nor was he precluded from accessing the Consolidated Court Automation Program (CCAP) database, which contains circuit court records from all Wisconsin counties except Walworth.

their clients and each of them, including Northern, indicated that they would be prepared to proceed to trial the next day.

¶13 We will not review invited error. ***In re Shawn B.N.***, 173 Wis. 2d 343, 372, 497 N.W.2d 141 (Ct. App. 1992). Northern complained about the timeliness of disclosure.[2] In response to this complaint, he was given the opportunity to adjourn the trial so he could have time to review the details of Peterson's plea agreement and potential testimony. He decided rather to proceed to trial, untimeliness notwithstanding, making himself responsible for the timeline.[3]

¶14 Northern also contends that not all of the details of Peterson's agreement were disclosed. On cross-examination, one of the other defendants

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[2] WISCONSIN STAT. § 971.23 requires the district attorney make his disclosures "within a reasonable time before trial." Although we realize that disclosure came the day before trial, we note that it also came nearly immediately after the agreement was reached. The State cannot disclose terms of a plea agreement before it is made, and the agreement with Peterson was not made until January 7. It was disclosed January 8, after State officials spent several hours preparing the information. This is reasonable under the circumstances.

[3] We acknowledge that the trial court asked the defendants to waive their speedy trial rights and, as Northern points out, he should not be asked to trade one constitutional right (speedy trial) for another (confrontation). However, this is premised in part on the prosecutor's discovery *violation* and, as we explained in note 2, there was no violation here.

Northern also fails to show that he ever asserted his speedy trial right, and we cannot assume he did so. We will not sift the record for evidence to support his argument. *See* ***Keplin v. Hardware Mut. Cas. Co.***, 24 Wis. 2d 319, 324, 129 N.W.2d 321 (1964). Assertion of the right to a speedy trial is one of the concerns we analyze to determine whether there is a violation. ***State v. Leighton***, 2000 WI App 156, ¶6, 237 Wis. 2d 709, 616 N.W.2d 126. A defendant has some responsibility to assert the right. ***Id.***, ¶20.

The concerns implicated in the speedy trial right also include the length of the delay and the possible prejudice to the defendant. ***Leighton***, 237 Wis. 2d 709, ¶6. Prejudice is assessed in terms of, among other things, limiting impairment of the defense. ***Id.***, ¶22. The length of the delay would be slightly more than two months—a year is presumptively prejudicial, ***id.***, ¶8,—and the delay would apparently have aided, not impaired the defense.

elicited testimony from Peterson that the State allowed her to visit her child following her plea agreement. Northern did not object to this as a surprise, but now complains that it was error. We conclude that the failure to object to the testimony or otherwise bring the court's attention to the alleged State error results in waiver of the argument.[4]

Summary of Oral Statements

¶15 Finally, Northern argues that the State failed to turn over a summary of Peterson's oral statements that she provided after her written statement. At one point during Peterson's testimony, the State asked her, "Did you provide the [written] information … as an initial proffer as part of the plea agreement in this case with the agreement that you would provide a more detailed interview orally with officers after the plea was entered?" She answered yes.

¶16 Northern failed to object to this information as a discovery violation. It is also waived.[5]

By the Court.—Judgment affirmed.

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

[4] In any event, Northern mischaracterizes the information. The record discloses that visitation with the child was not a term of the agreement, but rather a courtesy the State extended at the conclusion of the negotiations. The State is not required to disclose that which is not a term.

[5] Nowhere in WIS. STAT. § 971.23 is the State required to disclose its witnesses' oral statements; it must only supply copies of written or recorded statements.