COURT OF APPEALS
DECISION
DATED AND FILED

September 27, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal Nos. 2010AP2385-CR
2010AP2386-CR

Cir. Ct. Nos. 2005CF83
2005CF84

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEVIN S. POPHAL,

DEFENDANT-APPELLANT.

APPEALS from judgments of the circuit court for Lincoln County: JAY R. TLUSTY, Judge. *Affirmed*.

Before Hoover, P.J., Peterson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Kevin Pophal appeals judgments of conviction for three counts of child sexual assault by sexual contact. Pophal argues: (1) he was denied his right to a speedy trial; (2) he was denied his right to an impartial jury

because one of the jurors was related to one of the victims; (3) the circuit court should have ordered a mistrial when the State's police witness testified to other acts evidence in violation of a pretrial order; (4) newly discovered evidence in the form of a recantation entitles him to a new trial; and (5) the State failed to disclose exculpatory evidence. We reject Pophal's arguments and affirm.

BACKGROUND

¶2 On April 28, 2005, Pophal was charged in two separate cases with seven counts of sexual assault of five children between 2003 and 2005. Pophal was ultimately bound over for trial after preliminary hearings for the respective cases were held in January, October, and December 2006.[1] A trial was initially scheduled for July 2007. However, the State moved to consolidate the two cases that month, and Pophal moved for a trial continuance because he needed additional time for discovery and investigation. Pophal did not object to the consolidation request, and the circuit court ordered consolidation in November 2007. The next trial date was set for December 2007. That trial was rescheduled to April 2008 due to unresolved evidentiary matters. In April, trial was again rescheduled, to October 6, 2008.

¶3 Pophal moved to dismiss on speedy trial grounds on September 19, 2008. The court denied the motion and the case advanced to trial. On the first day of trial, two counts were dismissed without prejudice on the State's motion because a necessary witness was unavailable. Thus, the case proceeded to trial with five counts and four victims: Lisa P., Ariel H., Megan H. (two charges), and

[1] The preliminary hearing in the second case was apparently commenced in October 2006 and continued until the December date.

Brianna H. Pophal was acquitted of assaulting Ariel H., convicted of assaulting Lisa P. and Brianna H., and convicted and acquitted of one charge each concerning Megan H. Following the denial of his postconviction motions, Pophal now appeals.

DISCUSSION

Right to a speedy trial

¶4 Pophal argues the delays in his case violated his constitutional right to a speedy trial. Review of a claim that a defendant was deprived of the constitutional right to a speedy trial requires consideration of four factors: (1) the length of delay, (2) the reason(s) for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant. ***Barker v. Wingo***, 407 U.S. 514, 530 (1972); ***Day v. State***, 61 Wis. 2d 236, 244, 212 N.W.2d 489 (1973).

¶5 Pophal's trial did not commence until over three years and five months after he was charged. As the circuit court and the State acknowledge, "the length of the delay [was] long." Delays of one year or more may be presumptively prejudicial; delays of less than a year generally are not. ***Doggett v. United States***, 505 U.S. 647, 652 n.1 (1992); ***State v. Leighton***, 2000 WI App 156, ¶8, 237 Wis. 2d 709, 616 N.W.2d 126 (twenty-six-month delay presumptively prejudicial); ***Scarbrough v. State***, 76 Wis. 2d 87, 104, 250 N.W.2d 354 (1977) (eight-month delay not presumptively prejudicial).

¶6 The State concedes that the significant delay in bringing Pophal's consolidated cases to trial is presumptively prejudicial. However, this conclusion "merely triggers further review of the allegation under the other three ***Barker*** factors. [Case law does] not place an additional burden on the [S]tate to prove the

negative, lack of prejudice." ***State v. Lemay***, 155 Wis. 2d 202, 212-13, 455 N.W.2d 233 (1990) (citations omitted).

¶7 When considering the second ***Barker*** factor, reasons for the delay:

> [C]ourts first identify the reason for each particular portion of the delay and accord different treatment to each category of reasons. A deliberate attempt by the government to delay the trial in order to hamper the defense is weighted heavily against the State, while delays caused by the government's negligence or overcrowded courts, though still counted, are weighted less heavily. On the other hand, if the delay is caused by something intrinsic to the case, such as witness unavailability, that time period is not counted. Finally, if the delay is caused by the defendant, it is not counted.

State v. Urdahl, 2005 WI App 191, ¶26, 286 Wis. 2d 476, 704 N.W.2d 324 (citations omitted). Pophal asserts, "While not all the delay in this case can be attributed to the prosecution, the majority of requests to continue one or the other case were at the State's request."

¶8 Pophal, however, fails to identify any particular portions of the delay in his case, much less discuss the fault for each portion. Pophal further fails to provide any citations to the record in support of his assertion.[2] We reject his speedy trial argument as undeveloped. *See* ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994) (We will not decide issues that are not, or inadequately, briefed.). In any event, we note that Pophal requested a trial continuance in July 2000, well over two years after he was charged, and did not assert his speedy trial right until the month prior to trial, and then only by his

[2] Pophal does purport to provide one record citation, to "(R-57)." However, he fails to identify which of the two appellate records he is referring to. Moreover, the alleged document does not appear in either record at 57, nor did we locate it elsewhere.

motion to dismiss.[3] Moreover, the dismissal of two charges, and acquittal on two more, suggest the delay just as likely assisted, rather than prejudiced, Pophal's defense.

Right to an impartial jury

¶9 Pophal contends he was denied his constitutional right to an impartial jury because one of the twelve jurors who decided his case failed to disclose that he was related to one of the victims, Lisa P. The juror was not, however, a close relative. In fact, the circuit court accepted the juror's testimony that he never met Lisa P. and did not know she was related until after the trial. The juror was Lisa P.'s grand uncle, by marriage.[4] The juror's wife, Lisa P.'s grand aunt by blood, had died thirteen years prior to Pophal's trial.

¶10 There are three types of juror bias: statutory, subjective, and objective. ***State v. Faucher***, 227 Wis. 2d 700, 706, 716, 596 N.W.2d 770 (1999). As to the first, our legislature has deemed biased those who are related by "blood, marriage or adoption to any party or to any attorney appearing in the case," and those who have "any financial interest in the case." WIS. STAT. § 805.08(1).[5] "[A] person meeting one of these descriptions is statutorily biased and may not serve on a jury regardless of his or her ability to be impartial." ***Faucher***, 227 Wis. 2d at 717.

[3] Pophal never filed a speedy trial demand.

[4] In other words, Lisa P. was the juror's sibling-in-law's grandchild, or, alternatively, his deceased wife's niece/nephew's child.

[5] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶11 Subjective bias refers to bias that is revealed through the words and the demeanor of the juror; it refers to the prospective juror's state of mind. ***Id.*** at 717-18. Subjective bias turns on the "circuit court's assessment of the individual's honesty and credibility, among other relevant factors." ***Id.*** at 718.

¶12 On the other hand, the focus of the inquiry into "objective bias" is not upon the juror's state of mind, but upon whether the reasonable person in the individual prospective juror's position could be impartial. ***Id.*** Generally, when assessing whether a juror is objectively biased, a circuit court must consider the facts and circumstances surrounding the voir dire and the facts involved in the case. ***Id.***

¶13 Pophal contends all three types of juror bias are present here. However, Pophal acknowledges that statutory bias, by WIS. STAT. § 805.08(1)'s plain terms, applies only to those jurors who are related to a *party* in the case. Indeed, because Lisa P. was not a party, the circuit court rejected Pophal's reliance on that statute: "Clearly [§] 805.0[8](1) as written does not apply to the situation involving [Lisa P.] She was not a party[.]" Because Pophal does not challenge the circuit court's ruling that § 805.08(1) does not apply to the victim in a criminal prosecution as a "party," we deem Pophal to have admitted the validity of that holding.

> This court has held that respondents cannot complain if propositions of appellants are taken as confessed which respondents do not undertake to refute. ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979). We think the same holds true when an appellant ignores the ground upon which the trial court ruled and raises issues on appeal that do not undertake to refute the trial court's ruling.

Schlieper v. DNR, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994).

¶14 Nonetheless, Pophal asserts that statutory bias exists because in ***State v. Gesch***, 167 Wis. 2d 660, 662, 482 N.W.2d 99 (1992), "the court extended statutory bias to those related by blood or marriage to a state witness." This is incorrect. ***Gesch*** never mentioned WIS. STAT. § 805.08(1), though that statute existed long before the case was decided. ***Gesch*** is instead an objective bias case. *See* ***Faucher***, 227 Wis. 2d at 724.

¶15 Moreover, Pophal misrepresents the scope of the holding in ***Gesch***, which, as the circuit court observed, applies only to "prospective jurors who are related to a state witness by blood or marriage *to the third degree* as shown in Figure 852.03(2), Stats. [(1991-92)]." ***Gesch***, 167 Wis. 2d at 662, 671 (emphasis added). Pophal is apparently aware of the third-degree limitation, not only because it is set forth numerous times in that case and the circuit court here relied on it, but because he then misstates in his brief, "Here, [the] juror ... was the uncle of a state witness."

¶16 The circuit court was unable to locate the degrees of kinship table previously found in WIS. STAT. § 852.03(2) (1991-92), and therefore rejected Pophal's argument because he failed to demonstrate that Lisa P. was within three degrees of kinship to the juror. The same kinship table is now found at WIS. STAT. § 990.001(16). Both versions indicate that a person's grand niece is a relative to the *fourth* degree. ***Gesch***, therefore, does not aid Pophal.

¶17 Pophal next argues there was objective bias, because the relationship between the juror and his grand niece resulted in an unacceptable risk of unconscious bias. The circuit court accepted the juror's testimony and determined that the juror was never aware of the relationship during the trial. Therefore, there was no risk of bias, and Pophal does not argue that the court's factual

determination was clearly erroneous. *See* ***Faucher***, 227 Wis. 2d at 720. Pophal's subjective bias argument fails for the same reasons.

Improper other acts testimony

¶18 Prior to trial, the State acceded to Pophal's motion to exclude testimony of certain other acts evidence. Nonetheless, at trial, the State's only police witness then testified about prohibited evidence, in an answer that was nonresponsive to the question posed. Specifically, the officer testified about an alleged assault of Ariel H. that was not charged. Pophal's counsel immediately objected.

¶19 The court sustained the objection. However, the court denied Pophal's request for a mistrial, indicating:

> I believe that instruction by the Court, and a jury instruction regarding stricken testimony will be sufficient, and that the relatively brief answer by the witness is not unduly prejudicial to the defendant such that it would constitute an unfair trial to the defendant. So the Court will deny the defendant's motion for a mistrial. But again, I will [be] instructing the jury now and during the instruction phase of this trial to disregard the stricken testimony. If this were to occur again, an accumulative effect would be [that] it could result in a mistrial.

When the jury returned, the court stated the witness's last answer had been stricken, that it was "totally irrelevant," and that the jurors were "not to consider it at all." The jury was also later given the standard jury instruction to disregard all stricken testimony.

¶20 "Whether to grant a mistrial is a decision that lies within the sound discretion of the circuit court." ***State v. Doss***, 2008 WI 93, ¶69, 312 Wis. 2d 570, 754 N.W.2d 150. "The circuit court 'must determine, in light of the whole

proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial. The denial of a motion for mistrial will be reversed only on a clear showing of an erroneous use of discretion' by the circuit court." ***Id.*** (citing ***State v. Ross***, 2003 WI App 27, ¶47, 260 Wis. 2d 291, 659 N.W.2d 122). The circuit court's response here to the improper testimony was reasonable and appropriate. Moreover, it is apparent that the jury followed the court's instructions and that Pophal suffered no prejudice. The jury acquitted Pophal of two of the five charges. Indeed, the jury acquitted him of assaulting Ariel H., the alleged victim to whom the prohibited testimony referred.

Newly discovered evidence

¶21 Pophal next argues he is entitled to a new trial based on what he views as a partial recantation by Megan H. A motion for new trial based on newly discovered evidence "is committed to the circuit court's discretion." ***State v. Plude***, 2008 WI 58, ¶31, 310 Wis. 2d 28, 750 N.W.2d 42. The legal standard to be applied to the motion is well-established:

> In order to set aside a judgment of conviction based on newly-discovered evidence, the newly-discovered evidence must be sufficient to establish that a defendant's conviction was a "manifest injustice." When moving for a new trial based on the allegation of newly-discovered evidence, a defendant must prove: "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." If the defendant is able to prove all four of these criteria, then it must be determined whether a reasonable probability exists that had the jury heard the newly-discovered evidence, it would have had a reasonable doubt as to the defendant's guilt.

Id., ¶32 (citations omitted).

¶22 Megan H. testified at trial to two occasions on which Pophal had picked her up by touching her crotch area and her buttocks. She stated that on the first occasion Pophal had sat down next to her on a couch when it appeared she was asleep; that he put her legs onto his lap and began to rub the inside of her thigh, getting close to her private area; that he stopped when another adult came into the room and then resumed the touching when she left; and that he ultimately lifted Megan H. up by her crotch and backside and carried her into a bedroom.

¶23 Describing the second incident, Megan H. stated Pophal held her crotch area while picking her up during what might have appeared to be a playful episode in the presence of a number of other persons. Pophal was acquitted of the charge relating to this incident.

¶24 When asked at trial whether she thought the touching of her crotch on these two occasions was "intentional" as opposed to "accidental," Megan H. said she thought it had been intentional. However, she was not asked for, and did not offer, a view on whether Pophal had acted with any sexual intent or purpose.

¶25 Megan H.'s recantation consisted of her reassertion of the underlying facts, that Pophal "did rub my leg and he did pick me up that way," but also her opinion that "it was not a sexual intentions [sic]." Similarly, at the postconviction hearing, Megan H. testified that she had been pressured to testify against Pophal and that even though he did those acts, she did "not think it was sexual intention."

¶26 The circuit court concluded Pophal fell short of establishing the four newly discovered evidence criteria, but did not specify which criteria were not met. However, the court could have reasonably concluded that the new testimony was not material. The court noted that the jury was instructed that the requisite

intent in the case—intentional touching with the purpose of sexually degrading or humiliating the victim or sexually arousing the defendant, WIS. STAT. § 948.01(5)(a)—could be found, if at all, only from the defendant's acts, words, and statements, and from the facts and circumstances bearing upon intent. Thus, Megan H.'s opinion whether Pophal's intentions were sexual would not qualify for proper evidentiary consideration by the jury. The jurors were just as able as Megan H. to divine Pophal's intentions based on the described acts. In any event, we are not convinced that there is a reasonable probability that had the jury heard the newly discovered evidence the result would have been any different.

Suppression of exculpatory evidence

¶27 In ***Brady v. Maryland***, 373 U.S. 83, 87 (1963), the Supreme Court held that the prosecution's suppression of "evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." To establish a ***Brady*** violation, Pophal must show that the State suppressed the evidence in question, that the evidence was favorable to him, and that the evidence was material to the determination of guilt or punishment. *See* ***Strickler v. Greene***, 527 U.S. 263, 281-82 (1999). Further, Pophal must demonstrate that "the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *See* ***id.*** at 281.

¶28 Pophal complains that the State failed to disclose it had interviewed a former babysitter, S.B., to determine if she was a possible victim of sexual assault by Pophal. S.B. told investigators she was not assaulted. Further, the circuit court found that S.B. provided no information to investigators relating to any of the girls who were eventually identified as Pophal's sexual assault victims

in these cases. S.B.'s failure to provide any incriminating evidence was neither exculpatory nor material. Even if admissible, such evidence would have had no effect on the outcome of the case. Therefore, there was no ***Brady*** violation.

By the Court.—Judgments affirmed.

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