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**DISTRICT III**

March 7, 2023

To:

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Circuit Court Judge  
Electronic Notice

Sara Lynn Shaeffer  
Electronic Notice

John VanderLeest  
Clerk of Circuit Court  
Brown County Courthouse  
Electronic Notice

Patricia Sommer  
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

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2021AP2087-CR                      State of Wisconsin v. Andres Monge-Lopez  
(L. C. No. 2016CF1462)

Before Stark, P.J., Hruz and Gill, JJ.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Andres Monge-Lopez appeals from a judgment convicting him of six felonies and seven misdemeanors, and from an order denying his postconviction motion. He claims he is entitled to dismissal of the charges based upon a constitutional<sup>1</sup> speedy trial violation or, alternatively, to a mistrial based upon his claim that the State violated the circuit court's ruling on other-acts evidence. Based upon our review of the briefs and record, we conclude at conference that this

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<sup>1</sup> A defendant has both a statutory and a constitutional right to a speedy trial. *See* WIS. STAT. § 971.10(2)(a) (2021-22); U.S. CONST. amends. VI, XIV; WIS. CONST. art. I, § 7. However, the exclusive remedy for noncompliance with the speedy trial statute is discharge from custody. Sec. 971.10(4) (2021-22). All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We summarily affirm.

We address the speedy trial issue first because the remedy for a defendant whose constitutional right to a speedy trial has been violated is dismissal of the charges. *State v. Urdahl*, 2005 WI App 191, ¶11, 286 Wis. 2d 476, 704 N.W.2d 324. Courts employ a four-part balancing test to determine whether a person’s constitutional right to a speedy trial was violated, considering: (1) the length of delay, (2) the reason for the delay, (3) whether the defendant asserted his or her right to a speedy trial, and (4) whether the delay resulted in prejudice to the defendant. *State v. Borhegyi*, 222 Wis. 2d 506, 509, 588 N.W.2d 89 (Ct. App. 1998). We will uphold the circuit court’s factual findings unless they are clearly erroneous, but we will determine de novo whether those facts establish a constitutional violation. *Id.* at 508-09.

The circuit court made the following factual findings regarding the length of and reasons for the delays. The State charged Monge-Lopez on October 14, 2016,<sup>2</sup> and the court scheduled an initial trial date of June 27, 2017. At the final pretrial conference, the court rescheduled the trial to October 16, 2017.<sup>3</sup> The court scheduled a third trial date of January 16, 2018, based upon the State’s unopposed motion for an adjournment and to allow the parties to continue pretrial

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<sup>2</sup> Monge-Lopez asserts in his brief that he was arrested on August 2, 2016. The State responds that the August 2 arrest related to only two misdemeanor charges and predated the commission of the more serious felonies that were later added. The circuit court did not make a factual finding as to the date of the arrest. Under these circumstances, we will analyze the speedy trial claim based upon the date the complaint was filed rather than the date of arrest. We note that the difference between these two dates would not alter our analysis of this case.

<sup>3</sup> Although the circuit court did not make a factual finding as to the reason for this delay, Monge-Lopez’s trial counsel stated at the hearing that his preparation had been complicated by Monge-Lopez being housed in an out-of-county jail and that arrangements were being made to have two interpreters at trial.

negotiations. The court scheduled a fourth trial date of March 26, 2018, over Monge-Lopez's objection, due to the State's second motion for an adjournment "to resolve legal issues" including an outstanding motion on other-acts evidence. The court scheduled a fifth trial date of June 26, 2018, after allowing Monge-Lopez's trial counsel to withdraw. The court scheduled a sixth trial date of October 30, 2018, to allow the new defense attorney more time to review the file. The court scheduled a seventh trial date of December 12, 2018, on Monge-Lopez's motion for an adjournment, because his trial counsel "had yet to have a meaningful meeting with her client due to a jail lockdown." In addition, trial counsel had a scheduling conflict and was still waiting for the State to turn over one piece of discovery. Finally, the court scheduled an eighth trial date of February 25, 2019, on its own motion, after a pretrial hearing had to be cancelled because Monge-Lopez had not been transferred from jail to attend the hearing.

The circuit court made several additional findings relevant to this appeal. It found that Monge-Lopez filed a speedy trial demand on January 18, 2018, shortly after the court granted the State's second motion for adjournment. The court further found that the State was not "manipulating the trial calendar by filing its motions" and that Monge-Lopez was subject to an "immigration hold" during pretrial proceedings.

All of the circuit court's findings are supported by the record and are not clearly erroneous. Thus, by our calculation, the first unopposed postponement was for 111 days; the second postponement for plea negotiations was for 92 days; the third postponement to accommodate the State's other-acts motion was for 69 days; the fourth postponement, based on the withdrawal of defense counsel was for 92 days; the fifth postponement to allow Monge-Lopez's new attorney time to review the file was for 126 days; the sixth postponement to allow Monge-Lopez to meet with his new attorney was for 43 days; and the seventh

postponement at the court's own instigation was for 75 days. Ultimately, the trial began 864 days after Monge-Lopez was charged, 608 days after the initially scheduled trial date, and 403 days after Monge-Lopez made his speedy trial demand.

We next apply the *Borhegyi* balancing test to these facts. The first *Borhegyi* factor (the length of the delay) weighs in favor of Monge-Lopez because a delay of more than one year before trial is presumptively unreasonable or prejudicial. See *Borhegyi*, 222 Wis. 2d at 510. The third *Borhegyi* factor also weighs in favor of Monge-Lopez because he made a written speedy trial demand.

As to the second *Borhegyi* factor (the reasons for the delay), we note that only one of the seven postponements (the third postponement totaling 69 days) was solely attributable to the State. Three of the postponements (the fourth, fifth and sixth, totaling 261 days) were solely attributable to Monge-Lopez. The remaining three postponements (the first, second, and seventh, totaling 278 days), as well as the initial 256 days between when Monge-Lopez was charged and the first scheduled trial date, were either attributable to neither party or were partially attributable to both parties; thus, the postponements are nominally charged against the State but with little weight. Given that Monge-Lopez was solely responsible for more than three times as much of the apportioned delay as the State; the amount of delay solely attributable to the State was just over two months; the State made its second adjournment motion before Monge-Lopez made his speedy trial demand; and the State's request for a hearing on other-acts evidence had a legitimate purpose not intended to hamper the defense, we conclude that the second *Borhegyi* factor weighs in favor of the State.

In considering the fourth *Borhegyi* factor (whether the defendant was prejudiced by the delay), we take into account the reasons for the speedy trial guarantee. These include: “(1) preventing oppressive pretrial incarceration; (2) minimizing the accused’s anxiety and concern; and (3) limiting the possibility that the defense will be impaired.” *Borhegyi*, 222 Wis. 2d at 514. Here, we acknowledge that Monge-Lopez likely suffered anxiety and concern awaiting trial for over two years on serious felony charges. However, Monge-Lopez did not seek release on bond pending trial based upon the violation of his speedy trial right,<sup>4</sup> which reduces the weight we give to the impact of his pretrial incarceration. Most significantly, Monge-Lopez does not identify any way in which his ability to defend his case was harmed by the delay. To the contrary, many of the postponements served to protect Monge-Lopez’s ability to defend his case by providing him with complete discovery and allowing his trial counsel additional time to prepare. We conclude that the fourth factor also favors the State and that, upon balancing all four factors, the delays here did not rise to the level of a constitutional speedy trial violation.

We next turn to Monge-Lopez’s alternative claim that he is entitled to a mistrial. In evaluating a motion for a mistrial, the circuit court must determine whether the claimed error was sufficiently prejudicial to warrant a new trial “in light of the whole proceeding.” *State v. Doss*, 2008 WI 93, ¶69, 312 Wis. 2d 570, 754 N.W.2d 150 (citation omitted). We will not reverse the denial of a mistrial absent “a clear showing of an erroneous exercise of discretion.” *Id.* (citation omitted).

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<sup>4</sup> Monge-Lopez’s trial counsel told the circuit court, “There’s a detainer filed by the United States of America Immigration that would be holding him, Judge. In the event that bond was ever reduced or if he ever met bond[,] the federal authorities would then have the opportunity to act on their detainer.”

The multiple charges in this case included battery and disorderly conduct counts arising out of a domestic abuse incident that occurred on August 2, 2016; a sexual assault count arising out of an incident that occurred on October 10, 2016; counts of sexual assault, false imprisonment, intimidation of a victim, and battery arising out of an incident on October 13, 2016; and a count of stalking that covered a time period between August 3, 2016, and October 13, 2016. All of the charges related to the same victim, Rachel.<sup>5</sup> Prior to trial, the State moved to admit evidence of a series of prior acts of violence that Rachel alleged Monge-Lopez had committed against her. The circuit court limited the admission of other-acts evidence to a single prior incident in which Monge-Lopez pushed Rachel on a bed and punched her in the face five to seven times.

At trial, the following exchange occurred during the State's direct examination of Rachel:

Q: [D]o you have any feelings toward [Monge-Lopez] about what he did to you on these various dates?

A: What I feel is sadness.... and I just wanted to clarify these are not the only times that he hit me. There were other occasions when he also beat me.

COURT: Stop. Stop. That last statement is to be stricken. The jury is not to consider that testimony.

Monge-Lopez immediately moved for a mistrial. The circuit court found that the State's question had not improperly sought inadmissible testimony. Rather, the witness "went off on a tangent." The court concluded that a cautionary instruction would be sufficient to prevent undue

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<sup>5</sup> This matter involves the victim of a crime. Pursuant to the policy underlying WIS. STAT. RULE 809.86(4), we use a pseudonym instead of the victim's name.

prejudice given the “nature of the testimony [that had] been given so far,” and it denied the motion for a mistrial.

On appeal, the State does not dispute that Rachel’s testimony constituted inadmissible prior bad-acts evidence and that it violated the circuit court’s pretrial order. The State argues that the court nonetheless properly exercised its discretion by denying the motion for a mistrial. We agree.

The circuit court properly considered whether Rachel’s testimony—that there were “other times” Monge-Lopez hit her—was so prejudicial as to warrant a new trial, taking into account the “nature” and the “context” of Rachel’s<sup>6</sup> “other testimony” and the jury’s presumed ability to follow a curative instruction. We note that Rachel’s other testimony included detailed accounts of four separate violent episodes that occurred on four different days. In contrast, her isolated reference to “other times” that Monge-Lopez hit her did not include any details. In this context, where the jury was already aware of Rachel’s assertions that Monge-Lopez was violent toward her on multiple occasions, it was reasonable and within the court’s discretion to determine that a curative instruction would be sufficient to address the objectionable testimony.

Therefore,

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<sup>6</sup> The State also discusses the testimony of other witnesses, but none of those witnesses had yet testified when the circuit court ruled on the mistrial motion. Therefore, the court could only have been referring to Rachel’s other testimony.

IT IS ORDERED that the judgment and order are summarily affirmed under WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*