COURT OF APPEALS
DECISION
DATED AND FILED

March 31, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1130-CR **Cir. Ct. No. 2012CF5148**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID A. ALLEN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: STEPHANIE ROTHSTEIN, Judge. *Reversed and cause remanded with directions.*

Before Curley, P.J., Kessler, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. David A. Allen appeals the nonfinal order denying his motions for continuance and to amend his witness list. Allen argues that the circuit court's order violates his constitutional right to present a defense. He also

asserts that the circuit court erred when it prohibited videoconference testimony at trial. According to Allen, the interest of justice requires that some of his expert witnesses be permitted to testify in that manner.

¶2 We conclude that the circuit court erred when it denied Allen's motions for continuance and to amend his witness list. Consequently, we reverse and remand. On remand, if the circuit court concludes that the requisite admissibility thresholds are satisfied, Allen will be afforded the opportunity to amend his witness list to include Dr. Charles Hyman and Dr. Joseph Scheller. *See* WIS. STAT. § 907.02(1) (2013-14)[1]; ***Daubert v. Merrell Dow Pharm., Inc.***, 509 U.S. 579 (1993). Additionally, a trial date should be scheduled to allow for Allen's expert witnesses to appear in person or, if the circuit court decides that its calendar would be better-served, to allow for the witnesses to testify by videoconference. Because the circuit court may be revisiting its ruling on videoconferencing, we will not analyze it here. Doing so would essentially amount to an advisory opinion, which is something we do not provide.

BACKGROUND

¶3 The procedural history of Allen's efforts to secure continuances and to amend his witness list is important to understanding the issues presented, and we review that history in some detail.

¶4 In October 2012, Allen was charged with two counts of physical abuse of a child and one count of child neglect. According to the complaint, Allen

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

caused injuries to his infant son, David A. Jr., which included rib fractures and traumatic brain injury.[2]

¶5 In April 2013, David Jr. died. The State subsequently filed an amended complaint and information charging Allen with physical abuse of a child, first-degree reckless homicide, and child neglect.

¶6 Allen's defense is that his son's fractures were the result of an independent medical cause—and not any action on his part. Thus, the interpretation of medical evidence and the medical conditions of David Jr. are at issue.

¶7 In July 2013, the State provided the medical examiner's autopsy report to defense counsel, who requested an adjournment to consult with an expert. The following month, defense counsel told the court that the case was headed to trial. Defense counsel requested that the court schedule a hearing to address an outstanding motion regarding the admissibility of statements made by Allen rather than a trial date because defense experts were still reviewing the medical reports and had not completed their analyses. The State indicated that it might request a ***Daubert*** hearing to challenge the defense experts' credentials.

¶8 The circuit court scheduled the requested hearing and asked defense counsel if he would be able to provide the State with the names of the experts he intended to call at trial along with their qualifications and the nature of their

[2] To avoid confusion, the appellant, David A. Allen, will be referred to as Allen. His son, David A. Jr. will be referred to as David Jr.

proposed testimony by that date. Defense counsel confirmed that he would do that.

¶9 The scheduled hearing did not take place due to the unavailability of one of the State's witnesses. However, the parties met in court on October 14, 2013, to schedule a trial date. Due to his calendar, defense counsel requested that a trial date be set in April. The court, acknowledging that defense counsel had "worked diligently on the motions," set a trial date on April 7, 2014, with a motion date on January 28, 2014.

¶10 The motion hearing did not take place because the Milwaukee County courthouse was closed on January 28, 2014. The following day, the court held an off-record scheduling conference, adjourning the case to March 14, 2014 for final pretrial, a motion, and a possible ***Daubert*** hearing.

Denial of First Motion for Continuance

¶11 On February 26, 2014, defense counsel filed a motion for continuance of the April trial date to June, noting the complex nature of the medical issues presented and detailing his ongoing contact with several named experts in the case in an effort to prepare for trial. The experts included Dr. Waney Squier (a pathologist with expertise on venous thrombosis), Dr. Julie Mack (a radiologist), Dr. Patrick Barnes (an expert on Rickets disease), and Dr. Shaku Teas (a forensic pathologist). Defense counsel asserted that there had been several delays, not attributable to the defense, in obtaining necessary records and physical evidence. Additionally, defense counsel relayed that Dr. Barnes had recently informed him (in late January) that he would not be able to work on the case. As a result, the defense had been referred to Dr. Charles Hyman (a pediatric bone specialist) and Dr. Joseph Scheller (a neurologist), both of whom had agreed

to work on the case but needed additional time to review records and provide analyses—to late March or early April. Defense counsel argued that a continuance was necessary to ensure Allen's constitutional right to present a defense. The State filed a written response opposing a continuance.

¶12 At the hearing, the circuit court noted its "interest in moving the case forward," and said that "considerations of undue delay in prosecution of matters are always at the top of the [c]ourt's list." The court further remarked that it was "not impugning [defense counsel's] diligence here. I'm not implying that you're not—that your firm is not acting to the best of your ability to bring the matter forward." However, it noted that the State had "an equal interest in advancing the case to trial." The circuit court denied the motion for continuance.

¶13 At the same hearing, the prosecutor said he would file the State's witness list that day, but advised the court that he had not received information about any witnesses, other than Dr. Squier, the defense might call. The court concluded:

> Then that's it. The notice is provided under the statute. Whatever you have proper and timely notice of, Mr. Torbenson [prosecutor], is what will be allowed.

Denial of Second Motion for Continuance and Exclusion of Dr. Hyman and Dr. Scheller

¶14 The State subsequently filed a motion requesting that the court prohibit or limit the testimony of Dr. Squier, the only defense expert that the court was permitting to testify at trial. In response to the motion, defense counsel filed a second motion to continue the trial, arguing that it needed time to review the State's motion and attachments with Dr. Squier in order to prepare a detailed response. With the response, defense counsel included a recently completed

report from Dr. Teas and affidavits supporting the requested continuance and the need for Dr. Teas' testimony. The circuit court denied the motion for continuance and refused to permit Dr. Teas to testify.

¶15 Allen petitioned this court, seeking relief from the circuit court's denial of a continuance as to the April 7 trial and the denial of his right to call expert witnesses. The same day Allen filed his petition, the circuit court *sua sponte* entered a written order adjourning the trial on the basis that a speedy trial homicide was scheduled for trial the same date. Allen then moved to withdraw his petition, and we granted his request.

¶16 At a hearing on April 8, 2014, the court set the new trial date for June 16 and scheduled a ***Daubert*** hearing to take place on May 21 and May 22. The court emphasized for the parties that "the witness list is closed," and made clear that the parties were "not being afforded this adjournment for the purposes of augmenting any witness list." When asked to clarify which defense experts it was permitting to testify, the court stated that it would allow the witnesses named on the defense's witness list, subject to qualification: Dr. Mack, Dr. Squier, Dr. Barnes, and Dr. Teas.

¶17 Defense counsel objected to setting the trial date in June and told the court that not all of the experts would be available to testify then. Counsel explained that while a June trial date was realistic when the defense filed its original motion for continuance in February, the court had denied that motion and allowed only Dr. Squier's testimony. Additionally, defense counsel informed the court that Dr. Teas was waiting on slides from the medical examiner's office. Defense counsel requested that the court set a trial date the first two weeks in December when all of its experts would be available. Additionally, defense

counsel sought permission to amend the defense witness list to include Dr. Hyman and Dr. Scheller, neither of whom had been listed on the defense's previously filed witness list based on the court's March 14 ruling that excluded them.

¶18 The circuit court did not specifically address defense counsel's request to amend the witness list; however, it held to the June trial date, stating that it had to "set some limits on its scheduling and maintain control over its calendar." As for scheduled motion hearings, the court further advised the parties that it was its "general practice" to prohibit testimony by telephone or videoconference and that all witnesses "presented to the [c]ourt for qualification, must be here in person."

Denial of Third Motion for Continuance and Motion to Amend the Witness List

¶19 On April 11, 2014, defense counsel filed an amended witness list that included Dr. Hyman and Dr. Scheller. Three days later, defense counsel filed a third motion for continuance and a motion to amend the witness list to include Dr. Hyman and Dr. Scheller. The State opposed the motion.

¶20 The circuit court denied the motion in a written decision, concluding that the defense had failed to show "good cause" to delay the trial.

Denial of Fourth Motion for Continuance and Motion to Amend the Witness List

¶21 On May 1, 2014, defense counsel filed a fourth motion for continuance and again sought to amend the witness list to include Dr. Hyman and Dr. Scheller. Defense counsel attached letters from Dr. Teas, Dr. Squier, Dr. Mack, Dr. Hyman, and Dr. Scheller listing specific dates on which each doctor

would be available and unavailable for trial. The circuit court denied the motion in a written decision.

¶22 Defense counsel petitioned this court for leave to appeal from that nonfinal order.

Denial of Motion for Videoconference Testimony at Trial from Dr. Squier and Dr. Mack

¶23 At the same time defense counsel filed a third motion for continuance, he also requested permission for Dr. Hyman, Dr. Scheller, Dr. Mack, and Dr. Squier to testify by videoconference at the ***Daubert*** hearings that were to take place in May. The circuit court permitted only Dr. Squier, who resides in England, to testify by video.[3]

¶24 Later, defense counsel filed motions to allow Dr. Squier and Dr. Mack, who resides in Pennsylvania, to testify by videoconference at trial. The State objected, and the circuit court denied the motion.

¶25 On June 13, 2014, we granted the petition for leave to appeal.

DISCUSSION

A. *Motion for Continuance*

¶26 Allen argues that when the circuit court denied his motion for a continuance of the trial, it violated his constitutional right to present a defense.

[3] After the ***Daubert*** hearing, the circuit court noted: "[I]t did work out well with Dr. Squier by video. I was pleased … that[] we were able to work that out."

¶27 "The decision whether to grant or deny [a continuance] request is left to the [circuit] court's discretion and will not be reversed on appeal absent an erroneous exercise of discretion." ***State v. Leighton***, 2000 WI App 156, ¶27, 237 Wis. 2d 709, 616 N.W.2d 126. The exercise of discretion is not the equivalent of unfettered decision-making; rather, the circuit court's decision must reflect a reasoned application of the appropriate legal standard to the relevant facts of the case. ***Hedtcke v. Sentry Ins. Co.***, 109 Wis. 2d 461, 471, 326 N.W.2d 727 (1982).

¶28 Because the denial of a continuance may implicate a party's rights to counsel and due process, "'this court's task on review is to balance the defendant's right to adequate representation by counsel against the public interest in the prompt and efficient administration of justice.'" *See* ***Leighton***, 237 Wis. 2d 709, ¶27 (citation omitted). Factors to be considered include:

> 1. The length of the delay requested;
>
> 2. Whether the "lead" counsel has associates prepared to try the case in his [or her] absence;
>
> 3. Whether other continuances had been requested and received by the defendant;
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> 4. The convenience or inconvenience to the parties, witnesses and the court;
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> 5. Whether the delay seems to be for legitimate reasons; or whether its purpose is dilatory;
>
> 6. Other relevant factors.

State v. Wollman, 86 Wis. 2d 459, 470, 273 N.W.2d 225 (1979) (internal quotation marks and citation omitted).

¶29 Allen acknowledges that the circuit court utilized these factors when it denied his third continuance motion, but he asserts that the court erred in its analysis.

¶30 First, as to the length of the delay, Allen contends that the court inaccurately claimed that he received one continuance from April 2014 to June 2014, when in reality, his requests had been denied and the case was only later adjourned *sua sponte* by the court for its own calendar conflict reasons. Allen further submits that he was asking for a continuance of just under six months, not eight months as the delay is described in the decision.

¶31 Second, regarding the availability of Allen's counsel, the circuit court concluded that Allen's attorneys "are well-versed, prepared and have sufficient legal acumen to effectively assert Mr. Allen's chosen defense(s)." From this, the court found that the availability of counsel was not a factor weighing in favor of a continuance. Allen challenges this determination because the circuit court failed to consider that counsel "would be unable to in fact *present* Mr. Allen's defense to the jury, given the unavailability of the expert medical witnesses that were necessary to testify regarding the alternative medical cause for the child's injuries and death on the scheduled June trial date."

¶32 Third, Allen asserts that the factor addressing whether other continuances had been requested and received by the defense was given short shrift by the circuit court. In its decision, the circuit court stated "[t]he procedural history set forth above speaks for itself" and found that this was not a factor weighing in favor of a continuance. While scheduling accommodations were made early on in the proceedings, Allen argues that he had not been granted any previous continuances of a scheduled *trial* date.

¶33 Fourth, in terms of the convenience or inconvenience to the parties, witnesses and the court, Allen contends that the circuit court erred when it focused on the lack of specificity and documentary support as to the witnesses'

unavailability. Allen argues that the motion did not require verification or affidavits to establish unavailability; rather, counsels' signatures on the motion were sufficient to certify that the factual information was true. *See* WIS. STAT. §§ 802.05, 972.11(1) (making § 802.05 applicable in criminal proceedings).

¶34 Fifth, as to whether the delay seems to be for legitimate reasons or whether its purpose is dilatory, Allen disagrees with the circuit court's assessment that his submissions throughout the case were "deliberately vague."

¶35 We share some of Allen's concerns related to the circuit court's analysis of the preceding factors. While these concerns contribute to our ultimate conclusion that the circuit court erred when it denied the continuance motion, what we find most problematic is the circuit court's discussion of other relevant factors.

¶36 In its analysis, the circuit court, citing WIS. STAT. § 971.23(7m)(a), held: "It is clear that the court has, among various alternatives, the discretion to sanction discovery violations by excluding offered evidence." We agree with Allen that the circuit court's reliance on this statutory provision to support its decision to deny a continuance is misplaced. Based on the timing of the State's discovery demand, which had a cover letter dated April 22, 2014, and the circuit court's decision denying the third motion to adjourn, which was dated April 24, 2014, the sanctions in § 971.23 were inapplicable. *See* § 971.23(2m) ("Upon demand, the defendant or his or her attorney shall, within a reasonable time before trial, disclose to the district attorney and permit the district attorney to inspect and copy or photograph all of the following materials and information, if it is within the possession, custody or control of the defendant…."). Additionally, even if it did apply, there is no support in § 971.23(7m)(a) for denying a continuance motion as a sanction.

¶37 As another relevant factor, the circuit court considered the rights of the victim, here, David Jr.'s mother. It noted that David Jr.'s mother objected to any further continuance. However, as Allen points out, the circuit court failed to account for the narrow application of the statutory provision found at § 950.04(1v): "Victims of crimes have the following rights: … (ar) To have his or her interest considered when the court is deciding whether to grant a continuance in the case, as provided under ss. 938.315(2) [juvenile cases] and 971.10(3)(b)3. [cases where a speedy trial demand was made]." Neither situation applies here. And, while the statute does generally provide victims with a right "[t]o a speedy disposition," *see* § 950.04(1v)(k), we are not convinced that this consideration outweighs Allen's right to present a defense.

¶38 The State asserts that this issue is moot because we previously stayed the trial pending resolution of this appeal. We disagree. Consolidated Court Automation Program (CCAP) entries reflect that this case is scheduled for a jury trial on April 13, 2015, and that the State previously put the circuit court on notice that it may be requesting an adjournment if this court decided to allow Dr. Hyman and Dr. Scheller to be named as experts.[4] Consequently, a determination of this issue is necessary to clarify further proceedings in the litigation, which is one of the specific purposes underlying this court's grant of a permissive appeal. *See* WIS. STAT. § 808.03(2).

[4] Because they are not presently before us, this court will not delve into any issues that may result from the circuit court's scheduling of that trial date.

CCAP is a case management system provided by Wisconsin Circuit Court Access program (WCCA).

B. *Motion to Amend Witness List*

¶39 Allen argues that the circuit court erred when it excluded two additional expert witnesses, Dr. Hyman and Dr. Scheller. The State asserts that the circuit court had authority to exclude the testimony of these witness under "the broad grant of superintending authority over the mode of the trial" conferred by WIS. STAT. § 906.11. *See* ***State v. Wright***, 2003 WI App 252, ¶50, 268 Wis. 2d 694, 673 N.W.2d 386.

¶40 "'[W]hile we agree that the evidentiary rule [WIS. STAT.] § 906.11(1) provides the circuit court with broad discretion in its control over the presentation of evidence at trial, that discretion is not unfettered.'" ***State v. Smith***, 2002 WI App 118, ¶15, 254 Wis. 2d 654, 648 N.W.2d 15 (citation omitted). In ***Smith***, we noted that evidence that is otherwise admissible may not be excluded merely by invoking § 906.11(1). *See* ***Smith***, 254 Wis. 2d 654, ¶14.

¶41 Allen's failure to name Dr. Hyman and Dr. Scheller in compliance with a pretrial order does not justify the circuit court's summary exclusion of these witnesses:

> [W]hile such a sanction may be permitted, lesser sanctions must be considered first, and … the extreme sanction of exclusion is permissible only after the circuit court has determined that the violation was "willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence."

State v. McClaren, 2009 WI 69, ¶6, 318 Wis. 2d 739, 767 N.W.2d 550 (citation omitted).

¶42 Here, there is no indication that the circuit court considered any lesser sanctions before excluding Dr. Hyman and Dr. Scheller as witnesses.

Additionally, the circuit court made no determination as to whether the failure to name these witnesses in compliance with its pretrial order was "'willful and motivated by a desire to obtain a tactical advantage.'" *See* ***id.*** (citation omitted).

¶43 Accordingly, on remand, the circuit court will have the opportunity to determine whether the requisite admissibility standards are satisfied as to the testimony that will be offered by Dr. Charles Hyman and Dr. Joseph Scheller, and if the court so concludes, Allen will be afforded the opportunity to amend his witness list to include them. Additionally, a trial date should be scheduled to allow for Allen's expert witnesses to appear in person or, if the circuit court decides that its calendar would be better-served, to allow for the witnesses to testify by videoconference.

¶44 Because the circuit court may be revisiting its ruling on videoconferencing, we conclude that deciding the issue now would be tantamount to rendering an advisory opinion. It would also be an inefficient use of judicial resources because the issue may become moot. Indulging in hypothetical scenarios or offering advisory opinions is beyond the scope of legitimate appellate review. *See* ***Commerce Bluff One Condo. Ass'n, Inc. v. Dixon***, 2011 WI App 46, ¶22 n.6, 332 Wis. 2d 357, 798 N.W.2d 264 (this court does not provide advisory opinions); *see also* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (appellate courts should decide cases on narrowest possible grounds).

By the Court.—Order reversed and cause remanded with directions.

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