COURT OF APPEALS
DECISION
DATED AND FILED

April 27, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1255-CR **Cir. Ct. No. 2008CF342**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

MARY K. BENZ,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Sheboygan County: TERENCE T. BOURKE, Judge. *Affirmed*.

Before Brown, C.J., Anderson and Reilly, JJ.

¶1 PER CURIAM. The State appeals from an order dismissing the criminal prosecution against Mary K. Benz due to the denial of Benz's right to a speedy trial. The State argues it should not be faulted for the bulk of the delay and

that, on balance, Benz was not prejudiced. We disagree with the State and affirm the order dismissing the prosecution for the speedy trial violation.

¶2 Benz was the director of a church-run day care center. On June 26, 2007, Grace S., a ten-month-old in Benz's care, was discovered to have sustained a penetrating vaginal injury. Benz was charged on May 29, 2008, with one count of child abuse and three counts of obstruction for giving investigating officers false statements and altered day care reports regarding Grace's care. A fifth count, failure to report child abuse, was dismissed.

¶3 Trial was set for April 20, 2009. On April 2, 2009, the court ordered the exclusion of certain evidence the State planned to use at trial. The court granted the State's motion for an adjournment to seek Attorney General review; the AG declined. On April 7, Benz formally demanded a speedy trial. Trial was rescheduled for August 31, 2009.

¶4 On July 2, the State moved to adjourn the new trial date on grounds that Dr. Thomas Valvano, the doctor who first examined Grace, would not be available the week of August 31. The court denied the motion. On August 14, the State moved for reconsideration, explaining that Dr. Valvano had accepted a new position in Oregon and the press of his responsibilities had stymied efforts to schedule a video deposition. Over Benz's objection, the court granted the motion.

¶5 Trial commenced on November 30, 2009. Dr. Valvano and defense expert Dr. Marcus DeGraw had completed their testimony by December 2. On December 3, the fourth day of trial, the prosecutor and defense counsel were reviewing audiotapes in the prosecutor's office. Defense counsel saw a report from the Sheboygan County Department of Health and Human Services lying face-up next to the prosecutor's desk. The report, authored by Department social

worker Laura Lemon, involved the investigation of Grace's case in the summer of 2007. Lemon spoke to Dr. Valvano by telephone shortly after he examined Grace. The report contained statements Lemon attributed to Dr. Valvano regarding the timing and possible cause of Grace's injuries and noted that her parents had not been ruled out. The statements differed in some respects from his trial testimony. The report also referred to Lemon's complete file on the case and the file of Jody Beyer, the state licensing agent who oversaw the day care center's license to operate. The Lemon report had not been produced to the defense in discovery.

¶6 The defense moved for a mistrial. Counsel argued that the undisclosed materials raised issues he could have used "with great prominence" when he cross-examined Dr. Valvano. The trial court agreed and noted the difficulty posed because Dr. Valvano and Dr. DeGraw already had returned to Oregon and Michigan. The court granted a mistrial, albeit "with great hesitancy." It found no bad faith of the part of the State, however. A fourth trial date was set for April 12, 2010.

¶7 On December 20, 2009, Benz moved for dismissal on grounds of a violation of her right to a speedy trial. After an evidentiary hearing, the court granted the motion. The State appeals.

¶8 A defendant's assertion of the right to a speedy trial raises an issue of constitutional dimensions. ***State v. Borhegyi***, 222 Wis. 2d 506, 508, 588 N.W.2d 89 (Ct. App. 1998). In reviewing constitutional questions, we accept the trial court's findings of historical fact unless they are clearly erroneous. ***Id.*** at 508-09. We apply those facts to constitutional standards and principles without deference to the trial court's conclusion. ***Id.*** Despite our de novo standard of review, we value the trial court's decision. *See* ***Scheunemann v. City of West***

Bend, 179 Wis. 2d 469, 475-76, 507 N.W.2d 163 (Ct. App. 1993). This is especially so since the same judge presided over this entire matter, such that his ultimate decision was informed by full knowledge of all prior proceedings.

¶9 To determine whether a defendant's constitutional right to a speedy trial has been violated, we consider the length of the delay, the reason for the delay, the defendant's assertion of the constitutional right to a speedy trial, and prejudice to the defendant. ***Barker v. Wingo***, 407 U.S. 514, 530-32 (1972); ***Borhegyi***, 222 Wis. 2d at 509. We balance these four factors in light of the totality of the circumstances of the specific case. *See* ***Borhegyi***, 222 Wis. 2d at 509.

¶10 We easily dispense with the first and third ***Barker*** factors. The first, length of the delay, weighs in Benz's favor because any delay of one year or more is presumptively prejudicial. *See* ***State v. Urdahl***, 2005 WI App 191, ¶12, 286 Wis. 2d 476, 704 N.W.2d 324. The complaint was issued on May 29, 2008, and her thrice-rescheduled trial ultimately was set for April 12, 2010. The State concedes that the nearly twenty-three-month delay was presumptively prejudicial. The third factor, assertion of her right, also weighs in her favor. She filed a written demand on April 7, 2009 and acted consistent with that desire.

¶11 The second ***Barker*** factor is reason for the delay. The first delay involved the adjournment due to Dr. Valvano's unavailability. The State asserts that the three-month delay should not count heavily against it because Dr. Valvano's commitments made delay unavoidable. The trial court faulted the State for failing to subpoena the doctor or to otherwise compel his presence at trial, and found that the lack of an attempt to keep the trial on track evinced a "cavalier disregard" for Benz's constitutional right. A cavalier disregard of the

defendant's right is to be weighed heavily against the State. ***Green v. State***, 75 Wis. 2d 631, 638, 250 N.W.2d 305 (1977).

¶12 The next delay arose from the mistrial. The court also found that the State's discovery violations for its failure to disclose the Lemon report showed a cavalier disregard of Benz's rights.

¶13 Upon a defendant's demand, the prosecutor must produce any exculpatory evidence within the State's possession, custody or control. WIS. STAT. § 971.23(1)(h) (2009-10). Due process imposes a similar obligation of disclosure "where the evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of the prosecution." ***Brady v. Maryland***, 373 U.S. 83, 87 (1963). To establish a ***Brady*** violation, a defendant must show that the State suppressed evidence in its possession; that the evidence was favorable to him or her; and that the evidence was material to his or her guilt or punishment. ***Strickler v. Greene***, 527 U.S. 263, 281-82 (1999). Evidence is material if there is a reasonable probability that its disclosure would have led to a different result in the proceeding. *See* ***State v. Garrity***, 161 Wis. 2d 842, 850, 469 N.W.2d 219 (Ct. App. 1991).

¶14 The State argues that the delay caused by the mistrial should not count against it because the mistrial should not have been granted. It asserts that the chances are miniscule that the Lemon report could have been used to Benz's benefit.

¶15 The court concluded that the Lemon report was relevant because Dr. Valvano's statements in the report differed somewhat from his trial testimony and, further, it indicated the existence of other potentially useful files. By the time the defense accidentally discovered the Lemon report, it was Day Four of a five-

day trial. The opportunity to cross-examine Dr. Valvano on his earlier statements had passed. The court accepted the prosecutor's claim that he had been unaware that the report was in the possession of his office since June 2, 2008, eighteen months earlier. Still, the court imputed to the State knowledge of the information because the Department participated in the investigation and Lemon regularly reported to the District Attorney's Office. *See* ***State v. DeLao***, 2002 WI 49, ¶24, 252 Wis. 2d 289, 643 N.W.2d 480. "The test of whether evidence should be disclosed is not whether in fact the prosecutor knows of its existence but, rather, whether by the exercise of due diligence [the prosecutor] should have discovered it." ***Id***, ¶22 (citation omitted).

¶16 The State also argues that it had no discovery obligation with regard to Beyer's file because, unlike Lemon, Beyer had no investigative role apart from the licensing of the day care center and did not regularly report to the District Attorney's Office. The State's case partly relied on Benz's deceptive statements to the police as evidence of her guilt. The defense theory was that, after speaking with Beyer, Benz acted out of fear that the day care center would be closed if she were charged. Beyer testified at the motion hearing on the speedy trial that she no longer recalled the substance of her conversation with Benz and had destroyed her notes once she closed the file. The court concluded that Beyer's complete file, now irretrievable, might have been favorable to Benz. Lost recall is an element of delay to be weighed heavily against the State. *See* ***Green***, 75 Wis. 2d at 638.

¶17 The State tries to discredit information of possible benefit to Benz. For example, Dr. Valvano first examined Grace on June 27, a Wednesday. While Dr. Valvano later stated that Grace's injury likely occurred within the previous twelve to twenty-four hours, the Lemon report indicates that he stated Grace's injury may have occurred as early as Monday. It was not established that Grace

was in Benz's care on Monday. The State asserts that the enlarged time "seems best explained by the fact that Lemon made an error" and that "an abbreviated (and inaccurate) version" of another person's statement "made its way" into her report. It also asserts that, had Dr. Valvano been cross-examined with the Lemon report, "he would have denied its accuracy" and a detective's notes would have shown that Lemon's notes were "probably an abridged and incorrect record of [Dr.] Valvano's statement."

¶18 We are not moved by the State's speculation as to what Lemon really meant, how Dr. Valvano would have testified on cross-examination and, by implication, what the jury would have made of conflicts in the evidence. Allowing for meaningful cross-examination is the primary mechanism for promoting the reliability of the truth-determining process in a criminal trial. *See* ***State v. Thomas***, 144 Wis. 2d 876, 887, 425 N.W.2d 641 (1988). The State's breach of its discovery obligation deprived Benz of that opportunity.

¶19 The trial court must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to grant a motion for a mistrial. *See* ***State v. Ross***, 2003 WI App 27, ¶47, 260 Wis. 2d 291, 659 N.W.2d 122. We will reverse that determination only on a clear showing of an erroneous use of its discretion. ***Id.***

¶20 Here, the court found that a brief recess to recall Drs. Valvano and DeGraw from out of state was impractical, that telephone testimony was not permitted in a criminal case and that videoconferencing was not a reasonable alternative. Even if the State had no duty to disclose Beyer's file, its existence would have come to light eighteen months sooner and the defense could have

explored its utility. The court properly exercised its discretion in granting a mistrial. We agree that the responsibility for this delay should lie with the State.

¶21 The fourth ***Barker*** factor is whether the delays caused prejudice. We assess prejudice in light of the three interests the speedy trial right was designed to protect: preventing oppressive pretrial incarceration; minimizing the accused's anxiety and concern; and, the most serious, limiting the possibility that the defense will be impaired. ***Barker***, 407 U.S. at 532; ***Borhegyi***, 222 Wis. 2d at 514. The State argues that it was not trial delays but Benz's own mental health history and her decision to go to trial that led to any mental or financial strain.

¶22 Benz has a documented mental health history dating back to 1996 that includes anxiety, depression, bipolarity and difficulty handling stress. At the speedy trial motion hearing, an examining psychologist testified that since the mistrial Benz had become "extremely anxious" with a "very limited" ability to focus and concentrate, and that her recall of details was "essentially nonexistent," such that she no longer could meaningfully assist in her trial. Benz's husband testified that his wife's mental health problems escalated since she was charged, that she became paranoid and, in his opinion, unemployable, and that ongoing media coverage led to their teen-age daughter being ridiculed. He also testified that by December 2009 they had incurred $15,000 in legal and expert fees.

¶23 The court found that Benz was prepared three times to seek a final decision on the charges. It also found that, due to the State's actions, Benz each time was forced to return home and "ponder her fate for several additional months," causing her considerable personal and financial stress.

¶24 The court also found that Benz's defense was impaired. Records discovered late in the trial precluded her from accessing evidence of now

unknowable use. Source materials were discarded; memories faded; Dr. Valvano moved away. While the record does not establish why the defense did not name Beyer as a witness on its own, we agree with the trial court that the delays overall impaired Benz's defense. Due to her own mental deterioration, Benz no longer realistically would even have the option of testifying in her own defense. That prejudice is enough for us to conclude that the nearly two-year delay resulted in at least minimal prejudice.

¶25 In balancing the ***Barker*** factors, we agree with the trial court that the totality of the circumstances mandates dismissal. First, there is the presumptively prejudicial delay between the filing of the complaint and the trial. Next, the delays—intentional or not—resulting from the trial adjournment and mistrial are chargeable to the State. Third, Benz has sufficiently established prejudice. Where a violation is established, the sole remedy is dismissal of the charges. ***Urdahl***, 286 Wis. 2d 476, ¶11.

By the Court.—Order affirmed.

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