COURT OF APPEALS
DECISION
DATED AND FILED

September 20, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2590-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAY D. HARRIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: DENNIS FLYNN, Judge. *Reversed and cause remanded with directions.*

Before Brown, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Jay D. Harris appeals from a judgment convicting him of delivering cocaine within 1000 feet of a school or park as a repeat offender and from an order denying his postconviction motion alleging ineffective

assistance of trial counsel and denial of his constitutional right to a speedy trial. While Harris was not denied his right to a speedy trial, his trial counsel was ineffective. Therefore, we reverse the judgment and the order and remand for a new trial.

¶2 Harris first argues that he was denied a speedy trial. The genesis of Harris's speedy trial claim lies in the confusion surrounding production of a videotape of the drug transaction with which Harris was charged. The videotape purportedly showed Reggie Hubbard leaving and returning to an undercover agent's vehicle after allegedly purchasing cocaine from Harris. The undercover agent who handled the transaction involving Hubbard and Harris testified at Harris's December 1997 preliminary examination that he videotaped Hubbard's leaving and returning to the vehicle and that the videotape had been preserved. The prosecutor agreed, upon defense counsel's request, to save the videotape.

¶3 At a March 16, 1998 hearing, defense counsel moved the court for a continuance because counsel still had not received the videotape. The prosecutor responded that she was trying to contact the undercover agent to obtain the tape. The court granted a continuance so that Harris's counsel could pursue discovery of the videotape. The court acknowledged that Harris had made a speedy trial demand[1] and commenced the speedy trial period from the date the court received Harris's letter, March 13, 1998. Trial was scheduled for April 29.

¶4 On April 29, defense counsel advised the court that discovery problems were continuing and that he intended to file a motion relating to those

[1] Harris wrote to the court himself to request that his trial occur as soon as possible.

problems. Trial was scheduled for June 24 with the understanding that defense counsel had another case scheduled for trial that day.

¶5 On May 29, the court heard Harris's discovery motion relating to the videotape. The court ordered the State to produce all of the videotapes of Hubbard's numerous drug transactions involving the undercover agent.

¶6 On June 17, Harris wrote the court again and asked the court to schedule his trial as soon as possible. Harris's June 24 trial did not occur because of a previously scheduled trial. Trial was rescheduled for July 21. On July 21, the trial was bumped again to August 19.

¶7 On August 11, defense counsel moved to dismiss the charges against Harris because the State had failed to produce the videotape as ordered by the court, thereby denying Harris a speedy trial. At the August 13 hearing on Harris's motion to dismiss, defense counsel advised that the State had recently informed him that the videotape did not exist. The court found that at the time it originally ordered the videotape produced, there was no indication that the videotape did not actually exist. The court accepted the State's assertion that the videotape was subsequently found not to exist and denied the motion to dismiss.[2] Trial commenced on August 19, and the jury found Harris guilty.

¶8 In his postconviction motion, Harris renewed his claim that he was denied a speedy trial. Harris's trial counsel testified that trying to obtain the videotape was the major reason for the delay. Counsel stated that he learned the

[2] On August 19, the undercover agent filed an affidavit stating that there was no videotape relating to the Hubbard-Harris drug transaction. At trial, the agent testified that the videotape had existed at one point but disappeared and may have been taped over.

tape did not exist shortly after he filed his August 11 motion to dismiss. Counsel believed that the videotape was crucial to Harris's defense because, based upon his understanding of its contents, counsel intended to argue that the undercover officer and Hubbard were lying about Harris's involvement in the transaction. Counsel advised Harris that in order to effectively defend him, he needed the videotape.

¶9 The court made the following findings. The adjournments granted in March and April were for cause because the videotape had not been produced. The discovery dispute was heard in May. The court's calendar caused the trial to be bumped from the June 24 date. The July 21 date had to be adjourned for a previously scheduled trial. Although Harris suffered anxiety pending his long-delayed trial, he did not suffer oppressive incarceration because he would not have been released due to a probation hold. Harris's ability to present a defense was not impaired by the delay because he was attempting to obtain an item he believed was material to his defense. The court did not find any serious compromise of witnesses' memories due to the delay in commencing trial. The court determined that the trial was delayed for legitimate reasons relating to discovery, and that Harris did not establish that he was prejudiced by the delay.

¶10 Harris argues on appeal that his constitutional right to a speedy trial was violated because the State failed to provide the required discovery.[3] For purposes of our disposition of this appellate issue, we will assume without

[3] The State argues that Harris waived his speedy trial right. We disagree and address the claim on the merits.

deciding that Harris's pro se letter to the court was sufficient to invoke his right to a speedy trial.[4] Therefore, we turn to whether that right was violated.

¶11 The parameters of the constitutional right to a speedy trial are outlined in ***Barker v. Wingo***, 407 U.S. 514 (1972), and were recognized in Wisconsin in ***Day v. State***, 61 Wis. 2d 236, 244-46, 212 N.W.2d 489 (1973). *See* ***State ex rel. Hager v. Marten***, 226 Wis. 2d 687, 700, 594 N.W.2d 791 (1999). Whether a defendant's right to a speedy trial has been violated is determined on a case-by-case basis. *See* ***id.*** A court considering an alleged speedy trial violation must consider several factors, "including the length of delay, the reason for the delay … and whether the delay resulted in prejudice to the defendant." ***Id.*** (citation omitted). These factors are balanced together to determine whether the speedy trial right was violated. *See* ***Day***, 61 Wis. 2d at 244. We will uphold the circuit court's findings of historical fact unless they are clearly erroneous. *See* ***State v. Borhegyi***, 222 Wis. 2d 506, 508-09, 588 N.W.2d 89 (Ct. App. 1998), *review denied*, 224 Wis. 2d 265, 590 N.W.2d 490 (Wis. Jan. 12, 1999) (No. 98-0567-CR). However, we will independently apply those facts to the constitutional standards of the speedy trial right. *See* ***id.*** at 509.

¶12 The circuit court's findings regarding the reasons for the trial delay are not clearly erroneous. The court found that the adjournments related to the attempt to obtain the videotape. Until approximately the middle of August, Harris, the State and the court all believed—mistakenly as it turned out—that the videotape existed and was in the process of being located. Trial commenced within less than ten days once it became clear that the videotape did not exist and

[4] Normally, a defendant may not proceed pro se while simultaneously being represented by counsel. *See* ***State v. Debra A.E.***, 188 Wis. 2d 111, 138, 523 N.W.2d 727 (1994).

could not be provided to Harris. Trial dates in June and July were not usable because of calendaring problems. The court did not find any inappropriate conduct by the State with regard to the missing videotape. The missing videotape, which the defense deemed important to its case, was a "valid reason" for the delay, and the calendaring problems were a "neutral reason" for the delay. *See* ***Barker***, 407 U.S. at 531.

¶13 The court's findings regarding the reasons for the trial delay are inextricably linked with the length of the delay. Because we uphold the findings regarding the reasons for the delay, we conclude that the length of the delay was no more than that required to resolve the problems with the videotape and the scheduling of the trial.

¶14 On the question of prejudice due to the delay, the court is to consider the prevention of oppressive incarceration, the defendant's anxiety and concern, and the possibility that the defense will be impaired. *See* ***id.*** at 532. The circuit court's findings in this regard are not clearly erroneous. The court found that Harris was not oppressively incarcerated because he would not have been released due to a probation hold. Harris's ability to present a defense was not impaired because he was attempting to obtain an item he believed was material to his defense. The court did not find any serious problem relating to failed memory of witnesses due to the delay in commencing trial.

¶15 In summary, the circuit court found that the trial was delayed for legitimate reasons relating to discovery and calendaring and that Harris did not establish that he was prejudiced by the delay. We agree. The balancing of these factors leads us to conclude that Harris was not deprived of his right to a speedy trial.

¶16 We turn to Harris's claim that his trial counsel was ineffective in two respects. First, trial counsel did not make the proper objection to questions posed to Hubbard about whether he had been threatened while in jail. Second, trial counsel did not object to testimony by Hubbard's counsel regarding Hubbard's truthfulness. We conclude that counsel's performance was deficient in both respects and that the deficient performance prejudiced Harris.

¶17 "There are two components to a claim of ineffective assistance of counsel: a demonstration that counsel's performance was deficient, and a demonstration that such deficient performance prejudiced the defendant. The defendant has the burden of proof on both components." ***State v. Smith***, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997) (citation omitted). Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). The circuit court's findings of what counsel did and the basis for the challenged conduct are factual and will be upheld unless clearly erroneous. *See* ***id.*** However, whether counsel's conduct was deficient and prejudicial is a question of law which we review de novo. *See* ***id.*** at 236-37.

¶18 Harris argues that his trial counsel did not make the proper objection when the prosecutor asked Hubbard whether he had been threatened. Defense counsel objected that there was no evidence of threats and that the prosecutor was "just fishing." The prosecutor responded that the line of inquiry related to Hubbard's demeanor and credibility. The court overruled the objection after the prosecutor stated that she knew that Hubbard had been threatened. Hubbard then testified that he had often been threatened and that there was a bounty on his head because "he [snitched] out all these people." Hubbard testified that his family had also been threatened.

¶19 At the postconviction motion hearing, trial counsel testified that one day before trial started, the prosecutor asked counsel if he knew that Hubbard had been threatened in jail. Counsel inquired whether the threats were linked to Harris, and the prosecutor responded that she did not have any information linking the threats to Harris. After that exchange, which trial counsel characterized as small talk, trial counsel did not research the admissibility of threats to a witness or prepare himself to object to testimony regarding such threats. Counsel also conceded that, at the time of trial, he was not familiar with ***Bowie v. State***, 85 Wis. 2d 549, 554, 271 N.W.2d 110 (1978), which holds that evidence of threats made to a witness is inadmissible unless the threats can be tied directly to the defendant. Here, the prosecutor made no effort to connect the alleged threats to Harris.

¶20 The circuit court ruled that trial counsel performed sufficiently in this regard. However, we are charged with independently determining whether counsel's performance was deficient and prejudicial. *See* ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

¶21 "[C]ounsel must act in a manner that demonstrates that he is versed in the criminal law." ***State v. Felton***, 110 Wis. 2d 485, 505, 329 N.W.2d 161 (1983). We are of the view that a lawyer practicing criminal law must possess a knowledge of the rules of evidence applicable to such proceedings, including the evidentiary rules relating to threats to a witness. Counsel performed deficiently when he failed to make a ***Bowie*** objection to Hubbard's testimony that he was threatened.

¶22 "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect

on the judgment." ***Strickland v. Washington***, 466 U.S. 668, 691 (1984). We conclude that Harris has established prejudice. Hubbard identified Harris as his cocaine supplier and the testimony at trial was largely a conflict between Hubbard's contention that Harris sold him cocaine and Harris's denial of the same.[5] The prosecutor referred to the threats in her closing argument. The jury was left with the impression both from the evidence and the closing argument that Hubbard was threatened by Harris or those associated with him, even though the standard for admitting such evidence had not been satisfied. In ***Bowie***, the court noted the inflammatory nature and inherent prejudice of evidence of threats which have not been linked to the defendant. *See* ***Bowie***, 85 Wis. 2d at 553-54. Trial counsel's failure to object to the threat evidence was prejudicial and rendered the verdict suspect.

¶23 Harris next argues that his trial counsel was ineffective because he failed to object to testimony by Hubbard's counsel regarding Hubbard's truthfulness. After Hubbard testified, the State announced its intention to call his counsel to testify. Hubbard's counsel indicated that Hubbard had agreed to waive the attorney-client privilege so that counsel could explain Hubbard's agreement with the prosecutor that Hubbard would testify against Harris.

¶24 Hubbard's counsel testified about the details of Hubbard's agreement with the prosecutor, particularly that the agreement required Hubbard to give truthful testimony about the drug transaction with Harris. On redirect, the prosecutor asked

[5] For this reason, we cannot conclude that the error was harmless. *See* ***Bowie v. State***, 85 Wis. 2d 549, 554-55, 271 N.W.2d 110 (1978). We are unpersuaded that the undercover agent's testimony that he glimpsed Harris for "just a few seconds" during the cocaine transaction with Hubbard is sufficient evidence of Harris's guilt to render the admission of Hubbard's threat testimony harmless.

counsel if Hubbard had ever told counsel that he had made untrue statements to the police. Harris's counsel objected that this inquiry related to privileged information beyond the scope of Hubbard's waiver of the attorney-client privilege. The prosecutor responded that the testimony regarding Hubbard's truthfulness "goes to one of the cornerstones of the entire agreement [with the prosecutor]." The circuit court apparently agreed and overruled Harris's objection, noting that the testimony was within the scope of matters addressed during Hubbard's counsel's testimony and the privilege waiver. Hubbard's counsel then testified as follows:

> No, [Hubbard] has always maintained that when he was initially arrested he was terrified. That he was encouraged to cooperate, encouraged to tell the truth. He's also maintained that he told the truth on the date that he was arrested and he's always maintained that he was going to tell the truth when he testified here today.

¶25 At the postconviction motion hearing, trial counsel testified that when Hubbard's counsel started to testify about his client's credibility, trial counsel believed that Hubbard's counsel was impermissibly commenting on Hubbard's credibility. However, counsel's objection related to the scope of the privilege waiver, not to an impermissible bolstering of a witness's credibility. The circuit court found that trial counsel had a strategy for not objecting on hearsay grounds to avoid coming on too strong before the jury. The court also found that trial counsel had assessed how Hubbard's counsel was performing on the stand and felt that counsel was not testifying strongly. Because trial counsel had reasons for responding as he did to Hubbard's counsel's testimony, the circuit court concluded that counsel's performance was not deficient.

¶26 While the circuit court's findings of what counsel did are factual and will be upheld unless clearly erroneous, *see* ***Sanchez***, 201 Wis. 2d at 236, we

independently determine whether counsel performed deficiently. *See* ***Johnson***, 153 Wis. 2d at 128. While we must review counsel's performance with great deference, *see* ***id.*** at 127, we note that a strategic trial decision must nevertheless be rationally based on the facts and the law. *See* ***State v. Elm***, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996). In applying the "prudent-lawyer" standard, we consider if trial counsel's strategic decisions were rationally based on the law and the facts upon which an ordinarily prudent lawyer would have then relied. *See* ***Felton***, 110 Wis. 2d at 502-03. We independently determine whether counsel's strategy on this evidentiary question was rational.

¶27 Trial counsel testified that he wanted to exclude the testimony of Hubbard's counsel. While trial counsel testified postconviction that he was concerned that Hubbard's counsel was vouching for his client's credibility, trial counsel did not make the objection required to bring that to the circuit court's attention. Therefore, although counsel had a strategy, he did not employ it as an ordinarily prudent lawyer would have done. Counsel performed deficiently when he offered the wrong objection and did not draw the court's attention to the true flaw in Hubbard's counsel's testimony.

¶28 Trial counsel's failure to make the proper objection to Hubbard's counsel's testimony also prejudiced Harris. We observed earlier that Hubbard's testimony was central to the State's case. A witness may not testify that another mentally and physically competent witness is telling the truth. *See* ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984). Such testimony invades the province of the jury. *See* ***id.*** This was the effect of the testimony of Hubbard's counsel that Hubbard made truthful statements to the police.[6] The

[6] We note that the testimony was also objectionable on hearsay grounds.

impermissible bolstering of Hubbard's credibility would have had a more forceful effect on the jury, and it undermines our confidence in the verdict. Harris has established that there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. *See* ***Johnson***, 153 Wis. 2d at 129. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** (citation omitted).

¶29 In summary, we conclude that Harris's right to a speedy trial was not violated. The Sixth Amendment to the United States Constitution and article I, section 7 of the Wisconsin Constitution guarantee every criminal defendant the right to the effective assistance of counsel. *See* ***Felton***, 110 Wis. 2d at 499. Harris's trial counsel did not provide that assistance. Therefore, we reverse and remand for a new trial.

By the Court.—Judgment and order reversed and cause remanded with directions.

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