COURT OF APPEALS
DECISION
DATED AND FILED

August 29, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1263-CR **Cir. Ct. No. 2011CF71**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL PRINCE COTTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed*.

Before Kessler, Brash and Dugan, JJ.

¶1 PER CURIAM. Michael Prince Cotton appeals a judgment convicting him of four counts of first-degree sexual assault. He also appeals orders denying his motions for postconviction relief. Cotton argues: (1) he received ineffective assistance of counsel; (2) there was insufficient evidence to support the convictions; and (3) his right to a speedy trial was violated. We resolve these issues against Cotton. Accordingly, we affirm.

¶2 Cotton argues that he received ineffective assistance of counsel, citing five acts or omissions of his trial counsel. A defendant claiming ineffective assistance of counsel must show both that his lawyer performed deficiently and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, "a defendant must show specific acts or omissions of counsel that were 'outside the wide range of professionally competent assistance.'" ***State v. Nielsen***, 2001 WI App 192, ¶12, 247 Wis. 2d 466, 634 N.W.2d 325 (citation omitted). To demonstrate prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694.

¶3 Cotton contends that trial counsel provided him with constitutionally ineffective assistance when he questioned Cotton in front of the jury about the specifics of his prior convictions. We reject this argument. Cotton was forced to admit that he had five prior convictions because he decided to testify at trial. The circuit court explained that trial counsel's questions were part of a deliberate defense strategy:

> It was clear to the court that trial counsel did this to show the jury that the defendant had never been convicted of a sexual assault of any kind previously. It was … clearly a point of strategy …. The defendant's five prior convictions

> may have [otherwise] caused the jury to believe that he had engaged in similar behavior with children in the past.

A claim of ineffective assistance of counsel will not lie where counsel engages in conduct based on reasonable strategy. *See* ***Strickland***, 466 U.S. at 697.

¶4 Cotton next argues that trial counsel provided him with constitutionally ineffective assistance because he did not object to the prosecutor's statements during closing argument about his involvement with two women at the same time:

> And what sort of personality would sexual[ly] assault a child? Someone who cares only about his own pleasure. That's the only sort of person who would commit this sort of heinous, horrible act. That's the only person who could. Someone who freely tramples on the feelings of others, someone who's trying to use both women for – two women for his own sexual pleasure.

Cotton characterizes this as "other acts" evidence. *See* WIS. STAT. § 904.04(2) (2015-16).[1] We reject this argument. The jury was informed that the remarks of the attorneys are not evidence: "Consider carefully the closing arguments of the attorneys, but their arguments and conclusions and opinions are not evidence." Moreover, the prosecutor's comments had an evidentiary basis in Cotton's testimony that he was dating the victims' mother and another woman at the same time. Counsel did not perform deficiently in failing to object to the prosecutor's closing argument on the ground that it was other acts evidence because an objection on that ground would not have been successful. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994) (trial counsel was not ineffective for failing to raise a meritless claim).

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶5 Cotton next argues that trial counsel provided him with constitutionally ineffective assistance when he allegedly: (1) failed to impeach key State witnesses with statements given to the police closer in time to the alleged assaults; (2) failed to interview or subpoena witnesses who would have corroborated Cotton's testimony and/or attested to his good character; and (3) failed to investigate the medical condition of a key state witness and procure her medical records for trial. Where, as here, claims of ineffective assistance of counsel are not first raised in the circuit court, we will not consider them. ***State v. Caban***, 210 Wis. 2d 597, 604-05, 563 N.W.2d 501 (1997) ("By limiting the scope of appellate review to those issues that were first raised before the circuit court, this court gives deference to the factual expertise of the trier of fact, encourages litigation of all issues at one time, simplifies the appellate task, and discourages a flood of appeals.").[2]

¶6 Cotton next argues that the evidence presented at trial was insufficient to sustain his conviction of the charges in the information. First, Cotton contends child victim K.J. testified that the assaults charged in counts one and two occurred between November 22, 2008, and August 20, 2009, while the information listed the assaults as occurring between November 22, 2009, and August 20, 2010. Second, Cotton contends that child victim S.E. testified that the assaults charged in counts three and four occurred at the family's apartment on

[2] After the circuit court denied Cotton's first postconviction motion, which was filed by appointed counsel, Cotton decided to proceed *pro se* and brought a second postconviction motion, in which he raised the two claims of ineffective assistance of counsel we have addressed. Cotton was amply warned that as a *pro se* litigant he was required to follow this court's rules. Cotton's *pro se* status does not excuse his failure to first raise these three claims of ineffective assistance of trial counsel in the circuit court.

Michigan Avenue, while the information listed the family's apartment on 25th Avenue as the place the assaults occurred.

¶7 The discrepancies between the testimony and the facts alleged in the information do not render the evidence insufficient to support the verdicts because the exact date and precise location of an assault is not a material element of the crime of sexual assault of a child.[3] *See* ***State v. Hurley***, 2015 WI 35, ¶34, 361 Wis. 2d 529, 861 N.W.2d 174 (time is not a material element of the crime of child sexual assault). Moreover, "[a]fter verdict, the pleading shall be deemed amended to conform to the proof if no objection to the relevance of the evidence was timely raised upon the trial." WIS. STAT. § 971.29(2). Cotton's argument is unavailing.

¶8 Cotton next argues that his right to a speedy trial was violated. A defendant is guaranteed the right to a speedy trial by the United States constitution. ***Barker v. Wingo***, 407 U.S. 514, 515 (1972). To determine whether a defendant's right to a speedy trial has been violated, courts must use a balancing test "in which the conduct of both the prosecution and the defendant are weighed." ***Id.*** at 530. Cotton raises his claim under both the Wisconsin constitution and the United States constitution. The balancing test is the same under both documents. *See* ***State v. Urdahl***, 2005 WI App 191, ¶11, 286 Wis. 2d 476, 704 N.W.2d 324. Courts should consider four primary factors: (1) whether the defendant asserted the right to a speedy trial; (2) the length of the delay; (3) the reason for the delay;

[3] Sexual assault of a child as alleged in counts one and two contains two elements: (1) sexual intercourse with the victim; and (2) the victim was under the age of twelve. *See* WIS. STAT. § 948.02(1)(b). Sexual assault of a child as alleged in counts three and four contains two elements: (1) sexual contact with the victim; and (2) the victim was under the age of thirteen. *See* WIS. STAT. § 948.02(1)(e).

and (4) the prejudice to the defendant. ***Id.*** However, "none of the four factors … [is] either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial." ***Barker***, 407 U.S. at 533. "Rather, they are related factors and must be considered together with such other circumstances as may be relevant." ***Id.***

¶9 We begin with a presumption that Cotton's right to a speedy trial was violated because there was an eighteen-month delay between Cotton's charging and the trial. *See* ***Urdahl***, 286 Wis. 2d 476, ¶12 (when the length of the delay approaches a year, it is presumptively prejudicial, triggering a closer examination of the circumstances surrounding the claim). As for the reasons for the delay, the State and the defense jointly requested the first trial adjournment. Cotton's lawyer requested a postponement of the second trial date on the ground that he needed more time to prepare. After the third trial date was set, the State requested a three-week delay for scheduling reasons. Cotton then requested adjournment of the delayed third trial date. Most of the delays were thus attributable to Cotton. ***Id.***, ¶26 (delays caused by the defendant are not counted). And the delays attributable to the State were reasonably made, and are thus not weighed heavily in the ***Barker*** analysis, especially in light of the fact that the circuit court was informed on several occasions that there was no speedy trial request pending because Cotton was serving time on another charge. *See* ***Urdahl***, 286 Wis. 2d 476, ¶26 ("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 over-crowded courts, though still counted, are weighted less heavily.").

¶10 Turning to whether Cotton asserted his speedy trial right, Cotton did not make a speedy trial request through counsel, although Cotton argues on appeal

that he attempted to file a speedy trial request *pro se*. As for prejudice to Cotton from the delay, it "should be assessed in the light of the interests of defendant which the speedy trial right was designed to protect." ***Barker***, 407 U.S. at 532. The right to a speedy trial was designed: (1) "to prevent oppressive pretrial incarceration"; (2) "to minimize the anxiety and concern of the accused"; and (3) "to limit the possibility the defense will be impaired." ***Id.*** Here, Cotton was serving time on another case during the pretrial period, so he cannot claim that the circuit court's failure to more promptly conduct the trial subjected him to unwarranted pretrial incarceration. While Cotton may have experienced anxiety waiting for his trial, he does not assert that *his defense* to these charges was impaired, although he contends that he suffered other inconveniences. On the whole, the lack of prejudice to Cotton weighs strongly in favor of a conclusion that his right to a speedy trial was not violated.

¶11 In sum, then, the delay between Cotton's charging on the trial was presumptively unreasonable and Cotton was forced to endure the anxiety attendant to having pending criminal charges for a period of time. However, these factors are counterbalanced—and ultimately outweighed—by the fact that most of the delay was attributable to Cotton, his ability to defend himself was not impaired, and he would have remained incarcerated in any event. We therefore reject Cotton's argument that his constitutional right to a speedy trial was violated.

By the Court.—Judgment and orders affirmed.

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