COURT OF APPEALS
DECISION
DATED AND FILED

September 26, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2017AP228-CR **Cir. Ct. No. 2015CT1832**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

JULIO CESAR PACHECO ARIAS,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: HANNAH C. DUGAN, Judge. *Reversed and remanded with directions*.

¶1 BRENNAN, P.J.[1] The State appeals from a circuit court order dismissing case number 2015CT1832, which included an OWI 3rd offense charge

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

against Julio Pacheco Arias, "*with* prejudice."[2] The State had moved to dismiss the complaint "*without* prejudice" so that it could reissue the case as an OWI 4th in the event that Pacheco Arias was convicted of a second (earlier) OWI 3rd that he had pending at the same time. Pacheco Arias had objected to the "*without* prejudice" part of the State's motion, seeking a dismissal "*with* prejudice." The circuit court ultimately granted Pacheco Arias's motion, finding a constitutional speedy trial violation. The State appeals the "*with* prejudice" part of the dismissal order, arguing that under the applicable four-factor balancing test set forth in ***Barker v. Wingo***, there was no speedy-trial right violation and thus no basis for a dismissal with prejudice. *See* ***Barker v. Wingo***, 407 U.S. 514, 530-32 (1972), ***Day v. State***, 61 Wis. 2d 236, 244, 212 N.W.2d 489 (1973).

¶2 The record is abundantly clear that under the proper application of the legal test there was no speedy trial violation. First, Pacheco Arias never made a speedy trial demand. Second, for ten of the thirteen months this case was pending, Pacheco Arias sought or agreed to adjournments at every turn. Third, nothing in the record indicates that the State's delays were "[a] deliberate attempt … to delay the trial in order to hamper the defense" of this case. *See* ***State v. Urdahl***, 2005 WI App 191, ¶26, 286 Wis. 2d 476, 704 N.W.2d 324.[3] Not only is there no evidence that the State deliberately attempted to hamper the defense, but

[2] The complaint in this case, 2015CT1832, included one count of OWI 3rd offense, one count of operating a vehicle with a prohibited alcohol content (PAC) 3rd offense, and one count of operating a motor vehicle while revoked. The trial court dismissed the entire complaint. The parties focus on the OWI 3rd offense count for purposes of this appeal.

[3] *See also* ***Scarbrough v. State***, 76 Wis. 2d 87, 98, 250 N.W.2d 354 (1977) (holding that impairment of defense occurs "(1) if witnesses die or disappear during a delay, (2) if defense witnesses are unable to recall accurately events of the distant past, or (3) if a defendant is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense" (internal quotations omitted)).

also there is no evidence the defendant actually wanted a trial. In this case, as in ***Barker***, in which the United States Supreme Court rejected a claim of a speedy trial right violation despite a five-year delay between the defendant's arrest and his trial, "the record strongly suggests that while [defendant] hoped to take advantage of the delay in which he had acquiesced, and thereby obtain a dismissal of the charges, he definitely did not want to be tried." ***Barker***, 407 U.S. at 516, 518, 535. Fourth, there is no evidence of the kind of prejudice that is considered in a speedy trial right analysis. Therefore, the dismissal *with* prejudice was improper. This court reverses and remands with instructions to the circuit court to enter an order of dismissal *without* prejudice.

BACKGROUND

Pacheco Arias's two OWI arrests.

¶3 In August 2015, Pacheco Arias had two arrests for operating while intoxicated fifteen days apart.[4] The first arrest occurred on August 1; we will refer to it as "the earlier charge." The earlier charge is not the subject of this appeal, but it is relevant here because it was the State's efforts to resolve the earlier charge first that gave rise to the dispute in this case. Pacheco Arias posted bail on this case at the time of arrest and was never in custody on this earlier case during any time relevant to this appeal.

¶4 The second arrest occurred two weeks later, when, the complaint alleged, at 10:54 p.m. on August 15, a citizen reported to police that a blue Ford

[4] The offense from the first arrest was charged as a separate case, 2015CT1693, but was calendared with the later case at all times relevant to this appeal.

Fusion had crashed into a car parked on the street, and the driver had stumbled out of the car, walked across the street, and laid down in the grass. When police arrived, they found Pacheco Arias, who smelled of alcohol and had red eyes and slurred speech. When a chemical analysis was performed following the arrest, Pacheco Arias had a BAC of .26. We will refer to the charge arising from this arrest as "the later charge."

Court hearings on the two cases from August 2015 through October 2016.

¶5 Pacheco Arias was charged with the earlier offense on August 19, 2015. He was charged with the later offense by a complaint filed September 10, 2015. Because Pacheco Arias had prior convictions from 2006 and 2008 that counted for purposes of the statute as prior OWIs, each offense was charged as misdemeanor OWI-3rd offense.[5] He posted bail on the later offense on August 21, 2015, and was not incarcerated on this later charge after that date.

¶6 We note at the outset that under the statutory scheme in effect at the time Pacheco Arias was charged, the consequences of convictions varied depending on which of the two charges was resolved first. This was due to a quirk in the law, now corrected by the legislature.[6] At that time, if the earlier OWI charge resulted in a conviction, the later charge would, by operation of law, become a felony OWI offense because it would satisfy the statute's requirement of three previous convictions for OWI *and* the existence of a prior OWI conviction

[5] *See* WIS. STAT. § 346.63(1)(a), 346.65(2)(am)3 (2015-16).

[6] The legislature has eliminated the language making an OWI conviction within the previous five years a condition for a felony charge of OWI-4th offense. Effective January 1, 2017, any fourth offense OWI, regardless of when the prior offenses occurred, is a felony. *See* 2016 Wis. Act 371.

within the previous five years. However, if the later charge resulted in a conviction *before* the earlier charge was resolved, the earlier charge could never become a felony charge—even though he had three prior OWI convictions—because there was no prior OWI conviction in the five years prior to the August 1, 2015 offense.

¶7 Over the next eleven months the two cases proceeded together through adjournments that we explain in more detail below. Beginning at the first status date on October 30, 2015, Pacheco Arias's counsel and the State represented to the trial court that the expected disposition of the charges was "as a third and a fourth," with the fourth "becom[ing] a felony." But at no point did Pacheco Arias demand a speedy trial. When he retained new counsel in June 2016, he, for the first time, requested that the later case be set for trial first. Judge Michael J. Hanrahan, then assigned to both cases, rejected the request initially and set the earlier case for the first trial. But on a subsequent appearance, Judge Hanrahan changed his mind and set the later case first. The State objected and advised the court that if the later case went to a final pretrial, it "would be … asking you to dismiss without prejudice until the other case is resolved." Judge Hanrahan said he understood and that the court would rule on such a motion when and if that occurred. The cases then were transferred by reason of judicial rotation to Judge Hannah C. Dugan who continued to set the later case for the first trial.

¶8 On the date set for trial, October 3, 2016, the State moved to dismiss the later case–without prejudice–in order to try the earlier case first, then refile the later case as a felony, as the statute provided. Pacheco Arias's counsel objected to the dismissal "without prejudice." His stated reason for the request was to avoid the operation of WIS. STAT. §§ 346.63(1)(a) and 346.65(2)(am)3. He openly admitted he sought to avoid the possibility of the later charge becoming a felony

due to the statutory scheme. The court set for briefing the issue of whether the dismissal would be with or without prejudice. In briefing, for the first time, Pacheco Arias argued that he was entitled to a dismissal with prejudice based on the State's violation of his constitutional speedy trial rights.

¶9 After briefing by the parties in which Pacheco Arias argued a speedy trial violation for the first time, the circuit court granted the defendant's motion to dismiss with prejudice on December 22, 2016 based on a speedy trial violation. The circuit court cited the ***Barker*** speedy trial test and applied it as follows. First, it concluded that the delay from accusation to the scheduled trial date of October 3, 2016, was presumptively prejudicial and that the State's failure to subpoena witnesses for trial "compromised the length-of-delay remedies contemplated in" the decision by the prior judge to set the later charge for trial first. Second, it concluded that there would be future delays in the trial of the later offense if the State was allowed to dismiss and reissue the later case after resolution of the earlier case. Third, it concluded that the defendant had "implicitly … asserted his right to a speedy trial during his arguments [about which order to try the cases in] before Judge Hanrahan," and that he "affirmed his speedy trial rights at the Final Pretrial Conference in September 2016." Fourth, it found that "[t]he prejudice to the Defendant is clear" and that the order by Judge Hanrahan setting this case for trial before the earlier case had "mitigated potential prejudice to him." The court noted in the order that Judge Hanrahan's order "remedied anticipated future delays that would have occurred through the dismissal of the misdemeanor charge and reissuance as a felony." At a status hearing the same day the circuit court issued the written order, the circuit court stated, "The dismissal would have allowed for a felony trial that would have unnecessarily and unconstitutionally delayed the speedy trial rights of the defendant."

¶10 The State appealed the order.

DISCUSSION

I. Standard of review and relevant law.

¶11 The right to a speedy trial is found in the Sixth Amendment to the United States Constitution and article I, §7, of the Wisconsin Constitution. Whether a defendant has been denied the right to a speedy trial is a constitutional question that this court reviews *de novo*. *See* ***State v. Ziegenhagen***, 73 Wis. 2d 656, 664, 245 N.W.2d 656 (1976). The trial court's underlying findings of historical fact, however, will be upheld unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2); ***State v. Clappes***, 136 Wis. 2d 222, 235, 401 N.W.2d 759 (1987).

¶12 The United States Supreme Court long ago established the framework for analyzing a Sixth Amendment constitutional speedy trial challenge in ***Barker***, 407 U.S. at 530. The test for alleged violations of the Wisconsin Constitution is the same. *See* ***Day***, 61 Wis. 2d at 244. The four-factor analysis requires the trial court to consider the total length of the delay, examine the reasons for each portion of it, ascribe fault or responsibility for each delay and determine the State's intent, and consider the existence of any prejudice to the defendant. It is a totality of the circumstances test. ***Id.*** "The approach we accept is a *balancing test*, in which the conduct of both the prosecution and the defendant are weighed." ***Barker***, 407 U.S. at 530.

¶13 Notably, in ***Barker***, despite a five-year delay composed almost entirely of delays requested by the government without objection by the defense (compared to the thirteen-and-one-half-month delay here composed almost

entirely of delays requested by the defense), the court concluded that the defendant's right to a speedy trial had not been violated, in large part because the record showed any prejudice was minimal and the record showed that Barker did not actually want a trial. ***Id.*** at 534.

¶14 The parties here agree that this case is subject to the ***Barker*** balancing test, which involves weighing the following factors: (1) the length of the delay; (2) "the reason for each particular portion of the delay" and whether it was "[a] deliberate attempt by the [State] … to hamper the defense"; (3) whether the defendant asserted the right to a speedy trial; and (4) whether the defendant suffered prejudice with regard to "the three interests that the right to a speedy trial protects[.]" ***Urdahl***, 286 Wis. 2d 476, ¶¶12, 26, 33, 34. The prejudice analysis consists of three sub-factors: (1) oppressive pretrial incarceration; (2) anxiety and concern of the accused; and (3) impairment of defense—with the third sub-factor being the most significant. ***Id.***, ¶34.

II. Under the *Barker* balancing test, there was no speedy trial right violation, and thus it was error to dismiss the later charge with prejudice.

A. Length of delay.

¶15 As we noted in ***Urdahl***, the first factor–the length of delay–is a triggering mechanism for the four-factor test. ***Id.***, ¶12. Generally, post-accusation delay "approaching one year" is "presumptively prejudicial." ***Id.*** The length of the delay is measured from the date at which the defendant "first officially became the accused," typically the date of the arrest, to the scheduled trial date. *See* ***id.***, ¶¶15, 25. In this case, the delay is measured from August 15, 2015, to October 3, 2016, and it totals thirteen and one-half months. The State concedes that the delay is presumptively prejudicial and therefore triggers the application of the four-

factor test. Here, the thirteen-month delay does not stretch much beyond that bare minimum ("a … delay approaching one year") that triggers a speedy trial analysis. *See* ***id.***, ¶12 (considering length as one of the four factors in the balancing test, the court considers "'the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim'").

B. Reasons for the delay.

The applicable law.

¶16 We first note that ***Urdahl*** instructs courts as follows: "When considering the reasons for the delay, courts first identify the reason *for each particular portion of the delay and accord different treatment to each category of reasons*." ***Id.***, ¶26 (emphasis added). Here the trial court failed to make any findings "for each particular portion of the delay[.]" As our review of this constitutional question is *de novo*, we review the entire record to determine what the reasons for the delay were and to which party they were attributable.

¶17 A delay is "weighted heavily" against the State if it is "[a] deliberate attempt by the government to delay the trial in order to hamper the defense[.]" ***Id.*** The government is responsible also for its own negligence and for delays attributable to the court's calendar, but those delays are "weighted less heavily." ***Id.*** Delays that don't count at all: delays caused by the defendant and delays caused by neither the State nor the defense, "such as witness unavailability." ***Id.***

The timeline of the delays.

¶18 Below we set out the timeline of the court appearances. Because the ***Barker*** test will require an accounting of who caused which delays on the later

charge, we have noted after each court appearance who was responsible for the delay immediately following the hearing:

- September 23, 2015: Pacheco Arias, out of custody, appeared in court on the later charge, but his retained counsel was unable to be present. The case was set over for the next day. This one-day delay is attributable to the defendant and does not count against the State. ***Id.***, ¶26.

- September 24, 2015: Pacheco Arias appeared with retained counsel. The initial appearance was adjourned to October 16 because the State did not have its file in court.[7] This twenty-two–day delay is attributable to the State's negligence regarding the file but is "weighted less heavily" against the State. ***Id.***

- October 16, 2015: Pacheco Arias appeared with counsel on the later charge and entered a not-guilty plea. The case was then set for a status conference on October 30, 2015. This fourteen-day delay is due to the court's calendar; it counts against the State but "less heavily." ***Id.***

- October 30, 2015: Pacheco Arias appeared with counsel on both charges, and counsel requested an adjournment. Defense counsel told the circuit court that she needed a few weeks to confirm the status of the prior convictions, and she planned to "proceed with plans to resolve the two cases together as a third and a fourth[.]" (Beginning with this

[7] There is no indication in the record that the case was called on October 8, 2015; a notation states that that date had been scheduled in error and then corrected to October 16, 2015.

hearing, the earlier charge and the later charge were calendared together.) This seventeen-day delay is attributable to the defense and does not count against the State. ***Id.***

- November 16, 2015: The defense moved to adjourn for the same reason as at the prior hearing. Counsel stated to the circuit court: "[I]t is a case that involves a third [OWI], and then the other case would then be a fourth [OWI][.]" This fifty-one–day delay is attributable to the defense and does not count against the State. ***Id.***

- January 6, 2016: Defense counsel moved to adjourn for a projected guilty plea and sentencing. This fifty-day delay is attributable to the defense and does not count against the State. ***Id.***

- February 25, 2016: Defense counsel and the State filed an "Agreed Upon Request for A New Court Date" adjournment stipulation in both cases. The reason given is "DA file missing." A date for plea and sentencing was again calendared. This twenty-two–day delay, although initially attributable to the State's negligence, was joined in by the defense and in that respect "caused" by the defense, and thus does not count against the State.[8] ***Id.***

[8] Although ***Urdahl*** does not expressly address responsibility for a stipulation to adjournment by the defendant, ***Barker*** specifically holds that a defendant has some responsibility to put the court on notice: "a defendant has some responsibility to assert a speedy trial claim." ***Barker v. Wingo***, 407 U.S. 514, 529 (1972). Also, "[t]he defendant cannot be heard to complain about delay caused by his own conduct." ***Norwood v. State***, 74 Wis. 2d 343, 357, 246 N.W.2d 801 (1976).

- March 18, 2016: Defense counsel and the State again filed a stipulation for an adjournment for the same reason as before. This twenty-six–day delay is not counted against the State.[9] ***Id.***

- April 13, 2016: Defense counsel requests an adjournment to obtain new counsel. This twenty-seven–day delay is attributable to the defense and does not count against the State. ***Id.***

- May 10, 2016: Defense counsel and the State again filed a stipulation for an adjournment, stating the reason as "New attorney received today the discovery from prior counsel." This twenty-one–day delay is attributable to the defense and does not count against the State. ***Id.***

- May 31, 2016: Defense counsel requested an adjournment because counsel just "came on board[.]" The State did not object to new counsel but expressed concerns about the delays saying, "Discovery's been turned over for a long time, and it's been very clear from the notes that I see on the file, most of which were made by me, that the second case … will become a felony once the plea is entered to the [first case]." The circuit court also expressing concern about the delays, set the earlier OWI for final pretrial on June 17 and for jury trial on July 13, saying the later OWI was "just tagging along" for a status conference on those dates. This seventeen-day delay was attributable to the defense and does not count against the State. ***Id.***

[9] *See* ¶18, n.7.

- June 17, 2016: Defense moved to adjourn the July 13 trial set for the earlier charge so that it could file a collateral attack motion attacking on a prior conviction. Defense counsel also informed the court that the defense would prefer that the later OWI offense be tried before the earlier one. The trial court acceded to the request and took the July 13 trial date off of the calendar and set a status conference for July 27. This forty-day delay was attributable to the defense and does not count against the State. ***Id.***

- July 27, 2016: After initially seeking a continuance, the defense brought a motion to change the order of offenses set for trial asking the circuit court to "set the [later] case for trial and have the [earlier] case tag along." The State opposed it, and the court granted the defense request that the later case be set for trial first. The case was recalled and the State put the court and defense on notice that if the later case was set for trial first, the State would move to dismiss it without prejudice until the earlier case is resolved. The court left the later case set first for trial but added, "[The State] can certainly move to dismiss and give their rationale to the Court … the Court can make a determination at that time. Although, the Court believes that's an appropriate exercise of their prosecutorial discretion, then it will be dismissed without prejudice, and if not, we go to trial." The later charge was set for final pretrial on September 6 and for jury trial on October 3, with the earlier case tagging along for a status conference. This sixty-eight–day delay constituted an additional delay of the trial of the earlier charge (it had previously been set by the circuit court for a July 13 jury trial) and correspondingly, the resolution of the later charge, which had been set

to resolve in order; this delay is solely attributable to the defense and does not count against the State. ***Id.***

- August 1, 2016: The case was reassigned by reason of judicial rotation.

- October 3, 2016: On the date of trial, the State moved to dismiss the later charge without prejudice, stating its intent to resolve the earlier charge first and refile the later charge. Defense objected to dismissal without prejudice and asked for the dismissal of the later charge to be made with prejudice, making no mention of a speedy trial violation. Defense counsel acknowledged the statute's operation with regard to the conviction order: "The State demanded that the chronologically first case be set for trial first; and the reason was that if he's convicted of that, then they could charge this as a felony—the [later charge] as a felony, but they can't do it the other way around. And Mr. Pacheco Arias has immigration consequences of a felony conviction[.]"

The amount of delay attributable to the State.

¶19 Here, the circuit court's ruling failed to calculate the reasons for each portion of the delay as required. Most notably, the circuit court failed to account for the fact that on the later charge, the sole delay attributable to the State's negligence prior to the October 3, 2016 trial date was the thirty-six days of delay—from September 24 through October 30, 2015—due to the State's failure to have the necessary file in court and due to the court's routine schedule of a status. This short delay weighs "less heavily" against the State. ***Id.***

¶20 Thereafter, the record shows, Pacheco Arias requested or acquiesced in every delay in every court appearance starting from the first status conference

on October 30, 2015, through the trial date. In fact, Pacheco Arias requested adjournment seven times and stipulated to adjournment three times. When the earlier OWI case was set for a final pretrial and trial with the purpose of expediting the resolution of this case as well, it was Pacheco Arias, not the State, who requested an adjournment to evade that trial. *See* ***id.*** But for Pacheco Arias's requests for continuance, the earlier case would have resolved by plea or trial June 17 such that the later one (at issue here) would also have been resolved. "The defendant cannot be heard to complain about delay caused by his own conduct." ***Norwood v. State***, 74 Wis. 2d 343, 357, 246 N.W.2d 801 (1976). In addition, the ***Barker*** court recognized that delays do not necessarily prejudice the defense and are commonly employed as defense strategy; in this case, over the course of a year, the strategy changed from an early plan of guilty pleas to both charges, to a collateral attack on a prior OWI conviction, and then to a strategy to try the later charge first in order to avoid a reissuance of a felony under WIS. STAT. § 346.63(1)(a) and 346.65(2)(am)3.

¶21 The circuit court's analysis also considered and wrongly attributed to the State delays that had yet to occur—specifically, the time it would take to re-issue this charge if it were dismissed without prejudice.[10] Established law excludes both from consideration. *See* ***Urdahl***, 286 Wis. 2d 476, ¶¶18, 25 (delay

[10] Our supreme court has held that the general rule is that where there's a claim of a speedy trial violation, it cannot be determined until *after* trial because only after trial can the court evaluate, without speculating, what the delay was and whether it hampered the defense. *See* ***State v. Lemay***, 155 Wis. 2d 202, 214, 455 N.W.2d 233 (1990) (holding that defendant's request for a pre-trial determination of prejudice "cannot be done"). Lemay had sought a pre-trial dismissal on the grounds of a speedy trial right violation in a case that involved a thirty-seven–month delay of trial that was conceded to be caused by the State's negligence. The court held that Lemay's speedy trial claim could "only be clearly and finally decided after trial." ***Id.*** at 213, 216.

is measured up to "the scheduled trial date," and "once charges are dismissed, the speedy trial guarantee is no longer applicable").

¶22 Here, the portions of the thirteen-month delay that are weighted against the State total thirty-six days, and they are the type of delays that are less heavily weighed against the State. ***Id.***, ¶26. And the record further shows that the defendant's stated reasons for the balance of delays attributable to him were for his own strategic plans and in no way evidence of any attempt by the State to hamper Pacheco Arias's defense.

C. Invocation of speedy trial right.

¶23 At no time did Pacheco Arias assert a speedy trial demand in the circuit court. "[T]he defendant's assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right[.]" *See* ***Barker***, 407 U.S. at 528. "As recently as 1972, Wisconsin held that a failure to demand a speedy trial precluded dismissal of charges on the ground that the defendant was denied the right to speedy trial." ***Hipp v. State***, 75 Wis. 2d 621, 628, 250 N.W.2d 299 (1977). "While the demand waiver rule was repudiated in ***Day v. State***, … the failure to demand a speedy trial *must be considered*." ***Id.*** (emphasis added). "The failure to make a demand is weighed against a defendant as evidence that he was consciously avoiding trial." ***Id.*** "Although reasonable requests for time to prepare for trial may not be weighed against the defense, neither may the delays resulting from the defense's requests be weighed against the State, *especially in the absence of a speedy trial demand*." ***State v. Leighton***, 2000 WI App 156, ¶19, 237 Wis. 2d 709, 616 N.W.2d 126 (emphasis added). A court may determine from the record that a defendant "did not want a speedy trial." *See* ***id.*** The defendant's assertion of his speedy trial

right, then, is entitled to "strong evidentiary weight[.]" ***Barker***, 407 U.S. at 531–32. "We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." ***Id.***

¶24 The circuit court found that Pacheco Arias had asserted the right "implicitly" by seeking to schedule a trial on the later charge, but as the State points out, courts have not interpreted "asserting a speedy trial demand" as encompassing ordinary scheduling and appearing for court hearings. There is no authority for imputing a speedy trial demand to a defendant who never directly or indirectly made such a demand prior to moving for dismissal with prejudice.

¶25 The transcripts in the record show that as late as July 27, counsel for Pacheco Arias continued to request continuances. Pacheco Arias never made a speedy trial demand prior to his motion on July 27, 2016, and this constitutes "evidence that he was consciously avoiding trial." This is given "strong evidentiary weight." ***Id.*** at 532.

D. Prejudice to defendant.

¶26 The test considers prejudice of a very precise kind: prejudice as to "the three interests that the right to a speedy trial protects[.]" ***Urdahl***, 286 Wis. 2d 476, ¶34. The first is pretrial incarceration; the second is the defendant's anxiety and concern; the third is impairment of defense. ***Id.*** "Impairment of defense is present (1) 'if witnesses die or disappear during a delay,' (2) 'if defense witnesses are unable to recall accurately events of the distant past,' or (3) if a defendant is 'hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense.'" ***Scarbrough v. State***, 76 Wis. 2d 87, 98, 250 N.W.2d 354 (1977).

¶27 The question is therefore whether Pacheco Arias suffered the sort of prejudice that the speedy trial right is concerned with. Pretrial incarceration is not a factor here because Pacheco Arias posted bail and was out of custody prior to his first appearance on this case. As to the second interest—the defendant's anxiety and concern over the pending charges—Pacheco Arias made no record of any nor does the record reflect it. And as to the third interest—impairment of defense—the record is clear there was none. Most of the delays were of the defendant's choice. The thirty-six–day delay attributed to the State was short, early in the case, and in no way connected to loss of witnesses, gathering evidence or in any way impeding his defense. In fact, the record shows that Pacheco Arias informed the court that he intended to call no witnesses, bring no motions, and file no jury instructions. Under those circumstances there is no evidence that his ability to defend the case was impaired.

¶28 The trial court instead found prejudice was created by the State's attempt to try the defendant for his fourth OWI *as a felony*—a process clearly authorized by WIS. STAT. § 346.63(1)(a) and 346.65(2)(am)3 and intended by the legislature. The court cited no authority for this prejudice. And in fact, as ***Scarbrough*** shows, the prejudice meant to be considered is specific to an impairment of defense. ***Id***. The State did not seek to impair Pacheco Arias's ability to prove he was not guilty of the later OWI charge. Rather, it sought to try the cases in the order the offenses were allegedly committed and dismiss and reissue as a felony the fourth offence in the event he was convicted of the OWI 3rd. These were charging decisions authorized by statute. None had anything to do with impairing Pacheco Arias's ability to defend the accusation of OWI. The legislature clearly intended this possibility as its subsequent revision of the statute

makes abundantly clear. These disadvantages to Pacheco Arias are not the kind of prejudice the ***Barker*** test envisions.

¶29 In sum, as to this factor, there is no prejudice of any interest the speedy trial right is meant to protect. *See* ***id.*** at 98.

E. Balancing the factors.

¶30 We recognize the State's considerable interest in prosecuting a serious OWI charge. Weighing in Pacheco Arias's favor is only the negligible (and un-objected-to) thirty-six–day–delay attributable to the State in the first months of the case. Strongly weighing against that is the fact that Pacheco Arias never sought dismissal with prejudice until his motion on the date set for trial. Even then, the transcript reflects, Pacheco Arias was not claiming any speedy trial violation; he was asserting his request to try the cases out of order so he could employ a penalty loophole in the statute. There is no prejudice to weigh in the balance because there was no pretrial incarceration prejudice (he was undisputedly out of custody throughout this case), there was no evidence in the record of anxiety and concern, and most importantly there was no impairment of the defense (no evidence that needed witnesses became unavailable due to the delay because Pacheco Arias intended to call none). Therefore, balancing the factors required by ***Barker*** and ***Day***, we conclude that Pacheco Arias was not denied his constitutional right to a speedy trial. We remand with instructions for the circuit court to enter an order of dismissal without prejudice on the State's motion.

By the court. Order reversed, and remanded with instructions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.