COURT OF APPEALS
DECISION
DATED AND FILED

September 27, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2607-CR **Cir. Ct. No. 2001CF1783**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EDWARD D. ANDERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ and MARTIN J. DONALD, Judges.[1] *Remanded for a hearing*.

Before Wedemeyer, P.J., Fine and Curley, JJ.

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[1] The Honorable Richard J. Sankovitz presided over the court trial and heard several of the motions. The Honorable Martin J. Donald was initially assigned to this case and heard the motion seeking a dismissal of the charges because of pre-arrest delay.

¶1 CURLEY, J. Edward D. Anderson appeals the judgment convicting him of two counts of third-degree sexual assault, contrary to WIS. STAT. § 940.225(3) (2001-02),[2] entered following his court trial on stipulated facts, and from the order denying his postconviction motion. Anderson makes three arguments. He submits that: (1) his constitutional right to a speedy trial was violated; (2) his due process rights to present a defense were denied when the trial court denied his motion seeking to introduce prior sexual conduct of the child victim; and (3) the trial court erroneously exercised its discretion by imposing an unduly harsh sentence. We are satisfied that his constitutional right to a speedy trial was not violated, although we are troubled that it took twenty-seven months to bring Anderson to trial. After discussing the evidence Anderson sought to introduce concerning prior sexual conduct of the child victim, under the five-factor test found in ***State v. Pulizzano***, 155 Wis. 2d 633, 651, 456 N.W.2d 325 (1990), the trial court denied Anderson's motion *in limine* without hearing any testimony declaring that the child would not remember such behavior. On remand, a hearing should be conducted, at which the defense witness(es) testify, and then the five-factor ***Pulizzano*** test should be applied. Thus, because we are remanding for a hearing, at this time we need not address Anderson's claim that the trial court erroneously exercised its discretion when sentencing him. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W.2d 663 (1938) (only dispositive issue need be addressed).

[2] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

I. BACKGROUND.

¶2 Anderson was placed under arrest on these charges on November 10, 2000, while in custody on another case. For over six months, the police continued their investigation into this matter. Anderson was formally charged with two counts of first-degree sexual assault of a child on May 31, 2001. The complaint alleges that Anderson placed his mouth on the four-year-old victim's vagina and placed his penis in her anus. A brief delay in scheduling the preliminary hearing occurred due to the State's failure to provide Anderson and his counsel with a copy of the videotaped interview with the victim. Several weeks later, Anderson waived his right to a preliminary hearing. Shortly before a pretrial conference was held, some three months after the preliminary hearing waiver, Anderson filed a motion seeking to suppress any statements he gave to the police, and a motion seeking to require the State to make the information concerning the charge more definite and certain. At the pretrial, held on September 25, 2001, Anderson made a speedy trial demand.[3] After the pretrial was held, he filed a motion seeking dismissal of the charges because of the pre-arrest delay.

¶3 After the September 25, 2001 pretrial, a motion hearing was scheduled eight times before the trial court finally heard and denied Anderson's motion to dismiss on February 27, 2002. On March 12, 2002, a hearing was scheduled to hear Anderson's remaining motions. However, the State notified the trial court that an interstate detainer had been filed by Anderson *pro se*, and the scheduled trial date of April 22, 2002 fell outside of the time limitations.[4] The

[3] No speedy trial demand is recorded on the judgment roll. However, the transcript reflects Anderson's then-attorney making such a demand.

[4] No interstate detainer is in the record and the judgment roll makes no mention of it.

State requested that Anderson waive those time limits in order to proceed to trial on the April date. When Anderson refused to waive the time limits, the case was set for a jury trial the next day. At a proceeding held the next day, Anderson's attorney requested an adjournment to allow him time to investigate an issue. Anderson informed the court that he wanted to proceed *pro se.* Ultimately, Anderson waived his rights under the interstate detainer act and a new jury trial date was set. The trial court did not discharge Anderson's trial counsel.

¶4 Following the March 13, 2002 proceeding, Anderson filed a motion *in limine* seeking to admit evidence of the victim's prior sexual conduct. Anderson's attorney had been informed by the child victim's grandmother that she witnessed the child, then approximately two years old, licking the crotch of her Barbie doll. When the grandmother inquired of the child what she was doing, the child told her that her mother taught her to do that.

¶5 On May 6, 2002, the adjourned date for the jury trial, Anderson's attorney advised the court that the defense was seeking an adjournment because it wished to file a notice of alibi. The trial court granted the request and a new date was scheduled. On August 5, 2002, the trial court denied Anderson's motion *in limine* and his request for a stay for an interlocutory appeal. The trial court did, however, allow Anderson's attorney to withdraw.

¶6 Anderson was provided with a new attorney and, after several other dates were set and adjourned, another pretrial was held on November 22, 2002. Anderson was not present. The matter was scheduled for a jury trial on December 2, 2002, but was adjourned again at the request of Anderson's new attorney, who claimed to need additional time to locate evidence. Another motion hearing seeking to admit evidence of prior sexual conduct of the victim was held on

December 3, 2002, and Anderson's motion was denied without the taking of any testimony. (Apparently the new attorney was unaware that the motion had already been decided.) On January 29, 2003, Anderson made another demand for a speedy trial. A final pretrial was held on February 5, 2003, and a jury trial was set for February 12, 2003. However, no jury trial was held because Anderson was not produced from prison, and the matter was adjourned. Finally, on February 17, 2003, Anderson agreed to waive his right to a jury trial and a court trial was held, at which time the State amended the charges to two counts of third-degree sexual assault, and the parties stipulated to the facts. The trial court found him guilty and he was sentenced the same day. On count one, the trial court sentenced him to five years of confinement, to be followed by five years of extended supervision. On count two, the trial court sentenced him to three years of confinement, to be followed by three years of extended supervision. The sentences were ordered to be served consecutively.

¶7 After a change in postconviction counsel, a postconviction motion was filed on August 31, 2004. The motion was denied by written order on September 15, 2004. This appeal follows.

II. ANALYSIS.

A. Anderson's right to a speedy trial was not violated.

¶8 Anderson claims his right to a speedy trial was violated. To determine whether a defendant's constitutional right to a speedy trial has been violated, we consider a four-part balancing test: (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant asserted the right to a speedy trial; and (4) whether the defense was prejudiced by the delay. ***Barker v. Wingo***, 407 U.S. 514, 530 (1972); ***State v. Borhegyi***, 222 Wis. 2d 506, 509, 588 N.W.2d 89

(Ct. App. 1998). "The right to a speedy trial, however, is not subject to bright-line determinations and must be considered based upon the totality of the circumstances that exist in any specific case." ***Borhegyi***, 222 Wis. 2d at 509. We review a defendant's claim that he or she was denied the right to a speedy trial *de novo*. ***Id.*** at 508. The first inquiry is always whether the delay has crossed the threshold dividing ordinary from "presumptively prejudicial" delay. ***Hatcher v. State***, 83 Wis. 2d 559, 566-67, 266 N.W.2d 320 (1978).

¶9 Here, the State concedes that the approximate twenty-seven-month delay in holding a trial is "presumably prejudicial." *See* ***Doggett v. United States***, 505 U.S. 647, 652 n.1 (1992) (post-accusation delay "presumptively prejudicial" "at least as it approaches one year"); *see also* ***State v. Leighton***, 2000 WI App 156, ¶8, 237 Wis. 2d 709, 616 N.W.2d 126. Thus, we must examine the remaining factors.

¶10 The next ***Barker*** factor to consider is the reason for the delay. There are three classes of reasons for delay, and different weights are to be assigned in each class. The first class is "[a] deliberate attempt to delay the trial in order to hamper the defense" which "should be weighted heavily against the government." ***Barker***, 407 U.S. at 531 (footnote omitted). The second class is "[a] more neutral reason such as negligence or overcrowded courts" which "should be weighted less heavily" against the government. ***Id.*** The third class is "a valid reason, such as a missing witness[,]" which "should serve to justify appropriate delay." ***Id.***

¶11 The parties are sharply divided on who is responsible for the many delays in this case. Anderson attempts to lump the adjournments requested by his first trial counsel as delays attributable to the State by claiming, among other things, that his first trial attorney was ineffective for requesting several

adjournments. However, he fails to adequately develop this charge. Thus, we deem the issue abandoned and decline to address it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals may decline to review issues inadequately briefed).

¶12 The original delay of six months between when Anderson was arrested and charged was caused by the ongoing investigation. While this delay between the arrest and filing of criminal charges appears longer than usual, given the charges and the age of the victim, we cannot find that the delay was unreasonable. The period of time between the filing of the complaint on May 31, 2001, and the stipulated bench trial on February 17, 2003, occurred due to a combination of factors. The trial court's adjournment of the first motion hearing for approximately six months was unfortunate and was due, in part, to a crowded calendar.[5] At the expedited jury trial date, scheduled less than three weeks after the first defense motion was denied, Anderson eventually acquiesced to his attorney's request for an adjournment due to the new information that was provided to his attorney. This several-month delay is directly attributable to Anderson, as is the delay occasioned by Anderson's attorney's request to explore an alibi defense raised at the next jury trial date.[6] At the next scheduled trial date, Anderson's attorney asked to withdraw from the case. Anderson had been seeking the dismissal of his attorney for some time. After the trial court granted the request, a several-month delay occurred in order for new counsel to be appointed

[5] We urge trial judges to better calendar their cases so incidents such as what occurred in this case are not repeated.

[6] On review, we note Anderson's frustration with his attorney's conduct. While we sympathize with his stated desire to obtain a trial, and note his several letters to the trial court seeking the same, this delay was caused by Anderson, not the State.

and to set a suitable date for trial. At the next trial date, Anderson's new attorney asked for an adjournment in order to locate some evidence. Finally, a court trial was held on stipulated facts, at which time Anderson was found guilty of the reduced charges and sentenced.

¶13 Thus, approximately seven-plus months of the delay is directly attributable to Anderson, with the trial court's apparently congested calendar responsible for much of the remaining delay. The only delay actually caused by the prosecution was the six-month delay between his arrest and formal charges, the two-week adjournment of the preliminary hearing, and several other weeks when the State failed to produce Anderson from prison when a hearing could have actually gone forward. Thus, the delay attributable to the State falls within the "neutral reason such as negligence or overcrowded courts," which "should be weighted less heavily" against the government. *See* ***Barker***, 407 U.S. at 531. Indeed, the record reflects that the State was always prepared to try the case on the scheduled trial dates.

¶14 Next, we address whether Anderson asserted his right to a speedy trial. It is clear that early on, Anderson made a demand for a speedy trial. His attorney orally made this demand on September 25, 2001. His attorney renewed the demand on January 29, 2003. As noted, Anderson also wrote several letters to the trial court complaining about the delay. Anderson's subsequent conduct, however, was not always consistent with his stated desire to have a speedy trial. As noted, both of Anderson's attorneys filed various motions at different stages of the litigation. Several of the adjournments were sought by Anderson's attorneys on the date of trial. Anderson acquiesced to his attorneys' various requests to adjourn the trial. In doing so, he weakened his case for a speedy trial. As the State observed: "Those requests for, and consents to, the adjournments

significantly diminished the weight of his demand for a speedy trial. As was the case with the criminal defendant in ***United States v. Sarvis***, 523 F.2d 1177, 1182 (D.C. Cir. 1975): 'It cannot be said that [Anderson] … uniformly pressed for the earliest possible trial date.'"

¶15 Finally, the last ***Barker*** factor to be considered is whether Anderson experienced any prejudice as a result of the delay. Anderson claims he was prejudiced because:

> … [T]he pending charges and lengthy delay had an adverse effect on his ability to enroll in certain programming while in custody. This had the effect of Mr. Anderson serving a substantial amount of "dead time" during the unbelievably lengthy delay.
>
> Mr. Anderson was also prejudiced by the mounting anxiety and concern he experienced despite his repeated request for a prompt disposition of the charges.
>
> Finally, Mr. Anderson was prejudiced by the excessive delays as the delays hampered his ability to locate and bring witnesses for his defense and eroded the possibility of a reliable trial since so much time passed prior to it.

¶16 The prejudice factor is assessed in light of the interests the speedy trial right is designed to protect: "(1) preventing oppressive pretrial incarceration; (2) minimizing the accused's anxiety and concern; and (3) limiting the possibility that the defense will be impaired" due to lost witnesses, failed memories, lost physical evidence, etc. ***Borhegyi***, 222 Wis. 2d at 514.

¶17 Inasmuch as Anderson was incarcerated on another charge during the pendency of this matter, he was not subject to "oppressive pretrial incarceration," although he might well have been prevented from engaging in

certain prison programs, had these charges been resolved in a more timely fashion. However, this loss does not reach constitutional proportions.

¶18 With regard to Anderson's claim that he suffered "anxiety and concern [generated by] his repeated requests for a prompt resolution of the charges[,]" we note that Anderson, via his trial attorneys, was responsible for much of the delay, and Anderson ultimately benefited by it as the State significantly reduced the charges.

¶19 Finally, with respect to his last argument, Anderson has not identified any witnesses that became unavailable as a result of the delay, or what these witnesses would have testified to. His defense was that the acts never occurred. Since no specific date for the offenses was ever established, it is unclear what additional information could have been gleaned from any defense witnesses, had they been located earlier.

¶20 Thus, after balancing the various ***Barker*** factors, we are satisfied that no constitutional violation occurred. Although the delay from Anderson's charging to his trial was presumptively prejudicial, a review of the remaining factors evinces no violation of his constitutional right to a speedy trial. Much of the delay was attributable to Anderson, little directly to the State. While Anderson affirmatively asserted his speedy trial right, his subsequent conduct suggested that he was not as interested in a speedy trial as he claimed. While this case is not a textbook example of careful case management, Anderson was, at certain points in the proceedings, a willing co-conspirator to the twenty-seven-month delay. Finally, Anderson has not shown any prejudice as a result of the delay. Thus, we conclude that his constitutional right to a speedy trial was not violated.

B. Anderson has a right to a hearing to determine whether he may introduce evidence of the victim's prior sexual conduct.

¶21 Anderson argues that his right to present a defense was violated when the trial court denied his motion *in limine* seeking to introduce evidence of the victim's prior sexual conduct.

¶22 The admission of evidence is a decision left to the discretion of the circuit court. *See* ***Michael R.B. v. State***, 175 Wis. 2d 713, 723, 499 N.W.2d 641 (1993). We will not find an erroneous exercise of discretion where the circuit court applies the facts of record to accepted legal standards. *See* ***State v. Kuntz***, 160 Wis. 2d 722, 745, 467 N.W.2d 531 (1991). However, a determination of whether the circuit court's actions violate the defendant's constitutional rights to confrontation and to present a defense is a question of constitutional fact. *See* ***State v. Heft***, 185 Wis. 2d 288, 296, 517 N.W.2d 494 (1994). For purposes of reviewing a question of constitutional fact, we adopt the circuit court's findings of fact unless clearly erroneous, but independently apply those facts to the constitutional standard. *See* ***State v. McMorris***, 213 Wis. 2d 156, 165-66, 570 N.W.2d 384 (1997).

¶23 The right to present a defense through the testimony of favorable witnesses and the effective cross-examination of adverse witnesses is grounded in the Confrontation and Compulsory Process Clauses of the Sixth Amendment to the United States Constitution and article I, section 7 of the Wisconsin Constitution. *See* ***Pulizzano***, 155 Wis. 2d at 645-46. The primary objective of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by rigorously testing it in an adversarial proceeding before a jury or trier of fact. *See* ***Maryland v. Craig***, 497 U.S. 836, 845 (1990). To accomplish this objective, the defendant must have the opportunity to meaningfully cross-examine

witnesses. *See* ***State v. Thomas***, 144 Wis. 2d 876, 893, 425 N.W.2d 641 (1988). A defendant's right to present a defense may in some cases require the admission of testimony that would otherwise be excluded under applicable evidentiary rules. *See* ***Pulizzano***, 155 Wis. 2d at 648. The right to present a defense is not absolute, but rather is limited to the presentation of relevant evidence whose probative value is not substantially outweighed by its potential prejudicial effect. *See* ***id.***; WIS. STAT. § 904.03.

¶24 Another limitation on the admission of evidence is found in the rape shield law. Wisconsin's rape shield law is codified in WIS. STAT. § 972.11(2), which provides, in relevant part:

> (a) In this subsection, "sexual conduct" means any conduct or behavior relating to sexual activities of the complaining witness, including but not limited to prior experience of sexual intercourse or sexual contact, use of contraceptives, living arrangement and life-style.
>
> (b) If the defendant is accused of a crime under s. 940.225, 948.02, 948.025, 948.05, 948.06 or 948.095, any evidence concerning the complaining witness's prior sexual conduct or opinions of the witness's prior sexual conduct and reputation as to prior sexual conduct shall not be admitted into evidence during the course of the hearing or trial, nor shall any reference to such conduct be made in the presence of the jury, except the following, subject to s. 971.31 (11):
>
> 1. Evidence of the complaining witness's past conduct with the defendant.
>
> 2. Evidence of specific instances of sexual conduct showing the source or origin of semen, pregnancy or disease, for use in determining the degree of sexual assault or the extent of injury suffered.
>
> 3. Evidence of prior untruthful allegations of sexual assault made by the complaining witness.
>
> (c) Notwithstanding s. 901.06, the limitation on the admission of evidence of or reference to the prior sexual

> conduct of the complaining witness in par. (b) applies regardless of the purpose of the admission or reference unless the admission is expressly permitted under par. (b) 1., 2., or 3.

¶25 In this case, the alleged sexual behavior of the victim witnessed by the grandmother is clearly an example of "sexual conduct" as envisioned by the statute. Unless the behavior is somehow exempt from the rape shield law, the evidence offered by Anderson would be inadmissible under WIS. STAT. § 972.11(2).

¶26 The statute itself lists three types of evidence that are exceptions to the rape shield law: (1) evidence of the complainant's past conduct with the defendant; (2) evidence of specific instances of sexual conduct used to show the source or origin of semen, pregnancy or disease, for use in determining the degree of sexual assault or the extent of injury suffered; and (3) evidence of prior untruthful allegations of sexual assault made by the complainant. WIS. STAT. § 972.11(2)(b). The evidence that Anderson sought to introduce does not fall within any of the exceptions, but that does not end the matter.

¶27 In order to balance the interests of the defendant and the complainant, our supreme court has developed a narrow test to determine when a defendant's right to present a defense should supersede the State's interest in protecting the complainant from prejudice and irrelevant inquiries. In ***Pulizzano***, the supreme court held that evidence of a child complainant's past sexual behavior may be admissible over the rape shield law if it meets a five-part test and if the defendant's right to present the evidence outweighs the State's interests in excluding it. ***Pulizzano***, 155 Wis. 2d at 651-52. To meet the ***Pulizzano*** test, the defendant must show that the proffered evidence meets five criteria: (1) the prior acts must have clearly occurred; (2) the prior acts must closely resemble those of

the present case; (3) the prior acts must be clearly relevant to a material issue; (4) the evidence must be necessary to the defendant's case; and (5) the probative value of the evidence must outweigh its prejudicial effect. ***Id.*** at 651-52. If the five prongs are met, the court must then balance the parties' interests to determine if the evidence is admissible. ***Id.*** at 653-55.

¶28 We next turn to the trial court's findings. Both Anderson and the State claimed to have found the trial court's analysis confusing. We agree. After reciting the five ***Pulizzano*** factors, the trial court determined that factors two through five seemed to favor admission of the evidence, although the trial court found that factor two favored both admission and denial of the evidence. The trial court then explained:

> I think the decisive factor is the first factor. I have to be satisfied that these acts clearly occurred. I accept the offer of proof in its strongest form, which is that [the victim] was 2 years old and not 12 to 24 months, that she was verbal, and that she did describe these acts in words to her grandmother.

However, later the trial court remarked:

> In other words, I am not satisfied that the acts clearly occurred. While I have no doubt at least based on the offer of proof taken in a light most favorable to the defense that a conversation may have occurred, the connection between those acts involving a Barbie doll and the acts that are alleged in the [c]omplaint I think suffer based on the fact that a child grows so much during that time and I think forgets so much during that time.

¶29 The trial court's findings appear to be inconsistent and are not based on any actual testimony. The trial court never actually heard the testimony of the grandmother, who was in court and prepared to testify, but rather assumed that the incident occurred, but believed that a child would not remember it two years later.

Thus, it appears that, in the trial court's mind, the purpose behind the exception—to suggest an alternative source for the child's sexual knowledge—was eliminated and the court denied Anderson's motion. If indeed the trial court's cryptic comments mean what we believe them to mean, we do not accept the trial court's logic. Nothing in the offer of proof or any other information supplied to the court established that the child could not remember licking the crotch of a Barbie doll and telling her grandmother that her mother taught her to do that. We conclude that if the allegations are true, the child's behavior was odd, and if her mother actually taught the child to lick her doll's crotch, it would supply the relevant knowledge for one of the victim's complaints against Anderson.[7] It is certainly possible that there is an innocent explanation for her conduct or that the acts never occurred. On the other hand, the child's actions could also have been the result of exposure to numerous sexual acts by others, or could have reflected some pathology that would explain her behavior. Nevertheless, the alleged behavior calls into question her later claims against Anderson.

¶30 We remand this matter to the trial court for a hearing, complete with live testimony, to find out if the proffered evidence meets all the ***Pulizzano*** criteria; that is, whether the act occurred; the act closely resembled one of the charged counts; the prior act was clearly relevant to a material issue; the evidence was necessary to Anderson's case; and finally, whether the probative value of the evidence outweighed its prejudicial effect. Anderson had a right to a hearing. He was not given that opportunity. As a consequence, this court remands for a

[7] Unlike the circumstances in ***State v. St. George***, 2002 WI 50, 252 Wis. 2d 499, 643 N.W.2d 777, where the child victim's account of the assault did not suggest any precocious sexual knowledge, *see* ***id.***, ¶24, here the alleged witnessed prior act of the child strongly suggests knowledge beyond the ken of a two-year-old child.

hearing pursuant to WIS. STAT. § 901.04(2). After the trial court determines whether the evidence is admissible, the trial court should notify this court of its decision. It is anticipated that notification will occur within forty-five days of receipt of this decision.

By the Court.—Remanded for a hearing. *See* WIS. STAT. § 901.04(2).

Not recommended for publication in the official reports.