COURT OF APPEALS
DECISION
DATED AND FILED

June 20, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2930-CR **Cir. Ct. No. 2006CF210**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL T. O'HAVER,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Waukesha County: J. MAC DAVIS and KATHRYN W. FOSTER, Judges. *Affirmed.*

Before Lundsten, P.J., Higginbotham and Sherman, JJ.

¶1 LUNDSTEN, P.J. Following a jury trial, Michael O'Haver was convicted of first-degree intentional homicide.[1] On appeal, O'Haver contends that the circuit court erred by denying his request for a change of venue, that his constitutional right to a speedy trial was violated, that he is entitled to a new trial because an expert's opinion, discovered after trial, constitutes newly discovered evidence, and that he was denied the effective assistance of counsel because his trial counsel failed to discover and present the "newly discovered" expert testimony. We reject each argument, and affirm the circuit court.

Background

¶2 O'Haver was charged with first-degree intentional homicide on February 21, 2006. A five-day trial commenced on June 19, 2007. In addition to other evidence, the jury learned the following.

¶3 In November 2005, an adult female was reported missing by her parents and her boyfriend, O'Haver. O'Haver reported that he last saw the victim two days earlier when they had a disagreement about O'Haver's ex-girlfriend.

¶4 On January 10, 2006, the victim's body, along with a bag containing blood, was located near a roadway by a man picking up discarded cans and trash. An autopsy revealed lacerations and numerous areas of blunt force trauma on the victim's head and bruising to other parts of her body.

[1] The Honorable J. Mac Davis presided over trial and entered the judgments of conviction. The Honorable Kathryn W. Foster entered the order denying O'Haver's postconviction motion.

¶5 On January 23, 2006, a news organization received an e-mail from a person claiming knowledge of the victim's death. O'Haver later admitted that he sent the e-mail.

¶6 On January 26, 2006, O'Haver asked to speak to a detective about something "stupid" he had done. O'Haver later admitted to the detective that he struck the victim, and that he disposed of her body on the side of a roadway. O'Haver said he was drunk when he struck her. He told police the two had an argument over one of O'Haver's former girlfriends. O'Haver said that the victim struck O'Haver, and that he punched her with a closed fist. He asserted that the victim was sitting on a couch and he lay down with his head in her lap. He said he later woke up and realized that the victim was not breathing.

¶7 O'Haver admitted that he covered the victim's body in plastic, waited until dark, carried the body to his van, and left the body near a roadway. When asked how the victim died, O'Haver responded: "Miserably."

¶8 On June 25, 2007, the jury found O'Haver guilty of the first-degree intentional homicide charge.

Discussion

I. Change Of Venue

¶9 O'Haver contends that the circuit court erred by denying his request for a change of venue. This argument is easily rejected. Although the crime at issue is a homicide, there is, sadly, nothing that made the crime remarkable when compared with other similar and all too common homicides. This is especially true in an age when heavy media attention is given to the most sensational

homicides and homicide trials around the country. In the end, the change of venue question was not a close one for the circuit court.

¶10 Change of venue motions are a matter of discretion; we will not reverse a decision on such a motion unless there has been a misuse of discretion. *See* ***State v. Albrecht***, 184 Wis. 2d 287, 306, 516 N.W.2d 776 (Ct. App. 1994).

¶11 The question is whether there is a reasonable likelihood of community prejudice so pervasive as to preclude the possibility of a fair trial. ***Id.*** at 306. Courts consider the following factors:

> (1) the inflammatory nature of the publicity; (2) the timing and specificity of the publicity; (3) the degree of care exercised, and the amount of difficulty encountered, in selecting the jury; (4) the extent to which the jurors were familiar with the publicity; (5) the defendant's utilization of peremptory and for cause challenges of jurors; (6) the State's participation in the adverse publicity; (7) the severity of the offense charged; and (8) the nature of the verdict returned.

Id.; *see also* ***State v. Fonte***, 2005 WI 77, ¶31, 281 Wis. 2d 654, 698 N.W.2d 594.

¶12 We agree with the State that O'Haver's primary concern is the nature of the pretrial media, which sometimes included references to other acts evidence that was ruled inadmissible at trial. O'Haver complains that several prospective jurors reported that they had some recollection of media coverage of the homicide. We focus on these topics. As to the ***Albrecht*** factors that we do not discuss, we have considered them and, plainly, they do not weigh in favor of reversing O'Haver's conviction and ordering a new trial.

1. Media Coverage Of Details Of The Charged Homicide

¶13 As O'Haver points out: "News reports become objectionable when they editorialize, amount to 'rabble rousing' or attempt to influence public opinion against a defendant." *See* ***Fonte***, 281 Wis. 2d 654, ¶32 (quoting ***Briggs v. State***, 76 Wis. 2d 313, 327, 251 N.W.2d 12 (1977)). In this respect, O'Haver has identified a limited number of news reports that fall on the low end of what might be viewed as objectionable.

¶14 O'Haver points to a September 25, 2006 Milwaukee Journal Sentinel article that informed the reader that "[a]n autopsy revealed [the victim] was viciously struck on the back of the head." The same article quoted a family member as saying "He tore every one of our hearts apart." This and other similar examples give little cause for concern. It is not shocking that a homicide would involve a vicious blow to the head or that family members of the deceased would be distressed and, in an alleged domestic violence situation, point a finger at the accused. Even assuming jurors remembered such an account in the media, the information could easily be put to the side in the face of far more detailed trial evidence about the mechanism of death and O'Haver's opportunity and motive.

¶15 Moreover, we agree with the circuit court that the volume and nature of the publicity was not exceptional or unusual given the nature of the crime. In the circuit court's view, there was nothing that made this case stand out. We agree with the court's observation: "[U]nfortunately, in some other counties like in Milwaukee County where they apparently have dozens like this happening all the time, and this being the same media market, as serious as these events are, they tend to blend together when there's quite a number of them going on."

2. Other Acts Evidence

¶16 O'Haver points to multiple media reports indicating that O'Haver had a history of inflicting domestic abuse. Several news reports indicated that, prior to trial, the prosecutor was attempting to persuade the circuit court to admit evidence that O'Haver had a history of abusing women. One newspaper article stated, in part:

> However, [the prosecutor] said the more important aspect of the case, from the state's perspective, is its appeal of a ruling by [the circuit court] that prevented evidence from other domestic violence cases from coming into the … case….
>
> "We think that is the more significant evidence, the history of abusing women," [the prosecutor] said. "We definitely want to make sure that is decided before the trial is started."

O'Haver also points to an article in the Milwaukee Journal Sentinel referring to the State's other acts motion and indicating that one of O'Haver's alleged victims asserted that O'Haver engaged in verbal abuse and hit her with his fists.

¶17 The circuit court's explanation of why this aspect of media coverage did not warrant a change of venue overlapped the court's explanation generally. The court aptly explained that this was not the only homicide in the county in recent years, and it was not an unusual homicide. The reports indicated that the context here was an alleged domestic violence homicide and, in that context, it is far from unusual that such a crime would involve allegations that the alleged male perpetrator was abusive toward women and that the charged crime fit a pattern. The judgment call for the circuit court was whether it was likely that a substantial number of the potential jurors would have read or heard about the alleged other acts evidence *and* remembered the allegations in meaningful detail, such that there should not even be an attempt to locate jurors who were sufficiently unfamiliar

with coverage or who could otherwise put aside what they had learned and be impartial. This was an easy call. To repeat, there was nothing remarkable about the pretrial publicity here.

3. Jury Selection

¶18 As it turned out, the circuit court correctly foresaw that it would not be difficult to find unbiased jurors. O'Haver does not seriously dispute this. Rather, O'Haver points to prospective jurors, some of whom ended up serving as jurors, who simply had some memory of having heard or read about the allegations. O'Haver writes in his brief-in-chief:

> Regarding the selection of the jury factor, six of the fourteen initial jurors selected to be on the jury had some knowledge of the case from the media.… [One of the fourteen, Juror B,] was one of the two alternate jurors at the end of the trial. The final twelve-member jury, therefore, included five jurors who had knowledge of the case from the media. This factor, therefore, weighs in O'Haver's favor and indicates the erroneous nature of having the trial in Waukesha County.

(Record citations omitted.)

¶19 The reason O'Haver's discussion of this factor is abbreviated is because he has little to work with. As the State explains, each of these jurors indicated limited knowledge, and none indicated knowledge of allegations of other acts of domestic violence. The lack of specific memory is exemplified by one juror who said she remembered a report of the victim's body being found, but could not remember any other details.

¶20 In sum, the record amply supports the circuit court's determination that the media coverage was not of a nature likely to make it difficult to find

impartial jurors and, indeed, there was no difficulty finding impartial jurors. It follows that the court correctly denied O'Haver's change of venue request.

II. Right To A Speedy Trial

¶21 O'Haver contends that his constitutional right to a speedy trial was violated. We apply a four-part balancing test when determining whether a defendant's constitutional right to a speedy trial has been violated: (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant asserted his or her right to a speedy trial; and (4) whether the defendant was prejudiced by the delay. *See* ***Barker v. Wingo***, 407 U.S. 514, 530 (1972). There are no bright-line rules; we consider the totality of the circumstances. ***State v. Urdahl***, 2005 WI App 191, ¶11, 286 Wis. 2d 476, 704 N.W.2d 324.

¶22 We first inquire whether the length of the delay has crossed the line dividing ordinary from "presumptively prejudicial" delay. *See* ***Hatcher v. State***, 83 Wis. 2d 559, 566-67, 266 N.W.2d 320 (1978). A post-accusation delay "approaching one year" is presumptively prejudicial. ***Urdahl***, 286 Wis. 2d 476, ¶12. Here, there was about a sixteen-month period between charging and trial, and the parties agree that this time period was presumptively prejudicial.

¶23 Turning to the second factor, the reason for the delay, O'Haver asserts that this factor should be counted against the State because "the primary reason for the delay was the state's decision to pursue an interlocutory appeal of the trial court's decision that other acts evidence should not be admitted at the jury trial." O'Haver asserts that the State's appeal caused a seven-month delay, from August 8, 2006, to March 14, 2007.

¶24 We agree with the State that the actual delay caused by the appeal was four months. As the State explains, although the appeal was filed in August 2006, trial court proceedings continued until the circuit court issued a stay on November 17, 2006.

¶25 And, we agree with the State that even this four-month time period should not weigh heavily against the State because there is no indication of an attempt to hamper the defense. *See* ***Barker***, 407 U.S. at 531 (deliberate attempts to delay in order to hamper the defense weigh heavily against the government; more neutral reasons are weighed less heavily).

¶26 The parties dispute whether this time period should be weighed against the State at all. This dispute centers on non-binding case law involving delays caused by interlocutory appeals. We need not resolve this dispute because, assuming without deciding that this factor should be weighed against the State, the scales do not tip in O'Haver's favor.

¶27 The third factor looks at whether the defendant requested a speedy trial. Here, O'Haver was charged on February 21, 2006, and made a speedy trial demand on September 8, 2006. This factor weighs in favor of O'Haver.

¶28 The last factor is whether O'Haver was prejudiced by the delay. The circuit court acknowledged that the delay may have caused O'Haver anxiety, but also found that there was no indication that O'Haver's ability to defend himself was impaired. We agree. On appeal, O'Haver asserts he had "difficulty in preparing his case for the jury trial in that he was in the Waukesha County jail continuously after the charges were filed, making it difficult for him to assist his counsel in preparing for the trial." But O'Haver provides no specifics showing that there was an actual effect on trial preparation.

¶29 Viewing the totality of the circumstances, and balancing the four-part test, leads to the conclusion that O'Haver was not denied his constitutional right to a speedy trial. Although "presumptively prejudicial" in the sense that the delay was long enough to trigger consideration of other factors, the delay was not substantial, and there is no evidence that O'Haver's defense suffered because of the delay.

III. Newly Discovered Evidence

¶30 O'Haver asserts that he is entitled to a new trial because he has demonstrated the existence of newly discovered evidence. The test for newly discovered evidence is well settled. A defendant must show "by clear and convincing evidence" that:

> (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative.

State v. McCallum, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). If a defendant makes this showing, the court must determine whether there is a reasonable probability that a new trial would produce a different result. ***Id.***

¶31 The evidence that O'Haver asserts is newly discovered is an expert opinion regarding the cause of death. Post-trial, O'Haver's new counsel located a forensic pathologist that is prepared to testify that the "external injuries seen on the [victim's] head would not have led to death" and "[t]he injuries seen at autopsy are insufficient to explain [the victim's] death." Viewed in context, the expert opined that there were several factors that may have contributed to the victim's death, but that the expert would have labeled the cause as "undetermined." According to O'Haver, this opinion is substantially different from the State's

expert's opinion that the victim died as the result of "homicidal violence" and, therefore, the opinion would undercut the State's theory that O'Haver beat the victim to death. We disagree for two reasons.

¶32 First, O'Haver merely presents a new expert opinion based on the same facts available prior to trial. A new expert opinion based on facts available prior to trial is generally not newly discovered evidence. *See* ***State v. Fosnow***, 2001 WI App 2, ¶26, 240 Wis. 2d 699, 624 N.W.2d 883 (WI App 2000).

¶33 O'Haver contends that ***Fosnow*** and similar cases are distinguishable because such cases involved psychiatric expert testimony, not an expert opinion about the significance of physical remains and injuries. O'Haver suggests that it would have been more difficult for O'Haver to "tailor" his expert's testimony. O'Haver, however, fails to provide a reason why this might be true. We conclude that O'Haver points to a difference without explaining a meaningful distinction.

¶34 Second, even if such expert testimony could be considered newly discovered evidence, we agree with the State that there is no reasonable probability that a new trial will produce a different result. As the State points out, the new expert testimony does not, as O'Haver contends, plainly contradict the opinion of the State's expert. O'Haver's new expert merely opined that she could not determine a cause of death, while acknowledging that other qualified experts might disagree with her. And, the State explains, its expert admitted that the precise cause of death could not be determined. The State's expert acknowledged that death could have been caused by the brain injury, by smothering or suffocation, or by hypothermia in conjunction with the beating. The State's expert also acknowledged that intoxication could have contributed to the victim's death.

Thus, the State's expert did not assert that the evidence showed that O'Haver beat the victim to death.

¶35 Moreover, O'Haver's trial counsel used the equivocal nature of the State's expert's opinion to O'Haver's advantage. Trial counsel argued that the State's expert could really say only that a beating by O'Haver contributed to the victim's death, just as other factors might have contributed to her death.

¶36 In light of O'Haver's own inculpatory statements (including that he struck the victim and hid her body), and other substantial inculpatory evidence, it is apparent that there is no reasonable probability of a different result if a different jury heard the new expert's opinion.

IV. Ineffective Assistance Of Counsel

¶37 O'Haver argues that he was denied the effective assistance of counsel because his trial counsel failed to discover and present the expert testimony described above. A defendant alleging ineffective assistance of counsel must show both deficient performance and prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Here, even if O'Haver could demonstrate deficient performance, his claim fails because he has not demonstrated prejudice.

¶38 The test for prejudice is whether there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." ***Id.*** That test is not met here for the same reason that there is, under the newly discovered evidence test, no reasonable probability that a new trial would produce a different result. As explained above, there is no significant difference between the expert opinion the

jury did not hear and the expert opinion the jury did hear. The difference was more one of semantics than substance. The new expert explained that, although other experts might use the term "homicidal violence" to describe the cause of the victim's death, the new expert thought it more appropriate to label the cause of death as "undetermined." But as to causation specifics—factors that, separately or in combination, contributed to the victim's death—O'Haver points to little substantive difference.

¶39 Accordingly, we reject O'Haver's ineffective assistance of counsel claim.

Conclusion

¶40 For the reasons above, we affirm the circuit court.

By the Court.—Judgments and order affirmed.

Not recommended for publication in the official reports.