COURT OF APPEALS
DECISION
DATED AND FILED

September 25, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0766-CR **Cir. Ct. No. 01CM000622**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

COREY ROBERT SAXBY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jefferson County: JOHN ULLSVIK, Judge. *Affirmed*.

¶1 VERGERONT, J.[1] Corey Saxby appeals the judgment of conviction for misdemeanor battery in violation of WIS. STAT. § 940.19(1) and the trial court's order denying his motion for a new trial. He contends he is entitled to

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

a dismissal of the charge because his constitutional right to a speedy trial was denied and, in the alternative, he is entitled to a new trial because counsel was ineffective in failing to ask any questions of the venire panel and he was therefore denied his right to an impartial jury. We reject each claim and therefore affirm.

Speedy Trial

Background

¶2 The criminal complaint alleged that on February 2, 2001, Saxby repeatedly punched John Flahive, believing him to be the new boyfriend of Saxby's ex-girlfriend, Theresa Burns. As a result of what occurred on that date, on February 8, 2001, a parole hold was placed on Saxby, his parole was subsequently revoked, and he remained in custody until the complaint was filed on August 28, 2001. Saxby made an initial appearance on October 8, 2001, with counsel and demanded a speedy trial. A trial date was set for December 3, 2001.

¶3 On November 19, 2001, Saxby's counsel, Daniel Grable, notified the court that he would not be prepared for a December 3 trial and that he would contact Saxby to see if Saxby would waive his right to a speedy trial. A trial date was set for February 19, 2002. On December 4, 2001, Saxby wrote to the court stating that the February 19 trial date was not within the time limits for a speedy trial, Grable was not representing him, and he needed a state-appointed attorney. On December 20, 2001, Attorney Grable moved to withdraw as counsel, stating that Saxby no longer wanted Grable to represent him, and the court granted the motion on that date.

¶4 New counsel was appointed on January 15, 2002, and she appeared with Saxby at a status conference on January 24, 2002, which had been

rescheduled from January 3, 2002, in order to arrange for her appointment. At the status conference on January 24, 2002, Saxby's counsel stated that Saxby did not wish to waive his right to a speedy trial. The court concluded that WIS. STAT. § 971.10 had been violated, because even with a tolling from November 19, 2001, to January 24, 2002, a trial on February 19 would be beyond sixty days of Saxby's request for a speedy trial on October 8, 2001. However, the court decided that violation did not entitle Saxby to release from custody because he was not in custody for this case. Although the court affirmed that the trial would remain as scheduled for February 19, the court later rescheduled it for April 9, 2002, because it determined that a two-day jury trial in a CHIPS case, which had been adjourned several times, deserved priority over the trial in this case.

¶5 On April 4, 2002, Saxby moved to dismiss the complaint on the ground that his constitutional right to a speedy trial had been violated and the court denied the motion. The trial took place on April 9, 2002.

Discussion

¶6 When we review a defendant's claim that he has been denied his constitutional right to a speedy trial, we accept the trial court's findings of historical fact unless they are clearly erroneous. However, the application of the constitutional standards and principles to those facts presents a question of law, which we review de novo. ***State v. Borhegyi***, 222 Wis. 2d 506, 508-09, 588 N.W.2d 89 (Ct. App. 1998).

¶7 In determining whether a defendant's constitutional right to a speedy trial has been violated, we look to the four-part balancing test in ***Barker v. Wingo***, 407 U.S. 514, 530 (1972): (1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant. The

constitutional right to a speedy trial is not subject to bright-line determinations and must be considered based upon the totality of the circumstances that exist in any specific case. ***Id***. at 530-31. The appellate court must look to the totality of the circumstances; if, after doing so, the court finds that the defendant was denied the benefit of his constitutional right to a speedy trial, dismissal of the charges is required. *See* ***id***. at 522.

¶8 We consider first the length of the delay. The fourteen-month delay from the February 2, 2001 incident to the April 9, 2002 trial is presumptively prejudicial. *See* ***Green v. State***, 75 Wis. 2d 631, 636, 250 N.W.2d 305 (1977) (delay between a preliminary examination and trial of nearly one year was presumptively prejudicial).

¶9 We next consider the causes of the delay. As far as reasons attributed to the actions or inactions of the prosecution:

> [D]iffering weights are assigned to reasons that may be given for the delay:
>
> > A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.

Borhegyi, 222 Wis. 2d at 512 (quoting ***Barker***, 407 U.S. at 531). Likewise, any delay that is "attributable to accommodating the demands of the defendant" cannot be considered "in determining whether there has been a delay in trial such as to be presumptively prejudicial to his right to a speedy trial." ***Beckett v. State***, 73 Wis. 2d 345, 349, 243 N.W.2d 472 (1976).

¶10 The delays here were caused by actions of the prosecution, the defense, and the court. The initial gap of almost seven months between arrest and charging, from February 8, 2001, to August 28, 2001, was caused by the State.

¶11 The next segment of delay was caused by the defense. Saxby would have proceeded promptly to trial on December 3, 2001, but his defense attorney informed the court that he was not prepared to proceed, and he then moved to withdraw on December 20, 2001. Saxby's new counsel was appointed January 15, 2002, and a new trial date set for February 19, 2002. Consequently, the two and one-half month delay from December 3, 2001, to February 19, 2002, was caused by the defense. We do not agree with Saxby's argument that this delay is attributable to the government. Saxby asserts this is so because the record does not show that Attorney Grable ever told the court that Saxby agreed to waive his right to a speedy trial. However, once Attorney Grable contacted the court and said he would not be prepared for the December 3 trial date, the court could not move ahead with that trial date as long as Grable was representing Saxby. There is no indication the State or the court did not act expeditiously in obtaining the appointment of new counsel once Grable moved to withdraw.

¶12 The subsequent seven-week delay was caused by the trial court's busy calendar when Saxby's February 19 trial was rescheduled to April 9.

¶13 Accordingly, apart from the delay caused by the defense, this case was delayed about nine months. We view this as a relatively short delay. There is no indication that any of this delay was caused by an attempt to gain an unfair advantage.

¶14 The third factor is whether Saxby asserted his right to a speedy trial. ***Barker***, 407 U.S. at 530. The State does not dispute that Saxby asserted that right.

¶15 The last factor is whether the defendant suffered prejudice as a result of the delay. ***Id***. In assessing this factor, the court should look to the interests of the defendant that the speedy trial right is designed to protect. ***Id***. at 532. The three interests identified by the ***Barker*** Court are: (1) preventing oppressive pretrial incarceration; (2) minimizing the accused's anxiety and concern; and (3) limiting the possibility that the defense will be impaired. ***Barker***, 407 U.S. at 532. Saxby acknowledges the first interest is not relevant here. Beyond asserting the importance of the second and third interests generally, he does not explain how his interests in particular were adversely affected. We conclude there was no prejudice.

¶16 In summary, the delay was sufficient to trigger consideration of the second, third, and fourth ***Barker*** factors. However, Saxby was not denied his constitutional right to a speedy trial because the delay caused by the State and the court was relatively short, there is no indication that any delay was caused by the State in an attempt to gain an unfair advantage, and there is no reason to suspect resulting prejudice.

Ineffective Assistance of Counsel and Impartial Jury

Background

¶17 The venire panel consisted of twenty persons. During voir dire, the prosecutor asked the panel a number of questions, including:

> 3) Has anybody been involved in a bad relationship before?
>
> 4) Does anybody think or agree with the old saying: That jealousy is a green-eyed monster? Does anybody disagree with that?

> 5) Would you agree with the statement: Jealousy causes people to do things that they normally wouldn't do? Does everybody agree with that statement?
>
> ….
>
> 7) Has anybody had the unfortunate experience of dealing with what we all know as a bully—someone who takes advantage of their height, their weight, their size—has anybody had that experience?

Some venire panel members responded affirmatively by raising their hands to question three. The prosecutor followed up by asking whether a bad relationship might cause people to do things they normally would not. Venire panel members Wilson and Hegemeister responded "Yes." Panel member Hegemeister was later peremptorily struck from the jury pool; panel member Wilson went on to serve on the jury. Some venire panel members responded affirmatively to question seven by raising their hands. The prosecutor followed up by asking whether there is something unfair about someone using their physical advantages to bully others. Some panel members nodded their heads up and down in agreement. Panel member Banzhof responded affirmatively to the prosecutor's question asking whether her experience with bullies had been negative. Panel member Banzhof was not peremptorily struck from the jury pool. Saxby's counsel did not move to strike any juror for cause or ask any questions of the venire panel.

¶18 At trial, Flahive testified that he was getting a video out of Burns' car, which he was going to watch in her apartment with her and her roommate, when a person whom he did not know—Saxby—said, "What's up?" When Flahive turned around Saxby punched him on the side of his face, and, after Flahive fell to the ground, Saxby punched him three or four more times. According to Flahive, Saxby later apologized and said he thought Flahive was someone else. Burns' roommate testified that Burns and Saxby had recently

broken up. The roommate's testimony was that, while Flahive was still outside getting the video, Saxby came in and said to Burns, "I just beat the shit out of your new boyfriend"; when Saxby learned Burns and Flahive were not romantically involved, he apologized to Flahive. Saxby testified that he saw a stranger—Flahive—near Burns' car and, when he asked what Flahive was doing, Flahive turned and swung at him; he grabbed Flahive and slipped as he brought Flahive down; then he straddled Flahive and told him to "stay put."

¶19 After the jury returned its verdict of guilty, Saxby moved for a new trial on the ground that his counsel had been ineffective because the prosecutor asked "several provocative prosecution questions eliciting apparent subjective bias on the part of the venire panel, [and] [defense] counsel failed to ask a single question …."

¶20 At the ***Machner***[2] hearing, defense counsel testified she did not like the questions the prosecutor asked, but she did not believe they rose to the level of being objectionable. She also testified that, when it came time to use Saxby's peremptory strikes, she realized she did not have as much information as she should have had to be able to make a good decision on whom to strike. In response to the court's questions, defense counsel testified she was caught off guard by the prosecutor's questions, in particular the one about bullying, and she could not think of any questions to ask. In hindsight, she would have asked questions about how the venire panel would feel about self-defense, about the defense of others and of property, and who the venire panel would believe. Defense counsel's opinion of her own performance was that it was deficient.

[2] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

¶21 The trial court denied Saxby's motion for a new trial. The court concluded that defense counsel's failure to ask any questions was not deficient performance because the prosecutor's questions were innocuous and not very indicative of a panel member being prejudiced. The court reasoned that no one likes a bully and everyone who had had an experience with a bully would have had a negative experience, so an affirmative answer to the prosecutor's question on bullies would not have indicated prejudice on the part of a juror. The court also reasoned that, had the defense counsel pursued questioning on experiences with bullies, it might have been prejudicial to Saxby, because panel members might have gotten the idea that Saxby was a bully, whereas, if one heard his testimony and believed him, he was not.

¶22 The trial court concluded, in the alternative, that, even if defense counsel had performed deficiently, Saxby had not shown he was prejudiced as a result. The court reasoned that the evidence against Saxby was very strong, Flahive was a credible witness, and Saxby's testimony was discredited by the number of his prior convictions.

Discussion

¶23 In order to prevail on a claim of ineffective assistance of counsel, the defendant must show both that counsel's performance was deficient and that counsel's deficient performance so prejudiced the defense as to render the result of the trial unreliable. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). On appeal, we accept findings of fact by the trial court unless they are clearly erroneous. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845, 847 (1990). Whether counsel's performance was deficient and prejudicial is a question of law, which we review de novo. ***Id.*** at 128.

¶24 When a defendant alleges that counsel failed to sufficiently question jurors in a manner that would have discovered subjective bias, the issue of prejudice becomes whether counsel's performance resulted in a biased juror. ***State v. Koller***, 2001 WI App 253, ¶14, 248 Wis. 2d 259, 635 N.W.2d 838. To establish prejudice, the defendant must show that additional questioning would have resulted in the discovery of bias on the part of at least one of the jurors who actually decided the case. ***Id.***, ¶15. Neither an assertion of bias nor speculation is adequate: there must be evidence, such as that provided by calling the allegedly biased juror as a witness at the ***Machner*** hearing. ***Id.***

¶25 Saxby did not call any juror as a witness at the ***Machner*** hearing. He does not develop an argument based on the record from voir dire that either Juror Wilson or Juror Banzhof, or any other juror, was subjectively biased, and we conclude the record of the voir dire would not support such an argument. Instead, Saxby argues that we should presume prejudice, that is, presume a biased jury from defense counsel's failure to ask any questions at voir dire. As authority he relies on ***United States. v. Dellinger***, 472 F.2d 340, 367 (7th Cir. 1972), in which the defendant challenged the trial court's failure to ask questions at voir dire proposed by the defense. The Seventh Circuit concluded that, given the particular case, the trial court's failure to inquire into pretrial publicity and certain other matters proposed by the defendant violated the court's duty to "'to do what was reasonably practicable to enable the accused to have the benefit of preemptory challenge or to prevent unfairness in the trial.'" ***Id.*** at 370 (citation omitted). Saxby relies on the court's statement in ***Dellinger*** that the defendant need not show that jurors were in fact prejudiced, because the "focus is exclusively on whether the procedure used for testing impartiality created a reasonable assurance that prejudice would be discovered if present." ***Id.*** at 367. Saxby argues that there

is no reason to apply a different standard to voir dire conducted by the court than to voir dire conducted by defense counsel because both impact on the right to an impartial jury. Saxby does not discuss ***Koller***.

¶26 The Seventh Circuit in ***Dellinger*** did not, as Saxby suggests, automatically presume prejudice from the failure of the trial court to ask questions. Rather, the appellate court concluded the trial court's failure to ask particular questions, including questions the defense wanted asked, given the specific issues in the case before it, made that voir dire process deficient. In any event, we conclude that ***Koller***, not ***Dellinger***, establishes the standard we are to employ in deciding whether a defendant was prejudiced by the failure of defense counsel to ask questions at voir dire. Applying that standard, we conclude that Saxby has not shown that questioning by defense counsel would have resulted in the discovery of bias on the part of any juror. Because this conclusion resolves Saxby's claim of ineffective assistance of counsel against him, we do not decide whether defense counsel's failure to ask any questions was deficient performance. *See* ***Johnson***, 153 Wis. 2d at 128.

By the Court.—Judgment affirmed.

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