COURT OF APPEALS
DECISION
DATED AND FILED

May 20, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP626-CR **Cir. Ct. No. 2006CF2041**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT D. STEED,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: ROBERT DE CHAMBEAU, Judge. *Affirmed*.

Before Dykman, P.J., Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Robert Steed appeals from a judgment convicting him of first-degree reckless homicide, delivery of counterfeit heroin, and from two counts of delivery of heroin. He also appeals an order denying his postconviction motion in which he alleged ineffective assistance of trial counsel. Steed argues:

(1) the trial court erroneously exercised its discretion when it denied his request for a continuance; (2) the court erroneously exercised its discretion when it denied Steed's request to discharge his trial counsel without inquiring whether he wanted to represent himself; (3) Steed's counsel was ineffective for failing to object to the jury instruction on first-degree reckless homicide; and (4) counsel was ineffective for failing to seek severance of the homicide charge from the drug charges. We reject these arguments and affirm the judgment and order.

BACKGROUND

¶2 Steed was charged with causing the death of Elise Schnitzler by delivering heroin that resulted in her death, delivering counterfeit heroin to Francis Thompson and twice selling heroin to Samuel Wright. At Steed's December 9, 2006 arraignment, the court suggested a February 19, 2007 trial date. Steed's attorney indicated that she could not be ready in February and suggested a May or June trial date. The court then stated the trial would take place in April. Steed's counsel said she had some difficulty finding an expert and she had just received "another stack" of discovery. The court observed that Steed's initial appearance was September 1 and five months from the arraignment date should allow sufficient time for counsel to prepare.

¶3 On March 23, ten days before the scheduled trial, Steed's attorney filed a motion for a continuance, indicating that she was not prepared to proceed to trial, she had just received some "crucial exculpatory material in the form of lengthy phone records," some materials she received in discovery were not copies of original documents and contained errors, and she had not interviewed a witness because the address provided by the assistant district attorney was not valid. She indicated the biggest problem was due to Steed's incarceration in another county

which required at least five hours of her time to see him. On March 26, counsel submitted a letter indicating that she had a family emergency requiring her to go to Phoenix because her daughter had a baby by cesarean section. At a hearing held the next day, counsel stated that she had not had enough time to listen to five hours of recorded telephone conversations that the State intended to use in rebuttal. She again requested to be with her daughter stating "she's not [in] good shape."

¶4 The State responded that some of its witnesses had cancelled vacations, the State had purchased plane tickets and booked hotel rooms for witnesses and coordinated the appearance of five crime lab analysts for the trial. Regarding discovery, the State noted that the defense attorney had access to the jail records and that the recorded telephone conversations were only potential rebuttal evidence. The recordings had been turned over one week before the hearing and the assistant district attorney opined that five hours should have been sufficient time to review the recordings.

¶5 The court denied the motion for a continuance, indicating that the defense had five months to prepare and it was a "Herculean task" to arrange for the crime lab witnesses to be available. Counsel then stated "if you want me to withdraw, I will." The court stated it would not allow counsel to withdraw at that point.

¶6 On March 30, 2007, Steed's counsel filed a renewed motion for a continuance reciting the history of discovery in this case, reiterating counsel's travel difficulties, indicating that Steed had not yet listened to the recorded jail telephone calls, and stating that her investigator informed her that he would be out of the state from then through the trial. On April 2, counsel announced that she

was not ready to proceed. She received the coroner's report two weeks earlier and had not had time to do anything with it. The court indicated that the coroner's report was of little significance. Counsel again complained that she did not have adequate time to play all of the recorded phone conversations to Steed. Steed then spoke on his own behalf, asking for an additional month so he could discuss matters with his attorney. The court reiterated that it set trial four months after arraignment, eight or nine months after the initial appearance, and seven or eight months after the preliminary hearing. The court saw nothing unusual in the course of discovery and concluded four months was adequate time to prepare.

¶7 Steed then announced that he wished to discharge his attorney due to her not being prepared. He stated "I don't think she's ready. She has admitted to me that she is not ready, and I'm not going to trial with a counsel saying she's not ready. So I will just fire her. I don't want her." The prosecutor countered that Steed had stated in the recorded jail tapes that he was planning on dragging the case out for two years and had obtained advice from other inmates as to how to do this. The prosecutor further related that Steed had threatened witnesses by letter, and mouthed threats to an officer who had testified at the preliminary hearing. She said "I believe that the intent right now by Mr. Steed is to in fact extend his trial date, get a set-over, and in fact deal with it on the streets. I believe this is just another ploy for the set-over." The court found that Steed's attempt to discharge counsel was a ploy to delay the case. The court did not inquire whether Steed wished to represent himself.

¶8 At trial, Kellie Prager testified that she and Schnitzler went to a Madison hotel, expecting to receive drugs in exchange for sex with Steed. Steed provided the heroin that Schnitzler used, resulting in her death. In the morning, when Schnitzler was unresponsive, Steed drove them to Schnitzler's home where

they carried Schnitzler's body from his car to her home. Steed requested that his name be kept out of the affair, and attempted to remove records of phone calls made to him from Schnitzler's cell phone.

¶9 Christopher Davis, a long-term acquaintance and friend of Steed's, testified that on May 19, 2006, he and Steed discussed a news story about a woman dying from a drug overdose. Steed responded, jokingly, "my shit killin' people. My shit killed her." Another witness, Jackie Noyes, testified that she overheard Steed say "I got shit that kills."

¶10 Francis Thompson testified that he made a "controlled buy" from Steed in June 2006. The powder turned out not to contain any controlled substance. Thompson testified that Steed asked him if he injected the drug and Thompson answered, "Don't worry about me, I'm old school," to which Steed replied, "Well, be careful because people are droppin' from it."

¶11 Samuel Wright testified that he made two controlled buys of a half-gram of heroin from Steed on June 27 and June 30, 2006.

¶12 Steed testified on his own behalf, admitting that he sold counterfeit heroin to Thompson and admitting one of the two sales to Wright. He denied being at the hotel with Schnitzler or giving her heroin and denied being at Schnitzler's house. He also denied making any statements about his heroin killing anyone.

¶13 At the close of the evidence, the court read the standard jury instruction for first-degree reckless homicide, WIS JI—CRIMINAL 1021 (2006), without objection. The instruction indicated that first-degree reckless homicide by delivering a controlled substance has four elements:

> One, the defendant delivered a substance. Deliver means to transfer something from one person to another. Two, the substance was heroin. Three, the defendant knew or believed that the substance was heroin, a controlled substance….
>
> ….
>
> Four, Elise A. Schnitzler used the substance alleged to have been delivered by the defendant and died as a result of that use. This requires the use of the controlled substance—this requires that the use of the controlled substance was a substantial factor in causing the death.

¶14 The jury found Steed guilty of all four counts. In his postconviction motion, Steed alleged ineffective assistance of trial counsel for failing to object to the jury instruction for first-degree reckless homicide and for failure to move for severance of the homicide charge from the drug charges.[1]

DISCUSSION

¶15 The circuit court properly exercised its discretion when it denied Steed's counsel's request for a continuance. This court must balance Steed's right to adequate representation by counsel against the public interest in the prompt and efficient administration of justice. *See* ***State v. Leighton***, 2000 WI App 156, ¶27, 237 Wis. 2d 709, 616 N.W.2d 126. The trial court is accorded a great deal of latitude in scheduling trials and only an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay violates a defendant's right to assistance of counsel. ***Ungar v. Sarafite***, 376 U.S. 575, 589 (1964). Factors that the court should consider are:

> (1) The length of the delay requested;

[1] Other issues raised in the postconviction motion are not pursued in this appeal.

> (2) …Whether there is competent counsel presently available to try the case;
>
> (3) Whether other continuances had been requested and received by the defendant;
>
> (4) The convenience or inconvenience to the parties, witnesses and the court;
>
> (5) Whether the delay seems to be for legitimate reasons; or whether its purpose is dilatory; [and]
>
> (6) Other relevant factors.

State v. Lomax, 146 Wis. 2d 356, 360, 432 N.W.2d 89 (1988) (citation omitted).

¶16 The court appropriately balanced Steed's counsel's reasons for delay against the State's concern that police witnesses had cancelled family vacations and five crime lab analysts cleared their calendars to testify. The court found nothing unusual about the discovery process and appropriately found that counsel had adequate time to review the taped phone calls the State planned to use in rebuttal. Counsel's concern about receiving the coroner's report only two weeks before her motion did not present sufficient grounds for delay because the relevant document regarding cause of death was prepared by a pathologist. Steed's attorney visited him while he was in the Dane County jail and at the Dodge Correctional Center before trial, and there were many telephone conversations between them. Finally, counsel's need to be with her daughter was not adequately explained in the motion for a continuance, at the hearing or in the postconviction motion. Under these circumstances, the court appropriately considered the factors set out in ***Lomax***.

¶17 Steed contends that the circuit court did not inquire whether he wanted to represent himself when he indicated that he wanted to fire his attorney. Steed never asked to represent himself. The court has no obligation to inquire into

a defendant's desire to represent himself unless he clearly expresses that desire. ***State v. Darby***, 2009 WI App 50, ¶24, 317 Wis. 2d 478, 766 N.W.2d 770. The record supports the finding that Steed's request to fire his attorney was merely a part of his ploy to delay the trial.

¶18 Steed's argument that his counsel was ineffective for failing to object to the pattern jury instruction for first-degree reckless homicide fails for two reasons. Steed contends the fourth element requires the jury to find only that Elise Schnitzler used the substance *alleged* to have been delivered by Steed, suggesting that the State did not have to prove that Steed delivered the fatal dose of heroin. That argument was rejected in ***State v. Patterson***, 2009 WI App 161, ¶¶30-32, 321 Wis. 2d 752, 776 N.W.2d 602. The pattern jury instruction read as a whole correctly states the elements of the offense. Steed's argument is based on artificially isolating the fourth element from the remainder of the instruction. In addition, counsel's performance cannot be said to be deficient for relying on the pattern jury instruction prepared by the Wisconsin Criminal Jury Instructions Committee.

¶19 Steed also failed to establish ineffective assistance of counsel based on his attorney's decision not to seek severance of the homicide charge from the drug charges. Counsel testified at the postconviction hearing that her strategy was to have Steed admit to two of the charges in hopes of gaining credibility. Counsel's strategic decision, made with full knowledge of the law and facts is virtually unchallengeable. *See* ***Strickland v. Washington***, 466 U.S. 668, 690 (1984). In addition, Steed has not established any prejudice from his counsel's decision. Two of the three delivery counts would have been disclosed to the jury to provide context for Steed's statements that his heroin was killing people. Steed

has not established any likelihood that the result of the trial would have been different if the homicide charge had been severed. *See* ***id.*** at 694.

By the Court.—Judgment and order affirmed.

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