**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**November 5, 2015**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2014AP2538-CR** **Cir. Ct. No. 2012CF312**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**MATTHEW L. DENNIS,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Walworth County: DAVID M. REDDY, Judge. *Affirmed*.

Before Kloppenburg, P.J., Higginbotham and Blanchard, JJ.

¶1 PER CURIAM. Matthew Dennis appeals from a judgment of conviction of four counts of second-degree sexual assault of a child and from an order denying his motion for postconviction relief. He claims that his trial counsel was constitutionally deficient by failing to object to the amendment of the

information to add three counts, by failing to request a unanimity jury instruction, by failing to object at the jury trial to the admission of other acts evidence and a part of an expert's testimony, and by not protecting Dennis's right to a speedy trial. He also claims that the circuit court impermissibly excluded testimony and argument at the ***Machner***[1] hearing. We reject his claims and affirm the judgment and order.

## BACKGROUND

¶2 On June 30, 2012, the thirteen-year-old victim reported to police that Dennis had sexual contact with her on June 27 and 28, 2012. She indicated that while swimming Dennis put his hand inside her bikini top and grabbed her breast, put his hand inside her bikini bottom and attempted to put his finger in her vagina, and rubbed his exposed penis on her leg. Dennis threatened to hurt the victim if she told her family about his conduct. The victim indicated that the next day Dennis approached her in a bedroom where she was alone and put his hand under her shirt and on her breasts, forced his hand into her shorts and attempted to put his fingers in her vagina, and exposed his erect penis and rubbed it. The assaults occurred while the victim was visiting her older sister S., who was Dennis's girlfriend and shared a home with Dennis.

¶3 Dennis was originally charged with two counts of sexual assault of a child. Without objection to the prosecutor's motion to file a second amended information, Dennis was charged with three counts for alleged conduct on June 27, 2012, one for touching the victim's breast, one for touching her vagina, and one

[1] A ***Machner*** hearing addresses a defendant's ineffective assistance of counsel claim. *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

for touching her leg with his penis, and two counts for alleged conduct on June 28, 2012, one for touching the victim's breasts and another for touching her vagina.

¶4 The prosecution moved pretrial to admit other acts evidence that Dennis started dating S. when S. was fourteen and Dennis was twenty-one and that when the victim's older sister A. was fourteen, Dennis slapped A. on the buttocks and told A. she had a bubble butt. When the motion was heard, the defense indicated that it would not oppose the prosecution's motion and the circuit court did not make any explicit analysis regarding the admissibility of the proposed other acts evidence. Subsequently, the prosecutor filed an amended motion on other acts evidence to include evidence that when the victim was ten, Dennis "accidently" touched and rubbed up against the victim and told the victim he would hurt her if she told anyone about the "accidental" contact.[2]

¶5 A jury trial was held on January 30 and 31, 2013. The victim's older sister, I., testified that after the victim had a fight with Dennis on June 29, 2012, the victim revealed the assaults to her. I. and A. testified to what the victim told them about the assaults. They both testified about how the victim's demeanor changed on the day of each assault after the assault occurred. They also testified that Dennis made them feel uncomfortable because he would talk about his sex life and pornography. During her trial testimony the victim recanted her statement to police and testified that Dennis did not sexually assault her in any manner. She indicated that I. did not like Dennis and came up with a plan to get him arrested

[2] Dennis alleged in his postconviction motion that the evidence that he had "accidental" contact with the victim when she was ten was raised for the first time at trial. Although the hearing on the initial motion to introduce other acts evidence was held October 8, 2012, the record includes the prosecution's October 15, 2012 amended motion to introduce other acts evidence which outlined the "accidental" contact evidence.

and told her what to say. The victim also denied any recollection of an instance where Dennis attempted to touch her when she was ten. An expert witness testified that delayed reporting is common and that a number of factors can cause a victim to recant. During the defense's case, the jury viewed two videos of interviews conducted June 30, 2012, one with the victim, I., and an officer, and the other a short follow-up interview with the victim alone. The jury found Dennis guilty of four counts and acquitted him of the charge that he rubbed his penis against the victim while swimming on June 27, 2012.

¶6 Dennis moved for postconviction relief alleging ineffective assistance of trial counsel. He alleged that trial counsel was deficient for not challenging the amended information as multiplicitous and for not requesting a unanimity instruction, for failing to object to other acts evidence and other impermissible evidence at trial, and for failing to move to challenge the prosecution's expert's qualifications and testimony or requesting an independent psychological examination of the victim so the defense could present its own expert. Trial counsel testified at the ***Machner*** hearing that he did not object to the other acts evidence because he would have the opportunity to confront the witnesses and it played into the defense theory that I. had plotted against Dennis. Counsel also believed that the evidence would be admitted over an objection. As to amendment of the information to add three counts, counsel indicated in part that he had no basis for an objection because the defense was not prejudiced. Counsel did not object to the expert testimony because he believed it added very little to the prosecution's case and he had no expert to counter with. He also indicated that he was not aware of any legal basis to request a psychological examination of the victim. Counsel was asked about the failure to object to the expert's testimony that it was exceptionally rare for a child victim to lie about being sexually

assaulted. Counsel answered that by not objecting, he sought to leave an impression with the jury that the expert's testimony mattered very little and he did not want to draw attention to the testimony. At the hearing, Dennis tried to elicit trial counsel's testimony about a known tattoo near Dennis's genital area and why counsel did not have Dennis testify about it. The circuit court sustained the prosecutor's objection that the line of questioning was beyond the issues raised in the postconviction motion. The circuit court also refused to consider Dennis's argument that the state's expert witness violated ***State v. Haseltine***, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984).

¶7 The circuit court determined that the charges were not multiplicitous, that the other acts evidence was properly admitted for the purpose of motive, that the expert's qualifications were sufficient to permit her testimony, and that there was no basis for the defense to request an examination of the victim. The court also found that trial counsel had strategic reasons for not objecting to the amendment of the information and the admission of the other acts evidence. It found that Dennis failed to show that a defense expert could be found who would contradict the prosecution's expert. Dennis's postconviction motion was denied.

## STANDARD OF REVIEW

¶8 The first argument in Dennis's brief is that his protection against double jeopardy was violated when the circuit court granted the prosecution's motion to amend the information to add three counts. As the State points out, Dennis did not object to the motion for leave to file a second amended information and forfeited the issue for appeal. *See* ***State v. Perry***, 215 Wis. 2d 696, 704, 573 N.W.2d 876 (Ct. App. 1997). Therefore, we review nearly all of Dennis's

appellate arguments under the rubric of ineffective assistance of trial counsel. ***State v. Carprue***, 2004 WI 111, ¶47, 274 Wis. 2d 656, 683 N.W.2d 31.

¶9 In order to establish that trial counsel was ineffective, the defendant must show that counsel's representation was deficient and prejudicial. ***State v. Thiel***, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305. The test for the performance prong is whether counsel's assistance was reasonable under the facts of the particular case, viewed as of the time of counsel's conduct. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 636-37, 369 N.W.2d 711 (1985). Under the second prong of the test, the question is whether counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable trial outcome. *See* ***id.*** at 640-41. An error is prejudicial if it undermines confidence in the outcome. *See* ***id.*** at 642.

¶10 Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. ***Thiel***, 264 Wis. 2d 571, ¶21. The circuit court's findings of what counsel did and the basis for the challenged conduct are factual and will be upheld unless clearly erroneous. ***Id.*** However, whether counsel's conduct amounted to ineffective assistance is a question of law which we review de novo. ***Id.***

¶11 We may reach the merits of some of the issues under the ineffective assistance claim because only if there was actual error could counsel's performance be deemed deficient or prejudicial. *See* ***State v. Berggren***, 2009 WI App 82, ¶21, 320 Wis. 2d 209, 769 N.W.2d 110 (trial counsel was not deficient for deciding not to make a meritless objection), ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 (counsel's failure to present legal challenge is not deficient performance if challenge would have been

rejected). In this opinion, the applicable standard of review on the merits will be stated within the relevant discussion of the alleged claim of ineffective assistance of counsel.

¶12 Dennis does not identify the standard of review for his claim that at the ***Machner*** hearing the circuit court impermissibly excluded testimony and argument on claims of ineffectiveness that Dennis did not raise in his postconviction motion. He characterizes the limitation on testimony as a violation of his due process right to make a record for appeal. The State also does not suggest a standard of review.

¶13 We conclude that the circuit court's decision to limit evidence and argument at the hearing should be reviewed under an erroneous exercise of discretion standard. Because Dennis did not allege any facts in his postconviction motion with respect to the two claims on which the circuit court precluded evidence and argument, the circuit court had discretion to determine whether a hearing could be conducted on those claims. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433 (the circuit court has discretion to grant or deny a hearing when a postconviction motion does not raise facts sufficient to entitle the defendant to relief). Additionally, the scope of the hearing, including its length and what constitutes proper argument, is within the circuit court's discretion to control its docket and calendar. *See* ***State v. Chamblis***, 2015 WI 53, ¶63, 362 Wis. 2d 370, 864 N.W.2d 806 ("a circuit court should likewise have the discretion to say enough is enough"); ***State v. Anthony***, 2015 WI 20, ¶75, 361 Wis. 2d 116, 860 N.W.2d 10 (recognizing "the circuit court's ability to control the presentation of evidence so as to ensure the fairness and reliability of the criminal trial process.").

## DISCUSSION

### *Trial Counsel's Failure to Object to Amendment of the Information*

¶14 Dennis argues that he was prejudiced by trial counsel's failure to object to the amendment of the information because the amendment caused a three and one-half month delay in the trial, he was exposed to three additional felony charges that made him look much worse to the jury, and the charges were multiplicitous. His first contention rests on a mischaracterization of the record. As the State explains, the October 17-19, 2012 trial date was reset to November 6-9, 2012, on Dennis's motion for a continuance. The motion to amend the information was taken up and granted after Dennis's requested continuance was granted. The November 2012 trial date was rescheduled to January 30, 2013 on a continuance granted because two child witnesses could not be procured for trial. The amendment to the information did not cause the delay in the trial and Dennis cannot claim trial delay as proof of prejudice for trial counsel's failure to object to the amendment.

¶15 As for his looks-worse argument, this is not an independent ground to prevent amendment of the information.

¶16 As to multiplicity, Dennis invokes a "unit-of-prosecution" challenge which questions whether the prosecution improperly subdivided the same offense into multiple counts of violating the same statute. *See* ***State v. Kelty***, 2006 WI 101, ¶16, 294 Wis. 2d 62, 716 N.W.2d 886. Whether a multiplicity violation exists is a question of law. ***State v. Davison***, 2003 WI 89, ¶15, 263 Wis. 2d 145, 666 N.W.2d 1.

> We examine multiplicity claims using a two-part test. First, we consider whether the charged offenses are

> identical in law and in fact. Then, we consider whether the legislature intended to authorize multiple punishments. If the first part of the test reveals that the charged offenses are not identical in law and in fact, a presumption arises that the legislature did not intend to preclude cumulative punishments.
>
> Only the first part of the multiplicity analysis implicates a defendant's right to be free from double jeopardy. "Once it is determined that the offenses are different in law or fact, double jeopardy concerns disappear." "The second factor of the test is solely a question of statutory interpretation. Criminal charges that are multiplicitous under this factor are impermissible because they contravene the will of the legislature."

***State v. Jacobsen***, 2014 WI App 13, ¶¶26-27, 352 Wis. 2d 409, 842 N.W.2d 365 (2013) (citations omitted) (quoting ***State v. Grayson***, 172 Wis. 2d 156, 159 n.3, 493 N.W.2d 23 (1992)).

¶17 Here the charges are identical in law because they are all under the same statute. Dennis was charged under WIS. STAT. § 948.02(2) (2013-14).[3] We next address whether the offenses are identical in fact. In making this determination, we consider the nature of the acts charged, the time between the acts, where the acts are alleged to have taken place, whether each of the acts represented a separate volitional decision by the defendant to commit those acts, and, also, what the legislature intended to be the permissible extent of punishment. ***Harrell v. State***, 88 Wis. 2d 546, 572-574, 277 N.W.2d 462 (Ct. App. 1979). "The presence and absence of a single factor or a combination of factors other than the nature of the act is not conclusive of the issue." ***Id.*** at 572.

[3] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶18 We conclude that the charges are different in fact. Although all of Dennis's alleged conduct in each instance occurred during a short period of time and at the same location each day, it involved touching different parts of the victim's body. Moreover, the body parts were not in close proximity and required Dennis to navigate different types of clothing. "Invasion of different intimate parts of the victim's body demonstrates [different] kinds and means of sexual abuse or gratification and therefore different acts." ***Id.*** at 573. Each alleged act of sexual contact constituted a separate, volitional act. *See* ***State v. Eisch***, 96 Wis. 2d 25, 36, 291 N.W.2d 800 (1980).

¶19 The second part of the multiplicity analysis requires us to consider whether the legislature intended to preclude cumulative punishments. ***Jacobsen***, 352 Wis. 2d 409, ¶31. The presumption that the legislature did not intend to preclude cumulative punishments applies and Dennis bears the burden of demonstrating otherwise. *See* ***State v. Ziegler***, 2012 WI 73, ¶74, 342 Wis. 2d 256, 816 N.W.2d 238.

¶20 Dennis does not address legislative intent except to argue that because his conduct was different from the distinct and separate rapes at issue in ***Harrell***, the legislature in enacting WIS. STAT. § 948.02(2) did not intend for someone alleged to have committed these acts to be punished multiple times. That argument does not satisfy Dennis's burden of rebutting the presumption that the legislature intended multiple punishments. Moreover, our Supreme Court has reviewed the relevant statutory language and legislative history, the nature of the proscribed conduct, and the appropriateness of multiple punishments and concluded that "the nature of the conduct proscribed by WIS. STAT. § 948.02(2) renders cumulative punishments especially appropriate." ***Ziegler***, 342 Wis. 2d 356, ¶¶74, 77.

¶21 The charges were not multiplicitous. Had trial counsel made an objection to the amendment of the information on that ground, it would have been unsuccessful. Trial counsel was not deficient for not making a meritless objection. *See* ***Berggren***, 320 Wis. 2d 209, ¶21.

¶22 In sum, trial counsel was not ineffective for not objecting to the amendment of the information.

*Trial Counsel's Failure to Request Unanimity Instruction*

¶23 Within his claim of multiplicity, Dennis argues that his trial counsel should have requested a unanimity instruction and that he was prejudiced because the jury was not informed to reach unanimous verdicts. The claim is puzzling in light of the amended information, which charged each act of sexual contact separately.[4] The jury was instructed separately on each of the five acts of sexual contact. The jury was given separate verdict forms for each count. There was no risk that the jury would not agree on the nature of the act constituting each charge. A unanimity instruction was not necessary and trial counsel was not ineffective for not requesting it.

*Trial Counsel's Failure to Object to Other Acts Evidence*

¶24 We conclude that Dennis's claim that trial counsel was ineffective for not objecting to other acts evidence also fails. Dennis identifies various points

[4] In his postconviction motion, Dennis argued that trial counsel should have requested a unanimity instruction in place of the amendment of the information. He does not advance the claim in that manner on appeal. We have concluded that the information was properly amended. There was no basis for trial counsel to request a unanimity instruction instead of amendment.

of testimony as other acts evidence. To address his claim, we divide the evidence into two groups:

Group A:

- Testimony by I., A., and the victim that Dennis was in an intimate relationship with their sister S. when S. was fourteen years old and Dennis was twenty-one.
- I.'s testimony that Dennis would talk about his sex life with S.
- A.'s testimony that when she was fourteen years old Dennis slapped her butt and told her she had a bubble butt.
- A.'s testimony that Dennis talked about pornography.
- The attempt to elicit testimony from the victim that Dennis had inappropriately touched her when she was ten years old.

Group B:

- I.'s testimony that she did not approve of Dennis's relationship with her sister.
- I.'s and A.'s testimony that Dennis made I. and A. feel uncomfortable.

¶25 Other acts evidence is properly admitted when it is offered for a permissible purpose other than the prohibited propensity purpose, when it is of consequence to the fact or proposition that it is offered to prove and is probative of that fact or proposition, and when its probative value is not substantially outweighed by the risk of unfair prejudice. *See* WIS. STAT. §§ 904.04(2)(a),

904.01; *see also* ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 785-86, 576 N.W.2d 30 (1998). In child sexual assault cases, "the greater latitude rule permit[s] a more liberal admission of other crimes evidence" and the rule applies to each prong of the ***Sullivan*** analysis. ***State v. Marinez***, 2011 WI 12, ¶20, 331 Wis. 2d 568, 797 N.W.2d 399 (quoted source omitted). We review the decision to admit other acts evidence for a proper exercise of discretion. ***Id.***, ¶17.

¶26 All of the other acts evidence was offered to show Dennis's intent, motive, and absence of mistake or accident. Dennis argues that intent and motive were not permissible purposes because the prosecution was not required to prove intent and the defense was that the allegations were fabricated and the defense did not contest that the alleged touching was for a purpose other than sexual gratification. However, the charges required the prosecution to prove that the sexual contact was for the purpose of sexual gratification or sexual humiliation. *See* WIS. STAT. §§ 948.01(5)(a), 948.02(2). The theory of defense that the victim's accusation was a fabrication did not relieve the prosecution of the obligation to prove the purpose of the contact. In this case, motive was an appropriate purpose for admission of other acts evidence. *See* ***State v. Hurley***, 2015 WI 35, ¶¶73, 74, 361 Wis. 2d 529, 861 N.W.2d 174 (motive is relevant to purpose and the desire to achieve sexual gratification).

¶27 We turn to consider whether the evidence in Group A was probative of motive as required by the second step of the other acts analysis. Similarity between the charged offense and the other acts is the touchstone of relevance. ***Id.***, ¶79. "Other-acts evidence is particularly relevant in child sexual assault cases because an average juror likely presumes that a defendant is incapable of such an act." ***Id.***, ¶59. The Group A evidence raises reasonable inferences about Dennis's desire and willingness to actively engage in sexually provocative contact with

teenage girls. The charged crimes involve sexually provocative contact with a teenage girl. The evidence has the requisite linkage to the charged crimes and is probative of the proposition that Dennis's contact with the victim was for the purpose of sexual gratification. It also aids the jury in overcoming the presumption that no adult would have sexual contact with a child.

¶28 The final consideration is whether the probative value of the Group A evidence was substantially outweighed by the danger of unfair prejudice. Unfair prejudice results when the evidence has a tendency to influence the jury by improper means, appeal to its sympathy, arouse its sense of horror, promote its desire to punish, or otherwise cause the jury to base its decision on extraneous considerations. *See* ***Sullivan***, 216 Wis. 2d at 789-90. The other acts evidence admitted here was not as serious as the charged crimes. The incidents were not likely to influence the jury's decision by appealing to its sense of sympathy or horror.

¶29 We conclude that the other acts evidence in Group A was properly admitted. Dennis was not prejudiced by trial counsel's failure to object to the Group A evidence.

¶30 As to the Group B evidence, we do not engage in the other acts analysis to determine if trial counsel was ineffective in not objecting to admission of that evidence. We conclude that the Group B evidence was irrelevant and therefore inadmissible. And, we assume without deciding that trial counsel's failure to object to the Group B evidence was deficient performance.

¶31 However, Dennis's ineffective assistance claim regarding the Group B evidence fails on the prejudice prong. In light of the other evidence, including the properly admitted Group A other acts evidence, our confidence in the outcome

is not undermined. The evidence of disapproval of Dennis's relationship with S. and that Dennis made the victim's sisters uncomfortable was trivial and unlikely to influence the jury. This is especially true when compared to the properly admitted evidence that Dennis had an intimate relationship with a teenage girl and previously slapped a teenage girl on the butt. Further, Dennis used I.'s disapproval and discomfort to promote his theory of defense, namely, that I. put the victim up to making false allegations. Dennis was not prejudiced by the unobjected to inadmissible Group B evidence.

*Trial Counsel's Failure to Object to State's Expert Testimony*

¶32 Dennis argues that his trial counsel was ineffective for failing to object to testimony from the prosecution's expert witness on redirect examination that it is exceedingly rare for a child to lie about being sexually assaulted. Dennis contends that the testimony was objectionable because it violated ***Haseltine***, 120 Wis. 2d at 96, which holds that a witness, expert or otherwise, may not testify that another witness is telling the truth. He also argues that the expert indirectly violated the ***Haseltine*** rule when she testified as to the reasons that victims recant their statements. Although the circuit court refused to consider this aspect of Dennis's ineffective assistance claim, we are able to do so because whether the testimony constituted improper comment on the credibility of another witness is a question of law which we decide independently of the circuit court. ***State v. Davis***, 199 Wis. 2d 513, 519, 545 N.W.2d 244 (Ct. App. 1996).

¶33 The expert's testimony about the reasons why victims may recant accusation was properly admitted. ***Haseltine***, 120 Wis. 2d at 96-97, recognizes that such evidence is admissible and assists the jury in understanding common behaviors of sexual assault victims.

¶34 We disagree with Dennis's characterization that the expert's testimony that it is exceedingly rare for a child to lie about sexual assault was tantamount to an opinion that the victim in this case originally told the truth and that her recantation should be disbelieved. The expert did not relate her testimony to the victim in this case and acknowledged that she had never met or interviewed the victim or any parties in this case. The expert did not even hint that she believed the victim in this case. The expert's testimony was not objectionable under ***Haseltine***. Trial counsel was not ineffective for not objecting. *See* ***Berggren***, 320 Wis. 2d 209, ¶21.

*Trial Counsel's Failure to Protect Dennis's Right to a Speedy Trial*

¶35 Dennis argues that his trial counsel failed to protect his right to a speedy trial. We deem this issue raised for the first time on appeal. It was not raised in Dennis's postconviction motion and trial counsel was not asked any questions about it. The State also fails to address the issue. This court generally does not address issues raised for the first time on appeal. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997). We do so here because the claim can be resolved on the existing record.

¶36 Dennis cites to WIS. STAT. § 971.10(2)(a), which provides a statutory right to a speedy trial. It requires trial to start within ninety days of a defendant's demand for a speedy trial. WIS. STAT. § 971.10(2)(a). Section 971.10(3) sets forth limitations on the granting of a continuance. Dennis makes a lengthy argument to the effect that, under the factors set forth in § 971.10(3)(b), the circuit court was not permitted to grant a continuance and postpone the trial until January 30, 2013. Dennis argues that trial counsel was ineffective for not pursuing avenues to protect his right to a speedy trial and in failing to object to

motions that caused unreasonable delay and tactical advantage to the prosecution. Dennis asks for a new trial based on the statutory violation and that he be released pending a new trial.

¶37 His claim of ineffective counsel is a nonstarter because trial counsel did object to the continuance of the November 6, 2012 trial date, the last day to commence the trial within the statutory time for a speedy trial under WIS. STAT. § 971.10. When it became apparent that the trial could not start that day because two child witnesses could not be procured for attendance, trial counsel asserted Dennis's right to be released because the ninety-day statutory requirement was not satisfied. The circuit court examined the competing interests and properly exercised its discretion in granting the continuance and denying Dennis's motion for release.

¶38 When the trial scheduled for November 6, 2012 was continued, trial counsel asked for dismissal based on the constitutional right to a speedy trial. The circuit court required Dennis to file a formal motion if he wanted to assert the constitutional violation. Trial counsel did not file a motion asserting a constitutional speedy trial violation. Moreover, post-arrest delay is not presumptively prejudicial until delay between arrest and trial approaches a year in length. ***State v. Urdahl***, 2005 WI App 191, ¶¶12, 15, 286 Wis. 2d 476, 704 N.W.2d 324. Dennis was arrested June 30, 2012, and his trial started on January 30, 2013. The delay of only seven months was insufficient to make a constitutional claim viable. Trial counsel was not ineffective.

*Circuit Court Limiting Hearing to Issues Raised in Postconviction Motion.*

¶39 The circuit court limited Dennis's questioning at the ***Machner*** hearing to issues raised in his postconviction motion. Consequently the circuit

court did not allow questions about trial counsel's knowledge of a tattoo near Dennis's genital area or argument on the claimed ***Haseltine*** violation by the expert witness. Dennis argues that because the court granted a hearing on his postconviction motion, it was a due process violation to limit his ability to develop a record for appeal on any issues he wished to pursue on the day of the hearing. He requests that the cause be remanded for a new ***Machner*** hearing on the two issues.

¶40 Contrary to Dennis's claim, the fact that the circuit court granted an evidentiary hearing did not open the door for any and all issues Dennis wished to pursue at the hearing. "The evidentiary hearing is not a fishing expedition to discover ineffective assistance; it is a forum to prove ineffective assistance. Both the court and the State are entitled to know *what* is expected to happen at the hearing, and *what* the defendant intends to prove." ***State v. Balliette***, 2011 WI 79, ¶68, 336 Wis. 2d 358, 805 N.W.2d 334 (alteration in original).

¶41 The right to present relevant and competent evidence is a corollary principle to the due process right to a fair opportunity to defend against the criminal charges *at trial*. *See* ***State v. Johnson***, 118 Wis. 2d 472, 479, 348 N.W.2d 196 (Ct. App. 1984). Even if a concomitant right exists for postconviction proceedings, such a right is not absolute and it may bow to other legitimate state interests in the criminal process. *See* ***id.*** One such interest is fairness.

> The adversary process could not function effectively without adherence to rules of procedure that govern the orderly presentation of facts and arguments to provide each party with a fair opportunity to assemble and submit evidence to contradict or explain the opponent's case. The trial process would be a shambles if either party had an absolute right to control the time and content of his witnesses' testimony.

***Taylor v. Illinois***, 484 U.S. 400, 410-11 (1988).

¶42 In sustaining the prosecutor's objection, the circuit court explained that fairness required notice of the claims of ineffective assistance of counsel so that the prosecution could adequately prepare and respond. This was a proper consideration. *See* ***Anthony***, 361 Wis. 2d 116, ¶75 (the circuit court is to ensure the fairness and reliability of criminal proceedings). The court properly exercised its discretion in limiting the presentation of evidence at the ***Machner*** hearing.

*By the Court.*—Judgment and order affirmed.

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