COURT OF APPEALS
DECISION
DATED AND FILED

April 6, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1808-CR **Cir. Ct. No. 2010CF220**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER J. TRIOLO,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waupaca County: JOHN P. HOFFMANN, Judge. *Affirmed*.

Before Lundsten, Sherman and Blanchard, JJ.

¶1 PER CURIAM. A jury found Christopher J. Triolo guilty of one count of second-degree sexual assault of a child and one count of felony bail jumping. Triolo's first trial ended in a mistrial, and he was convicted after a second trial. Before the second trial, the circuit court denied Triolo's motion to

dismiss based on a violation of his constitutional right to a speedy trial. In a postconviction motion, Triolo argued that his trial counsel was ineffective for not arguing that the second trial was barred by double jeopardy. The circuit court denied Triolo's postconviction motion. Triolo appeals, raising both double jeopardy and speedy trial arguments. We affirm.

DOUBLE JEOPARDY

¶2 As noted above, Triolo's first trial ended in a mistrial. Several months later, Triolo was retried and found guilty. Triolo contends that the second trial violated his constitutional right to be free from double jeopardy.

¶3 More specifically, Triolo argues that when, on the third day of his first trial, he requested dismissal with prejudice and the circuit court instead granted a mistrial, double jeopardy attached because the prosecutor argued in favor of a mistrial without demonstrating a "manifest necessity" for a mistrial. *See* ***State v. Seefeldt***, 2003 WI 47, ¶19, 261 Wis. 2d 383, 661 N.W.2d 822 ("If a trial is terminated without manifest necessity and over the defendant's objection, the State is not permitted to commence a second trial against the defendant.").

¶4 Triolo's argument is flawed because Triolo fails to come to grips with the fact that his attorney, not the prosecutor, requested the mistrial. Double jeopardy does not bar a retrial when a defendant successfully requests a mistrial.[1] ***State v. Hill***, 2000 WI App 259, ¶11, 240 Wis. 2d 1, 622 N.W.2d 34. The record

[1] Double jeopardy does bar retrial in cases of "prosecutorial overreaching," that is, "if the prosecutor acted with intent to gain another chance to convict or to harass the defendant with multiple prosecutions." ***State v. Hill***, 2000 WI App 259, ¶¶11-12, 240 Wis. 2d 1, 622 N.W.2d 34. On appeal, Triolo argues that the mistrial was ordered over his objection; he does not argue that the "prosecutorial overreaching" exception applies.

here plainly shows that, although Triolo's trial counsel expressed a strong preference for dismissal with prejudice, counsel simultaneously requested a mistrial in the alternative.

¶5 The first trial was filled with procedural missteps, some directly attributable to the State and others simply happenstance occurrences. Triolo responded by requesting a mistrial on several occasions. Triolo first moved for a mistrial when a witness stated that the victim's mother had visited Triolo in jail. Triolo again moved for a mistrial when the State received documents, in the middle of trial, that were relevant to the chain of custody of DNA evidence. Triolo moved for a mistrial after a juror appeared to be sleeping. Triolo moved for a mistrial after he learned that a detective who had been present when the victim was interviewed by a social worker had not prepared a report about the interview. The detective was on vacation and unavailable at trial. The circuit court denied all of these mistrial motions.

¶6 On the third day of trial, there was yet another problem that arose through no fault on Triolo's part. Another chain of custody problem arose relating to DNA evidence and the prosecutor informed the court that the detective who had sent the DNA evidence to the State Crime Lab and, thus, might clear up this chain of custody issue was on vacation.[2] Triolo's attorney requested dismissal:

> My motion is for a dismissal now.…
>
> I mean, this issue with chain of custody, it's so important on a DNA case, especially one like this, and it's so screwed up. It's grounds for dismissal, a flat-out

[2] The State had a difficult time proving the chain of custody for the DNA evidence. The State had already called and recalled several witnesses in an effort to establish the chain of custody.

> dismissal. I know the jury is sworn. It's a dismissal with prejudice because of how the investigation was screwed up and how the evidence was handled by all the law enforcement officers.

¶7 After the prosecutor responded, the court stated: "The motion before this court is, as I understand it, is for dismissal, not a mistrial at this point." Triolo's attorney then clarified that, while dismissal was the most appropriate course, counsel was also, alternatively, requesting a mistrial:

> Well, I asked for mistrial numerous times. *I think it's still warranted.* Here, because of the evidence handling, a dismissal is the most appropriate action before the court.

(Emphasis added.)

¶8 Further discussion ensued with the prosecutor offering the excuse that the sheriff's department had not provided her with the reverse side of an inventory form. Triolo's counsel again argued for dismissal:

> I will ask a rhetorical question: How many times do we have to be here and have [the State] find evidence? I'm sick of it, I'm – it's a waste of my time. As the court knows, I'm appointed by the State Public Defender's office. I'm – it's a waste of State resources, it's a waste of County resources if we do continue this trial. I think the only grounds are for a dismissal, that's the sanction against both the State, in particular the sheriff's department. They will learn their lesson.

¶9 The prosecutor then suggested a continuance, to give Triolo time to respond and "prepare a proper defense." The court asked Triolo's attorney to "summarize the various motions you have made for mistrial." After providing a summary, Triolo's attorney stated:

> I have asked for mistrial plenty of times. I don't know – in my opinion, a majority of them are warranted. I don't ask for mistrials very often.… Chain of custody is important. If it wasn't important, then we wouldn't have to get into this.

> When you are dealing with DNA evidence, you are dealing with issues of contamination, of tampering. Although, I understand that the packages were properly labeled and sealed, but I don't know if [a detective] saw the package as sealed or later sealed it and then – there is a gap there. And any time you have a gap with any DNA evidence, it takes into consideration the credibility of that evidence, the weight that evidence deserves.
>
> And, ultimately here, these are – are things that I didn't anticipate at a trial. *They are legitimate defense arguments and I think I feel dismissal is appropriate. At a minimum, I feel a mistrial is appropriate. I believe those are my motions.*

(Emphasis added.) After the prosecutor responded, the court took a short recess.

¶10 When court resumed, the prosecutor offered to stipulate to a mistrial in lieu of dismissal. Triolo's attorney responded:

> I still feel dismissal is appropriate. I think that it's necessary. This is an old case. They have had their opportunity to present the evidence. All a mistrial would do is allow the State to cure any of their defects and, basically, the defendant would be – would be stuck. To be honest, I didn't think it was going to be an issue in this case, but sometimes issues show up.

The circuit court denied Triolo's request for dismissal and, instead, granted "a motion for mistrial."

¶11 The above-quoted facts show that, while Triolo strongly preferred dismissal, his attorney also sought, in the alternative, a mistrial. Indeed counsel argued that, "[a]t a minimum, I feel a mistrial is appropriate."

¶12 The prosecutor, on the other hand, never affirmatively requested a mistrial. Rather, the prosecutor repeatedly opposed the mistrial motions and only offered to stipulate to a mistrial to avoid the more severe sanction of dismissal

with prejudice. In the face of that offer, Triolo did not withdraw his mistrial motion nor did he object when the court granted a mistrial.[3]

¶13 However strong Triolo's preference for dismissal, it does not negate the fact that Triolo was the source of the mistrial request granted by the circuit court. Accordingly, double jeopardy did not bar retrial.[4] *See* ***Hill***, 240 Wis. 2d 1, ¶11.

SPEEDY TRIAL

¶14 Triolo argues that his right to a speedy trial under the Sixth Amendment to the United States Constitution and under Article I, sec. 7 of the Wisconsin Constitution was violated.

¶15 Four factors are used to determine whether a defendant has been denied his right to a speedy trial: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) the prejudice, if any, resulting from the delay. ***Barker v. Wingo***, 407 U.S. 514, 530 (1972); ***Day v. State***, 61 Wis. 2d 236, 244, 212 N.W.2d 489 (1973), *cert. denied*, 417 U.S. 914 (1974). "The right to a speedy trial ... is not subject to bright-line determinations and must be considered based upon the totality of circumstances that exist in any specific case." ***State v. Borhegyi***, 222 Wis. 2d 506, 509, 588

[3] At a subsequent status conference, Triolo's attorney acknowledged that he "used the term mistrial" in conjunction with his request for a dismissal and, therefore, there were no grounds to seek a dismissal of the case before the second trial.

[4] Triolo couches his double jeopardy argument in an ineffective assistance of counsel context—that his trial attorney was ineffective for not raising a double jeopardy objection to the second trial. We conclude that the mistrial was ordered at Triolo's request and a double jeopardy objection would have failed. *See* ***Hill***, 240 Wis. 2d 1, ¶11. Therefore, counsel was not ineffective in failing to raise a double jeopardy objection.

N.W.2d 89 (Ct. App. 1998). "[T]he test weighs the conduct of the prosecution and the defense and balances the right to bring the defendant to justice against the defendant's right to have that done speedily." ***State v. Urdahl***, 2005 WI App 191, ¶11, 286 Wis. 2d 476, 704 N.W.2d 324. We review a defendant's claim that he or she was denied the right to a speedy trial de novo. ***Borhegyi***, 222 Wis. 2d at 508.

¶16 The threshold question is whether the length of delay is presumptively prejudicial. That question must be answered in the affirmative before inquiry can be made into the remaining three factors. ***Hatcher v. State***, 83 Wis. 2d 559, 566-67, 266 N.W.2d 320 (1978). Here, the State concedes that the approximate 27-month delay in holding a trial is presumptively 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"). Thus, we examine the remaining factors.

¶17 The next ***Barker*** factor to consider is the reason for the delay.

> When considering the reasons for the delay, courts first identify the reason for each particular portion of the delay and accord different treatment to each category of reasons. A deliberate attempt by the government to delay the trial in order to hamper the defense is weighted heavily against the State, while delays caused by the government's negligence or overcrowded courts, though still counted, are weighted less heavily. On the other hand, if the delay is caused by something intrinsic to the case, such as witness unavailability, that time period is not counted. Finally, if the delay is caused by the defendant, it is not counted.

Urdahl, 286 Wis. 2d 476, ¶26 (citations omitted).

¶18 Thus, we examine the time line of this case to determine which time periods, if any, should be charged against the State and the weight to be given those periods.

¶19 Triolo concedes that the time between his arrest on November 22, 2010, and his June 24, 2011 conviction and sentence in Outagamie County in another case could be considered time for trial preparation and could be charged against him. Accordingly, that time is not counted against the State.

¶20 On September 12, 2011, the first trial date of February 6, 2012, was set. Although neither party addresses the period between June 24, 2011, and September 12, 2011, there is no indication in the record that those 11 weeks should be considered anything other than the routine delay arising from court calendaring. In other words, that time period also is not counted heavily against the State. *See* ***id.***

¶21 The February 6, 2012 trial date was adjourned at the State's request because the DNA analysis had not been completed. Triolo opposed the continuance, and the court "reluctantly" granted the motion and set a new trial date of May 7, 2012. The State concedes that that three-month period counts against the State. The May 7, 2012 trial date was adjourned at Triolo's request so that counsel could assist another attorney in a first-degree intentional homicide case. The State did not object, and the court set a new trial date of July 23, 2012. That 11-week period counts against Triolo. The parties agree that the 7-month period between July 25, 2012, when the mistrial was ordered, and March 4, 2013, the start of the second trial, counts against the State.

¶22 Triolo contends that 15 months should be counted against the State. We disagree. As the above chronology shows, the State is responsible for 10 months out of the 27-month delay between the filing of the criminal complaint and the start of Triolo's second trial.

¶23 The third ***Barker*** factor is the defendant's assertion of his right to a speedy trial. ***Barker***, 407 U.S. at 530; ***State v. Leighton***, 2000 WI App 156, ¶6, 237 Wis. 2d 709, 616 N.W.2d 126. Triolo concedes that he never filed a statutory demand for a speedy trial. *See* WIS. STAT. § 971.10(2)(a) (a felony trial "shall commence within 90 days from the date trial is demanded by any party in writing").[5] Triolo first asserted his constitutional right to a speedy trial on February 11, 2013, when he filed a motion to dismiss. The circuit court denied the motion on February 26, 2013, and the second trial began on March 4, 2013.

¶24 Triolo points to his objections to the State's requests for adjournment as showing that he wanted a speedy trial. Triolo's reliance on those objections, however, is misplaced for several reasons.[6] First, he mischaracterizes the nature of his November 14, 2011 objection. At that hearing, Triolo opposed an extension of the State's briefing deadline on its pretrial motion to admit other acts evidence under WIS. STAT. § 904.04(2). That briefing deadline extension did not affect the then-scheduled trial date. Second, and more importantly, Triolo offers no authority for the proposition implicit in his argument, namely, that an objection to an adjournment is tantamount to an assertion of the right to a speedy trial. An argument unsupported by legal authority will not be considered. ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

[5] All references to the Wisconsin Statutes are to the 2015-16 version, unless otherwise noted.

[6] In his reply brief, Triolo concedes that his claim that he objected to a continuance on November 28, 2011, was a typographical error, and that the reference should have been "November 28, 2012." On that date, a status conference was held and Triolo was questioned about whether he wanted his attorney to continue representing him. Scheduling was not discussed.

¶25 We next consider the fourth ***Barker*** factor—the prejudice, if any, to the defendant. *See* ***Leighton***, 237 Wis. 2d 709, ¶6. The element of prejudice implicates "the three interests that the right to a speedy trial protects: prevention of oppressive pretrial incarceration, prevention of anxiety and concern by the accused, and prevention of impairment of defense." ***Urdahl***, 286 Wis. 2d 476, ¶34.

¶26 Triolo was convicted of two counts of first-degree sexual assault of a child and sentenced on June 24, 2011, in Outagamie County to 20 years of initial confinement and 10 years of extended supervision. Thus, Triolo was incarcerated by virtue of that conviction for most of the pendency of this case. Triolo suggests that his security classification within the state prison system was adversely affected while this case was pending, but he provides neither factual nor legal support for that factual assertion. The first interest, prevention of oppressive pretrial incarceration, is not implicated.

¶27 The second interest—prevention of anxiety and concern—is implicated but "the bare fact of unresolved charges … exists in every criminal case." *See* ***id.***, ¶35. Triolo contends that he was concerned about the possibility of life imprisonment if convicted. That concern is not unique to Triolo, but would be shared by any other 41-year-old defendant facing serious felony charges. Thus, that interest does not carry significant weight.

¶28 The third interest—impairment of defense—does not favor Triolo. Triolo argues that his defense was impaired because "evidence continued to come in up to and through the retrial." However, "[e]nhancement of the government's case during pre-trial delay is not relevant to the question of prejudice to the defendant's case by that delay." ***United States v. Joyner***, 494 F.2d 501, 506 (5th

Cir. 1974). The purpose of the speedy trial protection is to "prevent impairment of the defendant's ability to defend himself … not to limit the ongoing accumulation of evidence by the prosecution." ***Id.***

¶29 After balancing the ***Barker*** factors, we conclude that Triolo's constitutional right to a speedy trial was not violated. Although the 27-month delay was lengthy, only 10 months of the delay are attributable to the State. Triolo does not argue that the State "deliberate[ly] attempt[ed] … to delay the trial in order to hamper the defense." *See* ***Urdahl***, 286 Wis. 2d 476, ¶26. Therefore, the delay is not weighted "heavily" against the State. *See* ***id.*** Triolo did not assert his right to a speedy trial until several months after the first trial ended in a mistrial. That delay "weigh[s] heavily against his claim that his right to a speedy trial was violated." *See* ***id.***, ¶37. Triolo can show only minimal prejudice. Therefore, the circuit court properly denied Triolo's motion to dismiss. *See* ***id.***

By the Court.—Judgment and order affirmed.

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