

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 13, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Nos. 99-2953-CR, 99-2954-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

No. 99-2953-CR

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

LARRY J. WOLF,

DEFENDANT-APPELLANT.

No. 99-2954-CR

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

BELINDA C. WOLF,

DEFENDANT-APPELLANT.

APPEALS from judgments of the circuit court for Chippewa County: THOMAS J. SAZAMA, Judge. *Affirmed.*

¶1 PETERSON, J.¹ Larry and Belinda Wolf, pro se, appeal judgments convicting them of defamation, contrary to WIS. STAT. § 942.01(1).² The Wolfs raise essentially two arguments: (1) that they were denied their right to a speedy trial pursuant to WIS. STAT. § 971.10; and (2) that the evidence produced at trial was insufficient to link them to the distribution of defamatory material. This court rejects both arguments and affirms the judgments.

BACKGROUND

¶2 Although the history of the Wolfs’ prosecution is drawn out, only a relatively short recitation is necessary for purposes of this appeal. The State charged the Wolfs on May 7, 1998, with distributing defamatory material including signs, letters and notes that stated, among other things, that Gordon Schafer sold pornography at his stores.³ Schafer owns an IGA and two Hardware

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f). All statutory references are to the 1997-98 edition.

² The Wolfs both submitted identical briefs. Because their appeals raise the same issues, this court consolidated their appeals on its own motion. *See* WIS. STAT. RULE 809.10(3).

³ The Wolfs targeted Schafer, at least partially, for the greeting cards his store sold. The Wolfs argue that rather than defamatory, the distributed materials may be somewhat religious and appear “to have good motives and concern for the children used in the photographs on the cards being sold in Mr. Schafer’s stores.” The trial court viewed the materials differently. One of the signs the Wolfs distributed read:

WHATS IN A NAME LIKE GORDYS IGA?
PORNO. + MURDER
LIES + BRIBERY
INFILTRATOR + CRIME
RISING RATE OF MISSING
CHILDREN
HOMETOWN COMMUNISM

(continued)

Hank stores that are located in Chippewa Falls and Lafayette. The Wolfs insisted on proceeding without legal representation and pled not guilty at their initial appearance on May 26. The circuit court released them on signature bonds and ordered them not to have any contact with Schafer. After several hearings, the State deferred prosecution for approximately six months. When similar defamatory materials continued to appear in the community, however, the Wolfs were brought back to court to face trial. The Wolfs waived their right to a jury trial and were found guilty after a trial to the court on October 22, 1999.

DISCUSSION

¶3 The Wolfs first argue that they were denied a speedy trial pursuant to WIS. STAT. § 971.10.⁴ As the circuit court explained several times, the remedy

NO COMMANDMENTS NO GOD

"[W]hen faced with a record of historical facts which supports more than one inference, an appellate court must accept and follow the inference drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter of law." *State v. Poellinger*, 153 Wis. 2d 493, 506-07, 451 N.W.2d 752 (1990). The Wolfs have not developed any argument that addresses the deferential standard of appellate review that applies to whether the distributed materials were defamatory. Therefore, this court does not address that issue.

⁴ WISCONSIN STAT. § 971.10 provides, in relevant part:

(1) In misdemeanor actions trial shall commence within 60 days from the date of the defendant's initial appearance in court.

....

(3) (a) A court may grant a continuance in a case, upon its own motion or the motion of any party, if the ends of justice served by taking action outweigh the best interest of the public and the defendant in a speedy trial....

....

(4) Every defendant not tried in accordance with this section shall be discharged from custody but the obligations of the bond or other conditions of release of a defendant shall continue until modified or until the bond is released or the conditions removed.

for failing to accord a defendant a speedy trial pursuant to § 971.10 is release from custody. *See* § 971.10(4). The Wolfs were not being held in custody during these proceedings. They were subject to conditions of bond, but those conditions continue even where the time limits of § 971.10 have not been followed. *See id.* Therefore § 971.10 provides the Wolfs no remedy.

¶4 As the State notes, the Wolfs never raised concerns about their constitutional rights to a speedy trial. “[Pro se litigants] are bound by the same rules that apply to attorneys on appeal.” *Waushara County v. Graf*, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992). Moreover, “neither a trial court nor a reviewing court has a duty to walk pro se litigants through the procedural requirements or to point them to the proper substantive law.”⁵ *Id.*

⁵ Even if the Wolfs had properly raised their constitutional right to a speedy trial, this court would not direct that the charges be dismissed. The analysis used to determine whether a defendant's constitutional right to a speedy trial has been violated is set forth in *Barker v. Wingo*, 407 U.S. 514 (1972), and was adopted in Wisconsin in *Day v. State*, 61 Wis. 2d 236, 244, 212 N.W.2d 489 (1973). When defendants assert a violation of their constitutional right to a speedy trial, the court employs a four-part balancing test that considers: (1) the length of delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant. *See Barker*, 407 U.S. at 530.

The first of the four factors considered is the length of delay. *See id.* at 530. Until there is some delay which is presumptively prejudicial it is unnecessary to inquire into the other *Barker* factors. *See id.* Courts have generally found that postaccusation delay is presumptively prejudicial as it approaches one year. *See, e.g., Green v. State*, 75 Wis. 2d 631, 635, 250 N.W.2d 305 (1977). In this case the 17-month delay between bringing charges against the Wolfs and bringing their cases to trial would result in a presumption of prejudice, particularly because the Wolfs did not expressly agree to the deferred prosecution of their cases.

The second factor analyzes the reasons for the delay. The deferred prosecution only accounted for six months of the delay. Because the Wolfs were responsible for a great deal of the delay themselves, overall the second factor weighs in favor of the State.

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After the Wolfs' initial appearance, the trial court held hearings in each of the next several months. One hearing was rescheduled after the Wolfs requested an adjournment for a second pretrial conference with the district attorney. At the other hearings, the court discussed the Wolfs' understanding of the charges and the advantages of attorney representation. The court also made a concerted effort to determine whether the Wolfs were competent to stand trial and represent themselves.

At a July hearing, the State recommended that the trial court order competency evaluations. After discussions with the Wolfs, the court agreed that competency evaluations would be helpful. Belinda Wolf appeared at her scheduled competency evaluation in August, but refused to answer any questions.

At the next scheduled hearing, on October 7, only Belinda Wolf appeared. The trial court addressed Belinda's objection to not having a trial within 60 days and explained the extent of the Wolfs' statutory rights to a speedy trial. The court, Belinda and the prosecutor then discussed the possibility of an agreement to defer prosecution for a year. Belinda indicated that the agreement might be acceptable, but that she would have to discuss it with her husband. At the next court hearing, on October 27, both Wolfs appeared and the State indicated that it would defer prosecution without the Wolfs' cooperation.

Prosecution was deferred for six months. When similar defamatory materials continued to be distributed, the trial court ordered the Wolfs to show cause why they should not be prosecuted. The Wolfs failed to appear at the scheduled hearing and a bench warrant was issued for their arrest. After being arrested, the Wolfs were released on bond. The court scheduled competency evaluations for a second time, but the Wolfs again refused to answer any questions. Concluding that competency evaluations were not practical, the trial court questioned the Wolfs to determine whether they were competent to stand trial and represent themselves. Through extensive questioning the court was satisfied that the Wolfs were competent to stand trial and represent themselves.

This procedural history indicates that much of the 17-month delay was attributed to the Wolfs' refusal to accept counsel and the trial court's effort to make sure that they received a fair trial. The Wolfs requested continuances and the substitution of a judge. When the trial court was concerned with their competency to stand trial without representation, the Wolfs thwarted the competency determination process. Further, other than the delay from the deferred prosecution, the Wolfs did not object to any other continuances. This history also weighs heavily into the other *Barker* factors.

The third factor, whether the defendants asserted their right to a speedy trial, also weighs in favor of the State. The Wolfs never expressly asserted their right to a speedy trial. Rather they only asked on numerous occasions for the dismissal of the charges for violating WIS. STAT. § 971.10. One particular discussion of the Wolfs' desire for a speedy trial is instructive. At the October 7, 1998 hearing, the court expressly stated: "Let me ask you this: Are you asking for a speedy trial in this case?" Belinda Wolf, who was also speaking on behalf of Larry Wolf, responded: "Well, we never had a hearing or anything like that, so I don't know, and the 60 days, misdemeanor case, are up" The Wolfs never expressly demanded a speedy trial. They were only interested in the dismissal of their charges.

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B. Insufficient Evidence

¶5 The Wolfs argue that there is insufficient evidence to connect them to the defamatory material. The Wolfs essentially base this argument on the fact that no one who testified at trial actually saw them distribute the defamatory materials. They also seize on the trial court's comment that the State's case was largely circumstantial.

¶6 This court will uphold a conviction unless the evidence viewed most favorably to the State and the conviction is so insufficient in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. *See State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). The test for reviewing whether the evidence is sufficient to sustain a criminal conviction is whether the trier of fact could have been reasonably convinced of the accused's guilt beyond a reasonable doubt by any direct or circumstantial evidence upon which it had a right to rely. *See id.* at 503-04.

¶7 *Poellinger* teaches that the standard of review when the defendant challenges the sufficiency of the evidence to support a conviction is the same whether it is a direct or circumstantial evidence case. *Id.* at 501-02. In some instances, circumstantial evidence may be stronger or more convincing than direct evidence. *See WIS JI—Criminal 170.*

The fourth factor, whether there was any prejudice to the defendants, fails to justify dismissal. The Wolfs have not shown any indication as to how their defense was prejudiced by the delay. That, and the fact that the trial court and State did not negligently delay the Wolfs' cases or show a cavalier disregard for their right to a speedy trial, would make this court unwilling to conclude that the Wolfs were prejudiced by the delay in bringing them to trial.

¶8 There was abundant evidence from which the trial court could find that the Wolfs distributed the defamatory materials. Signs similar to the ones found around the community were found in the Wolfs' home. Further, a Chippewa Falls police detective testified that Belinda admitted that she and her husband had been involved in making and distributing some of the defamatory material. The Wolfs argue on appeal that the detective was lying and biased. However, the trial court is the ultimate arbiter of the credibility of witnesses, *see State v. Holt*, 128 Wis. 2d 110, 121, 382 N.W.2d 679 (Ct. App. 1985), and was entitled to rely on the detective's testimony.

By the Court.—Judgments affirmed.

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