

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 11, 2002

Cornelia G. Clark
Clerk of Court of Appeals

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.

Appeal No. 01-1259-CR

Cir. Ct. No. 98-CF-1663

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOHNNY M. LACY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: STEVEN D. EBERT, Judge. *Affirmed.*

Before Dykman, Roggensack and Lundsten, JJ.

¶1 PER CURIAM. Johnny Lacy appeals a judgment convicting him on fourteen felony charges, including four counts of first-degree sexual assault. He also appeals the order denying him postconviction relief. The issues are whether his constitutional and statutory rights to a speedy trial were violated, whether the evidence was sufficient to convict him on one of the fifteen charges,

whether there was prosecutorial misconduct at his trial, and whether he received effective assistance from trial counsel. We affirm on all issues.

¶2 Lacy went on a crime spree in Milwaukee and Madison in mid-May 1998. He was arrested on May 17, 1998, by Madison police, but was released into the custody of Milwaukee County on May 22, where he was subsequently charged with multiple felonies. The Dane County prosecution commenced on August 13, 1998, with the filing of a complaint. No action was taken on the complaint for several months, while Lacy remained in custody elsewhere, subject to the Milwaukee County prosecution and a parole revocation proceeding. On February 3, 1999, the Milwaukee County case concluded with Lacy's conviction, and his sentence to 360 years in prison.

¶3 On May 26, 1999, Lacy made his initial appearance in Dane County. The preliminary hearing was scheduled for June 3, 1999, but was rescheduled because Lacy was occupied in Milwaukee County Circuit Court on that day on a postconviction matter. Lacy subsequently requested and received replacement counsel on July 1, 1999. On July 7, the preliminary hearing was held and Lacy was bound over for a trial set for November 22, 1999. On September 8, Lacy moved to dismiss the complaint or, in the alternative, to suppress evidence, and that motion was denied on November 9, 1999.

¶4 The court subsequently rescheduled the trial for January 18, 2000. A subsequent trial court conflict on that date caused postponement until May 8, 2000, when the trial finally commenced.

¶5 The charges against Lacy included second-degree recklessly endangering safety. To prove that charge, the State offered the victim's testimony that, in the process of sexually assaulting her, Lacy placed something sharp against

her neck. It felt like a needle to the victim, and left scratches where he pressed it against her.

¶6 As part of his defense to the sexual assault charges, Lacy testified that it was medically impossible for him to have an erection. Consequently, the trial court allowed the prosecutor to cross-examine Lacy about a sexual assault conviction in the Milwaukee case that involved ejaculation. However, the court barred the prosecutor from mentioning the fact that Lacy ejaculated on the victim's face. Nevertheless, the prosecutor asked Lacy if he had done so, and Lacy admitted that fact. Defense counsel then moved for a mistrial, which the trial court denied. The court instructed the jurors to consider the testimony only as it pertained to Lacy's ability to maintain an erection and ejaculate.

¶7 At the close of trial, the jury found Lacy guilty on fifteen of the seventeen felony charges that were tried. The trial court sentenced him to 258 years in prison, consecutive to the 360 years imposed in Milwaukee County.¹

¶8 Lacy first argues that he was denied his right to a speedy trial. The constitutional right to a speedy trial is found in the Sixth Amendment to the United States Constitution and article 1, section 7 of the Wisconsin Constitution. Whether this constitutional right to a speedy trial has been violated is a question of law which this court reviews *de novo*. See *State v. Ziegenhagen*, 73 Wis. 2d 656, 664, 245 N.W.2d 656 (1976). However, the trial court's underlying findings of historical fact are sustained unless they are clearly erroneous. *State v. Leighton*, 2000 WI App 156, ¶5, 237 Wis. 2d 709, 616 N.W.2d 126. In reviewing a speedy

¹ The court subsequently vacated one count, reducing Lacy's sentence to 238 years.

trial claim, we must first consider the length of the delay until trial. *See State v. Borhegyi*, 222 Wis. 2d 506, 509-10, 588 N.W.2d 89 (Ct. App. 1998). If the delay is presumptively prejudicial, as the State concedes here, then we must also consider the reason for the delay, whether the defendant asserted the right to a speedy trial, and whether the delay actually prejudiced the defendant. *Id.* at 509. Upon consideration of these factors, the totality of the circumstances determines if there was a speedy trial violation. *Id.*

¶9 The State did not violate Lacy's constitutional right to a speedy trial. As noted, the twenty-one months between charging and trial, or the twenty-four-month delay between the initial arrest and trial, was presumptively prejudicial to Lacy. However, only the time between February 3 and May 26, 1999, and January 18 to May 8, 2000, are potentially attributable to the State, with the latter due to court congestion, which is not to be weighed heavily against the State. *Hatcher v. State*, 83 Wis. 2d 559, 568, 266 N.W.2d 320 (1978). The remainder of the delay is either directly attributable to Lacy's involvement in other proceedings, his litigation on a suppression motion, or a reasonable period of trial preparation.

¶10 Also weighing against Lacy is his failure to formally assert his right to a speedy trial. Rather, he merely informally asserted his speedy trial right a single time. After raising the issue at his initial appearance, Lacy made no further reference to it. Additionally, Lacy has no reasonable claim to prejudice from the delay. His incarceration during the period was due to the Milwaukee prosecution and a parole hold. Furthermore, he cannot plausibly contend that the delay hampered preparation of his defense. Lacy essentially had no defense in the face of the overwhelming evidence of his guilt, including his arrest inside the home of one of his victims. Although he has claimed that the delay hampered his efforts to

locate certain alibi witnesses, he has never produced any reliable information that would assist in identifying or locating these persons.

¶11 WISCONSIN STAT. § 971.11 (1999-2000)² provides an additional, statutory speedy trial right for inmates, upon request. Section 971.11(1) provides that upon notice of an untried criminal case pending against an inmate of an institution, the warden or superintendent shall, at the inmate's request, send by certified mail a written request to the district attorney for prompt disposition of the case. If the crime charged is a felony, the district attorney must then bring the case on for trial within 120 days after receiving the request, and if trial does not occur within 120 days, "the case shall be dismissed." WIS. STAT. § 971.11(2) and (7). Dismissal may be with or without prejudice, but must occur. *State v. Davis*, 2001 WI 136, ¶5, 248 Wis. 2d 986, 637 N.W.2d 62.

¶12 Lacy waived his claim to violation of his statutory speedy trial right. When the complaint was filed in August 1998, Lacy was incarcerated at Racine Correctional Institution on a parole hold. Within a few days, Lacy completed a written request for a speedy trial pursuant to WIS. STAT. § 971.11. However, due to a prison staff clerical omission, the request was not served on the prosecutor, although a copy of it was filed in the trial court. After the initial appearance, Lacy never raised the issue, nor questioned the ensuing delays in the proceeding. He cannot fault the trial court for failing to invoke the right on his behalf even in the unlikely event that the court was aware of his request.

² All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶13 Lacy addresses his waiver by asserting that it was due to trial counsel's negligence. However, to obtain relief on this ground, he must show prejudice from counsel's failure to raise the speedy trial issue. As noted, the trial court had discretion whether to dismiss with or without prejudice. *See Davis*, 2001 WI 136 at ¶5. Under the circumstances presented in this case, no reasonable trial court would have granted a dismissal with prejudice. Counsel's assertion of the speedy trial right would have merely delayed the inevitable.

¶14 We next consider whether the jury heard sufficient evidence to convict Lacy of second-degree recklessly endangering safety. The State's burden is to show endangerment of the victim by conduct that intentionally creates an unreasonable and substantial risk of death or great bodily harm. Here, the victim testified that Lacy held a very sharp object to her neck, scratching it in the process. Lacy contends that the object was a rubber-tipped dental pick found at the crime scene. However, there was no direct evidence showing that Lacy used the dental pick during the attack. The jury could have reasonably inferred that Lacy used some other, more lethal object, such as the knife or screwdriver discovered in his pockets when he was arrested later the same night. A jury could reasonably view pressing some such object against a person's neck as conduct creating an unreasonable risk of death or great bodily harm.

¶15 Lacy next asserts prosecutorial misconduct warranting a new trial. Lacy complains that while questioning one victim, the prosecutor referred to the perpetrator as "the defendant" six times. Four times the prosecutor corrected himself. On cross-examination, the witness confirmed that she could not identify Lacy as her attacker. We conclude that no reasonable juror would have failed to understand that Lacy's identity as the perpetrator remained in dispute and that this particular witness was not asserting that Lacy was her attacker.

¶16 Lacy also complains that the prosecutor, in violation of a limiting order, made reference to the fact that Lacy ejaculated on the face of a prior sexual assault victim. The fact that he ejaculated during that assault was admissible to refute testimony concerning Lacy's potency, but not where he ejaculated. However, in view of the overwhelming evidence of guilt, Lacy cannot reasonably contend that this additional information had any effect on the verdict. The trial court instructed the jurors at the time not to judge Lacy's character based on evidence of the prior assault. It is presumed that jurors follow the trial court's instructions. *State v. Smith*, 170 Wis. 2d 701, 719, 490 N.W.2d 40 (Ct. App. 1992).

By the Court.—Judgment and order affirmed.

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

