COURT OF APPEALS
DECISION
DATED AND FILED

March 26, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2332-CR **Cir. Ct. No. 00 CF 2114**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHNNY M. MCADOO,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: KITTY K. BRENNAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. Johnny M. McAdoo appeals from a judgment entered after a jury found him guilty of endangering safety by use of a dangerous weapon, possession of a firearm by a felon, and bail jumping, contrary to WIS.

STAT. §§ 941.20(1)(c), 941.29(2) and 946.49(1)(a) (1999-2000).[1] McAdoo claims: (1) his right to a speedy trial was violated; (2) he is entitled to a new trial because the victim/witness recanted her testimony; (3) there was insufficient evidence to show that he possessed and used a gun; and (4) trial counsel provided ineffective assistance. Because we resolve each issue in favor of upholding the judgment, we affirm.

I. BACKGROUND

¶2 On April 25, 2000, shortly before 9:00 p.m., sixteen-year-old Antonia O'Neil telephoned police to report that a man she knew just pointed a handgun at her and made threatening remarks. One marked and one unmarked squad car responded to the call. As the police officers were taking her statement, O'Neil noticed McAdoo driving past in his van and notified the officers. The officers followed the van and attempted to conduct a traffic stop. McAdoo refused to pull over and a police chase ensued.

¶3 At one point, McAdoo briefly stopped the van and the officers observed a shiny object being tossed from the driver's side of the van onto a grassy field. Eventually, McAdoo stopped the van and surrendered to police. McAdoo and his passenger were taken into custody. The officers returned to the grassy field area and recovered a .38 caliber revolver, which was loaded with five live cartridges.

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted. The jury deadlocked on the fourth charge against McAdoo—fleeing a police officer, WIS. STAT. § 346.04(3), and a mistrial was declared on that count. However, McAdoo pled guilty to that charge, and sentencing on all four counts occurred on December 21, 2000.

¶4 O'Neil identified McAdoo from a photograph as the person who pointed the gun at her. She also identified the .38 caliber revolver as the weapon involved.

¶5 McAdoo was charged with fleeing, endangering safety by use of a dangerous weapon, possession of a firearm by a felon, and bail jumping, all as a habitual criminal. McAdoo made a request for a speedy trial. Because he changed attorneys, the request was construed to commence on the date the new attorney was appointed—June 20, 2000. The trial was scheduled for September 12, 2000. On that date, McAdoo announced he was again switching attorneys. The State indicated it was not ready to proceed because two critical witnesses, including the victim, had not appeared in response to subpoenas. The trial court ruled that McAdoo's change in counsel was good cause to extend the time for his speedy trial demand. The trial was rescheduled for November 13, 2000, and body attachments were issued by the court for the State's witnesses.

¶6 The case proceeded to trial as scheduled. The jury deadlocked on the fleeing charge, but found McAdoo guilty on the other three charges. At the sentencing on December 21, 2000, McAdoo pled guilty to the fleeing charge. Before sentence was imposed, O'Neil made a statement seeking leniency for McAdoo. She attempted to recant her trial testimony. The trial court found her testimony at the sentencing hearing to be incredible. The court proceeded to sentence McAdoo. Judgment was entered. McAdoo now appeals.

II. DISCUSSION

A. Speedy Trial.

¶7 McAdoo first asserts that his right to a speedy trial was violated. The State responds that McAdoo waived his right to raise this issue on appeal because he failed to make the motion in the trial court.

¶8 In response to the State's claim that McAdoo waived his right to a speedy trial, McAdoo contends that he raised this issue in the trial court twice. His reply brief, however, fails to provide record references. His main brief does indicate two places in the record where the speedy trial was mentioned: (1) a speedy trial demand was made at the scheduling conference; and (2) on September 12, 2000—the date the trial was originally supposed to take place—McAdoo's new counsel referenced the speedy trial request. After excusing McAdoo's former counsel, the following colloquy occurred:

> THE COURT: … And, Mr. Toran [McAdoo's new counsel], we'll set this for another jury trial.
>
> MR. TORAN: Your Honor, this was a speedy trial demand today. Today was the ninetieth day.
>
> THE COURT: And certainly the defendant's choice to change counsel is good cause to extend that time. And do you understand that, Mr. McAdoo, you made the decision to change your counsel, correct?
>
> THE DEFENDANT: Yes, I did. But --
>
> THE COURT: So let's get another date.

¶9 No further reference is made to the speedy trial issue until the appeal. Under these circumstances, a reasonable court could construe McAdoo's limited reference to a speedy trial to constitute waiver. Although it is true that defense counsel pointed out to the court that a speedy trial demand was made,

counsel did not advise the court that he was prepared to proceed to trial on September 12, 2000. Further, although it appears from the excised portion of the transcript that the trial court did not allow further discussion on the matter, McAdoo certainly could have raised the issue formally with a written motion. He did not. Despite all of the foregoing, because the colloquy could be construed as an attempt to raise the issue of a speedy trial, we will address the merits.

¶10 The right to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution and article I, section 7 of the Wisconsin Constitution.[2] Whether a defendant has been denied his or her right to a speedy trial is a constitutional question, which we review *de novo*. ***State v. Ziegenhagen***, 73 Wis. 2d 656, 664, 245 N.W.2d 656 (1976). The trial court's underlying findings of historical fact, however, are upheld unless they are clearly erroneous.

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[2] The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Article I, section 7 of the Wisconsin Constitution provides:

> **Rights of accused.** SECTION 7. In all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process to compel the attendance of witnesses in his behalf; and in prosecutions by indictment, or information, to a speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed; which county or district shall have been previously ascertained by law.

State v. Clappes, 136 Wis. 2d 222, 235, 401 N.W.2d 759 (1987); WIS. STAT. § 805.17(2).

¶11 When a defendant asserts a violation of the constitutional right to a speedy trial, "the court employs a four-part balancing test considering: (1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant." ***State v. Borhegyi***, 222 Wis. 2d 506, 509, 588 N.W.2d 89 (Ct. App. 1998) (citation omitted).

¶12 Here, the length of the delay was minimal—two more months. *See* ***Green v. State***, 75 Wis. 2d 631, 636, 250 N.W.2d 305 (1977) (holding that a delay of more than one year is presumptively prejudicial). The reason for the delay was two-fold: (1) McAdoo changed counsel; and (2) two of the State's witnesses were not present. Although there is no dispute that McAdoo made a request for a speedy trial at the scheduling conference, when the time came to assert that his speedy trial right was being violated, his assertion of his right was, at most, minimal. As noted, the defense did not assert on September 12, 2000 that they were prepared to proceed to trial. No written motion was made thereafter, pre- or post-trial, suggesting that McAdoo's speedy trial right was violated.

¶13 Finally, the fourth consideration is whether McAdoo was prejudiced. He argues he was prejudiced because without the two no-show State witnesses, his case would have had to have been dismissed. This is not the type of prejudice referred to in examining the speedy trial violation. The prejudice factor is assessed in light of the interests the speedy trial right is designed to protect: "(1) preventing oppressive pretrial incarceration; (2) minimizing the accused's anxiety and concern; and (3) limiting the possibility that the defense will be

impaired" due to lost witnesses, failed memories, lost physical evidence, etc. ***Borhegyi***, 222 Wis. 2d at 514. None of these factors was present here.

¶14 Having examined each of the factors, we must conclude, under the totality of the circumstances, that McAdoo's speedy trial right was not violated.

B. Recantation.

¶15 McAdoo next argues that he is entitled to a new trial because O'Neil recanted her trial testimony at the sentencing hearing. The State responds that McAdoo never raised this issue in the trial court, and that even if the merits are considered, there is no corroboration to support the recantation.

¶16 Generally, in order to secure a new trial on grounds of newly discovered evidence, the defendant must prove, by clear and convincing evidence, that: (1) the "new" evidence came to his or her knowledge after the trial; (2) he or she was not negligent in seeking to discover it; (3) the evidence is material to an issue in the case; (4) the evidence is not merely cumulative to evidence adduced at trial; and (5) the new evidence creates a reasonable probability that a different result would be reached at a new trial. ***State v. Brunton***, 203 Wis. 2d 195, 200, 207, 552 N.W.2d 452 (Ct. App. 1996). In "recantation" cases, however, there is an additional element: "[The] newly discovered recantation evidence must be corroborated by other newly discovered evidence." ***State v. McCallum***, 208 Wis. 2d 463, 476, 561 N.W.2d 707 (1997). Because recantations involve an admission that the recanting witness has lied under oath, they are considered to be "inherently unreliable." ***Id.***

¶17 Here, McAdoo never filed a motion for a new trial based on newly discovered evidence. Instead, he relies solely on the issue being raised during the

sentencing hearing. That is procedurally infirm and insufficient. Even if we were to consider the merits despite the procedural infirmity, we would reject McAdoo's contention because there is no corroboration for the recantation. To prove corroboration, McAdoo must show that: (1) there is a feasible motive for the initial false statement; and (2) there are circumstantial guarantees of the trustworthiness of the recantation. ***Id.*** at 477-78. He has shown neither.

¶18 There was no motive for O'Neil to testify falsely at trial. McAdoo argues that her motive was her desire to invoke the Fifth Amendment. However, there was no basis for O'Neil to invoke the Fifth. She was not offering testimony under which she could incur criminal liability. Moreover, her recantation was completely untrustworthy. The trial court found it to be incredible. That finding is not clearly erroneous.

C. Insufficient Evidence.

¶19 Next, McAdoo complains that there was insufficient evidence to support his conviction because there was no evidence tying him to the use of the handgun. We disagree.

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (citations omitted). Where there are inconsistencies within a witness' or witnesses' testimony, it is the trier of fact's duty to determine the weight and credibility of the testimony. ***Thomas v. State***, 92 Wis. 2d 372, 382, 284 N.W.2d 917 (1979).

¶20 O'Neil testified that McAdoo pointed the gun right at her. She positively identified McAdoo and the weapon used. This evidence was sufficient to sustain the verdict. Even without this direct evidence, there was circumstantial evidence from which a jury could infer that McAdoo possessed or used the handgun. A police officer testified that McAdoo abruptly stopped the van in the course of his flight and the officer saw a hand throw a shiny object out of the driver's side window. The weapon used was discovered shortly thereafter at that site. A reasonable jury could infer from this testimony that McAdoo tossed the gun out the window. Accordingly, his claim that the evidence was insufficient fails.

D. Ineffective Assistance.

¶21 McAdoo's last claim is that his trial counsel provided ineffective assistance. Specifically, he argues counsel erroneously stated during closing that the prosecutor had only shown O'Neil a picture of the gun recovered and not the gun itself, in order for O'Neil to identify the weapon. We decline to consider this claim.

¶22 In order to pursue a claim alleging ineffective assistance of trial counsel, a defendant must file a postconviction motion so that trial counsel has an opportunity to explain his or her conduct during the proceedings. ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979); ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 677-78, 556 N.W.2d 136 (Ct. App. 1996). This is not a claim that we can decide for the first time on appeal.

McAdoo failed to file a postconviction motion alleging ineffective assistance of counsel. Accordingly, he has waived his right to raise the issue in this appeal.

By the Court.—Judgment affirmed.

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