COURT OF APPEALS
DECISION
DATED AND FILED

April 15, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2773-CR **Cir. Ct. No. 98-CF-12**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMIE L. PENNINGTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marathon County: GREGORY E. GRAU, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 HOOVER, P.J. Jamie Pennington appeals a judgment of conviction on seven counts of second-degree sexual assault, contrary to WIS. STAT. § 948.02(2) (1997-98). With regard to certain inculpatory statements to police, Pennington contends that she was in custody but had not been given her ***Miranda*** rights before making an oral statement. *See* ***Miranda v. Arizona***, 384 U.S. 436

(1966). She further argues that the oral statement as well as a written statement given after she was ***Mirandized*** were involuntary and should have been suppressed. Pennington also contends that she was denied her constitutional right to a speedy trial and that the court used an improper jury instruction. We reject her arguments and affirm the judgment and order.

Background

¶2 In the fall of 1997, Pennington was hired to work at a Wausau group home for delinquent boys. In January of 1998, Wausau police investigated a fight that occurred at the home. During their investigation, the police discovered that Pennington may have supplied alcohol to and had sexual relations with some of the home's residents.

¶3 The police contacted Pennington and asked her to come to the station as part of their investigation of the fight. Pennington complied and two officers interviewed her. They did not read her ***Miranda*** rights when she came in, and she made inculpatory statements while questioned. Based in part on the statements, she was arrested and ***Mirandized***. She then gave police a written statement.

¶4 On January 12, 1998, Pennington was charged with eight counts of second degree sexual assault. She was tried in June 2001 and was convicted on seven counts. One of the counts had been dropped after the victim became unavailable. Additional facts will be added as needed in the discussion below.

Whether Pennington Was In Custody When She Incriminated Herself

¶5 The trial court determined Pennington was not in custody when she gave her inculpatory statement to police. In reviewing the trial court's decision,

we accept its findings of historical fact unless they are clearly erroneous; however, whether a person is "in custody" for ***Miranda*** purposes is a question of law we review de novo. ***State v. Morgan***, 2002 WI App 124, ¶11, 254 Wis. 2d 602, 648 N.W.2d 23.

¶6 In determining whether an individual is in custody for ***Miranda*** purposes, we consider the totality of the circumstances. ***Morgan***, 254 Wis. 2d at 602, ¶12. We examine factors such as the suspect's freedom to leave and the purpose, place, and length of the interrogation. We also consider the degree of restraint; that is, whether the suspect is handcuffed, whether a weapon is drawn, whether a frisk is performed, the manner in which the suspect is restrained, whether the suspect is moved to another location, whether questioning took place in a police vehicle, and the number of officers involved. ***Id.***

¶7 The trial court made the following findings. Pennington drove herself to the station and entered of her own accord. The door was open in the detective's office during the interrogation. Pennington kept her coat on during questioning. She was never told she was under arrest. She was not searched before or during questioning. No weapons were drawn. Before being ***Mirandized***, Pennington did not ask for a lawyer. No threats were made to her. Nothing coercive was done or displayed. The tone was one of general conversation and matter of fact. No offers or promises were made to her in exchange for her statement. There was no indication that she was ill or under the influence of drugs or alcohol. She was never emotional and appeared friendly, jovial, and talkative.

¶8 The trial court noted that at the time, Pennington was twenty years old, of average intelligence, and had apparently completed one year of college.

There was no physical abuse by the police. At the very end, even after she had been informed she was under arrest and ***Mirandized***, she stood up, picked up her car keys, and started to leave, expressing surprise when the officers informed her she was being detained.

¶9 The trial court concluded that when Pennington stood to leave at the very end of the interview, she "displayed a reasonable belief that she was free to go. [D]uring the pre-Miranda statement, [Pennington] was not of the mind-set that she was in custody. And reasonable persons so situated would be of the same mind-set."

¶10 Pennington's challenge is only that "The interrogation was not a fact finding exercise. It was accusatory in tone and designed to 'sew up' the case by eliciting a confession."

¶11 Pennington propounds nothing to show the police expressed this alleged ulterior motive to her before her arrest. The United States Supreme Court has firmly rejected the argument that an officer's views or beliefs *that are not manifested to the suspect* are relevant to a custody determination—the only pertinent inquiry is how a reasonable person in the suspect's position would have understood his or her situation. *See* ***State v. Mosher***, 221 Wis. 2d 203, 215-16, 584 N.W.2d 553 (Ct. App. 1998) (citing ***Berkemer v. McCarty***, 468 U.S. 420, 421 (1984)). An officer's views concerning the nature of the interrogation only bear upon the custodial assessment if the officer's views "*were somehow manifested to the individual under interrogation* …." ***Id.*** (citing ***Stansbury v. California***, 511 U.S. 318, 325 (1994)). Pennington's challenge to the interrogation based on alleged but unmanifested ulterior police motives fails.

¶12 The trial court determined that a reasonable person in Pennington's position would not have believed he or she was in custody. Based on the trial court's thorough findings, even had Pennington challenged the factual findings, we would still conclude that the trial court did not err. The record overwhelmingly demonstrates that Pennington was not in custody when she incriminated herself. The trial court properly refused to suppress her statement on custodial or ***Miranda*** grounds.[1]

Whether Pennington's Statements Were Voluntary

¶13 Pennington complains that both her pre- and post-***Miranda*** statements were involuntary. She alleges that the hostile environment of the police station contributed to the involuntariness. She also points to several factors that various cases suggest we should consider, including length of time of the interview, whether there is deprivation of food or drink, personal factors such as a suspect's age and experience with the police, police strategies, and whether the accused is informed of his or her rights.

¶14 Pennington also claims the State must prove the voluntariness of her statements beyond a reasonable doubt. However, this is no longer the law in Wisconsin. Our supreme court, recognizing conflicting jurisprudence, settled the matter and determined that the State must prove the voluntariness of statements by

[1] Pennington also challenges the admissibility of a written statement she gave after she was informed of her rights. She argues that it came so closely after the improper interrogation that the written statement could not be free of taint. However, because we conclude that there was no impropriety in the pre-***Miranda*** investigation, we need not reach this issue. *See* ***State ex rel. Tate v. Schwarz***, 2001 WI App 131, ¶18 n.4, 246 Wis. 2d 293, 630 N.W.2d 761.

a preponderance of the evidence. *See* ***State v. Agnello***, 226 Wis. 2d 164, 182, 593 N.W.2d 427 (1999).

¶15 In determining whether a statement was voluntary, the essential inquiry is whether the statement was procured via coercive means or was the product of improper police pressure. ***State v. Clappes***, 136 Wis. 2d 222, 235-36, 401 N.W.2d 759 (1987). "While a defendant's personal characteristics are relevant, they only become determinative … when there is something against which to balance them." ***Id.*** at 239.

¶16 Pennington argues that "the weight of evidence establishes [her] statements were not the product of free and unconstrained choice."[2] Pennington fails, however, to link a single fact in her case to one of the factors she enumerated or to identify a single action by the police that we should evaluate for coerciveness. She directs us to no portion of the record to consider. At best, she alleges the "hostile environment" of the police station, but this argument fails because she went to the station of her own accord. Because there was no police coercion, we conclude that Pennington's statements were voluntary—her personal characteristics are irrelevant. *See* ***id.***

Constitutional Speedy Trial Violation

¶17 The right to a speedy trial is in the Sixth Amendment to the United States Constitution and in article 1, section 7, of the Wisconsin Constitution.

[2] With the exception of arguing her personal factors, Pennington does not provide us with facts or record citations from her case relative to these factors, and we decline to scour the record to give substance to her argument. *See* ***Grothe v. Valley Coatings***, 2000 WI App 240, ¶6, 239 Wis. 2d 406, 620 N.W.2d 463.

Whether a defendant's right to a speedy trial is violated is a constitutional question we review de novo, upholding the trial court's findings of historical fact unless they are clearly erroneous. ***State v. Leighton***, 2000 WI App 156, ¶5, 237 Wis. 2d 709, 616 N.W.2d 126.

¶18 Under both the United States and Wisconsin Constitutions, we must consider (1) the length of the delay [between the "official accusation" and trial], (2) the reason for the delay—that is, whether the delay is more attributable to the State or the defense, (3) whether the defendant asserted the right, and (4) whether the delay resulted in prejudice to the defendant. ***Id.***, ¶6 (citing ***Doggett v. United States***, 505 U.S. 647, 651 (1992); ***Barker v. Wingo***, 407 U.S. 514, 530 (1972)). Pennington contends she was denied a speedy trial because she was charged in January 1998 and not tried until June 2001, a delay of about three and one-half years; because the delay is primarily attributable to the State; because several motions she made were the equivalent of a speedy trial demand; and the delay prejudiced her defense.

¶19 This issue was apparently not raised to the trial court in a postconviction motion or otherwise. Generally, we do not consider issues raised for the first time on appeal. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980). Moreover, this presents us with a particular problem because we have no factual findings from the trial court, and we are not a factfinder. Nonetheless, the speedy trial analysis involves a totality of the circumstances review, and we conclude that we can dispose of the issue on undisputed facts and legal, not factual, considerations.

A. Length of the Delay

¶20 The length of delay factor is a threshold consideration—the court must determine that the delay is presumptively prejudicial before inquiring into the other three factors. ***Leighton***, 237 Wis. 2d 709, ¶7. Generally, a delay is presumptively prejudicial as it approaches one year. ***Id.***, ¶8 (citing ***Doggett***, 505 U.S. at 652 n.1). Here, the State concedes that the nearly three-and-one-half-year delay is presumptively prejudicial. Application of the law to undisputed facts is a question of law. *See* ***GMAC Mort. Corp. v. Gisvold***, 215 Wis. 2d 459, 470, 572 N.W.2d 466 (1998).

B. Reason for the Delay

¶21 Reasons for delay are assigned different weights. ***Id.***, ¶9. A deliberate attempt to delay the trial in order to hamper the defense is weighted heavily against the government. ***Id.*** A more neutral reason, such as negligence or overcrowded courts, should be weighted less heavily but still considered. ***Id.*** This is because the ultimate responsibility for such circumstances rests with the government, not the defendant. ***Id.***

¶22 Because the speedy trial issue was not raised in the trial court and therefore no factual findings were made, the delay is the most difficult factor to resolve. Nonetheless, the relevant facts are either undisputed outright or are conceded by one party, making them undisputed.

¶23 **January 12, 1998, to July 28, 1999, trial date.** Pennington was initially charged on January 12, 1998, and the trial was originally scheduled for November 3, 1998. Pennington, however, retained new counsel in September

1998 and requested an adjournment, which the court granted. The new trial was set for July 28, 1999. This delay is attributed to Pennington.

¶24 **July 28, 1999, to January 11, 2000, trial date.** Pennington claims this delay was attributable to the State's failure to provide discovery. Although the State appears to concede that because of a change in prosecutors the new prosecutor had not complied with certain orders to disclose, it also points to factors beyond the State's control. Among other things, the court had double-booked trials and another trial was likely to preempt Pennington's. She appears to concede this point, simply stating "calendar delays … are institutional delays which must be chargeable to the government." While it is true that the government is ultimately responsible for the trial calendar, *see* ***Leighton***, 237 Wis. 2d 709, ¶9, the court's calendar issues are not weighed against the State as heavily as other reasons for delay directly attributable to a prosecutor.

¶25 The State also argues that Pennington advised the trial court that the trial would need more than the scheduled two days, and that she faced delays not attributable to the State, such as a request for the trial court's inspection of certain documents. Pennington does not refute these arguments in her reply, and they are thus deemed admitted. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). However, we conclude that the ultimate cause of the delay was the trial court's scheduling conflict, a primarily neutral factor imputed against the State, but not as heavily as if the prosecutor were at fault. *See* ***Leighton***, 237 Wis. 2d 709, ¶9.

¶26 **January 11, 2000, to December 18, 2000, trial date.** Pennington claims this delay occurred when "trial was adjourned because no discovery had been provided." Indeed, she informed the trial court, "We don't have any

discovery except what we have found on our own. We have nothing from the State." However, Pennington now concedes this was incorrect; the State had provided by that point over 100 pages of discovery.

¶27 The parties dispute how we should interpret this delay, with the State claiming Pennington blatantly misrepresented the situation to the trial court and Pennington claiming the State had only minimally complied with court orders. We agree with the State, however, on one key point: It is "only partly to blame" for this delay. Pennington also shares responsibility for this gap.

¶28 **December 18, 2000, to June 4, 2001, trial date.** On December 1, 2000, group home employee Dennis Sampe informed the State that he had a tape-recording of conversations with some of the victims. This tape apparently included potentially exculpatory evidence and the State sent a copy to Pennington's counsel. At a motion hearing on December 15, Pennington sought dismissal alleging prosecutorial misconduct because her copy was apparently inaudible.[3] The State contended the tape was a surprise to both parties. The trial court agreed, stating, "I don't find there has been any wrongdoing" by either party. This finding is key—it is not clearly erroneous and thus we assign no error to either party. At a January 4, 2001, status conference the court set trial for June 4, which is when the trial proceeded.

¶29 No delay in this case was attributable solely to the State. The first delay resulted from Pennington's attorney change, a legitimate reason, but hers nonetheless. The second delay was attributable to the trial court, which counts

[3] Pennington also claims she sought dismissal on speedy trial grounds, but the part of the record she cites in support of this claim contains no mention of a speedy trial violation.

only lightly against the State. The third delay, while potentially caused by the State's slow disclosure, was compounded by Pennington's misrepresentation to the trial court and thus both parties are the cause of the delay. Finally, the fourth delay was due to newly discovered evidence, and the trial court explicitly determined that neither party had engaged in any wrongdoing. Where delays between dates are unexplained, we cannot attribute the delays to either party.

C. Assertion of the Right

¶30 We acknowledge, as Pennington points out, that "A defendant has no duty to bring himself [or herself] to trial; the State has that duty …." ***Leighton***, 237 Wis. 2d 709, ¶20. However, what Pennington neglects is that "[t]he defendant ha[s] some responsibility to assert the right to speedy trial … to distinguish cases … where there [is] evidence that the defendant did not want to be brought to trial." ***Id.*** (citation omitted).

¶31 Pennington concedes that she never formally demanded a speedy trial. She contends, however, that her attorneys were diligent in their attempts to move the case along and that three motions she filed effectively asserted her demand.

¶32 We decline to hold that an attorney's diligence indicates or implicates the assertion of the client's right to a speedy trial, considering such diligence and expediency is required of attorneys in this state. *See* SCR 20:1.3 (2001-02) ("A lawyer shall act with reasonable diligence and promptness in representing a client."); SCR 20:3.2 (2001-02) ("A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.").

¶33 Contrary to Pennington's contentions, her motions fail, as a matter of law, to assert her right to a speedy trial. *See* ***Cohn v. Town of Randall***, 2001 WI App 176, ¶5, 247 Wis. 2d 118, 633 N.W.2d 674 (interpretation of a document is a question of law). The first motion was a motion to compel the disclosure of the State's witness list and other discovery materials because the State allegedly failed to comply with the court's earlier orders. The motion sought dismissal if the witnesses were unavailable or, alternatively, requested a continuance once the discovery materials were obtained. The second motion was a renewal of the motion to dismiss, again because the State allegedly failed to meet the court's deadline for the witness list.

¶34 These two motions might go to the issue of *delays*, but they do not equate to an assertion of the right to a speedy trial. The challenges were to violations of court orders and the remedy sought was dismissal. The challenge was not to the trial court's pace and the remedy sought was not expedition of the case. Indeed, the alternative argument in the first motion seeking an adjournment belies a claim that the case was proceeding to trial at an unsatisfactory pace—the motion need not have requested the alternative, but could have simply asked for dismissal.

¶35 The third motion was a motion to suppress Pennington's statements for the alleged ***Miranda*** violation and dismissal because new evidence had just come to light. ***Miranda*** has nothing to do with the speedy trial right, and the dismissal motion was premised on prejudice because Pennington had no opportunity to review the new evidence. Again, nothing implicates the speedy trial right. Pennington made no affirmative assertion of her right, and that weighs heavily against her. *See* ***Scarbrough v. State***, 76 Wis. 2d 87, 96, 250 N.W.2d 354

(1977) ("failure to assert the right will make it difficult for a defendant to prove that he [or she] was denied a speedy trial").

D. Prejudice

¶36 The prejudice factor is assessed in light of the interests the speedy trial right is designed to protect. ***Leighton***, 237 Wis. 2d 709, ¶22. These interests are "(1) preventing oppressive pretrial incarceration; (2) minimizing the accused's anxiety and concern; and (3) limiting the possibility that the defense will be impaired." ***Id.***

1. Pretrial Incarceration

¶37 Pennington concedes she was free on bond most of the time. The record indicates she was in jail for only ten days, as evidenced by her sentencing credit.

2. Concern and Anxiety

¶38 A certain degree of anxiety will always pervade a criminal prosecution. No judicial mandate, however, could ever wholly eliminate that circumstance from the criminal justice system. Pennington contends she suffered additional anxiety because she had repeatedly asked the trial court to dismiss the charges, she had posted bond with a credit card and was paying interest on it, and because her attorney fees were "astronomical."

¶39 First, we reiterate that we have no factual findings from the trial court on which to rely. Still, Pennington does not explain why repeated attempts to have her case dismissed resulted in concern or anxiety. Repeated attempts at dismissal are not uncommon in any case, and without any adequate explanation,

we reject this argument as conclusory and unsupported. *See* ***Roehl v. American Fam. Mut. Ins. Co.***, 222 Wis. 2d 136, 149, 585 N.W.2d 893 (Ct. App. 1998).

¶40 Second, the decision to charge any amount of the $17,000 bond to a credit card is a self-imposed dilemma. While Pennington should not be penalized for such a choice, she nevertheless fails to explain how "anxiety" attributable to incurring credit card debt is germane to a speedy trial prejudice analysis. That is, Pennington does not explain how proceeding faster to trial would have resulted in lessening the debt or interest due.[4] We thus decline to give Pennington the "benefit" of this situation.

¶41 Finally, one of Pennington's attorney's told the court that the trial was costing Pennington $3,680 a day in attorney fees. The record, however, indicates that a public defender had been appointed. Moreover, in requesting the public defender to appoint appellate counsel, Pennington reiterated that she had a public defender appointed for her and that her financial situation had not improved since the initial indigency determination.[5] Thus, while we suspect Pennington may have been responsible for some fees, the record does not demonstrate that she was actually responsible for $3,680 a day. Because we are not entitled to resolve the factual dispute, we choose to assign a neutral weight to the attorney fee claim and conclude that Pennington did not suffer any unnatural or undue anxiety other than that which is inherent in the criminal justice system.

[4] Only an acquittal resulting in the refund of her bond would have alleviated this problem.

[5] Other than the list of docket entries from CCAP and the request for appellate counsel, there is no record of the initial public defender appointment or the indigency determination.

3. Impairment of the Defense

¶42 The defense may be impaired if (1) "witnesses die or disappear during a delay; (2) if defense witnesses are unable to recall accurately events of the distant past; or (3) if a defendant is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense." ***Leighton***, 237 Wis. 2d 709, ¶23.

¶43 Pennington claims three manners of impairment. First, she contends "The delay permitted the [State] to assert at trial that [she] had three and a half years to rehearse her testimony." This is an attack on credibility, which the jury is entitled to resolve. It does not fulfill one of the three potential impairments from ***Leighton***. In any event, Pennington does not explain how this would be different from the State insinuating on the trial's first scheduled day that Pennington had ten months to rehearse her testimony. Indeed, any delay, including a presumptively permissible delay, leaves the door open for the State to insinuate that a defendant had practiced testimony.

¶44 Second, Pennington claims that at least one witness could not be located for trial. The missing witness, Buck G., was originally a victim of one count in the complaint. The State dismissed this claim after Buck became unavailable, apparently because of health issues. Pennington does not explain how Buck's testimony would have been otherwise relevant.

¶45 Finally, Pennington complains that the time lapse resulted in a number of "I don't remember" responses on cross-examination of the State's witnesses. We note that the impairment under ***Leighton*** comes when the *defendant's* witnesses cannot recall answers. Here, all the witnesses with memory lapses were State witnesses.

¶46 Assuming but not deciding the plain language of ***Leighton*** is insufficient, we acknowledge that on cross-examination the defense may try to impeach a State witness and, by encountering a memory lapse, may be hampered to some degree in attempts to call the witness's credibility into question.

¶47 We reviewed the citations Pennington provided. The questions, paraphrased, to which "I don't remember" was a response are: what time did the intercourse occur, what was the order of rooms in which alcohol was consumed, how long had the witness been drinking with Pennington, how many days had passed after the witness broke his arm did he have sex with Pennington, did Pennington work weekends, and did an officer ask a witness to "pull up a chair, dude."

¶48 From a five-day jury trial and more than 1,000 pages of transcript, Pennington cites only a handful of uncertain answers. Most of them do not even appear relevant and Pennington certainly fails to explain how they were. Because Pennington fails to show even a modicum of prejudice, we conclude that as a matter of law she suffered none.[6]

[6] We note that in ***State v. Leighton,*** 2000 WI App 156, ¶25, 237 Wis. 2d 709, 616 N.W.2d 126, the court noted that "a defendant need not show prejudice in fact to evince a speedy trial violation," and cited ***Hadley v. State***, 66 Wis. 2d 350, 364, 225 N.W.2d 461 (1975). ***Hadley***, in turn, cited ***Moore v. Arizona***, 414 U.S. 25 (1973), which concluded that the Arizona Supreme Court erred by holding that ***Barker v. Wingo***, 407 U.S. 514 (1972), required a showing of prejudice to sustain a speedy trial claim. ***Moore*** concluded that prejudice was to be considered along with the other ***Barker*** factors. ***Moore***, 414 U.S. at 26. Thus, the meaning of ***Leighton*** is that failure to show prejudice need not be fatal to a speedy trial violation claim, not that a defendant never need prove prejudice. Prejudice remains a factor for consideration against the totality of the circumstances.

E. Speedy Trial Conclusion

¶49 Although the delay from Pennington's charging to her trial was presumptively prejudicial, a review of the remaining factors evinces no violation of her constitutional right to a speedy trial. The delays were at least as attributable to her as the State, or the delays were attributable to neither party. Pennington never affirmatively asserted her right or a dissatisfaction with the speed of the case. Finally, Pennington has shown absolutely no prejudice as a result of the delay.

Jury Instructions

¶50 Pennington claims error because the trial court gave WIS JI—CRIMINAL 255, which relieves the State of proving specific dates of offense. Pennington claims this robbed her of her defense, which she had prepared to show the assaults could not have occurred on the dates charged in the information. The State contends that Pennington failed to preserve this issue for appeal by failing to object to the instructions at trial. We reject the State's waiver argument but nonetheless agree with its alternative argument that the instruction was proper.

¶51 A circuit court has broad discretion in determining which instructions should be given to the jury. ***State v. Morgan***, 195 Wis. 2d 388, 448, 536 N.W.2d 425 (Ct. App. 1995). We do not reverse such a decision absent an erroneous exercise of discretion. ***Id.***

¶52 WISCONSIN JI—CRIMINAL 255 states:

> If you find that the offense charged was committed by the defendant, it is not necessary for the State to prove that the offense was committed on the precise date alleged in the (information) (complaint). If the evidence shows beyond a

> reasonable doubt that the offense was committed on a date near the date alleged, that is sufficient.

The instruction is designed "for a fact situation in which one offense only is alleged, or where, if there are multiple offenses, there is absolutely no confusion in anyone's mind as to their separateness …." ***Jensen v. State***, 36 Wis. 2d 598, 604-05, 154 N.W.2d 769 (1967).

¶53 Pennington argues that, "No fair reading of the record would result in anyone contending that the testimony was not confusing with regard to the time of the offenses." This argument is circular; the jury instruction states that the date need not be proven and thus there need not be clarity as to the dates. The offenses need only be distinct in time relative to each other. Pennington never directly argues why they were not.

¶54 Out of seven counts, there were three victims. One count was charged for victim Matt W. The assault alleged on him could not possibly have happened concurrently with assaults on other victims and is thus distinct. Two counts were charged relative to Bradley L. He was able to recount two incidents—one around when he broke his arm and once on a night that he was sick from drinking.

¶55 Four counts were charged relative to victim Michael B. He was able to distinguish four occasions. One assault occurred on a night when only he and Buck G. were at home and Pennington provided condoms. A second assault occurred when Michael's roommate Matt was home and Michael provided the condoms. The third assault apparently occurred on New Year's Eve, although Michael wavered on the date. He distinguished the night, however, because Pennington provided vodka and Michael later fought with two housemates in the

basement. The fourth assault occurred when the home was full because no one was out on visitation and no fights or other unusual event occurred.

¶56 Pennington claims that because much of her defense was premised on defending against specific dates, the jury instruction stripped her of a defense. However, Pennington was not prevented from arguing her alibi, calling attention to the State's originally charged dates, or pointing out inconsistencies in victims' testimony and arguing from that to a conclusion that nothing happened, leaving the jury to its duty to weigh the credibility of witnesses and evidence.

¶57 By giving the jury instruction, the court implicitly determined that the incidents could be found separate in time, regardless of the actual dates, and that the instruction was therefore proper. We cannot conclude that this was an erroneous exercise of discretion. The instruction is a proper statement of the law, and an appellate court will generally look for reasons to sustain the trial court's discretionary decisions. ***Randall v. Randall***, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737.

Conclusion

¶58 There was no ***Miranda*** violation because the trial court correctly determined that Pennington was not in custody when she gave incriminating statements. Both her oral and written statements were voluntary because there was no improper police conduct. Pennington was not denied her constitutional right to a speedy trial, even though the delay was presumptively prejudicial. She was at least as responsible for the delay as the State, she did not assert her right to a speedy trial, and she did not suffer from any actual prejudice from the delay. Finally, the trial court properly charged the jury with WIS JI—CRIMINAL 255.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.