COURT OF APPEALS
DECISION
DATED AND FILED

February 28, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2742-CR **Cir. Ct. No. 2003CF206**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY L. WARE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: JAMES L. MARTIN, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Dykman, Lundsten and Bridge, JJ.

¶1 PER CURIAM. Jeffrey Ware appeals a judgment convicting him on two burglary counts. He also appeals an order denying his motion for postconviction relief. Ware's conviction followed a jury trial. He raises issues

concerning an evidentiary ruling during trial, trial counsel's performance at trial, Ware's constitutional right to a speedy trial, and sentence credit. We conclude that Ware is entitled to additional sentence credit, but otherwise affirm.

BACKGROUND

¶2 In January 2003, the State charged Ware with three counts of burglary. Ware made his initial appearance on March 3, 2003. On March 12, 2003, Ware failed to appear for his preliminary hearing, and the court issued a bench warrant for his arrest. Later in March, Ware was arrested in Illinois on Illinois charges, but freed on electronic monitoring. On March 31, 2003, Ware was arrested and confined in the Cook County, Illinois, jail on a Wisconsin fugitive warrant. An Illinois court dismissed the warrant on June 26, 2003, because of Wisconsin's failure to prosecute. Ware remained in jail in Illinois until May 19, 2004, when the charges he faced in Illinois were dismissed. He did not appear in this case until December 15, 2004.

¶3 At his preliminary hearing on December 23, 2004, Ware demanded a speedy trial. In February 2005, he withdrew his speedy trial demand. Ware then filed a motion to dismiss based on constitutional speedy trial grounds and, in April 2005, the circuit court denied his motion. Ware's trial occurred on April 27, 2005.

¶4 The State tried Ware on allegations that he and Mallory Thome burglarized rooms in a co-op. Thome was also charged in the burglaries, and negotiated a plea agreement that included her promise to testify against Ware.

¶5 At trial, Thome testified that the two entered the co-op, burglarized several rooms, and carried the stolen items out to Ware's van. Thome also testified that Ware stole a guitar during the burglary. Thome said she

subsequently left when a resident caught her taking things from his room. She and Ware then escaped in Ware's van.

¶6 Kenneth Horn, a resident of the co-op, testified at trial that he caught Thome in the act of burglarizing his room. Horn testified that after Thome left the co-op he followed her for a couple of blocks, and he then returned to the co-op. At that point, Horn spoke to another resident of the co-op, Daniel Hooper, who told of seeing a black male in the co-op carrying things through a hall, including a guitar case. Hooper was reportedly out of the country at the time of trial and did not testify. The circuit court allowed Horn to testify to Hooper's statement under the present sense impression exception to the hearsay rule. *See* WIS. STAT. § 908.03(1) (2005-06).[1] The statement was inculpatory because Ware is a black male, and Hooper's statement inferentially supported Thome's testimony that Ware participated in the burglary and had taken a guitar.

¶7 Ware testified that he remained in the van while Thome entered the co-op, and he was not aware that she intended to commit burglaries while she was there.

¶8 In postconviction proceedings, Ware alleged that counsel provided ineffective representation. Counsel's alleged omissions included his failure to: (1) object on confrontation grounds to Horn's testimony about Hooper's statement; (2) request WIS JI—CRIMINAL 245, Testimony of Accomplices; and (3) present evidence at trial that counsel promised to present in his opening statement. The court held that counsel reasonably withheld a confrontation

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

objection, but that omissions (2) and (3) amounted to ineffective representation. However, the court held that Ware was not prejudiced by those two omissions.

¶9 Ware also moved for sentence credit for the time he spent in the Cook County Jail between March 31, 2003, and May 19, 2004. The circuit court concluded that Ware's confinement attributable to this prosecution ended on June 26, 2003, and denied credit between June 27, 2003, and May 19, 2004. On appeal, Ware contends that Horn's testimony about Hooper's statement was inadmissible because it violated Ware's constitutional right to confront witnesses; that trial counsel's omissions listed above were both unreasonable and prejudicial; that the delay in his trial attributable to the State violated his constitutional right to a speedy trial; and that he is entitled to sentence credit for the period June 27, 2003, to May 19, 2004.

HOOPER'S STATEMENT

¶10 An out-of-court statement is inadmissible under U.S. CONST. amend. VI and WIS. CONST. art. I, § 7, if it is "testimonial" in nature, the declarant is unavailable, and the defendant has had no prior opportunity to cross-examine the declarant. ***State v. Jensen***, 2007 WI 26, ¶15, 299 Wis. 2d 267, 727 N.W.2d 518. If the statement is not "testimonial," and the declarant is unavailable, then the statement must "bear adequate 'indicia of reliability.'" ***State v. Hale***, 2005 WI 7, ¶45, 277 Wis. 2d 593, 691 N.W.2d 637 (citing and quoting ***Ohio v. Roberts***, 448 U.S. 56, 66 (1980)). The court may infer adequate indicia of reliability if the evidence falls within a firmly rooted hearsay exception, or upon a showing of "'particularized guarantees of trustworthiness.'" ***Hale***, 277 Wis. 2d 593, ¶45 (quoting ***Roberts***, 448 U.S. at 66).

¶11 Ware first contends that Hooper's statement to Horn was testimonial, and thus inadmissible, because Ware never had the chance to cross-examine Hooper before Hooper became unavailable, and there was reason to believe that Hooper's statement would be used at trial. *See* ***State v. Manuel***, 2005 WI 75, ¶37, 281 Wis. 2d 554, 697 N.W.2d 811 (citing and quoting ***Crawford v. Washington***, 541 U.S. 36, 51-52 (2004)) (a testimonial statement includes one made under circumstances leading an objective witness to reasonably believe that the statement would be available for use at a subsequent trial). However, informal, spontaneous statements to friends, neighbors, or acquaintances are generally not considered testimonial. *See* ***Jensen***, 299 Wis. 2d 267, ¶¶31-33; *see also* ***Manuel***, 281 Wis. 2d 554, ¶¶47-53. They are testimonial only if made "with an eye towards litigation." ***Manuel***, 281 Wis. 2d 554, ¶53. There is no indication that a reasonable person in Hooper's position would have believed, or intended, that his simple, brief statement would be used in a subsequent prosecution. He was merely relating what he had just seen to his co-op housemates. His statement, therefore, was not "testimonial."

¶12 Alternatively, Ware argues that, even if Hooper's statement was not testimonial, it was inadmissible under the confrontation clause because it did not fit a firmly rooted hearsay exception, and did not bear particularized guarantees of trustworthiness. An out-of-court statement of a non-testifying witness is admissible if the witness is unavailable and the statement bears particularized guarantees of trustworthiness. ***Roberts***, 448 U.S. at 74-75. In evaluating whether a statement evinces particularized guarantees of trustworthiness, we consider the circumstances surrounding the making of the statement and those circumstances that render the declarant particularly worthy of belief. ***State v. Weed***, 2003 WI 85, ¶25, 263 Wis. 2d 434, 666 N.W.2d 485 (citing and quoting ***Idaho v. Wright***, 497

U.S. 805, 819 (1990)). If the declarant's truthfulness is so clear from the surrounding circumstances that cross-examination would be no more than marginally useful, then the statement is sufficiently trustworthy. *See* ***Weed***, 263 Wis. 2d 434, ¶25 (citing and quoting ***Wright***, 497 U.S. at 820).

¶13 Here, there is no serious dispute regarding Hooper's unavailability. Furthermore, we conclude that Hooper's statement contained sufficient guarantees of trustworthiness. Hooper told Horn that he saw a black male with a guitar case, but provided no further description. Although Horn gave no precise time estimate, it is clear that Hooper made his statement within minutes of the event he described. It was very shortly after Horn discovered Thome in his room and followed her out of the co-op, and it is reasonable to assume that Ware and Thome had not been in the co-op, burglarizing it, over an extended period of time. Additionally, Hooper had no apparent reason to lie about what he saw, and there was no reason to infer that he was mistaken in what he saw. He relayed a very simple piece of information that was, on its face, neutral. Only when later coupled with Thome's testimony was his statement inculpatory. Cross-examination of Hooper would have been marginally useful, at best.

TRIAL COUNSEL'S PERFORMANCE

¶14 To establish ineffective assistance, the defendant must show that trial counsel's representation was deficient and that the deficiency prejudiced him. ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). We review both questions without deference, as matters of law. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). If we conclude that the defendant has not proven prejudice, we need not address the issue of performance. ***Strickland v. Washington***, 466 U.S. 668, 697 (1984). To show prejudice, the defendant must

demonstrate a reasonable probability that, but for the error, the outcome of the proceeding would have been different. ***Id.*** at 694.

¶15 Ware first argues that counsel did not properly preserve his confrontation clause challenge to the use of Hooper's statement. For the reasons explained in the previous section of this opinion, a confrontation clause challenge would not have succeeded. Consequently, counsel's omission was neither deficient nor prejudicial.

¶16 Ware next argues that counsel negligently failed to request WIS JI—CRIMINAL 245, Testimony of Accomplices. That instruction advises the jury to consider an accomplice's testimony with "caution and great care." WIS JI—CRIMINAL 245. It is intended to safeguard the defendant's right to a fair trial when the State grants concessions in exchange for testimony by an accomplice. ***State v. Nerison***, 136 Wis. 2d 37, 46, 401 N.W.2d 1 (1987). It was, in the circuit court's view, deficient performance not to request that instruction. Accepting that view for argument's sake, we nonetheless conclude that the omission did not prejudice Ware.

¶17 The jury heard the following testimony about Thome: she had multiple criminal convictions; abused drugs and alcohol; she was under the influence of drugs when she and Ware committed the burglaries; she gave police inconsistent versions of the burglary and, at one point, told police that she was so drugged she could not remember what happened. The jury also heard that, although Ware was thirty-five-years old, Thome initially described him as a teenager; she considered Ware her lover; she was upset that he had jilted her after her arrest; and she had once lived in the burglarized co-op, but was kicked out for theft. Additionally, counsel read Thome's plea agreement to the jury, including

the prosecutor's unequivocal declaration that Thome received sentencing and charging concessions partly in exchange for her testimony against Ware. However, when asked to confirm that she received concessions for testifying, Thome both flatly denied that she had and answered evasively. Defense counsel extensively reviewed the problematic nature of Thome's testimony in his closing argument. In summary, he described Thome as an "unreliable witness who was paid for, who has got a history of lying, who was making a deal to get herself out of trouble." In short, the jury was fully informed as to why Thome's testimony might be unreliable. It defies common sense to suspect that the jury did not understand the need to consider Thome's testimony with great care. Therefore, Ware has not shown a reasonable probability of a different result had the court given the accomplice instruction.

¶18 Finally, Ware argues that counsel negligently failed to present evidence impeaching Thome's credibility, despite promising to do so in his opening argument. Counsel promised testimony that Thome told lies in three specific instances unrelated to the co-op burglary or her relationship with Ware. By his own account, counsel forgot to introduce that testimony. Again, the circuit court found his omission deficient, but not prejudicial. We agree with the circuit court that Ware has not shown prejudice. As the circuit court noted, and as we have recounted above, Thome's questionable reliability and credibility was sufficiently established during her own testimony. Thome admitted to multiple lies directly related to this case, and counsel effectively presented the jury with plausible motives Thome may have had to falsely implicate Ware. Further evidence that she had been untruthful in the past would have been cumulative.

SPEEDY TRIAL

¶19 To determine whether a defendant's constitutional right to a speedy trial has been violated, we consider a four-part balancing test: (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) whether the defendant was prejudiced by the delay. ***Barker v. Wingo***, 407 U.S. 514, 530 (1972). We first inquire whether the length of the delay has crossed the line dividing ordinary from "presumptively prejudicial" delay. ***Hatcher v. State***, 83 Wis. 2d 559, 566-67, 266 N.W.2d 320 (1978). A presumptively prejudicial post-accusation delay is one that approaches one year. *See* ***Doggett v. United States***, 505 U.S. 647, 652 n.1 (1992).

¶20 Ware contends that at least fourteen months of the delay should be attributed to the State's negligence rather than to his absconding. Even if we accepted that contention, Ware's claim fails on the remaining prongs of the speedy trial test.

¶21 The reason for the delay does not weigh heavily against the State. Assuming the State was guilty of negligence, negligent delay weighs less heavily than intentional delay. ***Hipp v. State***, 75 Wis. 2d 621, 627, 250 N.W.2d 299 (1977).

¶22 The third prong, assertion of his right to a speedy trial, weighs against Ware because he did not demand a speedy trial until he returned to Wisconsin, in December 2004, and he subsequently withdrew his statutory speedy trial demand and requested a delay in scheduling the trial.

¶23 Finally, Ware failed to demonstrate that the delay actually prejudiced his defense.

¶24 Ware contends that we should assume the delay caused him anxiety and concern. But Ware himself explains that this assumption leads only to minimal prejudice. Ware also contends that, by the time he came to trial, potentially exculpatory witnesses could no longer recall events that occurred near the time of the burglary in November 2002. However, Ware fails to explain why he could not have contacted the witnesses between the time he was charged, in January 2003, and the time he absconded, in March 2003, when the witnesses presumably had a better memory of events. If the witnesses were lost to him, he must bear the blame.

¶25 Furthermore, Ware's recitation of evidence indicating that he made legitimate purchases totaling $300 just before the charged burglary is undeveloped. Ware asserts that "log notes" of agents supervising Ware showed the purchases, but that he could not present the evidence because the agents involved had no independent recollection because of the delayed trial. But Ware does not explain why the "log notes" could not have been used to refresh the agents' memories, or been admissible themselves if the agents could not recall. Ware asserts that the log notes are not detailed enough to be helpful. But, if that is true, then Ware is purely speculating as to what the agents would have said if interviewed sooner. And, it is difficult to see how purchases exculpate Ware. Obviously, burglars often use ill-gotten proceeds to make retail purchases. The supposedly lost evidence did not show that Ware had a legitimate source of income.

¶26 In sum, under these circumstances Ware has not established a constitutional deprivation of his right to a speedy trial.

SENTENCE CREDIT

¶27 A sentenced defendant receives credit for all days spent in custody in connection with the course of conduct for which sentence was imposed. WIS. STAT. § 973.155(1)(a). We independently determine whether the defendant should receive sentence credit. *See* ***State v. Lange***, 2003 WI App 2, ¶41, 259 Wis. 2d 774, 656 N.W.2d 480 (Ct. App. 2002). We will uphold the circuit court's findings of fact on the question, however, unless they are clearly erroneous. ***Noll v. Dimiceli's, Inc***., 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983).

¶28 The dispositive question here is whether Ware would have been held in the Cook County Jail between June 27, 2003, and May 19, 2004, even if he had not been a fugitive in this case. *See* ***State v. Johnson***, 2007 WI 107, ¶¶70, 81, __ Wis. 2d __, 735 N.W.2d 505. We conclude that the circuit court erred by finding no connection between Ware's fugitive status and his continued confinement after June 26. Before Illinois authorities became aware of the Wisconsin prosecution, Ware was placed on electronic monitoring. He was then jailed on Wisconsin's fugitive warrant. When the warrant was dismissed for failure to prosecute, Ware remained in jail. The record discloses no violations of electronic monitoring rules, or any other reason related to the Illinois prosecution, that would explain why Ware was not again released to monitoring, as he had been three months earlier. The only reasonable inference is that the pending Wisconsin charges were a substantial factor in the decision to remove Ware from monitoring for the custody time at issue. We therefore direct the circuit court on remand to enter an amended judgment awarding Ware sentence credit for the time spent in custody between June 27, 2003, and May 19, 2004, which we calculate at 328 days.

By the Court.—Judgment and order affirmed in part; reversed in part and cause remanded with directions.

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