COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1512-CR **Cir. Ct. No. 2006CF153**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DENNIS D. MCCOY,

DEFENDANT-APPELLANT.

APPEAL from judgments and orders of the circuit court for Chippewa County: RODERICK A. CAMERON, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Dennis McCoy, pro se, appeals judgments of conviction for exposing a child to harmful material, disorderly conduct, and intimidating a victim, and orders denying his postconviction motion and motion for reconsideration. McCoy argues the circuit court lacked personal jurisdiction,

his statutory speedy trial right was violated, there was insufficient evidence on the harmful material charge, and the prosecutor made improper remarks during closing argument. McCoy also argues his trial counsel was ineffective for failing to object to the claimed errors. We disagree and affirm the judgments and orders.

BACKGROUND

¶2 The charge of exposing a child to harmful material was based on McCoy providing a vibrator to his thirteen-year-old stepdaughter, which he left in the bathroom with a note that read:

> If your mom knew you even knew about this toy she'd kill us both. I think you are very curious about it. To satisfy yourself is a normal healthy act. You only get one chance for a new different experience. In the morning I [sic] hide this and destroy this note when I wake up. Twist button for off and on. Do not have it anywheres near water. I suggest a towel on the floor then you can sit or lay down. If you enjoy it before you shower then you can again after you shower if you want. Your mom can't ever know you experimented with her toy. She'd kill the both of us. You will find pleasure quick and intense.

Additional facts are set forth as necessary in the body of the opinion.

¶3 McCoy was convicted following a jury trial. The court rejected his postconviction motion and motion for reconsideration without a hearing and this appeal follows.

DISCUSSION

¶4 McCoy first argues the trial court lacked personal jurisdiction because it failed to conduct a preliminary examination within the twenty-day limit

prescribed by WIS. STAT. § 970.03(2).[1] While such a failure may result in the loss of personal jurisdiction, McCoy waived this argument by pleading to the Information. *See* ***Flowers v. State***, 43 Wis. 2d 352, 366, 168 N.W.2d 843 (1969).[2]

¶5 McCoy further argues his trial counsel provided ineffective assistance by failing to preserve the personal jurisdiction issue. To prevail on this claim, McCoy must prove both that his attorney's performance was deficient and that McCoy was prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We need not address both prongs if we determine the defendant fails to demonstrate either of them. ***Id.*** at 697.

¶6 The trial court scheduled the preliminary hearing to occur six days after the State filed an amended complaint that reintroduced a felony charge. McCoy was already released on a signature bond on this case, but he remained in custody on other charges. The court stated McCoy was to be held at the county jail during the interim, but the jail sent him back to prison and he was therefore not present at the scheduled preliminary hearing. The hearing was then held three weeks later, seven days beyond the statutory timeframe.

¶7 McCoy's counsel was not ineffective for failing to challenge personal jurisdiction because the trial court properly extended the time limit for cause, as permitted by WIS. STAT. § 970.03(2). Whether to extend the time for

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

[2] Out of an apparent abundance of caution, the State informs us ***State v. Selders***, 163 Wis. 2d 607, 613, 472 N.W.2d 526 (Ct. App. 1991), could be read to conflict with ***Flowers v. State***, 43 Wis. 2d 352, 366, 168 N.W.2d 843 (1969). We perceive no conflict. In any event, ***Flowers***, which was decided by our supreme court prior to our decision in ***Selders***, would control. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997).

holding a preliminary examination is a decision committed to the trial court's discretion. ***State v. Selders***, 163 Wis. 2d 607, 613, 472 N.W.2d 526 (Ct. App. 1991). The two main factors to consider are the justification for the extension and the potential for prejudice to the opposing party. ***Id.*** at 614-15. Here, the court rescheduled the hearing so McCoy could be present, and there is no prejudice apparent from the record. Thus, the court properly acted within its discretion. Further, even if an objection had been successful, the State could have simply refiled the charge because the statute of limitations had not expired. ***State v. Stoeckle***, 41 Wis. 2d 378, 386, 164 N.W.2d 303 (1969). Therefore, McCoy was not prejudiced by his counsel's failure to preserve the personal jurisdiction issue.

¶8 McCoy next contends his right to a speedy trial under WIS. STAT. § 971.10(3) was violated, asserting the trial date was delayed due to congestion of the court calendar. However, even if this were true, there was no remedy because he was already released from custody in this case. The only remedy for a violation of the statutory right to a speedy trial is release from custody. WIS. STAT. § 971.10(4).

¶9 Regardless, there was no speedy trial violation for two reasons. First, McCoy withdrew his speedy trial request after consultation with his counsel. Second, any violation of the sixty-day rule for misdemeanor cases based on the scheduled trial date was rendered moot when the State filed the felony charge just nine days later.

¶10 McCoy also appears to argue his counsel was ineffective for failing to raise a speedy trial objection and for advising McCoy to withdraw his request. Because he had no remedy even if there were a violation and because any violation would have been rendered moot before expiration of the time limit,

McCoy fails to demonstrate any prejudice from his attorney's alleged failures. Further, merely complaining that he followed his attorney's advice does not demonstrate McCoy did not understand the implications of withdrawing his speedy trial demand. Further, as the trial court told him, McCoy could have reasserted a speedy trial demand at any time. Therefore, McCoy's ineffective assistance argument again fails for lack of prejudice.

¶11 McCoy next claims there was insufficient evidence to convict him of exposing a child to harmful material under WIS. STAT. § 948.11(2)(a). Specifically, he argues the State failed to prove the sub-element described in subd. (1)(b)2., that the materials were "patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for children." McCoy contends it was error to permit the jury to decide what constituted the "prevailing standard." Rather, he asserts the State was required to affirmatively demonstrate or describe the prevailing community standard.

¶12 Contrary to McCoy's assertion, "[t]he United States Supreme Court, federal courts, and Wisconsin courts are uniform in concluding that questions of whether material … satisfies community standards for potentially obscene material … may be appropriately decided by a jury." ***State v. Booker***, 2006 WI 79, ¶24, 292 Wis. 2d 43, 717 N.W.2d 676. In fact, in one of the cases ***Booker*** cited, we stated "'community standards must be applied by juries in accordance with their own understanding of the tolerance of the average person in their community.'" ***State v. Tee & Bee, Inc.***, 229 Wis. 2d 446, 452, 600 N.W.2d 230 (Ct. App. 1999) (citing ***Smith v. United States***, 431 U.S. 291, 305 (1977)). In another, the Supreme Court stated the materials are "sufficient in themselves for the determination of the question" of whether they were obscene. ***Paris Adult Theatre I v. Slaton***, 413 U.S. 49, 56 (1973). Therefore, McCoy's argument is

contrary to established precedent holding it is the jury's responsibility to determine and apply the community standard.

¶13 McCoy also complains the State did not fully inform the jury of the elements of the exposing a child to harmful material charge during closing argument. While this claim is undeveloped and therefore need not be addressed,[3] we note it is the trial court's responsibility to instruct the jury on the law. There is no requirement that the State also instruct the jurors.[4]

¶14 McCoy's final argument is that his attorney was ineffective for failing to object to allegedly improper statements during the State's closing argument. McCoy objects to the prosecutor's statements that, "You don't say, 'If you promise not to sexually assault her and not give her more vibrators, we can live together'" and "to give up her daughter to let him do what he was planning to do." McCoy argues these statements were inappropriate because he was not charged with sexually assaulting his stepdaughter and there was no evidence he intended to do so.

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[3] *See* ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994).

[4] We do, however, observe an error in the jury instructions utilized here, which persists in the current version of the pattern jury instruction, WIS JI—CRIMINAL 2142 (May 2007). The instruction is required to clearly inform the jury that the "community" in reference to the "prevailing standards of the adult community as a whole" is the State of Wisconsin. ***State v. Tee & Bee, Inc.***, 229 Wis. 2d 446, 454-55, 600 N.W.2d 230 (Ct. App. 1999); *see also* ***Court v. State***, 63 Wis. 2d 570, 576-78, 217 N.W.2d 676 (1974) (on remand from the United States Supreme Court); ***State v. Booker***, 2006 WI 79, ¶26, 292 Wis. 2d 43, 717 N.W.2d 676. The pattern instruction fails to define the scope of the community. We encourage the instruction committee to review the instruction in light of these cases, to determine whether it currently invites error.

McCoy does not claim he objected to the instruction's use at trial, argue his trial counsel was ineffective for failing to object, nor otherwise raise the issue. Therefore, he has waived the matter in this case. *See* WIS. STAT. § 805.13(3); ***State v. McDowell***, 2003 WI App 168, ¶73, 266 Wis. 2d 599, 669 N.W.2d 204.

¶15 As the State aptly responds, the statements were appropriate in light of the other acts evidence admitted at trial, to support the State's theory that McCoy was grooming the victim for future sexual activity. The State offered the other acts evidence to rebut the anticipated argument that McCoy's presentation of the note and vibrator was a legitimate attempt at sex education. The court ruled the evidence was admissible to demonstrate motive and plan, noting McCoy had repeatedly pinched the victim in the buttocks, commented about her physical appearance, had sexual conversations with her, and viewed pornography in her presence.

¶16 Additionally, the prosecutor's statements were an acceptable response to the strategy employed during cross-examination of the victim's mother, attempting to show she overreacted to the note and vibrator because she had not previously taken action to protect her daughter relative to the prior acts. The State is allowed considerable latitude in closing argument and all statements must be considered in context. ***State v. Wolff***, 171 Wis. 2d 161, 167-68, 491 N.W.2d 498 (Ct. App. 1992). Here, the comments drew an inference from admissible evidence for the purpose for which it was admitted. Further, the comments were a reasonable "measured response" to the defense strategy. *See* ***id.*** at 168. Because the statements were proper, McCoy's counsel was not ineffective for failing to object to them.

By the Court.—Judgments and orders affirmed.

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