COURT OF APPEALS
DECISION
DATED AND FILED

OCTOBER 13, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0701-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BARBARA A. DUVAL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: DONALD J. HASSIN, JR., Judge. *Affirmed.*

¶1 ANDERSON, J. Barbara A. DuVal appeals pro se from her misdemeanor retail theft conviction pursuant to § 943.50(1m), STATS. DuVal argues that her conviction should not stand because her due process rights were violated because the police did not investigate her alibi, she did not receive a trial within sixty days as required by § 971.10, STATS., and the court was biased in favor of the State. Additionally, she claims the trial court committed several

errors. The trial court erred, she contends, by: (1) allowing inadmissible evidence into the jury room, (2) not instructing the jury on her alibi defense, (3) allowing untrue remarks during the prosecutor's closing arguments, and (4) excluding questioning about a witness's driving record. All of these arguments fail and we affirm.

BACKGROUND

¶2 On a busy evening at a gas station, Kimberlee Kozuh, the gas station's night manager, observed DuVal come into the station's store. After wandering around the store, DuVal came up to the counter, paid $2 for her gas and left the store. Meanwhile, Scott Fittshur was looking around the store while Kozuh phoned for a credit card approval for his purchase. Fittshur saw DuVal stuff pantyhose and some other items in her jacket pockets and leave without paying for them. When Fittshur returned to the checkout counter, he informed Kozuh about what he had witnessed.

¶3 Kozuh ran outside to find DuVal. She found DuVal in her car and asked her to return to the store. DuVal went back into the store with Kozuh. Kozuh asked her if she took anything from the store. DuVal denied taking anything. During her conversation with Kozuh, DuVal was very fidgety. All of a sudden, a box of pantyhose fell to the floor near DuVal. Despite standing in the candy aisle, DuVal insisted that the pantyhose must have fallen from the shelf. Kozuh testified that it fell from DuVal's jacket.

¶4 Kozuh informed DuVal that she would have to wait while she contacted the police. DuVal requested that she not call the police and then left the store. Fittshur and Kozuh went outside. Fittshur tried to get DuVal's car keys but

was unable to do so. As DuVal drove off, Fittshur and Kozuh wrote down her license plate number. Both testified that DuVal's car was a station wagon.

¶5 A few days later, the police department contacted DuVal. Deputy Sheriff Michael Hecht informed her that he was investigating the shoplifting incident. DuVal agreed to go to the sheriff's department for an interview. DuVal insisted that she knew nothing about the incident and was having dinner with her husband at Burger King when the theft occurred. Hecht testified that during his phone conversation with DuVal prior to the interview, she had stated that she was having dinner at McDonald's during the incident. Because of these conflicting statements, Hecht decided not to investigate DuVal's alibi claim. DuVal was subsequently charged with misdemeanor retail theft contrary to § 943.50(1m), STATS.

¶6 After pleading not guilty, DuVal waived her right to counsel and represented herself at trial. During voir dire, DuVal made several mistakes that necessitated that the judge declare a mistrial and seat a new jury panel. The State, shortly thereafter, moved for DuVal to be declared incompetent to proceed pro se at trial. The State's motion was denied. A jury trial followed. The jury found DuVal guilty of retail theft. DuVal appeals.

DISCUSSION

A. Alibi

¶7 DuVal raises two arguments regarding her alibi defense. First, she argues that her due process rights were violated when the police department failed to investigate her alibi claim. Second, she contends that the trial court erred by not instructing the jury on her alibi defense.

¶8 DuVal argues that the court inadequately instructed the jury by failing to give them WIS J I—CRIMINAL 775 about criminal defendants with alibi defenses. However, the record reveals that she never objected to the proposed instructions and that she never submitted any alternative instructions to the court. It follows that she has waived her right to claim error on appeal. *See* ***State v. Schumacher***, 144 Wis.2d 388, 409, 424 N.W.2d 672, 680 (1988); ***State v. Zelenka***, 130 Wis.2d 34, 44, 387 N.W.2d 55, 59 (1986) (failure to object to a jury instruction before the trial court constitutes a waiver of the error).

¶9 In any event, if a criminal defendant desires to present an alibi as a defense to the State's charges, he or she must follow the procedures outlined in § 971.23(8), STATS. To present an alibi defense, the defendant "shall give notice to the district attorney at the arraignment or at least 15 days before trial stating particularly the place where the defendant claims to have been when the crime is alleged to have been committed together with the names and addresses of witnesses to the alibi, if known." ***Id.*** DuVal did not comply with § 971.23(8) by giving the State notice that she intended to present an alibi. Because she did not act according to the alibi statute, she may not raise this issue on appeal.

¶10 Despite DuVal's failure to follow the statutory requirements necessary for presenting an alibi defense, the court, using its discretionary powers, allowed DuVal to put her husband on the stand to testify about her Burger King alibi. The State could have objected to any alibi testimony being presented because DuVal did not comply with the requirements of § 971.23(8), STATS. However, she was permitted to present evidence of this defense to the jury.

¶11 We also determine that DuVal's complaints that the police did not investigate her alibi are without basis. First, criminal defendants have no right to

instruct the police department about how to handle its investigations. Second, the decision about whether to offer an alibi defense is for defendants to make. It is not the responsibility of law enforcement agencies to investigate such a defense and do what the defendants have not elected to do for themselves. We conclude that DuVal's alibi arguments are without merit.

B. Speedy Trial

¶12 DuVal challenges her conviction because she claims she was denied the right to a speedy trial. Section 971.10, STATS., requires misdemeanor trials to begin within sixty days of the defendant's initial appearance. The criminal complaint against DuVal was filed on April 3, 1998. At her initial appearance on May 6, 1998, DuVal entered a not guilty plea and her next court date was set for May 20, 1998. However, DuVal was convicted at a jury trial held on March 3, 1999. DuVal's trial began over sixty days after her initial appearance before the court.

¶13 The record does not clearly indicate all the activities, if any, that occurred during this period. The only activity revealed in the record is the State's February 9, 1999 motion to have DuVal declared incompetent to proceed at trial. Because DuVal appeals her criminal conviction, she has the duty to see that the evidence material to her appeal is in the record. *See* ***Peterson v. State***, 73 Wis.2d 417, 423, 243 N.W.2d 491, 495 (1976). The State provides a procedural history of the case in its brief. DuVal does not dispute this history in her reply brief. Because DuVal does not refute the procedural history recited by the State, we infer that she concedes its accuracy. *See* ***Madison Teachers, Inc. v. Madison Metro. Sch. Dist.***, 197 Wis.2d 731, 751, 541 N.W.2d 786, 794 (Ct. App. 1995) ("A proposition asserted by a respondent on appeal and not disputed by the appellant's reply is taken as admitted.").

¶14 Between the initial appearance and trial, the following events transpired. First, DuVal moved for the court to dismiss the case. Her request was denied on July 20, 1998. DuVal was granted continuances to retain counsel and prepare for trial. Jury selection began for her trial on December 2, 1998. However, DuVal incorrectly performed voir dire, tainting the jury and necessitating a mistrial. Subsequently, the State moved for DuVal to be declared incompetent to represent herself pro se at trial. The motion was denied, and DuVal was found guilty after a jury trial on March 3, 1999.

¶15 In determining whether the constitutional right to a speedy trial has been infringed, we consider: "the length of delay, the reason for the delay, whether or not the defendant asserted the right to a speedy trial, and whether the delay caused prejudice to the defendant." ***State v. Mullis***, 81 Wis.2d 454, 458, 260 N.W.2d 696, 698 (1978). DuVal does not claim that she demanded a speedy trial. Although this does not constitute a waiver of that right, her complete failure to assert it will be weighed against her. *See* ***Hatcher v. State***, 83 Wis.2d 559, 568, 266 N.W.2d 320, 325 (1978). Not only did DuVal fail to assert her right to a speedy trial, she initiated and caused the delays. DuVal requested and received continuances. She cannot request a continuance to prepare for trial and then later on appeal complain that her trial was not speedy enough. There was no denial of DuVal's statutory or constitutional right to a speedy trial.

C. Prosecutorial Error

¶16 DuVal contends that the prosecution committed a prejudicial error at trial. Specifically, DuVal contends these prosecutorial remarks during closing argument were prejudicial:

> Ms. DuVal would like us to believe it's just a coincidence that her license plate number was the number that was written down by Kimberlee Kozuh and Scott Fittshur that night at the gas station…. Then why … did her husband lie about owning the car to the police?

¶17 DuVal argues that because the prosecutor stated that the license plate number belonged to her, reasonable persons would not doubt what the State tells them or think it could be false or misleading information. We disagree. DuVal misunderstands the role of the jury. The jury serves as the fact finder, sifts through the evidence presented by the parties, determines which evidence is credible and which is not, and resolves conflicts within the evidence, possibly rejecting exculpatory testimony. *See* ***State v. Pankow***, 144 Wis.2d 23, 30-31, 422 N.W.2d 913, 915 (Ct. App. 1988). While the prosecutor's remark may have been improper, the determination of which vehicle the license plate number belonged to is a question of fact. The jury was free to determine what it believed.

¶18 DuVal's husband testified that he did not own a vehicle matching the license plate number written down by Kozuh and Fittshur. In addition, DuVal stressed this fact in her closing argument:

> [T]hey were relying so much on … the license plate over and over and over. Oh, I'm so sure of it. I definitely could see. The lighting was so proper. It's not our license number. My husband said it under oath…. That is not our license number to that car.

The jury had knowledge of the fact that DuVal disputed the license plate number used to identify her vehicle. The prosecutor's remark to the contrary is her characterization of the fact at issue and cannot be construed as prejudicial.

D. State Bias

¶19 DuVal also asserts that the trial court was biased towards the State, which violated her due process rights. She finds support for this argument in the judge's remarks at the beginning of trial. Whether a judge lacks impartiality is a question of law which this court reviews de novo. *See* ***Murray v. Murray***, 128 Wis.2d 458, 463, 383 N.W.2d 904, 907 (Ct. App. 1986).

¶20 At trial, the State was represented by a legal intern, a third-year law student working in the district attorney's office. *See* SCR 50.06. The court said:

> How many witnesses? You got four witnesses, [legal intern]? I'm sorry. Going to try to stay with you, [legal intern]. If I get mad, I'm going to [your supervising attorney]. That's probably preferable for you.

¶21 DuVal insists that this passage demonstrates the court's intent to give the State preferential treatment. On the contrary, we read the judge's statements as reprimanding the legal intern and informing her that should he get upset at her courtroom conduct, he would discuss it with her supervisor. This does not show any court bias against DuVal.

E. Trial Court Error Arguments

¶22 DuVal raises two arguments of trial court error. First, she contends that the court erroneously excluded her questioning of a witness about his driving record. Second, she posits that the trial court allowed inadmissible evidence into the jury room. We will address each argument in turn.

¶23 The admission of evidence lies within the sound discretion of the trial court. *See* ***State v. Pepin***, 110 Wis.2d 431, 435, 328 N.W.2d 898, 900 (Ct. App. 1982). When we review a discretionary decision, we examine the record to determine if the trial court logically interpreted the facts, applied the proper legal standard, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach. *See* ***State v. Keith***, 216 Wis.2d 61, 69, 573 N.W.2d 888, 892-93 (Ct. App. 1997), *review denied*, 217 Wis.2d 518, 580 N.W.2d 689 (1998). Furthermore, if evidence has been erroneously admitted or excluded, we will independently determine whether that error was harmless or prejudicial. *See* ***State v. Patricia A.M.***, 176 Wis.2d 542, 556-57, 500 N.W.2d 289, 295 (1993).

¶24 DuVal asserts that photos of a vehicle's license plate were declared inadmissible by the court but were allowed in the jury room. We agree that the photos in question were determined to be inadmissible. During jury deliberations, the record reveals that the jury's foreperson requested several exhibits, including the vehicle photos. However, the exhibit list indicates that these photos were denied admissibility as evidence and were excluded from the trial's exhibits. DuVal presents no evidence that the jury actually received the inadmissible photos. She only presents evidence that the photos were requested. Without such proof, we find no error.

¶25 DuVal also contends that during her cross-examination of Fittshur, the court erroneously denied her attempts to question him about his driving record. Fittshur identified DuVal as the woman who stole a box of pantyhose from the gas station. The court concluded that questions about Fittshur's driving record were not relevant to his credibility or ability to identify the suspect. We agree that Fittshur's driving record did not make any fact of consequence to DuVal's retail theft charge more or less probable. *See* § 904.01, STATS. Nor was it permissible

character evidence. "Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, … may not be proved by extrinsic evidence." Section 906.08(2), STATS. The court did not err in excluding this line of questioning.

¶26 In conclusion, we have considered each of DuVal's claims and, based on the foregoing reasons, decide that the trial court did not commit any errors and, likewise, DuVal's due process rights were not violated. Accordingly, we affirm her conviction.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.