COURT OF APPEALS
DECISION
DATED AND FILED

September 11, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-2874-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MANUEL CUCUTA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Manuel Cucuta appeals from a judgment entered after a jury convicted him of two counts of first-degree intentional homicide, party to a crime, contrary to WIS. STAT. §§ 940.01(1) and 939.05, and one count of use

of a dangerous weapon, contrary to WIS. STAT. § 939.63 (1995-96).[1] Cucuta also appeals from the trial court's order denying his motion for postconviction relief. Cucuta argues that the trial court erred in denying his motion for postconviction relief and his request for a new trial because: (1) he was denied his constitutional right to a speedy trial; (2) the State failed to disclose a confidential informant's identity which was exculpatory evidence; and (3) the jury instructions were inadequate and prejudicial because there was no cautionary instruction regarding accomplice testimony. We disagree and affirm.

I. BACKGROUND.

¶2 Two men were gunned down on November 27, 1995. The police found the first victim lying face down in the front of a residence with a gunshot wound in the head, and the location of the second victim suggested he had been shot in the back while climbing over a fence in the backyard of the same residence. An eyewitness saw two men running away from the scene of the shooting wearing dark-colored hoods. Cucuta was identified as one of the shooters and charged as a juvenile, as he was fifteen years old at the time. He was later waived into adult court.

¶3 A jury found Cucuta guilty of the homicides and the weapon charge. At trial, the State called several witnesses including Cucuta's alleged accomplice, Alejandro Vallejo. Vallejo testified that he and Cucuta were members of a gang called the Latin Kings, and that on the night of the shooting, they were on their

[1] All references to the Wisconsin Statutes are to the 1995-96 version unless otherwise indicated.

way to "scope out" a local tavern for a possible robbery when they ran into two rival gang members.

¶4 Vallejo related that one of the victims said, "What's up Folks," which apparently signified that they were in a rival gang. Upon hearing this, Vallejo pulled out a .357-caliber handgun and shot that person in the face. He claimed that Cucuta then chased down the second victim and shot him in the back with a .380-caliber handgun.

¶5 Three witnesses who were also fellow gang members corroborated this testimony. Each stated that they had been at a friend's house when Vallejo and Cucuta left the house to "check out" the tavern, wearing black hooded sweatshirts and carrying weapons. These witnesses testified that they were planning to return with Cucuta and Vallejo to rob the tavern, but when Cucuta came back, he told them they couldn't carry out the robbery because he had just shot someone. One witness stated that Cucuta described the shooting in detail, including the fact that Cucuta said he had run after the victim and shot him while he tried to climb over a fence.

¶6 On the first day of trial, Cucuta raised the issue of getting information supplied to the State by a confidential informant. The State indicated to the trial court that it had information regarding a confidential informant who could exculpate Cucuta and identify another person as the shooter, but the State had not turned over this information because the informant's identity was being protected under WIS. STAT. § 905.10 and Cucuta had not yet requested disclosure. This issue arose again after the testimony of Vallejo. After an *in camera* inspection of two reports which summarized the informant's statements, the court determined that the informant could provide relevant testimony to Cucuta and

instructed the State to disclose the informant's identity. The State provided the information and the parties agreed that the informer would not take the stand, but that one of the police detectives would read the reports into the record.

¶7 After the trial, which lasted five days, Cucuta was sentenced to two life terms without the possibility of parole.

II. ANALYSIS.

A. Speedy Trial

¶8 "The right to a speedy trial is guaranteed by art. I, sec. 7 of the Wisconsin Constitution and the [S]ixth and [F]ourteenth [A]mendments of the United States Constitution."[2] ***State v. Stoeckle***, 41 Wis. 2d 378, 384, 164 N.W.2d 303 (1969). In ***Barker v. Wingo***, the Supreme Court held that "the right to a

[2] The Sixth Amendment to the United States Constitution provides (emphasis added):

> 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 defense.

Article 1, sec. 7 of the Wisconsin Constitution provides (emphasis added):

> **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.

speedy trial is as fundamental as any of the rights secured by the Sixth Amendment." 407 U.S. 514, 515 n.2 (1972) (citation omitted). Incorporating the Sixth amendment right to a speedy trial as enforceable against the states through the Fourteenth amendment, the Court called it "one of the most basic rights preserved by our Constitution." ***Klopfer v. North Carolina***, 386 U.S. 213, 225 (1967).

¶9 The right to a speedy trial assures a criminal defendant that "on demand a State ha[s] a duty to make a diligent and good-faith effort to secure the presence of the accused from the custodial jurisdiction and afford him a trial." ***Dickey v. Florida***, 398 U.S. 30, 37 (1970). However, "[w]e cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate." ***Barker***, 407 U.S. at 521. Therefore, the "[r]ight to a speedy trial … is not subject to bright-line determinations and must be considered based upon the totality of circumstances that exist in any specific case." ***State v. Borhegyi***, 222 Wis. 2d 506, 509, 588 N.W.2d 89 (Ct. App. 1998).

¶10 Cucuta contends that he was denied a speedy trial due to repeated delays by the State. The State responds that: (1) Cucuta waived any right to appellate review of his speedy trial request because he never formally demanded a speedy trial; and (2) in the alternative, Cucuta was not denied a speedy trial because any delays were for legitimate reasons and he was not prejudiced by any delay in the case. While we conclude that Cucuta did not waive his constitutional right to a speedy trial, we hold that he was not deprived of his right to a speedy trial.

¶11 The first issue is whether Cucuta waived his right to a speedy trial. Whether a defendant waived his or her right to a speedy trial is a question of law,

State v. Lemay, 155 Wis. 2d 202, 210, 455 N.W.2d 233 (1990), which this court reviews *de novo*, ***First Nat'l Leasing Corp. v. Madison***, 81 Wis. 2d 205, 208, 260 N.W.2d 251 (1977).

¶12 The issue of a speedy trial can be raised in two contexts. First, the constitutional right to due process as found in the Sixth Amendment to the United States Constitution and art. I, § 7 of the Wisconsin Constitution guarantees a speedy trial. Second, there is a statutory right to a speedy trial found in WIS. STAT. § 971.10.[3] Cucuta does not claim that he made any formal speedy trial demand under WIS. STAT. § 971.10(1). Instead, Cucuta relies on his constitutional right to a speedy trial.

¶13 While Cucuta has clearly waived any statutory claim to a speedy trial under § 971.10(1),[4] a defendant's failure to assert a speedy trial demand will not constitute a waiver of the constitutional right to such a trial.[5] ***Hatcher v. State***, 83 Wis. 2d 559, 568, 266 N.W.2d 320 (1978). In ***Barker***, the Supreme Court rejected the "demand waiver doctrine" which would require a defendant's formal demand of a speedy trial or face waiver of the right. 407 U.S. at 522-29. Instead,

---

[3] WIS. STAT. § 971.10, Speedy trial, provides:

> **(2)**(a) The trial of a defendant charged with a felony shall commence within 90 days from the date trial is demanded by any party in writing or on the record. If the demand is made in writing, a copy shall be served upon the opposing party. The demand may not be made until after the filing of the information or indictment.

[4] ***Brown v. State***, 230 Wis. 2d 355, 370, 602 N.W.2d 79 (Ct. App. 1999) (court of appeals does not generally consider issues on appeal that were not raised in the trial court).

[5] However, a guilty plea, made knowingly and voluntarily, will also waive all defects and defenses of a constitutional dimension. ***Mack v. State***, 93 Wis. 2d 287, 293, 286 N.W.2d 563 (1980).

the Court stated that "the better rule is that the defendant's assertion of or failure to assert his right to a speedy trial is one of the factors to be considered." ***Id.*** at 528. Therefore, although Cucuta did not waive his constitutionally protected right to a speedy trial, his assertion of his speedy trial right may carry strong evidentiary weight in determining whether he was deprived of the right. ***Id.*** at 531-32.

¶14 Therefore, we must determine whether Cucuta was denied the right to a speedy trial. Whether a defendant has been denied the right to a speedy trial is a constitutional question that we review *de novo*. ***State v. Leighton***, 2000 WI App 156, ¶5, 237 Wis. 2d 709, 616 N.W.2d 126. Under both state and federal constitutions, the court must consider four factors in determining whether a defendant has been denied a speedy trial: (1) the length of the delay; (2) the reason for the delay, i.e., whether the government or the defendant is more to blame for the delay; (3) whether the defendant asserted the right to a speedy trial; and (4) whether the delay was prejudicial. ***Id.*** at ¶6.

¶15 The length of the delay is a threshold consideration – the length of the delay must be presumptively prejudicial before inquiry into the remaining three factors occurs. ***Id.*** at ¶7. The Supreme Court has generally recognized that post-accustation delay is "presumptively prejudicial" as it approaches one year. ***Doggett v. United States***, 505 U.S. 647, 652 n.1 (1992). In Wisconsin, twelve months between arrest and trial is the bare minimum for a finding of prejudicial delay. ***Borhegyi***, 222 Wis. 2d at 518.

¶16 The speedy trial provision applies once a defendant "in some way formally becomes the accused." ***State v. Lemay***, 155 Wis. 2d 202, 209, 455 N.W.2d 233 (1990). Generally, speedy trial inquiry is triggered by arrest, indictment, or other official accusation. ***Doggett***, 505 U.S. at 655. This court has

determined that depending on the facts, either the date of arrest, *see* ***Borhegyi***, 222 Wis. 2d at 511-12, or the date of filing the criminal complaint, *see* ***Leighton*** 2000 WI App 156 at ¶7, triggers the speedy trial inquiry.

¶17 Here, Cucuta was waived from juvenile court into adult court on January 20, 1998, on a delinquency petition that was filed on August 5, 1997. At the time of waiver, Cucuta was serving time in a juvenile facility on another matter and, therefore, was already in custody. The criminal complaint was filed on August 11, 1998, and the trial ultimately began on March 15, 1999.

¶18 Because Cucuta was already in custody on a separate matter prior to being waived into adult court, the date of arrest for the homicide charges is of little consequence. The order waiving Children's Court jurisdiction placed Cucuta, who was being held under the juvenile justice code, WIS. STAT. ch. 938, under the jurisdiction of the criminal code, WIS. STAT. chs. 939 to 951. Accordingly, we conclude that Cucuta "formally became the accused," and his right to a speedy trial attached when he was waived into adult court to face the charges of two counts of first-degree intentional homicide, party to a crime, and one count of use of a dangerous weapon under the criminal code. Therefore, we address the resulting delay between the waiver date of January 20, 1998, and the beginning of trial, March 15, 1999, a period of just under fourteen months.

¶19 "In determining the reasons for a delay, an initial inquiry is, who caused the delay?" ***Norwood v. State***, 74 Wis. 2d 343, 354, 246 N.W.2d 801 (1976). In ***Norwood***, the supreme court stated:

> If the delay can be attributed to the actions of the defendant, he cannot be heard to claim that that period of time be considered in deciding whether he has been denied a speedy trial. If the delay can be attributed to the state, then the state must justify the delay and to be a valid reason

> for delay it must be a delay that is intrinsic to the case itself.

Id.

¶20 Here, Cucuta's defense counsel was ill in April of 1998. A scheduling conference was scheduled for April 7, 1998, and the State was prepared to charge Cucuta at this time, but delayed the charging at the request of defense counsel. The State was informed at the end of May that defense counsel had recovered and Cucuta was ready to proceed. The complaint was finally filed on August 11, 1998, and the initial appearance took place on September 8, 1998.

¶21 Any delay directly attributable to Cucuta should not be considered. *See* ***Norwood***, 74 Wis. 2d at 357. The State was prepared to proceed on April 7, 1998, but delayed the proceedings at Cucuta's request. The State was then informed approximately two months later that Cucuta was prepared to move forward. Thus, at least two months' delay before trial is attributable to Cucuta and his counsel's illness.[6] As a result, the delay attributable to the State falls below the twelve-month threshold and the presumption of prejudice does not come into play. Consequently, it is not necessary to inquire into the other factors that go into the balancing test. ***Foster v. State***, 70 Wis. 2d 12, 18, 233 N.W.2d 411 (1975).

[6] The entire delay from the April 7, 1998 scheduling conference until the actual charging cannot be attributed to defense counsel's illness. However, Cucuta could not expect the State to file the complaint and hold the initial appearance on the day it learned defense counsel had recovered. Cucuta should have anticipated some administrative delay. Thus, we conclude that at least two months of the delay is attributable to Cucuta.

B. Exculpatory Witness

¶22 Next, Cucuta contends that the State violated the discovery statute, WIS. STAT. § 971.23, and its duty to disclose exculpatory evidence under ***Brady v. Maryland***, 373 U.S. 83 (1963), because it disclosed the confidential informant's identity at trial rather than before the trial. The State responds that: (1) under WIS. STAT. § 905.10[7] and ***State v. Larsen***, 141 Wis. 2d 412, 415 N.W.2d 535 (Ct. App. 1987), a criminal defendant has no constitutional right to disclosure of a confidential informant's identity; (2) it complied with § 971.23 by disclosing the substance of the informant's information before trial and identifying the informant when ordered by the court at trial; and (3) the State was under no obligation to disclose the informant's identity until Cucuta made the proper ***Outlaw***[8] motion.

---

[7] WIS. STAT. § 905.10 provides:

> **Identity of informer. (1)** RULE OF PRIVILEGE. The federal government or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation....
>
> **(3)** EXCEPTIONS. ...
>
> (b) *Testimony on merits*. If it appears from the evidence in the case or from other showing by a party that an informer may be able to give testimony necessary to a fair determination of the issue of guilt or innocence in a criminal case . . . the judge shall give the federal government or a state or subdivision thereof an opportunity to show in camera facts relevant to determining whether the informer can, in fact, supply that testimony....

[8] ***State v. Outlaw***, 108 Wis. 2d 112, 321 N.W.2d 145 (1982) (establishing the legal standards for discovery of a confidential informant's identity).

¶23 In reviewing a trial court's *in camera* review under WIS. STAT. § 905.10(3)(b), we determine whether the trial court erroneously exercised its discretion. ***Larsen***, 141 Wis. 2d at 419. In the instant case, after the trial court's *in camera* inspection of the reports regarding the confidential informant, the court determined that there was a reasonable possibility that the informant could give relevant testimony and ordered the State to divulge the informant's identity under § 905.10(3)(b) and ***State v. Outlaw***, 108 Wis. 2d 112, 321 N.W.2d 145 (1982). The State complied and the parties then agreed that the informer would not be put on the stand, but that the detective who interviewed the informant would read the two reports into the record.

¶24 Cucuta never objected to this agreement. In fact, defense counsel stated:

> We agreed we'd take the name and then volunteered that ... we wouldn't even take his place of employment and we won't contact him. But in lieu of that, [the detective] will read in both reports in their entirety with an understood droning effect or no inflection for emphasis, just read the reports.

¶25 Cucuta later filed a postconviction motion requesting a new trial because the State failed to disclose the informant's identity until trial. In denying the postconviction motion, the trial court correctly noted:

> Based on the agreement of the parties as set forth on the record in open court and based on the nature of the testimony at the closed hearing, the defendant's current contention that the tardy disclosure of the confidential informant's identity jeopardized trial counsel's ability to interview him or present his testimony falls short.... Because trial counsel opted not to pursue this matter, the court fails to see how the defendant was prejudiced by the non-disclosure of the informant's name prior to this juncture.

We agree. Section 905.10 makes clear that the State was justified in refusing to disclose the identity of the confidential informant as part of initial discovery. In order to compel discovery, the defendant has the initial, although minimal, burden of justifying further inquiry into whether disclosure should be compelled. ***State v. Hargrove***, 159 Wis. 2d 69, 75, 469 N.W.2d 181 (Ct. App. 1990). Then, when the defendant, through evidence or other showing, has made it reasonably probable that the informant could give relevant testimony, the burden shifts to the prosecution to overcome this inference. ***State v. Outlaw***, 104 Wis. 2d 231, 239, 311 N.W.2d 235 (Ct. App. 1981).

¶26 Cucuta initially demonstrated a need for disclosure on March 15, 1999, by arguing that the informant's identity was necessary to prove another gang member shot the victims. Upon this showing, the trial court completed an *in camera* review of the reports and determined that the State should disclose the informant's identity. The State complied.

¶27 Therefore, the informant's identity was released to Cucuta the day before any defense witness was called. Cucuta failed to make his offer of proof earlier and failed to request an adjournment to complete an investigation. Instead, Cucuta agreed to have the detective read the reports into the record in lieu of calling the informant as a witness. He cannot create his own error by deliberate choice of strategy and then receive the benefit from that error on appeal. ***Shawn B.N. v. State***, 173 Wis. 2d 343, 372, 497 N.W.2d 141 (Ct. App. 1992). Thus, we fail to see where the trial court erroneously exercised its discretion.

C. Ineffective Assistance of Counsel

¶28 Cucuta next claims that if a written ***Outlaw*** motion was required to disclose the informant's identity, then trial counsel was ineffective for failing to

do so. The trial court heard this argument in Cucuta's postconviction motion and determined:

> Furthermore, it is unclear how an earlier disclosure of the informant's identity would have altered the outcome. Although Cucuta contends that counsel was deprived of the opportunity to perform an investigation after interviewing the confidential informant, he does not set forth what such an investigation would probably have overturned. He also has not demonstrated that counsel's decision not to call the informant was unreasonable or strategically unsound. In the same vein, he has not demonstrated what the informant would have added to the testimony....
>
> The evidence in this case was overwhelming, and the testimony of the State's witnesses was extremely consistent with the occurrence of the events set forth on [the night of the shooting]. There is not a reasonable probability that the outcome of this case would have been different had the identity of the confidential informant been revealed sooner.

Again, we agree with the trial court. The familiar two-pronged test for ineffective assistance of counsel claims requires defendants to prove (1) deficient performance and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Johnson***, 133 Wis. 2d 207, 216-17, 395 N.W.2d 176 (1986). To prove deficient performance, a defendant must show specific acts or omissions of counsel which were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. To prove prejudice, a defendant must show that counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Id.*** at 687. In other words, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694.

¶29 On appeal, the trial court's findings of fact will be upheld unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711

(1985). But proof of either the deficiency or prejudice prong is a question of law which this court reviews de novo. ***Id.***

¶30 Cucuta fails on both prongs. First, it is unclear that the timing of counsel's request for disclosure of the informant's identity was outside the range of competent professional assistance. Counsel requested the identity before Cucuta's defense and could have sought an adjournment to interview the informant or subpoena him as a witness. The fact that counsel chose to do neither of these acts fails to establish ineffective assistance because there existed a number of strategical reasons for having the detective read the reports into the record. Moreover, Cucuta has failed to prove that he was prejudiced by counsel's actions. As the trial court concluded, the evidence against Cucuta was overwhelming and obtaining the confidential informant's name earlier would not have changed the outcome of the trial. Therefore, we conclude that trial counsel was not ineffective.

D. Jury Instructions

¶31 Finally, Cucuta contends that the jury instructions were inadequate because the trial court failed to give an appropriate accomplice jury instruction regarding Vallejo's testimony. WIS JI—CRIMINAL 245 is the standard accomplice jury instruction and states:

> You have heard testimony from (name accomplice) who stated that (he) (she) was involved in the crime charged against the defendant. You should consider this testimony with caution and great care, giving it the weight you believe it is entitled to receive. You should not base a verdict of guilty upon it alone, unless after consideration of all the evidence you are satisfied beyond a reasonable doubt that the defendant is guilty.

Cucuta argues that this instruction was necessary because the State's accomplice testimony was unreliable and unsupported by the facts. We disagree.

¶32 "The decision to give or not to give a requested jury instruction lies within the trial court's discretion. We will not reverse such a determination absent an erroneous exercise of discretion." ***State v. Miller***, 231 Wis. 2d 447, 464, 605 N.W.2d 567 (Ct. App. 1999), *review denied,* 233 Wis. 2d 84, 609 N.W.2d 473 (No. 98-2089-CR). Therefore, on review, we will affirm the choice of jury instructions if the instructions both accurately state the law and explain to the jury what the law means. ***Nommensen v. American Continental Ins. Co.***, 2001 WI App. 230, ¶45, 239 Wis. 2d 129, 619 N.W.2d 137, *aff'd*, 2001 WI 112, 629 N.W.2d 301. However, the issue of whether the jury instructions fully and fairly explained the relevant law is a question of law, which this court reviews *de novo*. ***County of Kenosha v. C&S Mgmt., Inc.***, 223 Wis. 2d 373, 395, 588 N.W.2d 236 (1999).

¶33 We conclude that here the jury instructions adequately informed the jury of the applicable law based on the facts of the case. While we agree that when the State grants concessions in exchange for testimony by accomplices, the defendant's right to a fair trial should be safeguarded by a cautionary instruction regarding the credibility of the accomplice's testimony, *see* ***State v. Nerison***, 136 Wis. 2d 37, 46, 401 N.W.2d 1 (1987), the supreme court has made it clear "that it is error to deny a request for an accomplice instruction only where the accomplice's testimony is totally uncorroborated," ***Linse v. State***, 93 Wis. 2d 163, 172, 286 N.W.2d 554 (1980). Therefore, when the trial court finds sufficient corroboration, the failure to give an accomplice instruction is not an erroneous exercise of the court's discretion. ***Id.*** at 171.

¶34 Here, Vallejo's accomplice testimony was corroborated by a number of State witnesses, including the three witnesses who were waiting back at the house. These witnesses corroborated Vallejo's statements that the boys left the

house armed while in black hooded sweatshirts, that they were on their way to "scope out" a tavern for a robbery when they encountered rival gang members, and that Cucuta told them that he had shot a man in the backyard. Vallejo's testimony was further corroborated by the eyewitness as well as independent circumstantial evidence including the location of the second victim in the backyard near the fence, and the .380-caliber cartridge and shell casings found near the second victim's body.

¶35 Because of all this independent evidence corroborating Vallejo's testimony, there was no need for an accomplice jury instruction. We conclude that the general instruction with respect to the credibility of witnesses, coupled with the defendant's unlimited right to cross-examination and argument, adequately protected Cucuta's rights. *See* ***Linse***, 93 Wis. 2d at 171.

¶36 For all of the above stated reasons, we affirm the trial court's decision to enter judgment against the defendant and deny the motion for postconviction relief.

By the Court.—Judgment and order affirmed.

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