

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 29, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 01-3113-CR
STATE OF WISCONSIN**

Cir. Ct. No. 00-CF-1226

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TOMAS C. CUESTA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and order of the circuit court for Dane County: MORIA KRUEGER, Judge. *Affirmed.*

Before Roggensack, Deininger and Lundsten, JJ.

¶1 PER CURIAM. Tomas Cuesta appeals a judgment convicting him of aggravated battery, false imprisonment and reckless endangerment of safety. He also appeals an order denying postconviction relief. The issues are whether the jury selection process violated his right to a “fair cross section” jury, whether his speedy trial right was violated, whether the jury heard sufficient evidence to find

him guilty of the charges, whether the trial court properly excluded evidence of the victim's criminal record and whether he received effective assistance from counsel. We affirm on all issues.

¶2 In June 2000, the State charged Cuesta in connection with the brutal beating of his girlfriend, Laura L.G. In July, Cuesta's competency to stand trial was established, and he obtained replacement counsel. In August, Cuesta requested yet another change of counsel, and he received his third trial attorney on September 21, 2000.

¶3 Cuesta's preliminary hearing occurred on October 20, 2000. He was bound over for trial. On December 4, 2000, his attorney formally requested a speedy trial. On February 13, 2001, Cuesta filed a pro se motion to include African Americans in the jury panel. The trial occurred on February 27. Cuesta was not satisfied with the jury's racial and ethnic makeup, although the record is silent as to what it was.

¶4 In her initial statements to police, Laura identified Cuesta as her assailant, but later recanted. However, at the preliminary hearing and at trial, Laura testified that Cuesta was in fact her assailant and that her recantation was falsely made under pressure from Cuesta. Over Cuesta's objection, the court excluded testimony on Laura's fourteen-year-old misdemeanor fraud conviction. Following the jury's guilty verdict and conviction, Cuesta moved for postconviction relief. The trial court's order denying relief resulted in this appeal.

¶5 Cuesta failed to show any constitutional violations in the jury selection process. The Sixth and Fourteenth Amendments to the United States Constitution grant the defendant the right to a "jury selected from a fair cross-section of the community." *Duren v. Missouri*, 439 U.S. 357, 359 (1979). Cuesta

contends that this constitutional right was violated. However, a defendant has the burden of factually demonstrating that the jury selection process systematically excluded distinctive groups in the community. *Id.* at 364. Cuesta’s claim fails because he presented no such facts, although he had the opportunity to do so at his postconviction hearing.

¶6 The proceedings did not violate Cuesta’s statutory right to a speedy trial. WISCONSIN STAT. § 971.10(2)(a) (1999-2000)¹ requires trial within ninety days after the defendant demands a speedy trial in writing or on the record. Cuesta contends that because he first requested a speedy trial in writing on September 5, 2000, and the trial did not occur until February 2001, his right under the statute was violated. However, a speedy trial demand under § 971.10(2)(a) “may not be made until after the filing of the information or indictment.” The trial was held within ninety days of the December 4, 2000 demand, which was the only one made after the information was filed on October 20, 2000. The September request was premature.

¶7 Additionally, Cuesta’s constitutional right to a speedy trial was not violated. Cuesta received his trial eight and a half months after his arrest. That length of delay is not presumptively prejudicial, such that a defendant’s constitutional rights are implicated. *See Beckett v. State*, 73 Wis. 2d 345, 348, 243 N.W.2d 472 (1976).

¶8 The jury heard sufficient evidence to convict Cuesta. The evidence supporting a criminal conviction is sufficient if, when viewed most favorably to

¹ All references are to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

the State, a reasonable trier of fact could have found guilt beyond a reasonable doubt. *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Cuesta suggests that the ambiguities and inconsistencies in the victim's statement and testimony render her identification of him as her attacker so unreliable as to be insufficient. However, as the sole judge of credibility, the jury may accept some of the testimony of a witness and reject the remainder. *See State v. Toy*, 125 Wis. 2d 216, 222, 371 N.W.2d 386 (Ct. App. 1985). Within the body of Laura's testimony were unequivocal statements that Cuesta assaulted her.

¶9 Cuesta also argues that the State failed to prove false imprisonment because there was no proof that Laura was restrained against her will or could not have voluntarily left the scene of her beating. The crime of false imprisonment is proved by evidence that the defendant intentionally confined or restrained another without that person's consent and with the defendant's knowledge that he or she had no lawful authority to confine. WIS. STAT. § 940.30. The confinement element of this section is proved by evidence that the victim was afraid that an attempt to leave would provoke physical violence. *See State v. Teynor*, 141 Wis. 2d 187, 205-06, 414 N.W.2d 76 (Ct. App. 1987). Laura so testified.

¶10 The trial court properly excluded testimony concerning Laura's prior criminal conviction. The court weighed the weak impeachment value of a fourteen-year-old misdemeanor conviction against its potential prejudicial value, and excluded it. The age and minor nature of the crime were proper factors to consider, and the resulting decision was within scope of the trial court's discretion. *See State v. Kuntz*, 160 Wis. 2d 722, 752, 467 N.W.2d 531 (1991).

¶11 Cuesta failed to demonstrate ineffective assistance of trial counsel. Cuesta cites various actions of his trial attorneys that delayed his trial. However,

the actions of trial counsel do not constitute ineffective assistance unless the defendant also demonstrates that those actions prejudiced the defense. *State v. Eckert*, 203 Wis. 2d 497, 506, 553 N.W.2d 539 (Ct. App. 1996). As noted, however, Cuesta's speedy trial rights were not violated. Cuesta offered no proof of any other prejudice resulting from any failure to obtain an earlier trial date.

¶12 Cuesta's only other claim of ineffectiveness concerns trial counsel's handling of the jury selection issue. Again, Cuesta has not shown any prejudice because he has never presented evidence that the jury selection process systematically excluded minorities.

By the Court.—Judgment and order affirmed.

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

