STATE OF MINNESOTA
IN COURT OF APPEALS
A06-1948

State of Minnesota,
Respondent,
vs.

Jerry Darnell Smith,
Appellant.

Filed February 5, 2008
Affirmed
Huspeni, Judge[*]

Ramsey County District Court
File No. K4-05-2983

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Susan Gaertner, Ramsey County Attorney, Mitchell L. Rothman, Assistant County Attorney, 50 Kellogg Boulevard West, Suite 315, St. Paul, MN 55102 (for respondent)

John M. Stuart, State Public Defender, Sara L. Martin, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Wright, Presiding Judge; Peterson, Judge; and Huspeni, Judge.

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[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

HUSPENI, Judge

Appellant challenges his conviction for possession of a firearm by an ineligible person, claiming that the district court erred by not dismissing the case as violative of appellant's right to a speedy trial and abused its discretion by excluding hearsay testimony at trial. In his pro se supplemental brief, appellant also contends that the evidence at trial was insufficient to support his conviction. Because we conclude that appellant's right to a speedy trial was not violated and the court did not err in refusing to admit the challenged testimony, and because the evidence at trial was sufficient to support appellant's conviction, we affirm.

FACTS

On August 27, 2005, Kirk Robledo, his wife, and their three children stopped at a St. Paul residence because Robledo wanted to confront Edward Jones about money that Robledo believed Jones owed Robledo's wife. Robledo and Jones's conversation escalated into an argument. Testimony at trial indicated that Jones then motioned with his hands to appellant Jerry Darnell Smith, who was sitting on the front porch of the residence. Smith left the porch and retrieved a gun, which was covered by a sock, from underneath the passenger seat of a nearby vehicle. As Robledo returned to his vehicle to call police, Smith pointed the sock-covered gun at Robledo and stated that Smith "was always heated."

Robeldo then called police and gave the operator a description of the gun in the sock and Smith's vehicle, a green Ford Escort. Robledo left the scene, and shortly

thereafter, Smith also departed in the Escort. A St. Paul police officer, dispatched in response to Robledo's call, passed Smith's vehicle on the officer's way to the residence where the altercation occurred. The officer turned his squad car around and, after following Smith for several blocks, stopped the Escort. The officer searched the vehicle, Smith, and the vehicle's other passenger, but did not find a weapon.

Another officer arrived on the scene, conferred with the first officer about Smith's route, and retraced that route. During this search, the second officer discovered on a nearby street a white sock that contained a handgun.

On August 29, 2005, Smith was charged with possession of a firearm by an ineligible person, in violation of Minn. Stat. § 624.713, subd. 1(b) (2004).[1] On September 12, 2005, Smith demanded a speedy trial. Approximately one week before trial was to begin, the defense disclosed evidence that raised a question about whether someone other than appellant possessed the gun. On November 7, 2005, the district court granted the state's request for a continuance to test the gun for DNA evidence and for Smith to submit to DNA testing. And at a December 6, 2005 pretrial hearing, the state requested another continuance until January 3, 2006, because the Bureau of Criminal Apprehension (BCA) had not yet returned the results of the DNA testing. On January 3, the state asked for a third continuance to complete DNA testing, and the district court granted this motion, continuing the trial until February 2006. Smith did not object to any of these motions, but he did ask to be released on his own recognizance, and the district

[1] Smith was convicted of second-degree assault in 1997 and prohibited from possessing a firearm.

court granted his request. Smith, however, was immediately placed on a DOC hold for a possible probation violation, so he remained in custody.

On February 3, 2006, Smith moved for a dismissal based on a violation of his right to a speedy trial. The district court denied the motion. Smith then waived his right to a jury trial and, after a bench trial, the district court found Smith guilty of possession of a firearm by an ineligible person. In July 2006, the district court sentenced Smith to an executed term of 60 months' imprisonment. Smith now appeals.

D E C I S I O N

I. Smith was not deprived of his right to a speedy trial.

Smith argues first that the district court denied his right to a speedy trial by continuing his trial date. Determining whether a defendant has been denied the constitutional right to a speedy trial is a question of law, which we review de novo. *State v. Cham*, 680 N.W.2d 121, 124 (Minn. App. 2004), *review denied* (Minn. July 20, 2004).

The United States and Minnesota Constitutions establish that in all criminal prosecutions, "the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI; Minn. Const. art. I, § 6. To determine whether a delay deprived the accused of the right to a speedy trial, Minnesota courts apply the Supreme Court's four-factor balancing test announced in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182 (1972), in which the court weighs the pretrial conduct of both the state and the defendant. *State v. Widell*, 258 N.W.2d 795, 796 (Minn. 1977). The four factors are (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 delay prejudiced the defendant. *State v. Windish*, 590

N.W.2d 311, 315 (Minn. 1999). No one factor is necessary or dispositive to finding that the defendant was denied the right to a speedy trial; the factors must be considered together in light of the relevant circumstances. *Id*. We review each *Barker* factor in turn.

Length of delay

The length-of-delay factor is "to some extent a triggering mechanism in that until some delay, which is presumptively prejudicial, is evident the other factors need not be considered." *State v. Jones*, 392 N.W.2d 224, 235 (Minn. 1986). The filing of criminal charges against an accused activates the Sixth Amendment's protection and marks the starting point for calculating the length of the delay. *State v. Huddock*, 408 N.W.2d 218, 220 (Minn. App. 1987). A delay of more than 60 days from a speedy-trial demand raises a presumption that the defendant's right to a speedy trial was violated. *Windish*, 590 N.W.2d at 315-16; *see also* Minn. R. Crim. P. 11.10 ("On demand made in writing or orally on the record by the prosecuting attorney or the defendant, the trial shall be commenced within sixty (60) days from the date of the demand . . . .").

The state does not dispute that the facts of this case trigger the presumption because Smith made his speedy-trial demand on September 12, 2005, five months before his February 22, 2006 trial and because Smith was charged on August 29, 2005, nearly six months before his trial. Because this factor is met, we consider the other *Barker* factors.

Reason for delay

In assessing the reason for the delay, appellate courts give different reasons different weights. *Cham*, 680 N.W.2d at 125. For example, the state's deliberate attempt

to delay the trial to hamper the defense would weigh heavily against the state, while negligent or administrative delays receive less weight. *Barker*, 407 U.S. at 531, 92 S. Ct. at 2192; *Huddock*, 408 N.W.2d at 220. By contrast, when a defendant's actions are responsible for the overall delay, there is no violation of the right to a speedy trial. *State v. Derossier*, 695 N.W.2d 97, 109 (Minn. 2005).

The rules of criminal procedure provide that "the trial shall be commenced within sixty (60) days from the date of the demand unless good cause is shown upon the prosecuting attorney's or the defendant's motion or upon the court's initiative why the defendant should not be brought to trial within that period." Minn. R. Crim. P. 11.10. Generally, waiting for DNA test results is "good cause" to continue a trial. *See State v. Traylor*, 641 N.W.2d 335, 343 (Minn. App. 2002), *aff'd in part, rev'd in part on other grounds*, 656 N.W.2d 885 (Minn. 2003); *State v. Stroud*, 459 N.W.2d 332, 335 (Minn. App. 1990). Here, as in *Traylor* and *Stroud*, the district court properly concluded that the benefits of waiting for the DNA results to come back from the BCA satisfied the "good cause" requirement to continue the case.

Smith further claims that the state does not have a valid reason for the delay because the state waited to have the weapon tested and that "by waiting until just days before [the original trial date] to request DNA testing from the Bureau of Criminal Apprehension," the state violated Smith's right to a speedy trial. But the defense disclosed statements of witnesses that disputed statements in the police reports only a week before the trial date. This new evidence included statements that someone other than Smith had the weapon, and, therefore, required the state to test the weapon for the

presence of DNA. Because there is no evidence that the state intentionally delayed the proceeding and the delay, although unfortunate, was administrative in nature, this factor does not weigh in favor of Smith's argument that he was denied a speedy trial. *See Huddock*, 408 N.W.2d at 220.

Assertion of the right to a speedy trial

We next consider the "frequency and force" of Smith's speedy-trial demand because "the strength of the demand is likely to reflect the seriousness and extent of the prejudice which has resulted." *State v. Friberg*, 435 N.W.2d 509, 515 (Minn. 1989) (citing *Barker*, 407 U.S. at 531, 92 S. Ct. at 2192). The assertion of the right does not have to be technical or formal. *Windish*, 590 N.W.2d at 317 (noting that a defendant's assertion of the right is determined by examining the circumstances).

This factor is neutral in this case. Smith first asserted his right to a speedy trial early in the proceedings—at the September 12, 2005 hearing. His early assertion of the right weighs in his favor. *See id.* But Smith did not object to the state's continuance requests at hearings on November 7, 2005, and December 6, 2005. Smith's failure to object to the state's requests for continuances weakens his argument that he asserted his right frequently and forcefully. *See State v. Rachie*, 427 N.W.2d 253, 257 (Minn. App. 1988) (noting that a defendant's failure to object to continuances weighed against the argument that he asserted his right to a speedy trial), *review denied* (Minn. Sept. 20, 1988).

Prejudice

The final factor of prejudice is measured in light of the interests that the speedy-trial right was designed to protect. *Barker*, 407 U.S. at 532, 92 S. Ct. at 2193. The Supreme Court has identified three interests in assessing prejudice: (1) preventing oppressive pretrial incarceration; (2) minimizing anxiety and concern of the accused; and (3) limiting the possibility that the defense will be impaired. *Id.* The third interest, possible impairment of the defense, is the most important. *Id.* A defendant "does not have to affirmatively prove prejudice; rather, prejudice may be suggested by likely harm to a defendant's case." *Windish*, 590 N.W.2d at 318 (citing *Moore v. Arizona*, 414 U.S. 25, 26-27, 94 S. Ct. 188, 189-90 (1973)).

Despite being the most important of the three prejudice factors, Smith does not claim that the delay impaired his defense in any way. This strongly weighs against Smith's assertion of prejudice. *Friberg*, 435 N.W.2d at 515 (stating that when a "delay in no way affect[s] the strength of defendant['s] case, the final *Barker* factor does not favor defendant[]"). Smith does address, albeit briefly, the other factors. Although released on his own recognizance at the January 3, 2006 hearing, Smith argues that, because he was never actually released from custody, his incarceration was oppressive and caused him "concern and anxiety." This potentially weighs in favor of Smith on this factor. But we note that, while pretrial incarceration may be unfortunate, it is "not a serious allegation of prejudice." *See State v. Givens*, 356 N.W.2d 58, 62 (Minn. App. 1984) (citing *State v. Helenbolt*, 334 N.W.2d 400, 405-06 (Minn. 1983)), *review denied* (Minn. Jan. 2, 1985).

Because Smith has not shown how he was prejudiced by the delay, this factor does not weigh heavily in favor of Smith's argument.

Because the record shows that good cause existed for continuing Smith's trial date and that he was not prejudiced, we conclude that the district court did not err by refusing to dismiss the complaint for failure to provide a speedy trial.

II. The district court did not abuse its discretion by excluding hearsay testimony that Robledo was a police informant.

Smith argues next that the district court abused its discretion by "excluding evidence that Robledo was a police informant because that evidence would have shown that Robledo had good reason to fabricate his testimony." The admissibility of evidence rests within the sound discretion of the district court and will not be reversed absent a clear abuse of that discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

At trial, during direct examination, Smith's counsel asked Jones whether he had "reason to believe that Mr. Robledo was working with the police?" The state objected on relevance grounds, and the district court sustained the objection. Smith's counsel rephrased the question and asked Jones (1) whether Jones had ever had a conversation with Robledo about Robledo's alleged role as a police informant and (2) what Robledo had learned from that conversation. The state objected on hearsay grounds and the district court again sustained the objection. Robledo testified at trial, but Smith's counsel did not ask Robledo about his alleged role as a police informant.

Smith's argument that the district court abused its discretion by excluding this evidence is without merit. We note initially that Smith conflates the separate relevance

and hearsay inquiries under the rules of evidence. *See* Minn. R. Evid. 401, 801. The challenged question was relevant under the broad definition of relevancy in the rules of evidence because Robledo's motivations do have some tendency to make a fact of consequence more or less probable than without the evidence. *See* Minn. R. Evid. 401. Robledo's status as an informant could go to the weight and credibility of his testimony.

But this does not end our inquiry. The question clearly called for an out-of-court statement (i.e., what Robledo had told Jones during an earlier conversation), which Smith attempted to offer into evidence for the truth of the matter asserted (i.e., that Robledo was a police informant). *See* Minn. R. Evid. 801 (defining hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted"). Smith has not shown that the statement was offered for some non-hearsay purpose. And Smith has not identified any applicable hearsay exception that would allow Jones's answer to be admitted into evidence.[2] The district court did not abuse its discretion by denying Smith's attempt to elicit testimony from Jones about statements made to him by Robledo. Importantly, even if we were to conclude that the challenged testimony was admissible and the district court erred, Jones testified during cross-examination by the state, without objection, that Robledo once told him that he (Robledo) worked as a police informant. Thus, the substance of the

[2] At trial, counsel argued that the statement was admissible as a statement against interest. *See* Minn. R. Evid. 804((b)(3). But even if Robledo's statement to Jones would qualify as a statement against Robledo's penal, proprietary, or pecuniary interest, the exception would still not apply. Rule 804(b)(3) applies only when the declarant is unavailable. Because Robledo was available and testified at trial, Smith could not use this exception to the hearsay rule.

testimony about which Smith complains was before the trial court for its consideration. *See State v. Reed*, 737 N.W.2d 572, 586 (Minn. 2007) (describing the harmless-error test as applied to evidentiary issues).

III. The evidence produced at trial was sufficient to convict Smith beyond a reasonable doubt.

In his pro se supplemental brief, Smith argues that the evidence produced at trial was insufficient to support a conviction because the state "[f]ailed to prove the element of possession beyond a reasonable doubt."

When considering a claim that the evidence was insufficient to support a conviction, this court views the evidence in the light most favorable to the conviction and assumes that the factfinder believed the state's witnesses and disbelieved contrary evidence. *State v. Moore*, 481 N.W.2d 355, 360 (Minn. 1992). The same standard applies to both bench and jury trials. *State v. Slaughter*, 691 N.W.2d 70, 75 n.3 (Minn. 2005).

The offense for which Smith was convicted provides:

> The following persons shall not be entitled to possess a pistol or semiautomatic military-style assault weapon or . . . any other firearm: . . . (b) . . . a person who has been convicted of, or adjudicated delinquent or convicted as an extended jurisdiction juvenile for committing, in this state or elsewhere, a crime of violence.

Minn. Stat. § 624.713, subd. 1(b) (2004). Therefore, the state must prove (1) that Smith possessed the handgun and (2) that he was previously convicted of a crime of violence.

At trial, Smith stipulated that he had been convicted of a crime of violence. On appeal, Smith argues that the state did not prove that he actually or constructively

possessed the handgun. But the state introduced the testimony of two witnesses who testified that they saw Smith point the handgun at Robledo. The state also introduced circumstantial evidence, including the statements of two police officers, the sock, and the handgun itself. Given these facts and our deferential standard of review, we conclude that the record evidence was sufficient to prove Smith's guilt beyond a reasonable doubt.

Affirmed.