STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0397

State of Minnesota,
Respondent,

vs.

Javier Ignacio Alejo,
Appellant.

Filed May 13, 2008
Affirmed
Crippen, Judge[*]

Mower County District Court
File No. CR-06-1264

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

Kristen Nelsen, Mower County Attorney, Mower County Courthouse, 201 First Street Northeast, Austin, MN 55912 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Lydia Villalva Lijó, Assistant State Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Peterson, Presiding Judge; Toussaint, Chief Judge; and

Crippen, 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

CRIPPEN, Judge

Appellant Javier Alejo contends that his speedy-trial right was violated by a trial conducted 95 days after his demand and the district court's mere repetition of its original instruction failed to adequately address the deliberating jury's question. We affirm.

FACTS

Appellant was charged with three counts of first-degree criminal sexual conduct and one count of aggravated forgery (on personal identity) on May 11, 2006. On June 16, he entered a provisional plea of not guilty and demanded a speedy trial. Although the matter was originally set for a jury trial on August 14, the state moved for and was granted a one-month continuance based on the unavailability of its witness.

One week before trial, appellant moved to sever his aggravated-forgery charge. The district court granted appellant's motion, and a jury trial began on the three remaining counts on September 19, 2006. The jury ultimately convicted appellant of all three counts of first-degree criminal sexual conduct.

D E C I S I O N

1.

Appellant argues that the district court denied his constitutional right to a speedy trial by erroneously granting the state's motion for a continuance. Specifically, appellant contends that the district court improperly found that the state's witness was unavailable to testify and gave undue consideration to appellant's immigration status.

A criminal defendant's right to a speedy trial is protected by the United States and Minnesota Constitutions. U.S. Const. Amend VI; Minn. Const. art. 1 § 6. Determining whether an accused was afforded his right to a speedy trial presents a question of constitutional law, which we review de novo. *State v. Cham*, 680 N.W.2d 121, 124 (Minn. App. 2004), *review denied* (Minn. Jul. 20, 2004). When deciding whether an accused's right to a speedy trial has been violated, we consider the length of the delay, the reason for the delay, whether the accused asserted his right to a speedy trial, and whether the accused was prejudiced by the delay. *Barker v. Wingo*, 407 U.S. 514, 530-32, 92 S. Ct. 2182, 2192-93 (1972); *State v. Windish*, 590 N.W.2d 311, 315 (Minn. 1999); *see also State v. Widell*, 258 N.W.2d 795, 796 (Minn. 1977) (adopting four-part test articulated in *Barker*). None of the *Barker* factors is dispositive; rather, all four factors must be considered together, along with any additional relevant circumstances. *Windish*, 590 N.W.2d at 315.

Length of the Delay

There was a delay of 95 days between when appellant asserted his right to a speedy trial at his omnibus hearing in June 2006 and when his trial began in September. Because a delay of this length exceeds the 60-day time limit set forth in Minn. R. Crim. P. 11.10, it creates a presumption that appellant's right to a speedy trial was violated and triggers further analysis. *See Barker*, 407 U.S. at 530-31, 92 S. Ct. at 2192; *Windish*, 590 N.W.2d at 316; *State v. Corarito*, 268 N.W.2d 79, 80 (Minn. 1978). Nevertheless, we have recognized that delay alone, even for a period as long as 15 months, is insufficient to demonstrate that an accused's constitutional right to a speedy trial was denied. *See*

State v. Givens, 356 N.W.2d 58, 61-62 (Minn. App. 1984), *review denied* (Minn. Jan. 2, 1985).

Reason for the Delay

A defendant's speedy trial right is not absolute, but rather subject to a showing by the prosecution that there was good cause for any delay. Minn. R. Crim. P. 11.10. In assessing the reasons for the delay, the Supreme Court has compared "deliberate" efforts to hamper the defense, more "neutral" reasons such as negligence or busy courts—that must be considered because of the government's responsibility to conduct the trial, and valid and justifying reasons, "such as a missing witness." *Barker*, 407 U.S. at 531, 92 S. Ct. at 2192. The unavailability of a witness may constitute good cause for delay when the state shows that it was diligent in attempting to secure the witness's availability and that the unavailability does not prejudice the defendant. *See id.*; *Windish*, 590 N.W.2d at 317*; State v. Terry*, 295 N.W.2d 95, 96 (Minn. 1980).

Appellant's trial was originally scheduled to begin on August 14, 2006, but the state moved for a continuance because one of its witnesses was attending a 10-week elite training course at the FBI Academy in Virginia and would be unavailable to testify until September 18, 2006. In its motion for a continuance, the state asserted that because the detective was the lead investigator in appellant's case, his presence would be required for the entire week of trial in order to prepare for the case and offer both direct and rebuttal testimony, particularly with respect to the aggravated-forgery charge. At the motion hearing on August 9, the detective's superior testified that taking the detective out of the training session for such a length of time might result in the detective getting "dumped"

or "furloughed" from the program because he would miss an entire week of mandatory classes, physical training, and assignments.

Appellant argues that the state failed to produce any evidence that it made diligent efforts to ensure the detective's availability. Although there is certainly no indication that the continuance was a deliberate attempt to delay the trial, it infringed on appellant's speedy-trial right for the convenience of the state and weighs somewhat against the state under the "more neutral reason" category. *See Barker*, 407 U.S. at 531, 92 S. Ct. at 2192. But the delay does not provide weighty support for appellant's argument that he was denied his constitutional right to a speedy trial because, first, it postponed the trial only for a month and, second, interrupting and jeopardizing the officer's training would have required extraordinary and arguably unwarranted measures by the state. *See State v. Reese*, 446 N.W.2d 173, 179 (Minn. App. 1989), *review denied* (Minn. Nov. 15, 1989); *Terry*, 295 N.W.2d at 96 (finding that delays because of witness availability are legitimate as long as they are not extreme or prejudicial).

Unlike the deliberate "legal maneuvering" disapproved of by the Minnesota Supreme Court in *State v. Kasper*, the prosecutor here made a reasonable request for a continuance. 411 N.W.2d 182, 185 (Minn. 1987). Although appellant argues that the supposed indispensability of the detective's testimony is undermined by the fact that the detective did not ultimately testify at trial, this assertion ignores the fact that the state filed its motion for a continuance well before it knew that appellant would seek and obtain severance of the aggravated forgery charge, the very charge for which the

detective's testimony was deemed essential; in addition, appellant's decision not to take the stand at trial eliminated the need for the detective to offer rebuttal testimony.

Likewise, there is no merit in appellant's contention that the district court gave improper consideration to appellant's immigration status in granting the continuance. Although the state alerted the district court to appellant's status as an illegal immigrant who had previously been deported, and thus was subject to a hold by federal immigration authorities, it did so only to illustrate that appellant would have been subject to detention if released from custody, diminishing prejudice associated with his extended pretrial detention. Both the motion for a continuance filed by the state and the jail administrator's testimony at the hearing demonstrate that appellant's immigration status was relevant to the district court's decision only to the extent that it factored into the court's prejudice analysis.

Even though the state was in large part responsible for appellant's trial being delayed, there is no support in the record for appellant's assertion that this delay was the result of the state's deliberate legal maneuvering.

Assertion of Right to a Speedy Trial

In determining whether a defendant asserted his right to a speedy trial, we must consider the force and frequency of the demand. *State v. Friberg*, 435 N.W.2d 509, 515 (Minn. 1989). Here, it is uncontested that appellant first asserted his right to a speedy trial on June 16, 2006, at his omnibus hearing and then reiterated that demand at the pretrial conference held on August 3, 2006. Appellant's prompt and unequivocal assertion of his right to a speedy trial weighs in his favor.

Prejudice Suffered as a Result of the Delay

When determining whether a defendant was prejudiced by a delay, we consider those interests that the right to a speedy trial was intended to protect: avoiding oppressive pretrial incarceration; minimizing the defendant's anxiety and concern; and preventing impairment of the defendant's defense. *Windish*, 590 N.W.2d at 318 (citing *Moore v. Arizona*, 414 U.S. 25, 26-27, 94 S. Ct. 188, 190 (1973)). The third factor, possible impairment of a defendant's defense, is the most important. *Id.* A defendant does not have to affirmatively prove prejudice, but instead may suggest it by showing "likely harm to a defendant's case." *Windish*, 590 N.W.2d at 318. And "consideration of prejudice is not limited to the specifically demonstrable" because "time's erosion of exculpatory evidence and testimony can rarely be shown." *Doggett v. United States*, 505 U.S. 647, 655, 112 S. Ct. 2686, 2692-93 (1992) (quotation omitted). But we have recognized that pretrial incarceration alone is not enough to demonstrate prejudice. *State v. Helenbolt*, 334 N.W.2d 400, 405-06 (Minn. 1983); *State v. Jones*, 392 N.W.2d 224, 235-36 (Minn. 1986). And when a defendant is in custody for an unrelated matter, the first two prejudice considerations—preventing oppressive pretrial incarceration and minimizing the defendant's anxiety—are rendered moot. *Windish*, 590 N.W.2d at 318.

The prosecutor established that appellant would have been subject to federal detention even if he had been released from the state's custody pending trial. Accordingly, appellant's extended pretrial incarceration and any anxiety that he suffered as a result of that incarceration are irrelevant. *See id.* And appellant's argument that the delay caused likely harm to his case is equally unavailing.

Appellant claims that the delay prejudiced his defense by rendering his wife unavailable to testify as a witness. But this argument is unpersuasive for a number of reasons: appellant never submitted a witness list identifying his wife as a potential witness for the defense; when opposing the state's continuance motion, defense counsel never argued that appellant's wife's unavailability was a concern; there is no evidence that the delay actually caused appellant's wife's return to Mexico and subsequent unavailability; and defense counsel's limited offer of proof stating that appellant's wife "would have been able to offer some testimony as to her observing of the child's mother in response to seeing [appellant]" fails to show how appellant's wife's testimony might have materially benefited appellant's defense.

In sum, the circumstances demonstrate that a neutral-to-good cause existed for continuing appellant's trial date, that the length of the delay was modest, and that appellant was not prejudiced by the delay. When viewing the record in the context of the speedy-trial factors, appellant has not shown that the district court denied him his constitutional right to a speedy trial.

2.

Appellant argues that the district court's response to the deliberating jury's question about a fourth charge that was severed for trial, but mistakenly mentioned by the court in its preliminary instructions, constituted an abuse of discretion.

During jury selection, the district court told the panel that a fourth charge had been stricken from the complaint and that the jury would only be addressing the three charges of first-degree criminal sexual conduct. At the time, neither party objected to the

reference or requested a cautionary instruction to address the district court's reference to the fourth charge. Then, after deliberating for more than four hours, the jury submitted four questions to the court, including this inquiry and statement: "What was the fourth charge?" . . . "Because if it was dropped and the same thing happened twice why was he not charged with fellatio twice. We have limited information on the third charge." The jury's comment evidently represents speculation related to the fact that count two addressed an act of performing fellatio and counts one and three addressed another sexual act on two separate occasions.

The district court discussed the question and possible responses with both attorneys. Defense counsel asked for an instruction telling the jurors that they were to consider only the three counts in front of them. The prosecutor argued for an instruction that went further to state that the court had made a mistake in mentioning the fourth count, but defense counsel objected to that portion of the prosecutor's proposed instruction. After discussing and considering the proposed instructions, the court reiterated its previous instruction, which included, in pertinent part, the following:

> You should base your verdict entirely upon the evidence which has been received in court and upon the law which I have given you in these instructions. As I explained to you earlier, there are three separate charges or counts against the defendant in this case. There are six possible forms of verdict in this case. It will be a guilty verdict form and a not guilty verdict form for each separate charge or count. These verdict forms are self-explanatory. You will consider each charge or count separately, and you will use the appropriate verdict form for each charge or count depending on your decision.

There was no objection to the district court's chosen method of responding to the deliberating jury's question by either party.

If a defendant fails to challenge the district court's decision on how to respond to a jury's question, he waives the right to appeal that issue unless the district court committed plain error. *State v. Crims*, 540 N.W.2d 860, 864 (Minn. App. 1995), *review denied* (Minn. Jan. 23, 1996). Because no one objected to the district court's response here, we have the discretion to consider the issue on appeal only if we find that the response constituted plain error affecting appellant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998); Minn. R. Crim. P. 31.02. Under the plain-error standard, appellant must demonstrate that there was error, the error was plain, and the error affected appellant's substantial rights. *State v. Morton*, 701 N.W.2d 225, 234 (Minn. 2005). And even if appellant satisfies this three-part test, we will grant relief only if the error is shown to seriously affect the fairness, integrity, or public reputation of the judicial proceedings. *Griller*, 583 N.W.2d at 742.

We review a district court's decision about whether to give additional instructions in response to a jury's question for an abuse of discretion. *State v. Harwell*, 515 N.W.2d 105, 108 (Minn. App. 1994), *review denied* (Minn. June 15, 1994). When responding to a jury's question, the district court may give additional instructions, amplify previous instructions, reread previous instructions, or give no response at all. *See* Minn. R. Crim. P. 26.03, subd. 19(3); *State v. Laine*, 715 N.W.2d 425, 434 (Minn. 2006). Because district courts are afforded considerable latitude in selecting the particular language to be used in jury instructions, an instruction is not erroneous as long as it can be understood

by the jury and does not misstate the law. *State v. Goodloe*, 718 N.W.2d 413, 421 (Minn. 2006); *State v. Peou*, 579 N.W.2d 471, 475 (Minn. 1998).

Although appellant argues that the jury's question raised a point of law, such that Minn. R. Crim. P. 26.03, subd. 19(3)(1), required the district court to give the jury appropriate additional instructions, the jury's question about the nature of the charge appears to be primarily a question of fact. Minn. R. Crim. P. 26.03, subd. 19(3)(1). Furthermore, even if the jury's question did pose a question of law, Minn. R. Crim. P. 26.03, subd. 19(3)(1)(b), specifically states that the court is not required to give any additional instructions in response to a jury's question of law if the request "concerns matters not in evidence or questions which do not pertain to the law of the case." *Id.* Because the jury's question about the nature of the severed count concerned a matter that was not in evidence and irrelevant to the law governing the three criminal sexual conduct charges at issue in this trial, the district court was not required to provide additional instructions about why the fourth count was severed.

Moreover, even though the district court's instruction did not expressly adopt the prosecutor's suggestion that the jury be told not to speculate about the severed count, the district court's chosen response, reiterating its prior instruction, addressed the central concern expressed by counsel for both parties—that the jury should consider only the three charges before it. And we have recognized that, although the interests of justice occasionally require a district court to clarify its instructions, it may properly refer the jury to the original instructions when they provide the jury with the guidance necessary to resolve the confusion. *Crims*, 540 N.W.2d at 864-65; *Harwell*, 515 N.W.2d at 109.

Because the district court's supplemental instruction was clear and did not misstate the law, it did not constitute an abuse of discretion. The district court's response to the deliberating jury's question about the nature of the severed charge was not erroneous, and we need not reach the issue of whether the response was plain error affecting substantial rights.

Affirmed.