STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0626

State of Minnesota,
Respondent,

vs.

Anthony Joseph Mussehl,
Appellant.

Filed May 19, 2009
Affirmed
Randall, Judge[*]

Ramsey County District Court
File No. 62-K7-2291

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

Susan Gaertner, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, 50 Kellogg Boulevard West, Suite 315, St. Paul, MN 55102 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Sharon E. Jacks, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Connolly, Presiding Judge; Ross, Judge; and Randall, 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

RANDALL, Judge

Appellant challenges his convictions of four counts of possession of a firearm by an ineligible person, arguing: (1) his constitutional right to a speedy trial was violated; and (2) the district court erred by improperly excluding evidence. We affirm.

FACTS

In 2002, appellant Anthony Joseph Mussehl pleaded guilty to terroristic threats. He was given a stay of imposition, which was revoked for probation violations, and he was committed to the commissioner of corrections for a year and a day.

In June 2007, appellant's grandfather noticed that four of his guns were missing from his garage. A police investigation determined that appellant had pawned the guns in April and May of 2007. Appellant was charged with one count of ineligible person in possession of a firearm and one count of receiving stolen property.

On July 11, 2007, appellant appeared with counsel and pleaded not guilty to the charges and filed a speedy-trial demand. At the August 22 pretrial hearing, trial was scheduled for September 10, 2007, 60 days after appellant's speedy-trial demand. Appellant's public defender indicated that he was unavailable that week because he was starting a murder trial. On September 10, 2007, stand-in attorneys appeared on behalf of both parties. Counsel appearing on behalf of appellant did not express concerns about appellant's speedy-trial rights, and appellant did not reassert his speedy-trial demand. Appellant's case was on call for the next two weeks, but appellant's counsel remained unavailable and the district court continued the trial to October 29, 2007.

On Monday, October 29, appellant appeared with counsel. A new prosecutor appeared for the state, and indicated that the case had been reassigned to her on Friday, October 26. The new prosecutor asked for a three-day continuance to get up to speed on the case, and the district court granted the continuance. On November 5, the state moved to amend the complaint because the new prosecutor concluded that the case had been undercharged. The district court overruled appellant's objection and granted the motion to amend the complaint to add three additional ineligible-person-in-possession-of-a-firearm and three receiving-stolen-property charges.

At the November 7, 2007 trial, appellant attempted to present evidence that (1) a prospective employer was unable to determine that appellant had a felony conviction; and (2) when he pleaded guilty to terroristic threats in 2002, he understood that within three years he would have a misdemeanor conviction. The jury found appellant guilty on four counts of ineligible person in possession of a firearm and not guilty on the four counts of receiving stolen property.

D E C I S I O N

Speedy Trial

Appellant first argues that his convictions must be reversed because the delay in bringing him to trial violated his constitutional right to a speedy trial. A speedy-trial challenge presents a constitutional question subject to de novo review. *State v. Cham*, 680 N.W.2d 121, 124 (Minn. App. 2004), *review denied* (Minn. July 20, 2004).

"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. Minnesota courts apply a

four-part test to determine whether a defendant's speedy-trial right has been violated: "(1) the length of the delay; (2) the reason for the delay; (3) whether and when the defendant asserted his right to a speedy trial; and (4) the prejudice to the defendant caused by the delay." *Cham*, 680 N.W.2d at 124 (citing *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192 (1972)).

Length of Delay

In Minnesota, following a speedy-trial demand, the trial shall commence within 60 days of the demand unless good cause is shown. Minn. R. Crim. P. 11.10. Delay beyond the 60-day period raises a presumption that a defendant's speedy-trial right has been violated, and requires further inquiry into whether a violation has occurred. *State v. Friberg*, 435 N.W.2d 509, 513 (Minn. 1989). Appellant made a speedy-trial demand on July 11, 2007. Appellant's trial commenced on November 5, 2007, nearly four months after his speedy-trial demand. Because appellant's trial commenced beyond the 60-day period, this factor is satisfied, and we must consider the other factors.

Reason for Delay

The reason for delay is closely related to the length of delay, and different weights are assigned to different reasons. *Barker*, 407 U.S. at 531, 92 S. Ct. at 2192. The state's deliberate attempt to delay the trial to hamper the defense weighs more heavily against the state, while negligent or administrative delays are given less weight. *Id.*; *State v. Huddock*, 408 N.W.2d 218, 220 (Minn. App. 1987). But when the overall delay in bringing a case to trial is the result of the defendant's actions, there is no speedy-trial violation. *State v. DeRosier*, 695 N.W.2d 97, 109 (Minn. 2005).

Here, nothing in the record indicates a deliberate attempt to delay trial. The delay was caused by the unavailability of the public defender and the prosecutor, and a reorganization within the county attorney's office. On July 11, appellant made his speedy-trial demand, and trial was originally scheduled to begin September 10, 61 days after appellant's demand. After appellant's counsel notified the district court that he was unavailable that week or the next, the district court stated "[t]hat means there is good cause shown on the speedy trial notice." The prosecutor was also unavailable the week of the tenth, but was available the following week. Thus, neither appellant's counsel nor the prosecutor was available for the first trial date of September 10. But the following week, the case was delayed because appellant's counsel was trying a murder case, and on September 26, the district court continued the case until October 29, 2007. There is no record of any hearing; thus, the reason for the one-month delay is unknown. The next continuance occurred on October 29 when a new prosecutor took over the case due to administrative changes. Appellant did not object or raise any speedy-trial concerns during this hearing, and the trial began on November 5.

Appellant argues that the state should be responsible for the overburdened public defender's office and he should not bear any responsibility for any of the delay. Even if this factor is weighed against the state, its weight is diminished by the lack of any evidence showing a deliberate attempt by the state to delay trial by overburdening public defenders. In cases with considerably longer trial delays and greater evidence of an overburdened court system, the supreme court has found that defendants' speedy-trial rights were not violated. *See, e.g.*, *State v. Jones*, 392 N.W.2d 224, 235-36 (Minn. 1986)

(holding that a seven-month delay did not violate defendant's speedy-trial right when defendant argued court system was overburdened but no unfair prejudice resulted); *State v. Corarito*, 268 N.W.2d 79, 80 (Minn. 1978) (holding that a six-month delay did not violate defendant's speedy-trial right when state was not trying to hamper the defense and defendant did not show any unfair prejudice resulting from the delay).

We acknowledge that part of the delay in this case is technically attributable to appellant. Appellant's trial was first continued and on call for two weeks because his counsel was trying another case. The state, on the other hand, had control over the reassignment of cases in the prosecutor's office, which resulted in a one-week continuance. Ultimately, appellant experienced a delay of two months—one week of that is solely attributable to the state, one week attributable to appellant, and one week attributable to both. We could weigh this factor neutrally because both parties were at fault. We will weigh this factor ultimately against the state because it is the state's responsibility to bring a defendant to trial. However, the state did not deliberately attempt to delay the trial, and this factor weighs just moderately in appellant's favor.

Assertion of Right

Assertion of the right to a speedy trial need not be formal or technical, and it is determined by the circumstances. *State v. Windish*, 590 N.W.2d 311, 317 (Minn. 1999). A court must assess "the frequency and intensity of a defendant's assertion of a speedy trial demand—including the import of defense decisions to seek delays." *Id.* at 318. This court considers the "frequency and force" of the speedy-trial demand because "the

strength of the demand is likely to reflect the seriousness and extent of the prejudice." *Friberg*, 435 N.W.2d at 515 (citing *Barker*, 407 U.S. at 531, 92 S. Ct. at 2192).

Appellant argues that he asserted his right to a speedy trial when he made his demand at the July 11 plea hearing, and therefore this factor weighs in his favor. Appellant, however, made no other assertions of this right until appeal. The state argues that appellant failed to object to the continuances and appellant's attorney was partially responsible for the delay. Here, appellant was aware of, participated in, and did not object to the continuing of his trial. In fact, according to the record, appellant apparently did not object to any of the continuances. Likewise, appellant apparently never raised concerns about his speedy-trial right. *See State v. Rachie*, 427 N.W.2d 253, 257 (Minn. App. 1988) (noting that the 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). Despite appellant's initial demand, he did not voice any objections or raise any speedy-trial concerns when the district court granted the continuances. This factor is neutral.

Prejudice

The fourth factor, whether a defendant has been prejudiced by the delay, encompasses three concerns: (1) preventing oppressive pretrial incarceration; (2) minimizing the anxiety of the accused; and (3) limiting impairment of the defense. *Barker*, 407 U.S. at 532, 92 S. Ct. at 2193. The third concern is the most important. *Windish*, 590 N.W.2d at 318. The defendant does not have to prove prejudice; it can be "suggested by likely harm to a defendant's case." *Id.*

Appellant challenges only the first of the three concerns, arguing that this prejudice factor weighs in his favor because he was subject to four months of pretrial incarceration. "If trial is not commenced within 120 days after such demand is made and such a plea is entered, the defendant . . . shall be released subject to such nonmonetary release conditions as may be required by the court." Minn. R. Crim. P. 11.10. Appellant was incarcerated for 117 days before his trial began, within the guidelines established by rule 11.10. And five months of pretrial incarceration has previously been upheld as non-prejudicial. *See State v. Givens*, 356 N.W.2d 58, 62 (Minn. App. 1984) (holding prejudice when defendant was in custody for five months prior to trial), *review denied* (Minn. Jan. 2, 1985). Further, appellant received credit toward his prison sentence for the time served during his pretrial incarceration. Although appellant was incarcerated prior to his trial, he did not demonstrate any further prejudice from the incarceration.

Appellant argues that he was prejudiced by the 4.5-point increase in his criminal history score when the district court allowed the new prosecutor to amend the complaint and add three additional ineligible-person-in-possession charges. Appellant cites no authority for this argument. He simply suggests that but for the delay the prosecutor would not have amended the complaint. At the November 5 hearing, the court responded to the prosecutor's motion to amend the complaint, stating the "motion to amend the complaint, [ ] is not a surprise to [appellant] because [the] different firearms are listed in the original complaint." We conclude the amended complaint did not impair or harm the defense. The additional charges were mirror images of the original charges. Although the other *Barker* factors weigh slightly in favor of appellant, we cannot find any

substantial prejudice to appellant by the delay, wherein the interests of justice would mandate a dismissal.

Exclusion of Evidence

Appellant also argues that his procedural due-process rights were violated when the district court prevented him from fully explaining himself and from presenting certain evidence during his trial. Generally, we review a constitutional challenge de novo. *State v. Johnson*, 689 N.W.2d 247, 253 (Minn. App. 2004), *review denied* (Minn. Jan. 20, 2005). "[A] defendant has no constitutional right to present irrelevant evidence." *State v. Jensen*, 373 N.W.2d 364, 366 (Minn. App. 1985), *review denied* (Minn. Oct. 11, 1985). Evidence that is not relevant is inadmissible. Minn. R. Evid. 402. And a decision to exclude evidence as irrelevant is subject only to an abuse-of-discretion standard of review. *See State v. Horning*, 535 N.W.2d 296, 298 (Minn. 1995).

> "The threshold determination of relevance turns on whether the evidence logically or reasonably tends to prove or disprove a material fact in issue, or tends to make such a fact more or less probable, or affords the basis for or supports a reasonable inference or presumption regarding the existence of a material fact."

Id. The party claiming error has the burden of showing both the error and the resulting prejudice. *State v. Loebach*, 310 N.W.2d 58, 64 (Minn. 1981).

Appellant attempted to present evidence that a potential employer was unable to determine that he had a felony conviction when a background check on appellant was performed. Here, the evidence demonstrates that appellant had been convicted of terroristic threats. Whether a potential employer was correctly able to determine that

appellant had a felony conviction does not prove or disprove this fact. The district court did not abuse its discretion by excluding the evidence.

Appellant also attempted to testify that when he pleaded guilty to terroristic threats, he understood that after three years the felony conviction would be dropped to a misdemeanor. Criminal defendants have a due-process right to give the jury an explanation of their conduct, even if their motive is not a valid defense. *State v. Rein*, 477 N.W.2d 716, 719 (Minn. App. 1991), *review denied* (Minn. Jan. 30, 1992). But, although a "defendant's constitutional right to give testimony regarding his intent and motivation is very broad," it is "not without limitation . . . and must be balanced against interests served by imposing strict relevancy requirements on the defendant's testimony." *State v. Buchanan*, 431 N.W.2d 542, 550 (Minn. 1988).

Here, appellant attempted to testify that he was ignorant of the law. In Minnesota, "ignorance of the law is not a defense when it would have been possible, had [the defendant] made the effort to do so, to learn of the existence of the prohibition." *State v. Grillo*, 661 N.W.2d 641, 645 (Minn. App. 2003), *review denied* (Minn. Aug. 5, 2003); *see also State v. King*, 257 N.W.2d 693, 697-98 (Minn. 1977) (holding ignorance of the law is no excuse, and an individual cannot be heard to complain that she was without notice of a criminal statute when, had the appellant made an effort to ascertain information, she would have been put on adequate notice). Testifying that one was ignorant of the law does not tend to prove or disprove a material fact in issue, or tend to make such a fact more or less probable. It does not afford the basis for, or support a

reasonable inference or presumption regarding the existence of a material fact. The district court did not abuse its discretion by excluding it.

Appellant argues that his entire case was based on this evidence and that the jury may have believed him. The facts are relatively simple. Appellant pleaded guilty to terroristic threats. He received a stay of imposition, which was revoked due to numerous probation violations. He was committed to the commissioner of corrections for a year and a day. The ineligible-person-in-possession-of-a-firearm statute prohibits a person who has been convicted of a crime "punishable by imprisonment for a term exceeding one year" from possessing a firearm. Minn. Stat. § 624.713 subd. 1(j)(1) (2006). Because appellant was convicted of a crime and imprisoned for more than one year, Minn. Stat. § 624.713 is applicable. The record demonstrates that appellant pawned four separate guns on four separate days, and therefore was in possession of the four guns, in violation of Minn. Stat. § 624.713. Evidence showing appellant's state of mind or "understanding of the law" does not change the facts. The state presented, and the jury found beyond a reasonable doubt, the essential elements of the possession charges. The record does not support any claim of error or prejudice.

Affirmed.