STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0872

State of Minnesota,
Respondent,

vs.

Lenny Clyde White,
Appellant.

Filed August 18, 2009
Affirmed
Kalitowski, Judge

Stearns County District Court
File No. 73-CR-07-9817

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

Janelle Kendall, Stearns County Attorney, Administration Center, 705 Courthouse Square, Room 448, St. Cloud, MN 56303-4773 (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Hudson, Presiding Judge; Kalitowski, Judge; and Klaphake, Judge.

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

KALITOWSKI, Judge

Appellant challenges his February 2008 jury conviction of felony terroristic threats in violation of Minn. Stat. § 609.713 (2006). Appellant argues that the district court (1) erred by not dismissing the charges because his constitutional right to a speedy trial was violated and (2) abused its discretion by failing to appoint advisory counsel. Appellant also argues that he did not receive a fair trial because the district court improperly admitted relationship evidence pursuant to Minn. Stat. § 634.20 (2006). We affirm.

D E C I S I O N

I.

Appellant contends that his conviction should be reversed because his constitutional right to a speedy trial was violated. We review de novo whether a delay in bringing a defendant to trial violates that defendant's constitutional rights. *State v. Cham*, 680 N.W.2d 121, 124 (Minn. App. 2004), *review denied* (Minn. July 20, 2004).

All criminal defendants have a constitutional right to a speedy and public trial. *Id.* (citing Minn. Const. Art. I, § 6). This right is addressed in part by the Minnesota Rules of Criminal Procedure, which provide that on assertion of the right, trial shall commence within 60 days:

> A defendant shall be tried as soon as possible after entry of a plea other than guilty. 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 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. The time period shall not begin to run earlier than the date of the plea other than guilty.

Minn. R. Crim. P. 11.10.

In determining whether a defendant's right to a speedy trial has been violated, Minnesota courts apply the *Barker* test, which consists of four factors: (1) the length of the delay; (2) the reason for the delay; (3) whether and when the defendant asserted the right to speedy trial; and (4) whether the delay prejudiced the defendant. *Cham*, 680 N.W.2d at 124 (citing *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192 (1972)). "None of the factors is either a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant." *State v. Windish*, 590 N.W.2d 311, 315 (Minn. 1999) (quotation omitted).

Length of delay

The filing of criminal charges against an accused marks the starting point for calculating the length of the delay. *State v. Huddock*, 408 N.W.2d 218, 220 (Minn. App. 1987). Delays beyond 60 days from the demand for a speedy trial create a presumption that a violation has occurred. *Windish*, 590 N.W.2d at 315-16. Here, appellant was charged by complaint on August 28, 2007, and made his speedy-trial demand at his first appearance on October 1, 2007. Appellant's trial did not commence until February 11, 2008. Because the delay is over 60 days, the district court correctly concluded that there is a presumption that a violation of appellant's right has occurred.

Reason for the delay

"The second *Barker* factor requires an inquiry into the reasons for the delay." *Windish*, 590 N.W.2d at 316. Both courts and prosecutors bear the burden of ensuring speedy trials. *Id.* The particular reasons for the delay affect whether the delay favors the accused or the state. *See, e.g., id.* (stating that the delay attributable to the defendant does not weigh in his favor); *Cham*, 680 N.W.2d at 125 (stating where the state was not responsible for the delay in obtaining an interpreter and did not act in bad faith, the delay does not weigh against the state).

Here, the record from proceedings of a November 29, 2007 settlement conference indicates that there was some confusion on the part of the district court as to whether appellant's October 2007 request was for a speedy omnibus hearing or a speedy trial. But the record indicates that at this conference, appellant again reiterated his demand for a speedy trial, and trial was scheduled for January 15, 2008. On January 28, 2008, appellant agreed to a continuance of the trial because of new discovery he had received from the state. Apart from this two-week period in January 2008, no other reasons for delay are attributable to appellant. Therefore, we agree with the district court that this factor weighs only slightly against the state because there is no evidence of bad faith or designs to delay the trial.

Assertion of the speedy-trial right

The next *Barker* factor considers whether and when the accused asserted his or her right to speedy trial. *Windish*, 590 N.W.2d at 315-16. Here, the record is clear that appellant first asserted his right to a speedy trial on October 1, 2007, and continued to

assert his right throughout the proceedings at the district court. We thus agree with the district court that this factor weighs in appellant's favor.

Prejudice

The fourth factor for consideration is whether the accused suffered prejudice from the delay. *Id.* at 315, 318. Under the fourth or "prejudice factor" of the *Barker* test, we examine three interests: "(1) preventing oppressive pretrial incarceration; (2) minimizing the anxiety and concern of the accused; and (3) preventing the possibility that the defense will be impaired." *Id.* at 318. Of the three interests, the most serious is the possible impairment of a defense. *Id.* A defendant need not affirmatively prove prejudice; "rather, prejudice may be suggested by likely harm to a defendant's case." *Id.* Here, we conclude that appellant suffered no prejudice from the delay.

Appellant argues that his numerous requests for relief from delay demonstrate that he suffered oppressive pretrial incarceration. But while "[p]retrial incarceration may be unfortunate, [it] is not a serious allegation of prejudice." *State v. Stroud*, 459 N.W.2d 332, 335 (Minn. App. 1990) (citations omitted). Moreover, appellant has not explained how his pretrial incarceration was "oppressive." Appellant's multiple assertions of his speedy-trial right do not show any particular oppressiveness of his incarceration, but rather the vigilance with which he asserted his right.

Appellant next contends that his repeated requests for a speedy trial demonstrate anxiety and concern over the prospect that he could be convicted. But the "anxiety suffered waiting for trial is not a serious allegation of prejudice." *State v. L'Italien*, 363 N.W.2d 490, 493 (Minn. App. 1985), *review denied* (Minn. Apr. 26, 1985). To establish

prejudice, appellant must make more than a claim that his request for a speedy trial reflects his anxiety. Were it otherwise, a defendant could establish prejudice simply by vigorously asserting his right to a speedy trial.

Finally, appellant argues that his ability to receive a fair trial was compromised. Appellant contends that the delay caused "undue anxiety and may have hampered his defense." The impairment of a defense caused by a delay in trial is a serious concern. *Windish*, 590 N.W.2d at 318. But here, appellant has not contended that his defense was prejudiced because of inability to locate key witnesses or from the loss of evidence. *See id.* at 318-19 (finding prejudice due to delay in trial where defendant lost contact with key witnesses). Furthermore, appellant's claim that undue anxiety hampered his defense is contradicted by the record, which indicates that appellant raised motions and objections before and during trial.

Importantly, the length of delay here was not so great as in cases where we have found prejudice based on the undeniable prejudice that flows from the deprivation of a constitutional right. *See, e.g., State v. Griffin*, 760 N.W.2d 336, 341 (Minn. App. 2009) (concluding six-month delay prejudicial even though no prejudice to the appellant's defense of the case because during that time, appellant was on "standby status" thus making it impossible to return to her Chicago home). We conclude, based on our de novo review of appellant's speedy-trial claim and application of the *Barker* factors, that appellant was not denied his constitutional right to a speedy trial.

II.

Appellant contends that the district court erred because it failed to exercise its discretion regarding appointment of advisory counsel. Because the lack of advisory counsel did not prejudice appellant or deny him a fair trial, we disagree.

Under Minn. R. Crim. P. 5.02, subd. 2, a district court "may" appoint advisory counsel to assist a defendant who voluntarily and intelligently waives the right to counsel. The failure to exercise discretion regarding the appointment of advisory counsel is not subject to per se reversal. *State v. Clark*, 722 N.W.2d 460, 467-68 (Minn. 2006). "The role of advisory counsel is fundamentally different from the role of counsel generally." *Id.* at 468 (quotation omitted). It is to "steer a defendant through the basic procedures of the trial" and "to relieve the judge of the need to explain and enforce basic rules of [the] courtroom." *Id.* (alteration in original) (quotations omitted). The use of advisory counsel is justified by the goals of ensuring fairness in the criminal justice process, promoting judicial efficiency, and preserving the appearance of judicial impartiality. *Id.* The use of advisory counsel is encouraged, but ultimately, a defendant is entitled to a fair trial, not an error-free trial. *Id.* at 469. It is the duty of the court and the prosecutor to ensure defendant receives a fair trial and we examine the lack of advisory counsel for prejudice to the defendant. *Id.*

The exchange between the district court and appellant regarding advisory counsel consisted of the following:

> THE COURT: You do have the right to be represented by an attorney. You have not requested a court-appointed attorney. Do you want to request a court-appointed attorney?

> THE DEFENDANT: No, I would like to request to go pro se, and like to have you consider appoint me maybe a counsel to interpret and coexist with me.
> THE COURT: We don't appoint stand-by counsel as a matter of course, Mr. White. If you want to apply for an attorney you can or you can represent yourself.
> THE DEFENDANT: I would like to represent myself.
> THE COURT: That's fine.

Appellant was not appointed advisory counsel and represented himself throughout trial.

Appellant first argues that he was denied a fair trial because the presence of advisory counsel would have prevented the introduction of what appellant describes as an overwhelming amount of prejudicial, inflammatory, and cumulative relationship evidence. Specifically, appellant complains of long narrative responses by the victim, A.L., during the state's direct examination. But, as discussed below, the relationship evidence was properly admitted at trial. Moreover, the role of advisory counsel is to help the accused understand and negotiate through the basic procedures of the trial, not to provide a pro se party with objections. *See* Minn. R. Crim. P. 5 cmt. ("It should be made clear to the pro se defendant that advisory counsel is not a functionary of the defendant who can be directed to perform tasks by the defendant.").

Appellant also argues that advisory counsel could have assisted him with objections during the cross-examination of A.L. because of her nonresponsive and prejudicial remarks such as, "you were there, you know." But appellant objected to this response and following the objection, the district court instructed A.L. to answer the question and not to editorialize. We conclude, based on our review of the record, that the complained-of testimony does not establish the lack of a fair trial.

Appellant also argues that advisory counsel could have guided him "through the process of impeaching [the victim's] testimony" with her prior inconsistent statements. But appellant chose to proceed at trial without representation. Thus, even if an attorney would have done a better job of impeaching a witness, this does not establish that it was error not to appoint advisory counsel. Moreover, inadequate impeachment does not establish that appellant was denied a fair trial.

Because appellant was not prejudiced by the lack of advisory counsel, we conclude that the district court's refusal to exercise its discretion in appointing advisory counsel is not reversible error.

III.

Appellant contends that he was deprived a fair trial because the state was permitted to introduce a substantial amount of relationship evidence under Minn. Stat. § 634.20. Appellant argues that any probative value of evidence of his similar conduct was substantially outweighed by the danger of unfair prejudice. We disagree.

We review for an abuse of discretion the admission of similar conduct evidence under section 634.20. *State v. McCoy*, 682 N.W.2d 153, 161 (Minn. 2004). "Appellant has the burden to establish that the district court abused its discretion and that appellant was prejudiced." *State v. Lindsey*, 755 N.W.2d 752, 755 (Minn. App. 2008). Section 634.20 provides:

> Evidence of similar conduct by the accused against the victim of domestic abuse, or against other family or household members, is admissible unless the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury, or by

> considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Minn. Stat. § 634.20. "In deciding whether to admit evidence under section 634.20, the district court must consider whether the probative value of the evidence is outweighed by the danger of unfair prejudice." *Lindsey*, 755 N.W.2d at 756 (citing *State v. Bell*, 719 N.W.2d 635, 640 (Minn. 2006)).

"Evidence that helps to establish the relationship between the victim and the defendant or which places the event in context bolsters its probative value." *State v. Kennedy*, 585 N.W.2d 385, 392 (Minn. 1998). "When balancing the probative value against the potential prejudice, unfair prejudice is not merely damaging evidence, even severely damaging evidence; rather, unfair prejudice is evidence that persuades by illegitimate means, giving one party an unfair advantage." *Bell*, 719 N.W.2d at 641 (quotation omitted). Cautionary instructions lessen the probability of undue weight being given to evidence. *Lindsey*, 755 N.W.2d at 757.

Here, the state sought to admit evidence of the general course of appellant and A.L.'s relationship and two specific incidents that allegedly occurred prior to the incident resulting in this conviction. According to A.L.'s testimony, in one incident in early June 2007, appellant struck her with a remote control. The other incident involved appellant punching A.L. in the thigh and threatening her.

Appellant's brief accurately reflects the volume of similar conduct evidence introduced at trial. But we conclude that appellant has not met his burden to establish that the district court abused its discretion and that appellant was prejudiced.

In *Lindsey*, we concluded that extensive evidence regarding two prior incidents of conduct admitted under section 634.20 that included photographs of injuries, and testimony from police officers and other professionals, did not result in the danger of unfair prejudice outweighing the probative value of the similar-conduct evidence. 755 N.W.2d at 756-57. The *Lindsey* court concluded that the prejudicial potential of this similar-conduct evidence did not outweigh its probative value because it provided a context for the charged offense, which was important because the defendant did not testify, and because the district court cautioned the jury on the limited purpose of the similar-conduct evidence. *Id.* at 757.

We conclude here that the danger of unfair prejudice did not substantially outweigh the probative value and the evidence was not unnecessarily cumulative. As in *Lindsey*, appellant did not testify and thus A.L's testimony established the context for the charged crime and was significantly probative. Additionally, directly following A.L.'s testimony about the two prior incidents, the district court cautioned the jury that the evidence was not to be used as proof of appellant's character and that appellant may not be convicted for offenses that may have occurred before the charged incident. At the close of trial, the district court repeated this cautionary instruction. We therefore conclude that the district court did not abuse its discretion. *See State v. Meyer*, 749 N.W.2d 844, 850-51 (Minn. App. 2008) (concluding that the probative value of three prior acts admitted under section 634.20 was not outweighed by the danger of unfair prejudice).

Appellant cites the supreme court's statement in *Ture v. State*, that "courts should not allow the state, when presenting *Spreigl* evidence, to present evidence that is unduly cumulative." 681 N.W.2d 9, 16 (Minn. 2004). But the *Ture* court held that the district court did not abuse its discretion in allowing 3 days of a 12-day trial to be taken up with *Spreigl* evidence because the defendant did not object to the manner in which the *Spreigl* evidence was presented. *Id.* Similarly here, appellant did not object during trial to the volume of evidence presented by the state. Appellant also relies on *State v. Townsend*, 546 N.W.2d 292 (Minn. 1996), to support his argument that the probative value of the evidence was outweighed by the danger of unfair prejudice. But *Townsend* is distinguishable because there, six witnesses testified to the appearance of the crime scene and to the victim's appearance and wounds after the assault, including the fact that the victim was pregnant. *Id.* at 295. Here, only a single witness testified about her relationship with appellant and the prior incidents.

Affirmed.