STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1300

State of Minnesota,
Respondent,

vs.

Gari Lamont Stewart,
Appellant.

Filed August 31, 2010
Affirmed
Bjorkman, Judge

Ramsey County District Court
File No. 62-KX-07-003575

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Susan Gaertner, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, G. Tony Atwal, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Shumaker, Judge; and Larkin, Judge.

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

BJORKMAN, Judge

Appellant Gari Lamont Stewart challenges his convictions of first-degree criminal sexual conduct, first-degree burglary, attempted first-degree murder, attempted second-

degree murder, first-degree arson, and kidnapping. Because the district court did not err in denying appellant's suppression motion, appellant's speedy-trial right was not violated, and appellant's mandatory life sentence under Minn. Stat. § 609.3455 (2006) was proper, we affirm.

FACTS

Appellant's multiple convictions stem from a home invasion that occurred during the early morning hours of June 15, 2007. Appellant entered E.M.'s apartment, which was also occupied by E.M.'s boyfriend, K.S. K.S. awoke to find appellant pointing a knife at his throat. Appellant told K.S. not to move or appellant would kill him. The noise woke E.M.

Appellant asked K.S. "[w]here's the f---ing money?" and K.S. replied that there was no money in the apartment. Appellant walked K.S. into the bathroom at knifepoint and wrapped him up in a plastic shower curtain. Appellant then forced K.S. back into the bedroom. E.M. asked appellant not to hurt K.S. Appellant told her not to move or he would kill her.

K.S. attempted to fight back, and a struggle ensued. Appellant stabbed K.S. five times in the back and once in the chest, puncturing a lung. E.M. tried to help K.S., but appellant pointed the knife at her and told her to stay away from him. Appellant then told E.M. to wrap K.S. back up in the shower curtain. E.M. complied, thinking that K.S. was dead.

Appellant then led E.M. to the living room where he raped her at knifepoint. After the rape, appellant forced E.M. to shower with him and wash his genitals. He again

forced her into the living room, where he performed oral sex on her, and vaginally and anally raped her. During the second rape, appellant told E.M., "This is how I f--k a white ho." After the second rape, appellant again forced E.M. to wash his genitals.

Appellant led E.M. back into the bedroom and had E.M. pull the clothes out of her dresser. Appellant took bottles of alcohol from E.M.'s refrigerator and poured them onto the pile of clothes in the bedroom, then repeated his demand for money. E.M. told him that she had money in a bank account. Appellant then set the living room couch on fire. He also set the clothes in the bedroom on fire and dismantled the fire alarm. K.S. was still in the bedroom as the apartment began to burn.

E.M. wanted to stay in the apartment, but appellant told her that she had to leave with him. E.M. told appellant that she had health problems and needed to take medicine with her. Appellant allowed her to retrieve her medicine, but told her that if she made any noises or tried to run, he would kill her. A security camera recorded E.M. and appellant leaving the building. As they were walking, appellant told R.M. that after everything was done, she would be placed in the witness protection program, but he would still find her and kill her and her family.

Appellant led E.M. to a gas station, where he called a cab and forced E.M. to withdraw $100 from her bank account. The cab dropped appellant and E.M. off near the University of Minnesota. Appellant took E.M. into a restaurant and a hotel, where he was caught on a surveillance camera. E.M. attempted to withdraw cash from an ATM located in the hotel, but was unable to do so because she had exceeded her daily

withdrawal limit. Appellant told E.M. that he wanted to find a television so he could see if there was any news coverage of the apartment fire.

E.M. brought appellant to a nearby hospital where she had previously received treatment. She took appellant to the third-floor waiting room, where she knew a security guard was usually stationed. Because no guard was present, E.M. feigned illness in the hope that she would convince appellant to release her. Appellant told her that she must first rent a car for him.

Appellant used E.M.'s cell phone to call car-rental agencies. He then forced E.M. to walk back to the hotel, where they hailed a cab to take them to the car rental agency. Appellant rented a car using E.M.'s driver's license and debit card.

After forcing E.M. into the passenger seat of the car, appellant placed the knife on the center console and drove away from the rental agency. E.M. begged appellant to let her go. Appellant released E.M. back at the hospital, but kept her driver's license, debit card, and phone.

E.M. ran into the hospital and told the front-desk employee that she had been raped and that her boyfriend had been stabbed to death. E.M. was examined in the emergency room and later spoke to officers from the St. Paul Police Department, providing a description of appellant.

During E.M.'s abduction, K.S. regained consciousness and saw that the bedroom was on fire. He was able to get out of the apartment and reach his brother's apartment down the hall. His brother called 911, and police and firefighters arrived at the apartment around 5:30 a.m.

After interviewing E.M. and K.S., the police began to search for appellant. They asked E.M.'s bank to notify them if her debit card was used. Police Sergeant Timothy McCarty learned that the card was used in various locations around the metro area throughout the day.

Shortly after midnight on June 16, the police learned that E.M.'s debit card had recently been used at a Bloomington hotel. A team of police officers went to the hotel to investigate. Upon arrival, they observed the rental car in the parking lot. Two of the officers spoke to the desk clerk, who told them that a person matching appellant's description had checked into the hotel with a woman. Appellant used E.M.'s debit card to pay for the room. The desk clerk gave the officers a keycard to access the room. The police considered obtaining a search warrant, but concluded that the woman could be in imminent danger based on appellant's recent violent acts.

The officers knocked on the hotel room door and, receiving no response, entered the room with the keycard. Once inside, they immediately arrested appellant. Without prompting, appellant said, "I suppose this is over the credit card and stuff." The police searched appellant, finding E.M.'s debit card in his pocket.

Appellant first appeared before the district court on June 18, 2007. During an August 2 pretrial hearing, appellant made an oral request for a speedy trial. The state moved on September 12 to delay trial pending results of DNA testing, and appellant did not object. Appellant filed a written speedy-trial demand on September 14. In October, appellant was indicted by a grand jury. Appellant subsequently filed motions to suppress evidence obtained during the search of the hotel room, which the district court denied.

Appellant was tried in February 2009. The jury found him guilty of all charges. Based on the jury's finding of guilt on the first-degree criminal-sexual-conduct count, the jury was asked to determine whether heinous elements exist for purposes of imposing a mandatory life sentence under Minn. Stat. § 609.3455, subd. 2(a)(1). The district court submitted ten special-verdict questions regarding the statutory heinous elements, all of which the jury answered in the affirmative. The district court imposed the mandatory life sentence. This appeal follows.

D E C I S I O N

I. The district court did not err in denying appellant's suppression motion.

"When reviewing pretrial orders on motions to suppress evidence, we may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing—or not suppressing—the evidence." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). We accept the district court's underlying factual determinations unless they are clearly erroneous. *State v. George*, 557 N.W.2d 575, 578 (Minn. 1997).

Appellant challenges the warrantless search of the hotel room, the seizure of the debit card, and the admission of his non-*Mirandized*[1] statement to the arresting officers. We address each argument in turn.

The United States and Minnesota constitutions prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Warrantless searches are generally per se unreasonable, with limited exceptions. *State v. Waddell*, 655 N.W.2d

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966).

803, 809 (Minn. 2003). But a warrantless search may be justified if "the exigencies of the situation make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *State v. Shriner*, 751 N.W.2d 538, 541 (Minn. 2008) (quotation omitted). We determine whether exigent circumstances exist based on two tests: the presence of a single factor or the "totality of the circumstances." *Id.* at 541–42. Under the single-factor test, "one fact alone" may create exigent circumstances justifying a warrantless search. *Id.* at 542 (emphasis omitted).

The district court determined that the possibility of imminent harm to the woman in appellant's hotel room supports the warrantless search. We agree. Protection of human life is an exigent circumstance justifying a warrantless search. *State v. Lussier*, 770 N.W.2d 581, 587 (Minn. App. 2009), *review denied* (Minn. Nov. 17, 2009). The police knew that appellant had committed an attempted murder and a violent rape and kidnapping while armed with a deadly weapon less than 24 hours before he entered the hotel with the unidentified woman. From viewing surveillance tapes, the police were aware that appellant had forced E.M. to enter a hotel and numerous other public places under the threat of violence. Accordingly, the police had reasonable grounds to believe that the woman in the hotel room may be in imminent danger of bodily harm. On this record, we conclude that the warrantless search was justified. *See State v. Olson*, 482 N.W.2d 212, 214 (Minn. 1992) (holding that "if there is an objective legal basis" for a search, it will be upheld). Because the search was justified, the evidence found as a result of the search is admissible.

Appellant also argues that the discovery of the physical evidence in the room should be suppressed because it was obtained as the result of an illegal *Terry*[2] stop. But appellant does not analyze this issue in his brief. Issues not briefed on appeal are considered waived. *State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997), *review denied* (Minn. Aug. 5, 1997). Even if the issue were not waived, the search was a legitimate search incident to arrest. The officers placed appellant under arrest when they entered the hotel room. We conclude that the search of appellant's pockets was a search made incident to appellant's arrest and was not a *Terry* search.

Finally, appellant contends that the statement "I suppose this is over the credit card and stuff?" should be suppressed because the officers had not advised appellant of his *Miranda* rights. But *Miranda* does not protect spontaneous and voluntary statements. *See, e.g., State v. Hale*, 453 N.W.2d 704, 707 (Minn. 1990) (excluding spontaneous and voluntary statements not made in response to interrogation from *Miranda* requirements) (citing *Rhode Island v. Innis*, 446 U.S. 291, 300–02, 100 S. Ct. 1682, 1689–90 (1980)). It is undisputed that the officers had not asked appellant any questions before he made the challenged statement. Because the statement was not made in response to custodial interrogation, it is not protected by *Miranda*.

II. Appellant's right to a speedy trial was not violated.

The federal and Minnesota constitutions guarantee a criminal defendant the right to a speedy trial. U.S. Const. amend. VI; Minn. Const., art. I, § 6; *see also* Minn. R. Crim. P. 11.10. In determining whether a defendant's speedy-trial right has been

[2] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968).

violated, we consider "(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." *State v. Cham*, 680 N.W.2d 121, 124 (Minn. App. 2004) (citing *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192 (1972)), *review denied* (Minn. July 20, 2004). We review whether a defendant's right to a speedy trial has been violated de novo. *State v. Griffin*, 760 N.W.2d 336, 339 (Minn. App. 2009).

Minn. R. Crim. P. 11.10 requires that trial commence within 60 days of a speedy-trial demand unless good cause is shown. Delay beyond the 60-day period creates 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). Courts look to the reasons for the delay, *Cham*, 680 N.W.2d at 125, and not all delays weigh heavily against the state, *Friberg*, 435 N.W.2d at 514.

Appellant first made a speedy-trial demand on August 2, 2007. He was tried 18 months later. The length of the delay triggers the presumption that a violation has occurred. Thus, we consider the reasons for the delay.

The state initially requested that trial be postponed until it obtained the results of the DNA testing from the BCA. Generally, the delay occasioned by DNA testing meets the good-cause requirement. *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); *see also State v. Stroud*, 459 N.W.2d 332, 335 (Minn. App. 1990) (noting that DNA evidence can either inculpate or exculpate and delays caused by DNA testing are not caused by the

state, but by the testing facility). We note also that appellant did not object to the state's request. The DNA testing was completed by December 2007, and the results were promptly disclosed to the defense. We conclude that there was good cause for the delay related to the DNA testing.

The subsequent delay resulted from appellant's actions. After the state provided the DNA evidence to appellant, his counsel requested that the next pretrial hearing be held in March 2008. At that hearing, appellant's counsel requested a trial date in 2009. The delay occasioned by appellant's requests does not count against the speedy-trial clock. *State v. DeRosier*, 695 N.W.2d 97, 109 (Minn. 2005) (holding that when the overall delay in bringing a case to trial is the result of the defendant's actions, there is no speedy-trial violation).

Appellant's argument that his failure to more forcefully assert his speedy-trial right was due to ineffective assistance of counsel is unavailing. Because appellant offers little more than bald assertion to support this argument, we decline to analyze it further. *See State by Humphrey v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (noting that assignments of error based on "mere assertion" are waived unless prejudicial error is obvious on mere inspection (quotation omitted)). On this record, we conclude that appellant's speedy-trial right was not violated.

III. The district court did not err in sentencing appellant to life in prison pursuant to Minn. Stat. § 609.3455.

Under Minn. Stat. § 609.3455, subd. 2(1), a defendant convicted of first-degree criminal sexual conduct must receive a life sentence without possibility of release if two or more "heinous elements" exist. Under the statute, a "heinous element" exists when

> (1) the offender tortured the complainant;
>
> . . . .
>
> (4) the offender exposed the complainant to extreme inhumane conditions;
>
> (5) the offender was armed with a dangerous weapon . . . and used or threatened to use the weapon or article to cause the complainant to submit . . . .

Minn. Stat. § 609.3455, subd. 1(d). Because the legislature enacted this statute after the Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), we presume that the legislature intended that the existence of a heinous element would "be determined by a jury based on proof beyond a reasonable doubt." *State v. DeWalt*, 757 N.W.2d 282, 289 (Minn. App. 2008).

Following the guilty verdict on the first-degree criminal-sexual-conduct charge, the district court asked the jury, in 10 special-verdict questions, to determine whether heinous elements were present.[3] The jury answered these questions in the affirmative, finding that appellant: tortured E.M., exposed E.M. to inhumane conditions, and was armed with a dangerous weapon and used or threatened to use the weapon to cause E.M. to submit.

[3] The district court also submitted 13 special-verdict questions regarding aggravating sentencing factors that are not at issue in this appeal.

Appellant does not dispute the factual basis for the special verdicts but argues that the special-verdict questions constitute structural error because they, in effect, directed the jury's verdicts. Appellant also asserts that the questions erroneously encompass elements of the underlying offense. We consider each argument in turn.

District courts are allowed "considerable latitude" in selecting language for the jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). But a jury instruction that essentially directs a verdict is not subject to harmless-error analysis and requires reversal. *State v. Moore*, 699 N.W.2d 733, 737-38 (Minn. 2005) (holding that harmless-error analysis does not apply where instruction deprived the defendant of the right to a jury finding on an element of the offense).

Appellant contends that the wording of the heinous element special-verdict questions required the jury to assume that the factual portion of the question had been proven. We disagree. Each of the special-verdict questions includes the definition of the particular heinous element at issue within the context of a factual question. For example, the third special-verdict question asks, "Did [appellant] intentionally inflict extreme mental anguish or extreme psychological abuse, committed in an especially depraved manner, by sexually assaulting [E.M.] while [K.S.] was critically injured in another room?" To answer the question in the affirmative, the jury had to find that appellant committed a sexual assault against E.M. at the same time K.S. was critically injured in another room of the apartment. As required by *Blakely*, the district court instructed the jury that the state had the burden of establishing an affirmative answer to the special-verdict questions beyond a reasonable doubt.

Appellant's reliance on *Moore* to support his structural-error argument is misplaced. In *Moore*, the district court instructed the jury that "[t]he loss of a tooth is a permanent loss of the function of a bodily member." *Id.* at 736. The supreme court concluded that this instruction amounted to a directed verdict because it "in effect[] instructed the jury that the definition of 'great bodily harm' was established." *Id*. at 737. But here, unlike *Moore*, the jury was asked to determine whether the state proved the facts necessary to establish the three heinous elements. The jury could have found that the state did not prove the facts beyond a reasonable doubt and answered the special-verdict questions in the negative. Appellant's counsel argued to the jury that the state did not meet its burden of proof as to the facts. When the special-verdict questions are considered in light of the other jury instructions and the arguments of counsel, they cannot reasonably be read as directing the jurors that the specific facts had been proved.

Although we conclude that the heinous element special-verdict questions do not constitute directed verdicts, we observe that a better approach would be to separate the factual and legal components of the questions to avoid the potential for jury confusion.

Appellant also argues that the special-verdict questions are erroneous because they encompass elements of the offense. The statute provides that

> [a] fact finder may not consider a heinous element if it is an element of the underlying specified violation . . . . In addition, when determining whether two or more heinous elements exist, the factfinder may not use the same underlying facts to support a determination that more than one element exists.

Minn. Stat. § 609.3455, subd. 2(b).

Appellant's conviction of first-degree criminal sexual conduct was based on the jury's finding of sexual penetration under circumstances that "cause the complainant to have a reasonable fear of imminent great bodily harm to the complainant or another." Minn. Stat. § 609.342, subd. 1(c) (2006). Appellant argues that the heinous element of using a dangerous weapon to cause the victim to submit is an element of the criminal-sexual-conduct offense. We disagree. A conviction of first-degree criminal sexual conduct does not require proof that the defendant used or threatened to use a dangerous weapon. The state need only prove that the circumstances of the offense caused the victim to have a "reasonable fear of imminent great bodily harm." This can be proven in the absence of a weapon. Appellant's challenges to special-verdict questions 3, 6, and 9 are likewise unavailing. Questions 3 and 6 concern K.S., who had already been stabbed, and question 9 concerns appellant's threats to E.M.'s family. None of the facts the state needed to prove in connection with these special-verdict questions involves E.M.'s fear of imminent great bodily harm to her or another.

Appellant argues that facts that "pertain to" an element of an offense cannot support a heinous element under subdivision 2(b). But the terms of the statute do not reach that far. The statute only bars consideration of a claimed heinous element that "*is* an element" of the underlying offense. Minn. Stat. § 609.3455, subd. 2(b) (emphasis added). Because the heinous elements outlined in the special-verdict questions are not necessary elements of the criminal-sexual-conduct offense, appellant's claim of error is

unavailing. The district court did not err in imposing a mandatory life sentence under Minn. Stat. § 609.3455.

Affirmed.