STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1104

State of Minnesota,
Respondent,

vs.

Daniel Joseph Hamilton,
Appellant.

Filed June 6, 2011
Affirmed
Johnson, Chief Judge

Hennepin County District Court
File No. 27-CR-08-27279

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

Michael O. Freeman, Hennepin County Attorney, Michael Richardson, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Jordan S. Kushner, Minneapolis, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Johnson, Chief Judge; and Toussaint, Judge.

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

JOHNSON, Chief Judge

A Hennepin County jury found Daniel Joseph Hamilton guilty of making terroristic threats based on evidence that he telephoned the office of a job-counseling agency and angrily threatened the agency's staff. One employee testified at trial that Hamilton said he was "going to get a gun and come down there and kill everybody." On appeal, Hamilton raises five issues. His primary argument is that he was denied his constitutional right to a speedy trial. We conclude that there was no reversible error and, therefore, affirm.

FACTS

In June 2008, the state charged Hamilton with one count of being a felon in possession of a firearm, a violation of Minn. Stat. § 624.713, subd. 1(b) (2006), and two counts of making terroristic threats, violations of Minn. Stat. § 609.713, subd. 1 (2006). The district court appointed a public defender to represent Hamilton. On June 30, 2008, the district court conducted an omnibus hearing, at which the parties discussed in chambers a legal issue regarding the felon-in-possession count.

The district court conducted another omnibus hearing on August 19, 2008. At that hearing, Hamilton personally sought a continuance of the trial date, which tentatively had been set for November 18, 2008. Hamilton supported his motion by stating that he wanted more time for his public defender to take certain actions that he had asked her to take. The district court, however, denied the motion for a continuance.

On November 18, 2008, Hamilton failed to appear for trial. The district court issued a bench warrant for his arrest. The district court docket reveals that there were several hearings and appearances by Hamilton over the next twelve months. But no transcript is available for hearings on February 9, 2009; March 16, 2009; and June 16, 2009.

On November 9, 2009, Hamilton appeared for a scheduled trial date, without his public defender. Hamilton moved to dismiss the charges. In support of his motion, he complained about the inconvenience of traveling from his home in Colorado to Minnesota for court appearances. The district court noted that there had been "a number of discussions" in chambers about the felon-in-possession charge, and the prosecutor agreed to dismiss the felon-in-possession count.

In support of his motion to dismiss, Hamilton also complained about a lack of effort by his public defender. The district court explained that the public defender was absent that day because she had a short-term illness. Hamilton stated that he "could handle another delay if action was taken here." The district court concluded that Hamilton had not shown a compelling reason to obtain a substitution of counsel. Based on the district court's ruling, Hamilton agreed that the district court "should set it out a little ways" to allow his public defender to engage in additional preparation for trial. The prosecutor opposed a "lengthy continuance," stating that the case "has been set for trial numerous times, and on each occasion the State was ready to go forward." The district court granted a continuance, with the date to be determined by Hamilton's public

defender and the prosecutor, subject to Hamilton's final approval. At the November 9, 2009, appearance, the prosecutor also put on the record the state's plea offer.

The case subsequently was twice set for a pre-plea hearing. But there is an incomplete record of what occurred thereafter. No transcript is available for a hearing on February 16, 2010.

The case eventually went to trial on May 26, 2010. Hamilton chose to represent himself, and the district court appointed his public defender to be advisory counsel. *See* Minn. R. Crim. P. 5.04, subd. 2. Hamilton's primary defense was that the county attorney's office brought criminal charges against him to preempt a lawsuit he might have brought against the county and the city of Minneapolis for injuries he sustained when police officers executed a search warrant and arrested him.

The state relied primarily on four witnesses. The first was S.B., who worked as an administrative assistant at Life Track Resources, an agency that provides job-counseling services for people who receive county assistance. S.B. testified that Hamilton called the Life Track office on May 1, 2008, and became upset after she told him that S.H. was the job counselor assigned to his case. S.B. transferred the call to S.H., but the call was transferred back to S.B. S.B. testified that Hamilton was "yelling and screaming," saying he was "going to get a gun and come down there and kill everybody." S.B. testified that Hamilton called a second time and a third time, each time repeating the threat.

The state's second witness was S.H., who testified that she had spoken with Hamilton by telephone several times before the incident in question. She testified that on May 1, 2008, Hamilton became upset with her and swore and screamed until she hung up

the phone. She testified that a supervisor directed her and others to move away from the office's windows and that she was provided with an escort to her home.

The state's third and fourth witnesses were Officer Alan Liotta, a Minneapolis police officer who responded to the 911 call, and Sergeant Bruce Kohn, who investigated the incident. Officer Liotta testified that S.B. and S.H. were "very frightened." Sergeant Kohn testified that Hamilton admitted calling Life Track and swearing over the telephone. Sergeant Kohn testified that Hamilton said that the victims might have been afraid of him because they knew that he had been arrested in 2006 for possession of a gun. Hamilton attempted to cross-examine Sergeant Kohn about the search and arrest of Hamilton and Hamilton's allegation of a conspiracy to cover up an alleged assault against him. The district court sustained the state's objection to Hamilton's questioning concerning a cover-up of wrongdoing. Hamilton elicited testimony that police officers found firearms when executing search warrants. Hamilton also elicited testimony that he told the officer that he had inherited 30 guns, which were stored at his mother's residence.

The state also called N.P., who testified about an incident in 2006 in which Hamilton threatened to hurt him if he did not repay a $10 debt and later came to his residence demanding payment. The prosecutor stated earlier in the trial that it was "potentially *Spreigl*" evidence. The district court deemed the evidence admissible to show Hamilton's reckless disregard of the risk of causing terror in his victims. N.P. testified that he called police, who arrested Hamilton and found "a big black gun" on him.

The jury found Hamilton guilty on both counts of making terroristic threats. The district court imposed concurrent sentences of 15 months of imprisonment on each count and stayed execution of the sentences. Hamilton appeals.

D E C I S I O N

I. Speedy Trial

Hamilton first argues that he was deprived of his constitutional right to a speedy trial. The determination whether a defendant has been denied the right to a speedy trial is a constitutional question, to which we apply a *de novo* standard of review. *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; *see also* Minn. Const. art. I, § 6. In determining whether a delay has deprived the defendant of the right to a speedy trial, Minnesota courts generally apply the four-part balancing test of *Barker v. Wingo*, 407 U.S. 514, 530-33, 92 S. Ct. 2182, 2192-93 (1972). *State v. Windish*, 590 N.W.2d 311, 315 (Minn. 1999). 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. *Id.* The factors must be considered together in light of the relevant circumstances, and none is dispositive or necessary to a finding that a defendant has been deprived of the right to a speedy trial. *Id.*

A. Length of Delay

The first *Barker* factor is "a triggering mechanism in that until some delay . . . is evident the other factors need not be considered." *State v. Jones*, 392 N.W.2d 224, 235 (Minn. 1986). The starting point for calculating the length of the delay is the filing of criminal charges, which is when the Sixth Amendment right to a speedy trial attaches. *Id.* In addition, the rules of criminal procedure require that a trial commence within 60 days after a speedy-trial demand has been made, unless good cause is shown for a longer delay. *See* Minn. R. Crim. P. 11.09(b). "The time period begins on the date of the plea other than guilty." *Id.* The defendant may not enter a not-guilty plea until the omnibus hearing. Minn. R. Crim. P. 14.03(c).

Hamilton argues that the total length of the delay was almost two years. He was charged in June 2008, and he was tried in May 2010. In addressing the first *Barker* factor, courts have looked to the length of the overall delay as well as the length of time following a speedy-trial demand. *See Cham*, 680 N.W.2d at 125 (holding that delay of 23 months following arrest created presumption of speedy-trial violation). In *Jones*, a seven-month delay was enough to trigger consideration of the other *Barker* factors. 392 N.W.2d at 235. Hamilton emphasizes the 18-month delay between his extradition from Colorado and his trial. This delay is sufficient to raise a presumption of prejudice. *See State v. Smith*, 749 N.W.2d 88, 97 (Minn. App. 2008) (holding that ten-month delay following charge raised rebuttable presumption of prejudice). Thus, the 23-month delay in this case is sufficient to prompt consideration of the other factors.

B. Reason for the Delay

In assessing the reason for the delay, "different weights should be assigned to different reasons" for the delay. *Barker*, 407 U.S. at 531, 92 S. Ct. at 2192. Although deliberate attempts to delay the trial are weighed heavily against the state, more "neutral" reasons for delay, "such as negligence or overcrowded courts," are accorded less weight. *Id.* Nonetheless, "the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." *Id.*

Hamilton's case was delayed on multiple occasions, and on many occasions for reasons that are not apparent from the record. We are concerned about the absence of transcripts of five pretrial proceedings. Hamilton's appellate counsel ordered transcripts of those appearances but was informed that no record was made. The absence of these transcripts is contrary to statutory requirements and impedes thorough appellate review of Hamilton's speedy-trial argument. *See* Minn. Stat. § 484.72, subd. 4(1) (2010) (requiring "complete stenographic record" of felony proceedings, except arraignments and first appearances). In such a situation, however, the appellant has an opportunity to create an alternative record by preparing a statement of the proceedings and submitting it to the district court for approval. *See* Minn. R. Civ. App. P. 110.03. Ultimately, an appellant is responsible for providing a record adequate for appellate review. *See State v. Anderson*, 351 N.W.2d 1, 2 (Minn. 1984).

To the extent that transcripts of pre-trial hearings are available, they reveal that Hamilton usually was the cause of delays in bringing his case to trial. Several pretrial appearances were taken up with Hamilton's challenge to the felon-in-possession count,

which ultimately was dismissed, and with plea negotiations that might have allowed Hamilton to plead guilty to the terroristic-threats charges and obtain presumptively stayed sentences. These delays were for Hamilton's benefit, even though he decided not to plead guilty. There is no indication that the state sought any of the trial continuances. And there is no reason to question the prosecutor's assertion that, at multiple stages, the state was prepared to proceed to trial.

Hamilton contends that the delays were not attributable to him personally but, rather, to his public defender's unavailability. But at least some of the delays occasioned by his public defender were due to her efforts on his behalf, which benefitted him, and other delays arose from Hamilton's insistence that his public defender develop evidence that later was ruled inadmissible. Thus, this factor weighs against Hamilton.

C. Assertion of Speedy Trial Right

"The demand for a speedy trial may be made orally or in writing, but it must be made on the record to give all parties notice of when to start the clock running." *State v. Rachie*, 427 N.W.2d 253, 257 (Minn. App. 1988), *review denied* (Minn. Sept. 20, 1988). In evaluating this factor, the force and frequency of the defendant's demand for a speedy trial must be considered. *State v. Friberg*, 435 N.W.2d 509, 515 (Minn. 1989).

There is no indication in the record that Hamilton ever made a speedy-trial demand. He moved to dismiss the complaint in November 2009, complaining of delay, but he also stated at that hearing that he wanted more time, and he at least acquiesced in a continuance, as he had at an earlier appearance. The prosecutor noted at the November

2009 appearance that the state was ready to try the case and had been prepared for trial at the previous trial settings. Thus, the third *Barker* factor weighs against Hamilton.

D. Prejudice

The fourth factor, prejudice, is measured "in light of the interests which the speedy trial right was designed to protect." *Barker*, 407 U.S. at 532, 92 S. Ct. at 2193. Three interests must be assessed: (1) preventing oppressive pretrial incarceration, (2) minimizing the accused's anxiety and concern, and (3) limiting the possibility that the defense will be impaired. *Id.* The third interest is the most important. *Id.*

Hamilton has not shown any significant prejudice from the delay. The first interest in a speedy trial was not significantly compromised because Hamilton was not in custody for most of the 18-month period. The third and most important interest in a speedy trial was not significantly compromised because Hamilton has not identified any way in which his defense was impaired. As indicated above, Hamilton sometimes asked for delay to allow his public defender to pursue evidence, and at other times he conceded that delay was beneficial to him. Thus, the fourth *Barker* factor weighs against Hamilton.

E. Summary

First, the length of the delay is somewhat significant. Second, the reasons for the delay are sometimes unclear but, to the extent they are known, are due to Hamilton's requests. Third, Hamilton did not clearly invoke his right to a speedy trial. And fourth, there was no apparent prejudice to Hamilton's defense. Considering these factors, we conclude that Hamilton was not denied his Sixth Amendment right to a speedy trial. *See Cham*, 680 N.W.2d at 125 (holding that right to speedy trial not violated, although delay

was 23 months long, because reason for delay was difficulty obtaining an interpreter, defendant never moved for speedy trial, and prejudice was mere anxiety); *Friberg*, 435 N.W.2d at 515 (holding that right to speedy trial not violated because delay was not deliberate, defendants contributed to delay, and defendants suffered no prejudice).

II. *Spreigl* Evidence

Hamilton next argues that the district court erred by admitting into evidence N.P.'s testimony about the incident in 2006 in which Hamilton threatened N.P. while possessing a firearm. More specifically, Hamilton argues that N.P.'s testimony should not have been admitted without following the procedural safeguards required for *Spreigl* evidence.

The state provided no pretrial notice of its intent to offer *Spreigl* evidence. *See* Minn. R. Crim. P. 7.02. When the state offered N.P.'s testimony about the 2006 incident, the prosecutor argued "that it goes directly to an element of the offense," namely, the element of "reckless disregard." We need not decide whether the district court erred by admitting the challenged testimony because, even if the district court erred, the error was harmless. As a general rule, evidentiary errors during a criminal trial require the reversal of a conviction, unless the error was harmless. The relevant rule of criminal procedure provides, "Any error that does not affect substantial rights must be disregarded." Minn. R. Crim. P. 31.01. Under the harmless-error test, a non-constitutional error does not require reversal "unless the error substantially influence[d] the jury's decision." *State v. Valtierra*, 718 N.W.2d 425, 438 (Minn. 2006) (quotations omitted).

There is overwhelming evidence in this case which may be a factor in a harmless-error analysis. *See State v. Caulfield*, 722 N.W.2d 304, 314 (Minn. 2006). The state

presented the consistent testimony of S.B. and S.H. that Hamilton threatened to come to their office with a gun and kill them. That evidence was partially corroborated by Hamilton's own admission to a police officer that he had telephoned the victims and had used profanity. In closing argument, the prosecutor made only a brief reference to N.P.'s testimony about the 2006 incident. The state's evidence that went directly to guilt on the charged offenses plainly was more dramatic and impactful than N.P.'s brief description of the 2006 incident. Thus, we conclude that the admission of N.P.'s testimony of the 2006 incident, even if erroneous, did not substantially influence the jury's verdict and, thus, would not constitute reversible error.

III. Miscellaneous Evidentiary Rulings

Hamilton also argues that the district court erred by making several rulings that restricted his ability to introduce evidence. We will address Hamilton's arguments seriatim. We apply an abuse-of-discretion standard of review. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

First, Hamilton contends that the district court erred by sustaining the state's relevance objections to his cross-examination of Sergeant Kohn. Hamilton asked Sergeant Kohn why more than a month elapsed between the offense and the issuance of the warrant for Hamilton's arrest. Hamilton contends that this evidence was admissible to show police bias or the weakness of the state's case. But the record reveals that Hamilton sought to prove a plan to charge Hamilton with a crime to cover up alleged police wrongdoing in beating him during the execution of a search warrant. The district court sustained the state's relevance objection on the ground that Hamilton had not

produced sufficient evidence of such a plan to provide foundation for that line of questioning. In fact, at the time of trial, Hamilton was still trying to obtain evidence of the badge numbers of the officers who arrested him and his own medical records, and he never articulated a coherent offer of proof concerning the alleged plot. Thus, the district court's ruling was not an abuse of discretion. *See* Minn. R. Evid. 104(b).

Second, Hamilton contends that the district court erred by sustaining the state's objections to his efforts to elicit N.P.'s criminal record while cross-examining him. N.P. appeared in an orange prison jumpsuit, and the prosecutor elicited testimony that he was serving a prison sentence. On cross-examination, N.P. admitted that he had been convicted of a felony and was serving time for robbery. The district court, however, sustained objections to Hamilton's further questioning as to the nature of his crimes and whether he had committed a "home invasion." *See State v. Griese*, 565 N.W.2d 419, 426 (Minn. 1997) (holding that district court has discretion to determine scope of impeachment by prior conviction when witness is not defendant). The district court sustained the state's objection to one question "as phrased," and Hamilton did not re-phrase the question. When the court noted that Hamilton needed a good-faith basis for asking the question, Hamilton did not provide one. Hamilton did not make a record concerning N.P.'s prior convictions, so this court cannot determine whether he had any prior convictions that are admissible under Minn. R. Evid. 609, whether he had committed a crime with significant impeachment value, or whether Hamilton was prejudiced by the restrictions on his questioning. Thus, we conclude that the district court did not abuse its discretion in limiting Hamilton's cross-examination of N.P.

Third, Hamilton contends that the district court erred by sustaining the state's objections to one of his cross-examination questions of S.H. Hamilton asked S.H. whether there was "reason to worry" about gunfire that might be directed through Life Track's third-floor windows. S.H. had testified that her supervisor told the staff to move away from the windows. Hamilton has not shown the relevance of S.H.'s opinion as to whether the supervisor's suggestion was reasonable. Thus, the district court did not abuse its discretion by sustaining the objection. *See* Minn. R. Evid. 402.

Fourth, Hamilton contends that the district court erred by allowing Sergeant Kohn and Officer Liotta to testify about statements made by S.H. and S.B. Because both S.H. and S.B. had testified about Hamilton's threats, the officers' testimony was not prejudicial.

Fifth, Hamilton contends that the district court erred by preventing Hamilton from introducing evidence to support his theory that he was charged with a crime for the purpose of covering up police misconduct at the time of his arrest, and that the district court erred by sustaining the state's objections to his opening statement, in which he attempted to inform the jury of his theory. We already have noted that Hamilton failed to present adequate foundation of a cover-up. Thus, the district court did not abuse its discretion by precluding his evidence on that subject. *See Turnage v. State*, 708 N.W.2d 535, 542 (Minn. 2006) (reviewing district court's determination of adequacy of foundation for abuse of discretion). The district court did not improperly limit Hamilton's opening statement, which was reserved until after the state rested, because Hamilton had not elicited any admissible evidence to justify his theory. *See State v.*

Montgomery, 707 N.W.2d 392, 399 (Minn. App. 2005). Hamilton's opening statement otherwise consisted only of argumentative statements that the state's witnesses lacked credibility. Thus, the district court did not abuse its discretion by limiting Hamilton's opening statement.

IV. Allegation of Judicial Bias

Hamilton also argues that the district court judge engaged in conduct that reflects a bias toward him and, thus, that he was denied his right to an impartial tribunal. *See Cuypers v. State*, 711 N.W.2d 100, 104 (Minn. 2006) (noting constitutional right to be tried before fair and impartial judge). A judge is presumed to have "discharged his or her judicial duties properly." *State v. Mems*, 708 N.W.2d 526, 533 (Minn. 2006).

Hamilton complains that the district court judge treated him in a hostile, impatient, sarcastic, abusive, and threatening manner. Only a selective sampling of rulings and remarks taken out of context would support the argument. The fact that the court excluded Hamilton's proffered evidence is insufficient to show bias. *See id.* The remarks Hamilton cites came in response to Hamilton's repeated attempts, despite adverse rulings, to present evidence of a conspiracy of which he had made no offer of proof, his demand for discovery in the middle of trial, threats to disclose to the jury evidence that had been ruled inadmissible, and persistence in arguing the lack of credibility of the state's witnesses in his opening statement. The record reveals that the district court gave significant leeway to Hamilton to present his case, provided warnings before inflicting consequences, allowed him to consult with standby counsel, and reacted

reasonably when Hamilton violated court rulings or persisted in arguing a point after a ruling had been made. Thus, Hamilton has not shown judicial bias.

V. Effectiveness of Counsel

Hamilton also argues that his public defender provided him with ineffective assistance of counsel, thereby depriving him of his Sixth Amendment right to the effective assistance of counsel. More specifically, Hamilton contends that his public defender was frequently unavailable for court appearances and for attorney-client meetings and that the district court erred by refusing to appoint substitute counsel.

To establish ineffective assistance of counsel, a defendant must show that his attorney's performance "fell below an objective standard of reasonableness, and that a reasonable probability exists that the outcome would have been different but for counsel's errors." *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003) (quotations omitted). Hamilton's public defender succeeded in persuading the state to dismiss the felon-in-possession charge, which carried a mandatory prison sentence. She also negotiated a favorable plea offer to gross misdemeanor harassment, which would have resulted in the dismissal of the felony terroristic-threats charges.

Hamilton contends that more diligent representation could have resulted in dismissal of the case on speedy-trial grounds, but Hamilton personally requested or agreed to several continuances. And, as discussed above, Hamilton did not make a speedy-trial demand on the record that is available to this court and has not shown on appeal that he was entitled to a speedy-trial dismissal at any stage of the proceeding.

In any event, Hamilton has not demonstrated that any deficiency in his attorney's representation prejudiced him. He chose to forego the favorable plea offer that his attorney had negotiated. And because Hamilton chose to represent himself at trial, he bears primary responsibility for the adverse verdict. An indigent defendant is entitled to substitute counsel only if exceptional circumstances are shown. *State v. Reed*, 737 N.W.2d 572, 587 (Minn. 2007). As noted above, Hamilton's public defender obtained favorable results for him in her pretrial representation. And, as the district court found, no exceptional circumstances exist based on counsel's refusal to demand discovery of evidence that would have been inadmissible at trial or her refusal to agree to Hamilton's proposed trial strategy. Thus, Hamilton has not established that his attorney provided him with ineffective assistance.

Affirmed.