STATE OF MINNESOTA

IN SUPREME COURT

A19-2096

Hennepin County — Gildea, C.J.

State of Minnesota,

Respondent,

vs.

Filed: July 6, 2022
Office of Appellate Courts

Kevin Lemar Jones,

Appellant.

Keith Ellison, Attorney General, Saint Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Brittany D. Lawonn, Assistant County Attorney, Minneapolis, Minnesota, for respondent.

Alexander H. De Marco, Saint Paul, Minnesota, for appellant.

S Y L L A B U S

1. The evidence is sufficient to support appellant's conviction for murder in the first degree in violation of Minn. Stat. § 609.185(a)(3) (2020).

2. Appellant's due process rights were not implicated by an allegedly suggestive eyewitness identification that law enforcement did not arrange.

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

4. Appellant's ineffective assistance of trial counsel claims fail.

Affirmed.

O P I N I O N

GILDEA, Chief Justice.

Following a bench trial, appellant Kevin Lemar Jones was convicted of first-degree felony murder and sentenced to life in prison. Jones filed a direct appeal that we stayed to allow him to pursue postconviction relief. In his petition for postconviction relief, Jones challenged the sufficiency of the evidence, argued that a central witness's identification of him was irrevocably tainted in violation of his due process rights, and raised claims of ineffective assistance of trial counsel. Following an evidentiary hearing at which Jones and his trial counsel testified, the district court denied the petition. Jones appealed.

We lifted the stay and consolidated Jones's appeals. In this consolidated appeal, Jones continues to challenge the sufficiency of the evidence, the propriety of the witness identification, and the effectiveness of trial counsel. Jones also argues that he was deprived of his right to a speedy trial. Because we conclude that sufficient evidence supports the conviction, and that Jones's constitutional and ineffective assistance of counsel challenges fail, we affirm.

FACTS

This case arises from the shooting death of Anthony Hill-Prowell. The State proved that Jones and his friend Antwion Crawford made arrangements to purchase marijuana from Hill-Prowell on the day of the shooting. Crawford knew Hill-Prowell and had

previously purchased marijuana from him. Jones and Crawford met Hill-Prowell at the home of D.J., Hill-Prowell's girlfriend. D.J. testified that on the day of the shooting, two Black men came to her home to meet with Hill-Prowell. D.J. knew one of these men—Crawford—but she did not know the other man, who she described as taller than Crawford.[1]

Shortly before the shooting, D.J.'s next-door neighbor saw two Black men in their 20s or 30s walk between his and D.J.'s homes towards the back of the two homes. The neighbor then heard a woman scream, followed by approximately four gunshots, at which time his husband called 911. From his back porch, the neighbor saw the two men run out the back door of D.J.'s home. One was wearing an aqua-colored T-shirt, and the neighbor saw this man stick a gun in his waistband.

Law enforcement responded to the neighbor's 911 call. They discovered Hill-Prowell alive, lying on the kitchen floor with D.J. crouched over him crying. D.J.'s 5-year-old son was upstairs. When law enforcement asked Hill-Prowell who shot him, he repeatedly responded, "Antwion." Paramedics arrived shortly after law enforcement first responded. Hill-Prowell was taken by ambulance to a hospital where he died.

Law enforcement questioned D.J. at the scene. While D.J. was still inside her house, she reported that the shooter was the taller of the two men she saw at her house. She also said that the shooter was wearing a white shirt and black pants. She described the shorter man as wearing a gray sweat suit and a white shirt.

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[1] According to their government-issued IDs, Jones is 6 feet tall and Crawford is 5 feet, 9 inches tall.

D.J. then gave a longer statement outside in a squad car. She said that she was upstairs when she heard the first gunshot, at which point she rushed downstairs and saw Hill-Prowell and two men fighting in her kitchen and living room. She reported, among other things, that she saw one gun and one shooter. She again described the shooter as the taller of the two men and said that he was wearing a white shirt and black pants. She also said that after both men left through the back door, the shorter man returned through the front door and demanded his car keys.

Later that evening, D.J. met with detectives at the police station. She identified Crawford as the "short one, lighter tone, caramel complexion, goatee fluffy, stocky, 5-feet to 5-7 inches, gray jogging suit, first came in wearing a hat." She described the shooter as the "[t]aller guy, dark complexion with a fade, sinister eyes like, don't f*** with me, light black – white shirt, black pants, 5-foot 9-inches, taller than . . . Antwion. . . . 20 to 30 years old, possible goatee, deep voice." The detectives showed D.J. a still image from a neighbor's surveillance camera that showed both men but did not show their faces. The detectives showed D.J. this photo to confirm that there was not a third individual involved in the incident because the taller man was not wearing a white shirt and black pants like D.J. had earlier indicated. D.J. confirmed that the taller man in the aqua shirt was the one who shot Hill-Prowell, but she said that he must have changed his clothes. D.J. circled the shorter man dressed in gray and wrote "Antwan." She said that she did not circle the taller man with the aqua shirt because she did not know his name.

After meeting with the detectives, D.J. reached out to a friend of Crawford's and was able to access Crawford's Facebook page. She found a photo of Crawford and Jones

on Facebook. She recognized Jones as the shooter and forwarded the photo to detectives at approximately 4 a.m. The detectives prepared a photo lineup containing a 2-year-old photo of Jones and showed it to D.J. shortly after receiving the Facebook photo. D.J. was unable to pick Jones out of the photo lineup.

During their investigation at the crime scene, law enforcement noticed an unoccupied red Ford Fusion that was locked but left running across the street from D.J.'s house. They ran a check on the vehicle and discovered that Crawford's fiancée owned the vehicle and that she had reported the vehicle stolen. A search of the car revealed a backpack containing various items belonging to Jones including his cell phone, Nebraska driver's license and other photo identification, prescription pill bottles with his name, and marijuana.

At D.J.'s home, law enforcement also found a backpack in the kitchen with marijuana and cash inside. Four spent 9mm shell casings were recovered, two from the kitchen and two from the living room. A ballistics expert later determined that the casings were fired from the same gun. A bloody baseball cap was found on the back porch, and a Ford car key was found in the house next to the stove. Forensic scientists discovered a fingerprint that matched Crawford on the handle of the front door.

Law enforcement also found that one of D.J.'s other neighbors had a surveillance system with cameras pointing at the street in front of D.J.'s house. The cameras captured the red Ford Fusion pulling up and showed two Black men leave the vehicle and cross the street towards D.J.'s house. One of the men was wearing a gray sweat suit and one was wearing an aqua-colored T-shirt and distinctive blue basketball shoes. Four gunshots can

be heard in the surveillance video; the two men then run back toward their car while the one in the aqua shirt holds the right side of his pants. The men are not able to get in the car and, as the man in the gray sweat suit runs back towards D.J.'s house, the man in the aqua shirt says, "Hurry up! Go get the keys!"

Because of Jones's Nebraska driver's license, Minneapolis Police contacted the Omaha Police Department and informed them that two homicide suspects may be in the area. Omaha police apprehended Crawford and Jones in a white Jeep. When police searched the Jeep, they discovered two pairs of basketball shoes stuffed in trash bags that matched the shoes that the men on the surveillance footage are seen wearing. Omaha police then searched Jones's home and discovered a holster in the master bedroom and a 50-round box of 9mm ammunition containing only 37 rounds in a different bedroom closet. The manufacturer's stamping on the ammunition found in Jones's closet was identical to the stamp on the shell casings that police found at the crime scene.

In August 2017, the State charged Jones and Crawford in connection with Hill-Prowell's death.[2] Jones's trial was initially scheduled for August 13, 2018, but the trial was rescheduled several times. Jones never made a demand for a speedy trial under Rule 11.09(b). *See* Minn. R. Crim. P. 11.09(b) ("A defendant must be tried as soon as possible after entry of a plea other than guilty. On demand of any party after entry of such plea, the trial must start within 60 days . . . .").

[2] Crawford was indicted for first-degree murder but pleaded guilty to second-degree intentional murder under an aiding-and-abetting theory of criminal liability in exchange for providing truthful testimony at Jones's trial.

At a hearing held on July 26, 2018, Jones agreed to strike the initial trial date and reschedule to a later date because, as defense counsel explained and Jones personally confirmed, Jones did not wish to go to trial without all possible DNA evidence. Jones thought that DNA results could contain exonerating evidence that would help his defense. A possible mid-October trial was discussed if the Minnesota Bureau of Criminal Apprehension (BCA) could complete the testing by that time.

The mid-October trial date did not materialize, and the district court ultimately issued a scheduling order on November 30, 2018, setting trial for February 4, 2019. On January 28, 2019, Jones affirmatively waived his right to a speedy trial until April 15, 2019, and the court set that as the trial date. Before choosing that date, the court confirmed that Jones desired complete DNA results and noted that the BCA had failed to test under Hill-Prowell's fingernails for DNA. At a hearing held on May 13, 2019, however, the court noted that trial was scheduled for July 8, 2019. There was no explanation given for why the trial was rescheduled.

Jones's trial began on July 10, 2019. Jones executed a written waiver of his right to a jury trial under Minn. R. Crim. P. 26.01, subd. 1(2)(a). Trial counsel questioned Jones about his decision to waive his jury trial right, confirming that this was Jones's decision, that Jones had always wanted a bench trial, and that they had discussed the advantages and disadvantages of the decision. The district court also questioned Jones about his decision to forego a jury trial. The court accepted Jones's waiver, and the case proceeded as a bench trial.

D.J. and Crawford were the principal witnesses against Jones at trial. D.J. testified that Hill-Prowell had come over to her house the afternoon of the shooting and that they planned to have a serious discussion regarding their relationship. But Hill-Prowell received a phone call and told the person with whom he was speaking to come around to the back door. D.J. explained that she had met Crawford before and that Crawford came to her house with another man introduced as Crawford's "homeboy" who was taller, stockier, and had a darker complexion. D.J. said that she had not met this man before, but she later identified him as Jones. The men entered the house through the back door. At this point, D.J. went upstairs to be with her son. She then heard a gunshot and ran downstairs.

She saw Crawford and Jones "jumping" Hill-Prowell in the kitchen. She testified that Jones hit Hill-Prowell in the head with the butt of a gun. D.J. tried to run back upstairs, but Crawford followed her and brought her back down. Crawford and Jones then started demanding that she give them Hill-Prowell's backpack, their cell phones, marijuana, and money. During this time, Jones pointed the gun at her face and threatened to shoot her if she did not stop screaming. She found Hill-Prowell's backpack and threw it, at which point Hill-Prowell and Jones fought over the backpack. D.J. testified that she heard multiple shots and that the "[s]ame person was shooting the entire time."[3] She witnessed Jones shoot Hill-Prowell in the kitchen and toss him like "a rag doll." This was the last shot. After the last shot, "something seemed more wrong with" Hill-Prowell, and he tried to roll over and scoot to the refrigerator. She testified that only she, Hill-Prowell, Crawford,

[3] D.J. testified that she was upstairs when she heard the first shot and therefore could not have seen who fired that initial round.

Jones, and her son were in the home. She never saw Crawford with a gun. She identified Jones in the courtroom as the man who shot Hill-Prowell.

Crawford also testified for the State. He explained that he and Jones were friends, that Jones lived in Omaha, Nebraska, and that Jones would visit Minnesota from time to time. On the day of Hill-Prowell's death, Jones was in Minnesota, having driven up from Omaha in a white Jeep rental car. Jones spent the day with Crawford at Crawford's house and then at Jones's friend G.B.'s house. While at G.B.'s house, Crawford informed Jones of his plan to rob Hill-Prowell. Jones had never met Hill-Prowell, but Crawford knew that Hill-Prowell regularly had "a large amount of weed on him, sometimes cash," and probably would not call the police. They agreed to rob Hill-Prowell at gunpoint. Jones had a gun and Crawford did not. No one else was involved in the plan.

Jones and Crawford explained to G.B. and to Crawford's fiancée, who were at G.B.'s house at the time, that they were going to get some weed and would meet them later. The men drove the red Ford Fusion owned by Crawford's fiancée to D.J.'s house. When they arrived at D.J.'s house, Hill-Prowell told them over the phone to come in through the back door. When Crawford gave Jones "the look," Jones pulled the gun on Hill-Prowell, and Jones and Crawford demanded "the cash and the weed." At this point, Crawford testified that he ran upstairs to get D.J. because he did not want her calling the police. While upstairs, Crawford heard what he assumed was a warning shot. Hill-Prowell did not seem injured when Crawford got back downstairs with D.J., and then Crawford started fighting with Hill-Prowell over a backpack.

During this fight, Hill-Prowell attempted to escape out the back door, but Crawford pulled him back inside. Jones struck Hill-Prowell in the head with the butt of the gun. While Crawford wrestled with Hill-Prowell in the kitchen, there were at least three or four shots and at least one sounded close to Crawford's head.

After the final shot, Crawford testified that he and Jones ran out the front door but when they got to the red Ford Fusion, they discovered that they had lost the keys. Crawford ran back into D.J.'s house through the front door to try and find his car keys. He took D.J.'s phone while she was trying to assist Hill-Prowell. Crawford and Jones then started running on foot and ultimately split up. Crawford called his fiancée and told her to pick him up and report the red Ford Fusion stolen. She picked up Crawford in Jones's white Jeep rental car, and then they picked up Jones. They disposed of the gun in a dumpster outside G.B.'s home.

Crawford testified that the next morning, Crawford and Jones drove the white Jeep rental car back to Omaha. Crawford threw his cell phone out of the window on the drive. They first went to Jones's house. Then both went to a store and purchased prepaid phones. Later that night, Jones and Crawford were arrested while driving the white Jeep in Omaha.

At trial, the State also offered DNA evidence recovered from the scene. DNA from the band of a baseball hat found on D.J.'s back porch matched Crawford, while the blood on the hat was Hill-Prowell's. DNA from underneath Hill-Prowell's fingernails matched Crawford but did not match Jones. Jones was affirmatively excluded from all of the major profiles recovered from Hill-Prowell's fingernails, but many minor types contained insufficient information to compare.

Jones waived his right to testify and did not call any witnesses in defense. His theory at trial, which he pursued on cross-examination of the State's witnesses and in his written closing argument, was that he was not the shooter. Jones contended that either Crawford or an unidentified third person was the shooter.

Following the bench trial, the district court convicted Jones of first-degree murder while committing or attempting to commit aggravated robbery. Among other things, the district court found that "Crawford and [D.J.] both credibly testified [Jones] was the shooter." The court sentenced Jones to life in prison.

Jones filed a direct appeal. We stayed that direct appeal to allow Jones the opportunity to pursue postconviction relief.

Jones then filed a petition for postconviction relief. In his petition, Jones challenged the sufficiency of the evidence, argued that the identification process for D.J.'s identification of him was irrevocably tainted, and alleged that his trial counsel was ineffective for pressuring him to waive his right to a speedy trial and his right to a jury trial. Jones also argued that trial counsel was ineffective for failing to contact potential defense witnesses, raise sufficient evidentiary objections, and cross-examine the State's ballistic expert.

Following an evidentiary hearing at which Jones and his trial counsel testified, the district court denied Jones's petition for postconviction relief. The district court rejected the sufficiency of the evidence argument, concluding that Jones's "claim that he was not the shooter flies in the face of the evidence" and that the evidence presented against Jones was "overwhelming." The court concluded that Jones's due process rights were not

violated by D.J.'s identification of Jones as the shooter because the identification was not procured by law enforcement. The court rejected Jones's ineffective assistance of counsel arguments, first concluding that there was no speedy trial violation because Jones requested continuances to obtain beneficial evidence and never asserted his right to a speedy trial, and then finding that trial counsel did not pressure Jones to waive his right to a jury trial. The district court rejected Jones's remaining ineffective counsel arguments as matters of "trial strategy which should not be reviewed by the court."

We then lifted the stay and consolidated Jones's appeals.

ANALYSIS

Jones raises four arguments in this consolidated appeal. First, Jones argues that there is insufficient evidence to support his conviction. Second, he contends that D.J.'s identification of him as the shooter violated his due process rights because it was "irrevocably tainted." Third, Jones asserts a deprivation of his constitutional right to a speedy trial. Fourth, he argues that his trial counsel was ineffective. We address each argument in turn.

I.

We first address Jones's argument that there was insufficient evidence to convict him of murder in the first degree while committing a felony, a violation of Minn. Stat. § 609.185(a)(3) (2020). Jones argues that the State failed to present sufficient evidence on the element of identity. Jones defines the issue as "whether Mr. Jones was, in fact the shooter" and raises the possibility of an unidentified third-party shooter. Jones concedes that Hill-Prowell was "the victim of homicide and that the cause of death was a gunshot

wound." Jones also acknowledges that Crawford and Jones plotted to rob Hill-Prowell at gunpoint and that "[t]here is no question about the location it happened and the date it happened."

In determining whether the evidence is sufficient in a case like this one, which is based on direct evidence, we "view the evidence in a light most favorable to the verdict and assume the fact-finder disbelieved any testimony conflicting with that verdict." *State v. Balandin*, 944 N.W.2d 204, 217 (Minn. 2020) (quoting *State v. Chomnarith*, 654 N.W.2d 660, 664 (Minn. 2003)); *see also State v. Horst*, 880 N.W.2d 24, 40 (Minn. 2016) (explaining that when the State presents direct evidence on each element of the offense, "we limit our review to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did" (citation omitted) (internal quotation marks omitted)). Our standard of review does not change when evaluating the sufficiency of the evidence in a bench trial rather than a jury trial. *State v. Palmer*, 803 N.W.2d 727, 733 (Minn. 2011).

The State presented direct evidence in this case that Jones was the shooter. *See Bernhardt v. State*, 684 N.W.2d 465, 477 n.11 (Minn. 2004) (defining "direct evidence" as "[e]vidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption" (alteration in original) (quoting *Direct Evidence*, *Black's Law Dictionary* (8th ed. 2004))). D.J. testified that she saw Jones shoot Hill-Prowell and that no one else fired any shots. Specifically, D.J. testified that "[Hill-Prowell] and [Jones] both started fighting over the backpack" and then "[Jones] shot [Hill-Prowell]

and threw him in front of me, like, he was a rag doll." Then, after clarifying that "all of us were in the kitchen, all four of us" (referring to Hill-Prowell, Crawford, Jones, and herself), she reiterated that "[h]e shot him and he threw him." D.J. was clear that the "[s]ame person was shooting the entire time." The district court found that D.J. "credibly testified [Jones] was the shooter." Because Jones does not dispute that Hill-Prowell died from a gunshot wound, D.J.'s testimony alone is sufficient direct evidence to establish that Jones caused Hill-Prowell's death. *See State v. Walker*, 310 N.W.2d 89, 90 (Minn. 1981) (holding that testimony from one eyewitness may be sufficient to sustain a conviction); *Balandin*, 944 N.W.2d at 217 (noting that our standard of review requires us to "assume the fact-finder disbelieved any testimony conflicting with [its] verdict" (citation omitted) (internal quotation marks omitted)).

Although we need go no further to hold that there is sufficient evidence to support the conviction, the district court also found that Crawford, Jones's accomplice, credibly testified that Jones shot Hill-Prowell. And the State offered additional evidence that supported the district court's conclusion that Jones was the shooter. Surveillance footage shows the men that D.J. identified as Crawford and Jones exiting the Ford Fusion and walking towards D.J.'s home. Four shots are heard in the surveillance footage, and then Jones is seen running with his hand near his waistband and his pants sagging consistent with carrying a gun. D.J.'s neighbor testified that two men ran out of D.J.'s house after he heard gunshots and that the man in the aqua-colored shirt, later identified as Jones, stuck a

gun in his waistband. Finally, a box of ammunition of the same brand and caliber used to kill Hill-Prowell was found in Jones's home with 13 rounds missing from the box.[4]

Based on our review of the record, we hold that the evidence is sufficient to conclude, as the district court did, that Jones committed first-degree murder while committing a felony (specifically, aggravated robbery) in violation of Minn. Stat. § 609.185(a)(3).

II.

We next address Jones's arguments related to D.J.'s identification testimony. Jones first argues that D.J.'s independent search of Crawford's Facebook photos violated his due process rights because it "irrevocably tainted" her identification of Jones as the shooter. Where, as here, "the facts are not in dispute and the trial court's decision is a question of law," we "independently review the facts and determine, as a matter of law, whether the evidence need be suppressed." *State v. Taylor*, 594 N.W.2d 158, 161 (Minn. 1999) (citation omitted) (internal quotation marks omitted).

[4] Jones makes several arguments that fail to view the evidence in the light most favorable to the verdict or fail to defer to the district court's credibility determinations. Specifically, he challenges D.J.'s and Crawford's credibility, points to Hill-Prowell's statement to police that Crawford was the shooter, identifies inconsistencies between D.J.'s and Crawford's testimony, and notes the absence of DNA evidence tying Jones to the scene. Because these arguments are inconsistent with our standard of review, they are unavailing. *See Balandin*, 944 N.W.2d at 217 (explaining that our standard of review requires us to "assume the fact-finder disbelieved any testimony conflicting with [its] verdict"); *State v. Ostrem*, 535 N.W.2d 916, 924 (Minn. 1995) (explaining that we view "the evidence in the light most favorable to the state," when concluding sufficient evidence supported a conviction, despite the presence of conflicting evidence); *State v. Bliss*, 457 N.W.2d 385, 391 (Minn. 1990) ("Defendant's attempt to retry his case by asking us to reevaluate [a witness]'s credibility is contrary to our role.").

The law is well-established that an "eyewitness identification . . . only implicates a defendant's due process rights when the identification of the defendant by the witness was *arranged by law enforcement*." *State v. Mosley*, 853 N.W.2d 789, 796 (Minn. 2014) (citing *Perry v. New Hampshire*, 565 U.S. 228, 248 (2012)). Because nothing in the record suggests that law enforcement arranged D.J.'s search of Crawford's Facebook photos, Jones's due process rights are not implicated here, and we reject Jones's challenge to D.J.'s identification.[5]

Jones also argues that the district court erred when it failed to question the admissibility of D.J.'s identification testimony sua sponte. When a criminal defendant challenges a witness's identification, district courts must conduct a pretrial omnibus hearing or midtrial hearing to resolve the challenge. *Coralin v. State*, 377 N.W.2d 14, 18–19 (Minn. 1985). But we have never held that a district court must sua sponte determine

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[5] Jones relies heavily on the *Report of the Minnesota Supreme Court Rules of Evidence Advisory Committee*, ADM10-8047 (Oct. 1, 2018) ("Advisory Committee Report"), to support his due process arguments. His reliance on the Advisory Committee Report is misplaced because although the Committee made many *evidentiary*-related recommendations concerning eyewitness testimony, it did not address—nor was it empowered to address—expanding *constitutional* due process protections to identifications that were not arranged by law enforcement.

Jones also suggests that when law enforcement showed D.J. a surveillance still of Crawford and Jones that did not show their faces, law enforcement may have "irrevocably tainted" D.J.'s identification by undermining her confidence in her prior descriptions of the shooter's attire. We cannot see how an image that did not show Jones's face could have unfairly singled him out for identification, and we therefore reject this argument. *See State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995) (explaining that, where identifications are arranged by law enforcement, we apply a two-part test to determine whether the identification violates a defendant's due process rights. The first step of that test asks, "whether the procedure was unnecessarily suggestive," which "turns on whether the defendant was unfairly singled out for identification").

whether witness identification procedures complied with due process when, like here, no challenge to the identification was raised before the district court. Nor does the Constitution compel such a rule. *See Watkins v. Sowders*, 449 U.S. 341, 349 (1981) (explaining that "[a] judicial determination outside the presence of the jury of the admissibility of identification evidence may often be advisable" but that "it does not follow that the Constitution requires a *per se* rule compelling such a procedure"). Jones has failed to articulate any compelling reason for us to adopt a rule requiring district courts to analyze whether eyewitness identifications comport with due process when no party challenges the identification, and we decline to adopt such a rule in this case.[6]

III.

We next turn to Jones's argument that his right to a speedy trial was violated. A criminal defendant's right to a speedy trial is protected by both the federal and Minnesota Constitutions. *See* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial . . . ."); Minn. Const. art. I, § 6 (same). The right is a "safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself." *State v. Mikell*, 960 N.W.2d 230,

[6] The only authority that Jones cites for his argument that district courts should sua sponte determine the admissibility of witness identifications is the Advisory Committee Report. Jones's reliance on the report is misplaced. Although the report recommends that "[c]ourts should continue to assess both the *suggestiveness* and *reliability* of an identification . . . at the omnibus hearing under Minn. R. Crim. P. 11.02," it does not recommend that district courts engage in the witness identification due process analysis on their own initiative. Advisory Committee Report at 16.

244 (Minn. 2021) (quoting *United States v. Ewell*, 383 U.S. 116, 120 (1966)). When a defendant's speedy trial right is violated, "the only possible remedy" is dismissal of the indictment. *Barker v. Wingo*, 407 U.S. 514, 522 (1972). Whether the right to a speedy trial is violated "is a constitutional question subject to de novo review." *State v. Osorio*, 891 N.W.2d 620, 627 (Minn. 2017).

To determine whether a defendant's right to a speedy trial has been infringed, we engage in a "difficult and sensitive balancing process" that considers four nonexclusive factors. *Mikell*, 960 N.W.2d at 245 (quoting *Barker*, 407 U.S. at 533). Specifically, we balance the length of the delay, the reason for the delay, whether the defendant asserted his right to a speedy trial, and whether the delay prejudiced the defendant "to answer the essential question of whether the State brought the accused to trial quickly enough to avoid endangering the values that the right to a speedy trial protects." *Id.* No factor is "either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant." *Barker*, 407 U.S. at 533.

A.

The first factor—the length of delay between the defendant's charging and trial—weighs towards a speedy trial violation in this case. The length of delay is measured "from the point at which the sixth amendment right attaches." *State v. Jones*, 392 N.W.2d 224, 235 (Minn. 1986). The length of delay is also "significant because 'the presumption that pretrial delay has prejudiced the accused intensifies over time.' " *Mikell*, 960 N.W.2d at 246 (quoting *Doggett v. United States*, 505 U.S. 647, 652 (1992)).

Here, the delay between when Jones was charged in August 2017 and when his trial was held in July 2019 was approximately 23 months. The State concedes that this delay was presumptively prejudicial, triggering our continued review. *See State v. Corarito*, 268 N.W.2d 79, 80 (Minn. 1978) (holding that a delay of 6 months is presumptively prejudicial). And where, as here, the delay extends far beyond the point that the delay became presumptively prejudicial, we are less likely to find the delay justified by the other factors and more likely to find a speedy trial violation. *Mikell*, 960 N.W.2d at 250.

B.

In weighing the second factor—the reason for the delay—"the key question is whether the government or the criminal defendant is more to blame for th[e] delay." *Osorio*, 891 N.W.2d at 628 (alteration in original) (citation omitted) (internal quotation marks omitted). When the delay "is the result of the defendant's actions, there is no speedy trial violation." *Mikell*, 960 N.W.2d at 251 (citation omitted) (internal quotation marks omitted). Delays caused by defense counsel, whether appointed or privately retained, are attributable to the defendant. *Vermont v. Brillon*, 556 U.S. 81, 90–91 (2009). But when the State "is responsible for the delay, we must also assess the reasons offered to justify the delay." *Mikell*, 960 N.W.2d at 251. Deliberate efforts "to delay the trial in order to hamper the defense [are] weighted heavily against the government." *Id.* (quoting *Barker*, 407 U.S. at 531). State negligence and overcrowded courts are "weighted less heavily" but are still considered against the State. *Barker*, 407 U.S. at 531. Finally, a delay will not be held against the State when there is good cause for the delay. *Mikell*, 960 N.W.2d at 251.

The delay here appears to be attributable to both the defense and to the State. Both the defense and the State wanted DNA results before trial. The State initially requested a delay in the trial date for the DNA analysis. Jones agreed to the requested continuance in the trial date because he also wanted the results of the testing of DNA taken from the crime scene. *See State v. Windish*, 590 N.W.2d 311, 318 (Minn. 1999) (explaining that continuances are considered under the reasons for the delay). Jones himself requested a later continuance, again so that the DNA results would be available. And he also affirmatively waived his speedy trial right on the record for the delay from January 2019 through April 15, 2019. *See id.* at 317 n.2 (recognizing that waiver of a defendant's speedy trial right requires "on-the-record intentional relinquishment of the right").

Regarding the State, no evidence suggests that the delay was a deliberate effort by the State to hamper the defense. But the DNA analysis was being done at the BCA, and the BCA, an arm of the State, was responsible for completing that testing. Uncontradicted testimony at the postconviction hearing established that Jones "had to keep requesting" testing because "the lab was not coordinating well with the prosecutors" and that these requests had to go "through the prosecutor." Further, the BCA represented to the parties that testing would be complete by January 11, 2019, but then failed to test DNA from under Hill-Prowell's fingernails. Because the State has "the primary burden" to bring cases to trial, *Mikell*, 960 N.W.2d at 244 (quoting *Barker*, 407 U.S. at 529), we hold the delay against the State but weigh it less heavily in our analysis. *See Barker*, 407 U.S. at 531.

C.

The third factor—whether the defendant asserted his right to a speedy trial—weighs against a speedy trial violation in this case. Here, Jones never asserted his speedy trial right before or during trial, and he personally agreed to continuances. *See Barker*, 407 U.S. at 532 (explaining "that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial").

At the July 26, 2018 hearing addressing the State's motion for a buccal swab and new trial date, Jones personally confirmed that he did not want to proceed to trial before obtaining the potentially exonerating DNA evidence that the State was requesting. He agreed to strike the trial date and reschedule trial at a later date. At the next hearing, held on January 28, 2019, Jones requested the continuance and affirmatively waived his speedy trial right.

The only indication that Jones may have wished to assert his speedy trial right came at the postconviction hearing. At the postconviction evidentiary hearing, Jones's trial council testified that he received a letter from Jones dated July 17, 2018, in which Jones asked him to make a speedy trial demand. Nevertheless, counsel testified that after he received the letter, they discussed the issue and Jones agreed that the best course of action was to not demand a speedy trial. Jones confirmed during the hearing that, after his counsel explained the reasons for the needed continuance (i.e., the desire for DNA results), he "agreed with him."

For these reasons, we hold that the third factor weighs against a speedy trial violation. *See State v. DeRosier*, 695 N.W.2d 97, 109 (Minn. 2005) (concluding that where

delay "was occasioned by defense motions" and the defendant "never moved for a speedy trial," the defendant's speedy trial right was not violated).

D.

The fourth factor—whether the delay prejudiced the defendant—also weighs against finding a deprivation of Jones's speedy trial right. We consider three interests when analyzing prejudice: "(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." *Windish*, 590 N.W.2d at 318. Prejudice due to the impairment of the defense "is the most serious." *Id.* But "[a] defendant does not have to affirmatively prove prejudice; rather, prejudice may be suggested by likely harm to a defendant's case." *Id.*

Here, the record fails to establish a likely harm to Jones's case. Jones argues that his trial counsel's failure to follow up with potential witnesses establishes prejudice, but this alleged failure was not a result of delay in bringing the case to trial. Moreover, the delay actually gave Jones *more* time to contact these witnesses, not less.

Next, Jones argues that Crawford's decision to take a plea deal in exchange for testimony against Jones establishes prejudice due to the delay. But Crawford entered his plea before Jones's original trial date. And it is purely speculative that Crawford would not have accepted a plea deal had Jones's trial been held sooner.

Finally in terms of our prejudice analysis, the delay allowed Jones to obtain complete DNA testing, which was of some benefit to his defense. On this record, Jones has not established that he was prejudiced by the delay in his trial.

E.

We now balance the four factors to determine whether the State violated Jones's right to a speedy trial. The approximately 23-month period between the initial charge and the start of trial is presumptively prejudicial. The bulk of the delay extending beyond the point at which the delay became presumptively prejudicial (6 months after charges were filed against him) is attributable to the BCA and therefore the State and weighs somewhat against the State. But Jones failed to assert his right to a speedy trial after discussing the issue with counsel because he believed that the DNA evidence would be beneficial to his case, which weighs heavily against Jones's challenge. Further, Jones's prejudice arguments lack merit.

Based on our balancing of the four factors, we hold that Jones's right to a speedy trial was not violated.

IV.

We last address Jones's argument that his trial counsel was ineffective for (1) failing to challenge D.J.'s identification, (2) failing to demand a speedy trial contrary to Jones's expressed wishes, (3) allegedly pressuring him to waive his right to a jury trial, (4) failing to contact potential witnesses or retain an expert, (5) failing to raise sufficient evidentiary objections at trial, and (6) failing to cross-examine the State's ballistics expert.[7]

[7] Jones also makes a generalized allegation that his trial counsel "was inexperienced and ill-prepared" and "not familiar with basic courtroom procedure." We reject these arguments without analysis because we do not entertain "ineffective assistance claims when based solely on conclusory, argumentative assertions without factual support." *Crow v. State*, 923 N.W.2d 2, 15 (Minn. 2019) (citation omitted) (internal quotation marks omitted).

Both "[t]he United States and Minnesota Constitutions guarantee a criminal defendant the right to effective assistance of counsel." *Crow v. State*, 923 N.W.2d 2, 14 (Minn. 2019); *see* U.S. Const. amend. VI; Minn. Const. art. I, § 6. Whether counsel was constitutionally ineffective is a mixed question of law and fact that we review de novo. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003).

We use the *Strickland* test to resolve ineffective assistance of counsel claims. *See Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (adopting the two-part test described in *Strickland v. Washington*, 466 U.S. 668 (1984)). *Strickland* requires a criminal defendant to "show both that (1) his trial counsel's representation fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." *Crow*, 923 N.W.2d at 14. For purposes of the first prong, "[t]he objective standard of reasonableness is defined as representation by an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." *Id.* (citation omitted) (internal quotation marks omitted). We apply "a strong presumption that counsel's performance was reasonable," and we do not generally "review matters of trial strategy or the particular tactics used by counsel." *State v. Hokanson*, 821 N.W.2d 340, 358 (Minn. 2012). We may address and dispose of an ineffective assistance of counsel claim on either prong without analyzing the other. *See State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999) (citing *Strickland*, 466 U.S. at 697).

Jones's argument that his trial counsel was ineffective for not challenging D.J.'s identification fails. During cross-examination, defense counsel did challenge D.J.'s

identification, noting that her repeated description of the shooter's clothes did not match the surveillance footage and her failure to pick Jones out of a photo lineup. Jones has not demonstrated that counsel was objectively unreasonable for not making additional challenges.

Jones's argument that his counsel was ineffective for failing to assert Jones's speedy trial rights fails for the same reason. As counsel explained during the postconviction hearing, he and Jones agreed that waiting for the DNA results would be beneficial for the defense. We cannot say that counsel's failure to assert a right that his client agreed should not be asserted is objectively unreasonable.

Jones next argues that his trial counsel was ineffective by pressuring him to waive his right to a jury trial by telling him that a bench trial would allow him to "go home." But the postconviction court found, based on trial counsel's testimony, that trial counsel did not pressure Jones to waive his jury trial right. This finding is not clearly erroneous, *see Bobo v. State*, 860 N.W.2d 681, 684 (Minn. 2015) (stating that the postconviction court's credibility determinations are reviewed under the clearly erroneous standard), as it is supported by Jones's own written waiver of his jury trial rights and Jones's responses to questioning by the court and trial counsel confirming that his decision was made knowingly and independently.

The State argues that Jones's next three arguments—that Jones's trial counsel was ineffective for failing to retain an expert and contact four witnesses, including G.B.; failing to raise sufficient evidentiary objections at trial; and failing to cross-examine the State's ballistics expert—are all unreviewable matters of trial strategy. *See State v. Mosley*,

895 N.W.2d 585, 592 (Minn. 2017) ("Generally, [d]ecisions about objections at trial are matters of trial strategy, which we will not review." (alteration in original) (citation omitted) (internal quotation marks omitted)); *State v. Lahue*, 585 N.W.2d 785, 789–90 (Minn. 1998) (holding that the failure to locate witnesses and determining what information to present to the factfinder are matters of trial strategy). Even if these decisions were reviewable, Jones failed to establish prejudice. Jones does not explain what an expert may have testified about, or identify which specific pieces of evidence that trial counsel should have objected to, or how cross-examination of the State's ballistics expert may have impacted the outcome of the trial.[8] Although Jones argues that G.B. may have been able to testify as to "the timeline" and "the use of vehicles," it is unclear how this hypothetical testimony could overcome the "overwhelming" evidence in this case. Without providing this information, Jones cannot establish a reasonable probability that the result of his trial would have been different.

Based on our analysis, we hold that Jones's claims of ineffective assistance of counsel fail.

CONCLUSION

For the foregoing reasons, we affirm the decision of the district court.

Affirmed.

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[8] Jones argues that trial counsel should have cross-examined the State's ballistics expert about whether the partly empty box of 9mm ammunition found in his Nebraska residence was the same type used in the shooting. But this evidence was not introduced or discussed until after the State's expert testified. Accordingly, the State's expert did not reference the ammunition discovered in Nebraska and focused only on the bullets and shell casings recovered from the crime scene.