STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1364, A21-0726

State of Minnesota,
Respondent,

vs.

James David Wren,
Appellant.

Filed May 2, 2022
Affirmed
Connolly, Judge

Hennepin County District Court
File No. 27-CR-19-13690

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Sarah J. Vokes, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Paul P. Sarratori, Mesenbourg & Sarratori Law Offices, P.A., Coon Rapids, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Connolly, Judge; and Frisch, Judge.

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

Appellant argues that his conviction and the district court's post-sentence restitution order must be reversed because his right to a speedy trial was violated by COVID-related delays. He also argues that the district court abused its discretion by instructing the jury

on a lesser-included offense and by ordering restitution and that he received ineffective assistance of counsel. Because appellant's speedy-trial right was not violated by COVID-related delays, we see no abuse of discretion in the jury instruction or the restitution order, and because appellant's counsel did not provide ineffective assistance, we affirm.

FACTS

In June 2019, appellant James Wren was identified by a witness, C.F., as the shooter in an incident in downtown Minneapolis that left one man dead and another man paralyzed. Appellant was charged with second-degree intentional murder, with attempted second-degree intentional murder, and with possession of a firearm by an ineligible person.

In October 2019, appellant demanded a speedy trial. Both his counsel and the prosecutor said that they could not be prepared for trial until January 2020 and that, if appellant were also indicted on first-degree murder charges, they could not be prepared until March 2020. Trial was continued until January 21, 2020. Later in October, appellant was also indicted on charges of first-degree premeditated murder, attempted first-degree premeditated murder, and first-degree assault.

Early in November, appellant's private counsel's motion to withdraw and appellant's motion to discharge his private counsel were both granted, and a public defender (P.D.) was appointed for appellant. The P.D. said he could not be ready for trial by January 21, 2020, and appellant waived his right to a speedy trial until March 16, 2020.

Questionnaires were distributed to potential jurors on March 13, 2020. On that date, the Chief Justice of the Minnesota Supreme Court responded to the emerging COVID-19 pandemic with an order suspending all district court proceedings until March 30, 2020,

except for ongoing jury trials and certain high-priority cases. On March 16, 2020, the state sought a continuance of appellant's trial because of COVID, and a continuance was granted until May 11, 2020.

On March 30, 2020, and again on May 26, 2020, the P.D. moved to dismiss the indictment based on a violation of appellant's right to a speedy trial; both motions were denied. All jury trials were suspended until June 1, 2020, and it was decided that a shorter, simpler case than appellant's should be tried first, as part of a pilot program. Appellant's case went to trial on June 15, 2020.

The jury heard testimony from C.F., a major witness for the prosecution. He testified that, at about two o'clock in the morning on June 10, 2019, while he was at work driving his tow truck in an alley, he had to stop driving because a group of people was walking towards him, arguing and swearing. A man came up on the driver's side of the truck, hit the mirror, and, while standing six or seven inches from C.F.., started shooting. C.F. saw light flashing from the gun; he heard two "tinks" on the hood of his truck that he believed were casings from the gun. C.F. described the shooter as an African-American male, between 6'2" and 6'5" tall, who was wearing a dark shirt and a necklace with a gold charm; his hair was in a bun or braids, and he had a small backpack on his shoulders. C.F. saw a gunshot hit one person, who fell to the ground, and saw another person on the ground, about three or four feet from C.F.'s truck and from the shooter. C.F. looked the shooter directly in the eyes and pointed him out to the police when they arrived. C.F. also said he did not see or hear anyone else firing a gun. Finally, he identified the shooter as appellant, who was present in court.

The state requested a jury instruction on the lesser-included offense of unintentional second-degree felony murder, there was no objection, and the district court added that instruction. The jury found appellant guilty of unintentional second-degree felony murder and first-degree assault. He was sentenced to 189 months in prison for first-degree assault and to a consecutive 180 months in prison for second-degree murder, a total of 369 months in prison, and he was ordered to pay $8,557.65 in restitution.

Appellant challenged the judgment of conviction and the restitution order in separate appeals, which were consolidated. On appeal, he argues that his right to a speedy trial was violated, that the district court abused its discretion in instructing the jury on a lesser-included offense and in ordering restitution, and that he was denied the effective assistance of counsel.

DECISION

1. Right to a Speedy Trial

"Whether a defendant has been denied a speedy trial is a constitutional question subject to de novo review." *State v. Osorio*, 891 N.W.2d 620, 627 (Minn. 2017). But "any inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case." *Barker v. Wingo*, 407 U.S. 514, 522 (1972).

Barker sets out four factors to be considered in speedy-trial claims: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) the prejudice to the defendant. *Barker*, 407 U.S. at 530. Minnesota has adopted these factors, noting that they are to be considered in balancing "the sometimes competing interests between the orderly prosecution of crimes that is fair to both sides and

the prompt resolution of the case by trial." *State v. Mikell*, 960 N.W.2d 230, 245 (Minn. 2021). The *Barker* factors are not exclusive; rather, they are considered "together with such other circumstances as may be relevant" in evaluating an alleged violation of the right to a speedy trial. *Osorio*, 891 N.W.2d at 628. In the final analysis, "whether delay in completing a prosecution amounts to an unconstitutional deprivation of rights depends on the circumstances." *State v. Jackson*, 968 N.W.2d 55, 60 (Minn. App. 2021), (quotation omitted), *rev. granted* (Minn. Jan. 18, 2022).

The circumstances in *Jackson*, like those in this case, included the COVID pandemic. *Id.* at 58. *Jackson* cited and applied the four *Barker* factors. *Id.* at 60.

A. Length of the Delay

"On demand of any party after the entry of [a not-guilty] plea, the trial must start within 60 days unless the court finds good cause for a later trial date." Minn. R. Crim. P. 11.09(b). Appellant first demanded a speedy trial on October 3, 2019; he waived his speedy-trial right on March 16, 2020, 165 days after his initial speedy-trial demand; and his trial began on June 15, 2020, which was 91 days after the end of the waiver. Therefore, we must address the three remaining *Barker* factors. *See State v. Windish*, 590 N.W.2d 311, 315-16 (Minn. 1999).

B. Reason for the Delay

In *Jackson*, the defendant argued that the state was responsible for the delay because the Chief Justice of the Minnesota Supreme Court had ordered that no trials were to be held until adequate safety precautions were in place. 968 N.W.2d. at 61. This court rejected that argument:

> [T]he circumstances of the pandemic in July 2020 rendered a trial unsafe and did not reflect a deliberate attempt by the state to hamper the defense. [The appellant's] 77-day wait after invoking his speedy-trial demand was unavoidable. Accordingly, we hold that neither [the appellant] nor the state are responsible for the delay in commencing the trial when that delay occurred solely because of public-safety concerns due to the COVID-19 pandemic and when the district court was prohibited from holding a jury trial by order of the Chief Justice.

Id. *Jackson* holds that "[i]n the context of a speedy-trial analysis, neither the state nor the defendant is responsible for the delay in bringing a defendant to trial when that delay is solely due to public-safety concerns related to the COVID-19 pandemic." *Id*. at 58. Accordingly, under *Jackson,* we conclude that neither appellant nor the state was responsible for the 91-day delay from March 16, 2020, to June 15, 2020.

C. Assertion of the Right to a Speedy Trial

Jackson noted that "a defendant's assertion of his speedy trial right is entitled to strong evidentiary weight in determining whether the defendant was deprived of the right, . . . [but] the inquiry is necessarily contextual." *Id.* at 61 (quoting *Mikell*, 960 N.W.2d at 252 (quotation omitted)). In *Jackson,* the state's counsel asked the district court to find good cause to extend the trial date because a trial could not occur without violating the order of the Chief Justice, and the defendant's counsel did not object. *Id*. at 62. The district court responded, "I am going to make a finding that, as [to] the specific articulations by [counsel], they are all true. We couldn't have a trial if we wanted to have a trial today, or [if the defendant] demanded that he have a trial today." *Id.*

This court "[did] not question whether [the *Jackson* defendant's] demand for a speedy trial was serious," but observed that "the context of the demand illustrates that all parties were aware that a safe trial could not occur within the 60-day period because of the pandemic and . . . [t]hese circumstances weaken the strength of [the defendant's] demand for a speedy trial in our overall balancing." *Id.* Analogously, while appellant's demand for a speedy trial was serious, a safe trial in his case was not possible before June 15, 2020. His demand, while serious, was incapable of fulfillment, given the context in which it was made.

D. Prejudice to the Defendant

The prejudice that can result from a violation of a defendant's speedy-trial right may be avoided or minimized by protecting the defendant's interests in (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. *Barker*, 407 U.S. at 532. The most serious of these interests is the third. *Id.*

Here, appellant argues that his defense was impaired because K.C., a witness to the shooting, was killed on Sunday, March 22, 2020, and therefore unavailable to testify in support of appellant's self-defense claim. The district court, in denying appellant's motions to dismiss because of a speedy-trial violation, found that, because trial testimony was not due to start until May 23, "K.C. was killed before he would have testified, even if the trial had not been continued." The district court also noted that appellant was "able to use video surveillance footage of the incident or call any of his numerous other friends who were present during the shooting to support his self-defense claim." Appellant's defense

was not impaired by the delay of his trial because K.C.'s death occurred before he would have testified, and whether his testimony would have helped appellant is at best speculative.

The defendant in *Jackson* did not contend that the delay impaired his defense. *Jackson*, 968 N.W.2d at 62. In *Jackson*, the balancing of the four *Barker* factors led this court to conclude that the delay was justified by the pandemic, its length was consistent with and proportionate to that justification, and there was no particular harm to the defendant resulting from the delay: his right to a speedy trial was not violated. The same is true here.

2. Jury Instruction

Near the end of trial, on Saturday, June 27, 2020, counsel for both parties received an email from the district court containing a revised version of the jury instructions and asking them to let the district court know by email if they had any changes or corrections, or if they were "fine with this revised version of the instructions." On Sunday, June 28, 2020, the P.D. sent an email saying, "As for the jury instructions, the defense approves of this final draft"; later, counsel for the state sent an email saying, "The State approves of the current jury instructions. However, the State intends to ask for a lesser-included count of Murder in the Second Degree (Felony/Unintentional) . . . . Therefore we are requesting the jury instructions be added for that offense." The district court replied to these messages that "[t]he murder in the second degree, while committing a felony, instruction was added at the request of the state" and also said, "[t]hese changes will be discussed tomorrow

morning and the instructions will be finalized only after hearing arguments from the parties on any disputes." The next morning, neither side objected to the instructions.[1]

This court reviews a district court's decision to give a requested lesser-included offense instruction for an abuse of discretion. *State v. Hannon*, 703 N.W.2d 498, 509 (Minn. 2005). Where the evidence warrants a requested lesser-included offense instruction, the district court must give it. *Id.*; *see also State v. Dahlin*, 695 N.W.2d 588, 598 (Minn. 2005) (holding that district courts must give a lesser-included-offense instruction when the lesser offense is included in the charged offense and the evidence provides a rational basis both for acquitting the defendant of the offense charged and for convicting the defendant of the lesser-included offense).

Here, based on the evidence, the jury acquitted appellant of the charged offenses, first-degree premeditated murder (defined as "caus[ing] the death of a human being with premeditation and with intent to effect the death of the person or of another" in Minn. Stat. § 609.185(a)(1)(2018)), and second degree murder, with intent but not premeditated, (defined as "caus[ing] the death of a human being with intent to effect the death of that person or another, but without premeditation" in Minn. Stat. § 609.19, subd. 1(1)(2018)). However, the jury convicted appellant of the lesser-included offense, second-degree unintentional murder (defined as "caus[ing] the death of a human being, without intent to

[1] Thus, as appellant acknowledges, the standard of review is arguably de novo. When there is no objection, an appellate court has discretion to consider a claim of error on appeal if the instructions involve either a plain error affecting substantial rights or an error of fundamental law. *State v. Reek*, 942 N.W.2d 148, 158 (Minn. 2020).

effect the death of any person, while committing or attempting to commit a felony offense . . . .” in Minn. Stat. § 609.19, subd. 2(1)(2018)).

Appellant does not mention the term “lesser included offense,” but he argues that “[u]nintentional felony murder is a different charge than intentional murder” and “unintentional felony murder contains different elements and is a completely different charge than what [appellant] was indicted.” He also argues that it was “clearly plain error” to add a new charge “that is arguably substantially different . . . than what was charged in the original complaint and indictment.” But every lesser degree of murder is a lesser included offense under Minn. Stat. § 609.04 (2020), which defines a lesser included offense as a lesser degree of the same crime, or an attempt to commit the crime charged, or an attempt to commit a lesser degree of the same crime, or a crime necessarily proved if the crime charged were to be proved. *See Dahlin*, 695 N.W.2d at 597.

There was no abuse of discretion in the district court’s decision to give the instruction on a lesser-included offense that the state requested.

3. Restitution

The district court ordered appellant to pay the mother of the man whose death was caused by the shooting $1,000 and the Crime Victims Reparations Board $7,500 for funeral expenses. The order provided that, during incarceration, appellant was to pay by deduction from his prison wages and inmate account, and, during supervised release, by deduction from his wages; he will have paid the entire amount by the time supervised release ends. Appellant argues that the restitution award should be vacated if his conviction is reversed on speedy-trial grounds and, in the alternative, that the district court “abused its

discretion in finding that [appellant] had the ability to pay restitution [because] he will make $.50 per hour while incarcerated until he is 55 years old." Appellant argues that this court should "remand [the award] back to the trial court to address [appellant's] ability to pay and to outline a payment plan."

A district court in setting restitution "shall consider . . . the income, resources, and obligations of the defendant." Minn. Stat. § 611A.045, subd. 1 (2020). This court reviews a restitution order for an abuse of the district court's "broad discretion." *State v. Wigham*, 967 N.W.2d 657, 662 (Minn. 2021).

Wigham sets out a district court's obligations concerning restitution.

> [W]e hold that a district court fulfills its statutory duty to consider a defendant's income, resources, and obligations in awarding and setting the amount of restitution when it expressly states, either orally or in writing, that it considered the defendant's ability to pay . . . . [T]he record must include sufficient evidence about the defendant's income, resources, and obligations to allow a district court to consider the defendant's ability to pay the amount of restitution ordered.

Id. at 664-65. The district court here complied with these obligations, finding that:

> [Appellant] is currently incarcerated. [He] qualified for the services of the public defender. [Appellant], however, is a relatively young man of 36 years old, and nothing in the record suggests that he would be mentally or physically unable to work, either while in prison or upon release. The Department of Corrections will withhold a portion of prison wages and a portion of money deposited in inmate accounts for restitution. Therefore, [appellant] has an ability to make payments toward the restitution amount while incarcerated. Moreover, [he] is anticipated to be released from prison in 2039, when he will be approximate[ly] 55 years old. He could be employed and will have a sufficient period of time within which to repay restitution while on supervised release (parole). After considering [appellant's] financial situation, including his

> current incarceration, the court concludes that restitution should remain in the total amount of $8,500.
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> . . . .
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> Once [appellant] is placed on supervised release, [he] shall work with his supervised release officer to establish a payment schedule. The payment schedule shall ensure that [he] makes regular and substantial payments and remains obligated to pay the entire restitution amount in full by the date that [his] supervised release ends.

Thus, the district court has already done what appellant wants it to do on remand: addressed appellant's ability to pay and outlined a payment plan. We affirm the restitution award.

4. Ineffective Assistance of Counsel

Appellant claims that he received ineffective assistance of counsel during his trial because the P.D. did not call "eyewitnesses to the alleged murder and [appellant] acting in self-defense" and did not object to the jury instruction on second-degree felony murder, to an officer's testimony that he found an eyewitness's testimony consistent with the video surveillance, or to references to appellant as "the shooter" and to the man killed and the man paralyzed by the shooting as "the victims." To prevail on his ineffective-assistance claim, appellant must show both that the P.D.'s "representation fell below an objective standard of reasonableness" and that there is "a reasonable probability that, but for [the P.D.'s] unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984). Known as the *Strickland* prongs, these criteria of an ineffective-assistance claim were adopted by Minnesota in *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987).

A. The P.D.'s Performance

The objective standard of reasonableness is met when an attorney exercises "the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." *State v. Vang*, 847 N.W.2d, 248, 266 Minn. 2014) (citation omitted). There is a strong presumption that an attorney's "performance falls within the wide range of professional assistance." *State v. Miller*, 754 N.W.2d 686, 709 (Minn. 2008). Appellate courts do not generally review an ineffective-assistance claim that is based on trial strategy. *Vang*, 847 N.W.2d at 267. "Which witnesses to call at trial and what information to present to the jury are questions that lie within the proper discretion of the trial counsel. Such trial tactics should not be reviewed by an appellant court, which, unlike [trial] counsel, has the benefit of hindsight." *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986).

Thus, the P.D.'s decision not to call the exculpatory witness or witnesses appellant claims should have been called is not a decision this court reviews in an ineffective-assistance claim. *See id.*; *Andersen v. State*, 830 N.W.2d 1, 13 (Minn. 2013) (declining to review an attorney's decision not to call exculpatory witnesses as an act falling within trial strategy).

An attorney's failure to object to a jury instruction is equally a matter of trial strategy. *State v. Mosley*, 895 N.W.2d 585, 592 (Minn. 2017); *White v. State*, 711 N.W.2d 106, 110 (Minn. 2006) (noting that jury instructions are matters of trial strategy and an attorney's failure to object to a jury instruction is therefore not reviewable). The P.D.'s decision not to object when an officer testified that he found the eyewitness's testimony

consistent with the video surveillance recording, even if it were vouching testimony, is also a matter of trial strategy. *State v. Vick*, 632 N.W.2d 676, 689 (Minn. 2001) (declining to review failure to object to vouching testimony, because not objecting to it was a matter of trial strategy). The P.D.'s decisions not to object when appellant was referred to as "the shooter" and when the man who later died and the man who was paralyzed from the shooting were referred to as "the victims" were also matters of trial strategy. This court does not review such decisions, and the P.D.'s conduct did not fall below an objective standard of reasonableness.

B. Prejudice to appellant[2]

Appellant has the burden of proof as to his prejudice from the P.D.'s representation. *See State v. Cram*, 718 N.W.2d 898, 907 (Minn. 2006) (holding that the defendant has the burden of proof on both prongs of an ineffective-assistance claim). The defendant in an ineffective-assistance claim must show "that but for the errors [of counsel] the result of the proceeding probably would have been different." *Gates*, 398 N.W.2d at 562.

Appellant argues that he "pleaded self-defense[,] and witnesses that he requested of his attorney to be called, eyewitnesses to the alleged murder and [appellant] acting in self-defense, did not testify. . . . [The] attorney did not believe they would help and therefore refused to call them even though they would go directly to [appellant's] possible acquittal." Appellant does not say who these witnesses were or what they would have said to convince

[2]Although we need not consider whether appellant was prejudiced by that conduct, we do so in the interest of completeness. *See Vang*, 874 N.W.2d at 266 (holding that an appellate court "need not analyze both [*Strickland*] prongs if either one is determinative").

the jury that appellant was not the shooter. "In determining whether the defendant [making an ineffective-assistance claim] has made the requisite showing [of prejudice], the court must consider the totality of the evidence before the judge or jury." *Id.* Here, C.F.'s testimony alone provided ample evidence to support the jury's verdict that appellant committed second-degree murder; the witnesses whom appellant wanted to call would not have altered the verdict, and he was not prejudiced by their absence.

Appellant also objects that he was prejudiced because his presumption of innocence was taken away by the references to him as "the shooter." But appellant himself testified that he was the shooter and that he had lied to the police about not being the shooter, which would have done more to reduce the jury's presumption of his innocence than any other person's reference to him as the shooter. The use of the word "victim" to refer to someone who was shot and killed has been held not to be prejudicial. *State v. Hall*, 764 N.W.2d 837, 845 (Minn. 2009). Appellant was not prejudiced either by the P.D.'s failure to object to the use of "shooter" to refer to appellant or by the use of "victims" to refer to those he shot during the trial.

The addition of the jury instruction on the lesser included offense of second-degree murder was mandatory; appellant's attorney's objection to it would have been pointless, because a district court must give a requested lesser-included offense instruction when the evidence warrants it. *Hannon*, 703 N.W.2d at 509. Finally, the officer who testified that she had compared the testimony of C.F., a third-party witness, to the video surveillance of the incident and found that the testimony and the video were consistent was not commenting on the credibility of C.F: she had previously said that the prosecution's "two

big pieces of evidence" were the eyewitness to the crime and the large amount of video surveillance in downtown Minneapolis. She was asked if she found the two pieces of evidence consistent, and said she did; she went on to testify how the videos corroborated what the police had been told by C.F. Moreover, the jurors were repeatedly instructed that they were the sole judges of witnesses' credibility, which would have reduced any possible prejudice from the officer's statements. Appellant was not prejudiced by the P.D.'s failure to object to the officer's testimony. Appellant has not shown either that the P.D.'s representation of him fell below a standard of reasonableness or that he was prejudiced by the P.D.'s representation.

Appellant's right to a speedy trial was not violated; the district court did not abuse its discretion either in instructing the jury on a lesser-included offense or in setting restitution, and appellant was not deprived of the effective assistance of counsel.

Affirmed.