STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0216

State of Minnesota,
Respondent,

vs.

Christopher Floyd Boder,
Appellant.

Filed February 28, 2022
Affirmed
Jesson, Judge

St. Louis County District Court
File No. 69DU-CR-19-3572

Keith Ellison, Attorney General, Peter Magnuson, Assistant Attorney General, St. Paul, Minnesota; and

Kimberly Jean Maki Hromatka, St. Louis County Attorney, Duluth, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Jesson, Presiding Judge; Johnson, Judge; and Reilly, Judge.

NONPRECEDENTIAL OPINION

JESSON, Judge

Following a shooting in Duluth, respondent State of Minnesota charged appellant Christopher Floyd Boder with aiding and abetting second-degree murder. The state alleged

that Boder and his accomplice killed a man in retaliation for an attempted robbery earlier that night. Boder asserts that he is entitled to a new trial because the district court did not instruct the jury on his accomplice's right to self-defense. He further contends that he was denied his right to a speedy trial because of pandemic-related delays, and that he was denied his right to a public trial because the district court set up a separate viewing area for the public instead of having spectators physically present in the courtroom. We affirm.

FACTS

Early one September 2019 morning, a methamphetamine purchase led to an attempted robbery and then a fatal shooting.[1] The decedent, T.N., had spent much of the night driving around with a friend named J.S. J.S. decided to meet Boder to purchase methamphetamine. Because J.S. was already in T.N.'s truck, she asked him for a ride. At J.S.'s request, T.N. parked a block away from Boder's home, and J.S. walked over to the house. But Boder did not want to sell in front of his house because other people were around. As a result, Boder and J.S. drove a short distance away from the house in Boder's car.

Boder parked at the end of a dirt road and sat talking with J.S. for a while. During this time, T.N. drove past Boder's car twice. All of a sudden, T.N. ran up to Boder's car and tried to grab him through his window and said something along the lines of "give me all you got." During the attempted robbery, T.N. had something in his hand that looked like a gun. Boder opened the car door and punched T.N. in the face, and T.N. ran away.

[1] The following is a summary of the evidence produced at trial by the state.

After the attempted robbery, Boder and J.S. drove back to Boder's house, passing T.N.'s truck on the way. At his home, Boder went inside and returned to his car holding a rifle. James Peterson also came out of the house and sat in the back seat of Boder's car. Then J.S., prompted by Boder and still in his car, called T.N. to ask him why he had attempted to rob Boder. T.N., who had not realized the identity of the people he attempted to rob, apologized for the incident. Boder replied that "it was fine," but requested T.N.'s location so they could "take care of it." Boder handed the rifle to Peterson. Then, Boder, Peterson, and J.S. left in Boder's car. Boder dropped off J.S. at a liquor store, where she called T.N. to warn him that Boder and Peterson were "not going to take this lightly." But T.N. assured J.S. that "everything would be fine" and then ended the call because he saw headlights approaching.

Shortly after T.N. ended the call, police received a shots-fired call near Boder's house. When the first police officer arrived at the scene, he found T.N. sitting in the front seat of his truck holding his abdomen. T.N. was conscious but did not respond to the officer's questions. Wedged between the driver's seat and the front arm rest, the officer discovered a flare gun that looked similar to a revolver-style pistol.[2]

After securing the scene, officers canvassed the neighborhood to find people who had heard the shooting. No one claimed to have seen the shooting. But several neighbors heard a brief argument involving two voices, a gunshot, and then a car driving away. The

[2] Although the flare gun was shaped like a pistol, the officer concluded that it was a flare gun because it was painted bright orange.

neighbors remembered the argument differently, but they all remembered an angry voice demanding something and a frightened voice replying.

T.N. died shortly after police arrived at the scene. The medical examiner who conducted his autopsy opined that the cause of death was a single gunshot. A blood test revealed that T.N. had "6,900 NG per ML"[3] of methamphetamine in his system. The medical examiner in her report observed that: "Blood levels of 200 to 600 [NG per ML] have been reported in methamphetamine users who had exhibited violent and/or irrational behavior."

Around four in the morning, Peterson contacted J.S. on Facebook, and she called him. Peterson told J.S. that T.N. "was rushing" at him and Boder, and "that he pulled the trigger." Peterson told J.S. that he needed to leave town, and she never heard from him or Boder again. The next day, J.S. told police about the attempted robbery on the night of the incident.

Less than a week after the shooting, the state charged Boder with aiding and abetting second-degree intentional murder.[4] Boder demanded a speedy trial on March 4, 2020. But Boder's original trial date was postponed because of the COVID-19 pandemic. On March 20, 2020, the Chief Justice of the Minnesota Supreme Court suspended all jury trials that were not currently underway.[5] The district court ultimately continued Boder's trial

[3] "NG per ML" means the number of nanograms of a given substance that is found per one milliliter of a person's blood.

[4] The state charged Peterson with second-degree intentional murder separately.

[5] *Order Continuing Operations of the Courts of the State of Minnesota Under a Statewide Peacetime Declaration of Emergency*, No. ADM20-8001 (Minn. Mar. 20, 2020). While some counties were allowed to conduct jury trials in the summer of 2020 under a pilot

until October 6, 2020, the first available time that it was authorized to conduct a jury trial. And because of the pandemic-related safety protocols, a camera with a live feed was set up in a viewing area so members of the public could watch the trial remotely instead of being inside the courtroom. Boder did not object to this procedure.

At trial, Boder requested that the district court instruct the jury on Peterson's right to self-defense. The district court denied the requested self-defense instruction. The jury found Boder guilty of aiding and abetting second-degree murder.

Boder appeals.

DECISION

Boder argues that he is entitled to a new trial because the district court: (1) abused its discretion by denying his request for a self-defense jury instruction, (2) violated his right to a speedy trial, and (3) violated his right to a public trial. We address each contention in turn.

I. The district court did not abuse its discretion by denying Boder's requested self-defense instruction.

Minnesota law authorizes the use of "reasonable force" in certain situations, including "when used by any person in resisting . . . an offense against the person." Minn. Stat. § 609.06, subd. 1 (2018). But to raise this self-defense claim, a defendant must first provide reasonable evidence showing each of the following four elements: (1) the absence

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program, St. Louis County was not included in the pilot program. *Order Governing the Operations of the Minnesota Judicial Branch Under Executive Emergency Order Nos. 20-53, 20-56*, No. ADM20-8001 (Minn. May 15, 2020); *see also Minnesota Judicial Branch COVID-19 Preparedness Plan* (Minn. May 15, 2020) (plan developed in response to pandemic for safely conducting court operations including jury trials).

of aggression or provocation, (2) an actual and honest belief that the defendant was in imminent danger of death or great bodily harm, (3) reasonable grounds for that belief, and (4) the absence of a reasonable possibility of retreat. *State v. Johnson*, 719 N.W.2d 619, 629 (Minn. 2006); *State v. Basting*, 572 N.W.2d 281, 285-86 (Minn. 1997). If a defendant meets this burden, the state bears the burden of disproving one or more of those elements beyond a reasonable doubt. *Johnson*, 719 N.W.2d at 629.

The defense theory was that T.N.—acting erratically due to the high concentration of methamphetamine in his system—ambushed Boder and Peterson in a second robbery attempt, and Peterson shot T.N. in self-defense. The district court denied Boder's requested self-defense instruction because it concluded that he had not met his burden of producing evidence supporting three of the four elements of self-defense. We review this jury-instruction decision for an abuse of discretion. *State v. Huber*, 877 N.W.2d 519, 522 (Minn. 2016).

We discern no error in the district court's decision to deny the instruction. While, as the district court acknowledged, there was evidence that T.N. lunged at Peterson, there was no absence of aggression or provocation on Peterson's part, which is the first required element of a self-defense claim. Rather, the men obtained a firearm, had J.S. call T.N. to obtain his location, and traveled to confront T.N. after taking steps to leave behind a potential witness. *See State v. Radke*, 821 N.W.2d 316, 324-25 (Minn. 2012) (concluding defendant "was the aggressor who provoked the events leading to [the victim's] death"

because defendant traveled to victim's home with a loaded rifle and did not attempt to diffuse the situation before shooting victim).[6]

Still Boder argues that even if he and Peterson were the original aggressors, Peterson's right to self-defense "revived" because he "withdrew" from the conflict. An initial aggressor who withdraws from the conflict in good faith and communicates that withdrawal to the intended victim has a right to use reasonable force to resist a subsequent offense against their person. *Bellcourt v. State*, 390 N.W.2d 269, 272 (Minn. 1986). But there is no evidence that Boder and Peterson attempted to withdraw from the conflict, or that they communicated that withdrawal to T.N. Accordingly, Boder has not shown the first element required by his requested self-defense instruction.

A defendant who fails to produce evidence supporting any of the four elements is not entitled to a self-defense instruction. *State v. Graham*, 371 N.W.2d 204, 209 (Minn. 1985). Because Boder did not show an absence of provocation or aggression on the part of him or Peterson, the district court did not abuse its discretion by denying Boder's requested instruction.

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

Boder argues next that he was denied his right to a speedy trial because his trial was delayed for 216 days after his speedy-trial demand. He acknowledges that the pandemic provided good cause for "some delay" in this case—but not a delay of this duration. His

[6] While we need not move beyond examination of the first element, the fact that the two men traveled to confront T.N. also establishes record support for the district court's finding that Boder failed to establish that he attempted to retreat or otherwise withdraw from the situation, the fourth required element of a self-defense claim. *Johnson*, 719 N.W.2d at 629.

claim is grounded on the right each accused has to a "speedy and public trial" in all criminal prosecutions under both the Sixth Amendment to the United States Constitution and Article 1, Section 6, of the Minnesota Constitution. We review de novo whether a defendant's speedy-trial right was violated. *State v. Taylor*, 869 N.W.2d 1, 19 (Minn. 2015).

To determine whether a defendant's right to a speedy trial has been violated, we consider nonexclusive factors used by the United States Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 530 (1972). The factors are (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right to a speedy trial, and (4) the prejudice to the defendant as a consequence of the delay. *State v. Mikell*, 960 N.W.2d 230, 245 (Minn. 2021). Finally, we balance the above factors to determine whether the defendant's speedy-trial right was violated. *Id.*

A. Length of the Delay

First, the 216-day delay here is presumptively prejudicial. A defendant must be tried within 60 days of a speedy-trial demand following a not guilty plea "unless the court finds good cause for a later trial date." Minn. R. Crim. P. 11.09(b). As a result, a delay of more than 60 days is presumed to be prejudicial. *Mikell*, 960 N.W.2d at 246. But we must consider the remaining *Barker* factors to determine whether the delay was justified. *Id.* at 250.

B. Reason for the Delay

Second, we consider whether the state or the defendant was responsible for this pandemic-related delay. In a recent opinion, we determined that when the delay is "solely

attributable to the COVID-19 pandemic," the delay "is not attributable to either party." *State v. Jackson*, 968 N.W.2d 55, 61 (Minn. App. 2021), *rev. granted* (Minn. Jan. 18, 2022). Here, the parties agree that the initial delay was, indeed, attributable to the pandemic. Boder, however, argues that the existence of pilot jury trials in the summer of 2020 (in select Minnesota counties) shows that at least a limited number of trials were possible before October 2020. Accordingly, he asserts that the entirety of the 216-day delay was unjustified and must weigh against the state.

We disagree. Between June and October 2020—as Boder acknowledges—only limited pilot jury trials took place because of the pandemic. Our reasoning in *Jackson*, controls. Jury trials were limited because of the COVID-19 pandemic. As a result, the delay here—where no one disputes that October 6 was the first available time this district court was authorized to conduct a jury trial since March 20, 2020—is not attributable to either party.

C. Assertion of Right

Third, we consider the nature of Boder's assertion of his right to a speedy trial. A demand for a speedy trial is evidence that the defendant believes a delayed trial will be harmful. *Mikell*, 960 N.W.2d at 252. We consider the defendant's assertion of the right in the context of "other signals in the case to assess whether a demand for a speedy trial is serious." *Id.*

Here, Boder inconsistently asserted his right to a speedy trial. He first demanded a speedy trial in March 2020. And at a motion hearing in June, he demanded a speedy trial again. But when the district court found good cause to continue Boder's trial at his pretrial

hearing in July, he agreed to the October trial date as *the closest realistic date* that his trial could begin. Accordingly, this factor weighs weakly in Boder's favor.

D. Prejudice

Fourth, we consider whether Boder was prejudiced by reference to three interests: "(1) preventing oppressive pretrial incarceration; (2) minimizing the anxiety and concern of the accused; and (3) preventing the possibility that the defense will be impaired." *Id.* (quoting *State v. Windish*, 590 N.W.2d 311, 318 (Minn. 1999)). Generally, impairment to the defense is the most serious of these interests and is measured "by memory loss or witness unavailability." *Taylor*, 869 N.W.2d at 20. But the prejudice must be caused by the delay. *State v. Osorio*, 891 N.W.2d 620, 631 (Minn. 2017).

Here, Boder undoubtedly suffered anxiety while incarcerated during the pandemic, which infected many incarcerated persons. But the reason that his pretrial incarceration was more oppressive or anxiety-inducing than usual is the pandemic, which is not attributable to the state. *Jackson*, 968 N.W.2d at 61. And Boder does not point to any loss of memory by the witnesses, nor any witness becoming unavailable. Boder does not need to allege specific instances of prejudice because excessive delay is presumptively prejudicial. *Doggett v. United States*, 505 U.S. 647, 655 (1992). But because Boder rests on presumed prejudice rather than showing *how* he was prejudiced by the delay, this factor weighs only weakly in his favor.

E. Balancing the Factors

Finally, we balance the above factors to determine whether the state brought Boder to trial "quickly enough so as not to endanger the values that the speedy trial right protects."

Mikell, 960 N.W.2d at 255. The length of the delay here, 216 days, is presumptively prejudicial. *Id.* at 246. The reason for the delay is not attributable to either party. *Jackson*, 968 N.W.2d at 61. Boder's inconsistent assertion of his right to a speedy trial, due to his recognition that no jury trial was possible under the then-effective orders of the Chief Justice, "dilutes the impact of [his] initial strong demand for a speedy trial" in the overall balancing. *Mikell*, 960 N.W.2d at 253. And because Boder's only claim of prejudice is the prejudice that is presumed to flow from delay in ways that are difficult to quantify, this factor also weighs weakly in his favor. Balancing the factors, with *Mikell* in mind, we conclude that the delay here did not "endanger the values that the speedy trial right protects." *Id.* at 244. Accordingly, Boder has not shown that his speedy-trial right was violated.

III. Boder's right to a public trial was not violated.

Lastly, Boder asserts that because the audience watched his trial from a separate room through a video feed, his right to a public trial was violated. Like the speedy-trial right, the right to a public trial is guaranteed by the United States and Minnesota Constitutions. U.S. Const. amend. VI; Minn. Const. art. I, § 6. But the right is not absolute. *Taylor*, 869 N.W.2d at 10. Not all restrictions on access to a courtroom amount to a true closure. *State v. Peterson*, 933 N.W.2d 545, 551 (Minn. App. 2019). A closure may still be justified if: (1) the party seeking closure advances an overriding interest likely to be prejudiced, (2) the closure is not broader than necessary to protect the interest, (3) the court considers reasonable alternatives to closure, and (4) the court makes findings adequate to support the closure (the *Waller* factors). *Waller v. Georgia*, 467 U.S. 39, 46 (1984). We

recently considered, and rejected, a nearly identical challenge to a district court's use of a viewing room to allow spectators to view the trial while reducing the risk of spreading the virus. *State v. Modtland*, ___ N.W.2d ___, ___, 2022 WL 433245, at *6-8 (Minn. App. Feb. 14, 2021).

The state argues that because Boder did not object to the court's viewing-room procedure, we should review his claim for plain error, while Boder argues that we should review this issue de novo. The standard of review for an unobjected-to-public-trial violation is unsettled. *Id.* at *6 n.4. But we need not decide which standard applies here because we conclude that Boder's right to a public trial was not violated even on de novo review. *Id.* at *6-8.

Because Boder did not object to the proposed closure of the courtroom to the public, the court did not specifically address the *Waller* factors on the record. But the district court noted that "we are following our pandemic jury trial plan, which includes having a live feed for the—to a public viewing area." And when Boder's counsel requested that the jurors be allowed to remove their masks during voir dire, the court denied the request because it was "not consistent with orders from the Governor or our Chief Justice or our pandemic plan that has been developed in conjunction with the Minnesota Department of Public Health." The district court's on-the-record description of its pandemic protocols implicitly addressed the *Waller* factors. *See id.* at *8 (concluding that district court's implicit findings were sufficient to permit review of its decision). With this context in mind, we turn to the *Waller* factors.

Under the first factor, a closure is justified when the party seeking the closure advances an overriding interest. *Waller*, 467 U.S. at 48. "We have already established that preventing the spread of COVID-19 is undoubtedly an overriding interest." *Modtland*, ___ N.W.2d at ___, 2022 WL 433245, at *7.

Second, the district court's procedures were not broader than necessary to prevent the spread of the virus. The record shows that the district court's procedure was based on the county's "pandemic jury trial plan," which was in turn based on orders from the governor and chief justice, as well as guidance from the health department. And the viewing room allowed the public to witness the trial while reducing the risk of the virus spreading. *Id.*

Third, the record suggests that the district court concluded that there were no realistic alternatives to the closure. As noted, the district court had to comply with the St. Louis County plan for conducting jury trials, which was created in concert with guidance from the statewide Preparedness Plan. *See Minnesota Judicial Branch COVID-19 Preparedness Plan* (Minn. May 15, 2020).[7] The court remarked that, following those recommendations, "on a statewide basis, a number of jury trials have been done successfully" and that the court had "worked very carefully with the public health officials to make sure we can do this in a safe way for everyone." Because the Preparedness Plan required all persons in a court facility to socially distance, alternatives to a "viewing room"

[7] The Plan notes that "remote video participation, when technically feasible, should remain an option when social distancing is not maintained." *Id.*

were limited, particularly without a continuance in a matter where Boder asserted his right to a speedy trial.

Finally, we conclude that the district court's "reliance on the Chief Justice's guidance adequately supported its decision to limit public access to the courtroom." *Modtland*, ___ N.W.2d at ___, 2022 WL 433245, at *8. Although the district court did not make explicit findings on the record—because Boder did not object to the closure—the record permits review of the court's decision. *See Waller*, 467 U.S. at 45 (noting that findings must be specific enough that reviewing court can determine whether closure was proper). Accordingly, on this record we conclude that the use of a viewing area in lieu of live spectators in the courtroom did not violate Boder's right to a public trial.

Affirmed.