STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0848

State of Minnesota,
Respondent,

vs.

Aaron Morris Swenson,
Appellant.

Filed June 20, 2022
Affirmed in part, reversed in part, and remanded; motion granted
Bryan, Judge

Redwood County District Court
File No. 64-CR-20-591

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

Jenna M. Peterson, Redwood County Attorney, Travis J. Smith, Special Assistant County Attorney, Slayton, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Wheelock, Presiding Judge; Jesson, Judge; and Bryan, Judge.

NONPRECEDENTIAL OPINION

BRYAN, Judge

In this direct appeal from a judgment of conviction, appellant argues that his conviction should be reversed and the remaining, unadjudicated counts of conviction be dismissed because the district court violated his constitutional right to a speedy trial.

Alternatively, appellant argues that his conviction must be reversed for insufficient evidence. We conclude that the district court did not violate appellant's speedy trial rights. However, because we conclude that the evidence is insufficient to support the jury's finding that appellant inflicted great bodily harm, we reverse the conviction and remand for further proceedings regarding the unadjudicated counts of conviction. We also grant the state's motion to strike portions of appellant's brief.

FACTS

On August 11, 2020, respondent State of Minnesota charged appellant Aaron Swenson with second-degree assault, fifth-degree assault, and threats of violence. On October 19, 2020, the state amended its complaint to remove the threats-of-violence charge and to add one count of first-degree assault and one count of third-degree assault. Swenson's attorney made requests for a speedy trial at hearings on August 31, 2020; October 5, 2020; October 23, 2020; October 31, 2020; and November 12, 2020.

Swenson's jury trial was originally scheduled for November 3, 2020. In early November 2020, the district court rescheduled Swenson's jury trial to December 2, 2020. The district court found good cause to continue the trial because a critical witness exhibited COVID-19 symptoms. On December 4, 2020, the district court postponed Swenson's jury trial a second time, this time until February 10, 2021, pursuant to the Minnesota Supreme Court Chief Justice's November 20, 2020 order[1] suspending criminal jury trials until

[1] In response to the COVID-19 pandemic, jury trials were suspended until February 1, 2021. *Order Governing the Continuing Operations of the Minnesota Judicial Branch*, No. ADM20-8001, at 2 (Nov. 20, 2020).

February 1, 2021. On February 10, 2021, the district court postponed Swenson's jury trial a third time, rescheduling the trial for February 24, 2021. This third continuance occurred because Swenson's defense counsel was exhibiting COVID-19 symptoms. On February 24, 2021, jury selection began for Swenson's jury trial. Before the trial itself could begin, however, the district court issued a fourth continuance because one of the state's witnesses was hospitalized. The trial began on March 10, 2021.

The three-day trial included testimony from Swenson; Swenson's mother, L.A.J.; the victim, S.A.J.; L.A.J.'s brother-in-law, D.G.E.; the physician who treated S.A.J.; and two Redwood County sheriff's officers. According to the testimony of S.A.J., the following events occurred. In August 2020, S.A.J. went fishing with D.G.E. After fishing along the rocks of a river located within the Lower Sioux Indian Community for around half an hour, Swenson arrived. S.A.J. was swimming in the water when Swenson put him in a chokehold until S.A.J. become unconscious. S.A.J. regained consciousness on the rocks of the riverbank, having been pulled out of the water by Swenson. After S.A.J. smoked a cigarette, Swenson then demanded that S.A.J. get back into the water. When S.A.J. refused, Swenson pulled out a serrated steak knife and threatened S.A.J. S.A.J. then went back into the river where Swenson choked him a second time before pulling S.A.J. onto the shore again. S.A.J. saw police officers enter the riverbank area and begin speaking with Swenson. S.A.J. was taken to the hospital, where he was treated by a physician.

According to the physician's testimony, S.A.J. had no identifiable bruising, but there were "[two] tender points" on his neck. The physician further noted that he observed S.A.J.'s heart rate was elevated. The physician testified that a brain scan of S.A.J. was

normal and explained what potential injuries a person could experience as a result of being choked or held under water.

D.G.E. witnessed the altercation, spoke to police at the time of the incident, and testified at trial. He stated that he planned to go fishing with S.A.J. that morning. About forty minutes after D.G.E. and S.A.J. began fishing, Swenson arrived. D.G.E. also testified that he heard splashing and saw Swenson with his arm around S.A.J.'s neck. D.G.E. hollered at Swenson to leave S.A.J. alone. D.G.E. then left to get help from his sister, L.A.J. During his testimony, D.G.E. was asked to reconcile his testimony with conflicting statements that he made to the police. For instance, D.G.E. told police that he saw Swenson holding a knife, but at trial, D.G.E. did not remember seeing a knife. Instead, D.G.E. testified that he saw Swenson holding something that could have been Swenson's glasses.

L.A.J. testified that her brother D.G.E. went fishing with S.A.J. At some point that day, D.G.E. returned to the house where L.A.J. was and said that there was a fight going on by the river's edge. L.A.J. was immediately concerned and grabbed the phone to call 911. The state introduced the 911 call and played it for the jury during L.A.J.'s direct examination. In the call, L.A.J. told the dispatcher "to get to the river as fast as you can." The state also inquired about D.G.E.'s demeanor and L.A.J.'s reason for urgency that day.

Swenson also testified at trial. Swenson testified that he, S.A.J., and D.G.E. planned to fish together that day. While there, S.A.J. was intoxicated from alcohol, belligerent, and confrontational. Swenson testified that he and S.A.J. began splashing each other and pushing each other in the water. Swenson denied that S.A.J. lost consciousness and denied fighting with S.A.J. Swenson also denied holding S.A.J. underwater and stated that he did

not possess a knife that day. Instead, Swenson stated that he was holding his reading glasses and a cell phone while speaking with S.A.J.

The jury found Swenson guilty of all counts, including first-degree assault. The district court adjudicated the conviction of first-degree assault, and sentenced Swenson to an executed term of imprisonment of 161 months. The district court did not formally adjudicate the convictions on the remaining three counts. Swenson appeals.

DECISION

I. Speedy Trial

Swenson argues that his conviction must be overturned and the remaining counts dismissed because of the delay in bringing him to trial. We conclude that based on the applicable factors, Swenson's constitutional rights to a speedy trial were not violated.

The federal and Minnesota constitutions provide state criminal defendants the right to a speedy trial. U.S. Const. amends. VI, XIV; Minn. Const. art. I, § 6. The Minnesota rule of criminal procedure providing for a speedy trial states, in relevant part:

> 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 unless the court finds good cause for a later trial date. Unless exigent circumstances exist, if trial does not start within 120 days from the date the plea other than guilty is entered and the demand is made, the defendant must be released under any nonmonetary conditions the court orders under Rule 6.01, subd. 1.

Minn. R. Crim. P. 11.09(b).

To determine whether a delay in a case violates a person's speedy trial rights, reviewing courts use the balancing test set forth by the United States Supreme Court in

Barker v. Wingo, 407 U.S. 514 (1972). *State v. Windish*, 590 N.W.2d 311, 315 (Minn. 1999). This test requires courts to consider the following factors, known as the *Barker* factors, to determine whether a violation occurred: "(1) the length of the delay; (2) the reason for the delay; (3) whether the defendant asserted his or her right to a speedy trial; and (4) whether the delay prejudiced the defendant." *Id.*; *Barker*, 407 U.S. at 530-33. A 60-day delay is presumptively prejudicial and requires the weighing of the remaining factors. *Windish*, 590 N.W.2d at 315-16. None of these factors alone is "either a necessary or sufficient condition to the finding of a deprivation of the right to a 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. Appellate courts review alleged violations of a defendant's constitutional rights to a speedy trial de novo. *State v. Griffin*, 760 N.W.2d 336, 339 (Minn. App. 2009).

A. The length of the delay

"A defendant must be tried as soon as possible after entry of a plea other than guilty . . . . [T]he trial must start within 60 days unless the court finds good cause for a later trial date." Minn. R. Crim. P. 11.09(b). "[D]elays beyond the 60-day limit simply raise the presumption that a violation has occurred and require the trial court to conduct a further inquiry to determine if there has been a violation of the defendant's right to a speedy trial." *State v. Friberg*, 435 N.W.2d 509, 513 (Minn. 1989).

Pursuant to rule 11, the 60-day period of time begins when a defendant enters a not guilty plea. Minn. R. Crim. P. 11.09(b); *see also, e.g.*, *State v. Mikell*, 960 N.W.2d 230, 250 n.14 (Minn. 2021). Swenson pleaded not guilty and asserted his speedy trial rights on

October 5, 2020. His trial began on March 10, 2021. There was, therefore, a 156-day delay in bringing Swenson's case to trial. Because this figure exceeds 60 days, we must consider the other *Barker* factors.

B. The reason for the delay

If the state caused the delay, it may have violated a defendant's right to speedy trial, depending on the particular reasons for the delay. *Mikell*, 960 N.W.2d at 251. Multiple factors, many of which were related to the COVID-19 pandemic, caused the delay here. We identify the following four distinct periods of delay in this case: (1) November 4, 2020 to December 2, 2020, which resulted from the unavoidable unavailability of S.A.J.'s treating physician who was experiencing COVID-19 symptoms at the time of the scheduled trial; (2) December 2, 2020 to February 10, 2021, which resulted from the provisions of Order No. ADM20-8001 preventing the commencement of jury trials; (3) February 10, 2021 to February 24, 2021, which resulted from the unavailability of Swenson's attorney who was experiencing COVID-19 symptoms at the time of the scheduled trial; and (4) February 24, 2020 to March 10, 2020, which resulted from the unavoidable unavailability of L.A.J., who was hospitalized at the time of the scheduled trial.

We cannot attribute the first, second, or third delays to the state. *State v. Jackson*, 968 N.W.2d 55, 61 (Minn. App. 2021), *rev. granted* (Minn. Jan. 18, 2022) (finding that delays caused by the COVID-19 pandemic are not attributable to the state). We also conclude that there was good cause for the fourth delay because "[n]ormally, the unavailability of a witness constitutes good cause for delay," when the state acts diligently.

Windish, 590 N.W.2d at 317.[2] Importantly, Swenson does not argue that the state acted in bad faith or failed to act diligently to secure L.A.J.'s appearance. For these reasons, this factor weighs in the state's favor.

C. Assertion of Swenson's right to a speedy trial

We next determine whether Swenson asserted his rights to a speedy trial. In evaluating this factor, the force and frequency of the defendant's demand for a speedy trial must be considered. *Friberg*, 435 N.W.2d at 515. Swenson's attorney noted his speedy trial demand on the record at the hearings on October 5, 2020; October 23, 2020; October 31, 2020; and November 12, 2020. This factor weighs in Swenson's favor.

D. Prejudice

Under the final factor, we consider whether the delay prejudiced Swenson's interests, including pretrial incarceration, anxiety, and ability to prepare a defense:

> Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.

Barker, 407 U.S. at 532.

[2] Without asserting error, Swenson appears to disagree with the characterization of L.A.J. as a "material witness." We discern no error and conclude that L.A.J. was a material witness because her testimony corroborated portions of S.A.J.'s testimony, contradicted portions of Swenson's testimony, supplied information regarding D.G.E.'s demeanor and sense of urgency, and provided foundation and context for the 911 call.

In this case, Swenson argues that he was prejudiced by the delay because he had increased exposure to COVID-19 and anxiety about contracting COVID-19 while incarcerated prior to the start of the trial.[3] Swenson's argument is unpersuasive because Swenson's incarceration was not solely related to this case. Instead, Swenson was also held in custody on a separate and unrelated matter. Indeed, even after the district court released Swenson in this case on February 25, 2021, he remained in custody. The first two interests listed in *Barker*—preventing oppressive pretrial incarceration and minimizing anxiety and concern of the accused—are not relevant when a defendant is in custody on another matter, *State v. Taylor*, 869 N.W.2d 1, 20 (Minn. 2015), and Swenson makes no argument regarding the third interest—whether the defense was impaired. For these reasons, the final factor weighs strongly in favor of the state.

In sum, after considering and balancing each of the *Barker* factors, we conclude that the district court did not violate Swenson's constitutional right to a speedy trial.

II. Sufficiency of the Evidence

Swenson next argues that his conviction for first-degree assault must be reversed because S.A.J. did not actually sustain great bodily harm. Because the evidence of S.A.J.'s actual injuries cannot sustain a finding that he experienced great bodily harm, we reverse Swenson's conviction and remand for further proceedings on the unadjudicated counts.

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[3] In its brief, the state moves this court to strike footnotes 9 and 10 of Swenson's brief, which reference news articles covering COVID-19. Because Swenson references material outside the court record, we grant the state's motion to strike footnotes 9 and 10. Minn. R. Civ. App. P. 110.01; *Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988); *Stageberg v. Stageberg*, 695 N.W.2d 609, 613 (Minn. App. 2005), *rev. denied* (Minn. July 19, 2005).

To assess whether sufficient evidence supports a conviction, this court "carefully examine[s] the record to determine whether the facts and the legitimate inferences drawn from them would permit the jury to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted." *State v. Griffin*, 887 N.W.2d 257, 263 (Minn. 2016) (quotation omitted). When direct evidence supports an element of an offense, this court's review is limited "to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did." *State v. Horst*, 880 N.W.2d 24, 40 (Minn. 2016) (quotation omitted).

To convict a person of first-degree assault, the state must prove that the person "assault[ed] another and inflict[ed] great bodily harm." Minn. Stat. § 609.221, subd. 1 (2020). "Great bodily harm" is defined as "bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm." Minn. Stat. § 609.02, subd. 8 (2020). Whether an injury constitutes great bodily harm is a question for the jury. *State v. Moore*, 699 N.W.2d 733, 737 (Minn. 2005). When determining whether the victim suffered great bodily harm, a court must "focus on the injury to the victim rather than the actions of the assailant," *State v. Gerald*, 486 N.W.2d 799, 802 (Minn. App. 1992), and must consider the totality of the victim's injuries, *State v. Dye*, 871 N.W.2d 916, 922 (Minn. App. 2015).

In this case, the state presented the testimony of S.A.J.'s treating physician, who testified generally regarding injuries that can theoretically occur when someone is choked

or held under water, such as bone fractures, neurological issues, artery damage, internal bleeding, and death. The treating physician also testified specifically regarding the injuries that S.A.J. actually sustained, stating that S.A.J. experienced tender spots on his neck, an elevated pulse, and elevated temperature. Further, the physician testified that S.A.J.'s brain scan was normal. In addition, S.A.J. testified that he vomited water on the riverbed and that he experienced lapses of consciousness. The parties do not dispute that this testimony is insufficient to establish that S.A.J. actually suffered great bodily harm. Instead, the dispute presented relates to whether evidence that Swenson's actions had the *potential* to cause S.A.J. great bodily harm can sustain a conviction of first-degree assault.

We are bound by precedent requiring evidence of actual great bodily harm, not merely the potential for great bodily harm. *E.g.*, *Gerald*, 486 N.W.2d at 802; *Dye*, 871 N.W.2d at 921-22. In *Gerald*, this court determined that two knife cuts on the back of the victim's neck and near his ear did not amount to great bodily harm. 486 N.W.2d at 802. The state argued that Gerald inflicted great bodily harm because one of the wounds was near a major artery and had the potential to cause death if it had injured the artery. *Id*. This court rejected that argument, reasoning that "the injury itself must be life-threatening" and that the statutory definition of great bodily harm is not satisfied if the injury "could have been more serious." *Id*. Similarly, in *Dye*, this court determined that a victim who was shot in the abdomen did not suffer great bodily harm because the bullet did not injure any major organs. 871 N.W.2d at 922. This court rejected the state's argument that the bullet could have injured "critical body parts" and caused the victim's death, focusing on actual injuries not theoretical ones. *Id*. at 921-22.

Here, the conviction of first-degree assault rests on evidence of potential injuries, which cannot sustain a finding that Swenson inflicted great bodily harm. Therefore, we reverse Swenson's conviction of first-degree assault and remand to the district court for further proceedings regarding the jury's guilty verdicts on the remaining, unadjudicated counts of conviction.

Affirmed in part, reversed in part, and remanded.