STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1225

State of Minnesota,
Respondent,

vs.

Karl Arthur Keene,
Appellant.

Filed June 20, 2022
Affirmed
Cleary, Judge[*]

Rock County District Court
File No. 67-CR-17-364

Keith Ellison, Attorney General, Lydia Villalva Lijó, Assistant Attorney General, St. Paul, Minnesota; and

Jeffrey Haubrich, Rock County Attorney, Luverne, 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; Wheelock, Judge; and Cleary, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

CLEARY, Judge

In this direct appeal from the final judgment of conviction for bribery, appellant Karl Arthur Keene argues that the district court violated his constitutional rights to (1) confront a witness face-to-face, and (2) a speedy trial. We affirm.

FACTS

On December 1, 2017, respondent State of Minnesota charged Keene with three crimes, the relevant count being bribery of a public official or employee in violation of Minn. Stat. § 609.42, subd. 1(1) (2016), for an incident involving Keene and city-hall employees. Keene posted bail and was released from custody.

Between January 2018 and April 2019, Keene filed several motions, including multiple motions for a Minnesota Rule of Criminal Procedure 20.01 competency assessment. The state also filed a motion for a competency assessment during that time. At his arraignment Keene pleaded not guilty to all three charges. The state later dismissed two of the charges, leaving only the bribery charge.

On March 20, 2020, the Chief Justice of the Minnesota Supreme Court issued an order suspending new jury trials because of the COVID-19 pandemic, delaying Keene's trial. *See Continuing Operations of the Courts of the State of Minnesota Under a Statewide Peacetime Declaration of Emergency*, No. ADM20-8001 (Minn. Mar. 20, 2020). The Chief Justice again suspended new jury trials on November 20, 2020. *Order Governing the Continuing Operations of the Minnesota Judicial Branch*, No. ADM20-8001 (Minn.

Nov. 20, 2020). Jury trials were eventually permitted to proceed after March 15, 2021, and the district court scheduled the trial for March 18, 2021.

Before trial, the state filed a motion to permit the remote testimony of a witness, P.A., based on P.A.'s recent international travel and the CDC quarantine guidelines for international travelers at that time.[1] The district court granted the state's motion to permit P.A. to testify remotely.

The district court held a trial on Keene's bribery charge as scheduled. At trial, two city-hall employees, including P.A., and a deputy sheriff, testified on the state's behalf. Keene testified in his own defense but otherwise presented no witnesses. Less than an hour after deliberating, the jury found Keene guilty of the bribery charge. The district court adjudicated Keene guilty, stayed imposition of his sentence, and placed him on supervised probation for two years. This appeal follows.

DECISION

I. The district court did not violate Keene's right to confront a witness.

Keene argues that the district court's decision to allow P.A. to testify remotely violated his rights under the Confrontation Clause. *See* U.S. Const. amend. VI; Minn. Const. art. I, § 6. This clause, contained within the Sixth Amendment of the United States Constitution and echoed in the Minnesota Constitution, provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses

[1] The remote testimony was provided via a common "internet platform for live, remote, two-way video technology." *See State v. Tate*, 969 N.W.2d 378, 380 n.2 (Minn. App. Jan. 3, 2022), *rev. granted* (Minn. Mar. 15, 2022).

against him." U.S. Const. amend. VI. "[W]e apply de novo review when determining whether the admission of evidence violates a defendant's rights under the Confrontation Clause." *State v. Sutter*, 959 N.W.2d 760, 764 (Minn. 2021).

The Confrontation Clause "predominantly requires a face-to-face meeting." *Tate*, 969 N.W.2d at 380. But the right to face-to-face confrontation is not absolute. The United States Supreme Court has held that "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *Maryland v. Craig*, 497 U.S. 836, 850 (1990). Recently, this court held in *Tate* that the two-part test in *Craig* applies to the kind of remote testimony at issue here. *Tate*, 969 N.W.2d at 380-81. We therefore examine the record in this matter to determine whether (1) allowing P.A. to testify remotely was necessary to further an important public policy; and (2) the testimony's reliability was otherwise assured.

A. Public Policy

Keene argues that the state failed to meet its burden on this first prong because a generalized concern for COVID-19 does not sufficiently further an important public policy, and the state failed to make a case-specific showing that P.A. had been exposed to COVID-19. *See id.* at 388-90 (noting that the state made "a specific showing" that the witness was susceptible to COVID-19 and therefore remote testimony was necessary). Keene's argument is unpersuasive. Under the first prong of *Craig*, we consider whether denial of Keene's right to confrontation was "necessary to further an important public policy."

Craig, 497 U.S. at 850. The public policy exception to the Confrontation Clause is defined narrowly; it does not include, for example, "issues related to the convenience of the parties or added expense." *Tate*, 969 N.W.2d at 386. But in *Tate*, this court summarized the Governor's and Chief Justice's COVID-19-related orders from 2020 and concluded that "protecting public health when in the throes of a global pandemic . . . easily qualifies as an important purpose." *Id.* at 388. This court noted, though, that a generalized concern about the pandemic is insufficient because, under *Craig*, a finding of necessity must be "case-specific." *Id.* (quoting *Craig*, 497 U.S. at 855). This court held that, to satisfy *Craig*, the state must "show that the testimony of a *particular witness* must be remote in order to serve an important public policy, rather than . . . rest[ing] on the general existence of the pandemic." *Id.*

In this case, the state made such a showing. The state submitted an affidavit stating, in part, that P.A. "is on vacation this week out of the country and that upon her return she will be required to follow the Centers for Disease Control (CDC) recommendations and guidelines for international travel," which "call for testing 3-5 days after return" from international travel "with a 7-day quarantine for a negative test or alternatively 10 days quarantine without a test." Because both of those time periods "expire[d] after the date of trial," the district court determined that it should proceed with P.A.'s testimony remotely "so as to avoid possible exposure to COVID" as a result of P.A.'s recent international travel and "consistent with the CDC guidelines." Citing *Craig*, the district court acknowledged that there is a preference for face-to-face confrontation at trial but determined that, in this particular case, "The witness's physical presence at trial potentially jeopardizes not only

the health of this witness, but also the health of all other persons who will be present in the courtroom." Based on these facts, the state made a sufficient *case-specific* showing that allowing P.A. to testify remotely was necessary to further the public policy of protecting public health during the COVID-19 pandemic.

B. Reliability

Keene argues that P.A.'s remote testimony was not sufficiently reliable because it "did not provide the jury the ability to observe her demeanor equivalent to live, in-person testimony." Keene argues generally that the Confrontation Clause requires face-to-face testimony, and again cites *Tate*, stating that unlike in *Tate* the district court here did not use a "large" screen to help the jury observe P.A.'s demeanor. *See Tate*, 969 N.W.2d at 390. Keene's second-prong argument is also unpersuasive.

For the second prong of *Craig*, we consider whether "the reliability of the [remote] testimony is otherwise assured." *See Craig*, 497 U.S. at 850. "To satisfy this prong, the witness must generally be under oath and understand the seriousness of his or her testimony, the witness must be subject to cross-examination, and the judge, jury, and defendant must be able to properly see and hear the testifying witness." *Tate*, 969 N.W.2d at 390. Keene does not dispute that P.A. gave her testimony under oath, nor does he dispute that she was subject to contemporaneous cross-examination.

The record reflects that the district court sought to ensure reliability. Before any of the witnesses testified, the district court instructed the jury on the importance of seeing and hearing everything:

> [T]rial is about to begin, and you have now been sworn in. It is important that you, members of the jury, be able to hear and see everything that takes place during this trial. If you have difficulty hearing, understanding, or seeing something during this trial, please raise your hand and alert us, and we will make accommodations so that you can see and hear everything.

And before P.A.'s testimony, the district court administered an oath to P.A. It also told the jury that "[t]he next witness [P.A.], ladies and gentlemen, will be testifying remotely, so if you could direct your attention toward the screen." The district court then asked P.A. if she could hear everything and further advised her: "This is an official court hearing and trial. It is important that you speak loudly and clearly, and if we can't hear you, we will ask you to repeat yourself. If you can't hear something that you are asked, please let us know."

Finally, at no point throughout P.A.'s testimony did the judge, jury, or Keene suggest that they could not properly hear or see P.A.'s testimony. Nor did P.A. convey an inability to see or hear the questions asked. Based on this record, P.A. was under oath and was subject to cross-examination, and the judge, jury, and Keene could properly see and hear P.A. *See Tate*, 969 N.W.2d at 390. The reliability of P.A.'s remote testimony was therefore adequately assured.

Because the two-part *Craig* test is satisfied here, the district court did not violate Keene's rights under the Confrontation Clause by permitting P.A.'s remote testimony.

II. The district court did not violate Keene's right to a speedy trial.

Keene argues that although he caused the three initial reasons for the trial delay, the delay after March 20, 2020, is solely because of the COVID-19 pandemic and violates his speedy-trial right. Keene's argument fails.

"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 consider 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. *Id.* 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).

A. Length of the Delay

A delay becomes "presumptively prejudicial" after two time periods. *Mikell*, 960 N.W.2d at 246. The first period "starts when a criminal prosecution has begun," and the supreme court has found that "a 6-month delay after the beginning of a prosecution, without any demand made, [is] presumptively prejudicial." *Id.* (quotation omitted). The second period "occurs 60 days after an accused demands a speedy trial after entering a not guilty plea." *Id.* In Minnesota, delays that are presumptively prejudicial trigger the "necessity for inquiry into the remaining factors of the [*Barker*] test." *State v. Windish*, 590 N.W.2d 311, 315 (Minn. 1999).

Because police arrested Keene on November 30, 2017, more than three years before his trial, which began on March 18, 2021, the length of delay here well exceeds six months after Keene's arrest. Thus, this factor weighs in favor of Keene and triggers evaluation of the remaining *Barker* factors. *See id*.

B. Reason for the Delay

Under the second *Barker* factor, we consider the reasons for the delay, including which party bears responsibility for the delay. *Mikell*, 960 N.W.2d at 250-51. When the trial delay stems from the defendant's own actions, his speedy-trial right is not violated. *Id.* at 251. When the trial delay is attributable to the state's actions, we assess the state's reasoning for the delay. *Id*. (noting that when good cause for delay exists, such as "a key witness of the State is unavoidably unavailable . . . the delay will not be held against the state").

Again, Keene acknowledges that he caused the initial three delays, which spanned nearly two years, but challenges the delay beginning March 20, 2020, arguing that the delay was caused by COVID-19. He asserts that this weighs against the state. Keene is correct that the final delay was caused by the COVID-19 pandemic, but his argument that this weighs against the state fails in light of *Jackson*. In *Jackson*, this court concluded that a 17-day delay caused by public-safety concerns related to the COVID-19 pandemic did not violate the defendant's speedy-trial right. 968 N.W.2d at 63. This court also concluded that neither the defendant nor the state was responsible for the delay, and that "[t]he delay was justified by the pandemic." *Id.*

On March 20, 2020, the Chief Justice of the Minnesota Supreme Court suspended new jury trials because of the COVID-19 pandemic and, with limited exceptions not applicable here, extended that suspension through July 6, 2020. *See id.* at 59. And on November 20, 2020, the Chief Justice once again announced that new jury trials were suspended, and that moratorium was later extended to March 15, 2021. *Order Governing the Continuing Operations of the Minnesota Judicial Branch*, No. ADM20-8001 (Minn. Nov. 20, 2020); *Order Governing the Continuing Operations of the Minnesota Judicial Branch*, No. ADM20-8001 (Minn. Jan. 21, 2021).

Here, as in *Jackson*, the delay from March 20, 2020, to March 18, 2021, resulted from the "order of the Chief Justice and requirements set forth by the Judicial Council recogniz[ing] that certain safety protocols must be implemented to conduct a safe trial for all participants, including court employees, lawyers, witnesses, jurors, and [the defendant] himself." *Id.* at 63. When a district court "couldn't have a trial if [it] wanted to," good

cause necessarily existed for a delay in trial. *Id.* at 61. The district court here similarly "couldn't have a trial if [it] wanted to" from March 20, 2020, to March 15, 2021.

The delay attributable to the COVID-19 pandemic is not attributable to either party. *Id.* at 61. And because Keene acknowledges that the remainder of the delays are the result of his own actions, this factor weighs against finding a violation of Keene's right to a speedy trial.

C. Assertion of the Right to a Speedy Trial

As for the third *Barker* factor, Keene asserted his right to a speedy trial several times: first, during his arraignment hearing, stating that the year-and-a-half delay "violates the speedy trial"; next, during a hearing on October 24, 2019, stating that "from the beginning, I've asked for a speedy trial"; and finally, during his pretrial hearing, stating, "I have an issue with the speedy-trial violation . . . I've asked for speedy trial motions to be filed . . . we have to move forward because we're beyond speedy trial." This factor weighs in Keene's favor.

D. Prejudice to Keene

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 the following: (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*., and "is typically suggested by memory loss by witnesses or witness unavailability," *Jackson*, 968 N.W.2d at 62 (quotation omitted).

1. Oppressive pretrial incarceration

Keene had not been incarcerated for much of the length of the delay. The record reflects that he was released on bail January 18, 2018. So, Keene had been in custody for roughly *one-and-a-half months*. By contrast, he had been out-of-custody for roughly *three-and-a-half years*. Keene's first interest was not implicated.

2. Minimizing Keene's anxiety and concern

Keene argues that the delay caused him "an unprecedented form of anxiety and concern" and "more uncertainty than defendants in pre-pandemic cases." He cites no legal authority to support his position. Even so, while Keene likely suffered anxiety because of the pandemic, his reasoning that the delay was more oppressive or anxiety-inducing than usual is unpersuasive.

The expected stress and anxiety experienced by anyone who is involved in a trial is insufficient, by itself, to show prejudice. *State v. Strobel*, 921 N.W.2d 563, 571 (Minn. App. 2018), *aff'd*, 932 N.W.2d 303 (Minn. 2019). Keene has only asserted a level of stress associated with *all* defendants involved in a trial during the pandemic, which is insufficient, by itself, to show that he was prejudiced by the COVID-19-related delay more than all defendants who were necessarily similarly situated. This interest was therefore not implicated.

3. Preventing possible defense impairment

Demonstrating prejudice from a pretrial delay involves an affirmative showing that the delay impeded the defendant's ability to raise specific defenses, elicit specific testimony, or produce specific evidence. *Id.* at 571. Keene has made no such showing.

Keene was the sole witness appearing in his defense, and so witness unavailability was not a concern. And although Keene argues that the delay caused him to have "forgotten most the facts of the case," he provides no further explanation as how this specifically impaired his ability to defend himself. Accordingly, Keene has failed to demonstrate that he was prejudiced by delay in trial.

E. Balancing the *Barker* Factors

Here, the first and third factors weigh in Keene's favor, while the second and fourth factors weigh in the state's favor. The delay was presumptively prejudicial. And Keene asserted his speedy-trial rights. But the greatest part of the delay is attributed to Keene's own actions, while the remaining delay was because of the necessary suspension of new jury trials and other guidelines imposed amid the COVID-19 pandemic. Keene was not incarcerated during the delay, except for a comparatively short 45-day period. And though he claims that "memory loss" impaired his defense, he does not adequately brief the issue, nor does he explain how it specifically impaired his defense. Keene's trial delay was long, but on balance we conclude that his speedy trial right was not violated, particularly given that he was out of custody and that he was his only witness.

Affirmed.