STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1940

State of Minnesota,
Respondent,

vs.

Eric Vandell Taylor,
Appellant.

Filed April 9, 2012
Affirmed
Ross, Judge

Ramsey County District Court
File No. 62-CR-09-14641

Lori Swanson, Attorney General, St. Paul, Minnesota; and

John J. Choi, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Ross, Judge; and Toussaint, Judge.*

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

U N P U B L I S H E D O P I N I O N

ROSS, Judge

Thirty-six-year-old Eric Taylor sodomized and had sexual intercourse with L.P., the 13-year-old daughter of his girlfriend, and the state charged him with two counts of first-degree criminal sexual conduct. Taylor demanded a speedy trial on September 9, 2009. His jury trial began eight months later on May 24, 2010. The jury found him guilty of one count. The district court sentenced him to 360 months in prison. He appeals, arguing that he was denied his constitutional right to a speedy trial. He also contends that the district court's jury instructions violated his constitutional right to be convicted only by a unanimous jury. Because neither the trial delay nor the jury instructions offended Taylor's constitutional rights, we affirm.

FACTS

Eric Taylor and his girlfriend A.T. began a romantic relationship in 2005 and lived together in Minneapolis. After a heated argument in April 2009, A.T. moved herself and her four children, including an infant daughter fathered by Taylor, to Georgia. A.T. and the children moved back to Minnesota in July 2009 and lived in a friend's home in St. Paul. Taylor and A.T. were again physically intimate after she returned, and Taylor often went over to spend time with the children.

A.T. went to the library with her 10-year-old daughter on August 13, 2009, leaving her other three children at home with Taylor. When she returned she saw Taylor coming out of the bathroom covered in sweat and appearing startled to see her. His clothes were disheveled. A.T. asked Taylor what had been happening, and he replied, "It's not what

you think." He tried unsuccessfully to close the bathroom door. A.T. went into the bathroom and found her 13-year-old daughter, L.P., wearing only her bra. She told her mother, "Dad had sex with me." A.T. told L.P. to get dressed and not to wash anything.

Taylor told A.T. he was sorry, and he asked her why she wasn't hitting him. He told her he was retaliating against her because she had taken his baby daughter away when she separated from him. He repeatedly asked if she was going to call the police. She did.

L.P. told police that Taylor had ejaculated on her face and she showed them the towel that he used to wipe her face afterward. Police took L.P. to Midwest Children's Resource Center. Swabs of L.P.'s face and the towel contained both L.P.'s DNA and Taylor's sperm. Physician Alice Swenson interviewed L.P. and physically examined her. L.P. told her that Taylor forced her to perform oral, vaginal, and anal sex with him before he ejaculated on her face. Dr. Swenson found a small tear near L.P.'s anus, consistent with L.P.'s recounting of Taylor's assault.

Police arrested Taylor seven days later and the state charged him with two counts of first-degree criminal sexual conduct. Count one alleged that Taylor was in a position of authority over L.P., and count two alleged that he had a significant relationship with her. *See* Minn. Stat. § 609.342, subd. 1(b), (g) (2008).

On September 9, 2009, Taylor demanded a speedy trial. The trial was twice postponed. The first delay was to allow for DNA analysis; the state moved for a continuance in October 2009 because the Bureau of Criminal Apprehension (BCA) had not yet analyzed the physical evidence for DNA content because of a laboratory backlog.

The BCA estimated that it would complete the analysis by December 16, 2009. The district court granted the state's continuance motion.

The second delay was because a key state witness was unavailable. On January 4, 2010, the state requested another continuance until May 2010 because it learned that Dr. Swenson had left the country in November and would be in New Zealand until April. The state insisted that Dr. Swenson was an essential witness. Taylor opposed the motion and moved to dismiss for a speedy-trial violation. He argued that the state acted negligently because a state investigator had known that Dr. Swenson was planning to leave the country but never informed the county attorney's office. The district court denied Taylor's motion to dismiss and again postponed the trial. But given the length of the delay, it ordered Taylor to be released from jail with conditions.

The district court informed the parties on April 28, 2010, that the trial was set for the next four-week trial block, beginning on May 10. On May 10, the district court told the parties that the case had been placed in "on-call" status.

During the second delay, in March 2010, L.P. made additional allegations of sex abuse by Taylor. On May 21 the state amended the criminal complaint to include the new allegations. L.P. had confided in her pastor that the bathroom incident was not Taylor's first assault. She disclosed that he had sexually assaulted her on numerous earlier occasions in 2009, beginning on January 1. The amended criminal complaint expanded the offense dates to "[o]n or about January 1, 2009 through August 13, 2009," and it added a description of L.P.'s additional allegations to the probable-cause section of the

complaint. Taylor moved the district court to dismiss the amendments for lack of probable cause and for improper venue. The district court denied the motion.

On May 24 the parties tried the case. Taylor denied sexually assaulting L.P. and offered an explanation for the inculpatory DNA evidence. He claimed that on August 13, 2009, he had sex with A.T., but because he did not want any more children with her, he ejaculated onto her stomach. He asserted that A.T. wiped off his semen using the later-tested towel, which L.P. said Taylor used to wipe his semen from her face. He said that A.T. was upset that he didn't want any more children and that they began arguing about whether he was cheating. After the argument, he said he left.

Both L.P. and A.T. testified. L.P. testified that Taylor penetrated her with his penis orally and in her "privates" on August 13. The state also presented the testimony of Dr. Swenson, as well as police officers, L.P.'s pastor, and two forensic scientists who explained the DNA evidence from L.P.'s face and the towel she claimed Taylor used to wipe it. The jury found Taylor guilty of the first count of first-degree criminal sexual conduct (position of authority) but not guilty of the second count of first-degree criminal sexual conduct (significant relationship). Bearing on the state's effort for an upward sentencing departure based on aggravating factors, the jury also unanimously found that Taylor engaged in more than one form of penetration and that he ejaculated on L.P.'s face while he sexually assaulted her. The district court sentenced Taylor to 360 months in prison.

Taylor appeals.

D E C I S I O N

I

Taylor first argues that this court must reverse his conviction because the 257-day delay between his speedy-trial demand and his jury trial violated his constitutional right to a speedy trial. A criminal defendant's right to a speedy trial is guaranteed by both the federal and state constitutions. U.S. Const. amend. VI; Minn. Const. art. I, § 6. Whether a defendant's constitutional right to a speedy trial was violated is a question of law, which we review de novo. *State v. Cham*, 680 N.W.2d 121, 124 (Minn. App. 2004), *review denied* (Minn. July 20, 2004).

Not all delays have constitutional significance, and not all constitutionally significant delays require reversal. To determine whether a delay offends the constitutional right to a speedy trial, this court considers: "(1) the length of the delay; (2) the reason for the delay; (3) whether the defendant asserted his . . . right to a speedy trial; and (4) whether the delay prejudiced the defendant." *State v. Windish*, 590 N.W.2d 311, 315 (Minn. 1999) (citing *Barker v. Wingo*, 407 U.S. 514, 530–33, 92 S. Ct. 2182, 2192–93 (1972)). No one factor is either necessary or sufficient to find a violation, and other circumstances may also be relevant. *Barker*, 407 U.S. at 533, 92 S. Ct. at 2193.

Length of the Delay

The first *Barker* factor, the length of the delay, favors Taylor's position. Delays greater than 60 days are presumptively prejudicial. *State v. Friberg*, 435 N.W.2d 509, 512 (Minn. 1989). Taylor's trial began 257 days after he asserted his right to a speedy trial.

Reason for the Delay

The next *Barker* factor, the reason for the delay, also tips in Taylor's favor, but not overwhelmingly. The state was mostly responsible for both delays. But when a delay arises from good cause, there is no violation of the defendant's speedy-trial right. *State v. Griffin*, 760 N.W.2d 336, 340 (Minn. App. 2009). "[C]ircumstances over which the prosecutor has no control are good cause for delays up to fourteen months where the defendant[] suffered no unfair prejudice." *Friberg*, 435 N.W.2d at 513–14 (listing cases where lengthy delay did not violate right to speedy trial). These circumstances "weigh[] less heavily against the state than would deliberate attempts to delay trial." *Id.* at 513 (citation omitted).

The first delay was to obtain DNA analysis. The processing of DNA evidence is usually a good reason for a trial delay. *State v. Traylor*, 641 N.W.2d 335, 343 (Minn. App. 2002), *aff'd in part, rev'd in part on other grounds*, 656 N.W.2d 885 (Minn. 2003); *see also State v. Stroud*, 459 N.W.2d 332, 335 (Minn. App. 1990) (holding that DNA test results were material to the prosecution's case and the state's request for a reasonable continuance to allow for DNA testing constituted good cause). The state submitted its DNA evidence to the BCA within one week after the August 13, 2009 assault. The initial four-month delay due to the backlog at the BCA forensic laboratory for DNA analysis was for good cause and does not weigh substantially against the state.

The second delay weighs more heavily against the state. The state asked for a second continuance because it discovered that its essential witness, Dr. Swenson, had left the country in November 2009 and would not return until April 2010. Usually,

"[p]rosecutorial delay because of unavailability of a witness is not weighed heavily against the state." *State v. Miller*, 525 N.W.2d 576, 581 n.2 (Minn. App. 1994). Although witness unavailability is normally good cause for delay, "a prosecutor must be diligent in attempting to make witnesses available and the unavailability must not prejudice the defendant." *Windish*, 590 N.W.2d at 317. The prosecutor here asserted that he did not learn until late December that Dr. Swenson was out of the country for six months. But a state investigator knew that she would be leaving before she was gone. The state knew or should have known of the pending scheduling conflict and could have taken some steps earlier at least attempting to avoid the second delay. The record does not suggest, for example, that the state notified Dr. Swenson of the new trial date before she left the country or explored options for her to testify at trial despite her travel plans.

Although the second delay was not deliberate, it does weigh against the state.

Assertion of Right to a Speedy Trial

Taylor promptly asserted his right to a speedy trial. This *Barker* factor clearly favors him.

Prejudice

Despite our assessment of the first three factors, the final *Barker* factor convinces us not to reverse Taylor's conviction on speedy-trial grounds. The final factor, unfair prejudice, is measured in light of the interests that the right to a speedy trial is designed to protect. *Barker*, 407 U.S. at 532, 92 S. Ct. at 2193. Those interests are three: (1) preventing oppressive pretrial incarceration; (2) minimizing the accused's anxiety and concern; and (3) preventing the possibility that the defense will be impaired. *Id.*

Impairment of defense is the most serious of these. *Doggett v. U.S.*, 505 U.S. 647, 654, 112 S. Ct. 2686, 2692 (1992) (quoting *Barker*, 407 U.S. at 532, 92 S. Ct. at 2193).

Taylor argues that the delay impaired his defense because it gave the state time to amend the complaint with additional allegations of sexual abuse. But Taylor knew from early April 2010 that the state planned to amend the complaint because the state included its plan to amend in its attempt to negotiate a plea deal. The additional allegations also had no effect on Taylor's only defense—that L.P. and A.T. were lying.

Taylor contends that he was unfairly prejudiced by the delay because of the anxiety and stress arising from his pretrial incarceration and his conditional release. We are not persuaded. Stress arising from pretrial incarceration is not unique. *Friberg*, 435 N.W.2d at 515. Taylor was in custody for five months after he was arrested, but then placed on conditional release at the end of the first delay. The conditional release required him to maintain weekly contact with Project Remand, give 24-hour notice of address or employment changes, and obtain permission before leaving the metropolitan area. In *Griffin*, we found prejudice from a delay that caused the defendant, a resident of Chicago, to be on six months of "standby" status for her trial, during which time the trial was rescheduled and continued without explanation 30 times. 760 N.W.2d at 338–39, 341. Despite Taylor's attempts to draw a comparison, this case is nothing like *Griffin*. Taylor's incarceration, the requirements of his conditional release, and his resulting anxiety, are not insignificant, but they do not amount to constitutionally compelling prejudice. The *Barker* prejudice factor weighs substantially against Taylor's claimed speedy-trial violation.

The first three *Barker* factors weigh slightly to moderately in Taylor's favor. But because he was not prejudiced by the delay, we conclude that his constitutional right to a speedy trial was not violated. *See State v. Jones*, 392 N.W.2d 224, 234–36 (Minn. 1986) (holding no speedy trial violation for first-degree murder defendant after seven-month delay because no unfair prejudice shown although other three *Barker* factors all weighed against the state).

II

Taylor also argues that the district court plainly erred by failing to instruct the jury that it could not convict him unless it unanimously agreed on which charged sexual abuse he committed. The argument fails. Because Taylor never objected to the jury instructions, we review only for plain error. *See State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). Plain error exists if there is error, the error is plain, and the error affects substantial rights. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Even if these three elements are met, we have discretion whether to address the error and will do so only if necessary to ensure the fairness and integrity of the judicial proceedings. *Id.*

The two counts of charged first-degree criminal sexual conduct were first that Taylor engaged in sexual penetration of 13-year-old L.P. and that he was more than 48 months older than her and in a position of authority over her, and second, that he had a significant relationship to L.P. and she was less than 16 years old when the penetration occurred. *See* Minn. Stat. § 609.342, subd. 1(b), (g). The amended complaint stated that the unlawful sexual penetration occurred "[o]n or about January 1, 2009 through August 13, 2009." At trial, the state introduced evidence of sexual abuse that occurred on

January 1 in Minneapolis and continued occasionally until the August 13 bathroom assault.

The district court instructed the jury that "each juror must agree with [the] verdict" and, "Your verdicts must be unanimous." Taylor is correct that jury instructions must include "all matters of law necessary to render a verdict." Minn. R. Crim. P. 26.03, subd. 19(6). And he is correct that he has a right to a unanimous jury. *See State v. Hart*, 477 N.W.2d 732, 739 (Minn. App. 1991), *review denied* (Minn. Jan. 16, 1992). He contends essentially that because the verdict form did not direct the jury to specify which of the two counts it was convicting him of, and because the district court's instructions did not otherwise require a specific finding, the district court plainly erred.

We need not address whether there was an error or whether the error was plain because Taylor fails under his "heavy burden" to show that any error was prejudicial. *See State v. Burg*, 648 N.W.2d 673, 677 (Minn. 2002). Taylor argues that he was prejudiced because sexual penetration is an element of the charged crime and, without a specific-unanimity instruction, some jurors might have intended to convict him for sexually penetrating L.P. in January 2009 in Minneapolis while others might have intended to convict him for the bathroom abuse that occurred in August 2009 in St. Paul. But the jury unanimously agreed on the aggravating factor that Taylor ejaculated on L.P.'s face, and August 13, 2009, is the only date when this alleged aggravating fact occurred. Less than two hours after the jury returned the guilty verdict that Taylor contends might have been nonunanimous, it unanimously found that Taylor ejaculated on L.P.'s face while committing criminal sexual conduct in the first degree. The jury's trial verdict and

unanimous sentencing findings rested entirely on the same facts, leading us to the unmistakable conclusion that it unanimously found Taylor guilty of the bathroom abuse on August 13. Because Taylor clearly was not prejudiced by the lack of a specific-unanimity instruction, his argument fails the plain-error test.

Affirmed.