STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2145

State of Minnesota,
Respondent,

vs.

Don Antione Jones,
Appellant.

Filed November 5, 2012
Affirmed
Kirk, Judge

Ramsey County District Court
File No. 62-CR-10-9924

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

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

David W. Merchant, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Kirk, Presiding Judge; Bjorkman, Judge; and Rodenberg, Judge.

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

KIRK, Judge

We are asked to overturn appellant's convictions of two felony counts of violating an order for protection under Minn. Stat. § 518B.01, subd. 14(a) (2010), and one felony count of aggravated stalking in violation of Minn. Stat. § 609.749, subd. 4(b) (2010). Because we find that appellant's speedy-trial right was not violated, the district court did not err in its evidentiary rulings, and that appellant's pro se arguments are not properly before us, we affirm.

FACTS

Appellant Don Antione Jones and S.J. started a relationship in 2003, had two children, and married in 2009. Their relationship began to deteriorate and appellant started to engage in conduct that led S.J. to successfully petition the district court for an ex parte order for protection (OFP) on October 11, 2010.

On October 18, appellant confronted S.J. and their children outside of S.J.'s home. Appellant pushed S.J. to the ground and left with her cell phone. Later the same day, the district court issued S.J. a permanent OFP. Appellant continued contacting S.J. after October 18 via e-mail, telephone, and text message.

On November 3, the state charged appellant with felony violation of the OFP for the events of October 18. Appellant was arrested in early November and on November 22 entered a speedy-trial demand.

On November 30, the state charged appellant with two counts of aggravated stalking for conduct directed at S.J. between October 26 and November 3. After he was

arrested, appellant continued contacting S.J. from jail, leading to even more charges in other matters that proceeded simultaneously.

On December 15, the district court ordered appellant to undergo a competency evaluation pursuant to Minn. R. Crim. P. 20. At an omnibus hearing on January 5, 2011, the court found appellant competent to proceed based on the rule 20 report, although it expressed reservations that appellant had sufficiently cooperated in the evaluation. The district court also granted appellant's petition to proceed pro se.

In January, the state dismissed the first complaint pursuant to Minn. R. Crim. P. 30.01, and it amended the second complaint to include one count of felony violation of an OFP for the events of October 18. Appellant advised the court at a hearing on February 28 that he was prepared to go to trial that day. At that same hearing, the court entered a speedy-trial demand on appellant's behalf.

On April 26, appellant and the state appeared before the district court to address the expiration of the 60-day speedy-trial window. In continuing the matter, the district court noted that it had a full calendar, but commented that any prejudice faced by appellant was mitigated because he was also in custody on other matters and was not able to make bail. The district court also stated that appellant's decision to discharge two competent public defenders contributed to confusion and delay in the proceedings. Appellant told the district court that he had been in custody since November and that the lack of resolution to the matter was "kind of tiresome." The district court asked appellant to meet with the prosecutor to discuss a global settlement of all the charges he faced and appear again "in a week or a couple of weeks."

On May 16, the parties appeared before the district court, which again disclosed that it faced calendar congestion and was not able to begin trial that day. Appellant was now represented by a public defender, who was also representing him on the other pending matters. Appellant's counsel advised the district court that mastering the factual differences in the various cases in which he was representing appellant would take time, and that counsel was not prepared to proceed to trial that day.

The parties next appeared before the district court on June 28, when appellant moved for dismissal on speedy-trial grounds. The court denied appellant's motion and set the matter for trial on July 5. In light of the delay in bringing the matter to trial, the court released appellant on his own recognizance. This had little practical effect, however, because appellant remained in custody on the other pending matters.

After a jury trial, the jury acquitted appellant on July 8 of one aggravated stalking count for occurrences from October 18 to November 3, 2010, and convicted him of the remaining count of aggravated stalking and two counts of violations of the OFP. The district court sentenced appellant to 57 months for aggravated stalking and 32 months for violations of the OFP, to be served concurrently. This appeal follows.

D E C I S I O N

I. Any delay in bringing this matter to trial did not violate appellant's constitutionally guaranteed right to a speedy trial.

Both the United States and Minnesota Constitutions guarantee a criminal defendant the right to a speedy trial. U.S. Const. amend. VI; Minn. Const. art. I, § 6. Whether appellant's right to a speedy trial has been violated is a constitutional question subject to de novo review. *State v. Cham*, 680 N.W.2d 121, 124 (Minn. App. 2004), *review denied*

(Minn. July 20, 2004). In conducting its de novo review, this court determines whether there was good cause for the delays in bringing appellant's matter to trial. *McIntosh v. Davis*, 441 N.W.2d 115, 120 (Minn. 1989).

Minnesota courts balance the four factors described in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182 (1972), to determine whether a speedy-trial violation has occurred. *State v. Windish*, 590 N.W.2d 311, 315 (Minn. 1999). They are (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. *Barker*, 407 U.S. at 530, 92 S. Ct. at 2192. None of the factors is sufficient alone to find that a right to a speedy trial has been violated. *Windish*, 590 N.W.2d at 315. "Rather, they are related factors and must be considered together with such other circumstances as may be relevant." *Id.* (quoting *Barker*, 407 U.S. at 533, 92 S. Ct. at 2193).

A. Length of delay.

In Minnesota, a trial "must start within 60 days of the [speedy-trial] demand unless the court finds good cause for a later trial date." Minn. R. Crim. P. 11.09(b). A delay beyond 60 days raises a presumption that appellant's speedy-trial right was violated. *Windish*, 590 N.W.2d at 315-16. A review of the remaining three *Barker* factors is triggered when the delay surpasses the 60-day maximum and becomes presumptively prejudicial. *State v. Griffin*, 760 N.W.2d 336, 340 (Minn. App. 2009).

Both parties agree that, regardless whether the 60 days began to run with the initial speedy-trial demand appellant made on November 22, 2010, or when the charges were combined into one matter and the demand was entered on appellant's behalf by the district

court on February 28, 2011, the 60-day rule was violated and the other *Barker* factors must be analyzed.

B. Reason for the delay.

Appellant contends that the reason for the delay in coming to trial was calendar congestion at the district court, and that calendar congestion is not good cause for delay unless there are exceptional circumstances. The state argues that calendar congestion was one of several factors causing the delay and urges that appellant's lack of cooperation in the rule 20 evaluation, his decision to discharge his public defenders before the new, merged case was filed, appellant's continued criminal activity while in custody, and negotiations between the parties for a global resolution all contributed to the delay.

1. Calendar congestion.

In the absence of exceptional circumstances, calendar congestion at the trial court is not a valid reason for denying a defendant a speedy trial. *Griffin*, 760 N.W.2d at 340. However, "administrative delay, by itself, is generally insufficient to violate a defendant's speedy-trial right in the absence of a deliberate attempt to delay trial." *State v. Hahn*, 799 N.W.2d 25, 32 (Minn. App. 2011), *review denied* (Minn. Aug. 24, 2011). While delay caused by an overburdened judicial system weighs in favor of finding a speedy-trial violation, it "weighs less heavily against the government than, for example, a deliberate attempt on the part of a prosecuting attorney to delay a trial." *State v. Jones*, 392 N.W.2d 224, 235 (Minn. 1986). Appellant has not contended that the prosecution deliberately caused the delay.

2. Rule 20 evaluation.

The delay caused by a rule 20 evaluation is a relevant consideration to whether a speedy-trial violation has occurred. *State v. DeRosier*, 695 N.W.2d 97, 109 (Minn. 2005). Appellant was ordered to undergo a rule 20 evaluation on December 15, 2010, and the interviewing psychologist was ordered to submit findings to the court in time for an omnibus hearing to be held on January 5, 2011. Thus, the proceedings were legitimately delayed by at least three weeks while the court awaited the results of the evaluation.

3. Dismissal of public defender.

The state contends that appellant's dismissal of his public defenders contributed to the delay by promoting appellant's lack of understanding of the pretrial process. Frequent changing of defense counsel can be a delaying factor, particularly if it leads to continuances of trial dates. *State v. Richards*, 456 N.W.2d 260, 266 (Minn. 1990). Procedural complexities occasioned by the appellant's involvement in other legal actions, while not directly attributable against the appellant, may be weighed in a determination as to whether a speedy-trial violation has occurred. *Hahn*, 799 N.W.2d at 31. Delays that are caused by the appellant himself cannot give rise to a speedy-trial violation. *See State v. Johnson*, 498 N.W.2d 10, 16 (Minn. 1993).

The district court repeatedly advised appellant that his decision to proceed pro se was unwise, and hearings were often spent explaining legal issues to appellant. The district court repeatedly noted that appellant had fired competent public defenders and that this made the proceedings more difficult. Later, when represented by the same public defender who also represented him on other pending matters, appellant's counsel advised

the district court that the factual differences in the various cases would take time to learn so that he could adequately represent appellant. We conclude that appellant contributed to the delay by discharging his attorneys, acting pro se, and continuing to commit crimes that led to other charges.

In sum, calendar congestion plainly delayed the proceedings, but appellant contributed to the delay through his own conduct. This *Barker* factor tends to favor appellant, but only slightly. Moreover, the fact that the prosecution was not acting in bad faith to contribute to this delay further moderates how strongly this factor weighs against the state. *See Cham*, 680 N.W.2d at 125 (weighing this *Barker* factor in favor of the state because there was no bad-faith delay caused by the prosecution and because other delays were attributable to the defendant).

C. Appellant's assertion of right to a speedy trial.

"The defendant's assertion of his speedy trial right . . . is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." *Barker*, 407 U.S. at 531-32, 92 S. Ct. 2192-93. The frequency and force of the demand is to be weighed in this factor. *Id.* at 529, 92 S. Ct. at 2191.

Appellant asserted a speedy-trial right on the first of the charges filed against him on November 22, 2010. This charge was later dismissed and merged into another matter. The district court subsequently entered a speedy-trial demand on appellant's behalf in the merged file on February 28, 2011. The district court held hearings at the 60- and 120-day mark, and appellant noted that the delays in resolving the case were becoming "tiresome." This *Barker* factor favors appellant.

D. Prejudice caused by the delay.

Appellant has no affirmative duty to prove that he was prejudiced by the delay in coming to trial; instead, prejudice may be suggested by likely harm to his case. *Windish*, 590 N.W.2d at 318. Whether a defendant is prejudiced is answered by weighing three factors: (1) avoidance of oppressive pretrial incarceration; (2) minimizing the defendant's anxiety and concern; and (3) preventing impairment of the defendant's defense. *Id*. The third of these factors—impairment of the defendant's defense—is the most serious because of its potential to lead to systematic injustice. *Doggett v. United States*, 505 U.S. 647, 654, 112 S. Ct. 2686, 2692 (1992). Despite being the most important of the prejudice factors we weigh, appellant does not claim that the delay impaired his defense in any way. This weighs against his assertion of prejudice. *State v. Friberg*, 435 N.W.2d 509, 515 (Minn. 1989) (stating that when a "delay in no way affect[s] the strength of defendant['s] case, the final *Barker* factor does not favor defendant[ ]").

Appellant contends that he suffered professional, emotional, and physical setbacks as a result of his incarceration, including loss of clientele in his photography business, loss of housing, revocation of his driver's license, and inadequate health care while in jail. All of these setbacks suggest prejudice based on the first two factors. However, these factors are rendered moot here because appellant was also in custody on other offenses. *Windish*, 590 N.W.2d at 318. Moreover, pretrial incarceration "is not a serious allegation of prejudice." *State v. Stroud*, 459 N.W.2d 332, 335 (Minn. App. 1990).

Appellant relies on *State v. Brooke*, 381 N.W.2d 885 (Minn. App. 1986), to support his contention that factors like anxiety and financial distress are sufficiently prejudicial to

justify dismissal. However, *Brooke* is distinguishable. The appellant in *Brooke* was out of custody and had to marshal his witnesses to appear at five separate court appearances. *Id.* at 889. Each of the setbacks appellant claims he suffered here flow directly from his incarceration, which was predicated not only on the charges pending in this case but in other matters as well.

Appellant's legal defense at trial was not prejudiced by delay. The delay, for example, did not cause witnesses at trial to forget essential facts, no witness died during the delay, and there is no evidence that the detention impaired appellant's right to fair representation at trial. *See Jones*, 392 N.W.2d at 235-36. Consequently, this *Barker* factor weighs decidedly in favor of the state.

Moreover, we recognize that on June 28, 2011, the district court released appellant on his own recognizance. Although this had little practical consequence for appellant because of his incarceration on other charges, the release militates against a finding of prejudice. *See State v. Reese*, 446 N.W.2d 173, 179 (Minn. App. 1989) (being released on his own recognizance awaiting trial supported a finding of no prejudice to appellant), *review denied* (Minn. Nov. 15, 1989).

Having applied the *Barker* factors, we cannot conclude on this record that a speedy-trial violation has occurred. While calendar congestion contributed to the delay, appellant's actions were also aggravating factors. In the end, appellant suffered no cognizable prejudice. We conclude that his right to a speedy trial was therefore not violated.

II. The district court did not err in admitting appellant's testimony related to his marital status, the number of children he had, and his efforts to seek visitation rights.

Appellant contends that the district court erred when it permitted the state to cross-examine appellant regarding the number of children he had by other mothers. During the state's cross-examination, the prosecutor inquired about appellant's past relationships over the objection of appellant's counsel:

Q: You have eight children?
A: Yes, ma'am.
Q: Of those eight, how many do you have with [S.J.]?
A: We have two.
Q: Of the remaining six children, are they all with another mother, one mother or other people?
A: One mother —
MR. ALMON: Objection, Your Honor; relevance.
THE COURT: Overruled.
THE DEFENDANT: Two with one, two with another, one and one.
Q: (By Ms. Barker, continuing:) So five different mothers of your children?
A: Yes.

The prosecutor also inquired whether appellant had ever made efforts to obtain visitation rights or other contact with his children over appellant's counsel's objection:

Q: Now, you never went to court to request any visitation or contact with your children, did you?
A: No, at that time I did not.
Q: Well, you haven't since then, either, have you?
MR. ALMON: Objection, Your Honor. I think we should approach on that.
THE COURT: Yes.
(An off-the-record discussion was held at the bench.)
Q: (By Ms. Barker, continuing:) So between October 18th, 2010 and November 3rd of 2010, you never went to court to seek visitation or contact with your children, correct?
A: I didn't know how.

Q: Now, of the eight children you have, the six that you do not have with [S.J.], are they older or younger than the two children that you have with [S.J.]?
A: They're all older.
Q: Okay. So of those four mothers of those other children, were you ever legally married to any of them?
A: No, I was not.
Q: So you've only been legally married once, correct?
A: Yes.
Q: And you were divorced as of early January of 2011, correct?
A: That's the paperwork I received.
Q: You didn't go for the divorce hearing, correct?
MR. ALMON: Objection, Your Honor.
THE COURT: Would counsel approach again?
(An off-the-record discussion was held at the bench.)
MS. BARKER: I have no further questions, Your Honor.

Appellant argues that the prosecutor's inquiries into the number of children appellant had, the number of mothers with whom he had those children, his marital history, his failure to request visitation rights, and his failure to appear at divorce proceedings were not relevant to whether he committed the charged offenses. Appellant further contends that the admission of the evidence was highly prejudicial because it portrayed him as a poor father with questionable morals.

The state argues appellant's testimony that he had eight children conflicted with earlier testimony from S.J. that they had two children together, and that it was entitled to clarify the testimony for the sake of the jury's understanding. The state also argues that appellant's failure to seek visitation rights is relevant because it shows that his contact with his children after the OFP issued was impermissible. Such evidence may have also demonstrated that he had the wherewithal to seek visitation rights from the courts if it were the case that he had done so with his other children. Finally, the state argues that, even if

the evidence is not relevant, appellant has failed to show that he was prejudiced by its admission.

Unless an evidentiary exception applies, all relevant evidence is admissible. Minn. R. Evid. 402. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401.

"Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted). Even if the district court erred in admitting the evidence, the error is considered harmless unless this court determines that "there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *State v. Post*, 512 N.W.2d 99, 102 n.2 (Minn. 1994).

To prevail on the charge that appellant violated the OFP, the state needed to show that appellant knowingly violated the order. Minn. Stat. § 518B.01, subd. 14(d) (2010). The state presented S.J.'s testimony, copies of the OFP, and copies of text messages and e-mails sent by appellant. To the extent that appellant's testimony about the number of children he had appeared to contradict S.J.'s testimony, the state's inquiry about the children appellant had by other mothers was relevant because it provided a factual clarification that could otherwise have brought into question the credibility of both witnesses. The district court did not abuse its wide discretion in admitting this evidence.

The state's argument regarding testimony related to appellant's marital status and his failure to seek visitation rights is less plausible. Nothing in the record indicates that appellant defended against the OFP-violation charges by claiming he had court-ordered visitation rights to his children. In the absence of such a defense, his marital status and visitation rights to the children (whether with S.J. or another mother) are not relevant to proving a violation of Minn. Stat. § 518B.01. Nor is such evidence relevant to the stalking charges, except that the fact of S.J.'s divorce from appellant may be probative of her feeling "frightened, threatened, oppressed, persecuted, or intimidated." *See* Minn. Stat. § 609.749, subd. 1 (2010).

Even if the district court erred in permitting this testimony, appellant still bears the burden of proving the admission was prejudicial. *State v. Loving*, 775 N.W.2d 872, 879 (Minn. 2009). The state correctly notes that there is a low probability that appellant's marital history and failure to seek visitation rights affected the jury's decision. The evidence of appellant's misconduct was extensively documented in e-mails, text messages, and eyewitness testimony presented to the jury. Moreover, when "the jury has acquitted the appellant of some counts, but convicted the appellant of others, we view the verdict as an 'indica[tion] that the members of the jury were not unduly inflamed by the prosecutor's comments.'" *State v. Washington*, 521 N.W.2d 35, 40 (Minn. 1994) (quoting *State v. DeWald*, 463 N.W.2d 741, 745 (Minn. 1990)) (alteration in original).

We must note, however, the caution that should be attendant upon such evidentiary admissions. While we doubt that the character evidence at issue here would have affected

the jury's decision, an accumulation of improper admissions can deny the defendant a right to a fair trial. *State v. Mayhorn*, 720 N.W.2d 776, 792 (Minn. 2006).

Because it is unlikely that the admission of appellant's testimony "reasonably could have impacted upon the jury's decision," *State v. Juarez*, 572 N.W.2d 286, 292 (Minn. 1997), we conclude that there is no sound basis for reversing the district court's evidentiary rulings.

III. The issues raised in appellant's pro se brief related to his prison-provided healthcare and delivery of legal papers are not properly before this court.

Appellant raises pro se supplemental arguments. In his brief, appellant appears to seek relief from this court for poor healthcare he received while in Ramsey County's custody and for the failure of the correctional facilities to timely provide him with paperwork related to the divorce proceedings occurring while he was incarcerated. Appellant does not describe the relief he is seeking from this court.

Generally, an appellate court will not consider matters that were not argued and considered by the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). However, "at the court's discretion, it may deviate from this rule when the interests of justice require consideration of such issues and doing so would not unfairly surprise a party to the appeal." *Id.* Because appellant's pro se brief does not describe an actionable claim against the state raised before the district court, nor does it identify the relief sought from this court, we exercise our discretion to decline to consider these matters.

Affirmed.