STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0744

State of Minnesota,
Respondent,

vs.

Ambakisye Adam Holmes,
Appellant.

Filed April 22, 2013
Affirmed
Peterson, Judge

Ramsey County District Court
File No. 62-CR-11-5803

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

John Jung-Hoon Choi, Ramsey County Attorney, Thomas Ragatz, Assistant County Attorney, St. Paul, Minnesota (for respondent)

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

Considered and decided by Peterson, Presiding Judge; Ross, Judge; and Chutich, Judge.

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

PETERSON, Judge

In this appeal from a conviction of felony domestic assault, appellant argues that the district court (1) erred in denying his motion to dismiss for a speedy-trial violation,

and (2) committed plain error when it (a) allowed a police officer to testify about statements that the victim made to him, and (b) admitted evidence regarding appellant's prior assault conviction and the sentence for the current offense. We affirm.

FACTS

Appellant Ambakisye Adam Holmes was charged with one count of third-degree assault and one count of felony domestic assault, and the case was tried to a jury. At trial, the victim testified that she went to a convenience store near her residence with blood on her face. The store clerk described the victim as "scared, shaken up," and testified that her lip was split. The clerk testified that the victim told him that her boyfriend had beaten her up. The clerk called 911 and tried to give the phone to the victim, but she was too shaken up to talk.

St. Paul Police Officer Jeff Stiff responded to the 911 call. He described the victim as bleeding "pretty profusely from the mouth." Stiff testified that the victim told him that she had gotten into a fight with her boyfriend, who punched her multiple times. The victim testified that she told a police officer that appellant hit her in the face two times and caused her injury.

Stiff brought the victim to a hospital, where she was treated by Dr. Steven Atwater. Atwater testified that the victim told the first nurse who treated her that she had not been assaulted but told a second nurse and Atwater that her injury resulted from being punched. Atwater opined that because there was no sign of an abrasion on the victim's face or contamination of the wound with dirt or concrete, the victim's injury was consistent with having been punched in the face and inconsistent with having fallen.

St. Paul Police Officer Jeffrey Schwab testified that, in an interview the day after the incident, the victim stated that appellant punched her in the face four times following an argument. Schwab also testified about two telephone calls that appellant made from jail, and transcripts of the telephone conversations were admitted at trial. Two days after the incident, appellant called the victim from jail and told her to tell police that "you fell or something like that" and to make sure that the case did not go to trial. Appellant also called another woman and told her to make sure that the victim did not attend the trial. He also told the woman that the charges had been increased to a felony and that he faced a potential prison sentence of six and one-half years.

When Schwab went to the victim's apartment the next day to have her sign a release form, the victim said that her injuries occurred when she tripped and fell. The victim initially refused to testify and did not appear in court until after she was picked up on a warrant.

The jury found appellant not guilty of third-degree assault and guilty of felony domestic assault. This appeal followed sentencing.

D E C I S I O N

I.

Both the United States Constitution and the Minnesota Constitution guarantee the right to a speedy trial. U.S. Const. amend. VI; Minn. Const. art. I, § 6. "A speedy trial challenge presents a constitutional question subject to de novo review." *State v. Hahn*, 799 N.W.2d 25, 29 (Minn. App. 2011), *review denied* (Minn. Aug. 24, 2011). To determine whether a delay deprives a defendant of the 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 or her 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)).

Length of delay

"The length of the delay is a triggering mechanism which determines whether further review [of the *Barker* factors] is necessary." *Windish*, 590 N.W.2d at 315 (quotation omitted). A delay of more than 60 days from the date of the defendant's demand for a speedy trial is presumptively prejudicial. *Id.* at 315-16; *State v. Friberg*, 435 N.W.2d 509, 512 (Minn. 1989). Appellant demanded a speedy trial on August 10, 2011, and trial began on December 13, 2011, 126 days after the demand. Because the length of the delay before trial is presumptively prejudicial, the three remaining *Barker* factors must be considered.

Reason for Delay

The second *Barker* factor requires consideration of the reason for the delay. *Windish*, 590 N.W.2d at 316. "The responsibility for promptly bringing a case to trial rests with the state." *Hahn*, 799 N.W.2d at 30 (citing *Barker*, 407 U.S. at 529, 92 S. Ct. at 2192). But when delay "is the result of the defendant's actions, there is no speedy-trial violation." *State v. Johnson*, 498 N.W.2d 10, 16 (Minn. 1993).

The record does not support appellant's claim that "[t]he only reason for the delay apparent from the record was court congestion." At the beginning of an October 3 court appearance, appellant indicated that he was not satisfied with defense counsel's

representation and wanted a new attorney. Appellant stated that he wanted to speak to a managing attorney at the public defender's office about being assigned a new public defender. The district court left defense counsel as appellant's attorney of record but continued the case to give appellant an opportunity to contact the public defender's office about getting a new attorney.

The district court did not learn until appellant's next court appearance on October 18 that appellant had decided not to obtain a new attorney and to proceed to trial with his attorney of record. Defense counsel stated that he was not prepared for trial because appellant had told him only a few days earlier that appellant would not be getting a new attorney and intended to keep him as counsel. The district court set the matter for trial on December 5 "[b]ased on the discussions we've had about scheduling to accommodate the attorneys' schedules and the delays that have been caused here by [appellant's] requests for time to explore his options regarding representation."

Because the delay from October 3 until December 5 resulted from appellant's desire to obtain a new attorney and failure to communicate his decision to keep his original attorney in time for the attorney to prepare for trial, the delay weighs against appellant. *See Hahn*, 799 N.W.2d at 30-31 (stating that delay resulting from defendant's decision to change attorneys weighs against defendant). Appellant concedes that the delay from December 5 until December 11 was due to his trial on other charges and does not argue that the additional two-day delay until December 13 was significant.

Assertion of right

The state does not dispute that appellant asserted his speedy-trial right.

Prejudice

"The Supreme Court has identified three interests that are protected by the right to a speedy trial: (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." *Windish*, 590 N.W.2d at 318.

Appellant asserts that he was prejudiced by pretrial incarceration and general anxiety and stress caused by wondering about his fate. "Pretrial incarceration may be unfortunate, but is not a serious allegation of prejudice." *State v. Stroud*, 459 N.W.2d 332, 335 (Minn. App. 1990). Nor is the "stress, anxiety and inconvenience experienced by anyone who is involved in a trial" serious prejudice. *Friberg*, 435 N.W.2d at 515. The most serious prejudice factor is impairment of a defendant's defense. *Windish*, 590 N.W.2d at 318. "A defendant does not have to affirmatively prove prejudice; rather, prejudice may be suggested by likely harm to a defendant's case." *Id.* Appellant does not address how the delay in bringing him to trial could have harmed his case. Because there is no suggestion of likely harm to his case, the prejudice factor weighs against appellant.

We conclude that the delay in bringing appellant to trial did not violate his right to a speedy trial.

II.

"Plain error affecting a substantial right can be considered . . . on appeal even if it was not brought to the trial court's attention." Minn. R. Crim. P. 31.02. To demonstrate plain error, appellant must show that 1) there was error, 2) that was plain, and 3) that

affected substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998); *see also State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006) (explaining burden of proof). "If these three prongs are met, the appellate court then assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings." *Griller*, 583 N.W.2d at 740. "The third prong, requiring that the error affect substantial rights, is satisfied if the error was prejudicial and affected the outcome of the case." *Id.* at 741. Plain error is prejudicial if there is a reasonable likelihood that the error had a significant effect on the jury's verdict. *Id.* The defendant bears a heavy burden of persuasion on this third prong. *Id.*

(a) Appellant argues that allowing Schwab to testify about statements that the victim made to Schwab on the day after the assault was plain error. But appellant has not demonstrated that this claimed error affected substantial rights. The evidence against appellant was very strong. On the day of the assault, the victim reported to four people at separate times that her injuries resulted from being punched or beaten up. Her demeanor following the assault, fleeing to a convenience store and being frightened and too upset to talk to the 911 operator, corroborated her statements. *See State v. Mosby*, 450 N.W.2d 629, 635 (Minn. App. 1990) (noting that victim's testimony was corroborated by her upset, emotional state following assault), *review denied* (Minn. Mar. 16, 1990). Her injury was consistent with having been punched and inconsistent with having fallen. Although the victim twice denied that she had been assaulted and was reluctant to testify at trial, there was evidence that she was acting under fear and intimidation.

The victim's statements to Schwab that appellant argues were inadmissible described events on the day of the assault, including that appellant punched the victim four times. Appellant contends that there is a strong possibility that the verdict was based on this inadmissible evidence. But the victim's statements to Schwab were not the only evidence that appellant hit the victim and caused her injury. Officer Stiff, who responded to the 911 call, testified at trial that the victim told him that her boyfriend punched her in the mouth multiple times, and the victim testified that when police responded to the 911 call on the day of the incident, she told them that appellant hit her in the face and caused her injury. Because the jury learned from the victim's and Stiff's trial testimony that the victim initially told police that appellant punched her, it is not reasonably likely that admitting the victim's statements to Schwab had a significant effect on the jury's verdict. Because appellant has failed to show a reasonable likelihood that the claimed evidentiary error had a significant effect on the jury's verdict, he has not demonstrated that the claimed error was plain error, and we need not consider the remaining two prongs of the plain-error test. *See State v. Goelz*, 743 N.W.2d 249, 258 (Minn. 2007) (if defendant fails to establish that claimed error affected substantial rights, reviewing court need not consider the other plain-error factors).

(b) During telephone calls from the jail, appellant stated that (a) he has a prior third-degree-assault conviction, (b) the current domestic-assault charge is a felony, and (c) he faces up to six and one-half years in prison if convicted of the charge. Because appellant did not object to these statements on the grounds that he asserts on appeal, we review the admission of the statements for plain error.

During appellant's telephone call to the victim, the following conversation occurred:

> [APPELLANT]: Now you need to tell them I ain't touching, I ain't put my hands on you, you fell or something like that, and you don't want to press no charges. That's how you got your injuries.
>
> [VICTIM]: All right.
>
> [APPELLANT]: And when they ask you what, what you said before and all that, you lied.
>
> [VICTIM]: All right.
>
> [APPELLANT]: Cause I, I, you know I got a, a whatchacallit on my credit that I all ready get.
>
> [VICTIM]: A what?
>
> [APPELLANT]: A, a third-degree assault on my record all ready. If I get hit with this one, I'm gonna be facing like six, um, cause I still got a year to do for the other stuff, you what I'm saying? I was on, I was done with probation. All I had to do is stay clean until 2012.
>
> [VICTIM]: Mm-hmm (affirmative).
>
> [APPELLANT]: So I'm expecting like six, um.
>
> [VICTIM]: For this? I tripped and fell.
>
> [APPELLANT]: Yup.
>
> . . .
>
> [APPELLANT]: You know what I'm saying? You, you just tell 'em, um, just tell 'em, uh, what

the woo, you lied, you wanted to get me in trouble, you know what I'm saying? You was mad cause you fell and hurt yourself. You know what I'm saying? Say you tripped over the stair, or whatever, however you fell, however you fell, or whatever, but tell 'em I ain't put my hands on you, I ain't do nothing. Just tell 'em the truth, just tell 'em I ain't put my hands on you. Tell 'em. You know what I'm saying? Tell 'em you don't want to press charges, or anything. And if they end up, and if they end up sending me, if they end up pressing them anyway, you know I gotta go to trial, but you make sure you don't, you know what I'm saying, come to trial. You know what I'm saying?

[VICTIM]: I gotta come to trial too, right?

[APPELLANT]: No, I said you make sure you don't.

[VICTIM]: Okay.

[APPELLANT]: Cause if you do, you know what I'm saying, if you do they can book me. But if, if the victim don't show up in, at trial they automatically got to drop the charges.

During appellant's telephone call to another woman, the following conversation occurred:

[APPELLANT]: They, man, they jumped that junk up to a felony. This stuff, man, they, when they first arrested me they ain't said nothin' about no felony or nothing. Here they're trying to give me six and a half years though.

[WOMAN]: For what? I mean, what is the third degree assault.

[APPELLANT]: Because when we got into it, I punched her, and busted her lip.

[WOMAN]: Yeah, I know about that, that's battery. But they charging you, you with assault, battery and third degree.

[APPELLANT]: Yeah. Third degree domestic assault.

[WOMAN]: So why I'm thinking two charges, 'cuz you busted her lip.

[APPELLANT]: I don't know.

[WOMAN]: Um, (inaudible) So they wouldn't drop the battery assault?

[APPELLANT]: No and she told 'em she ain't wanna press charges and all that stuff and they still wouldn't drop, but I need, I need you to tell her that just don't, don't contact them people, don't take nothing from 'em, don't take no summons from them, don't come to court, none of that stuff. Cause if she don't show up, they gotta throw the junk out.

Even if the district court erred in admitting appellant's statements that he has a prior third-degree-assault conviction, the current domestic-assault charge is a felony, and he faces up to six and one-half years in prison if convicted, appellant has not shown that the error was prejudicial. The statements were brief portions of conversations during which appellant instructed the victim about what to say about how she was injured and to make sure that she did not come to trial and instructed another woman to tell the victim to avoid a summons and to not come to court. Given the remaining content of the

conversations in which the statements were made, it is not reasonably likely that admitting the statements had a significant effect on the jury's verdict, and appellant has not demonstrated that admitting the statements was plain error.

Affirmed.