STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0206

State of Minnesota,
Respondent,

vs.

Terrance Newsome,
Appellant.

Filed December 2, 2013
Affirmed
Cleary, Chief Judge

Dakota County District Court
File No. 19HA-CR-11-2526

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

James C. Backstrom, Dakota County Attorney, Jenny R. Nystrom, Assistant County Attorney, Hastings, Minnesota (for respondent)

Michelle L. MacDonald, MacDonald Law Firm, LLC, West St. Paul, Minnesota (for appellant)

Considered and decided by Cleary, Chief Judge; Kalitowski, Judge; and Kirk, Judge.

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

CLEARY, Chief Judge

Appealing the denial of his motion for a new trial, appellant argues that the prosecutor committed misconduct when referencing appellant's opportunity to testify; the

court erred in allowing an investigator's testimony regarding appellant's voicemail and that his past work included "high profile crimes"; the district court abused its discretion in determining that photographs of text messages were properly authenticated; appellant was not properly on notice of the predicate violent crime for the terroristic-threats charge; the prosecutor's offer of a plea bargain violated appellant's constitutional rights; the cumulative effect of errors deprived appellant of a fair trial; and the time lapse between charging and trial violated appellant's right to a speedy trial. We affirm.

FACTS

This case arose from a number of threatening text messages sent to B.M. from appellant Terrance Newsome. On March 4, 2011, B.M. reported receipt of these messages to the Lakeville Police Department. The text messages came from the number saved in B.M.'s phone as "Terry Compton" or "Compton Terry," the nickname B.M. used for Newsome. B.M. stated that Newsome was angry with B.M. for spending time with Newsome's girlfriend and helping her buy a car and that he was not aware of anyone else who would be upset with him during the period the text messages were sent. The text messages included personal threats and threats to B.M.'s family. The threatening messages read: "U BETTER PRAY U DON'T C ME!!!!!! CUZ HONESTLY IM HUNTIN U DOWN"; "i would move rite about now if u still wanna breathe"; "ima deliver ur head to ur mom n then ur bro n mom r f-cked!"; and "ur goin to the hospital tonite p-ssy! . . . ur dead."

On July 28, 2011, Newsome was charged with one count of terroristic threats pursuant to Minn. Stat. § 609.713, subd. 1 (2010). On November 14, 2011, Newsome

waived his right to a speedy trial, and the district court set his trial for May 7, 2012. Because of newly retained counsel, Newsome requested a continuance on May 7, 2012 and the trial was continued to August 6, 2012. On August 2, 2012, the prosecutor called Newsome's attorney, offering a plea bargain. The prosecutor had just been informed that B.M. had reported that Newsome had violated the harassment restraining order (HRO) that B.M. had obtained after the charges were filed. The state was willing to consider not charging the HRO violation in exchange for a guilty plea to the terroristic-threats charge. Newsome rejected the offer and proceeded to trial.

At trial, the state called B.M., Officer Danielson, Officer Stevens, and Investigator Helmueller. Over Newsome's objection, the district court admitted into evidence eight photographs depicting the messages on B.M.'s phone. B.M. identified his phone in the pictures by the black rubber case and he confirmed that the phone number from which the text messages were sent belonged to Newsome. B.M. testified that he and Newsome had been friends in the past, and he had Newsome's phone number saved in his phone as "Terry Compton" or "Compton Terry." B.M. denied deleting any text messages from his conversations with Newsome. B.M. testified that he sold the cell phone to which Newsome sent the threatening text messages. On cross-examination, Newsome attempted to offer his own phone records to show that text messages had been deleted from the conversations depicted in the state's exhibits. The court sustained the state's objection to admitting the records due to lack of foundation and relevance.

Officer Danielson testified that he responded to B.M.'s complaint, took B.M.'s statement, and viewed the text messages. Officer Danielson then testified to calling

Newsome using the number from which the text messages were sent, and that Newsome agreed to come in the next day to provide a statement. Newsome never came in or provided a statement. Officer Stevens testified that he photographed the messages and that he observed Officer Danielson take B.M.'s recorded statement.

Investigator Helmueller testified that he was assigned as the investigating officer. When describing his job duties, Investigator Helmueller said, "I investigate high profile crimes and I investigate computer crimes, internet crimes." Shortly thereafter, the court requested a sidebar. After the unrecorded sidebar, the following questioning occurred:

> STATE: Detective, when you were describing your duties as a detective for the Lakeville Police Department, you indicated that sometimes you're required to investigate high profile type cases, right?
> HELMUELLER: Correct.
> STATE: But other times you are required to investigate cases that are not high profile?
> HELMUELLER: Correct.
> STATE: Is this case high profile in any way?
> HELMUELLER: Not at all.

Investigator Helmueller then testified about his attempts to contact Newsome at his residence. He testified to calling Newsome at the phone number from which the text messages at issue were sent and the voicemail which Newsome left for him. The voicemail itself was not introduced. On cross-examination, defense counsel questioned Investigator Helmueller about other statements in the voicemail, statements to which he had not yet testified. The state objected: "Objection, Your Honor. Self-serving hearsay. The Defendant has the opportunity to testify." The district court immediately asked the attorneys to approach the bench. After an unrecorded sidebar, cross-examination

continued. Defense counsel asked, "Did [Newsome] also say [in the voicemail], that it's just a – it's just bullsh-t because [B.M.] has threatened him, too?" Helmueller responded that he did.

The prosecution rested and Newsome did not call any witnesses or testify. The court then gave each party a copy of the proposed jury instructions. The instructions provided that the predicate crime of violence was second-degree murder. Newsome objected that the facts did not support a threat of murder.

The jury found Newsome guilty of felony terroristic threats in violation of Minn. Stat. § 609.713, subd. 1. Newsome filed a motion for a new trial, which the district court denied on October 25, 2012. Newsome received a stay of imposition pursuant to Minnesota Statutes section 609.135, subd. 1 (2010), which, with successful completion of probation, will result in a misdemeanor conviction.

D E C I S I O N

I. Prosecutorial misconduct referencing Newsome's opportunity to testify

Newsome argues that the prosecutor erred by mentioning his opportunity to testify while stating her basis for an objection made during defense counsel's cross-examination of Investigator Helmueller. A review of the trial transcript shows no objection by Newsome to the prosecutor's statement at the time it was made. If the party claiming error fails to object at trial, we review for plain error. *State v. Ramey*, 721 N.W.2d 294, 297 (Minn. 2006); *see* Minn. R. Crim. P. 31.02 (giving the standard on appeal for unobjected-to errors at trial). In order to correct an unobjected-to error, we must first find an "(1) error; (2) that is plain; and (3) the error must affect substantial rights." *State v.*

Griller, 583 N.W.2d 736, 740 (Minn. 1998). If these three prongs are satisfied, we assess whether we should address the error to "ensure fairness and the integrity of the judicial proceedings." *Id.* at 740. When alleging prosecutorial misconduct, the appellant has the burden of proving the error and that it was plain. *Ramey*, 721 N.W.2d at 302. The state has the burden of showing that the error did not affect the appellant's substantial rights. *Id.*

Plain Error

Newsome argues that the prosecutor's comment—"The defendant has the opportunity to testify"—was an indirect reference to Newsome's decision not to testify. An error is plain if it "contravenes case law, a rule, or a standard of conduct." *Id.* at 302. A defendant has a due process right to a fair trial. *State v. Reardon*, 245 Minn. 509, 513-14, 73 N.W.2d 192, 195 (1955). "[A] prosecutor at a defendant's trial shall not allude to the defendant's failure to testify." *State v. Whittaker*, 568 N.W.2d 440, 451 (Minn. 1997). "Indirect references to a defendant's failure to testify are prohibited if they either (1) manifest the prosecutor's intention to call attention to the defendant's failure to testify, or (2) are such that the jury would naturally have understood them as a comment on defendant's failure to testify." *State v. DeRosier*, 695 N.W.2d 97, 107 (Minn. 2005) (quotation omitted). Although the comment was brief and tangential, the prosecutor still committed error by connecting Newsome to the witness stand although he had not decided whether to testify. The jury could have drawn a negative inference from the comment when Newsome later decided not to testify. Immediately after the prosecutor

made the comment, the district court stopped proceedings and called the attorneys to the bench. It was a plain error to make the comment.

Substantial Rights

"Substantial rights are affected when a plain error was prejudicial and affected the outcome of the case. Plain error is prejudicial when there is a reasonable likelihood that the error had a significant effect on the jury's verdict." *State v. Sontoya*, 788 N.W.2d 868, 872 (Minn. 2010) (citation omitted). When determining if the absence of the misconduct would likely have had a significant effect on the jury's verdict, "we consider the strength of the evidence against the defendant, the pervasiveness of the improper suggestions, and whether the defendant had an opportunity to (or made efforts to) rebut the improper suggestions." *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007). The substantial-rights analysis follows closely with the determination of harmless error. *State v. Reed*, 737 N.W.2d 572, 583 (Minn. 2007). Thus, if Newsome can show that the comment was not a harmless error, it affected his substantial rights.

In *DeRosier*, the prosecutor made present-tense statements in closing arguments that defendant "knows" what happened, and "it would be nice to know" what happened. 695 N.W.2d at 107 & n.5. The court held that these indirect references were harmless. While the court found that the statements constituted misconduct, it held that the misconduct was not reversible error per se due to the other properly admitted evidence; due to the jury instruction confirming that the defendant had a right not to testify; and due to the lack of an objection. *Id.* at 108. Here, the district court included an instruction on Newsome's right not to testify. In addition, the statement was not made directly to the

jury in an opening or closing statement and was not significant in light of the amount of evidence properly admitted over the three-day trial. Because this error did not affect Newsome's substantial rights, Newsome was not deprived of his right to a fair trial.

II. Statements of investigating officer

Newsome makes three arguments regarding Investigator Helmueller's testimony: that his testimony was not relevant; that his characterization of Newsome's voicemail was unfairly prejudicial; and that his "high profile crimes" comment was improperly allowed.

Testifying in general

Newsome argues that the district court abused its discretion in overruling his objection to allow Investigator Helmueller to testify. Newsome asserts that Investigator Helmueller's testimony was irrelevant to the case. We review the district court's evidentiary rulings for an abuse of discretion. *State v. Mahkuk*, 736 N.W.2d 675, 686 (Minn. 2007). When the district court errs in admitting evidence, we determine "whether 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). If there is a reasonable possibility that the verdict might have been more favorable to the defendant without the evidence, then the error is prejudicial. *Id.*; *see also State v. Quick*, 659 N.W.2d 701, 713 (Minn. 2003) ("[E]videntiary questions are reviewed for abuse of discretion and any error is subject to harmless error analysis.").

In general, relevant evidence is admissible at trial. Minn. R. Evid. 402. Evidence is relevant if it offers "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. Under Minn. R. Evid. 602, witnesses must have personal knowledge about the subject of their testimony. Newsome argues that, because Newsome's voicemail to Investigator Helmueller was not admitted into evidence, Investigator Helmueller's testimony is irrelevant to the case. But Investigator Helmueller's testimony provided more than foundation for admission of the voicemail. Because he was the recipient of the voicemail and had previously contacted Newsome regarding the allegations, his testimony was relevant, and he had sufficient personal knowledge to testify about the voicemail.

Characterization of Newsome's voicemail

Newsome argues that Investigator Helmueller's testimony about the contents of the voicemail was unfairly prejudicial and should have been excluded under Minn. R. Evid. 403. His argument essentially raises two issues: whether Investigator Helmueller's testimony regarding the voicemail should have been allowed when the voicemail itself was available and whether he misrepresented what Newsome said in the voicemail. Newsome objected to allowing testimony without having the voicemail admitted into evidence. Thus, we review for abuse of discretion. *See Mahkuk*, 736 N.W.2d at 686.

Minn. R. Evid. 801(d)(2) permits the admission of statements by a party opponent when offered against that party. Under Minn. R. Evid. 403, relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." The state relies on *State v. Bauer* as support for allowing Investigator Helmueller's testimony when the voicemail was available. 598 N.W.2d 352, 368 (Minn.

1999) affirming the district court's decision to allow the investigating officers to testify about conversations with defendant when a recording of the conversation was available. In *Bauer*, the supreme court held that is was not error to permit the officers to testify because the recordings were extensive, and defendant did not object to any discrepancies between the testimony and recordings or provide any evidence that their testimony was misleading. *Id.* On appeal, Newsome argues that Investigator Helmueller's testimony mischaracterized Newsome's voicemail. However, he did not object to the alleged mischaracterization at trial. Additionally, Newsome filed a motion in limine to *prevent* the state from offering the voicemail into evidence. *Bauer* provides authority for allowing Helmueller to testify as to Newsome's statements in the voicemail. *See id*. Under these circumstances, the district court did not abuse its discretion in allowing Investigator Helmueller to testify as to his recollection of the voicemail without requiring the state to offer the voicemail for admission into evidence.

Next, Newsome argues on appeal that Investigator Helmueller prejudicially misrepresented Newsome's voicemail. Newsome did not make the objection at trial, thus we review for plain error. *See Griller*, 583 N.W.2d at 740. "An error is plain if it was clear or obvious." *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002). In response to a question about what the voicemail contained, Investigator Helmueller replied, "He stated that he doesn't make threats. He only makes promises. He said that we can talk but he's not going to give me much information because he's not dumb. He said that it only takes one slip of the word to bust him."

Investigator Helmueller's recollection of the voicemail was not a clear mischaracterization of Newsome's statements. Defense counsel had an adequate opportunity to impeach Helmueller on his recollection and to show that he mischaracterized the voicemail by offering a recording of it into evidence. The district court did not plainly err in admitting Investigator Helmueller's testimony about his recollection of Newsome's voicemail.

"High profile crime" statement

Newsome argues that the district court erred in allowing Investigator Helmueller to state that his job duties included investigating high-profile crimes. Newsome failed to object to this statement at trial, so we review for plain error. *See Griller*, 583 N.W.2d at 740.

In response to the state's questioning about his job duties as an investigator, Helmueller stated, "I investigate high profile crimes and I investigate computer crimes, internet crimes." The statement was made at the beginning of Investigator Helmueller's testimony before the state asked any specific questions relating to the case. A jury cannot reasonably infer from Investigator Helmueller's list of job duties that each duty pertains to this specific case. Even if the statement confused a juror regarding the status of this case, the state's subsequent questioning mitigated any prejudice. Investigator Helmueller made it clear that Newsome's case was not high profile. Although the comment was a poor choice of words, it did not have a significant impact. The court did not plainly err in admitting Investigator Helmueller's testimony.

III. Admitting pictures of B.M.'s cell phone

Newsome argues that the photographs of B.M.'s cell phone were not adequately authenticated. Newsome also argues that the actual cell phone to which the text messages were sent is more appropriate evidence of the text messages under the best-evidence rule. "The [district] court has considerable discretion under Minn. R. Evid. 901(a) in deciding whether evidence has been adequately authenticated or identified . . . ." *State v. Dulak*, 348 N.W.2d 342, 344 (Minn. 1984). We review the district court's evidentiary rulings for an abuse of discretion. *Mahkuk*, 736 N.W.2d at 686.

Authentication

"The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Minn. R. Evid. 901(a). One way authentication can be achieved is through the testimony of a witness with knowledge "that a matter is what it is claimed to be." Minn. R. Evid. 901(b)(1). The photos of B.M.'s phone were authenticated by Officer Stevens, who photographed the phone. The text messages were authenticated by B.M., the recipient of the text messages. B.M. also testified that the phone in the photos was his phone.

Next, Newsome argues that the state failed to submit complete phone records to show that text messages from B.M. to Newsome had not been deleted. Newsome asserts that without a showing that text messages had not been deleted, the photographs could not be properly authenticated. Newsome compares the text messages to an audio

recording, in which both sides of the conversation must be admitted in order to be authenticated. This argument is unavailing. Officer Stevens testified to taking the photographs of B.M.'s phone and B.M. testified to the contents of each photograph and to the text messages. Whether the messages were deleted is irrelevant for purposes of determining whether the remaining text messages were threatening in nature. Phone records establishing that B.M. had indeed deleted his response to Newsome's threatening text messages may provide context for the conversation, but would not rebut Newsome's text messages satisfying the elements for a terroristic threat. B.M. testified to the authenticity of Newsome's text messages, and there is no evidence that the text messages themselves were altered.

Best evidence

Newsome also argues that the photos of the text messages were not the best evidence. Under Minn. R. Evid. 1002, the original writing, recording, or photograph is generally required to prove the contents of the evidence. However, other evidence of the content of a writing, recording, or photograph is admissible if "[a]ll originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith." Minn. R. Evid. 1004. If the original is not produced, it is a question of fact for the jury to determine whether the secondary evidence correctly reflects the contents of the original. Minn. R. Evid. 1008 cmt. Credibility determinations are the sole province of the jury. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). B.M testified that he no longer had possession of the phone because he sold it. There is no evidence B.M. acted in bad faith; he had already had the officer take pictures of the text messages, preserving the evidence

for trial. Furthermore, the state persuasively argues that, in light of the amount of personal information in a phone and the frequency of everyday use, it would be illogical to keep B.M.'s cell phone as physical evidence. Admitting the content through photograph exhibits provided admissible evidence to the jury in a different form and corroborated B.M.'s testimony. The jury determined that the photographs correctly reflected the actual text messages. The photographs of the text messages were properly authenticated.

"Contrary speculation may well affect the weight of the evidence accorded it by the factfinder but does not affect its admissibility." *State v. Johnson*, 307 Minn. 501, 505, 239 N.W.2d 239, 242 (1976). Newsome's assertion that his phone was stolen the week the text messages were sent does not negate authenticity of the text messages or the testimony of B.M. that Newsome was the sender.

IV. Notice of the predicate violent crime as a violation of due process

Newsome argues that his due-process rights were violated because he was not on notice of the predicate crime of violence required for a charge of terroristic threats. Whether a due-process violation has occurred is a question of law that we review de novo. *State v. Bobo*, 770 N.W.2d 129, 139 (Minn. 2009). We review unobjected-to due-process claims for plain error. *State v. Beecroft*, 813 N.W.2d 814, 836 (Minn. 2012). Before considering whether to correct an unobjected-to error, we must find an "(1) error; (2) that is plain; and (3) the error must affect substantial rights." *Griller*, 583 N.W.2d at 740. If these three prongs are satisfied, we then assess whether we should address the error to "ensure fairness and the integrity of the judicial proceedings." *Id.*

Under the Sixth and Fourteenth Amendments, "the state [must] inform a defendant of the nature and cause of the accusation." *State v. Chauvin*, 723 N.W.2d 20, 29 (Minn. 2006) (quotation omitted). A complaint satisfies the "nature and cause" requirement if it "contains such descriptions of the offense charged as will enable him to make his defense and to plead the judgment in bar of any further prosecution for the same crime." *State v. Becker*, 351 N.W.2d 923, 926 (Minn. 1984) (quotation omitted). The complaint referenced both the statute for terroristic threats, Minn. Stat. § 609.713, subd. 1, and the statute defining "violent crime," Minn. Stat. § 609.1095, subd. 1(d) (2012). The complaint did not explicitly identify the predicate violent crime. The complaint included a probable cause statement regarding the threatening text messages:

> In one of the messages, Newsome states that if B.M. continues to talk to his girl he, Newsome, would blow B.M.'s head off. In another message Newsom [sic] stated he would deliver B.M.'s head to his mother and brother.

The probable-cause statement is sufficient to satisfy the notice requirement of the due-process clause. Homicide, not mere assault, is alleged in the probable cause statement as the predicate crime. The charges stem directly from the text messages mentioned in the statement; this gives sufficient notice for Newsome to develop a defense. Therefore, no plain error occurred and Newsome's due-process rights were not violated. Although we hold that Newsome's due-process rights were not violated, we note that the best practice for the state is to include the predicate violent crime in the complaint. Doing so will ensure defendants are on notice of all elements of the crime charged, and doing so requires minimal additional effort by the prosecution.

V. Plea bargaining as a violation of due process

Newsome asserts that his rights were violated when the prosecutor threatened to add charges if Newsome did not plead guilty to the terroristic-threats charge. Whether a due-process violation has occurred is a question of law that we review de novo. *Bobo*, 770 N.W.2d at 139. Prosecutors have discretion in plea bargaining. *State v. Leming*, 617 N.W.2d 587, 590 (Minn. App. 2000). As such, the trial court should not ordinarily interfere with the bargaining process between parties. *State v. McEwan*, 265 N.W.2d 818, 820-21 (Minn. 1978). Newsome called the court's attention to the prosecutor's plea bargain prior to trial. He implied in statements to the district court and in his brief that the new charges were based on the same facts underlying the terroristic threats charge. However, the state learned the week before trial that B.M. had reported two occasions of Newsome allegedly violating a restraining order. The prosecutor left a voicemail for defense counsel in which she offered, in exchange for a guilty plea to the terroristic-threats charge, to refrain from charging the alleged HRO violations. In an affidavit submitted to this court, defense counsel includes a transcript of the prosecutor's voicemail. After making the offer, the prosecutor then said, "[I]f your client is not interested that's fine, we can proceed to trial on Monday and . . . it will get charged out and we'll deal with that charge . . . when it comes." As the district court found, this type of plea bargaining is not unusual nor a violation of rights. Newsome's due-process rights were not violated by the prosecutor's plea offer.

VI. Cumulative errors

Newsome argues that the cumulative effect of trial errors warrants reversal. "[I]n rare cases, . . . the cumulative effect of trial errors can deprive a defendant of his constitutional right to a fair trial when the errors and indiscretions, none of which alone might have been enough to tip the scales, operate to the defendant's prejudice by producing a biased jury." *State v. Davis*, 820 N.W.2d 525, 538 (Minn. 2012) (quotation omitted). None of the raised issues prejudiced Newsome or had an effect on the outcome of the trial. Newsome received a fair trial, and the jury based its verdict on ample admissible evidence.

VII. Constitutional speedy-trial rights

Newsome makes two separate arguments related to delays in the case. First, he argues that his Sixth Amendment right to a speedy trial was violated by the 12 months between charging and the trial. Second, Newsome argues that his due-process rights were violated by the pre-charging delay. Newsome asks this court to create a rule to expedite the charging process.

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. Whether a defendant's constitutional right to a speedy trial has been violated is a question of law subject to de novo review. *State v. Cham*, 680 N.W.2d 121, 124 (Minn. App. 2004), *review denied* (Minn. July 20, 2004). "In order to determine whether a delay in any given case constitutes a deprivation of the right to a speedy trial, courts are instructed to

use the balancing test announced by the United States Supreme Court in *Barker v. Wingo*, 407 U.S. 515, 92 S. Ct. 2182 (1972)." *State v. Windish*, 590 N.W.2d 311, 315 (Minn. 1999). "The [*Barker*] test provides that a court must consider (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.* "None of the factors 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.'" *Id.* (quoting *Barker*, 407 U.S. at 533, 92 S. Ct. at 2182). "When the defendant's right to a speedy trial has been deprived, dismissal, while severe, is the remedy." *State v. Stitzel*, 351 N.W.2d 409, 410 (Minn. App. 1984).

Length of Delay

A delay of greater than 60 days is presumptively a violation of a defendant's right to a speedy trial. *Windish*, 590 N.W.2d at 315-16. This factor favors a finding of a violation of Newsome's right to a speedy trial, but it is not dispositive. Although any delay past 60 days is a presumptive violation, delays of longer periods of time have not resulted in reversal of a conviction when good cause for the delay is shown. *See, e.g., State v. Johnson*, 498 N.W.2d 10, 16 (Minn. 1993) (finding good cause for a 629-day delay); *Cham*, 680 N.W.2d at 125 (finding good cause for a 23-month delay); *but see State v. Griffin*, 760 N.W.2d 336, 340 (Minn. App. 2009) (concluding that an eight-month delay was a violation of the defendant's speedy-trial right). Consequently, we must inquire into the other factors to determine if good cause is shown.

Reason for delay

Once the complaint was filed in July of 2011, there was an initial delay of over three months before a probable cause hearing was held on November 14, 2011. At that time, Newsome waived his speedy-trial rights and the court set his trial for May 7, 2012. Newsome requested a continuance on May 7, 2012, because of newly retained counsel and the trial began on August 6, 2012. Although the initial delay apparently was not the fault of the defendant, there is no evidence that it was the result of the state's bad faith. *See Cham*, 680 N.W.2d at 125 (determining that a lack of prosecutorial bad faith is a factor in determining whether a delay was unreasonable).

Demand

Newsome waived his right to a speedy trial. This factor weighs in favor of the state.

Prejudice

"We consider three factors in determining if a defendant was prejudiced by the delay: (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." *Cham*, 680 N.W.2d at 125 (quotation omitted). Newsome may have suffered some anxiety and concern, but he has failed to demonstrate that he was prejudiced because of the trial delay. He was never arrested or incarcerated and he was able to maintain full-time employment. At no point did the state's actions affect Newsome's due-process rights. Although the delay is largely unexplained, Newsome caused the only known delay by requesting a continuance, and the state did not act in bad faith in

postponing the trial. Furthermore, Newsome waived his right to a speedy trial and was not unduly prejudiced by the delay. We conclude that appellant was not denied a speedy trial.

Pre-charging process

Newsome's second argument, that his due-process rights were violated by the five-month pre-charging delay, lacks merit. In order for a pre-charging delay to warrant dismissal, defendant must show "at trial that the pre-indictment delay caused substantial prejudice to the defendant's rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused." *State v. Lussier*, 695 N.W.2d 651, 654 (Minn. App. 2005) (quotation omitted). As discussed above, Newsome has not shown any prejudice resulted from delay. Newsome also has not shown that the prosecution prolonged this period as a tactical advantage over him. Furthermore, Newsome's request for a rule to expedite the charging process might result in a prosecutor filing a complaint based on an incomplete investigation. Statutes of limitations provide defendants with a specific period in which they can expect charges. *State v. Danielski*, 348 N.W.2d 352, 356 (Minn. App. 1984), *review denied* (Minn. July 26, 1984). The delay in the trial did not deprive Newsome of his right to a speedy trial, and the delay in charging did not violate Newsome's due-process rights.

Affirmed.