STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0042

State of Minnesota,
Respondent,

vs.

Jerome Dominic Gussiaas,
Appellant.

Filed December 23, 2013
Affirmed
Stauber, Judge

Hennepin County District Court
File No. 27CR1050242

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

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Anthony M. Grostyan, Minneapolis, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Bjorkman, Judge; and Minge, 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

STAUBER, Judge

On appeal from his convictions of two counts of misdemeanor domestic assault, appellant argues that (1) he was denied his right to a speedy trial; (2) the district court abused its discretion by granting the state's motion to exclude appellant's expert witness; and (3) the district court abused its discretion by denying appellant's request for a brief continuance to allow his expert witness to testify. We affirm.

FACTS

Appellant Jerome Dominic Gussiaas was charged with felony domestic assault by strangulation and two counts of misdemeanor domestic assault for allegedly assaulting his ex-girlfriend A.B. After several continuances, a jury trial began in October 2012, two years after the complaint was filed. A.B. testified that on October 2, 2010, she was involved in an argument with appellant at her apartment. According to A.B., appellant's "anger escalated" and he grabbed her and "threw [her] into the door frame." A.B. also testified that appellant grabbed the sides of her arms and "pinned" her down on the bed, and later wrapped his hands around her throat and choked her. Photographs of bruises and marks on A.B.'s body were admitted into evidence, which allegedly depicted the injuries A.B. sustained during the assaults.

After the state rested, a discussion was held regarding appellant's request to call Dr. Steven Tredal as an expert witness to give his medical opinion "as to whether or not [A.B.] received an injury or even physical contact to the neck." Because he was not available to testify at the onset of appellant's case, appellant asked the district court for a

brief continuance to allow Dr. Tredal to testify. The district court denied the request. The issue of Dr. Tredal's availability was then discussed further by the parties, prompting the state to request a ruling on its motion to exclude Dr. Tredal as a witness. Concluding that his testimony would not "be helpful to the trier of fact," the district court granted the state's motion to exclude Dr. Tredal's testimony.

The jury found appellant not guilty of felony domestic assault by strangulation, but guilty of the remaining two misdemeanor domestic assault charges. The district court then sentenced appellant to "90 days in the Hennepin County Adult Corrections Facility," imposed a $1,000 fine, and ordered restitution. This appeal followed.

D E C I S I O N

I.

Appellant argues that he was denied his right to a speedy trial. The United States and Minnesota Constitutions guarantee the right to a speedy trial. U.S. Const. amend. VI; Minn. Const. art. I., § 6; *State v. DeRosier*, 695 N.W.2d 97, 108 (Minn. 2005). "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 an accused was deprived of the right to a speedy trial, this court considers the four-factor balancing test announced in *Barker v. Wingo*, 407 U.S. 514, 530-33, 92 S. Ct. 2182, 2191-93 (1972): "(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." *DeRosier*, 695 N.W.2d at 109. "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." *State v. Windish*, 590 N.W.2d 311, 315 (Minn. 1999) (quotation omitted).

A. Length of delay

In Minnesota, following a speedy-trial demand, the trial shall commence within 60 days of the demand unless good cause is shown. Minn. R. Crim. P. 11.09. Delay beyond the 60-day period raises a presumption that a defendant's speedy-trial right has been violated and requires further inquiry into whether a violation has occurred. *State v. Friberg*, 435 N.W.2d 509, 513 (Minn. 1989).

Here, appellant did not demand a speedy trial. Consequently, we must measure the delay from the time the complaint was filed to the time of the trial. *See State v. Jones*, 392 N.W.2d 224, 235 (Minn. 1986) ("The delay in speedy-trial cases is calculated from the point at which the sixth amendment right attaches: when a formal indictment or information is issued against a person or when a person is arrested and held to answer a criminal charge."). The complaint in this case was filed in October 2010, but the trial was not held until two years after the complaint was filed. This delay is presumptively prejudicial and the remaining *Barker* factors must be analyzed. *See State v. Smith*, 749 N.W.2d 88, 97 (Minn. App. 2008) (holding that ten-month delay following charge raised rebuttable presumption of prejudice).

B. Reason for delay

"The responsibility for promptly bringing a case to trial rests with the state." *Hahn*, 799 N.W.2d at 30. "There may be no violation if the delay is due to good cause." *State v. Griffin*, 760 N.W.2d 336, 340 (Minn. App. 2009); *see also* Minn. R. Crim. P. 11.09(b). The state's deliberate attempt to delay trial weighs heavily against the state, while negligent or administrative delays receive less weight. *Barker*, 407 U.S at 531, 92 S. Ct. at 2192. When a delay in bringing a case to trial is the result of the defendant's own actions, no speedy-trial violation will be found. *See State v. Johnson*, 498 N.W.2d 10, 16 (Minn. 1993).

Appellant argues that this factor weighs in his favor because "[t]here was no good reason for a case such as this to be delayed for over two years from arrest to trial, especially where none of the delay can be attributed to [him]." But it is well settled that an appellant is responsible for providing a record adequate for appellate review. *See State v. Carlson*, 281 Minn. 564, 566, 161 N.W.2d 38, 40 (1968) (stating that a "party seeking review has a duty to see that the appellate court is presented with a record which is sufficient to show the alleged errors and all matters necessary to consider the questions presented"). Here, appellant claims that his case was continued eight times. The record, however, contains transcripts of only two of those continuances. Without the transcripts of those proceedings, it is impossible to adequately review the cause of most of the continuances. *See State v. Vang*, 357 N.W.2d 128, 128 (Minn. App. 1984) (affirming because the limited record available to the court on appeal made appellate review impossible). Although we recognize that there may not be a record of many of the

continuances because the discussions were held in chambers, we urge attorneys to make a record of such discussions to ensure adequate appellate review in the event such review becomes necessary.

Moreover, appellant does not claim that the state deliberately caused the delay. Rather, appellant claims that some of the delays were for administrative reasons, while other delays were for "undocumented reason[s]." Thus, even if we were to accept the reasons for the continuances as recollected by appellant, the reasons receive less weight due to their administrative nature. *See Barker*, 407 U.S at 531, 92 S. Ct. at 2192 (recognizing that negligent or administrative delays receive less weight).

Finally, in the proceedings in which appellant did provide the transcripts, the record from the October 31, 2011 hearing indicates that appellant was in favor of a later trial date due to the end of the year being an "extremely busy time of year at work." And, the record from October 29, 2012 shows that the one-day continuance was due to the defendant in a prior case having priority because he was in custody and had made a speedy trial demand. Accordingly, the limited record before us indicates that the state, the court system, and appellant are equally responsible for the delay, which makes this factor neutral.

C. Demand

Assertion of a speedy-trial right "need not be formal or technical." *Windish*, 590 N.W.2d at 317. While "defendants are not required to continuously reassert their demand," "the frequency and force of a demand must be considered when weighing this factor." *Friberg*, 435 N.W.2d at 515. A district court must assess "the frequency and

intensity of a defendant's assertion of a speedy trial demand—including the import of defense decisions to seek delays." *Windish*, 590 N.W.2d at 318.

Here, the record reflects, and appellant does not dispute, that he did not assert his right to a speedy trial. In fact, the record reflects that appellant asked for a brief continuance during trial so that his expert witness could testify in his defense. Thus, the third *Barker* factor weighs against appellant.

D. Prejudice

The prejudice factor is measured "in the light of the interests of defendants which the speedy trial right was designed to protect." *Barker*, 407 U.S. at 532, 92 S. Ct. at 2193. Three interests must be assessed: (1) preventing oppressive pretrial incarceration; (2) minimizing the accused's anxiety and concern; and (3) limiting the possibility that the defense will be impaired. *Id.* The third interest is the most important. *Id.*

Appellant argues that he was prejudiced by the delay because the uncertainty surrounding his legal status "made it difficult for [him] to conduct business as usual in his high pressure occupation," and caused him to suffer through two years of the "anxiety and concern accompanying public accusation." Appellant also contends that his defense was impacted because the two-year delay caused his testimony to become stale, which adversely affected his credibility.

We disagree. The "stress, anxiety and inconvenience experienced by anyone who is involved in a trial" does not constitute serious prejudice. *Friberg*, 435 N.W.2d at 515. Here, as the state points out, appellant has not suffered any more anxiety and concern than any other defendant awaiting trial in our criminal justice system. Moreover, there is

nothing in the record which indicates that appellant's career suffered as a result of the delay. And, although the most serious prejudice factor is impairment of a defendant's defense, *Windish*, 590 N.W.2d at 318, appellant does not identify any specific prejudice by the delay. Appellant's testimony was no more stale than that of the state's witnesses, and he fails to point to any details he may have forgotten during his trial testimony. Thus, this factor does not weigh in favor of appellant.

In sum, the two-year delay was significant. But appellant did not assert his speedy-trial right, and appellant does not demonstrate that he was prejudiced by the delay. Moreover, the reasons for the delay do not appear to be significantly attributable to the state; rather they appear to be equally attributable to not only appellant and the state, but also the court system. Accordingly, because the *Barker* factors do not weigh heavily against the state, and because appellant did not invoke his right to a speedy trial, we conclude that appellant's speedy-trial right was not violated.

II.

This court reviews the district court's evidentiary rulings for an abuse of discretion. *State v. Burrell*, 772 N.W.2d 459, 465 (Minn. 2009). A defendant challenging an evidentiary ruling has the burden of establishing that the district court abused its discretion and that the defendant was prejudiced by the ruling. *Id.*

Appellant argues that the district court abused its discretion by granting the state's motion to exclude appellant's presentation of expert-witness testimony. But, even if we were to conclude that the district court improperly excluded Dr. Tredal's testimony, appellant cannot establish that he was prejudiced by the decision. Although the district

court did not allow Dr. Tredal to testify, his curriculum vitae, along with his letter providing his opinion as to whether A.B. was strangled was admitted into evidence. The letter provided that in Dr. Tredal's opinion, A.B. was not strangled and did not sustain any injuries to her neck. Appellant was then acquitted of the strangulation charge. The fact that appellant was acquitted of the strangulation charge demonstrates that appellant was not prejudiced by the decision to exclude Dr. Tredal's testimony. *See State v. Reese*, 446 N.W.2d 173, 177-78 (Minn. App. 1989) (no prejudice from admission of evidence when defendant was acquitted of primary felony charge), *review denied* (Minn. Nov. 15, 1989).

Appellant also argues that he was prejudiced by the exclusion of his expert witness because Dr. Tredal was "prepared to address the bruises depicted in photographs of [A.B.], to explain how their coloration bears upon the cause of bruising and the time at which the bruising occurred." But appellant failed to make an offer of proof that Dr. Tredal would testify about the coloration of the complainant's bruises. Instead, the letter provided by Dr. Tredal and admitted into evidence focuses exclusively on the complainant's alleged injuries to her neck. And at trial, when the district court asked about Dr. Tredal's testimony, appellant stated that

> the substance of Dr. Tredal's testimony . . . would involve his medical opinion as an expert after reviewing the photographs that have been submitted in this case as exhibits and also all the police reports . . . and he would be providing an opinion as to whether or not [A.B.] received an injury or even physical contact to the neck, which I think is the most important issue in this case.

Consequently, the record indicates that Dr. Tredal's testimony was not directed toward the two misdemeanor domestic assault charges. Moreover, even if his testimony was applicable to those charges, the evidence supporting appellant's convictions was strong, which included photographs of bruises on A.B.'s body and testimony from the neighbors who heard appellant and A.B. arguing. Accordingly, appellant cannot establish that he was prejudiced by the district court's decision to exclude Dr. Tredal's testimony.

Because appellant cannot establish any prejudice by the district court's decision, appellant's argument that the district court abused its discretion by denying his motion for a continuance to allow Dr. Tredal the opportunity to testify for the defense is moot. *See Obermoller v. Fed. Land Bank of St. Paul*, 409 N.W.2d 229, 230-31 (Minn. App. 1987) (stating that an issue is moot when a determination is sought on a matter, which, when made, will not have any practical effect or will make no difference with respect to the controversy on the merits), *review denied* (Minn. Sept. 18, 1987). Thus, we do not address it.

Affirmed.