STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1631

State of Minnesota,
Respondent,

vs.

Dakota M. Galtney,
Appellant.

Filed December 9, 2008
Affirmed
Klaphake, Judge

Ramsey County District Court
File No. K0-06-2098

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Susan Gaertner, Ramsey County Attorney, Mitchell L. Rothman, Assistant County Attorney, 50 West Kellogg Blvd., Suite 315, St. Paul, MN 55102 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Jodie Lee Carlson, Assistant State Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Worke, Presiding Judge; Klaphake, Judge; and Peterson, Judge.

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

KLAPHAKE, Judge

Dakota Marta Galtney appeals from the jury conviction of (1) possession of a firearm by an ineligible person in violation of Minn. Stat. § 624.713, subd. 1(b) (2004); (2) possession of a firearm by an ineligible person committed for the benefit of a gang in violation of Minn. Stat. § 609.229, subds. 2, 3(a) (2004); (3) first-degree aggravated robbery in violation of Minn. Stat. §§ 609.245, subd. 1, .05, subd. 1 (2004); and (4) first-degree aggravated robbery committed for the benefit of a gang in violation of Minn. Stat. § 609.229, subds. 2, 3(a). Because there was sufficient evidence to support the jury verdict and any error in permitting gang-related evidence did not adversely impact appellant's substantial rights, and because appellant has not proven prejudice due to the length of delay in commencing the trial, we affirm.

D E C I S I O N

1. Sufficient Evidence of Guilt

Appellant contends that there was insufficient evidence to convict him of the charges. "The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires the state, in a criminal case, to prove beyond a reasonable doubt every fact necessary to constitute the crime with which the defendant is charged." *State v. Otterstad*, 734 N.W.2d 642, 645 (Minn. 2007) (citing *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073 (1970)). In considering a claim of insufficient evidence, this court's "review on appeal is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction,

was sufficient to permit the [fact-finder] to reach the verdict which [it] did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We should assume the fact-finder "believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). "[A] conviction may rest on the testimony of a single credible witness." *State v. Miles*, 585 N.W.2d 368, 373 (Minn. 1998); *State v. Williams*, 307 Minn. 191, 198, 239 N.W.2d 222, 226 (1976) (conviction upheld on testimony of store clerk).

Here, the victim, A.M., claimed appellant and Kevin Anthony robbed him at gunpoint. A.M. testified that sometime in April 2006, appellant and Anthony followed him out of a house where they had been smoking marijuana and drinking. A.M. stated that they surrounded him and demanded he "run his pockets," meaning to give them whatever was in his pockets. A.M. stated that when he refused, appellant pulled out a gun and again demanded he "run his pockets" and this time both appellant and Anthony repeated phrases such as "LTG" and "E-block," which A.M. stated referred to a gang called Lowertown Gangsters. A.M. gave a similar report to the police when he filed a police report one or two months after the incident, but failed to mention anything about a gun. A.M. first mentioned a gun during a second police interview a few days later. These mostly consistent statements made to police corroborated A.M.'s testimony at trial. *See State v. Halvorson*, 506 N.W.2d 331, 335-36 (Minn. App. 1993) (holding prior consistent statements corroborated victims' testimony).

Based on this testimony, there is sufficient evidence for a jury to conclude that appellant committed the underlying crime of aggravated robbery. Furthermore, uttering

gang-related statements such as the gang's name, LTG, or sub-gang, E-Block, during the commission of a crime sufficiently supports the inference that it was committed for the benefit of a gang. *State v. Carillo*, 623 N.W.2d 922, 930 (Minn. App. 2001), *review denied* (Minn. June 19, 2001). In addition, three police officers testified regarding prior statements made by appellant that he was a member of the LTG or that he had previously been an LTG member.

There is also ample evidence that appellant was in constructive possession of the firearm as an ineligible person. *See State v. Smith,* 619 N.W.2d 766, 770 (Minn. App. 2000), *review denied* (Minn. Jan. 16, 2001) (ruling that state must establish either actual or constructive possession of a firearm for conviction). After receiving A.M.'s complaint, probation officer Arvidson conducted a probation violation search of appellant's home. During the search, a gun wrapped in a sock was discovered under appellant's bed, an area over which appellant had access and exercised dominion and control. *See id*. (holding constructive possession may be found where "the inference is strong that the defendant physically possessed the item at one time and did not abandon his possessory interest in it"). The fact that Kevin Anthony also exercised control over the firearm by being in the same room does not negate appellant's control over and connection to the same gun. *See State v. Olson*, 326 N.W.2d 661, 663 (Minn. 1982) (holding constructive possession may be shared with others as long as defendant consciously exercised his dominion and control over the firearm).

Sufficient evidence also existed for the jury to conclude that appellant possessed the gun for the benefit of a gang. The fact finder is permitted to make reasonable

inferences and connections between the gun used during the robbery and the one discovered under appellant's bed. *State v. Brown*, 732 N.W.2d 625, 628 (Minn. 2007) (holding court must accept reasonable inferences jury can draw from evidence that is favorable to the verdict). A.M. testified that a gun was used during the robbery and that even though it was dark, he saw its general shape—specifically, it was not like that of a policeman's gun but more of an old fashioned, cowboy gun. He further testified that the gun found in appellant's bedroom was like the gun he saw the evening of the robbery.

A review of the record indicates the evidence was sufficient to support appellant's conviction on the underlying claim of aggravated robbery and that the robbery was committed for the benefit of a gang, that appellant possessed a firearm as an ineligible person, and that he possessed the gun for the benefit of a gang.

2. Evidence of Gang Membership

Appellant also complains that he was denied the right to a fair trial because of the improper admission of co-defendant Anthony's prior statements made to police and of gang expert testimony. The critical question is whether the purported improper gang-related evidence adversely impacted appellant's substantive rights.

Appellant acknowledges that defense counsel failed to properly object to most of the gang-related testimony admitted at trial. In general, the failure to object to the admission of evidence constitutes a waiver of the issue on appeal. *State v. Vick*, 632 N.W.2d 676, 684 (Minn. 2001). Despite the foregoing, the rules state that "[p]lain errors or defects affecting substantial rights may be considered by the court . . . on appeal although they were not brought to the attention of the trial court." Minn. R. Crim. P.

31.02; *see also State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). "The plain error standard requires that the defendant show: (1) error; (2) that was plain; and (3) that affected substantial rights." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). An error is plain if it is "clear" or "obvious." *Id.* at 688 (citations omitted). In *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006), the supreme court stated that an error is clear or obvious if the error "contravenes case law, a rule, or a standard of conduct." *Id.*

To establish that appellant committed a crime for the benefit of a gang, the state was required to prove that a criminal gang existed and that the crime was committed for the benefit of the gang. Minn. Stat. § 609.229, subds. 1, 2 (2002); *State v. Mahkuk*, 736 N.W.2d 675, 687 n.3 (Minn. 2007). Here, appellant claims that he was convicted based on improper hearsay evidence concerning his purported gang membership, prejudicial gang expert testimony, and prejudicial bad character evidence.

Although the supreme court has identified concerns with the use of gang expert testimony, its admission is not prohibited. *State v. Jackson*, 714 N.W.2d 681, 691 (Minn. 2006). The court recommends that "firsthand knowledge testimony be used to prove the 'for the benefit of a gang' element when feasible." *Id.* The court further allows that gang expert testimony should be admitted if it is helpful to the fact-finder in making specific factual determinations. *State v. Blanche*, 696 N.W.2d 351, 373 (Minn. 2005); *see also Carillo*, 623 N.W.2d at 928 (explaining that an officer with knowledge and experience concerning a particular gang's activities "is able to offer a factual perspective that is both helpful and not otherwise available to a lay juror").

Here, there is no question that the majority of the prosecution's case focused on the gang-related evidence. Co-defendant Kevin Anthony's testimony included numerous out-of-court statements used for impeachment or to refresh recollection concerning prior gang-related incidents, prior bad acts, and acts of violence by purported gang members, including appellant. Three police officers also testified generally regarding gang activities and that appellant and Anthony were LTG members, opinions based partially on prior statements each made to police. The victim, A.M., also testified that appellant was a gang member and used gang references of "LTG" and "E-block" when he robbed A.M. at gunpoint. This firsthand knowledge testimony is permissible and within the scope of admissible evidence. *See Jackson*, 714 N.W.2d at 691.

In addition to the direct testimony of Anthony and the other three officers, however, Officer Kennedy testified as the state's gang expert. Her testimony included (1) hearsay statements of other gang members stating that appellant and Anthony were LTG members, (2) general criminal activities of the LTG, including shootings and aggravated assaults, (3) statements regarding an ongoing war between the LTG and Selby Siders, and police activities to protect the community from these gang fights, (4) incidents of gang members beating or assaulting other gang members in order to teach a lesson, and (5) an ultimate opinion that appellant and Anthony were LTG members based on ten criteria used by police departments.

Appellant complains that Kennedy's testimony was improper. We agree. Considering the cautionary instruction given by the supreme court in *Jackson*, this expert witness testimony should not have been used here because it was cumulative in light of

testimony from the victim and the other three officers regarding the prior statements of appellant and Anthony admitting they were members of a gang. *See Jackson*, 714 N.W.2d at 691 (instructing that "firsthand knowledge testimony be used to prove the 'for the benefit of a gang' element when feasible.").[1] In light of the supreme court's admonitions in *Jackson*, we conclude that appellant has demonstrated plain error. We must therefore consider whether this error affected his substantial rights.

"An error affects substantial rights when there is a 'reasonable likelihood' that the absence of error would have had a 'significant effect' on the jury's verdict." *State v. Clark*, 755 N.W.2d 241, 252 (Minn. 2008) (citation omitted). In prior cases, the supreme court has concluded that when there is ample independent evidence establishing a defendant's links to a gang and supporting the conclusion of guilt as to the crimes charged, the expert testimony corroborated other witnesses' testimony, and likely was no more influential than the other evidence. *See State v. Martinez*, 725 N.W.2d 733, 739 (Minn. 2007) (examining the line of gang-expert-testimony cases). In those cases, because the error did not affect substantial rights, reversal was not warranted.

Here, again, there was ample evidence for a jury to convict appellant based on the victim's testimony and appellant's own prior statements of being a LTG member. Kennedy's testimony, like that in *Martinez*, tended to confirm the direct evidence.

[1] We also note that any question of undue prejudice could have been avoided by bifurcating the underlying charge, with the consent of the defendant, for trial from the charge of being committed for the benefit of a gang. *See Jackson*, 714 N.W.2d at 701 (concurring opinion) (suggesting bifurcation "in order to prevent the unfair prejudice that character and other crime aspects of gang evidence may have on the jury's evaluation of the evidence concerning a defendant's guilt for the underlying crimes.").

Therefore, we conclude there was no reasonable likelihood that the absence of the error would have significantly affected the jury's verdict. *Clark*, 755 N.W.2d at 252. Accordingly, we find appellant's substantial rights on the four counts were not adversely impacted. *See Griller*, 583 N.W.2d at 741 (explaining that the error affects a substantial right "if the error was prejudicial and affected the outcome of the case").

3. Speedy Trial

The United States and Minnesota Constitutions guarantee a defendant the right to a speedy trial. U.S. Const., amend. VI; Minn. Const., art. I, § 6. Minn. R. Crim. P. 11.10 requires that trial commence within 60 days of a demand for a speedy trial, unless the state, defense counsel, or the court shows good cause why the trial cannot begin within that period of time. The district court's speedy trial determination, as a constitutional question, is reviewed de novo. *State v. Cham*, 680 N.W.2d 121, 124 (Minn. App. 2004), *review denied* (Minn. July 20, 2004). To determine whether a defendant's right to a speedy trial has been violated, courts employ a balancing test and consider four factors: "(1) the length of the delay; (2) the reason for the delay; (3) whether and when the defendant asserted his right to a speedy trial; and (4) the prejudice to the defendant caused by the delay." *Id.*; *see Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192 (1972).

The reasons for delay do not raise a constitutional concern here. Although the 11-month delay here was significant, defense counsel acquiesced in several of the continuances. 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." *State v. Windish*, 590 N.W.2d 311, 318 (Minn. 1999).

Appellant demanded a speedy trial on June 15 and again on August 21, 2006. The trial was continued on August 21, September 6, and again on December 28, 2006, at the prosecution's request to complete DNA testing of the gun, evidence that the defense counsel also could use if exculpatory. Defense counsel did not object to the delay from December 28, 2006, to January 22, 2007. On January 22, defense counsel requested more time to obtain the transcript of co-defendant Anthony's plea agreement because he was listed as a state witness. On February 5, the district court permitted amendment of the complaint to include three additional charges of aggravated robbery and the addition of "committed for the benefit of a gang" to both charges. The record does not reflect a reason for the delay to April 2, 2007, but appellant did not object to this postponement. *See State v. Curtis*, 393 N.W.2d 10, 12 (Minn. App. 1986) (concluding that defendant's acceptance without objection of a trial date waived "strict compliance with the 60 day rule"). Finally, a week of the delay was attributable to appellant's nonappearance for trial on April 2, 2007. In analyzing the first three factors, there is good cause in the record for the numerous delays.

The fourth factor requires the court to consider the prejudice to the defendant caused by the delay. An "affirmative demonstration of prejudice" is not necessary, but a "court should also consider prejudice from interference with the [defendant's] liberty, disruption of employment, financial hardship, strain on friendships and associations, and

anxiety and stress to the defendant and the defendant's family." *State v. Rachie*, 427 N.W.2d 253, 257 (Minn. App. 1988), *review denied* (Minn. Sept. 20, 1988).

Appellant claims he was prejudiced mainly because the delay allowed his co-defendant to enter a plea to the gun charge and then testify against him, and because his defense counsel had a difficult time preparing for trial while appellant was in prison for a separate probation violation. There is no certainty that this prejudice was caused by or connected to the delay; his co-defendant may have reached the same plea agreement earlier had the trial not been continued and because appellant was in prison as of September 2006, the same inconvenience would have been incurred if trial was held earlier.

In considering the *Barker* factors together, the record does not support a conclusion that appellant was denied his right to a speedy trial.

Affirmed.