STATE OF MINNESOTA
IN COURT OF APPEALS
A10-205

State of Minnesota,
Respondent,

vs.

Adam Danforth Sherman,
Appellant.

Filed September 14, 2010
Affirmed
Halbrooks, Judge

St. Louis County District Court
File No. 69DU-CR-06-7562

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

Melanie S. Ford, St. Louis County Attorney, Mark S. Rubin, Assistant County Attorney, Duluth, Minnesota (for respondent)

Joanna M. Wiegert, Wiegert Law Office, Cloquet, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Stoneburner, Judge; and Stauber, Judge.

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

HALBROOKS, Judge

Appellant Adam D. Sherman challenges his conviction of fifth-degree misdemeanor assault, arguing that the district court erred by denying his motion to

dismiss on the grounds that (1) the three-year delay in conducting a trial violated his constitutional right to a speedy trial, (2) the district court erred by granting respondent State of Minnesota's motion to join his trial with the trials of his codefendants, and (3) the district court's executed sentence of 90 days in jail unfairly exaggerates the criminality of conduct. We affirm.

FACTS

On the evening of August 14, 2006, a group of minors attended a party at "Raspberry Hill," which is a field in Proctor. Many of the attendees were drinking alcohol. Appellant, his brother E.S., their friends J.A. and J.R., and the victim, A.O., were all at the party. At some point, E.S. poured beer on an individual who had passed out. A.O. became upset and told appellant and E.S. that the act was uncalled for. The group began arguing, and eventually A.O. walked away to "blow off steam." J.A. followed A.O. and told him to come back to the party because everything had calmed down. When A.O. returned to the party, he was put in a headlock by J.R., and J.A. began hitting A.O. from behind. Appellant and E.S. also hit A.O., and J.R. pulled A.O. to the ground. One witness testified that appellant and E.S. kicked A.O. while he was on the ground. A.O. testified that he did not remember hitting the ground but remembered "waking up" to hear someone yelling.

Immediately after the beating, A.O.'s face was swollen, and he was unable to walk. A witness called A.O.'s brother, who came to the location and helped A.O. leave. A.O.'s brother drove him home, and his mother told him to go to the hospital. A.O.

refused, so it was not until the following day that A.O. sought medical care for his injuries. A.O. testified that at this point he wanted retaliation.

A.O. was given pain medication, a knee immobilizer, crutches, and antibiotic drops for his eyes. A subsequent MRI showed that A.O. sustained serious injuries to his left knee. Specifically, he sustained a "grade 2 MCL tear and a grade 3 ACL tear." Although he participated in physical therapy, A.O. eventually needed surgery in October 2006 to repair his knee.

On December 6, 2006, appellant, J.A., J.R., and E.S. were jointly charged with third-degree assault. According to the record, appellant made his first appearance on December 29, 2006. An omnibus hearing was scheduled for January 16, 2007. The notations on the case-manager's report indicate that appellant waived the omnibus hearing, and the case was assigned and set for a pretrial. The following day, appellant's case was assigned to a district court judge. In a motion dated February 20, 2007, the state moved to join all four defendants for trial. Following that motion, there was a two-year lapse in activity on this case.

On March 16, 2009, the district court held a hearing on the joinder motion filed in 2007. At the hearing, the state withdrew its motion to join J.R.,[1] and the remaining defendants moved to dismiss the case for failure to prosecute. The prosecutor remarked that

> there were four different judges involved at the time this case was originally filed with the court, so there was—I made

[1] The state withdrew its motion with respect to J.R. because he apparently gave testimony at an omnibus hearing.

> some effort on my part to get this brought before one judge to hear the motion for joinder, so I think that the reason it got delayed and kind of fell off the charts is because the original assignment was to four separate judges.

Counsel for appellant and counsel for the codefendants opposed the state's motion, and also moved to dismiss for the state's failure to prosecute. Appellant's counsel also asked for a brief continuance on the issue of joinder because appellant was not present, and she had not discussed the state's motion with him. The district court took the motion to dismiss under advisement and set a new date for the joinder motion hearing in accordance with counsel's request.

In an order dated March 24, 2009, the district court denied appellant's motion to dismiss. The district court analyzed the issue as one of violation of a right to speedy trial and found that (1) the delay was not attributable to appellant, (2) appellant waived his right to a speedy trial and had not asserted that right since waiving it, (3) appellant did not suffer any prejudice or hardship as a result of the delay, (4) the state did not assert any reason for delay, and (5) the case appeared to have "[fallen] through the cracks." The district court concluded that "[o]n balance, justice requires that this matter be pursued to its conclusion as quickly as feasible."

On April 2, 2009, the district court held a hearing on the state's joinder motion. The state argued that appellant had not asserted any prejudice that would result from a joint trial and that it would be unjust to require the victim to go through separate trials when the same witnesses would be called in each trial. Counsel for appellant argued that the assault did not rise to the level of "complex illegal activity that's necessary to rebut

the presumption in favor of separate trials," the victim was not particularly vulnerable, and it was possible that prejudice would arise at some point during the proceedings.

The district court granted the state's motion for joinder. The district court found that (1) the codefendants acted in concert in committing the assault, (2) the impact on the victim would be substantial if he were required to testify in separate trials, (3) there would be potential prejudice at subsequent trials if the first received publicity, (4) there was no reason a jury could not appropriately process the information without undue prejudice, (5) there was no indication that the defendants were raising antagonistic defenses at that time, and (6) judicial economy weighed heavily in favor of joinder.

A trial was held on December 15, 2009. The jury acquitted appellant of the third-degree assault charge but found him guilty of the lesser-included charge of fifth-degree assault. In preparation for sentencing, a probation officer noted in appellant's presentence investigation (PSI) report that she was concerned by appellant's lack of remorse and refusal to admit any wrong-doing. The agent concluded that probation would be an ineffective consequence and recommended 90 days in the county jail or the Northeast Regional Correctional Center (NERCC). Appellant's attorney argued that the PSI "screams trial penalty" and that despite the guilty verdict, appellant was entitled to maintain his innocence. Appellant spoke at the hearing and stated, "I think that the record will show that [A.O.] instigated that himself [and] I was almost nowhere in the whole record anywhere at all." The district court stated that appellant's statement sounded like an excuse "after the fact" and due to the serious injuries sustained by the

victim, jail time was necessary. Appellant was sentenced to 90 days in county jail or NERCC. This appeal follows.

D E C I S I O N

I. Appellant's right to a speedy trial was not violated.

The federal and Minnesota Constitutions guarantee a criminal defendant the right to a speedy trial. U.S. Const. amend. VI; Minn. Const. art. I, § 6; *see also* Minn. R. Crim. P. 11.09. Whether a defendant's right to a speedy trial has been violated is reviewed de novo. *State v. Griffin*, 760 N.W.2d 336, 339 (Minn. App. 2009). To determine whether a delay deprived the accused of the right to a speedy trial, Minnesota courts apply the four-factor balancing test announced by the U.S. Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182 (1972). *State v. Widell*, 258 N.W.2d 795, 796 (Minn. 1977). The four factors 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. *State v. Windish*, 590 N.W.2d 311, 315 (Minn. 1999). No one factor is necessary to or dispositive of a determination that a defendant was denied the right to a speedy trial; the factors must be considered together in light of the relevant circumstances. *Id.*

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. Therefore, 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 delay between these two events was approximately three years, which is a presumptively prejudicial period of time that triggers analysis of the remaining factors.

B. Reason for Delay

Not all delays weigh heavily against the state. *Friberg*, 435 N.W.2d at 514. The state's deliberate attempt to delay the trial to hamper the defense would weigh heavily against the state, while negligent or administrative delays are given less weight. *Barker*, 407 U.S. at 531, 92 S. Ct. at 2192; *State v. Huddock*, 408 N.W.2d 218, 220 (Minn. App. 1987).

In this case, the district court found that the delay was not attributable to any deliberate actions by appellant or the state, but was administrative in nature, as the case appeared to have fallen "through the cracks." This finding is not challenged by appellant. Because the delay was due to administrative issues, it does not weigh heavily against the state.

C. Assertion of Right

A defendant's assertion of the right to a speedy trial need not be formal or technical, and it is determined by the circumstances. *Windish*, 590 N.W.2d at 317. A 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." *Id.* at 318. This court considers the "frequency and force" of the speedy-trial demand because "the strength of the demand is likely to reflect the seriousness and extent of the prejudice." *Friberg*, 435 N.W.2d at 515 (citing *Barker*, 407 U.S. at 529, 531, 92 S. Ct. at 2191, 2192).

The district court found that appellant waived his right to a speedy trial, a finding that appellant challenges. We cannot discern from the record whether appellant ever expressly waived his right to a speedy trial. But appellant does admit that he never affirmatively asserted his right to a speedy trial. Because appellant did not assert this right, this factor weighs in favor of the state.

D. Prejudice

Prejudice is measured in light of the interests that 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.* The defendant does not have to prove specific prejudice. *Griffin*, 760 N.W.2d at 341.

As noted by the district court, appellant was not in custody during the three-year delay, there is no indication that appellant suffered any anxiety or concern during the delay, and there is no indication that the defense was impaired by the delay. In fact, the district court noted that to the extent the defense was impaired by the delay, the state's case was equally impaired by the delay. We agree with the district court's assessment; the delay in trial in this matter would have burdened the state just as much as the defense. As such, the lack of prejudice weighs in favor of the state.

Considering the factors in the context of this case, the three-year delay in prosecuting appellant is presumptively prejudicial, and we do not condone the length of delay that occurred here. But because the remaining factors do not weigh heavily against the state and because appellant did not invoke his right to a speedy trial, we conclude that his speedy-trial right was not violated.

II. The district court did not err by granting the state's joinder motion.

Appellate review of joinder decisions requires an independent inquiry into whether the defendants suffered any substantial prejudice as a result of the joinder. *State v. Blanche*, 696 N.W.2d 351, 370 (Minn. 2005). Minn. R. Crim. P. 17.03, subd. 2, requires a district court to consider the following factors when determining whether multiple defendants should be joined for trial: (1) the nature of the offense, (2) the impact on the victim, (3) the potential prejudice to the defendants, and (4) the interests of justice. The district court has discretion regarding the joinder of defendants. Minn. R. Crim. P. 17.03, subd. 2(1). "This rule neither favors nor disfavors joinder." *State v. Jackson*, 773 N.W.2d 111, 118 (Minn. 2009).

Appellant first argues that joinder was inappropriate because he and his codefendants did not act in concert with one another or according to a sophisticated plan. The supreme court has determined that the nature of an offense may support joinder when the charges and evidence against the codefendants are similar. *Id.* In *Jackson*, the appellant argued that he and his codefendant did not act in close concert and therefore joinder was inappropriate. *Id.* But the supreme court affirmed, noting that the codefendants were charged with the same crimes and that the majority of the evidence presented was admissible against both defendants. *Id.* at 118-19.

Here, the district court found that appellant and his codefendants "acted in concert at the same time and place in committing an assault against a lone victim." Based on the complaint, the pretrial submissions, and the evidence ultimately admitted at trial, the record reflects that appellant and his codefendants did act in close concert with one another in committing the assault. The charges against each codefendant were identical, as was the evidence against them. Had separate trials been conducted, evidence of the actions of the other codefendants would have been admitted at each trial. The fact that the three did not act according to a sophisticated plan is of no consequence to this analysis; the rule does not limit joinder to offenses where the codefendants act pursuant to a complex plan.

Second, appellant argues that A.O. was not a particularly vulnerable victim nor was he subjected to a cruel or dehumanizing crime, and therefore the district court erred by granting the state's motion for joinder. Appellant relies on *State v. Stock*, 362 N.W.2d 351 (Minn. App. 1985), to support his argument. We find *Stock* to be inapposite. In

Stock, we analyzed the issue of joinder under a prior version of rule 17.03, subdivision 2(1), which stated that "[w]hen two or more defendants shall be jointly charged with a felony, they shall be tried separately" but allowed the district court to order a joint trial in the interests of justice "and not solely related to the economy of time or expense." *Id.* at 352 (quoting Minn. R. Crim. P. 17.03, subd. 2(1)). Since that time, rule 17.03 has been amended.

Nothing in the current rule 17.03, subdivision 2, limits joinder to offenses involving particularly vulnerable victims or crimes of a cruel nature. And while some of the cases discuss these considerations, nothing in our jurisprudence limits joinder to particularly vulnerable victims or gruesome crimes. The rule states that the district court has discretion to order joint trials as long as the four factors are considered.

The supreme court has stated that "[p]otential trauma to either the victim or an eyewitness to a crime is a factor that weighs in favor of joinder." *Jackson*, 773 N.W.2d at 119. Again, this statement of law does not limit joinder to instances where the victim is frail or vulnerable or the crime is particularly dehumanizing; instead, the district court must assess whether the victim may suffer trauma as a result of testifying in multiple trials. Here, the record reflects that the day after the assault, A.O. was reluctant to press charges "for fear of retribution." A.O. suffered serious injuries as a result of the assault, some of which required physical therapy and surgery. The district court concluded that the effect on A.O. could be substantial if he were required to testify at multiple trials. We agree. Therefore, this factor supports joinder.

Finally, appellant argues that he was prejudiced by the joint trial because the district court "failed to instruct the jury that each charge must be considered separately in regard to each respective defendant." Appellant relies on the case of *State v. Dick*, 638 N.W.2d 486, 491 (Minn. App. 2002), *review denied* (Minn. Apr. 16, 2002), to support this argument. But that case involved the joining of separate offenses, not separate defendants. *See* 10 *Minnesota Practice*, CRIMJIG 3.23 (2006) (providing an instruction for multiple offenses to be considered separately). Appellant did not request any additional instructions related to the joinder of the codefendants, and we cannot conclude that appellant was prejudiced by the district court's failure to give a jury instruction that appellant did not request then and does not articulate now.

Because the district court properly analyzed the four joinder factors and because the factors supported granting the state's motion to join the codefendants' cases for trial, we conclude that the district court did not err in granting the state's motion.

III. The district court did not abuse its discretion by sentencing appellant to an executed sentence of 90 days in jail.

The district court has broad discretion in misdemeanor cases to sentence the defendant within the limits defined by statute. *See State v. Lambert*, 392 N.W.2d 242, 243-44 (Minn. 1986), *superceded by statute on other grounds*, Minn. Stat. § 244.11 (1992). We will not interfere with the district court's exercise of its discretion unless the sentence is disproportionate to the offense. *State v. Hough*, 585 N.W.2d 393, 397 (Minn. 1998). If not otherwise specified, a district court may sentence a person convicted of a

misdemeanor offense to 90 days incarceration or payment of $1,000, or both. Minn. Stat. § 609.03(3) (2006).

Appellant argues that his 90-day jail sentence unfairly exaggerates his criminal conduct because he had no prior criminal history and "evidence reflected that his involvement in the incident charged was nominal." Before sentencing appellant, the district court stated that it had some concerns similar to those expressed in the PSI, namely that appellant continued to place blame on the victim for what happened to him. The district court also stated that "with the nature of the injuries to [the victim], it does seem to me that jail time is necessary." Based on this record, we conclude that the district court did not abuse its discretion by sentencing appellant to 90 days in jail, consistent with the statutory maximum for misdemeanor sentences. Because the 90-day sentence in NERCC is not disproportionate to appellant's crime, the district court acted within its discretion by imposing this sentence.

Affirmed.