STATE OF MINNESOTA
IN COURT OF APPEALS
A10-216

State of Minnesota,
Respondent,

vs.

Michael Angel Rosillo,
Appellant.

Filed February 8, 2011
Affirmed
Hudson, Judge

Morrison County District Court
File No. 49-CR-08-1395

Lori Swanson, Attorney General, John B. Galus, Assistant Attorney General, St. Paul, Minnesota; and

Brian Middendorf, Morrison County Attorney, Todd Kosovich, Assistant County Attorney, Little Falls, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, G. Tony Atwal, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Hudson, Judge; and Schellhas, Judge.

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

HUDSON, Judge

Appellant challenges his conviction of aiding and abetting theft, contending that his conviction must be reversed because (1) he was denied his right to a speedy trial;

(2) his conviction was not supported by sufficient evidence; and (3) he was entitled to a mistrial. We affirm.

FACTS

The Royalton Fire Gambling Association maintains three pull-tab machines, which are charitable gaming machines, at the 10 Spot Bar (10 Spot) in Royalton. On December 28, 2007, a member of the Royalton Fire Department opened one of the machines, discovered that $2,234 was missing, and notified one of the co-owners of 10 Spot of the theft. The co-owner of 10 Spot proceeded to report the theft to Royalton's chief of police, who interviewed 10 Spot's employees, reviewed 10 Spot's video surveillance footage, and developed descriptions of the four men who were suspected of the theft.

In January 2008, the chief of police identified two of the men as Dennis Juen and Michael Angel Rosillo. He conducted photographic line-ups for the 10 Spot employees who were working on the evening of the theft. The co-owner and the bartender identified Juen, but only the co-owner identified Rosillo.

Rosillo was charged with aiding and abetting the theft of property valued between $1,000 and $5,000 in violation of Minn. Stat. § 609.52, subds. 2(1) (2006) and 3(3)(a) (Supp. 2007), and Minn. Stat. § 609.05, subd. 1 (2006). The jury found Rosillo guilty, and the district court sentenced him to a 24-month prison term. This appeal follows.

D E C I S I O N

I

Rosillo claims that he was denied his right to a speedy trial. This court reviews de novo whether a defendant was denied his constitutional right to a speedy trial. *State v. Griffin*, 760 N.W.2d 336, 339 (Minn. App. 2009). Both the United States and Minnesota constitutions guarantee a criminal defendant the right to a speedy trial. U.S. Const. amend. VI; Minn. Const. art. I, § 6. Minnesota courts have adopted the four-factor balancing test announced in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182 (1972), to determine whether a defendant's speedy-trial right has been violated. *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) the defendant's assertion of the right; and (4) the prejudice to the defendant. *State v. Windish*, 590 N.W.2d 311, 315 (Minn. 1999). The factors must be considered together in light of the relevant circumstances because no one factor is dispositive of a determination that a defendant was denied the right to a speedy trial. *Id.*

Length of delay

A trial must commence within 60 days of a speedy-trial demand unless good cause is shown. Minn. R. Crim. P. 11.09(b). "[D]elays greater than 60 days after a demand for speedy trial has been made are presumptively prejudicial and require further inquiry to determine whether there was good cause for the delay." *State v. Friberg*, 435 N.W.2d 509, 512 (Minn. 1989). Rosillo made his speedy-trial demand on July 15, 2009, but his trial did not begin until September 16, 2009, 63 days after his speedy-trial demand. This

three-day delay raises a presumption that Rosillo's right to a speedy trial was violated. *See id.*

Reason for delay

The state has the primary burden of ensuring a speedy trial, but different weights should be assigned to different reasons for the delay. *Barker*, 407 U.S. at 529–31, 92 S. Ct. at 2191–92; *State v. Cham*, 680 N.W.2d 121, 125 (Minn. App. 2004), *review denied* (Minn. July 20, 2004). "A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government." *Barker*, 407 U.S. at 531, 92 S. Ct. at 2192. Rosillo does not allege, nor does the record indicate, that the three-day delay was attributable to a deliberate attempt by the state to hamper Rosillo's defense. Rosillo contends that because the state has advanced no justification for the delay and because Rosillo bore no responsibility for the delay, this factor should weigh heavily against the state. A neutral reason for delay, however, should be considered, but weighted less heavily than a deliberate attempt at delay. *Id.* Because the delay here appears to have resulted from negligence in scheduling by the court and the state, this factor weighs less heavily in favor of finding a speedy-trial violation. *See id.*

Assertion of speedy-trial 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. *Id.* at 534, 92 S. Ct. at 2194; *Windish*, 590 N.W.2d at 317. Rosillo made a speedy-trial demand at his plea hearing on July 15, 2009. Rosillo also moved for dismissal immediately prior to trial on

September 16, 2009, on the ground that his right to a speedy trial had been violated. This factor also weighs slightly in favor of finding a speedy-trial violation. *See id.*

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; *Windish*, 590 N.W.2d at 318. The interests at issue are: (1) preventing oppressive pretrial incarceration; (2) minimizing the accused's anxiety and concern; and (3) limiting the possibility that the defense will be impaired. *Windish*, 590 N.W.2d at 318. The third interest, possible impairment of a defendant's defense, is the most important. *Id.* A defendant need not affirmatively prove prejudice, but instead may suggest it by showing "likely harm to a defendant's case." *Id.*

Rosillo makes no claim that the three-day delay of his trial either increased his anxiety and concern or that it impaired his defense. Instead, Rosillo contends that because the delay extended his pretrial incarceration by three days, this factor automatically supports a finding of a speedy-trial violation. "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). Rosillo has presented no evidence that three additional days of incarceration was so oppressive that it constituted prejudice. *See Windish*, 590 N.W.2d at 318. This factor weighs strongly in favor of the state.

Although Rosillo clearly made a speedy-trial demand, and the court negligently scheduled the trial outside the 60-day statutory period, Rosillo's right to a speedy trial was not violated because Rosillo suffered no prejudice as a result of the delay.

II

"When reviewing a sufficiency of the evidence claim, we view the evidence in the light most favorable to the verdict and assume that the fact finder rejected any evidence inconsistent with the verdict." *State v. Pendleton*, 759 N.W.2d 900, 909 (Minn. 2009). This court "will not disturb the verdict if the jury could reasonably conclude, given the presumption of innocence and the requirement of proof beyond a reasonable doubt, that the defendant was guilty of the charged offense." *Id.* In evaluating the verdict, this court recognizes that "[a]ssessing witness credibility and the weight given to witness testimony is exclusively the province of the jury." *Id.* The court may assume that "the jury credited the state's witnesses and rejected any contrary evidence." *Id.*

A person commits a theft when he "intentionally and without claim of right takes, uses, transfers, conceals or retains possession of movable property of another without the other's consent and with intent to deprive the owner permanently of possession of the property." Minn. Stat. § 609.52, subd. 2(1). A person is criminally liable for the theft of another if he "intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime." *See* Minn. Stat. § 609.05, subd. 1 (criminal aiding and abetting). Aiding and abetting a theft is a specific-intent crime. *Id.*; *State v. Charlton*, 338 N.W.2d 26, 30 (Minn. 1983).

To establish criminal aiding and abetting, the state has the burden of proving beyond a reasonable doubt that the defendant played "some knowing role in the commission of the crime" and that he took "no steps to thwart its completion." *State v. Ostrem*, 535 N.W.2d 916, 924 (Minn. 1995) (quotation omitted). "Mere presence at the

scene of a crime does not alone prove that a person aided or abetted, because inaction, knowledge, or passive acquiescence does not rise to the level of criminal culpability." *Id.* But "active participation in the overt act which constitutes the substantive offense is not required." *Id.* "[A] person's presence, companionship, and conduct before and after an offense are relevant circumstances from which a person's criminal intent may be inferred." *Id.* Rosillo contends that the evidence is insufficient to prove that he was at 10 Spot, and that even if he were there, that he played some knowing role in the commission of the theft.

First, Rosillo contends that there was insufficient evidence for the jury to find that he was present at 10 Spot during the theft. Specifically, Rosillo argues that the co-owner's identification was unreliable. The co-owner described one of the suspects as a Hispanic or Native American man. During her initial interview, the co-owner stated that this man had a tattoo on his neck, but after the photographic line-up, the bartender said that he did not. Rosillo is Hispanic, and he has no tattoo on his neck.

The state does not squarely address this argument, but there is sufficient evidence for the jury to have found that Rosillo was the Hispanic man present at 10 Spot during the theft. "Identification testimony need not be positive and certain." *State v. Hill*, 312 Minn. 514, 519, 253 N.W.2d 378, 382 (Minn. 1977). "It is sufficient for a witness to testify that it is her opinion, belief, impression, or judgment that the defendant is the person she saw commit the crime." *Id.* at 519–20, 223 N.W.2d at 382. Here, the co-owner positively identified Rosillo as the Hispanic perpetrator of the theft during the photographic line-up and at trial.

Where a witness has made inconsistent statements, and the jury is apprised of them, "the task of weighing credibility [is] for the jury, not this court." *State v. Reichenberger*, 289 Minn. 75, 79, 182 N.W.2d 692, 695 (1970). Here, the co-owner originally described two of the suspects as having tattoos on their neck, but the bartender later stated that only one of the suspects—Juen—had a tattoo on his neck. Taking this evidence in the light most favorable to the verdict, we conclude that the jury could have found beyond a reasonable doubt that the co-owner made an honest mistake in her original description, that her identification of Rosillo was credible, and that Rosillo was indeed present at 10 Spot.

Next, Rosillo contends that there was insufficient evidence for the jury to find that he aided and abetted the theft beyond a reasonable doubt. Rosillo avers that the video surveillance footage reveals that he played no part in the theft. The state counters that the video surveillance footage provided a sufficient basis for the jury to find that Rosillo aided and abetted the theft. We agree with the state.

When reviewing the sufficiency of circumstantial evidence, we engage in a two-step analysis. First, we identify the circumstances proved, giving due deference to "the jury's acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the [s]tate." *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010) (quoting *State v. Stein*, 776 N.W.2d 709, 718 (Minn. 2010)). Next, we "'examine independently the reasonableness of all inferences that might be drawn from the circumstances proved,' [including] inferences consistent with a hypothesis other than guilt." *Id.* (quoting *Stein*, 776 N.W.2d at 716). "[T]he

circumstances proved must be consistent with guilt and inconsistent with any rational hypothesis except that of . . . guilt." *Id.* But "[w]e will not overturn a conviction based on circumstantial evidence on the basis of mere conjecture." *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998).

Here, the circumstances are consistent with the jury's finding that Rosillo aided and abetted Juen's theft, and they are also inconsistent with any other finding. The video footage showed the pull-tab machines and the table closest to the pull tab-machines from approximately 7:30 p.m. to approximately 8:40 p.m. Juen and one of the suspects sat down at the table nearest the pull tab-machines, and Rosillo and the other suspect joined them two minutes later. Over the course of an hour, Juen examined the pull-tab machines, attempted to open all of them, succeeded in opening the middle pull-tab machine, and removed items from it. Several times when Juen was close to the pull-tab machines, Rosillo was looking around the bar or looking intently toward the entrance from Highway 10. All of the suspects also left the bar within a minute of one another.

Rosillo argues that, at best, the circumstantial evidence establishes that he was present at 10 Spot, not that he accompanied Juen, let alone that he aided and abetted the theft from the pull-tab machine. We disagree. Rosillo arrived and left 10 Spot within a few minutes of Juen; they sat at the same table; and all four suspects, including Rosillo and Juen, were clearly conversing with one another. One could only infer that Rosillo was one of Juen's companions. Rosillo's behavior also closely reflected Juen's actions. Rosillo was looking around the bar several times when Juen was trying to open the pull-tab machines. One could only infer that Rosillo was acting as a look-out for Juen.

For these reasons, we conclude that, after a thorough review of the video surveillance footage, the jury's finding of guilt is supported by sufficient evidence.

III

This court reviews the denial of a motion for mistrial for an abuse of discretion. *State v. Mahkuk*, 736 N.W.2d 675, 689 (Minn. 2007). The Minnesota Supreme Court has determined that references to a defendant's prior incarceration can be unfairly prejudicial, but it has not adopted a general rule that "it is prejudicial for the jury to learn that a defendant is in jail for the crime for which he or she is on trial." *State v. Manthey*, 711 N.W.2d 498, 506 (Minn. 2006). In *Manthey*, the court observed that a witness's statement that the defendant was in jail pending trial "arguably damaged the presumption that [the defendant] was innocent until proven guilty," but concluded that "whatever prejudice was created was not so fundamental or egregious as to require a mistrial and was effectively mitigated by the court's instructions." *Id.*

Here, the chief of police testified that he first saw Rosillo "in January when [he] was notified that [Rosillo] was picked up on the warrant issued by Morrison County." This testimony may have slightly damaged the presumption of Rosillo's innocence, but it was not so serious as to call into question the outcome of the trial. The jury likely understood that issuance of a warrant, and the arrest of a suspect is part of ordinary law-enforcement practice for the investigation of a felony theft offense. *See Manthey*, 711 N.W.2d at 506–07 ("jurors' knowledge that a defendant is in custody pending the outcome of a first-degree murder trial is likely to [have been] seen for just what it is—standard law enforcement practice") (quotation omitted).

Moreover, the district court mitigated any prejudice by instructing the jury to disregard the chief of police's testimony and reminding the jury that the fact that Rosillo was charged with a crime and was brought to trial should not be treated as an indicator of guilt. Rosillo maintains that the only proper method for curing the chief of police's testimony was to order a mistrial. The appellate courts, however, have long permitted the use of curative instructions as an alternative to mistrials, and Rosillo has presented no reason why the use of a curative instruction was inappropriate or insufficient here. *See Manthey*, 711 N.W.2d at 506; *Ture v. State*, 353 N.W.2d 518, 524 (Minn. 1984) (concluding that witness's reference to other criminal conduct by defendant justified curative instruction but not mistrial); *cf. Long v. Humphrey*, 184 F.3d 758, 761 (8th Cir. 1999) (discussing "less drastic" alternatives to a mistrial).

For these reasons, we conclude that the district court did not abuse its discretion in denying Rosillo's request for a mistrial and issuing a curative instruction instead.

Affirmed.