Opinion issued January 27, 2011

In The

Court of Appeals

For The

First District of Texas

NOS. 01-10-00138-CR, 01-10-00139-CR

TAVARES ANTWAN RYAN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Case No. 1177027, 1177028

MEMORANDUM OPINION

Appellant, Tavares Antwan Ryan, appeals his convictions for aggravated sexual assault and aggravated kidnapping. TEX. PENAL CODE ANN. § 20.04 (West 2003), § 22.021 (West Supp. 2009). In two issues, appellant asserts that the trial

court should have excluded a complaining witness's testimony after she conferred with another State witness and that the trial court violated his right to a speedy trial. We conclude the trial court did not abuse its discretion by declining to instruct the jury to disregard the challenged testimony. Applying the four-part balancing test from *Barker v. Wingo*,[1] we also conclude that the approximately 18-month delay between appellant's arrest and the start of his trial did not infringe upon his right to a speedy trial because appellant acquiesced in all delays. We affirm.

Background

Late one night in July 2008, the complainants, K.H. and T.E., were walking along the frontage road of Interstate 10 on the east side of Houston, heading for a temporary work agency to try to get jobs the next morning. They were approached by two men in a car who asked if the women needed a ride. K.H. hesitated, but one of the men said that he would not hurt the women because he had two kids. He showed them two car seats as proof. K.H. and T.E. got into the back seat of the car.

The women realized something was wrong when the men drove past the temporary agency. The men said that they were going to have sex with the women, and the man sitting in the passenger's seat revealed a handgun and cocked

[1] 407 U.S. 514, 92 S. Ct. 2182 (1972).

it. T.E. began to have a panic attack, and the men threw her out of the car. T.E. walked to a nearby factory, where workers let her use the phone to call police. She gave police the license plate number of the car and approximate descriptions of the two men.

The men took K.H. to a house, where both had sexual intercourse with her in her female sexual organ, mouth, and anus. K.H. noticed that the house had an exposed shower in the bedroom. At one point during the assault, the men left K.H. alone in the bedroom. K.H. cleaned herself with toilet paper and baby wipes and put her clothes back on. She then took three Social Security cards and a child's photograph from the bedroom, hiding them in her clothes. The man who had been sitting in the driver's seat had sexual intercourse with K.H. again, and then the two men drove her to a truck-towing yard and left her there. As they drove away, K.H. memorized their license plate number. At her request, a towing-yard worker called the police. The police and an ambulance came, and the ambulance took K.H. to the hospital.

At the hospital, a nurse performed a sexual assault examination on K.H. As part of the exam, the nurse took a medical history, in which K.H. stated that she had been sexually assaulted by men called "AD" and "I-Wall." The nurse documented physical injuries, collected swabs from K.H.'s skin and female sexual

organ, and took the clothes that K.H. wore during the assault. K.H. told the nurse that neither assailant wore a condom.

The license plate number reported by K.H. and T.E. led police to the apartment of LaShaunda Hayes. The Social Security cards taken by K.H. belonged to Hayes, Hayes's sister, and Hayes's niece. At the apartment, police arrested Hayes's fiancé, Donald Carr. Police went to Hayes's sister's house nearby, where there was a bedroom with a bathroom that matched K.H.'s description of the bedroom where the assault took place. Police also learned of an individual known as "AB," who lived nearby and was a friend of Carr. Police learned that "AB" was appellant.

Appellant heard that there was a warrant for his arrest, and he turned himself in to the police. Police showed K.H. a photo array that included a photo of appellant. K.H. quickly chose the photo of appellant, identifying him as the man who assaulted her. The police also showed a photo array to T.E., who circled appellant's photo and a filler photo.

K.H.'s sexual assault kit yielded several DNA samples. All but one of these samples excluded appellant, and the remaining sample did not permit the analyst to make any conclusion regarding appellant. The district attorney sought a continuance in October 2009 so that DNA tests could be performed on the baby wipes recovered from the scene, but this second set of tests also excluded appellant

from the recovered DNA samples. Carr was the source of at least one sample of DNA from the sexual assault kit, and he could not be excluded from other samples from the kit and from the wipes.

Appellant filed a motion for a speedy trial on Thursday, January 21, 2010. Appellant's motion read as follows:

> COMES NOW, the Defendant in the above-entitled and numbered cause, by and through his attorney of record, and files this Motion For Speedy Trial and would show the Court as follows:
>
> The Defendant stands charged with Aggravated Kidnapping and Aggravated Sexual Assault in the above numbered causes. He has been continually confined and unable to post bail since his arrest in August of 2008. The State has successfully requested two delays in his trial from the court and this Honorable Court has refused the Defendant's repeated requests for an affordable bail pursuant to Texas Code of Criminal Procedure Art 17.151. Defendant is ready for trial, has perpetually been ready for trial and requests this Honorable Court grant him his constitutional right to have a speedy trial without further delay. In the alternative, Defendant respectfully requests this Honorable Court dismiss both of the above causes based upon a speedy trial violation.

The record does not show whether this motion was presented to the trial court or whether the trial court ruled on it. On the same day, the case was set for trial on February 4 and 5, 2010. Appellant and his attorney signed a form titled "Agreed Setting" in which they agreed to the new trial dates.

A little over a week before trial began, the district attorney realized that the photo array that included appellant's picture had not been provided to the defense. The district attorney notified appellant's trial counsel and supplied him with a copy

of the photo array during jury selection on Friday, February 5. During a pretrial hearing conducted on the following Monday, appellant's trial counsel moved for a continuance in order to research case law relating to the photo array. The trial court denied the continuance.

At the same pretrial hearing, the State called K.H. to testify. K.H. was present when the trial court invoked "the rule" by instructing witnesses that they had to remain outside the courtroom when they were not testifying and that they were not permitted to converse with other witnesses while the trial was ongoing. During this hearing, K.H. testified that appellant was the driver of the car and that the other man was carrying the handgun.

Trial began the next day, and the trial court again invoked the rule in K.H.'s presence. While waiting outside the courtroom, K.H. was approached by Hayes, who was also a witness for the State. Hayes had not been present when the trial court admonished witnesses not to discuss the case, and K.H. did not know that Hayes would testify. Hayes asked if K.H. was the victim. Hayes then gave K.H. a hug and said that she was sorry. During the conversation, K.H. learned that appellant's nickname was AB, not AD.

Hayes testified after she spoke with K.H. She stated that she knew appellant and that appellant and Carr "were very close." She said that she knew appellant by

the nickname "AB," which he was called because he was from Alabama. She also said that other people called appellant "T."

K.H. testified after Hayes did, describing the events of the night on which she was attacked. She testified differently from the pretrial hearing by stating that appellant was the passenger, not the driver. She also stated for the first time that appellant wore a condom when he sexually assaulted her. She explained that when she told the sexual assault nurse the assailant did not use a condom, she was not focused on that matter as she had just been "traumatized" by the sexual assault. K.H., however, also testified that when both men ejaculated on her face, they did not use condoms. K.H. initially stated that the only name she heard was "AD." Upon further questioning, she stated that the name was either "AD or AB," and she indicated that she was referring to appellant. She later stated that she told police that his name was "AD" or just "D." K.H. stated that she learned appellant's actual nickname, "AB," from talking to Hayes and that Hayes "connected all the pieces to the dots."

The next day, the trial court held a hearing concerning K.H.'s conversation with Hayes. K.H. stated that she had no idea who Hayes was before their encounter. K.H. stated that Hayes told her that she had been threatened and told not to testify. K.H. testified that in addition to talking to Hayes, she also talked to

T.E. but that she and T.E. did not discuss the case. Appellant moved to exclude all of K.H.'s testimony and the trial court denied the motion.

The jury found appellant guilty of aggravated kidnapping and aggravated sexual assault. The jury assessed punishment at five years in prison on the aggravated kidnapping in trial cause number 1177027, which is appellate number 01-10-00138-CR. The jury assessed punishment at twelve years in prison on the aggravated sexual assault in trial cause number 1177028, which is appellate number 01-10-00139-CR. The trial court ordered the sentences to run concurrently.

Violation of "The Rule"

In his first issue, appellant argues that the trial court should have excluded K.H.'s testimony because her conversation with Hayes violated the rule against sequestration of witnesses. The State contends that K.H. and Hayes did not corroborate each other's testimony and that appellant's nickname was not an issue bearing upon his guilt or innocence.

When the trial court invokes "the rule," it excludes witnesses from the courtroom pursuant to Texas Rule of Evidence 614, which provides in relevant part: "At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion." TEX. R. EVID. 614. The purpose of the rule is to prevent the

testimony of one witness from influencing the testimony of another. *Martinez v. State*, 867 S.W.2d 30, 40 (Tex. Crim. App. 1993).

The trial court must invoke the rule if requested to do so. TEX. R. EVID. 614. After the rule has been invoked, enforcement of the rule is within the trial court's discretion. *Guerra v. State*, 771 S.W.2d 453, 474–75 (Tex. Crim. App. 1988); *Walker v. State*, 2 S.W.3d 655, 658 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd). A violation of the rule may not be relied upon for reversal of the case unless it is shown that the trial court abused its discretion by allowing the violative testimony. *Guerra*, 771 S.W.2d at 474–75; *Walker*, 2 S.W.3d at 658.

In determining whether the rule has been violated in circumstances where a witness has personal knowledge of the offense and a party clearly anticipated calling her to the stand, we consider (1) whether the witness conferred with another witness without permission and (2) whether the witness's testimony corroborated the testimony of another witness for same side on an issue of fact bearing upon the issue of guilt or innocence. *Cooks v. State*, 844 S.W.2d 697, 733 (Tex. Crim. App. 1992); *Guerra*, 771 S.W.2d at 476. The State clearly anticipated calling K.H. as a witness because she was the named complainant in the indictment. K.H. conferred with Hayes without permission, and K.H. and Hayes were both State witnesses. The sole pertinent inquiry, therefore, is whether K.H.'s testimony corroborated

Hayes on an issue of fact bearing upon the issue of guilt or innocence. *Cooks*, 844 S.W.2d at 733; *Guerra*, 771 S.W.2d at 476.

Appellant first contends that K.H. exhibited a "willingness to alter her testimony." He suggests, as he did at trial, that K.H. fabricated her testimony that appellant used a condom in order to explain the lack of DNA evidence connecting appellant to the offense. Appellant also asserts that the trial court abused its discretion by not permitting him to question Hayes about her conversation with K.H. because if Hayes's depiction of the encounter differed from K.H.'s, the record "would more accurately reflect the extent of the prejudice [K.H.'s] testimony posed to the defendant." Finally, appellant emphasizes K.H.'s statement that Hayes "connected all the pieces to the dots." None of these assertions, however, pertains to whether K.H.'s testimony corroborated Hayes's or whether Hayes's testimony corroborated K.H.'s.

The only issues to which both Hayes and K.H. testified concerned appellant's nickname and the location of the Social Security cards that K.H. took from the house where she was assaulted. We must determine whether these facts bear upon appellant's guilt or innocence. We conclude that they do not. K.H. identified appellant from a photo array as one of the two men that assaulted her, and identified him again in court. T.E. also identified appellant from a photo array and in court. Hayes's testimony established that appellant was close friends with

Carr, who had access to the car and the crime scene and was a source of DNA found in K.H.'s sexual assault kit. The trial court did not abuse its discretion in concluding that neither the precision with which K.H. remembered appellant's nickname nor the precise location from which K.H. took the Social Security cards that led police to her attackers were facts that bore on appellant's guilt or innocence. *See Cooks*, 844 S.W.2d at 733.

We overrule appellant's first issue.

Speedy Trial

In his second issue, appellant contends that the delay of approximately 18 months between his arrest and the start of his trial violated his right to a speedy trial. He urges us to apply the four-part balancing test set out by the United States Supreme Court in *Barker v. Wingo* and to enter an order of acquittal. 407 U.S. 514, 92 S. Ct. 2182 (1972). The State responds that a proper balancing of the *Barker* factors shows appellant's rights were not violated.

The right to a speedy trial is guaranteed by the Sixth Amendment of the United States Constitution and is applicable to the states through the Fourteenth Amendment. *Barker*, 407 U.S. at 515, 92 S. Ct. at 2184; *see* U.S. CONST. amends. IV, XIV. The Texas Constitution also guarantees a speedy trial, but Texas courts apply the same *Barker* test for speedy-trial analysis under state law as under federal law. *Harris v. State*, 827 S.W.2d 949, 956 (Tex. Crim. App. 1992); *see*

TEX. CONST. art. I, § 10; TEX. CODE CRIM. PROC. ANN. art. 1.05 (West 2005). The *Barker* test requires that the following non-exclusive factors be balanced against each other to determine whether a defendant's right to a speedy trial has been violated: (1) the length of delay, (2) the reason for the delay, (3) appellant's assertion of his speedy-trial right, and (4) the prejudice to appellant from the delay. *Barker*, 407 U.S. at 530, 92 S. Ct. at 2192; *Shaw v. State*, 117 S.W.3d 883, 888–89 (Tex. Crim. App. 2003).

A trial court's conclusion on the balancing analysis is a purely legal question to be reviewed de novo on appeal. *Cantu v. State*, 253 S.W.3d 273, 281 (Tex. Crim. App. 2008). However, fact determinations made by the trial court and on which the balancing test is performed are to be given the deference generally afforded to such fact-findings. *Id.*

Appellant was arrested on August 2, 2008. On October 19, 2009, the State sought a continuance so that DNA tests could be performed on the baby wipes that K.H. used to clean herself after the assaulted. Appellant filed a motion asserting his right to a speedy trial on January 21, 2010. Nothing in our record shows that the trial court heard the motion or ruled on it. While the case was pending, appellant and the State agreed to a number of trial date resets, the last of which was filed on January 21, 2010. Voir dire was held the following month on February 5, and the jury trial began on February 9, 2010.

Less than three weeks after he filed his motion, appellant's case went to trial. This Court has held that when a speedy trial motion results in a form of relief that appellant requested, there is nothing for us to review. *Cline v. State*, 685 S.W.2d 760, 761–62 (Tex. App.—Houston [1st Dist.] 1985, no pet.); *see also Hill v. State*, 213 S.W.3d 533, 538 (Tex. App.—Texarkana 2007, no pet.). However, even if we were to assume that the trial court heard and impliedly denied his motion, appellant's speedy trial arguments fall short on the merits. *See Hill*, 213 S.W.3d at 538–39 (addressing dismissal even after finding that trial court had granted relief requested by speedy trial motion).

The delay from appellant's arrest to the beginning of his trial was approximately 18 months. In general, delays approaching one year have been found to be presumptively prejudicial under the first factor of the *Barker* inquiry. *Shaw*, 117 S.W.3d at 889. Where a delay is presumptively prejudicial, we then proceed to the remaining *Barker* factors. *Id.* Because the delay here exceeds one year, we conclude that the first *Barker* factor is met.

Regarding the second factor that examines the reason for the delay, appellant contends that the State's request for continuance for additional DNA testing weighs in his favor. To that end, he cites the trial testimony of two State witnesses who indicated that the State first relied on the sexual assault kit evidence alone for DNA testing and that only after tests on that evidence failed to connect

appellant to the crime, did the State submit the baby wipes for DNA analysis. We conclude that the State bears some burden for the delay because it sought a continuance for further DNA testing but that appellant also acquiesced in this delay by agreeing to reset the case. *See Ervin v. State*, 125 S.W.3d 542, 546–47, 549 (Tex. App.—Houston [1st Dist.] 2002, no pet.). The second *Barker* factor weighs neither in favor of nor against a finding of a violation of appellant's right to a speedy trial.

Under the third *Barker* factor, the failure of a defendant to assert his right makes it difficult to establish the denial of that right. *Dragoo v. State*, 96 S.W.3d 308, 314 (Tex. Crim. App. 2003). A defendant's lack of a timely demand for a speedy trial indicates that he does not really want one. *Id.* Further, the longer a trial is delayed, the greater the likelihood that a defendant who wanted a speedy trial would take action to obtain it. *Id.* Here, appellant did not assert his right to a speedy trial until 16 months after he was arrested. Additionally, he acquiesced in any delay by agreeing to a number of trial resets. *See Ervin*, 125 S.W.3d at 546–47, 549. Because of appellant's participation in the delay of his trial and his inaction in asserting his speedy-trial rights, we conclude that the third *Barker* factor weighs heavily against appellant.

In the final *Barker* factor—prejudice to appellant—we consider the interests that the speedy trial right is intended to protect: (1) preventing oppressive pretrial

incarceration, (2) minimizing the defendant's anxiety and concern, and (3) limiting the possibility that the defendant's defense will be impaired. *Shaw*, 117 S.W.2d at 891. The third interest is the most serious because the inability of a defendant to adequately prepare his case affects the fairness of the entire criminal justice system. *Id.* Proof of prejudice is not essential "because excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or even identify." *Id.* However, the presumption of prejudice is countered by the defendant's acquiescence in the delay. *Id.*

Here, appellant emphasizes inconsistencies in the testimony of K.H. and T.E., attributes these inconsistencies to the delay in his trial, and contends that his defense was thereby impaired. He also asserts that he was oppressively incarcerated because although he complied with police "at all times," he was repeatedly denied bond reductions. Appellant, however, agreed to all of the trial resets, which also worked to his benefit as the DNA tests conducted during the delay proved that his DNA did not match the DNA in evidence recovered at the scene of the crime. On the present record, we cannot discern any evidence, argument, or information that demonstrates prejudice. We conclude that the fourth *Barker* factor weighs against appellant.

Balancing the *Barker* factors, we conclude that appellant's acquiescence in the delay of his trial overwhelms the other three factors. Appellant repeatedly

agreed to trial resettings and asserted his right to a speedy trial only two-and-a-half weeks prior to trial. Any fault attributable to the State because of its motion for a continuance for further DNA testing is subsumed by appellant's failure to oppose the motion and his immediate agreement to a resetting. We hold that the *Barker* test shows that appellant's right to a speedy trial was not violated. *See Celestine v. State*, No. 14-08-00766-CR, 2009 WL 3365893, at *3 (Tex. App.—Houston [14th Dist.] Sept. 10, 2009, no pet.).

We overrule appellant's second issue.

Conclusion

We affirm the judgment of the trial court.

Elsa Alcala
Justice

Panel consists of Justices Jennings, Alcala, and Sharp.

Do not publish. TEX. R. APP. P. 47.2(b).