COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-14-00454-CR

NATHANIEL WASHINGTON — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM THE 432ND DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 1323494D

MEMORANDUM OPINION[1]

I. INTRODUCTION

Pro se Appellant Nathaniel Washington appeals his conviction for the delivery of a controlled substance—cocaine—in the amount of more than four grams but less than 200 grams. In eight issues, Washington argues that the State withheld exculpatory evidence and elicited false testimony at trial; that the

[1]*See* Tex. R. App. P. 47.4.

evidence is insufficient to support his conviction; that the trial court erred in its charge to the jury; that his rights to a speedy trial were violated; and that the trial court abused its discretion by not recusing itself and by not conducting a hearing on his motion for new trial. We will affirm.

II. BACKGROUND

After the State charged Washington with delivery of a controlled substance and after the trial court determined that Washington was indigent, the trial court appointed counsel. Despite having appointed counsel, Washington filed more than thirty pro se motions prior to trial. Among these motions, Washington motioned the court for a "Speedy Hearing"; filed numerous motions to set aside the State's charges[2]; filed multiple motions asking for continuances; and filed a motion to recuse the trial court. In addition to these motions, Washington filed multiple motions that he titled writs of mandamus and writs of habeas corpus. In many of these filings, Washington asked that his appointed counsel be substituted or that the State's charges be dismissed. The contents of some of his motions allege a conspiracy between the State and his appointed counsel. And one of his motions asked that the "entire Tarrant County District Attorney's Office" be recused.

[2]In many of his pro se filings, Washington refers to the State's "three" charges against him. The State, however, only charged Washington with one count of delivery of a controlled substance. The State also included a habitual-offender paragraph alleging two prior convictions. We interpret Washington's verbiage that the State charged him with three crimes to mean the one indicted charge plus the two habitual-offender convictions.

It is not clear from the record which motion the trial court was responding to, or if to any of Washington's pro se filings at all, but the trial court granted a substitution of appointed counsel prior to trial. Nonetheless, Washington continued to file numerous pro se motions in the trial court asking for reductions in bail and continuances. In one of his filings, titled as a writ of habeas corpus, Washington alleged that his first appointed counsel and the State were "trying to convince [him] to plea[d] guilty[] without [his] defense lawyer investigating finding a . . . defense." Coupled with this filing, Washington also wrote a letter to the trial court judge requesting a "bond reduction." The trial court then ordered Washington's court-appointed counsel to "advise [Washington] to not communicate with the Court directly regarding any plea bargain efforts or desires." Nonetheless, Washington sent a letter to the trial court judge alleging that his substituted, appointed counsel was "working with the D.A. to railroad" him and that he would not allow substituted counsel to represent him. Washington's pro se filings continued.

During the time preceding trial, both of Washington's appointed attorneys filed numerous motions, including motions for the appointment of an investigator; motions requesting disclosures from the State, and motions for bond reduction. In addition to other filings, the State also filed its notice of potential *Brady* material, notice of its intent to introduce extraneous offense evidence, and its witness lists. *See Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963).

Prior to trial, the trial court judge sent a letter, stamped by the trial court clerk, to the administrative judge. In the letter, the trial court judge informed the administrative judge of Washington's pro se recusal motion, expressed that he would not voluntarily recuse himself from the case, and asked the administrative judge how he should proceed. The record does not contain a ruling by the administrative judge, but on the day of trial and outside the jury's presence, Washington testified that his substituted, appointed counsel had withdrawn that motion.

Also outside the presence of the jury, Washington testified that he believed he had been disadvantaged by the time that had elapsed between his arrest and the time of trial. Specifically, Washington averred that he had been unable to locate witnesses and that videos containing exculpatory evidence no longer existed due to the alleged delay. The trial court also inquired at this time whether Washington wished to represent himself or to continue the trial with substituted, appointed counsel. The trial court also informed Washington that if he continued with counsel, it would not rule on any of his pro se motions. Washington said that he wished to continue with counsel.

At trial, Detective Robert Walsh of the Arlington Police Department testified that he received information that Washington was a "midlevel narcotics dealer." Walsh also learned Washington's phone number. Walsh said that he met with Washington on June 1, 2012, as part of a prearranged "crack cocaine" purchase. Walsh testified that the preliminary calls he made were to Terion Robinson and

that the parties originally agreed to meet at a local gas station to conduct the deal.

According to Walsh, he ultimately met Washington at a Lisa's Chicken located in Fort Worth. Walsh averred that there were "multiple people" in Washington's vehicle, including Washington and another person that Walsh identified as Robinson. Walsh said that he had a recorder running during the buy and that he was able to audibly record the conversation he had while making the purchase.

The State introduced and published for the jury a recording that Walsh averred was an accurate audio recording of the buy—State's Exhibit 1. Walsh testified that the recording was split into three segments and that he routinely split his audio recordings into three tracks. Walsh said that typically the first track contained "the actual introduction, which lists the date and time and all persons involved in the operation." Walsh said that the second track typically contained "the deal" and that the third track was normally "just [] the ending of [the] transaction."

As State's Exhibit 1 was published for the jury, the State would pause between tracks and ask Walsh to explain to the jury what it was hearing. Walsh identified all three tracks specifically and explained who was talking and what was occurring on each track. Walsh identified the "first track" and explained to the jury that at that point, Washington was not in his car and that the purpose of

the first track was to set the stage and make a record of what Walsh expected to transpire.

The State then published track two for the jury. Walsh testified that in the second track, he was speaking to Robinson. The State then published track three for the jury. Walsh identified that it was "track three" which contained the audio portion where the deal actually took place. Walsh testified that during "the deal" portion of the audio recording, Washington had gotten into his car and handed him a "clear plastic bag" which contained what he believed to be crack cocaine.

Walsh identified the person speaking on track three as Washington and explained that he and Washington had discussed Washington obtaining a "bird" of cocaine for the purchase price of $20,000 and that the two discussed the present deal. Walsh testified that it was he who could be heard asking "how much?" for the crack cocaine. Walsh testified that it was Washington stating "[$]450." Walsh said that he actually gave Washington $460.

This court has listened to the three tracks, and it appears that Walsh's testimony is consistent with the three tracks. It is also evident that the State played each of the tracks separately and elicited testimony from Walsh after each track. In the first track, Walsh can be heard stating the date and time. He can also be heard stating that he was on his way to buy "a half ounce of crack cocaine" from "Nate Washington." In the second track, Walsh can be heard making what appears to be a phone call wherein he explains to the other person

that he missed the designated gas station and that he was at "Lisa's Chicken." The other speaker can be heard saying, "What's up man?" It is clear that the speaker in track two is a different person than the person who can be heard having a conversation with Walsh in track three.

In track three, Walsh can be heard stating that at least three individuals were in the car that was "pull[ing] right next to" him "on the passenger side." The conversation between Walsh and the other speaker involves what appears to be the consideration of several different drug-buy scenarios. The majority of the conversation is a discussion of whether the other speaker can obtain a "bird . . . of powder" for Walsh for the amount of $20,000. At one point, Walsh can be heard asking, "How much for this?" and the other speaker can be heard stating, "[$]450." Walsh can be heard stating, "That's [$]460." The other person can be heard stating, "Alright."

Walsh said that he again met Washington on June 14, 2012. According to Walsh, he had a video-recording device on that day. The State produced still photographs from the video of images that Walsh testified were true and accurate photographs of Washington from the June 14, 2012 meeting.

Sarah Skiles, a senior forensic chemist for the Tarrant County Medical Examiner's Office, testified that she tested the contents of the clear baggie which Washington gave Walsh on June 1, 2012. According to Skiles, the baggie contained 13.07 grams of cocaine.

After the State closed and outside the presence of the jury, Washington's attorney questioned him. Washington averred that he agreed with his attorney's advice that he should not take the stand, that he was satisfied with his attorney's performance, and that there was not a different defensive strategy or route that he preferred to take. Washington also testified that he had been at trial during the testimony of the State's witnesses and that he was satisfied with defense counsel's questioning of them. Washington then rested and closed.

During jury deliberations at the guilt-innocence phase, the jury sent a note to the trial court stating, "We request to hear the audio tape evidence again." Later, the jury reached a verdict of guilty to the charge of delivery of cocaine and also found the habitual-offender paragraphs true. After a punishment hearing, the jury assessed punishment at 99 years' confinement. The trial court entered judgment accordingly and this appeal followed.

III. DISCUSSION

A. The Three Tracks of State's Exhibit 1

In his first issue, Washington argues that "[t]he prosecutor intentionally and knowingly use[d] [per]jured testimony to obtain [a] conviction." Specifically, Washington claims that the State "coached" Walsh to testify falsely; that the prosecutor gave improper opening and closing statements that were not supported by the evidence; that the trial court improperly allowed the jury to play the entirety of State's Exhibit 1 in the jury room when that exhibit had allegedly not been previously played in its entirety in the courtroom; and that the State

suppressed a portion of State's Exhibit 1 which would have shown that he did not commit the crime for which he was convicted.

Washington's argument in this issue is predicated on his allegation that the record demonstrates that only the second track of State's Exhibit 1 was played for the jury at trial; that Walsh's testimony established that it was Robinson speaking on that track; that the prosecutor, during opening and closing arguments, argued that it was Washington speaking on the track; and that the jury was allowed to listen to all three tracks only after it retired to deliberate.

There is no evidence in the record to support Washington's claims. In fact, the record demonstrates that not only did the State play the entirety of State's Exhibit 1 at trial, but the State also elicited testimony from Walsh wherein he delineated what transpired on each track and he testified to whom he was speaking in each of the three tracks.

Mere assertions in a brief not supported by evidence in the record will not be considered on appeal. *Franklin v. State*, 693 S.W.2d 420, 431 (Tex. Crim. App. 1985), *cert. denied*, 475 U.S. 1031 (1986); *see Berrios-Torres v. State*, 802 S.W.2d 91, 95–96 (Tex. App.—Austin 1990, no pet.) (finding no evidence in record to support defendant's claim that he had previously been acquitted of offense for which he stood trial); *see also Hutchinson v. State*, No. 05-92-00155-CR, 1996 WL 272931, at *2–3 (Tex. App.—Dallas, May 21, 1996, pet ref'd) (not designated for publication) (holding that reviewing court could not address claims that prosecutor improperly coached witness without "some evidence" in the

record). Because Washington makes assertions in his brief that are not supported by evidence in the record, we do not consider them; therefore, we overrule his first issue.

B. No Evidence of a *Brady* Violation

In his second issue, Washington argues that the State withheld *Brady* material. *See Brady* at 83, 83 S. Ct. at 1194. Specifically, Washington argues that the State withheld all but thirty seconds of State's Exhibit 1 from him prior to trial.

Much like his first issue, Washington's second issue is predicated on his argument that there was more to State's Exhibit 1 than was disclosed to the defense during discovery or than was played for the jury during trial. We agree with the State that Washington's second issue is a bald assertion of fact without any support in the appellate record. Again, nothing in the record supports his contention. *See Herrin v. State*, 525 S.W.2d 27, 29 (Tex. Crim. App. 1975) (holding that assertions in an appellate brief not supported by the record will not be accepted as fact); *see also Franklin*, 693 S.W.2d at 431 ("Mere assertions in a brief not supported by evidence in the record will not be considered on appeal."). Washington's second issue is without merit; therefore, we overrule it.

C. Sufficiency of the Evidence

In his third and fourth issues, Washington argues that the evidence is insufficient to support his conviction. We disagree.

1. Standard of Review

In our due-process review of the sufficiency of the evidence to support a conviction, we view all of the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). This standard gives full play to the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Id.*, 99 S. Ct. at 2789; *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App.), *cert. denied*, 136 S. Ct. 198 (2015).

The trier of fact is the sole judge of the weight and credibility of the evidence. *See* Tex. Code Crim. Proc. Ann. art. 38.04 (West 1979); *Dobbs v. State*, 434 S.W.3d 166, 170 (Tex. Crim. App. 2014). Thus, when performing an evidentiary sufficiency review, we may not re-evaluate the weight and credibility of the evidence and substitute our judgment for that of the factfinder. *See Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012). Instead, we determine whether the necessary inferences are reasonable based upon the cumulative force of the evidence when viewed in the light most favorable to the verdict. *Murray*, 457 S.W.3d at 448. We must presume that the factfinder resolved any conflicting inferences in favor of the verdict and defer to that resolution. *Id.* at 448–49.

To determine whether the State has met its burden under *Jackson* to prove a defendant's guilt beyond a reasonable doubt, we compare the elements of the crime as defined by the hypothetically correct jury charge to the evidence adduced at trial. *Thomas v. State*, 444 S.W.3d 4, 8 (Tex. Crim. App. 2014); *see Crabtree v. State*, 389 S.W.3d 820, 824 (Tex. Crim. App. 2012) ("The essential elements of the crime are determined by state law."). Such a charge is one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried. *Thomas*, 444 S.W.3d at 8. The law as authorized by the indictment means the statutory elements of the charged offense as modified by the factual details and legal theories contained in the charging instrument. *See id.*; *see also Rabb v. State*, 434 S.W.3d 613, 616 (Tex. Crim. App. 2014) ("When the State pleads a specific element of a penal offense that has statutory alternatives for that element, the sufficiency of the evidence will be measured by the element that was actually pleaded, and not any alternative statutory elements.").

The standard of review is the same for direct and circumstantial evidence cases; circumstantial evidence is as probative as direct evidence in establishing guilt. *Dobbs*, 434 S.W.3d at 170; *Acosta v. State*, 429 S.W.3d 621, 625 (Tex. Crim. App. 2014).

2. Delivery of a Controlled Substance

It is a felony in Texas if a person "knowingly manufactures, delivers, or possesses with intent to deliver a controlled substance listed in Penalty Group 1." Tex. Health & Safety Code Ann. § 481.112 (West 2010); *see also Stephens v. State*, 269 S.W.3d 178, 180 (Tex. App.—Texarkana 2008, pet. ref'd). Cocaine is defined by statute as a Penalty Group 1 narcotic. Tex. Health & Safety Code Ann. § 481.102(3)(D) (West 2010). The phrase "to deliver," as it is used in section 481.112, means "to transfer, actually or constructively, to another a controlled substance, counterfeit substance, or drug paraphernalia, regardless of whether there is an agency relationship." Tex. Health & Safety Code Ann. § 481.002(8) (West Supp. 2016). "An indictment for the delivery of a controlled substance must specify which type or types of delivery . . . was performed." *Young v. State*, 183 S.W.3d 699, 706 (Tex. App.—Tyler 2005, pet. ref'd); *see also Marable v. State*, 990 S.W.2d 421, 423 (Tex. App.—Texarkana 1999), *aff'd*, 85 S.W.3d 287 (Tex. Crim. App. 2002). At trial, the State is required to prove delivery via the method that is alleged in the indictment. *Conaway v. State*, 738 S.W.2d 692, 694 (Tex. Crim. App. 1987) ("[N]otwithstanding that the State could have alleged both actual *and* constructive delivery, . . . it chose only to allege that the delivery occurred by 'actual delivery.' It was thus bound to prove its allegation beyond a reasonable doubt.") (emphasis in original) (citation omitted).

In this case, because the State alleged that Washington delivered cocaine by actual transfer to Walsh, the State was bound to prove beyond a reasonable

doubt that Washington delivered the cocaine by actual transfer. *See id.* An actual transfer or delivery, as commonly understood, contemplates the manual transfer of property from the transferor to the transferee or to the transferee's agents or to someone identified in law with the transferee. *Heberling v. State*, 834 S.W.2d 350, 354 (Tex. Crim. App. 1992); *Cohea v. State*, 845 S.W.2d 448, 450 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd).

Viewing the evidence in the light most favorable to the jury's verdict, the record demonstrates that Washington was a known drug dealer who was approached by Walsh, an undercover police officer. Washington met Walsh at an agreed-to location for the purposes of exchanging crack cocaine for money and to discuss future drug deals. Washington got into Walsh's car and gave Walsh a predetermined amount of crack cocaine in exchange for $460. The amount of cocaine, determined by scientific testing, weighed 13.07 grams.

Washington disputes this evidence by, much like in his first two issues, arguing that the State failed to play the entirety of State's Exhibit 1 for the jury at trial. The record belies this contention. What the record does show is that Walsh testified to the contents of State's Exhibit 1 in detail and that the audio found in the three tracks contained in State's Exhibit 1 corroborated Walsh's testimony that he spoke to Robinson en route to the drug deal and that once he arrived at Lisa's Chicken, Washington got into Walsh's car, where Washington exchanged crack cocaine for money. Furthermore, Walsh's testimony alone was sufficient to support the jury's verdict. *See Fletcher v. State*, 39 S.W.3d 274, 278–80 (Tex.

App.—Texarkana 2001, no pet.) (concluding evidence sufficient to support conviction for delivery of methamphetamine where officer testified that he received methamphetamine from appellant in exchange for $250). We overrule Washington's third and fourth issues.

D. Law of Parties

In his fifth issue, Washington seems to argue that the trial court committed reversible error because it did not include an instruction on the law of parties in the jury charge. Washington's argument is predicated on his characterization of the evidence as showing that it was Robinson, and not Washington, that actually delivered the crack cocaine to Walsh. As discussed above, the evidence supports the jury's verdict that it was Washington who delivered, by actual transfer, the crack cocaine to Walsh.

Evidence is sufficient to convict under the law of parties—and a jury instruction should be given—where the accused is physically present at the commission of the offense and encourages another to commit the offense by words or other agreement. *Ransom v. State*, 920 S.W.2d 288, 302–03 (Tex. Crim. App.) (op. on reh'g), *cert. denied*, 519 U.S. 1030 (1996). Because the State alleged and proved that Washington was the principal actor, the State did not need to prove conduct constituting delivery of cocaine by another plus an act committed by Washington intended to promote or assist the delivery. *Beier v. State*, 687 S.W.2d 2, 3 (Tex. Crim. App. 1985).

The record evidence does not support that Robinson transferred the crack cocaine to Walsh, therefore the trial court was not required to include a law-of-the-parties instruction in its charge to the jury. *See Dinkins v. State*, 894 S.W.2d 330, 339 (Tex. Crim. App.) ("Because the charge is the instrument by which the jury convicts, [it] must contain an accurate statement of the law and must set out all the essential elements of the offense.") (citation omitted), *cert. denied*, 516 U.S. 832 (1995). We overrule Washington's fifth issue.

E. Speedy Trial

In his sixth issue, Washington argues that his right to a speedy trial was violated by the eighteen-month period of time between his arrest and trial. Washington argues that this caused prejudice to his defense because of the loss of potential witnesses and the loss of alleged exculpatory video evidence.

We note at first that the trial court never expressly ruled on a motion for speedy trial. And the record is devoid of any formal motions for a speedy trial. Indeed, neither of Washington's appointed attorneys filed any such motions. But the record does support that the trial court impliedly denied Washington's assertion that his rights to a speedy trial had prejudiced his defense. Specifically, on the day of trial and prior to voir dire, the trial court held a hearing wherein Washington's court-appointed attorney questioned Washington about a number of things, including Washington's desire to reject the prosecutor's proposed plea agreement, Washington's satisfaction with counsel, and Washington's election on punishment.

The trial court also questioned Washington regarding his right to self-representation. Washington testified that he wished to retain appointed counsel. During this hearing, the court reporter asked Washington to speak up multiple times. The trial court also instructed Washington to speak clearly. The record does not indicate why, but at one point, the trial court asked Washington, "Your complaint is that the -- the way of you being arrested caused you not to be able to locate witnesses. Is that what you're saying?" Washington's response was "I just feel the delay -- delay in trial come -- as far as finding evidence." Again the court reporter told Washington that she could not hear him. Defense counsel then asked Washington, "[W]hat are those things that . . . you feel like we haven't had [an] opportunity to obtain because of this delay?" Washington responded, "locating witness, videos that don't exist no more." From there, counsel elicited testimony from Washington wherein Washington averred that his desire to remove his first appointed counsel and his own pro se filings, specifically his pro se recusal motions, had contributed to the delay between arrest and trial. The trial court never made a formal ruling regarding a speedy-trial assertion.

We will assume that the trial court impliedly overruled an assertion of Washington's right to a speedy trial, and we will address the merits of his issue. *See Ryan v. State*, No. 01-10-00138-CR, 2011 WL 286140, at *6 (Tex. App.—Houston [1st Dist.] Jan. 27, 2011, pet. struck) (assuming implied ruling by trial court on speedy-right motion and addressing merits of appellant's complaint); *see also Hill v. State*, 213 S.W.3d 533, 538 (Tex. App.—Texarkana 2007, no

pet.) (addressing dismissal even after finding that trial court had granted relief requested by speedy-trial motion).

1. The Right to a Speedy Trial

The Sixth Amendment to the United States Constitution and article 1, section 10 of the Constitution of the State of Texas guarantee an accused the right to a speedy trial. *See* U.S. Const. amend. VI; Tex. Const. art. I, § 10; *see also Zamorano v. State*, 84 S.W.3d 643, 647 (Tex. Crim. App. 2002); *Orand v. State*, 254 S.W.3d 560, 565 (Tex. App.—Fort Worth 2008, pet. ref'd). Texas courts analyze claims of a denial of this right, both under the federal and state constitutions, the same. *See Harris v. State*, 827 S.W.2d 949, 956 (Tex. Crim. App.), *cert. denied*, 506 U.S. 942 (1992). In *Barker v. Wingo*, the United States Supreme Court qualified the literal sweep of the right to a speedy trial by analyzing the constitutional question in terms of four specific factors:

(1) whether the delay before trial was uncommonly long;

(2) whether the government or the criminal defendant is more to blame for the delay;

(3) whether in due course, the defendant asserted his right to a speedy trial; and

(4) whether the defendant suffered prejudice as a result of the delay.

407 U.S. 514, 530–32, 92 S. Ct. 2182, 2192–93 (1972). Under *Barker*, courts must analyze federal constitutional, speedy-trial claims by first weighing the strength of each of the above factors and then balancing their relative weights in

light of the conduct of both the prosecution and the defendant. *Zamorano*, 84 S.W.3d at 647–48. None of the four factors is either a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial; instead, all must be considered together along with any other relevant circumstances. *Id.* No one factor possesses "talismanic qualities"; thus, courts must "engage in a difficult and sensitive balancing process" in each individual case. *Id.* (quoting *Barker*, 407 U.S. at 533, 92 S. Ct. at 2193).

2. Standard of Review

In reviewing the trial court's ruling on a speedy-trial claim, we apply a bifurcated standard of review: an abuse of discretion standard for the factual components and a de novo standard for the legal components. *Id.* Review of the individual *Barker* factors necessarily involves factual determinations and legal conclusions, but the balancing test as a whole is purely a legal question. *Cantu v. State*, 253 S.W.3d 273, 282 (Tex. Crim. App. 2008).

Under this standard, we defer not only to a trial judge's resolution of disputed facts, but also to the trial judge's right to draw reasonable inferences from those facts. *Id.* In assessing the evidence at a speedy-trial hearing, the trial judge may completely disregard a witness's testimony, based on credibility and demeanor evaluations, even if that testimony is uncontroverted. *Id.* The trial judge may disbelieve any evidence so long as there is a reasonable and articulable basis for doing so. *Id.* And all of the evidence must be viewed in the light most favorable to the trial judge's ultimate ruling. *Id.*

3. Analysis of the Barker Factors

a. Length of Delay

The length of delay is a "triggering mechanism" for analysis of the other *Barker* factors. *Barker*, 407 U.S. at 530–32, 92 S. Ct. at 2192–93; *Zamorano*, 84 S.W.3d at 648. Depending on the nature of the charges, a post-accusation delay of about one year is "presumptively prejudicial" for purposes of the length-of-delay factor. *Doggett v. United States*, 505 U.S. 647, 652 n.1, 112 S. Ct. 2686, 2691 n.1 (1992). If the accused shows that the interval between accusation and trial has crossed the threshold dividing "ordinary" from "presumptively prejudicial" delay, then the court must consider, as one factor among several, the extent to which that delay stretches beyond the bare minimum needed to trigger judicial examination of the claim. *Zamorano*, 84 S.W.3d at 649 (*quoting Doggett*, 505 U.S. at 652, 112 S. Ct. at 2690–91). This second inquiry is significant to the speedy-trial analysis because the "presumption that pretrial delay has prejudiced the accused intensifies over time." *Id.*

The State here concedes that the eighteen-month delay between Washington's arrest and trial weighs in Washington's favor and triggers an analysis of the remaining *Barker* factors. We agree.

b. Reasons for the Delay

The second factor—reasons for the delay—seeks to ensure that courts do not simply concentrate on the sheer passage of time without taking into account the reasons underlying the delay. *See Rashad v. Walsh*, 300 F.3d 27, 34 (1st

Cir. 2002), *cert. denied*, 537 U.S. 1236 (2003). Under *Barker*, "different weights should be assigned to different reasons" for the delay. 407 U.S. at 531, 92 S. Ct. at 2192. The inquiry into causation involves a sliding scale: deliberately dilatory tactics must be weighed more heavily against the State than periods of delay resulting from negligence. *Id.* Furthermore, valid reasons for delay should not be weighed against the State. *State v. Munoz*, 991 S.W.2d 818, 824 (Tex. Crim. App. 1999).

The record does not reveal that the State offered any reasons to explain the delay in getting this case to trial. The record does show that Washington filed more than thirty pro se motions while he was represented by counsel, including at least three pro se requests for ninety-day continuances. Washington repeatedly asked for the removal of his first appointed counsel because he claimed that counsel was conspiring with the district attorney against him. Washington's first appointed counsel was allowed to withdraw as counsel of record after serving for one year. Once new counsel was appointed, and although Washington also alleged in numerous pro se filings that his replacement counsel was also conspiring with the district attorney, the case proceeded to trial within six months of the second appointment.

During the hearing prior to trial, Washington stated that part of the eighteen-month delay was attributable to his repeated pro se filings. On this record, Washington was responsible for some of the delay in this case. Thus, this second factor weighs slightly against Washington. *See Dickey v. Florida*,

398 U.S. 30, 48, 90 S. Ct. 1564, 1574 (1970) (Brennan, J., concurring) (stating defendant may be "disentitled to the speedy-trial safeguard in the case of a delay for which he has, or shares, responsibility").

c. Assertion of That Right

We next consider the extent to which Washington affirmatively sought a speedy trial. *Barker*, 407 U.S. at 531–32, 92 S. Ct. at 2192–93. The nature of the speedy trial right makes it "impossible to pinpoint a precise time in the process when the right must be asserted or waived, but that fact does not argue for placing the burden of protecting the right solely on defendants." *Id.* at 527, 92 S. Ct. at 2190. The right to a speedy trial "is constitutionally guaranteed and, as such, is not to be honored only for the vigilant and the knowledgeable." *Id.* at 527 n.27, 92 S. Ct. at 2190 n.27 (*quoting Hodges v. United States*, 408 F.2d 543, 551 (8th Cir. 1969)).

Whether and how a defendant asserts this right is closely related to the other three factors because the strength of the defendant's efforts will be shaped by them. *Barker*, 407 U.S. at 531, 92 S. Ct. at 2192. Filing for a dismissal instead of a speedy trial generally weakens a speedy-trial claim because it may show a desire to have no trial instead of a speedy one. *Cantu*, 253 S.W.3d at 283.

Both of Washington's appointed attorneys filed numerous motions in the court, but none of these motions were or could be interpreted as a motion for a speedy trial. And although Washington filed more than thirty pro se filings, only

one of them could possibly be construed as an assertion of the right to a speedy trial. That single pro se motion, filed nearly two weeks after his arrest, is titled "Defendants Request for Speedy Hearing." The contents of that motion reveal that Washington was requesting a hearing related to his concurrently filed pro se "Motion for Examining Trial." In both of these filings, Washington asserted that there was no evidence that he committed the State's charge and also that he was the victim of "[mistaken] identity." The lion's share of Washington's other pro se filings asked for the charge to be dismissed with prejudice and alleged conspiracies involving the trial court, his nephew, the district attorney, his own appointed attorneys, and Robinson's attorney. The tenor of most of Washington's filings indicated that he wanted no trial rather than a speedy one. *See Phillips v. State*, 650 S.W.2d 396, 401 (Tex. Crim. App. 1983) ("[A] defendant's motivation in asking for dismissal rather than a prompt trial is clearly relevant, and may sometimes attenuate the strength of his claim.").

The only time that it can be said that Washington actually motioned the trial court regarding his rights to a speedy trial is during the pretrial hearing held just prior to voir dire where Washington stated to the trial court that he believed that the delay between his arrest and trial had caused problems in his attorney's ability to "locat[e a] witness [and] videos that don't exist no more." Immediately after making this statement, Washington testified that having his previously appointed attorney removed and his filing of numerous pro se motions had contributed to the delay in his case coming to trial. We conclude that this factor

weights against Washington. *See Cook v. State*, 741 S.W.2d 928, 940 (Tex. Crim. App. 1987) (weighing third *Barker* factor against appellant because no evidence other than two motions for speedy trial filed with court showed that appellant asserted his right to a speedy trial by requesting hearings to present evidence on the matter), *vacated and remanded on other grounds*, 488 U.S. 807, 109 S. Ct. 39 (1988).

d. Prejudice

The final factor of "prejudice" must be assessed in light of the interests the speedy-trial right was intended to protect. *See Barker*, 407 U.S. at 532, 92 S. Ct. at 2193. Those interests are (1) to prevent oppressive pretrial incarceration, (2) to minimize the accused's anxiety and concern, and (3) to limit the possibility the defense will be impaired. *Id.* Of these interests, the third is the most serious because the inability of a defendant to adequately prepare his case skews the fairness of the entire system. *Id.*; *see Doggett*, 505 U.S. at 654, 112 S. Ct. at 2692; *Dragoo v. State*, 96 S.W.3d 308, 315 (Tex. Crim. App. 2003).

In some cases, the delay may be so excessive as to be presumptively prejudicial. *Guajardo v. State*, 999 S.W.2d 566, 570 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd); *see Doggett*, 505 U.S. at 658, 112 S. Ct. at 2694. Courts have held that delays of five years and longer are presumptively prejudicial under the fourth *Barker* factor. *See Guajardo*, 999 S.W.2d at 570 (nearly five-year delay raises presumption of prejudice); *see also Doggett*, 505 U.S. at 657–58, 112 S. Ct. at 2694 (eight-and-one-half years was presumptively prejudicial);

Orand, 254 S.W.3d at 570 (fourteen-year delay was presumptively prejudicial). Yet even when the delay is presumptively prejudicial, the defendant must nevertheless show that he has, in fact, been prejudiced. *Guajardo*, 999 S.W.2d at 570; *see Doggett*, 505 U.S. at 655–56, 112 S. Ct. at 2693.

A showing of actual prejudice is not required; however, a defendant must make a prima facie showing of prejudice caused by the delay of the trial. *Munoz*, 991 S.W.2d at 826. Once the defendant has made such a showing, the burden shifts to the State. *Guajardo*, 999 S.W.2d at 570–71.

Although the delay in the present case triggers a speedy-trial analysis, it is not long enough for Washington to have suffered presumptive prejudice. *See Compass v. State*, No. 02-06-00075-CR, 2007 WL 2067733, at *3 n.28 (Tex. App.—Fort Worth July 19, 2007, no pet.) (mem. op., not designated for publication) ("We decline to hold that a twenty-nine month delay is presumptively prejudicial."); *see also Clarke v. State*, 928 S.W.2d 709, 717 (Tex. App.—Fort Worth 1996, pet. ref'd) (finding no presumptive prejudice where appellant retried on punishment two years and five months after Supreme Court denied certiorari and five months after appellant filed motion for speedy retrial); *Sanders v. State*, 978 S.W.2d 597, 605 (Tex. App.—Tyler 1997, pet. ref'd) (finding nineteen-month delay not presumptively prejudicial).

Washington argues that he was prejudiced for three reasons. First, Washington argues that two witnesses, Robinson's "drug connection" and a person named "Spudnick," could have been called as defense witnesses. To

claim prejudice because of a missing witness, a defendant must show that (1) the witness was unavailable at the time of trial, (2) the witness's testimony would have been relevant and material, and (3) the defendant exercised due diligence in attempting to locate the witness. *Clarke*, 928 S.W.2d at 716. Washington has failed to show what material information these alleged witnesses would have provided. *See Palacios v. State*, 225 S.W.3d 162, 169–70 (Tex. App.—El Paso 2005, pet. ref'd); *Clarke*, 928 S.W.2d at 716. And although Washington claims that one of these witnesses was "killed" and the other potential witness also died, he has not asserted that these witnesses were unavailable at the time of trial nor has he shown that he exercised due diligence in attempting to locate them. Consequently, Washington has failed to make a prima-facie showing that his defense was impaired by the absence of these witnesses. *See Clarke*, 928 S.W.2d at 716.

Washington's second claim regarding prejudice is his contention that "evidence [was] lost." The only evidence that Washington even remotely alludes to in his brief is his suggestion that his "incompetent attorney" should have obtained video footage "from the store parking lot." He did testify before the trial court that "videos" had been lost. But Washington has not shown how any alleged video was relevant or material; he has not shown any evidence demonstrating that such evidence was available or his diligence to obtain it; and he has not alleged how its absence prejudiced him. *See id.*; *see also Smith v. State*, 436 S.W.3d 353, 368 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd)

("Moreover, with regard to the missing evidence . . . appellant has not shown how [its] absence prejudiced him."); *see also Harris v. State*, 489 S.W.2d 303, 308 (Tex. Crim. App. 1973) (concluding that defendant could not show that his defense was impaired where defendant failed to offer any evidence of his attempts to find the potential witnesses or evidence that they were material or relevant). Thus, Washington has failed to make a prima-facie showing that his defense was impaired by any alleged lost evidence.

Washington's third claim regarding prejudice is that he was "living a normal life, working [every day], active in church, [and] staffing his non[-]profit organization to help homeless people[,] battered women, [and] troubled teens[; and that] he was about to be married when his life was disrupted." But Washington has not shown how these concerns are beyond the level associated with being charged with delivery of a controlled substance nor has he shown how his defense was impaired by these disruptions. *See Shaw v. State*, 117 S.W.3d 883, 890 (Tex. Crim. App. 2003) ("[A]ppellant offered no evidence to the trial court that the delay had caused him any unusual anxiety or concern, i.e., any anxiety or concern beyond the level normally associated with being charged with [the] crime.").

Washington does not present this court, and did not present the trial court, with any other argument regarding the prejudice-to-the-defense factor. *Cf. Zamorano*, 84 S.W.3d at 654 (noting, in prejudice analysis, defendant's testimony about undue anxiety, lost income, and missed work as a result of the

delay); *Puckett v. State*, 279 S.W.3d 434, 441 (Tex. App.—Texarkana 2009, no pet.) (finding prejudice where appellant showed witnesses with relevant testimony were unavailable). Washington does not meet the presumptively prejudicial standard, and even considering his oppressive pretrial incarceration, he has not made a prima facie showing that he suffered anxiety or concern or that his defense was impaired. *See Munoz*, 991 S.W.2d at 829 (holding prejudice was "minimal" where defendant showed oppressive pretrial incarceration and anxiety but failed to show defense was impaired by delay); *Meyer v. State*, 27 S.W.3d 644, 651 (Tex. App.—Waco 2000, pet. ref'd) (finding minimal prejudice where appellant suffered "some oppressive pretrial incarceration and undue anxiety" but did not "make even a prima facie showing that his defense had been impaired"), *abrogated on other grounds by Robinson v. State*, 240 S.W.3d 919 (Tex. Crim. App. 2007). In short, on this record, any prejudice to Washington was minimal. *Munoz*, 991 S.W.2d at 829; *Meyer*, 27 S.W.3d at 651. This factor weighs against finding Washington's speedy-trial right was violated.

4. Balancing the Factors

Having addressed the *Barker* factors, we must now balance them. The eighteen-month delay between Washington's arrest and his trial weighs slightly against the State and in favor of Washington. The second factor—reasons for the delay—weighs against Washington because no evidence exists that the State used deliberately dilatory tactics and the evidence demonstrates that

Washington contributed to the delay. The third factor—assertion of the right—weighs against Washington. Finally, any prejudice suffered by Washington was minimal. We hold that the weight of these factors, balanced together, supports the trial judge's implied ruling to deny Washington's motion to dismiss and that there was no violation of his rights to a speedy trial. *See Palacios*, 225 S.W.3d at 170 (finding no speedy-trial violation when first three factors weighed against State and fourth factor weighed heavily against appellant); *see also Russell v. State*, 90 S.W.3d 865, 874–75 (Tex. App.—San Antonio 2002, pet. ref'd) (finding no speedy-trial violation when first three factors weighed in appellant's favor and presumptive prejudice was rebutted by failure to demonstrate any prejudice); *Guajardo*, 999 S.W.2d at 571 (same). We overrule Washington's sixth issue.

F. Washington's Recusal Motion

In his seventh issue, Washington argues that the trial court committed reversible error by failing to comply with the rules governing motions to recuse. Specifically, Washington complains that the trial court did not properly rule on his pro se recusal motion.

Rule 18a of the Texas Rules of Civil Procedure applies to recusal and disqualification matters in criminal cases. Tex. R. Civ. P. 18a; *see Sanchez v. State*, 926 S.W.2d 391, 394 (Tex. App.—El Paso 1996, pet. ref'd). Generally, when a properly verified recusal motion is filed, the trial judge against whom the motion is directed is required either to recuse himself or to refer the recusal motion to the presiding judge of the administrative judicial district for assignment

to another judge for hearing and disposition. *See Bruno v. State*, 916 S.W.2d 4, 7 (Tex. App.—Houston [14th Dist.] 1995, pet. ref'd).

Hybrid representation occurs when one is partly represented by counsel and partly pro se. *Landers v. State*, 550 S.W.2d 272, 278 (Tex. Crim. App. 1977). A defendant has no right to hybrid representation. *McKinny v. State*, 76 S.W.3d 463, 478 (Tex. App.—Houston [1st Dist.] 2002, no pet.). A trial court is not obligated to rule on pro se motions when a defendant is represented by counsel. *Robinson v. State*, 240 S.W.3d 919, 922 (Tex. Crim. App. 2007). But if a trial court elects to rule on a pro se motion even though the defendant is represented by counsel, those rulings may be reviewed on appeal. *Id.*

Washington filed a pro se motion to recuse the trial court judge. Because Washington was represented by counsel, the trial court was not required to rule on Washington's motion. *See id.* The record does indicate, however, that the trial court judge sent the administrative judge a letter, stamped by the trial court clerk, indicating that Washington had filed his pro se recusal motion, informing the administrative judge that the trial court would not voluntarily recuse itself, and asking the administrative judge how the trial court should proceed. But the record does not indicate whether the administrative judge took further action. At the hearing prior to trial, Washington testified that he wished to be represented by his appointed counsel and that he knew his appointed counsel had withdrawn his pro se recusal motion. Furthermore, the trial court informed Washington that it would not rule on any of Washington's pro se motions.

We cannot abate this cause to the trial court to determine the trial court's intent in sending the letter to the administrative judge. Tex. R. App. P. 44.4 (remand permitted to remedy "erroneous action or failure or refusal to act"); *see also Robinson v. State*, No. 01-04-00717-CR, 2008 WL 2340384, at *3, *7 (Tex. App.—Houston [1st Dist.] June 5, 2008, no pet.) (mem. op., not designated for publication). ("We are not able to determine the intent of the trial court from this record. Nor are we legally authorized to abate this case so that the trial court may tell us what it intended."). But regardless of how the trial court's actions are interpreted, we conclude that there is no reversible error. If Washington withdrew his recusal motion, this issue is moot. If we interpret the trial court's actions as the trial court refusing to rule on Washington's pro se motion, that was the trial court's prerogative and there is nothing for this court to review. *Robinson*, 240 S.W.3d at 922. And even if we interpret the trial court's letter to the administrative judge as a ruling capable of review, we conclude that the trial court complied with the mandates of Rule 18a—the trial court's referral letter to the administrative judge informed the administrative judge that the trial judge would not voluntarily recuse itself and that the matter was now before the administrative judge. *See* Tex. R. Civ. P. 18a(f)(1) (requiring the judge to either sign an order of recusal, or to refer the motion to the regional presiding judge). We overrule Washington's seventh issue.

G. Motion-for-New-Trial Hearing

In his eighth issue, Washington argues that the trial court abused its discretion by not conducting a hearing on his motion for new trial—a motion he filed eleven months after the trial court imposed his sentence.

A defendant in a criminal case may file a motion for new trial before, but no later than thirty days after, the date the trial court imposes or suspends sentence in open court. Tex. R. App. P. 21.4(a). The trial court does not have jurisdiction to entertain an untimely motion for new trial. *See Drew v. State*, 743 S.W.2d 207, 223 (Tex. Crim. App. 1987). In the instant case, Washington filed his motion for new trial eleven months after the trial court imposed his sentence. Therefore, his motion for new trial was untimely, and the trial court had no jurisdiction to consider it. *Id.* at 223; Tex. R. App. P. 21.4(a). As such, the trial court had no duty to hold a hearing on Washington's motion for new trial. *See Drew*, 743 S.W.2d at 223. We overrule Washington's eighth issue.

H. Motions Before This Court

Like in the trial court, Washington has repeatedly filed motions in this court. The lone remaining motion that this court has not ruled on, filed on August 17, 2015, is titled "Objection to State's Brief/Motion to Abate Appeal." We deny this motion as moot.

IV. CONCLUSION

Having overruled all eight of Washington's issues on appeal and having denied his remaining motion as moot, we affirm the trial court's judgment.

PER CURIAM

PANEL: MEIER, J.; LIVINGSTON, C.J.; and WALKER, J.

WALKER, J., concurs without opinion.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: August 31, 2016