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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0731**

State of Minnesota,
Respondent,

vs.

Robert Earl Leatherberry,
Appellant.

**Filed May 1, 2017
Affirmed
Bratvold, Judge**

St. Louis County District Court
File No. 69DU-CR-15-1250

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

Mark S. Rubin, St. Louis County Attorney, Jessica J. Fralich, Assistant County Attorney,
Duluth, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Michael W. Kunkel, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Kirk, Presiding Judge; Schellhas, Judge; and Bratvold,
Judge.

UNPUBLISHED OPINION

BRATVOLD, Judge

On appeal from his conviction of first-degree criminal sexual conduct, appellant
argues that he was denied his right to a speedy trial because trial was postponed eight days

beyond the 60-day speedy-trial deadline. Because appellant was responsible for causing delays before he made a speedy-trial demand, and the district court did not abuse its discretion in determining witness unavailability was good cause to extend the 60-day period, we affirm.

In his pro se supplemental brief, appellant also argues his conviction should be reversed for additional reasons. Because appellant was not denied effective assistance of counsel, the district court did not deny appellant his due-process right to present a complete defense, and none of appellant's other pro se claims have merit, we affirm.

FACTS

The evidence at trial established that K.B. was on her front porch when appellant Robert Leatherberry, her next door neighbor, approached her around midnight on November 12, 2014. K.B. walked into her house and tried to shut the door, but Leatherberry pushed his way in and locked the door behind him. Leatherberry sat down on the couch next to K.B., and K.B. asked him to leave; Leatherberry responded that he would "in a few minutes." Leatherberry then pushed K.B. back on the couch and ripped off her pants. K.B. told Leatherberry, "No, No, I don't want to do this." Leatherberry inserted three fingers into K.B.'s vagina and then penetrated her vagina with his penis. Leatherberry ejaculated inside of K.B., and, according to K.B., kissed her "on the cheek, laughed, and put his stuff on and went out the back door."

After Leatherberry left, K.B. "knew what [Leatherberry] did wasn't right," so she "wipe[d] off" with a tissue, placed the tissue in a Ziplock bag, and placed the leggings she had been wearing in a plastic bag. K.B. waited until the next morning to go to the hospital

because it was late at night, her children were sleeping, and her efforts to seek help from a friend failed.

At the hospital, K.B. told the sexual assault nurse that Leatherberry had digitally penetrated her and had intercourse with her. The nurse documented numerous scratches on K.B.'s legs. The nurse also collected blood and urine samples; swabbed K.B.'s vaginal and rectal areas, cheek, fingernails, and neck; and collected and documented the leggings and tissue that K.B. brought with her to the hospital. Sperm cell fractions matching Leatherberry's DNA were found on the vaginal and rectal swabs.

On April 15, 2015, the state arrested Leatherberry on charges of first-degree criminal sexual conduct and first-degree burglary. At his first appearance, the district court set bail at \$75,000 and Leatherberry remained in custody through trial and was represented throughout the pretrial and trial proceedings.

At the scheduled omnibus hearing, Leatherberry requested a continuance, which the district court granted, and Leatherberry waived his right to a timely omnibus hearing. At two hearings in June and July 2015, Leatherberry again requested continuances so he could review the state's discovery and decide whether to raise an omnibus challenge.

At the rescheduled omnibus hearing on August 13, 2015, Leatherberry waived any omnibus issues and specifically stated that he did *not* demand a speedy trial. Leatherberry also moved for additional DNA testing of the tissue and leggings and a cushion from K.B.'s couch. In support of his motion, Leatherberry told the court that he was *not* relying on an alibi defense and that the court should not "place too much weight" on any further delay caused by additional testing.

The district court granted Leatherberry's motion and instructed the Bureau of Criminal Apprehension (BCA) to conduct DNA testing of the tissue, leggings, and cushion. The BCA, however, informed the court that it would not conduct the additional DNA testing pursuant to a policy, the details of which are not relevant here. The district court told Leatherberry that he could have an independent lab perform testing at the state's expense, but Leatherberry responded that he did not want to hire an independent lab and expressly acknowledged that the tissue, leggings, and cushion would not be tested. On August 25, 2015, Leatherberry requested an omnibus hearing and asserted a probable-cause challenge, which the district court denied after a hearing.

At a pretrial hearing on September 24, 2015, Leatherberry demanded a speedy trial. The district court acknowledged the demand and stated that it would coordinate schedules with counsel to accommodate the demand. On September 25, Leatherberry filed notice of an alibi defense and identified his wife, V.H., as his alibi witness.

On October 15, 2015, the district court considered two pretrial motions. First, Leatherberry moved to allow V.H. to testify telephonically, which the state opposed. Leatherberry argued that when his counsel contacted V.H. to testify, she refused to travel to Minnesota because she could not afford it. The district court denied Leatherberry's motion, citing the rules and the state's opposition.

Second, the state moved to set the trial beyond the 60-day speedy-trial period, arguing that good cause supported its request. Leatherberry opposed the motion and

reasserted his speedy-trial demand.¹ The state “primarily” relied on the unavailability of three witnesses. The state informed the court that it expected to call the sexual assault nurse as a witness, but the nurse was unavailable until after the 60-day speedy-trial deadline. The state further explained that two other witnesses were unavailable and it was unable to locate V.H. The state also explained that its office was “severely taxed,” and no prosecutor was available to prosecute the case within the 60-day period. Noting that “witness unavailability is something the State has generally little control over,” the district court found good cause to set the trial eight days beyond the 60-day speedy-trial deadline.

On December 1, 2015, the prospective jury panel was sworn.² During trial, the state called K.B., four BCA scientists, and two responding officers. The state asked to present testimony outside the chain-of-custody order because two of its BCA witnesses had scheduling conflicts. Leatherberry opposed the motion and asked the court to exclude testimony outside the chain-of-custody order. The district court provisionally admitted the state’s testimony, but stated that it would entertain a mistrial motion if the state did not establish chain of custody. On the last day of trial, the district court determined that the

¹ The state’s motion to re-set the trial date was discussed at two hearings. At the end of the first hearing on October 15, the district court did not issue an order and the parties tentatively agreed to schedule the trial for November 23, 2015, the last day within the 60-day period. One week later, the parties reconvened to discuss scheduling conflicts, and the district court granted the state’s motion in a written order.

² On December 10, the district court continued trial for one week because Leatherberry’s counsel was unable to attend trial due to a death in the family. The chief public defender attended trial on December 10 on Leatherberry’s behalf.

state had established chain of custody through its witness testimony, and Leatherberry's counsel did not move for a mistrial.

Leatherberry testified that on November 12, 2014, he arrived home around 8:00 or 9:00 p.m. from a friend's house, showered, ate, "got into bed next to [his] wife," and went to sleep. Leatherberry further testified that, since 2012, he and K.B. had been in a casual sexual relationship, he had consensual sex with K.B. three days *before* November 12, after which he and K.B. had argued because he wanted to end their relationship. K.B. said he would "pay for it." Leatherberry testified that he did not have any contact with K.B. on November 12, 2014, although he also acknowledged that he told police that he had never had any contact with K.B.

The jury found Leatherberry guilty of first-degree criminal sexual conduct, but acquitted him of first-degree burglary. The district court sentenced Leatherberry to 306 months in prison. This appeal follows.

D E C I S I O N

I. Leatherberry was not denied his right to a speedy trial.

The U.S. and Minnesota Constitutions guarantee criminal defendants the right to a speedy trial. U.S. Const. amend. VI; Minn. Const. art. I, § 6. Minnesota has adopted the four-factor test articulated by the United States Supreme Court in *Barker v. Wingo* for determining whether a defendant's speedy-trial right has been violated. *State v. Taylor*, 869 N.W.2d 1, 19 (Minn. 2015); *see Barker*, 407 U.S. 514, 530–33, 92 S. Ct. 2182, 2192–93 (1972). Under *Barker*, appellate courts consider: "(1) the length of the delay; (2) the reason for the delay; (3) whether the defendant asserted his or her right to a speedy trial; and

(4) whether the delay prejudiced the defendant.” *Taylor*, 869 N.W.2d at 19 (quotation omitted). No factor is either necessary or sufficient to finding a speedy-trial violation. *Id.* Instead, appellate courts “engage in a difficult and sensitive balancing process,” considering all the factors together with any other relevant circumstances. *Id.* (quotation omitted). This court reviews a claimed speedy-trial violation de novo. *Id.*

A. Length of the delay

“The length of the delay is a ‘triggering mechanism’ which determines whether further review is necessary.” *State v. Windish*, 590 N.W.2d 311, 315 (Minn. 1999) (quoting *Barker*, 407 U.S. at 530, 92 S. Ct. at 2192). The delay is calculated based on “when a formal indictment or information is issued against a person or when a person is arrested and held to answer a criminal charge.” *State v. Jones*, 392 N.W.2d 224, 235 (Minn. 1986). Unless good cause is shown, “trial must start within 60 days” of a speedy-trial demand. Minn. R. Crim. P. 11.09(b). “A delay that exceeds 60 days from the date of the demand raises a presumption that a violation has occurred.” *Taylor*, 869 N.W.2d at 19.

The state concedes that Leatherberry has met the first *Barker* factor because trial began after the 60-day speedy-trial deadline. We agree. Leatherberry was arrested on April 15, 2015, and demanded a speedy trial on September 24, 2015. The 60-day speedy-trial deadline was November 23. Trial began on December 1, over seven months after the arrest and 68 days after the demand. *See Jones*, 392 N.W.2d at 235 (concluding that seven-month delay from the date of arrest triggered consideration of the other *Barker* factors). Therefore, we will consider the remaining *Barker* factors.

B. Reason for the delay

“The responsibility for promptly bringing a case to trial rests with the state,” but different weights are assigned for different reasons causing a delay. *State v. Hahn*, 799 N.W.2d 25, 30 (Minn. App. 2011), *review denied* (Minn. Aug. 24, 2011). The key question is whether the government or the defendant is responsible for the delay. *Taylor*, 869 N.W.2d at 20. Because the right to a speedy trial attaches at the time a defendant is arrested or charged, the reasons for the entire delay, not merely the delay after the speedy-trial demand, should be considered. *State v. Osorio*, 872 N.W.2d 547, 554 (Minn. App. 2015), *aff’d as modified*, 891 N.W.2d 620 (Minn. 2017). A district court’s determination that there is good cause to extend the 60-day speedy-trial deadline under Minn. R. Crim. P. 11.09(b) is reviewed for an abuse of discretion. *State v. Friberg*, 435 N.W.2d 509, 515 (Minn. 1989).

In this case, responsibility for pre-demand delays are attributable to Leatherberry. During the five-month period between Leatherberry’s arrest and his speedy-trial demand, Leatherberry waived a timely omnibus hearing, requested four continuances, waived any omnibus challenges, but then revoked the waiver and asserted a probable-cause challenge. *See Hahn*, 799 N.W.2d at 32 (“Delays caused by defense motions generally weigh against the defendant.”). Notably, Leatherberry initially waived a speedy trial, but then later changed his mind and demanded a speedy trial. Therefore, the five-month pre-demand delay is attributed to Leatherberry.

Next, we consider post-demand delays. The district court determined that the eight-day post-demand delay was caused by witness unavailability. Generally, the unavailability

of state witnesses establishes good cause for a delay, but only if the state acted diligently in attempting to procure the witnesses' attendance at trial. *Windish*, 590 N.W.2d at 317.

Leatherberry argues that the state was not diligent in pursuing its witnesses. We disagree. There were three state witnesses with scheduling conflicts. The sexual assault nurse was unavailable until after the 60-day speedy-trial deadline, and two other state witnesses were unavailable during one week in the 60-day period. The sexual assault nurse was a key witness for the state, and the state was diligent in ascertaining her availability and raising scheduling conflicts with the court. *See State v. Terry*, 295 N.W.2d 95, 96 (Minn. 1980) (finding no speedy-trial violation where delay was caused by unavailability of state's key witness, and state was diligent in trying to locate the witness).³ The state was also diligent in attempting to locate and subpoena V.H., given the late timing of Leatherberry's notice of his alibi defense, but was unsure of her whereabouts. We conclude the record supports the district court's determination that witness unavailability established good cause for extending trial beyond the 60-day speedy-trial deadline.

The state also argued that the prosecutor's office was "severely taxed" and no other prosecutors were available to try the case within the 60-day period. These reasons weigh against the state because "overcrowding in the court system is not a valid reason for denying a defendant a speedy trial." *Windish*, 590 N.W.2d at 316. But there is no evidence

³ In his pro se reply brief, Leatherberry argues that the state failed to consider alternative solutions to the nurse's unavailability, such as introducing the nurse's "findings without her being present" under hearsay exceptions. But Leatherberry does not point to any specific hearsay exception that would have applied, and fails to acknowledge that witness unavailability is good cause for trial delay so long as the state acted diligently.

that the state deliberately delayed trial; therefore, the state's other reasons weigh, at most, only slightly against the state. *See Hahn*, 799 N.W.2d at 32 (state's own scheduling conflict weighs slightly against state in absence of "deliberate attempt to delay trial").

In sum, Leatherberry is responsible for the five-month pre-demand delay, while the state is responsible for delaying the trial eight days beyond the 60-day speedy-trial deadline. Because the district court did not abuse its discretion in determining the state had good cause for seeking an eight-day delay, we conclude that the second *Barker* factor weighs against a speedy-trial violation.

C. Strength of the speedy-trial demand

A defendant's assertion of the right to a speedy trial "is entitled to strong evidentiary weight." *Friberg*, 435 N.W.2d at 515 (quotation omitted). Courts evaluate "[t]he circumstances surrounding the frequency and intensity of a defendant's assertion of a speedy trial demand—including the import of defense decisions to seek delays." *Windish*, 590 N.W.2d at 318. Although the defendant is not required to repeatedly assert the right, "the strength of the demand is likely to reflect the seriousness and extent of the prejudice which has resulted." *Friberg*, 435 N.W.2d at 515.

The state concedes that Leatherberry unequivocally demanded a speedy trial on September 24, 2015, and reasserted the demand through trial. We agree that Leatherberry's speedy-trial demand was clear and unequivocal, and he reasserted the demand at least two additional times. On the other hand, Leatherberry specifically declined to demand a speedy trial when given the option to do so at a hearing in August 2015, and he waited over five months after being arrested to assert his right. *See State v. Johnson*, 498 N.W.2d 10, 16

(Minn. 1993) (noting defendant’s seven-month delay in demanding a speedy trial after attempting to dismiss the charges “cannot be regarded as prompt or forceful”). Thus, this factor only slightly weighs in favor of finding a violation.

D. Prejudice

Whether a defendant is prejudiced from a delay is determined in light of three interests served by the right to a speedy trial: “(1) preventing oppressive pretrial incarceration; (2) minimizing the anxiety and concern of the accused; and (3) preventing the possibility that the defense will be impaired.” *Taylor*, 869 N.W.2d at 20 (quotation omitted). The third interest, impairment of the defense, is the most important. *Id.*

Leatherberry was held in pretrial custody through trial, which undoubtedly contributed to his anxiety and concern. Some of the length of Leatherberry’s pretrial custody was caused by Leatherberry’s pretrial motions and delay in asserting his speedy-trial right. *See Johnson*, 498 N.W.2d at 16 (finding no prejudice from incarceration because defendant was responsible for most of the delay between arrest and trial). The state carries some responsibility for the post-demand delay, but this delay was only eight days beyond the 60-day speedy-trial deadline. Thus, the first two interests, pretrial custody and the defendant’s anxiety, only slightly favor a speedy-trial violation.

Regarding the third and most important interest, Leatherberry does not identify how the delay impaired his defense. Because it is difficult to prove exactly how a case was impaired by a delay, “[a] defendant does not have to affirmatively prove prejudice; rather, prejudice may be suggested by likely harm to a defendant’s case.” *Windish*, 590 N.W.2d at 318. To establish that a delay likely harmed the defense, a defendant must “suggest

evidentiary prejudice.” *Taylor*, 869 N.W.2d at 20 (quotation omitted). In this case, the delay arguably benefitted Leatherberry by giving him more time to develop his alibi defense.⁴ Because Leatherberry alleges no impairment to his defense, the fourth *Barker* factor weighs against a speedy-trial violation.

Upon balancing all of the *Barker* factors, we conclude that Leatherberry was not denied his right to a speedy trial. Although the length of delay raises a presumptive violation, the state had good cause to request a delay based on witness unavailability, the state’s admitted limited resources make it only slightly responsible for the post-demand delay, there is no evidence that the state deliberately delayed trial to gain a strategic advantage, Leatherberry waited over five months to assert his speedy-trial right, and he has not suggested how his case was prejudiced by the eight-day delay. Therefore, we conclude that the balance of the *Barker* factors overcome the presumption of a speedy-trial violation.

II. Leatherberry was not denied effective assistance of trial counsel.

In his pro se supplemental brief, Leatherberry asserts that his trial counsel was ineffective. A claim of ineffective assistance of counsel involves a mixed question of law and fact, which this court reviews de novo. *Hawes v. State*, 826 N.W.2d 775, 782 (Minn. 2013). Minnesota courts analyze ineffective-assistance-of-counsel claims under the two-prong analysis from *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064

⁴ In his pro se reply brief, Leatherberry intimates that he was prejudiced by the delay because, had trial started when previously scheduled, his counsel would not have been absent for a death in the family and would not have been negatively affected by grief during trial. Trial, however, was continued one week to allow defense counsel time to grieve, and there is no evidence that defense counsel’s performance was negatively affected by grief.

(1984). *Hawes*, 826 N.W.2d at 782. Under the first prong, a defendant must show that counsel’s representation “fell below an objective standard of reasonableness.” *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2064. The second prong requires that a reasonable probability exists that, but for counsel’s errors, the outcome would have been different. *Id.* at 695, 104 S. Ct. at 2068–69. There is a “strong presumption that counsel’s performance was reasonable.” *Zornes v. State*, 880 N.W.2d 363, 370 (Minn. 2016). This court will “not review an ineffective-assistance-of-counsel claim that is based on trial strategy.” *Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013). If a defendant cannot meet the first *Strickland* prong, this court will not consider the second prong. *Zornes*, 880 N.W.2d at 370.

Leatherberry argues that his trial counsel was ineffective because she did not: (1) subpoena V.H., (2) move for a mistrial when the state presented testimony outside the chain-of-custody order, (3) hire an expert to rebut the state’s DNA evidence, or (4) object to an exhibit that depicted the leggings K.B. wore on the night of the assault.⁵ All of Leatherberry’s claims of ineffective assistance are matters of trial strategy that are not reviewed by appellate courts. *See Carridine v. State*, 867 N.W.2d 488, 494 (Minn. 2015) (decisions whether to subpoena a witness and file a motion are matters of trial strategy); *State v. Nicks*, 831 N.W.2d 493, 506 (Minn. 2013) (“[T]he extent of any investigation is a part of trial strategy.”); *Leake v. State*, 737 N.W.2d 531, 542 (Minn. 2007) (“Decisions

⁵ Leatherberry appends four documents to his pro se supplemental brief. Only one document is contained within the record. Appellate courts do not consider documents that are outside the record on appeal. Minn. R. Civ. App. P. 110.01 (providing that the record on appeal consists of all documents filed in the district court and transcripts). Thus, our analysis requires considering only those documents contained within the appellate record.

about objections at trial are matters of trial strategy.”). Therefore, Leatherberry’s ineffective-assistance-of-counsel claim fails under the first *Strickland* prong, and we do not address the second prong of the test. *Zornes*, 880 N.W.2d at 370.

III. Leatherberry was not denied his due-process right to present a complete defense.

In his pro se supplemental brief, Leatherberry also asserts that the district court denied his due-process right to present a complete defense. The Due Process Clause of the U.S. and Minnesota Constitutions guarantee the right to present a complete defense. U.S. Const. amend. XIV; Minn. Const. art. 1, § 7; *State v. Jenkins*, 782 N.W.2d 211, 225 (Minn. 2010). The right to present a complete defense includes the right to offer witness testimony. *State v. LeDoux*, 770 N.W.2d 504, 513 (Minn. 2009). Usually, “evidentiary rulings rest within the sound discretion of the trial court” and are reviewed for abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). But we review due-process questions de novo. *LeDoux*, 770 N.W.2d at 512.

Leatherberry argues that he was denied the right to present a complete defense because his alibi witness, V.H., was not allowed to testify telephonically at trial. The district court denied Leatherberry’s motion because the state objected to telephonic testimony and Minn. R. Crim. P. 26.03, subd. 16, states that “witness testimony *must* be taken in open court, unless [the] rules provide otherwise.” (Emphasis added.) Analogizing the district court’s decision to a decision to exclude V.H.’s testimony, the issue is whether Minn. R. Crim. P. 26.03, subd. 16, infringes upon Leatherberry’s weighty interest in

presenting a complete defense and is arbitrary or disproportionate to the purposes the rule is designed to serve. *State v. Pass*, 832 N.W.2d 836, 841–42 (Minn. 2013).

In denying Leatherberry’s request, the district court relied on a civil commitment case, which held that it was an abuse of discretion for the district court to allow telephonic testimony over appellant’s objection because telephonic testimony impedes the factfinder’s ability to make credibility determinations. *In re Bieganowski*, 520 N.W.2d 525, 528 (Minn. App. 1994), *review denied* (Minn. Oct. 27, 1994). *Bieganowski* reasoned that “[w]ith telephone testimony, the trier of fact can perceive some of the indicia of credibility, such as tone of voice, but cannot perceive others, such as body language.” *Id.* at 529. In contrast, in-court testimony permits the factfinder to “perceive both visual and aural indicia of credibility.” *Id.* The civil rule of procedure on which *Bieganowski* relied is virtually the same as the criminal rule. *See* Minn. R. Civ. P. 43.01 (“In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by statute or by these rules.”). Thus, *Bieganowski* instructs our interpretation of Minn. R. Crim. P. 26.03, subd. 16.

We conclude that rule 26.03, subdivision 16, does not infringe on a defendant’s constitutional right to present a complete defense because it requires testimony to be presented in open court and applies equally to the defendant and the state. Additionally, the purpose served by the rule, as explained in *Bieganowski*—fostering an environment for fact-finders to make credibility determinations—is proportionate to the requirement that testimony be taken in open court before the fact-finder. Thus, the district court did not

abuse its discretion in denying Leatherberry's request for telephonic testimony, and Leatherberry was not denied his constitutional right to present a complete defense.

Leatherberry asserts other pro se claims, including that the state violated its *Brady* obligation by suppressing exculpatory evidence and engaged in misconduct by interviewing V.H. without his permission. After close review of the record, we conclude that none of Leatherberry's pro se claims have merit, and Leatherberry is not entitled to the relief he seeks.

Affirmed.