

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0968**

State of Minnesota,
Respondent,

vs.

Gideon Wesseh Chea,
Appellant.

**Filed May 30, 2017
Affirmed
Peterson, Judge**

Hennepin County District Court
File No. 27-CR-14-2574

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

Michael O. Freeman, Hennepin County Attorney, Elizabeth A. Johnston, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Cleary, Chief Judge; and Peterson, Judge.

UNPUBLISHED OPINION

PETERSON, Judge

In this appeal from a conviction of third-degree criminal sexual conduct, appellant argues that (1) the district court committed reversible error by failing to suppress DNA

evidence obtained from the warrantless swabbing of his hands, and (2) his conviction must be reversed because his constitutional right to a speedy trial was violated. We affirm.

FACTS

After going out to a club, K.D. and two of her friends, J.Y. and B.T., went to appellant Gideon Wesseh Chea's apartment. K.D. went to sleep in a bedroom, and J.Y. and B.T. left. K.D. woke up in pain and felt her leg being lifted and then her vagina being penetrated by fingers. Although she was fully dressed and covered by a sheet when she went to sleep, K.D. was fully undressed and covered by nothing when she awoke, and she did not recall feeling her clothing being removed. K.D. realized that Chea's head was between her legs and that he was licking or sucking her vagina. She became aware that Chea had used his right hand to lift her left leg and the fingers on his left hand to penetrate her vagina. K.D. shouted, kicked Chea off of her, grabbed her phone and clothes, and ran into the bathroom.

K.D. called 911 from the bathroom. Police arrived a short time later, escorted K.D. out of the apartment, and arrested Chea and took him to the police station. Chea denied sexually assaulting K.D., claiming that he had tapped her on the thigh to wake her up. Because K.D. reported digital penetration, a crime-scene investigator swabbed Chea's hands. The swabs of Chea's left hand contained DNA from a mixture of three or more people, and, although 99.95% of the population could be excluded as contributing to the mixture, neither K.D. nor Chea could be excluded.

Chea was charged with third-degree criminal sexual conduct. He moved to suppress the DNA evidence obtained by the warrantless swabbing of his fingers. Detective Mona

Pearson, the general investigator who requested that Chea's hands and fingers be swabbed, testified at the suppression hearing. Pearson had 17 years of experience in law enforcement, including training on DNA collection and preservation and specialized training in the preservation of evidence in sexual-assault cases. Pearson stated the following reasons for not obtaining a search warrant before having Chea's hands swabbed:

Certainly the time issue. For Mr. Chea to preserve evidence that was on his fingers potentially, I would have requested that he remain handcuffed . . . for potentially several hours that it might take to obtain the search warrant and get crime lab to come back out to take these swabs. I did not feel like that was reasonable to have him handcuffed and to have an officer basically stand there and watch his every move. I was concerned that there might be . . . the loss of evidence from his fingertips. I am aware that . . . if you rub your fingers on anything or rub them together, you can lose DNA that way. If you . . . have any contact with liquid, the DNA can be washed away, and that includes sweating. I was also concerned. I had information that everyone in the apartment had been drinking and that at some point, Mr. Chea might have to use the restroom, which again would require him to have contact with water or other fluids. He can't use the restroom when he's handcuffed obviously. Basically just concerned that it would not be reasonable to have him . . . in that manner for the several hours that it might take to obtain a search warrant.

In denying Chea's suppression motion, the district court specifically found Pearson's testimony credible "based upon her 17 years of experience as [a police] investigator . . . , as well as her frankness and sincerity displayed on the witness stand."

The case was tried to a jury, which found Chea guilty as charged. This appeal followed sentencing.

DECISION

I.

In reviewing a pretrial order denying a motion to suppress evidence, this court “independently review[s] the facts to determine whether, as a matter of law, the [district] court erred in its ruling.” *State v. Jackson*, 742 N.W.2d 163, 168 (Minn. 2007). But we review the district court’s factual findings for clear error and defer to its credibility determinations. *State v. Klamar*, 823 N.W.2d 687, 691 (Minn. App. 2012).

Both the United States and Minnesota Constitutions prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. The Supreme Court has concluded that the collection and analysis of a biological specimen is a Fourth Amendment search. *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 618, 109 S. Ct. 1402, 1413 (1989); *see also State v. Lussier*, 770 N.W.2d 581, 585, 589 (Minn. App. 2009) (recognizing that sexual-assault examination of defendant that involved pubic hair combings and swabbing of cheek, hands, and penis was a search), *review denied* (Minn. Nov. 17, 1999).

A warrantless search is unreasonable unless it falls under a recognized exception to the warrant requirement. *State v. Lemert*, 843 N.W.2d 227, 230 (Minn. 2014). One recognized exception is the existence of exigent circumstances. *State v. Stavish*, 868 N.W.2d 670, 675 (Minn. 2015). Exigent circumstances exist when “there is compelling need for official action and no time to secure a warrant.” *Id.* (quoting *Michigan v. Tyler*, 436 U.S. 499, 509, 98 S. Ct. 1942, 1949 (1978)). The state carries the burden to prove the

probable-cause basis for a warrantless search. *State v. Flowers*, 734 N.W.2d 239, 248 (Minn. 2007).

“The United States Supreme Court has recognized several circumstances that may give rise to an exigency that justifies a warrantless search, including preventing the imminent destruction of evidence.” *Stavish*, 868 N.W.2d at 675 (citing *Kentucky v. King*, 563 U.S. 452, 460, 131 S. Ct. 1849, 1856-57 (2011)). “To resolve whether a law enforcement officer faced an emergency that justified acting without a warrant, the Court applies the totality-of-the-circumstances approach.” *Id.* (citing *Missouri v. McNeely*, 133 S. Ct. 1552, 1559 (2013)). “The exigent circumstances analysis requires an objective evaluation of the facts reasonably available to the officer at the time of the search.” *Id.* (citing *Brigham City v. Stuart*, 547 U.S. 398, 404, 126 S. Ct. 1943, 1948 (2006)).

The district court explained its conclusion that the warrantless swabbing of Chea’s hands was justified as follows:

In the instant case, Detective Pearson, a veteran law enforcement investigator, determined that evidence of the crime might be present on [Chea’s] hands and fingers, as [K.D.] had alleged digital penetration committed by [Chea]. If this evidence existed, it might have been destroyed at any moment had [Chea] washed his hands or rubbed his hands together or on another object just during the very act of living as a human being. Furthermore, [Chea] was aware that law enforcement believed he had committed a crime, and thus might have deliberately attempted to destroy the evidence on his hands. Detective Pearson determined that obtaining a warrant to conduct a search of [Chea’s] hands might have taken several hours, as the alleged crime had been committed in the early hours of a national holiday (Labor Day), and the judge who was on call to examine warrant requests would have to be reached at home. After any initial communication with the judge, law enforcement then would need to drive to that

judge's residence for approval and signature. Thus, Detective Pearson determined that by the time a warrant had potentially been approved, any evidence on [Chea's] hands might have been destroyed, either purposefully or inadvertently.

Citing *Lussier*, Chea argues that because he was in custody and under police supervision, the warrantless swabbing of his hands was not justified by the need to preserve evidence. 770 N.W.2d at 589. In *Lussier*, this court concluded that the warrantless sexual-assault (SARS) examination of the defendant's genitalia was not valid under the search-incident-to-arrest exception because neither justification for that exception, officer safety and preservation of evidence, was present. *Id.* at 589-90. In addressing the preservation of evidence, the court stated:

[W]e note that nothing in the record indicates that body-fluid evidence following a sexual assault naturally evaporates or is compromised over time like the dissipation of a defendant's alcohol concentration in driving-while-impaired cases. And here, the SARS examination took place at 5:00 a.m.; the officers themselves acknowledged that they could have begun the process to secure a search warrant for respondent's residence and thus presumably his body, as well, by 6:00 a.m.

Because of the very intrusive nature of a SARS examination, and because respondent was restrained and under police observation and therefore not capable of destroying evidence, officers were required to obtain a warrant before conducting a SARS examination.

Id. at 590.

Chea notes that there was no evidence that he was contemplating or trying to destroy evidence. But in *Lussier*, in concluding that a warrantless search of the defendant's

residence was justified by exigent circumstances,¹ this court noted “that the correct focus is on a defendant’s *capability* of destroying evidence, not whether he or she actually intended to destroy evidence of a sexual assault.” *Id.* at 588. Unlike the evidence obtained during the SARS examination in *Lussier*, the district court found that Chea could have destroyed DNA evidence on his hands “at any moment” by “rubb[ing] his hands together or on another object,” or even by sweating. We also note that the search of genitalia in *Lussier* was far more intrusive than the search of Chea’s hands, which, under the totality-of-circumstances, is a factor that weighs in favor of upholding Chea’s search.

Chea argues that the state failed to show that it did not have sufficient time to secure a warrant. But even if Chea is correct that a warrant could have been quickly obtained electronically or by telephone, any DNA evidence on Chea’s hands could have been destroyed, even inadvertently, in a moment. *See id.* (stating that the defendant’s argument “that [the state] failed to prove that [the defendant] was a ‘quick-thinking, fast-acting evidence destroyer’ misses the mark because [the state] was only required to prove that officers reasonably believed that [the defendant] was capable of destroying evidence”). Thus, even if Pearson was wrong about how long it would take to obtain a warrant, her belief that Chea was capable of destroying evidence before a warrant could be obtained was reasonable.

¹ In *Lussier*, the defendant moved to suppress evidence collected during the warrantless SARS examination and evidence collected during a warrantless search of his residence. 770 N.W.2d at 585. The recitation of facts states that “officers swabbed [the defendant’s] hands to take a sample of blood because they feared it would be washed or rubbed off.” *Id.* at 584. But this fact is not addressed in the opinion.

Chea cites a Montana case holding that a warrantless swab of the defendant's hands was not justified by exigent circumstances. *State v. Hardaway*, 36 P.3d 900, 915 (Mont. 2001). The *Hardaway* court relied on Article II, Section 10, of the Montana Constitution, which states, "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." *Id.* at 910. That provision grants "Montana citizens a specific right to privacy and broader protection than does the federal constitution." *Id.* *Hardaway* is also factually distinguishable from this case in that, in *Hardaway*, "the police knew that the blood they swabbed and sent in for analysis was Hardaway's blood, and not the blood of a victim that could be washed away unless taken at once." *Id.* at 914; *see also State v. Madplume*, 150 P.3d 956, 959 (Mont. 2007) (distinguishing *Hardaway* and concluding that warrantless search of the defendant's hands was justified by exigent circumstances when the evidence sought was the victim's DNA and a forensic expert testified that the defendant "could have destroyed the evidence by licking his fingers, rubbing them against a wall or some other surface, or simply perspiring").

Given the fact that any DNA evidence on Chea's hands could have been destroyed in a moment, even inadvertently, the warrantless swabbing of his hands was justified by the totality of the circumstances to prevent the imminent destruction of evidence.

II.

The Minnesota and United States Constitutions guarantee criminal defendants the right to a speedy trial. U.S. Const. amend. VI; Minn. Const. art. I, § 6. Minnesota has adopted a four-factor test for determining whether a defendant's speedy-trial right has been

violated. *State v. Taylor*, 869 N.W.2d 1, 19 (Minn. 2015) (citing *Barker v. Wingo*, 407 U.S. 514, 530-33, 92 S. Ct. 2182, 2192-93 (1972)). The test requires a court to “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.” *Id.* at 19 (quotation omitted). This court reviews a claimed speedy-trial violation de novo. *Id.*

Length of delay

“The length of the delay is a ‘triggering mechanism’ which determines whether further review [of the *Barker* factors] is necessary.” *State v. Windish*, 590 N.W.2d 311, 315 (Minn. 1999). “The delay in speedy-trial cases is calculated from the point at which the sixth amendment right attaches: when a formal indictment or information is issued against a person or when a person is arrested and held to answer a criminal charge.” *State v. Jones*, 392 N.W.2d 224, 235 (Minn. 1986). A delay of seven months from when the right attaches is long enough to trigger the consideration of the other *Barker* factors. *Id.* And a delay of more than 60 days from the date of the defendant’s speedy-trial “demand raise[s] a presumption that a violation has occurred.” *Windish*, 590 N.W.2d at 315-16.

Chea was charged on January 23, 2014. On April 10, 2014, he waived his right to a speedy trial. He demanded a speedy trial on July 23, 2015. Trial began on November 16, 2015. Therefore, consideration of the remaining *Barker* factors is appropriate.

Reasons for 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). “[W]hen the

overall delay in bringing a case to trial is the result of the defendant's actions, there is no speedy trial violation." *State v. Johnson*, 498 N.W.2d 10, 16 (Minn. 1993). But the state's "[d]eliberate attempts at delay weigh heavily against the state," while more neutral reasons, such as the state's negligence or overcrowded courts, weigh only slightly against the state. *Hahn*, 799 N.W.2d at 30. Because the right to a speedy trial attaches when a defendant is arrested or charged, the reasons for the entire delay, not just the delay after the speedy-trial demand, should be considered. *See State v. Osorio*, 872 N.W.2d 547, 554 (Minn. App. 2015) (considering reason for delay that preceded defendant's demand for a speedy trial).

Three delays were at defense counsel's request. Defense counsel requested additional time to review evidence, and defense counsel twice requested a continuance because of health issues. Three other delays were for more neutral reasons, including the unavailability of a trial judge and unavailability of witnesses for the state, but with no deliberate attempt at delay by the state.

Assertion of right

A defendant's assertion of the right to a speedy trial "is entitled to strong evidentiary weight." *State v. Friberg*, 435 N.W.2d 509, 515 (Minn. 1989) (quotation omitted). A court may consider "the frequency and force of the speedy-trial demand because the strength of the demand is likely to reflect the seriousness and extent of the prejudice." *Hahn*, 799 N.W.2d at 32.

Chea did not assert his speedy-trial right until July 23, 2015, 18 months after he was charged, and he reasserted it once on September 21, 2015. Trial began less than four months after Chea first asserted his speedy-trial right. This factor weighs against Chea.

Prejudice

Whether a defendant is prejudiced from a delay is determined in light of three interests: “(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 serious. *Id.* To establish that a delay harms the defense, a defendant must “suggest evidentiary prejudice.” *Id.* (quotation omitted).

Chea was not in custody, and he does not suggest any evidentiary prejudice. Chea asserts that he lost two jobs while waiting for trial, but he cites no record evidence substantiating this assertion. As of September 15, 2015, Chea was employed.

Based on the lack of prejudice, Chea’s 18-month delay in asserting his speedy-trial right, and the reasons for the delay being either neutral or attributable to Chea, we conclude that his speedy-trial right was not violated.

III.

In a pro se supplemental brief, Chea argues that statements in the record about the reasons for continuances are inaccurate and that evidence about how his DNA may have transferred to K.D. and vice versa is incomplete; he also raises issues about his attorney advising him to plead guilty and the possibility that a witness could not be located because she was using an alias. None of these claims is supported by the record. Chea’s claims that his apartment was searched and he was photographed without a warrant were not raised

before the district court and are contrary to the testimony of police officers. Finally, Chea's objection to the swabbing of his hands has already been addressed.

Affirmed.