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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0727**

State of Minnesota,
Respondent,

vs.

Said Yusuf Mumin,
Appellant.

**Filed March 26, 2018
Affirmed
Florey, Judge**

Olmsted County District Court
File No. 55-CR-15-1046

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

Mark A. Ostrem, Olmsted County Attorney, Jennifer D. Plante, Assistant County Attorney,
Rochester, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jenna Yauch-Erickson, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Larkin, Judge; and Florey,
Judge.

UNPUBLISHED OPINION

FLOREY, Judge

Appellant challenges his conviction for fourth-degree criminal sexual conduct, arguing that his constitutional right to a speedy trial was violated by a 208-day period between the invocation of his speedy-trial right and his trial. We affirm.

FACTS

The state charged appellant with fourth-degree criminal sexual conduct six months after he held a woman in a tight grip across her torso and touched her vaginal area. At the initial appearance, the district court released appellant on his own recognizance and with conditions. Between the date the charges were filed and the demand for a speedy trial, the trial was continued three times: once after the state requested a continuance because of an unavailable law-enforcement witness, a second time after appellant requested a continuance because his employer would not permit him to take days off work, and a third time because an older case took priority on the district court's trial calendar.

On March 17, 2016, after the third continuance of trial, appellant made a speedy-trial demand. At a pretrial hearing in April, the parties acknowledged that appellant's case may not be heard in April because two other cases had priority on the trial calendar. The case was subsequently removed from the trial calendar in April because of an ongoing trial.

The trial was rescheduled to May 16. At a pretrial hearing, the parties acknowledged that another case would be heard before appellant's case because it involved an in-custody defendant whose speedy-trial demand was set to expire. Appellant's attorney was scheduled as standby counsel in the other case. On the week of May 16, the state emailed

the district court to ask if the case would proceed to trial later that same week, and, if not, requested that a hearing be held to discuss appellant's speedy-trial demand.

At a hearing on May 19, the district court found that there had been good cause to delay the trial on May 16. The district court explained that it heard a different trial that week, and appellant's trial could not be moved to a different judge because appellant's attorney was appearing in the other trial as well. Both the state and appellant's attorney acknowledged that a witness for the state and a witness for the defense had been unavailable for trial. Appellant's attorney then explained that the same witness would be unavailable for trial between July 13 and August 25. Appellant's attorney requested that the trial be held before July 13, indicating that appellant would be prejudiced if the trial was scheduled during the period when his witness would be unavailable. Appellant declined to waive his speedy-trial demand or request a continuance.

The trial was subsequently rescheduled to August 29. On that day, the state requested a continuance because a "third-party disinterested witness" was out of the state and had not returned the state's recent attempts at contact until that morning. The state acknowledged that the case could be tried without the witness, but that it would only do so as a last resort. The state told the district court that it planned to dismiss the case and refile the charges if a continuance was not granted. Appellant objected to the request for a continuance. The district court granted a continuance on the basis that the state had made reasonable efforts to secure the appearance of the witness. The district court acknowledged appellant's speedy-trial demand, but found that further delay would not be "particularly prejudicial" in light of appellant's out-of-custody status.

The trial was rescheduled to October 10. On October 7, appellant moved for a dismissal on the ground that the previous delays violated his right to a speedy trial. Appellant's attorney argued that the delays from March 16 to May 19 and from August 29 to October 10 were heavily attributable to the state because they were caused by the state's actions and court congestion. Appellant's attorney acknowledged that the delay from May 19 to August 29 was not attributable to the state because a defense witness was not available during that time, and because the attorneys' schedules would not permit a trial in late May. When asked by the district court if appellant turned down trial dates in June and July, appellant's attorney answered in the affirmative. The district court concluded that appellant's right to a speedy trial was not violated by the delay.

The case proceeded to trial and a jury found appellant guilty of the sole charge. This appeal followed.

D E C I S I O N

The United States Constitution and the Minnesota Constitution guarantee criminal defendants the right to a speedy trial. U.S. Const. amend. VI; Minn. Const. art. I, § 6; *State v. Taylor*, 869 N.W.2d 1, 19 (Minn. 2015). “Whether a defendant has been denied a speedy trial is a constitutional question subject to de novo review.” *State v. Osorio*, 891 N.W.2d 620, 627 (Minn. 2017). If a defendant is deprived of his right to a speedy trial, the case must be dismissed. *Id.*

Minnesota appellate courts apply the four-factor test articulated in *Barker v. Wingo*, 407 U.S. 514, 530-33, 92 S. Ct. 2182, 2192-93 (1972), to determine whether a defendant's speedy-trial right has been violated. *Id.* “Under the *Barker* test, we must 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.* (quotations omitted). We consider each factor, weighing the conduct of both the state and the defendant. *Id.* at 628. None of the factors is either necessary or sufficient to find a speedy-trial violation; rather, the factors must be considered together along with any other relevant circumstances. *Id.*

I. Length of 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). A delay that exceeds 60 days from the date of a defendant’s speedy-trial demand is presumptively prejudicial. *Taylor*, 869 N.W.2d at 19 (citing Minn. R. Crim. P. 11.09(b) (requiring a trial to start within 60 days of a speedy-trial demand unless good cause for delay is shown)). If a delay is presumptively prejudicial, we must consider the remaining *Barker* factors. *Id.*

Appellant has satisfied the first *Barker* factor because his trial did not occur within 60 days of his speedy-trial demand. This delay was presumptively prejudicial and triggers further review of the remaining *Barker* factors. *Windish*, 590 N.W.2d at 315.

II. Reason for delay

“[T]he key question is whether the government or the criminal defendant is more to blame for the delay.” *Taylor*, 869 N.W.2d at 19-20 (quotation omitted). Different reasons for a delay are weighed differently: a deliberate delay to hamper the defense is weighed heavily against the prosecution, but neutral reasons, such as negligence or overcrowded

courts are weighed less heavily against the prosecution. *Id.* Court congestion is weighed against the state, as the responsibility of bringing the defendant to trial rests with the government rather than the defendant. *Barker*, 407 U.S. at 531, 92 S. Ct. at 2192. But “when 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).

Appellant’s trial was primarily delayed from March 17 to May 19 due to court congestion. Court congestion is considered a more neutral factor, though it is still weighs against the state. *Barker*, 407 U.S. at 531, 92 S. Ct. at 2192. However, the district court found that, even if a district court judge had been available to hear the case, appellant’s attorney would not have been available because he was appearing in a different trial. The parties likewise agreed that both witnesses for the state and appellant were unavailable for trial at that time. Because both court congestion, and the availability of appellant’s attorney impacted the delay, this delay is a neutral factor.

The second delay, from May 19 to August 29, was caused by the unavailability of the attorneys for trial, as admitted in the motion to dismiss, and the unavailability of appellant’s character witness. The bulk of this delay is attributable to appellant because of the unavailability of his witness, and thus does not weigh in favor of a finding of a speedy-trial violation. *See Windish*, 590 N.W.2d at 316 (indicating that a defendant’s requests for continuances do not weigh in favor of a speedy-trial violation).

The final delay, from August 29 to October 10, was caused by the unavailability of a witness for the state. “Normally, the unavailability of a witness constitutes good cause for delay.” *Windish*, 590 N.W.2d at 317. “[A] prosecutor must be diligent in attempting

to make witnesses available and the unavailability must not prejudice the defendant.” *Id.* If the state does not produce evidence of its efforts to ensure a witness’s appearance, the “lack of diligence weighs against the state.” *Id.* In granting a continuance, the district court found that the state acted diligently in attempting to procure the witness. The state sent a subpoena to the witness, which the witness returned. The state then lost contact with the witness, despite trying to contact him in the days prior to the scheduled trial date. The witness did not make contact with the state until the day the trial was scheduled to begin. The witness informed the state that he was travelling and would be unable and unwilling to return for the trial. The state produced evidence of its efforts to ensure the witness’s appearance, and the delay did not impact appellant’s case. This delay is a neutral factor.

Of the three delays in bringing the case to trial after appellant’s demand, two of the delays were neutral and the longest delay was attributable to appellant.

III. Appellant’s assertion of the right

“Whether and how a defendant asserts his right is closely related to the other factors” *Barker*, 407 U.S. at 531, 92 S. Ct. at 2192. Assertion of the right need not be formal or technical, and is determined by the circumstances. *Windish*, 590 N.W.2d at 317. The defendant’s assertion of his speedy-trial right is entitled to strong evidentiary weight when evaluating whether he has been deprived of his right. *Barker*, 407 U.S. at 531-32, 92 S. Ct. at 2192-93. We 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. Defendants are not required to “continuously reassert their demand,” but “the strength of the demand is likely

to reflect the seriousness and extent of the prejudice which has resulted.” *State v. Friberg*, 435 N.W.2d 509, 515 (Minn. 1989); *see Johnson*, 498 N.W.2d at 16 (indicating that whether the demand is “prompt” and “forceful” is key to a court’s evaluation of a speedy-trial claim).

Appellant asserted his speedy-trial right 13 months after the complaint was filed. Between the assertion of the trial right on March 17 and the May 19 hearing, appellant did not request a continuance or relinquish his right to a speedy trial. But it is clear from the record that appellant’s attorney and a witness were unavailable for trial on the scheduled trial date in May. From May 19 to August 25, the strength of appellant’s demand diminished. As explained by appellant’s attorney in his motion to dismiss, a trial would not have been possible in late May because appellant’s attorney was unavailable, and appellant’s witness was unavailable in July and August. However, it is clear that appellant reasserted his speedy-trial demand when the state requested a continuance in August and in October when he requested dismissal for deprivation of his speedy-trial right. This factor weighs against the state, though not as strongly as it would have if appellant consistently asserted his right. *See Osorio*, 891 N.W.2d at 633 (noting that the defendant’s acquiescence to the delay ameliorates any generalized prejudice he may have suffered).

IV. Prejudice to appellant

“Prejudice . . . should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect.” *Barker*, 407 U.S. at 532, 92 S. Ct. at 2193. Those interests are: “(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be

impaired.” *Id.* Preventing the possibility that the defense will be impaired is the most serious interest. *Id.*

Appellant does not argue that he was prejudiced by oppressive pretrial incarceration or that his defense was impaired by a delay. He argues that the delay caused him to suffer anxiety, impacted his social and ordinary-life activities, and required him to appear for seven hearings after his initial speedy-trial demand.

The Supreme Court has recognized that “even if an accused is not incarcerated prior to trial, he is still disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility.” *Barker*, 407 U.S. at 533, 92 S. Ct. at 2193. “Inordinate delay may seriously interfere with the defendant’s liberty, whether he is free on bail or not, and may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.” *State v. Griffin*, 760 N.W.2d 336, 341 (Minn. App. 2009) (quotation omitted).

Though the anxiety appellant faced during the pendency of the trial impacted his daily life, “stress, anxiety and inconvenience experienced by anyone who is involved in a trial” is insufficient for a finding of prejudice. *Friberg*, 435 N.W.2d at 515. Large portions of the delays were caused by the unavailability of defense witnesses, defense counsel, and appellant’s request to continue trial to accommodate his employer’s demands. While appellant expressed that he wanted the case to be decided as quickly as possible, he was comfortable with some level of delay to accommodate his own interests.

Finally, appellant argues that he established that the length of the delay was presumptively prejudicial. He argues nothing in the record negates this prejudice, and

therefore his conviction should be reversed. However, the length of the delay is not the only factor we must weigh in considering whether a speedy-trial violation has occurred; we consider all of the factors along with all relevant circumstances. *Osorio*, 891 N.W.2d at 628. Here, appellant asserted his speedy-trial demand and was then responsible for the longest postdemand delay in bringing the case to trial. He has asserted no prejudice except the anxiety and inconvenience that attend all persons involved in criminal trials. We conclude that appellant's right to a speedy trial was not violated, and the district court did not err in denying appellant's motion to dismiss.

Affirmed.