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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0730**

State of Minnesota,
Respondent,

vs.

Ronald Lee Conway,
Appellant.

**Filed March 26, 2018
Affirmed
Cleary, Chief Judge**

Ramsey County District Court
File No. 62-CR-16-2168

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

John J. Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney,
St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Melissa Sheridan, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cleary, Chief Judge; Reyes, Judge; and Jesson, Judge.

U N P U B L I S H E D O P I N I O N

CLEARY, Chief Judge

On appeal from his conviction of two counts of second-degree murder while
committing a felony and one count of second-degree murder with intent, appellant Ronald

Lee Conway asserts that his conviction must be reversed because respondent State of Minnesota violated his right to a speedy trial. In the alternative, appellant argues that he is entitled to a new trial because of alleged prosecutorial misconduct and the district court's failure to order a mistrial due to that misconduct. We affirm.

FACTS

Two men were shot and killed at a motel in St. Paul on March 22, 2016. Multiple witnesses were present, and the shooting was captured on surveillance video. Appellant and two other men were arrested within days of the shooting. Appellant was charged with two counts of second-degree murder on March 25. The two other men—E.B. and C.S.—eventually cooperated with the state, pleaded guilty to charges related to the shooting prior to appellant's trial, and testified at his trial.

On May 13, 2016, appellant made a written demand for a speedy trial. The district court initially scheduled a trial date within the 60-day speedy-trial window. At the next hearing, the district court noted appellant's speedy-trial demand and the state expressed concern that the required DNA testing could not be accomplished within the 60-day speedy-trial window. That same day, the state filed a motion to consolidate the three cases of codefendants—E.B., C.S., and appellant—for the purposes of DNA testing. Appellant challenged the DNA testing procedure, contesting the BCA's need to consume the entire DNA sample because of the "long-term implications that can negatively impact" any further appeal.

At the next scheduling hearing on June 10, the state informed the district court that the BCA employee who was going to offer testimony about the consumption of the DNA sample through testing was unavailable until July 6. The state explained that the BCA employee had “all information” and was “in authority at the BCA.” The state requested the district court to continue the hearing to a date after July 6 and to find good cause to extend the 60-day speedy-trial window to 120 days. Appellant strongly objected to any continuance based on the BCA employee’s unavailability. The state was unable to offer a specific reason for the BCA employee’s unavailability. The district court found good cause to issue a continuance due to the BCA employee’s “critical information” and “critical evidence . . . against all three defendants” that could be inculpatory or exculpatory.

The district court rescheduled the motion hearing for July 11 and the jury trial for August 29. The parties eventually agreed to have the motion scheduled for the July 11 hearing heard by stipulation. The state submitted a transcript of the BCA testimony from a pretrial hearing on the same DNA issue in a different case held months before as part of its stipulation.

On July 26, appellant’s codefendant, E.B., pleaded guilty pursuant to an agreement with the state and agreed to testify before the grand jury and at appellant’s trial. The next day, the state convened a grand jury. The grand jury returned an indictment charging appellant with two counts of first-degree murder, two counts of second-degree intentional murder, and two counts of second-degree unintentional murder for his role in the shooting. At his arraignment hearing on August 3, appellant’s attorney noted the speedy trial demand

and alleged that the indictment was “just another way for the state to further extend this matter and subvert my client’s right to a speedy trial.”

At the next hearing on August 18, appellant noted that he had no notice that there would be a grand jury convened, that the state had yet to complete its disclosure obligations, and that he received the grand jury transcript on August 16—13 days before the scheduled trial date. Appellant stated that there was no way to present an adequate defense given the late disclosures and recent indictment and felt he had “no choice” but to waive his speedy-trial demand. The district court accepted appellant’s waiver and scheduled a new trial date for December 5.

Prior to trial, appellant made a motion to preclude testimony regarding his involvement in any prior shootings or kidnappings. The district court granted the motion and directed the state to “instruct its witnesses not to discuss” another murder or other shootings or kidnappings. During E.B.’s testimony at trial, the following exchange occurred:

STATE: What was [appellant]’s demeanor like?

E.B.: He was very upset and “Nobody takes sh-t from me and gets away with it. Nobody steals from me and gets away with it.” I guess it’s ways I never really heard him talk before, I guess. I heard him saying things like, “Do you know how many I done kidnapped? Do you know how many people I done shot at?” I’ve never—

Appellant objected to this line of testimony, the parties approached, and the jury was removed from the courtroom. The district court noted the pretrial motion to exclude the statements involving prior crimes and that the “witness was to be instructed that he was not

supposed to refer” to those prior crimes. The prosecutor explained that she was not allowed to have contact with E.B. as he was a represented party and that it was unclear whether the prohibition on testimony involving prior crimes had been conveyed to E.B. The district court sustained the objection, ordered the statement stricken, and instructed the jury to disregard the statement when they returned. Appellant then moved for a mistrial. The prosecutor explained that lay witnesses are hard to control and that a mistrial was not necessary because a curative instruction would suffice. The district court denied the motion for a mistrial and issued a curative instruction to the jury upon their return and again prior to closing arguments. In a written order denying the motion for a mistrial, the district court concluded that there was “no manifest necessity for a mistrial, in light of various less restrictive alternatives” and found that “[t]here is nothing in the record to suggest that the state took any action to precipitate the violation of the Court’s ruling on the motion in limine.”

Appellant was found guilty of two counts of second-degree murder while committing a felony in violation of Minn. Stat. § 609.19, subd. 2(1) (2016), and one count of second-degree murder in violation of Minn. Stat. § 609.19, subd. 1(1) (2016). This appeal follows.

D E C I S I O N

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

“The right to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 6 of the Minnesota Constitution.” *State v.*

DeRosier, 695 N.W.2d 97, 108 (Minn. 2005). In Minnesota, “trial is to commence within 60 days from the date of the demand unless good cause is shown . . . why the defendant should not be brought to trial within that period.” *State v. Hahn*, 799 N.W.2d 25, 29-30 (Minn. App. 2011); *see also* Minn. R. Crim. P. 11.09(b).

“A speedy-trial challenge presents a constitutional question subject to de novo review.” *State v. Griffin*, 760 N.W.2d 336, 339 (Minn. App. 2009). To determine whether a delay deprives a defendant of his right to a speedy trial, a court must balance four factors: (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. *Barker v. Wingo*, 407 U.S. 514, 530-32, 92 S. Ct. 2182, 2192-93 (1972); *see also State v. Widell*, 258 N.W.2d 795, 796 (Minn. 1977) (adopting the four-part *Barker* test for speedy-trial demands). “None of the factors is either a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant.” *State v. Windish*, 590 N.W.2d 311, 315 (Minn. 1999) (quotation omitted).

A. Length of the delay

“Under Minnesota law, a delay of more than 60 days from the date of the speedy-trial demand is presumptively prejudicial, triggering review of the remaining three factors.” *State v. Johnson*, 811 N.W.2d 136, 144 (Minn. App. 2012), *review denied* (Minn. Mar. 28, 2012). Appellant’s formal demand on May 13 triggered the 60-day time period under Minn. R. Crim. P. 11.09(b). The district court continued the trial outside the 60-day time

period after finding good cause for the continuance. The delay here is 97 days, triggering a review of the remaining factors.

B. Reason for the delay

With respect to the second factor, “the key question is whether the government or the criminal defendant is more to blame for the delay.” *State v. Taylor*, 869 N.W.2d 1, 19 (Minn. 2015) (quotation omitted). “The Supreme Court assigned the burden of protecting speedy trial rights to the court system and prosecutors.” *Windish*, 590 N.W.2d at 317. A deliberate attempt to delay trial weighs heavily against the state. *Barker*, 407 U.S. at 531, 92 S. Ct. at 2192. “A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.” *Id.*

The primary cause for delay in this case was the unavailability of the BCA employee that the state intended to call as a witness. “Normally, the unavailability of a witness constitutes good cause for delay.” *Windish*, 590 N.W.2d at 317. However, the state “must be diligent in attempting to make witnesses available and the unavailability must not prejudice the defendant.” *Id.* In *Windish*, the court concluded that because the “state did not produce any evidence of its efforts to ensure [the witness]’s appearance,” the “lack of diligence weigh[ed] against the state.” *Id.* Here, the state exhibited a similar lack of diligence. The state asserted that this particular BCA employee was the only person competent to testify on the DNA consumption issue. Nothing in the record indicates that

the witness was unnecessary or that there was another witness who was competent to testify that the state knew of or failed to contact. But there is also nothing in the record that establishes that the state was diligent in attempting to make the witness available to testify other than placing at least one phone call to the witness and reaching a voicemail recording. The state also could not point to a specific reason for the witness's unavailability, whether it was a vacation, some sort of health-related leave, or otherwise.

Despite this lack of diligence, there is no evidence that the state was deliberately trying to delay the trial or hinder the defense. And while the issue was eventually heard through a stipulation, there is no evidence that this option was a possibility considered by the parties at the time the motion was made. Because there is no evidence of a deliberate intent to delay on the part of the state, the witness's unavailability is a neutral reason for the delay and this factor should not weigh heavily against the state. But it still weighs against the state because the state bears the burden of ensuring a speedy trial and there is little evidence that the state was diligent in its attempts to make the witness available.

The second event that appellant argues caused a delay was the indictment. Appellant notes that the state convened the grand jury without any notice to him or the district court. There is no requirement that the state notify a defendant that a grand jury is to be convened and there are express provisions designed to ensure the secrecy of the proceedings. *See* Minn. R. Crim. P. 18.07. And there is no evidence in the record that indicates the state convened the grand jury to delay or hinder the appellant's defense. The timing of the guilty plea of one of appellant's codefendants was not within the control of

the state. In response to the grand jury's indictment, appellant waived his right to a speedy trial. "If a defendant's own actions caused the delay, there is no violation of the right to a speedy trial." *Griffin*, 760 N.W.2d at 340. After waiving his right to a speedy trial, the parties and the district court agreed upon the December 5, 2016 trial date. Because appellant voluntarily waived his right to a speedy trial, this portion of the delay is not attributable to the state.

C. Strength of appellant's speedy-trial demand

On the third factor, a defendant's assertion of the right to a speedy trial need not be formal or technical and is determined by the circumstances. *Windish*, 590 N.W.2d at 317. A court must assess "the frequency and intensity of a defendant's assertion of a speedy trial demand." *Id.* at 318. Courts evaluate the "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." *Id.* Delay "occasioned by the defendant himself often is deemed a temporary waiver of his speedy trial demand, which can only be revived when the defendant reasserts his speedy trial right." *State v. Johnson*, 498 N.W.2d 10, 16 (Minn. 1993).

Appellant repeatedly asserted his right to a speedy trial and objected to the state's request for a continuance. The district court found good cause for the continuance over his objection. Appellant later made a knowing and voluntary waiver of his right to a speedy trial. Appellant did not revive or reassert his right at any time prior to trial. This factor is

neutral because appellant vigorously asserted his right to a speedy trial but later waived that right without reasserting it.

D. Prejudice

Prejudice should be analyzed in light of the interests that the speedy-trial right is designed to protect. *Barker*, 407 U.S. at 532, 92 S. Ct. at 2193. “The Supreme Court has identified three interests that are protected 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.” *Windish*, 590 N.W.2d at 318. Preventing the possibility that the defense will be impaired is the most serious interest. *Id.* “A defendant does not have to affirmatively prove prejudice; rather, prejudice may be suggested by likely harm to a defendant’s case.” *Id.* To establish that a delay harms the defense, a defendant must “suggest evidentiary prejudice.” *Taylor*, 869 N.W.2d at 20 (quotation omitted). Evidentiary prejudice may include damage to a witness’s ability to recall “essential facts,” the unavailability of a witness, or impairment of representation. *State v. Jones*, 392 N.W.2d 224, 235-36 (Minn. 1986).

The first two interests weigh in appellant’s favor: he was in custody during the delay. But the third, and most important interest, does not. During the delay, both of appellant’s codefendants pleaded guilty and one testified at the grand jury hearing. The supreme court has “reject[ed] the notion that the procurement of a plea agreement constitutes unfair prejudice.” *Taylor*, 869 N.W.2d at 20. The sort of prejudice at issue here is concerned with the ability of the defense to make its own case and the opportunity for

the state to prepare for trial does not, on its own, amount to prejudice to the defense. *Id.* In announcing this rule, the *Taylor* court noted that there was “no allegation that the delay was manufactured by the State.” *Id.* Here, appellant alleges the delay was manufactured, but that allegation is not supported by facts in the record. While the two factors related to appellant’s incarceration weigh in his favor, the third and most important factor does not. Appellant did not suffer the type of unfair prejudice akin to the evidentiary prejudice contemplated by *Barker*. Accordingly, this factor does not weigh in appellant’s favor.

After evaluating all the *Barker* factors, we conclude that appellant’s right to a speedy trial was not violated by the 97-day delay.

II. The prosecutor’s failure to prepare the state’s witness in violation of the district court’s order was misconduct, but it was harmless error.

Appellant argues that the prosecutor committed misconduct by failing to prepare E.B. in accordance with the district court’s order and by eliciting information about his prior bad acts on cross-examination and that this misconduct requires the reversal of his conviction and a new trial. We disagree.

When reviewing a claim of prosecutorial misconduct, our standard of review depends on whether there was an objection at trial to the claimed misconduct. *State v. McDaniel*, 777 N.W.2d 739, 749 (Minn. 2010). For objected-to prosecutorial misconduct, like the misconduct at issue here, there are two harmless-error standards of review taken from *State v. Caron*, 300 Minn. 123, 127-28, 218 N.W.2d 197, 200 (1974).¹ The harmless-

¹ The supreme court has questioned the viability of this approach, but has yet to decide that issue. See *State v. Whitson*, 876 N.W.2d 297, 304 n.2 (Minn. 2016).

error test for “unusually serious” misconduct requires an analysis of whether the misconduct was “harmless beyond a reasonable doubt.” *State v. Nissalke*, 801 N.W.2d 82, 105 (Minn. 2011) (quotation omitted). The harmless-error test for less serious prosecutorial misconduct requires an analysis of “whether the misconduct likely played a substantial part in influencing the jury to convict.” *Id.* (quotation omitted). An error is harmless beyond a reasonable doubt “only if the verdict rendered was surely unattributable to the error.” *Id.* at 105-06 (quotation omitted). A new trial will only be granted based on objected-to prosecutorial misconduct if the misconduct, “viewed in the light of the whole record, appears to be inexcusable and so serious and prejudicial that the defendant’s right to a fair trial was denied.” *State v. Palubicki*, 700 N.W.2d 476, 489 (Minn. 2005) (quotation omitted).

“Prosecutors have an affirmative obligation to ensure that a defendant receives a fair trial, no matter how strong the evidence of guilt.” *State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006). The prosecutor is a “minister of justice” who “may not seek a conviction at any price.” *Id.* (quotation omitted). It is well established that a prosecutor may not intentionally elicit, or try to elicit, inadmissible evidence at trial. *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007). “Minnesota law is crystal clear . . . the state has an *absolute duty* to prepare its witnesses to ensure that they are aware of the limits of permissible testimony.” *State v. McNeil*, 658 N.W.2d 228, 232 (Minn. App. 2003) (emphasis added). The state must prepare its witnesses so that they “will not blurt out

anything that might be inadmissible and prejudicial.” *State v. Carlson*, 264 N.W.2d 639, 641 (Minn. 1978).

Here, the prosecutor failed to prepare E.B., in violation of the district court’s order, and E.B. offered a response that included inadmissible character evidence of appellant’s prior bad acts. Whether this violation of the court’s order was intentional or not, the failure to prepare the witness was misconduct attributable to the prosecutor. *State v. Mahkuk*, 736 N.W.2d 675, 689 (Minn. 2007). When the district court questioned the prosecutor about whether or not she complied with her duty to prepare her witnesses and the court order to do so, she explained that E.B. was a represented party with whom she could not have direct contact and that lay witnesses are generally difficult to control. The state’s duty to prepare its witnesses extends to all of its witnesses—even lay witnesses represented by counsel. The prosecutor’s failure to prepare E.B. was misconduct.

But there is no evidence in the record that the prosecutor intentionally failed to prepare E.B. in an attempt to elicit inadmissible evidence through testimony. The question asked by the prosecutor, “What was [appellant]’s demeanor like?” was open ended and not directed at appellant’s alleged involvement in other kidnappings or shootings. She asked that same question, phrased the same way, to multiple other witnesses about other persons involved in the shooting. The prosecutor unintentionally elicited the improper testimony by asking open-ended questions of a witness she failed to prepare.

Even if the failure to prepare E.B. was “unusually serious” misconduct, it was harmless beyond a reasonable doubt. The verdict was unattributable to the witness’s

inadmissible testimony. The trial spanned six days, the offending testimony was one sentence that was immediately objected to, the district court excused the jury and issued multiple curative instructions, and the prosecutor made no reference to the prohibited testimony during her closing argument. The evidence against appellant was strong, including the permissible testimony of his codefendants about the events leading up to the shooting; the video evidence of appellant approaching the motel room, directing his codefendant to knock on the door, and fleeing after the shooting; and the non-accomplice eyewitness testimony.

Because there was no evidence that the prosecutor intentionally failed to prepare her witness in an attempt to elicit inadmissible testimony, the error caused by her misconduct was harmless beyond a reasonable doubt; therefore, appellant is not entitled to a new trial.

III. The district court did not abuse its discretion in refusing to declare a mistrial.

Appellant contends that the district court abused its discretion in refusing to declare a mistrial after E.B.'s inadmissible testimony because it applied the wrong standard in reviewing the motion. We disagree.

The denial of a motion for a mistrial is reviewed for abuse of discretion. *State v. Jorgensen*, 660 N.W.2d 127, 133 (Minn. 2003). “A mistrial should not be granted unless there is a reasonable probability that the outcome of the trial would be different if the event that prompted the motion had not occurred.” *State v. Manthey*, 711 N.W.2d 498, 506 (Minn. 2006) (quotation omitted). “The trial judge is in the best position to determine whether an outburst creates sufficient prejudice to deny the defendant a fair trial such that

a mistrial should be granted.” *Id.* When a criminal trial is terminated over the *defendant’s* objection, the double-jeopardy clause is implicated and bars retrial unless the previous trial was terminated for a manifest necessity. *See Oregon v. Kennedy*, 456 U.S. 667, 683, 102 S. Ct. 2083, 2093 (1982). But where the defendant moves for the mistrial, that standard is inapplicable. *Id.*

Initially, the district court denied the motion for a mistrial from the bench—without discussing either the “reasonable probability” standard or the “manifest necessity” standard. In a written order meant to supplement that ruling, the district court discussed the “manifest necessity” standard at length in its order denying the motion. The district court also discussed the correct standard in its order—citing and discussing *Manthey* in coming to its conclusion. The district court found that the statements were “prejudicial” but that “any prejudice created was not so fundamental as to require a mistrial and could be effectively mitigated by the court’s instructions” and discussed the curative instructions it gave and intended to give the jury. Ultimately, the district court concluded that the facts and circumstances here did “not rise to the high degree of necessity required to grant the motion for a mistrial in light of Double Jeopardy concerns.”

The district court mistakenly applied the “manifest necessity” standard and accounted for “Double Jeopardy concerns” that were not implicated by appellant’s motion for a mistrial. But the district court also made sufficient findings under the applicable “reasonable probability” standard. And the district court issued multiple curative instructions on the issue—both immediately after the statements were made and before

closing arguments. The district court was in the best position to evaluate whether a mistrial was necessary or whether its curative instructions could mitigate the prejudice. *Manthey*, 711 N.W.2d at 506. The district court mistakenly relied on the wrong standard, discussed the correct standard, and concluded that the curative instructions were sufficient.

In light of the strength of the evidence against appellant and the district court's multiple curative instructions, we conclude that there was not a reasonable probability that the outcome of the trial would have been different but for E.B.'s one sentence containing inadmissible character evidence. The district court did not abuse its discretion in denying the motion for a mistrial.

Affirmed.