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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1051**

State of Minnesota,
Respondent,

vs.

Kurt Lee Villa,
Appellant.

**Filed June 18, 2018
Affirmed
Johnson, Judge**

Cottonwood County District Court
File No. 17-CR-15-283

Lori Swanson, Attorney General, Edwin Stockmeyer, Assistant Attorney General, St. Paul, Minnesota; and

Nick Anderson, Cottonwood County Attorney, Windom, Minnesota (for respondent)

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

Considered and decided by Kirk, Presiding Judge; Johnson, Judge; and Bjorkman, Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

A Cottonwood County jury found Kurt Lee Villa guilty of third-degree assault based on evidence that he punched another man in the face three times. We conclude that the

prosecutor did not commit misconduct in closing argument and that Villa's right to a speedy trial was not violated. Therefore, we affirm.

FACTS

Villa has an antagonistic relationship with J.S., who lives with Villa's former girlfriend, N.K., and with two children of Villa and N.K. On the evening of July 7, 2015, Villa encountered J.S. on a sidewalk in the city of Westbrook. The two men exchanged words before Villa threw J.S. to the ground and punched him in the face three times. J.S. suffered a broken orbital eye socket.

The state charged Villa with first-degree assault, in violation of Minn. Stat. § 609.221, subd. 1 (2014), and third-degree assault, in violation of Minn. Stat. § 609.223, subd. 1 (2014). In August 2015, Villa gave notice of his intent to assert the defense of self-defense. *See* Minn. R. Crim. P. 9.02, subd. 1(5)(a). Before trial, the state filed a motion *in limine* to admit evidence of two prior incidents in which Villa had threatened J.S. The state sought to introduce the two prior incidents to show the antagonistic relationship between Villa and J.S. and to show that Villa had a motive and an intent to cause harm to J.S. The district court agreed with the state's rationale and granted the motion.

The case was tried to a jury over two days in February 2017. J.S. testified that, on the evening of the incident, he was standing on the sidewalk outside the V.F.W. hall, smoking a cigarette. He had consumed one alcoholic drink. He saw Villa put some things in Villa's parked car and then walk toward him. J.S. and Villa had a conversation, which J.S. had difficulty remembering, except that he remembered telling Villa that Villa's children were happier living with J.S. J.S. testified that he and Villa then scuffled, that he

had his right arm around Villa's neck in a choke hold, and that he was lying on the ground while bleeding. He suffered a broken bone around his nose and eyes, and he still experiences double-vision.

J.S. also testified about two prior interactions with Villa. On September 29, 2014, Villa visited J.S.'s house and asked to talk to him. Villa accused J.S. of ruining his family and said that he would "mess [him] up." There was no physical altercation. Approximately a month later, on October 24, 2014, J.S. was standing outside the V.F.W. hall when Villa approached him. Villa yelled at J.S. and threatened to "mess [him] up." Again, there was no physical altercation.

Alan Wahl, the city's police chief, testified that he responded to a report of a fight outside the V.F.W. hall but that he arrived after both J.S. and Villa had left. Chief Wahl went to a nearby emergency room to speak with J.S. He observed that J.S.'s face was swollen and discolored, that he had a cut below his right eye, and that he was incoherent. Chief Wahl then went to a residence where Villa was visiting a friend. Villa did not appear to have any injuries. Villa agreed to accompany Chief Wahl to the police station to make a statement, which was recorded and played for the jury at trial. In his statement to Chief Wahl, Villa said that J.S. taunted him from across the street, saying "come and get me." Villa told Chief Wahl that he and J.S. argued for approximately five minutes before J.S. kicked Villa in the knee. Villa stated that he then took J.S. to the ground, struck him three times, and walked away. Villa did not tell Chief Wahl that he struck J.S. in self-defense.

In the defense case, Villa testified that he went to a grocery store that is near the V.F.W. hall. He saw J.S. standing outside the V.F.W. hall. Villa parked his car and walked

into the grocery store while J.S. yelled at him. When Villa left the grocery store, J.S. continued yelling at him. Villa yelled back at him, and then J.S. approached him. J.S. taunted Villa by saying that Villa did not see his children anymore because J.S. was raising them. Villa told J.S. that he should either go back to his bar stool or fight. The two men argued for approximately five minutes before J.S. kicked Villa in his right knee and then squeezed Villa's throat. Villa used a wrestling move to take J.S. down to the sidewalk and then punched him three times in the face. Villa testified that he did not intend to hurt J.S. but intended only to cause J.S. to remove his hands from Villa's throat. Villa then returned to his car and drove to a friend's house, where they intended to prepare and eat a meal.

When cross-examining Villa, the prosecutor confirmed that Villa did not mention to Chief Wahl that he punched J.S. in an effort to cause J.S. to remove his hands from Villa's throat. During closing arguments, the prosecutor urged the jury to consider the fact that Villa did not tell Chief Wahl that he was defending himself when he punched J.S. The prosecutor also argued that the prior incidents between J.S. and Villa demonstrated that Villa was motivated to cause harm to J.S. and that his pre-existing state of mind is inconsistent with his theory of self-defense. The district court instructed the jury on the defense of self-defense, stating that the defense "is available only to those who act honestly and in good faith."

The jury found Villa not guilty of first-degree assault and guilty of third-degree assault. The district court imposed a sentence of 90 days in jail, with 60 days stayed. Villa appeals.

DECISION

I. Claim of Prosecutorial Misconduct

Villa argues that the prosecutor committed misconduct in two ways. First, Villa argues that the prosecutor committed misconduct by eliciting inadmissible evidence that Villa did not tell Chief Wahl that he punched J.S. in self-defense and by commenting on that evidence in her closing argument. Second, Villa argues that the prosecutor committed misconduct by urging the jury to consider the two prior incidents for a different purpose than that for which they were admitted.

Villa did not object to these alleged errors at trial. Accordingly, this court applies “a modified plain-error test.” *State v. Carridine*, 812 N.W.2d 130, 146 (Minn. 2012). To prevail under the modified plain-error test, Villa must establish that there is an error and that the error is plain. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). An error is plain if it “contravenes case law, a rule, or a standard of conduct.” *Id.* If Villa were to establish a plain error, the state would have the burden of showing that the error did not affect Villa’s substantial rights, *i.e.*, “that there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury.” *Id.* (quotations omitted).

A. Comment on Post-Arrest Silence

The first part of Villa’s argument is based on the prosecutor’s cross-examination of Villa concerning the fact that he did not tell Chief Wahl that J.S. choked him and that he punched J.S. in self-defense. The prosecutor asked Villa, “You never went back and told Chief Wahl that you had remembered more additional information?” Villa responded,

“No, I did not.” In her closing argument, the prosecutor highlighted this evidence in the following way:

[T]his choking business. . . . It was not told to Al Wahl on the night of July 7th. It was not told to anybody in the meantime. Why did [he] not talk to the police? He said it wouldn’t be beneficial to him. Again, I don’t believe this shows good faith or force reasonably necessary.

Villa contends that the prosecutor should not have urged the jury to consider the fact that he did not tell Chief Wahl that he punched J.S. in self-defense. Villa relies exclusively on caselaw based on the right against self-incrimination after being arrested; he does not contend that the prosecutor’s cross-examination and closing argument infringed his right against self-incrimination before being arrested. *See State v. Borg*, 806 N.W.2d 535, 541-43 (Minn. 2011).

Whether the state may introduce evidence concerning a defendant’s post-arrest silence depends on whether the defendant previously received a *Miranda* warning. *See Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966). If a defendant received a *Miranda* warning, the state may not introduce evidence that the defendant thereafter refrained from providing any particular information to investigators. *Doyle v. Ohio*, 426 U.S. 610, 619, 96 S. Ct. 2240, 2245 (1976); *State v. Dobbins*, 725 N.W.2d 492, 509 (Minn. 2006); *State v. Billups*, 264 N.W.2d 137, 138-39 (Minn. 1978). But if a defendant had *not* received a *Miranda* warning, or if the record is silent as to whether the defendant had received a *Miranda* warning, then the state is not prohibited from introducing evidence that the defendant refrained from providing information to investigators. *Fletcher v. Weir*, 455

U.S. 603, 603-07, 102 S. Ct. 1309, 1310-12 (1982); *State v. Morrison*, 351 N.W.2d 359, 361-62 (Minn. 1984).

In this case, there is nothing in the trial record as to whether Villa received a *Miranda* warning before he gave his statement to Chief Wahl or at any other time before trial. In the absence of such evidence, we must assume that the state was not restrained from questioning Villa about his omission of information when he provided a statement to Chief Wahl and that the prosecutor was not prohibited from commenting on such evidence in her closing argument. See *Fletcher*, 455 U.S. at 605-07, 102 S. Ct. at 1311-12; *Morrison*, 351 N.W.2d at 362.

Thus, the prosecutor did not commit misconduct by eliciting inadmissible evidence that Villa did not tell Chief Wahl that he punched J.S. in self-defense or by commenting on that evidence in her closing argument.

B. Argument on Prior Bad Acts

The second part of Villa's argument is based on the following excerpt from the prosecutor's closing argument:

He had had previous incidents with [J.S.] . . . All of these incidents have a common theme in that the Defendant went to [J.S.]. The Defendant said – yup, he left both of the times. So, clearly he knew how to leave. One of them occurred at the V.F.W. He left then and he could have left. He could have retreated. He could have avoided the danger by just getting in his car and quote to use his words “going about his business.” He made that conscious choice. . . . Honesty. Good faith. Those prior examples show the Defendant did not use either of those in this case.

Villa argues that the prosecutor should not have urged the jury to consider the two prior incidents to find that Villa did not act in self-defense because the two incidents were admitted for a different purpose, which was to show Villa's motive and intent. In response, the state argues, first, that the prosecutor did not urge the jury to use the evidence for an improper purpose and, second, that the purpose for which the evidence was admitted is directly relevant to Villa's defense of self-defense.

Villa cites *State v. Johnson*, 616 N.W.2d 720 (Minn. 2000), in support of his argument. In *Johnson*, the supreme court stated that "it is unprofessional conduct for a prosecutor to 'knowingly and for the purpose of bringing inadmissible matter to the attention of the judge or jury to . . . make other impermissible comments or arguments.'" *Id.* at 729 (quoting American Bar Ass'n Standards for Criminal Justice 3-5.6(b) (2d ed. 1980)). The supreme court added that, if "evidence admissible for one purpose but not for another [purpose] is admitted, the court upon request must instruct the jury that the evidence is limited to its proper purpose." *Id.* (citing Minn. R. Evid. 105). In this case, the district court gave such an instruction.

To prevail, Villa must show that the evidence of the two prior incidents was inadmissible for the purpose for which the prosecutor used it in closing argument. *See id.* at 728-30. Evidence of a defendant's prior bad acts is not admissible to prove that the defendant acted in conformity with the prior bad acts or has a propensity to act in such a way. Minn. R. Evid. 404(b); *State v. Smith*, 749 N.W.2d 88, 92 (Minn. App. 2008). But evidence of a defendant's prior bad acts may be admissible for other purposes, such as to prove motive, opportunity, or intent. Minn. R. Evid. 404(b).

In this case, the prosecutor's argument did not seek to persuade the jury that Villa's actions on July 7, 2015, conformed to his actions on the prior occasions or that he had a propensity to act as he acted on the prior occasions. To the contrary, the prosecutor sought *to contrast* the prior incidents with the July 7, 2015 incident and to show that Villa acted *differently* on this occasion than he had in the past. In so doing, the prosecutor did not attempt to use the prior-bad-acts evidence for an inadmissible purpose. The prosecutor's purpose was essentially the same as the purpose for which the prior-bad-acts evidence was originally offered—to show that Villa was motivated to cause harm to J.S. and intended to do so, which may be inconsistent with his defense of self-defense.

Thus, the prosecutor did not commit misconduct by urging the jury to consider the two prior incidents for a different purpose than that for which they were admitted.

II. Right to Speedy Trial

In a *pro se* supplemental brief, Villa argues that he was denied his constitutional right to a speedy trial. Villa did not file a motion in the district court to dismiss the charges on this ground, so we do not have the benefit of the district court's analysis of the issue. The supreme court has not decided whether an offender may argue on direct appeal that his right to a speedy trial was violated if he did not file a motion for dismissal in the district court. *See State v. Walter*, 289 Minn. 309, 312, 184 N.W.2d 426, 429 (1971); *State ex rel. McGregor v. Rigg*, 260 Minn. 141, 147, 109 N.W.2d 310, 314-15 (1961). This court has considered such arguments for the first time on appeal. *See e.g., State v. Johnson*, 811 N.W.2d 136, 141-45 (Minn. App. 2012), *review denied* (Minn. Mar. 28, 2012); *State v. Smith*, 749 N.W.2d 88, 91, 97-98 (Minn. App. 2008); *State v. Carlson*, 369 N.W.2d 326,

328 (Minn. App. 1985), *review denied* (Minn. July 26, 1985). Thus, we will consider Villa’s speedy-trial argument.

The United States and Minnesota constitutions provide that, in all criminal prosecutions, “the accused shall enjoy the right to a speedy and public trial.” U.S. Const. amend. VI; *see also* Minn. Const. art. I, § 6. In determining whether a delay has deprived a defendant of the right to a speedy trial, Minnesota courts generally apply the four-part balancing test of *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182 (1972). *See State v. Taylor*, 869 N.W.2d 1, 19 (Minn. 2015); *State v. Windish*, 590 N.W.2d 311, 315 (Minn. 1999). The four factors are (1) the length of the delay, (2) the reason for the delay, (3) whether the defendant asserted his right to a speedy trial, and (4) whether the delay prejudiced the defendant. *Barker*, 407 U.S. at 530-33, 92 S. Ct. at 2192-93. The four factors must be considered together in light of the relevant circumstances, and no one factor is dispositive or necessary to a finding that a defendant has been deprived of the right to a speedy trial. *Id.* at 533, 92 S. Ct. at 2193; *Windish*, 590 N.W.2d at 315.

First, Villa’s trial began on February 16, 2017, approximately 18 months after he initially was charged. *See State v. Jones*, 392 N.W.2d 224, 235 (Minn. 1986) (stating that “delay in speedy-trial cases is calculated from the point at which . . . a person is arrested and held to answer a criminal charge”). A “delay of seven months is long enough to trigger the consideration of the other *Barker* factors.” *Id.*

Second, the record indicates that the state and the district court often had valid reasons for postponing the trial and that Villa generally either caused or acquiesced to the postponements. The record does not indicate a reason for every postponement, in part

because Villa did not file a speedy-trial motion in the district court. When the state initially charged Villa in July 2015, trial was scheduled for January 28, 2016. At a pre-trial conference in mid-January 2016, the state informed the district court that it was amending the complaint, and the state asked the district court to postpone the trial so that it could develop additional evidence concerning J.S.'s injuries. Villa did not object. Accordingly, the district court rescheduled the trial to April 29, 2016. In February 2016, the district court rescheduled the trial to August 29, 2016, for reasons that do not appear on the record. In April 2016, in response to Villa's speedy-trial demand, the district court moved the trial forward to May 12, 2016. After Villa withdrew his speedy-trial demand in April, the district court moved the trial back again to December 22, 2016. In May 2016, the district court moved the trial forward again to August 11, 2016, for reasons that do not appear in the record. In July 2016, the district court rescheduled the trial for September 29, 2016, because both the prosecutor and Villa's attorney were scheduled to try a different case in August 2016. At a hearing on September 29, 2016, the state requested a continuance because of confusion as to whether Villa would stipulate to certain facts, which would affect the state's witness list. As a result, the district court rescheduled the trial for November 17, 2016. In November 2016, the district court rescheduled the trial for February 16, 2017, at Villa's request. To the extent that the record does not reveal a reason for postponements, we presume that valid reasons existed because Villa did not file a motion for dismissal in the district court. In addition, delays that are attributable to the defendant do not support a conclusion that the right to a speedy trial has been violated. *See*

State v. Mahr, 701 N.W.2d 286, 292 (Minn. App. 2005), *review denied* (Minn. Oct. 26, 2005). Thus, this factor weighs against Villa.

Third, Villa demanded a speedy trial three times, but he withdrew the first two requests within a month, and the trial actually occurred approximately a month after his last request. Villa first demanded a speedy trial on March 28, 2016, but waived the demand on April 26, 2016. Villa also demanded a speedy trial on October 19, 2016, but withdrew it on November 21, 2016. Villa demanded a speedy trial again on January 3, 2017, and the trial began approximately six weeks later. Thus, this factor weighs against Villa. See *Windish*, 590 N.W.2d at 318 (stating that court must assess “the frequency and intensity of a defendant’s assertion of a speedy trial demand”).

Fourth, there is no evidence in the record that the length of time between the initial charge and the trial prejudiced Villa. A defendant has three interests in a speedy trial: (1) preventing oppressive pre-trial incarceration, (2) minimizing the accused’s anxiety and concern, and (3) limiting the possibility that the defense will be impaired. *Barker*, 407 U.S. at 532, 92 S. Ct. at 2193. Villa was not detained between his first appearance and the trial. He asserts in his brief that he suffered “sleepless nights, constant stress, pressure, and even vomiting blood” as a result of his stress awaiting trial. But he has not identified any way in which his defense was impaired by the 18-month period between charging and trial. Thus, this factor weighs against Villa.

After considering each of the four factors, we conclude that Villa’s right to a speedy trial was not violated.

Affirmed.