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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0030**

State of Minnesota,
Respondent,

vs.

Vernon Kingbird, Jr.,
Appellant.

**Filed January 13, 2020
Affirmed
Cochran, Judge**

Itasca County District Court
File No. 31-CR-17-3080

Keith Ellison, Attorney General, Karen B. McGillic, Assistant Attorney General, St. Paul, Minnesota; and

Matti R. Adam, Itasca County Attorney, Grand Rapids, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Reilly, Judge; and
Cochran, Judge.

UNPUBLISHED OPINION

COCHRAN, Judge

In this direct appeal from final judgment, appellant Vernon Kingbird Jr. argues that his conviction of third-degree criminal sexual conduct must be reversed because the district

court abused its discretion by allowing the state to specify the nature of appellant's prior convictions when impeaching his credibility and because he was denied the right to a speedy trial. We affirm.

FACTS

The state charged appellant Vernon Kingbird Jr. with two counts of criminal sexual conduct (CSC) and one count of assault for an incident that occurred in June 2017. Kingbird was accused of sexually assaulting S.E. and then brandishing a knife. S.E. reported, and later testified at trial, that Kingbird digitally penetrated her vagina without her consent and that Kingbird forcefully assaulted her while committing the act. According to S.E., after she called police, Kingbird retrieved a knife and brandished it in her presence. Kingbird first appeared in court in connection with the charges on June 12, 2017. At a June 26, 2017 hearing, Kingbird formally demanded a speedy trial. The district court set trial for August 22, 2017.

In early August 2017, the state disclosed to defense counsel a Bureau of Criminal Apprehension (BCA) test result related to a fingerprint found on the knife that was consistent with Kingbird's fingerprint. The disclosure prompted the defense counsel to request the complete BCA file from the state. The state then requested the file from the BCA. On August 18, the Friday before the August 22 trial date, the BCA disclosed the complete file to the state. That same day, the prosecutor disclosed the file to defense counsel. The complete file included reports from three BCA analysts who reviewed the primary analyst's conclusion that the fingerprint on the knife matched Kingbird's fingerprint. Two of the analysts agreed with the primary analyst that the fingerprint on the

knife matched Kingbird's. One analyst concluded that the fingerprint analysis was "inconclusive." The BCA file also included medical records from the doctor who examined S.E. on the day of the alleged assault. The doctor's notes indicated that S.E. showed no signs of abrasion or injury, but S.E.'s report of the incident to the doctor was consistent with her report to police and ultimately with her testimony at trial.

After reviewing the BCA file, the defense counsel called the prosecutor. He was upset about the timing of the disclosure of exculpatory evidence and felt that he did not have adequate time to prepare for trial given the new information. He suggested to the prosecutor that the prosecutor dismiss the case without prejudice and refile the case only "after all [the state's] evidence was obtained and adequately disclosed to" Kingbird's defense attorney. The prosecutor agreed and dismissed the case pursuant to Minn. R. Crim. P. 30.01 on August 20, 2017.

The state refiled charges against Kingbird on November 22, 2017, after conducting additional BCA testing for DNA on the clothes that S.E. was wearing during the assault.¹ The state charged Kingbird by complaint with one count each of CSC in the first, second, third and fourth degree and one count of assault in the second degree (assault with a dangerous weapon). Kingbird was brought into custody and appeared on November 28, 2017 for a first appearance. At a December 4, 2017 second appearance, Kingbird appeared with new counsel. Kingbird waived an omnibus hearing, and reasserted

¹ No DNA evidence was introduced at trial.

his speedy trial demand. The district court scheduled the trial for the January 10, 2018 trial block.

On January 9, Kingbird withdrew his speedy trial demand and requested a continuance in order to pursue omnibus issues. An omnibus hearing was scheduled for January 29, but Kingbird requested a continuance of that hearing to allow his attorney to do additional research regarding the speedy trial issue. The omnibus hearing was rescheduled to March.

On February 23, Kingbird filed a motion to dismiss based on a claimed violation of his right to a speedy trial. The March omnibus hearing was rescheduled twice, eventually to April. But before the omnibus hearing occurred, Kingbird requested a competency evaluation under Minn. R. Crim. P. 20.01. The April omnibus hearing was cancelled to await the results of the competency evaluation. The evaluation was completed on April 30. The psychologist who examined Kingbird determined that Kingbird was “competent to proceed to trial.” On May 29, the district court, with agreement of the parties, adopted the evaluator’s determination and found Kingbird to be competent.

On June 26, the district court held a hearing on the speedy trial motion. During the hearing, the attorney who represented Kingbird in August 2017 testified about the disclosure of the BCA file and his suggestion to the prosecutor to dismiss the case without prejudice. Kingbird also testified that the delay took a “toll” on him and asserted that he was prejudiced by the pretrial delay. The district court later issued a written order denying Kingbird’s motion to dismiss.

Trial began on August 15, 2018. S.E. testified to her recollection of the incident. The state also called police officers involved in investigating the incident, the doctor who examined S.E. on the day of the incident, and the BCA analysts involved in the fingerprint analysis, among other witnesses. Kingbird also testified, generally claiming that S.E. made sexual advances towards him and that any sexual contact that he had with S.E. was consensual. He testified that the knife belonged to S.E. and that he had handled it because he wanted to look at it. The district court allowed the state to impeach Kingbird with four prior felony convictions under Minn. R. Evid. 609(a).

The jury found Kingbird not guilty of CSC in the first and second degree, guilty of CSC in the third and fourth degree, and not guilty of assault in the second degree. The district court sentenced Kingbird in October 2018.

Kingbird appeals.

D E C I S I O N

Kingbird argues that the pretrial delay in this case deprived him of his right to a speedy trial. Alternatively, Kingbird maintains that he is entitled to a new trial because the district court abused its discretion by allowing the state to disclose the nature of four prior felony convictions when impeaching his credibility under Minn. R. Evid. 609. We address each argument in turn.

I. Kingbird was not denied the right to a speedy trial.

Kingbird contends that the delay between his first appearance in June 2017 on the original charges and the August 2018 trial in this matter constitutes a denial of his right to a speedy trial. The state maintains that Kingbird was not denied a speedy trial because the

pretrial delay in this case was primarily attributable to Kingbird, because Kingbird did not forcefully assert his right to a speedy trial, and because Kingbird was not prejudiced by the delay. We review de novo whether Kingbird has been denied his constitutional right to a speedy trial. *State v. Osorio*, 891 N.W.2d 620, 627 (Minn. 2017).

“To determine whether a speedy-trial violation has occurred, we apply the four-factor balancing test set forth by the Supreme Court of the United States in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182 [(1972)].” *Osorio*, 891 N.W.2d at 627. The four factors are: “(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). “None of these factors is ‘either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant.’” *State v. Taylor*, 869 N.W.2d 1, 19 (Minn. 2015) (quoting *Barker*, 407 U.S. at 533, 92 S. Ct. at 2193). It is “a difficult and sensitive balancing process” in which the court considers “the conduct of both the State and the defendant.” *Osorio*, 891 N.W.2d at 628 (quotations omitted).

A. The Length of the Delay

“The length of the delay is a triggering mechanism which determines whether further review is necessary.” *Id.* (quotations omitted). Analysis of the other three factors is only required if the length of the delay is presumptively prejudicial. *See State v. Johnson*, 498 N.W.2d 10, 16 (Minn. 1993).

The right to a speedy trial under the Sixth Amendment attaches either when the defendant is formally charged or when he is arrested and held to answer to a criminal charge. *Osorio*, 891 N.W.2d at 628. A six month delay between attachment of the constitutional right and trial is presumptively prejudicial, “triggering an inquiry into the remaining *Barker* factors.” *Id.*²

While the parties argue on appeal over whether the length of the delay should include the time between dismissal of the original set of charges and refile of the second set of charges,³ they agree that the length of the pretrial delay here is presumptively prejudicial. Consequently, we conclude that the length of delay weighs in Kingbird’s favor and that analysis of the other *Barker* factors is required.

B. The Reason for the Delay

“Under the second prong of the *Barker* test, the key question is whether the government or the criminal defendant is more to blame for the delay.” *Osorio*, 891 N.W.2d at 628 (quotations omitted). “Once we have determined which party is responsible for the delay, we must consider the specific reason for the delay.” *Id.* “We weigh various reasons differently.” *Id.* The responsibility for an overburdened judicial system rests with the state. *State v. Jones*, 392 N.W.2d 224, 235 (Minn. 1986). But this factor weighs less heavily against the state than when it deliberately attempts to delay trial. *Id.* Delays caused by a

² In Minnesota, if a defendant demands a speedy trial under Minn. R. Crim. P. 11.09, a delay of just 60 days is presumptively prejudicial. *State v. Windish*, 590 N.W.2d 311, 315-16 (Minn. 1999). On appeal, the parties frame their arguments on this factor considering only the six-month measure indicated in *Osorio*.

³ If the delay includes this time, the delay in bringing Kingbird to trial is 14 months. If not, it is 11 months.

defendant's own motions may be attributable to the defendant and weigh against him in a speedy trial challenge. *See Johnson*, 498 N.W.2d at 16. A delay to facilitate a defense motion for a competency evaluation under Rule 20.01 is attributable to the defendant. *See State v. DeRosier*, 695 N.W.2d 97, 109 (Minn. 2005).

Both parties share some of the responsibility for the pretrial delay in this case. While the state maintains that Kingbird is more to blame for the pretrial delay that resulted from the dismissal of the original charges because his previous defense counsel suggested that the prosecutor dismiss the charges, we conclude that the responsibility for this delay is more attributable to the state. The state did not disclose relevant evidence in the BCA file, including medical records, until shortly before trial was to begin. We note that the state admitted to the district court that it was negligent in failing to disclose the medical records contained in the BCA file.

Many of the later delays, however, are attributable to Kingbird. At a December 4, 2017 hearing, Kingbird reasserted his right to a speedy trial. The district court then scheduled the case for the trial block beginning on January 10, 2018. But on January 9, the day before the scheduled trial block, Kingbird withdrew his speedy trial demand, and requested a continuance of the trial as well as the scheduling of an omnibus hearing. The district court granted Kingbird's requests and scheduled an omnibus hearing for January 29. Then, at the January 29 hearing, Kingbird's counsel requested that the omnibus hearing be continued to March to allow him additional time to research whether Kingbird's right to a speedy trial had been violated. Kingbird eventually filed a motion to dismiss, alleging a violation of his right to a speedy trial. The omnibus hearing set for

March 5 was subsequently continued two more times for reasons relating to Kingbird's motion. Thereafter, on April 12, Kingbird's attorney requested a competency evaluation for Kingbird under Minn. R. Crim. P. 20.01, which delayed both the omnibus hearing and the trial into the summer of 2018.

While both parties share some of the responsibility for the delays in this case, the record demonstrates that Kingbird was at fault for more of the significant delays in bringing the matter to trial. Consequently, we conclude that this factor weighs slightly in favor of the state.

C. Whether Kingbird Asserted the Right to a Speedy Trial

"Whether and how a defendant asserts his right is closely related to the other [*Barker*] factors" *Osorio*, 891 N.W.2d at 629 (quotation omitted). "The defendant's assertion of his speedy trial right . . . is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." *Id.* (quotation omitted). "[T]he frequency and force of a demand must be considered when weighing this factor and 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).

Kingbird maintains that this factor weighs heavily in his favor because he asserted the right at six hearings. The state concedes that Kingbird asserted his right to a speedy trial at the hearings, but argues that this factor weighs against Kingbird because he expressly withdrew the demand at the January 9, 2018 hearing and did not reassert it until June 26, 2018.

Though Kingbird withdrew his demand for a speedy trial in order to bring a motion to dismiss, he first made the demand while the prior charges were pending and eventually reasserted the right in December 2017 after the new charges were filed. After withdrawing that demand, Kingbird later reasserted the right after the competency and omnibus issues were resolved. Consequently, we conclude that this factor weighs slightly in Kingbird's favor.

D. Whether Kingbird was Prejudiced by the Delay

In *State v. Strobel*, this court explained the three forms of prejudice to consider when assessing whether a speedy-trial violation has occurred:

“Unreasonable delay between formal accusation and trial threatens to produce more than one sort of harm, including oppressive pretrial incarceration, anxiety and concern of the accused, and the possibility that the accused's defense will be impaired by dimming memories and loss of exculpatory evidence. Of these forms of prejudice, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.”

921 N.W.2d 563, 570 (Minn. App. 2018) (quoting *Doggett v. United States*, 505 U.S. 647, 654, 112 S. Ct. 2686, 2692 (1992)) (citations omitted), *aff'd* (932 N.W.2d 303 (Minn. 2019)).

Kingbird does not argue that the delay caused the most serious form of prejudice—a prejudice to his ability to present a defense at trial. Instead, he maintains that the pretrial delay in this case caused him anxiety and concern, and that it resulted in oppressive pretrial incarceration.

Kingbird contends that the pretrial delay in this case caused him unusual anxiety and concern because he suffers from mental health conditions. When analyzing whether delay causes prejudice to a defendant's interest in avoiding undue anxiety and concern, the question is whether a defendant suffers anxiety that "is greater than the anxiety of any other defendant." *State v. Hahn*, 799 N.W.2d 25, 33 (Minn. App. 2011), *review denied* (Minn. Aug. 24, 2011). Kingbird testified that the pending charges took a "toll" on him. But he did not testify that his mental condition amplified his pretrial anxiety or that the pretrial incarceration negatively impacted his mental health. While there is support in the record that Kingbird suffers from mental health conditions, we conclude that the record does not support Kingbird's claim that the level of anxiety he experienced as a result of the delays was any greater than that of any other defendant.

Kingbird also asserts that his pretrial incarceration was oppressive. We are not persuaded. In determining whether a defendant's pretrial incarceration is oppressive, we may consider whether pretrial delay is due to the defendant's own actions. *Johnson*, 498 N.W.2d at 16. The district court released Kingbird from custody with conditions of release twice while the charges were pending. Both times, Kingbird was charged with a new offense shortly after release, therefore violating the conditions of his release, and was brought back into custody. Considering that the reason that Kingbird remained in custody pending trial was his failure to remain law abiding and comply with conditional release, we conclude that Kingbird's pretrial incarceration was not oppressive.

Because Kingbird did not suffer prejudice as a result of his delay, we conclude that this factor does not support Kingbird's assertion that the pretrial delay violated his right to a speedy trial. *See Osorio*, 891 N.W.2d at 632.

E. Balancing the *Barker* Factors

We have concluded that two factors weigh in the state's favor and two factors weigh in Kingbird's favor. Minnesota appellate courts have emphasized the importance of the prejudice factor in balancing the *Barker* factors. *See Jones*, 392 N.W.2d at 234-36 (concluding no violation of speedy trial right when no prejudice is shown despite the other three *Barker* factors weighing in defendant's favor); *Strobel*, 921 N.W.2d at 573 (same). While the prejudice factor alone is neither "a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial," we place particular emphasis on the complete lack of prejudice demonstrated in this case. *Strobel*, 921 N.W.2d at 569. Considering all of the relevant circumstances and that multiple factors favor the state, we conclude that the record does not establish a violation of Kingbird's constitutional right to a speedy trial.

II. The district court did not abuse its discretion by allowing the state to specify the nature of Kingbird's prior convictions introduced under Minn. R. Evid. 609.

Next, Kingbird maintains that the district court abused its discretion by allowing the state to specify the nature of Kingbird's prior convictions while impeaching Kingbird under Minn. R. Evid. 609.

Minnesota Rule of Evidence 609(a) allows a party to impeach a witness with evidence of a prior conviction:

For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect, or (2) involved dishonesty or false statement, regardless of the punishment.

To determine whether the probative value of admitting a prior conviction outweighs its prejudicial effect, the district court must consider the five *Jones* factors:

(1) the impeachment value of the prior crime, (2) the date of the conviction and the defendant's subsequent history, (3) the similarity of the past crime with the charged crime (the greater the similarity, the greater reason for not permitting use of the prior crime to impeach), (4) the importance of [the] defendant's testimony, and (5) the centrality of the credibility issue.

State v. Griffin, 846 N.W.2d 93, 103-04 (Minn. App. 2014), (quoting *State v. Jones*, 271 N.W.2d 534, 538 (Minn. 1978)), *review denied* (Minn. Aug. 5, 2014). An appellate court “will not reverse a district court’s ruling on the impeachment of a witness by prior conviction absent a clear abuse of discretion.” *State v. Hill*, 801 N.W.2d 646, 651 (Minn. 2011); *see also State v. Lloyd*, 345 N.W.2d 240, 246 (Minn. 1984) (“We must uphold the trial court’s ruling [on impeachment evidence under Rule 609] unless a clear abuse of discretion is shown.” (quotation omitted)). Moreover, an appellate court will not grant relief unless the appellant demonstrates that there is a reasonable possibility that the error “significantly affected the verdict.” *Griffin*, 846 N.W.2d at 103.

It is within the district court's discretion whether to allow the state to impeach a defendant with an unspecified felony conviction. *Hill*, 801 N.W.2d at 652-53. "[T]he decision about what details, if any, to disclose about the conviction at the time of impeachment is a decision that remains within the sound discretion of the district court." *Id.* at 652. "To exercise that discretion properly, a district court must weigh the probative value of admitting the evidence against its prejudicial effect." *Id.* "If a court finds that the prejudicial effect of disclosing the nature of a felony conviction outweighs its probative value, then it may still allow a party to impeach a witness with an unspecified felony conviction if the use of the unspecified conviction satisfies the balancing test of Rule 609(a)(1)." *Id.* at 652-53.

The district court allowed the state to impeach Kingbird with four prior felony convictions for: (1) escape from custody, (2) obstructing legal process, and (3) two fifth-degree controlled-substance crime convictions. In ruling that the prior convictions were admissible, the district court considered all five *Jones* factors. First, it found that the prior convictions had impeachment value because they were probative of Kingbird's trustworthiness. Second, it found that the prior convictions, the oldest being from 2013, were close enough in time to be relevant for impeachment purposes. Third, the district court found that the prior convictions were not similar to the charged crimes, weighing in favor of admitting them under Rule 609. Fourth, it found that Kingbird's testimony was important, but recognized that two of Kingbird's statements had already been admitted and received into evidence without objection, including a claim of innocence. Finally, the district court found that credibility was the central issue of the trial because Kingbird and

S.E. were the only witnesses to the incident. Based on its review of the *Jones* factors, the district court ordered that the state could impeach Kingbird with the prior convictions but that the state could not elicit details about each offense. Instead, the district court allowed the state to name the offenses and the date of each offense.

Kingbird does not challenge the admissibility of the offenses under Minn. R. Evid. 609(a)—he argues only that the district court abused its discretion by allowing the state to disclose to the jury that Kingbird had been convicted of escape from custody, fifth-degree controlled-substance crime, and obstruction of legal process. He maintains that the names of these offenses were not probative because the convictions were only probative of Kingbird’s “general lack of respect for the law” and that allowing the state to disclose the nature of the offenses was prejudicial. *See Hill*, 801 N.W.2d at 652 (“Under both our approach to Rule 609(a) and the common law tradition, it is the general lack of respect for the law, rather than the specific nature of the conviction, that informs the fact-finder about a witness’s credibility, at least with respect to convictions other than those involving dishonesty or false statements.”).

We conclude that the district court did not abuse its discretion in allowing the state to disclose the nature of the offenses. The district court properly considered the *Jones* factors in determining whether the prior convictions were more probative than prejudicial. The district court’s analysis of the *Jones* factors is logical and well-reasoned, and importantly, analyzes the admissibility of the offenses assuming that the nature of the offense would be disclosed. We determine that the district court acted within its discretion

in concluding, after consideration of the *Jones* factors, that the prior *specified* offenses were admissible under Rule 609(a).

We also reject Kingbird's argument that identifying the crimes by name was prejudicial. Kingbird contends that the crimes of escape from custody, fifth-degree controlled-substance crime, and obstruction of legal process might have caused the jury to believe that he has the propensity to act forcefully and therefore committed the charged crimes. But none of the identified offenses, by name only, suggest that Kingbird used any force to accomplish the crime. Moreover, the jury acquitted Kingbird of first and second-degree CSC and of second-degree assault—all offenses involving the use of force. Consequently, the argument that the jury improperly considered the prior convictions as evidence that Kingbird was guilty of the charged crimes because he was prone to act forcefully is not persuasive.⁴

Because we conclude that Kingbird was not deprived of his right to a speedy trial and that the district court did not abuse its discretion by allowing the state to specify the nature of the prior convictions, we affirm Kingbird's conviction.

Affirmed.

⁴ Kingbird also maintains that the danger of prejudice was heightened in this case because the district court did not give a cautionary instruction to the jury on the proper use of Rule 609(a) evidence. See 10 *Minnesota Practice*, CRIMJIG 2.02 (2019); 10 *Minnesota Practice*, CRIMJIG 3.15 (2019). Kingbird does not argue that the district court erred in failing to give the instruction. We conclude that the district court's failure to give a sua sponte cautionary instruction did not cause the specified offenses to become so prejudicial as to outweigh their probative value under these circumstances because the alleged prejudice identified by Kingbird is nonexistent. And because Kingbird does not argue that the district court erred by failing to give a cautionary instruction, we do not consider this issue.