STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1499

State of Minnesota,
Respondent,

vs.

Leroy Diaz Evans,
Appellant.

Filed September 17, 2012
Affirmed
Worke, Judge

Kandiyohi County District Court
File No. 34-CR-10-772

Lori Swanson, Attorney General, Jennifer Coates, Assistant Attorney General, St. Paul, Minnesota; and

Jennifer K. Fischer, Kandiyohi County Attorney, Willmar, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, G. Tony Atwal, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Worke, Judge; and Connolly, Judge.

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

WORKE, Judge

On appeal from his convictions of multiple charges, including use of deadly force against a peace officer, first-degree burglary, and attempted first-degree robbery,

appellant argues that (1) his convictions must be reversed because he was denied his right to a speedy trial; (2) the district court erred by refusing to give his requested instruction on the defense of duress on all of the charged offenses; and (3) the district court erred by sentencing on multiple offenses because they were all part of the same behavioral incident. We affirm.

D E C I S I O N

Speedy trial

Appellant Leroy Diaz Evans argues that his convictions must be reversed because he was denied his right to a speedy trial. We review a speedy trial challenge de novo, as a constitutional question. *State v. Cham*, 680 N.W.2d 121, 124 (Minn. App. 2004), *review denied* (Minn. July 20, 2004). A criminal defendant has a constitutional right to a speedy and public trial. U. S. Const. amend. VI; Minn. Const. art. I, § 6. In Minnesota, once a defendant has made a demand, a trial must be held within 60 days, unless the district court "finds good cause for a later trial date." Minn. R. Crim. P. 11.09(b). Appellant made a speedy trial demand on December 1, 2010; trial began on March 7, 2011, 93 days after appellant's demand. Therefore, we must determine if there was good cause for the delay.

A court considers four factors to determine whether a delay resulted in a constitutional deprivation of a defendant's right to a speedy trial: (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant demanded a speedy trial; and (4) whether the delay prejudiced the defendant. *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192 (1972); *State v. Widell*, 258 N.W.2d 795, 796 (Minn. 1977)

(adopting *Barker* factors). No single factor is dispositive; each factor must be considered, as well as any other relevant circumstances. *State v. Griffin*, 760 N.W.2d 336, 340 (Minn. App. 2009).

Length of Delay

A delay of greater than 60 days is presumptively a violation of a defendant's right to a speedy trial. *State v. Windish*, 590 N.W.2d 311, 315-16 (Minn. 1999). This factor favors a finding of a violation of appellant's right to a speedy trial, but it is not dispositive. Although any delay past 60 days is a presumptive violation, delays of longer periods of time have not resulted in a reversal of a conviction when good cause for the delay is shown. *See State v. Johnson*, 498 N.W.2d 10, 16 (Minn. 1993) (629-day delay); *Cham*, 680 N.W.2d at 125 (23-month delay); *but see Griffin*, 760 N.W.2d at 340 (concluding that eight-month delay was a violation of speedy trial right).

Reason for delay

Appellant made a speedy trial demand on December 1, 2010. A trial was scheduled for January 24, 2011, within the 60-day period. This trial date was continued at the state's request because two of its witnesses had vacation plans. The new trial date of February 11, 2011, was 70 days after appellant's speedy trial demand. At a pretrial conference held on February 7, appellant requested a continuance because his co-defendant, Arcadio Salinas, pleaded guilty and would be sentenced on March 7, 2011; Salinas indicated that he intended to claim the Fifth Amendment privilege if asked to testify before sentencing. Appellant's attorney described Salinas as "an important defense witness." Counsel also acknowledged that appellant had made a speedy trial demand, but

stated that if appellant would approve the continuance, he would recommend it; appellant agreed that it would be better to continue the trial if Salinas would not be sentenced before it began. At the same hearing, the district court asked how much time should be set aside for trial. The following day, the state indicated that it anticipated needing more time than had been set aside for trial. Based on both motions, the district court moved the trial date to March 7.

The state and the courts are charged with the responsibility of moving a case to trial. *Windish*, 590 N.W.2d at 316-17. An overcrowded court calendar is not a sufficient reason to deny a defendant a speedy trial. *Id.* But if a defendant's actions cause the delay, there is no violation of the right to a speedy trial. *Griffin*, 760 N.W.2d at 340. Here, both the state and appellant are responsible for the delay.

Demand

Appellant formally demanded a speedy trial, which satisfies this factor.

Prejudice

Finally, a court must consider the prejudice caused to a defendant; in doing so, a court considers primarily three factors: (1) oppressive pretrial confinement; (2) the accused's anxiety and concern; and (3) impairment of the defense. *Windish*, 590 N.W.2d at 318. The third factor is the most serious. *Id.* A defendant does not have the burden of proving prejudice. *Id.* "[E]xcessive delay presumptively compromises the reliability of a trial in ways that cannot be identified." *Griffin*, 760 N.W.2d at 341 (quotation omitted).

Appellant was incarcerated from the day of his arrest in September 2010 because he was unable to make bail. The delay in the trial after appellant's demand was 33 days

beyond the 60 day limit set forth in rule 11.09(b). Pretrial incarceration and the attendant anxiety are not alone sufficient to show prejudice. *State v. Helenbolt*, 334 N.W.2d 400, 405-06 (Minn. 1983); *State v. Givens*, 356 N.W.2d 58, 62 (Minn. App. 1984), *review denied* (Minn. Jan. 2, 1985). Nor are claims of missed work or disrupted vacation plans. *State v. Friberg*, 435 N.W.2d 509, 515 (Minn. 1989) ("The only prejudice attested to at the hearing was the stress, anxiety and inconvenience experienced by anyone who is involved in a trial."). Appellant was not employed and was not enrolled in school; unlike the defendant in *Griffin*, he was living in the same state. *See Griffin*, 760 N.W.2d at 341 (noting that defendant, a Chicago resident, was severely restricted by standby trial status from engaging in her usual life activities). Finally, the most important consideration is whether the defense was impaired; here, most of the delay was caused by appellant's decision to wait for Salinas' sentencing so that Salinas could testify at appellant's trial, which appellant thought would help his defense.

After weighing the *Barker* factors, we conclude that the district court had good cause to schedule the trial more than 60 days after appellant's trial demand.

Jury Instructions

Appellant asserts that the district court abused its discretion by refusing to instruct the jury on the defense of duress as to all of the charges against him. Appellant was charged with attempted first-degree robbery and first-degree burglary after he and Jesus Trevino entered R.T.'s home to demand money. Appellant was also charged with attempted first-degree robbery and first-degree burglary after he, Trevino, and Adrian and Arcadio Salinas returned to R.T.'s home approximately two hours later, again to demand

money. Occupants of R.T.'s home called police; when the men heard sirens, they ran from the house and into a getaway car. Appellant fired several shots from inside the car, several of which hit a responding police car, leading to the final charges of attempted first-degree murder of a peace officer[1] and use of deadly force against a peace officer. Appellant contended that he participated in these crimes because he was afraid of Trevino, who reputedly was a member of a violent gang. At appellant's request, the district court gave a duress instruction as to the charges arising out of the first home invasion, but refused to instruct the jury on duress as to the second home invasion or the use of deadly force.

A defendant is entitled to an instruction on his theory of the case if there is sufficient evidence to support it. *State v. Yang*, 644 N.W.2d 808, 818 (Minn. 2002). We review the district court's refusal to give a requested jury instruction for an abuse of discretion. *State v. Hannon*, 703 N.W.2d 498, 509 (Minn. 2005). The district court may not give an instruction that misleads, confuses, or materially misstates the law. *State v. Larson*, 787 N.W.2d 592, 601 (Minn. 2010). So long as the instructions do not materially misstate the law, a district court has considerable latitude in its choice of language. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002).

A defendant will be excused from criminal culpability if he participated in a crime "only under compulsion by another engaged therein, who by threats creates a reasonable apprehension in the mind of such participator that in case of refusal that participator is liable to instant death[.]" Minn. Stat. § 609.08 (2010). A defendant has the burden of

[1] Appellant was acquitted of this charge.

production of evidence supporting a request for an instruction on duress, although the state retains the burden of proof. *Yang*, 644 N.W.2d at 818.

Yang sets forth three factors for the court to consider when deciding whether to give a duress instruction: (1) whether the defendant was under a present reasonable apprehension of a threat of instant death if he refused to participate in the crime; (2) whether the fear of instant death persisted during the commission of the crime; and (3) whether the defendant could not safely withdraw from the situation. *Id.* The threat must be of instant death; fear of future harm is insufficient to establish duress. *Id.*

The district court made a thoughtful and thorough record of its decision regarding the jury instruction request, relying on *Yang* and *State v. Charlton*, 338 N.W.2d 26 (Minn. 1983). The district court agreed to give a duress instruction as to the first home invasion because appellant was clearly frightened of Trevino and had no opportunity to withdraw. But the district court refused to give an instruction as to the second home invasion and the deadly-use-of-force charges, because (1) appellant had an opportunity to withdraw, but did not; (2) appellant cited fear of future, not present, harm to his family or himself; (3) when it became apparent that police had been dispatched, he ran toward the getaway car instead of away from Trevino; and (4) appellant ran away from the scene, attempted to disguise himself by removing his shirt, and denied involvement when stopped by police. The district court concluded that as to these charges, appellant had not produced sufficient evidence to warrant a duress instruction. Based on the record before us, this was not an abuse of discretion.

Sentencing

Appellant argues that the district court erred by finding that the two home invasions and the use of deadly force against a peace officer constituted three distinct behavioral incidents, permitting the court to impose sentences on charges arising out of each separate incident. Subject to certain exceptions, "if a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses." Minn. Stat. § 609.035, subd. 1 (2010). Conversely, a defendant may be sentenced for multiple offenses if his actions constitute more than a single behavioral incident. *State v. Bookwalter*, 541 N.W.2d 290, 294 (Minn. 1995).[2]

The district court's findings of fact will not be disturbed unless clearly erroneous and unsupported by the record. *State v. O'Meara*, 755 N.W.2d 29, 37 (Minn. App. 2008). Appellant has not challenged the district court's findings of fact. Whether the district court's findings support a conclusion that a defendant's conduct constituted more than a single behavioral incident is a question of law that we review de novo. *State v. Marchbanks*, 632 N.W.2d 725, 731 (Minn. App. 2001).

To determine if a defendant's actions are part of a single behavioral incident, a court considers (1) whether the factors of time and place suggest a unity of conduct; and

[2] Another exception to the general rule arises when a defendant is convicted of burglary; a prosecution or conviction of burglary is not a bar to conviction or punishment for any crime committed after entering a building. *Bookwalter*, 541 N.W.2d at 294; Minn. Stat. § 609.585 (2010). Appellant acknowledges that separate sentences could be imposed for burglary and aggravated robbery, but argues that there was only one behavioral incident and that the use of deadly force was part of the same incident because appellant was attempting to avoid apprehension for the burglaries.

(2) whether a defendant's acts were "motivated by an effort to obtain a single criminal objective." *State v. Bauer*, 792 N.W.2d 825, 828 (Minn. 2011) (quotation omitted).

As to time and place, although the home invasions occurred at the same location, they were separated in time by approximately two hours; during that time, appellant, Trevino and Adrian Salinas went their separate ways, reconvened in order to commit the second invasion, and picked up another accomplice, Arcadio Salinas. Generally, a single behavioral incident consists of multiple acts occurring in a fairly short time period. *See State v. Williams*, 608 N.W.2d 837, 842-43 (Minn. 2000) (concluding that acts constituted a single behavioral incident, when burglary, sexual assault, and attempted murder occurred in an unbroken course of conduct); *State v. Johnson*, 653 N.W.2d 646, 652 (Minn. App. 2002) (concluding state had not proved that appellant had anything other than an indivisible state of mind during commission of burglary, assault, sexual assault, and robbery). Here, the home invasions were separated by two hours; the use of deadly force occurred shortly after the men left R.T.'s home.

The second factor to consider is whether the conduct was motivated by an effort to achieve a single criminal objective. *Bauer*, 792 N.W.2d at 828. Superficially, the home invasions were part of a single criminal objective: to obtain money from R.T. But a defendant's criminal objective can change over time and a series of acts can "constitute[ ] a divisible series of incidents given the lapse of time between each incident." *Id.* at 829 (quotation omitted). Here, the incidents were separated by approximately two hours in which appellant and his accomplices left the premises, added another accomplice, changed cars, found masks, and acquired another gun. Generally, if the charged offenses

are separate and distinct, and can be proved independently of one another, they are not part of a single behavioral incident. *State v. Butcher*, 563 N.W.2d 776, 784 (Minn. App. 1997), *review denied* (Minn. Aug. 5, 1997).

Each incident here involved different victims: during the first home invasion, the men threatened R.T.'s children because R.T. was not home; during the second, they threatened and struck R.T.; and during the third incident, the peace officer who drove the squad car shot by appellant was the sole victim. There is a "judicially created exception" to the prohibition against multiple sentences arising out of a single behavioral incident when multiple victims are involved. *Johnson*, 653 N.W.2d at 653. Each incident here involved distinct victims.

Finally, appellant argues that multiple sentences are not permitted when one of the offenses was committed in order to avoid apprehension. *See State v. Gibson*, 478 N.W.2d 496, 497 (Minn. 1991) (stating that "multiple sentences may not be used for two offenses if the defendant, substantially contemporaneously committed the second offense in order to avoid apprehension for the first offense"). In *Gibson*, the defendant was charged with criminal vehicular operation, resulting from a head-on collision that occurred while he was driving while intoxicated, and leaving the scene of an accident. *Id.* The supreme court concluded that the defendant left the scene in order to avoid apprehension and that the two charges were part of a single behavioral incident. *Id.* But the charge of use of deadly force against a peace officer involves intentional conduct against a specific victim, making it distinguishable from conduct that is intended merely to permit a person to escape detection.

Appellant's actions here do not have the requisite unity of time, place, and purpose to be a single behavioral incident. The district court's decision to impose multiple sentences is supported by the record.

Affirmed.