STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0120

State of Minnesota,
Respondent,

vs.

Tristan Anthony Harmon,
Appellant.

Filed December 10, 2012
Affirmed
Chutich, Judge

Ramsey County District Court
File No. 62-CR-11-2278

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)

David W. Merchant, Chief Appellate Public Defender, Sharon E. Jacks, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Worke, Judge; and Chutich, Judge.

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

CHUTICH, Judge

On appeal from his convictions of felon in possession of a firearm and terroristic threats, appellant Tristan Anthony Harmon argues that (1) his convictions must be

reversed because the district court denied him his constitutional right to a speedy trial; (2) the district court committed reversible error when it allowed the prosecutor to call the victim as a witness to impeach her with her prior inconsistent statements; (3) the prosecutor committed misconduct by referring to the victim's prior inconsistent statements as substantive evidence; and (4) the district court erred by allowing the state to question Harmon about the facts underlying his prior conviction. Harmon also filed a pro se brief alleging that he received ineffective assistance of counsel.

Because the district court did not violate Harmon's right to a speedy trial, the victim's prior statements were admissible as substantive evidence, Harmon was not prejudiced by the state's questioning regarding his prior conviction, and his claim of ineffective assistance of counsel has no merit, we affirm.

FACTS

In March 2011, Harmon and C.M. were in a romantic relationship and living together in C.M.'s home. On March 27, 2011, C.M. called 911 and reported that someone was shooting at her house. Police officers responded to the call, and C.M. told them that Harmon was in her house, that he had a gun, and that he had threatened to kill her. C.M. described the gun as a black revolver with tape on the handle. The officers found Harmon in the living room of the house putting his clothes into a garbage bag. The officers handcuffed Harmon and began to search for the gun that C.M. described.

During the search for the gun, C.M. told the officers that, when Harmon had drawn the gun, she ran out of the back door of the house and that Harmon shot at her as she ran down an alley. The officers observed one set of footprints in the alley that were

consistent with C.M.'s claims. An officer observed a second set of footprints and followed it to a wood pile along C.M.'s fence where he found a revolver with black tape around the handle. The second set of footprints had a distinctive emblem that matched the emblem on Harmon's shoes.

On March 28, 2011, Ramsey County charged Harmon with three crimes: felon in possession of a firearm; second-degree assault; and terroristic threats. A pretrial hearing was held on May 11, 2011, at which Harmon demanded a speedy trial. Harmon's trial was set for June 6, 2011.

On June 6, Harmon appeared for trial, and the parties began jury selection. After the district court completed its questioning of the jury, Harmon's counsel disclosed that C.M. had contacted him and they had spoken several times about the case. Harmon's counsel stated that C.M. told him she had contacted the state several times to recant her statements, but the prosecutor had refused to speak with her. The district court expressed concern that Harmon's counsel was a potential witness in the case and therefore was "conflicted out." The district court recommended that the parties wait until the following day before proceeding with jury selection.

The following day, Harmon's counsel withdrew due to the potential conflict. Harmon objected and argued that delaying the trial violated his constitutional right to a speedy trial. He claimed that no potential conflict would exist "if the prosecutor would have spoken to the victim ahead of time." The next available trial date was the second week of August, which was more than sixty days after Harmon first demanded a speedy

trial. The district court found good cause for the postponement because of "exigent circumstances."

On June 24, 2011, Harmon appeared in court with his new attorney for a pretrial hearing. The district court set a trial date of August 9, 2011. Harmon's new attorney was unable to accommodate an earlier trial date in July because of scheduling conflicts. Harmon's counsel requested that Harmon's bail be reduced because he was not at fault for the delay in his trial. While the district court agreed that the delay was not Harmon's fault, it denied Harmon's request given the severity of the charges.

Harmon appeared for trial on August 9, 2011. The trial was continued, however, because the prosecutor and Harmon's counsel were unavailable.

Harmon's trial began on August 29, 2011. At trial, the state called C.M. as a witness. C.M. testified that she called 911 because she and Harmon had an argument and she was angry, but she testified that Harmon never had a gun or threatened her. She further testified that she could not remember much of the evening's events because she had been intoxicated. The state treated C.M. as a hostile witness and impeached her with statements that she made to the officers who responded to her 911 call on March 27.

The state then called the responding officers, as well as the officer who interviewed C.M. the day after the alleged shooting. The responding officers testified that C.M. told them that Harmon threatened her and shot at her with a gun. They also testified that C.M. did not appear to be intoxicated that night.

Forensic scientist Kathryn Roche testified for the state. Roche testified that DNA was recovered from the gun, and she opined that it contained a mixture of DNA from

three or more persons. Notably, Roche testified that Harmon's DNA was consistent with the DNA present in the mixture.

Harmon testified in his own defense and denied that he possessed a gun. He further testified that C.M. had assaulted him on the night in question. Harmon called no other witnesses in his defense. To impeach Harmon, the state introduced evidence of his prior conviction for drug possession.

The jury found Harmon guilty of the crimes of felon in possession of a firearm and terroristic threats, but acquitted him of the most serious charge, second-degree assault. This appeal followed.

D E C I S I O N

I. Speedy Trial

Harmon first argues that the district court violated his right to a speedy trial. "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); *see also State v. Cham*, 680 N.W.2d 121, 124 (Minn. App. 2004), *review denied* (Minn. July 20, 2004).

The United States and Minnesota Constitutions guarantee a defendant's right to a speedy trial. U.S. Const. amend. VI, Minn. Const. art I, § 6. When reviewing a speedy-trial challenge, we consider a four-factor balancing test: "(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." *State v. Windish*, 590 N.W.2d 311, 315 (Minn. 1999) (citing *Barker v. Wingo*, 407 U.S. 514, 530–33, 92 S. Ct. 2182, 2192–93 (1972)). "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.'" *Id.* (quoting *Barker*, 407 U.S. at 533, 92 S. Ct. at 2193). Applying and balancing the relevant factors here, we conclude that Harmon's constitutional right to a speedy trial was not violated.

Length of Delay

"The length of the delay is a triggering mechanism which determines whether further review [of the *Barker* factors] is necessary." *Id*. (quotation omitted). Under Minnesota law, a delay of more than 60 days from the date of the defendant's demand for a speedy trial is presumptively prejudicial.[1] *Id*. at 315–16; *State v. Friberg*, 435 N.W.2d 509, 513 (Minn. 1989). Here, neither party disputes that Harmon's trial was delayed more than 60 days from his initial demand for a speedy trial. He first demanded a speedy trial on May 11, 2011, and he was not tried until August 29, 2011, over 110 days after his demand. Because the length of the delay before trial was presumptively prejudicial, we consider the remaining three *Barker* factors.

Reason for Delay

The second *Barker* factor requires consideration of the reason for the delay. *Windish*, 590 N.W.2d at 316. "The responsibility for promptly bringing a case to trial

[1] We recognize that this court has sometimes considered the date of the defendant's arrest, rather than the date of the speedy trial demand, when analyzing the first *Barker* factor. *See State v. Rhoads*, 802 N.W.2d 794, 806 (Minn. App. 2011), *rev'd on other grounds*, 813 N.W.2d 880 (Minn. 2012); *Cham*, 680 N.W.2d 125. Because both parties agree that the delay between Harmon's demand and the beginning of his trial is presumptively prejudicial, we do not consider the delay from the date of his arrest.

rests with the state." *State v. Hahn*, 799 N.W.2d 25, 30 (Minn. App. 2011) (citing *Barker*, 407 U.S. at 529, 92 S. Ct. at 2191), *review denied* (Minn. Aug. 24, 2011).

Here, the first delay occurred because Harmon's initial counsel withdrew from the case. Harmon argues that this delay should weigh against the state because it was the state's refusal to speak with C.M. about her recantation that forced his counsel to withdraw from his case. We disagree. Regardless of whether the state refused to speak with C.M. as she claimed, the actions of Harmon's counsel in speaking with her ultimately caused the conflict. The state should not be responsible for counsel's failure to manage a conflict situation. Therefore, this initial delay weighs against Harmon.

The remaining delay is neutral because it was caused by the unavailability of both the prosecutor and Harmon's counsel. The unavailability of the prosecutor weighs against the state. *See Windish*, 590 N.W.2d at 316 ("[O]vercrowding in the court system is not a valid reason for denying a defendant a speedy trial."); *Barker*, 407 U.S. at 531, 92 S. Ct. at 2192 (stating that delay due to "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."). The unavailability of defense counsel, however, is attributable to the defendant. *See Windish*, 590 N.W.2d at 316.

Assertion of Right

Next, we consider the "the frequency and intensity of a defendant's assertion of a speedy trial demand." *Windish*, 590 N.W.2d at 318. "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." *Barker*, 407 U.S. at 531–32, 92 S. Ct. at 2192–93. A defendant's assertion of the right need not be formal or technical, but rather is determined by the circumstances. *Windish*, 590 N.W.2d at 317.

Harmon first demanded a speedy trial at his pretrial hearing on May 11, 2011. Harmon again demanded a speedy trial on June 7 after his counsel withdrew, specifically arguing that his counsel's withdrawal violated his right to a speedy trial. At the pretrial hearing on June 24, Harmon's newly appointed counsel again mentioned Harmon's speedy trial request when arguing for reduced bail. Given Harmon's repeated assertions of his speedy trial right, this factor weighs in his favor.

Prejudice to Defendant

The fourth *Barker* factor is whether Harmon suffered prejudice as a result of the delays. "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 (citing *Barker*, 407 U.S. at 532, 92 S. Ct. at 2193). Of the three factors, impairment of a defense is the key factor in determining whether the defendant was prejudiced. *Barker*, 407 U.S. at 532, 92 S. Ct. at 2193.

Harmon asserts that he suffered lengthy pretrial incarceration, which increased his anxiety. But he makes no argument that the delay impaired his defense or that he would have had a stronger defense had his trial begun on June 6, as it was originally scheduled. In fact, the record suggests that no prejudice occurred because Harmon was acquitted of the most serious charge. Because Harmon failed to demonstrate that his defense was

impaired by the delay, this factor weighs in favor of the state. *See Rhoads*, 802 N.W.2d at 808 (finding that the appellant "did not demonstrate prejudice beyond the fact that he was incarcerated before trial and that his incarceration increased his anxiety and concern").

In sum, upon consideration of the *Barker* factors, we conclude that the district court did not violate Harmon's constitutional right to a speedy trial. We recognize that the length of the delay and Harmon's repeated assertions of his right weigh against the state. But, as the district court correctly found, the delay here was not primarily attributable to the state and was for good cause. Moreover, Harmon failed to demonstrate that the delay prejudiced his defense.

II. Dexter Issue

Harmon next contends that the district court abused its discretion by allowing the state to call C.M. as a witness solely to impeach her with her prior inconsistent statements. The supreme court has referred to this situation as "the *Dexter* problem." *Oliver v. State*, 502 N.W.2d 775, 778 (Minn. 1993). A *Dexter* problem occurs when

> a prosecutor calls a witness who has given a prior statement implicating the defendant, but that witness has since retracted the statement and signified an intent to testify in defendant's favor if called by the prosecutor. If the prosecutor is permitted to call this witness and use the prior statement for impeachment purposes, there is a large risk that the jury, even if properly instructed, will consider the prior statement as substantive evidence.

State v. Ortlepp, 363 N.W.2d 39, 42–43 (Minn. 1985). The *Dexter* problem arises only if the prior inconsistent statement is otherwise inadmissible, but it is avoided if the

impeachment evidence is admissible as substantive evidence under an exception to the hearsay rule. *See State v. Dexter*, 269 N.W.2d 721, 721 (Minn. 1978) (observing that the state was "seeking . . . to present, in the guise of impeachment, evidence which is not otherwise admissible"); *Ortlepp*, 363 N.W.2d at 44.

Here, C.M.'s initial statements to the police on the night of the charged events implicated Harmon. But at trial, C.M. denied making those statements and testified that she did not clearly remember the events of the night because she was intoxicated. During the state's examination, defense counsel objected that the state's questions were "leading," but did not assert a hearsay objection or argue that the state's questioning presented a *Dexter* issue. The defense's "leading" objections did not alert the district court to the *Dexter* issue that Harmon now raises on appeal. *See State v. Rodriguez*, 505 N.W.2d 373, 376 (Minn. App. 1993), *review denied* (Minn. Oct. 19, 1993) ("An objection must be specific as to the grounds for challenge."). Therefore, we review the district court's actions for plain error.

"The plain error analysis allows an appellate court to consider an unobjected-to error that affects a criminal defendant's substantial rights." *State v. Kuhlmann*, 806 N.W.2d 844, 852 (Minn. 2011). "Under plain error analysis, we must determine whether there was error, that was plain, and that affected the defendant's substantial rights. If each of these prongs is met, we will address the error only if it seriously affects the fairness and integrity of the judicial proceedings." *Id*. at 852–53 (citation omitted). "An error is 'plain' if it is clear or obvious." *Id.* at 853.

Here, the district court did not commit plain error by allowing the state to question C.M. about her prior statements to the police because her statements were admissible as substantive evidence. Under Minnesota Rule of Evidence 803(2), a statement is not excluded as hearsay if it relates "to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." The elements of an excited utterance are "(a) that there be a startling event or condition, (b) that the statement relates to the event or condition, and (c) that the statement is made under the stress caused by the event or condition." *State v. Edwards*, 485 N.W.2d 911, 914 (Minn. 1992).

When the officers arrived in response to the emergency call, C.M. told them that Harmon had a gun and he "shot at her as she was running from the residence." These statements are clearly about a startling event. The officers testified that, when they arrived, C.M. was panicked, shaking, screaming, irate, and frightened, showing that she made the statements under the stress caused by Harmon's actions. Thus, C.M.'s statements to the officers on March 27 qualify as excited utterances under rule 803(2).

One officer, Officer Carlson, interviewed C.M. the morning following the charged events. Because of the time gap between the events and the interview, we conclude that C.M.'s statements to Officer Carlson were not made "under the stress caused by the event." But C.M.'s statements to Officer Carlson, as well as her statements to the other officers, are admissible as substantive evidence under Minn. R. Evid. 807, the residual

hearsay exception.[2] Under rule 807, a district court may admit hearsay statements that have "circumstantial guarantees of trustworthiness." In determining whether a hearsay statement has guarantees of trustworthiness, a court may consider whether (1) the witness was available for cross examination; (2) there is a dispute that the declarant made the statement or as to what the statement was; (3) the statement was against the declarant's penal interest; and (4) the state's other evidence strongly corroborated the truth of the statement. *Ortlepp*, 363 N.W.2d at 44. These four factors are not exclusive; rather, courts consider the totality of the circumstances to determine whether a statement has "sufficient guarantees of trustworthiness." *State v. Martinez*, 725 N.W.2d 733, 737 (Minn. 2007).

C.M.'s interview with Officer Carlson and her other prior statements have several circumstantial guarantees of trustworthiness. No confrontation problem exists because C.M. testified and was available for cross-examination by defense counsel. C.M.'s statement to officer Carlson was taped so no dispute exists about the substance of the statement. DNA and footprint evidence corroborated C.M.'s statements and linked Harmon to the gun in the yard. C.M.'s statements were also against her interest in a

[2] Harmon asserts that the district court found that these statements were not admissible under the residual exception. Our review of the record reveals no such ruling by the district court. Harmon's citations to the record demonstrate only that the state offered Officer Carlson's interview of C.M., which was taped the day after the events, as both impeachment and substantive evidence. After a discussion off the record, the taped interview was not played for the jury. Harmon also cites to the district court's standard jury instruction on the use of impeachment evidence. Nothing in the record shows that this instruction was included as a direct response to C.M.'s testimony about her prior statements. The district court never concluded that C.M.'s prior statements were admissible for impeachment purposes only.

continued relationship with her boyfriend Harmon. *See State v. Plantin*, 682 N.W.2d 653, 659 (Minn. App. 2004) (holding that a domestic-assault victim's statements that are against the victim's interest in a relationship with the accused satisfied the third *Ortlepp* factor), *review denied* (Minn. Sept. 29, 2004). Thus, all of C.M.'s prior statements were admissible under the residual hearsay exception.

Because C.M.'s prior statements were admissible as substantive evidence under Minn. R. Evid. 803(2) or 807, no *Dexter* problem existed. The district court did not plainly err by allowing the state to cross-examine C.M. about those statements.

Moreover, even if the district court did err in allowing C.M.'s prior statements, any error did not affect Harmon's substantial rights. *Kuhlmann*, 806 N.W.2d at 852 ("An error affects substantial rights if the error was prejudicial and affected the outcome of the case."). As previously noted, C.M.'s prior statements were corroborated by the physical evidence—DNA and footprint evidence—that linked Harmon to the gun found in the yard behind C.M.'s house. *See State v. Barnes*, 713 N.W.2d 325, 337 (Minn. 2006) (concluding that an error in admitting evidence is harmless when other evidence is properly admitted on the same point). In addition, the jury acquitted Harmon of the most severe charge, second-degree assault, despite C.M.'s prior statement that Harmon shot at her in the alley. Based on this record, any erroneous impeachment of C.M. did not affect Harmon's substantial rights.

III. Prosecutorial Misconduct

Harmon argues that the state committed serious misconduct during its closing argument by urging the jury to find Harmon guilty based on C.M.'s prior statements. He

did not object to the closing argument at trial; we thus review his claim under a modified plain-error standard. *See State v. Ramey*, 721 N.W.2d 294, 299–300, 302 (Minn. 2006); *see also* Minn. R. Crim. P. 31.02. Under this standard, an appellant must demonstrate that the prosecutor's unobjected-to argument was erroneous and the error was plain. *Ramey*, 721 N.W.2d at 302 (citing *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)). The burden then shifts to the state to prove that the error did not affect the appellant's substantial rights. *Id.* Closing arguments are considered in their entirety in determining whether prejudicial misconduct occurred. *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993).

We do not find Harmon's argument persuasive because, as we previously concluded, C.M.'s prior statements were admissible as substantive evidence. Therefore, the state was free to refer to them during its closing argument. In addition, even if there was prosecutorial misconduct, it did not, for the reasons discussed above, affect Harmon's substantial rights.

IV. Facts Underlying Prior Conviction

To attack a witness's credibility, a party may impeach the witness with evidence of a prior conviction only if it was a felony conviction or involved dishonesty. Minn. R. Evid. 609(a). "Examination regarding prior convictions should be limited to the fact of the conviction, the nature of the offense, and the identity of the defendant." *State v. Valtierra*, 718 N.W.2d 425, 436 (Minn. 2006) (quotation omitted). Even when a prior conviction is properly introduced as impeachment evidence under rule 609, "the prosecutor may not elicit evidence concerning the facts underlying [the] prior

conviction[ ]." *State v. Edwards*, 343 N.W.2d 269, 273 (Minn. 1984); *see also State v. Norgaard*, 272 Minn. 48, 51, 136 N.W.2d 628, 631 (1965). "[I]mproperly admitted underlying-facts evidence will not require reversal unless the error substantially influences the jury's decision." *Valtierra*, 718 N.W.2d at 438 (quotations omitted).

Harmon argues that the district court erred by allowing the state to question him about the facts underlying his prior conviction for drug possession. We agree. The state asked Harmon several questions about his prior conviction, eliciting testimony about whether Harmon lied to the officers when they arrested him. The state's questioning went beyond the permissible scope of examination about prior offenses.

Nevertheless, while we are concerned about the state's expansion of the permissible scope of impeachment, it is unlikely that the state's questioning substantially influenced the jury's decision. Here, Harmon's actions underlying his drug conviction were completely different than the actions underlying the charges for which Harmon was being tried. *See Rodriguez*, 505 N.W.2d at 377 (noting defendant was not substantially prejudiced in part because the "actions underlying the prior conviction bore no resemblance to the actions underlying the present charges"). The district court also gave the jury a cautionary instruction to not use the evidence of Harmon's prior conviction as evidence of guilt for the current offenses. *See State v. Pendleton*, 706 N.W.2d 500, 509 (Minn. 2005) ("It is presumed that the jury follows the court's instructions."). Thus, the district court's error does not require reversal of Harmon's convictions.

V. Ineffective Assistance of Counsel

In his pro se brief, Harmon argues that his trial counsel was ineffective. To prevail on a claim of ineffective assistance of counsel, an appellant must demonstrate that the "'representation fell below an objective standard of reasonableness' and that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Martin*, 695 N.W.2d 578, 587 (Minn. 2005) (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068 (1984)).

Harmon contends that he and his counsel were unable to establish a trial strategy because of limited pretrial communication. Harmon also claims that his counsel was ineffective because he refused to subpoena necessary witnesses. We do not review attacks on counsel's trial strategy, *see*, *e.g.*, *Boitnott v. State*, 631 N.W.2d 362, 370 (Minn. 2001), or trial counsel's decisions about which witnesses to call. *Scruggs v. State*, 484 N.W.2d 21, 26–27 (Minn. 1992). Thus, we conclude that Harmon's claim of ineffective assistance of counsel has no merit.

Affirmed.