STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0730

State of Minnesota,
Respondent,

vs.

Kevin Lee Anthony,
Appellant.

Filed April 7, 2014
Affirmed
Connolly, Judge

Ramsey County District Court
File No. 62-CR-12-5940

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

John J. Choi, Ramsey County Attorney, Kaarin Long, Assistant County Attorney, St. Paul, Minnesota (for respondent)

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

Considered and decided by Chutich, Presiding Judge; Connolly, Judge; and Smith, Judge.

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

CONNOLLY, Judge

Appellant challenges his conviction of aiding and abetting simple robbery on the grounds that he was deprived of his right to a speedy trial and that the evidence was insufficient to support the jury's verdict. Because appellant's right to a speedy trial was not violated and the evidence amply supported the jury's verdict, we affirm.

FACTS

On July 18, 2012, appellant Kevin Anthony and some other men confronted a man riding a bicycle (the victim). One man asked to use the bicycle; when the victim refused, another man hit the victim in the face, knocking him to the ground. Appellant told the victim not to fight back because appellant had a gun. The four men took the victim's money, cell phone, hat, shoes, and bicycle.

The victim walked to an apartment building, where the police were called. The victim told the 911 operator that a group of four or five men had punched him in the face and taken his money, cell phone, hat, shoes, and bicycle; the victim also reported that one of the men said he had a pistol.

Four police officers were involved after the 911 call. One officer took the victim's statement that: (1) three to four men approached him; (2) when one man asked to ride the bicycle, he refused; (3) a second man punched him, knocking him to the ground; (4) a third man said he had a gun; (5) the men took his property; and (6) one man was wearing a white T-shirt and another a Bulls jersey.

A second officer saw a group of four men that matched the victim's description of the group; one of the four, later identified as appellant, was riding a bicycle that matched the victim's description of his bicycle. That officer radioed the location of the group of suspects. Two more officers went to that location, found three of the suspects, and ordered them to the ground. Appellant was one of two who complied; one of the officers chased the third suspect, caught him, and brought him back. When the three suspects were presented individually to the victim, he identified each of them as involved in the robbery.

Appellant was charged with aiding and abetting second-degree aggravated robbery and aiding and abetting simple robbery. On August 3, 2012, at the omnibus hearing, appellant filed a demand for a speedy trial. His case was placed on call for a jury trial on October 1, 2012. A district court judge was assigned to the case, and appellant had hearings before that judge on September 6 and October 1. On October 9, that judge was unavailable, and appellant had a hearing before a second district court judge, at which he decided to proceed pro se and filed notice to remove the second district court judge. On October 22, at a hearing with the initial district court judge, appellant announced that he had changed his mind and wanted to retain his appointed counsel. The first district court judge was unable to hear appellant's case that day, found good cause for delay, and referred the case to a third district court judge. However, appellant's counsel was not available, so the trial could not proceed. At a hearing on November 29, the third district court judge found good cause for continuing the case, set trial for December 10, and denied appellant's motion to release him from custody or reduce his bail. Trial began on

December 10. On December 12, the jury found appellant not guilty of aiding and abetting second-degree aggravated robbery but guilty of aiding and abetting simple robbery. Appellant was sentenced to 45 months in prison; he received credit for the 192 days of incarceration between his July 18, 2012, arrest and the January 25, 2013, sentencing hearing.

Appellant challenges his conviction, arguing that his right to a speedy trial was violated and that the evidence was not sufficient to support the jury's verdict.

D E C I S I O N

1. Speedy Trial

Whether a defendant's right to a speedy trial is violated is reviewed de novo, but a district court's determination that good cause existed for delaying trial is reviewed for an abuse of discretion. *State v. Griffin*, 760 N.W.2d 336, 339 (Minn. App. 2009) (right to speedy trial); *McIntosh v. Davis*, 441 N.W.2d 115, 119 (Minn. 1989) (good cause for delay); *see also State v. Lussier*, 695 N.W.2d 651, 654 (Minn. App. 2005) (noting that whether the right to a speedy trial was violated is a "delicate judgment based on the circumstances of each case" (quotation omitted)), *review denied* (Minn. July 19, 2005).

"On demand of any party the trial must start within 60 days of the demand unless the court finds good cause for a later trial date." Minn. R. Crim. P. 11.09(b). Appellant demanded a speedy trial on August 3, 2012, but his trial did not begin until December 10, 2012, in part because of appellant's vacillating on whether he would proceed pro se or with counsel and in part because of appellant's decision to remove one of the judges assigned to the case.

Caselaw provides "a balancing test for reviewing such claims." *State v. Friberg*, 435 N.W.2d 509, 512 (Minn. 1989). Four factors are relevant: "(1) the length of the delay; (2) the reason for the delay; (3) whether and when the defendant asserted his right to a speedy trial; and (4) the prejudice to the defendant caused by the delay." *State v. Cham*, 680 N.W.2d 121, 124 (Minn. App. 2004) (citing *Barker v. Wingo*, 407 U.S. 514, 530-32, 92 S. Ct. 2182, 2192-93 (1972)), *review denied* (Minn. July 20, 2004). "None of the factors is either a necessary or a 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.* (quotation omitted).

It is undisputed that appellant asserted his right to a speedy trial on August 3, 2012; therefore, factor (3) is not at issue.

As to factor (1), while a delay of more than 60 days raises a presumption of prejudice, there is no "arbitrary and rigid time period for determining whether the right to speedy trial has been violated." *Friberg*, 435 N.W.2d at 512. The time is measured from the date of the arrest to the date of trial. *State v. Jones*, 392 N.W.2d 224, 235 (Minn. 1986). *Cham* reversed a dismissal based on the violation of the right to a speedy trial found because, after an October 2001 arrest, a December 2001 omnibus hearing, a February 2002 arraignment, and a July 2002 scheduled trial date, trial had not yet occurred in August 2003. *Cham*, 680 N.W.2d at 123, 125-26; *see also Friberg*, 435 N.W.2d at 511, 515 (eight-month delay between arrest and trial did not violate right to speedy trial); *Jones*, 392 N.W.2d 224, 234-36 (seven-month delay did not violate right); *State v. Helenbolt*, 334 N.W.2d 400, 405-06 (Minn. 1983) (14-month delay did not

violate right); *State v. Rossbach*, 288 N.W.2d 714, 716 (Minn. 1980) (seven-month delay did not violate right); *State v. Corarito*, 268 N.W.2d 79, 80 (Minn. 1978) (six-month delay did not violate right). Appellant was arrested on July 18 and tried on December 10, a period of less than five months; caselaw indicates that the length of the delay did not violate his right to a speedy trial.

As to factor (2), the reasons for delay, the first delay was caused by congestion of the court calendar so that trial was originally scheduled for 67 days after appellant's arrest. This delay, while not attributable to appellant, was minimal. The second delay occurred on October 9 when, although the judge, the state, and appellant's counsel were ready to proceed with trial, appellant decided to discharge his appointed counsel and proceed pro se and to remove the judge. Appellant's right to remove the judge is undisputed, but his decision to do so necessitated delaying the trial and weighs against him, not against the state. *See Friberg*, 435 N.W.2d at 515 (decision to remove judge noticed on the day trial was scheduled to begin weighed against violation of defendants' right to a speedy trial).

The third delay was caused by appellant's vacillation over whether he would represent himself or be represented by appointed counsel: although the state and another judge were prepared to begin trial on October 22, appellant's last-minute decision to be represented caused a delay because his appointed counsel was unavailable, and the judge at the request of the state, found good cause for delay. The fourth delay was on November 29, when trial was scheduled for December 10, and the state again asked for a finding of good cause for delay. While court-calendar congestion played a part in the

reasons for multiple delays, appellant's vacillation over whether to represent himself or be represented by counsel and his decision to remove one judge played a greater part.

As to factor (4), there are three ways in which a defendant may suffer prejudice from a delay: oppressive pretrial incarceration, increased pretrial anxiety and concern, and impairment of the defense. *Barker*, 407 U.S. at 532, 92 S. Ct. at 2193. The most serious of these is the last. *Id.*, 92 S. Ct. at 2193. Appellant does not argue that his defense was impaired by the delay. When the delay in trial "in no way affected the strength of [a defendant's] case, the final *Barker* factor does not favor [the] defendant[]." *Friberg*, 435 N.W.2d at 515.

Appellant does argue that he suffered from incarceration and from the "kind of anxiety and stress . . . the speedy trial guarantee is supposed to prevent." But for him, as for the defendants in *Friberg*, "[t]he only prejudice attested to at the hearing was the stress, anxiety and inconvenience experienced by anyone who is involved in a trial." 435 N.W.2d at 515. At sentencing, appellant received credit for 192 days of incarceration between his arrest on July 18, 2012, and the sentencing hearing on January 25, 2013; thus, he was not unduly prejudiced by the pretrial incarceration.

Appellant's right to a speedy trial was not violated.

2. Sufficiency of the Evidence

Appellant argues that the evidence was insufficient to identify him as having aided and abetted the robbery. On a claim of insufficient evidence, this court's review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to

reach their verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). This court will not disturb a verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004). This court must assume "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989).

Direct evidence, namely the victim's testimony, supports appellant's conviction. Appellant argues that, because (1) the victim told the 911 operator and the police officer who took his statement that the man who claimed to have a gun was not wearing a shirt; (2) appellant, when arrested, was wearing a white T-shirt; and (3) the victim could not remember at trial what part the man in the white T-shirt had played in the robbery, the state failed to prove beyond a reasonable doubt that appellant aided and abetted in the robbery. But, although the victim could not remember at trial what the man who said he had a gun had been wearing, the victim readily identified appellant as that person.

> Q. [D]o you see any of the people that you identified as robbing you in the courtroom today?
> A. That person (indicating).
> Q. When you say that person, can you tell me what the person you're referring to is wearing?
> A. He's in a black suit.
> Q. Can you say anything else about that person?
> A. He said he had a pistol on him.
> . . . .
> Q. That's the person that you remember saying to you that they had a pistol on them?
> A. Yes, ma'am.

> [Q.] Let the record reflect that [the victim] has identified [appellant].

Assuming that the jury believed the victim, there was sufficient direct evidence to support the verdict. *See State v. Cao*, 788 N.W.2d 710, 717 (Minn. 2010) (holding that uncorroborated testimony of a single eyewitness may be a sufficient basis for a conviction).

Here, the victim's testimony was corroborated: appellant admits that "[t]he only arguable corroboration of [the victim's] identification is the evidence that [appellant] was found riding [the victim's] stolen bicycle after the robbery." Appellant argues that this was circumstantial evidence, but the officer who first saw the group of men after the robbery testified that he "saw four males and . . . the green bicycle with chrome rear pegs and black front pegs" that matched the victim's description of his bicycle and that the officer "identified the male wearing the white T-shirt and black shorts that was sitting on the ground . . . as the male that I saw that was riding the bicycle." Moreover, the men with appellant had the victim's cell phone and hat. Possession of stolen goods from a recent robbery in the vicinity is corroborating evidence of a victim's identification. *State v. Johnson*, 811 N.W.2d 136, 150 (Minn. App. 2012) (concluding that a pile of the victim's credit cards and identification cards found on the ground between two suspects "was evidence that corroborated [the victim's] testimony"), *review denied* (Minn. Mar. 28, 2012).

The evidence was sufficient to allow the jury to reach its verdict and appellant's right to a speedy trial was not violated.

Affirmed.