

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	
Plaintiff/Appellee,	)	Supreme Court No. 20180055
vs.	)	
	)	District Court No. 09-2017-CR-02433
John Phillip Hamre,	)	
	)	
Defendant/Appellant.	)	

---

APPEAL FROM CRIMINAL JUDGEMENT DATED JANUARY 25, 2018  
CASS COUNTY DISTRICT COURT  
EAST CENTRAL JUDICIAL DISTRICT  
THE HONORABLE STEVEN L. MARQUARDT, PRESIDING.

---

**APPELLEE'S BRIEF**

---

Tristan J. Van De Streek, #05849  
Assistant State's Attorney  
Cass County Courthouse  
P.O. Box 2806  
Fargo, North Dakota 58108  
(701) 241-5850  
Sa-defense-notices@casscountynd.gov  
Attorney for Plaintiff-Appellee

Nicholas S. Samuelson  
Summer Law Clerk  
Writing under R. Ltd. Practice of Law  
by Law Students.  
P.O. Box 2806  
Fargo, North Dakota 58108  
(701) 241-5850

**[¶1] TABLE OF CONTENTS**

Table of Contents .....	i
	<u>Paragraph No.</u>
Table of Authorities.....	¶2
Statement of the Issues .....	¶3
Statement of the Case .....	¶7
Statement of Facts .....	¶10
Standard of Review .....	¶17
Law and Argument.....	¶19
<b>I. The District Court did not err in regard to Hamre’s speedy trial requests. ....</b>	<b>¶20</b>
<b>II. The District Court did not err by not holding an evidentiary hearing on Hamre’s motion to dismiss.....</b>	<b>¶28</b>
<b>III. There was sufficient evidence at trial for the jury to find Hamre guilty on all counts. ....</b>	<b>¶35</b>
Conclusion.....	¶49
Certificate of Service.....	¶51

**[¶2] TABLE OF AUTHORITIES**

Paragraph No.

**Federal Constitutional Provisions:**

U.S. Const. amend. VI..... ¶21

**State Constitutional Provisions:**

N.D. Const. Art. I § 12 ..... ¶21

**United States Supreme Court Cases:**

Barker v. Wingo, 407 U.S. 514 (1972) ..... ¶9, 22, 23

**State Cases:**

Koenig v. State, 2018 ND 59, 907 N.W.2d 344..... Passim

State v. Acker, 2015 ND 278, 871 N.W.2d 603..... ¶33

State v. Carlson, 1997 ND 7, 559 N.W.2d 802 ..... ¶18

State v. Coppage, 2008 ND 134, 751 N.W.2d 254 ..... ¶18

State v. Erickson, 241 N.W.2d 854, 859 (N.D. 1976)..... ¶22

State v. Hall, 2017 ND 124, 894 N.W.2d 836..... ¶22

State v. Hannah, 2016 ND 11, 873 N.W.2d 668 ..... ¶37, 40

State v. Hidanovic, 2008 ND 66, 747 N.W.2d 463 ..... ¶18

State v. Wilson, 2004 ND 51, 676 N.W.2d 98 ..... ¶18

**Statutes:**

N.D.C.C. § 12.1-01-04 ..... ¶37, 39, 40

N.D.C.C. § 12.1-08-02 ..... ¶42

N.D.C.C. § 12.1-17-01 ..... ¶37

N.D.C.C. § 29-19-02 ..... ¶21

N.D.C.C. § 39-10-71 ..... ¶46

**Rules:**

N.D.R.Crim.P. 52 ..... ¶33

N.D.R.Ct. 3.2 ..... ¶30

### **[¶3] STATEMENT OF THE ISSUES**

- [¶4] I. Whether the district court denied Hamre's Constitutional right to a speedy trial.
- [¶5] II. Whether the district court erred in failing to hold an evidentiary hearing on Hamre's pro se motion to dismiss.
- [¶6] III. Whether the evidence presented at trial was sufficient to support the jury's guilty verdicts on the charges of Simple Assault on a Peace Officer, Preventing Arrest, and Fleeing or Attempting to Elude a Police Officer.

### **[¶7] STATEMENT OF THE CASE**

[¶8] A jury found Hamre guilty of two counts of Simple Assault on a Peace Officer, one count of Preventing Arrest, and one count of Fleeing or Attempting to Elude a Police Officer. Hamre now appeals arguing (1) he was denied his Constitutional right to a speedy trial; (2) the district court erred in failing to hold an evidentiary hearing on his motion to dismiss; and (3) there was insufficient evidence at trial to support his convictions.

[¶9] The State of North Dakota responds, arguing (1) applying the Barker factors, Hamre was not denied his right to a speedy trial; (2) the District Court did not err by deciding Hamre's motion to dismiss on the briefs; and (3) there was sufficient evidence presented at trial for a jury to find Hamre guilty on all counts.

## **[¶10] STATEMENT OF FACTS**

[¶11] On June 5, 2017, Fargo Police detective Phil Swan made a casual encounter with the Appellant, John Phillip Hamre, while investigating a string of storage unit burglaries. (Appellant's Appendix "App." at 11.) Later that same day, Detective Swan stopped Hamre for out of date license plates. (Appellant's App. at 11.) Detective Swan approached Hamre's vehicle and obtained Hamre's driver's license. (Appellant's App. at 11.) While Detective Swan was running Hamre's driver's license, Hamre drove off. (Appellant's App. at 11.)

[¶12] On June 15, 2017, Fargo Police detectives Phil Swan and Brent Malone went to a Fargo storage unit complex to investigate a series of recent burglaries. The detectives pulled into the storage unit area and noticed the Jeep that had recently fled Detective Swan. Detective Swan identified the driver as John Hamre from his previous encounter. Detective Swan knew from his previous encounter with Hamre that he had an active warrant from Minnesota.

[¶13] The detectives approached the Jeep and Detective Swan identified himself by saying, "Hi John, Fargo Police." (Appellant's App. at 9.) Hamre made a quick movement toward the Jeep's driver door. (Appellant's App. at 9.) Detective Swan ran to the Jeep to detain Hamre. As Detective Swan approached the vehicle, Hamre forcefully opened the door which hit Detective Swan and shoved him into the garage door behind him. (Appellant's App. at 9.) Detective Swan grabbed Hamre's arm to prevent Hamre from grabbing something from the center console. (Appellant's App. at 9.) While Detective Malone attempted to gain

control of Hamre, Hamre kicked Detective Malone in the chest and chin. (Appellant's App. at 9.)

[¶14] After some struggle, Hamre was detained and eventually arrested. Hamre had his initial appearance in district court on June 16, 2017. Laura Reynolds was appointed to represent Hamre. Hamre had his preliminary hearing and arraignment on July 19, 2017.

[¶15] On October 6, 2017, Hamre requested to represent himself and requested a speedy trial. (Appellant's App. at 12.) On November 16, 2017, Hamre filed a pro se motion to dismiss, alleging errors in police procedure during his arrest. (Appellant's App. at 14.) On December 12, 2017, this case was reassigned from Judge Wade Webb to Judge Steven Marquardt. (Appellant's App. at 26.) On December 21, Judge Marquardt denied Hamre's motion to dismiss.

[¶16] A jury trial was held on January 24, 2018. (Appellant's App. at 1.) A jury found Hamre guilty on all counts. (Appellant's App. at 29.)

## [¶17] STANDARD OF REVIEW

[¶18] When considering a challenge to sufficiency of the evidence, this Court "view[s] the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the verdict to decide whether a reasonable fact finder could have found the defendant guilty beyond a reasonable doubt." c. This Court "assume[s] the jury believed the evidence which supports the verdict and disbelieved any contrary evidence." Id. "When the sufficiency of evidence to support a criminal conviction is challenged, this Court merely reviews the record to determine if there is competent evidence allowing the jury to draw an inference reasonably tending to prove guilt and fairly warranting a conviction." State v. Coppage, 2008 ND 134, ¶ 24, 751 N.W.2d 254 (quoting State v. Schmeets, 2007 ND 197, ¶ 8, 742 N.W.2d 513). "The defendant bears the burden of showing the evidence reveals no reasonable inference of guilt when viewed in the light most favorable to the verdict." Coppage, at ¶ 24 (quoting Schmeets, at ¶ 8). When considering insufficiency of the evidence, this Court will not "reweigh conflicting evidence or judge the credibility of witnesses." State v. Hidanovic, 2008 ND 66, ¶ 44, 747 N.W.2d 463. This Court has held, "A jury may find a defendant guilty even though evidence exists which, if believed, could lead to a verdict of not guilty." State v. Wilson, 2004 ND 51, ¶ 9, 676 N.W.2d 98 (quoting State v. Hatch, 346 N.W.2d 268, 277 (N.D.1984)).



## [¶19] LAW AND ARGUMENT

### [¶20] I. The District Court did not err in regard to Hamre's speedy trial requests.

[¶21] A defendant in a criminal matter has a right to a speedy trial under Article I, Section 12, of the North Dakota Constitution, N.D.C.C. § 29-19-02, and the Sixth Amendment of the United States Constitution. Koenig v. State, 2018 ND 59, ¶ 13, 907 N.W.2d 344. The North Dakota Supreme Court has recognized that a defendant's statutory right to a speedy trial must be made within the 14-day window following arraignment. Id. at ¶ 19. Hamre's preliminary hearing and arraignment was held on July 9, 2017. He did not make his first speedy trial request until October 6, 2017. Because Hamre's demand for a speedy trial was not timely under the statutory requirements, his request must be analyzed as the constitutional right to speedy trial.

[¶22] To evaluate the validity of constitutional speedy trial claims, the North Dakota Supreme Court has adopted the United States Supreme Court's balancing test announced in Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). See State v. Erickson, 241 N.W.2d 854, 859 (N.D. 1976). The test requires balancing four factors: length of the delay, reason for the delay, proper assertion of the right, and actual prejudice to the accused. State v. Hall, 2017 ND 124, ¶ 11, 894 N.W.2d 836.

[¶23] Under the Barker analysis, “a delay of one year or more is ‘presumptively prejudicial,’ which triggers an analysis of the other speedy trial factors.” Koenig, 2018 ND 59, ¶ 21, 907 N.W.2d 344. Here, Hamre’s trial was held 222 days after his initial appearance and 111 days after his first request for a speedy trial which are both well below the one-year threshold for presumptive prejudice.

[¶24] The second factor, reason for the delay, weighs against the State if there is evidence of intentional or dilatory tactics that unnecessarily delay trial. Koenig, 2018 ND 59, ¶ 22, 907 N.W.2d 344 (citing State v. Moran, 2006 ND 62, ¶ 10, 711 N.W.2d 915). “Delays caused by the defendant weigh against him.” Id. The delays in this case were not caused by the State. The proceedings were delayed by Hamre when he asked the Court that his first public defender be dismissed. Proceedings were delayed again when Hamre filed a second application for appointed counsel. Proceedings in this case were also delayed by the Court when the case was reassigned to Judge Marquardt. There is, however, no evidence on the record that the State was the cause of any delay in the proceedings.

[¶25] The third factor, defendant’s proper election of his speedy trial right, weighs against a defendant who fails to assert the right. Id. (citing Moran, 2005 ND 62, ¶ 15, 711 N.W.2d 915). It is clear from the record that Hamre did make it known to the Court and the State that he wanted to assert his right to a speedy trial. His first request for a speedy trial did not happen, however, until October 6, 2017, only 111 days before being brought to trial.

[¶26] The fourth factor seeks to protect three interests: “(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.” *Id.* (citing *Moran*, 2006 ND 62, ¶ 17, 711 N.W.2d 915.) Proving actual prejudice requires a defendant to factually link his loss of liberty with any specific prejudice to his right to a fair trial. *Id.* (citing *State v. Hall*, 2017 ND 124, ¶ 14, 894 N.W.2d 836).

[¶27] Hamre’s blanket statement that he was prejudiced by any delay in the proceedings because pretrial incarceration is a deprivation of liberty fails to meet the standard required to prove prejudice. He has not asserted any factual link between his loss of liberty with specific prejudice to his right to a fair trial. Because Hamre was not prejudiced, his constitutional right to a speedy trial was not violated.

[¶28] **II. The District Court did not err by not holding an evidentiary hearing on Hamre’s motion to dismiss.**

[¶29] **A. It was not error for the District Court to decide Hamre’s motion on the briefs.**

[¶30] N.D.R.Ct. 3.2 governs the filing of motions in North Dakota trial courts. Under N.D.R.Ct. 3.2(a)(3), a timely request for oral argument will be granted. A motion must be accompanied by notice to the opposing party which indicates the time of oral argument. N.D.R.Ct. 3.2(a)(1).

[¶31] Hamre’s motion to dismiss did not include a request for a hearing. Because oral argument was not requested, neither the district court, nor the State, were aware of Hamre’s desire to be heard on the motion. Judge Marquardt then decided the motion on the briefs of the parties and found that Hamre had not set forth grounds warranting dismissal.

[¶32] **B. If the District Court erred in deciding Hamre’s motion without oral argument, the error was harmless.**

[¶33] If, however, the Court finds that the district court did err in not holding a hearing for oral argument on Hamre’s motion, the denial was nevertheless harmless error. Harmless error is defined as “any error, defect, irregularity or variance which does not affect substantial rights.” N.D.R.Crim.P. 52(a). “Stated simply, harmless error is error that is not prejudicial to the defendant.” State v. Acker, 2015 ND 278, ¶ 12, 871 N.W.2d 603 (quoting State v. Eugene, 536 N.W.2d 692, 696-97 (Levine, J., dissenting)). Harmless errors must be disregarded. N.D.R.Crim.P. 52(a).

[¶34] Hamre was not prejudiced by the Court not holding a hearing for oral argument on his motion. His motion complained about police procedure in confirming a warrant at the time of his arrest but failed to include any reason why such conduct would require dismissal. Had a hearing been held and Hamre established his factual claim regarding the warrant, such would still not warrant dismissal. Hamre was not prejudiced by the lack of oral argument and the district court’s decision on the briefs was harmless error.

[¶35] **III. There was sufficient evidence presented at trial for the jury to find Hamre guilty on all counts.**

[¶36] **A. Counts One and Two: Simple Assault on a Peace Officer.**

[¶37] “Under N.D.C.C. § 12.1–17–01(1)(a), a “person is guilty of [simple assault] if that person: a. Willfully causes bodily injury to another human being.” Bodily injury “means any impairment of physical condition, including physical pain.” N.D.C.C. § 12.1–01–04(4). State v. Hannah, 2016 ND 11, ¶ 8, 873 N.W.2d 668. “The offense is: a. A class C felony when the victim is a peace officer . . . acting in an official capacity, which the actor knows to be a fact.” N.D.C.C. § 12.1-17-01(2)(a).

[¶38] Hamre argues that there was insufficient evidence to sustain the jury’s guilty verdict on the charge of Simple Assault on a Peace Officer. Hamre disputes that he was aware that the detectives were peace officers acting in their official capacities because they were in plain clothes at the time of the incident. Detective Swan testified at trial, however, that when he and Detective Malone first encountered Hamre, Detective Swan identified himself and Detective Malone as police officers by saying, “Hi John. Fargo Police.” (Tr. at 114.)

[¶39] Hamre also argues that there was insufficient evidence of bodily injury to Detective Swan and Detective Malone because they were not “impaired of physical condition.” The language of N.D.C.C. § 12.1-01-04(4) is clear that “bodily injury means any impairment of physical condition, including physical pain.” (emphasis added). The jury heard testimony from Detective Swan that he

was shoved by Hamre into storage locker doors. (Tr. at 115.) They heard that Hamre closed his car door on Detective Swan's arm causing pain. (Tr. at 116.) They heard that Detective Swan's arm bruised after being slammed in the door by Hamre. (Tr. at 117.) They heard that Hamre kicked Detective Malone in the chest and chin, causing pain. (Tr. at 157.)

[¶40] Viewed in the light most favorable to the verdict, a rational fact finder could have concluded that Hamre was guilty of Simple Assault on a Peace Officer. "Pain, which is a qualifying, but not necessary, circumstance of bodily impairment under N.D.C.C. § 12.1-01-04(4), is a phenomenon of common experience and understanding." Hannah, 2016 ND 11 at ¶ 9, 873 N.W.2d 668 (citing Rogers v. State, 396 N.E.2d 348, 352 (1979)). Detective Swan and Detective Malone both testified that they felt pain when they were struck by Hamre. (Tr. at 116, 157.) In addition, Detective Swan's testimony regarding the bruising on his arm is further evidence of bodily injury. This Court has "long recognized juries may draw rational inferences based upon common knowledge in reaching a verdict, and that is not only permissible but also desirable." Id. Based on the testimony at trial, the jury's common knowledge, and drawing inferences in favor of the verdict, the evidence was sufficient to sustain Hamre's conviction.

[¶41] **B. Count Three: Preventing Arrest.**

[¶42] Under N.D.C.C. § 12.1-08-02, a person is guilty of Preventing Arrest if, "with intent to prevent a public servant from effecting an arrest of himself or another for a misdemeanor infraction, or from discharging any other official duty,

he creates a substantial risk of bodily injury to the public servant or to anyone except himself, or employs means justifying or requiring substantial force to overcome resistance to effecting the arrest or the discharge of the duty.”

[¶43] Count Three, as charged in the Information, alleged that Hamre, with intent to prevent officers from arresting him, employed means requiring substantial force to overcome.” (Appellant’s App. at 7.) It is clear from the testimony of Detective Swan that Hamre’s conduct required substantial force to overcome. Detective Swan estimated that the struggle to restrain Hamre took him and Detective Swan between five and seven minutes. (Tr. at 121-22.) Detective Swan also testified that at the end of the struggle, he and Detective Malone were exhausted from the muscle strain of struggling to restrain Hamre. (Tr. at 122.)

[¶44] Viewed in the light most favorable to the verdict, a rational fact finder could have concluded that Hamre was guilty of Preventing Arrest. Based on Detective Swan’s testimony, there was competent evidence allowing the jury to draw an inference reasonably tending to prove guilt and fairly warranting a conviction. For that reason, the Court should affirm the jury’s verdict on Count 3.

[¶45] C. **Count Four: Fleeing or Attempting to Elude a Police Officer.**

[¶46] Under N.D.C.C. § 39-10-71, “Any driver of a motor vehicle who willfully fails or refuses to bring the vehicle to a stop, or who otherwise flees or attempts to elude in a manner, a pursuing police vehicle or peace officer, when given a visual or audible signal to bring the vehicle to a stop, is guilty of” the offense of Fleeing or Attempting to Elude a Police Officer.

[¶47] This count was in reference to a traffic stop initiated by Detective Swan on Hamre on June 5, 2017. At trial, Detective Swan testified that that on June 5, 2017, he stopped Hamre for driving with expired plates. (Tr. at 108.) Hamre stopped his vehicle when Detective Swan activated his emergency lights on his unmarked police car. (Tr. at 109.) Detective Swan approached Hamre's vehicle and obtained Hamre's driver's license. (Tr. at 109.) As Detective Swan was waiting for backup to arrive, Hamre drove away. (Tr. at 110.) Detective Swan's emergency lights were still on and he had not indicated that Hamre was free to leave. (Tr. at 110.) Hamre fled while Detective Swan still had his driver's license. (Tr. at 110.)

[¶48] Viewed in the light most favorable to the verdict, a rational fact finder could have concluded that Hamre was guilty of Fleeing or Attempting to Elude a Police Officer. The jury heard testimony that Hamre was given a visual signal to stop when Detective Swan activated his emergency lights. (Tr. at 108.) During that encounter and while Hamre was still commanded to remain stopped, he fled. (Tr. at 110.) Based on Detective Swan's testimony, there was competent evidence allowing the jury to draw an inference reasonably tending to prove guilt and fairly warranting a conviction. For that reason, the Court should affirm the jury's verdict on Count 4.



**[¶49] CONCLUSION**

[¶50] For the foregoing reasons, the State respectfully requests this Court affirm the district court's criminal judgement entered on January 25, 2018.

Respectfully submitted this 27th day of September, 2018.

Tristan J. Van de Streek, #05849  
Assistant State's Attorney  
Cass County Courthouse  
P.O. Box 2806  
Fargo, North Dakota 58108  
(701) 241-5850  
Sa-defense-notices@casscountynd.gov  
Attorney for Plaintiff-Appellee

Nicholas S. Samuelson  
Summer Law Clerk  
Writing under R. Ltd. Practice of Law  
by Law Students.  
P.O. Box 2806  
Fargo, North Dakota 58108  
(701) 241-5850

**[¶51] CERTIFICATE OF SERVICE**

[¶52] A true and correct copy of the foregoing document was sent by e-mail on the 27th day of September, 2018 to: sam@egflawyer.com

Tristan J. Van de Streek