COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-541

COMMONWEALTH

vs.

TYRONE MARTINEZ.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant was convicted of six offenses: armed assault with intent to murder, G. L. c. 265, § 18 (b), assault and battery with a dangerous weapon causing serious bodily injury, G. L. c. 265, § 15A (c) (i), possession of a firearm without a license, G. L. c. 269, § 10 (a), carrying a loaded firearm without a license, G. L. c. 269, § 10 (n), discharging a firearm within 500 feet of a building, G. L. c. 269, § 12E, and conspiracy to commit an armed assault with intent to murder, G. L. c. 274, § 7. He now appeals. We incorporate the relevant facts of the case in our discussion below.

1. Speedy Trial. The defendant's first argument is that he was denied his right to a speedy trial. The speedy trial right is protected both by the Sixth Amendment to the United States Constitution, made applicable to the States by the

Fourteenth Amendment, see Klopfer v. North Carolina, 386 U.S. 213, 222-223 (1967), and by rule 36 of the Massachusetts Rules of Criminal Procedure, Mass. R. Crim. P. 36, 378 Mass. 909 (1979). The defendant contends that his right to a speedy trial was violated under both provisions.

We turn first to the claim under rule 36. To begin with, we note that the defendant's rule 36 claim was not raised below. Even if we assume, without deciding, however, that it was not waived, the claim fails on its merits.

The rule provides that the defendant "shall be tried within twelve months after the return day in the court in which the case is awaiting trial." Mass. R. Crim. P. 36 (b) (1) (C). Periods of time between arraignment and trial, however, are excluded from the twelve-month calculation if, among other things, the defendant "acquiesced in, was responsible for, or benefited from" those delays. See Commonwealth v. Spaulding, 411 Mass. 503, 504 (1992). Although the defendant was originally charged by complaint in the District Court, that complaint was nol prossed and the defendant ultimately was tried in the Superior Court. The calculation for purposes of the rule, therefore, as the Commonwealth notes, begins on the day the defendant was arraigned in the Superior Court, which in this case occurred on July 15, 2015. See Commonwealth v. Polanco, 92 Mass. App. Ct. 764, 767-768 (2018) (holding that in

circumstances such as these, clock begins to run on date of arraignment in Superior Court). See also Mass. R. Crim. P. 2 (b) (15), as amended, 397 Mass. 1226 (1986) (defining "Return Day" as "the day upon which a defendant is ordered by summons to first appear or, if under arrest, does first appear before a court to answer to the charges against him, whichever is earlier"). The period ends on the date trial began, in this case, March 7, 2017.

A total of 602 days elapsed between the defendant's arraignment and commencement of trial for purpose of the rule 36 calculation. If 237 days or more are excludable from the calculation, therefore, there has been no violation of rule 36.

The defendant objected below to only one continuance, that was allowed from May 19, 2016, to November 17, 2016. The Commonwealth argued that it required a continuance because it desired to try codefendant Kayla Spangenberg first, apparently in order to obviate any right against self-incrimination claim she might make that would prevent her from testifying at the defendant's trial.[1]

We may assume without deciding that the period of that continuance, and even of subsequent continuances which are unexplained in the record, were solely attributable to the

[1] We express no opinion whether this would have extinguished the witness's right against self-incrimination.

Commonwealth; the defendant argues with some force that his speedy trial rights should not be infringed on the basis of the Commonwealth's discretionary decision about how it chooses to address an issue concerning a witness against him. Nonetheless, there was no rule 36 violation here. That is because the period from September 21, 2015, through May 19, 2016, during which trial was not held, and which commenced with defense counsel failing to appear for a scheduled court date, consisted of delays for which the defendant was responsible or in which he acquiesced. These delays amounted to a period of 242 days, and once they are excluded from the calculation, trial was held within 365 days of the date of arraignment.

The constitutional claim is measured somewhat differently. To begin with, it need not be raised in the first instance in the trial court. See Commonwealth v. Horne, 362 Mass. 738, 741-742 (1973). Indeed, failure to raise it in the trial court is one of the factors to be considered in analyzing the claim. See id. at 742. The calculation of the period of delay for constitutional purposes begins with arrest, indictment, or criminal complaint, whichever is earlier. Commonwealth v. Butler, 464 Mass. 706, 712 (2013). In this case, therefore, the clock began running on April 10, 2015, the date on which the defendant was charged by complaint in the Waltham Division of the District Court Department.

The gateway for requiring the Commonwealth to justify delay is triggered where the delay "approaches one year," at which point prejudice is presumed. Commonwealth v. Dirico, 480 Mass. 491, 506 (2018), quoting Doggett v. United States, 505 U.S. 647, 652 n.1 (1992). This triggers the four-factor analysis articulated in Barker v. Wingo, 407 U.S. 514, 530-531 (1972). "Under the Barker test, a reviewing court weighs the length of the delay, the reason for the delay, the defendant's assertion of his right to a speedy trial, and prejudice to the defendant." Dirico, supra.

Given the approximately 700 days between the filing of the complaint in this case and the trial, the defendant is entitled to the presumptive prejudice that arises from a lengthy delay. We therefore turn to the four-factor test noting that, although the claim may be raised for the first time on appeal, we are limited to considering what is in the record that bears on those factors. To the extent a defendant has evidence bearing on those factors that is not apparent on the face of the record, he or she would be well advised to raise the claim in the first instance in the trial court where such evidence may be taken and where a judge may make findings of fact based on that evidence that may be relevant to the claim.

The burden is on the Commonwealth to explain the delay. See Barker, 407 U.S. at 531. As described above, a substantial

portion of the delay was the result of continuances in which the defendant acquiesced or for which he was responsible. We will assume without deciding that the portion of the delay from at least May through November 2016, to which the defendant objected on "Rule 36 grounds," was not for a good reason, and was therefore the responsibility of the Commonwealth. On this record, the subsequent delay between November 17, 2016, and March 7, 2017, is unexplained. We will therefore also assume without deciding that it, too, is weighted against the Commonwealth, since "the ultimate responsibility for [even neutral reasons such as negligence or overcrowded courts] must rest with the government rather than with the defendant." Id.

On these assumptions, the Commonwealth is thus responsible for ten months of the delay. This is a substantial delay in a context in which presumptive prejudice must be found when delay approaches a year.

The two remaining factors, however, cut against the defendant. First, other than the objection based on rule 36 noted above, he never asserted his speedy trial right. "The defendant's assertion of his speedy trial rights were notably absent from the record, and a defendant's 'failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial'" (citation omitted). Dirico, 480 Mass. at 507. With respect to prejudice, the defendant points

to no evidence that the delay resulted in any consequence with respect to his ability to put forward his defense. Indeed, he asserts only that "the defendant was prejudiced as he had been prepared for trial on more than one occasion, [and] he was incarcerated during this time unable to make bail."

Assuming that is true, having to prepare for trial more than once is not prejudicial in the same way or to the same degree as injury to one's ability to mount one's defense. As to pretrial incarceration, obviously any prolonged infringement on liberty due to an unwarranted delay in trial is a serious matter. However, in this case, where the defendant was given credit toward his sentence for all the time served in jail pretrial, we do not see sufficient prejudice to, in combination with our assessment of the other factors, warrant reversal. Rather, our weighting of the four Barker factors leads us to conclude that there was no violation of the defendant's right to a speedy trial under the Constitution.

2. Past incidents between the victim and the defendant. The defendant next argues that the trial judge erred by admitting evidence of alleged prior incidents between the victim and the defendant. The Commonwealth introduced evidence of two discrete prior altercations between the defendant and the victim. The first, in the summer of 2012, during which the defendant brandished a pipe to the victim and verbally

threatened the victim with physical harm; the second, a physical altercation within a grocery market in May 2013.[2]

The defendant argues that these incidents were too remote in time and too inflammatory to be admitted because the risk of unfair prejudice from their admission outweighs their probative value.

There was no abuse of discretion by the judge in allowing admission of this evidence. It was highly probative -- not to demonstrate character or propensity, but to demonstrate the hostility between the parties and, by extension, the defendant's motive and intent in firing the shots that struck the victim. In the absence of evidence that the mutual animosity of the defendant and the victim had for some reason dissipated, the time between those incidents and the crime was not so great as to substantially diminish the probative value of the evidence. Indeed without it, the events described by the rest of the evidence might well have made no sense to the jurors.

3. Sufficiency. Finally, the defendant argues that the trial judge erred in denying the defendant's motion for a required finding of not guilty on the charge of conspiracy to

[2] It appears that only the first was objected to. As we find no error in the admission of the evidence, whether we review for prejudice or a substantial risk of a miscarriage of justice is immaterial. See Commonwealth v. Collins, 92 Mass. App. Ct. 395, 397 & n.2 (2017).

commit armed assault with intent to murder. "The crime of conspiracy is committed upon the formation of an unlawful agreement to further, by concerted action, the accomplishment of a criminal act." Commonwealth v. Trung Chi Truong, 34 Mass. App. Ct. 668, 672 (1993). In determining whether the evidence was sufficient to support the conviction, we ask whether, viewing the evidence and all reasonable inferences that can be drawn therefrom in the light most favorable to the Commonwealth, any rational finder of fact could have found all the essential elements of the crime beyond a reasonable doubt. See Commonwealth v. Latimore, 378 Mass. 671, 677-678 (1979).

In this case, the defendant had his girlfriend, Spangenberg, repeatedly message the victim on Facebook in order to set up what might be a date or romantic encounter under the false impression that he would be meeting only with the girlfriend. Spangenberg and the victim agreed that she would pick up the victim and they would hang out and drink together. With the pretextual "date" arranged, the defendant drove the defendant's car to the residence of the defendant's friend Gordon Trammell with Spangenberg as a passenger. They picked up Trammell, who, despite not having a driver's license, drove the car to the site where Spangenberg had agreed to pick up the victim. The defendant rode in the back seat, which permitted him to shoot out the window of the car at the victim as the car

drove up to where the victim was waiting, something that would have been impossible had he been driving.

As soon as the defendant shot the victim, Trammell drove what was now the getaway car away from the scene, but at some point the defendant and Trammell switched seats because the defendant did not want Trammell, who did not have a license, to continue to drive his car. The defendant then drove them back to his own house in Maynard.

The defendant's entire argument with respect to sufficiency is that the jury were required to believe Spangenberg's testimony that there was no agreement between her and the defendant with respect to the armed assault with intent to murder. Even leaving aside the possibility that the jury found a conspiracy between the defendant and Trammell, they were free to believe other aspects of Spangenberg's testimony without believing her exculpatory statement that she had not agreed with, and was not aware of, the defendant's plan to commit armed

assault with intent to murder. The conviction on the conspiracy charge, as on all the other charges, is affirmed.

So ordered.

By the Court (Rubin, Wolohojian & Sacks, JJ.[3]),

Joseph F. Stanton

Clerk

Entered: April 30, 2021.

[3] The panelists are listed in order of seniority.