MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

Justin R. Ohmer,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

April 25, 2023

Court of Appeals Case No. 22A-CR-1820

Appeal from the Marion Superior Court

The Honorable Grant W. Hawkins, Judge

Trial Court Cause No. 49D31-2008-F1-26624

Memorandum Decision by Judge Tavitas
Judges Vaidik and Foley concur.

Tavitas, Judge.

Case Summary

[1] Justin Ohmer appeals his convictions for child molestation, a Level 1 felony; child molestation, a Level 4 felony; and criminal confinement, a Level 5 felony. Ohmer argues that the trial court erred by denying his motion for discharge under Criminal Rule 4(C); the Sixth Amendment to the United States Constitution; and Article 1, Section 12 of the Indiana Constitution. We find Ohmer's arguments without merit and, accordingly, affirm.

Issues

[2] Ohmer raises two issues on appeal, which we restate as:

I. Whether the delay in bringing Ohmer to trial violated his speedy trial rights under Criminal Rule 4(C).

II. Whether the delay in bringing Ohmer to trial violated his constitutional rights to a speedy trial.

Facts

[3] On August 21, 2020, Ohmer entered the home of his former girlfriend, L.W., and molested L.W.'s thirteen-year-old daughter in L.W.'s bedroom. Ohmer was arrested shortly thereafter that same night.

[4] On August 25, 2020, the State charged Ohmer with three counts: Count I, child molestation, a Level 1 felony; Count II, child molestation, a Level 4 felony; and Count III, criminal confinement, a Level 5 felony. Ohmer posted bond and was released pending trial.

[5] The trial court initially set the jury trial for February 1, 2021. On December 14, 2020, the Indiana Supreme Court suspended all in-person jury trials until March 1, 2021 due to the Covid-19 pandemic. *See* Order, 20S-CB-123 (Ind. Dec. 14, 2020). On January 28, 2021, the trial court continued Ohmer's jury trial to May 10, 2021, due to the Covid-19 pandemic. On April 27, 2021, Ohmer moved to continue the May 10, 2021 jury trial, which the trial court granted and reset for August 2, 2021.

[6] On June 6, 2021, Ohmer informed the State that he intended to serve L.W. with a subpoena permitting Ohmer to investigate the crime scene in the home; the State objected and requested a hearing on the matter, which the trial court set for July 8, 2021. Ohmer then moved for an order permitting inspection of the crime scene and for a continuance of the July 8 hearing. The trial court, accordingly, continued the hearing to July 16, 2021. By this point, Ohmer had not yet served the subpoena to inspect the crime scene on L.W.

[7] At the July 16 hearing, the trial court found that Trial Rule 34 permitted Ohmer to serve his subpoena on L.W., but that L.W. would then have thirty days to challenge that subpoena. Although Ohmer did not ask for a continuance of the August 2, 2021 jury trial, the trial court vacated that trial to give Ohmer time to serve the subpoena and L.W. time to challenge it. The trial court explained that the trial was "getting bounced by [Ohmer's] action" because:

> [B]y acting in accord with [the State's] objection, [Ohmer] did something. If [Ohmer] had simply said, that's nice, I'll be serving this on [L.W.] tomorrow, we wouldn't be here. There

> wouldn't be a need for a delay. Now there's a need for a delay because of the way it played out.

Tr. Vol. II p. 39. The trial court further stated, "I'm continuing it[,] but it's a continuance [Ohmer] caused so let them fight about the distinction later." *Id.* at 41. The chronological case summary ("CCS") entry for the July 16 hearing states, "Court continue[s] jury [trial] because Defense needs time to visit crime [scene] but defense does not want a continuance but wants to visit crime scene." Appellant's App. Vol. II p. 17. The trial court reset the jury trial for February 14, 2022.

[8] At some point, the trial court continued the February 14, 2022 jury trial and, instead, held a hearing. Ohmer then waived his right to a jury trial, and the trial court set a bench trial for April 11, 2022. The trial court advised the parties that the trial might be continued due to "congestion" from several other trials set for that date. Tr. Vol. II p. 101.

[9] At the April 8, 2022 pre-trial conference, the trial court advised that two trials with priority over Ohmer's trial were already "confirmed" for April 11. These two trials were *State v. Pitcock*, Cause No. 49D31-1912-MR-048647, a first-choice murder trial, and *State v. Paguero*, Cause No. 49D31-1808-F1-028117, a child molestation trial.[1]

[1] Charges were filed in both of these cases before charges were filed against Ohmer. Charges were filed in *Pitcock* on December 30, 2019, and charges were filed in *Paguero* on August 24, 2018.

[10] Ohmer requested that the trial court keep his trial date as scheduled for April 11 in the event that the other scheduled trials did not proceed. The trial court denied that request. Instead, the trial court continued Ohmer's trial date to April 25, 2022, and noted the reason for the continuance as "Cancelled Reason: Other" on the CCS. Appellant's App. Vol. I p. 13. Neither the trial in *Pitcock* nor *Paguero* proceeded to trial on April 11.

[11] On April 21, 2022, Ohmer moved for discharge under Criminal Rule 4(C); the Sixth Amendment to the United States Constitution; and Article 1, Section 12 of the Indiana Constitution. The trial court denied the motion during a hearing on April 25, 2022.

[12] The trial court proceeded with the April 25, 2022 bench trial as scheduled and found Ohmer guilty of all three counts. Ohmer was sentenced on June 21, 2022, to concurrent sentences of: (1) twenty-three years with three years suspended to probation on Count I; (2) six years on Count II; and (3) six years on Count III. Ohmer now appeals.

Discussion and Decision

[13] Ohmer argues that the trial court erred by denying his motion for discharge under Criminal Rule 4(C); the Sixth Amendment to the United States Constitution; and Article 1, Section 12 of the Indiana Constitution. We disagree.

[14] "Although 'Indiana Criminal Rule 4 generally implements the constitutional right of a criminal defendant to a speedy trial, thereby establishing time limits

and providing for discharge in the event that limits are exceeded,'" *S.L. v. State*, 16 N.E.3d 953, 958 (Ind. 2014) (quoting *Bridwell v. State*, 659 N.E.2d 552, 553 (Ind. 1995)), "our review of Rule 4 challenges is 'separate and distinct' from our review of claimed violations of the speedy trial rights secured by the Sixth Amendment of the U.S. Constitution and Article 1, Section 12 of the Indiana Constitution." *Id*. (citing *Austin v. State*, 997 N.E.2d 1027, 1037 n.7 (Ind. 2013)). Accordingly, we begin our analysis with Ohmer's arguments under Criminal Rule 4 and then proceed to his constitutional arguments. *See id*.

I. Criminal Rule 4(C)

[15] Criminal Rule 4(C) provides:

> **Defendant Discharged.** No person shall be held on recognizance or otherwise to answer a criminal charge for a period in aggregate embracing more than one year from the date the criminal charge against such defendant is filed, or from the date of his arrest on such charge, whichever is later; except where a continuance was had on his motion, or the delay was caused by his act, or where there was not sufficient time to try him during such period because of congestion of the court calendar; provided, however, that in the last-mentioned circumstance, the prosecuting attorney shall file a timely motion for continuance as under subdivision (A) of this rule. Provided further, that a trial court may take note of congestion or an emergency without the necessity of a motion, and upon so finding may order a continuance. **Any continuance granted due to a congested calendar or emergency shall be reduced to an order**, which order shall also set the case for trial within a reasonable time. Any defendant so held shall, on motion, be discharged.

(Emphasis added). Criminal Rule 4(C), thus, "places an affirmative duty on the State to bring a defendant to trial within one year from the later of two dates: (1) the filing of charges or (2) the arrest," subject to three exceptions: delay caused by the defendant, congestion in the trial court calendar, and emergencies. *Watson v. State*, 155 N.E.3d 608, 615 (Ind. 2020).

[16] The following chart summarizes the delays in this case:

Date	Event
August 25, 2020	Ohmer charged; trial set for February 1, 2021
December 14, 2020	Indiana Supreme Court tolls in-person jury trials
January 28, 2021	Trial court continues trial due to congestion from Covid-19 pandemic; trial set for May 10, 2021
April 27, 2021	Ohmer's motion to continue granted; trial set for August 2, 2021
July 16, 2021	Trial court continues trial to give Ohmer time to serve subpoena; trial set for February 14, 2022
February 14, 2022	Trial court continues trial to April 11, 2022
April 8, 2022	Trial court continues trial to April 25, 2022

[17] The relevant starting point is August 25, 2020, the date that the State brought charges against Ohmer. Between this date and Ohmer's trial, 608 days elapsed.

Ohmer, however, concedes that the delay caused by the Supreme Court's December 14, 2020 order tolling jury trials; the trial court's January 28, 2021 sua sponte continuance due to the Covid-19 pandemic; and his April 27, 2021 request for a continuance should not be charged to the State under Criminal Rule 4(C). Subtracting these delays yields a delay of 377 days. If at least twelve of those 377 days of delay are not charged to the State under Criminal Rule 4(C), then there can be no violation of that rule.

[18] We find that the trial court's continuance of Ohmer's April 11, 2022 trial due to congestion should not be charged to the State. Further, as this continuance amounts to a delay of 14 days, Ohmer was brought to trial within the requisite one-year period and his rights under Criminal Rule 4(C) were not violated.

[19] The Indiana Supreme Court has explained:

> Upon appellate review, a trial court's finding of congestion will be presumed valid and need not be contemporaneously explained or documented by the trial court. However, a defendant may challenge that finding, by filing a Motion for Discharge and demonstrating that, **at the time the trial court made its decision** to postpone trial, the finding of congestion was factually or legally inaccurate. Such proof would be prima facie adequate for discharge, absent further trial court findings explaining the congestion and justifying the continuance. In the appellate review of such a case, the trial court's explanations will be accorded reasonable deference, and a defendant must establish his entitlement to relief by showing that the trial court was clearly erroneous.

Austin, 997 N.E.2d at 1039 (quoting *Clark v. State*, 659 N.E.2d 548, 552 (Ind. 1995) (emphasis added). Under the clear error standard, we consider the probative evidence and reasonable inferences supporting the finding of congestion without reweighing the evidence or assessing witness credibility, and we reverse only if we are left with a firm conviction that a mistake was made. *See id.* at 1040.

[20] Ohmer argues that the delay caused by the continuance of his April 11 trial date should be charged to the State because the trial court did not issue an order finding congestion; rather the CCS entry lists the reason as "Other." Appellant's App. Vol. II p. 13. Ohmer also challenges the trial court's continuance as a "premature cancellation" because none of the other scheduled trials on April 11 took place. *Id*.

[21] In *Young v. State*, a panel of this Court held that, based on the language of Criminal Rule 4(C), "a written order is generally a prerequisite for the tolling of the Criminal Rule 4 timetable in a criminal case that has been continued by the trial court 'taking note' of court congestion." 765 N.E.2d 673, 677-78 (Ind. Ct. App. 2002). We further stated that, "[a]lthough not required by our criminal rules, we encourage trial courts to also note in the CCS or docket the reason why a criminal case is continued." *Id*. at 678 n.6.

[22] Turning to the facts in *Young*, we observed that "the record [did] not contain an order by the trial court, and the CCS [was] silent as to why Young's trial did not commence on [the scheduled] date. . . . Young's case essentially sat

dormant for more than seven months without explanation." *Id*. at 678. We also reviewed the record and found it "devoid of any indication that Young requested a continuance." *Id*. at 678-79. We, therefore, concluded that the delay could not be charged to the defendant.

[23] Here, unlike in *Young*, the reason for the continuance is evident in the record. *See Morrison v. State*, 555 N.E.2d 458, 461 (Ind. 1990) ("It seems inappropriate to assume that the record is incomplete simply because there are no docket entries on scheduled trial dates."), *overruled on other grounds by Cook v. State*, 810 N.E.2d 1064 (Ind. 2004). At the February 14, 2022 hearing, the trial court advised the parties that the April 11 trial date might be continued due to congestion. At the April 8 pre-trial hearing, the trial court advised that two trials with priority over Ohmer's trial were "confirmed" for April 11. Tr. Vol. II p. 115. Minutes after the hearing adjourned, the trial court continued the trial date to April 25.

[24] Clearly, the trial court continued the trial due to congestion. The trial court was not obliged to contemporaneously document its reasons for this continuance. *Austin*, 997 N.E.2d at 1039 ("[A] trial court's finding of congestion will be presumed valid and need not be contemporaneously explained or documented by the trial court."). We think, as a matter of best practice, that trial courts should issue written orders documenting their findings of congestion and note these findings on the CCS. The Indiana Supreme Court, however, has instructed that "the purpose of Criminal Rule 4 is not to provide defendants with a technical means to avoid trial but rather to assure

speedy trials." *Cundiff v. State*, 967 N.E.2d 1026, 1028 (Ind. 2012). Therefore, the absence of a written order documenting the trial court's finding of congestion does not require that this delay be charged to the State.

[25] Finally, we cannot say that the trial court's finding of congestion was clearly erroneous. We review a trial court's finding of congestion based on the circumstances at the time that finding was made; here, at the time the trial court made its finding of congestion, two trials with priority over Ohmer's trial were confirmed for April 11. Accordingly, the trial court could reasonably have concluded that it would be unable to hold Ohmer's trial as scheduled. The fact that neither of the other scheduled trials actually took place does not render the trial court's finding of congestion clearly erroneous.

[26] Because Ohmer's April 11 trial date was properly continued due to congestion, the delay is not chargeable to the State. That delay amounted to fourteen days, and subtracting this delay yields a total delay of less than one year chargeable to the State. Accordingly, Ohmer's rights under Criminal Rule 4(C) were not violated.

II. Constitutional Rights

[27] We next address Ohmer's argument that the delay in bringing him to trial violated his right to a speedy trial under the Sixth Amendment to the United States Constitution and Article 1, Section 12 of the Indiana Constitution. We find that Ohmer's rights were not violated.

[28] "When evaluating whether a defendant's constitutional speedy trial right has been infringed, we use the balancing test announced by the Supreme Court of the United States in [*Barker v. Wingo*, 407 U.S. 514 (1972)]." *Watson*, 155 N.E.3d at 614 (citing *S.L.*, 16 N.E.3d at 961). "The test assesses both the government's and the defendant's conduct and takes into consideration (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the speedy trial right, and (4) any resulting prejudice." *Id*. (citing *Barker*, 407 U.S. at 530). "Though this analysis is grounded in the Sixth Amendment, we have traditionally also applied it to claims brought under Article 1, Section 12 [of the Indiana constitution]." *Id*. (citing *Crawford v. State*, 669 N.E.2d 141, 145 (Ind. 1996)).

A. Length of Delay

[29] We consider the length of delay both "as the gateway to a full speedy trial analysis" and as an independent factor in the balancing test. *Id.* at 616 (citing *Barker*, 407 U.S. at 530-31). "If the interval between accusation and trial is 'ordinary,' further inquiry into the other factors is unnecessary"; however, "if the defendant shows that the interval is 'presumptively prejudicial,' we then consider the extent to which the delay exceeds that triggering threshold." *Id*. at 616-17 (quoting *Doggett v. United States*, 505 U.S. 647, 652 (1992)). "Delays approaching one year generally satisfy the presumptively prejudicial threshold." *Id*. at 617 (citing *Dogget*, 505 U.S. at 652; *Vermillion v. State*, 719 N.E.2d 1201, 1206 (Ind. 1999)). In addition, "the appropriateness of the length of delay between the State's filing of charges against the defendant and the beginning of

the defendant's trial is 'necessarily dependent upon the peculiar circumstances of the case.'" *S.L.*, 16 N.E.3d at 962 (quoting *Barker*, 407 U.S. at 530-31).

[30] Here, 612 days, or over one and one-half years, elapsed between Ohmer's arrest and his trial. *See Davis v. State*, 819 N.E.2d 91, 96 (Ind. Ct. App. 2004) ("Under the federal Sixth Amendment constitutional analysis, when the arrest of the defendant precedes the filing of charges, the period of delay to be examined is between the arrest and the trial." (citing *Sauerheber v. State*, 698 N.E.2d at 796, 805. (Ind. 1998))), *trans. denied*. The delay was greater than one year and is, therefore, presumptively prejudicial. *See Finnegan v. State*, 201 N.E.3d 1186, 1195 (Ind. Ct. App. 2023). The delay, however, only exceeds the triggering threshold by approximately eight months, and Ohmer was charged with three serious felonies, including Level 1 felony child molestation. Under these circumstances, we find that the length of the delay weighs only slightly against the State. *Cf. Keller v. State*, 987 N.E.2d 1099, 1110 (Ind. Ct. App. 2013) (holding delay of six months beyond one-year presumptively prejudicial threshold was "not excessive" for murder charge), *trans. denied*.

B. Reason for Delay

[31] "When considering delays attributable to the government, we assess the reasons for those delays and assign them different weights." *Watson*, 155 N.E.3d at 617 (citing *Barker*, 407 U.S. at 531). "Reasons for delay generally fall into three categories: (1) justifiable, like a missing witness; (2) neutral, like negligence or court congestion; or (3) bad faith, like a purposeful attempt to hinder the defense." *Id*. (citing *Barker*, 407 U.S. at 531). "Only those reasons falling in the

latter two categories weigh against the government, with one grounded in bad faith weighing most heavily." *Id*. (citing *Barker*, 407 U.S. at 531). "On the other side of the scale, any delay caused by the defense falls on the defendant." *Id*. (citing *Vermont v. Brillon*, 556 U.S. 81, 90 (2009)).

[32] Here, the majority of the delay was caused by the Covid-19 pandemic, which resulted in a congested court docket. We have held that "to the extent the government shoulders the blame for the delay in bringing [defendants] to trial because of court congestion, any such blame is minimal because the congestion arose in large part from pandemic-related shutdowns." *Finnegan*, 201 N.E.3d at 1196. On the other hand, Ohmer is also responsible for much of the delay here. Ohmer's trial was delayed due to his April 27, 2021 request for a continuance, which, of course, weighs against Ohmer. In addition, regarding delay caused by the trial court's July 16, 2021 continuance, Ohmer acknowledged that he needed neither the State's nor the trial court's permission to serve the subpoena on L.W., yet he failed to timely issue that subpoena.[2] On balance, therefore, we find that this *Barker* factor weighs against Ohmer.

C. Assertion of Right

[33] "The third *Barker* factor requires an examination of whether and how a defendant asserted the speedy trial right." *Watson*, 155 N.E.3d at 618 (citing

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[2] It is unnecessary that we decide whether the delay caused by the trial court's July 16, 2021 continuance would be charged to Ohmer or the State under Criminal Rule 4(C).

Barker, 407 U.S. at 531). "While 'a defendant has some responsibility to assert a speedy trial claim,' we do not look solely for a 'pro forma objection'" but will "also consider 'the frequency and force' of other, less formal assertions of the right." *Id*. (quoting *Barker*, 407 U.S. at 529). Here, Ohmer consistently asserted his speedy trial rights under Criminal Rule 4(C), and this was sufficient to put the trial court on notice regarding Ohmer's constitutional speedy trial rights. This factor, thus, favors Ohmer.

D. Prejudice

[34] "The final *Barker* factor considers the prejudice the defendant experienced from the delay." *Watson*, 155 N.E.3d at 619 (citing *Barker*, 407 U.S. at 532-33). "We assess prejudice in light of the three interests the speedy trial guarantee was designed to protect: (1) preventing oppressive pretrial incarceration; (2) minimizing the anxiety and concern of the accused; and (3) limiting the possibility that the defense will be impaired." *Id*. (citing *Barker*, 407 U.S. at 532). "The most important of the three is limiting the possibility of defense impairment." *Johnson v. State*, 83 N.E.3d 81, 87 (Ind. Ct. App. 2017) (citing *Barker*, 407 U.S. at 532).

[35] Ohmer does not argue that the delay prejudiced his defense at trial or that he suffered oppressive pretrial incarceration. Ohmer, however, argues that he was prejudiced because: (1) based on advice from his attorney, "Ohmer could not talk with anyone about the case, even his own family, which led to 'many misunderstandings'"; (2) Ohmer had "the cloud of serious criminal charges involving child molestation hanging over his head"; (3) Ohmer "was facing the

possibility of having to register as a lifetime sex offender"; (4) Ohmer was forced to sell his home to afford his attorney; and (5) Ohmer was denied housing due to the nature of the charges against him. Appellant's Br. p. 42.

[36] First, any "misunderstandings" caused by Ohmer's refusal to discuss the case with his family are attributable to Ohmer's following his attorney's advice, not the delay in bringing him to trial. Second, the anxiety Ohmer experienced based on the stigma of the charges against him and the possible legal consequences, while cognizable under *Barker*, are common to all serious criminal cases, and Ohmer would have experienced them regardless of any delay. Finally, Ohmer fails to explain how the sale of his home was due to trial delay rather than other financial and contractual circumstances. We conclude, therefore, that any prejudice caused by the delay was minimal.

Summary

[37] The length of delay and Ohmer's assertion of his speedy trial rights weigh in favor of a speedy trial violation, the former only slightly. On the other hand, Ohmer is responsible, in part, for the delay, and he suffered only minimal prejudice as a result of the delay. We find that, on balance, the four *Barker* factors weigh against Ohmer, and we conclude that Ohmer's constitutional rights to a speedy trial were not violated.

Conclusion

[38] Ohmer was not entitled to discharge under Criminal Rule 4(C), and Ohmer's constitutional rights to a speedy trial were not violated. Accordingly, we affirm.

[39] Affirmed.

Vaidik, J., and Foley, J., concur.