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COURT OF CRIMINAL APPEALS
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In the

Court of Criminal Appeals of Texas

Austin, Texas

STATE OF TEXAS,
Appellant

v.

MARTIN RIVERA LOPEZ,
Appellee

On the State's petition for discretionary review from the Fourth Court of Appeals, San Antonio, Texas

Appellate Cause No. 04-17-00568-CR

Appealed from a dismissal order in the County Court at Law No. 7 Bexar County, Texas

Trial Cause No. 549327

STATE'S PETITION FOR DISCRETIONARY REVIEW

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Trial Judge: THE HONORABLE GENIE WRIGHT
County Court at Law No. 7

Panel of the Fourth Court of Appeals: THE HONORABLE SANDEE BRYAN MARION, *Chief Justice*
THE HONORABLE REBECA MARTINEZ, *Justice*
THE HONORABLE LUZ ELENA CHAPA, *Justice*
Author of the Opinion

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STATEMENT REGARDING ORAL ARGUMENT

This case involves a short record and can be decided without oral argument. Should this Court decide that oral argument is necessary or beneficial, the undersigned counsel will be ready to participate.

STATEMENT OF THE CASE

The trial court dismissed Lopez's information 112 days after he was arrested based on an alleged speedy trial violation. The State appealed and the court of appeals affirmed the trial court's dismissal order.

STATEMENT OF THE PROCEDURAL HISTORY

The State charged Martin Lopez with intentionally or knowingly causing offensive or provocative physical contact to Maria Lopez, an elderly person (C.R. at 6). *See* TEX. PENAL CODE §§ 22.01(a)(3) & 22.01(c)(1). The trial court signed an order granting Lopez's request for a dismissal based on a violation of his right to a speedy trial (C.R. at 12). The court of appeals affirmed that order in a published decision. *State v. Lopez*, No. 04-17-00568, ___ S.W.3d ___ (Tex. App.—San Antonio 2018, pet. filed). The State moved for rehearing and en banc consideration. The panel denied rehearing but issued a new opinion on October 24, 2018 (Appendix A). Because the panel issued a new opinion, the en banc court denied the motion for en banc consideration as moot on the same day (Appendix B). This petition is due by November 26, 2018. *See* TEX. R. APP. P. 68.2(a).

GROUNDS FOR REVIEW

Ground One: The court of appeals erred by concluding that a 112 day delay was presumptively prejudicial based on potential delay that had not yet occurred and by weighing the first *Barker* factor against the State.

Ground Two: The court of appeals erred by concluding that the State was responsible for the delay and by weighing the second *Barker* factor against the State.

Ground Three: The court of appeals erred by weighing the third *Barker* factor against the State without any evidence that Lopez asserted his right to a speedy trial.

ARGUMENT

Ground One: The court of appeals erred by concluding that a 112 day delay was presumptively prejudicial based on potential delay that had not yet occurred and by weighing the first Barker factor against the State.

In this ground of review, the State requests this Court to exercise its supervisory power based on the extraordinarily short period of delay—112 days—between Lopez's arrest and the trial court's dismal order. TEX. R. APP. P. 66.3(f). The undersigned counsel is not aware of any other Texas appellate opinion, published or unpublished, where a court has found that such a short delay has triggered a speedy trial analysis. Nor is the undersigned counsel aware of a Texas case where a court found a speedy trial violation after such a short period of time.[1]

The undersigned counsel is aware of only one Texas case where the length of delay was comparable to the delay in this case. *State v. Wester*, No. 08-16-00105-CR, 2017 Tex. App. LEXIS 9070, 2017 WL 4277584 (Tex. App.—El Paso Sep. 27, 2017, no pet.) (mem. op., not designated for publication). In *Wester*, the El Paso Court of Appeals declined to review the *Barker* factors beyond the length

[1] The court of appeals relied on a Louisiana case to justify its analysis. *See State v. Reaves*, 376 So.2d 136 (La. 1979). *Reaves* is quite different from the present case. In that case, the trial court had set multiple trial dates—some without reason, others due to the prosecution's request for a continuance. The prosecution dismissed the case when a subsequent motion for continuance was denied. It then filed a new case, which was dismissed due to a speedy trial violation. *Id.* at 137.

of delay because the four month long delay in that case (possession of a controlled substance) was too short to trigger further consideration. *Id.* at *5–8. As a result, the El Paso Court of Appeals reversed a trial court's speedy trial dismissal order without any consideration of the other three factors.

In *Zamorano v. State*, 84 S.W.3d 643 (Tex. Crim. App. 2002), an appeal from a drunk driving conviction, this Court suggested in a footnote that a delay of eight months would trigger a Barker analysis. *Id.* at 649 n.26 (citing *Harris v. State*, 827 S.W.2d 949, 956 (Tex. Crim. App. 1992)). While *Zamorano* does not expressly disallow a court from finding a delay of less than eight months is sufficient to trigger *Barker*, it is difficult to reconcile *Zamorano*'s reference to eight months with the less-than-four-month delay in the present case.

Furthermore, there was only one trial date set in this case, and the State announced ready (R.R. at 7). The court of appeals nevertheless concluded that the 112 day delay was sufficient to trigger the *Barker* analysis because this was a factually simple allegation and that Lopez was confined in jail since arrest. *Lopez*, at *13–14. Additionally, the court of appeals relied the premise that the "trial court was also presented with the prospect that Lopez would be determined incompetent to stand trial and further confined." *Id.* The undersigned counsel is not aware of any case where the first *Barker* factor is analyzed with consideration given to future delay or delay that has not yet occurred.

While both the defense and prosecution expressed concern about Lopez's competence (R.R. at 7), the record does not establish that he was, in fact, in competent. Thus, there is no basis in the record to support a finding for additional future delay. It is pure speculation whether Lopez would have been further confined pending restoration of competency, or quickly returned to court for trial.

The court of appeals went further and weighted the first factor "slightly against the State." *Lopez*, at *15. This Court has observed that the first factor will weigh against the State when the "length of delay stretches well beyond the bare minimum needed to trigger a full *Barker* analysis." *Gonzales v. State*, 435 S.W.3d 801, 809 (Tex. Crim. App. 2014). How does a 112 day delay stretch well beyond the bare minimum needed to trigger *Barker*? (Assuming 112 days does trigger *Barker*.)

The speedy trial right should secure the rights of a defendant, but it should not "preclude the rights of public justice." *Beavers v. Haubert*, 198 U.S. 77, 87 (1905). The lower court's published precedent does not strike an appropriate balance between these two concepts.

Ground Two: The court of appeals erred by concluding that the State was responsible for the delay and by weighing the second Barker factor against the State.

Lopez was initially arrested and charged with felony injury to an elderly person on April 17, 2017 (R.R. at 8, 10). TEX. PENAL CODE § 22.04(a). Just shy of 90 days, the prosecution reduced the charge to a misdemeanor assault on an elderly person (C.R. at 6). Based on the State's actions, the court of appeals found that "the trial court could have impliedly found the State was at least negligent by initially filing the case as a felony when the case should or must have been filed as a misdemeanor from the outset." *Lopez*, at *16. The trial court made no such finding that the State was negligent and no such finding is implicit in the record. The only basis in the record to support this portion of the court of appeals opinion is defense counsel's statements that there was no evidence of bodily injury (R.R. at 10–11).

These statements are unsworn and not based on personal knowledge. This Court has frowned upon lower courts relying on such statements. *See Gonzales v. State*, 435 S.W.3d at 811 (attorney's statements absent personal knowledge are not evidence); *State v. Guerrero*, 400 S.W.3d 576, 585 (Tex. Crim. App. 2013) (trial counsel's statements may only be considered if based on first-hand knowledge); *Newman v. State*, 331 S.W.3d 447, 449 (Tex. Crim. App. 2011) (court of appeals may not consider unsworn factual assertions in speedy trial motion).

Furthermore, the court of appeals should not be able to imply negligence just because the State reduced a felony to a misdemeanor. This is a dangerous implication contained in published precedent that could have a chilling effect on prosecutors in future cases. The mere fact that a prosecutor exercised discretion, without more, should not be viewed as negligence or bad faith. Without some evidence to show bad faith or negligence, a court of appeals should not be able to draw an inference based solely on the charging decision itself.

Ground Three: The court of appeals erred by weighing the third Barker factor against the State without any evidence that Lopez asserted his right to a speedy trial.

The court of appeals quoted this Court's decision in *Cantu v. State*, 253 S.W.3d 273 (Tex. Crim. App. 2008). The court of appeals noted that requesting a dismissal without a trial will generally weaken a speedy trial claim. *Lopez*, at *18 (quoting *Cantu*, 253 S.W.3d at 283). More importantly, the court of appeals observed that a defendant who fails to seek a trial should "provide cogent reasons for this failure." *Lopez*, at *18–19 (quoting *Cantu*, 253 S.W.3d at 283).

The instant record contains no demand for a speedy trial. Nor does it contain any "cogent reason" why one was not demanded. Lopez did not even provide the State with any notice that he would be requesting a dismissal. The court of appeals, however, concluded that "the record supports an implied finding

of historical fact that trial counsel legitimately felt the delay had caused so much prejudice that dismissal is warranted, even though the State announced ready to proceed to trial." *Lopez*, at *19.

The record supports no such implied finding. This Court has noted circumstances which absolve a defendant from requesting a trial prior to requesting a dismissal. *See Gonzales*, 435 S.W.3d at 811–12 (third factor not weighed against defendant because he didn't know about indictment for over six years); *Zamorano*, 84 S.W.3d at 651–52 (third factor not weighed against defendant because he repeatedly announced ready for trial and filed multiple motions to dismiss); *Phillips v. State*, 650 S.W.2d 396, 400–401 (Tex. Crim. App. 1983) (third factor not weighed against defendant because he didn't know about indictment for over a year and because a witness had already died). The present case, with a mere 112 day delay, is simply not comparable to a case where a key witness has died, or where a defendant was not aware of an indictment.

Lopez's request for a dismissal after 112 days should have been weighed heavily against him. Because it was not, this State respectfully asks this Court to grant review.

Conclusion

There is not much of a record in this case. The State has included the brief, 20 page reporter's record in the appendix of this petition (Appendix C). The State had no notice that a speedy trial claim would be taken up by the court (R.R. at 7). Other than Lopez promising the judge to seek mental health services and that he would not contact his mother, no witnesses testified. Because there was only a 112 day delay, the dearth of evidence should count against Lopez. Furthermore, the absence of evidence in this case does not support the implied findings contained in the lower court's opinion. The State respectfully asks this Court to grant review.

PRAYER FOR RELIEF

WHEREFORE PREMISES CONSIDERED, the Petitioner State respectfully requests that this Court grant discretionary review of the opinion and judgment of the court of appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Nathan E. Morey, assistant district attorney for Bexar County, Texas, certify that a copy of the foregoing petition has been delivered by email to Michael D. Goains and the Office of the State Prosecuting Attorney on November 26, 2018 in accordance with Rules 6.3(a), 9.5(b), and 68.11 of the Texas Rules of Appellate Procedure.

CERTIFICATE OF COMPLIANCE

I, Nathan E. Morey, certify that, pursuant to Texas Rules of Appellate Procedure 9.4(i)(2)(D) and 9.4(i)(3), the above response contains 2,717 words according to the "word count" feature of Microsoft Office.

/s/ *Nathan E. Morey*

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APPENDIX A
(The October 24 Opinion of the Court of Appeals)

Fourth Court of Appeals
San Antonio, Texas

OPINION

No. 04-17-00568-CR

The **STATE** of Texas,
Appellant

v.

Martin **LOPEZ**,
Appellee

From the County Court at Law No. 7, Bexar County, Texas
Trial Court No. 549327
Honorable Genie Wright, Judge Presiding

OPINION ON DENIAL OF REHEARING

Opinion by: Luz Elena D. Chapa, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Rebeca C. Martinez, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: October 24, 2018

AFFIRMED

The State's motion for rehearing is denied. However, we withdraw our August 15, 2018 opinion and and judgment and substitute those issued today. The State appeals the trial court's order dismissing a misdemeanor assault charge against Martin Lopez on speedy trial grounds. As the parties acknowledge, the facts of this case are relatively uncommon in speedy trial cases. Lopez, who suffers from mental health disorders, was arrested for "putting his teeth [on his elderly mother's face] while trying to bite her." Lopez was placed in county jail, and he could not make

bail. The State took nearly three months to decide whether a felony or misdemeanor assault charge would be more appropriate, determining ultimately to file a misdemeanor charge. A visiting judge thereafter denied Lopez's request for bail and set trial for twelve days later. Despite Lopez's trial counsel raising the issue of his incompetence to stand trial at the pretrial hearing, Lopez was not evaluated. At trial, the State and Lopez's trial counsel expressed concerns about Lopez's competency. Based on the length of Lopez's pretrial incarceration and inevitable future delays for competency proceedings, Lopez requested that the trial court dismiss the case on speedy trial grounds. The trial court agreed and dismissed the misdemeanor assault charge. Considering the factors set out by the Supreme Court of the United States in *Barker v. Wingo*, 407 U.S. 514 (1972), we conclude the trial court did not err and, accordingly, affirm the trial court's order.

BACKGROUND

On April 18, 2017, Lopez allegedly "put[] his teeth [on his elderly mother's face] while trying to bite her." Lopez was arrested that day, and he was unable to make bail. The State opened a felony case against Lopez, but Lopez was never indicted.

While Lopez was in jail, Lopez's appointed trial counsel received a July 2, 2017 notice under article 17.151. *See* TEX. CODE CRIM. PROC. ANN. art. 17.151, § 1 (West 2015). The notice stated Lopez had been in custody for seventy-five days awaiting an indictment. It further stated:

> Pursuant to Article 17.151 section 1 of the Texas Code of Criminal Procedure, a defendant who is detained in jail pending trial of accusation against them must be released either on personal bond or by reducing the amount of bail required, if the State is not ready for trial of the criminal action for which they are being detained within 90 days from the commencement of their detention if they are accused of a felony.

On July 12, 2017, five days before the ninety-day deadline, the State filed a misdemeanor assault charge against Lopez and sought to keep him incarcerated in county jail.

At the July 27, 2017 pretrial hearing before a visiting judge, Lopez raised the issue of his competency to stand trial and requested a personal recognizance bond. The visiting judge denied Lopez's request. Although the visiting judge ordered Lopez's mental competence to be evaluated over the weekend, no evaluation was conducted. The trial date was set for twelve days later on August 8, 2017.

On August 8, 2017, the trial court called the case and began by asking Lopez questions, with the permission of his trial counsel. Lopez testified he has mental issues, but had no present desire to harm himself or others. Lopez testified he wanted the case dismissed because he had been in jail for four months. Lopez's trial counsel orally moved for a speedy trial, requesting that the case be dismissed.

The State responded it had a right to notice on the speedy trial motion, and that it was ready to proceed to trial. However, the State raised "concerns about [Lopez]'s mental health and competency to proceed to trial, possibly." The trial court then stated:

> All right. This is what I'm going to put on the record. This man has no place to live. Because of a prior suicide watch, Haven for Hope will not take him. He has been in jail. There is some serious questions about whether or not anybody can proceed with this case. There are serious questions about whether his mother will even testify against him. She is currently in possession of a protective order -- which means you have to stay away from her. So I feel like the victim in this case has been protected, and she's quite involved in the case from what I've learned from the attorney, and she's quite vocal about what she wants to accomplish.

The State did not object to the trial court taking notice of these matters.

The proceeding went off the record, and Lopez's trial counsel filed a written Motion for Speedy Trial. Back on the record, the State again asserted its right to notice on the motion. The trial court overruled the State's objection, noting the case was set for trial on that date and that the State had announced ready to proceed. The trial court admitted into evidence the article 17.151

notice that, together with Lopez's testimony, showed Lopez had spent 112 consecutive days in county jail as of the August 8, 2017 trial date.

The trial court asked the State to explain the delay in the case up to that point. The following exchange occurred:

> [THE STATE]: Your Honor, I don't believe they found no assault took place. They dismissed it and refiled it as a misdemeanor because I think they believed it was a more appropriate charge than the felony.
>
> [TRIAL COUNSEL]: I believe, Your Honor, they could say an assault took place, but there was no bodily injury, which was required for the felony.
>
> [THE STATE]: There was bodily injury in the case.
>
> THE COURT: Well, here are our choices: The man has spent what would be the equivalent of almost a year in jail if you're giving him two for one. He is not competent. We can't try the case.
>
> [TRIAL COUNSEL]: Your Honor, even if we sent him for a competency hearing, that would be another month and he would be in jail for a full year.
>
> THE COURT: And he would come back as being incompetent to stand trial.
>
> [TRIAL COUNSEL]: Correct.
>
> THE COURT: So I'm going to grant your Motion for a Speedy Trial, and I'm going on the record saying, State, you're right. This is something that we need to take care of in court and the Court has no means to take care of it. We can't try him. It's just not right to leave him in jail, and we really don't have any timely services to offer him.

Lopez's trial counsel further stated that both he and the State agreed there was an issue as to Lopez's competency to stand trial or to enter a plea.

The trial court stated it had no choice but to grant Lopez's Motion for Speedy Trial and to dismiss the case. The trial court and trial counsel explained to Lopez he could not see or contact his mother because she had a protective order. They also explained to Lopez that he was expected to seek mental health counseling immediately. Before the end of the hearing, the State argued the trial court could not dismiss the case because article 46B.005 of the Texas Code of Criminal

Procedure required the court to order a competency evaluation. Apparently disagreeing with the State, the trial court signed an order granting Lopez's Motion for Speedy Trial and dismissing the misdemeanor assault charge. The State timely filed a notice of appeal.

THE STATE'S SOLE ISSUE & ARGUMENTS ON APPEAL

The State presents a single issue on appeal, "Did the trial court err by failing to order a competency evaluation and, instead, dismissing the information against [Lopez] less than four months after he was arrested?" The State argues that once the trial court believed Lopez might be incompetent to enter a plea or stand trial, the trial court had no discretion but to refer Lopez for a competency evaluation. *See* TEX. CODE CRIM. PROC. ANN. art. 46B.005(a) (West 2018). The State further argues the trial court lacked a basis to dismiss the case either under the Sixth Amendment or under Chapter 46B of the Texas Code of Criminal Procedure.

The State does not raise an issue or argue that the trial court erred by granting Lopez's Motion for Speedy Trial based on the State not being provided with sufficient notice. The State also does not raise an issue or argue that the trial court improperly took judicial notice of any of the facts that the trial court noted for the record. In its reply brief, the State argues we may not consider any matters at the pretrial hearing before the visiting judge because Lopez "has not supplemented this Court with a record to support [his] claims" about the hearing. We disagree for two reasons. First, on August 8, 2017, the parties agreed that certain matters were raised at the pretrial hearing before the visiting judge. Thus, the record before us reflects some of the matters raised at the pretrial hearing. Second, because this is a State's appeal, the State has the burden to present a sufficient record demonstrating its entitlement to the relief it seeks. *See State v. Weiss*, 8 S.W.3d 342, 344 (Tex. App.—Beaumont 1999, no pet.); *State v. Thomas*, 938 S.W.2d 540, 542 (Tex. App.—Dallas 1997, no pet.); *see also Newman v. State*, 331 S.W.3d 447, 450 (Tex. Crim. App. 2011) (explaining an appellant must "present a record demonstrating that the trial court's

decision should be overturned."). We therefore turn to address the State's sole issue in light of the record presented by the State.

MANDATORY COMPETENCY EVALUATION UNDER CHAPTER 46B

The State argues the trial court erred under chapter 46B of the Texas Code of Criminal Procedure by not allowing the prosecution to proceed and ordering a competency evaluation. We review a trial court's implied decision not to order a competency evaluation for an abuse of discretion and consider the totality of the surrounding facts. *See Gray v. State*, 257 S.W.3d 825, 827 (Tex. App.—Texarkana 2008, pet. ref'd). Article 46B.005 of the Texas Code of Criminal Procedure provides, "If after an informal inquiry the court determines that evidence exists to support a finding of incompetency, the court shall order an examination . . . to determine whether the defendant is incompetent to stand trial in a criminal case." TEX. CRIM. PROC. CODE ANN. § 46B.005(a). Generally, article 46B.005(a)'s provision for ordering a competency examination imposes a mandatory duty on the trial court. *See id.*; TEX. GOV'T CODE ANN. § 311.016(2) (West 2013) ("'Shall' imposes a duty."). But we must consider the totality of the surrounding facts. *See Gray*, 257 S.W.3d at 827.

Here, Lopez argued his prosecution violated his constitutional right to a speedy trial. We may not construe chapter 46B, a state statute, in conflict with the constitution of the United States or of the State of Texas. *See* U.S. CONST. art. VI, cl. 2; *see also* TEX. GOV'T CODE ANN. § 311.021(1); *State v. Cortez*, 543 S.W.3d 198, 206 (Tex. Crim. App. 2018) ("We have a duty to narrowly construe statutes to avoid a constitutional violation."). We conclude a defendant must not be forced to undergo a competency evaluation in furtherance of his prosecution if his prosecution violates his constitutional rights. *See* TEX. GOV'T CODE ANN. § 311.021(1); *Cortez*, 543 S.W.3d at 206.

"If a violation of the speedy trial right is established, the only possible remedy is dismissal of the prosecution." *Dragoo v. State*, 96 S.W.3d 308, 313 (Tex. Crim. App. 2003) (citing *Strunk v. United States*, 412 U.S. 434, 440 (1973)). Thus, whether the trial court erred under article 46B.005(a) by not ordering a competency evaluation turns on whether the trial court erred by granting Lopez's motion to dismiss based on his constitutional right to a speedy trial. If the trial court erred, and if a remand were necessary for further proceedings, we agree with the State that any further proceedings would require a competency evaluation. But we must determine, as an initial matter, whether the trial court erred by dismissing the misdemeanor assault charge on speedy trial grounds.

RIGHT TO A SPEEDY TRIAL

The Sixth Amendment to the U.S. Constitution guarantees the accused in a criminal prosecution the right to a speedy trial. *Hopper v. State*, 520 S.W.3d 915, 923 (Tex. Crim. App. 2017) (citing U.S. CONST. amend. 6; *Vermont v. Brillon*, 556 U.S. 81, 89 (2009)); *see Klopfer v. North Carolina*, 386 U.S. 213, 222-23 (1967) (holding Sixth Amendment speedy trial right applies to states via the Fourteenth Amendment). The Texas Constitution similarly guarantees the accused a speedy trial in a criminal prosecution. TEX. CONST. art. 1, § 10. Although it is unclear whether Lopez asserted his right to a speedy trial under the U.S. Constitution, the Texas Constitution, or both, we apply the same test. *Harris v. State*, 827 S.W.2d 949, 956 (Tex. Crim. App. 1992). When evaluating a speedy trial claim under *Barker v. Wingo*, courts generally must "consider the length of delay, the reasons for delay, to what extent the defendant has asserted his right, and any prejudice suffered by the defendant." *Hopper*, 520 S.W.3d at 923 (citing *Barker*, 407 U.S. at 530-32); *see Harris*, 827 S.W.2d at 956. "The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Barker*, 407 U.S. at 530. The conduct of

both the State and the defense must be weighed in balancing the *Barker* factors, and no single factor is an essential or sufficient condition to the finding of a speedy trial violation. *See id.* at 530, 533. "No one factor possesses 'talismanic qualities,' thus courts must 'engage in a difficult and sensitive balancing process' in each individual case." *Zamorano v. State*, 84 S.W.3d 643, 648 (Tex. Crim. App. 2002) (quoting *Barker*, 407 U.S. at 533).

We apply a bifurcated standard of review. *Id.* "When reviewing the trial court's application of the *Barker* test, we give almost total deference to the trial court's historical findings of fact that the record supports, and we draw reasonable inferences from those facts necessary to support the trial court's findings." *Balderas v. State*, 517 S.W.3d 756, 767-68 (Tex. Crim. App. 2016). "An appellate court reviewing a trial court's ruling on a motion to dismiss for want of a speedy trial must do so in light of the arguments, information, and evidence that was available to the trial court at the time it ruled." *Shaw v. State*, 117 S.W.3d 883, 889 (Tex. Crim. App. 2003). However, we do not consider "evidence that was not before the trial court when it made its ruling." *Balderas*, 517 S.W.3d at 768.

"Review of the individual *Barker* factors necessarily involves fact determinations and legal conclusions, but the balancing test as a whole is a purely legal question that we review *de novo*." *Id.* (citing *Johnson v. State*, 954 S.W.2d 770, 771 (Tex. Crim. App. 1997)). Because Lopez prevailed on his speedy trial claim, "we presume the trial court resolved any disputed fact issues in [his] favor." *State v. Ritter*, 531 S.W.3d 366, 371 (Tex. App.—Texarkana 2017, no pet.) (citing *State v. Munoz*, 991 S.W.2d 818, 821 (Tex. Crim. App. 1999)). When, as here, the State did not request, and the trial court did not make, findings of fact and conclusions of law, we will imply all findings necessary to support the trial court's ruling if those findings are supported by the record. *Id.*

A. The Length of the Delay

The first factor we must consider is the length of the delay. *Barker*, 407 U.S. at 530; *Hopper*, 520 S.W.3d at 924; *Wisser v. State*, 350 S.W.3d 161, 165 (Tex. App.—San Antonio 2011, no pet.). This first factor involves "a double inquiry: A court must consider whether the delay is sufficiently long to even trigger a further analysis under the *Barker* factors, and if it is, then the court must consider to what extent it stretches beyond this triggering length." *Hopper*, 520 S.W.3d at 924 (citing *Doggett v. United States*, 505 U.S. 647, 651-52 (1992)). The length of delay is measured from the time the defendant is arrested or formally accused, whichever is first. *Dragoo*, 96 S.W.3d at 313 (citing *United States v. Marion*, 404 U.S. 307, 313 (1971)).

1. Whether the length of the delay was presumptively prejudicial

"[C]ourts have usually tried to settle upon some time period after which . . . it makes sense to inquire further into why the defendant has not been tried more promptly." 5 WAYNE R. LAFAVE, ET AL., CRIMINAL PROCEDURE, § 18.2(b), p. 130 (4th ed. 2015). The Court of Criminal Appeals has noted that other courts generally hold a delay of eight months to a year, or longer, is presumptively prejudicial and triggers a speedy trial analysis. *See, e.g.*, *Shaw*, 117 S.W.3d at 889; *Harris*, 827 S.W.2d at 956. And, in felony sexual assault cases and cases in which defendants are released on bond, the Court of Criminal Appeals has recognized that a delay of four months is not sufficient while a seventeen-month delay is. *Phillips v. State*, 650 S.W.2d 396, 399 (Tex. Crim. App. [Panel Op.] 1983) (holding delay of seventeen months in prosecution for rape was presumptively prejudicial); *Pete v. State*, 501 S.W.2d 683, 687 (Tex. Crim. App. 1973) (holding no presumptive prejudice when defendant, charged with rape and incarcerated on burglary conviction, was tried four months after indictment). However, "there are some cases which do not fit this mold." LAFAVE, *supra*, at § 18.2(b), p. 130.

There is "no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months." *Barker*, 407 U.S. at 523. And "[t]here is no set time element that triggers the analysis." *Cantu v. State*, 253 S.W.3d 273, 281 (Tex. Crim. App. 2008). "*Barker*'s formulation necessarily compels courts to approach speedy trial cases on an *ad hoc* basis." *Brillon*, 556 U.S. at 91 (internal quotation omitted). The right to a speedy trial is necessarily relative, and whether the length of a delay is presumptively prejudicial and triggers an inquiry into the other *Barker* factors "is necessarily dependent upon the peculiar circumstances of the case." *Barker*, 407 U.S. at 522, 530-31.

In this context, "prejudice" or "prejudicial" refers to (1) oppressive pretrial incarceration; (2) anxiety or concern related to the pending criminal charges; and (3) impairment of the accused's defense. *Shaw*, 117 S.W.3d at 890 (citing *Barker*, 407 U.S. at 532). Circumstances of a case that can affect whether the delay is presumptively prejudicial therefore may include the nature of the charged offense, and whether the defendant can make bail or must await trial while confined in jail. *See Barker*, 407 U.S. at 520 (noting, "If an accused cannot make bail, he is generally confined . . . in a local jail."). "[T]he delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." *Id.* at 531. The State is entitled to a reasonable period to prepare its case. *Cf. Shaw*, 117 S.W.3d at 889-90 (noting, in aggravated sexual assault case, a three-month period between indictment and trial was a reasonable time for State to prepare its case). But "unreasonable delay in run-of-the-mill criminal cases cannot be justified by simply asserting that the public resources provided by the States' criminal justice system are limited and that each case must await its turn." *Barker*, 407 U.S. at 538 (White, J., concurring).

The State cites an unpublished case from the El Paso court of appeals involving a four-month delay. *State v. Wester*, No. 08-16-00105-CR, 2017 WL 4277584 (Tex. App.—El Paso Sept.

27, 2017, no pet.) (mem. op., not designated for publication). The court of appeals noted courts must consider the "substance of the case" and the seriousness and complexity of the offense. *Id.* at *3. Wester, the defendant, was released on bond the day after he was arrested, but he was subsequently arrested on new, federal charges. *Id.* at *1. The court of appeals, relying on felony sexual assault cases, held a four-month delay did not trigger a full *Barker* analysis when the defendant was charged with first-degree-felony drug possession. *Id.* at *1, 3.

The State also cites *State v. Owens*, which involved a seven-month delay. 778 S.W.2d 135, 136 (Tex. App.—Houston [1st Dist.] 1989, pet. ref'd). In *Owens*, the delay was 223 days from the date of the defendant's arrest to the date of his indictment for two counts of burglary of a habitation. *Id.* Notably, the defendant was incarcerated in county jail during that time. *Id.* Two days after the indictment, the defendant filed an application for writ of habeas corpus, raised his right to a speedy trial, and requested dismissal of the charges. *Id.* The trial court granted the defendant relief, and in considering the State's appeal, the court of appeals affirmed. *Id.* Addressing *Barker*'s length-of-delay factor, the court of appeals relied on *Barker*, noting, "A delay that can be tolerated for an 'ordinary street crime' is considerably less than the time for a serious, complex conspiracy charge." *Id.* at 137 (citing *Barker*, 407 U.S. at 530). The court then held burglary of a habitation is an "ordinary street crime," and proceeded to analyze the remaining *Barker* factors. *Id.* at 137-38. Although the State asks us not to follow *Owens* for several reasons, those reasons do not relate to the *Owens* court's emphasis on *Barker*'s principle that we must consider the nature and complexity of the offense.

At least one court has held that under *Barker*, a three-and-half-month delay can trigger an analysis of the remaining *Barker* factors, depending upon the specific facts of the case. *State v. Reaves*, 376 So. 2d 136, 138 (La. 1979) (noting the court "assiduously follow[s] the *Barker v. Wingo* analysis in evaluating Louisiana speedy trial claims"). In *Reaves*, the defendant was arrested

and charged with misdemeanor possession of marijuana, and he was released on bail. *Id.* at 137. The court reset the trial multiple times over the course of several months because the State was unable to secure its witnesses' attendance. *Id.* The court explained that although the case had been pending for only three and a half months:

> the mere length of the delay does not determine the speedy trial issue. Since this case involves a simple misdemeanor offense, possession of a single marijuana cigarette, the constitution tolerates relatively brief delays. Accordingly, we must examine the peculiar circumstances of the case to find if the length of the delay and the closely related factor, the reason for the delay, provoke a speedy trial inquiry.

Id. at 138 (internal citations omitted). The *Reaves* court proceeded to analyze the remaining *Barker* factors and affirmed the trial court's dismissal of the defendant's misdemeanor drug possession charge on speedy trial grounds. *Id.* at 138-39.

The State argues *Wester* is good law, *Owens* is bad law, and that we should follow the former. But *Wester* and *Owens*, as well as *Reaves*, read in light of *Barker*'s principles, as reiterated by the Court of Criminal Appeals, can be reconciled based on their different facts. Under *Barker*, we may not quantify the exact length of the time that will, in all cases, trigger or not trigger an analysis of the remaining *Barker* factors. *Barker*, 407 U.S. at 523; *Cantu*, 253 S.W.3d at 281. The above-discussed authorities are all consistent with the principle that we must consider the delay in light of the substance, seriousness, and complexity of the offense, as well as whether the defendant has been incarcerated in jail awaiting trial. *See Wester*, 2017 WL 4277584, at *1-3; *Owens*, 778 S.W.2d at 136-38; *Reaves*, 376 So. 2d at 138-39; *see also Doggett*, 505 U.S. at 652 n.1 (noting whether a specific delay is presumptively prejudicial "depend[s] on the nature of the charges," and citing LAFAVE, *supra*, § 18.2); *Barker*, 407 U.S. at 531 (noting delay should be viewed in light of seriousness and complexity of the charges).

With these principles in mind, we turn to the facts of this case. As of the August 8, 2017 trial date, Lopez had been accused by virtue of his arrest for 112 consecutive days. *See Dragoo*,

96 S.W.3d at 313 (providing delay measured from time of arrest). Although the State announced at the August 8, 2017 hearing it was ready to proceed to trial, the parties agreed there was uncertainty as to whether Lopez was competent to stand trial. *See* TEX. CODE CRIM. PROC. ANN. art. 46B.003(a) (providing an incompetent defendant may not be tried). Had Lopez not asserted his constitutional right to a speedy trial, the trial court would have had no discretion but to delay trial and order a competency evaluation. *See id.* art. 46.005(a). The trial court, as a factfinder, was entitled to infer there necessarily would be additional delays before the case could proceed to trial on Lopez's guilt. Thus, the record supports an implied finding that the delay did not consist of only 112 days, but necessarily longer because not dismissing the charge would have required an evaluation of Lopez's competency to stand trial and possibly subsequent competency proceedings before the trial court could have proceeded with a trial on the misdemeanor assault charge. *See id.* arts. 46B.004(d), 46B.005(a), (b).

It is undisputed Lopez was incarcerated for 112 days because he could not make bail. The trial court considered the time Lopez had been incarcerated, as well as the likelihood of additional delays due to the question of Lopez's competency, in light of the nature of the charged offense and the maximum punishment available. Lopez was charged with a Class A misdemeanor, the maximum punishment for which is a $4,000 fine and confinement in jail for a term not to exceed one year. *See* TEX. PENAL CODE ANN. §§ 12.21, 22.01(a)(3), (c)(1) (West 2011 & Supp. 2018). Ordinarily, a defendant who is detained in jail pending trial of an accusation against him must be released on personal bond if the state is not ready for trial within "30 days from the commencement of his detention if he is accused of a misdemeanor punishable by a sentence of imprisonment in jail for more than 180 days." TEX. CODE CRIM. PROC. ANN. art. 17.151, § 1(2). As the trial court noted, Lopez had "spent what would be the equivalent of almost a year in jail if you're giving him two for one." The trial court was also presented with the prospect that Lopez would be determined

incompetent to stand trial and further confined. *See* TEX. CODE CRIM. PROC. ANN. art. 46B.0095(a) (West 2018) (providing a defendant incompetent to stand trial may be institutionalized for a period of time up to "the maximum term provided by law for the offense").

Furthermore, the facts alleged in support of the information and complaint were that Lopez "put[] his teeth [on his elderly mother's face] while trying to bite her" "when [he] knew and should reasonably have believed that [she] would regard the contact as offensive and provocative." Unlike the cases upon which the State primarily relies, this case does not involve a complex factual scenario, a felony offense, or a defendant who has been released on bail pending trial. This case, like *Reaves*, involves a defendant charged with a relatively straightforward misdemeanor offense. *See* 376 So. 2d at 138. The facts here present a stronger case than *Reaves* for concluding the delay was presumptively prejudicial because the *Reaves* defendant was released on bail and his claim to prejudice was missing six days of work to be present for multiple trial settings. *Id.* at 139. Lopez, on the other hand, could not make bail and had spent 112 days incarcerated on a misdemeanor offense.

Consistent with *Barker* and our sister courts, we consider the length of delay and the amount of time Lopez spent in the county jail in light of the substance, seriousness, and complexity of the offense. After all, a primary purpose of the right to a speedy trial is to prevent undue and oppressive pretrial incarceration. *Marion*, 404 U.S. at 320. "The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time." *Barker*, 407 U.S. at 532-33. We conclude that, based on the specific facts presented by this case, the delay in this case was presumptively prejudicial and sufficient to trigger an analysis of the remaining *Barker* factors.

2. The extent to which the delay stretches beyond the triggering length.

The second inquiry under the length-of-delay factor is the length of the total delay, including the delay beyond the triggering length. *See Hopper*, 520 S.W.3d at 924. As of August 8, 2017, Lopez had been incarcerated for 112 days on a misdemeanor offense. As we previously noted, the trial court was entitled to infer additional delays would be necessary if the trial court denied Lopez's Motion for Speedy Trial. Lopez's trial counsel argued the delay for a competency hearing would be approximately one month and Lopez could be confined for up to a year; the State did not disagree or argue otherwise. *See Shaw*, 117 S.W.3d at 889 (requiring us to consider the arguments and information available to the trial court). Considering the 112-day length of Lopez's pretrial incarceration, the simplicity of the offense, the maximum sentence for the charged offense, a reasonable time for the State to prepare this case, and an additional delay would be necessitated by the unresolved question of Lopez's competency to stand trial, we conclude the length of the delay in this case weighs slightly against the State.

B. The Reasons for Delay

The next factor we must consider is the reasons for the delay. *See Hopper*, 520 S.W.3d at 924. "The burden of justifying the delay is on the State." *Voda v. State*, 545 S.W.3d 734, 742 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (citing *Cantu*, 253 S.W.3d at 280). "In evaluating the State's reason for the delay, we assign different weights for different reasons. Valid reasons for delay do not weigh against the State, whereas bad-faith delays weigh heavily against the State." *Id.* (internal citations omitted). "A more neutral reason, such as negligence, will weigh less heavily against the State." *Id.* "In the absence of an assigned reason for the delay by the State, we may presume neither a deliberate attempt to prejudice the defense nor a valid reason for the delay." *Id.* (citing *Dragoo*, 96 S.W.3d at 314).

The record shows there are two[1] delays in this case we must consider. The first delay—the 112-day period from Lopez's arrest to the August 8, 2017 trial date—was caused primarily by the State's decision to pursue a felony assault charge initially, and then to refile the case against Lopez as a misdemeanor. The parties disputed in the trial court whether there was any evidence showing Lopez's mother suffered a bodily injury that would support charging a felony. The State explained the State refiled the case as a misdemeanor because the State likely "believed it was a more appropriate charge than the felony." The trial court was not bound to accept the State's explanation. And the trial court was entitled to infer the State should have filed the misdemeanor charge from the outset either because the misdemeanor charge was more appropriate or because the State had no evidence to prosecute the case as a felony. Based on the reason the State assigned for the delay, the trial court could have impliedly found the State was at least negligent by initially filing the case as a felony when the case should or must have been filed as a misdemeanor from the outset.

In its motion for rehearing, the State argues the trial court was not entitled to rely on the representations of the State's counsel unless "counsel's representations are based on matters which trial counsel has first-hand knowledge." First, the record does not establish that the State's counsel lacked first-hand knowledge about the reason for the delay in this case. *Cf. Gonzales v. State*, 435 S.W.3d 801, 811 (Tex. Crim. App. 2014) (rejecting appellant's reliance on State's argument when

[1] We note the record supports a possible third delay if Lopez were determined competent to stand trial. The trial court recited for the record, with no objection from the State, facts suggesting Lopez's mother was not willing to testify against Lopez and was simply using the criminal prosecution to keep Lopez in jail. The State did not complain on appeal that the trial court improperly took judicial notice of these matters until its motion for rehearing on appeal. *See* TEX. R. APP. 38.1(i); *Riles v. State*, 452 S.W.3d 333, 336 (Tex. Crim. App. 2015) (affirming court of appeals that held "new issues may not be raised through a motion for rehearing"); *see also Lighteard v. State*, No. 04-09-00021-CR, 2010 WL 1997723, at *2 (Tex. App.—San Antonio May 19, 2010, no pet.) (mem. op., not designated for publication) ("A trial court may take judicial notice when requested by a party or sua sponte."). Thus, even if Lopez were determined to be competent, the trial court clearly questioned whether there would ever be a trial in this case. The trial court noted Lopez's mother had been "very vocal" about her intent, which suggests the State likely knew about Lopez's mother's intent in pressing charges against Lopez. These facts could support an inference that the State's delay was in bad faith, in which case this delay would weigh heavily against the State. *See Cantu*, 253 S.W.3d at 280-81.

it was "clear that the prosecutor had no personal knowledge of the . . . issue"). Second, the State's argument attempts to improperly shift the burden to Lopez to explain the State's reason for the delay; if the State is now suggesting that it had no reason for the delay, then this factor would weigh more heavily against the State. *See Voda*, 545 S.W.3d at 742 ("The burden of justifying the delay is on the State."). Third, even without what the State is now suggesting was a misrepresentation to the trial court about the State's reason for delay, it was undisputed that the State did not pursue a felony charge after Lopez had been incarcerated nearly three months, the State filed a misdemeanor charge of a lesser-included-offense based on the same incident, and it continued to keep Lopez incarcerated. The trial court was entitled to make reasonable inferences from the State's conduct. Thus, the reason for the first delay of 112 days weighs against the State. *See Hooper*, 520 S.W.3d at 924.

The second delay we must consider is the future delay necessitated by the unresolved question as to Lopez's competency to stand trial. "Courts have recognized several other situations which fall within the 'valid reason' category, such as incompetency of the defendant." LAFAVE, *supra*, § 18.2(c), at 136 (citing *United States v. Geelan*, 520 F.2d 585 (9th Cir. 1975); *U. S. ex rel. Little v. Twomey*, 477 F.2d 767 (7th Cir. 1973)); *see Hull v. State*, 699 S.W.2d 220, 222 (Tex. Crim. App. 1985) ("[T]he eight month delay due to appellant's incompetency to stand trial does not infringe on his right to speedy trial.") (citing *Grayless v. State*, 567 S.W.2d 216 (Tex. Crim. App. [Panel Op.] 1978)). However, holding a defendant longer than reasonably necessary, as determined by the "gravity of the offense," presents different circumstances. *Little*, 477 F.2d at 770 (citing *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)). Moreover, the State has a duty to promptly try a defendant and "may not justify a delay merely by citing the defendant's incompetence." *Geelan*, 520 F.2d at 588.

On August 8, 2017, the parties informed the trial court that the issue of Lopez's competence had been raised and discussed at the pretrial hearing before the visiting judge. The trial court was informed the visiting judge had ordered Lopez to be evaluated, but Lopez was not evaluated. The trial court could have reasonably inferred from the parties' representations that the visiting judge had a serious question as to Lopez's competence to stand trial. However, the record does not reflect why the competency evaluation did not occur. *See* TEX. CODE CRIM. PROC. ANN. art. 46B.021 (providing the process for ordering a competency evaluation). We therefore cannot say the record supports an inference that the State was necessarily responsible for the inevitable future delay. *See Voda*, 545 S.W.3d at 742; *Dragoo*, 96 S.W.3d at 314. Overall, we conclude the second factor, the reasons for the delays, weighs slightly against the State.

C. Assertion of the Right

We next consider the extent that Lopez asserted his right to a speedy trial. *Barker*, 407 U.S. at 530; *Hopper*, 520 S.W.3d at 924; *Wisser*, 350 S.W.3d at 165. Lopez had the burden as to this factor. *Cantu*, 253 S.W.3d at 280. Generally, the assertion-of-the-right factor concerns whether a defendant asserted his right to a speedy trial in the trial court as opposed to the first time on appeal. *See Dragoo*, 96 S.W.3d at 314; *Phillips*, 650 S.W.2d at 400-01 (citing *Barker*, 407 U.S. at 531-532). "Of course, the defendant has no duty to bring himself to trial; that is the State's duty." *Zamorano*, 84 S.W.3d at 651. "This does not mean that the defendant has *no* responsibility to assert his right to a speedy trial." *Id.* "[T]he 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." *Id.*

"Filing for a dismissal instead of a speedy trial will generally weaken a speedy-trial claim because it shows a desire to have no trial instead of a speedy one." *Cantu*, 253 S.W.3d at 283. "If a defendant fails to first seek a speedy trial before seeking dismissal of the charges, he should

provide cogent reasons for this failure. Repeated requests for a speedy trial weigh heavily in favor of the defendant, while the failure to make such requests supports an inference that the defendant does not really want a trial, he wants only a dismissal." *Id.*

"This is not to say, however, that asking only for dismissal will result in a 'waiver,' while seeking a speedy trial and, in the alternative, a dismissal, would preserve the claim." *Phillips*, 650 S.W.2d at 401. "In some cases, defense counsel may legitimately feel that a long delay has caused a client so much prejudice that dismissal is warranted, even if the State is belatedly ready to move promptly." *Id.* "Each case must turn on its own facts, and the particular relief a defendant seeks is but one fact to consider." *Id.* We also consider whether there is anything "to suggest that appellant deliberately failed to move for a speedy trial because of tactical reasons." *See id.* (citing *Barker*, 407 U.S. at 534-36); *accord Cantu*, 253 S.W.3d at 283.

The State argues Lopez "did not assert his right to a speedy trial; instead, he asked for the case to be dismissed." Because dismissal is the only possible remedy for a violation of the right to a speedy trial, the assertion of the right to a speedy trial and a request for a dismissal are not mutually exclusive. *See Dragoo*, 96 S.W.3d at 313. The record establishes Lopez asserted his right to a speedy trial in the trial court on August 8, 2017, first by orally asserting his right and then by filing a written Motion for Speedy Trial. Lopez's assertion of his speedy trial right in the trial court "is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." *See Zamorano*, 84 S.W.3d at 651.

Lopez first asserted his right to a speedy trial by requesting a dismissal on the date of trial. Although such an assertion of his speedy trial right ordinarily weakens a speedy trial claim, the record supports an implied finding of historical fact that trial counsel legitimately felt the delay had caused so much prejudice that dismissal is warranted, even though the State announced ready to proceed to trial. *See Phillips*, 650 S.W.2d at 401. Lopez was incarcerated on or about April 17,

2017; he was charged with misdemeanor assault on July 11, 2017, and Lopez remained in jail; at the pretrial hearing, the issue of Lopez's competency was raised before a visiting judge, but no competency evaluation was conducted; the trial date was set for August 18, 2017; and Lopez first raised his right to a speedy trial on August 18, 2017. The record supports an implied finding of historical fact that Lopez did not deliberately fail to request a speedy trial for tactical reasons.

The State argues a dismissal for denial of a right to a speedy trial is premature when the defendant fails to exhaust less drastic remedies, such as a pretrial writ of habeas corpus or a motion to reduce his bond under article 17.151. *See* TEX. CODE CRIM. PROC. ANN. art. 17.151. We agree that we must consider whether a defendant who is granted bail ever attempts to secure his release on bail. *Grayless*, 567 S.W.2d at 222. The record in this case shows Lopez was initially unable to make bail while the case was filed as a felony case. And after the State filed the misdemeanor case, at the pretrial hearing before the visiting judge, Lopez pursued less drastic relief of being released from jail on a personal recognizance bond and having his competency evaluated before the trial date. The trial court denied the request for release, but then set the trial for only twelve days later. Under these circumstances, we cannot say Lopez's decision not to pursue habeas relief for a violation of article 17.151 significantly undermines his assertion of his right to a speedy trial. Considering Lopez's assertion of his right to a speedy trial in the trial court, we conclude this factor weighs slightly against the State.

D. Prejudice

We next consider prejudice. *Barker*, 407 U.S. at 530; *Hopper*, 520 S.W.3d at 924; *Wisser*, 350 S.W.3d at 165. We assess this factor "in light of the interests the right to a speedy trial was designed to protect: (1) preventing oppressive pretrial incarceration, (2) minimizing anxiety and concern of the accused, and (3) limiting the possibility that the defense will be impaired." *Hopper*, 520 S.W.3d at 924. "Affirmative proof of particularized prejudice is not essential to every speedy

trial claim because excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify . . . and its importance increases with the length of delay." *Id.* (internal quotation marks omitted). "Extensive pretrial incarceration as a result of the pending charges, of course, clearly shows prejudice." GEORGE E. DIX & JOHN M. SCHMOLESKY, TEXAS PRACTICE SERIES: CRIMINAL PRACTICE AND PROCEDURE § 28.18, at 685 (3d. ed. 2011).

Lopez was incarcerated for a total of 112 days before trial on a misdemeanor charge for which the maximum sentence included jail time of up to 365 days. The trial court considered the total time Lopez spent in jail as it relates to the maximum sentence he could have received for the offense. As the State acknowledges, any time spent in county jail is unpleasant, to say the least. *See Barker*, 407 U.S. at 532-33 ("The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time."). Lopez also testified he suffered from mental health issues; specifically, that he was with diagnosed anxiety, depression, and bipolar disorder. *Edwards v. State*, 867 S.W.2d 90, 96 (Tex. App.—Corpus Christi 1993, no pet.) (considering the state of the defendant's mental health). The State and Lopez's trial counsel also raised concerns about Lopez's competence to stand trial, suggesting Lopez lacked a rational understanding of the proceedings or the present ability to communicate with his counsel. *See* TEX. CODE CRIM. PROC. ANN. art. 46B.003(a). Thus, the record supports an implied finding of historical fact that Lopez's pretrial incarceration was particularly oppressive considering the nature and seriousness of the offense. *See Hopper*, 520 S.W.3d at 924. But because there is no evidence of the other prejudice components, particularly the most serious component of impairment of the defense, we conclude this factor weighs only slightly against the State. *See Barker*, 407 U.S. at 532.

E. Balancing the Factors

We agree with the State's characterization of this appeal, "This is a hard case." The facts of this case are uncommon for speedy trial cases, and most of the *Barker* factors weigh only slightly against the State. As we have explained, the State took nearly three months to determine, from the very simple facts of this case, whether it would be more appropriate to charge Lopez with felony assault or misdemeanor assault. During those three months, Lopez—who suffers from anxiety, depression, and bipolar disorder and who might ultimately be incompetent to stand trial—languished in the county jail, unable to make bail, without being tried. After the State determined it would be "more appropriate" to charge Lopez with misdemeanor assault, the State sought to keep Lopez in the county jail. A visiting judge then denied Lopez's request to be released from jail. Although the visiting judge ordered a competency evaluation, Lopez was never evaluated before trial. As a result, Lopez was in jail for a total of 112 days on a misdemeanor charge for which the maximum punishment is confinement for 365 days. On August 8, 2017, proceeding to trial was not an option, despite the State's ready announcement. But for Lopez's Motion for Speedy Trial, the trial court's only option was to further delay this case for competency proceedings. Having engaged in the "difficult and sensitive" process of balancing the *Barker* factors, we conclude the factors sufficiently weigh against the State and in favor of upholding the trial court's implied determination that the delay violated Lopez's right to a speedy trial. *See Zamorano*, 84 S.W.3d at 648 (citing *Barker*, 407 U.S. at 533).

CONCLUSION

The record supports the trial court's implied determination that the delay in this case violated—or that continuing the proceedings would violate—Lopez's constitutional right to a speedy trial. We cannot construe chapter 46B of the Texas Code of Criminal Procedure, a state statute mandating a competency evaluation under some circumstances, as requiring Lopez's

continued prosecution in violation of his constitutional rights. We therefore hold the trial court did not err "by failing to order a competency evaluation and, instead, dismissing the information against [Lopez] less than four months after he was arrested." Accordingly, the trial court's order is affirmed.

Luz Elena D. Chapa, Justice

PUBLISH

APPENDIX B
(Order Denying En Banc Consideration as Moot)

Fourth Court of Appeals
San Antonio, Texas

October 24, 2018

No. 04-17-00568-CR

The **STATE** of Texas,
Appellant

v.

Martin Rivera **LOPEZ,**
Appellee

From the County Court at Law No. 7, Bexar County, Texas
Trial Court No. 549327
Honorable Genie Wright, Judge Presiding

O R D E R

Sitting: Sandee Bryan Marion, Chief Justice
Karen Angelini, Justice
Marialyn Barnard, Justice
Rebeca C. Martinez, Justice
Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice
Irene Rios, Justice

Because the panel has issued a different opinion, the motion for en banc reconsideration is DENIED AS MOOT.

Luz Elena D. Chapa, Justice

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said court on this 24th day of October, 2018.

KEITH E. HOTTLE,
Clerk of Court

APPENDIX C
(Reporter's Record)

REPORTER'S RECORD

CAUSE NO. 549327

STATE OF TEXAS	)	IN THE COUNTY COURT
	)	
VS.	)	AT LAW NO. 7
	)	
MARTIN RIVERA LOPEZ	)	BEXAR COUNTY, TEXAS

****

HEARING ON MOTION FOR SPEEDY TRIAL

****

On the 8th day of August 2017, the following proceedings came on to be heard before the Court in the above-entitled and numbered cause before the HONORABLE EUGENIA "GENIE" WRIGHT, Judge presiding, held in San Antonio, Bexar County, Texas;

Proceedings reported by computerized stenotype machine; Reporter's Record produced by computer-assisted transcription.

ORIGINAL

A P P E A R A N C E S

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EXHIBIT INDEX

DEFENDANT NO.	DESCRIPTION	OFFERED	ADMITTED	VOL.
1	17.151 Notice	17	18	1

(P R O C E E D I N G S)

THE COURT: State of Texas versus Martin Lopez, Cause No. 549327. Let the record reflect that with the attorney's permission, I'm going to be asking Mr. Lopez some questions.

MR. GOAINS: Yes, Your Honor.

THE COURT: Mr. Lopez, raise your right hand, please.

(Defendant sworn.)

THE COURT: Mr. Lopez, are you aware of the fact that you have mental health issues?

THE DEFENDANT: Yes.

THE COURT: And are you, today, feeling suicidal?

THE DEFENDANT: No, ma'am.

THE COURT: Do you wish to harm yourself?

THE DEFENDANT: No, ma'am.

THE COURT: Do you wish to harm anyone else at this point?

THE DEFENDANT: No, ma'am.

THE COURT: And if your attorney succeeds in getting you out of jail, where are you going to go?

THE DEFENDANT: Keeping -- family shelter or relatives, people I know of, friends.

THE COURT: All right. My next question to

you is this: Do you feel competent to enter into a plea bargain agreement at this point?

THE DEFENDANT: On behalf of what?

THE COURT: Do you feel competent -- do you feel like you can hold it together enough today to enter into a plea bargain agreement?

THE DEFENDANT: For a dismissal?

THE COURT: No. It won't be a dismissal. It will be putting you on probation.

THE DEFENDANT: I want to get it -- for dismissed, ma'am.

THE COURT: It would be eventually dismissed after you completed everything on probation, but can you be on probation right now? Do you think you could sign the paperwork and understand the paperwork to be on probation?

THE DEFENDANT: Probation for what? How long? What kind of a probation is this?

THE COURT: It's a simple assault of the elderly/disabled. I'm just asking you -- if you don't understand it, you can't do it.

THE DEFENDANT: Okay.

THE COURT: But you want this case dismissed; you're tired of being in jail?

THE DEFENDANT: That's correct. Been in

for four months, ma'am, you know --

THE COURT: Let's go off the record.

(Off the record.)

THE COURT: Back on the record, please.

MR. GOAINS: Your Honor, I move for a speedy trial motion in this case and that this case be dismissed. I will file the official paperwork this afternoon as quickly as possible.

But Mr. Lopez has been in jail for approximately 120 days now because he was initially indicted for a felony. There was no proof that the felony conditions existed. After 88 days in the county jail, he was dismissed from the felony and immediately filed for -- this misdemeanor cause. It was such a convoluted situation that when I got the dismissal, I came down to your coordinator. I talked to the coordinator and he showed that Mr. Lopez had absconded. It hadn't even gotten on the computer that he was still in jail. It took us a week to figure out that he was -- had not absconded and that he was still under arrest.

At that point, we came down to get today's hearing set -- or excuse me -- we came down to get a hearing set. We had a visiting judge during that week who refused to do anything with the case because it was so convoluted, and now we're here today. We had the case,

that day, set for today.

Now we're at 120 days in jail. I'm not blaming the prosecutors in your court. This comes from the other courtrooms and them putting him in jail for 88 days when there was no evidence. This is from the felony.

THE COURT: State, what do you have to say about this?

MR. LYLES: Your Honor, regards to the Speedy Trial Motion, the State's going to have to assert its right to notice on that. The State is ready for trial today, but the State has concerns about the defendant's mental health and competency to proceed to trial, possibly.

THE COURT: All right. This is what I'm going to put on the record. This man has no place to live. Because of a prior suicide watch, Haven for Hope will not take him. He has been in jail. There is some serious questions about whether or not anybody can proceed with this case. There are serious questions about whether his mother will even testify against him. She is currently in possession of a protective order -- which means you have to stay away from her. So I feel like the victim in this case has been protected, and she's quite involved in the case from what I've learned from the attorney, and she's quite vocal about what she wants to

accomplish.

Therefore, I am going to grant your speedy trial motion. If y'all want to go to trial, we'll go to trial right now.

MR. LYLES: Judge, we're ready for trial. Like I said, we do have issues about his competency. I don't know, has he been evaluated by Carruthers?

THE COURT: Are you competent to go to trial? Do you feel you could go to trial?

THE DEFENDANT: Yeah, I could go to trial.

THE COURT: Do you remember what happened? Could you testify if your attorney asked you to? Could you sit there and listen to everything?

THE DEFENDANT: Yeah. Yeah, I can.

THE COURT: But I'm going to overrule you. I'm granting the speedy trial motion, and I'm dismissing the case. Go off the record.

(Off the record.)

THE COURT: Back on the record in Cause No. 549327, State of Texas versus Martin Rivera Lopez. Mr. Lopez was charged with simple assault, elderly or disabled. It was originally filed as a felony. It was dismissed as a felony and refiled as a Class A misdemeanor.

Mr. Lopez is represented by Mr. Michael

Goains. For the State we have --

MR. LYLES: Samuel Lyles for the State, Your Honor.

THE COURT: And Mr. Lopez is present. Mr. Goains has filed a Motion for Speedy Trial, and there's several points in this Motion for a Speedy Trial. Would you like to reiterate and innumerate what those reasons are, please, Mr. Goains?

MR. GOAINS: Yes, Your Honor.

MR. LYLES: Your Honor, before we get into it, the State is going to assert their right to notice on the Motion for a Speedy Trial.

THE COURT: All right. The bench is going to say this case was set for trial today and you announced ready, so I'm going to overrule your motion.

Please continue.

MR. GOAINS: Okay. Your Honor, I'd like to present at this time what's marked as Defendant's Exhibit Number 1. It's a --

THE COURT: Speak loudly and clearly.

MR. GOAINS: It's a Texas Code of Criminal Procedure, Article 17.151 Notice from Bexar County, that on July 2nd, 2017, Mr. Lopez had already served 75 days and was still waiting for indictment.

THE COURT: This is your Exhibit 1?

MR. GOAINS: Yes, Your Honor.

THE COURT: Can I make it part of the -- part of the paper record?

MR. GOAINS: You may, Your Honor.

THE COURT: Thank you. Continue.

MR. GOAINS: This will show that he was originally arrested on or about April 17th, 2017, for the felony charge of injury to an elderly or disabled person under night mag 341783, which was filed in the 144th District Court of Bexar County, Texas.

Defendant was unable to make bond in that cause of action. However, there was no evidence that showed any injury to the victim, and, therefore, it was dismissed on July -- on or about July 12th, 2017, and he's immediately rearrested in this case. At that time he had already served 87 days in the Bexar County jail. As of this date, he served 114 days in the Bexar County jail.

I've talked to the State and I believe we both believe that the defendant is not mentally competent to stand trial at this time. And, Your Honor, I believe he's not competent to enter into a plea bargain agreement at all.

As far as the delay, I believe that a prejudicial delay exists because the State of Texas held the defendant on a felony cause for 87 days and there was

no way to get the misdemeanor settled at that time. It hadn't even been filed. They held him and there was not enough evidence for the felony cause of action, refused to indict, and then turned around and arrested him after he'd already been in jail for 87 days on the misdemeanor.

THE COURT: All right. State, could you please explain to me why in the felony case they found that no assault had taken place, yet it was refiled as a misdemeanor?

MR. LYLES: Your Honor, I don't believe they found no assault took place. They dismissed it and refiled it as a misdemeanor because I think they believed it was a more appropriate charge than the felony.

MR. GOAINS: I believe, Your Honor, they could say an assault took place, but there was no bodily injury, which was required for the felony.

MR. LYLES: There was bodily injury in the case.

THE COURT: Well, here are our choices: The man has spent what would be the equivalent of almost a year in jail if you're giving him two for one. He is not competent. We can't try the case.

MR. GOAINS: Your Honor, even if we sent him for a competency hearing, that would be another month and he would be in jail for a full year.

THE COURT: And he would come back as being incompetent to stand trial.

MR. GOAINS: Correct.

THE COURT: So I'm going to grant your Motion for a Speedy Trial, and I'm going on the record saying, State, you're right. This is something that we need to take care of in court and the Court has no means to take care of it. We can't try him. It's just not right to leave him in jail, and we really don't have any timely services to offer him.

Mr. Lopez, do you know that you have a mental illness?

THE DEFENDANT: Yes, I do. That's correct.

THE COURT: Do you know where to go seek help?

THE DEFENDANT: Yes, ma'am.

THE COURT: Will you do so once you're released from jail?

THE DEFENDANT: Yes, ma'am.

THE COURT: Do you know what your diagnosis is?

THE DEFENDANT: Bipolar -- bipolar, depression, anxiety.

THE COURT: Do you also know that your mother has a protective order in place and you cannot go

to her home?

THE DEFENDANT: That's correct.

THE COURT: Do you know that if you go to her home you are going to be arrested for violation of a Protective Order?

THE DEFENDANT: That's correct.

THE COURT: Are you suicidal at this time? Are you having suicidal thoughts? You've got to answer me.

THE DEFENDANT: No, ma'am.

THE COURT: Do you feel like you're in a position right now that you're going to hurt other people?

THE DEFENDANT: No, ma'am.

THE COURT: Very well. We have no recourse except to dismiss this case.

MR. LYLES: Your Honor, if we're still on the record, I would like to ask defense counsel when he became aware of the competency issues because the State is ready on this case. We are not the one who caused the delay. If the issue is the defendant is not competent to stand trial, we are ready for trial today, Your Honor, but the defendant is not competent to stand trial. And as I -- from what I understand, there's never been an evaluation requested by the defense.

MR. GOAINS: Actually, Your Honor, there

was an evaluation requested. At the last hearing when we applied for a personal recognizance bond, the judge was unwilling to do the personal recognizance bond because there had not been a mental evaluation. He had no place to go. It was ordered that over the weekend following that hearing he would see a counselor about whether he was mentally competent and whether he could get into Haven for Hope, and somehow that all fell through.

THE COURT: So you are telling the Court that you and -- I believe, you, as the defense counsel and --

MR. GOAINS: Appeared in front of Judge White, I believe, it was, Your Honor.

THE COURT: -- the probation officer, because she's the one who talked to Haven for Hope; is that correct?

PROBATION OFFICER: No.

THE COURT: Well, anyway, did you let them -- did you tell the prosecutors he was not mentally competent?

MR. GOAINS: We all discussed it that day in front of Judge White.

THE COURT: Okay.

MR. LYLES: We did discuss it.

THE COURT: All right. So everybody's

known for a while. Well, this is what we're going to do -- and you've done a good job. It's very troubling for all of us.

MR. GOAINS: Judge, may I just put a few things on the record?

THE COURT: Sure. Go ahead.

MR. GOAINS: Mr. Lopez, you understand you can't go see your mother?

THE DEFENDANT: That's correct.

MR. GOAINS: Correct? You understand that if any type of assault takes place against anybody, not just your mother, you're going to be brought back here in the same situation? What you need to do --

THE DEFENDANT: (No audible answer.)

THE COURT: You can't just nod your head. You've got to say yes or no.

THE DEFENDANT: That's correct.

MR. GOAINS: What the judge wants you to do -- and I think she's making a fair request -- is that you immediately go seek mental health counseling through Nix or any other place in San Antonio that you can go.

THE COURT: Center for Healthcare Services, which they will set you up for -- at the Haven for Hope with the Center for Healthcare Services.

MR. GOAINS: And I want you to do this

immediately upon your release from jail. Okay? Do you have any questions at all?

THE DEFENDANT: The contact order for my mom?

THE COURT: She has a protective order.

MR. GOAINS: Which goes through the civil courthouse and we don't have any access to it over here. Okay?

THE COURT: But we know there's one in place and it's probably good for another year and a half.

THE DEFENDANT: So by all means there's no way I can call her?

THE COURT: No. You can't call her. You can't visit her. You can't go to her house.

THE DEFENDANT: Okay.

THE COURT: If you do, they're going to arrest you again.

MR. LYLES: Your Honor, I would like to point out that the Court is able to determine the defendant's competency without a motion urged before the Court, and granting a speedy trial motion is not the proper remedy, Judge. Although I respect what you're trying to do, this is not the proper setting.

THE COURT: I can't determine his competency, but he's obviously -- based on what his

attorney has projected to us, he's not competent, but I'm not a health care professional.

MR. GOAINS: Your Honor, we would be more than willing to do MIOF, except for the fact, once again, it's 30 more days in jail to try to do something about --

THE COURT: No. Off the record.

(Off the record.)

THE COURT: Back on the record.

MR. LYLES: I'd like to bring the Court's attention to Texas Code of Criminal Procedure, 46B.005 entitled, Determining Incompetency to Stand Trial. Section (a) states, "If after no formal inquiry the court determines that evidence exists to support a finding of incompetency, the Court shall order an examination under Subchapter B to determine whether the defendant is incompetent to stand trial in a criminal case."

THE COURT: So you're saying the wording is shall and I must send him --

MR. LYLES: The wording is shall, Judge.

THE COURT: -- to have competency determined.

MR. GOAINS: And, Your Honor, I still think because of the -- once again, I'm not talking about our --

THE COURT: Let me see that.

MR. GOAINS: -- State's attorneys, but the

District Attorney's office decided to leave him in jail for no reason for 87 days.

THE COURT: Oh, I'm sure they thought they had a reason.

So in addition -- all right. In addition to -- let me see if I understand correctly. Your Motion for a New Trial has more than one prong. One of the prongs is the incompetency, and the prosecutors have brought to my attention, and quite rightfully so, under Article 46B.005, Determining Incompetency to Stand Trial, I would be put in a position that he would have to go back to jail and be evaluated for competency.

The other prong that you've presented to me is that he's languished in jail for an extended period of time under a felony case that was then converted to a misdemeanor case without any resolution or the ability to make bond; is that correct?

MR. GOAINS: Well, almost, Your Honor. What upsets me about it is it wasn't converted. It was dropped because of no indictment. They dismissed that case.

THE COURT: Dismissed and refiled as a misdemeanor.

MR. GOAINS: It's dismissed and refiled as a misdemeanor, and even your competent coordinator, on the

day it was dismissed, could not find him because he is listed as a fugitive because they didn't get everything in the record fast enough to show that he had been rearrested, and it took us a week from that point to figure out he was still in jail.

MR. LYLES: Judge, this was actually, I think, a felony reduction.

THE COURT: Was it a reduction?

MR. GOAINS: It was a dismissal, Your Honor.

MR. LYLES: No, it was a reduction.

MR. GOAINS: It's a dismissal.

THE COURT: Have you got proof it was a dismissal?

MR. GOAINS: It's in their files. It's a -- I can pull up the clerk's record, Your Honor, where it says it was dismissed on the 12th and refiled on the 12th.

THE COURT: Find it.

(End of proceedings.)

THE STATE OF TEXAS)

COUNTY OF BEXAR)

I, PAULA J. CLOUD, Official Court Reporter in and for County Court at Law No. 7 of Bexar County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record, in the above-styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that the total cost for the preparation of this Reporter's Record is $66.50 and was paid by the Bexar County District Attorney's Office.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, offered by the respective parties.

WITNESS MY OFFICIAL HAND this the 18th day of August 2017.

Paula J. Cloud /s/

PAULA J. CLOUD, Texas CSR 5916
Expiration Date: 12/31/18
OFFICIAL COURT REPORTER
COUNTY COURT AT LAW NO. 7
CADENA-REEVES JUSTICE CENTER
300 Dolorosa
San Antonio, Texas 78205
(210) 335-2004

TEX. CODE of CRIM.PROC.ART.17.151 NOTICE

NOTIFICATION ONLY-BEXAR COUNTY INDICTMENT PENDING

DATE: 2017/07/02

TO: MICHAEL D GOAINS
BAR# 793815

THE FOLLOWING DEFENDANT:

NAME: LOPEZ MARTIN RIVERA
SID#: 0948417
DOB: 1991/08/14

HAS BEEN IN CUSTODY FOR 75 DAYS AWAITING INDICTMENT FOR
OFFENSE LISTED BELOW:

CASE NUMBER: NM341783 OFFENSE: INJURY TO ELDERLY BI COURT: D144

PURSUANT TO ARTICLE 17.151 SECTION 1 OF THE TEXAS CODE OF CRIMINAL PROCEDURE, A DEFENDANT WHO IS DETAINED IN JAIL PENDING TRIAL OF ACCUSATION AGAINST THEM MUST BE RELEASED EITHER ON PERSONAL BOND OR BY REDUCING THE AMOUNT OF BAIL REQUIRED, IF THE STATE IS NOT READY FOR TRIAL OF THE CRIMINAL ACTION FOR WHICH THEY ARE BEING DETAINED WITHIN 90 DAYS FROM THE COMMENCEMENT OF THEIR DETENTION IF THEY ARE ACCUSED OF A FELONY.