Circuit Court for Baltimore City
Case No. 115089006

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1114

September Term, 2017

CHARLES HENSON

v.

STATE OF MARYLAND

Wright,
Graeff,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: June 19, 2018

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of *stare decisis* or as persuasive authority. Md. Rule 1-104.

A jury, in the Circuit Court for Baltimore City, convicted Charles Henson, appellant, of second-degree murder and use of a firearm in a crime of violence. Henson was sentenced to a total term of 45 years' imprisonment. In this appeal, Henson presents the following questions for our review:

> 1. Did the circuit court err in denying Mr. Henson's Motion to Dismiss for lack of a speedy trial?
>
> 2. Did the circuit court err in admitting either the prior testimony of a witness or a recorded telephone conversation involving that witness, where Mr. Henson had no prior opportunity or motive to cross-examine the witness concerning that telephone conversation?

For reasons to follow, we answer both questions in the negative and affirm the judgments of the circuit court.

BACKGROUND

On February 27, 2015, Henson was arrested and held without bail on multiple charges after it was alleged that he had shot and killed Davon Johnson. Henson's trial was set to begin on June 22, 2015; however, on the day of trial, the State requested a postponement because the prosecutor assigned to the case was "on vacation." Defense counsel stated that he did not object to the postponement because he had just received discovery fourteen days prior and needed "to do further investigation." The circuit court granted the State's request for a postponement and reset Henson's trial date.

On the new trial date of July 27, 2015, the State requested another postponement. The prosecutor informed the circuit court that because she expected Henson's trial to last "approximately seven to ten days," the trial would conflict with another trial involving the prosecutor that was "specially set" to begin on August 3, 2015. Although defense

counsel objected to the postponement and asserted his right to a speedy trial, he also indicated that he “agree[d] with the State” that keeping the current trial date “would destroy her ability to be ready for this specially set trial.” The court ultimately granted the State’s request for a postponement and set a new trial date for September 4, 2015.

On that date, the State informed the circuit court that both parties wanted a postponement. The State proffered that the defense had provided “verbal notice of two additional witnesses they would be seeking to call at trial,” which would require the State to conduct “fairly significant investigation to be able to respond to that.” The State also proffered that defense counsel had requested transcripts of a “fairly large number of statements,” which had been transcribed but not yet received by the State. The court ultimately granted the joint request and reset Henson’s trial for October 7, 2015.

On October 7, 2015, defense counsel informed the circuit court that the parties would again be seeking a postponement. Defense counsel indicated that the State had yet to receive the requested transcripts, and that she had “just received additional discovery” and needed time “to go through the new material produced.” The court granted the joint request and reset Henson’s trial date.

On the new trial date of November 9, 2015, the State informed the circuit court that the parties wanted yet another postponement. According to the State, the parties had been engaged in “extensive discussions about all of the insanity that’s going to ensue with this trial” and that, following those discussions, defense counsel had advised the State about “some of the evidence he intended to get in.” The court granted the joint request and reset Henson’s trial for February 29, 2016.

On that date, the State informed the circuit court that the prosecutor was "specially set" to appear at a different trial on March 10, 2016, and that, given the anticipated length of Henson's trial, the prosecutor believed that she would not be finished with Henson's trial in time for the other trial. Defense counsel stated that the defense was "ready for trial" but that he "understood the need for postponement." The court granted the State's request for a postponement and reset Henson's trial for June 15, 2016.

Shortly thereafter, the circuit court informed the parties that there was a judicial conference on June 15, 2016, and that the trial date needed to be postponed. Because the prosecutor had other specially set cases assigned over the next few months, the court set Henson's trial for October 12, 2016.

On October 11, 2016, Henson filed a Motion to Dismiss the charges, arguing that his right to a speedy trial had been violated. That same day, the circuit court held a hearing on Henson's motion. At that hearing, defense counsel argued, among other things, that Henson was prejudiced by the inordinate delay between his arrest and subsequent trial. Specifically, defense counsel maintained that a witness, Kevin Anderson, aka Kevin Clark, had died on September 16, 2016.[1] According to defense counsel, Clark would have given testimony that contradicted statements made by the State's primary eyewitness, Acquinetta Johnson, who told the police that she saw Henson shoot the victim. Defense counsel later admitted that he did not attempt to subpoena

[1] For the sake of clarity, we shall refer to this individual as Kevin Clark.

Clark as a witness until approximately three weeks before the October 12, 2016 trial date, at which time he discovered that the witness had an alias and that he had died.

Ultimately, the circuit court denied Henson's motion to dismiss and found as follows:

> As the State has conceded, and as I would find anyway, the length of delay in this case from arraignment to trial is sufficient to trigger constitutional consideration; that is, it becomes of constitutional dimension, and therefore shifts the burden to the State to explain the reasons and the legitimacy of the delay.
>
> It also means that I consider four factors in connection with the delay; the length of the delay, the reasons for the delay, whether the defendant has asserted his speedy trial rights, and the existence of actual prejudice to the defendant.
>
> * * *
>
> The first postponement isn't a postponement, but the time to set the first trial date of June 22nd, 2015, is listed as administrative, and I accept that it is administrative. There has to be some delay associated with setting the case in for the first trial date.
>
> The . . . next delay to the second trial date was until July 27th, 2015, attributed to the State. The State does not contest that attribution. And it was due to [the prosecutor's] availability for trial.
>
> The next one was a postponement to September 4th, 2015. That was for 40 additional days, attributed to the State. Again the State does not contest that attribution. And it was based on the State's Attorney's trial schedule.
>
> The next postponement was to October 7th, 2015, a delay of 34 days. That was attributed to both parties, and is not contested as that attribution.
>
> The next one was a postponement to November 9th, 2015, also 34 days, also attributed to both parties. And I accept that attribution of that delay.

The next one, the postponement to February 29th, 2016, was longer. It was 113 days. On the postponement form it is attributed to both parties. And I accept that attribution.

* * *

The next postponement then was the postponement from February 29th, 2016, to June 15th, 2016 . . . . And that was attributed to the State. And I see no reason to disturb that attribution, again, based on the . . . State's Attorney's availability based on trial schedules.

The final postponement from June 15th to October 11th is perhaps the most disputed one, is attributed to administrative reasons because of the Court's error in setting the June 15th date despite the judicial conference when this Court was unavailable. But I understand the defense arguments that the length of that postponement was due primarily to the State's Attorney's trial schedule and that the defendant adamantly sought . . . an earlier date rather than going all the way until this date in October.

That is, however, I find, an administrative reason for the postponement. I do consider the fact that it was longer than the defense wished because of reasons that would be attributable to the State. But ultimately I don't think that that shade of difference is determinative in this case.

* * *

The last factor, and perhaps the most important is the issue of actual prejudice to the defendant. I recognize that Mr. Henson has been incarcerated throughout this period of delay, that that is particularly onerous on him, both personally, in terms of as one who is presumed to be innocent, and during the pretrial incarceration, and that it also has an effect on his defense because it makes him less accessible to defense counsel and to the community, both of which can enhance his ability to prepare a defense.

However, that prejudice is mitigated by the fact that he had counsel throughout this period, and has had consistent counsel in order to prepare for trial.

The most significant particular issue in this case is – is Mr. Henson's identification of Kevin Clark or Kevin Anderson as a potential defense

> witness who is now unavailable because he's died unfortunately just before this case got to trial.
>
> However, that prejudice is diminished by the fact that Mr. Clark or Mr. Anderson was not so key as a witness that he was identified any earlier in the proceedings.
>
> In fact there could be some doubt whether the State, even if he were available, would be willing – would be able to call him, given late disclosure, and the fact that while the defense can suggest what his testimony might be, there's no indication that he was in fact interviewed or developed as a witness with particularly helpful testimony to the defense.
>
> So while I find that the defendant has been prejudiced by Mr. Clark's or Mr. Anderson's unavailability now as a potential witness, that specific prejudice is diminished by the doubt about what his testimony actually would be and the fact that he was not identified earlier in the proceedings as a defense witness.
>
> Balancing all of the facts, I find that the delay, while substantial, is not so long as to create inherent prejudice to the defendant.
>
> In addition, the reasons, primarily the . . . State's Attorney's busy trial schedule are understandable, not entirely excusable, but understandable. There certainly is no sense at all that the State has deliberately delayed this case in order to prejudice Mr. Henson.

Henson's trial continued as scheduled. As part of that trial, the State called Shantice Mason, a friend of Henson's, as a witness. During her direct testimony, Mason was asked about certain statements Henson made to her regarding the murder of Davon Johnson. After denying that those statements were made, Mason was confronted with recorded statements she made to the police in which she indicated that Henson had confessed to Johnson's murder. Mason was then subjected to cross-examination by Henson's trial counsel.

That trial ended in a mistrial, and Henson was retried on June 5, 2017. At Henson's retrial, the State intended to call Shantice Mason as a witness. Before doing so, however, the State informed the circuit court that Mason could not be located. The State then asked the court if Mason's recorded testimony from Henson's first trial could be played for the jury. Defense counsel objected, and the court inquired as to the grounds of the objection:

[DEFENSE]: I understand [Maryland Rule of Evidence 5-804] allows for the playing of prior testimony if there had been an opportunity to cross-examine the witness. However, I was not Mr. Henson's attorney at the time of the original trial, so I have not been given the opportunity to cross-examine Ms. Mason.

THE COURT: So Mr. Henson was present, had an opportunity through his counsel to cross-examine, and in between he has new counsel.

[DEFENSE]: Yes.

THE COURT: The objection is overruled.

Defense counsel then indicated that he had a "second argument" regarding a recorded phone call between Henson and Mason:

[DEFENSE]: It's alleged that my client made a call from the jail to Ms. Mason, among other people. It was a call to one party who then included Ms. Mason on the call.

THE COURT: A three-way?

[DEFENSE]: Yes.

THE COURT: Okay.

[DEFENSE]: And then there was . . . another person that was included in that call after Ms. Mason, the call

disconnect[ed] with Ms. Mason. It is my understanding that the State is going to be seeking to introduce this call and I would have the opportunity to cross-examine Ms. Mason who was a party to the call about what the nature of this call meant to her, what she was referring to, et cetera.

Now, this was not information that was introduced into the last trial . . . and so there'd been no opportunity, obviously, to cross-examine her because it wasn't a portion of the State's case originally.

THE COURT: And?

[DEFENSE]: But at this point, if the State were to seek to introduce the call, if Ms. Mason were present, then I would have the opportunity to fully explore through cross-examination of Ms. Mason about the nature of this call.

THE COURT: Feel free to produce her on your own. Anything else?

[DEFENSE]: No, Your Honor.

The State then played for the jury a recording of Mason's testimony from Henson's first trial. The State also played for the jury Mason's recorded statements to the police, in which she stated that Henson had confessed to the killing. No additional evidence was introduced in conjunction with those two pieces of evidence.

Later, during the testimony of Baltimore City Homicide Detective Mark Veney, the State played a recording of a telephone call between Mason, Henson, and a third unidentified individual. During that call, which took place on October 11, 2016, and was recorded while Henson was incarcerated pending trial, Henson made several statements to Mason, some of which referenced her impending testimony. After Mason

disconnected from the call, Henson told the unidentified individual to "call [Mason] and tell that bitch I said do right, yo, or get done wrong."

The State also called Acquinetta Johnson, the mother of the victim, as a witness. Johnson testified that, on the night of the murder, she was at her home with her son and her son's friend, whom she later identified as Henson. According to Johnson, at some point during the night Henson and her son left the home. Shortly thereafter, Johnson "heard some gunshots." Upon hearing the gunshots, Johnson ran out her front door and onto her porch, at which time she saw her son "laying' on the ground" with Henson "standin' over top of him shootin' him."

Yolanda Butler, an acquaintance of Henson, also testified for the State. During that testimony, Butler was confronted with statements she made to the police following the shooting. In those statements, Butler informed the police that Henson had confessed to shooting the victim. Later, the State called Jasmine Littlejohn, another acquaintance of Henson. She testified that Henson told her that he had killed the victim.

Henson was ultimately convicted. This timely appeal followed.

DISCUSSION

I.

Henson first argues that the State violated his right to a speedy trial and that, as a result, the circuit court erred in failing to dismiss the charges. We disagree.

A defendant's right to a speedy trial is guaranteed by the Sixth and Fourteenth Amendments to the U.S. Constitution and Article 21 of the Maryland Declaration of Rights. *State v. Kanneh*, 403 Md. 678, 687 (2008). "In reviewing a circuit court's denial

of a motion to dismiss on the ground of a speedy trial violation, we accept its findings of fact unless clearly erroneous but 'perform a *de novo* constitutional appraisal in light of the particular facts of the case at hand.'" *Hallowell v. State*, 235 Md. App. 484, 513 (2018) (citations omitted).

Our constitutional appraisal begins with the four-factor balancing test announced in *Barker v. Wingo*, 407 U.S. 514, 530-32 (1972). *Peters v. State*, 224 Md. App. 306, 359 (2015), *cert. denied* 445 Md. 127. Those factors are: 1) the length of the delay; 2) the reason for the delay; 3) the defendant's assertion of his speedy-trial right; and 4) any prejudice to the defendant. *Id.* at 359-60. In evaluating those factors, we assess the relative significance of each factor, both by itself and in conjunction with the other factors, to determine if the State's delay in bringing an individual to trial substantially infringed on the individual's right to a speedy trial. *State v. Bailey*, 319 Md. 392, 413-14 (1990). "'None of [the *Barker*] factors is, in itself, either necessary or sufficient to find a violation of the speedy trial right; instead they are related factors and must be considered together with such other circumstances as may be relevant.'" *Hallowell*, 235 Md. App. at 513 (citations omitted).

That said, not all delays require a full *Barker* analysis. "[T]he first factor, the length of the delay, is a 'double enquiry,' because a delay of sufficient length is first required to trigger a speedy trial analysis, and the length of the delay is then considered as one of the factors within that analysis." *Kanneh*, 403 Md. at 688. "Unless the delay crosses the line from ordinary delay to presumptively prejudicial delay, 'there is no necessity for inquiry into the other factors that go into the balance.'" *White v. State*, 223

Md. App. 353, 377 (2015) (citations omitted). "The Court of Appeals has consistently held . . . that a delay of more than one year and fourteen days is 'presumptively prejudicial' and requires balancing the remaining factors." *Lloyd v. State*, 207 Md. App. 322, 328 (2012) (citations omitted). "[F]or purposes of a speedy trial analysis, the length of delay is measured from the date of arrest." *Kanneh*, 403 Md. at 688.

Here, the length of the delay is sufficient to trigger a speedy trial analysis. Henson was arrested on February 27, 2015, and brought to trial on October 12, 2016, for a total delay of approximately 19 months. Because that delay is presumptively prejudicial, we now turn to the four *Barker* factors to determine whether Henson's right to a speedy trial was violated.

A. Length of Delay

As previously discussed, the length of the delay is both a triggering mechanism for speedy trial analysis and a factor to be considered. In the latter context, the significance of the delay's length is diminished, and no one length is, by itself, either a necessary or sufficient condition of a speedy trial violation. *In re Thomas J.*, 372 Md. 50, 72-73 (2002). In other words, the length of the delay becomes significant only when considered within the context of the other factors and the unique circumstances of the case. *See Brady v. State*, 291 Md. 261, 269-70 (1981) (delay of 14 months held to be violative of defendant's right to speedy trial); *cf. Kanneh*, 403 Md. at 694 (delay of nearly three years did not violate defendant's right to speedy trial). Moreover, "of the four factors we weigh in determining whether [a defendant's] right to a speedy trial has been violated, . . . the length of the delay is the least determinative[.]" *Kanneh*, 403 Md. at 689-90.

Here, although the length of the delay was sufficient to trigger a speedy trial analysis, we do not consider the delay to be inordinate under the circumstances. First, Henson was charged with first-degree murder, and the State expected the trial to last anywhere from one to two weeks. *See Peters*, 224 Md. App. at 360 ("[T]he length of the delay that can be tolerated depends, to some extent, on the crime charged.") (Citations omitted). In addition, a significant portion of the delay – approximately six months – was the result of both parties needing extra time to review evidence and prepare for trial. *See Kanneh*, 403 Md. at 689 (noting that the length of delay, alone, is not a weighty factor). Thus, we give this factor little weight.

B. Reasons for Delay

The second factor – the reasons for the delay – is closely related to the length of the delay in that "different weights should be assigned to different reasons." *Id.* (quoting *Barker*, 407 U.S. at 531). As the Supreme Court explained:

> A deliberate attempt to delay the trial in order to hamper the defense should be weighted more heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

Barker, 407 U.S. at 531 (footnote omitted).

In the present case, there were eight separate delays between Henson's arrest and trial. Because the reasons for the delays vary, we shall discuss them in turn.

The initial delay between Henson's arrest and the first postponement, approximately 115 days, was purely administrative and a part of the regular administration of justice. That delay, therefore, "is accorded essentially no weight in the analysis, as that is the time it would have taken for trial preparation in the absence of any of the ensuing postponements." *Hallowell*, 235 Md. App. at 515.

The second delay of approximately 35 days is chargeable to the State, as it was the State who requested the postponement due to the prosecutor's vacation. Defense counsel, however, did not object to the postponement and indicated that he needed more time to prepare. Consequently, although that delay is attributable to the State, we accord it essentially no weight given the neutral reason and defense counsel's apparent consent.

The third delay of approximately 39 days is wholly attributable to the State, as it was the result of the prosecutor's busy trial calendar. Moreover, defense counsel objected to the postponement and asserted his right to a speedy trial. Nevertheless, given that the reason for the delay was neutral and the length was not inordinate, we accord the third delay minimal weight.

The next three delays, which totaled approximately 178 days, were requested by both parties and are, as a result, accorded no weight.

The seventh delay of approximately 107 days was the result of the prosecutor's busy trial schedule and is attributable squarely to the State. But, like the third delay, the reason for the delay was neutral and is, therefore, accorded minimal weight.

The final delay of 118 days is attributable to the State. Although the circuit court declared it "administrative," it is ultimately the State's responsibility to bring a defendant

to trial. *Barker*, 407 U.S. at 531; *see also Vermont v. Brillon*, 556 U.S. 81, 85 (2009) (delay caused by defendant's lack of counsel may be charged to the State "if the gaps resulted from the trial court's failure to appoint replacement counsel with dispatch."). That said, the weight of the delay is minimal given the neutral reason.

In sum, approximately one-half of the delay of 552 days, or 299 days, is attributable to the State. Although not an insignificant sum, it weighs only slightly in favor of Henson, as "none of it evinced a 'deliberate attempt to delay the trial in order to hamper the defense.'" *Hallowell*, 235 Md. App. at 516 (quoting *Barker*, 407 U.S. at 531).

C. Assertion of Right to Speedy Trial

The third factor involves Henson's assertion of his right to a speedy trial. Generally, if a defendant fails to assert the right as soon as practicable, such a failure "will make it difficult for the defendant to prove that he was denied a speedy trial." *Barker*, 407 U.S. at 532.

Here, Henson asserted his right to a speedy trial on July 25, 2015, following the State's second request for a postponement. He did not, however, assert the right again until October 11, 2016, when he moved to dismiss the charges. Moreover, Henson followed his initial assertion by requesting three separate postponements, which caused a total delay of 178 days. Thus, although Henson did assert his right to a speedy trial at a reasonable time, the weight normally accorded such an assertion is offset somewhat by Henson's subsequent actions. *See, e.g., Glover v. State*, 368 Md. 211, 228 (2002) ("Often the strength and timeliness of a defendant's assertion of his speedy trial right indicates

whether the delay has been lengthy and whether the defendant begins to experience prejudice from that delay."); *Jules v. State*, 171 Md. App. 458, 486 (2006) (concluding that this factor "weighs lightly" where the frequency of the demands is "not extraordinary").

D. Prejudice

The final and perhaps most important factor in the *Barker* analysis is whether the defendant suffered actual prejudice as a result of the delay. *Peters*, 224 Md. App. at 364. "Prejudice, in respect to the right to a speedy trial, has been defined to include not merely an 'impairment of defense' but also 'any threat to what has been termed an accused's significant stakes, psychological, physical and financial, in the prompt termination of a proceeding which may ultimately deprive him of life, liberty or property.'" *In re Thomas J.*, 372 Md. at 77 (quoting *U.S. v. Dreyer*, 533 F.2d 112, 115 (3d Cir. 1976)). In addition, any prejudice must be evaluated in light of the three primary interests the right to a speedy trial was designed to protect, which are: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Id.* (quoting *Barker*, 407 U.S. at 532). Of those three interests, the "'most serious . . . is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.'" *Hallowell*, 235 Md. App. at 517 (quoting *Barker*, 407 U.S. at 532).

Henson argues that his defense was irreparably impaired by the delay because a key witness, Clark, had died on September 16, 2016, and thus could not testify at trial on

October 12, 2016. Henson maintains that Clark would have provided testimony that impeached the testimony of the State's sole eyewitness, Johnson.

Although Henson's claims regarding the import of Clark's testimony may have merit, his claim that his defense was impaired by the delay does not. Henson admitted that he did not subpoena Clark as a witness until September 20, 2016, which is when he discovered that Clark had died. Moreover, there is no indication in the record to suggest that Henson intended to call Clark as a witness at any time prior to that date. We cannot say, therefore, that Henson was prejudiced by the death of Clark, as that witness would not have testified had Henson's trial been held on any of the scheduled dates prior to October 12, 2016. In short, it was not the period of delay that precluded Clark's testimony, but rather Henson's inability (or unwillingness) to procure Clark at one of the earlier trial dates. Had he done so, our conclusions may have been different, and the weight given may have been greater. Alas, that is not the case; therefore, other than the general prejudice inherent in Henson's pretrial incarceration and the natural anxiety caused by facing serious criminal charges, Henson suffered no prejudice.

Henson argues that the State was obligated to show that he was not prejudiced by the delay and that the State "made no effort whatsoever to carry its burden." While we agree that the State does, under certain circumstances, have an obligation to show a lack of prejudice, we disagree with Henson's assertion that the State failed completely in that respect. The record makes plain that the State made numerous arguments before the circuit court on that issue, some of which were accepted by the court and included in its ultimate findings.

E. Conclusion

After considering the above factors in light of the attendant circumstances, we hold that Henson's right to a speedy trial was not violated by the delay between his arrest and trial. The length of the delay, while sufficient to trigger a speedy trial analysis, was not inordinate, particularly when compared to other cases in which a defendant's right to a speedy trial was held not to have been violated. *See, e.g., Barker*, 407 U.S. at 533-36 (five-year delay); *Kanneh*, 403 Md. at 688-89 (three-year delay); *Hallowell*, 235 Md. App. at 518-19 (20-month delay); *Peters*, 224 Md. App. at 365 (19-month delay). Importantly, the reasons for the delay were neutral and weigh only slightly against the State. And, while Henson did make a timely assertion of his right to a speedy trial, he followed that assertion by requesting three postponements and then waiting until the day before his actual trial to assert the right again. Finally, the delay caused no apparent prejudice to Henson's defense, and any additional prejudice in the form of physical and mental stress weighs only slightly. *See Hallowell*, 235 Md. App. at 518 ("Oppressive pretrial incarceration with its attendant anxiety and concern to the accused is generally afforded only slight weight."). Accordingly, Henson's right to a speedy trial was not violated, and the circuit court did not err in denying his motion to dismiss.

II.

Henson's second argument is that the circuit court erred in permitting the State, at Henson's retrial, to play for the jury a recording of Mason's testimony from Henson's first trial. Henson claims that, while he had the opportunity to cross-examine Mason at his first trial, he did not have the opportunity to explore the same topics at his second

trial. Henson's sole basis for that contention is the introduction of the recorded conversation between Henson, Mason, and a third party, which Henson claims was not introduced at his previous trial and, as a result, precluded him from exploring that topic then. Henson also claims that the court erred in admitting the recording because he "had no opportunity to examine Mason concerning that telephone conversation."

Henson's claims are without merit and require only minimal discussion. Before doing so, however, we must clarify the nature of the two pieces of evidence at issue, as Henson has erroneously conflated the two. The first piece of evidence, Mason's prior testimony, was introduced at Henson's retrial without substantive change and because Mason was unavailable to testify. The State's purpose in introducing that evidence was just that – to have the jury hear Mason's testimony from the previous trial because Mason was not available to provide the testimony herself. And, as Henson readily admits, that testimony was subjected to cross-examination.

The second piece of evidence, the recorded conversation, which was not introduced at Henson's first trial, was introduced at Henson's retrial during the testimony of a police detective. As part of that testimony, the detective identified the callers and discussed the nature of the call. The State's purpose in introducing that evidence was to highlight statements made by Henson, one of which was an apparent threat directed at Mason, who, at the time, was set to testify at Henson's first trial. More to the point, although that evidence did concern Mason (as a party to the call and the subject of Henson's threat), it had no import whatsoever with respect to Mason's testimony from Henson's previous trial. In other words, aside from the fact that both pieces of evidence

involved Mason to some degree, each piece was quite distinct from the other, both in terms of the purpose for which it was admitted and the circumstances under which it was introduced to the jury.

Against that backdrop, Henson's arguments fall flat. Mason's prior testimony was made under oath, was subjected to cross-examination by Henson, and was introduced verbatim at Henson's retrial on the exact same charges and for the exact same reason as the first trial. Md. Rule 5-804(b)(1); *see also Williams v. State*, 416 Md. 670, 696 (2010) ("A motive to develop testimony is sufficiently similar for purposes of [Md.] Rule 804(b)(1) when the party now opposing the testimony would have had, at the time the testimony was given, 'an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue' now before the court.") (citations omitted). Consequently, the circuit court did not err in admitting it for that reason.

As for the recorded conversation, because it was admitted during the testimony of a police detective and not in conjunction with the admission of Mason's prior testimony, and because the contents of the recording were wholly unrelated to the subject of Mason's prior testimony, Henson's lack of opportunity to cross-examine Mason regarding the recording simply had no bearing on the admissibility of Mason's prior testimony.[2] If, on the other hand, Henson's desire to have Mason testify stemmed from his yearning to question her about the nature of the conversation and its effect on her, then he could have attempted to call her as a witness. Again, that Mason happened to

[2] Henson does not challenge the authenticity of the recording or the identity of the participants.

have testified at Henson's prior trial was of no consequence to the admission of the recorded conversation. Finally, to the extent that Henson is complaining that the admission of the recorded jailhouse phone conversation somehow violated his right to confront the participants as to the statements made during the call, that assertion is without merit, as such casual conversations are generally not considered "testimonial." *McClurkin v. State*, 222 Md. App. 461, 478-79 (2015) (holding that the Confrontation Clause does not prohibit the admission of recordings of casual phone conversations made by inmates while in jail), *cert. denied* 136 S.Ct. 564.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.