Circuit Court for Baltimore City
Case No. 104281054

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 130

September Term, 2019

CARL EMERSON-BEY

v.

STATE OF MARYLAND

Fader, C.J.,
Arthur,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: November 16, 2020

In 2018, appellant Carl Emerson-Bey ("Emerson-Bey") was convicted of first degree murder and use of a firearm in the commission of a felony or crime of violence. Emerson-Bey was sentenced to life in prison on the murder count, and twenty years consecutive on the use of a firearm count. On appeal, Emerson-Bey presents four questions for this Court's review, which we have rephrased slightly, as follows:

1. Did the circuit court violate Maryland Rule 4-215 and Appellant's constitutional right to self-representation?

2. Did the circuit court violate Appellant's constitutional right to a speedy trial?

3. Did the circuit court err in admitting a witness's prior statement under Rule 5-802.1(e)?

4. Was the evidence admitted at trial sufficient to support Appellant's convictions?

For the reasons set forth below, we affirm the circuit court.

BACKGROUND & PROCEDURAL HISTORY

On August 30, 2004, Jennie Emerson-Bey ("Ms. Emerson-Bey") was murdered as she entered her home on Biddle Street after work. Earlier that afternoon, Ms. Emerson-Bey's daughter, Tammy Malone, arrived around 2:00 p.m. to pick her mother up, and the two left the home after her mother activated the alarm system. Malone dropped her mother off at home shortly before midnight and remained in the car while her mother entered the house. Though the alarm system typically makes a noise when disarming it, Malone did not hear any noise. Malone then observed her mother motion to her as if to ask her to wait. As Ms. Emerson-Bey walked toward the dining room, Malone heard five

gunshots and saw flashes. After Malone entered the house, she observed that the back door in the kitchen was open. There were no signs of forced entry into the home.

Prior to her murder, Ms. Emerson-Bey and Emerson-Bey owned the Biddle Street home together. Emerson-Bey moved out in the beginning of July of 2004 due to infidelity but had not collected all of his belongings from the house. The day after Emerson-Bey moved out, Ms. Emerson-Bey changed the lock to the front door, but did not change the lock on the back door. The only people that had keys to the house were Emerson-Bey and Ms. Emerson-Bey. Ms. Emerson-Bey and Emerson-Bey were also the only two that had the code to disarm the alarm system. Though the two had reconciled to the point where Emerson-Bey drove her to work occasionally, he did not move back into the home.

Emerson-Bey was convicted of first degree murder of his wife and related weapons offenses in the Circuit Court for Baltimore City in 2005. He was sentenced in January 2006 to life imprisonment for the murder conviction and a consecutive twenty years for the use of a handgun in the commission of a crime of violence conviction. On July 31, 2017, Judge Frederick Motz of the United States District Court for the District of Maryland granted Emerson-Bey's petition for writ of habeas corpus and remanded the case for a new trial. Emerson-Bey's retrial took place in October of 2018. He was convicted of first degree murder and use of a firearm in the commission of a felony or crime of violence. Emerson-Bey was sentenced to life in prison for first degree murder and twenty years consecutive for the use of a firearm.

This timely appeal follows. We shall include additional facts as necessary in our discussion of the issues presented.

DISCUSSION

Emerson-Bey contends the trial court erred in four different ways and his convictions should be reversed. First, he alleges that the circuit court failed to comply with Maryland Rule 4-215 and violated his constitutional right to self-representation. Second, he argues that the circuit court violated his constitutional right to a speedy trial. Next, Emerson-Bey alleges that the circuit court erred in admitting a witness's prior statement and failing to make a finding of whether the memory loss suffered by the witness was real or feigned. Finally, Emerson-Bey argues that the evidence was insufficient to support his convictions.

I. THE CIRCUIT COURT DID NOT VIOLATE MARYLAND RULE 4-215 OR APPELLANT'S CONSTITUTIONAL RIGHT TO SELF-REPRESENTATION

Emerson-Bey contends that his convictions should be reversed because the circuit court failed to strictly comply with Maryland Rule 4-215 and violated his constitutional right to self-representation, specifically by failing to conduct an inquiry or allowing him to discharge counsel the first time he asserted it on January 24, 2018. The State argues that Rule 4-215 was not violated because Emerson-Bey's motion to discharge counsel was ultimately granted. The State also notes that the circuit court properly followed the requirements under Rule 4-215 by considering Emerson-Bey's written statements regarding the discharge of counsel and ultimately granted the relief he sought.

The Court of Appeals has held that "one cannot appeal from a favorable ruling." *Rush v. State*, 403 Md. 68, 95 (2008). Though Emerson-Bey's motion to discharge counsel was ultimately granted, he argues that the court refused to allow him to discharge counsel when he requested it, and thus allowing the court to postpone the case twice. We therefore will analyze whether the court properly complied with Rule 4-215.

To determine whether the trial court properly complied with Rule 4-215(e), we review its ruling *de novo*. *See State v. Weddington*, 457 Md. 589, 598-99 (2018). "The Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights guarantee that, '[i]n all criminal prosecutions,' the defendant shall have the right to counsel." *Laser Womack v. State*, 244 Md. App. 443, 450 (2020) (citing U.S. Const., amend. VI; Md. Decl. of Rights, art. 21; *Broadwater v. State*, 401 Md. 175, 179 (2007)). In an effort to protect the right to counsel, the Court of Appeals adopted Rule 4-215, "governing the waiver of counsel in criminal cases." *Womack*, 244 Md. App. at 451. "The function of the Rule is to ensure that the decision to waive counsel is made with eyes open and that the defendant has undertaken wavier in a knowing and intelligent fashion." *Id*. (Internal quotations and citations excluded).

Maryland Rule 4-215(e) provides:

> **Discharge of Counsel—Waiver.** If a defendant requests permission to discharge an attorney whose appearance has been entered, the court shall permit the defendant to explain the reasons for the request. If the court finds that there is a meritorious reason for the defendant's request, the court shall permit the discharge of counsel; continue the action if necessary; and advise the defendant that if new counsel does not enter an appearance by the next scheduled trial date, the action will proceed to trial with the defendant unrepresented by counsel. If the court finds no meritorious reason for the

> defendant's request, the court may not permit the discharge of counsel without first informing the defendant that the trial will proceed as scheduled with the defendant unrepresented by counsel if the defendant discharges counsel and does not have new counsel. If the court permits the defendant to discharge counsel, it shall comply with subsections (a)(1)–(4) of this Rule if the docket or file does not reflect prior compliance.

Emerson-Bey contends that he attempted to discharge counsel at both the January 24, 2018 hearing and the April 25, 2018 hearing, but the court refused to entertain the requests and postponed the case. Finally, on June 20, 2018 he was permitted to discharge counsel. Emerson-Bey contends that the court did not address his request to discharge counsel at the first two hearings and thereby violated Rule 4-215.

At the first hearing, both parties represented that they were making a mutual postponement request. Contrary to his defense counsel's representation to the court, Emerson-Bey opposed postponing the case. He specifically stated, "If it means a postponement, Your Honor, I'm not going to use counsel." He continued, "I don't need her representation if it warrants a postponement. I have everything I need to proceed." After considering Emerson-Bey's confusing request, the court determined that Emerson-Bey was actually stating that "if there's no postponement given, then [he] wouldn't [discharge counsel]." The court ultimately postponed the case, interpreting Emerson-Bey's request to discharge counsel to mean he would only discharge his attorney if that would prevent the postponement. Because a defendant must "clearly and unequivocally assert the right of self-representation," the court did not err in finding that Emerson-Bey's conditional request was not a clear and unequivocal assertion of the right of self-

representation. *Dykes v. State*, 444 Md. 642, 651 (2015) (Internal quotations and citations omitted).

At the second hearing, Emerson-Bey's counsel was absent due to sickness. Though Appellant stated he was a "pro se defendant," the court refused to hear his motion to discharge counsel without the presence of his counsel. The court reasoned that "[w]hen we come back to Court and [defense counsel] is here, we will entertain any motions you wish to strike her and proceed representing yourself if you can demonstrate a good reason, meritorious reason, to do that." The court continued that counsel needed to be there to answer questions about whether or not she represents him, and afforded Emerson-Bey the opportunity to present his motion at the next hearing after postponing the case due to his attorney's unavailability. The court did not err in postponing the matter until Emerson-Bey's counsel was present.

At the third trial date on June 20, 2018, with his attorney present, Emerson-Bey presented his motion to discharge counsel. Emerson-Bey referenced a letter he sent to the court in June of 2018 entitled "Discharge of Assistant Counsel and/or Replacement." The letter detailed Emerson-Bey's concerns with his counsel's deficiencies in representation and requested to have her replaced "with someone to assist me co-counsel as I Pro se my case." Emerson-Bey again stated that he would exercise his pro se rights "*if* counsel and I are not on the same page." (Emphasis added). The court ultimately permitted Emerson-Bey to discharge his attorney.

Emerson-Bey argues that the circuit court did not "ask him to state all of his reasons on the record" for asking for discharge of counsel. The court, however, read the entire letter into the record, which detailed Emerson-Bey's numerous reasons for discharging counsel. Rule 4-215(e) states the court "shall permit the defendant to explain the reasons for the request," but does not require a certain method of how the defendant must convey those reasons. Md. Rule 4-215(e). It is clear that the court addressed the reasons Emerson-Bey wished to discharge counsel, including her failure to interview witnesses, failure to file a motion to compel grand jury minutes, and her relationship with the State.

II. THE CIRCUIT COURT DID NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL

When assessing whether Emerson-Bey's right to a speedy trial was violated, "we make our own independent constitutional analysis." *Glover v. State*, 368 Md. 211, 220 (2002). "[W]e accept a lower court's findings of fact unless clearly erroneous." *Id*. at 221. To determine whether Emerson-Bey has been deprived of his right to a speedy trial, this Court evaluates the four factors set forth by the Supreme Court in *Barker v. Wingo*: "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." 407 U.S. 514, 530 (1972).

A. Length of Delay

We first analyze the length of the delay. After remand by a state appellate court, the speedy trial right begins when the mandate is issued. *See Coleman v. State*, 49 Md. App. 210, 220 (1981). The United States District Court for the District of Maryland

granted Emerson-Bey a new trial and issued the opinion on July 31, 2017. The trial ultimately began on October 3, 2018, approximately a fourteen month delay. The fourteen month delay triggers the speedy trial inquiry, however, the length of delay, "is the least determinative of the four factors that we consider." *State v. Kanneh*, 403 Md. 678, 690 (2008).

B. Reason for Delay

Next, the reason for delay should be allotted different weights:

> A deliberate attempt to delay the trial in order to hamper the defense should be weighted 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.

Id. (citing *Barker v. Wingo*, 407 U.S. 514, 531 (1972)).

In evaluating this factor, we address each postponement of the trial date. On January 24, 2018, the court docketed the postponement as a joint request because both the State and defense counsel were not ready for trial. The State was attempting to track down a witness from the prior trial and defense counsel needed time to investigate and prepare for trial. Emerson-Bey personally objected to the postponement, however he had not adequately requested to discharge counsel at this time. There is no evidence that the State "failed to act in a diligent manner" and thus this first postponement is "neutral and justified." *Kanneh*, 403 Md. at 690.

On April 25, 2018, defense requested postponement because defense counsel was sick. Despite Emerson-Bey objecting to the postponement and attempting to proceed that

day without counsel, the court granted the postponement request because counsel for the defendant was not available. The second postponement was the result of the unavailability of defense counsel and we determine this postponement is neutral.

On July 20, 2018, the State requested a postponement because it had discovered new material to disclose and wanted to ensure all material was disclosed directly to Emerson-Bey who had discharged counsel. Though this postponement was requested by the State, it was not in an attempt to stall the trial or harm the defense. Though we construe this reason for delay against the State, it is afforded little weight as it was in an effort to ensure Emerson-Bey had all necessary material to proceed to trial.

C. Assertion of Right

In *Barker*, the Supreme Court explained that:

> [t]he defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial."

Barker, 407 U.S. at 531-32. The Court also noted that we should "weigh the frequency and force of the objections." *Id.* at 529. In this case, both parties requested the first postponement, as they were not prepared for trial, despite Emerson-Bey's threats of discharge because he did not want a postponement. At the second postponement, Emerson-Bey again stated that he was ready to proceed with trial despite his counsel's absence due to illness. At the third postponement, Emerson-Bey objected to the postponement and wished to proceed to trial. During these hearings, Emerson-Bey

asserted his right to a speedy trial. We believe that this factor does weigh slightly in favor of Emerson-Bey.

D. Prejudice

The Supreme Court in *Barker* stated that prejudice "should be assessed in the light of the interests of defendants which the speedy trial was designed to protect." *Barker*, 407 U.S. at 532. The Court identifies three interests, including "(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*.

Appellant contends he was prejudiced because he would be unable to call his father as a witness due to his father's deteriorating medical condition, and that he was consistently incarcerated throughout the entire pre-trial delay. The State asserts that Emerson-Bey merely stated it would be more difficult for his father to testify, not that he would be unavailable to testify. The motions court found that the postponements on January 24, 2018, April 26, 2018, and June 20, 2018 were not an abuse of discretion. The court further found that the delay from June 20, 2018 until trial was not unreasonable or prejudicial by causing undue delay. We agree. Emerson-Bey did not suffer actual prejudice with respect to his father's testimony, as this would still have been admissible under Maryland Rule 5-804.[1] In *Coleman v. State*, this court determined that appellant

[1] Maryland Rule 5-804(c) permits former testimony by a witness if "(1) the witness has given testimony under oath; (2) the witness who gave the prior testimony is unavailable to testify; and (3) the accused had an opportunity to cross-examine the witness at the prior trial or hearing where the testimony was elicited." *Tyler v. State*, 342 Md. 766, 774

made "early and repeated assertion[s] of his speedy trial right" and was "incarcerated from the time of the mandate to the time of retrial," so the court held he was "prejudiced to some extent thereby." 49 Md. App. 210, 222 (1981). We agree that the length of time incarcerated may show prejudice to some extent, but Emerson-Bey did not suffer actual prejudice by the possibility that his father may have been unavailable to testify.

Under the circumstances evaluated, there is no evidence to suggest the State purposely delayed the trial or displayed any improper motive. The length of the delay may have tipped the scale slightly in favor of dismissal; however, the other three factors collectively weighed against the denial of the motion. Although Emerson-Bey did assert his right to a speedy trial, the reasons for the delay can be charged to both parties and he was not prejudiced by this delay. Having carefully considered each of these factors, under all of the circumstances surrounding this case, we hold that Emerson-Bey's constitutional right to a speedy trial was not infringed.

III. THE CIRCUIT COURT DID NOT ERR IN ADMITTING A WITNESS'S PRIOR STATEMENT

Emerson-Bey argues that the trial court erred in admitting Tiffany Jenkins' prior statement because the court failed to determine whether her memory loss was real or feigned. Jenkins was interviewed by police in 2005, and during that interview stated that she was in the alley near Ms. Emerson-Bey's home, heard gunshots, and saw a man come out of the back door of a house wearing a black and gold kufi. Jenkins also testified that

(1996). Emerson-Bey's father's testimony would be admissible under this rule as an exception to the rule for hearsay.

she knew the man, but admitted she was intoxicated, and did not identify Emerson-Bey in her statement or at trial. At trial, Jenkins testified that she had no recollection of her statement to police in 2005, but she properly identified her voice on the recording. The court admitted the statement under Maryland Rule 5-802.1(e), finding that "the witness has indicated that she currently has insufficient recollection to be able to testify fully and accurately, [and] that she recognizes her voice from April of 2005 when she spoke about the matter to detectives." Though Emerson-Bey did object to the admission of Jenkins' interview, he failed to raise this particular argument.

The Court of Appeals has previously held that the "review of arguments not raised at the trial level is discretionary, not mandatory." *State v. Bell*, 334 Md. 178, 188 (1994). Emerson-Bey cites to Maryland Rule 8-131(a) as the basis for preserving the issue. The court typically reviews an unpreserved issue "only after it has been thoroughly briefed and argued, and where a decision would[:] (1) help correct a recurring error, (2) provide guidance when there is likely to be a new trial, or (3) offer assistance if there is a subsequent collateral attack on the conviction." *Conyers v. State*, 354 Md. 132, 151 (1999). As this issue was not raised at trial, it is therefore unpreserved, and we decline to address the contentions.

IV. THE EVIDENCE ADMITTED AT TRIAL SUFFICIENTLY SUPPORTED APPELLANT'S CONVICTIONS

Emerson-Bey contends that there was insufficient evidence to support his convictions because the State's evidence failed to prove his agency. Specifically, he claims that the State failed to produce any evidence that he had disarmed the alarm or

entered the house. Emerson-Bey claims that his case relied solely on suspicion and conjecture.

The standard of review for determining whether sufficient evidence exists to support a conviction on appeal is whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier or fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Coleman*, 423 Md. 666, 672 (2011) (quoting *Facon v. State*, 375 Md. 435, 454 (2003)). The verdict must be supported with sufficient evidence, "that is, evidence that either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt." *State v. Albrecht*, 336 Md. 475, 479 (1994). Further, "[w]hen reviewing a non-jury trial for the sufficiency of the evidence, the judgment of the [c]ircuit [c]ourt will not be set aside on the evidence unless clearly erroneous and due regard will be given to the opportunity of the lower court to judge the credibility of the witnesses." *Brown v. State*, 234 Md. App. 145, 152 (2017) (Internal citations omitted).

Emerson-Bey specifically attacks the inference of agency that the court drew from the evidence. The circuit court made lengthy findings of fact, referencing witnesses and exhibits, and in relation to agency, the court found:

> "So, I find beyond a reasonable doubt that Mr. Emerson-Bey's own testimony has him leaving his home at the time of his wife's shooting. His nephew cannot say that he was home. Ms. Covington cannot say that he was home. Whoever shot Ms. Emerson-Bey was inside the home. The back door was open. It's reasonable to believe that Mr. Emerson-Bey still had his keys to the home. It's reasonable to believe that Mr. Emerson-Bey still has

> the alarm code to the home. The alarm does not go off. The person is inside the home. It's reasonable to believe that Mr. Emerson-Bey knows his wife['s] work schedule because until two weeks prior to her death, he transported her back and forth to work."

As cited above, the trial court reviewed and cited competent and material evidence to support the conclusion that Emerson-Bey was uniquely situated to enter the home through the back door with a key, and that he was the only other person to have the alarm code, which is significant because the alarm did not go off when Ms. Emerson-Bey entered her home after work. The court also considered the fact that Emerson-Bey likely knew her work schedule, as well as the fact that no witness could provide an alibi for Emerson-Bey, including his own testimony that acknowledged he was not at his father's house at the time of the murder. We hold that the findings of the trial court were not clearly erroneous, and Emerson-Bey's convictions were supported by sufficient evidence.

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