Circuit Court for Harford County
Case No. 12-K-17-000675

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 510

September Term, 2019

RUSSELL KURT JACOBS, JR.

v.

STATE OF MARYLAND

Fader, C.J.
Shaw Geter,
Greene, Clayton, Jr.
(Senior Judge, Specially Assigned)

JJ.

Opinion by Shaw Geter, J.

Filed: August 20, 2020

Appellant, Russell Kurt Jacobs, was convicted by a jury in the Circuit Court for Harford County of robbery with a dangerous weapon, robbery, theft of property valued between $1,000 to $10,000, and use of a firearm in the commission of a crime of violence. The court sentenced him to 40 years of incarceration, with all but 30 years suspended, and imposed 5 years of supervised probation. This timely appeal followed.

Appellant presents the following questions for our review:

1. Did the trial court err by denying appellant's speedy trial motion when, *inter alia*, he waited for twenty-three months in jail, the reasons for the delay all weighed in his favor, he asserted his constitutional speedy trial right multiple times throughout his pretrial hearings, and he suffered significant prejudice as result?

2. Did the trial court abuse its discretion by denying appellant's motion for mistrial when Detective Maddox testified that appellant could be linked to multiple, unrelated robberies?

For the reasons set forth below, we affirm.

BACKGROUND

On April 26, 2015, a robbery occurred at Sunoco gas station/convenience store located in Aberdeen, Maryland. The cashier, Chastity Apple, reported that the assailant had a handgun and demanded cash from the register. She complied, giving him approximately $1,200.00. She described the robber as a Caucasian male, approximately five feet seven-eight inches tall, who "wore a grey sweatshirt, black facemask, dark pants, and blue surgical gloves." When the robber left, "she locked the gas station's doors and called the police."

Officer Timothy Helf responded to the gas station and spoke to Apple. He then instructed other officers to canvass the area. A K-9 unit was dispatched to locate the

suspect, but was unable to successfully track beyond a business establishment nearby. Police recovered surveillance footage from the Sunoco and the 7-Eleven store across the street from the gas station.

The morning after the robbery, Jeff Foulk, a local resident, was discarding paper in a recycling bin at the St. Joan of Arc School when he observed a boot in the bin. He searched the bin and recovered a pair of boots, jeans, and a sweatshirt. He placed the items in a trash bag and took the bag to the police station. While there, Foulk consented to DNA testing. The detectives then went to the area where the bin was located to search for other items. They found a purple latex glove nearby. The items were analyzed by the Maryland State Police Laboratory and Bode Laboratory. While Foulk's DNA did not match DNA found on any of the items, appellant's DNA which was later collected, proved to be a match.

Appellant was indicted on the Sunoco gas station robbery on April 26, 2017, while incarcerated on unrelated charges. His trial was scheduled for August 25, 2017; however, no judge was available on that date and the case was postponed until December 14, 2017. On that date, inclement weather resulted in an insufficient number of residents appearing for jury duty and the trial was postponed until May 9, 2018. Because of court scheduling issues, appellant's motions hearing and trial could not go forward on May 9. The case was held over. However, the next day, May 10, 2018, no judge was available to conduct a hearing. The parties agreed to reschedule the matters and a new trial date was set for October 16, 2018. The court held a hearing on appellant's motion to suppression on June

20, 2018, and denied it. On October 3, the State provided appellant's attorney with the name of an additional witness, Michael Saunders, an inmate appellant was housed with at the detention center and who was also represented by the same local Public Defender's Office as appellant. This representation created a potential conflict of interest and a need to find outside counsel for the witness. Appellant's motion for a postponement, in order to panel out Saunders' case to private counsel, was granted by the court on October 16, 2018. A hearing on appellant's speedy trial motion was held on March 25, 2019. The court denied the motion and a jury trial was commenced thereafter.

The State's case consisted primarily of the testimony of the investigating detectives, the cashier, Saunders and several forensics personnel. Saunders testified that Jacobs confessed to "several robberies" and that he "robbed two stores" the night of the Sunoco robbery. He provided details about the amount of money taken in the robbery, clothing that was discarded in the recycling bin and appellant's desire to have the Good Samaritan "come up missing."

Detective Christopher Maddox, the lead investigator, testified that when he took a DNA swab from appellant, following his arrest, he asked appellant whether he wanted to talk about the case. Appellant replied "no" but stated that he had a question. Appellant asked, "why he was just being charged with the Riverside robbery?" Maddox stated, "[appellant] seemed not to understand why it was the Riverside robbery charge. So I said there were a total of six and at the time [he] stated yep. Then I explained that the clothing that was worn in the robberies was discarded during the last robbery." Appellant objected

to the testimony and moved for a mistrial, which the court denied. The judge ruled that because Saunders had testified previously, without objection, about several robberies, the "barn door" was opened. The judge instructed the jury, as follows:

> Ladies and gentlemen, you have heard some testimony, not only by this witness, but by the previous witness with regard to allegation of other crimes. I want to make clear to you that the [appellant] is on trial in this case for one robbery, the robbery of the Sunoco station. So, you are not to speculate with regard to the [appellant's] involvement in any other cases which are not before this jury today. So, you're only to consider the evidence in determining whether or not you believe that the State has met its burden beyond a reasonable doubt that the [appellant] is guilty of this particular robbery on this date in question.

Appellant was ultimately convicted and sentenced to 40 years of incarceration, with all but 30 years suspended, and 5 years of supervised probation.

Appellant noted this timely appeal.

DISCUSSION

I. The trial court did not err in denying appellant's speedy trial motion.

"Under the Sixth Amendment to the Constitution of the United States, '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial[.]'" *Phillips v. State*, 246 Md. App. 40, 55–56, 227 (2020) (quoting U.S. Const. amend. VI.). "Article 21 of the Maryland Declaration of Rights, [states] in all criminal prosecutions, every man hath a right . . . to a speedy trial[.]" *Id.* at 56 (internal quotations omitted). Whether a defendant was afforded a speedy trial is a mixed question of law and fact and is reviewed *de novo*; the reviewing court defers to the trial court's factual findings, unless they are clearly erroneous. *Greene v State,* 237 Md. App 502, 511 (2018). A reviewing court's

"determination must be made upon an overall view of the circumstances peculiar to each particular case, keeping in mind not only the rights of the defendant but also the interests of society." *State v. Bailey*, 319 Md. 392, 415 (1990). "Appellate review should be practical, not illusionary, realistic, not theoretical, and tightly prescribed, not reaching beyond the peculiar facts of the particular case." *Vaise v. State*, 246 Md. App. 188, 216 (2020) (quoting *Peters v. State*, 224 Md. App. 306, 359 (2015)).

When analyzing a denial of a speedy trial claim, we apply the four factor balancing test articulated by the Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 519–36 (1972), "noting that there is no bright-line rule to determine whether a defendant's right to a speedy trial had been violated[;] [w]e employ instead a balancing test in which we weigh 'the conduct of both the prosecution and the defendant.'" *Phillips*, 246 Md. App. at 56 (quoting *State v. Kanneh*, 403 Md. 678, 688 (2008)). The Court of Appeals has described the *Barker* analysis as follows:

> When the [pre-trial] delay is of a sufficient length, it becomes presumptively prejudicial, thereby triggering a balancing test[.] . . . The factors to be weighed are [l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. Because whether a period is presumptively prejudicial, or not, depends upon the length of a pre-trial delay, the first factor is to some extent a triggering mechanism.

Divver v. State, 356 Md. 379, 388 (1999) (quotation marks and citations omitted).

The Record

The record relevant to appellant's speedy trial motion is as follows:

April 26, 2017 Initial arrest and indictment

August 15, 2017	First trial date Case postponed: No judge available.	**(3 month, 20 day delay)**
December 14, 2018	Second trial date Case postponed: Insufficient number of jurors.	**(3 month, 29 day delay)**
May 10, 2018	Third trial date Case postponed: No judge available. Counsel agreed to a May 9, 2018 trial date. State's witness was unavailable to testify on that date, carried over to May 10, 2018. Motions hearing postponed until June 20, 2018	**(5 month delay)**
October 16, 2018	Fourth trial date Case postponed: Attorney conflict of interest, Defense request for postponement.	**(5month 6 day delay)**
March 25, 2019	Fifth trial date Hearing on Speedy Trial Motion. Motion denied, Jury trial held.	**(5 months 9 days)**.
		TOTAL DELAY **(23 months)**

Length of Delay

We first examine whether appellant's pre-trial delay was of sufficient length to trigger further analysis. If the length of delay is "presumptively prejudicial," inquiry into the remaining factors is required. The length of delay for speedy trial analysis "is measured from the date of arrest or filing of indictment . . . to the date of trial." *Divver*, 356 Md. at 388–89. A delay of more than one year triggers constitutional analysis, typically one year and fourteen days. *See Glover v. State*, 368 Md. 211, 223 (2002).

Appellant was indicted on April 26, 2017, and his trial commenced on March 25, 2019, resulting in a delay of one year, ten months, and 26 days, approximately 23 months.

The State concedes this delay is sufficient to trigger further Sixth Amendment scrutiny. We agree.

Reasons for the Delay

Regarding the second Barker factor, reasons for the delay, the Supreme Court observed:

> Closely related to length of delay is the reason the [State] assigns to justify the delay. [D]ifferent weights should be assigned to different reasons. 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.

Barker, 407 U.S. at 531.

In the present case, there were four postponements. Appellant's first trial date was August 15, 2017, three months and 20 days following his indictment. Trial was then postponed because no judge was available. The second assigned trial date was December 14, 2017 and again, the court was unable to proceed, this time because inclement weather caused an inadequate number of potential jurors to appear for court. May 9, 2018, was the next assigned date, and, on that date, no judge was available to hear appellant's motion to suppress and the attendant trial. A new trial date was scheduled for October 16, 2018. On that date, appellant's attorney notified the court of a conflict and the need for the Office of the Public Defender to panel out a case to private counsel. Appellant's trial was postponed a fourth and final time and scheduled for March 25–27, 2019.

In our review, of the four postponements, three were court delays because there was either no judge available to preside over appellant's trial or because of an insufficient number of potential jurors. We consider such court administrative postponements as inadvertent. They technically weigh against the State, but the weight accorded to them is less than that given to intentional delays. Appellant acknowledges that the delays "were not the result of any obvious malfeasance by the State" but insists, the State still bears responsibility. We agree and note, however, that we find nothing in the record to indicate that the State ever solely requested a postponement, or deliberately attempted "to delay the trial in order to hamper the defense." *Barker*, 407 U.S. at 531. Thus, we assign minimal weight to these delays.

The final postponement was properly charged to appellant as the Public Defender's Office was on notice in July 2017 of its potential conflict in representing both the State's witness and appellant. In total, of the 23 month delay, 14 months and 4 days are attributable to the State, but were a result of inadequate court resources, and 5 months and 9 days are charged to appellant. We find the initial 3 month, 29 day delay was neutral as this delay was required to allow for trial preparation, courtroom availability, staffing, juror notifications, etc. The delay was neutral as it was "necessary for the orderly administration of justice. . . ." *Ratchford v. State*, 141 Md. App 354, 361 (2001) (citing *Howell v. State,* 87 Md. App. 57, 82 (1991)). In analyzing the circumstances of the remaining postponements, which were mainly court administrative postponements, we find they do not weigh in favor of appellant's claim for dismissal.

Assertion of Right

The third Barker factor analyzes the defendant's responsibility to assert his right. *Barker*, 407 U.S. at 531.

> Whether and how a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain. The 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.

Id. at 531–32.

It is undisputed that appellant "consistently and forcefully asserted his speedy trial right." On August 25, 2017, at the first postponement hearing, appellant stated, "Your Honor, this case is two and a half years old . . . In almost an identical case, Ms. Manners . . . postponed my trial for a year only to dismiss the charges . . . I find this unjust and unconstitutional. I don't understand why we can't at least go by a bench trial today." Appellant continued to assert his right at least seven times throughout the various proceedings. This factor weighs in favor of appellant's claim.

Prejudice

The final and "'the most important factor in the Barker analysis is whether the defendant has suffered actual prejudice'" as a result of the delay. *Phillips*, 246 Md. App. at 67 (quoting *Henry v. State*, 204 Md. App. 509, 554 (2012)).

> Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (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. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.

Barker, 407 U.S. 532.

Appellant argues because of the delays, he was unable to prepare a defense and thus was prejudiced. He asserts his incarceration was oppressive, he suffered from anxiety as a result and his memory became foggy. Because the State was able to discover a witness following the May postponement, he argues he was prejudiced. If the trial had occurred when scheduled, "the witness would not have testified."

The impairment of a criminal defendant's defense is probably the most important interest to be protected. We have noted that the "most serious" prejudicial factor "is 'the last because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.'" *Phillips v. State*, 246 Md. App. at 67 (quoting *Barker*, 407 U.S. 532). Although a "demonstration of prejudice is not necessary . . . [i]f a defendant can show prejudice, he has a stronger case[.]." *Jones v. State*, 279 Md. 1, 16–17 (1976). Appellant has generally stated that his defense was impaired, but he has failed to describe or identify any witnesses who might have been called, a theory that could have been advanced or

developed by his attorney or a lack of information that impaired him. He actively assisted in his defense, sometimes interjecting himself into the proceedings by attempting to ask questions and assert arguments, yet he contends that he was unable to provide information or details necessary for his case, because of "fogginess." On this record, we cannot determine that he suffered an actual impairment. We also agree with the State that "the improvement of the State's case does not count as impairment of Jacob's defense."

Likewise, appellant's claim about oppressive pre-trial incarceration is unconvincing. When appellant was initially indicted on this case, he was incarcerated on unrelated charges and the record is unclear as to how or when those charges were resolved. Further, appellant bears some of the responsibility for his incarceration, as his bond was revoked in October 2018 because of his statements that he hoped to get out on bail so "he could make that witness disappear." In sum, we find no prejudice from the delay.

Having considered all the *Barker* factors, we conclude that appellant's constitutional right to a speedy trial was not violated. To be sure, appellant responsibly asserted his right to a speedy trial and the length of the delay was presumptively prejudicial. However, the reasons for delay do not weigh in appellant's favor and we find he suffered no actual prejudice.

II. The trial court did not abuse its discretion in denying appellant's motion for a mistrial.

An appellate court reviews a trial court's "ruling on a mistrial motion under the abuse of discretion standard." *Nash v. State*, 439 Md. 53, 66 (2014). "It is well-settled that a decision to grant a mistrial lies within the sound discretion of the trial judge and that the

trial judge's determination will not be disturbed on appeal unless there is abuse of discretion." *Simmons v. State*, 436 Md. 202, 212 (2013) (quoting *Carter v. State,* 366 Md. 574, 589 (2001)). Declaring a mistrial is an extreme remedy not to be ordered lightly. *See Burks v. State,* 96 Md. App. 173, 187 (1993) ("It is rather an extreme sanction that sometimes must be resorted to when such overwhelming prejudice has occurred that no other remedy will suffice to cure the prejudice.").

When it comes to inadmissible and prejudicial testimony, this court has identified several factors to be considered in determining "whether the evidence was so prejudicial that it denied the defendant a fair trial" that is, whether "the damage in the form of prejudice to the defendant transcended the curative effect of the instruction[.]" *Kosmas v. State,* 316 Md. 587, 594 (1989). We consider the following factors in determining whether a mistrial is required based on a reference to inadmissible evidence: "whether the reference . . . was repeated or whether it was a single, isolated statement;" if the statement was "solicited by counsel, or was an inadvertent and unresponsive statement;" whether the person testifying is a "principal witness upon whom the entire prosecution depends; whether credibility is a crucial issue; [and] whether a great deal of other evidence exists. . . ." *Rainville v. State*, 328 Md. 398, 408 (1992).

Appellant argues the trial court abused its discretion by allowing highly prejudicial evidence that implicated him in uncharged crimes to be presented to the jury. Detective Maddox's testimony regarding other robberies constituted "other crimes evidence" and

could only be cured by a mistrial. Conversely, the State argues the trial acted within its discretion.

We hold the court did not abuse its discretion in denying the motion for a mistrial. Detective Maddox's response to questioning was a single and isolated statement. Saunders had already testified, without objection, about his conversation with appellant, wherein appellant admitted to several robberies, including the Sunoco robbery. Further, there was ample evidence of appellant's involvement, including his forensic match with clothing worn during the robbery. Here, the trial judge was in the best position "to note the reaction of the jurors and counsel to inadmissible matters. That is to say, the judge ha[d] his finger on the pulse of the trial." *Jackson v. State*, 230 Md. App. 450, 467 (2016). The court's decision to provide a curative instruction was an adequate response to the potential of any unfair prejudice.

JUDGMENTS OF THE CIRCUIT COURT FOR HARFORD COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.