Circuit Court for Baltimore City
Case No. 115008027-028

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 914

September Term, 2016

OMAR MCGEE

v.

STATE OF MARYLAND

Meredith,
Reed,
Raker, Irma S.
(Senior Judge, Specially Assigned),
JJ.

Opinion by Raker, J.

Filed: August 31, 2018

Omar McGee, appellant, was convicted of first-degree murder, use of a handgun in the commission of a felony or crime of violence, unlawful possession of a firearm after a disqualifying conviction, and conspiracy to commit first-degree murder. He presents the following four questions for our review, which we have revised slightly:

> 1. Did the trial court err in denying appellant's motion to dismiss based on a *Hicks* violation?
>
> 2. Did the trial court deny appellant his constitutional right to a speedy trial?
>
> 3. Did the trial court err by allowing the prosecutor to elicit hearsay testimony?
>
> 4. Is the evidence insufficient to sustain appellant's conviction for conspiracy to commit first-degree murder?

Finding no error, we shall affirm.

I.

The Grand Jury for Baltimore City indicted appellant with crimes related to the homicide of Matthew Drake. The jury returned verdicts of guilty of first-degree murder, use of a handgun in the commission of a felony or crime of violence, unlawful possession of a firearm after a disqualifying crime conviction, and conspiracy to commit first-degree murder. The circuit court sentenced appellant to two concurrent life imprisonments and twenty years consecutive.

The following evidence was presented at trial: Baltimore City Police Detective Andrew Groman was on duty on July 4, 2014, when he received a call about a shooting. He arrived at the scene at the 3200 block of Chelsea Terrace, where he observed a male

lying face down in an east side alley, bleeding profusely and showing no signs of life. A paramedic pronounced the victim dead on the scene at 5:08 p.m. Assistant Medical Examiner Patricia Aronica found multiple gunshot wounds to the upper body of the victim. The victim was identified as Matthew Drake.

The police recovered seven spent 9mm shell casings, which were later determined to have all been fired from the same firearm. They found $460 on the victim. They also recovered a black and blue hat with the Orlando Magic logo on it. As part of his investigation, Detective Richard Moore determined that the suspected gunman had dropped the Orlando Magic hat.

Det. Moore obtained a surveillance video from the Bexx Market near the scene, which the State introduced as Exhibit 25B. Det. Moore testified that Exhibit 25B was the video he saw and observed. The video purportedly showed the following sequence of events: (1) the victim crossed the street as a "smoky gray" car entered the busy intersection, which Det. Moore believed to be a brown Infiniti M35; (2) the driver was not visible and was never identified; (3) the front passenger, wearing a black t-shirt, exited the vehicle, and bystanders started running for safety; (4) the front passenger went to the back of the car, where the victim was standing; (5) the victim set off running, and the front passenger began running toward the victim brandishing a gun; (6) the victim ran a short distance towards the alley, while the gunman chased the victim with his arm outstretched as he fired several rounds at the victim; (7) the driver waited in the intersection during the incident, which occurred over approximately eight seconds; (8) the victim fell to the ground, and the

gunman paused briefly to fire more shots at him; and (9) the gunman ran back to the car and entered the front passenger door, and the car drove away.

Det. Moore showed the surveillance video to police officers who patrol the Northwest District where the shooting occurred, and they identified two bystanders: Lavonte Bishop and Kendra Wilds. Det. Moore interviewed Ms. Wilds on July 28, 2014, and he showed her a photograph array containing six photographs. She identified the person in photograph number five, who was appellant, as the shooter. Ms. Wilds, in her recorded statement to the police, stated that she was near the victim when she saw a smoky gray or gold colored, four door Infiniti G35 car drive into the area near the Bexx Market. She saw a man get out of the passenger side of the car, position himself toward the rear of the vehicle, and start shooting. She described the shooter as a short and skinny man with a dark complexion who wore a black t-shirt and jeans. She saw his hat fall off, and she described his head as "beady ass."

Det. Moore requested the MVA records for the Infiniti he saw in the Bexx Market surveillance video, and the records showed that appellant owned a 2006 Infiniti. He located the car, a metallic brown or bronze color, at Cars Plus on Reisterstown Road and Woodland Avenue. MVA records described appellant as 6'2" and 179 lbs.

On July 30, 2014, Det. Moore interviewed appellant. During that interview, appellant identified himself on a citywide camera located at Saint Ambrose and Reisterstown Road on the day of the murder until approximately 4:47 p.m. At trial, Det. Moore explained that "the time that it takes to get from where [appellant] says he parked his vehicle that day, which was at 3415 Dupont Avenue, that it only takes seven minutes

to get from 3415 Dupont Avenue to Chelsea and Fairview, the 3200 block of Chelsea Terrace." Appellant acknowledged that he owned a brown four door Infiniti on July 4, 2014, but that he had sold it because he needed a larger vehicle. He denied taking any part in the shooting. He said that he went to a cookout on Maple Avenue with two men from the Park Heights neighborhood. During the interview, Det. Moore executed warrants to collect a DNA sample from appellant via oral swab and to search his residence, where a black shirt and black sneakers were recovered.

Appellant was in federal custody serving a sentence on an unrelated criminal case since the inception of this case. From January 1st, 2015 until June 1st, 2015, appellant was in Baltimore in the Chesapeake Detention Facility. Appellant was then sentenced by a federal court on unrelated charges and transferred to Cumberland, to Oklahoma, and then to Kentucky on November 1st, 2015.

Appellant was indicted by the Grand Jury for Baltimore City on January 8, 2015. Defense counsel entered her appearance on February 3, 2015. On February 12, 2015, defense counsel waived appellant's appearance, the arraignment became a scheduling conference, and the parties agreed upon a trial date of April 2, 2015. On April 2, 2015, appellant was not transported to the court despite the proper paperwork having been filed by the State. The State requested a postponement, explaining that the State had a preliminary report of a DNA sample done by an out-of-state lab but had not received the full report requested. The administrative judge found good cause to postpone the case and set a new trial date of May 29, 2015. Defense counsel did not challenge the administrative

judge's finding. On May 19, 2015, both parties requested advance postponement, which the docket entry indicates as follows:

> "[D]ef[ense] attorney [is] not available that time frame, nor primary detective. Both attorneys are available the week of 7/27–7/31 and request 7/27/15 as new trial date."

The reasons for postponement were "Defense attorney unavailable" and "State witness unavailable." The trial date was reset for July 27, 2015. On July 27, 2015, appellant was not brought to the court, and the State requested a postponement because the prosecutor assigned to this case was not available due to another trial starting on July 28, 2015. The parties selected a new trial date. The administrative judge then found good cause for postponement and set a new trial date of August 25, 2015. Defense counsel did not object to the postponement. On August 25, 2015, appellant was not transported to the court. The State requested a postponement because the prosecutor was unavailable, a State witness was unavailable, and the State needed further investigation. In addition, the State noted that it was engaged in discussions with federal authorities regarding "the possibility of a proffer session."[1] Defense counsel objected to any postponement and asserted appellant's speedy trial rights. The administrative judge did not explicitly rule on defense counsel's objection and proceeded to set a new trial date. On October 16, 2015, appellant was transferred to a Maryland state facility, from which he was brought to the hearing that day. The State requested a postponement because a State witness was unavailable and because

[1] In a proffer session, ordinarily, a criminal defendant offers information to a prosecutor in negotiations for a plea deal. The transcript suggests that the State had a proffer session with a potential witness in this case.

the State did not have the discovery document related to a newly found witness. The administrative judge found good cause for a postponement over defense counsel's objection. At the time of the December 7, 2015 hearing, federal authorities had transferred appellant to Kentucky, and the State could not bring him to the court. The State requested to postpone the trial as long as possible because the State expected it to "take a lot" to get appellant from federal custody, and a State witness was not available. Defense counsel objected, stressing that "*Hicks* did pass in August." The administrative judge found good cause for postponement. On February 22, 2016, the parties jointly requested a postponement because both parties needed further investigation. Defense counsel maintained that she needed more time to review the cooperating witness's grand jury testimony and discuss the developments in the case with appellant. The administrative judge found good cause for postponement. On April 15, 2016, appellant was not transported. The court held a hearing, at which time the defense counsel explained that although the parties had requested that the matter be specially set, neither the State nor the defense had heard back from the court regarding the trial date. The administrative judge found good cause for postponement, ruling that the trial date of April 15, 2016, had been set in error.

Appellant's trial started on June 1, 2016. At the beginning of the trial, the trial court denied defense counsel's motion to dismiss for a violation of speedy trial, stating as follows:

> "All right. I've considered the arguments of Counsel and the applicable law. I find that the delay of constitutional dimension. . . . It's two years old, but Counsel entered her

> appearance on February the 3rd, I think, of 2015, and I find that the delays of constitutional dimension.
>
> Having sat in this Court for over 20 years, I recognize the difficulties in assigning cases for trial and the postponements that become necessary because of the tremendous volume, a volume that I believe does not exist in other counties of this State, having sat on the Court of Special Appeals for 13 years and having seen, to some extent, the volume of cases from other jurisdictions.
>
> You have delays caused by the State because of witnesses not being available and you have delay by the State because trial counsel not being available. These, of course, are assigned against . . . the State. Then you have delays caused by mutual agreement.
>
> The Defendant in the case has continuously exercised his demand for a speedy trial. Then prejudice of being incarcerated is not singularly attributable to this case. Part of it is attributable to him having been sentenced by the United States authorities and having had him move to Cumberland, Oklahoma and then Kentucky, and of course, we know he was brought up here from Kentucky yesterday.
>
> There have been findings by the appropriate trial judges of good cause for the delays. Weighing the various reasons for the delays and the length of the delays, I do not find that the Defendant was denied his right to a speedy trial. I am, of course, relying, as Counsel knows, on the case of *Barker v. Wingo*[, 407 U.S. 514 (1972)], which I think is the primary authority for this. So the motion is denied."

The State brought Ms. Wilds to court pursuant to a body attachment order to testify. In her trial testimony, Ms. Wilds denied knowing the victim, insisted that she was under the influence of drugs at the time of the shooting, and maintained that she did not participate in a videotaped interview where she identified appellant as the gunman from the photograph array. Throughout her testimony, Ms. Wilds claimed that the person seen in the video was her twin sister. The State called Det. Moore, who authenticated that Ms. Wilds was the person shown in the interview footage. Det. Moore testified that Ms. Wilds

had never indicated that she had a twin sister and that she had completed and signed an information sheet attesting that she was not under the influence of drugs or alcohol at the time the photographic identification was conducted. The State then introduced the interview video into evidence.

The State also called Dwayne Haskins to testify. Mr. Haskins, a member of the Black Guerrilla Family criminal organization, testified that he had been in federal custody after pleading guilty to armed bank robbery and was awaiting sentencing. Mr. Haskins indicated that he was facing eighty years in federal prison when he agreed to testify on behalf of the State in exchange for a shortened sentence. According to Mr. Haskins, under the terms of the agreement, he could potentially serve seven years in federal custody and then enter the Witness Protection Program.

Mr. Haskins testified that in January 2015, about six months after the murder, while he and appellant were both incarcerated in the same federal facility, appellant informed him that he had a "gun case." According to Mr. Haskins, appellant confessed the murder to him during a later conversation. Mr. Haskins testified that during this conversation appellant asked him about the potential presence of DNA evidence on a hat. According to Mr. Haskins, he and appellant discussed the hat several times, as the hat was "a major problem" for appellant, and he was "very concerned" about it. Mr. Haskins identified appellant in court as the person who had confessed to the shooting. The pertinent part of Mr. Haskins's testimony is as follows:

> "[THE STATE]: Okay. Now, when you talked to him in the yard, what was that conversation about?

[MR. HASKINS]: When I talked to him in the yard, he said, do you—I think—he said—well, he explained to me what had happened in the case as far as—as far as the murder, right? 'Cause he was tellin' me that . . . he believed—

[THE STATE]: Hold—hold on just a second. This is a conversation in the yard?

[MR. HASKINS]: Yes.

[THE STATE]: He's telling you what happened?

[MR. HASKINS]: Yes.

[THE STATE]: Did he show you any documents this time?

[MR. HASKINS]: No.

[THE STATE]: Okay. So at that time, what did he tell you?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[MR. HASKINS]: He told me that—

[THE STATE]: Please tell the ladies and gentlemen of the jury.

[MR. HASKINS]: He was explainin' to me that—what had took place because he had said that he had dropped his hat. He was explainin' to me exactly what took place the day of the murder, right? And he—

[THE STATE]: Well, what exactly did he say took place?

[MR. HASKINS]: He said that he had drove over to Garrison, the other side of Park Heights and he got out of his car and that he had—he had ran down the dude who he was—who the hit was on and he said that the guy tried to run and he—he chased him down and he shot him. He stood overtop of him and he did him dirty. That was the terminology he used, that he did him dirty.

[THE STATE]: Now, what does doing dirty mean or what is—what's that terminology mean? What did you understand that to mean?

[MR. HASKINS]: It means he shot him, that he shot him up a lotta times.

[THE STATE]: In any particular part of the body?

[MR. HASKINS]: He said to the head.

[THE STATE]: And you said that he ran up on the person the hit was on. Did you know that person?

[MR. HASKINS]: No.

[THE STATE]: Did he ever tell you the guy's name?

[MR. HASKINS]: No, I don't know him.

[THE STATE]: You don't know the guy that he hit?

[MR. HASKINS]: No, no.

[THE STATE]: Okay. So he's told you that much of the story that day. Any more details?

[MR. HASKINS]: Yeah. So then he said that—he was askin' me, he said he had dropped his hat or—an Orlando magic hat and he was concerned whether or not the DNA—if they got the hat would the DNA be in—could DNA be found outta that. And I told him yeah, they could get DNA out of it, I say, but all you gotta do is tell 'em that you was—you was out there and when the shootin' started you just ran and your hat came off. That's what I told him, that's all he gotta do is say that, right? And, you know, we discussed it a little more, talkin' about, you know, different—he was tellin' me that it was some comrades who was out there who had a—he believed that they gave a statement against him and he wanted me to try to call and find out what they had said and try to get that taken care of. And I was tellin' him that I couldn't do it at that time, but when—when one of the other brothers left, that were all left,

> that I would call Mike Gray and try to get it taken care of. But I never got the chance to do it."

On cross examination, defense counsel questioned Mr. Haskins regarding the cooperation agreement and the reduced sentence he was promised in exchange for his testimony against appellant. Mr. Haskins acknowledged that his reduced sentence depended on his testimony in this case.

The State also introduced forensic evidence connecting appellant to the Orlando Magic hat recovered at the scene. David Morehead, a Baltimore City Police Department Crime Lab Technician, testified that he collected and processed evidence related to the shooting, including the Orlando Magic hat, which was submitted for DNA testing. Virginia Cates, a forensic scientist with the Baltimore City Police department, testified that she received the hat in accordance with department procedures and collected epithelial cells from the interior sweat band area. Thomas Hebert, a DNA analyst with the Baltimore City Police department, testified that he tested a sample of epithelial cells from the interior of the hat, as well as the comparison sample collected from appellant via oral swab. Mr. Hebert, who was qualified to testify as an expert in DNA analysis, explained that the results were "indeterminate" because there was a mixture of DNA from multiple contributors in the evidence sample collected from the hat. Because of the inconclusive finding, Mr. Hebert sent the data to Cybergenetics, an independent laboratory, for additional processing.

Dr. Mark Perlin, Chief Scientific Officer and Chief Executive of Cybergenetics, testified as an expert in DNA analysis and to his company's system for interpreting DNA mixtures and other evidence. Dr. Perlin explained that as part of the data interpretation

process, the Cybergenetics computer program separates the genotypes for each genetic contributor in the sample, then makes a comparison to known contributors to generate a match statistic. Analysis of the DNA sample data taken from the Orlando Magic hat indicated that there were at least three and probably four or five contributors of DNA. Based upon the data analysis, Dr. Perlin concluded that a match between the hat and appellant is twenty trillion times more probable than a coincidental match to a random African American person. On cross examination, Dr. Perlin testified that the Baltimore City Police Department provided two reference samples, including appellant's, to compare to the hat, and that appellant was statistically included as a match while the other was statistically excluded. Dr. Perlin testified that he was not asked to identify the other contributors to the DNA sample.

Appellant did not testify. The jury returned a guilty verdict on all four counts. The trial court sentenced appellant to the following terms of incarceration: life imprisonment from December 19, 2014, for first-degree murder; life imprisonment concurrent for conspiracy to commit first-degree murder; twenty years consecutive for use of a firearm in the commission of a felony or crime of violence, first five years without parole; and five years concurrent for unlawful possession of a firearm after a disqualifying conviction, first five years without parole. This timely appeal followed.

II.

Before this Court, appellant contends that the trial court erred in denying his motion to dismiss the charges based upon a *Hicks* violation, denying his motion to dismiss the

charges based on a violation of his constitutional right to a speedy trial, permitting the prosecutor to elicit hearsay testimony, and in denying his motion for judgment of acquittal based upon insufficiency of the evidence to convict for conspiracy to commit first-degree murder.

III.

Denial of Motion to Dismiss for *Hicks* Violation

We address first appellant's argument that the trial court erred in denying his motion to dismiss the charges because the State failed to try him within 180 days in violation of what is known in Maryland as the *Hicks* rule. Specifically, he claims that the State failed to bring him to trial within 180 days of the appearance of his counsel in the circuit court, in accord with Maryland Rule 4-271. He argues that the administrative judge's findings of good cause for postponements were an abuse of discretion.

The State does not contest appellant's contention that appellant's trial commenced after the 180-day period, but contends that the court did not abuse its discretion when it found good cause for postponement on July 27, 2015, the only critical continuance in this case. We agree with the State.

Rule 4-271(a) and its statutory counterpart, Maryland Code, Criminal Procedure, § 6-103, require a criminal trial in the circuit court to commence within 180 days after the earlier of appearance of counsel or the first appearance of the defendant in circuit court, *unless* the case is postponed by the administrative judge for good cause. In instances where the State fails to bring the case to trial within the 180-day period and good cause has not

been established, "dismissal of the criminal charges is the appropriate sanction." *State v. Hicks*, 285 Md. 310, 318 (1979).

The administrative judge's decision to postpone a trial beyond the *Hicks* date is within the court's wide discretion, and the decision carries a "heavy presumption of validity." *Fields v. State*, 172 Md. App. 496, 521 (2007). When reviewing an administrative judge's decision to postpone trial beyond the 180 days, this Court "shall not find an absence of good cause unless the defendant meets the burden of demonstrating either a clear abuse of discretion or a lack of good cause as a matter of law." *State v. Frazier*, 298 Md. 422, 454 (1984). Not to be forgotten or overlooked, "[t]he critical postponement is the one that extends the trial date beyond the *Hicks* deadline." *Moody v. State*, 209 Md. App. 366, 373 (2013).

Appellant urges this Court to consider the administrative judge's good cause findings at the February 12, 2015, and April 2, 2015, postponement hearings, asserting that the State's failure to transport him to court contributed to the delay causing the case to be tried outside of the 180-day deadline. He argues that "[i]f the trial had begun as scheduled on April 2, 2015, there would have been no violation of the 180-day rule." In the same vein, he contends that his not being transported to court on July 27, 2015, August 25, 2015, December 7, 2015, and April 15, 2016, caused "actual prejudice because of his attorney's compromised ability to communicate and share information with him prior to trial" and contributed to an additional ten-month delay of trial beyond the *Hicks* deadline.

This argument is without merit. The Court of Appeals has made it clear that since "the dismissal sanction is intended to further the goal of the prompt disposal of criminal

cases at the circuit court, applying it to postponements other than the critical one does not further that goal and, thus, is inappropriate." *State v. Brown*, 355 Md. 89, 108 (1999) (citation omitted).

The parties agree that the *Hicks* date in this matter was August 1, 2015. On July 27, 2015, the case was postponed at the request of the State and a new trial date was set after August 1, 2015, making that the critical postponement for *Hicks* purposes. The State requested the continuance because the prosecutor assigned to the case was in trial in another case. At the hearing, the administrative judge accepted that the prosecutor assigned to the case was currently in trial. The court instructed both parties to "[s]tep over and get a date," and counsel discussed the matter off the record before selecting a new trial date. At the conclusion of the hearing, the administrative judge found good cause for postponement and set a new trial date of August 25, 2015. At no time did defense counsel object to the postponement.

We find no abuse of discretion or error in the administrative judge's finding that the unavailability of the assigned prosecutor because of his trial schedule conflicts constituted good cause for a postponement. *See State v. Toney*, 315 Md. 122, 131 (1989) (noting that "the unavailability of a prosecutor does not, as a matter of law, constitute a lack of good cause for a postponement"). In *Frazier*, the Court of Appeals noted the impact of overcrowded dockets and prosecutor trial conflicts as they bear on *Hicks* concerns, stating as follows:

> "When overcrowded dockets are due in part to shortages of judges, prosecuting attorneys, public defenders, supporting personnel, or facilities, it must be remembered that public

> resources are not unlimited and there are many competing demands upon public funds. Moreover, even if there were no deficiencies in the number of judges, prosecutors, public defenders, etc., overcrowded docket situations are sometimes inescapable. As earlier explained, the nature of any reasonable scheduling system and the inherent lack of certainty concerning the number of cases which will be fully tried or the length of trials, will on occasions lead to overcrowded dockets.
>
> The Circuit Court for Baltimore City has implemented a thorough and entirely reasonable system for the scheduling of criminal cases."

298 Md. at 457–58. We hold that the administrative judge did not abuse his discretion or err in continuing the case beyond *Hicks*'s 180 days.

Denial of Motion to Dismiss for Violation of Right to Speedy Trial

Appellant contends that the trial court erred in denying his motion to dismiss for violation of his constitutional right to a speedy trial. The State, conceding that the seventeen-month delay that occurred in this case is of sufficient length to trigger further analysis, maintains that the lower court denied the motion to dismiss properly because the reasons for the delay were either neutral or did not weigh heavily against it in the ultimate analysis. We agree with the State.

The right of an accused to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution, as well as by Article 21 of the Maryland Constitution Declaration of Rights. We review the trial court's ruling on a motion to dismiss for violation of the right to a speedy trial *de novo*. *Howard v. State*, 440 Md. 427, 446–47 (2014); *Glover v. State*, 368 Md. 211, 220–21 (2002). "We perform a *de novo*

constitutional appraisal in light of the particular facts of the case at hand; in so doing, we accept a lower court's findings of fact unless clearly erroneous." *Glover*, 368 Md. at 221.

In *Barker v. Wingo*, 407 U.S. 514, 530 (1972), the United States Supreme Court set forth a balancing test to analyze defendant's claims of denial of speedy trial. *Peters v. State*, 224 Md. App. 306, 359 (2015); *see also State v. Kanneh*, 403 Md. 678, 687 (2008). The *Barker* 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. *Peters*, 224 Md. App. at 359–60. No single *Barker* factor, considered in isolation, is sufficient to establish that a defendant's speedy trial rights have been violated; "[r]ather, they are related factors and must be considered together with such other circumstances as may be relevant." *Id.* at 360 (internal quotation marks and citation omitted). No bright-line rule determines whether a defendant's right to a speedy trial has been violated, but we apply the *Barker* balancing factors, in which the conduct of both the State and the defendant are weighed. *Id*. at 359–60.

Length of Delay

Appellant was indicted for first-degree murder, conspiracy to commit first-degree murder, and related charges on January 8, 2015, and his trial began on June 1, 2016, a delay of approximately seventeen months.

In addition to serving as a threshold for *Barker* analysis, the length of delay is also the first factor considered by *Barker*. *See Ratchford v. State*, 141 Md. App. 354, 358 (2001) ("The 'length of delay' between arrest and trial is a term of art that serves two separate and

distinct functions in a speedy trial analysis. In its first function, it identifies the threshold that must be crossed before any further analysis is called for.") We measure the length of delay "from the day of arrest or filing of the indictment, information, or other formal charges to the date of trial." *Randall v. State*, 223 Md. App. 519, 544 (2015) (quoting *Divver v. State*, 356 Md. 379, 388–89 (1999)). Of the four factors, the length of delay is the least determinative. *Kanneh*, 403 Md. at 689–90. It is "heavily influenced by the other three factors, particularly that of 'reasons for the delay,'" and "[i]t may gain weight or it may lose weight because of circumstances that have nothing to do with the mere ticking of the clock." *Ratchford*, 141 Md. App. at 359.

Here, the delay of nearly seventeen months, while sufficient to trigger constitutional speedy trial analysis, is not "so overwhelming . . . as to potentially override the other factors." *Glover*, 368 Md. at 224–25. As the Court of Appeals noted in *Glover*, "the delay that can be tolerated is dependent, at least to some degree, on the crime for which the defendant has been indicted." *Id.* at 224. In *Glover*, the Court found that a fourteen-month delay "was not an inordinate delay for a murder case involving complex DNA evidence." *Id.*

Appellant's case involved allegations that he, along with an unidentified individual, conspired to commit and did commit first-degree murder. Moreover, the State relied upon DNA evidence to connect appellant to the crime scene, which required independent laboratory analysis to interpret an evidence sample with multiple DNA contributors. Considering the nature and seriousness of the charges and the complexity of the DNA evidence, the seventeen-month delay in this case weighs minimally against the State.

Reason for Delay

When considering the reasons for the delay, the weight that an appellate court should assign in favor of either the State or the defendant depends on the particular reason given. While "[a] deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the [State,] . . . negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered." *Barker*, 407 U.S. at 531.

Appellant was indicted on January 8, 2015, and the case was originally scheduled for trial on April 2, 2015. This initial eighty-four-day delay for pre-trial preparation is accorded neutral weight and is not charged to the State in the overall *Barker* analysis, as "[t]he span of time from charging to the first scheduled trial date is necessary for the orderly administration of justice." *Howell v. State*, 87 Md. App. 57, 82 (1991).

The first postponement was requested by the State on April 2, 2015, because of the unavailability of DNA test results. The State explained that an independent out-of-state laboratory analyzed the DNA data and that the State had yet to receive the full report or share the report with the defense pursuant to its discovery obligations. Defense counsel made no objection to the postponement, and the administrative judge found good cause to postpone the trial date to May 29, 2015. We charge the fifty-seven-day delay to neither party because "[w]here, as here, a postponement is the result of the unavailability of DNA evidence, and there is no evidence that the State failed to act in a diligent manner, the grounds for postponement are essentially neutral and justified." *Kanneh*, 403 Md. at 690.

The record reflects that the next postponement hearing was set for May 19, 2015, based upon a mutual request for advance postponement. The reason listed on the request was "def[ense] attorney not available that time frame, nor primary detective," while the docket entry states the reason for the postponement as "set in error." The trial was reset for July 27, 2015. We characterize the reason for this fifty-nine-day delay, requested by both parties, as largely neutral.

On July 27, 2015, the State requested a postponement due to the unavailability of the prosecutor, who was engaged in another trial. Defense counsel did not object. The court found that the unavailability of the prosecutor constituted good cause to postpone the trial and continued the case to August 25, 2015. This twenty-nine-day delay caused by the unavailability of the prosecutor is charged to the State; we do not, however, weigh it heavily. *See Toney*, 315 Md. at 131.

Then, on August 25, 2015, the State requested a postponement because the prosecutor and a witness were unavailable. In addition, the State noted that it was engaged in discussions with federal authorities regarding "the possibility of a proffer session" with someone besides appellant, presumably gathering evidence for this case. Defense counsel objected to the postponement, asserting appellant's speedy trial rights. The administrative judge granted the postponement over defense counsel's objections, and trial was set for October 16, 2015. This fifty-two-day delay to pursue evidentiary developments in the case is charged to the State, although we do not weigh this postponement heavily against it. *See id.* at 133 (discovery of new evidence constitutes good cause for postponement).

On October 16, 2015, appellant was transported to the courtroom from the federal facility where he was incarcerated on unrelated charges. The State, however, requested a postponement because it had discovered a cooperating witness and was still investigating that witness's testimony. The prosecutor also had two weeks of vacation during that time. The administrative judge granted the continuance over defense counsel's objection, and trial was rescheduled for December 18, 2015. We charge this sixty-three-day delay to the State, but we do not weigh forty-nine days of the postponement heavily against it because "a valid reason, such as a missing witness, should serve to justify appropriate delay." *Barker*, 407 U.S. at 531. The remaining fourteen days of the prosecutor's vacation are fully charged against the State. *See Powell v. State*, 56 Md. App. 351, 361 (1983).

On December 7, 2015, the parties convened for a hearing regarding the State's request for a postponement and for the case to be specially set. This was because of the need for arrangements to transport appellant from a federal facility in Kentucky back to Maryland and also because a State witness was not available. The court granted the State's request for a postponement over the defense's objections, and the case was specially set for February 29, 2016. We charge this seventy-three-day delay to the State and weigh it fully against it because it knew appellant was in federal custody before the previous postponement and made no arrangements to transport him for trial. *See id.* at 361–62.

On February 22, 2016, both parties filed a mutual request for postponement because defense counsel needed more time to review the cooperating witness's grand jury testimony and discuss the developments in the case with appellant. The trial court found

good cause to continue the case and continued it to April 15, 2016. We conclude that this forty-six-day delay, requested by both parties, was neutral.

On April 15, 2016, the court held a postponement hearing, at which time defense counsel explained that although the parties had requested that the matter be specially set, neither the State nor the defense had heard back from the court regarding the trial date. The court found good cause for the postponement, concluding that the April 15, 2016, trial date had been set in error, and the delay was charged as "administrative." Trial was then set for June 1, 2016. We charge this forty-seven-day delay against neither party. Trial then began as scheduled on June 1, 2016.

Cumulatively, of appellant's 510-day delay, 217 days are attributable to the State (87 fully, 130 not heavily), 189 days to both parties, and 104 days to administrative error or valid causes. This factor weighs against the State and in favor of dismissal, but lightly, because appellant does not allege that the State acted in bad faith or with less than reasonable diligence.

Assertion of Speedy Trial Right

The third *Barker* factor concerns "the defendant's responsibility to assert his right." *Barker*, 407 U.S. at 531. This factor is "closely related" to the other three, and "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. Here, the docket entries indicate that appellant first asserted his right to a speedy trial early in the proceedings, on February 3, 2015, at the time defense counsel entered her appearance. He continued to assert his right at the conclusion of the motions

hearings on August 25, 2015, October 16, 2015, and December 7, 2015, when the State asked for and received postponements. Appellant clearly asserted his right to a speedy trial.

Prejudice

In analyzing the fourth *Barker* factor, we consider whether the delay impacted the interests that the right to speedy trial was designed to protect: "(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.* at 532. Appellant asserts a violation of the most serious of these interests, namely, that his defense was impaired because he was not transported from federal custody to court on multiple occasions. Appellant does not claim any specified prejudice against his defense (e.g., memory fading, lost documents, or witness unavailability), but that the delay is "presumptively prejudicial," as "what exculpatory information may have been brought to light had the defendant been able to meet with counsel more frequently and assist in the investigation and preparation of his defense is simply unknowable."

At the hearing on the motion to dismiss, defense counsel maintained that "trial preparation has been difficult as a result of [appellant's] presence in federal custody, but most importantly, he's been denied the opportunity to be in court at each and every critical stage and that would be each and every trial date that was postponed and he wasn't here." The State, on the other hand, asserted that appellant's absence was never a reason for postponement of his trial dates, as "the reasons for the postponements were always

independent." The prosecutor also described the State's efforts to transport appellant to every hearing, explaining, "We would issue writs. They wouldn't be honored." The trial court denied the motion to dismiss, explaining, "The prejudice of being incarcerated is not singularly attributable to this case. Part of it is attributable to him having been sentenced by the United States authorities and having had him move to Cumberland, Oklahoma and then Kentucky, and of course, we know he was brought up here from Kentucky yesterday."

Turning to appellant's assertion of a "presumption of prejudice," in *Randall*, this Court considered whether the reasons and length of pre-trial delay were sufficient to warrant shifting the burden to prove a lack of prejudice to the State. 223 Md. App. at 554–55. In that case, Randall argued that her speedy trial rights were violated where her trial was delayed for twenty-five months, and sixteen months of the delay were attributable to the State's inability to serve her with an arrest warrant in Arizona. *Id.* at 546. We concluded that "the delay [] did not flow from bad-faith or inexcusable neglect" where "the State's pursuit of [Randall] was made with reasonable diligence" and held that that the delay did not give rise to a presumption of prejudice. *Id.* at 556. Moreover, we concluded that "so long as the State acts with reasonable diligence, and absent any specific prejudice to the defense's case, a speedy trial claim fails 'however great the delay.'" *Id.* (quoting *Doggett v. United States*, 505 U.S. 647, 656 (1992)). We then assigned the prejudice factor neutral weight in the *Barker* analysis. *Id.* at 557.

Relying on *Randall*, we conclude that the delay in this case was not presumptively prejudicial where the State made diligent efforts to secure appellant's presence in court by issuing the necessary writs, which were not complied with by other authorities. Further,

defense counsel did not allege grounds, nor was evidence presented during the motions hearing, to substantiate any actual prejudice to his defense. Thus, we assign this factor neutral weight.

Balancing

In balancing the four *Barker* factors, we hold that there was no violation of appellant's constitutional right to a speedy trial. Of the total delay of nearly seventeen months, approximately 217 days, or seven months, are attributable to the State. However, the reasons for the delay do not weigh heavily against the State, particularly where there is no evidence that the State engaged in intentional delay tactics or acted in bad faith. The lack of prejudice (actual or presumed) to appellant and the State's good faith and reasonable diligence in pursuing the prosecution outweigh the length of the delay and appellant's assertion of his right to a speedy trial. *See id.* at 556. Accordingly, the circuit court properly denied the motion to dismiss.

IV.

Appellant contends that the trial court erred in permitting Mr. Haskins, appellant's fellow inmate, to testify as to hearsay, namely, appellant's statement that he had shot and killed the victim. The State asserts that appellant's claim is not preserved, and further, if preserved, is meritless, as the statement was admissible under the hearsay exemption for statements made by a party-opponent.

The State argues that this issue is not preserved for our review because appellant did not object when the prosecutor asked Mr. Haskins "what exactly did he say took place." The State further argues that it is not preserved for our review because defense counsel did not move to strike the testimony after Mr. Haskins testified as to what appellant had told him.

Rule 8-131(a) provides that, except for issues pertaining to subject matter and personal jurisdiction, "the appellate court will not decide . . . [an] issue unless it plainly appears by the record to have been raised in or decided by the trial court." In order to preserve an objection to the admission of evidence, a party is required to object "at the time the evidence is offered . . . [o]therwise, the objection is waived." Rule 4-323(a).

Here, defense counsel objected when the State asked the witness, "What did he tell you?" and the court overruled the objection. While appellant did not again object when the State asked again "what exactly did [appellant] say took place," it is apparent that defense counsel objected to the admissibility of this highly prejudicial evidence. We hold that appellant did not waive his objection based upon a failure to object a second time.

On the merits, Mr. Haskins' testimony was admissible under Rule 5-803(a)(1)—although an out-of-court declaration, it is admissible as a statement by a party-opponent. The Rule provides that "[a] statement that is offered against a party and is . . . [t]he party's own statement, in either an individual or representative capacity" is "not excluded by the hearsay rule." *See also State v. Payne*, 440 Md. 680, 709 (2014).

This Court, in *McClurkin v. State*, 222 Md. App. 461 (2015), examined the admissibility of recorded jailhouse telephone calls and concluded that such statements are

admissible against a defendant under the hearsay exception for statements made by a party-opponent. We explained, however, that to qualify for admission into evidence, "the statement must have been 'made, adopted, or authorized by a party or that party's agent or coconspirator'; it must be 'offered in evidence against that party by an opposing party . . .'; and, 'as with all evidence, the statement must be relevant to a material fact.'" *Id.* at 483 (citation omitted). Appellant's jailhouse conversation with Mr. Haskins met all the elements articulated in *McClurkin*—namely, it was a statement made by appellant, which was offered by the State, and was relevant to prove that appellant shot and killed the victim. We find no error or abuse of discretion.

V.

Appellant argues that the evidence was insufficient to support the judgment of conviction for the offense of conspiracy to commit first-degree murder. He claims that the State presented no evidence that he and the unidentified driver of the Infiniti had entered into an agreement to carry out the shooting that caused the victim's death, and hence, that the evidence is insufficient to sustain this conviction. We disagree.

This Court, in reviewing a challenge to the sufficiency of the evidence, applies the test of "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 486 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The Court of Appeals, in *Corbin v. State*, 428 Md. 488 (2012), explained that circumstantial

evidence alone can support a conviction so long as the evidence supports a finding of guilt, explaining as follows:

> "Circumstantial evidence is sufficient to sustain a conviction, but not if that evidence amounts only to strong suspicion or mere probability. Although circumstantial evidence alone is sufficient to sustain a conviction, the inferences made from circumstantial evidence must rest upon more than mere speculation or conjecture."

Id. at 514.

Common law conspiracy is defined as follows:

> "[T]he combination of two or more persons to accomplish some unlawful purpose, or to accomplish a lawful purpose by unlawful means. The essence of a criminal conspiracy is an unlawful agreement. The agreement need not be formal or spoken, provided there is a meeting of the minds reflecting a unity of purpose and design."

Mitchell v. State, 363 Md. 130, 145 (2001). As this Court said in *Darling v. State*, 232 Md. App. 430 (2017), for the State to meet its burden of proof, "it is sufficient if the parties tacitly come to an understanding regarding the unlawful purpose. In fact, the State was only required to present facts that would allow the jury to infer that the parties entered into an unlawful agreement." *Id.* at 467.

Appellant complains that the State failed to provide "direct proof that [he and the unidentified driver] had entered into an agreement to carry out the crime of first degree murder." This contention, however, ignores the principle of law that "a conspiracy may be shown by circumstantial evidence, from which a common design may be inferred." *Mitchell*, 363 Md. at 145 (citation omitted).

The central question here is whether the evidence is sufficient to prove that appellant reached a "meeting of the minds" with another person to commit first-degree murder. The State introduced surveillance video that showed a "smoky gray" Infiniti, registered to appellant but driven by an unknown individual, entering the intersection as the victim crossed the street, then coming to a complete stop as appellant exited the passenger door. The victim ran, and appellant chased him and shot him. As everyone else in the immediate vicinity ran for safety, the driver waited in the intersection for approximately eight seconds while appellant fired several rounds at the victim and then hastily returned to the car. Only after appellant was safely inside the vehicle did the driver of the Infiniti leave the scene. This evidence was sufficient to convince a rational trier of fact that appellant and the driver, who waited for him to carry out the shooting and then transported him away from the crime scene, had entered into an agreement to shoot and kill the victim. Accordingly, we hold that there was sufficient evidence to sustain appellant's conviction for conspiracy to commit first-degree murder.

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