Circuit Court for Montgomery County
Case No. 138660C

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND

No. 1028

September Term, 2023

TREVON PRAYLOW

v.

STATE OF MARYLAND

Arthur,
Reed,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned)

JJ.

Opinion by Reed, J.

Filed: September 19, 2025

On May 1 through May 4, 2023, the Circuit Court for Montgomery County conducted a jury trial for Appellant, Trevon Praylow ("Appellant"). The State of Maryland ("State") charged Praylow with: (1) theft of U.S. currency over $100,000; (2) malicious destruction of property; and (3) fraudulent misappropriation by a Fiduciary. On May 5, 2023, the jury found him guilty of theft and malicious destruction of property, from which Appellant files this timely appeal.

In bringing his appeal, Appellant presents two questions for appellate review:

I. Did the trial court err in concluding that Appellant's constitutional right to a speedy trial was not violated?

II. Did the trial court err in declining to give requested jury instructions relating to the misappropriation by a fiduciary charge and to the order in which the jury should consider the charges during deliberations?

For the reasons outlined below, we affirm the decision of the Circuit Court.

FACTUAL & PROCEDURAL BACKGROUND

On December 22, 2020, a Brinks Security ("Brinks") messenger retrieved $124,087 from the Filipino Market and Café ("Filipino Market"), located along Route 355 in Rockville, Montgomery County. Appellant was charged with being the messenger who picked the money up from Filipino Market, retained it, and did not return it to Brinks. For this action, Appellant was charged and tried for theft of over $100,000, malicious destruction of property,[1] and fraudulent misappropriation by a fiduciary.

Testimony offered at trial proved that the Brinks Company collects liabilities

[1] This charge related to allegation that wires to a surveillance camera on Appellant's Brinks vehicle that were cut that day. Appellant was convicted on this charge and that charge is not independently on appeal here.

requested by the customers, which includes cash, jewelry, or other valuable items. Pick-ups are completed by either a messenger on their own or a messenger with a driver. Most safes containing the liabilities for pick-ups needed two keys, one held by the store owner, and one held by the messenger.

A messenger begins their day by picking up a scanner from the central Brinks facility that has their stops for the day. With those stops, the messenger gets into an assigned truck and completes their pick-ups before returning to the facility with the liabilities they collected. A daily guide sheet also shows the preauthorized stops assigned to a messenger. Once the scanner leaves the building, new stops cannot be added to it. If a new stop needs to be added, the messenger is contacted by phone or text. There is a holdover form used to document this additional pickup. The trucks are equipped with GPS monitoring devices and cameras to allow managers to monitor their employees.

Appellant also presented evidence at trial about Brinks' practice of adding stops to routes after messengers left the facility that the scanner did not list. Other drivers described how this could happen a few times a month or they would arrive for a pickup that another driver had already collected.

When the Brinks messengers return to the central office, they check their liabilities into a vault and another employee checks them out before they leave. This checkout involves looking at any bags the messenger had, to ensure that they did not leave with anything that did not belong to them.

On December 22, 2020, Appellant worked alone as both the driver and the messenger. Appellant's guide sheet showed that he departed the Brinks facility at 7:53 a.m.

and checked out at 6:51 p.m. The guide sheet did not include a stop at the Filipino Market. The evidence showed that Appellant picked up a liability at a Navy ATM between 9:33 and 9:39 a.m. and then arrived at a supermarket at 10:14 a.m. with no assigned stop between them. A GPS unit on the truck showed that the Appellant's truck stopped on Route 355 where the Filipino Market was located between these two stops. Appellant returned to the facility at the end of the day, and other employees later found out that the cameras on his truck had been cleanly cut. When Appellant was seen at the facility at the end of the day, he had several shopping bags.

Another Brinks employee, Shaven McNeil, had Filipino Market listed on her guide sheet. When she went to Filipino Market, she was informed by the store's employee that another Brinks employee had been by earlier in the day and collected $124,087 from the store. A receipt generated by the safe showed that the money was collected around 9:52 a.m. that day. She reported the issue with the pickup. A Brinks branch manager reported that there was no holdover form or documentation form the Appellant that he submitted verifying the pick-up from Filipino Market. The liability from Filipino Market from that day could not be located.

Filipino Market's owner, Joie Rumingan, identified the Brinks messenger from December 22, 2020 as the Appellant. The Appellant opened the safe, took the liability, and gave the owner a receipt for the money. Later that day, Ms. McNeil arrived for her scheduled pickup, and she took a photo of that receipt. Normally Brinks came by once or twice a week to pick up liabilities. Mr. Rumingan did not recall requesting any special service on December 22, 2020.

On December 23, 2020, Appellant told a manager that he was resigning that day. In the months after December 2020, Appellant had a total of $43,000 deposited into his various accounts. In January 2021, Appellant financed a new 2021 Hyundai Palisade Calligraphy, worth $49,225, using a $10,000 down payment. When officers executed a search warrant on Appellant's other vehicle, they found $10,000 in the back of the car in a bag and another $5,600 in the armrest.

On January 11, 2021, charges were filed against Appellant for theft and malicious destruction of property, and he was arrested on February 4, 2021. Additional facts related to the time period between Appellant's arrest and trial and events that occurred at trial will be provided as they relate the specific arguments discussed below.

DISCUSSION

I. Denial of a Speedy Trial

A. Parties' Contentions

In his brief, Appellant argues that his constitutional right to a speedy trial was denied based on the delays between charges being filed and his eventual trial date. Prior to trial, Appellant filed a demand for a speedy trial, followed by a motion to dismiss for a lack of speedy trial. After a hearing, the court denied the Appellant's motion. Just prior to trial on May 1, 2023, Appellant renewed the motion and was again denied. Appellant challenges the decision.

Appellant argues that this was a simple theft and misappropriation case that did not justify the delay Appellant experienced. The reasons for the delay should be weighed against the State due to delays from the pandemic and scheduling issues. The Appellant

asserts he suffered prejudice from these delays despite his continual assertions of his rights. Appellant asks this Court to find that the lower court erred in denying the motion to dismiss and order the indictment against Appellant to be dismissed as a result.

The State argues that the delays were not sufficient to rise to the level of a denial of the right to a speedy trial. The State agrees the length of delay triggers the analysis but does not weigh heavily towards dismissal. They also assert that the reasons for delay do not weigh heavily towards dismissal. Appellant's demands for a speedy trial were not extraordinary and the Appellant did not sufficiently show prejudice to his defense. The State says that the lower court's decision should be upheld as a result.

B. Standard of Review

In reviewing the lower court's judgment on a motion to dismiss for lack of a speedy trial, the appellate court will conduct its 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.

C. Analysis

The right of an accused to a speedy trial is guaranteed by the Sixth Amendment of the United States Constitution, made applicable to the states through the Fourteenth Amendment, along with Article 21 of the Maryland Declaration of Rights. *See, e.g.*, *Nottingham v. State*, 227 Md. App. 592, 613 (2016) (citing *State v. Kanneh*, 403 Md. 678,

687 (2008)).[2]

The Supreme Court set out a balancing test to determine whether an accused's right to a speedy trial has been violated in *Barker v. Wingo*. 407 U.S. 514 (1972); *see also Glover*, 368 Md. at 221 ("We consistently have applied the *Barker* factors when considering alleged violations of both the Sixth Amendment of the United States Constitution and Article 21 of the Maryland Declaration of Rights."). The Court identified four factors to consider: "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Barker*, 407 U.S. at 530. "[N]one of the four factors" are "either a necessary or sufficient condition to the finding of a deprivation of the right of a speedy trial." *Id.* at 533. Instead, the factors are related and must be considered with any other relevant circumstances. *Id.* In order to apply the balancing test, it must first be shown that the delay must be of a sufficient length to trigger a speedy trial analysis. *Id.*; *see also Kanneh*, 403 Md. at 687.

TIMELINE

The parties do not dispute the timeline of events in this case, presented below:

February 4, 2021	Appellant is arrested on a warrant that was filed on January 11, 2021, and is charged in the District Court of Montgomery County.
February 5, 2021	Appellant is released on bond.
February 26, 2021	Appellant makes a demand for a speedy trial in the District Court.

[2] The 6th Amendment of the United States Constitution states: "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." 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 by an impartial jury . . . ." Md. Decl. of Rights, art. 21.

July 15, 2021	The State files a new indictment in the Circuit Court for Montgomery County.
August 2, 2021	Appellant makes a second demand for a speedy trial in the Circuit Court.
August 6, 2021	Appellant's trial in the Circuit Court is scheduled for January 3, 2022.
November 16, 2021	Appellant files a supplemental motion to dismiss for violation of speedy trial rights.
December 16, 2021	Circuit Court holds a hearing for a motion to dismiss for a violation of speedy trial rights.
December 20, 2021	Circuit Court denies Appellant's motion to dismiss.
January 4, 2022	Circuit Court postpones trial to February 4, 2022.
February 14, 2022	The court postpones trial to September 12, 2022 based on COVID-19 emergency.
August 31, 2022	The prosecution files a motion to move the trial date based on the unavailability of an essential witness.
September 13, 2022	The court grants the continuance, but Appellant is unable to attend the initially proposed date, and trial is scheduled on May 1, 2023.
May 1, 2023	Appellant renews his motion to dismiss for lack of a speedy trial, which the court denies.
May 1, 2023	Appellant's trial begins.
May 5, 2023	Appellant is convicted after jury trial.

Based on this timeline, this analysis will now discuss the four *Barker* factors.

1. The Length of Delay

The first *Barker* factor is the length of the delay. The length of delay alone "is not a weighty factor" but is significant for its connections to the other factors. *Glover*, 368 Md. at 225.The length is measured from the date of arrest, or the filing of indictment, information, or formal charges, whichever is earlier, until the date of trial. *United States v. Marion*, 404 U.S. 307, 320–21 (1971); *see also In re Thomas J.*, 372 Md. 50, 73 (2002). The Supreme Court held that the Speedy Trial Clause does not apply "after the Government acting in good faith, formally drops charges." *Greene v. State*, 237 Md. App. 502, 513

(2018) (quoting *United States v. MacDonald*, 456 U.S. 1, 7 (1982)). The State acts in good faith when it terminates a prosecution when it "does not intend to circumvent the speedy trial right, and the termination does not have that effect." *State v. Henson*, 335 Md. 326, 338 (1994). The speedy trial clock will then start anew from the filing of the new charging documents. *Greene*, 237 Md. App. at 513.

The start of Appellant's delay will be July 15, 2021. Appellant was arrested on February 4, 2021 based on charges filed in the District Court. The State nol prossed the charges filed in the district court and filed three new charges in the Circuit Court on July 15, 2021. These were the charges actually brought to trial on May 1, 2023. The Appellant does not allege bad faith on the State's part in filing new charges in the Circuit Court of Montgomery County, noting the new charges being filed and recognizing the trial court chose the later date in starting the timeline.[3] The trial court measured the delay starting from on the July 15, 2021 charges. Both parties used this same timeline for their analysis.[4] As a result, the length of delay will be measured starting on July 15, 2021.

Starting from July 15, 2021, there was a delay of a year, nine months, and sixteen days, or 655 days, until the trial commenced on May 1, 2023. A delay of this length will be presumptively prejudicial. *Glover*, 368 Md. at 223 (finding that "a pre-trial delay greater

[3] Additionally, the Circuit Court found that there was no bad faith in filing the new indictment and transferring the case.

[4] The State explicitly uses this timeline, starting the 655-day period from July 15, 2021. Appellant does not necessarily concede the start date, arguing both the date of the arrest and the date of the new charges. Appellant does cite to *MacDonald* and *Henson* in a footnote and does not dispute that these cases would apply (such as through a showing of bad faith). As a result, this 655-day time frame will be used for the analysis.

than one year and fourteen days was presumptively prejudicial on several occasions") (internal quotations removed) (collecting cases finding this presumption to apply). However, that length alone does not necessarily violate the right to a speedy trial by itself without an examination of the other factors. *Id.* at 224–25 (finding that a fourteen-month delay "requires constitutional scrutiny" but is "not so overwhelming . . . as to potentially override the other factors"); *see also Randall v. State*, 223 Md. App. 519, 557–58 (2015) (finding that a twenty-five month delay triggered scrutiny but was not a violation of the speedy trial right when weighed against the other factors); *Hayes v. State*, 247 Md. App. 252, 304–05 (2020) (collecting Maryland cases with longer delays not found to be violations). Therefore, the length of the delay is sufficient to trigger the constitutional analysis.

The other component in this first factor is "the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim." *Greene*, 237 Md. App. at 512 (citing *Doggett v. United States*, 505 U.S. 647, 652 (1992)). This requires analyzing whether the delay was proper in light of the charges facing the defendant. *Barker*, 407 U.S. at 531 ("[T]he delay that can be tolerated for an ordinary street crime is considerably less than a serious, complex conspiracy charge."); *see also Glover*, 368 Md. at 224 ("[T]he delay that can be tolerated is dependent, at least to some degree, on the crime for which the defendant has been indicted."). In *Divver v. State*, the Supreme Court of Maryland held that a delay of twelve months and sixteen days was "uniquely inordinate" for a "run-of-the-mill" case for driving under the influence of alcohol. 356 Md, 379, 390 (1999); *see also Schmitt v. State*, 46 Md. App. 389, 391 (1980) (finding that the

case involved "the common garden variety of burglary and larceny of an apartment" and therefore an eight month delay was sufficient to trigger constitutional analysis). By contrast, in *State v. Kanneh*, a thirty-five month delay was tolerated in part because it was a complicated child abuse case involving the presentation of DNA evidence. 403 Md. 678, 689 (2008); *see also Howard v. State*, 440 Md. 427, 447–48 (2014) (finding a twenty-eight month pretrial delay did not violate the speedy trial right in a complex rape case involving DNA evidence).

Appellant argues that his case "did not involve much complexity" and this factor should therefore be weighed against the State. While this case did not involve the complexity of DNA testing or forensic evidence, it also was not a "run-of-the-mill" case as in *Divver*. The case was heard over a four-day jury trial. The State called ten witnesses to the stand, and the defense called five witnesses. The State entered over fifty pieces of evidence. The explanation of how the Appellant did his work and whether or not he was involved in theft required a complex explanation. Given this case's complexity, the delay was not improper on its face, and we must turn to the rest of the factors to determine whether. there was a violation of the Appellant's right to a speedy trial.

2. The Reason for the Delay

The second *Barker* factor is the reason for the delay. The *Barker* court created categories of reasons for delay and how a court should weigh them, where "[a] deliberate attempt to delay the trial" will weigh heavily against the government; more neutral reasons like "negligence or overcrowded courts" weigh less heavily but still weigh against the government because they are the government's responsibility to manage; lastly, valid

reasons, like "a missing witness," can justify an appropriate delay. *Barker*, 407 U.S. at 531. Additionally, "reasons for delay attributable to neither party receive neutral weight." *Berryman v. State*, 94. Md. App. 414, 421 (1993) (citing *Jones v. State*, 279 Md. 1, 367 A.2d 1 (1976), *cert. denied*, 431 U.S. 915 (1977)). Based on these categories, we will analyze each delay that occurred before Appellant's trial.

The first span of time is from Appellant's indictment on July 15, 2021 to the first scheduled trial date on January 3, 2022. This span will be accorded neutral weight because it "is necessary for the orderly administration of justice." *Howard*, 440 Md. at 448 n.16 (quoting *Lloyd v. State*, 207 Md. App. 322, 330 (2012), *cert. denied*, 430 Md. 12 (2013)); *see also Howell v. State*, 87 Md. App. 57, 82 (1991) ("The span of time from charging to the first scheduled trial date is necessary for the orderly administration of justice, and is accorded neutral status.").[5]

The next span of time is from January 3, 2022 until September 12, 2022 after the court delayed the trial based on the Chief Judge Getty's Administrative Order Restricting Statewide Judiciary Operations in Light of the Omicron Variant of the COVID-19 Emergency.[6] The State contends this delay is "plainly neutral." The Appellant contends this delay "cannot be attributed to the defense."

[5] Even if the timeline were to begin from the initial arrest date of February 4, 2021, the initial months would still be accorded neutral weight. Appellant's first trial date was scheduled for July 29, 2021. The State dropped those initial charges before Appellant's scheduled trial, so those first months still fall within the time needed for the orderly administration of justice that is accorded neutral status.

[6] There are two different delays in this span. There was a one-month delay from January 3, 2022, when the trial was originally scheduled, to February 14, 2022. Then on

Appellant cites *Kurtenbach v. Howell*, arguing that the pandemic does not create an exception to Constitutional principles. 509 F. Supp. 3d 1145, 1152 (D.S.D. 2020) However, that decision was made because the state courts in South Dakota were trying to "take advantage" of their own failures to implement COVID-19 security measures, which caused the delays in trials. *Id.* By contrast, the Maryland judiciary took proactive actions to ensure that trials kept happening despite the pandemic, through administrative orders regarding courtroom closures, remote hearings, and limited courtroom openings.

The other case cited by Appellant, *State v. Labrecque*, stated the proposition that the government still had the burden to bring the defendant to trial, even in the face of the pandemic. 249 A.3d 671, 680 (Vt. 2020). *Labrecque* then found that the delay was not intentional or unwarranted and therefore the delay weighed against finding a due process violation. *Id.* at 681. In this case, the government met that burden as Appellant was brought

February 10, the court moved the trial date from February 14, 2022 to September 12, 2022. The one-month delay does not have a reason provided by the court and does not appear to be made at the request of either party but was made while a motions hearing was set for January 14, 2022 for motions related to expert witnesses. While not in the record, on January 3, 2022, Montgomery County experienced a large snowstorm that deposited multiple inches of snow on the area and likely closed the courts. *See* Jason Samenow, *Region's biggest snowstorm in three years ends, leaving more than 500K customers without power*, WASH. POST (Jan. 3, 2022) https://www.washingtonpost.com/weather/2022/01/03/dc-snow-winter-storm-warning/. Neither party makes arguments addressing the initial one-month delay so we will not incorporate that delay into our analysis.

Additionally, Chief Judge Getty's order was lifted in April of 2022. *Maryland Judiciary returns to normal operations; exits five-phased COVID-19 resumption of operations plan*, GOV'T RELS. AND PUB. AFFS. (Mar. 28, 2022), https://www.courts.state.md.us/media/news/2022/pr20220328. Appellant's case was already rescheduled by that point under the order so the analysis will not change for the April to September period of time.

to trial. The delay from the COVID-19 pandemic was neither intentional nor unwarranted and should weigh against finding a violation based on *Labrecque*. The delays caused by the COVID-19 pandemic are the fault of neither party, but rather a necessity to respond to an ongoing public health crisis. Therefore, we find that the delays caused by the COVID-19 pandemic are neutral and not attributable to either party.

The third span of time is from September 12, 2022 until January 9, 2023, which was caused by the unavailability of a prosecution witness. A missing witness is a valid reason for an appropriate delay. *Barker*, 407 U.S. at 531. As a result, this delay will not be held against the government.

The final span of time was from January 9, 2023 until the trial on May 1, 2023. After the prosecution witness was unavailable, the trial court attempted to reschedule the trial. January 9, 2023 was proposed but that date did not work for the Appellant, resulting in the trial being scheduled for the next free date on May 1, 2023. Overcrowded courts, including the delays caused by the COVID-19 pandemic, should be considered against the government because the government has "the ultimate responsibility for such circumstances." *Barker*, 407 U.S. at 531. However, these would be more neutral reasons that weigh less heavily against the government, rather than a deliberate attempt to delay the case.

The delays in Appellant's case arise largely due to neutral reasons. No delays arose because of deliberate attempts at delay that would weigh heavily against the government. As a result, the overall delays may weigh only slightly against the State.

3. The Assertion of the Right to a Speedy Trial

The third *Barker* factor examines the defendant's assertion of their right to a speedy trial. The assertion of the right is "entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." *Barker*, 407 U.S. at 531–32. This factor allows a court "to weigh the frequency and force of the objections as opposed to attaching significant weight to a purely *pro forma* objection." *Id.* at 529 *see also State v. Ruben*, 127 Md. App. 430, 443 (1999).

In *Jules v. State*, the appellant made three demands for a speedy trial during the sixteen months before trial. 171 Md. App. 458, 486 (2006). There was a demand made shortly after the appellant's indictment and then two additional demands when the state entered a *nol pros* on the indictment and when the state re-indicted the appellant. *Id.* at 485–86. The court held that the frequency of these demands was not "extraordinary." *Id.* However, since the appellant did not just stand "idly by without registering his objections" this Court determined that the factor still weighed "lightly in favor of dismissal." *Id.* at 486. The Court concluded that the appellant's demands "were not constant and strident for long periods of time in between" the three demands for a speedy trial. *Id.* at 488.

There is a similar time frame and frequency of demands in this case. Following Appellant's arrest, Appellant first asserted his demand for a speedy trial on February 26, 2021. After the July 15, 2021 indictment moved the case to the circuit court, the Appellant filed a second motion to dismiss on August 2, 2021. This led to a hearing on November 18, 2021 for a speedy trial where the motion was denied. Lastly, on May 1, 2023, the first day of trial, the Appellant moved to dismiss again where the trial judge heard arguments before denying the motion and proceeding with trial. Over the nearly two years before trial, there

were only three motions to dismiss. The fact that Appellant asserted the right and had hearings on them shows they were not merely *pro forma* objections and the assertion is entitled to weight in the analysis. However, the repeated assertions did not rise to "extraordinary" levels and as in *Jules* this factor will only weigh slightly in favor of dismissal. 171 Md. App. at 486.

4. Prejudice to the Defendant

The final *Barker* factor is whether the delay caused any prejudice to the defendant. There are three interests the *Barker* court identified: "(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," with the final factor being the most serious one. *Barker*, 407 U.S. at 532. Maryland courts have emphasized that an impaired defense is the most important factor in the analysis. *Phillips*, 246 Md. App. at 67 (citing *Henry*, 204 Md. App. at 554). The lack of actual prejudice is given great weight in this analysis. *Wilson v. State*, 148 Md. App. 601, 639 (2002) ("[W]e accord great weight to the lack of any significant prejudice resulting from the delay.")

The first factor does not apply, as the Appellant was released on bail after he was arrested and was not incarcerated prior to trial. The Appellant claims the second two factors do apply. For the second factor, appellant "suffered anxiety and concern as he waited two years to have his day in court."

In *State v. Bailey*, the appellant asserted that in the two years he was waiting for trial, he "lived with the anxiety and concern naturally caused by a pending prosecution." 319 Md. 392, 417 (1990). The court said that this "bald statement" has little significance

for showing prejudice. *Id.* Actual prejudice from the anxiety and concern requires more than an assertion the appellant has had constant anxiety. *Glover*, 368 Md. at 230. Intangible factors will only prevail "if the State's sole basis for postponements is a crowded docket." *Id.* at 230; *see also Divver*, 356 Md. at 392–93 (quoting *Barker*, 407 U.S. at 537 (White, J., concurring)) (citing *Barker*'s analysis that personal factors such as anxiety should prevail "if the *only* countervailing considerations offered by the State are those connected with crowded dockets and prosecutorial case loads") (emphasis added). Appellant here has only asserted a bald claim of anxiety and concern. This is the exact kind of assertion that courts have continued to give little weight without a particular proffer of prejudice. Without more details, this anxiety and concern will not weigh heavily in favor for the Appellant, if at all.

For the third factor, Appellant argues the defense was impaired because "witnesses were losing their memories and the fact[s] were becoming dimmer." The Supreme Court recognized that there is prejudice from witnesses being unable to recall events in the more distant past accurate. *Barker*, 407 U.S. at 532. Additionally, memory loss may not always be "reflected in the record because what has been forgotten can rarely be shown." *Id.* But the Supreme Court later said in *United State v. Marion* that the "possibility of prejudice at trial is not itself sufficient reason to wrench the Sixth Amendment from its proper context" because any delay inherently has possible prejudice and can weaken both sides' cases. 404 U.S. 307, 321–22 (1971). This possibility of prejudice is not enough, and the Appellant

needs to meet the burden of showing actual prejudice.[7] *Phillips v. State*, 246 Md. App. 40, 67 (2020). The failure to show actual prejudice will weigh against the defendant. *Id.* (citing *Wilson v. State*, 148 Md. App. 601, 639 (2002)).

The Appellant did not point out any impairment to the defense with particularity. The Appellant broadly stated that "witnesses were losing their memories" without stating any memories that may have been lost or how lost memories would have impaired the defense. It is true that the record may not always show memory loss, but that does not relieve the Appellant's burden of showing actual prejudice. *Barker*, 407 U.S. at 532. Pointing out this lack of particularity, the trial court said that fading memories is "something that would affect both the Defense and the State." A failure to point out that witnesses "specifically had faded memories due to the delay" will be weighed against the defendant. *Wilson*, 148 Md. App. at 639; *see also Fields v. State*, 172 Md. App. 496, 549–50 (2007) (finding no violation of the right to a speedy trial for a twenty-month delay in large part due to the lack of demonstrated impairment to the defense). As a result, we are not persuaded that the Appellant's defense was actually prejudiced in this case. Without particular prejudice being asserted, this factor does not favor the Appellant.

5. Balancing of the Factors

[7] There is a distinction between the presumption of prejudice and actual prejudice in this analysis. The lengthy pretrial delay, discussed under the first factor, will trigger the constitutional analysis when it is long enough to create a presumption that there is prejudice. *Henry v. State*, 204 Md. App. 509, 555 (2012) (quoting *Brady v. State*, 291 Md. 261, 266 (1981)). But then this fourth factor requires a showing of actual prejudice based on the three factors outlined in *Barker*. *Id.*

Weighing the factors the Supreme Court created in *Barker v. Wingo*, we conclude that the delay in this case was not a constitutional violation. Moving through the *Barker* factors: (1) the length of delay between the new indictment and trial merited constitutional scrutiny but was not egregious; (2) the reason for most of the delay was neutral as a result of the COVID-19 pandemic, and while ultimately attributable to the State, was not made in bad faith; (3) Appellant diligently asserted his right to a speedy trial; and (4) Appellant did not identify specific actual prejudice that resulted from the delay. Weighing the final factor most heavily, without a clear showing of actual prejudice to Appellant's defense and without any evidence of bad faith on the State's behalf for the delay, we hold that the Appellant's right to a speedy trial was not violated in this case. Accordingly, the trial court properly denied the Appellant's motion to dismiss.

II. Jury Instructions

A. Parties' Contentions

Appellant argues there were two errors in the jury instructions given to the jury. First, the trial judge erred by not instructing the jury on the difference between theft and fraudulent misappropriation by a fiduciary. Second, the trial judge failed to change the order in which the jury analyzed the charges in order to consider this difference. Appellant contends that trial court committed reversible error as a result and the convictions should be reversed.

The State first contends that the trial court properly exercised its discretion over the instructions it gave to the jury. Next, the State argues that the trial court not giving the instructions in the order requested by defense counsel was also not an abuse of discretion,

and that Appellant did not properly request the instruction they are asking for on this appeal and therefore the issue was waived.

B. Standard of Review

The appellate court will review the decision of the circuit court to give a jury instruction for abuse of discretion. *Rainey v. State*, 480 Md. 230, 255 (2022) (citing *Thompson v. State*, 393 Md. 291, 311 (2006)). There is an abuse of discretion "where no reasonable person would take the view adopted by the [trial] court," or when the court acts "without reference to any guiding rules or principles." *Stidham v. Morris*, 161 Md. App. 562, 566 (2005). To appeal a problem with the jury instructions, the party must "object[ ] on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection." Md. Rule 4-325(e). However, an appellate court may "take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object." *Id.* The court will only overturn a jury verdict and grant a new trial based on an erroneous instruction if the appealing party can show that it rises to the level of prejudicial error. *Fry v. Carter*, 375 Md. 341, 355 (2003).

C. Analysis

Under Maryland Rule 4-325(c), a circuit court must give a requested jury instruction when "(1) the requested instruction is a correct statement of the law; (2) the requested instruction is applicable under the facts of the case; and (3) the content of the requested instruction was not fairly covered elsewhere in the jury instruction actually given." *Rainey v. State*, 480 Md. at 255 (quoting *Ware v. State*, 348 Md. 19, 58 (1997).

Appellant alleges two specific problems with the jury instructions: (1) that the jury instructions did not properly differentiate theft and fraudulent misappropriation by a fiduciary, and (2) that the order the charges were presented in meant that the jury never reached the question of whether Appellant committed fraudulent misappropriation as a fiduciary. For the reasons discussed below we find that the trial court did not abuse its discretion on either issue.

1. Instructions Distinguishing Theft and Fraudulent Misappropriation

Appellant's first issue with the jury instructions is that the instructions did not properly explain the differences between the crimes of theft and fraudulent misappropriation.

Theft is a crime defined in the Maryland code where "[a] person may not obtain control over property by willfully or knowingly using deception, if the person . . . intends to deprive the owner of the property." Md. Code, Crim. Law § 7-104(b)(1).[8] The punishment for theft of property with a value of $100,000 or more is a felony with a twenty-year maximum sentence or a fine with a maximum of $25,000 along with restoration of the property to the owner. *Id.* at § 7-104(g)(1)(iii).

Fraudulent misappropriation by a fiduciary is defined as when a fiduciary "fraudulently and willfully appropriate[s] money or a thing of value that the fiduciary holds in a fiduciary capacity contrary to the requirements of the fiduciary's trust responsibility." Md. Code, Crim. Law § 7-113(a)(1). The punishment for the misdemeanor of fraudulent

[8] The theft statute encompasses multiple definitions of theft that may be prosecuted. § 7-104(b)(1) is theft by deception, the charge pursued by the State in Appellant's case.

misappropriation by a fiduciary is a maximum penalty of five years. *Id.* at § 7-113(b).

The crucial difference between the charges is at what point the Appellant formulated the intent to steal. For theft, the relevant intent is that when the person obtains control of the property, they intend to deprive the owner of that property. Md. Code, Crim. Law § 7-104(b)(1). But for fraudulent misappropriation, the person must first hold the thing of value in their fiduciary capacity before fraudulently and willfully appropriating it. Md. Code, Crim. Law § 7-113(a)(1). This distinction has been analyzed by Maryland courts. *Mattingly v. State* held that theft and misappropriation by a fiduciary were inconsistent charges based on the facts of the case, finding that the defendant's status as a thief when he stole money "preempt[ed] his status as a fiduciary." 89 Md. App. 187, 198–200 (1991). Therefore, since the defendant knew he was not entitled to the money when he received it, and the intent to steal was present before he received the money, he had no fiduciary status. *Id.* Similarly, *State v. Burroughs* held that convictions for misappropriation by a fiduciary will merge into the convictions of theft. 333 Md. 614, 626 (1994) (analyzing the legislative history of the consolidated theft statute to come to its determination on merger). Based on the facts before it, the court did not specifically decide whether theft and fraudulent misappropriation were inconsistent since the outcome would be the same. *Id.* at 623.

Unlike in *Burroughs*, the facts here can create inconsistent outcomes based on when Appellant formed the intent to steal. If the Appellant acted as a fiduciary when he received the $124,087 from Filipino Market and *after* that act formed the intent to steal and appropriate the money for himself, then the Appellant would be guilty of fraudulent misappropriation by a fiduciary. If the Appellant had the intent to appropriate the money

for himself *at the time* he obtained the money from Filipino Market while merely acting like a Brinks messenger, then Appellant would be guilty of theft by deception. As shown in the two definitions, the difference in when the intent formed can mean a fifteen-year difference in the potential maximum penalty imposed. *See* Md. Code, Crim. Law § 7-104(g)(1)(iii), § 7-113(b). Therefore, Appellant's jury instructions related to this matter were relevant in the case at hand.

Turning to the jury instructions presented in this case, Appellant had submitted an addition to the instructions for misappropriation. His proposed instruction stated:

> Proposed Supplemental Addition to Misappropriation Jury Instruction:
>
> A fiduciary may not fraudulently and willfully appropriate money or a thing of value that the fiduciary holds in a fiduciary capacity contrary to the requirements of the fiduciary's trust responsibility.
>
> In order for a person to become a fiduciary, the person must lawfully obtain control over the thing of value and not be the person who engaged in a theft of the thing of value.

The trial court read to the jury instructions first on the count of theft by obtaining control by deception and then instructions on misappropriation by a fiduciary. When discussing what it means to be a fiduciary the trial court read to the jury:

> A fiduciary is one who has, who has obtained or received the trust or confidence of another based on the integrity of fidelity of the fiduciary. One is said to act in a fiduciary capacity or to receive money in a fiduciary capacity when the business he transacts or the money which he handles is not his own or for his own benefit, but for the benefit of another person as to who he stands in a relation, implying and necessitating great confidence and trust on the one part and a high degree of good faith on the other part. *In order for a person to become a fiduciary, the person must lawfully obtain control over the money and not be the person who engaged in theft of the money.*

(emphasis added). The trial court incorporated the second sentence of the requested jury instruction, but not the first. Then there was a bench conference on the jury instructions.

At the conference Appellant's counsel discussed the instructions with the court.[9] The trial court discussed how it adopted the second part of the requested instruction, finding the issue to be "fairly covered" and did not include the first part since it would be repetitive. While the jury instructions did not contain the exact text of the first part of the requested instruction, the fiduciary instruction made it clear that a fiduciary is one who "money which he handles is not his own or for his own benefit, but for the benefit of another person as to who he stands in a relation . . . ." The second sentence adequately covered the heart of Appellant's issue, making it clear that a fiduciary is not someone engaged in the theft of money.

[9] The exchange in full is as follows:

> APPELLANT: . . . With respect to the misappropriation in terms of, of how that is going to be handled by the Court, we've submitted it in the instruction on that. We, we had kind of a robust discussion about it, and –
>
> THE COURT: Well, well I thought I incorporated your instruction in to –
>
> APPELLANT: You -- most, most of it, I mean there were --
>
> THE COURT: Yeah.
>
> APPPELLANT: -- some parts that you didn't, I mean --
>
> THE COURT: Well I -- the, the only part I didn't was because it -- I thought it was fairly covered, it would just be repeating what the charge of fiduciary -- misappropriation by a fiduciary was, because I didn't want to repeat it again. I understand what you were saying there for the instruction was you're taking it from a case, which is then basically stating the elements of it. But then I think what the, the substantive part was the in order for a person to become a fiduciary, they can't be the thief -- the theft -- or the thief, I guess.

"The court need not grant a requested instruction if the matter is fairly covered by instructions actually given." Md. Rule 4-325. Here, the jury instructions fairly covered the idea that a fiduciary is one who appropriates money on behalf of a third party. Therefore, the trial court properly exercised its discretion in not giving the requested jury instruction.[10]

2. Order of the Charges

Appellant additionally argues that the trial judge "fail[ed] to give the jury these requested instructions [regarding theft and fraudulent misappropriation] in the order requested by the defense." Appellant wanted the instructions about fraudulent misappropriation presented before the instructions about theft and for this same order to apply for the verdict sheet.

Question 1 on the verdict sheet asked the jury to determine whether Appellant was guilty of theft. Question 2 dealt with the charge of misappropriation and question 3 dealt with the charge of malicious destruction of property. Beneath question 1 it said "If you find

[10] Appellant's brief references a failure to instruct the jury related to "exactly when the individual determined to take the property for his own purposes." In their request for jury instructions, the Appellant also requested the following:

> Under the law, a person cannot be deemed to be a fiduciary where the State alleges that the individual has obtained control over property of another which was unauthorized, or where the person exerts unauthorized control over the property of the owner.
> (*State of Maryland v. Burroughs*, 333 Md. 614, 621 (1994); *Mattingly v. State of Maryland*, 89 Md. App. 187, 200 (1991)).

When discussing these proposed supplemental jury instructions, State's counsel said that "proposed supplemental jury instruction number one not be given." After this, Appellant's counsel does not request the first instruction again. Nor do the objections after the jury instructions are read have to do with this specific language. Therefore, there was no error in not reading these instructions as well.

the defendant guilty of question 1, proceed to question 3. If you find defendant not guilty of question 1, proceed to question 2."

Prior to the reading of the jury instructions, Appellant's counsel discussed this verdict sheet. Appellant argued that the verdict sheet gave the jury "an analytical direction on how they're supposed to do this" and their concern was that no party "ought to be telling the jury about how to approach their analysis and their deliberations."[11] The trial court denied this request. The trial court did not want to include specific instructions on the jury sheet about scope of employment because "the verdict sheet for this purpose has no legal significance because the Court does not give that verdict sheet to the jury as anything other than a means to communicate what the jury's decision is."

After closing arguments, the judge presented the verdict form to the jury. The judge specifically mentioned the printed instruction on the verdict sheet stating that "if you find the defendant guilty of question one, then you would proceed on to question number three, which is the malicious destruction of property. If you find the defendant not guilty of question one, then you proceed on to question two." Before the jury was released, an "unidentified speaker" that is likely one of Appellant's counsel,[12] pointed out that the judge

[11] Additionally, Appellant argued that "the fraudulent misappropriation [claim] ought to be the first consideration for the jury to consider . . . ." The trial court denied this request because "the jury has to come back with a verdict" on the theft charge since it is not a lesser included offense and the court compromised by telling the jury that they cannot find Appellant guilty on both counts.

[12] In the transcript the speaker is not identified. However, State's counsel is specifically identified and after this meeting, the judge announces that "counsel pointed out to me" this issue. Given the use of "he" pronouns by the judge following this, it was likely Mr. Bruce Marcus on behalf of Appellant.

"basically told the jury that they are to go down the verdict sheet in the order that it's written." The judge agreed and offered to correct the issue, which Appellant agreed to.[13] Speaking to the jury, the judge said:

> Ladies and gentlemen, I guess when I went over the verdict sheet, I sort of said we go through the Counts I, II, III. What counsel pointed out to me, and I think he is correct, you don't have to consider them in that particular order. You can consider them in any order you wish to. . . .
> So you can consider any of the counts in whatever order you want to, and take them up in whatever order you wish to do so. I just said, was saying how the verdict sheet is laid out for you. But you can consider any one of them. You can decide you want to start with malicious destruction of property first, if you wish. Or misappropriation, or theft. That's up to you.

After the judge instructed the jury to review the verdict form in any order they choose there is no further objection on the record by Appellant.

Despite the lack of further objections, "substantial compliance" with Rule 4-325(e) can preserve an argument for appellate review even if the objection is not renewed on the record after jury instructions are read. *See Horton v. State*, 226 Md. App. 382, 413–414 (2016). To show "substantial compliance":

> there must be an objection to the instruction; the objection must appear on the record; the objection must be accompanied by a definite statement of the ground for objection unless the ground for objection is apparent from the

[13] This is the exchange as it appears in the transcript:

> THE COURT: If you want, I can say that they consider any count at any time.
> UNIDENTIFIED SPEAKER: Yeah.
> THE COURT: They don't have to follow the verdict sheet. In terms of timing, I'm happy to say that.
> UNIDENTIFIED SPEAKER: That, yeah.

> record and the circumstances must be such that a renewal of the objection after the court instructs the jury would be futile or useless.

Gore v. State, 309 Md. 203, 209 (1987) (quoting *Bennett v. State*, 230 Md. 562, 568–69 (1963)).[14]

Here, there was a definite objection on the record. Appellant's counsel specifically asks for the fraudulent misappropriation claim to appear first. When the judge rejects this to say he is just going to follow the indictment, Appellant points out that the jury will never wind up considering the fraudulent misappropriation claim if theft is presented first. Appellant reasserts their exception to the order but the court disagrees with their reasoning. Based on this interaction it is apparent from the record that renewing this objection would be futile as the trial judge had made a determination on the order in which the charges would be presented. Therefore, there was still substantial compliance, and the issue was not waived.

Even though the issue was preserved, the instruction did not show an abuse of discretion by the trial court. This issue was resolved when Appellant had the trial court deliver the extra instruction to the jury that they consider the charges in any order they wanted. *Carter v. State*, 366 Md. 574, 592 (2001) ("[J]urors are presumed to follow the court's instructions."); *Newton v. State*, 455 Md. 341, 360 (2017) (also discussing the same proposition related to an instruction that alternates should not participate in deliberations).

[14] In *Horton*, the defendant preserved the objection through substantial compliance, meeting all of the elements shown above. *Horton*, 226 Md. App. at 414. Despite preserving the objection, the court still found there was no merit to the prejudice argument. *Id.* at 414–15.

Since juries are presumed to follow the judge's instructions, it can be presumed that the jury could have chosen to consider any of the three charges first.

To go any further and try to evaluate how the jury considered the case would "involve pure speculation or necessitate an inquiry into the jury's deliberations." *Williams v. State*, 478 Md. 99, 119 (2022) (citing *McNeal v. State*, 426 Md. 455, 473 (2012)). Maryland courts should not "inquire into the details of deliberations" because it could "risk disturbing a verdict for the wrong reasons." *Id.* (citing *McNeal*, 426 Md. at 473). As a result, a reviewing court cannot determine whether or not the jury actually considered the charges in a specific order. But the reviewing court can determine that the trial court properly informed the jury as to their ability to review the charges in any order they wish. Therefore, there was no abuse of discretion by the trial court.

Even if the trial court did err, any error here was harmless because of the curative steps taken by the trial court. An error is harmless if the reviewing court finds that it did not play any role in the jury's verdict. *Bellamy v. State*, 403 Md. 308, 332 (2008) (quoting *Spain v. State*, 386 Md. 145, 175, (2005) (Bell, C.J., dissenting)). Here, the jury was specifically instructed by the judge to consider the counts in any order they pleased. The jury instructions also contained specific language that to be a fiduciary the person needs to initially lawfully control the thing of value. The jury was permitted to analyze the facts and come to the conclusion that when Appellant picked up the money from Filipino Market, he was not acting as a fiduciary but instead committing theft by deception. Any error on the part of the trial court did not play a role in the jury's verdict. The lower court will not be reversed for harmless error.

The trial court did not abuse its discretion in instructing the jury and Appellant's convictions are affirmed.

CONCLUSION

Appellant's right to a speedy trial was not violated in this case based on the delay prior to trial. The trial court did not abuse its discretion in its selection and delivery of jury instructions, and it cured the error that Appellant noted before deliberations. Accordingly, we affirm the rulings of the Circuit Court of Montgomery County.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.