Circuit Court for Howard County
Case No. 13-K-17-057524

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1475

September Term, 2017

EDWARD WITHERSPOON

v.

STATE OF MARYLAND

Nazarian,
Arthur,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: January 18, 2019

After a jury trial in the Circuit Court for Howard County, appellant Edward Witherspoon was found guilty of kidnapping, second-degree assault, and committing second- and third-degree sexual offenses. The court sentenced Witherspoon to incarceration for a term of 30 years for kidnapping and a concurrent term of 20 years for committing a second-degree sexual offense. The remaining convictions were merged for sentencing purposes. This timely appeal followed.

QUESTIONS PRESENTED

Witherspoon presents the following questions:

I. Was Witherspoon denied his federal or state constitutional rights to a speedy trial?

II. Did the trial court err in admitting witness testimony under the "prompt complaint" exception to the hearsay rule?

III. Did the trial court err in instructing the jury on kidnapping?

IV. Was the evidence legally insufficient to sustain the convictions?

For the reasons set forth below, we shall affirm.

FACTUAL BACKGROUND

On the night of Thursday, January 28, 2016, M.F., a college student, planned to go to a nightclub at the Power Plant in Baltimore City with three other students, including her roommate. Before leaving for the club, M.F. had about seven shots of vodka in a dorm room.

M.F. and her friends took an Uber to the Power Plant. She did not remember getting out of the Uber or getting into the nightclub. She did remember that she dropped

her cell phone and that the screen cracked. She also remembered that she gave her phone and her credit card to a friend.

M.F.'s next memory was of waking up in a bedroom that was not hers, with a man, later identified as Witherspoon, who was performing oral sex on her. M.F. attempted to push Witherspoon's head away, but she felt weak. When she got her hand up to his head, she passed out.

M.F. woke up again in the early morning, in her underwear. She was next to Witherspoon, who had his arm around her. Witherspoon got up and said he had to take M.F. to school because she had a class. M.F., who could not remember ever having seen Witherspoon before, felt "gross and weak" and as if she was still "tipsy." She found her clothing on a chair. Her shirt smelled like vomit, so Witherspoon gave her a clean, orange shirt to wear. She could not find her shoes.

Witherspoon guided M.F. out of the house to a small gray car, where she found her shoes in the backseat. When M.F. sat in the passenger seat, it felt wet. Witherspoon told M.F. that she had vomited in the car, which she did not recall. Witherspoon also told M.F. that all of her friends had left her alone and that he had found her and helped her.

Witherspoon drove M.F. to her dorm. They arrived at about 7:00 a.m. As she got out of the car, Witherspoon asked her for a hug. M.F. gave him a fist bump and ran into the dormitory. A desk assistant had to let M.F. into the building because she did not have her keycard.

When she got to her dorm room, M.F. yelled at her roommate for leaving her at the Power Plant. Her roommate was very alarmed and concerned, apparently about

where M.F. had been. M.F. threw away Witherspoon's shirt, "[b]ecause it just felt gross." Then she took a shower and went to bed. Her cell phone, credit cards, and keys were on her desk.

Sometime later, M.F. woke up, got dressed and went to a noon class. At that time, M.F. felt some soreness in her vagina.

After the class, M.F. saw that she had received a text message at about 3 a.m. from someone named M.R., asking whether she had gotten home safely. She did not know M.R., did not know how M.R. had gotten her number, and did not know why M.R. was asking whether she had gotten home safely. M.F. "knew that something was wrong at this point."

M.F. asked a friend to go with her to a pharmacy to get a "Plan B" contraceptive pill. She told another friend, M.L., what had happened, and the two women went together to the college's counselling center. At the counselling center, M.F. was advised to go to a hospital.

At the hospital, M.F. underwent a sexual assault forensic examination ("SAFE"). The examiner noted that M.F. suffered "a deep abrasion . . . almost like a gouge," on her cervix, "a pretty significant tear . . . to [her] fossa navicularus," and a laceration through her posterior fourchette. In addition, M.F. had a scrape on her knee and a bruise on her leg, which she did not have before she went out the night before. M.F. decided, at that time, not to report the incident to the police.

M.R., another student at M.F.'s school, had been in front of the Power Plant with a friend on the night of January 28, 2016. Although M.R. did not know M.F., M.F. asked

her whether she was going back to campus. M.R. and her friend were not sure what they wanted to do, so they walked to a nearby store to use the bathroom. M.F. went with them. M.F. fell down once on the way to the store and was slurring her words. M.R. "knew that [M.F.] was drunk."

As M.R. and M.F. returned to the Power Plant, M.R. saw M.F. fall off a curb "next to or under" a gray car. M.R. walked toward the first taxicab in a line outside the Power Plant and told the driver that M.F. wanted to go to her dorm, but the driver did not accept credit cards, and M.F. had no cash. At that point, a man from the grey car, whom M.R. thought was an Uber driver, said that he would take M.F. home. M.R. identified the driver of the gray car as Witherspoon.

M.R. walked with M.F. to Witherspoon's car. Because M.F. did not have her cell phone with her, M.R. asked her to put her phone number into M.R.'s cell phone so that she could "make sure [M.F.] got home safe." At about 3:00 a.m., M.R. sent a text to M.F. asking if she got home safely. Later that day, M.F. responded with a text message in which she expressed uncertainty about who M.R. was. M.R. responded that she had tried to help M.F. get a cab, but the cab driver would not take M.F. because she did not have cash. M.R. told M.F. that an Uber driver had gotten out of his car and said that he took cards and would get M.F. back.

An investigator for the college police department first met with M.F. on the morning after Witherspoon brought her back to the campus. In response to the meeting, the investigator reviewed footage from security cameras and discovered images of a silver Nissan Altima returning M.F. to campus on the morning of Friday, January 29,

2016. As a result of that discovery, the investigator went to the Power Plant at about 11 p.m. on the following Thursday, February 4, 2016, to look for a silver Altima. About 50 minutes later, she saw a silver Altima pull onto Market Place, near the Power Plant, and park. The investigator obtained the tag number and took photographs of the Altima, but the driver was not in the car at the time.

On February 5, 2016, the investigator met with M.F., who decided to report the incident to the Baltimore City police. The investigator took M.F. to a meeting with two detectives and gave them information about the vehicle that she had seen in the surveillance video and photographed near the Power Plant.

Based on information in a photograph provided by the investigator, one of the detectives searched the motor vehicle records. The search disclosed that the Altima was owned by Witherspoon, who lived in Howard County.

On Thursday, February 11, 2016, a detective located Witherspoon in a car on Market Place, near the Power Plant. Witherspoon agreed to go to the police station and speak with the police. In a search of Witherspoon's vehicle, the police recovered a "personal massager" and a corkscrew from the center console.

In a statement to the police, Witherspoon acknowledged having been at the Power Plant and meeting M.F. He asserted that he gave her a ride; that they flirted; that they went to his apartment, where he performed oral sex on her; and that he drove her back to campus the next morning. According to Witherspoon, his encounter with M.F. was consensual.

At trial, Witherspoon testified that on January 28, 2016, he was outside the Power Plant when he "heard a big thump." He said that he observed M.F. on the ground between parked cars having trouble getting up and that he "rushed over to assist her," as did another man. After a moment, he said, another young woman rushed up and said that she would flag a cab for M.F. According to Witherspoon, M.F. told him that she did not know the other woman and did not want to go with her.

A cab arrived, and Witherspoon said that he and the other man helped M.F. get into it. The driver, however, refused to take M.F., because she did not have cash or a credit card. At that point, Witherspoon said, M.F. grabbed his arm and asked him to take her home. In Witherspoon's account, she "almost insisted that [he] take her because she didn't want to go with no one else."

Witherspoon denied that he had to assist M.F. in getting into his car. He also denied that he was an Uber driver or that he accepted credit cards. He testified that M.F. "holler[ed] out her phone number to the other young lady," and then got into his car.

On cross-examination, Witherspoon testified that, once she was in his car, M.F. did not tell him where she wanted to go, but instead complimented him on how good the car smelled and how clean it was. He said that he asked if she was hungry, and she said that she was.

As he headed in the direction of Federal Hill, M.F. asked him to pull over because, he said, she was in a "rush" to urinate. He pulled into an alley to allow her to relieve herself, but he claimed not to have suspected that she was drunk.

Witherspoon said that, after M.F. had returned to the car, he offered to make her breakfast, because everything was closed. He said that she agreed, as long as she was back at school by 10:00 a.m.

According to Witherspoon, he and M.F. were "flirting with each other" during the drive. As they headed towards his residence about half an hour away, M.F. vomited on herself and on the passenger seat. Witherspoon said that he pulled over, retrieved a towel from his trunk, and gave it to M.F. Even then, he continued to maintain that he "had no idea she was drunk."

Witherspoon said that, when they arrived at his residence, M.F. went into the bathroom and washed her hair while he went outside to clean his car. When he went back inside his house, he said, M.F. was in his bed wearing only a bra and underwear. Witherspoon testified that they engaged in consensual sexual activity and that he drove M.F. back to campus in the morning.

We shall include additional facts as necessary in our discussion of the issues presented.

DISCUSSION

I.

Before trial, Witherspoon filed a motion to dismiss in which he complained of the denial of his federal and state constitutional rights to a speedy trial. After a hearing, the court denied that motion. Witherspoon challenges that decision.

The right of an accused to a speedy trial is guaranteed by both the Sixth Amendment to the United States Constitution, made applicable to the states by the

Fourteenth Amendment, and 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)).[1] "In reviewing the judgment on a motion to dismiss for violation of the constitutional right to a speedy trial, we make our own independent constitutional analysis." *Glover v. State*, 368 Md. 211, 220 (2002). "[I]n so doing, we accept a lower court's findings of fact unless clearly erroneous." *Id.* at 221.

To determine whether a defendant's right to a speedy trial has been violated, we apply the balancing test articulated by the United States Supreme Court in *Barker v. Wingo*, 407 U.S. 514 (1972). In that case, the Court identified four factors to be balanced when analyzing a claim that a defendant was denied a speedy trial: "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Barker v. Wingo*, 407 U.S. at 530. "[N]one of the four factors" is "either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial." *Id.* at 533. "Rather, they are related factors and must be considered together with such other circumstances as may be relevant." *Id.*

The first factor, "the length of the delay, is a 'double enquiry,' because a delay of sufficient length is first required to trigger a speedy trial analysis, and the length of the

[1] The Sixth Amendment provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial[.]" Article 21 of the Declaration of Rights provides, in pertinent part, "[t]hat in all criminal prosecutions, every man hath a right . . . to a speedy trial[.]" The Court of Appeals considers Supreme Court precedent interpreting the Sixth Amendment to be very persuasive, although not necessarily controlling, in interpreting the parallel right to a speedy trial in Article 21. *See, e.g.*, *Divver v. State*, 356 Md. 379, 388 (1999).

delay is then considered as one of the factors within that analysis." *State v. Kanneh*, 403 Md. at 688 (citing *Glover v. State*, 368 Md. at 222-23).

Timeline of Events

Although the records from the District Court of Maryland for Baltimore City and the Circuit Court for Baltimore City are not before us, the parties do not have any significant disputes as to the following timeline of events:

February 24, 2016	Witherspoon was arrested on a warrant and charged in the District Court of Maryland for Baltimore City in Case No. 4B02318726.[2]
April 6, 2016	The State indicted Witherspoon in the Circuit Court for Baltimore City in Case No. 116096008.[3]
April 26, 2016	Defense counsel filed an omnibus motion in the Circuit Court for Baltimore City. The motion included a demand for a speedy trial.
April 28, 2016	Witherspoon was arraigned in the Circuit Court for Baltimore City, and the court set a trial date of June 22, 2016.
June 22, 2016	Over objection, the court postponed the trial at the State's request because two of the State's witnesses were out of the country, an Assistant State's Attorney was unavailable, and the State needed further investigation, including DNA evidence.

[2] Witherspoon's brief variously states that he was arrested on February 24 or February 25, 2016, but his motion to dismiss stated that this matter "was first charged on February 24, 2016 in the District Court of Maryland for Baltimore City in Case Number 4B02318726.

[3] The record contains various dates for the indictment, including April 5, April 6, and April 7, 2016, but the parties do not dispute that Witherspoon was indicted on April 6, 2016.

July 15, 2016	Witherspoon was released from pretrial detention on bail.
September 13, 2016	The State requested a postponement because it was awaiting DNA test results. The court set a new trial date of December 5, 2016.
November 21, 2016	The State issued a warrant for Witherspoon's arrest in a separate case in Howard County, concerning a similar incident but a different victim.
November 22, 2016	The court postponed the trial in Baltimore City until March 14, 2017, because of the pending warrant in the Howard County case, and because of new evidence that Witherspoon had referred to this case in a statement made in Howard County.
February 8, 2017	The State indicted Witherspoon in Howard County in this case (13-K-17-057524).
February 14, 2017	Witherspoon was arraigned in Howard County in this case.
February 23, 2017	The State entered a plea of *nolle prosequi* in Case No. 116096008 in the Circuit Court for Baltimore City.
February 24, 2017	The Circuit Court for Howard County held a scheduling conference in this case. The court scheduled a motions hearing for April 21, 2017, and a trial for May 31, 2017.
April 11, 2017	Witherspoon moved to dismiss the charges, alleging a violation of his speedy trial rights.
April 21, 2017	At the motions hearing, the court denied the motion to dismiss.
May 31, 2017	The trial began.

With this timeline in mind, we turn to the four-factor balancing test required by *Barker v. Wingo*.

Length of Delay

Under the analysis required by *Barker v. Wingo*, the first factor is the length of delay. For speedy-trial purposes, the delay is measured from the earlier of the date of arrest or the filing of charges until the date of trial. *United States v. Marion*, 404 U.S. 307, 320-21 (1971); *In re Thomas J.*, 372 Md. 50, 73 (2002); *Divver v. State*, 356 Md. 379, 388-89 (1999). "While no specific duration of delay constitutes a *per se* delay of constitutional dimension," a delay of one year and 14 days is "presumptively prejudicial" and is sufficient to trigger constitutional scrutiny. *Glover v. State*, 368 Md. at 223.

"The length of delay, in and of itself, is not a weighty factor[.]" *Id.* at 225. In fact, it "'is the least conclusive of the four factors identified in *Barker*[.]'" *Id.* (quoting *Erbe v. State*, 276 Md. 541, 547 (1976)). Its main significance lies in its connection to the other factors. *Glover v. State*, 368 Md. at 225.

At the motions hearing, the court used the date of Witherspoon's arrest as the starting point for its analysis. The State contends, however, that the court's analysis was too generous to Witherspoon. In support of its contention, the State cites *Nottingham v. State*, 227 Md. App. at 614, which held that "so long as the State acted in good faith, [a] *nolle prosequi* terminates the original prosecution, and the speedy trial clock starts anew from the date of the filing of the new charging document." *Accord State v. Henson*, 335 Md. 326, 338 (1994); *Greene v. State*, 237 Md. App. 502, 515-17 (2018). Under *Nottingham*, the relevant time period in this case is less than four months (from the filing of the Howard County indictment on February 8, 2017, to the beginning of trial on May

31, 2017), unless there is some basis to say that the State did not act in good faith when it entered the nolle prosequi in Baltimore City.

There is no such basis. In this case, the motions court specifically found no "evidence to indicate that the State attempted to delay the trial date for improper reasons or to hamper the Defendant in any way, shape or form." Nothing in the record suggests otherwise. Accordingly, the relevant period of delay in this case is less than four months, which is not of constitutional dimension. *See Collins v. State*, 192 Md. App. 192, 213-14 (2010).

But even if we accepted the erroneous premise that the time period began to run on the date of Witherspoon's arrest (as he argues), the 15-month delay before the commencement of trial would not, in itself, favor dismissal.

Courts assess the overall reasonableness of the total delay in light of the nature of the criminal case. *Compare State v. Kanneh*, 403 Md. at 689-90 (reasoning that pretrial delay of 35 months was not particularly weighty in a "very complicated" child sexual abuse case involving the presentation of DNA evidence), *with Divver v. State*, 356 Md. at 390-91 (reasoning that delay of over one year was a "uniquely inordinate length for a relatively run-of-the-mill" DWI case in district court).

This was a relatively complex case involving DNA and difficult issues of proof concerning what Witherspoon had done to a victim who had no recollection of what had occurred. He faced serious charges that included kidnapping and second- and third-degree sexual offenses against a physically helpless and mentally incapacitated victim. In that context, a 15-month delay triggers the speedy-trial analysis, but it does not weigh

heavily towards establishing a constitutional violation. *See State v. Kanneh*, 403 Md. at 689-90; *see also Howard v. State*, 440 Md. 427, 447-48 (2014) (no speedy-trial violation despite approximately 28-month pretrial delay in first-degree rape case involving DNA evidence); *Henry v. State*, 204 Md. App. 509, 550-54 (2012) (no speedy-trial violation despite approximately 13-month delay in first-degree rape case involving DNA evidence).

Reason for Delay

Under *Barker v. Wingo*, the second factor is the reason for the delay. "Deliberate attempts by the State to delay weigh heavily against the State; the State's negligence causing delay weighs less heavily against the State[;]" and "reasons for delay attributable to neither party" receive neutral weight. *Berryman v. State*, 94 Md. App. 414, 421 (1993) (citation omitted).

Even if we proceeded from the erroneous premise that the nolle prosequi was of no consequence and that the relevant period of delay stretches from the arrest in February 2016 until the beginning of trial in May 2017, this factor would weigh, at most, only slightly in Witherspoon's favor.

The time from Witherspoon's arrest until his "originally scheduled trial date '[was] necessary for the orderly administration of justice[.]'" *Howard v. State*, 440 Md. at 448 n.16 (quoting *Lloyd v. State*, 207 Md. App. 322, 330 (2012)). This approximately four-month period for ordinary trial preparation receives neutral weight in the speedy-trial analysis. *See, e.g.*, *id.* at 448 & n.16; *Peters v. State*, 224 Md. App. 306, 362 (2015);

Randall v. State, 223 Md. App. 519, 551-52 (2015); *Brown v. State*, 153 Md. App. 544, 558 (2003).

The first postponement occurred on June 22, 2016. The grounds for the postponement included the unavailability of two of the State's witnesses, who were out of the country. The unavailability of a witness justifies an appropriate delay in the proceedings. *See Barker v. Wingo*, 407 U.S. at 531. Consequently, the delay from June 22, 2016, until the new trial date of September 13, 2016, receives neutral weight as well. *See Marks v. State*, 84 Md. App. 269, 283 (1990).

The second postponement occurred on September 13, 2016. The ground for the postponement was that the State had not yet received the results of DNA testing. "Where, 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." *State v. Kanneh*, 403 Md. at 690 (citing *Glover v. State*, 368 Md. at 226).

The third and final postponement occurred on November 22, 2016, approximately two weeks before the newly scheduled trial date of December 5, 2016. The ground for the postponement was the filing of another, similar criminal case against Witherspoon in Howard County, involving a different victim. Witherspoon appears to argue that the State sought the postponement as part of an unsuccessful attempt to persuade the Baltimore City court to admit evidence of the Howard County case as proof of a common plan or scheme under Md. Rule 5-404(b). Assuming that Witherspoon is correct, the delay would still weigh only slightly against the State: the delay did not result from a

deliberate effort to hinder the defense or from carelessness or neglect, but from a tactical effort to advance a new legal theory that could not have been discovered earlier. *See Howard v. State*, 66 Md. App. 273, 292 (1986) (delay resulting from tactical decision to try codefendants jointly was attributable to State, but received only slight weight).

In these circumstances, over half of the delay (from February 24, 2016, to November 22, 2016) is weighted neutrally. The remainder weighs only slightly against the State. These facts do not make a particularly formidable case for dismissal on speedy-trial grounds.

Witherspoon's Assertion of His Right to a Speedy Trial

The third factor "concerns the 'defendant's responsibility to assert his right.'" *Peters v. State*, 224 Md. App. at 364 (quoting *Barker v. Wingo*, 407 U.S. at 531). In considering this factor, a court weighs "'the frequency and force of the objections as opposed to attaching significant weight to a purely *pro forma* objection.'" *State v. Ruben*, 127 Md. App. 430, 443 (1999) (quoting *Barker v. Wingo*, 407 U.S. at 529).

Witherspoon made a perfunctory request for a speedy trial in omnibus motions in both the Circuit Court for Baltimore City and the Circuit Court for Howard County. At no time did Witherspoon formally waive his rights or consent to any postponement. On the other hand, Witherspoon did not make anything more than a boilerplate assertion of his speedy-trial rights until about seven weeks before trial, after the dismissal of the charges in Baltimore City, the filing of the new indictment in Howard County, and the establishment of a trial date in Howard County.

Because Witherspoon made only a pro forma objection until shortly before trial, his efforts amount to "little more than the avoidance of waiver." *Lloyd v. State*, 207 Md. App. at 332. At most, this factor weighs slightly in Witherspoon's favor. *Id.*

Prejudice

The final, and most important, *Barker* factor is prejudice to the defendant. *Peters v. State*, 224 Md. App. at 364. To analyze this factor, a court should consider whether the delay affected "the three 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.'" *Randall v. State*, 223 Md. App. at 553 (quoting *Barker v. Wingo*, 407 U.S. at 532). Of these three concerns, "the most serious is the potential that a delay will impair the ability to present an adequate defense and thus skew the fairness of the entire adversarial system." *Glover v. State*, 368 Md. at 230.

Witherspoon contends that he was prejudiced by the delays because he was incarcerated from February to July 2016 and re-incarcerated in November 2016. He argues that any person in his position "would have felt a great deal of anxiety and concern at the prospect of facing yet another term of incarceration," that he was unable to work as a result of his incarceration, and that his defense was impaired because of missing video footage.

Witherspoon was incarcerated as a result of the charges in this case for less than five of the 15 months between his arrest and the beginning of the trial: he was released from incarceration on July 15, 2016, and reincarcerated in November only because of a

warrant in the new case involving a different in Howard County. As the court observed at the motions hearing, Witherspoon's pretrial incarceration after July 2016 was not attributable to this case.

The court acknowledged that the defense was unable to obtain security-camera footage from two businesses near the Power Plant.[4] The court, however, correctly concluded that any ensuing prejudice was not attributable to the postponements. The court explained that because Witherspoon was not arrested until nearly a month after the incident involving M.F., the footage might well have been destroyed in the ordinary course of business before he even obtained counsel. Furthermore, once Witherspoon obtained counsel, the subsequent postponements had no effect on the ability to locate and obtain the footage, if it still existed. If anything, the postponements would have given the defense even more time to find and secure any exculpatory evidence that might still exist.

In these circumstances, Witherspoon has identified little prejudice that resulted from the delay between his arrest and trial (assuming that the relevant period even begins at the time of his arrest).

Balancing the Factors

Upon weighing the factors set forth in *Barker v. Wingo*, we conclude that the delay did not amount to a constitutional violation. Calculated correctly, the delay amounted to less than four months (from the date of the Howard County indictment until the

[4] According to the State's representations at the hearing on the motion to dismiss the Howard County indictment on speedy-trial grounds, Witherspoon apparently did receive some closed-circuit television footage in discovery. It is unclear what the source of that footage was.

commencement of trial trial), which is not a period of constitutional significance. But even assuming that the delay encompasses the entire 15-month period (from the date of arrest until the commencement of the trial), the total is not extraordinary, because of the seriousness of the charges and the complexity of some of the evidence in the case; because the majority of the delay resulted from neutral justifications; because the record does not show that Witherspoon made a particularly forceful assertion of the speedy-trial right; and because Witherspoon failed to establish actual prejudice.

In many cases that are far more aggravated than this, Maryland courts have rejected claims of speedy-trial violations. *See Glover v. State*, 368 Md. at 232 (concluding that, even though much of the 14-month delay resulted from State's conduct and defendant asserted right to a speedy trial, "the attempts to acquire complete DNA evidence, coupled with the fact that no evidence on the record established prejudice, leads [to the] conclusion that the [defendant's] speedy trial right was not violated"); *Fields v. State*, 172 Md. App. 496, 549-50 (2007) (concluding that, even though much of 20-month delay was attributable largely to the State's conduct and defendant asserted right to a speedy trial, defendant could still not establish constitutional violation with demonstrating either purposeful delay or actual impairment of defense). The circuit court therefore did not err in denying the motion to dismiss.

II.

Witherspoon contends that the trial court erred in denying a motion in limine and admitting the testimony of M.F.'s friend, M.L., about M.F.'s statements about the encounter with Witherspoon. He asserts that the statements do not fall within the hearsay

exception for prompt complaints of sexually assaultive behavior set forth in Md. Rule 5-802.1(d).[5] Specifically, he argues that M.F.'s reported statements were not sufficiently "prompt." In addition, he argues that M.L. did not recount a complaint of sexually assaultive behavior. In our view, the circuit court did not err or abuse its discretion in finding that the reports satisfied the hearsay exception.

At trial, M.L. testified that, on the morning after the visit to the Power Plant, she went to her classes and returned to her dorm room at about noon. At that time, she saw M.F. sitting on her bed acting "[v]ery standoffish, angry, upset, [and] confused." Over objection, M.L. testified that M.F. told her that she had left the club, apparently because she had become separated from M.L. and her other friends, and was walking around alone. She wandered outside, trying to find her friends. She encountered a young woman, who "put her in an Uber to go home safely because she had lost her friends and was too drunk to make decisions[.]" Instead of taking her home, however, the Uber driver took her back to his house. She vomited during the ride. She remembered getting out of the car, but remembered nothing else except waking up in the driver's orange shirt and her underwear. After listening to M.F.'s report of what had happened the night

[5] Rule 5-802.1(d) states:

> The following statements previously made by a witness who testifies at the trial or hearing and who is subject to cross-examination concerning the statement are not excluded by the hearsay rule:
>
> * * *
>
> (d) A statement that is one of prompt complaint of sexually assaultive behavior to which the declarant was subjected if the statement is consistent with the declarant's testimony[.]

before, M.L. accompanied M.F. to the university's counselling center and then to Mercy Hospital for a SAFE examination.

We first address Witherspoon's contention that M.L. did not recount a complaint of sexually assaultive behavior and, thus, that Rule 5-802.1(d) does not apply. Witherspoon did not raise that objection at trial. Therefore, he has not preserved it for appeal. *See* Md. Rule 4-323(a).

But even if Witherspoon had preserved the issue, the reported statement would still qualify as a complaint of "sexually assaultive behavior." M.F. reported that she "was too drunk to make decisions[.]" She got into a car with an Uber driver, who took her to his house rather than to her dorm. She was so drunk that she vomited during the ride. After she got to the house, she blacked out and remembered almost nothing else, except for waking up in her underwear and the driver's shirt.

In short, M.F. reported that, while she was physically helpless and mentally incapacitated, she was abducted and (at a minimum) undressed. In the State's words, "[t]hat scenario strongly suggests, even if it does not expressly state, that sexually assaultive behavior occurred." Brief at 27.

We turn next to Witherspoon's argument that M.F.'s complaint was not sufficiently prompt to qualify for the hearsay exception. "The question [of] whether a complaint is sufficiently prompt to be presented to the jury is one that is best committed to the sound discretion of the [trial] court." *Gaerian v. State*, 159 Md. App. 527, 545 (2004). We see no abuse of discretion.

"[P]romptness is a flexible concept, tied to the circumstances of the particular case." *Id*. at 540. In determining whether a complaint is sufficiently prompt, a trial court "should consider whether the complaint is prompt as 'measured by the expectation of what a reasonable victim, considering age and family involvement and other circumstances, would probably do by way of complaining once it became safe and feasible to do so.'" *Id.* at 545 (quoting *Nelson v. State*, 137 Md. App. 402, 418 (2001)). "[T]he requirement of promptness is not defeated by some delay in the reporting, so long as the delay is adequately explained." *Id.* at 542. "Once the court determines that the report is 'prompt,' it is for the jury to determine what weight to give it." *Id.* at 545.

In this case, Witherspoon returned M.F. to her dorm at about 7:00 a.m. M.F. took a shower, went to bed, and woke up in time to go to a class at noon. At that time, M.F. felt as though "something was wrong" – she felt "dirty" and "sore" in her vagina. Nevertheless, she went to her class because she accepted Witherspoon's statement that he had been "helping" her. When she returned to her dorm room, M.F. read the 3:00 a.m. text message from M.R. and began to realize that something was wrong. At that point, she went to the pharmacy to buy an emergency contraceptive. When she returned, she told M.L. what had happened to her the night before.

In explaining the basis for its discretionary conclusion that the reports of assaultive behavior were sufficiently prompt to satisfy the exception, the circuit court reasoned that the delay between the assault and the report was "not significant." The court's conclusion was, by no means, erroneous, let alone clearly erroneous.

M.F. appears to have reported the assault within about seven or eight hours after Witherspoon returned her to the dorm. Part of the delay (perhaps as much as four hours) occurred because she was asleep. A small part of the delay occurred because the young woman was understandably confused about what had happened to her and went to her class. When the class had ended and she began to realize what might have occurred, she reported the assault as soon as she had secured an emergency contraceptive. There was no unexplained delay. *See Hyman v. State*, 158 Md. App. 618, 634 (2004) (affirming admission of report of sexual assault made by an adult to a co-worker on the day after the crime).

For those reasons, we conclude that the trial court did not abuse its discretion in permitting M.L. to testify about M.F.'s reports of sexually assaultive behavior under Md. Rule 5-802.1(d).

III.

Witherspoon contends that the court erred in declining to give a special pattern jury instruction concerning an aspect of the crime of kidnapping – whether the movement or "asportation" of the victim was more than merely incidental to some other crime. We hold that the court did not err or abuse its discretion in declining to give the instruction.

Kidnapping involves "carry[ing] or caus[ing] a person to be carried in or outside the State," "by force or fraud," "with the intent to have the person carried or concealed in or outside the State." *See* Md. Code (2002, 2012 Repl. Vol.), § 3-502 of the Criminal Law Article. At trial, the judge gave the following jury instruction on the kidnapping charge:

> With reference to the charge of kidnapping, the defendant is charged with the crime of kidnapping. Kidnapping is the confinement or detention of a person against that person's will accomplished by deception, coupled with the movement of that person from one place to another with the intent to carry or conceal that person. So in order to find the defendant guilty of kidnapping the State must prove: one, that the defendant confined or detained [M.F.] against her will; secondly, that the defendant moved [M.F.] for more than a slight distance from one place to another against her will; thirdly, that the defendant used deception to both confine or detain and move [M.F.]; and fourth, that the defendant moved [M.F.] with the intent to carry or conceal [M.F.].

The instruction tracks Maryland Criminal Pattern Jury Instruction ("MPJI-Cr") 4:19 (2d ed. 2013).[6]

Witherspoon asked the court to give MPJI-Cr 4:19.1. That instruction contains much of the same language as MPJI-Cr 4:19, but includes additional language concerning

[6] MPJI-Cr 4:19 states:

> The defendant is charged with the crime of kidnapping. Kidnapping is the confinement or detention of a person against that person's will accomplished by [force or threat of force] [deception], coupled with the movement of that person from one place to another with the intent to carry or conceal that person. In order to find the defendant guilty of kidnapping the State must prove:
>
> (1) that the defendant [confined] [detained] (name) against [his] [her] will [and without legal justification];
>
> (2) that defendant moved (name) for more than a slight distance from one place to another against [his] [her] will [and without legal justification];
>
> (3) that the defendant used [force or threat of force] [deception] to both [confine] [detain] and move (name); and
>
> (4) that the defendant moved (name) with the intent to carry or conceal (name).

whether the movement or "asportation" of the victim was merely incidental to another crime.[7] The court declined to give MPJI-Cr 4:19.1.

[7] MPJI-Cr 4:19.1 is set out below, with additional language in bold-face type and deleted language stricken out:

> The defendant is charged with the crime of kidnapping. Kidnapping is the confinement or detention of a person against that person's will, accomplished by [force or threat of force] [deception], coupled with the movement of that person from one place to another with the intent to carry or conceal. In order to convict the defendant of kidnapping, the State must prove:
>
> (1) that the defendant [confined] [detained] (name) against [his] [her] will [and without legal justification];
>
> (2) that the defendant moved (name) ~~for more than a slight distance~~ from one place to another against [his] [her] will [and without legal justification];
>
> (3) that the defendant used [force or threat of force] [deception] to both [confine] [detain] and move (name); and
>
> (4) that the defendant moved (name) with the intent to carry or conceal (name).
>
> **The movement must be for more than a slight distance. It must be more than the movement that occurs incidental to the commission of the crime of (underlying crime). The movement must be for some purpose independent of the crime of (underlying crime). In determining whether the movement of (name) was slight or incidental, you should consider the following factors:**
>
> **(1) how long (name) was held;**
>
> **(2) how far and where (name) was taken;**
>
> **(3) whether the movement was greater than was necessary to commit the underlying crime;**

Maryland Rule 4-325(c) governs a court's obligation to give jury instructions in criminal cases. In pertinent part, it provides:

> The court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding. . . . The court need not grant a requested instruction if the matter is fairly covered by instructions actually given.

Id.

In summary, Rule 4-325(c) requires the trial court to give a requested instruction when a three-part test is met: (1) the requested instruction is a correct statement of the law; (2) the requested instruction is applicable under the facts of the case (i.e., is generated by some evidence); and (3) the content of the requested instruction was not fairly covered elsewhere in the jury instruction actually given. *See Atkins v. State*, 421 Md. 434, 444 (2011); *Thompson v. State*, 393 Md. 291, 302-03 (2006); *Ware v. State*, 348 Md. 19, 58 (1997); *accord Grandison v. State*, 341 Md. 175, 211 (1995).

The issue before us is whether MPJI-Cr 4:19.1 was applicable under the facts of the case. Whether "'the evidence is sufficient to generate the desired instruction is a question of law for the judge.'" *Bazzle v. State*, 426 Md. 541, 550 (2012) (quoting *Dishman v. State*, 352 Md. 279, 292-93 (1998)).

MPJI-Cr 4:19.1 concerns the concept of carrying, movement, or asportation, which has contributed to a great deal of litigation in kidnapping cases in Maryland and

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> **(4) whether the movement of (<u>name</u>) was for a purpose other than to commit the underlying crime; and**
>
> **(5) whether the movement and the [confinement] [detention] substantially increased the risk of harm, beyond the risk of harm that was part of the commission of the underlying crime.**

elsewhere. *See generally State v. Stouffer*, 352 Md. 97, 106-13 (1998). Because kidnapping statutes "often carry significant penalties" (*id.* at 107), courts have expressed concern that "'persons who have committed such substantive crimes as robbery or assault – which inherently involve the temporary detention or seizure of the victim – will suffer the far greater penalties prescribed by the kidnapping statutes.'" *Id*. (quoting *Government of the Virgin Islands v. Berry*, 604 F.2d 221, 226 (3d Cir. 1979)); *see also McGrier v. State*, 125 Md. App. 759, 769 (1999) (reasoning that General Assembly did not intend to impose maximum sentence of 30 years' imprisonment for kidnapping "where the forcible carrying of a person was incidental to the commission of another felony").

In *State v. Stouffer*, 352 Md. at 113, the Court of Appeals aligned Maryland with the majority of jurisdictions, which "examine[] the circumstances of each case and determine[] from them whether the kidnapping -- the intentional asportation -- was merely incidental to the commission of another offense." The *Stouffer* Court declined to formulate any specific standards for making that determination. *Id.* Instead, the Court enumerated the principal factors that bear on the analysis:

> How far, and where, was the victim taken? How long was the victim detained in relation to what was necessary to complete the crime? Was the movement either inherent as an element, or, as a practical matter, necessary to the commission, of the other crime? Did it have some independent purpose? Did the asportation subject the victim to any additional significant danger?

Id.

Applying those factors in *Stouffer*, the Court concluded that the evidence was sufficient to support a conviction for kidnapping. The defendant and his confederates had

driven the victim a "considerable" distance to field, where he was beaten and stabbed; the victim was not "simply dragged a short distance into a nearby alley or building." *Id.* The kidnapping had a purpose that was independent of the beating, because it was calculated to frighten the victim or "'teach him a lesson[.]'" *Id.* Finally, the kidnapping "substantially increased" the victim's peril, because he was alone, in a field, "completely at the mercy of his abductors, and with no prospect of escape or assistance[.]" *Id.* at 114.

By contrast, in *McGrier v. State*, 125 Md. App. at 771-73, this Court held the movement or asportation was merely incidental to rape, when the defendant had dragged or pulled his victims down several stairs, held them no longer than necessary to rape them and flee, and exposed them to no additional danger beyond the (considerable) danger of the forcible rape itself. Similarly, in *Paz v. State*, 125 Md. App. 729, 740 (1999), this Court recognized that the movement or asportation was merely incidental to an attempted rape, when the defendant dragged the victim 20 or 25 feet into an alley, detained her for only a brief period of time (because the police intervened), and moved the victim for the sole purpose of committing the rape in a secluded place. In both cases, this Court held that the evidence was insufficient to support a conviction for kidnapping. *McGrier v. State*, 125 Md. App. at 771-73; *Paz v. State*, 125 Md. App. at 740.

Strictly speaking, cases such as *Stouffer*, *Paz*, and *McGrier* concern whether the movement of the victim was merely incidental to another crime and thus whether the evidence was insufficient to support a conviction for kidnapping; they do not concern the question in this case, which is whether the court was required to instruct the jury about

how to determine whether the movement of the victim was merely incidental to another crime.

The answer to that question begins with the "Notes on Use" that follow MPJI-Cr 4:19.1. The first sentence of those notes directs a court to use this instruction if the defendant is charged with kidnapping under § 3-502 of the Criminal Law Article "*and there is an issue generated that the asportation was merely incidental to an underlying non-lesser included offense, e.g., robbery, rape.*" MPJI-Cr 4:19.1 (2d ed. 2013) (emphasis added). This direction implies that a court need not use MPJI-Cr 4:19.1 unless a reasonable factfinder could find that the asportation was merely incidental to some other crime.

In our judgment, the jury could not reasonably find that the asportation in this case was merely incidental to another crime, such as the second- and third-degree sexual offenses that Witherspoon was convicted of committing. Witherspoon drove M.F. about 30 minutes outside of Baltimore City, to Laurel, and kept her at his residence until the following morning, when he drove her back to school. The duration of the detention, from about 1:00 a.m. until 7:00 a.m., was far greater than necessary simply to commit a sexual assault; and he continued to detain her even after the assault had occurred. Nor was it necessary for Witherspoon to take M.F. all the way to the southern Howard County to commit the other crimes: he could have assaulted his mentally incapacitated and physically helpless victim at some less distant location. Witherspoon exposed M.F. to significant danger, beyond the danger inherent in the sexual assault itself, by taking her to an unknown location when she was helpless, incapacitated, intoxicated to the point where

she was unable to walk and was vomiting on herself, and had no phone, money, or other means to get back to Baltimore. Finally, by abducting M.F. from a public place and taking her to his residence in Laurel, he limited her opportunities to secure help, isolated her, placed her at his mercy, and diminished the likelihood that the sexual assault would be discovered.

In summary, this was not a case in which there was any real question about whether the movement or asportation of the victim was merely incidental to another crime: the movement in this case was, as a matter of law, *not* merely incidental to another crime. The court therefore did not err in declining to employ MPJI-CR 4:19.1 and in declining to instruct the jury about how to determine whether the movement was merely incidental.[8]

IV.

Witherspoon contends that the evidence was insufficient to support his convictions for second-degree assault, committing second- and third-degree sexual offenses, and kidnapping. We disagree.

[8] In addition to arguing that the instruction was not generated by the evidence, the State argues that the question of whether the movement of the victim was merely incidental to another crime concerns the sufficiency of the evidence, which is for the court alone, and not the jury, to decide. Hence, in the State's view, a court should never give MPJI Cr 4.19.1. The State also argues that the instruction does not contain a correct statement of the law, because it stresses some of the factors enumerated in *Stouffer* and treats them as essential elements rather than as factors to be balanced. In view of our conclusion that the instruction was not generated by the evidence, we need not consider the State's other contentions.

In assessing the sufficiency of the evidence supporting a criminal conviction, we ask "'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.'" *McClurkin v. State*, 222 Md. App. 461, 486 (2015) (emphasis in original) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "In applying that standard, we give 'due regard to the [fact-finder's] findings of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses.'" *Id*. (quoting *Harrison v. State*, 382 Md. 477, 488 (2004)). We do not "'distinguish between circumstantial and direct evidence because [a] conviction may be sustained on the basis of a single strand of direct evidence or successive links of circumstantial evidence.'" *Montgomery v. State*, 206 Md. App. 357, 385 (2012) (quoting *Morris v. State*, 192 Md. App. 1, 31 (2010)). A court, on appellate review of evidentiary sufficiency, will not "retry the case[,]" or "re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence." *Smith v. State*, 415 Md. 174, 185 (2010).

We first address the sufficiency of the evidence on the charges of committing second- and third-degree sexual offenses. At the time of the events in this case, a person committed a second-degree sexual offense if he "engage[d] in a sexual act" with a person whom he knew or reasonably should have known to be "a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual[.]" Md. Code

(2002, 2012 Repl. Vol., 2015 Supp.), § 3-306(a)(2) of the Criminal Law Article.[9] At the time of the events in this case, a person committed a third-degree sexual offense if he "engage[d] in sexual contact" with a person whom he knew or reasonably should have known to be "a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual[.]" *Id.* § 3-307(a)(2).[10]

Witherspoon does not (and cannot) contend that the evidence was insufficient to prove that he engaged in a "sexual act" with M.F. or that he had "sexual contact" with her. On cross-examination, Witherspoon admitted that he touched her breast and her vagina, which is "sexual contact" under what was then § 3-301(f)(1) of the Criminal Law Article.[11] Witherspoon also admitted that he performed cunnilingus on M.F., which is a "sexual act" under what was then § 3-301(e) of the Criminal Law Article.[12] The injuries to M.F.'s cervix, fossa navicularis, and posterior fourchette suggest that he committed other sexual acts and engaged in other forms of sexual contact with her as well.

[9] Section 3-306 of the Criminal Law Article was repealed as of October 1, 2017. *See* 2017 Md. Laws ch. 161, § 1.

[10] Section 3-307 of the Criminal Law Article was amended as of October 1, 2016, to change the term "mentally defective individual" to "substantially cognitively impaired individual." Subsection (a)(2) currently provides that a person may not "engage in sexual contact" with a person whom he knows or reasonably should know to be "a substantially cognitively impaired individual, a mentally incapacitated individual, or a physically helpless individual[.]"

[11] The definition of "sexual contact" now appears in § 3-301(e) of the Criminal Law Article.

[12] The definition of "sexual act" now appears in § 3-301(d) of the Criminal Law Article.

Therefore, for purposes of the convictions for committing second- and third-degree sexual offenses, the only question is whether the evidence was sufficient to show that Witherspoon knew or reasonably should have known that M.F. was "a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual."

Viewing the evidence in the light most favorable to the prosecution, it would not have been particularly difficult for the jury to find that Witherspoon, at a minimum, reasonably should have known that M.F. was mentally incapacitated, physically helpless, or both.

At the time of the events in this case, the term "mentally incapacitated individual" was defined as:

> an individual who, because of the influence of a drug, narcotic, or intoxicating substance, or because of an act committed on the individual without the individual's consent or awareness, is rendered substantially incapable of:
>
> (1) appraising the nature of the individual's conduct; or
>
> (2) resisting vaginal intercourse, a sexual act, or sexual contact.

Md. Code (2002, 2012 Repl. Vol., 2015 Supp.), § 3-301(c) of the Criminal Law Article.[13]

At the time of the events in this case, the term "[p]hysically helpless individual" was defined as an individual who:

> (1) is unconscious; or
>
> (2)(i) does not consent to vaginal intercourse, a sexual act, or sexual contact; and

[13] Former § 3-301(c) has been recodified, without change, as § 3-301(b) (2018 Supp.).

> (ii) is physically unable to resist, or communicate unwillingness to submit to, vaginal intercourse, a sexual act, or sexual contact.

Md. Code (2002, 2012 Repl. Vol., 2015 Supp.), § 3-301(d) of the Criminal Law Article.[14]

The evidence in this case revealed that M.F. drank around seven shots of vodka before she even arrived at the Power Plant. After M.F. had become separated from her friends at the Power Plant, M.R. saw M.F. fall twice, and she testified that M.F. was slurring her words, that she was obviously having difficulty walking, and that she was drunk. Witherspoon also saw M.F. fall to the ground between two parked cars. In addition, Witherspoon testified that, as he was driving out of Baltimore City, M.F. asked him to pull over because she was (in his words) in a "rush" to urinate. M.F. vomited on herself and on the passenger seat of Witherspoon's car, but she had no recollection of doing so. In fact, she remembered almost nothing that occurred that evening: after handing her cracked cell phone and credit card to a friend at the Power Plant, her next memory was of waking up in a bed while Witherspoon was performing oral sex on her. M.F. attempted to push Witherspoon's head away, but it was too much effort even to move her hand. At that point, she passed out again.

From this evidence, the jury could have concluded that M.F. was mentally incapacitated, or physically helpless, or both, as a result of being extremely intoxicated; that she was unconscious when Witherspoon engaged in a sexual act and had sexual contact with her; and that she was substantially incapable of resisting or communicating

[14] Former § 3-301(d) has been recodified, without change, as § 3-301(c) (2018 Supp.).

her unwillingness to submit to vaginal intercourse or any sexual act or sexual contact. The jury therefore could readily have concluded that Witherspoon committed both a second- and a third-degree sexual offense.

For similar reasons, the jury could readily have concluded that Witherspoon committed the form of second-degree assault that includes a common-law battery (*Snyder v. State*, 210 Md. App. 370, 380 (2013)), i.e., "the unlawful unjustified, offensive and non-consensual application of force to the person of another." *Hickman v. State*, 193 Md. App. 238, 256 (2010). The evidence disclosed that, at a time when M.F. was incapable of consenting to sexual contact, Witherspoon touched her breasts and vagina, performed cunnilingus on her, and either had vaginal intercourse with her or penetrated her vagina (and injured her) in some other way. This evidence is obviously sufficient to support a conviction for second-degree assault.

Finally, on the kidnapping charge, Witherspoon argues that there was insufficient evidence to support a finding of asportation that was not incidental to the sexual offenses. To the contrary, as we have already held in Section III, above, no rational jury could have found that the asportation in this case was merely incidental to another crime. Therefore, because the other elements of kidnapping were indisputably met, the jury could readily have convicted Witherspoon of that offense as well.

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