Circuit Court for Baltimore City
Case No. 119198005

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 1640

September Term, 2021

DAVID KELLY

v.

STATE OF MARYLAND

Wells, C.J.,
Shaw,
Ripken,

JJ.

Opinion by Ripken, J.

Filed: January 4, 2023

* At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

In July of 2021, a jury in the Circuit Court for Baltimore City found David Kelly ("Kelly") guilty of rape in the second degree. The court sentenced Kelly to 15 years of incarceration, with all but 13 years suspended, followed by two years' probation. Kelly noted this timely appeal of his conviction. For the reasons to follow, we shall affirm.

ISSUES PRESENTED FOR REVIEW

Kelly presents the following questions for our review:[1]

I. Whether Kelly's letter required the circuit court to follow the procedure for a request to discharge counsel pursuant to Maryland Rule 4-215(e).

II. Whether Kelly's right to confrontation under the Sixth Amendment and Article 21 of the Maryland Constitution was violated.

III. Whether the circuit court properly exercised its discretion in conducting *voir dire* of prospective jurors.

IV. Whether the circuit court erred in denying Kelly's motion to dismiss.

FACTUAL AND PROCEDURAL BACKGROUND

In June of 2019, M.J.[2] called the police to report that Kelly had sexually assaulted her. M.J.'s aunt introduced her to Kelly about six months prior to the incident. Kelly lived in the same senior housing apartment complex on the same floor as M.J.'s aunt. Prior to

[1] Rephrased from:

I. Did the trial court commit reversible error in failing to comply with Maryland Rule 4-215(e)?
II. Was Appellant's right to confrontation under the Sixth Amendment and Article 21 violated?
III. Did the trial court commit reversible error in the conducting of *voir dire*?
IV. Did the trial court err in denying Appellant's motion to dismiss for violation of his constitutional and statutory right to a speedy trial?

[2] To protect the privacy of the victim, we will refer to her as "M.J." Neither the victim's first name nor surname begin with these letters.

the incident, M.J. frequently visited her aunt and had casual conversations with Kelly while at her aunt's apartment.

On the date of the incident, M.J. was at her aunt's apartment and had fallen asleep. She woke up during the night, sometime after 12:00 a.m., and went to Kelly's apartment to get a cigarette just before 6:00 a.m. M.J. interpreted Kelly opening his apartment door after she knocked as an "invit[ation] . . . for . . . conversation." M.J. entered Kelly's apartment and as they were talking, she followed him toward his bedroom, where he gave her a cigarette that she lit and started to smoke. While in the bedroom, Kelly started yelling and became frustrated and angry. Kelly then started to force himself on her by leaning and pushing down on her. Kelly grabbed M.J.'s arms and she attempted to use her weight and push him off.

According to M.J., after she tried to push Kelly off of her, they ended up on the floor "wrestling and arguing . . . like, tussling and stuff[.]" Kelly was grabbing her hair and made statements indicating that he intended to have sexual intercourse with her. M.J. began screaming for help, and Kelly started punching her. He continued to make statements suggesting his intent to have intercourse with her. Kelly told M.J. to pull her pants down at the same time she was trying to get her cell phone. As M.J. got her pants down to her knees, M.J. told Kelly she was on her "cycle" and "[had] a tampon in." Kelly told M.J. that he did not care and to remove her tampon, which she did. M.J. was able to locate her cell phone and called 911. When the operator answered, M.J. started yelling for help. When Kelly realized M.J. was on the phone, he began hitting and punching her in the face, which resulted in bruises and scratches on her face.

Kelly put his tongue on M.J.'s nipples and then began to perform oral sex on M.J. by putting his tongue on her vaginal area. Kelly then penetrated M.J.'s vagina with his penis. According to M.J., Kelly also "knocked one of [her] teeth out." Immediately after the assault, Kelly became apologetic, threatened to kill himself, and gave M.J. the keys to his apartment for the purported purpose of enabling her to find his body. M.J. put her clothes back on, left her tampon on the floor in the bedroom, took Kelly's keys, and returned to her aunt's apartment and told her what happened.

M.J. then went to the manager's station at the apartment complex and reported that Kelly had raped her. The manager called the police to report the rape and the police subsequently responded to the scene. Shortly thereafter, Kelly also called the police reporting that M.J. had stolen the keys to his apartment, food, and "several other things." When the police arrived at the scene, M.J. spoke with officers and reported that she had been raped. M.J. was transported to Mercy Hospital where a forensic nurse conducted a sexual assault forensic examination ("SAFE")[3].

The nurse who performed the SAFE exam observed that M.J. had a cut on her upper lip, which was bloody, swelling and bruising around one of her eyes, and missing teeth. The nurse conducted a genital and cervical exam, noting redness in her cervix that was consistent with vaginal penetration. The nurse collected various swabs as well as blood and urine samples, pubic hair combings, and M.J.'s underwear. The nurse placed these items in sealed envelopes and gave the SAFE exam kit to the Baltimore City Police Department.

[3] The purpose of a SAFE exam is to collect evidence from a sexual assault.

The lead detective assigned to the case, a member of the Baltimore City Police Sex Offense Unit, went to Mercy Hospital and met with M.J. before the SAFE exam was conducted. According to the detective, M.J. appeared "visibly shaken," "upset," and "very tired." She also observed M.J. had a small bruise, "like an abrasion," underneath her left eye, an abrasion on top of her lip, blood and abrasions inside of her mouth, and a missing tooth. The detective received M.J.'s sealed SAFE exam kit and submitted it to the Evidence Control Unit ("ECU"). As part of her investigation, the detective obtained a search and seizure warrant for a "suspect SAFE," which was executed on Kelly on the same date.[4] Kelly was transported to Mercy Hospital where a suspect SAFE exam kit was completed by collecting items and was then submitted to the ECU. The nurse who performed the exam on Kelly collected oral, fingernail, and genital swabs, pubic hair combings, a blood sample, and the shorts he was wearing. The detective instructed the lab to examine the evidence in the SAFE exam kits and evidence collected from the crime scene for DNA comparison with that of M.J. and Kelly.

At trial, in addition to the testimony of the victim, the nurse who had conducted the SAFE exam, and the lead detective, the State also produced several other witnesses who were involved in the collection and analysis of the forensic evidence. The State called the crime laboratory technician who was dispatched to Kelly's apartment to document the scene and take photographs. The crime scene technician also collected evidence from

[4] The detective explained that a "suspect SAFE" is a sexual assault forensic exam "done on the suspect that has been identified in order to collect evidence from them."

Kelly's apartment and submitted certain items to the ECU. Additionally, the State called a DNA analyst and a forensic scientist, who were both admitted as experts in their respective fields. These experts testified regarding the serological processing of the SAFE exam evidence, what evidence was sampled for subsequent DNA testing, and the analysis of DNA profiles.

At the conclusion of the evidence, the jury found Kelly guilty of second-degree rape. The court imposed a sentence of 15 years, with all but 13 years suspended, followed by two years' probation. This appeal followed. Additional facts will be included as they become relevant to the issues.

DISCUSSION

I. THE CIRCUIT COURT WAS NOT REQUIRED TO APPLY RULE 4-215.

"Our interpretation of the Maryland Rules is a question of law." *State v. Weddington*, 457 Md. 589, 598–99 (2018). Therefore "[w]e review *de novo* whether the circuit court complied with [Maryland] Rule 4-215." *Gutloff v. State*, 207 Md. App. 176, 180 (2012).

On May 6, 2021, Kelly sent a two-page letter to a judge of the circuit court, the body of which stated:

> The document that is enclosed with this letter is a follow up from 4/26/21. Because the Public Defender's Office does not respond to you unless you write to the Judg first, I really have no choice. The rest of my life is very important to me to let the Public Defender's Office play with the case. It took the State two years to show me a search and seizure warrant for my arrest and my home. You can clearly see that the warrant's were never signed by Judge OMalley, they were signed by the officer. More details are in the request that I have enclosed to the Public Defender's Office. I wanted to send

> a copy of the warrant's but we do not have a case manager here that can help us with these matters.
>
> I would like for the court to hold this request so that the Public Defender's Office can not say that my request was not in writing. *I would also like to ask the court to apoint a pro-bono lawyer to represent me because the three Public Defender's that have been on the case has done nothing but what the State want's them to do.* I pray that the court will grant my request.

(Emphasis added). Along with the above-referenced letter to the judge, Kelly enclosed a separate, three-page letter to his attorney in which he noted numerous issues concerning a recently filed motion, body camera footage, the State's alleged impropriety, and the need for a handwriting expert to examine "the warrant in the discovery." In the letter to his attorney, Kelly also asserted violations of the *Hicks*[5] deadline and the right to attend his arraignment. Kelly insisted that he would send a copy of this letter to the judge if the case was not being handled "the right way[.]"

According to Kelly, the circuit court committed reversible error by failing to comply with Maryland Rule 4-215(e). Specifically, Kelly argues that the court should have inquired into the request for discharge of counsel because his "request was neither vague nor embedded within extraneous matter in an unrelated written motion." *Williams v. State*, 435 Md. 474, 489 (2013). Kelly asserts that the letter expressed dissatisfaction with his attorney "[f]rom start to finish." In response, the State contends that Kelly's one-sentence

[5] The "*Hicks*" Rule is codified in Section 6-103 of the Criminal Procedure Article of the Maryland Code and Maryland Rule 4-271. In *State v. Hicks*, 285 Md. 310 (1979), the Supreme Court of Maryland (see footnote 6, *infra*) held that a criminal defendant must be brought to trial within 180 days after the earlier of the appearance of counsel, or first appearance of the defendant before the circuit court, unless good cause is shown. *Id.* at 315–17.

request to appoint a pro bono attorney to represent him, amid a multi-page and multi-issue letter, would not have been reasonably cognizable to the court to trigger Rule 4-215(e). Both parties present an examination of three cases in support of their requested application of Rule 4-215(e) to the facts before us: *State v. Northam*, 421 Md. 195 (2011), *Williams*, and *Weddington*.

Rule 4-215(e) explains the procedure that Maryland courts must follow when a defendant requests a discharge of their counsel. The rule provides: "If a defendant requests permission to discharge an attorney whose appearance has been entered, the court shall permit the defendant to explain the reasons for the request." Md. Rule 4-215(e). "Once Rule 4-215(e) is triggered, the trial court has an affirmative duty to address the defendant's request." *Williams*, 435 Md. at 487. In order to trigger the rule, the dissatisfied party must provide a "statement from which a court could conclude reasonably that the defendant may be inclined to discharge counsel." *Id.* at 486–87 ("[A] request to discharge an attorney need not be explicit."). The request can reach the court in the form of a letter, but it must be neither vague nor obscured by an unrelated matter. *See id.* at 489.

The three cases cited by both parties are illustrative of the application of Rule 4-215(e). In *Northam*, the Supreme Court of Maryland (at the time named the Court of Appeals of Maryland)[6] held that Northam's letter to the circuit court did not trigger Rule

[6] At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022. *See, also*, Md. Rule 1-101.1(a) ("From and after December 14, 2022, any reference in these Rules or, in any proceedings before any court of the Maryland Judiciary, any reference in any statute,

4-215(e). 421 Md. at 197. Northam's letter, titled "Motion for Change of Venue," stated in its fourth and final paragraph:

> Regardless of my race, gender, or ethnic belief I feel as a [sic] American citizen I have the right to be judge [sic] properly and be granted the ability to be represented by a Firm who has represented. Thereselves [sic] with Integerty [sic] and Justice. My Lawyer[']s filed are updated but he has made no contact with me and trial is set at Sept 24[.] *I'm requesting a Court appointed attorney* and Change of Venue.

(Emphasis added). *Id.* at 203. Each of the three preceding paragraphs of the letter were short and discussed Northam's request for a change in venue. *Id.* at 202–03. The Court agreed with the State's argument that the defendant's request was "buried in the final sentence of the final paragraph of what was captioned and pled specifically and solely as a change of venue motion." *Id.* at 206.

In *Williams*, the defendant sent a letter to the circuit court, the body of which read:

> My name is Melvin Williams JR[.] *Im writting to request New representation* From the Public defender's office. Pending me being able to afford an attorney. MR John Janowich has truly No interest on my behalf in trying to help me on my case. I truly feel Im being mis-represented. May U please remove him from my case. I'll truly be appreciated.

(Emphasis added). *Id.* at 479. The Court held that "Williams's unambiguous and to-the-point letter was sufficient, on its own, to constitute a request to discharge counsel." *Id.* at 494. Crucially, "[u]nlike Northam's fleeting reference in closing to wanting a 'Court appointed attorney,' Williams's request was neither vague nor embedded within extraneous matter in an unrelated written motion." *Id.* at 489. Williams's letter "stated

ordinance, or regulation applicable in Maryland to the Court of Appeals of Maryland shall be deemed to refer to the Supreme Court of Maryland….").

clearly, solely, and unequivocally that he intended to discharge his counsel." *Id.* at 488–89. Notably, the Court explained that there is no need for a party seeking discharge of counsel to make their request verbally, use present tense words, or bring it to the court's attention once filed in writing. *Id.* at 489–92.

Similarly, in *Weddington*, the Court held that the defendant's letter initiated a Rule 4-215(e) inquiry because it was neither vague nor obscure in its request for discharge of counsel. 457 Md. at 605. Weddington's letter began by requesting help from the court[7] and then, over multiple paragraphs, "explained his complaints against his attorney[.]" *Id.* at 594–95. The letter ended with an explicit request to reassign counsel: "I beggin [sic] the court To Reasign [sic] me a Attorney or Allow me to get my own[.]" *Id.* at 595. Unlike in *Northam*, the statements in Weddington's letter "were clear, unmistakable requests to discharge his counsel." *Id.* at 602.

Kelly's letter lacked the necessary clarity and unambiguity for the court to reasonably discern a request for discharge of counsel. Unlike those in *Williams* or *Weddington*, Kelly's letter was obscured by other matters. The letters in both *Williams* and *Weddington* singularly focused on the defendant's requests regarding counsel. The letters in *Williams* and *Weddington* each began with explicit requests for help that detailed the reasons for the defendants' dissatisfaction with their attorneys and concluded with repeated requests for discharge of their attorneys. *See Williams*, 435 Md. at 479; *see also*

[7] The first sentence of Weddington's letter read, "There is a Great and terrible Injustice Being Done to me and Im writing you Asking for your help? I stand Accussed of some Horendouse Crimes." *Weddington*, 457 Md. at 594.

Weddington, 457 Md. at 594–95. Contrary to Kelly's assertion that his letter was focused on discharging his counsel "from start to finish," Kelly's letter began by referring to the enclosed letter to his attorney, alluding to dissatisfaction with the public defender's office, and then, in largest part, discussing the potential fraudulence of the State's search and seizure warrant. The letter ends with a request for the court to hold onto the letter and then, for the first time, explicitly requests that the court appoint Kelly new counsel. An additional letter addressed to Kelly's attorney was also enclosed.

Similar to the contents of the letter in *Northam*, Kelly's request was embedded in the second to last sentence of a letter largely focused on his complaints about a warrant, sent in conjunction with an extraneous additional letter. Therefore, Kelly's letter did not prompt the court to reasonably discern a request for discharge of counsel.[8] Hence, Kelly's letter was not sufficient to trigger Rule 4-215(e). Accordingly, we conclude the circuit court did not commit error.

II. KELLY'S RIGHT TO CONFRONTATION UNDER THE SIXTH AMENDMENT AND ARTICLE 21 OF THE MARYLAND CONSTITUTION WAS NOT VIOLATED.

We ordinarily review a trial court's decision to admit evidence for abuse of discretion. *State v. Miller*, 475 Md. 263, 280 (2021). However, this case presents a mixed

[8] We note, also, the added difficulty the court faced by receiving Kelly's letter to his attorney in the same envelope as the letter at issue. The court should avoid becoming privy to confidential communications made between client and attorney. *See Northam*, 421 Md. at 207 (explaining that "talk to your lawyer" was "the proper response" for the court to make when the defendant appeared to try to circumvent his attorney to make a direct request to the judge). Upon seeing the letter addressed to Kelly's attorney, the court appropriately responded by forwarding Kelly's envelope to his attorney.

question of law and fact. Therefore, our review is de novo. *Id*.

A. Factual Context

At trial, Taylor Hall ("Hall"), a forensic scientist with the Baltimore City Police Department Crime Lab was admitted as an expert in the field of forensic serology. Hall testified that her responsibilities include screening evidence samples for the possible presence of biological fluids, including blood or semen, and identifying suitable samples for epithelial[9] or skin cells and saliva. She explained that once she is assigned a case, she retrieves the evidence from a vault, performs the analysis, and generates a report. After a report is generated, another analyst performs a technical review. Hall described the role of a technical review as follows:

> The technical review is when another competent analyst in the field . . . look[s] at . . . the entire case file to make sure that all of [the] technical procedures were followed in terms of testing the evidence, the results, and making sure the results that [were] received are translated correctly and completely into the report.

Hall testified that she completed a technical review of the original analyst's case file to make sure that "all of the technical protocols were followed in terms of testing the results that were recorded" and to "mak[e] sure that all the information was translated correctly and accurately to her report." While Hall did not repeat or redo any of the tests that were performed by the original analyst, she had access to all of the data the original analyst used and relied on in coming to her conclusions. Hall explained that the reason the tests are not

[9] Epithelial refers to the layer of cells that cover most surfaces of the body. *Epithelial*, Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/epithelial (last visited Dec. 21, 2022).

repeated during a technical review is "[b]ecause we're all competent analysts and we are required to write down all of our results and record everything so there is no need to retest any evidence in the technical review process."

Hall made sure that all the steps the original analyst took during her analysis were appropriate by "looking at the case file to determine what samples she had, how she screened them, and making sure that the tests that she used were the appropriate ones for those particular samples." Hall testified regarding the analyses performed by the original analyst on 11 evidentiary items including, but not limited to, various swabs taken from both M.J. and Kelly.[10] Hall testified as the technical reviewer at trial because the original analyst in this case, Amanda Pasay ("Pasay") was unavailable.[11]

Virginia Sladko, a Baltimore City Police Department Forensic Laboratory DNA analyst was also admitted as an expert at trial. Sladko received and analyzed various samples, including the external genital, breast, and nipple swabs collected from M.J. The results of these samples yielded a DNA profile consistent with M.J. and Kelly.

B. Parties' Contentions

Kelly contends that his right to confrontation under the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights was violated because the court allowed Hall to testify about the contents of Pasay's serology

[10] Hall testified regarding the following evidentiary items: 1) vaginal swabs; 2) vaginal cervical swabs; 3) external genitalia swabs; 4) peri-anal swabs; 5) pubic hair combings; 6) underwear from the SAFE kit; 7) right breast and nipple "licking" swabs; 8) a blood sample from M.J.; 9) penile swabs; 10) finger and hand swabs; and 11) a blood sample from Kelly.

[11] The record indicates Pasay was unavailable to testify because she was on maternity leave.

report. Specifically, Kelly asserts that Hall conveyed Pasay's observation of possible saliva and "vouched" for the competence of the serologist's analysis. In Kelly's view, Hall's testimony was "unequivocally incriminating" hearsay. Kelly notes, after the court ruled that Hall could testify about the contents of Pasay's serology report, the Supreme Court of Maryland rendered decisions in *Leidig v. State*, 475 Md. 181 (2021), and *State v. Miller*, 475 Md. 263 (2021). According to Kelly, Hall did not satisfy *Miller's* requirements allowing for a technical reviewer to testify in place of the author of a scientific report. Moreover, Kelly asserts Pasay's report was testimonial according to *Leidig*.

The State responds that Hall did not testify that Pasay observed "possible saliva" on the relevant swabs. Rather, Hall testified that certain swabs were selected for DNA analysis because M.J.'s allegations suggested the possible presence of saliva. Moreover, the State contends it was not necessary to call Pasay to introduce the DNA evidence, as the State produced Hall, a DNA analyst with personal knowledge of the accuracy of the DNA testing and profiling. When Hall conveyed information from Pasay's report about the selection samples of DNA for testing, she did not offer testimonial hearsay because she was the technical reviewer of Pasay's report. According to the State, Hall was a proper witness under *Miller* and the State produced another witness with personal knowledge of the accuracy of the DNA testing and profiling at issue, as *Leidig* requires. Finally, the State asserts even if the circuit court erred in permitting Hall's testimony, any error was harmless.

C. Governing Legal Principles

The Confrontation Clause of the Sixth Amendment to the United States Constitution

provides a criminal defendant with the right "to be confronted with the witnesses against him[.]" U.S. Const. amend. VI. Article 21 of the Maryland Declaration of Rights similarly provides that, "in all criminal prosecutions," an accused has a right "to be confronted with the witnesses against him" and "to examine the witnesses for and against him on oath[.]" Md. Decl. of Rts. art. 21.

In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court held that an out-of-court "testimonial statement" of a witness who does not testify at trial is admissible without violating the Confrontation Clause of the Sixth Amendment "only where the declarant is unavailable and only where the defendant has had a prior opportunity to cross-examine." *Id.* at 59. Although the Court did not offer a precise definition of a "'testimonial' statement," it set forth what it referred to as a "core class" of statements, namely, affidavits, depositions, prior testimony, and confessions. *Rainey v. State*, 246 Md. App. 160, 172, *cert. denied*, 468 Md. 556 (2020) (citing *Crawford*, 541 U.S. at 51–52).

Following *Crawford*, the Court articulated the "primary purpose" test for determining whether an out-of-court statement is "testimonial." *Davis v. Washington*, 547 U.S. 813 (2006). In *Davis v. Washington*, the Court held that a domestic battery victim's statements in response to a 911 operator's interrogation were not testimonial. *Id.* at 817–18, 822. In that case, the "primary purpose" of the interrogation was "to enable police assistance to meet an ongoing emergency." *Id.* at 822. The Court concluded the victim "simply was not acting as a *witness*; she was not *testifying*." *Id.* at 828 (emphasis in original). What the victim said was not "a weaker substitute for live testimony at trial." *Id.*

The Supreme Court has been divided on how the "primary purpose" test applies to scientific and forensic reports in the years following *Crawford* and *Davis*. *See Rainey*, 246 Md. App. at 173–77 (summarizing the holdings of relevant Supreme Court decisions); *see also Leidig*, 475 Md. at 206–33 (summarizing *Crawford* and relevant decisions in its aftermath from both the Supreme Court and the Supreme Court of Maryland). Recently, the Supreme Court of Maryland adopted the following standard under Article 21: "[A] scientific report is 'testimonial' if the author of the report reasonably would have understood that the primary purpose for the creation of the report was to establish or prove past events potentially relevant to later criminal prosecution." *Leidig*, 475 Md. at 186; *see also Miller*, 475 Md. at 283.

In *Leidig*, Molly Rollo, a forensic scientist, conducted a serological and DNA analysis on swabs collected from a burglary scene and produced a report. 475 Md. at 185. At trial, the State presented the testimony of a different forensic scientist, Tiffany Keener, who had analyzed a reference sample collected from Leidig after he became a suspect in the burglary. *Id.* at 186. Keener then compared the DNA profile she generated from that known sample to the DNA profile that Rollo had generated from the forensic samples. *Id.* The trial court admitted Rollo's report into evidence and allowed the State to elicit Keener's expert opinion that Leidig's known DNA profile matched the DNA profile that had been generated from the samples collected at the crime scene. *Id.* The jury convicted Leidig and this Court affirmed his convictions. *Id.* The Supreme Court of Maryland reversed, concluding that, because Keener was "merely Ms. Rollo's administrative reviewer, not her technical reviewer," the State's introduction of Rollo's report without

making her available for cross-examination violated Leidig's right to confrontation under Article 21. *Id.* at 246–47.

In *Leidig*, the Supreme Court of Maryland highlighted two important points. First, "if a testifying witness thoroughly reviewed a scientific report for substance at the time of its creation – providing a 'technical' review of the primary author's results and conclusions . . . and signed off on its issuance, the witness may convey the information contained in the report . . . without violating Article 21." *Id.* at 245. "Second, the State is not required to call every technician who performed some part of the testing that led the authoring analyst(s) to state the results and conclusions contained in the report." *Id.* The Court agreed with the recent decision of the Supreme Court of Connecticut (relying on an earlier decision of the New York Court of Appeals) on this issue.

> [W]e agree with the New York Court of Appeals that "the analysts involved in the preliminary testing stages, specifically, the extraction, quantification or amplification stages," are not necessary witnesses. [*People v. John*, 27 N.Y.3d 294, 313 (2016)]. Rather, "it is the generated numerical identifiers and the calling of the alleles at the final stage of the DNA typing that effectively accuses [the] defendant of his role in the crime charged." *Id.* Accordingly, to satisfy the confrontation clause, the state need only call as a witness an analyst with personal knowledge concerning the accuracy of the numerical DNA profile generated from the preliminary stages of testing.

Leidig, 475 Md. at 245 (quoting *State v. Walker*, 212 A.3d 1244, 1267 (2019)).

In *Miller*, the Supreme Court of Maryland was tasked with determining "whether a trial court violates a criminal defendant's constitutional rights, where the court allows the technical reviewer of a report analyzing DNA evidence to testify about the results of the analysis, without requiring the primary author of the report to be available for cross-examination." 475 Md. at 266. In *Miller*, an unidentified assailant sexually assaulted a

victim in 2008. *Id.* at 265. Although forensic scientists collected evidence and generated a DNA profile for the presumptive assailant, the case went cold. *Id.* Nine years later, the Federal Bureau of Investigation's Combined DNA Index System ("CODIS") produced a match between Miller and "unknown male #1," leading to criminal charges against Miller. *Id.* At Miller's trial, the State produced several witnesses who were involved in the collection and analysis of the forensic evidence, but the State did not call Thomas Herbert. *Id.* at 266. Herbert had analyzed the DNA evidence and was the primary author of two reports concerning the DNA evidence in the case. *Id.* The first was a 2008 report stating that the DNA of "unknown male #1" was identified from various pieces of evidence collected pursuant to the 2008 sexual assault investigation. *Id.* The second report was from 2017 and, relevant to the appeal, named Miller as the suspect in the 2008 sexual assault. *Id.*

By the time of Miller's trial, Herbert had relocated out-of-state. *Id.* The State therefore sought to introduce the testimony of the technical reviewer of the 2017 report. *Id.* Miller challenged the admissibility of the technical reviewer's testimony on hearsay and confrontation grounds. *Id.* The trial court disagreed and permitted the technical reviewer to testify. *Id.* On appeal, the Supreme Court of Maryland concluded that the technical reviewer's testimony did not violate the criminal defendant's rights under Article 21 nor the Sixth Amendment because the reviewer conveyed her independent expert opinions to the jury. *Id.* at 290. *Miller* stands for the proposition that a technical reviewer may testify for the author of a scientific report when the reviewer: (1) thoroughly reviews all the data the primary author used; (2) independently determines whether the primary author's results

and conclusions were correct; and (3) signs off on the report's issuance. *Id.* at 293. Under these circumstances, the technical reviewer may be deemed the "functional equivalent" of a second author of the report.[12] *Id.* Thus, the Supreme Court of Maryland held that the technical reviewer's testimony concerning the information contained in the report in that case was not hearsay. *Id.*

The *Miller* Court considered *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), in reaching its decision. The question presented in *Bullcoming* was "whether a prosecutor may introduce a forensic laboratory report through the in-court 'surrogate' testimony of an expert who neither signed the report nor performed or observed the analysis." *Miller*, 475 Md. at 285–86 (citing *Bullcoming*, 564 U.S. at 652). Bullcoming was on trial for driving while intoxicated. *Bullcoming*, 564 U.S. at 651. At trial, the prosecution did not call the forensic analyst who prepared the laboratory report certifying that Bullcoming's blood-alcohol concentration was above the legal threshold to testify. *Id.* at 651–55. Instead, the State called another analyst who was familiar with the testing procedures but had "neither participated in nor observed the test on Bullcoming's blood sample." *Id.* at 651. The Supreme Court held that "surrogate testimony" of an expert who neither signed the report nor performed any part of the analysis violated Bullcoming's right to confrontation. *Id.* at 652.

[12] The Supreme Court of Maryland further noted, "[a] technical review is for substance; an administrative review is not." *Miller*, 475 Md. at 300 (internal citation omitted). "Unlike a technical reviewer, an administrative reviewer cannot be viewed as the functional equivalent of a second author of the report." *Id.*

D. Analysis

1. Hall's testimony as the technical reviewer did not violate Kelly's confrontation rights.

It is against this backdrop that we return to the facts of the present case. Here, the State does not dispute the circuit court's finding that the report at issue was "testimonial" for confrontation clause purposes. Prior to trial, the court determined that Hall would be permitted to testify to the contents of the report but that the report itself would not be admitted into evidence. Thus, the question becomes whether Hall's testimony as the technical reviewer complied with *Miller's* requirements. As we shall explain, Hall was the functional equivalent of a second author and therefore, pursuant to *Miller*, Kelly's confrontation rights were not violated by allowing Hall to testify as to the contents and results of Pasay's report.

At trial, Hall explained that as part of her technical review she reviewed the SAFE exam notes and the entire case file to ensure that "all the technical protocols were followed in terms of testing the results" and that the tests Pasay used "were the appropriate ones." Hall had access to all the data that Pasay used and relied upon in coming to her conclusions. Hall testified as to every individual piece of evidence that Pasay selected for testing, described the process and results of the testing, and explained why tests were performed on certain items. Hall agreed with the steps Pasay took and the swabs she selected for DNA testing. Hall adopted Pasay's conclusions regarding which samples were selected for DNA analysis and explained the rationale for doing so. Thus, having thoroughly reviewed Pasay's steps and conclusions, Hall independently formed the opinion that Pasay's opinions were correct.

Kelly asserts that the court clearly erred in determining that Hall signed off on Pasay's report, which is required by *Miller*. He notes that Hall did not sign Pasay's report, but instead signed a "Forensic Screening Case Review."[13] In the court's memorandum in support of its order denying Kelly's motion for a new trial, it noted the State submitted the report that Hall purportedly signed in its response to Kelly's motion for new trial. However, the court noted that the report was not admitted into evidence at the trial, and therefore, it was not preserved for the court's consideration in conjunction with the motion for new trial. After stating that the court must base its finding on the evidence offered at trial, the court concluded that the evidence supported a factual finding that Hall signed off on Pasay's report at the time she conducted the technical review. We find no error with this conclusion. During Hall's cross-examination, the following colloquy occurred:

> [DEFENSE COUNSEL]: So the five most probative things that [Pasay] decided to send on, you agree with her decision; right, *as the technical reviewer who signed off on this; right?*
>
> [HALL]: Yes, I agree.

(Emphasis added).

Moreover, on direct examination, while discussing the results of the administrative review that another analyst performed, Hall testified that "[t]he administrative reviewer also signed off on" the report. This further supports the conclusion that Hall signed off on Pasay's report.

[13] The State attached this document to its Response to Defendant's Motion for New Trial. However, this document was not introduced at trial and therefore, it is not appropriate for our review.

We conclude that Hall's role as the technical reviewer of Pasay's report is consistent with that of the technical reviewer in *Miller*. In applying the *Miller* requirements, it is clear from Hall's testimony that she (1) thoroughly reviewed all the data Pasay used; (2) independently determined Pasay's results and conclusions were correct; and (3) signed off on the report's issuance. 475 Md. at 293. Thus, the trial court did not err in concluding that Hall was the "functional equivalent of a second author," and her testimony did not violate Kelly's rights to confrontation. *Id.*

2. Any error was harmless.

Kelly suggests that there was possible contamination from Pasay's handling of the DNA samples in this case. Specifically, Kelly asserts that Hall's testimony regarding Pasay's analysis improperly suggested that "no mistakes were made by Pasay that would give the jury reason to question" whether Kelly's DNA was found on the swabs from M.J. because of sexual contact between the two or because of "contamination" from Pasay's improper handling of the DNA samples. In response, the State asserts that even if the circuit court erred in permitting Hall's testimony, any error was harmless because Kelly failed to make any contamination argument in his closing.

The harmless error test, first stated in *Dorsey v. State*, 276 Md. 638 (1976), provides:

> [W]hen an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed "harmless" and reversal is mandated.

Id. at 659. In performing a harmless error analysis, "the issue is not what evidence was available to the jury, but rather what evidence the jury, in fact, used to reach its verdict."

Dionas v. State, 436 Md. 97, 109 (2013).

To the extent that Hall's testimony resulted in the jury's belief that Kelly's DNA was found on the swabs from M.J. because of sexual contact between the two rather than "contamination," the error was harmless. The State called Sladko to testify, a forensic laboratory DNA analyst who received and analyzed various samples, which yielded DNA profiles consistent with M.J. and Kelly. Kelly cross-examined Sladko about the possibility of contamination and elicited her testimony that she did not observe Pasay's preparation of the samples. Kelly's counsel also elicited testimony from Hall that she did not examine the swabs sampled for testing. Kelly had the opportunity to argue the possibility that the swabs were contaminated without Pasay present at trial to refute such a contention. Moreover, despite the lack of testimony from Pasay, any information Kelly would have garnered from Pasay could have been elicited through cross-examination of Sladko.

However, Kelly did not make a cross-contamination argument in his closing. Instead, Kelly criticized the lead detective's investigation and focused on the serologist's failure to test other items of evidence, such as carpet samples, bed sheets, and swabs that were not submitted for analysis. Kelly conceded his DNA was found on M.J.'s external genitalia but suggested the sexual encounter between the two was consensual. In deciding not to raise the integrity of the DNA evidence in his closing and to, instead, assert that the DNA evidence could not disprove consent, Kelly withdrew the issue of contamination, rendering any error harmless. Under these circumstances, we discern no "reasonable possibility" that Hall's testimony as the technical reviewer "may have contributed to the rendition of the guilty verdict." *Dorsey*, 276 Md. at 659.

III. THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION IN CONDUCTING *VOIR DIRE* OF PROSPECTIVE JURORS.

Kelly requested the following *voir dire* question: "Would any member of this jury panel give more weight or less weight to a witness's testimony simply because they are an expert?" ("Question 21"). The court denied the request because it found that the question would be fairly covered by the jury instructions.[14] The court subsequently asked the following pertinent questions in its *voir dire*:

> There may be, in this case, testimony from one or more Baltimore City police officers. Would you give more or less weight to the testimony of a police officer merely because he or she is a police officer than to other witnesses in the case?
>
> * * *
>
> Would you give more or less weight to the testimony of witnesses called by the defense than to witnesses called by the State? Alternatively, would you give more or less weight to the testimony of witnesses called by the State than to witnesses called by the defense?
>
> * * *
>
> Do you hold any beliefs related to race, sex, color, religion, national origin or other personal attributes of the defendant or other witnesses that would or might affect your ability to reach a verdict based only on the evidence and the law?

[14] The court gave the jurors the following instruction regarding expert testimony:

> An expert is a witness who has knowledge, skill, experience, education or special training in a given field and therefore is permitted to express opinions in that field. You should consider an expert's testimony together with all the other evidence. In weighing the opinion portion of an expert's testimony, in addition to the factors that are relevant to any witnesses' credibility, you should consider the expert's knowledge, skill, experience, training or education as well as the expert's knowledge of the subject matter about which the expert is expressing an opinion. You should give expert testimony the weight and value you believe it should have. You are not required to accept an expert's testimony even if it is uncontradicted. As with any other witness, you may believe all, part or none of the testimony of any expert.

A. The Court's Denial to Ask Question 21 during *Voir Dire*

This Court reviews a circuit court's rulings during *voir dire* for abuse of discretion. *See Washington v. State*, 425 Md. 306, 314 (2012). Maryland exercises "limited *voir dire*," *Collins v. State*, 463 Md. 372, 404 (2019) ("*Collins II*"); thus, circuit courts have "significant latitude in the process of conducting voir dire and the scope and form of questions presented to the venire." *Collins v. State*, 452 Md. 614, 622–23 (2017) ("*Collins I*"). A circuit court "reaches the limits of its discretion only when the voir dire method employed by the court fails to probe juror biases effectively." *Collins I*, 452 Md. at 623 (quoting *Wright v. State*, 411 Md. 503, 508 (2009)).

Kelly argues that his right to an impartial jury under the Sixth Amendment and Article 21 of the Maryland Declaration of Rights was violated by the court's denial because *voir dire* "'is critical to' implementing the right to an impartial jury." *Pearson v. State*, 437 Md. 350, 356 (2014) (quoting *Washington*, 425 Md. at 312). Kelly claims that the court abused its discretion in declining to ask prospective jurors Question 21 because the question was specifically aimed at identifying a disqualifying bias or preconception directly relating to the expert status of the State's witness. Thus, Kelly contends that Question 21 was mandatory and, therefore, the court's reliance on jury instructions as a substitute was improper. *See Thomas v. State*, 454 Md. 495, 512 (2017) (citing *Moore v. State*, 412 Md. 635, 652 (2010) ("[I]f a potential juror is likely to give more credibility to a specific witness based on that witness's occupation, status, category, or affiliation then, upon request, the trial judge must ask a voir dire question that seeks to uncover that bias.")

The State responds by arguing that Question 21 was unlikely to expose a specific

cause for disqualification because it was not "tailored" to identify a prospective juror's bias toward a "specific occupation, status, or affiliation." *Thomas*, 454 Md. at 513. The State emphasizes that, under Maryland Rule 5-702, a witness's "expert" designation merely indicates that the court found the witness qualified to give specialized testimony on any number of subjects. Md. Rule 5-702. According to the State, the "expert" designation was too "generic" to elicit bias meaningful to the case—particularly bias that was not already covered by other *voir dire* questions. The State posits that such a vague question would cause confusion, and the court appropriately waited to raise the matter as an evidentiary designation for jury instruction at the close of the case. We agree.

"[T]he court need not ordinarily grant a particular requested [question] if the matter is fairly covered [elsewhere]." *Burch v. State*, 346 Md. 253, 293 (1997) (internal quotation marks omitted). However, if a party proposes *voir dire* questions "directed to a specific cause for disqualification, . . . failure to allow such questions is an abuse of discretion constituting reversible error." *Thomas*, 454 Md. at 505 (quoting *Moore*, 412 Md. at 646); *see also Dingle v. State*, 361 Md. 1, 13–14 (2000) (explaining that a court "need not make any particular inquiry of the prospective jurors unless that inquiry is directed toward revealing cause for disqualification"); *Pearson*, 437 Md. at 356 ("[T]he sole purpose of *voir dire* 'is to ensure a fair and impartial jury by determining the existence of [specific] cause for disqualification[.]'" (quoting *Washington*, 425 Md. at 312)).

"There are two categories for specific cause for disqualification: (1) a statute disqualifies a prospective juror; or (2) a collateral matter is reasonably liable to have undue influence over a prospective juror." *Collins II*, 463 Md. at 372 (quoting *Pearson*, 437 Md.

at 357 (cleaned up)); *see also Dingle*, 361 Md. at 10 (stating that causes for disqualification are "biases directly related to the crime[s], the witnesses, or the defendant"). The second category encompasses when a prospective juror is predisposed "to give more credibility to a specific witness based on that witness's occupation, status, category, or affiliation." *Thomas*, 454 Md. at 512. A party's requested *voir dire* question is only mandatory if the trial judge determines that a specific witness testifying in the present case could be favored or disfavored exclusively based on occupation, status, or affiliation. *Id.* at 513. Therefore, any *voir dire* question seeking to uncover bias on the basis of occupation, status, or affiliation must be "tailored to the witnesses who are testifying in the case and their specific occupation, status, or affiliation." *Id.* at 513.

In support of his argument, Kelly relies on *Langley v. State*, 281 Md. 337 (1977), in which a crucial part of the State's evidence was testimony of a police officer that directly contradicted that of the defendant. *Id.* at 349. The Supreme Court of Maryland held it prejudicial error for the trial court to fail to propound a requested *voir dire* question that sought to uncover a specific bias toward the credibility of the police officer's testimony over that of a civilian. *Id.* at 338, 349. The Court articulated the following conclusion in *Langley*:

> A juror who states on voir dire that he would give more credit to the testimony of police officers than to other persons has prejudged an issue of credibility in the case. Regardless of his efforts to be impartial, a part of his method for resolving controverted issues will be to give greater weight to the version of the prosecution, largely because of the official status of the witness.

Id. at 348. According to Kelly, a juror who states on *voir dire* that he or she would give more credit to the testimony of an expert witness over other witnesses "has prejudged an issue of credibility in the case." Kelly's attempt to analogize Question 21 to the *voir dire* question omitted in *Langley* is without merit. Although the State was the only party that offered expert testimony in this case, the bias that the proposed Question 21 sought to uncover was already fairly covered by other *voir dire* questions. Any underlying bias of potential jurors to believe the State's experts would have been revealed by the court's question regarding attributing more or less weight to the testimony of witnesses called by the State. Moreover, the court's question regarding beliefs related to race, sex, color, religion, national origin or other personal attributes of the defendant or other witnesses would have exposed any underlying bias. Thus, the topic was fairly covered by questions the court already asked.

Kelly's reliance on *Moore v. State*, 412 Md. 635 (2010), is similarly misplaced. In *Moore*, the trial court declined to ask *voir dire* questions, over the defense counsel's objection, directed at uncovering whether potential jurors would be biased against witnesses because the witnesses were called by the defense. *Id.* at 642. The Supreme Court of Maryland reversed because of the court's refusal to ask the requested questions. *Id.* at 668. *Moore* did not concern whether the questions were fairly covered by the other *voir dire* questions, and, in fact, no other questions were asked that would have captured the bias the questions sought to reveal. Here, unlike in *Moore*, the bias that Question 21 sought to reveal—whether a potential juror was more likely to give weight to an expert witness's testimony—was adequately covered by the aggregate of the other *voir dire* questions.

Accordingly, the court did not abuse its discretion in declining to ask Question 21.

B. The Court's Denial to Strike Juror 2187

This Court reviews a trial court's ruling on a motion to strike for cause for abuse of discretion. *See, e.g., Morris v. State*, 153 Md. App. 480, 497–501 (2003). "In reviewing a trial judge's exercise of discretion, . . . the appellate reviewer should not decide what [they] would probably have done under the circumstances. . .The appellate court's only proper inquiry is whether the trial judge had some rational basis for exercising his discretion as he did." *Id.* at 503–04.

Kelly argues that the court abused its discretion by denying his motion to strike Juror 2187 for cause. During *voir dire*, Juror 2187 indicated that he was a police officer who had familiarity with the incident and knew one of the State's listed witnesses, the investigating detective on the case, and "probably one of the forensic scientists." Additionally, Juror 2187 indicated that he had strong feelings toward the crime of rape because of his experiences as a police officer. Despite these responses, the court decided not to strike Juror 2187 because, when asked whether experience or personal knowledge would affect his ability to be fair and impartial in deciding the case, Juror 2187 responded in the negative. Kelly argues that impartiality, given Juror 2187's background, would "require a superhuman feat." In addition to being "violative of fact and logic," *Kusi v. State*, 438 Md. 362, 386 (2014) (quoting *Wilson v. John Crane, Inc.*, 385 Md. 185, 198 (2005)), Kelly maintains that the court's refusal to strike Juror 2187 undermines the integrity of our judicial system. *See Dillard v. State*, 415 Md. 445, 449 (2010). In response, the State asserts that the court's denial of Kelly's motion to strike was a proper exercise of its discretion

because the trial judge is in the appropriate position to make assessments of credibility based on a juror's assurances. *See Morris*, 153 Md. App. at 503–04.

Under Maryland Rule 4-312, "[a] party may challenge an individual qualified juror for cause." Md. Rule 4-312(e)(2). When a trial court excuses a prospective juror for cause, it has assessed the individual's credibility and determined that the prospective juror "might not be able to discharge the juror's obligation to decide a case fairly and impartially for the duration of the trial." *Kidder v. State*, 475 Md. 113, 124 (2021) (citing Md. Code Ann., Cts. & Jud. Proc. § 8-404(b)(2)(ii)). However, "[a] juror may be struck for cause only where [they] display[] a predisposition against innocence or guilt because of some bias extrinsic to the evidence to be presented." *McCree v. State*, 33 Md. App. 82, 98 (1976) (citing *Johnson v. State*, 9 Md. App. 143, 149 (1970)). Whether a juror has a particular bias relevant to a case is a question of fact. *See Dingle*, 361 Md. at 16.

A criminal defendant's right to an impartial jury under the Fourteenth Amendment's Due Process Clause and Article 21 of the Maryland Declaration of Rights does not require prospective jurors to be "free of all preconceived notions relating to guilt or innocence, only that [they] can lay aside [their] impressions or opinions and render a verdict based solely on the evidence presented in the case." *Calhoun v. State*, 297 Md. 563, 583 (1983) (quoting *Couser v. State*, 282 Md. 125, 138 (1978), *cert. denied*, 439 U.S. 852 (1978)). The Supreme Court of Maryland has held that admitting an experience or an association does not automatically disqualify the venire person. *See Dingle*, 361 Md. at 16 (internal footnote omitted). Moreover, this Court has concluded that it is not an abuse of discretion to decline to strike a potential juror for cause who was a police officer in the jurisdiction where the

trial occurred. *See Morris*, 153 Md. App. at 497–98. In *Morris*, although the prospective juror, a police officer, indicated an initial tilt in favor of the prosecution, he ultimately stated he would be able to render a fair and impartial verdict based on the evidence in the case. *Id.* at 497. Similarly, a prospective juror is not automatically disqualified by affirmatively responding to a "strong feelings" voir dire question. *See Pearson*, 437 Md. at 364.

Here, we conclude that the circuit court did not abuse its discretion in denying Kelly's motion to strike Juror 2187 for cause. Although Juror 2187 disclosed that he had some familiarity with the incident, experiences with the criminal justice system, strong feelings about rape, and knowledge of potential witnesses, he indicated that his knowledge and experience would not affect his ability to listen to the evidence in the case with an open mind and base his findings only on the law and the facts. The trial judge was in the proper position to assess Juror 2187's credibility when the juror made assurances that he could be fair and impartial in deciding the case.

IV. THE CIRCUIT COURT DID NOT ERR IN DENYING KELLY'S MOTION TO DISMISS.

Kelly contends the circuit court erred in denying his motion to dismiss for constitutional violations and speedy trial grounds. The State argues Kelly was not deprived of his constitutional right to a speedy trial, and the circuit court did not abuse its discretion in postponing the case beyond the *Hicks* deadline.

A. Four-Factor Balancing Test

When assessing whether a defendant's right to a speedy trial has been violated, we conduct our own independent constitutional analysis. *Glover v. State,* 368 Md. 211, 221

(2002). While we conduct a de novo constitutional appraisal, we accept the lower court's findings of fact unless they are clearly erroneous. *Id.* at 221. When addressing a constitutional speedy trial claim, we apply a four-factor balancing test articulated by the Supreme Court in *Barker v. Wingo*. 407 U.S. 514, 530 (1972). Those factors include: (1) the "[l]ength of delay," (2) the "reason for the delay," (3) the "defendant's assertion of his right," and (4) the "prejudice to the defendant." *Id.*

1. Length of delay

The length of the delay serves as a triggering mechanism for our analysis. *Id.* Unless the length of the delay is "presumptively prejudicial," we need not inquire into the remaining *Barker* factors. *Id.* The Supreme Court of Maryland has previously determined that a delay of one year and 14 days is presumptively prejudicial. *State v. Kanneh*, 403 Md. 678, 688 (2008) (citing *Epps v. State*, 276 Md. 96, 111 (1975)). "[T]he length of delay is measured from the date of arrest or filing of indictment, information, or other formal charges to the date of trial." *Divver v. State*, 356 Md. 379, 388–89 (1999).

In the present case, there was a delay of approximately 25 months between the time Kelly was arrested on June 17, 2019, and the date his trial began on July 20, 2021.[15] [RE 62; T1] Therefore, the 25-month delay was sufficiently long to trigger further analysis under *Barker*. *See Glover*, 368 Md. at 223–24. In balancing the length of delay against the remaining factors, we note that "the length of the delay is the least determinative of the four factors." *Kanneh*, 403 Md. at 690.

[15] The total length of time was 25 months and three days.

2. Reason for the delay

The second factor we consider is the reason for the delay. *See Barker*, 407 U.S. at 530; *see also Malik v. State*, 152 Md. App. 305, 318 (2003) ("Closely related to the length of delay are the reasons for delay.") In *Barker*, the Supreme Court explained that different reasons should be weighed differently:

> A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

Barker, 407 U.S. at 531.

In our view, the 25-month delay in this case can be broken down into four segments, which we will address in turn. The first segment occurred during the seven months between Kelly's arrest on June 17, 2019, and January 13, 2020, when the court postponed the case for the first time. There is nothing to suggest that the parties were engaged in anything other than "normal pre-trial preparation" during this time seven-month period. *Malik*, 152 Md. App. at 318. "Generally, time spent in pre-trial preparation is neutral and not charged either to the State or the defendant." *Id.* (citing *Dalton v. State*, 87 Md. App. 673, 687 (1991)). However, if the length of this period is excessively long relative to the complexity of the case, then the delay may be weighed against the government. *See id.* (explaining that a seven-month period between arrest and trial date should not be held against the State, "given the complexity of the case, the number of victims, and varied crime scenes"). Thus, we conclude the seven-month segment from June 17, 2019, to January 13, 2020, was

neutral and not solely attributable to either party.

The second segment of the delay occurred during the three months between January 13, 2020, through March 23, 2020. On January 13, 2020, the court determined there was good cause to postpone the case to March 23, 2020, as the assigned prosecutor was unavailable because of another trial. Neither party has argued nor does the record show that the prosecutor's unavailability was an intentional action by the State. Thus, accepting the court's conclusion that there was good cause for the postponement, the prosecutor's unavailability shall be weighed as a more neutral reason for delay. *See Barker*, 407 U.S. at 531. However, the prosecutor's unavailability shall still weigh slightly against the State "since the ultimate responsibility for such circumstances must rest with the government." *Id*.

The third segment occurred during the 11 months between the second and sixth trial dates, from March 23, 2020, through February 26, 2021. Each of the next five trial dates—March 23, 2020; May 11, 2020; September 17, 2020; December 4, 2020; and February 26, 2021—were postponed in response to the COVID-19 pandemic.[16] The delay's fourth and final segment occurred between February 26, 2021, and the first day of Kelly's trial, on July 20, 2021.[17]

[16] The Supreme Court of Maryland's active and rescinded COVID-19 Administrative Orders are available on the Maryland Courts website. (Covid-19) Administrative Orders, Maryland Courts, https://mdcourts.gov/coronavirusorders (last visited Dec. 21, 2022).

[17] On February 26, 2021, the circuit court postponed Kelly's trial date to July 21, 2021. The date was later changed to July 20, 2021, and assigned to a different trial judge.

Kelly argues that jury trials were not suspended during the entirety of the relevant timeframe.[18] He also cites *Kurtenbach v. Howell* in support of his argument that the COVID-related delay should still weigh against the State. 509 F. Supp. 3d 1145, 1152 (D.S.D. 2020). In *Kurtenbach*, the United States District Court for the District of South Dakota found that the defendant's right to a speedy trial had been violated because the COVID-19 pandemic was not a valid reason for justifying an 18-month delay. *See id.* at 1148–51. The U.S. District Court noted that South Dakota State court could not "take advantage of its own failures to follow scientific facts and safeguards in entering blanket denials of the rights of speedy trials." *Id.* at 1152. The court also indicated that the federal courts had continued to operate with "guidance from the Centers for Disease Control." *Id.* In response, the State argues that Kelly's case is distinguishable from that in *Kurtenbach* and that it should not be charged with any delay from the COVID-related postponements.

We recognize that while *Kurtenbach* may indicate that state officials in South Dakota may have failed to act in response to the COVID-19 pandemic, Maryland was proactive. Governor Larry Hogan took various steps to mitigate the effects of the pandemic, including issuing a statewide mask mandate and prohibiting large gatherings.[19] Similarly,

[18] Jury trials were suspended due to COVID-19 from March 16, 2020, through October 5, 2020, and November 16, 2020, through April 23, 2021.

[19] A full list of Governor Hogan's proclamations and orders issued during the pandemic, including those that have since been rescinded, are available on the Maryland.gov website. Covid-19 Pandemic: Orders and Guidance, The Office of Governor Larry Hogan, https://governor.maryland.gov/covid-19-pandemic-orders-and-guidance/ (last visited Dec. 21, 2022).

the Maryland Judiciary acted diligently, as evidenced by the various administrative orders on courtroom closures, remote hearings, and limited courtroom openings.[20] Here, we find the reason for the third and fourth segments of the delays—the COVID-19 pandemic—was neutral and not attributable to either party.

3. Assertion of right

A defendant's assertion of his speedy trial right is given "strong evidentiary weight in determining whether the defendant is being deprived of the right." *Barker*, 407 U.S. at 531–32. The State does not contest that Kelly asserted his speedy trial right but argues this factor should not carry dispositive weight given the other circumstances of the case. In *Barker*, the Supreme Court explained that whether a defendant asserted his speedy trial right "is entitled to strong evidentiary weight," and the "failure to assert the right will make it difficult for the defendant to prove that he was denied a speedy trial." *Id.* The vigorousness and timeliness of a defendant's assertion of his speedy trial right often indicates whether the delay has been lengthy and whether the defendant had begun to experience prejudice from that delay. *Glover*, 368 Md. at 228–29 (citing *Barker*, 407 U.S. at 531–32). Trial courts are permitted to "weigh the frequency and force of the objections as opposed to attaching significant weight to a purely pro forma objection." *Barker*, 407 U.S. at 529.

Here, Kelly asserted his speedy trial right by way of his attorney's entry of

[20] *See* footnote 12, *supra*.

appearance and omnibus motion in September of 2019.[21] Kelly also emphasizes he sent two *pro se* letters to the court in October of 2020 and April of 2021 complaining about violations of his right to a speedy trial. However, the State contends the omnibus motions were pro forma, and that it is unclear whether Kelly sought to invoke *Hicks* or his constitutional speedy trial rights in his various letters to the court. According to the State, invoking the statutory *Hicks* deadline is different from asserting constitutional speedy trial rights.

There is no dispute Kelly asserted his speedy trial right and therefore, these assertions weigh in his favor. However, given that this factor in the *Barker* analysis carries "only slight weight," and in light of the other circumstances, such as the delays due to the COVID-19 pandemic, this factor is not dispositive. *See Hallowell v. State*, 235 Md. App. 484, 519 (2018) (defendant's assertion of right "has only slight weight").

4. Prejudice

Ultimately, "the most important factor in the *Barker* analysis is whether the defendant has suffered actual prejudice." *Phillips v. State*, 246 Md. App. 40, 67 (2020). Three interests are relevant to the assessment of whether a defendant suffered prejudice: (i) "oppressive pretrial incarceration;" (ii) "anxiety and concern of the accused;" and (iii) "the possibility that the defense will be impaired." *Barker*, 407 U.S. at 532. The most serious of these interests is the possible impairment to the defense. *Id.* The burden of showing actual prejudice rests on the defendant. *Phillips*, 426 Md. App. at 67 (internal

[21] Subsequently, in February of 2021, another attorney entered his appearance for Kelly and filed an omnibus motion containing a speedy trial demand.

citation omitted). On appeal, Kelly emphasizes that "it can be reasonably concluded" that his delay in prosecution "contributed to more than a little anxiety." He does not, however, point to any specific instance of impairment to his defense.[22] Because there is nothing in the record to suggest Kelly's defense was impaired as a result of the delay, and we will not presume or infer that such an impairment existed, we are not persuaded that this factor should weigh in Kelly's favor.

Having weighed and balanced the *Barker* factors, we conclude that Kelly's constitutional right to a speedy trial under the Sixth Amendment was not violated under the circumstances of this case. Although the 25-month pretrial delay weighs in small measure against the State, the majority of the remaining delays were caused by the COVID-19 pandemic and the resulting unprecedented suspension on Maryland court operations, which was not attributable to either party. Kelly asserted his speedy trial right, but his assertion is not dispositive of the other factors. While Kelly expressed that the delay caused him anxiety, the delays were not prejudicial. Thus, Kelly was not denied his right to a speedy trial.

B. *Hicks*

Lastly, Kelly asserts a *Hicks* violation—he claims there was a lack of good cause to

[22] On appeal, Kelly simply asserts the court incorrectly found that he had not been prejudiced because there was no impairment to his defense. In his pretrial motion to dismiss, Kelly claimed he suffered prejudice because he was assigned a new attorney, had limited ability to meet with his attorney in person, the State was still making discovery disclosures, and memories of witnesses had undoubtedly faded. At a motions hearing in June of 2021, the court found the prejudice prong was not met and that there was "no reason why Mr. Kelly's defense [was] impaired by this delay."

support the postponement that took the case beyond the *Hicks* deadline, as well as inordinate delay. The State counters that Kelly's arguments are without merit.

Section 6-103 of the Criminal Procedure Article and Maryland Rule 4-271 govern the scheduling of a criminal trial. Md. Code Ann., Crim. Proc. ("CP") § 6-103; Md. Rule 4-271. Together, they require, absent a showing of good cause, that "a criminal case be brought to trial within 180 days of the appearance of counsel or the appearance of the defendant before the circuit court, whichever occurs first." *Choate v. State*, 214 Md. App. 118, 139 (2013). The 180-day deadline, known as the "*Hicks* date," emanates from *State v. Hicks*, 285 Md. 310 (1979). The 180-day rule is "mandatory[,] and dismissal of the criminal charges is the appropriate sanction for violation of that time period" if good cause for the delay has not been established. *Ross v. State*, 117 Md. App. 357, 364 (1997).

The administrative judge's decision to postpone a trial beyond the *Hicks* date is within the court's "wide discretion" and carries a "heavy presumption of validity." *Fields v. State*, 172 Md. App. 496, 521 (2007). In reviewing an administrative judge's decision to postpone trial beyond 180 days, we "shall not find an absence of good cause unless the defendant meets the burden of demonstrating either a clear abuse of discretion or a lack of good cause as a matter of law." *State v. Frazier*, 298 Md. 422, 454 (1984). The "unavailability of a judge, prosecutor, or courtroom – or general court congestion in a particular jurisdiction – could satisfy the good cause standard for a continuance under the *Hicks* rule." *Tunnell v. State*, 466 Md. 565, 587 (2020).

Kelly's first appearance of counsel was on September 5, 2019, with an original *Hicks* deadline of March 3, 2020. The focus of our *Hicks* analysis is on the court's January

13, 2020, postponement order, which was prior to the *Hicks* deadline, in which the court found good cause because of the prosecutor's unavailability.[23] However, "unavailability of a prosecutor, does not, as a matter of law, constitute a lack of good cause for a postponement." *State v. Toney*, 315 Md. 122, 131 (1989). Kelly also argues that the delay from the originally scheduled trial date in July of 2020 to the trial in July of 2021 was inordinate. However, we have already concluded that in light of the circumstances, the delay was not egregious. For these reasons, we conclude there was no violation of CP § 6-103 nor Rule 4-271.

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

[23] At the hearing on January 13, 2020, Kelly's counsel did not object to the postponement to March 23, 2020, which would take the case beyond the *Hick's* deadline.