

Circuit Court for Dorchester County
Case No. C-09-CR-17-000098

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1997

September Term, 2017

FRANCISCO CAMACHO

v.

STATE OF MARYLAND

Fader, C.J.
Nazarian,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: December 21, 2018

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellant Francisco Camacho was convicted in the Circuit Court for Dorchester County of five counts of reckless endangerment, possession of a rifle by a person with a felony conviction, and possession of a rifle by a person convicted of a disqualifying crime.

Appellant presents the following questions for our review, which we reorder:

- “1. Did the circuit court err in failing to grant [appellant]’s motion to dismiss because the State’s prosecutorial indifference caused a bad faith violation of the [Maryland Rule 4-271] 180-day rule?
2. Did the circuit court err in failing to grant [appellant]’s motion for judgment of acquittal on four reckless endangerment counts because no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt?”

Finding no error, we shall affirm.

I.

The Grand Jury for the Circuit Court for Dorchester County indicted appellant for five counts of attempted first degree murder, five counts of attempted second degree murder, five counts of first degree assault, five counts of second degree assault, five counts of reckless endangerment, use of a firearm in the commission of a felony, possession of a regulated firearm after conviction of a disqualifying crime, and use of a machine gun in a crime of violence. The court set the trial date for April 11, 2017, and under Maryland Rule 4-271, the 180-day deadline for trial was April 25, 2017. On the trial date, fourteen days before the deadline, the State entered a *nolle prosequi* to all of the charges. The Grand Jury returned a second indictment, similar to the first but substituting a rifle charge for the

machine gun charge. Appellant filed a motion to dismiss the case based on a violation of the 180-day trial deadline in Rule 4-271. The court denied the motion, and the jury convicted appellant of reckless endangerment and three firearm counts.

We state the following facts as set out at trial. On August 27, 2016, around 1:00 a.m., appellant fired multiple .22-caliber bullets into the rear of a home in Cambridge, Maryland. The home's design included a kitchen in the rear half of the first floor, a living room in the front half of the first floor, and a master bedroom in the rear of the second floor. The parties did not admit the entirety of the ballistics evidence at trial, but the State established that the police found two bullets lodged in the first-floor wall separating the kitchen from the living room, one lodged in the refrigerator in the kitchen, and a bullet fragment in the ceiling of the kitchen. The police also found bullet holes in the sliding glass door opening from the kitchen to the back yard and in an exterior window on one side of the kitchen. At the time of the shooting, one resident was in the kitchen, two were in the living room, and two were in the master bedroom.

Responding to the shooting, the police discovered appellant in a field behind the home and a .22-caliber rifle styled to look like an AK-47 rifle in a yard near the home. Appellant's clothing and the appearance of the rifle were consistent with the description of the shooter given by a neighbor, and the police arrested him. A detective investigating the shooting determined that the rifle was of a lower caliber than an AK-47, and the police sent the rifle to the United States Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") for further testing. The ATF completed testing in December 2016; the testing showed that the rifle was .22-caliber. The State possessed the ATF firearm report for

several months before the week of appellant’s trial, when the prosecutor realized that appellant was charged with the wrong firearm offense because the gun in question was not a machine gun, as charged in the indictment, but a standard rifle.

The circuit court found the following facts in deciding appellant’s motion to dismiss. The week before trial, the prosecutor noted the error in the indictment—appellant was charged mistakenly with use of a machine gun rather than possession of a rifle. On April 10, 2017, the prosecutor explained to the court in a pretrial hearing that while the State could proceed to trial as scheduled on April 11, it would not do so because of the error in the indictment. The State entered a *nolle prosequi* to all of the charges on April 11, 2017, the trial date.

In April 2017, the Grand Jury for the Circuit Court for Dorchester County returned a second indictment, charging appellant with the same substantive charges as before but this time alleging possession of a rifle instead of a machine gun. Appellant filed a motion to dismiss, arguing that the 180-day “*Hicks* deadline” had passed and that the court should dismiss the second indictment. The circuit court denied appellant’s motion to dismiss. The court found that under *Curley v. State*, 299 Md. 449 (1984), and several related cases, the defendant had to prove that the *nolle prosequi* had the purpose or the effect¹ of evading the

¹ The effect prong of *Curley* is a separate analysis from the purpose prong. *Curley v. State*, 299 Md. 449 (1984). *Curley* asks whether the State filed a *nolle prosequi* so close to the original deadline that, if the circuit court denied the motion, the court would also necessarily have dismissed the case with prejudice because there was insufficient time for the trial to proceed within the deadline imposed by Rule 4-271. *Id.* at 462. In *Curley*, the necessary effect of the State’s *nolle prosequi* on the final day within the 180-day deadline was to circumvent the deadline because it was impossible to proceed to trial before the

180-day trial deadline. Analyzing the test from *Curley*, the circuit court found that the prosecutor, after discovering that the recovered weapon was not a machine gun, acted in good faith in entering the *nolle prosequi* and not with the purpose to evade Rule 4-271. The court also found that the *nolle prosequi* had the actual, but not the necessary, effect of extending the trial beyond the initial deadline, because the court could have rescheduled the trial into the two weeks remaining between the *nolle prosequi* and the original trial deadline. Finding that the defendant failed to meet his burden under *Curley*, the circuit court denied the motion to dismiss.

The case proceeded to a trial by jury in the Circuit Court for Dorchester County. The jury found appellant guilty of possession of a rifle by a person with a felony conviction, possession of a rifle by a person convicted of a disqualifying crime, and five counts of reckless endangerment. For sentencing purposes, the court merged the two firearm offenses and sentenced appellant to a term of incarceration of five years, consecutive, for each of the five reckless endangerment convictions and fifteen years, consecutive, for possession of a rifle with a felony conviction—a total of forty years, consecutive. Appellant filed this timely appeal.

II.

Appellant raises two issues before this Court. Appellant argues that the circuit court should have granted his motion to dismiss because the State violated Rule 4-271. Under

original deadline. *Id.* Appellant does not argue this “necessary effect” exception before this Court.

Rule 4-271, unless the State shows good cause or the parties consent, the defendant’s trial must commence within 180 days of the earlier of the first appearance of defense counsel or the appearance of the defendant in the circuit court.² A *nolle prosequi* and a new charge generally restarts this 180-day deadline, *Curley*, 299 Md. at 462, but appellant argues that where the State enters a *nolle prosequi* “in bad faith” and tries the defendant after the 180-day deadline, the court should dismiss the case against the defendant. *See State v. Huntley*, 411 Md. 288 (2009). In this case, appellant argues, the State’s several-month delay in realizing that the unlawful possession of a weapon charge was erroneous constituted “prosecutorial indifference” and bad faith. Appellant acknowledges that the concept of “prosecutorial indifference” is a consideration in the legally distinct issue of the constitutional right to a speedy trial but argues that a prosecutor who exhibits indifference in the prosecution of a case should not be “entitled to deference on its alleged ‘good faith’ use of a *nol pros* to delay a case.” For those reasons, appellant argues, the circuit court should have dismissed the case after the State failed to bring appellant to trial within the original 180-day deadline set for April 25, 2017.

² Maryland Rule 4-271(a) provides, in pertinent part, as follows:

“(1) The date for trial in the circuit court shall be set within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the circuit court pursuant to Rule 4-213, and shall be not later than 180 days after the earlier of those events. . . . On motion of a party, or on the court’s initiative, and for good cause shown, the county administrative judge or that judge’s designee may grant a change of a circuit court trial date.”

Additionally, appellant argues that the circuit court erred in failing to grant his motion for judgment of acquittal on the four counts of reckless endangerment for the victims located outside the kitchen of their home. Under Md. Code, Crim. Law Art., § 3-204 and § 3-201, reckless endangerment requires an objective risk of death or serious bodily injury from the defendant's conduct. Appellant relies on *Perry v. State*, 229 Md. App. 687 (2016), for the proposition that the appropriate test is whether the victims were in the "line of fire" or "arc of danger" created by appellant's shooting. Appellant argues that because the two individuals in the living room were behind a wall that stopped multiple bullets and the two individuals in the master bedroom were apparently outside the direct line of fire, they faced no objective risk of death or serious bodily injury, and thus, there was insufficient evidence for a rational trier of fact to find reckless endangerment of those four victims beyond a reasonable doubt.

As to appellant's argument that the circuit court should have granted his motion to dismiss, the State argues that the *nolle prosequi* did not have the purpose of evading the original 180-day trial deadline. The purpose, the State argues, was to correct the indictment, and the prosecutor was otherwise prepared to proceed to trial. Therefore, the State argues, the 180-day deadline restarted on April 11, 2017, appellant was tried properly before the new "*Hicks* deadline," and the circuit court denied appellant's motion to dismiss correctly.

The State argues also that appellant's reckless endangerment argument before this Court was not made below to the trial judge, and hence it is barred by Rule 4-324(a). To preserve a sufficiency of the evidence argument for appeal, Rule 4-324(a) requires a

defendant to include his insufficiency of evidence argument in a motion for judgment of acquittal at trial. Appellant, the State argues, mentioned reckless endangerment in an unrelated argument for his motion but did not state the grounds below that he now argues before this Court. Assuming preservation *arguendo*, the State argues that there was sufficient evidence to find reckless endangerment of the victims because the “line of fire” or “arc of danger” analysis referenced by appellant was expressly limited to cases against trained police officers.

III.

Answering appellant’s first question, we hold that the circuit court did not err when it denied appellant’s motion to dismiss on the basis of the 180-day deadline in Rule 4-271. The rule requires that the circuit court set a defendant’s trial date no later than 180 days after the earlier of the first appearance of defense counsel or the first appearance of the defendant in the circuit court. The date is known as a “*Hicks* deadline” after a seminal case in which the Court of Appeals held such a deadline to be mandatory absent “extraordinary cause.” *State v. Hicks*, 285 Md. 310, 318 (1979). A *nolle prosequi* and subsequent indictment for the same or substantially the same crimes starts the 180-day deadline anew based upon the new charges. *Curley*, 299 Md. at 462. If, however, the defendant shows that the *nolle prosequi* had either the purpose or the effect of circumventing the Rule 4-271 deadline, the original deadline is enforceable by dismissal of the case. *Id.* at 462–63. Where the circuit court has ruled upon these exceptions in a motion to dismiss, we review the circuit court’s findings for clear error. *State v. Price*, 152 Md. App. 640, 655 (2003).

In *Curley v. State*, the Court of Appeals considered the application of Rule 4-271, then Rule 746, where the prosecutor filed a *nolle prosequi* prior to the expiration of the initial 180-day period and thereafter caused similar charges to be refiled against the defendant. *Curley*, 299 Md. at 452. The Court held that when the State’s Attorney enters a *nolle prosequi* for criminal charges and later refiles those charges, the time period for commencing trial ordinarily begins to run anew after the refileing. The Court based this holding on the nature of a *nolle prosequi*. In Maryland, when an indictment or other charging document is *nol prossed*, ordinarily the case is terminated, and there can be no further prosecution under that *nol prossed* charge. *Id.* at 459–60. The Court noted an exception to that rule—namely, that the time period will not begin to run anew where the *nolle prosequi* was intended to circumvent or necessarily circumvented the requirements of Rule 746. The Court explained the reason for the exception as follows:

“Otherwise the state could regularly evade . . . Rule 746. If, whenever the state desired a trial postponement beyond 180 days, it could *nol pros* the case, refile the same charges, and thereby cause the time period to start running anew, the requirements of . . . Rule 746 would largely be rendered meaningless. By such method the state could regularly escape the necessity, mandated by the statute and rule, of showing good cause for a postponement and obtaining an order of the administrative judge.”

Id. at 461.

Appellant addresses the purpose prong, thereby presenting to this Court the question of whether the prosecutor intended the *nolle prosequi* to circumvent the 180-day deadline imposed by Rule 4-271. In *State v. Glenn*, 299 Md. 464 (1984), the prosecutor noticed before trial that the charging documents were defective because they lacked recitation of a

required element of a charge. *Id.* at 465. He entered a *nolle prosequi* and filed a new charging document with the proper elements set out. *Id.* at 466. When the original 180-day deadline expired, the circuit court granted the defendants’ motion to dismiss the case on the basis of the original deadline. *Id.* On appeal, the Court of Appeals noted that “the record clearly establishes . . . that the charges were *nol prossed* because of a legitimate belief that the charging documents were defective and because the defendants’ attorney would not agree to amendment of the charging documents.” *Id.* at 467. On that basis, the Court held that the State’s purpose was to amend the charging documents, not to circumvent the original deadline—the 180-day deadline restarted with the second indictment. *Id.*; *see also Harris v. Com.*, 520 S.E.2d 825 (Va. 1999) (holding that entering *nolle prosequi* because prosecutor failed to obtain necessary documents in timely manner for trial was neither bad faith nor prosecutorial misconduct); *State v. Ware*, 850 P.2d 1042, 1044 (N.M. App. 1993) (holding that a *nolle prosequi* to amend a defective charging document restarted deadline for defendant’s trial).

In the case *sub judice*, appellant argues that the “bad faith” mentioned in the factually similar case of *State v. Huntley*, 411 Md. 288, 302 (2009), refers to general prosecutorial bad faith and “prosecutorial indifference” as to the State’s evidence before trial. The Court in *Huntley* held that a *nolle prosequi* and recharging after the denial of the prosecutor’s motion to amend an indictment resets the Rule 4-271 deadline “at least where bad faith on the part of the State to delay is not shown.” As in *Curley*, *Baker*, and *Glenn*, the bad faith referenced in *Hunter* would have been the prosecutor’s *subjective*, bad-faith intent to avoid the Rule 4-271 deadline at the time he entered the *nolle prosequi*, not his

decision to enter a *nolle prosequi* which also had the effect of avoiding the original deadline. *Baker v. State*, 130 Md. App. 281, 289 (2000).

Appellant's related argument, that the 180-day deadline for his trial should not have restarted following the State's *nolle prosequi* and recharging because of prosecutorial indifference, is inapplicable. In a constitutional speedy trial analysis, the reason for the delay in bringing the defendant to trial determines whether the delay is attributed to the State. *Barker v. Wingo*, 407 U.S. 514, 531 (1972). Maryland courts hold that delay caused by prosecutorial indifference counts against the State and in favor of a ruling that the State violated the defendant's right to a speedy trial. *Ferrell v. State*, 67 Md. App. 459, 464 (1986). Appellant attempts to engraft the notion of prosecutorial indifference onto a *Hicks* 180-day trial rule analysis. We find no case that has done so and conclude that the speedy trial analysis based on prosecutorial indifference is inapposite to appellant's case for two reasons.

First, as appellant acknowledges in his argument, the 180-day deadline imposed by Rule 4-271 is legally distinct from the 6th Amendment right to a speedy trial, which must be raised and analyzed separate from a violation of the 180-day *Hicks* deadline. *See Glenn*, 299 Md. at 467–68. Appellant's claim here is a violation of Rule 4-271, not his constitutional speedy trial right. Second, the prosecutorial indifference at issue in speedy trial cases is an indifference to bringing the defendant to trial, not a busy prosecutor's failure to prepare months in advance for a trial. *Ferrell v. State*, 67 Md. App. 459, 464 (1986) (finding indifference where the State offered no explanation for nine month delay in calling defendant's case for trial); *Powell v. State*, 56 Md. App. 351, 362 (1983) (finding

indifference where the State made no effort to set trial date for appellant for seventeen months after learning he was in federal custody); *Brady v. State*, 291 Md. 261, 267 (1981) (finding indifference where the State waited several months to arraign the defendant, incarcerated for another charge, for charge at issue in his appeal).

In this case, appellant did not offer evidence contrary to the prosecutor’s statement that her sole purpose in entering the *nolle prosequi* was to recharge appellant with the correct crimes. Further, the circuit court found that the prosecutor acted in good faith to correct an error in the indictment. Appellant failed to satisfy the “purpose” exception from *Curley* because allegations that the State was “indifferent” in noticing a defect in its case shortly before trial are insufficient to satisfy *Curley*’s requirement of subjective prosecutorial bad faith.³ Lacking an exception to the general rule that a *nolle prosequi* and recharging resets Rule 4-271’s 180-day deadline, the circuit court did not err in denying appellant’s motion to dismiss.

We turn next to appellant’s sufficiency of the evidence argument as to four counts of reckless endangerment. His arguments were not preserved for our review. Rule 4-324(a) requires a defendant to “state with particularity all reasons why the motion [for judgment of acquittal] should be granted.” It is black letter law in this State that an appellant may not challenge the sufficiency of evidence for reasons stated for the first time on appeal. *Peters v. State*, 224 Md. App. 306, 353 (2015).

Appellant’s only argument as to reckless endangerment before the circuit court was

³ Appellant does not argue the second exception from *Curley*, which applies to a *nolle prosequi* which has the necessary effect of evading the original 180-day deadline.

that there was insufficient evidence of “intent to frighten” for a *second degree assault* conviction, not reckless endangerment. Appellant argued that because the State failed to offer witness testimony of the effect of the shooting on the victims, there was insufficient evidence of intent to frighten, “So I submit, Your Honor, that assault first, assault second *and reckless endangerment* as to all four of the people who were either upstairs or in the [living] room [warrant judgments of acquittal].” Given that his argument went to an element of another crime, appellant arguably failed to raise the issue of sufficiency of evidence for reckless endangerment at all. In this appeal, appellant makes an entirely different argument to this Court. He never argued below that there was insufficient evidence of reckless endangerment because his conduct did not create a substantial risk of death or serious physical injury. His argument is not preserved for our review.

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