Circuit Court for Baltimore City
Case No. 117090002

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2006

September Term, 2017

ANTONIO THOMAS

v.

STATE OF MARYLAND

Wright,
Graeff,
Shaw Geter,

JJ.

Opinion by Wright, J.

Filed: February 5, 2019

This appeal arises out of a jury's verdict convicting appellant, Antonio Thomas ("Mr. Thomas"), of first-degree burglary in connection with the shooting death of Daquain Tate ("Mr. Tate"). Mr. Tate's death occurred on April 26, 2015. After the original charges brought against Mr. Thomas were dismissed by *nolle prosequi* ("*nol pros*"),[1] Mr. Thomas was re-indicted on March 31, 2017, and was charged with: first-degree murder, two counts of use of a firearm in a crime of violence, two counts of prohibited possession of a firearm, carrying a handgun on his person, first-degree burglary, and first-degree assault. After a trial which took place from September 12 to 14, 2017, a jury convicted Mr. Thomas of first-degree burglary and acquitted him on all other counts.

Mr. Thomas now challenges his conviction and presents the following questions for our review, which we have reworded for clarity:[2]

[1] "'*Nol pros*' is the common term for *nolle prosequi*, or a formal declaration of the State not to prosecute the case." *Clark v. State*, 97 Md. App. 381, 385 n.1(1993). Under Maryland law, "when an indictment or other charging document is *nol prossed*, ordinarily 'the case [is] terminated,'" *Curley v. State*, 299 Md. 449 (1984) (citation omitted), and the State may proceed against the accused "for the same offense only under a new or different charging document or count." *State v. Moulden*, 292 Md. 666, 673 (1982).

[2] Mr. Thomas presented his questions to the Court as follows:

1. Did the trial court err in giving a supplemental instruction that "all parties that are present in a break in [are] guilty of burglary?"

2. Did the trial court commit reversible error in permitting the state to make an improper missing witness argument?

1. Did the circuit court err in giving a supplemental jury instruction that "all parties that are present in a break in [are] guilty of burglary?"

2. Did the circuit court err in permitting the State to make a missing witness argument?

3. Did the circuit court err in denying Mr. Thomas's motion to dismiss for a violation of a constitutional right to speedy trial?

For the reasons below, we answer the first question in the affirmative, do not reach the second question, and answer the third question in the negative. Therefore, we reverse and remand the case to the circuit court for a new trial.

BACKGROUND

On May 27, 2015, Mr. Thomas was indicted on the following charges: first-degree murder, two counts of use of a firearm in a crime of violence, two counts of prohibited possession of a firearm, carrying a handgun on his person, first-degree burglary, and first-degree assault. The charges arose from the shooting death of Mr. Tate, which took place on April 26, 2015. After a jury was selected for trial on July 25, 2016, the State determined that it could not locate multiple witnesses pertinent to its case.[3] On July 26, 2016, the State *nol prossed* the charges against Mr. Thomas. Mr. Thomas was

3. Was Mr. Thomas's right to a speedy trial violated by the 28-month delay of his case?

[3] The witnesses that the State could not locate were Brittany Isaac and Tiffany Frohmberger. Ms. Isaac, who was eventually the State's key witness in the second trial against Mr. Thomas, lived in the apartment where Mr. Tate was shot. Ms. Isaac was in a relationship with Mr. Tate at the time of his death, and had previously been in a relationship with Mr. Thomas. The other witness, Ms. Frohmberger, was Ms. Isaac's roommate in the apartment at the time of the shooting; she did not testify at the second trial against Mr. Thomas.

subsequently re-indicted on the same charges on March 31, 2017, and a jury trial in the Circuit Court for Baltimore City commenced on September 12, 2017.

Brittany Isaac was the State's key witness at trial. Mr. Thomas resided, along with Tiffany Frohmberger, in the apartment where Mr. Tate was shot. Ms. Isaac testified that she had been in a romantic relationship with Mr. Tate for about a year prior to his death, and that she had previously been in a relationship with Mr. Thomas.

Ms. Isaac further testified that on the evening of April 25, 2015, she was in her apartment with Mr. Tate when they heard a banging noise on the front door. She stated that they both left the apartment when they determined that Mr. Thomas was at the door. On cross-examination, Ms. Isaac elaborated that the couple left the apartment so that Mr. Tate could retrieve a gun. Ms. Isaac also stated that she received multiple calls and text messages from Mr. Thomas throughout the evening. Ms. Isaac and Mr. Tate arrived back in the apartment between 3 and 4 a.m. Ms. Isaac testified that shortly after returning to her apartment, Mr. Thomas kicked the door in, entered the kitchen, and shot Mr. Thomas in the head.

During cross-examination, Ms. Isaac stated that "when Mr. Thomas kicked open the door, Mr. Tate also had a gun, which he pointed directly at Mr. Thomas, but only Mr. Thomas fired." Further, Ms. Isaac testified that Mr. Thomas entered the apartment with "his friend," "O.B."[4] According to Ms. Isaac, Mr. Thomas called out to O.B. while the

[4] O.B's given name is Harold Johnson. To be consistent with the circuit court, we will refer to him as "O.B." throughout our opinion. According to Ms. Isaac's testimony, O.B. was deceased at the time of trial.

two men were in the apartment on the night of the shooting. Ms. Isaac also stated that O.B. "stood right in the living room area" after the shooting, and that Mr. Thomas left with O.B. after the shooting occurred.

Tremaine Thomas,[5] Mr. Thomas's uncle, testified for the defense and stated that he was with Mr. Thomas on the evening of April 25, 2015. Specifically, Tremaine Thomas stated that he and Mr. Thomas arrived at a bar at 11:30 p.m. that evening, and that the two men left the bar together at 1:30 a.m. on the morning of April 26, 2015. He then testified that he drove Mr. Thomas to the house of his girlfriend at the time, Ciara Eaton, and that he watched Mr. Thomas enter Ms. Eaton's house at approximately 2:00 a.m. Finally, Tremaine Thomas testified that Mr. Thomas "did not have a gun and did not act aggressive or violent that evening."

At the conclusion of trial, the jury acquitted Mr. Thomas of all counts except first-degree burglary. Mr. Thomas was subsequently sentenced to 20 years' incarceration on November 17, 2017.

Additional facts will be included as they become relevant to our discussion below.

DISCUSSION

I.

At the close of evidence, the circuit court provided the jury with instructions regarding the law to be applied to each of the charges against Mr. Thomas. Notably, the

[5] Tremaine Thomas will be referenced by his full name to avoid confusion with appellant, Mr. Thomas. No disrespect is intended by referring to Tremaine Thomas as such.

circuit court did not provide a jury instruction related to accomplice liability for the crime of first-degree burglary.[6] However, less than an hour into their deliberations, the jury asked the following question:

> Regarding the law of burglary, if two people are at a door and forced entry occurs, is the only person responsible for the burglary the one who broke

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[6] The circuit court provided the jury with the following instruction related to burglary taken verbatim from Maryland Criminal Pattern Jury Instructions ("MPJI-Cr") 4:06:

> The defendant is charged with burglary in the first degree. Burglary in the first degree is the breaking and entering of someone else's dwelling with intent to commit murder or assault.
>
> In order to convict the defendant of burglary in the first degree, the State must prove that there was a breaking, that there was an entry, that the breaking and entry was into someone else's dwelling, that the breaking and entry was done with the intent to commit murder and/or an assault inside the dwelling, and that the defendant was the person who broke and entered.
>
> Breaking means the creation of or enlarging of an opening such as breaking or opening a window or pushing open a door.
>
> Entry means that any part of the defendant's body was inside the house.
>
> A dwelling is a structure where someone usually sleeps.

Regarding the weight to be given to an individual's "presence at the time and place of a crime," the circuit court instructed the jury as follows:

> A person's presence at the time and place of a crime without more is not enough to prove that that person committed the crime. The fact that a person witnessed a crime, made no objection, or did not notify the police, does not make that person guilty of the crime. However, a person's presence at the time of the crime is a fact in determining whether the defendant is guilty or not guilty.

See MPJI-CR 6:01.

> the door? Or if both people entered, would they both fall under the law of burglary?

After learning of the jury's note, counsel for the State requested that the circuit court give the jury an additional instruction on accomplice liability. Counsel for Mr. Thomas averred that "the proper thing to do is just to . . . refer [them] to the [original] instruction that you gave them . . . , [and] not to raise any new instructions[.]" In an effort to clarify the jury's question, the circuit court responded to the note by stating, "[p]lease explain your question further."

The jury then sent a second note to the circuit court: "Describe the law of [burglary] as it pertains to a group of people involved. Are all parties that are present in a break in guilty of burglary?" Upon reading the question, the circuit court informed the parties that it believed "the answer to [the jury's question] is yes." In response, counsel for the State again asserted that the circuit court should instruct the jury as to accomplice liability. However, the State withdrew its argument after the court determined that if it were to instruct the jury on accomplice liability, it would also be required to instruct the jury that Mr. Thomas had not been charged as an accomplice. Counsel for Mr. Thomas objected and reiterated his contention that nothing more than the original instruction should be given to the jury. The court instructed the jury, "yes."

A circuit court's "decision to supplement its instructions and the extent of supplementation are matters left to the sound discretion of the trial judge, whose decision will not be disturbed on appeal in the absence of a clear abuse of discretion." *Howard v. State*, 66 Md. App. 273, 283 (citations omitted), *cert. denied*, 306 Md. 288 (1986).

"Where the decision or order of the trial court is a matter of discretion it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Appraicio v. State*, 431 Md. 42, 51 (2013) (quotations omitted).

In analyzing the propriety of a supplemental jury instruction, the Court of Appeals has previously stated:

> The main purpose of a jury instruction is to aid the jury in clearly understanding the case, to provide guidance for the jury's deliberations, and to help the jury arrive at a correct verdict. Maryland Rule 4-325(a) states that [t]he court shall give instructions to the jury at the conclusion of all the evidence and before closing arguments and may supplement them at a later time when appropriate. . . . Supplemental instructions can include an instruction given in response to a jury question. When the jury asks such a question, courts must respond with a clarifying instruction when presented with a question involving an issue central to the case. Trial courts must avoid giving answers that are ambiguous, misleading, or confusing.

Appraicio, 431 Md. at 51 (internal quotation marks and citations omitted).

Mr. Thomas claims that the circuit court's supplemental jury instruction constituted error for three reasons. First, he argues that the instruction was not a correct statement of law. Next, he asserts that "the instruction, insofar as it touched upon accomplice liability, was not generated by the trial." Lastly, he claims that "the instruction prejudiced [him] by introducing a new theory of culpability after deliberations [had] begun." Since, according to Mr. Thomas, the circuit court's error was not "harmless," he contends that this Court must reverse the circuit court's judgment.

In response, the State contends that the jury instruction "accurately addressed the issue on which the jury sought clarification[,]" and that the instruction was reasonable in

light of the facts of the case. Further, the State argues that the instruction was generated by evidence that Mr. Thomas elicited at trial, and that the instruction did not "prejudice [Mr.] Thomas by introducing a new theory of liability after the jury began deliberation." As such, the State avers that the circuit court did not err in giving the supplemental instruction on accomplice liability, and that even if the court did err, such error was harmless to Mr. Thomas.

We agree with Mr. Thomas and hold that the circuit court abused its discretion by stating "yes," when asked by the jury whether "all parties that are present in a break in [are] guilty of burglary[.]"

A. The Supplemental Instruction and the Applicable Law

First, it is clear that the circuit court's supplemental jury instruction was a misstatement of the law. *See State v. Bircher*, 446 Md. 458, 463 (2016) (explaining "that the jury instruction initially must be a correct statement of the law and be applicable under the facts of the case."). As Mr. Thomas points out in his brief, "[i]t is a universally accepted rule of law that mere presence of a person at the scene of a crime is not of itself sufficient to prove the guilt of that person, even though it is an important element in determination of the guilt of the accused." *Fleming v. State*, 373 Md. 426, 433 (2003); *see also* MPJI-Cr 3:25, Presence of Defendant (explaining that "[a] person's presence at the time and place of a crime, without more, is not enough to prove that the person committed the crime."). By instructing the jury that "all parties that are present in a break in [are] guilty of burglary[,]" the circuit court misstated the applicable law, thereby abusing its discretion.

The circuit court's supplemental instruction further misapplied the law in that it relieved the State of its burden to prove, beyond a reasonable doubt, all of the elements of first-degree burglary. In a criminal case, "[t]he State has the burden of proving, beyond a reasonable doubt, all of the elements of the alleged crime." *Bane v. State*, 327 Md. 305, 311 (1992) (citation omitted). To prove that a defendant is guilty of first-degree robbery, the State must prove that the defendant broke and entered into the dwelling of another with the intent to commit theft, or the intent to commit a crime of violence. *See* Md. Code (2002, 2012 Repl. Vol.), Criminal Law Article ("Crim.") § 6-202. Mr. Thomas argues, and we agree, that the circuit court's instruction relieved the State's burden of establishing, beyond a reasonable doubt, that he had the intent to commit a theft or crime of violence. Instead, the instruction gave the jury permission to convict Mr. Thomas of first-degree burglary "for nothing more than presence to a burglary." Due to its negation of the State's burden of proof, the circuit court's supplemental instruction was a misapplication of the law and an abuse of the court's discretion.

The State argues that "this Court must review the jury's note in light of the facts of the case," and that considering the circumstances, "the judge provided a response that accurately addressed the concern of the jury." Specifically, the State alleges that a review of the record, the original instructions given to the jury, and the jury's first question shows that the jury was confused on the following point: "Is a person guilty of burglary, when, *holding other variables like entry and intent to commit a felony equal*, another person forces entry?" (Emphasis in original). In spite of the State's interpretation of the

record, we are not convinced that our conclusion on the circuit court's misstatement of the law should be altered.

In *Bircher*, 446 Md. at 464, the Court of Appeals stated that "[a] trial judge . . . must respond to a question from a deliberating jury in a way that clarifies its confusion, such that the judge's response is not ambiguous or misleading." Here, the circuit court originally instructed the jury on the required elements of first-degree burglary, as well as the effect of an individual's presence at a crime. *See supra* n.6. The court's affirmative answer to the question of whether "all parties that are present in a break in [are] guilty of burglary" directly contradicted those previous instructions. As such, the instruction did not clarify the jury's confusion, but instead added ambiguity to the jury's deliberations. Additionally, insofar as the jury's question implicated a theory of accomplice liability or concerted action, these issues were not raised at trial. As discussed below, those issues should not have been brought up by the circuit court's jury instructions.

B. The Supplemental Instruction and the Evidence at Trial

The supplemental jury instruction also constituted an abuse of the circuit court's discretion because it was not generated by the evidence presented at trial. *See Brogden v. State*, 384 Md. 631, 641 (2005) (explaining that the decision of whether to give a supplemental jury instruction "is only within the ambit of the trial judge's discretion in the first instance if the supplemental instruction actually relates to an issue presented at trial."). Mr. Thomas contends that the issue of accomplice liability "was not generated by the facts presented at trial." In making his argument, Mr. Thomas points out that the State's theory was that "Mr. Thomas [was] the principal in the first degree," and that the

State "did not mention accomplice liability during opening statement or closing argument, nor did the State request an instruction on accomplice liability before closing argument." In response, the State argues that facts "elicited by [Mr. Thomas] generated an accomplice liability issue because [it] raised the possibility of concerted action between [Mr.] Thomas and O.B."

In order to convict a defendant on a theory of accomplice liability:

> [T]he State must prove that [the crime] occurred and that the defendant, with the intent to make the crime happen, knowingly aided, counseled, commanded, or encouraged the commission of the crime, or communicated to a participant in the crime that [he or she] was ready, willing, and able to lend support, if needed.

MPJI-Cr 6:00, Accomplice Liability.

A review of the record demonstrates that the *only* evidence related to Mr. Thomas's potential relationship to O.B. was Ms. Isaac's testimony, elicited on cross-examination, that Mr. Thomas entered the apartment with O.B. on the night of the shooting, that Mr. Thomas called out to O.B. while the men were in the apartment, and that Mr. Thomas left the apartment with O.B.[7] This limited testimony, if true, falls far

[7] Defense counsel's mention of O.B. in his closing argument does not alter our analysis. In attempting to portray Ms. Isaac as an unreliable witness, defense counsel pointed out that Ms. Isaac's testimony about O.B. had not been corroborated by any other evidence. In a representative passage, defense counsel stated:

> Now, I don't know who [O.B.] is. I don't know what, if any, role he had in the crime. I don't know. I don't even know if [O.B.] was there to be quite frank with you because there is absolutely no other evidence that supports it, including [Ms. Isaac's] own roommate who was right there.

The State contends that defense counsel's closing argument was an attempt to show that O.B. may have played a role in the crime, and that this attempt was consistent

short of raising the issue of accomplice liability, or of raising the possibility that Mr. Thomas "inten[ded] to make the crime happen, [or] knowingly aided, counseled, commanded, or encouraged the commission of a crime." MDJI-Cr 6:00. As Mr. Thomas points out, the State did not provide any evidence suggesting that Mr. Thomas acted as an accomplice, did not raise the theory in opening statements or closing arguments, and did not request a jury instruction on accomplice liability. Simply put, the issue of accomplice liability was not raised at trial, and insofar as the jury's question implicated such a theory of liability, the circuit court's supplemental instruction was an abuse of discretion.

Even if the evidence presented had been sufficient to generate the issue of accomplice liability, the supplemental jury instruction would still have constituted a misstatement of the law and therefore an abuse of discretion. As stated above, accomplice liability requires, generally, that the State prove the defendant's intention to aid the commission of a crime. The circuit court's instruction that "all parties that are present in a break in [are] guilty of burglary[,]" fell far short of properly explaining the law of accomplice liability to the jury.

C. Effect of the Supplemental Instruction

In *Dorsey v. State*, 276 Md. 638, 659 (1976), the Court of Appeals stated that:

> [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

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with a theory of accomplice liability. However, we are not convinced that this statement is anything more than an attempt to discredit Ms. Isaac's testimony. Assuming *arguendo* that defense counsel did mean to suggest that O.B. was involved in the alleged crimes, the brief statement that he did not "know what, if any, role [O.B] had in the crime" still falls far short of raising the issue of accomplice liability.

influenced the verdict, such error cannot be deemed "harmless" and a reversal is mandated.

Here, the jury acquitted Mr. Thomas of every charge brought against him *except* the charge for which the circuit court gave an improper instruction. As discussed above, the instruction was an incorrect statement of the applicable law and raised an issue that was not generated by the evidence at trial. It is possible, if not probable, that the incorrect instruction had some influence on the jury's verdict convicting Mr. Thomas of first-degree burglary.

The State points out that "it would have preferred a different answer" to the jury's question, and argues that the circuit court originally provided a correct jury instruction on the effect of an individual's presence during a crime. Despite this, we are unable to conclude that the improper instruction "in no way influenced the verdict[,]" *Dorsey*, 276 Md. at 659, as "we cannot read the minds of the jurors." *Barksdale v. Wilkowsky*, 419 Md. 649, 673 (2011).

Applying the *Dorsey* standard to the facts of the instant case, we are not convinced, beyond a reasonable doubt, that the circuit court's erroneous supplemental jury instruction had no impact on the verdict. We hold that the circuit court's improper supplemental jury instruction was not merely harmless error, and we reverse the circuit court's judgment.

II.

Since we have determined that the circuit court's judgment will be reversed on the basis of the improper jury instruction, we will not address Mr. Thomas's argument that the State made an improper missing witness argument related to Ms. Eaton.

III.

On July 25, 2016, after a jury was selected for Mr. Thomas's trial, the State informed the circuit court that it was concerned about two of its witnesses being present to testify. On the same day, the State presented the circuit court with body attachments for each of the two witnesses and informed the court that the witnesses left the courthouse "the minute [it] brought the subpoenas [for the next day]." The circuit court signed the requests for body attachments and granted the State's request to delay swearing the jury until the next morning.

On the morning of July 26, 2016, the State informed the circuit court that it was still unable to secure the witnesses' presence for trial. The court stated that it would allow "some time," though not another full day, for the State to locate its witnesses and also noted that the witnesses said "they felt threatened because they were sitting in the same hallway as [Mr. Thomas' family] earlier in the day." Upon later determining that it would not be able to get its witnesses to court on that day, the State informed the circuit court that it would offer Mr. Thomas a more lenient plea arrangement. The State went on to explain that if the plea were not accepted, it would *nol pros* the charges. Though Mr. Thomas urged the circuit court to swear in the jury so that the trial could begin, the circuit

court refused to do so.[8] Thus, the State *nol prossed* the charges against Mr. Thomas. Mr. Thomas was re-indicted on March 31, 2017.

Prior to the commencement of the second trial, Mr. Thomas filed a motion to dismiss the charges against him, claiming that his Sixth Amendment right to a speedy trial was been violated.[9] Specifically, Mr. Thomas averred that this right was violated by

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[8] The circuit court explained its decision not to swear in the jury at Mr. Thomas's original trial as follows:

> THE COURT: Don't [you] realize if I did that, if I swore that jury in under the circumstances in this case where two witnesses I've issued a bench warrant, a body attachment for are not here alleging that they were terrified and split that I would, in fact, be ending this case? And I'm not going to do it.
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> [. . .]
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> My job is to foster administration of justice. It would be just as improper for me to swear . . . that jury in when two witnesses who were here all day or most of the day left alleging that they were frightened, that they were upset without knowing what caused those two witnesses to become upset.
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> [. . .]
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> If I were to [swear in the jury] I would be then not interested in the administration of justice. I would simply be interested in getting the case closed.

[9] In *Clark*, 97 Md. App. at 385-86 (alterations in original), this Court explained the Sixth Amendment right to a speedy trial:

> The Sixth Amendment [to the United States Constitution] guarantees that, '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial . . . .' *Doggett v. United States*, 505 U.S. 647, 651 (1992). This right is "'fundamental' and is imposed by the Due Process Clause of the Fourteenth Amendment on the States." *Barker v. Wingo*, 407 U.S. 514, 515 (1972) (footnote omitted).

the 28-month delay between "the date of [his original arrest], May 7, 2015," and "the date of the motion to dismiss," September 11, 2017. The circuit court found that the State *nol prossed* the charges in good faith and denied Mr. Thomas's motion to dismiss. Mr. Thomas now challenges that ruling.

In *State v. Henson*, 335 Md. 326, 332-33 (1994) (alterations in original), the Court of Appeals explained the standard that Maryland courts use to analyze speedy trial cases:

> The constitutional standard applicable in speedy trial cases was enunciated in *Barker v. Wingo*, 407 U.S. 514, 530 (1972). "When the [pre-trial] delay is of a sufficient length, it becomes 'presumptively prejudicial,' thereby triggering a 'balancing test [which] necessarily compels courts to approach speedy trial cases on an *ad hoc* basis." *Brady v. State*, 288 Md. 61, 65 (1980), *quoting Barker*, 407 U.S. at 530. The factors to be weighed are "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Barker*, 407 U.S. at 530. Because whether a period is presumptively prejudicial, or not, depends upon the length of a pre-trial delay, the first factor "is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Id*. And this factor cannot be applied until it is determined from what point the period of delay is measured. *State v. Bailey*, 319 Md. 392, 410 (1990).

The right to a speedy trial is invoked only "[u]pon the intervention of an arrest or formal charge[.]" *Henson*, 335 Md. at 333 (citation omitted). Typically, "the entire period from arrest or formal charge to trial is the applicable period for speedy trial

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> [. . .]
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> "The Sixth Amendment right to a speedy trial is . . . designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges." *United States v. MacDonald*, 456 U.S. 1, 8 (1982).

analysis." *Id*. When, as here, the State *nol prosses* charges and subsequently files a new indictment, the applicable time period may be different. "[T]he Maryland rule . . . is that, so long as the State acted in good faith, the [*nol pros*] terminates the original prosecution, and the speedy trial clock starts anew from the date of the filing of the new charging document." *Nottingham v. State*, 227 Md. App. 592, 614 (2016); *see also Clark*, 97 Md. App. at 393-94 (footnote omitted) ("If the prior termination of charges is done in good faith, we start the speedy trial clock at the second indictment.")

As such, the critical task in our speedy trial inquiry is to determine whether the State's dismissal of the charges by *nol pros* was in good faith. On this point, Mr. Thomas contends that the State's *nol pros* was motivated by its desire to "circumvent the denial of [its] postponement request and avoid and acquittal at trial[.]" Therefore, Mr. Thomas argues, the *nol pros* was in bad faith, and "the time calculation should begin on the date of [his] arrest, May 7, 2015[.]" In response, the State asserts that it "did everything in its power to secure the witnesses' presence, or otherwise resolve the case consistent with the interests of justice." Therefore, the State avers that it acted in good faith when it *nol prossed* the charges against Mr. Thomas, and that the time calculation should begin on the date of Mr. Thomas's second indictment.

In order to warrant reversal, Mr. Thomas has the "burden of showing that the circuit court's finding that the State had acted in good faith was clearly erroneous." *Greene v. State*, 237 Md. App. 502, 516 (2018). This Court explained the good faith standard in *Lee v. State*, 61 Md. App. 169, 175, *cert. denied*, 303 Md. 115 (1985). There, the Court stated that in cases where "the second indictment served to commence the

critical time period[,]" courts found good faith on behalf of the government where "the government did not deliberately attempt to circumvent the mandate of the Sixth Amendment by dismissing the charges. Instead, a sound prosecutorial decision was made." *Id*.

Here, Mr. Thomas has not established that the circuit court's finding of good faith was clearly erroneous. At trial, the State offered ample justification to explain why it was unable to secure the presence of its two key witnesses. After indicating that the witnesses left the courthouse because they felt "intimidated" by Mr. Thomas's family,[10] the State obtained body attachments for both witnesses and sent officers out to look for them.

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[10] In their briefs, both parties address the alleged intimidation that occurred here by citing *Clark v. State*, 97 Md. App. 381 (1993). In *Clark*, the defendant was indicted on January 9, 1990, for "stabbing [his former girlfriend] approximately nine times." *Id*. at 385. The original charges were *nol prossed* on May 21, 1990, because "the State's main witness [(the victim of the attack)] . . . refused to cooperate or testify against appellant[,]" and because "the defendant produced notarized statements in which [the witness] stated that she did not want to pursue the charges." *Id*. at 385, 391. A second indictment was filed against the appellant on March 17, 1992. *Id*. Based largely upon evidence that the defendant "used threats to coerce the State's witness into not testifying," this Court found that the State's *nol pros* occurred in good faith. *Id*. at 392.

Mr. Thomas contends that this case is "easily distinguished" from *Clark* because here, there is no evidence that Mr. Thomas intentionally intimidated the State's witnesses. The State, on the other hand, relies on the fact that its witnesses felt intimidated to assert that *Clark* is "on all fours" with the instant case. We are not convinced by either party's argument. Although Mr. Thomas may be correct that there is no evidence of direct intimidation here, the fact remains that both witnesses *felt* intimidated by Mr. Thomas's family. However, in *Clark*, much of the Court's discussion of witness intimidation revolved around problems specifically raised by witnesses in domestic violence cases. *See Clark*, 97 Md. App. at 393-94. Therefore, we are hesitant to analogize the alleged intimidation of the State's witnesses here to the direct intimidation of the victim of domestic violence that occurred in *Clark*. Regardless, our conclusion on the State's good faith is not altered.

However, neither witness could be located. Only after the State offered Mr. Thomas a more beneficial plea arrangement did it then *nol pros* the charges against him. Rather than evidencing the State's desire to "circumvent the mandate of the Sixth Amendment by dismissing the charges[,]" *Lee*, 61 Md. App. at 175, a review of the State's actions reveals that the State dismissed the charges against Mr. Thomas only after exhausting all other options to obtain the presence of its key witnesses.

Mr. Thomas's contention that "[c]ircumvention of the circuit court's ruling warrants starting the speedy trial clock at the outset of the case[,]" is unavailing for a number of reasons. Most importantly, all of the cases that Mr. Thomas cites to support this point deal with alleged violations of the *Hicks* Rule, which is embodied in Md. Rule 4-271.[11] As Mr. Thomas did not raise a *Hicks* issue on appeal, this argument has no effect on our conclusion that the State dismissed Mr. Thomas's charges in good faith.

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[11] Md. Rule 4-271. Trial Date.

(a) Trial Date in Circuit Court.

(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. When a case has been transferred from the District Court because of a demand for jury trial, and an appearance of counsel entered in the District Court was automatically entered in the circuit court pursuant to Rule 4-214 (a), the date of the appearance of counsel for purposes of this Rule is the date the case was docketed in the circuit court. 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. If a circuit court trial date is changed, any subsequent changes of the trial date may be made only by the county administrative judge or that judge's designee for good cause shown.

Additionally, a review of the record shows that the State did not actually circumvent any of the circuit court's rulings. The circuit court originally noted, on the morning of July 26, 2017, that it would not give the State an additional full day to locate its witnesses. However, upon learning, later that same afternoon, that the State would not be able to produce its witnesses, the circuit court refused to swear in the jury and thereby refused to commence the trial. As there was never an additional request made for postponement, and therefore no further ruling from the court on the issue, Mr. Thomas cannot argue that the State circumvented the court's authority. We therefore conclude that the circuit court did not err in finding that the State exercised good faith in *nol prossing* the original charges against Mr. Thomas.

Accordingly, as the State points out, "the length of delay in bringing [Mr.] Thomas to trial in this case amounted to five months and [eleven] days between the filing of the ultimate indictment on March 31, 2017, and the hearing on the motion to dismiss on September 11, 2017." A delay barely exceeding five months cannot be considered presumptively prejudicial, especially in light of the serious charges facing Mr. Thomas.[12]

> (2) Upon a finding by the Chief Judge of the Court of Appeals that the number of demands for jury trial filed in the District Court for a county is having a critical impact on the efficient operation of the circuit court for that county, the Chief Judge, by Administrative Order, may exempt from this section cases transferred to that circuit court from the District Court because of a demand for jury trial.

[12] In *Barker*, 407 U.S. at 514, 530-31, the Supreme Court explained how the seriousness of the alleged offense impacts the speedy trial analysis:

Nor can a five-month delay be classified as a delay of constitutional dimension. *See Glover v. State*, 368 Md. 211, 223 (explaining that the Court of Appeals has "employed the proposition that a pre-trial delay greater than one year and fourteen days was 'presumptively prejudicial[.]'"); *State v. Gee*, 298 Md. 565, 578 (1984) (noting that the Court was "not aware of an opinion of the Supreme Court of the United States or of the appellate courts of this State which holds that a delay of six months is of constitutional dimension"); *Greene v. State*, 237 Md. App. at 519-20 (explaining that a delay spanning six months does not amount "to a delay of constitutional dimension for a case involving felony drug charges"

As the delay in bringing Mr. Thomas to trial is not one of constitutional dimension, this Court is not required to analyze the other factors in the *Barker* test. *See Brady v. State*, 288 Md. 61, 61 (1980) (explaining that the *Barker* balancing test is triggered only upon a finding of a "presumptively prejudicial" pre-trial delay). Instead, we conclude that Mr. Thomas's Sixth Amendment right to a speedy trial was not violated here, and the circuit court did not err in denying Mr. Thomas's motion to dismiss.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED AND CASE REMANDED FOR A NEW TRIAL; COSTS TO BE PAID BY APPELLEE.

> [B]ecause of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.