UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0709

September Term, 2013

MARQUETTE LEON JONES

v.

STATE OF MARYLAND

Woodward,
Wright,
Raker, Irma S.
(Retired, Specially Assigned),

JJ.

Opinion by Woodward, J.

Filed: May 27, 2016

Marquette Leon Jones, appellant, challenges his convictions for one count of second degree assault and two counts of reckless endangerment by a Montgomery County jury on April 30, 2013. The charges stemmed from an altercation between appellant and his girlfriend that occurred on October 16, 2011. The State charged appellant on October 21, 2011, but appellant was not brought to trial until April 2013, in part because appellant was arrested and convicted in the District of Columbia on drug charges, and was not sentenced on those convictions until April 2012.

Appellant claimed that during the delay, the State lost key evidence, specifically a knife and crime scene photographs. Appellant filed three motions to dismiss on speedy trial grounds, two pre-trial and one post-trial, all of which were denied. Appellant also requested a missing evidence instruction, which the trial court refused to give. Further, the trial court denied appellant's *Batson* challenge, as well as his motion for judgment of acquittal on the reckless endangerment charges.

Appellant presents five questions for our review, which we have rephrased, reordered, and consolidated into the following four questions:[1]

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[1] Appellant's original questions read as follows:

1. Did the court erroneously require actual prejudice as a necessary condition for establishing a speedy trial violation?

2. Did the court erroneously refuse to dismiss the indictment on speedy trial grounds after the court found that [appellant] suffered actual prejudice from the State's delay in bringing

(continued...)

1. Did the trial court abuse its discretion by refusing to give a missing evidence instruction?

2. Did the trial court err by denying appellant's motions to dismiss based on speedy trial grounds?

3. Did the trial court err in denying appellant's *Batson* challenge?

4. Did the State present legally sufficient evidence to sustain appellant's convictions for reckless endangerment?

For the reasons set forth below, we affirm the judgments of the circuit court.

BACKGROUND

On October 16, 2011, appellant's girlfriend, Victoria Puckett, called 911, claiming that appellant was "trying to kill" her and was "going to blow the apartment up." Puckett told the 911 dispatcher that she had fled the apartment, and that appellant had initially

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[1](...continued)

him to trial because the State destroyed or failed to preserve the alleged assault weapon (a knife) and crime scene photographs?

3. Did the court erroneously refuse to give a missing evidence instruction for the knife and crime scene photographs?

4. Did the court erroneously deny defense counsel's *Batson* challenge where the State used four of its five peremptory strikes on African-Americans without sufficient non-discriminatory justifications?

5. Did the State fail to present legally sufficient evidence to sustain the convictions for reckless endangerment of Victoria and Sara Puckett?

pursued her, but then ran to the back of the building. When the police arrived at the apartment complex, Puckett told Officer Susanna Stanley that appellant had broken into her apartment and hidden in the closet. According to Puckett, appellant then jumped out of the closet, punched her in the head, ripped out her braids, held a knife to her throat, and threatened to kill her. Puckett also informed Officer Stanley that appellant had attempted to set a fire to the apartment by turning on the gas from the stove's burners and pushing cereal boxes onto them.

Upon entering Puckett's apartment that night, Officer Stanley detected "an overwhelming smell of natural gas, propane," and observed that "all the knobs on the stove were on high" with "gas coming out." Officer Stanley also saw cereal boxes and a pan by the stove, and braids scattered throughout the apartment. She further noticed a small cut on the left side of Puckett's throat.

While Officer Stanley was in the apartment, appellant telephoned Puckett and began screaming at her loudly enough for the officer to overhear what appellant said. According to Officer Stanley, appellant told Puckett that

> I'm going to f**king—when you drop your son off at the bus stop, I'm going to f**cking finish what I started tonight. I'm going to slice your neck, you motherf**cking n**ger bitch. I'm going to kill you, I'm going to f**cking kill you[.]

Puckett showed Officer Stanley the knife that appellant had brandished, and the latter instructed another officer to seize it. Officer Christopher West placed the knife into an

evidence bag, and later entered it into the police's evidence system. Officer Stanley instructed another officer, Officer Rodney Campbell, to take photographs of the scene, but those photographs apparently were never taken.

On October 21, 2011, the State charged appellant with attempted murder, first degree assault, second degree assault, reckless endangerment, burglary in the first degree, making threats of arson, and making threatening phone calls. On October 25, 2011, two District of Columbia ("D.C.") police officers stopped appellant within their jurisdiction, because he matched the description of a suspect wanted in Maryland. Maryland police officers arrived in D.C. and confirmed that appellant was their suspect.

During the stop, however, the D.C. police found illegal drugs on appellant's person, which resulted in him being charged with possession with intent to distribute in D.C. Appellant was arraigned in the D.C. Superior Court on October 26, 2011, and was held without bond. During the arraignment, appellant waived extradition to Maryland.

On October 28, 2011, Maryland police withdrew the warrant for appellant's arrest and lodged a detainer on the grounds that appellant was being held without bond on pending charges in D.C. D.C. continued its prosecution of appellant after Maryland filed the detainer. On February 1, 2012, appellant pled guilty to possession with intent to distribute a controlled dangerous substance in D.C. Superior Court. On April 6, 2012, the D.C. court sentenced appellant to twenty-five months' incarceration.

On August 13, 2012, appellant filed a Request for Disposition of Interstate Detainers ("Disposition Request"). The District Court of Maryland for Montgomery County received the Disposition Request on September 5, 2012, and the Office of the State's Attorney received it on September 7, 2012. The State's Attorney filed for custody of appellant on October 31, 2012, and took appellant into custody on November 15, 2012.

On November 29, 2012, the Assistant State's Attorney presented the case to a grand jury. The grand jury indicted appellant on charges of first degree assault, first degree burglary, making threats of arson, and two counts of reckless endangerment of Puckett and her daughter, respectively. The State also charged appellant with the lesser-included offense of second degree assault.

On January 4, 2013, appellant filed a Motion to Dismiss for Speedy Trial in the circuit court. Judge Ronald B. Rubin held a hearing on appellant's motion on February 7, 2013, and found that the delay in bringing appellant to trial in Maryland was of constitutional import, but that appellant had not suffered any prejudice as a result of the delay. He ultimately concluded that no Sixth Amendment violation had occurred, and denied appellant's motion.

On March 8, 2013, appellant's trial counsel scheduled an appointment for March 14, 2013, to view the knife seized from Puckett's apartment. On March 14, 2013, however, the State's Attorney informed defense counsel that the Montgomery County police had destroyed the knife taken from Puckett's apartment. Appellant also requested to see any photographs

taken at Puckett's apartment. The State later informed appellant that Officer Stanley had no photographs in her possession and that none had been placed in evidence.

On March 19, 2013, appellant filed a motion for reconsideration of his speedy trial claim. Appellant asserted that he was entitled to reconsideration because the State had "destroyed tangible evidence critical to his defense." Accordingly, he argued that he had now suffered "substantial actual prejudice" because of the delay in bringing him to trial.

Judge Rubin held a second hearing regarding appellant's speedy trial claim on April 18, 2013. The prosecutor advised Judge Rubin that the knife had only been slated for destruction by a controlled burn, and thus had its protective packaging removed, but might yet be located at Central Property. Nevertheless, Judge Rubin found that the police had destroyed or lost both the knife and the photographs, and that appellant had suffered some prejudice as a result. The court, however, further found:

> [I]t seems to me that that prejudice is curable by the trial judge. Or by me. **And that frankly [appellant] will be better off than had the [S]tate not lost or destroyed the evidence. Also, the evidence goes to some but not all of the charges, be they lesser, included, or otherwise. So this is not a case where the prejudice to the defendant is so great,** especially when considered in connection with the other factors that I found at the prior hearing, which I simply incorporate by reference, **that justice or the constitution or both require that the indictment is to be dismissed**. So those motions [to dismiss] are denied.

(Emphasis added). In other words, Judge Rubin balanced his new finding with regard to prejudice against the determinations he made at February 7, 2013 hearing regarding the

length and nature of the delay, and concluded that no constitutional violation had occurred. He thus denied appellant's renewed speedy trial motion.

Judge Rubin, however, immediately qualified his ruling as follows:

> **However, I'm going to make this an order and attach to it a limiting instruction, which I order to be given at the defendant's trial.** Now, I understand that if I'm not the trial judge **it's** at least theoretically **possible that some other trial judge will refuse to give it.** As a consequence, I reserve—**in the event that that happens—I reserve jurisdiction to reconsider the motion to dismiss.**

(Emphasis added).

The limiting instruction referred to by Judge Rubin was a spoilation instruction, which read:

> The police destroyed the knife allegedly used in this case, and the police cannot find the photographs taken at the crime scene. The destruction of or the failure to preserve evidence by a party gives rise to an inference unfavorable to that party. The destruction of evidence indicates that the party believes that his or her case is weak and that he or she would not prevail if the evidence was preserved.

In contrast to his oral ruling, Judge Rubin issued an order on April 18, 2013, stating that "[i]f the trial judge declines to give [the above] spoliation instruction, [appellant's] *motion to dismiss on speedy trial grounds will be granted*."

As a result of Judge Rubin's order, the State renewed its effort to locate the missing knife. The State discovered that the police had placed the knife into a container of evidence set to be destroyed by a controlled burn ("the burn pallet"). The police then separated 102 knives from the other items in the burn pallet, all of which had been stripped of their

packaging and identifying information. Officer West, who had initially seized the knife from Puckett's apartment, examined the segregated knives and identified a knife, claiming to be "97 percent sure that [it was] the same knife." Officer West repackaged the recovered knife and re-submitted it as evidence.

At a pre-trial hearing before Judge Sharon V. Burrell, the State told the court that it intended to enter the recovered knife as "demonstrative evidence . . . so that the jury can visualize what the weapon looked like." Appellant responded that, even if the recovered knife was in fact the knife seized from Puckett's apartment, it had been contaminated. Accordingly, appellant requested a missing evidence instruction on the grounds that he had been denied the opportunity to perform forensic testing on the knife.

Appellant also asked for a missing evidence instruction with regard to the photographs, which "the police took at the scene and can't find now." The State responded that the "evidence suggests that Officer Stanley may have told somebody to take photos, but none were taken." The State thus asserted that a missing evidence instruction would be inappropriate, because the photographs never existed.

Judge Burrell did not rule on the appropriateness of a missing evidence instruction with regard to the knife or the photographs during the pre-trial hearing, but instead postponed that decision until after evidence had been presented. Judge Burrell did, however, suppress the knife from being admitted, ruling:

> Well you're going to have to [use] another knife [for demonstration purposes] that looks like this knife. Because you can't use that knife and say, "I'm 97 percent sure that this was the knife." **You can get another knife and say the knife looked like this, but you can't get this knife and say, "This is the knife. I'm 97 percent sure." Because of the chain of custody . . . I think it's prejudicial to the defendant to allow the officer to testify, "This is the knife" or "I think it's the knife."**

(Emphasis added).

Appellant's trial began on April 29, 2013. Puckett, the State's first witness, recanted much of her original story, admitting that she "lied a lot to the police" on the night of October 16, 2011. Puckett testified that appellant did not break into the apartment, did not assault her with a knife, and did not threaten to blow up the apartment. Instead, Puckett stated that her altercation with appellant amounted to "a little bit of tus[s]ling," and that she called the police as a "scare tactic." During cross-examination of Puckett, defense counsel showed Puckett the knife recovered from the burn pallet, and Puckett testified that it was not the one from her apartment. Officer West later testified that the knife recovered from the burn pallet was no different from the knife he seized from Puckett's apartment.

Officer Stanley testified that she remembered instructing Officer Campbell to take photographs at the scene, but noted that no record of any photographs appeared in her report. Later, Officer Campbell testified that he did not take any photographs at Puckett's apartment, and both Officers Campbell and West testified that they did not recall whether any photographs were taken that night.

After the State rested, appellant made a motion for judgment of acquittal on the reckless endangerment counts, which Judge Burrell denied.[2]

At the close of evidence, defense counsel again requested a missing evidence instruction with regard to the knife. Defense counsel recommended to Judge Burrell that the instruction be modeled after the missing witness instruction from the Maryland Criminal Pattern Jury Instructions ("MPJI–CR") 3:29, which reads as follows:

> You have heard testimony about ____, who was not called as a witness in this case. If a witness could have given important testimony on an issue in this case and if the witness was peculiarly within the power of the [State] [] to produce, but was not called as a witness by the [State] [] and the absence of that witness was not sufficiently accounted for or explained, then you may decide that the testimony of that witness would have been unfavorable to the [State] [].

The State argued that the missing evidence instruction did not apply to the knife, because it had been recovered. Judge Burrell agreed with the State:

> The State has presented what it believes to be the evidence that [appellant is] saying is missing. **It's no longer missing.**
>
> ***
>
> All right, **I don't think that this instruction applies, based on the information that's been presented in this case, what I have,**

[2] Appellant moved for acquittal on all counts, but only challenges on appeal the sufficiency of the evidence with regard to the reckless endangerment convictions.

> **what the State has presented**. Even if you modify it, it doesn't apply to this case.

(Emphasis added).

Judge Burrell did provide a jury instruction to accompany the photograph of the recovered knife that would be submitted to the jury. The court instructed the jury that it had "heard no testimony that the knife reflected [in the photograph] is the actual knife that was in the apartment. And you are not permitted to infer that it is the actual knife from the apartment."

Appellant also repeated his request for a missing evidence instruction with regard to the photographs. Judge Burrell found that no evidence had been presented that indicated that photographs had been taken besides Officer Stanley's testimony that she *may* have instructed another officer to take the photographs. The court thus rejected appellant's argument that the jury could infer from that testimony that photographs had *in fact* been taken, and therefore refused to give the missing evidence instruction.

On April 30, 2013, the jury acquitted appellant of first degree assault, first degree burglary, and making threats of arson. The jury convicted appellant of second degree assault and two counts of reckless endangerment.

On May 21, 2013, appellant filed a Renewed Motion to Dismiss the Indictment For Violation of His Sixth Amendment Right to a Speedy Trial. Appellant asserted that Judge Rubin had ruled that the prejudice caused by the delay in bringing him to trial could only be

cured by a spoliation instruction with regard to the knife and photographs. Because the instruction was not given, appellant argued that he was entitled to a dismissal of the indictment. Judge Burrell denied the motion without a hearing on June 3, 2013.

On June 26, 2013, Judge Burrell sentenced appellant to five years' incarceration for the second degree assault conviction, and two years' incarceration for each count of reckless endangerment. The reckless endangerment sentences were to be served concurrent to each other, but consecutive to the sentence for second degree assault. This timely appeal followed.

Additional facts will be set forth below to resolve the questions presented.

DISCUSSION

I. *The Missing Evidence Instruction*

Waiver

Appellant argues that the trial court erred when it refused to give a missing evidence instruction with regard to the knife and crime scene photographs. The State responds that, as an initial matter, appellant waived his claim to the missing evidence instruction, because he did not proffer for the record the language of the requested instruction. We disagree with the State's waiver argument.

At trial, appellant asked for a missing evidence instruction with regard to both the photographs and the knife. Appellant clarified that the instruction he sought was modeled

on the missing witness instruction and was the same one that the Court of Appeals used in *Cost v. State*, 417 Md. 360 (2010). Appellant later referenced MPJI–CR 3:29 explicitly:

> [DEFENSE COUNSEL]: And as far as the missing evidence instruction, do—in order for that to be ordered based on what's been presented to you, do we have to call the cops, or what has been represented so far sufficient for that?
>
> THE COURT: I need to see what the instruction is. But if you're pursing this line—I warned you, if you're pursing this line with this knife, then the knife might eventually come in, and West may have to come back and testify, so you need to figure out what you're going to do about that.
>
> [DEFENSE COUNSEL]: **Yeah, the missing witness instruction is really patterned [sic] jury instruction 3:29.**
>
> THE COURT: All right, have you seen this?
>
> [STATE'S ATTORNEY]: I've seen it, your honor.

(Emphasis added).

After the court denied appellant's request for the instruction, defense counsel stated the following:

> Yes, your honor. We will—we'll just stick with the photo going back with the instruction, and don't plan to call Officers Clark or Haywood or West on the knife. **But for the record, we requested the missing evidence instruction, as there isn't a knife in evidence that they've linked to the case**.

(Emphasis added). We conclude that appellant's request for a missing evidence instruction regarding the knife and the photographs was sufficiently specific to be preserved for appellate review.

Standard of Review and the *Cost* Requirements

"A trial court must give a requested jury instruction where '(1) the instruction is a correct statement of law; (2) the instruction is applicable to the facts of the case; and (3) the content of the instruction was not fairly covered elsewhere in instructions actually given.'" *Cost*, 417 Md. at 368-69 (quoting *Dickey v. State*, 404 Md. 187, 197-98 (2008)).

With regard to a missing evidence instruction specifically, the Court of Appeals held in *Cost*:

> Our holding does not require a trial court to grant a missing evidence instruction, as a matter of course, whenever the defendant alleges non-production of evidence that the State might have introduced. Instead, **we recommit the decision to the trial court's discretion, but emphasize that it abuses its discretion when it denies a missing evidence instruction and the "jury instructions, taken as a whole, [do not] sufficiently protect the defendant's rights" and "cover adequately the issues raised by the evidence." In another case, where the destroyed evidence was not so highly relevant, not the type of evidence usually collected by the state, or not already in the state's custody, . . . a trial court may well be within its discretion to refuse a similar missing evidence instruction.**

Id. at 382 (citation omitted) (emphasis added). Thus, under *Cost*, litigants seeking a missing evidence instruction must demonstrate that the evidence in question was (1) in the State's

custody, (2) the "type of evidence usually collected by the state," and (3) highly relevant to the defense in light of the evidence in the record and the jury instructions given. *Id.*

Parties' Contentions

With regard to the knife, appellant argues that the three *Cost* requirements had been satisfied. Specifically, he first contends that "[i]t is not disputed that the knife . . . was 'actually held as evidence, completely within State custody.'" *Id.* at 380. Appellant next asserts that the knife "normally would be collected and analyzed," and that the State's argument to the contrary ignores the importance of forensic testing to appellant's defense. *Id.* Appellant finally argues that forensic testing of the knife was in fact "highly relevant" to his defense, because it "could have proven that [] Puckett lied in her original story to the police." Appellant claims that, "if [appellant's] fingerprints or [] Puckett's blood were not on the knife, it would have significantly undermined the State's theory that [appellant] assaulted [] Puckett."

With regard to the photographs, appellant contends that the first *Cost* requirement—that the evidence be within the State's custody—had been satisfied. *Id.* Specifically, according to appellant, Officer Stanley's testimony that she instructed another officer to take the pictures created a reasonable inference that crime scene photographs were taken and placed into evidence. Appellant next asserts that "[p]olice officers routinely take crime scene photographs," thus indicating that the second *Cost* requirement was also met. *Id.* Finally, appellant asserts that the photographs could have demonstrated that Puckett did

not have injuries on the night of the attack, and that no cereal boxes had been placed on the stove, both of which would support his claim that Puckett lied about the violent nature of the altercation and appellant's attempt to burn down the apartment.

The State responds that trial courts are not generally required to provide instructions with regard to factual inferences. The State contends that *Cost* is an exception, and that appellant has not demonstrated that the exceptional circumstances of *Cost* exist in the instant matter.

In particular, with regard to the knife, the State argues that under *Cost*, the evidence in question must have been retained and analyzed by the State. The State does not dispute that the knife might have been retained, but claims that the uncontested testimony of the police was that the knife would *not* have been forensically tested, because "the identity of [the] suspect was known, and he had lived in the apartment." The State contends that appellant's claim that he would have forensically tested the evidence is speculative and irrelevant, because *Cost* only looks at whether the State would have tested the evidence. Lastly, the State contends that "the results of any testing of the knife would have been highly equivocal, not 'highly relevant,' as in *Cost*," because any forensic evidence on the knife would not have "directly controverted the evidence that [appellant] hit Puckett on the head and pulled out her braids, and turned on the gas burners."

As for the photographs, the State asserts that there is no evidence that they were ever taken or placed into evidence. The State claims that, even if the photographs existed and did

not show visible injury to Puckett, appellant would not be exonerated, because "injury was not crucial to proving any of the offenses of which [appellant] was convicted." Similarly, the State argues that, if the photographs failed to depict cereal boxes on the stove, they would not negate the testimony of the officers who, upon entering the apartment, found the burners turned on.

The Photographs

We shall not undergo a *Cost* analysis with regard to the photographs, because we agree with the State and Judge Burrell that the record contains no indication that crime scene photographs ever existed. Instead, the police officers involved testified that an instruction to take photographs may have been given, but no one recalls taking the photographs, and there is no record of the taking of any photographs.

Cost does not permit the factfinder, under a missing evidence instruction, to make inferences with regard to the existence of evidence. *See Hajireen v. State*, 203 Md. App. 537, 561 (2012) ("A missing evidence instruction, advising the jury that it could infer that the missing evidence would be unfavorable to the State, is not warranted in a situation where evidence was not destroyed, but rather, it was never created."). Therefore, Judge Burrell did not abuse her discretion by refusing to give the missing evidence instruction with regard to the photographs.

The Knife

At the outset, we need to identify the "missing evidence" that appellant sought to be covered by the missing evidence instruction. The "missing evidence" was not the knife, but rather the forensic evidence that could have been extracted from the knife. At the pre-trial evidentiary hearing before Judge Burrell, defense counsel argued that the State's mishandling of the knife denied appellant the opportunity to analyze the knife:

> The knife . . . in that box, it is of zero worth to us to have tested. It's worthless, it's contaminated. That's why they keep evidence in protective containers. And when they purge it and throw it into a burn pallet they take out the protective container and destroy it. So [appellant] is now [] prejudiced by the [S]tate's actions.

Regardless of whether Officer West had successfully identified the knife in the burn pallet, the knife at that point had been contaminated. The packaging had been removed, the identification had been lost, and the chain of custody had been broken.[3] Accordingly, no useful forensic testing could be performed on the knife by appellant or by the State. Thus we conclude that the forensic analysis of the knife constituted the missing evidence that must be considered in light of the *Cost* decision.

The parties agree that (1) the knife was within State custody, because it was seized and retained by the State; and (2) the State did not make the knife available for forensic testing until after the knife had been extracted from the burn pallet. The State, therefore, had

[3] Judge Burrell essentially agreed with appellant that the knife had been tainted when she ruled that the knife must be suppressed because of the "chain of custody."

exclusive control over the forensic testing of the knife prior to the point of contamination, *i.e.*, up until the point that appellant "lost" the opportunity to run forensic tests. We thus conclude that the missing evidence was within the State's custody, satisfying the first *Cost* factor. *See Cost*, 417 Md. at 382.

We next consider whether the forensic analysis of the knife was the "type of evidence usually collected by the state." *Id.* Although the State is correct that *Cost* looks at what the State would normally collect, the fact that the State decided against forensically analyzing the knife in the matter *sub judice* is not determinative of the second *Cost* factor.

The *Cost* test considers whether the missing evidence is the *type* of evidence the State would usually collect. *See id*. Thus testimony from the police regarding why certain *categories* of evidence would not be collected is relevant to the *Cost* analysis. *See Gimble v. State*, 198 Md. App. 610, 631-32 (2011) (in which the police testified that fabric evidence is not normally submitted for fingerprint analysis, because the fingerprints are difficult to lift from cloth). Here, the State never claimed that a knife used during an alleged assault would not normally be analyzed for fingerprint and DNA evidence. On the contrary, the State asserted that the police and the State's Attorney *considered* performing forensic analyses of the knife, but decided that such tests would be unlikely to yield probative evidence for the State *in this case* so as to justify the costs of running them.

We have no doubt that weapons, and forensic evidence culled from weapons, are exactly the type of evidence that the State usually collects. Indeed, the "missing evidence"

at stake in *Cost* was the "laboratory analysis" of the victim's "clothing, towel, sheets, and the red substance on the floor of [the victim's] cell," which "might well have created reasonable doubt" as to whether the appellant had stabbed his fellow inmate. *Cost*, 417 Md. at 380. Accordingly, we conclude that the second factor of the *Cost* test has been met.

Finally, in our view, the forensic tests appellant sought to perform on the knife were highly relevant to his defense, thus satisfying the third *Cost* factor. *Id*. The State correctly points out that any forensic evidence on the knife would not have "directly controverted the evidence that [appellant] hit Puckett on the head and pulled out her braids, and turned on the gas burners." As a result, forensic evidence connected to the knife would not have exonerated appellant from the charge of second degree assault. The State, however, used the knife as the lynchpin in its argument that appellant committed first degree assault. Therefore, the forensic evidence from the knife would have been highly relevant to appellant's defense to the charge of first degree assault.

In sum, we conclude that the State, which retained the knife, denied appellant the opportunity to perform forensic tests on the knife. Such tests qualify as the type of evidentiary analysis normally performed by the State, and would have been highly relevant to appellant's defense. We thus hold that, under *Cost*, the trial court abused its discretion by denying appellant's request for a missing evidence instruction regarding the knife.

Harmless Error

Nevertheless, we will not vacate appellant's convictions, because we hold that the failure to give the missing evidence instruction for the knife was harmless beyond a reasonable doubt. We shall explain.

The harmless error standard is as follows:

> We conclude that when 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 a reversal is mandated. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict.

Dorsey v. State, 276 Md. 638, 659 (1976).

The knife, and any forensic evidence that could have been obtained therefrom, pertained only to the first degree assault charge, and appellant was acquitted of first degree assault. The State focused exclusively on the knife when it discussed the first degree assault charge:

> And what exactly are [appellant's] actions that constitute that first degree assault, that constitute showing that intent to kill her, or intent to create such serious bodily harm that's likely to result in death. She said to the police that night, and she told 911 that he hid in her closet, when he emerged from her closet he violently assaulted her. He struck her upon the head, he pulled several braids from her head. Office[r] Stanley, when she responded, testified that she observed braids, some in the bathroom sink, she thought where was one in another room; braids throughout the apartment to cooperate [sic] what Ms. Puckett had told her happened, and that the argument

> continued to escalate, that is wasn't just the hitting in the head and the pulling of braids, which alone may not be sufficient, that **then the defendant threatened to take her life and he grabbed a knife. . . . And that is the conduct that shows the defendant had the intent to inflict serious bodily injury.**
>
> Officer Stanley and Officer Campbell testified that they observed a red mark on her neck and a small cut. You don't need to be convinced, and we're not arguing that such a serious bodily injury did occur, likely to result in death. **The question is did the defendant intend to cause that kind of injury when he held the knife to her throat. And we would argue what other intent is there when someone holds a knife to another human being[']s throat. And take that coupled with the defendant's words, defendant's threats that he was going to kill her. So that is the first degree assault.**

(Emphasis added).

But appellant contends that the jury could have convicted appellant of second degree assault based on appellant's holding the knife to Puckett's neck. The State, however, argued in closing that appellant would be guilty of second degree assault based on Puckett's testimony at trial, which did not include any reference to appellant's use of the knife:

> **So what are the elements of second degree assault?** That the defendant caused offensive physical contact to Victoria Puckett. That the contact was the result of an intentional or reckless act of the defendant and was not accidental, and that the contact was not consented to by Victoria Puckett. **Well, taking either version of Ms. Puckett's events. That is, what she stated to officers the night of October 16th, what she stated on the 911 call, and what she wrote in her statement, versus her testimony about this tussling argument. In any which way that you look at it, it's clear contact by [appellant] upon Ms. Puckett[; it] was contact that was not consented to. It was offensive and it was physical, and it was not accidental.** There's been no testimony presented to you, even in Ms.

> Puckett's attempt to minimize [appellant's] conduct—minimize, thank you. Minimize [appellant's] conduct. She didn't say he was swinging his arms in the air and accidentally hit me. This isn't a case where it's an accident. Any contact by [appellant] on Ms. Puckett was intentional.

(Emphasis added).

Defense counsel responded to the State's argument on the second degree assault charge by claiming that Puckett's injuries did not line up with the State's theory of the case:

> **Now the [S]tate hasn't proven any of the other charges beyond a reasonable doubt either. The second degree assault**, the threat of arson, or the reckless endangerment. Ms. Puckett testified that [appellant] didn't hit her or punch her; didn't pull out any extensions in her hair; didn't threaten to burn down or blow up the apartment; didn't grab any lighter fluid[;] didn't turn on any burners on the stove; didn't put any cereal boxes on the stove. That's what she told you under oath. The [S]tate wants you to believe the story that she told that night in the heat of [the] moment when she was angry. But she admits that's not true. But you don't have to take her word for it that her earlier statements are not true because the evidence supports what she sat there under oath and told you. Ms. Puckett said she didn't have any injuries requiring medical treatment, none that even required a Band-Aid. All of that's consistent with what she told you here in the court room. No medical records, no doctors. **And I want to talk for a minute about the [S]tate's theory about the alleged assault. There's a big problem with it. The alleged injury which is at most a red mark or a small cut on her neck doesn't match the narrative. It doesn't match what Ms. Rodriguez argued happened in that apartment. The police testified and Ms. Rodriguez relays a horrific struggle that happened in that apartment based on what Ms. Puckett told them that night. One where [appellant] allegedly jumped out of the closet repeatedly and violently hit her in the head. But then there's only a red mark? A small cut? But the [S]tate says that came from the knife? That story doesn't line up. The injuries don't match the narrative that they want you to believe. There was no bruising, no swelling, no medical treatment, no photos.**

> **The injuries doesn't [sic] match the story that it confirms what she told you. . . .**

(Emphasis added).

Given the closing arguments and appellant's acquittal of first degree assault, it is clear that the jury did not base the second degree assault conviction on appellant's alleged use of the knife. The State's theory of second degree assault, was not based on the knife; rather, it was based on appellant hitting Puckett and pulling out her braids. We thus conclude that the trial court's failure to provide the missing evidence instruction for the knife in no way affected the jury's conviction of appellant for second degree assault.[4]

II. *Speedy Trial Violation*

Scope of Appellate Review

Appellant makes several arguments in connection with Judge Rubin's pre-trial rulings on his Sixth Amendment claims of a violation of his right to a speedy trial. The State, however, contends that only Judge Burrell's denial of the post-trial motion on the same ground is before this Court. Thus we must first determine the scope of this Court's review.

[4] Appellant also claims that he was entitled to a spoliation instruction. The State argues that appellant was not entitled to a spoliation instruction, akin to the instruction authored by Judge Rubin, because appellant failed to demonstrate bad faith on the part of the State which, according to the State, is required to before a spoilation instruction can be given. The State contends that Judge Burrell correctly determined that there was no evidence that the State failed to preserve the evidence based on a belief that its case was weak. We agree with the State that appellant made no showing of bad faith that would entitle him to a spoliation instruction. *See Cost v. State*, 417 Md. 360, 369-71 (2010). We thus only consider the missing evidence instruction under *Cost.*

The State argues that the standard for speedy trial issues established by the Supreme Court in *Barker v. Wingo*, 407 U.S. 514 (1972),

> is fundamentally a balancing of factual circumstances. In this case, the facts bearing on the first three *Barker* factors [the length of delay, the reason for the delay, and the defendant's assertion of his right] were not substantially different at the time of each of the three rulings. As to the fourth prong—prejudice from delay—at the time of the post-trial ruling, the evidentiary record had been completed, [appellant] stood acquitted of the first-degree assault charge, and so the assessment of actual prejudice resulting from failure to preserve the knife was more certain that [sic] at any earlier contingency-based ruling on the motion to dismiss.

Appellant acknowledges that "the trial court [Judge Burrell], in refusing to dismiss the indictment, did not disturb ***any*** of the motions court's [Judge Rubin's] rulings regarding the first three *Barker* factors." (Emphasis in original). Appellant thus essentially agrees with the State that the "first three *Barker* factors were not substantially different at the time of each of the three rulings." **[Aee. 9]** Appellant also has no response to the State' argument that the factual record vis-a-vis the prejudice prong did not crystalize until after trial.

We agree that the two motions before Judge Rubin are not before this Court. Judge Rubin's rulings were interlocutory, and therefore were made upon consideration of an incomplete record, unlike Judge Burell's denial of the post-trial motion. *See State v. Ensor*, 27 Md. App. 670, 681 (1975), *rev'd on other grounds*, 277 Md. 529 (1976) ("But a review of Judge Grady's interlocutory suppression order in this case would be fruitless. Whether the order was right or wrong can be of no more than academic interest, and is irrelevant to our

decision."). Moreover, Maryland Rule 4-252 specifically allows the trial court to defer the determination of a speedy trial violation. Md. Rule 4-252(g)(1) provides: "Motions [to dismiss] filed pursuant to this Rule shall be determined before trial and, to the extent practicable, before the day of trial, *except that the court may defer until after trial its determination of a motion to dismiss for failure to obtain a speedy trial*." (Emphasis added).

Thus, to the extent that Judge Rubin conditioned his order denying appellant's speedy trial motion on the provision of the spoliation instruction, we construe the order as a deferral of the ultimate decision with regard to the speedy trial issue. Judge Rubin, in fact, originally stated that his intention was to defer the final disposition of appellant's motion to dismiss on speedy trial grounds. During the court's colloquy at the April 18, 2013 hearing, Judge Rubin stated that, if the spoliation instruction was not given, he would "*reconsider* the motion to dismiss."[5] (Emphasis added).

[5] As stated above, Judge Rubin's subsequent order was inconsistent with the court's colloquy on April 18, 2013. In the April 18, 2013 order, Judge Rubin held that "[i]f the trial judge declines to give [the above] spoliation instruction, [appellant's] *motion to dismiss on speedy trial grounds will be granted*." "Judges[, however,] are presumed to know the law." *Hebb v. State*, 31 Md. App. 493, 499 (1976). Thus, we assume that Judge Rubin knew that his choices under Maryland law were to (1) dismiss the indictment because a speedy trial violation had occurred, (2) deny the motion to dismiss because no speedy trial violation had occurred, or (3) defer the decision on the speedy trial claim. *See* Md. Rule 4-252(g)(1); *Smith v. State*, 276 Md. 521, 534 (1976) (finding that the only remedy for a speedy trial violation is dismissal of the charges). In light of the court's colloquy on April 18, 2013, we conclude that Judge Rubin intended to defer making a ruling on the speedy trial claim, and that his order was an inartful expression of that intention.

Once the speedy trial issue had been deferred, the trial court would then consider appellant's post-trial motion based on the complete factual record before it.[6] *Cf. Divver v. State*, 356 Md. 379, 385-886 (1999) (allowing a *de novo* review of a district court's denial of a motion to dismiss on speedy trial grounds, because to hold otherwise would "make[] a hollow shell" of Rule 4-252, which permits speedy trial determinations to be deferred). Thus, despite appellant's arguments to the contrary, Judge Burrell did not err by failing to give Judge Rubin's spoliation instruction, and we consider the trial court's denial of appellant's post-trial motion based on the complete record before the court at that time.

Standard of Review

This Court reviews the trial court's denial of a speedy trial motion under our own independent constitutional analysis. *Butler v. State*, 214 Md. App. 635, 655 (2013). In considering the *Barker* factors, this Court "perform[s] a de novo constitutional appraisal in light of the particular facts of the case at hand[,]" but must "accept [the] lower court's findings of fact unless clearly erroneous." *Id.* (citations omitted)

A criminal defendant's right to a speedy trial is guaranteed by the Sixth Amendment and Article 21 of the Maryland Declaration of Rights. *Epps v. State*, 276 Md. 96, 102 (1975).

[6] We note that under Md. Rule 4-252(g)(1), the *trial court* retains the ability to review speedy trial determinations; a particular judge on the circuit court does not retain jurisdiction over the issue. Thus, by making his order conditional, Judge Rubin ensured that the ultimate decision would be made by a circuit court judge who had before him or her the complete factual record, which in this case was Judge Burrell.

Under *Barker*, we must consider four factors to determine whether the State violated appellant's right to a speedy trial: "(1) length of delay, (2) reasons for the delay, (3) defendant's assertion of his right, and (4) prejudice to the defendant." *Jones v. State*, 279 Md. 1, 6 (1976) (citing *Barker*, 407 U.S. at 530).

Analysis

"[T]he length of delay is a 'double enquiry' as it both triggers constitutional analysis and is a factor in determining whether a defendant's constitutional right to a speedy trial has been violated." *Glover v. State*, 368 Md. 211, 222-23 (2002). In *Glover*, the Court of Appeals held that a "fourteen-month delay certainly requires constitutional scrutiny." *Id.* at 224. Previously, in *State v. Bailey*, the Court held that the speedy trial clock begins at the time of arrest or when the charges are filed. 319 Md. 392, 410 (1990). Here, the length of delay spans from October 21, 2011, when police charged appellant in Maryland, until April 29, 2013, when the trial began. This eighteen-month delay is four months greater than the length of time in *Glover*, which the Court of Appeals determined required "constitutional scrutiny." 368 Md. at 224. We thus conclude that the length of the delay triggers constitutional scrutiny under the *Barker* factors.

We next consider the eighteen-month delay in light of the reasons for the delay. We perform this simultaneous analysis, because "[d]ifferent reasons for delay in prosecuting a defendant should be assigned different weights." *State v. Dean*, 42 Md. App. 155, 156-57

(1979). With regard to the "weights" assigned to the periods of the delay, the Court of Appeals has held that

> a continuum exists whereby a deliberate attempt to hamper the defense would be weighed most heavily against the State, a prolongation due to the negligence of the State would be weighed less heavily against it, a delay caused by a missing witness might be a neutral reason chargeable to neither party, and a delay attributable solely to the defendant himself would not be used to support the conclusion that he was denied a speedy trial.

Jones, 279 Md. at 6-7.

The first period of delay began on October 21, 2011, when appellant was charged, and extends to April 6, 2012, when appellant was sentenced in D.C. We agree with the State that this period is neutral—counted against neither party—because, under the Interstate Agreement on Detainers ("IAD"), neither appellant nor the State could have requested a trial in Maryland until appellant had been sentenced in D.C. *See State v. Pair*, 416 Md. 157, 176 (2010); *Davidson v. State*, 87 Md. App. 105, 111 (1991); *see also* Md. Code (1999, 2008 Repl. Vol.), § 8-405(a) of the Correctional Services Article ("CS") ("*Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state*, and whenever . . . a detainer has been lodged against the prisoner, the prisoner shall be brought to trial within 180 days after the prisoner shall have caused to be delivered to the prosecuting officer . . . ." (Emphasis added)).

The parties agree that it was not until August 13, 2012, that appellant filed his Disposition Request, by which he requested resolution of the Maryland detainer under the

IAD. Appellant contends, however, that when he waived extradition during his arraignment in D.C. on October 26, 2011, he in effect made a speedy trial demand. Appellant claims that, because he asserted his right to a speedy trial as early as October 2011, the period from April 6, 2012, when appellant was sentenced in DC and thus available for extradition to Maryland under the IAD, until August 13, 2012, when appellant filed his Disposition Request, should be weighed heavily against the State.

Assuming, *arguendo*, that appellant's waiver of extradition constituted a demand for a speedy trial, we weigh the four months and one week period from April 6, 2012, to August 13, 2012, only slightly against the State. Appellant presented no evidence that such delay constituted "a deliberate attempt to hamper the defense." *See Dean*, 42 Md. App. at 163 (internal quotation marks omitted). In *Dean*, this Court did not weigh heavily against the State a longer period—seven and a quarter months—from when the defendant had been released from out-of-state custody until his apprehension in Maryland. *Id.* In that case, the defendant spent the seven-plus months at home, and not incarcerated out-of-state, thus giving the State even less reason to delay his trial. *Id.*

The next period spans approximately three weeks: from August 13, 2012, when appellant filed the Disposition Request, until September 7, 2012, when the State's Attorney received it. Appellant does not dispute that this period should be weighed only lightly against the State. Again, appellant presents no evidence that the State purposely interfered with its receipt of appellant's request. Moreoever, orders and motions from outside of

Maryland frequently take days, or weeks, to be transmitted and received. In this instance, appellant's request had to travel from D.C. to the District Court of Maryland for Montgomery County to the Montgomery County State's Attorney's Office. In Judge Rubin's words, "[i]t's just the time it took." Thus we count this period only lightly against the State.

Next, we must consider the time span from September 7, 2012, when the State received appellant's Disposition Request, until November 15, 2012, when appellant was brought to Maryland. The State's Attorney explained that during this time, the State had to assign the case to a prosecutor, and the prosecutor had to determine whether the charges still merited prosecution. After resolving to bring the charges on October 31, 2012 , the State's Attorney requested that appellant be transported to Maryland by November 15, 2012. We determine that it was in the appellant's interest to have the State carefully consider whether to pursue the case against him, and thus we conclude that this period is neutral.

Finally, appellant does not claim that the period from appellant's arrival in Maryland on November 15, 2012, until his trial on April 29, 2013, should be counted against the State. Consequently, such five and one-half month period is neutral.

In sum, of the eighteen-month delay from the institution of charges against appellant until his trial in Maryland, thirteen months are neutral and five months are weighed only slightly against the State. Under these circumstances, the second *Barker* factor, reasons for the delay, does not weigh in favor of appellant.

Regarding the third *Barker* factor, appellant's assertion of his right to a speedy trial, appellant made two such requests: at his arraignment in D.C. on October 26, 2011, and in his Disposition Request on August 13, 2012. The former was an ambiguous assertion at best. The State would have known about appellant's waiver only upon receipt of the order issued by the D.C. Superior Court on October 26, 2011, which stated that it would schedule a status hearing in the event that appellant had not been "surrendered to the custody of a proper official in the State of Maryland by October 31, 2011." It is unclear from the record whether the State did in fact receive this order. What is clear, however, is that the D.C. court received notice that Maryland had lodged a detainer, and that appellant's D.C. trial counsel was aware of the detainer.

Finally, we conclude that appellant suffered no actual prejudice as a result of the delay. As discussed in Section I *supra*, the trial court determined that the only possible prejudice appellant suffered due to the delay was the inability to forensically test the knife after the State contaminated it in the burn pallet. Appellant, however, was acquitted of the first degree assault charge, which was the only charge associated with the knife. Appellant suffered no prejudice because of the State's loss of the forensic testing on the knife, and thus, no prejudice from the delay. In other words, for the same reasons that we determined harmless error above, we hold that appellant suffered no prejudice of constitutional importance.

In sum, (1) there was an eighteen-month delay from the institution of charges against appellant until his trial, which was of constitutional dimension; (2) the reasons for the delay were predominantly neutral, with a brief period weighing only slightly against the State; (3) appellant made only one unambiguous demand for a speedy trial; and (4) appellant suffered no prejudice from the delay. Considering these four *Barker* factors together, we hold that the State did not violate appellant's constitutional right to a speedy trial. The trial court, therefore, did not err by denying appellant's post-trial motion to dismiss on speedy trial grounds.

III. *The* Batson *Claim*

Parties' Contentions

Appellant claims that the trial court erred in denying his *Batson* challenge. Appellant asserts that the State's use of four of its five peremptory strikes on African-American jurors "established a *prima facie* case of purposeful discrimination" contrary to *Batson.* Appellant argues that the State failed to provide a race-neutral and non-pretextual justification for its exclusion of the African-American jurors.

The State responds that appellant waived his *Batson* challenge, because he abandoned his objection to the exclusion of the African-American jurors when he subsequently expressed satisfaction with the jury selection. On the merits, the State argues that the trial court did not abuse its discretion in accepting the State's justifications for its peremptory strikes.

Analysis

We need not reach the merits of the parties's arguments with regard to the *Batson* challenge, because we agree with the State that appellant waived his *Batson* claim. The Court of Appeals held in *Gilchrist v. State*:

> When a party complains about the exclusion of someone from or the inclusion of someone in a particular jury, and thereafter states without qualification that the same jury as ultimately chosen is satisfactory or acceptable, the party is clearly waiving or abandoning the earlier complaint about that jury. The party's final position is directly inconsistent with his or her earlier complaint.

340 Md. 606, 618 (1995).

In the matter *sub judice*, appellant, through his defense counsel, expressed his satisfaction with the jury and the two alternates at the end of *voir dire* and thus abandoned his previous objection to the exclusion of the African-American jurors. Appellant therefore waived appellate review of his *Batson* claim under *Gilchrist*. *See id.* at 617.

We are not persuaded by appellant's contention that he never "stated without qualification that the entire jury panel was acceptable." Appellant misstates the record when he claims that his counsel "expressed satisfaction with the *alternates* only" in response to the court's question, "Is the defense satisfied?" When the trial court made that inquiry, defense counsel already had been given the opportunity to express his satisfaction with the final alternate. The record states in relevant part:

THE CLERK: Is the defense satisfied with the alternates?

[DEFENSE COUNSEL]: Court's indulgence. Defense is satisfied, your honor.

THE COURT: Is the [S]tate satisfied?

[STATE'S ATTORNEY]: Your honor, I think that they can excuse juror 215.

THE COURT: All right, 215, if you can return to the courtroom.

THE CLERK: Juror Number 218, please come forward. Please remain standing.

THE COURT: Defense?

[DEFENSE COUNSEL]: Please seat the juror.

THE COURT: State?

[STATE'S ATTORNEY]: No. No [objection].

THE COURT: Is the defense satisfied?

[DEFENSE COUNSEL]: Yes, your honor.

THE COURT: All right. Ladies and gentlemen, if you were not selected for this jury, please return to the jury room on the fourth floor. Thank you . . . We're going to take a 10-minute break and then come back and then start . . . .

(Emphasis added).

Defense counsel clearly approved of the final alternate, Juror 218, when he stated "Please seat the juror" in response to the trial court's prompt. The court next asked the prosecutor if there was an objection to the last alternate, to which the prosecutor said, "No." Thus, when the trial court then asked, "Is the defense satisfied?", the court clearly meant to inquire whether defense counsel was satisfied with the final composition of the jury panel. Defense counsel answered in the affirmative without preserving his previous objection to the State's peremptory strikes, and thus abandoned his *Batson* claim.

IV. *Sufficiency of the Evidence*

Parties' Contentions

Finally, appellant argues that the State failed to present sufficient evidence to convict him of reckless endangerment. Citing New York case law, appellant claims that the State needed to provide expert testimony regarding whether the stove could have emitted enough gas to cause serious bodily injury. Appellant also asserts that Puckett was not exposed to the gas long enough to cause injury.

The State responds that no expert testimony was necessary. The State argues that the New York precedent cited by appellant is inapposite because the New York statute required "grave risk of *death* to another person, not conduct which creates a grave risk of *serious bodily injury*." (Emphasis added).

Analysis

Maryland's reckless endangerment statute states, in relevant part, that "a person may not recklessly . . . engage in conduct that creates a substantial risk of death or serious physical injury to another." Md. Code (2002, 2012 Repl. Vol.), § 3-204(a)(1) of the Criminal Law (I) Article. We conclude that the State presented sufficient evidence that appellant engaged in conduct that caused a substantial risk of death or serious injury to Puckett and her daughter. We shall explain.

On the evening in question, Puckett called 911, claiming that appellant was "going to blow the apartment up." Puckett then informed Officer Stanley that appellant had attempted to set a fire to the apartment by turning on the gas burners and pushing cereal boxes onto the stove. Further, when Officer Stanley entered Puckett's apartment that night, she detected "an overwhelming smell of natural gas, propane," and observed that "all the knobs on the stove were on high" with "gas coming out." She further observed cereal boxes and a pan by the stove.

The above evidence, in our view, showed that appellant created a substantial risk of serious injury to both Puckett and her daughter. Expert testimony was not needed to establish that appellant created this risk. Turning on all four gas burners is a gross deviation from standard conduct, and thus the jury could consider the risk created based on their own experience. *See Williams v. State*, 100 Md. App. 468, 506 (1994) ("[T]he disregarding of [a known] risk would represent a gross deviation or gross departure from the standard of

conduct that a law-abiding person would observe in the actor's situation, then the risk, objectively measured, is *ipso facto substantial*." (emphasis in original)).

Finally, there is no merit to appellant's claim that Puckett ran out of the apartment and "was not, therefore, exposed to any gas for any length of time." Section 3-204(a)(1) requires the State to demonstrate that appellant created a substantial *risk* of serious injury, and not that Puckett was actually exposed to injury. *See Pryor v. State*, 195 Md. App. 311, 334 (2010) ("Contrary to appellant's argument, the State need not produce evidence that appellant 'actually' knew that [the victim] was inside the home when the fire was set. Rather, the State was required to prove that appellant was aware that his conduct created a risk of death or serious physical injury to [the victim] and that he consciously disregarded that risk.") The State presented evidence that appellant not only knew of the risk and disregarded it, but that he *intended* to "blow the apartment up." Moreover, a single spark could have ignited the gas in an instant, thus placing Puckett and her daughter at substantial risk of serious injury.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED; APPELLANT TO PAY COSTS.