UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1225

September Term, 2015

LAMONT DASHAUN McINNIS

v.

STATE OF MARYLAND

Kehoe,
Leahy,
Davis, Arrie W.
(Retired, Specially Assigned),

JJ.

Opinion by Davis, J.

Filed: April 5, 2016

Appellant, Lamont McInnis, was tried and convicted of theft scheme up to $1,000.00, but less than, $10,000.00 by a jury in the Circuit Court for Charles County (West, J.). He was sentenced to ten years imprisonment, with all but forty-two months suspended. From the conviction and sentence, appellant filed the instant appeal in which he raises the following issues for our review:

> 1. Did the trial court err in failing to dismiss this case for a violation of appellant's rights to a speedy trial?
>
> 2. Did the trial court err in allowing the admission of impermissible lay opinion testimony?

FACTS AND LEGAL PROCEEDING

John Williams, Jr., a resident of Waldorf, Maryland, testified that, on January 2, 2014, he wrote two checks, numbered 290 and 291, drawn on his account with BB&T bank, to pay bills for his automobile insurance and his dentist and that he posted them in his residential mailbox. According to Williams, he subsequently discovered that the balance on his account was lower than he had thought. As a result of his further investigation, he discovered that check No. 291, issued to his dentist, in the amount of $192.00, was made payable to "Lamont McInnis," in the amount of $992.00 and that check No. 290, issued to Erie Insurance, in the original amount of $119.22, was made payable to "Lamont McInnis" in the amount of $919.22. These changes in the amounts on the checks were not in his handwriting and Williams had not written any checks to Lamont McInnis, nor did he know Lamont McInnis. After this discovery, Williams notified the police and closed the account.

District Court Proceedings

On May 28, 2014, a summons was served on appellant, charging him with two counts of counterfeiting private documents, two counts of possession of counterfeited private documents, two counts of issuing counterfeited documents, and two counts of theft, less than $1000.00. On July 23, 2014, appellant was arrested on a warrant. He first appeared in the District Court for Charles County on August 8, 2014. On September 11, 2014, appellant filed an omnibus motion, which included a demand for a speedy trial. On September 23, 2014, appellant's first scheduled trial date, he made a demand for a speedy trial in open court. On the same day, however, and over objection, the State obtained a continuance. The trial was rescheduled to commence on November 25, 2014.

Appellant filed a Motion to Compel Discovery on October 14, 2014 and a Motion to Produce Records regarding the Fingerprint Analysis on October 24, 2014. On November 13, 2014, the State filed a Motion to Continue, citing the continuing unavailability of a witness. The district court denied the motion on November 17, 2014.

At the November 25, 2014 court proceeding, the Assistant State's Attorney advised the judge that the State was not prepared to proceed because a witness was still on maternity leave and unavailable to testify. Over objection, the State was granted a second continuance. The court, however, noting that appellant's prior discovery requests had not been addressed, ordered the State to complete discovery within fourteen days. Unaccounted for were photocopies of the checks in question and the fingerprint analysis record, which the State

conceded excluded appellant. The State indicated that the witness, who had been on maternity leave since late September 2014, would return to duty mid-January 2015. Accordingly, a new trial date was set for January 20, 2015. However**,** on December 5, 2014, prior to the expiration of the fourteen-day discovery deadline set by the court, the State obtained an indictment against appellant in circuit court.

Circuit Court Indictment and Proceedings

In circuit court, appellant was indicted on two counts of forgery and counterfeiting private documents, one count of theft scheme up to $1000.00, but less than, $10,000.00 and one count of conspiracy to theft scheme up to $1000.00, but less than, $10,000.00.[1] The first three counts were felonies and the last count was a misdemeanor. Appellant's initial appearance in circuit court was January 9, 2015.

On February 4, 2015, appellant made another demand for a speedy trial and requests for discovery. The State completed the discovery requests in late March 2015. At the April 3, 2015 Motions/ Readiness Hearing, the State requested a postponement of the hearing, citing the unavailability of the prosecutor who was familiar with the case. The request was granted, and the hearing was rescheduled for May 8, 2015.

On May 8, 2015, appellant rejected the State's plea offer, on the record, and argued his Motion to Dismiss for Lack of Speedy Trial. The State responded that the decision to

[1] At the conclusion of trial testimony, the State requested a *nolle prosequi* of Count four, conspiracy to theft, which the court granted.

indict appellant in the circuit court and with new, more severe charges was "partly based on when to indict the co-defendant," Genaro Hewitt, who was not indicted until October 2014. The State's Attorney indicated that "matters were far more complicated" with Hewitt, but that appellant was "part of the larger scheme" and his actions in the instant case "are part of the case that ultimately indicted the co-defendant." The circuit court denied appellant's motion to dismiss, finding the length of the delay not inordinate compared with the "moving parts" of the case, the complexity of the facts and because the State had not acted out of an intentional desire to delay the case. Trial was scheduled for June 15, 2015.

At trial, the State offered testimony from four witness. In addition to John Williams' testimony, *supra*, Officer Sullivan, Charles County Sheriff's Office, testified that he took Williams' complaint and referred it to the Criminal Investigations Division. Kelly Lupis, Corporate Fraud Investigator for BB&T Bank, identified the checks and account records at issue in this case. Lupis stated that the markings on the checks indicated that they were cashed and that the still shots from the surveillance cameras at the bank's Waldorf branch were from the date and time that the checks at issue were negotiated.

Detective Elizabeth Clark, Charles County Sheriff's Office, Financial Crimes Division, testified that she investigated this case. She obtained from the bank's loss prevention department surveillance footage from BB&T, copies of the checks and the driver's license identification number used during the check negotiation. During her testimony, Detective Clark identified the seven still photographs from the surveillance

footage as those she received from the bank. She also identified appellant from a certified copy of his driver's license from the Motor Vehicles Association[2] ("MVA"), to which appellant objected.

At the bench conference, appellant raised a concern that Detective Clark's identification of him in the MVA photograph would establish that the MVA photograph and the person in the surveillance photographs "matched up." The State's Attorney responded that Detective Clark was strictly identifying appellant as the same person in the MVA photograph, not the surveillance still photographs. In reassuring appellant and the judge that there was no conflation, the prosecutor further responded that he would not ask about the surveillance still photographs because Detective Clark did not "have the requisite basis, because she [did not] know him beyond seeing him the one time in the MVA" photograph. The State's Attorney assured the court that he was "just trying to get the MVA [photograph] in[to evidence] . . . ."

On cross examination, Detective Clark testified that a fingerprint analysis had been conducted on the checks and that none of the fingerprints were identified as appellant's. In response to the question posed by appellant's counsel, as to whether one of the fingerprints were the fingerprints of Genero Hewitt, Detective Clark confirmed that it was and that none

[2] Detective Clark obtained the MVA photograph after submitting the driver's license identification number and the name appearing on the checks, "Lamont McInnis" to the MVA.

of the fingerprints were appellant's. The parties stipulated to the results of the fingerprint analysis.

During the redirect examination, the State's Attorney asked Detective Clark questions about Hewitt:

> STATE'S ATTORNEY: . . . [Appellant's counsel] asked you about Genaro Hewitt?
>
> DETECTIVE CLARK: Yes, sir.
>
> PROSECUTOR: Are you familiar with Mr. Hewitt?
>
> DETECTIVE CLARK: Oh, yes sir, I am.
>
> STATE'S ATTORNEY: To be as . . . I'm not going to ask you how you are familiar with Mr. Hewitt at this particular point, but I am going to ask you, can you provide a physical description of Genaro Hewitt?
>
> DETECTIVE CLARK: Black male, short hair. He has been described several times as looking like a chipmunk or a hamster.
>
> STATE'S ATTORNEY: Okay, and for the record, obviously, you have met Mr. Mcinnis?
>
> DETECTIVE CLARK: Yes, sir.
>
> STATE'S ATTORNEY: And you obviously identified Mr. Mcinnis in court?
>
> DETECTIVE CLARK: Yes, sir.
>
> STATE'S ATTORNEY: Okay, does Mr. Mcinnis look anything like Mr. Hewitt?
>
> [APPELLANT'S COUNSEL]: Objection, Your Honor. May we approach?
>
> THE COURTT: Approach.
>
> *BENCH CONFERENCE*

THE COURT: Go ahead.

[APPELLANT'S COUNSEL]: So, I mean, at this point I think we're going to 403 on that, just because the jury doesn't have photos. I mean, it's the State's burden to, you know, kind of prove that. So if the State wanted to provide photos or something for the jury to look at, that would be one thing.

THE COURT: Sure, but it's just lay opinion.

[APPELLANT'S COUNSEL]: Yeah, but I mean, I think it's—

PROSECUTOR: If you want me to get a picture, I'll get a picture of Mr. Hewitt. That's no problem.

THE COURT: I mean . . . here's the situation. I mean, the name comes up.

[APPELLANT'S COUNSEL]: Right.

THE COURT: So it's not quite opening the door, but the name comes up because of the print.

[APPELLANT'S COUNSEL]: Uh-hum, right.

THE COURT: He asked her, are you familiar? Yes. So I'm thinking, so a prejudicial and proper question, do they resemble each other?

[APPELLANT'S COUNSEL]: Right, right.

THE COURT: So if you require the photo, I guess we have to do that later.

[APPELLANT'S COUNSEL]: Yeah.

THE COURT: But I think, (inaudible), so I'll overrule it.

[BENCH CONFERENCE CONCLUDED]

PROSECUTOR: So again, Mr. Hewitt looks nothing like Mr. McInnis?

DETECTIVE CLARK: Absolutely not.

At the conclusion of testimony, the State requested a *nolle prosequi* of Count four, conspiracy to theft, which the court granted.

DISCUSSION

I. RIGHT TO SPEEDY TRIAL

A. Appellant's Federal/ State Constitutional Right to a Speedy Trial

Appellant asserts that the trial court erred in failing to dismiss the instant case for a violation of his right to a speedy trial, to which the State responds that appellant's constitutional right to a speedy trial was not violated.

"The Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights guarantee an accused's right to a speedy trial." *Randall v. State*, 223 Md. App. 519, 542 (2015) (citing *Divver v. State*, 356 Md. 379, 387–88 (1999)). The Supreme Court in *Barker v. Wingo,* 407 U.S. 514 (1972) rejected inflexible approaches in determining whether a defendant's right to a speedy trial has been violated.

> The approach we accept is a balancing test, in which the conduct of both the prosecution and the defendant are weighed. A balancing test necessarily compels courts to approach speedy trial cases on an *ad hoc* basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.

Id. at 530. Maryland has adopted these four factors when analyzing potential constitutional violations of the right to a speedy trial. *Howard v. State*, 440 Md. 427, 447 (2014) (citing *Vermont v. Brillon*, 556 U.S. 81, 90 (2009)) (quoting *Barker*, 407 U.S. at 530).

> We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution.

Barker, 407 U.S. at 533.

As this Court recently articulated, "when reviewing a [trial] court's judgment on a motion to dismiss claiming deprivation of the right to a speedy trial, 'we make our own independent constitutional analysis.'" *Randall*, 223 Md. App. at 538 (citing *Glover v. State*, 368 Md. 211, 220 (2002)). "'We perform a *de novo* constitutional appraisal in light of the particular facts of the case at hand; in so doing, we accept a lower court's findings of fact unless clearly erroneous.'" *Id.* (citing *Glover*, 368 Md. at 221).

1. Length of Delay

Appellant contends that the delay in the instant case was of a constitutional dimension and presumptively prejudicial. Specifically, the ten month and twenty-three day delay in conjunction with the "relatively simple" facts of the case and "straightforward" legal issues constituted a delay that violated his right to a speedy trial. According to appellant, "This was a basic 'check passing' case that originated as a misdemeanor in the district court[,]" and "[t]he presentation of the evidence took less than one day." Therefore, a *Barker* analysis is required and the first fact, the length of delay, weighs in his favor.

The State responds that the length of the delay was less than one year and, therefore, not presumptively prejudicial. Moreover, a delay of ten months and twenty-three days is not an inordinate amount of time and does not require a constitutional speedy trial claim review. If, however, appellant's speedy trial claim is of a constitutional dimension, the "only consequence would be the application of a more in-depth analysis." In sum, the State submits that the length of delay in the instant case, is insufficient to compel dismissal.

Before a trial delay is determined to be of constitutional dimension, requiring a *Barker* analysis, we must first look at the length of the delay.

> The length of delay factor is a term of art that serves two separate and distinct functions in a speedy trial analysis. First, it identifies the threshold that must be crossed before further analysis is called for, marking the minimal point of constitutional dimension. A lengthy post-indictment, pretrial delay is presumptively prejudicial and requires scrutiny under the *Barker* constitutional analysis. Once the delay triggers the four-factored analysis, we view the length of delay on its merits as a distinct inquiry, which is heavily impacted by the other factors. But, unless the delay crosses the line from ordinary delay to presumptively prejudicial delay, there is no necessity for inquiry into the other factors that go into the balance.

Randall, 223 Md. App. at 543–44 (quotations and citations omitted).

> The length of delay is measured from the day of arrest or filing of the indictment, information, or other formal charges to the day of the trial . . . . The Court of Appeals has consistently held . . . that a delay of more than one year and fourteen days is 'presumptively prejudicial' and requires balancing the remaining factors.

Id. at 544–45 (quotations and citations omitted).

There are, however, instances when a delay of less than a year may be of a constitutional dimension.[3] The closer to one year that the delay approaches, the more presumptively prejudicial it becomes and looking at the facts of the case becomes less important. *See State v. Ruben*, 127 Md. App. 430, 441 (1999) (noting that "a delay of nearly 11 months is cause for concern under the Sixth Amendment, while a delay of approximately 9 ½ months is relatively less egregious and its analysis necessarily more dependent on attendant circumstances").

In the case *sub judice*, the length of the delay is ten months and twenty-three days. Although it is a period of time less than one year, we examine the length of the delay in relation to the circumstances of the case, *i.e.*, the complexity of the facts and legal issues. Accordingly, we hold that the delay meets the threshold and triggers a speedy trial analysis under *Barker*. It is a delay of nearly eleven months, which is "cause for concern under the Sixth Amendment." *Ruben, supra*.

[3] *See Battle v. State*, 287, Md. 675, 686 (1980) (noting that the State conceded that an eight month, twenty-day delay "might be construed to be of constitutional dimension so as to trigger the prescribed balancing test"); *Icgoren v. State*, 103 Md. App. 407, 423 (1995) (holding that a delay of eleven months, thirteen days for various charges arising from a murder was of constitutional dimension, "though barely so"); *Carter v. State*, 77 Md. App. 46, 4662 (1988) (holding that a delay of seven months, twenty-five days was of constitutional dimension in an "uncomplicated case" involving "credit card misuse"); *Dorsey v. State*, 34 Md. App. 525, 533 (1977) (holding that an eleven month delay for a "relatively uncomplicated drug case" was of a constitutional dimension).

Additionally, it is a delay that warrants closer analysis. The State requested three continuances in district court (two of which were granted) and a postponement of a motions hearing in circuit court, which was also granted. Furthermore, the district court ordered the State to submit discovery but, before complying with the Court's order, the State indicted appellant in circuit court, complying with the discovery request three months after the original deadline. These attendant circumstances, as well as the nearly eleven month delay, accordingly, trigger a *Barker* analysis.

2. Reasons for Delay

Appellant next asserts that "[t]he entirety of the blame of any and all of the delay must be squarely placed at the feet of the State," since all postponements were requested by the State and the State chose to indict him in circuit court, moving a case that originated as a misdemeanor in the district court.

According to the State, the reasons for the delay were "innocuous," and the delay should be broken up into three different time periods and each period should be examined independently. The first time period, from July 23, 2014 to September 23, 2014, between appellant's arrest and the first scheduled trial date in district court, was a delay which could be characterized as " administrative."Accordingly, the State contends that the delay during this time period should be considered "neutral" and should not count against the State. Second, the delay from September 23, 2014 to January 9, 2015 occurred because Detective Clark was unavailable due to maternity leave and, therefore, the State could not proceed.

Finally, the State asserts that the delay from January 9, 2015 to June 15, 2015 was the time period between appellant's first appearance after his indictment and his first scheduled trial date in circuit court. Accordingly, the delay during this time period is administrative in nature and should be considered "neutral" and should not count against the State.

The Supreme Court has held that, regarding reasons for a delay, "different weights should be assigned to different reasons." *Barker*, 407 U.S. at 531.

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

Id.

This State recognizes that, although an accused has a right to a speedy trial, there is the reality that a reasonable delay is needed for orderly judicial administration. "The span of time from charging to the first scheduled trial date is necessary for the orderly administration of justice, and is accorded neutral status." *Howell v. State*, 87 Md. App. 57, 82 (1991) (citing *Carter v. State*, 77 Md. App. 462, 462 (1988)). "[S]ufficient time must be allowed for the reasonable preparation of the case on the part of the prosecution and for the orderly processes of the case 'because of the many procedural safeguards provided an accused.'" *Epps v. State*, 276 Md. 96, 110 (1975) (quotations and citations omitted).

A reasonable delay may also be required to obtain a missing witness or one who is otherwise difficult to obtain. This Court has recognized that "a reasonable delay caused by difficulty in obtaining a witness' presence to testify is justified and will not be weighed against the State." *Howell*, 87 Md. at 82. *See also Epps*, *supra* (holding that a delay of two months, nine days caused by the incapacitating illness of testifying police officer is as valid a reason for justifying delay as 'missing witness' and is not attributable to either prosecution nor defendant).

In the case *sub judice*, we agree with the State that the period between July 23, 2014 to September 23, 2014 should be accorded neutral status. The time period from appellant's arrest to his first scheduled trial date, consisting of two months, constituted the orderly administration of justice.

The time period from September 23, 2014 to January 9, 2015 should also be accorded neutral status. The difficulty in obtaining a witness' presence to testify is just as valid a reason for a delay as a missing witness. *Howell*, *supra. See also Matthews v. State*, 23 Md. App. 59, 66 (1974) (holding that a two and one-half month delay caused by absence of prosecuting witness is, at most, a 'neutral' reason under *Barker*). Detective Clark was on maternity leave from late September 2014 to mid-January 2015. She was unavailable to testify for that time period of approximately three months and two weeks. The State further indicated that her testimony was central to their case. In light of the fact that her testimony

was central to the State's case, her limited unavailability constituted a valid reason to justify the delay and will not be weighed against the State.

Finally, the time period from January 9, 2015 to June 15, 2015, which constituted the time from appellant's first appearance in circuit court until the date that his trial was scheduled to begin, is also accorded neutral status as it constituted a reasonable delay to allow for the orderly administration of justice. *See supra*. Although the State chose to re-indict appellant in the circuit court without first dismissing or entering a *nolle pros* of the charges in district court, there is no evidence that this decision was made intentionally to delay appellant's trial or circumvent speedy trial procedural safeguards. *See infra*. Furthermore, a delay of less than five months is not an inordinate period of time for pre-trial judicial administration. *See Epps, supra.* Accordingly, this time period will also not be weighed against the State.

3. Assertion of Right to Speedy Trial

Appellant contends that he consistently asserted his right to a speedy trial. He cites a demand for a speedy trial that was included first in the September 11, 2014 omnibus motion, then in open court on September 23, 2014, again in open court on November 25, 2014 and then in a subsequent omnibus motion made in circuit court on February 2, 2015. Appellant insists that, at no time, did he waive his right to a speedy trial.

The State does not contend that appellant waived his right to a speedy trial. The State does contend, however, that appellant's failure to assert his right to a speedy trial when the

June 15, 2015 trial date was set is "telling." The State reasons that, had appellant asserted his right to a speedy trial at that time, the circuit court could have taken steps to set an earlier date. In addition, the State insists that it is unable to locate an assertion in the record by appellant of his right to a speedy trial on November 25, 2014 nor has appellant brought such an assertion to the Court's attention.

The U.S. Supreme Court has opined that

> Whether and how a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. *We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.*

Barker, 407 U.S. at 531–32. (Emphasis added). *See also Glover*, 368 Md. at 228 (2002) (noting that a petitioner who twice asserted his right to a speedy trial, one year a part, "without question, satisfies this factor").

In the instant case, that appellant asserted his right to a speedy trial in both open court and in two separate motions is not in dispute. Nor is it disputed that appellant's assertion of the right to a speedy trial was made both in the district court and in circuit court. Therefore, we must accord weight to his timely assertion of his Sixth Amendment right to a speedy trial.

Although the State points out that the record does not support appellant's contention that he asserted his right to a speedy trial in open court on November 25, 2015, we deem his

failure, on one occasion, to assert the right to be ineffectual. Upon our review of the November 25, 2015 transcript, we find no express assertion by appellant of his right to a speedy trial; however, in light of three other instances where appellant unequivocally asserted his right, we hold that the issue is preserved for our review. As in *Glover*, *supra*, appellant, "without question, satisfies this factor."

The State also contends that it is "telling" that appellant failed to assert his right to a speedy trial when the June 15, 2015 trial date was set, particularly at appellant's initial appearance in circuit court, on January 9, 2015. Again, we do not consider this significant. Less than a month after his initial appearance, appellant asserted his right to a speedy trial in an omnibus motion on February 4, 2015 and, less than two months after that, appellant filed a motion to dismiss for violation of his right to a speedy trial. The motion to dismiss was denied at the May 8, 2015 hearing and, one month later, the trial commenced.

Furthermore, a trial date sooner than June 15th, in light of the facts, would not have been practicable. The State did not comply with appellant's discovery requests until late March and requested a postponement of the April hearing, rescheduling it for May 8, 2015. The trial commenced one month later. We are unpersuaded that, in light of the nexus of these proceedings and appellant's several speedy trial demands, appellant was obliged to contest the June 15th trial date or otherwise waive his right to a speedy trial. Accordingly, appellant demonstrably asserted his right to a speedy trial and this factor, consequently, weighs in his favor.

4. Prejudice

As to the final *Barker* factor, appellant argues that the length of the delay created a presumption of prejudice. Appellant asserts that "any person" in his position would have felt a "great deal" of anxiety and concern at the prospect of facing incarceration. Appellant contends that he lost job opportunities due to the unfair delay of his trial and that "missing discovery" impaired his ability to prepare a defense.

According to the State, appellant has failed to show actual prejudice as a result of the delay of his trial and that "presumption of prejudice" does "not indicate a statistical probability of prejudice, but marks the point at which the court deems the delay unreasonable enough to trigger the *Barker* inquiry." Regarding appellant's assertion that he missed job opportunities because of the delay, the State points out that appellant did not list specific job opportunities; therefore, he has not demonstrated actual prejudice. Furthermore, the State points out that, at his sentencing hearing, appellant indicated he had a job at Home Depot for the eight to nine months prior thereto; thus, no actual prejudice resulted from the delay of his trial.

"[A]ctual prejudice may result from any of three factors: (1) oppressive pretrial incarceration; (2) anxiety and concern; and (3) impairment of the defense." *Divver*, 356 Md. at 392 (citing *State v. Bailey,* 319 Md. 392, 416–17 (1990)). The Court of Appeals has acknowledged that "[a] problem peculiar to the *Barker* test is its use of the terms *presumption of prejudice* and *actual prejudice* . . . ." *Bailey*, 319 Md. at 416 (citation

omitted). The Court further stated that, in applying the *Barker* analysis, "a balancing test must be employed which involves a weighing of four factors, *one of which is actual prejudice*." *Id.* (citation omitted). In the instant case, appellant concedes he was not incarcerated.

> In evaluating "anxiety and concern," the Court of Appeals has articulated that
>
> > personal factors . . . such as interference with the defendant's liberty, the disruption of his employment, the drain of his financial resources, the curtailment of his associations, his subjection to public obloquy and the creation of anxiety in him, his family and friends.

Divver, 356 Md. at 392 (quoting *Epps*, 276 Md. at 116). "The personal factors should prevail if the only countervailing considerations offered by the State are those connected with crowded dockets and prosecutorial case loads. *Id.* at 393 (quoting *Epps*, 276 Md. at 116).

In the case *sub judice*, the length of the delay did not, *per se*, cross the "critical point" that would have created a presumption of prejudice. *See, supra*. Therefore, we agree with the State that appellant has failed to articulate any actual prejudice concerning anxiety or concern caused by the delay. Although appellant states, generally, that he "lost job opportunities" and that "anyone" in his position would have felt "a great deal of anxiety and concern," appellant failed to provide any substantiation of these assertions.

Finally, appellant contends that his ability to prepare a defense was impaired because of the delay, specifically, the delayed discovery consisting of the checks and records pertaining to the fingerprint analysis which constituted exonerating evidence. Appellant's

claims that the delay in his case impaired his defense are without merit, according to the State, because appellant was in receipt of the results of the fingerprint analysis and appellant's claims of prejudice were "remedied by the time of the hearing."

> *Barker v. Wingo*, described as the most serious of the varieties of possible prejudice the impairment to the defense itself: 'Of these, the most serious is the last, because the inability of a defendant to adequately prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past.

State v. Wilson, 35 Md. App. 111, 131 (1977), *aff'd*, 281 Md. 640 (1978) (citing *Barker*, 407 U.S. at 532).

In the case *sub judice*, although there is no question that appellant received the discovery in question much later than he initially requested in district court, there is no indication that discovery was delayed by the State intentionally or that the discovery was delayed as a result of the *trial delay*, itself. Therefore, there is no correlation between the delayed receipt of discovery and the delay of the trial that would result in the third prejudice factor described in *Barker*, *supra.*

Furthermore, appellant has failed to articulate, specifically, how his defense was impaired without the delayed discovery. Although the district court's order compelling discovery would still have been in effect but for appellant's indictment in circuit court, appellant does not indicate how receiving the requested discovery three months later impaired his defense and, thus, constituted a constitutional violation. Additionally, appellant

was in receipt of the *results* of the fingerprint analysis by September 2014. This Court has opined that "bald assertions" will not satisfy the actual prejudice requirement under *Barker*. *See Icgoren v. State*, 103 Md. App. 407, 435 (1995) (noting that appellant failed to specify factual allegations that his defense was inhibited by the delay, relying rather on bald assertions). For the foregoing reasons, the actual prejudice factor does not weigh in appellant's favor.

6. Balancing

In applying *Barker*, The Court of Appeals has instructed:

> In making our independent constitutional appraisal of whether the appellant was denied his constitutional right to a speedy trial we must under the holding in *Barker v. Wingo* 'engage in a difficult and sensitive balancing process' in which 'the conduct of both the prosecution and the defendant are 'weighed' and 'considered together with such other circumstances as may be relevant' [*i.e.,*] the four enumerated and related factors . . . .

Epps, 276 Md. at 109 (1975) (citing *Barker,* 407 U.S. at 533). Ultimately, "we must determine whether the State did discharge its constitutional duty to make a diligent, good-faith effort" to bring appellant to trial." *Id.* (quotations and citations omitted).

In the instant case, we acknowledge that the length of the delay in this case, is not, *per se*, a factor supporting a finding that appellant's right to a speedy trial has been violated. Indisputably, however, appellant asserted his right to a speedy trial. Consequently, we are constrained to assess the net affect of the reason for the delay and whether or not appellant suffered prejudice. We are persuaded that the reasons for the approximately eleven month

delay resulted from judicial administration and the difficulty in obtaining a witness' presence to testify, whose maternity leave provided her a legally sanctioned excuse for the unavailability. Furthermore, examining the three prejudice factors articulated in *Barker* does not illustrate, nor did appellant articulate, any actual prejudice suffered. Accordingly, we conclude that appellant's constitutional rights to a speedy trial were not violated.

B. Md. Code Ann., Crim. Proc. § 6–103 and Md. Rule 4–271

Appellant next asserts that the circuit court, by allowing the State to obtain an indictment only after procuring a delay in the district court and "arguably in response to the district court order to provide discovery," violated Md. Code Ann., Crim. Proc. § 6–103. Therefore, appellant maintains**,** the State "effectively circumvented" the district court's discovery deadline and "effectively violated" Md. Rule 4–271.

"As a preliminary manner," rejoins the State, "neither Md. Code Ann., Crim. Proc. § 6–103 nor Md. Rule 4–271 apply to proceedings in the district court and appellant's reliance on *Curley v. State*,[4] is inapplicable because the State acted in good faith requesting the delays and indicting appellant in the circuit court.

Md. Code Ann., Crim. Proc. § 6–103(a)(2) provides in pertinent part

> (a)(1) The date for trial of a criminal matter in the circuit court shall be set within 30 days after the earlier of:
>
> (i) the appearance of counsel; or

[4] 299 Md. 449 (1984).

> (ii) the first appearance of the defendant before the circuit court, as provided in the Maryland Rules.
>
> (2) The trial date may not be later than 180 days after the earlier of those events.

Md. Rule 4-271 provides in pertinent part:

> **(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 . . . .

Dismissal is required for failure to comply with §6–103. *State v. Hicks,* 285 Md. 310 (1979). When the State, however, dismisses a prosecution in good faith before the conclusion of 180 days, the speedy trial clock "stops" and the prosecution can be reinstituted at a later period without violation of §6–103. *State v. Henson,* 335 Md. 326, 333 (1994) (citing *United States v. MacDonald*, 456 U.S. 1 (1982)).

In *Curley*, the Court of Appeals articulated an exception to *MacDonald* and *Henson.*

> [W]hen a circuit court criminal case is *nol prossed*, and the State later has the same charges refiled, the 180-day period for trial prescribed by [current §6–103] and [current Md. Rule 4–271] ordinarily begins to run with the arraignment or first appearance of defense counsel under the second prosecution. If, however, it is shown that the *nol pros* had the purpose or the effect of circumventing the requirements of [current §6–103] and [current Md. Rule 4–271], the 180-day period will commence to run with the arraignment or first appearance of counsel under the first prosecution.

Curley, 299 Md. at 462.

Recently, in *White v. State*, 223 Md. App. 353 (2015), this Court reiterated that, "because of the plain language of Rule 4–271, only proceedings in the *circuit court*—not the district court—trigger the 180-day clock." *Id.* at 374 (emphasis in original) (citing *Scott v. State*, 49 Md. App. 70, 86 (1981)). Accordingly, proceedings in the district court are not applied against the 180-day time line under Rule 4–271.

In the case *sub judice,* neither Md. Code Ann., Crim. Proc. § 6–103, Rule 4–271 or *Curley* are applicable. Appellant's case first commenced in district court and was later transferred to circuit court after the indictment. Accordingly, appellant's trial date, for purposes of Rule 4–271, would have had to occur 180 days from either the appearance of counsel or appellant's first appearance before the *circuit court*, whichever was earliest. Appellant does not contend that the June 15, 2015 trial date violates the Rule. Therefore, the circuit court did not violate either Md. Code Ann., Crim. Proc. § 6–103 or Md. Rule 4–271.

Similarly, as *Curley* is an exception to the general rule first articulated in *McDonald* and then adopted by the Court of Appeals in *Henson*, concerning the *nolle prosequi* of *circuit court* charges made in bad faith, *Curley* is equally inapplicable to the instant case.

II. LAY OPINION TESTIMONY

Lastly, appellant contends that, Detective Clark's testimony**,** concerning appellant's lack of resemblance to Genaro Hewitt is inadmissible under Md. Rule 5–701 because it was not "helpful to the determination of fact in issue" and**,** under Md. Rule 5–403, because the testimony is more prejudicial than probative. Specifically, appellant asserts that Detective

Clark's testimony "went far beyond merely identifying [him] to, in essence, bolstering that with the non-identification of Hewitt in the absence of any photograph." Whether or not appellant and Hewitt were similar, in appearance, appellant argues, is a conclusion that the jury would be capable of making on its own.

According to the State, the trial court did not abuse its discretion in admitting Detective Clark's testimony that Hewitt "looks nothing like" appellant. Moreover, Detective Clark testified as to her observations of the "appearance of persons," which is one of the "prototypical examples of lay opinion testimony identified by the Court of Appeals." Furthermore, Detective Clark's testimony was helpful to the jury because the similarity between the appearances of Hewitt and appellant was "highly relevant, given the presence of Hewitt's fingerprints on the checks and the State's burden to show that [appellant], (whose prints were not on the checks), was the individual pictured cashing checks in the surveillance photographs from the bank." The State also contends that the admission of Detective Clark's testimony was not more prejudicial than probative.

Finally, the State asserts, assuming that the trial court erred in admitting Detective Clark's testimony to the effect that Hewitt did not look like appellant, it is harmless "for the simple reason that [appellant], through counsel, expressly conceded that he was the person depicted in the photographs at issue" in opening statements at trial.

Md. Rule 5–701 governs lay opinion testimony and provides:

> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

"The two requirements in Rule 5–701 for the admissibility of lay opinions are conjunctive. Thus, a lay opinion must be based on the perceptions of the witness and must be helpful to the trier of fact." *Goren v. U.S. Fire Ins. Co*., 113 Md. App. 674, 686 (1997).

> The rule in Maryland is that a lay witness is not qualified to express an opinion about matters which are either within the scope of common knowledge and experience of the jury or which are peculiarly within the specialized knowledge of experts. A lay witness may opine 'on matters as to which he or she has first-hand knowledge.' Only lay opinions that are 'rationally based on the perceptions of the witness and helpful to the trier of fact' are admissible, however. The admissibility of a lay opinion is vested in the sound discretion of the trial court.

Id. at 685 (quotations and citations omitted).

"The requirement that the lay opinion testimony be helpful to the trier of fact precludes a lay witness from offering conclusions and inferences that the jury is capable of making on its own when analyzing the evidence." *Washington v. State*, 179 Md. App. 32, 55 (2008), *rev'd on other grounds*, 406 Md. 642 (2008) (citing *Baltimore & Y. Turnpike Road v. Leonhardt,* 66 Md. 70, 77 (1886)).

> The prototypical example of the type of evidence contemplated by the adoption of [the federal equivalent of Md. Rule 5–701] relates to the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences.... Other examples . . . include identification of an individual, the speed of a vehicle, the mental state or responsibility of another, whether another was healthy, the value of one's property.

Ragland v. State, 385 Md. 706, 718 (2005) (quoting *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190. 1196–98 (3rd Cir.1995)).

Md. Rule 5–403 governs the exclusion of relevant evidence on grounds of prejudice, confusion, or that it is a waste of time. The Rule provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

In the case *sub judice*, it is uncontested that Detective Clark was familiar with Hewitt and had met appellant once in person. Inasmuch as Detective Clark identified appellant in an MVA photograph, her testimony constitutes lay opinion. When Detective Clark was asked if Hewitt "looked anything like" appellant, her testimony was helpful to the jury in that there was no photograph or visual rendering of Hewitt presented as evidence. Without Detective Clark's testimony, the jury would have been unable to compare Hewitt's appearance with that of appellant. As the identity of the individual in the surveillance still photographs was central to the State's case, Detective Clark's testimony is highly probative.

Appellant contends that Detective Clark's testimony is more prejudicial than probative. We disagree. The jury was presented with appellant's MVA photograph and the surveillance still photographs. It compared the two and convicted appellant of theft. The jury would have been able to examine a picture of Hewitt and compare it to appellant's certified

copy of his MVA photograph; however, it appears that appellant neither provided or insisted that the State provide such evidence.

Finally, the State proffers that appellant, through counsel's opening statements, conceded that he was the individual in the surveillance still photographs. This concession, according to the State, was part of a "defense theory' postulated by counsel that appellant was not the individual who forged the checks, but innocently cashed them.

"Opening statements in a jury trial are merely for the purpose of apprising the jury as to the issues involved and what it might reasonably expect the evidence presented to it to be. Such statements are not evidence . . . although material concessions and stipulations may be made therein . . . ." *Goff v. Richards*, 19 Md. App. 250, 252 1973) (citations omitted). "[T]he function of an opening statement should not be changed into an opening 'argument' . . . ." *McLhinney v. Lansdell Corp. of Md*., 254 Md. 7, 12-13 (1969). *See Sippio v. State*, 350 Md. 633, 665 (1998) (citing *McLhinney* that "assertions made during opening statement are not admissible to establish the attorney's theory of the case, but may fall under the category of admissions . . . .").

In the instant case, the State references statements made by counsel for appellant, during opening statements, that concerned the forging and cashing of the checks: "The State is going to tell you that [appellant], and he is the person in those photos, knew that they were false, and that he did it anyway, using his own identity . . . . Indeed, it's not that he just possessed the check, it's that he forged it himself." The State also points out that appellant's

counsel "appears to repudiate this concession during her closing arguments . . . ." We are not persuaded that appellant, through counsel, conceded evidence of his identity as the individual in the surveillance still photographs. The thrust of appellant's defense was not that he innocently cashed the checks. As stated, *supra*, appellant's counsel objected to Detective Clark's identification of appellant's MVA photograph because, according to appellant, it would create a "match up" between the driver's license and surveillance stills.

Furthermore, assertions made during opening statements cannot be offered as evidence to establish a theory of defense. *See Sippio, supra*. Although material concessions and stipulations can occur during opening arguments, *Goff, supra*, examining counsel's opening statement in its entirety reveals that the State's chosen quote does not indicate appellant making a material concession. Accordingly, the trial court did not abuse its discretion in admitting Detective Clark's lay opinion testimony.

CONCLUSION

For the foregoing reasons, we hold that the trial court did not err in denying appellant's motion to dismiss the case against him as appellant's constitutional rights to a speedy trial were not violated, nor did the court abuse its discretion in allowing the admission of lay opinion testimony.

JUDGMENT OF THE CIRCUIT COURT FOR CHARLES COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.