UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Nos. 1533 & 1883

September Term, 2015

CONSOLIDATED CASES

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MARTAZ JOHNSON

v.

STATE OF MARYLAND

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Berger,
Arthur,
Reed,

JJ.

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Opinion by Arthur, J.

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Filed: December 16, 2016

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

In a series of indictments in the Circuit Court for Baltimore City, the State charged Martaz Johnson with an array of offenses relating to the allegation that he raped and assaulted a woman in her home while he was on duty as a Maryland Transit Administration (MTA) police officer.

The jury acquitted Johnson of first-degree rape, first-degree burglary, and third-degree burglary. The jurors could not reach a unanimous verdict on one count of second-degree rape and one count of fourth-degree sexual offense, and the court declared a mistrial as to those charges. The court granted a judgment of acquittal as to charges of first-degree assault and reckless endangerment. Johnson was convicted only of two counts of second-degree assault and one count of malfeasance in office.

On July 28, 2015, the court sentenced Johnson to a 10-year term of incarceration, with all but 18 months suspended, on one of the two convictions for second-degree assault. The court also sentenced Johnson to a concurrent term of five years, with all but 18 months suspended, for malfeasance in office. Citing double-jeopardy concerns, the court initially refrained from sentencing Johnson on the second conviction for second-degree assault, because that charge was related to the charges of second-degree rape and fourth-degree sexual offense on which the jury had not reached a unanimous verdict.

Johnson noted an appeal on August 4, 2015, and again on August 13, 2015. Those appeals were docketed in this Court as Case No. 1533, September Term 2015.

After Johnson had taken those appeals, the court became satisfied that if it imposed a sentence on the second conviction for second-degree assault, double jeopardy would not bar a subsequent prosecution on the charges on which the jury had deadlocked.

*See State v. Griffiths*, 338 Md. 485 (1995). Hence, the court imposed a sentence of 18 months of incarceration, concurrent with the sentences previously imposed, on September 25, 2015.

On October 14, 2015, Johnson filed another notice of appeal. That appeal was docketed in this Court as Case No. 1883, September Term 2015. This Court consolidated the two appeals.[1]

## QUESTIONS PRESENTED

Johnson presents the following four questions:

I. Did the circuit court err in admitting in evidence a SAFE kit collected from [the alleged victim] when the State failed to prove the first link in the kit's chain of custody – whether and how the kit was properly collected?

II. Did the circuit court err in permitting testimony about GPS tracking evidence after correctly excluding such evidence from trial because, in the absence of expert testimony, it was not "clear to the jury?"

[1] In criminal cases, "an appealable final judgment does not come with conviction alone, but requires the imposition of a sentence for that conviction." *Ridgeway v. State*, 140 Md. App. 49, 63 (2001) (citation and quotation marks omitted), *aff'd*, 369 Md. 165 (2002); *see Middleton v. State*, 318 Md. 749, 759-60 (1990) (explaining that there was a final judgment for a particular offense when the trial court imposed and entered a sentence for that offense). Here, Johnson faced charges in five criminal cases by way of five separate indictments that were joined for the purpose of trial. At the time of Johnson's first two notices of appeal from August 2015, the judgments were final in most of those cases, but the court entered no appealable judgment in one case (concerning the alleged rape) until September 2015, when it imposed and entered a sentence for the other second-degree assault conviction. Johnson's third notice of appeal in October 2015 was timely and sufficient to effectuate an appeal from that judgment. The final judgment on a single count of the indictment in that case "can be appealed even though there is no final judgment on []other count[s] in the same indictment charging [] different offense[s]." *Brewster v. Woodhaven Bldg. & Dev., Inc.*, 360 Md. 602, 618 n.3 (2000). Accordingly, this Court has jurisdiction to consider each of Johnson's convictions and sentences.

III. Did the delay to bring Johnson to trial, costing him a potentially exculpatory witness, violate his Sixth Amendment right to a speedy trial?

IV. Did the circuit court abuse its discretion by precluding Johnson from presenting evidence of [the alleged victim]'s state of mind, which she had posted on her Facebook profile?

For the reasons set forth below, we affirm the judgments.

## FACTUAL BACKGROUND[2]

On the night of March 12, 2014, T.K.[3] went out with her friend, K.B. for dinner, drinks, and dancing. Afterwards, the two women returned to K.B.'s home. T.K. stayed there until after 3:00 a.m., when she drove her car toward her own home. While T.K. was stopped at a traffic light about a block away from K.B.'s house, an MTA bus struck her car.

T.K. waited in her car until police officers arrived. Johnson was one of the officers who arrived on the scene.

According to T.K., Johnson said that she should not be driving. She agreed, because she had been drinking.

[2] Because the jury acquitted Johnson of the most serious charges and could not reach a verdict on a number of others, we do not view the facts, as we normally would, in the light most favorable to the State. In recounting the factual background in this case, we largely recount the evidence that the jury heard, and not necessarily the facts that the jury found.

[3] The State requests that we use the complaining witness's initials rather than her name. Johnson responds that there is no legal basis to use an adult's initials. Despite the absence of any legal requirement, we elect to designate the alleged victim of a sexual assault by her initials. We also elect to designate the alleged victim's friend by her initials.

Johnson asked if she could arrange for someone else to pick her up and retrieve her vehicle. T.K. made multiple attempts to call her friend K.B., but she did not answer.

T.K. testified that she "was instructed" to get into the police cruiser and that she "was not allowed to drive." According to T.K., Johnson told her that she needed to be "released" to someone and that someone needed to retrieve her vehicle or she would be "going downtown." T.K. said that she interpreted Johnson's statements to mean that he was taking her to jail. T.K. also said that Johnson would not allow her to leave the police car to knock on the door to K.B.'s house.

T.K. testified that she began to cry, told Johnson that she was only a mile and a half from her home, and gave him her street address. Although T.K. claims to have thought that Johnson was driving her to the jail, she looked out the window and saw that she was outside of her house. She testified that Johnson asked her, "What are you going to do to make this up?"

T.K. said that Johnson told her to get out of the car. She testified that, as she opened the door, Johnson held the door open with his forearm and entered the house without an invitation, throwing her back as he did so. T.K. claimed that Johnson used a flashlight from his utility belt to "case[]" the first floor of the house. She said that he asked if anyone else lived in the home and that she told him that she lived alone.

According to T.K., Johnson advanced toward her, immobilized her, removed most of her clothing, and raped her. She testified that she tried to resist him and that she told him to stop and to leave, but that he did not comply with her demands.

T.K. testified that Johnson eventually stopped and put on his pants and utility belt. She said that as he did so she grabbed her cell phone and tried, unsuccessfully, to take a photograph of him. She also said that Johnson tried to snatch the phone from her hands, but that it fell to the floor and slid into another room. T.K. said that she ran towards the phone, but that Johnson wrapped his arm around her neck, choked her, and demanded that she unlock the phone. She claimed that he scrolled through her photographs and used the phone to make a call, in which he asked the person he reached if he or she could access a person's iCloud to delete photographs. In response to an apparent reply, Johnson allegedly said, "Okay, I might need you to do me a favor." According to T.K., Johnson ended the call, told her that she had "fucked up," and left.

After Johnson left, T.K. called 911 and reported that she had been raped by a Baltimore City police officer. An ambulance transported T.K. to Mercy Medical Center. Carolyn Tufts, a forensic nurse examiner, collected samples and swabs from T.K. for a sexual assault forensic examination ("SAFE") kit.

Pursuant to a warrant, another forensic nurse examiner conducted a suspect SAFE examination of Johnson, which included the collection of a penile swab. Forensic tests revealed that epithelial cells belonging to T.K. were located on the shaft of Johnson's penis.[4]

[4] "Sperm fractions" or seminal fluid from a vaginal swab of T.K. contained the DNA of an unknown male, but Johnson was excluded as a possible contributor. T.K.'s testimony suggested that Johnson may have used a condom when he allegedly raped her.

As part of the investigation, the MTA police retrieved GPS records from Johnson's MTA-issued cell phone. Those records indicated that Johnson spent about 14 minutes after 3:55 a.m. at an address near the intersection of where the bus collided with T.K's car. The records also indicate that Johnson spent about 37 minutes after 4:10 a.m. near a house next door to T.K.'s address.

Johnson was tried slightly more than 14 months after his arrest. During that period, Nurse Tufts, the nurse who had examined T.K., moved out of state. The State did not secure her appearance for trial.

## DISCUSSION

### I.

Johnson contends that the trial court erred in admitting T.K.'s SAFE kit and the DNA analysis derived from it. He argues that the State failed to establish an adequate chain of custody for that evidence because Nurse Tufts, the forensic nurse who examined T.K., did not testify about the collection of samples from T.K.

Before trial, defense counsel asked the court to exclude all evidence derived from the SAFE examination of T.K. Counsel argued that, without Nurse Tufts's testimony, the State could not establish that the samples actually came from T.K. The State responded that T.K. herself would testify about her examination and that other witnesses would testify about standard procedures for SAFE examinations. The court concluded that this chain of custody was "satisfactory."

During the trial, the court overruled a series of objections based on the chain of custody for T.K.'s SAFE kit. As a result of those rulings, the State eventually introduced

evidence that epithelial cells found on Johnson's penis matched the profile derived from the samples collected from T.K. On appeal, Johnson contends that the court erred in admitting that evidence.

Generally, authentication or identification is a condition precedent to the admissibility of physical evidence. Md. Rule 5-901(a). This requirement may be "satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." *Id.* Methods of authentication or identification include direct testimony from a witness with firsthand knowledge of an item, circumstantial evidence about the appearance or characteristics of an item, and evidence describing a process or system used to produce the exhibit or testimony and showing that the process or system produces an accurate result. Md. Rule 5-901(b).

For items such as biological samples, the proponent "must 'account for its handling from the time it was seized until it is offered into evidence.'" *Jones v. State*, 172 Md. App. 444, 462 (2007) (quoting *Lester v. State*, 82 Md. App. 391, 394 (1990)). In most cases, the proponent can establish an adequate chain of custody "through the testimony of key witnesses who were responsible for the safekeeping of the evidence, i.e., those who can 'negate a possibility of tampering' . . . and thus preclude a likelihood that the thing's condition was changed.'" *Easter v. State*, 223 Md. App. 65, 75 (citing *Jones*, 172 Md. App. at 462) (further citation and quotation marks omitted), *cert. denied*, 445 Md. 488 (2015). The circumstances surrounding the safekeeping of the item of evidence during that time "'need only be proven as a reasonable probability[.]'" *Cooper v. State*, 434 Md. 209, 228 (2013) (quoting *Wagner v. State*, 160 Md. App. 531, 552

(2005)). Thus, "[t]he existence of gaps or weaknesses in the chain of custody generally go to the weight of the evidence and do not require exclusion of the evidence as a matter of law." *Easter*, 223 Md. App. at 75 (citing *Jones*, 172 Md. App. at 463).

Like most other evidentiary rulings, determinations of the adequacy of the chain of custody are generally left to the sound discretion of the trial court, and this Court reviews those rulings for abuse of discretion. *Easter*, 223 Md. App. at 74-75. A trial court abuses its discretion "when 'no reasonable person would take the view adopted by the [trial] court,' or when the court acts 'without reference to any guiding rules or principles.'" *Id.* at 75 (citing *King v. State*, 407 Md. 682, 697 (2009) (quoting *North v. North*, 102 Md. App. 1, 13 (1994))).

A trial court has discretion to admit an item of evidence even where the chain of custody is not complete enough to negate all possibility of alteration or contamination. *E.g. Cooper*, 434 Md. at 223-28 (adequate custody for napkin containing semen of attacker even though State presented sparse testimony about forwarding of particular samples to outside laboratory); *Bey v. State*, 228 Md. App. 521, 535-38 (adequate chain of custody for DNA sample even though analyst could not remember name of officer to whom she delivered sample), *cert. denied*, 450 Md. 105 (2016); *Easter*, 223 Md. App. at 73-76 (adequate chain of custody for blood sample taken from defendant even though much of documentation about transfers of sample was arguably incomplete); *Jones*, 172 Md. App. at 460-63 (adequate chain of custody for swabs recovered from sexual assault victim even though "there were details on the chain of custody sheet that some witnesses did not know").

Johnson attempts to differentiate those cases by arguing that they involve "minor" gaps "in the middle of the evidentiary chain." Johnson makes no argument that the condition of T.K.'s SAFE kit may have changed between the time when it was initially collected until the time it was tested. Instead, he argues: "Without Nurse Tufts or her report, the State made no showing as to the first link in the chain of custody – how the evidence was seized, such that it was not tainted or contaminated by the collection process." According to Johnson, without putting Nurse Tufts on the witness stand, the State could not establish a reasonable probability that the SAFE kit contained untainted samples that had been collected from T.K.

We disagree with Johnson's assertion that the State made "no showing as to how the kit was collected." Contrary to the implicit premise in Johnson's argument, authentication or identification typically does not depend on direct testimony from a witness who seized the evidence in question. *See* Md. Rule 5-901(b) (listing various methods to satisfy authentication or identification requirement).[5] In this case, the State adduced evidence to prove, inferentially, a reasonable probability that the SAFE kit contained blood samples that had been collected from T.K. through an accurate process.

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[5] With regard to the chain of custody for drug evidence, which is governed by sections 10-1001 to 10-1003 of the Courts and Judicial Proceedings Article, this Court has rejected the argument that live testimony from the seizing officer is necessary to establish an adequate chain of custody. *See Levine v. State*, 93 Md. App. 553, 562-66 (1992) (upholding admission of drug evidence even without testimony from out-of-State officers that seized evidence); *Thompson v. State*, 80 Md. App. 676, 683-85 (1989) (upholding admission of drug evidence even though seizing officer could not testify because he had died before trial).

T.K. herself testified about the examination. She recalled that a nurse at Mercy Medical Center conducted a "rape kit exam" on the morning of the assault. According to T.K., the nurse "took swabs and samples." When asked what, if anything, she observed the nurse doing with the swabs and the samples, T.K. responded: "They had it submitted to the lab." In addition, the State introduced T.K.'s hospital records, which confirmed that T.K. had undergone a SAFE examination on the morning of March 13, 2014.

Although Nurse Tufts did not testify, a different forensic nurse examiner, who had performed the SAFE examination of Johnson, explained generally how SAFE examinations are performed at Mercy Medical Center. According to that nurse, every SAFE examination, regardless of whether it is for a victim or a suspect, includes the collection of a blood sample. She explained that the nurse packages the evidence in a kit, which is sealed, signed, and labeled by the nurse.

The lead investigator for the Baltimore City Police testified that T.K.'s case was assigned a control number, referred to as a "C.C." number. He explained that victim SAFE kits, which are sometimes called "rape kits," include blood samples and swabs that are collected pursuant to a standard checklist. According to the detective, the completed SAFE kits are stored in a locked closet in the hospital, where they can be identified by the C.C. number and signed out only by authorized personnel. Another detective testified that he personally retrieved T.K.'s SAFE kit from the secured locker at the hospital and delivered it to the police department, which assigned it a property number. According to that detective, the evidence seal on the SAFE kit envelope was intact when he picked it up from the hospital.

A serologist at the police department's crime lab testified that she analyzed the SAFE kit with the assigned property number and C.C. number. The serologist stated that the seal across the package was undisturbed. Upon opening the kit, she compared the items in the package with an inventory that had been prepared by the SAFE nurse, and she concluded that the package contained everything that was listed on the inventory. She obtained a number of items from the kit, including the blood sample. Then she repackaged each item in envelopes, which she sealed, signed, and relabeled. Finally, a DNA analyst from a private laboratory testified that she received items, including swabs and a blood card, as labeled by the serologist. The items that she received had no signs of tampering.

In the aggregate, this evidence allowed a rational factfinder to conclude that the SAFE kit contained blood that had been collected from T.K. The absence of testimony from Nurse Tufts about how she administered the SAFE kit to ensure the integrity of the samples does not render the evidence inadmissible as a matter of law.[6]

Johnson attempts to liken the circumstances of this case to those in *McDonald v. State*, 314 Md. 271 (1988), but that case is readily distinguishable. In *McDonald* the circuit court found a probation violation based on a laboratory report stating that urine samples from containers with the name Kathleen McDonald had tested positive for

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[6] Johnson cites *Cooper*, 434 Md. at 227; *Jones*, 172 Md. App. at 460; and cases from other states as examples where the chain-of-custody evidence included testimony from an examiner who compiled a forensic kit. These cases do not stand for the proposition that testimony from the examiner is *required* to establish the chain of custody.

cocaine. *Id.* at 279-80. A representative from the private laboratory testified about normal procedures for analyzing samples received from the probation agency (*id.* at 279), but "[a]t no point . . . did the State present evidence on how [the probation agency] obtains, stores, and identifies urine samples of probationers subject to [those] testing procedures." *Id.* at 280. Furthermore, the State presented no "direct evidence to indicate that the Kathleen McDonald then on trial did, in fact, provide [the probation agency] with urine samples on or near the dates in question." *Id.* Faced with "nothing more than the delivery, to [the laboratory], of urine samples labelled with the not uncommon name of Kathleen McDonald and the subsequent processing of those samples[,]" the Court concluded that the evidence was "simply not enough to authenticate the urine samples[.]" *Id.* at 281.

In this case, the State produced the type of authentication evidence that the Court found lacking in *McDonald*. A forensic nurse examiner, as well as two detectives, testified about how nurse examiners at Mercy Medical Center "obtain[], store[], and identif[y]" (*id.* at 280) blood samples during SAFE examinations. T.K. herself confirmed that she "did, in fact, provide" the nurse with samples "on . . . the date[] in question." *Id.* Under these circumstances, it "is unlikely" that a blood sample other than one taken from T.K. at the hospital "somehow end[ed] up being labeled as part of the case." *Cooper*, 434 Md. at 228.

Retreating from his main argument, Johnson's reply brief appears to concede that the State had sufficient evidence to prove that the blood sample had been taken from T.K. Johnson "does not contend that the wrong blood card could have been placed in [T.K.'s]

SAFE kit[,]" but instead "that the blood card could have contained DNA . . . from [T.K.] and DNA, through contamination, . . . from another individual (the forensic nurse)." Direct testimony from Nurse Tufts may have addressed Johnson's concerns, but that type of testimony was not necessary to establish a reasonable probability as to the integrity of the blood sample. *See* Md. Rule 5-901(b)(4), (b)(9) (providing that authentication may be accomplished through circumstantial evidence or evidence about the general accuracy of a process). It was sufficient for the State to adduce testimony about standard SAFE examination procedures at the hospital and testimony that the contents of the SAFE kit appeared to be in order. Johnson's argument about possible contamination goes to the weight of the evidence and not to the threshold issue of admissibility.

In sum, the circuit court did not abuse its discretion in concluding that the chain of custody for the SAFE kit was sufficient.

**II.**

Johnson contends that the trial court erred in admitting testimony from a lay witness about Global Positioning System (GPS) tracking information from State's Exhibit 13, a document that was ultimately not admitted in evidence.

The general subject of GPS tracking was first introduced by the defense. Officer Clark, the first MTA police officer to arrive at the scene of the collision, had testified that protocol required an officer to report to radio dispatch if the officer was transporting a person by vehicle, but the radio log showed that Johnson made no such report when he transported T.K. In an apparent response to the suggestion that Johnson failed to report his movements, defense counsel asked Officer Clark about technology used to track the

locations of MTA police officers. The officer testified that the MTA issues cell phones to each officer with a program known as "PocketCop." According to Officer Clark, the program provides "detailed GPS coordinates" for each officer at all times, so that the MTA police could account for an officer's location "at every minute of every shift."

The State's next witness was Sergeant William Schauman, an executive officer with the MTA Police, who testified mainly as a custodian for various records, including GPS tracking information. Sergeant Schauman explained that all MTA officers receive department-issued cell phones that include a GPS tracking program, which is sometimes called as a "PocketCop." According to Sergeant Schauman, the program serves as a safety measure to permit other officers to respond to an officer's location even if the officer is unable to communicate. He explained that the GPS information is stored electronically so that certain supervisors can review it.

Through Sergeant Schauman, the State attempted to introduce State's Exhibit 13, a print-out of the GPS tracking information from Johnson's phone for the morning of the alleged rape. Sergeant Schauman could not recall whether he or someone else had printed the report. Nevertheless, he identified it as "a GPS and stop report for Field Force Manager" that set forth "the tracking of Officer Johnson's cell phone . . . for the time period 3/13/2014, 12:00 a.m. to the same day at 11:59 p.m."

Two entries indicated that Johnson was at near the intersection where the accident occurred for about 14 minutes after 3:55 a.m. and at an address next door to T.K.'s house for 37 minutes after 4:10 a.m. The report appears to include no entries for an approximately three-hour period before 3:54 a.m.

Defense counsel objected to the admission of the exhibit, arguing that the document had not been maintained in the ordinary course of business and that it had been generated by an unknown person for the purpose of the trial. In addition, defense counsel complained that the document was incomplete because of the unexplained three-hour gap immediately before the time period in question. The court declined to admit the exhibit at that time, stating that a further foundation was necessary with regard to how the information in the report had been generated. After some additional questions by the prosecutor, the court directly asked Sergeant Schauman to explain how information gets from an officer's phone to the report. He responded: "That's technical stuff[.] I'm not the tech guy[.]"

Defense counsel again objected to the admission of Exhibit 13, arguing that Sergeant Schauman was not competent to explain the information, particularly the three-hour time gap that preceded the encounter between T.K. and Johnson. Defense counsel asserted that, despite Sergeant Schauman's admitted lack of expertise, the State was relying on him "as a quasi[-]expert to lay a foundation for the admission of technical information[.]" The court overruled the defense objection at that time, stating that the gap in the tracking information went to the weight of the evidence and that the defense would be free to explore those matters on cross-examination.

The prosecutor proceeded to ask Sergeant Schauman to read entries from Exhibit 13 for the jury. Without an additional objection, the witness read the entry from "3:55 a.m." with a location of near where the accident occurred and a duration of "14 minutes." He also read the entry from "4:10 a.m." with a location of next door to T.K.'s house and a

duration of "37 minutes." Sergeant Schauman stated that, "[t]o the best of [his] knowledge," these entries meant that Johnson was at or near the accident scene for 14 minutes and at or near T.K.'s house for 37 minutes on the morning of March 13, 2014. The State did not formally move the introduction of the document into evidence during his testimony.

During a thorough cross-examination, Sergeant Schauman admitted that he could not testify about the technical aspects of the GPS tracking program, how the GPS had been calibrated, or how accurate it was. He could not explain the three-hour time period for which there was no indication of Johnson's location, other than to say that "apparently, it went offline." He did not know whether Johnson shut off his phone or entered an underground subway station or whether there was some other problem with the device. As for the entries for addresses listed in the report, Sergeant Schauman acknowledged that he could not determine whether Johnson was at those exact locations or whether he was some unknown distance away from them.

At the conclusion of that testimony, the court declined to admit Exhibit 13, commenting that Sergeant Schauman "kn[ew] nothing about" that exhibit. Defense counsel, however, did not ask the court to strike the portions of Sergeant Schauman's testimony regarding specific entries from the report or to otherwise instruct the jury about that testimony.[7]

[7] The State did not mention the GPS tracking information during its closing arguments. Perhaps anticipating that the State might mention Sergeant Schauman's testimony during rebuttal, defense counsel argued that the GPS data did not prove that Johnson was inside T.K.'s apartment or that an assault had occurred.

On appeal, Johnson contends that the court properly excluded the GPS records, but that the court should not have "permitted" Sergeant Schauman to read specific entries to the jury. Johnson argues that "Exhibit 13 and its contents should never have reached the jury without a foundation of explanatory expert testimony." He relies on three Maryland cases holding that expert testimony is necessary for the admission of cell-phone tower geolocation evidence: *State v. Payne*, 440 Md. 680, 698-702 (2014); *Coleman-Fuller v. State*, 192 Md. App. 577, 612-19 (2010); and *Wilder v. State*, 191 Md. App. 319, 361-68 (2010). Assuming without deciding that his challenge is preserved for appellate review, we reject it.

A few months after Johnson filed his brief, this Court held as a matter of first impression that expert testimony is not necessary for the admission of records of GPS data. *Gross v. State*, 229 Md. App. 24, 31-36 (2016). That case arose out of allegations that Gross and his accomplices stole copper materials, sometimes using trucks owned by the employer of one of the accomplices. *Id.* at 27-29. The employer, unbeknownst to its drivers, had installed GPS units on its vehicles so that it could test the accuracy of the drivers' logs. *Id.* at 29. The court admitted a printed version of the GPS records under the business records exception to the hearsay rule and permitted a supervisor for the employer to read certain entries for the jury and to highlight those entries on the printed version. *Id*.

On appeal, Gross argued that the GPS records and testimony based on those records were inadmissible without expert testimony about the operation and accuracy of GPS devices. *Id.* at 31. Gross attempted to liken GPS data to testimony regarding cell-

phone geolocation, for which expert testimony is required under *Payne*, *Coleman-Fuller*, and *Wilder*. *Gross*, 229 Md. App. at 33. This Court rejected that comparison, explaining:

> Unlike the cell phone geolocation data cases, [the witness] was not relying on special knowledge, skill, or training to interpret the GPS records for the box truck, nor did he "engage[] in a process to derive his conclusion . . . that was beyond the ken of an average person." *See Payne*, 440 Md. at 700, 104 A.3d 142. Rather, [the witness] simply read the GPS data as it appeared in the GPS records. Furthermore, we conclude that the average juror could understand the GPS records without expert help. The records indicate simply and clearly the date and time of the reading and the address at which the truck was then located.

*Gross*, 229 Md. App. at 34.

The holding of *Gross* is dispositive of Johnson's argument. For the reasons explained in *Gross*, expert testimony was not necessary for the admission of data from the GPS records for cell phones issued by the MTA Police Department.

**III.**

Johnson contends that the circuit court denied him his constitutional right to a speedy trial. We reject his contention.

Johnson was arrested on March 14, 2014, one day after the assault. The State filed charges in the district court on that same day and filed indictments in the circuit court a few weeks later. Johnson was released on bail pending trial, but he asserts that he was placed on administrative leave without pay and was unable to find employment while the charges were pending.

Discovery disclosures were extensive from the outset and became progressively more so. The State's initial disclosures related to the 911 call, medical reports, police

interviews, a photo identification of Johnson, MTA police records, and phone records. The State gave notice that it intended to produce expert testimony about DNA and cell-phone technology. The State disclosed the serology report in May 2014, about two months after the samples were collected. The private DNA laboratory in Texas received the samples on June 25, 2014.

On the scheduled trial date of June 27, 2014, the court granted the State's request for a postponement to complete its investigation. Over the following month, the State obtained additional cell-phone records, which it disclosed to the defense.

The court found good cause for a second postponement on September 5, 2014, again because the State requested time to gather evidence.[8] At the end of October 2014, the State disclosed the DNA report from the private laboratory.

On November 19, 2014, the State requested a third postponement, because an Assistant State's Attorney and one State witness were unavailable, and because the State had just produced some discovery materials. The court granted the postponement over Johnson's objection.[9]

In January 2015, the State gave notice that it intended to call three expert witnesses: the serologist, the DNA analyst, and the forensic nurse examiner, Nurse Tufts.

[8] According to Johnson, the lab initially selected by the State was unable to process the samples.

[9] On the same date, the State and Johnson made a joint request for a specially-set trial date in February 2015 (after which the trial could no longer be postponed), citing the need to secure the appearances of out-of-state witnesses and 50 additional jurors to ensure a jury untainted by press coverage. The court denied that request without explanation.

Yet on February 9, 2015, the State requested a fourth postponement because of a need for further investigation and because it had just disclosed more discovery materials. Johnson objected again, but the court granted the request.

The court ordered a final postponement, over Johnson's objection on April 13, 2015, because no courtroom was available for the trial. The trial eventually commenced on May 20, 2015.

During the two days before the trial, defense counsel filed a number of written motions. One motion asserted that a written report from Nurse Tufts, the forensic nurse examiner, stated that she had identified "five minor abrasions" on T.K.'s genital area that were only observable with a certain dye. Defense counsel sought to preclude Nurse Tufts or any other witness from giving an opinion that the abrasions were consistent with forcible intercourse. In another motion, the defense sought to preclude the report and all evidence from the SAFE examination on the ground that Nurse Tufts was unavailable to testify.

Along with those motions, Johnson moved to dismiss the charges against him on speedy-trial grounds. He argued that over the previous 14 months nearly all of the delays had resulted from "negligence of the investigating officers." He asserted that Nurse Tufts had moved to Massachusetts during that period of delay, but that he was unable to find her address and to serve her with a subpoena that would compel her to testify in a Maryland proceeding. He also asserted that Nurse Tufts's unavailability resulted in the "loss of exculpatory evidence[,]" and thus that the delays prejudiced his defense. The court declined to dismiss the charges.

On appeal, Johnson contends that the circuit court erred in refusing to dismiss the charges for violation of the right to a speedy trial under the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights.[10]

In reviewing a trial court's denial of a motion to dismiss on speedy-trial grounds, this Court makes its own examination of the record and an independent constitutional appraisal in light of the facts the case. *See, e.g.*, *Peters v. State*, 224 Md. App. 306, 359, *cert. denied*, 445 Md. 127 (2015) (citations omitted). Maryland courts assess claims of a speedy-trial violation under the Maryland and federal constitutions in light of the four, interrelated factors identified by the Supreme Court in *Barker v. Wingo*, 407 U.S. 514 (1972). *See, e.g.*, *Randall v. State*, 223 Md. App. 519, 542 (2015). Those factors are: (1) the length of the delay; (2) the reasons for the delay; (3) the defendant's assertion of the speedy-trial right; and (4) prejudice to the defendant. *See, e.g.*, *State v. Kanneh*, 403 Md. 678, 687-88 (2008) (quoting *Barker*, 407 U.S. at 530).

Under *Barker*, the length of delay is "'measured from the date of arrest or filing of indictment, information, or other formal charges to the date of trial.'" *Peters*, 224 Md. App. at 360 (quoting *Divver v. State*, 356 Md. 379, 388-89 (1999)). Johnson's trial began 432 days, or slightly more than 14 months, after his arrest. "The fourteen-month delay

[10] Article 21 of the Maryland Declaration of Rights guarantees "[t]hat in all criminal prosecutions, every man hath a right . . . to a speedy trial[.]" The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial[.]" This right is a fundamental right imposed on the States by the Due Process Clause of the Fourteenth Amendment. *See, e.g.*, *Lloyd v. State*, 207 Md. App. 322, 327 (2012) (citations omitted).

certainly requires constitutional scrutiny" (*Glover v. State*, 368 Md. 211, 224 (2002)) under the remaining *Barker* factors.

Courts assess the overall reasonableness of the total delay in light of the nature of the criminal case. *Compare Kanneh*, 403 Md. at 689-90 (reasoning that pretrial delay of 35 months was not particularly weighty in a "very complicated" child sexual abuse case involving the presentation of DNA evidence), *with Divver*, 356 Md. at 390-91 (reasoning that delay of over one year was a "uniquely inordinate length for a relatively run-of-the-mill" district court DWI case). By all indications, Johnson's case was a relatively complex case involving DNA and cell-phone evidence. He faced serious charges that included rape, first-degree assault, burglary, and misconduct in office. In that context, a 14-month delay triggers the speedy-trial analysis, but it does not weigh heavily towards establishing a constitutional violation. *See Kanneh*, 403 Md. at 689-90; *see also Howard v. State*, 440 Md. 427, 447-48 (2014) (approximately 28-month pretrial delay in first-degree rape case involving DNA evidence); *Henry v. State*, 204 Md. App. 509, 550 (2012) (approximately 13-month delay in first-degree rape case involving DNA evidence).

"The length of delay, in and of itself, is not a weighty factor," and its main significance lies in its connection to the other factors. *Glover*, 368 Md. at 225 (citation omitted). In this case, Johnson has compiled an incomplete record as to those remaining factors. The record contains a series of forms documenting each postponement, including information about which party requested the postponement, the reason for the postponement (*e.g.*, checking a box labeled "State needs further investigation"), and

whether Johnson objected. The record does not include any transcripts from the postponement hearings. To establish the details of each postponement, Johnson's appellate brief cites the vague descriptions contained in his motion to dismiss.

Without those hearing transcripts, the existing record leaves this Court with only a general overview for the second *Barker* factor: the reasons for the delay. Under this factor, different periods of delay receive different weights based on the reasons for the delay. *See, e.g.*, *Peters*, 224 Md. App. at 361. "Deliberate attempts by the State to delay weigh heavily against the State; the State's negligence causing delay weighs less heavily against the State[;]" and "reasons for delay attributable to neither party" receive neutral weight. *Berryman v. State*, 94 Md. App. 414, 421 (1993) (citation omitted).

The time from Johnson's arrest until his "originally scheduled trial date '[wa]s necessary for the orderly administration of justice[.]'" *Howard*, 440 Md. at 448 n.16 (quoting *Lloyd v. State*, 207 Md. App. 322, 330 (2012)). This approximately three-and-a-half-month period for ordinary trial preparation receives neutral weight in the speedy-trial analysis. *See, e.g.*, *Howard*, 440 Md. at 448 & n.16; *Peters*, 224 Md. App. at 362; *Randall*, 223 Md. App. at 551-52.

Roughly four-and-a-half months of delay resulted from the two postponements to permit the processing and review of DNA evidence. In general, "the unavailability of DNA test results . . . is a valid justification" for pretrial delay, because courts should "allow more time for completion of the tests and review, by both parties, of the results." *Glover*, 368 Md. at 226. Although Johnson complains that the State could have acted more aggressively in processing the DNA evidence, he points to nothing that would

suggest that the State failed to act with reasonable diligence.[11] "Where, as here, a postponement is the result of the unavailability of DNA evidence, and there is no evidence that the State failed to act in a diligent manner, the grounds for postponement are essentially neutral and justified." *Kanneh*, 403 Md. at 690 (citing *Glover*, 368 Md. at 226). The delay resulting from the postponements to obtain and review DNA test results is attributable to the State, but it does not weigh heavily in the constitutional analysis. *See Howard*, 440 Md. at 448-49 & n.19 (declining to assign significant weight to multi-month delay caused during period to obtain DNA test results); *Kanneh*, 403 Md. at 690 (same); *Glover*, 368 Md. at 226-27 (same); *Peters*, 224 Md. App. at 362-63 (same); *Henry*, 204 Md. App. at 552 (same).

The State is charged with responsibility for about five months of delay resulting from the third and fourth postponements that it requested. In granting the third postponement, the court noted the unavailability of a State witness and a prosecutor, reasons that weigh against the State, but not very heavily. *See Howard*, 440 Md. at 448 & n.18 (delays from unavailability of State witnesses); *Peters*, 224 Md. App. at 362-64 (delays from unavailability of prosecutor and unavailability of State witness); *Henry*, 204 Md. App. at 551 (delay from unavailability of prosecutor).[12]

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[11] Johnson asserts that the State "failed to submit its sample to the lab for three months." This statement is inaccurate. Before forwarding the samples for DNA testing, the State analyzed the samples at a police department crime lab and produced a serology report.

[12] Although the court listed multiple reasons for the third postponement, Johnson characterizes the unavailability of a State witness as the primary reason for that postponement.

Yet even at that late stage, the State was still requesting more time for "further investigation," apparently involving additional cell-phone evidence. The court granted the fourth postponement because the State needed to conduct even "further investigation" and because the State had "just provided" more discovery materials. We assign slightly more weight to the delays resulting from these postponements than to the other delays. *See Malik v. State*, 152 Md. App. 305, 319 (2003) (reasoning that, although the Court would not give great weight to delay to analyze evidence, the Court would assign "slightly more" weight to subsequent delay caused by State's tardiness in submitting and disclosing test results); *see also Glover*, 368 Md. at 227-28 (discussing delay from State's failures to meet discovery deadlines). Although Johnson does not allege deliberate gamesmanship by the State, this approximately five-month period of delay weighs in his favor.

Neither the State nor the defense caused the delay of slightly more than a month from the final postponement, which occurred solely because the court had no courtrooms available for Johnson's trial. Overcrowding of courts is a neutral justification for delay, but "should [be] considered" as part of a speedy-trial analysis because "the ultimate responsibility for [those] circumstances must rest with the government rather than with the defendant." *Glover*, 368 Md. at 225 (quoting *State v. Bailey*, 319 Md. 392, 412 (1990) (quoting *Barker*, 407 U.S. at 531)) (quotation marks omitted). To the extent that this approximately one-month delay weighs against the State, it does so minimally. *See Lloyd*, 207 Md. App. at 327, 331 (minimal weight assigned to short delay resulting from postponement granted because of unavailability of courtroom); *Brown v. State*, 153 Md.

App. 544, 561-62 (2003) (same); *Ratchford v. State*, 141 Md. App. 354, 362 (2001) (same).

In the aggregate, the 14 months of delay in Johnson's case resulted primarily from neutral reasons. Consequently, about nine months receive either no weight (period for initial trial preparation), minimal weight (period for courtroom unavailability), or little weight (period for unopposed postponements to complete DNA testing). The balance of about five months resulted from a mix of neutral reasons (witness and prosecutor unavailability) and the State's prolonged investigation and late disclosures. Although the State was responsible for much of the delay in bringing the case to trial, that factor in itself is not overwhelming. *See Glover*, 368 Md. at 228 (despite admonishing State for "lack of diligence when the case was postponed for the third time," concluding that total 14-month delay "as a whole, stem[med] largely from neutral reasons").

The third *Barker* factor "concerns the 'defendant's responsibility to assert his right." *Peters*, 224 Md. App. at 364 (quoting *Barker*, 407 U.S. at 531). The court weighs "'the frequency and force of the objections as opposed to attaching significant weight to purely *pro forma* objection.'" *Butler v. State*, 214 Md. App. 635, 661 (2013) (quoting *Barker*, 407 U.S. at 529), *overruled in part on other grounds by Nalls v. State*, 437 Md. 674 (2014). Here, the record shows that Johnson objected to the State's postponement requests on November 19, 2014, and on February 9, 2015, as well as to the court-imposed postponement on April 13, 2015, but we have no record of the grounds for his objections. Johnson then filed a written motion to dismiss two days before the trial. Based on this record, we conclude that Johnson adequately asserted the right to a speedy trial and that

those assertions weigh slightly in his favor. *See Jules v. State*, 171 Md. App. 458, 486 (2006).

The final, and most important, *Barker* factor is whether the defendant has suffered actual prejudice. *See, e.g.*, *Peters*, 224 Md. App. at 364 (citing *Henry*, 204 Md. App. at 554). To analyze this factor, a court should consider whether the delay affected "the three interests that the right to speedy trial was designed to protect: '(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.'" *Randall*, 223 Md. App. at 553 (quoting *Barker*, 407 U.S. at 532). Of these three concerns, "the most serious is the potential that a delay will impair the ability to present an adequate defense and thus skew the fairness of the entire adversarial system." *Glover*, 368 Md. at 230.

Johnson did not endure any pretrial incarceration, as he was free on bail while he awaited trial. *See, e.g.*, *Kanneh*, 403 Md. at 693; *Jules*, 171 Md. App. at 488. Johnson asserts that he lost his only source of income and was unable to find a new job because of the charges, but he does not explain with any specificity how those factors affected his defense. These assertions "show[], at best, minimal prejudice" in the context of evaluating his speedy-trial claim. *Kanneh*, 403 Md. at 693. Johnson also mentions anxiety and concern in the abstract, but a showing of prejudice requires more than a generalized assertion that the accused endured anxiety while awaiting trial. *See Glover*, 368 Md. at 230; *Brown*, 153 Md. App. at 564.

In his brief, Johnson asserts that the delay impaired his defense because Nurse Tufts, the forensic nurse who had examined T.K., moved out of state during that period.

He argues that Nurse Tufts "could have testified favorably to Mr. Johnson that she observed no trauma or injuries to Ms. T.K.'s genitals during the SAFE exam[.]"

Although Johnson's brief characterizes Nurse Tufts as a potentially exculpatory witness, Johnson actually worked to exclude the conclusions from her forensic examination. At the same time as Johnson was characterizing Nurse Tufts as an exculpatory witness in his speedy-trial motion, he was moving to exclude testimony that she used a special dye in her forensic examination to reveal abrasions to T.K.'s genital area. In fact, because Nurse Tufts was unavailable to testify, the court granted the defense motion to exclude the conclusions from the written SAFE report that Nurse Tufts had prepared. Before the trial court, defense counsel admitted that Nurse Tufts could "offer both inculpatory and exculpatory evidence[,]" but counsel argued that the inability to call Nurse Tufts was still prejudicial enough to justify dismissal. The court was not persuaded.

The record fails to establish that Nurse Tufts's testimony would have been favorable to Johnson, and indeed it suggests that her testimony might have been unfavorable to him. As a result, Johnson has failed to demonstrate that Nurse Tufts's unavailability caused any actual prejudice to his defense. *See Butler*, 214 Md. App. at 662 (rejecting argument that unavailability of witness prejudiced defense where the witness's "testimony would have been of dubious value" to the defendant); *Lloyd*, 207 Md. App. at 334-35 (rejecting argument that unavailability of witness prejudiced defense where trial court concluded that witness's testimony was not significant): *Dalton v. State*, 87 Md. App. 673, 689-91 (1991) (rejecting argument that unavailability of witness

prejudiced defense where defendant made "no showing" that the witness's testimony "would have been critical" to the defense); *see also State v. Ruben*, 127 Md. App. 430, 444-45 (1999) (concluding that defendant did not establish "particularized prejudice" from destruction of evidence where it was "uncertain" whether evidence would have favored defense or prosecution).

In short, we cannot conclude that Johnson suffered actual prejudice from the pretrial delay. Moreover, considering the outcome of this case, which included acquittals or a hung jury on the most serious charges, it seems likely that neither the delay nor the absence of that testimony impaired Johnson's ability to mount an effective defense. *See Henry*, 204 Md. App. at 555 (commenting that acquittal on rape charges and all other charges except second-degree assault confirmed absence of actual prejudice to defense). The final, and most important, *Barker* factor does not weigh in Johnson's favor.

Upon weighing the factors set forth in *Barker*, we conclude that the delay did not amount to a constitutional violation. The total delay of 14 months is not extraordinary given the seriousness of the charges and the complexity of some of the evidence in the case; the majority of the delay resulted from neutral justifications; the record does not show that Johnson made a particularly forceful assertion of the speedy-trial right; and Johnson failed to establish actual prejudice from the forensic nurse's unavailability. In many cases with attributes similar to this, Maryland courts have rejected claims of speedy-trial violations. *See Glover*, 368 Md. at 232 (concluding that, even though much of 14-month delay resulted from State's conduct and defendant asserted right to a speedy trial, "the attempts to acquire complete DNA evidence, coupled with the fact that no

evidence on the record established prejudice, leads [to the] conclusion that the [defendant]'s speedy trial right was not violated"); *Fields v. State*, 172 Md. App. 496, 549-50 (2007) (concluding that, even though much of 20-month delay was attributable largely to the State's conduct and defendant asserted right to a speedy trial, defendant could still not establish constitutional violation with demonstrating either purposeful delay or actual impairment of defense). The circuit court did not err in denying his motion to dismiss.

**IV.**

Johnson contends that the trial court abused its discretion by precluding him from presenting evidence about social-media postings made by T.K. soon after the reported rape. We see no abuse of discretion in that ruling.

Shortly before trial, the State moved in limine to preclude evidence about T.K.'s social-media accounts and postings on the grounds that those matters were irrelevant, confusing, a waste of time, and an invasion of T.K.'s privacy. Defense counsel proffered that, soon after the incident with Johnson, T.K. made postings to advertise appearances at clubs or to invite people to different venues and that she shared information about what was happening in the criminal case. Defense counsel further asserted that, within one week after the incident, T.K. "essentially" posted "that she wanted to go out and party

and she invited people to go out and party with her because she wanted to have a good time."[13] The court granted the State's motion.

On appeal, Johnson contends that the court abused its discretion in excluding the evidence of T.K.'s social-media postings. He asserts that the evidence was relevant and that its probative value was not outweighed by the danger of unfair prejudice.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Md. Rule 5-401; *see Snyder v. State*, 361 Md. 580, 591 (2000) ("an item of evidence can be relevant only when, through proper analysis and reasoning, it is related logically to a matter at issue in the case, *i.e.*, one that is properly provable in the case"). Irrelevant evidence is not admissible. Md. Rule 5-402. In addition, 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." Md. Rule 5-403.

Maryland appellate courts conduct a de novo review of questions of relevance, and we review the court's weighing of the probative value of evidence against its potentially harmful effects under an abuse of discretion standard. *State v. Simms*, 420 Md. 705, 724-25 (2011). Because the ruling here affected the scope of cross-examination, we note that

[13] T.K. testified that she worked as a bartender, promotional model, and a brand ambassador. During cross-examination, she explained that her work includes promotion of different venues or drinks. It may well be that it was part of her job to make at least some of the postings.

"trial judges are entitled to impose reasonable limits on . . . cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues . . . or interrogation that is . . . only marginally relevant." *Parker v. State*, 185 Md. App. 399, 426 (2009) (citations and quotation marks omitted).

The trial court concluded that T.K.'s social-media postings had little to no probative value, and Johnson's brief does not adequately explain why that conclusion was incorrect. He asserts that the social-media evidence was probative because it "impeach[es]" T.K.'s testimony that she had been "assaulted and raped after going out to a club on a Wednesday night." In his view, T.K's interest in engaging in "celebratory activities" on the weekend after the incident "tended to make a 'fact that is of consequence' – the alleged assault and rape – 'less probable.'"

The gist of his argument, as we understand it, is that that the court should have allowed the jury to evaluate T.K.'s social-media postings in light of his retrograde conceptions how a victim should behave.[14] We agree with the State that admitting evidence for that purpose would have presented a substantial risk of unfair prejudice and confusion of the issues. Even if the evidence of T.K.'s social-media postings could be said to have some bare relevance, the court was well within its discretion to conclude that any probative value would be substantially outweighed by the risk of unfair prejudice, that the evidence would have confused the issues, and that the testimony would have

[14] Defense counsel told the trial judge: "[A]s I understand it, people who have been raped or assaulted don't three days later say, hey everybody on Facebook, let's go out and party."

been a waste of time. *See Malik*, 152 Md. App. at 325-26. Finally, even without the dubious postings, Johnson's counsel was highly effective in undermining T.K.'s credibility: they extracted admissions that she had dishonestly collected unemployment benefits while she was working; and they demonstrated that Johnson needed both hands to remove his utility belt, which cast some doubt on T.K.'s testimony that the encounter was forcible. The court did not abuse its discretion in refusing to admit the social-media postings.

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