UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1713

SEPTEMBER TERM, 2014

GREGORY HOLDEN

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Arthur,
Kenney, James A., III
(Retired, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S.

Filed: March 15, 2016

On September 10, 2014, a jury sitting in the Circuit Court for Baltimore City convicted Gregory Holden, the appellant, of first-degree murder and openly carrying a dangerous weapon with the intent to injure. The court sentenced the appellant to life imprisonment for first-degree murder, with a consecutive three-year sentence for the weapons charge. The appellant raises several issues on appeal, which we have rephrased as follows:[1]

I. Did the trial court err by denying the appellant's motion to suppress the items recovered from the apartment where he resided?

II. Did the trial court err by refusing to ask on *voir dire* whether any member of the venire had "any strong feelings about crimes" involving a knife?

III. Did the trial court err by admitting evidence relating to the appellant's DNA profile?

IV. Did the trial court err by denying the appellant's motion to dismiss on speedy trial grounds?

[1] The appellant phrased the issues as follows:

1. The trial court erred by failing to grant Mr. Holden's Motion to Suppress the items recovered from the apartment where he resided.

2. The trial court erred by refusing to ask during voir dire whether any member of the panel had "any strong feelings about crimes" where a knife was used.

3. The trial court erred in admitting evidence at trial relating to Mr. Holden's DNA profile.

4. The court erred by denying Mr. Holden's Motion to Dismiss inasmuch as he was denied his constitutional right to a speedy trial.

5. The trial court erred by admitting irrelevant and/or unduly prejudicial evidence.

V. Did the trial court err by admitting evidence that a witness observed a scratch on the appellant's face before the murder?

For the following reasons, we shall affirm the judgments of the circuit court.

FACTS AND PROCEEDINGS

On December 10, 2011, at 9:54 a.m., the Baltimore City police received a call that a person at 2503 Violet Avenue was not breathing. That address is a high-rise apartment complex that consists of two buildings of "about nine floors" apiece. Officer Andrew Galletti responded to apartment 704 South in the complex. The apartment was rented by Dwight Jones. The Officer saw Fire and EMS personnel loading Jones on a backboard for transport to medical care. Officer Galletti observed that Jones had "blood coming from his chest with multiple puncture wounds to his chest." He further observed that there was "a lot of blood on the floor" of the apartment, there were blood stains on the wall, and the "furniture in the apartment was in disarray, looked like it could have been a struggle there." Jones later died of his injuries.

According to the medical examiner, the cause of Jones's death was "multiple sharp force injuries" and the manner of death was homicide. Jones had sustained 38 "sharp force injuries" to his neck, chest, abdomen, and extremities. The medical examiner determined that five of those wounds were "fatal" and had "caused the injury to the lungs, [heart] and the liver." The medical examiner studied a serrated knife recovered from the kitchen of apartment 701 South and compared it to the wounds on Jones's body. The medical examination showed that all of Jones's wounds were "consistent" with having been inflicted by the serrated knife.

Gregory White lived in apartment 707 South and was "good friends" with Jones. Each had a key to the other's apartment. White also knew the appellant, who from time to time lived in apartment 701 South with his mother, Sandra Holden. Apartments 707 South, 704 South, and 701 South were near each other and opened onto the same common hallway. On the evening of December 9, 2011, White was in his apartment with Jones, Ronald Pretlow, Glen Thomas, the appellant, and the appellant's aunt, Antoinette Holden.[2] During the evening Jones and Antoinette left White's apartment together.

According to Antoinette, that evening of December 9, 2011, she went to the apartment building to visit her sister Sandra in apartment 701 South, where the appellant and Sandra were living. When Antoinette arrived, Sandra was not there but the appellant was. Antoinette stayed and kept the appellant "company for a while." Antoinette and the appellant then went to White's apartment where they watched television and drank liquor. Jones invited her to his apartment. She and the appellant followed Jones to his apartment. Once there, they watched television and continued to drink. Jones asked Antoinette if she wanted anything and she replied that she did. Jones went into a back room and returned with $20, which he handed to her. She in turn, handed it to the appellant, who then left the apartment. The appellant later returned with two bags of crack cocaine. Antoinette smoked one bag, and the appellant smoked the other. Jones did not use any drugs while Antoinette was in his apartment.

[2] We shall refer to the appellant's mother, Sandra Holden, and his aunt, Antoinette Holden, by their first names to avoid confusion.

The three continued talking until the appellant asked Jones if he could use the bathroom. Jones replied that he could, and the appellant left the area where Jones and Antoinette were sitting. Jones then got up and walked down the hall. Antoinette heard him say something to the appellant. The appellant and Jones then returned to where Antoinette was sitting. She overheard Jones telling the appellant that "he had to go." As Jones was saying this, he appeared "a little bit" upset. He raised his voice "a little bit," and accused the appellant of stealing. Antoinette apologized for the appellant, and she and the appellant left Jones's apartment. Soon thereafter, Antoinette left the apartment building. Video surveillance showed her leaving the building at 1:16 a.m.

According to White, at about 4:30 a.m., Jones came back to his apartment. Jones appeared "a little depressed" and "upset." He stayed for about two hours and then left.

Pretlow, who also lived in the same apartment complex, went to White's apartment later that morning to return a glass. (Pretlow had spent the night in his own apartment). While Pretlow was there, White left to go to Jones's apartment to look for some alcohol. White used the key Jones had given him to enter Jones's apartment. Once inside, he noticed that "[t]wo chairs were turned over and the TV looked like it had been pushed." He saw Jones lying on the floor with a "blanket over him." Thinking Jones may have passed out, White went to him and touched him. When he did so, a "whole bunch of stuff came out of his chest. It was too dark to tell what it was, but I figured it was blood." White returned to his own apartment and told Pretlow to call the police. To Pretlow, White appeared to be in shock. White said, "[M]an, I think Dwight's dead."

Pretlow called 911 and told the operator, "We think the guy is dead. He was arguing with somebody last night."

The police obtained a search warrant for Apartment 701 South, where, as noted, the appellant was staying with his mother. They found a serrated knife at the bottom of a drain board in the kitchen. The sink was partially filled with water and had a "strong smell of bleach." They also found a bleach bottle on the kitchen floor.[3] Jones's DNA was found on the bleach bottle. DNA "consistent with a mixture of [Jones's] and at least one additional unknown individual" was found on the interior bathroom door of the apartment. The appellant could neither be "included nor excluded as a possible contributor to the mixture."

We will provide additional facts as relevant to our discussion of the issues.

DISCUSSION

I.

Shortly after responding to the apartment complex on December 10, 2011, the police began interviewing witnesses. The search and seizure warrant application for apartment 701 South was prepared and the warrant was signed the same day and executed at 6:18 p.m. As noted, a serrated knife was found in the kitchen, and a bleach bottle on which Jones's DNA was located was found on the kitchen floor.

[3] No DNA was found on the handle of the knife and a swab taken from the blade of the knife yielded inconclusive results. At trial, Candra Johnson, an expert in DNA analysis and testing, testified that she performed the DNA analysis in this case and that bleach is used in the laboratory to clean their equipment and surface areas to remove DNA.

The affidavit in support of the warrant application verbatim read as follows:

On 10 Dec. 2011, at approx. 10:13 hrs. P/O Slade, S. (Unit # [xxx]/ Seq. #[xxx]) contacted the Homicide Unit advising of a male found deceased suffering from multiple stab wounds at 2503 Violet Ave. Apartment #704 S. Upon this notification your Affiant (Det. R. Bennett) as well as Det. Sgt. W. Simmons responded directly to the scene arriving at approx. 1039 hrs.

Upon your Affiant's arrival to the scene information obtained from the officers is that a call for service was dispatched to 2503 Violet Ave. Apartment #704 S (Monte Verde Apartments) for a DOA. Police and Paramedics arrived on scene to render aid to the deceased. The deceased, who is tentatively identified as Dwight Jones (B/M dob 01/15/53), was observed laying face down with a blanket covering him. Upon rendering aid it was found that the deceased was suffering from multiple stab wounds to the torso area. The victim was transported to Sinai Hospital where despite medical intervention was pronounced deceased by Dr. Rodriguez at 1037 hrs. Located inside of Apartment #704 S was suspected blood and signs of a struggle. Chairs were observed knocked over as well as a TV that appears to have been moved from its original position. A blood trail was also located at the front entry way of Apartment #704 S. leading into the hallway. A cell phone was also located on this table with the knocked over chairs. Blood was also observed on the walls, a small table and the couch. Apartment #704 S was secured by Northwest District Patrol Officer so that a Search and Seizure Warrant could be prayed for.

Several potential witnesses were transported to the Homicide Unit at which time it was learned that the victim along with several individuals to include a Gregory Holden B/M/38yoa: SID#1217368: Height: 5'11"; 150lbs, as well as an unk. B/F who Gregory Holden referred to as his "Aunt" were inside of 2503 Violet Ave., Apartment #707 S with a tan front door and the numbers 707 S in white on the door knocker, consuming alcohol. Also present was a Gregory White and Ronald Pretlow.

Information was also learned through the interviews that early this morning the victim spoke with a Mr. Gregory White and advised that he was scared because he had to, "Put out Greg" because he (the victim) caught him (Gregory Holden) going through his drawers. The victim left and went back to his apartment #704 S. Shortly thereafter Ronald Pretlow responded to Gregory White's apartment (Apartment #707 S.) to return a glass. During this visit they became aware that they were out of alcohol and knew that the victim had alcohol in his apartment. The victim and Gregory White had

> keys to each other's apartments as they were close friends and each others emergency contact.
>
> Mr. Gregory White responded to Apartment #704 S. in an attempt to get more alcohol. Utilizing a key to gain access to the victim's apartment he found the victim covered in a blanket, deceased in the living room. 911 was notified at this time.
>
> According to Ms. M. Moss (Security Officer for Monte Verde Apartments) Gregory Holden's mother (Sandra Holden) resides on the 7th floor at Apartment #701 S. A sign in sheet dated for 12/10/11 shows that a G. Holden signed in utilizing the tenant/address of 701 S. – S. Holden. At this time your Affiant as well as Uniformed Patrol Officers responded to Apartment #701 S. with a tan front door and the numbers 707 S in white on the door knocker. After numerous knocks went unanswered a key was obtained to enter the apartment. No persons were located within Apartment #701 S. This location was also secured by a Uniformed Officer so that a Search and Seizure Warrant could be prayed for. Efforts are currently under way in an attempt to locate Gregory Holden (B/M/38yoa; SID#1217368; Height: 5'11"; 150lbs).
>
> Your Affiant prays that a Search and Siezure Warrant be granted for Apartment #701 S., 704 S. and 707 S. so that evidence related to this case can be recovered. Your Affiant also prays that a Search and Seizure Warrant be granted to obtain a DNA sample from Gregory Holden to compare to evidence that will be recovered in this case.

The appellant argues that "[t]he judge who issued the warrant lacked a substantial basis for finding probable cause to search the residence, and the officer presenting the warrant application should have recognized that the facts asserted did not establish probable cause to search the home for evidence of the homicide." As such, the appellant argues, "the good faith exception to the exclusionary rule does not apply, and the evidence should have been suppressed." Specifically, he argues that there was "absolutely nothing in the affidavit that could provide anyone with more than a mere suspicion that [the appellant] was somehow involved in the murder." Further, he alleges

that the "application failed to establish a specific nexus between the homicide and the place to be searched[.]" The State counters that the "warrant was supported by probable cause," and, even if it was not, the police acted "upon it in good faith."

"Before conducting a search, ordinarily the police must obtain a search warrant that is, itself, based upon 'sufficient probable cause to justify its issuance as to each person or place named therein.'" *Patterson v. State*, 401 Md. 76, 92 (2007) (quoting *State v. Ward*, 350 Md. 372, 387 (1998)). "[T]here must be a nexus between criminal activity and the place to be searched." *Agurs v. State*, 415 Md. 62, 84 (2010). The Court of Appeals discussed the nexus requirement in *Holmes v. State*, 368 Md. 506, 522 (2002).

> Direct evidence that contraband exists in the home is not required for a search warrant; rather, probable cause may be inferred from the type of crime, the nature of the items sought, the opportunity for concealment, and reasonable inferences about where the defendant may hide the incriminating items.

"The task of the issuing judge is to reach a practical and common-sense decision, given all of the circumstances set forth in the affidavit, as to whether there exists a fair probability that contraband or evidence of a crime will be found in a particular search." *Greenstreet v. State*, 392 Md. 652, 667–68 (2006) (citing *Illinois v. Gates*, 462 U.S. 213, 238–39 (1983)). When reviewing the issuance of a search warrant, the suppression court determines "whether the warrant-issuing judge was or was not in legal error." *State v. Johnson*, 208 Md. App. 573, 579 (2012). In making that determination, the suppression court conducts a "deferential appraisal" of the issuing judge's ruling and determines if the issuing judge had "some substantial basis for issuing the warrant." *State v. Jenkins*, 178 Md. App. 156, 162 (2008).

When reviewing the suppression court's determination, we "do so not by applying a *de novo* standard of review, but rather a deferential one." *Greenstreet*, 392 Md. at 667. Like the suppression court, "[w]e determine first whether the issuing judge had a substantial basis to conclude that the warrant was supported by probable cause." *Id.* (citing *State v. Amerman,* 84 Md. App. 461, 463–64 (1990)). This review is confined "to the information provided in the warrant and its accompanying application documents." *Greenstreet*, 392 Md. at 669 (citing *Valdez v. State,* 300 Md. 160, 168 (1984)). "A substantial basis is less weighty and less logically probative than probable cause." *Johnson*, 208 Md. App. at 586–87.

In this case, we hold that the issuing judge had a substantial basis to conclude that the search warrant for apartment 701 South was supported by probable cause. The warrant affidavit related that the responding officers found Jones's dead body, in his apartment (704 South). He had sustained multiple stab wounds. Inside that apartment, the police found "suspected blood and signs of a struggle." A blood trail led from that apartment to the apartment complex hallway. Witnesses advised that Jones had been in apartment 707 South, drinking with the appellant and several other people; that Jones, the appellant, and Antoinette went to Jones's apartment, and that, early on the morning of December 10, 2011, Jones had expressed fear of the appellant. Specifically, he was fearful because he had had to throw the appellant out of his apartment because he had caught him "going through his drawers." Jones told White about that and then returned to his own apartment. Later that morning, he was found dead in his apartment. Officers also learned that Sandra, the appellant's mother, resided in apartment 701 South, and that

a sign in sheet dated December 10, 2011 showed a "G. Holden" (the appellant) signing in and "utilizing the tenant/address of 701 S. – S. Holden." That apartment was on the same floor as the apartment in which Jones was found deceased.

Because there was a blood trail leading from Jones's apartment to the common hallway, a reasonable inference could be drawn that, at a minimum, blood evidence could be found in other locations on the same floor, and most likely in 701 South where the person with whom Jones had just had a dispute and about whom Jones had expressed fear was living.

We need not determine whether the good faith exception to the exclusionary rule applies because the issuing judge had a substantial basis for finding probable cause to search apartment 701 South.

II.

The appellant contends the trial court abused its discretion by declining, on *voir dire*, to ask whether any member of the venire had "any strong feelings about crimes where a knife was used."

The following colloquy took place during *voir dire*:

> [DEFENSE COUNSEL]: [W]e would ask for some verbiage about a knife, because there is an allegation that a knife was used in the case, and certain members might have strong feelings about that type of thing.
>
> * * *
>
> [DEFENSE COUNSEL]: [W]e would ask that the Court ask if any member of the panel has any strong feelings about crimes –
>
> [THE COURT]: You can ask that when they come up here.

> [DEFENSE COUNSEL]: Involving – and my request is that it be propounded to the entire panel.
>
> THE COURT: All right.
>
> [DEFENSE COUNSEL]: So that we catch those that don't come to the bench.
>
> THE COURT: All right. Your – your request is noted, I'm not going to have – I'm not going to do all of that. I'm going to ask them whether they've ever been accused of a crime involving a knife, ever been the victim of a crime involving a knife. Those who respond will come up and you can ask them that which is not objectionable.[4]

Ultimately, the court posed the following *voir dire* to the venire:

> Has any member of the jury panel or any member of your immediate family ever been accused of a crime involving a knife[?]
>
> * * *
>
> Has any member of the jury panel or any member of your immediate family ever been a victim of a crime involving a knife[?]
>
> * * *
>
> The defendant in these proceedings has been charged with the offenses of first degree murder of Dwight Jones, carrying a dangerous weapon openly with intent to injure. . . . Does any member of the jury panel have strong feelings about the crimes with which the defendant is charged[?]

"Voir dire is critical to assure that the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights guarantees to a fair and impartial jury will be honored." *Stewart v. State*, 399 Md. 146, 158 (2007) (citing

[4] The State accurately points out that "[d]efense counsel had proposed that the trial court ask all members of the venire whether they had 'strong feelings' about crimes involving knives; the trial court informed counsel that those questions could be propounded one at a time, to the jurors who had answered that they had experience with knife-related crimes. . . . Defense counsel never did so."

State v. Logan, 394 Md. 378, 395 (2006). The main "purpose of voir dire is to ensure a fair and impartial jury by determining the existence of cause for disqualification." *Logan*, 394 Md. at 396. "The scope of voir dire and the form of questions propounded rest firmly within the discretion of the trial judge." *Stewart,* 399 Md. at 159 (citing *Curtin v. State,* 393 Md. 593, 603 (2006)). "The standard for evaluating a court's exercise of discretion during the *voir dire* is whether the questions posed and the procedures employed have created a reasonable assurance that prejudice would be discovered if present." *White v. State*, 374 Md. 232, 242 (2003). "An appellate court reviews for abuse of discretion a trial court's decision as to whether to ask a *voir dire* question." *Pearson v. State*, 437 Md. 350, 356 (2014).

In *Pearson*, the Court of Appeals held that "a trial court must ask during *voir dire* whether any prospective juror has 'strong feelings' about the crime with which the defendant is charged." *Id.* at 363. The appellant argues that it was error for the trial court to refuse to ask whether any prospective juror had "strong feelings" about crimes involving knives. We disagree. The court asked the question specifically contemplated by *Pearson*. The court first asked whether any member of the venire or any member of their immediate family ever had been a victim or had been accused of a crime involving a knife. Later, after informing the venire that the appellant was charged with first degree murder and carrying a dangerous weapon openly with intent to injure, the court asked whether any member of the venire had strong feelings about those crimes. Taken together, we are satisfied that the prospective jurors were informed of the nature of the case, and that court endeavored to ferret out any potential bias.

III.

At trial, the State called Sandra Johnson, the DNA expert, who testified that DNA "consistent with a mixture of [Jones] and at least one additional unknown individual" was found on the interior bathroom door of apartment 701 South, where the appellant often lived with his mother. She used a sample of the appellant's DNA that had been collected in connection with a 2006 case, in which he was never charged, and compared it to the DNA found in this case. The appellant could neither be "included nor excluded as a possible contributor to the mixture."

Before trial, the defense moved in limine, unsuccessfully, to exclude this evidence, on the ground of relevance. Defense counsel argued that, given that the appellant could not be excluded or included as a possible contributor, the DNA was "evidence of nothing." At trial, defense counsel objected to testimony about the appellant's 2006 DNA sample, and argued there was "a break in the chain of custody," because the detectives who retrieved the DNA sample from the appellant did not testify. The court ruled that the evidence was admissible and found that the "possible admission of this DNA analysis report goes to rather the thoroughness or the lack thereof with the investigation."

(a)

On appeal, the appellant "contends that, because his DNA profile could not be 'matched' to any evidence in this case, it is irrelevant evidence and inadmissible." The State counters that the evidence was relevant because "it countered the suggestion that the police investigation had been incomplete or incompetent."

A trial court's decision regarding relevance is reviewed under an abuse of discretion standard. *State v. Simms*, 420 Md. 705, 724 (2011). Trial judges generally have "wide discretion" when assessing the relevancy of evidence. *Id.* Rule 5-401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 5-402 provides that generally "relevant evidence is admissible" and "[e]vidence that is not relevant is not admissible." Relevant evidence may be excluded, however, "if its probative value is substantially outweighed by the danger of unfair prejudice[.]" Md. Rule 5-403.

In the present case, the State points out several occasions when defense counsel called into question the absence of forensic evidence and the thoroughness of the police investigation. In her opening statement, defense counsel told the jury there was a "slight fingerprint" found on a bleach bottle located in the appellant's mother's apartment, and that "there will be no evidence presented saying that that fingerprint belonged to" the appellant. She further advised the jury that the police went into Sandra's apartment and stayed for hours while they tried to obtain a search warrant; and asked, "What were they doing in Sandra Holden's apartment for hours, ladies and gentlemen, without a warrant?" She told the jurors that a smear of blood was found in Jones's apartment, but they wouldn't "see any evidence showing that that blood came from" the appellant. On cross-examination of one of the police officers, defense counsel questioned his lack of follow-up with a witness at the scene. In light of these repeated suggestions that the police investigation was lacking, evidence that the appellant's DNA profile was compared with

the DNA evidence at the scene, while ultimately inconclusive, was relevant so show that the police conducted a thorough investigation.

Even if this evidence was admitted in error, the error would have been harmless beyond a reasonable doubt. An error is harmless when a reviewing court is "satisfied that there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict." *Dorsey v. State*, 276 Md. 638, 659 (1976). We examined similar DNA evidence in *Diggs & Allen v. State*, 213 Md. App 28 (2013). In that case, there was testimony by a DNA expert at trial "that Allen could neither be 'included nor excluded' as the source of the DNA recovered" on an item left at the crime scene. *Id.* at 66. We found "that [while] an inconclusive test is evidence of nothing, . . . any error committed in admitting this evidence is harmless beyond a reasonable doubt because evidence of nothing could not prejudicially affect the fairness of Allen's trial." *Id.* at 66–67. The appellant cites *Diggs & Allen* for the proposition that inconclusive DNA testimony is always irrelevant and therefore inadmissible; but there is nothing in *Diggs & Allen* to suggest that the defendants had called the police investigation into question. Thus, the evidence that makes the DNA evidence relevant here was lacking in *Diggs & Allen*.

In *Clark v. State*, 218 Md. App. 230 (2014), we addressed a similar circumstance. The State presented evidence that Clark could "neither [be] included nor excluded as a possible contributor" to DNA found on a handgun. *Id.* at 240. We held that any error in the admission of that evidence was harmless, explaining:

> Here, the inconclusive DNA test result on the gun may well have been relevant to show that the State performed a DNA test at all. As the prosecutor pointed out, without that evidence the defense could argue that the State had not performed a DNA analysis of the gun that, if performed, could have ruled out the appellant. In any event, even if the evidence were not relevant, its admission was harmless beyond a reasonable doubt.

Id. at 241.

In the case at bar, in light of the blood found at the crime scene and the evidence located in the appellant's apartment, it was important that the police recovered and tested those items. A failure by the State to test those items and compare them against the appellant's DNA profile would have been fodder for criticism by defense counsel. The evidence was relevant for that reason.

(b)

The appellant challenges the chain of custody of his DNA profile evidence, arguing that the profile evidence was inadmissible because "[t]here was no independent 'match' or corroboration that this DNA profile belonged to" him. The State responds that this claim of error lacks merit because the "State never sought to introduce into evidence either (1) the 2006 sample of [the appellant's] blood, or (2) any match of that sample to biological samples found during the investigation."

"Trial judges are afforded 'broad discretion in the conduct of trials in such areas as the reception of evidence.'" *Hopkins v. State*, 352 Md. 146, 158 (1998) (quoting *Void v. State*, 325 Md. 386, 393 (1992)). We review the trial court's "evidentiary rulings for abuse of discretion." *Easter v. State*, 223 Md. App. 65, 75 (2015) (citing *Simms*, 420 Md. at 724–25). "Abuse occurs when a trial judge exercises discretion in an arbitrary or

capricious manner or when he or she acts beyond the letter or reason of the law." *Jenkins v. State*, 375 Md. 284, 295–96 (2003) (citations omitted).

Chain of custody evidence is necessary to demonstrate the "ultimate integrity of the physical evidence." *Best v. State*, 79 Md. App. 241, 256, *cert denied*, 317 Md. 70 (1989). When a tangible piece of evidence is introduced, chain of custody must "account for its handling from the time it was seized until it is offered into evidence." *Lester v. State*, 82 Md. App. 391, 394 (1990) (citing *Amos v. State*, 42 Md. App. 365, 370 (1979)). "The circumstances surrounding its safekeeping in that condition in the interim need only be proven as a reasonable probability . . . and in most instances is established . . . by responsible parties who can negate a possibility of 'tampering' . . . and thus preclude a likelihood that the thing's condition was changed." *Wagner v. State*, 160 Md. App 531, 552 (2005) (citations omitted).

In the present case, chain of custody is not pertinent, because the State did not introduce the appellant's 2006 DNA sample, nor did the State present evidence that the appellant's sample matched the physical evidence taken in this case. Maryland Rule 5-703(a) provides, "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing." The rule further states that the "facts or data need not be admissible in evidence." Moreover, as held above, any chain of custody error in admitting evidence of the appellant's DNA profile was harmless beyond a reasonable doubt.

IV.

The appellant was indicted on June 25, 2012, arraigned on October 1, 2012, and tried beginning on September 2, 2014. He contends he was denied his right to a speedy trial under the Sixth Amendment of the United States Constitution and Article 21 of the Maryland Declaration of Rights. "In assessing on appeal whether a defendant has been denied this constitutional right, we make our own independent examination of the record. In so doing, we defer to the circuit court's first level findings of fact unless clearly erroneous." *Henry v. State*, 204 Md. App. 509, 549 (2012) (citations omitted). We then must make our "own independent constitutional analysis." *Glover v. State*, 368 Md. 211, 220 (2002).

In *Barker v. Wingo*, 407 U.S. 514 (1972), the Supreme Court explained the constitutional analysis to be applied in the speedy trial context. "The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Id.* at 530. Should such a delay be demonstrated, the trial court must balance four factors to determine if the delay violates the defendant's speedy trial right. *Glover*, 368 Md. at 222. The factors to be considered are: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his speedy trial right; and (4) the presence of actual prejudice to the defendant. *Id.*

(a)

"The speedy trial clock starts ticking when a person is arrested or when a formal charge is filed against him." *State v. Bailey*, 319 Md. 392, 410 (1990). "[T]he length of

delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case." *Barker*, 407 U.S. at 530–31. The State concedes, correctly, that the delay in this case, "in excess of two years, triggers the speedy trial analysis." *See Brady v. State*, 291 Md. 261, 265 (fourteen month delay triggers analysis); *Reed v. State*, 78 Md. App. 522, 537 (1989) (delay of thirteen months presumptively prejudicial).

The length of the delay is just one factor to be considered in the speedy trial analysis. There is "no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months." *Barker*, 407 U.S. at 523. "The length of delay, in and of itself, is not a weighty factor." *Glover*, 368 Md. at 225. The delay in *Barker* exceeded five years but was deemed permissible in light of the other factors. *Barker*, 407 U.S. at 534. In *State v. Kanneh*, 403 Md. 678 (2008), the Court held that a delay of 35 months did not violate the defendant's constitutional right to speedy trial. *Id*. at 694. In this case, the appellant was tried approximately 26 months after he was indicted. While lengthy, this delay, in and of itself, is not a weighty factor.

(b)

We next look to the reason for the delay. The *Barker* Court explained:

> Closely related to length of delay is the reason the government assigns to justify the delay. Here, too, different weights should be assigned to different reasons. 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.

407 U.S. at 532 (footnote omitted).

The following is a summary of the pertinent chronology in this case:

November 26, 2012: The first trial date was postponed by agreement. Defense counsel stated to the court, "Well, I don't think this is the day for us. I don't think it's the day for me. I have a lot of DNA evidence[.]" "This isn't a good time." The State responded that it was "technically ready," but had a witness with medical issues, so did not have a "problem" with the postponement.

February 4, 2013: The court found good cause to postpone the trial because no court was available. Both parties indicated they were ready.

March 8, 2013: The State requested a postponement because a witness was unavailable. Defense counsel did not object. The court found good cause to postpone.

April 18, 2013: The court found good cause to postpone the trial because no court was available. Both parties indicated they were ready.

June 27, 2013: The State requested a postponement of a July 1, 2013 trial date because the medical examiner would not be available until August due to a "medical issue." The court found good cause, over defense objection.

September 10, 2013: Defense co-counsel entered her appearance, and requested a postponement for "additional time to prepare." The State objected, stating that it had been ready and noting that "it's hard to keep all the witnesses together." The court found good cause.

November 18, 2013: The State requested a postponement due to an unavailable witness. Good cause was found. Trial was reset for 3 weeks later.

December 9, 2013: Defense counsel requested a postponement because she was in another trial. The State responded that it was ready. The court found good cause.

March 11, 2014: The court found good cause to postpone because no court was available. Both parties indicated that they were ready.

April 17, 2014: The court found good cause to postpone because no court was available. The court offered to "hold it over" as a courtroom might become available. The State agreed to have the case "held over," but the defense objected, as she had another case starting 12 days later, on April 29th. The State "again request[s] that defense agree to specially set this matter." Defense stated she was "amenable to that."

July 1, 2014: Defense counsel asked the court to begin ruling on pre-trial motions, and then recess later in the week so co-counsel could be with her mother, who was scheduled for surgery, and then restart the following week. The State objected because one of its witnesses was unavailable the following week. The court stated it could not follow defense counsel's proposed schedule because the motions judge needed to be the same judge that would preside over the trial and no judge was available. The court explained, "I can't send a trial of this length to anybody right now, and I can't segment the trial." The defense objected to the postponement. The State responded that it was not asking for a postponement. Ultimately, the court found that it was a court postponement, but that while a court could become available, "[t]he problem is the schedule of the parties."

Trial commenced on September 2, 2014. On the first day, defense counsel moved to dismiss "for lack of a speedy trial." The State proffered that it had made multiple attempts to have the case specially set, but defense counsel had refused to cooperate. The State proffered the following:

> With regard to the postponement requests, I would bring to the Court's attention that on July 30th of 2013, the State actually sent a letter to [defense counsel], I have a copy of it, in which I said, "I would like to try and specially set this case for September, please advice [sic] if you're willing to apply to [the court] for specially set status." No reply whatsoever from the defense.
>
> I sent e-mail, which I also have a copy of to [defense counsel] on Thursday, January 2nd, 2014, in which I said "Our trial date is March 11th, so I was thinking of trying to get it specially set for that date." [Defense counsel] replied, "Let me get back to you on that. Thanks." No reply.

> There was another chance, your Honor, when I was trying to specially set the case and defense counsel wanted an additional copy of a document. She said she would not send the specially sent [sic] form back until I had provided a copy of a pdf file to her, that delayed us being able to specially set that matter.

The court denied the motion to dismiss, stating:

> First of all, good cause has been found for each and every postponement, even beginning with the Court's current postponement as of March 8th, 2013.
>
> And with the gamesmanship that is involved in all of this kind of litigation, there have been an attempt by the State with regard to trying to specially set this matter, I think around this time of last year. Didn't work.
>
> * * *
>
> There are 50 cases a day set in the Circuit Court for Baltimore City on nine trial dockets. And I'll note the impracticality.
>
> Now, as to this specific defendant, this case has been set since November 26th of 2012, beginning with a mutual postponement, ending with a not court available, which leads to today's trial date. Splice in a few more not courts available, a couple of State's postponements, and a couple of defendant's postponements, it runs the gamut for reasons for postponement with good cause having been found each and every one.

By our count, there were two defense postponement requests, three State postponement requests, one mutual postponement request, four court postponements due to court unavailability, and one postponement due to mutual court and counsel scheduling conflicts. On two of the dates that the postponement was ruled a court postponement, the court attempted to accommodate the parties, but the defense either did not want to wait for a court to become available, or wanted to delay the continuation of the trial to a date on which the State's witnesses were unavailable. Additionally, there was evidence that the defense did not cooperate with the State's attempts to have the case specially set. The

reasons for the delay in this case, while many, were reasonable and do not weigh in favor of the defense.

(c)

We next look to whether the appellant asserted his speedy trial right. "[T]he defendant's assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right." *Id.*, at 528. We are to "weigh the frequency and force of the objections as opposed to attaching significant weight to a purely *pro forma* objection." *Id.* at 529. "The defendant's assertion of his speedy trial right" is given "strong evidentiary weight in determining whether the defendant is being deprived of the right." *Id.* at 531–32.

On October 2, 2012, the appellant filed an omnibus motion asserting his right to a speedy trial. He subsequently objected "for the record" to the State's postponement request of the July 1, 2013 trial date. He re-asserted his speedy trial right on March 11, 2014, and July 1, 2014. Trial was postponed on March 11 due to court unavailability. We note again, that the court and the State were both available for trial on July 1, 2014, but that due to the defense request to segment the trial, the case ultimately was postponed. On April 17, 2014, the court indicated that while there was no court available to hear the case immediately, it could hold the case over until a court became available. While the State agreed to this arrangement, defense counsel rejected the court's offer, citing a scheduling conflict twelve days later, on April 29th. While the record reflects that the appellant asserted his speedy trial right, it cannot be said that he did so vigorously, and in some instances he appeared to resist attempts to get the case to trial.

(d)

The fourth and final factor we must consider is "prejudice to the defendant." *Id.* at 532. The *Barker* Court addressed the manner in which a reviewing court should assess this factor:

> Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (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. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious.

Id. (footnote omitted).

The appellant argues that he suffered actual prejudice due to the delay in this case, because an "essential witness" died before the case went to trial. During the motions hearing, defense counsel noted that the appellant's mother died on June 3, 2014, and proffered to the court that she would have been a defense witness and would have testified as follows:

> These players, these characters that I mentioned were acquaintances and friends, really, that hung out together all the time. They were in and out of each others' apartments. There were disagreements. There were cussing fights. There were occasionally physical scuffles among these individuals who did like to drink heavily and on a regular and consistent basis.

The appellant further argues that he was prejudiced because his mother's death while he was incarcerated was extremely upsetting to him.

In response, the State notes that the appellant's mother was not a witness to the events because she was in the hospital at the time of the murder. It further argues that the

appellant's "attachment to this witness was not so great that he had disclosed her name to the State as a witness in discovery."

While we recognize that the death of his mother while he was incarcerated was undoubtedly upsetting to the appellant, she was not a witness to any of the events pertinent to this case, and her proffered testimony would have had very limited relevance.

Based upon our consideration of all the pertinent factors, we hold that the trial court did not err in denying the appellant's motion to dismiss, as his right to a speedy trial was not violated.

V.

The apartment building's surveillance cameras captured the appellant leaving and returning to the apartment building multiple times during the early morning hours of December 10, 2011. He is seen leaving close to 1:16 a.m., with his aunt, Antoinette, and returning to the complex soon thereafter. Robert Aytch was working overnight security at the apartment complex on December 9-10, 2011. He was working at the security desk at the entrance of the apartment complex at approximately 1:00 a.m., when he saw the appellant enter the building. After entering, the appellant asked Aytch to call Jones. Aytch looked up Jones's phone number in a book the complex kept of the residents' phone numbers, but when he called, Jones did not answer.

Later that night, Aytch again saw the appellant leave the building. Surveillance cameras captured the appellant leaving at 2:30 a.m. He is next seen on the surveillance camera returning at 4:22 a.m. At trial, Aytch was shown this portion of the surveillance video and the following exchange occurred:

[THE STATE]: Do you recognize the gentleman coming in to the apartment complex?

[AYTCH]: Yes.

[THE STATE]: Who is that?

[AYTCH]: Defendant.

[THE STATE]: Okay. What was the defendant asking you, if you recall?

[AYTCH]: (Inaudible) he had a scratch on his face.

The appellant contends that evidence of the scratch on his face was not relevant and therefore was not admissible. He further argues that because he probably was scratched "during an unrelated 'scuffle,'" the scratch was "evidence of 'prior bad acts' that are inadmissible under Md. Rule 5-404(b)." The State counters that this issue is not preserved because there was no timely objection at trial to the testimony about the scratch on the appellant's face. It also argues that, even if preserved, the testimony was "relevant to demonstrate Aytch's familiarity with" the appellant. Finally, the State argues that the testimony about the scratch was not inadmissible evidence of a prior bad act as "there was no suggestion that the source of the scratch was some bad act."

Under Rule 4-323, an objection to the admission of evidence must "be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent." Where a party has moved to exclude evidence the "court's ruling which has the effect of admitting contested evidence does not relieve the party, as to whom the ruling is adverse, of the obligation of objecting when the evidence is actually offered.

Failure to object results in the non-preservation of the issue for appellate review." *Hickman v. State*, 76 Md. App. 111, 117 (1988).

Aytch's testimony about the scratch on the appellant's face was the subject of a motion in limine by the defense prior to trial. The court denied the motion, whereupon the following exchange occurred:

> THE COURT: Motion to suppress the statement he had a scratch on his face is denied. Thank you.
>
> [DEFENSE COUNSEL]: And we would ask for a continuing objection, Your Honor.
>
> THE COURT: You're [sic] objection is noted and continues.
>
> [DEFENSE COUNSEL]: Thank you. Um, just so I don't have have [sic] to jump up and down and I don't waive anything, and noted means granted? So I—I—
>
> THE COURT: Yes, ma'am.
>
> [DEFENSE COUNSEL]: Thank you, sir.
>
> THE COURT: In that regard, yes.
>
> [DEFENSE COUNSEL]: Thank you, your Honor, to continue –
>
> THE COURT: Look, you may – just so it's preserved, you may want to just make – I move to, you know, to suppress – I object, at the point that she asks the question so it is absolutely preserved on the record. Because I know when it goes down to Annapolis the reviewing court is all – they kind of nose [sic] continuing objections.
>
> [DEFENSE COUNSEL]: Right.
>
> THE COURT: Although I've granted you a continuing objection.
>
> [DEFENSE COUNSEL]: Yes, sir.

THE COURT: But at the point the objection becomes ripe, make it. You don't have to approach the bench, I'll just say overruled and we'll move on.

[DEFENSE COUNSEL]: Yes, sir. If the Court would allow, I'd like to indicate my objection by just referring to our pretrial motions.

THE COURT: That – that's – that will –

[DEFENSE COUNSEL]: And so that way –

THE COURT: – preserve it.

[DEFENSE COUNSEL]: Okay.

The defense also had moved *in limine* to preclude evidence of Aytch's identification of the appellant in a photo array. During the hearing on that motion, defense counsel showed Aytch a copy of the photo array, and the following exchange occurred:

[DEFENSE COUNSEL]: [S]o what did you write on the back of the – is that your handwriting on that?

[AYTCH]: Yes, it is.

[DEFENSE COUNSEL]: And what did you write there?

[AYTCH]: "Person asked me to phone Dwight Jones apartment which I did, I didn't get an answer. A few hours later I again saw him, he asked me did he have a scratch under his right eye, I said yes."

[DEFENSE COUNSEL]: Okay. And that's the person that you identified on the other side?

[AYTCH]: Yes.[5]

[5] The photo array is not included in the record.

The court denied the motion *in limine*. At trial, the State showed Aytch the photo array and the following exchange occurred:

> [THE STATE]: And on the back of it, there's a statement. I'll just ask you to read that to yourself. Read it to yourself.
>
> [AYTCH]: Person asked me –
>
> [THE STATE]: No. No. No. To yourself.
>
> [AYTCH]: Oh. I'm sorry.
>
> [THE STATE]: Did you write that statement?
>
> [AYTCH]: Yes.
>
> [THE STATE]: Okay. Did anybody tell you what to write?
>
> [AYTCH]: No.
>
> [THE STATE]: Your Honor, I would offer State's Exhibit 26 into evidence.
>
> [DEFENSE COUNSEL]: **Subject to the prior motion, Your Honor.**
>
> [THE COURT]: **Subject to the prior objection, the Court's ruling is the same.** State's Exhibit 26 is now in evidence.

(Emphasis added.)

Later during Aytch's testimony, he was shown the video surveillance of the entrance to the apartment complex that documents his interaction with the appellant in the early morning hours of December 10, 2011. Just before the video was played, defense counsel addressed the court as follows:

> [DEFENSE COUNSEL]: Just noting our prior conversation. Thank you.
>
> [THE COURT]: I'm sorry. I note the prior request. The Court stands with it's [sic] previous ruling. Thank you.

Upon viewing the video, the following occurred:

[THE STATE]: Do you see yourself on the video?

[AYTCH]: Yes.

[THE STATE]: Where are you at?

[AYTCH]: At the front desk.

[THE STATE]: Do you recognize the gentleman coming in to the apartment complex?

[AYTCH]: Yes.

[THE STATE]: Who is that?

[AYTCH]: Defendant.

[THE STATE]: Okay. What was the defendant asking you, if you recall?

[AYTCH]: (Inaudible) he had a scratch on his face.

The State maintains that the defense objected at trial when Aytch testified about identifying the appellant in the photo array, but did not object with respect to the video surveillance regarding the scratch. We disagree. When the motion *in limine* regarding the scratch was argued and denied, defense counsel asked to "indicate my objection [at trial] by referring to our pretrial motions," to which the court responded "that will . . . preserve it." When the State sought to admit into evidence the photo array in which Aytch identified the appellant, defense counsel addressed the court and said, "Subject to the prior motion, Your Honor." On the back of the photo array, Aytch had written "[p]erson asked me to phone Dwight Jones apartment which I did, I didn't get an answer. A few hours later I again saw him, he asked me did he have a scratch under his right eye,

I said yes." It is clear that defense counsel's objection was not only to the admission of Aytch's pretrial identification of the appellant, but also to the writing on the back of the array that referenced the scratch on the appellant's face. And before the surveillance video was published to the jury, defense counsel again addressed the court and stated, "Just noting our prior conversation." The court then responded, "I note the prior request. The Court stands with it's [sic] previous ruling." It is plain that defense counsel sought to preserve her objection each time the State sought to introduce evidence of the scratch on the appellant's face, and that the court noted the objections.

As discussed above, "relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence," Md. Rule 5-401; "Trial judges generally have 'wide discretion' when weighing the relevancy of evidence," *Simms*, 420 Md. at 724; and we review a trial court's relevancy decision for abuse of discretion. *Id.* Relevant evidence may be excluded, however, when

> 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.

The appellant maintains that the evidence about the scratch on his face was "inconsequential" and therefore irrelevant, because defense counsel had proffered at the motions hearing that the appellant's "presence in the apartment building on this day and time would not be in dispute." Indeed, at the motions hearing, defense counsel proffered

that Aytch "seeing my client come in is not something that—that's not the heart of the case, and it's not something that we were, you know, vigorously contesting in this case at all." The State responds that Aytch's testimony regarding his conversation with the appellant about the scratch on his face was relevant "to demonstrate Aytch's familiarity with" the appellant, and that it was "simply the manner in which Aytch recalled seeing [him] at the apartment building on the day of the murder."

Notwithstanding defense counsel's pretrial proffer, the appellant's presence in the apartment building at the time of the murder was an issue at trial. As there were no witnesses to the murder itself, the State's case was a circumstantial one. The appellant was not in apartment 701 South when officers responded to the scene on the morning of December 10, 2011. In a portion of the appellant's recorded statement to the detectives, which was played to the jury, he denied being there when the murder happened and said he had last seen Jones "[p]robably a day or two . . . something . . . before" the murder. In the same statement, when asked the last time Jones had been in his apartment, appellant responded that he did not have an apartment. Under the circumstances, the appellant's presence at the apartment complex at the time of the murder was not a forgone conclusion. The appellant's conversation with Aytch on the day of the murder was relevant to show the basis of Aytch's recollection. The trial court did not abuse its discretion in ruling the evidence relevant.

Additionally, the probative value of the evidence outweighs any potential for prejudice. There were no witnesses to the murder. Placing the appellant in the apartment building at or near the time of the murder was critical to the State's case. Aytch not only

remembered seeing the appellant around 4:00 a.m. on the day of the murder, he remembered the nature of his conversation with the appellant. This detail lent credibility to Aytch's testimony.

The appellant argues that evidence of the scratch on his face was prejudicial, because it was "presumably incurred during an unrelated 'scuffle.'" There are a multitude of ways to scratch one's face, most of which are completely innocuous. The mere presence of a scratch does not lend itself to the presumption that the appellant had been engaged in a scuffle prior to the murder.

Nor was the scratch evidence inadmissible as "prior bad acts," under Rule 5-404(b). That rule provides:

> Evidence of other crimes, wrongs, or acts including delinquent acts as defined by Code, Courts Article, § 3-8A-01 is not admissible to prove the character of a person in order to show action in conformity therewith. Such evidence, however, may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident.

"[A] bad act is an activity or conduct, not necessarily criminal, that tends to impugn or reflect adversely upon one's character, taking into consideration the facts of the underlying lawsuit." *Klauenberg v. State*, 355 Md. 528, 549 (1999). The mere evidence of a scratch on the appellant's face does not impugn or reflect adversely upon his character. The court did not err in admitting Aytch's testimony about a scratch on the appellant's face.

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