Circuit Court for Prince George's County
Case No. CT140217X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1552

September Term, 2016

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RAYMOND EDWARD FORD, JR.

v.

STATE OF MARYLAND

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Eyler, Deborah S.,
Beachley,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Beachley, J.

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Filed: November 20, 2017

On November 16, 2013, three hooded gunmen assaulted members of the Gordon family in their home. After killing the family's dog, the robbers stole cash and a distinctive Rolex watch that police later recovered from the residence of Raymond Edward Ford, Jr., appellant.

Following a four-day trial, a jury in the Circuit Court for Prince George's County convicted appellant of two counts of robbery with a dangerous weapon, four counts of first-degree assault, four counts of using a handgun to commit a crime of violence, conspiracy to commit armed robbery, first-degree burglary (home invasion), animal cruelty, and illegal possession of a firearm after a disqualifying conviction. Appellant received the maximum sentence on all counts, with all but four sentences to be served consecutively; the term of incarceration totals 190 years, plus 90 days.

In this timely appeal, appellant presents four questions, which we re-order chronologically as follows:

1. Were [appellant's] speedy trial rights violated by the 827-day delay in his case?

2. Did the trial court abuse its discretion in postponing [appellant's] case, rather than excluding the testimony of jailhouse informant Sherrod Weaver?

3. Did the trial court err in admitting hearsay evidence?

4. Did the trial court err by imposing separate, consecutive sentences for first-degree assault and armed robbery?

We hold that the delay in appellant's trial did not violate his right to a speedy trial, that the trial court did not abuse its discretion in declining to exclude the inmate witness's

testimony, and that the court did not err in admitting the challenged evidence over appellant's limited objection. As the State concedes, however, the court erred in failing to merge, for sentencing purposes, two of appellant's first-degree assault convictions into the two armed robbery convictions involving the same victims. Consequently, we shall affirm appellant's convictions but vacate his sentences and remand for resentencing.

## BACKGROUND[1]

Around 8 p.m. on November 16, 2013, three hooded, gloved, and uniformed gunmen entered the Mitchellville residence of Debra Gordon, "shouting 'police, police . . . put your hands up." Alone in her kitchen, Mrs. Gordon responded that they had the "wrong house." She soon understood they were intruders, however, because they came "right up on [her] with guns."

Drawing on her experiences as a facial microdermabrasion professional in a plastic surgery practice, she studied their faces, which were visible from forehead to chin, "trying to remember every little detail . . . the color of the eyes, eyebrows, mouth and structure of the face." She later identified appellant as the assailant who held a handgun to her head.

Appellant, after telling Mrs. Gordon to stop looking at him, instructed an accomplice to place a hood over her head, while her hands were bound behind her back with zip ties. Appellant stated, "We're not here for you" and that she would "make it through this okay"

[1] Because appellant does not challenge the sufficiency of the evidence supporting his convictions, our summary of the record focuses on evidence that provides context for the issues addressed in this appeal. *See Washington v. State*, 180 Md. App. 458, 461 n.2 (2008).

if she did as she was "told." After going upstairs, appellant returned and said, "he's not up there."

Minutes later, Eric Gordon returned home, accompanied by two of the couple's grandchildren. They were immediately assaulted by two hooded men wielding weapons. Mr. Gordon "was hit upside the head with a pistol." The other assailant "grabbed" the children, then "yelled at them and took their food and threw it on the floor and made them sit in the living room on the sofa." Mr. Gordon saw his wife on the kitchen floor, bound and hooded, as a third gunman with an assault rifle stood over her "with his knee in her back[.]"

During the assault, the robber whom Eric Gordon later identified as appellant said, "I know you from Capitol Heights." Mr. Gordon understood this to mean that the assailant was someone he encountered while gambling, which he did regularly after business hours at certain auto body shops in that area. Mr. Gordon had cash on hand from his business and recent gambling activities, and because earlier that day he traveled to Pennsylvania to purchase a motorcycle.

After taking $6,000 in cash from Mr. Gordon's person, appellant escorted Mrs. Gordon upstairs, threatening to "kill somebody" if they did not get more money. From under a waterbed mattress, appellant took $15,000 in bundled cash and a gold Rolex Presidential watch with an appraised value of up to $40,000. Mrs. Gordon noticed that appellant had difficulty raising the mattress, "like there was something wrong . . . . with his hands."

While his wife was upstairs with two of the robbers and his grandchildren were in the living room, Mr. Gordon fought with the third robber, whom he later identified as Rashard Washington. Mr. Gordon escaped, then ran across the street to his neighbors, who supplied him with a handgun and called 911, at 8:37 p.m.

When Mr. Gordon returned to his house, he observed that two of the robbers were outside with their hoods removed. Mr. Gordon fired at them but the chamber was empty. After both robbers pointed their weapons at him, he ran until he was out of breath.

As soon as the robbers left, Mrs. Gordon called 911. At 8:39 p.m., police responded to the Gordon residence. Officers found the family's dog, Rocco, strangled by a zip tie around his throat and thrown over the backyard fence.

On November 27, 2013, Mr. Gordon, having conducted his own inquiries, provided police with photographs of three suspects–appellant, Rashard Washington, and Kennez Motley. Using these photos, Mr. Gordon identified appellant, with whom he had some mutual acquaintances, as the robber who said he knew him, held a gun to his head, and took his money. On December 5, Mr. Gordon picked appellant and Kennez Motley out of photo arrays. Mrs. Gordon, who had not seen the photographs her husband supplied to police, separately identified appellant and Motley from photo arrays. Both Gordons testified at trial that appellant was the robber who held a gun to their heads.

During the robbery on November 16, 2013, appellant was on home detention for a pending federal weapon charge.[2] He was wearing an ankle transmitter that recorded when he left and returned to his residence but did not pinpoint his location. According to the supervisor monitoring appellant's home detention, appellant had been granted permission to leave his home that day, to work with a catering company owned by his mother. Records for appellant's ankle monitor show that he left his home at 12:19 that afternoon and returned at 8:59 p.m., one minute before his curfew.

On November 27, 2013, Rachel Ford, appellant's wife, posted a photograph on Instagram, "showing off" a gold Rolex watch that she described as a recent birthday gift. When appellant was arrested on December 10, 2013, police executing a search warrant at appellant's residence recovered that watch. The Gordons and an expert in Rolex watches identified it as the rare vintage Rolex stolen during the Gordon robbery.

Police investigators clocked the driving time from the Gordon residence to appellant's home at eighteen minutes. With the first 911 call occurring at 8:37 p.m. and police arriving within two minutes to find the robbers gone, the State maintained that appellant had enough time to return home from the robbery just before his 9 p.m. curfew.

In February 2014, appellant was charged in the Gordon robbery. Rashard Washington and Kennez Motley were subsequently charged as co-conspirators. At the time of his arrest, Mr. Motley was attending a community police academy. In September

[2] After appellant was incarcerated and charged for the Gordon robbery, the federal charge was dismissed, and appellant was released from home detention.

2014, Motley was tried and acquitted on all charges relating to the Gordon robbery, but convicted of a weapon offense. After a series of continuances, stemming in part from the State's desire to jointly try the charges against appellant and Washington, their trial was set to begin on October 27, 2015, when Mr. Washington entered a guilty plea. The following day, after a jury was selected but not sworn, trial was again postponed, until March 15, 2016, twenty-eight months after appellant was arrested.

At trial, the State presented testimony by two inmates who were incarcerated with appellant at different times. Each recounted incriminating statements made by appellant, revealing "insider" details about the Gordon robbery.

Sherrod Weaver shared a cell with appellant, who "was friends with" Weaver's brother. In exchange for a reduced sentence recommendation on a pending burglary conviction, Weaver reluctantly testified against appellant. At another time, Weaver shared a cell with Rashard Washington, against whom he also agreed to testify.

According to Weaver, appellant said "[t]hat he was gambling with somebody, knew that he had money" and drugs, and had the idea to rob him. Appellant, Washington, and "somebody else" whose name Weaver never learned, "end up robbing him." "They said they did something with the dog" and entered the house "[l]ike they was the police[,]" because the "other guy" was "about to become a police officer." One of the weapons was "[a]n assault rifle." They "[t]ied up the girlfriend and then the dude came home." From a bedroom, they got "a brick" (i.e., a kilo) of cocaine. In addition, they got "like $30,000, and a watch," but appellant "didn't split everything up with Rashard," who "didn't know

they got the coke" or the watch. Appellant said "he had to hurry up and get back home" because he was on electronic monitoring at the time. He also said he "wish[ed] he could get rid of" the witnesses.

George Dodson testified in exchange for being granted a hearing on his petition to reduce the twenty-year sentence he was serving for armed robbery. While Dodson was appellant's cellmate for approximately three or four months, appellant told him "about the crime." He said that "him and two dudes went to a house" of "[a] dude he was gambling with," who won a lot of money "at a detail shop in Capitol Heights." Appellant was wearing an "ankle bracelet" that "wasn't going to tell where he was at." "[H]e had a pistol." Appellant said that he and Rashard Washington

> went to his house to go rob him and they cut off the electric. He said the dog was barking and they put a zip tie around the dog's neck.
>
> He said they went in the house, they took his wife upstairs. The lady who was in the house, they took her upstairs. They asked her where the money was at. They went upstairs and they got a couple thousand and a Rolex watch.

Appellant gave the watch "to his girlfriend" named "Rachel." He was not worried about DNA being on the zip ties "cause he had on gloves."

When Dodson was moved to the same housing unit where Rashard Washington was incarcerated, he delivered a message to Washington from appellant, who "told [Dodson to] pull up on him and tell him to do the right thing." Regarding Eric Gordon, appellant "said he should have just left it in the streets" and that "he was going to kill him if he caught up with him." When Dodson encountered appellant at a pretrial proceeding in October 2015,

appellant warned him, "don't do it," because appellant's "arm's long" enough to get Dodson "touched[,]" so when Dodson went home, he "ain't going to be able to go nowhere."

Appellant presented an alibi defense, calling family members who testified that during the robbery, he was in Capitol Heights at a birthday party for his wife's great-grandmother. Cell phone video showed that appellant was present at the party. According to both appellant's wife and his sister, appellant remained at the party until they left together after 8 p.m. They returned directly home, around 8:40 to 8:45 p.m. Appellant stayed outside talking to others, until he came in the house to make his curfew, just before 9 p.m.

Rachel Ford also testified that a few days later, on November 23, the couple purchased the Rolex watch for her birthday. She claimed that the transaction occurred in a shopping center parking lot, where they paid $1,200 to one of appellant's friends, Shawn Minor. She posted an Instagram photo to show off the watch. After appellant was arrested and jailed on December 10, Mrs. Ford deleted that post, but she did not contact police to tell them about the parking lot purchase. Instead, she told appellant's lawyer about it.

Appellant testified in his defense, denying any part in the Gordon robbery. He attended the party for his wife's great-grandmother and performed catering duties while there. He could not remember exactly what time he left but maintained that he and his wife returned home "way before 9:00;" he stayed outside until his mother warned him his curfew was imminent.

Appellant claimed that after Shawn Minor sent him photos of the Rolex watch around November 18, 2013, he bought it. Appellant maintained that the images were on his cell phone, but he last saw the device at his house when he was arrested in December 2013.

Appellant denied that he discussed the robbery with either George Dodson or Sherrod Weaver. He suggested that both of them read "paperwork" provided to him in discovery, which was stored unsecured in his cell whenever he left.

On cross-examination, appellant acknowledged that at the time of the Gordon robbery, he was on home detention for a gun possession charge and that he had been shot in his arms and back, which affected his movement. Appellant conceded that he never saw Weaver or Dodson looking at his "discovery."

In rebuttal, the State called Shawn Minor, who testified that he did not sell appellant the Rolex watch. In addition, the State presented cell phone evidence, discussed in detail *infra*, in Part III, to undermine appellant's alibi that he left the birthday party in Capitol Heights after 8 p.m. and went directly to his residence on John Street in Suitland. The State also recalled Mr. and Mrs. Gordon, who identified appellant by voice as the person who told them not to look at him and demanded money.

Appellant was convicted and sentenced as follows:

| Convictions | Consecutive Sentences | Concurrent Sentences |
|---|---|---|
| Count 1: Robbery with dangerous weapon – Debra Gordon | 20 years | |
| Count 2: Robbery with dangerous weapon – Eric Gordon | 20 years | |
| Count 3: First degree burglary (home invasion) | 25 years | |
| Count 4: First degree assault of Debra Gordon | 25 years | |
| Count 5: First degree assault of Eric Gordon | 25 years | |
| Count 6: First degree assault of grandchild #1 | | 25 years |
| Count 7: First degree assault of grandchild #2 | | 25 years |
| Count 8: Using handgun in crime of violence against Debra Gordon | 20 years, first 5 without parole | |
| Count 9: Using handgun in crime of violence against Eric Gordon | 20 years, first 5 without parole | |
| Count 10: Use of handgun in crime of violence against Destiny Gordon | | 20 years, first 5 without parole |
| Count 11: Use of handgun in crime of violence against Devin Gordon | | 20 years, first 5 without parole |
| Count 12: Conspiracy to commit armed robbery | 20 years | |
| Count 13: Cruelty to an animal | 90 days | |
| Count 14: Illegal possession of firearm | 15 years | |
| **Totals** | **190 years + 90 days** | **90 years** |

We shall add pertinent facts in our discussion of the issues raised on appeal.

## DISCUSSION

### I. Speedy Trial

Appellant contends that he was denied his right to a speedy trial by a series of eight continuances that delayed his trial for 28 months (or 827 days) after his arrest. After independently examining the record, we hold that, although the delay was of constitutional dimension, appellant was not denied his right to a speedy trial, given the reasons for the continuances and the lack of prejudice to appellant's defense.

### A. Standards Governing Review of Speedy Trial Challenge

Maryland courts have

> consistently applied the four factor balancing test announced by the U.S. Supreme Court in *Barker* [*v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182 (1972)] to address allegations that a defendant's right to a speedy trial, as provided by the Sixth Amendment of the United States Constitution and Article 21 of the Maryland Declaration of Rights, has been violated. In *Barker,* the Supreme Court rejected a bright-line rule to determine whether a defendant's right to a speedy trial had been violated, and instead adopted "a balancing test, in which the conduct of both the prosecution and the defendant are weighed." *Barker,* 407 U.S. at 530, 92 S. Ct. at 2191-92. The Court identified four factors to be used in determining whether a defendant's right to a speedy trial has been violated: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id.* at 530, 92 S. Ct. at 2192. None of these factors are "either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant."

*State v. Kanneh*, 403 Md. 678, 687-88 (2008) (some citations omitted). *See also Vermont v. Brillon*, 556 U.S. 81, 89-90, 129 S. Ct. 1283, 1290 (2009) (reaffirming the analytical framework established by *Barker*).

In reviewing the denial of a motion to dismiss for lack of a speedy trial, "we make our own independent constitutional analysis." *Glover v. State*, 368 Md. 211, 220 (2002). In other words, "[w]e perform a *de novo* constitutional appraisal in light of the particular facts of the case at hand; in so doing, we accept a lower court's findings of fact unless clearly erroneous." *Id.* at 221. "Appellate review should be practical, not illusionary, realistic, not theoretical, and tightly prescribed, not reaching beyond the peculiar facts of the particular case." *Peters v. State*, 224 Md. App. 306, 359 (2015) (internal quotation

marks omitted) (quoting *Brown v. State*, 153 Md. App. 544, 556 (2003), and *State v. Bailey*, 319 Md. 392, 415 (1990)), *cert. denied*, 445 Md. 127 (2015).

**B. The Record**

Before trial, appellant twice moved to dismiss the charges against him on speedy trial grounds. The record pertinent to those motions and to this appellate speedy trial challenge is set forth in the following time line, with continuances shown in bold type.

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| December 10, 2013 | ARREST<br>Appellant was arrested and incarcerated. |
| February 6, 2014 | INDICTMENT<br>Appellant was indicted on fourteen counts. |
| February 28, 2014 | FIRST APPEARANCE<br>Appellant's trial was scheduled for June 11, 2014. |
| **June 6, 2014** | **FIRST CONTINUANCE – 70 DAYS – HEARING – DEFENSE DISCOVERY PROBLEM + PROSECUTOR CONFLICT**<br>Because defense counsel could not open discovery discs provided by the State and one of the prosecutors had a conflict due to "a multi-day homicide trial," trial was continued by consent, from June 11 to August 20, 2014, and a new motions hearing date was set. The court designated the continuance as "Joint." |
| August 14, 2014 | STATE'S MOTION TO CONTINUE TRIAL DATE + LATE DISCLOSURE OF STATE WITNESSES<br>The day after identifying two experts who could match Mr. Gordon's Rolex watch to the one recovered from appellant's residence, the State notified defense counsel of its intent to call these experts, then moved for a one week continuance to give "[t]he Defense . . . additional time to investigate these experts, their opinions, and possibly obtain other opinions." Defense counsel's objection "for the record" was noted. |

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| **August 14, 2014** | **SECOND CONTINUANCE – 7 DAYS – LATE DISCLOSURE OF STATE'S EXPERT WITNESSES**<br>The State's motion to continue was granted without a hearing, moving the trial date from August 20 to August 27. |
| August 18, 2014 | MOTIONS HEARING – PHYSICAL ALTERCATION BETWEEN STATE WITNESS AND DEFENSE WITNESS<br>After a suppression hearing, prosecution witness Mr. Gordon "got into a physical altercation with a witness subpoenaed by [co-defendant Rashard Washington] in the hallway outside the Courtroom," resulting in charges of second-degree assault against Mr. Gordon. |
| August 20, 2014 | STATE'S MOTION TO CONTINUE TRIAL DATE – UNAVAILABILITY OF PROSECUTION WITNESS + LATE DISCLOSURE OF DEFENSE WITNESSES<br>After the deadline for disclosure of witnesses, defense counsel belatedly notified prosecutors about "seven witnesses, two of which were alibi witnesses[,]" all of whom the State "need[ed] additional time to investigate[.]" In addition, as a result of the charges against prosecution witness Mr. Gordon, stemming from his courthouse assault on a witness for co-defendant Washington, "the State need[ed] additional time to collect and review the [investigation] materials and provide them to Defense Counsel if necessary," and Mr. Gordon likely "need[ed] additional time to retain Counsel to be available to testify . . . in this matter." Defense counsel "object[ed] for the record[.]" |
| **August 21, 2014** | **THIRD CONTINUANCE – 61 DAYS – HEARING – PROSECUTION WITNESS ALTERCATION + LATE DISCLOSURE OF DEFENSE WITNESSES**<br>Over appellant's objection, the court granted the State's motion for a continuance. Finding "good cause to go beyond *Hicks,*" the court stated, "I do want the case to be tried as quickly as possible." Trial was delayed from August 27 until October 27, 2014. |

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| August 27, 2014 | *HICKS* DATE[3]<br>180-day statutory deadline for appellant's trial. |
| October 17, 2014 | STATE'S MOTION TO JOIN CO-DEFENDANT<br>Citing judicial economy and mutually admissible evidence, the State moved to join its case against appellant with its case against Rashard Washington, who was indicted on July 8, 2014, and scheduled for trial November 24-25, 2014. Kennez Motley, who was indicted on March 25, recently had been acquitted of charges stemming from the Gordon robbery, in a four-day jury trial. |
| October 23, 2014 | STATE'S MOTION TO CONTINUE – INVESTIGATE ALIBI WITNESSES + JOINDER PENDING<br>Because earlier that week, the State had "finally located and interviewed several witnesses" who were identified by defense counsel the week before the previous trial date, it sought "additional time to investigat[e] the information provided by the witnesses, specifically, the alibi provided to Detectives," and to disclose any related materials to the defense. In addition, the pending motion for joinder could not be heard before the trial date, and counsel for proposed co-defendant Washington "need[ed] additional time to prepare for" such a hearing. Defense counsel "object[ed] to this continuance." |
| **October 23, 2014** | **FOURTH CONTINUANCE – 77 DAYS – JOINDER + CONFLICT OF CO-DEFENDANT'S COUNSEL**<br>Without a hearing, the State's motion to continue was granted. Trial was moved from October 27, 2014, to January 12-15, 2015. |
| November 13, 2014 | DEFENSE MOTION TO DISMISS – SPEEDY TRIAL |

[3] Md. Code (2001, 2008 Repl. Vol.), § 6-103(a)(2) of the Criminal Procedure Article and Maryland Rule 4-271(a) both require a criminal defendant to be brought to trial within 180 days after the earlier of the defendant's first appearance in circuit court or the appearance of defense counsel, unless the administrative judge finds "good cause" for a postponement. In *State v. Hicks*, 285 Md. 310, 318 (1979), the Court of Appeals held that charges must be dismissed if the State fails to establish good cause for trying the defendant after this 180-day deadline, which has become known as the "*Hicks* date." *See State v. Huntley*, 411 Md. 288, 298 (2009); *Peters*, 224 Md. App. at 356.

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| November 14, 2014 | HEARING – MOTIONS FOR SPEEDY TRIAL + JOINDER<br>The court granted joinder but reserved ruling on the speedy trial motion for later determination by the trial judge. |
| December 16, 2014 | SUBSTITUTION OF DEFENSE COUNSEL + SPEEDY TRIAL DEMAND + DEFENSE MOTIONS TO SUPPRESS AND FOR DISCOVERY<br>After appellant changed counsel, his new attorney entered his appearance and simultaneously filed omnibus motions "for a speedy trial," to suppress evidence, and for discovery. |
| January 8, 2015 | DEFENSE MOTION TO CONTINUE – NEW COUNSEL<br>New defense counsel filed a "Consent Motion for Postponement of Trial Date," citing his scheduling conflict and the prior "waiver" of appellant's *Hicks* date. |
| **January 9, 2015** | **FIFTH CONTINUANCE – 126 DAYS – HEARING – SUBSTITUTION OF DEFENSE COUNSEL – *HICKS* WAIVER**<br>Over a *Hicks*/speedy trial objection by counsel for co-defendant Washington, the court granted appellant's motion to continue trial from January 12 to May 18, 2015. Defense counsel for appellant stated, "*Hicks* in my case is not a problem," and the court found that the joinder supplied good cause to move Washington's trial date beyond his *Hicks* date. |
| May 14, 2015 | STATE'S MOTION FOR PROTECTIVE ORDER – NEW INMATE WITNESS<br>The State sought a protective order against disclosure of the identity of an incarcerated witness, later identified as George Dodson, whose existence had been disclosed to defense counsel the previous day. Police first met with the inmate on May 6, 2015. The prosecutor met with him and his attorney on May 12, securing a signed agreement to testify. |
| May 14, 2015 | HEARING – JOINT DEFENSE MOTION TO EXCLUDE NEW PROSECUTION WITNESS + STATE'S MOTION TO CONTINUE<br>Counsel for both appellant and co-defendant Washington orally moved to exclude the inmate witness for whom the State sought a protective order. In support, counsel cited the late notice by the State and the necessity of another continuance, |

both to "fully digest and be able to prepare," and also to resolve a conflict in representation that arose because the inmate witness and Washington were both represented by the Public Defender. Because the witness's case "just recently went to sentencing," Washington's representation would have to be reassigned to a panel attorney, who could not be adequately prepared for trial by May 18. Although the court initially deferred its ruling pending a hearing, counsel agreed there was no need for a hearing.

The State then proposed a continuance, citing both the recent notice regarding the inmate witness and its recent discovery of potentially exculpatory DNA material that had just been sent for testing. Counsel for both defendants opposed continuing the trial again, arguing that, instead, the inmate witness should be excluded, and trial should proceed as scheduled.

The court denied the request to exclude the witness, finding the State had no previous knowledge of his existence and that he was "an essential witness."

Defense counsel then told the court that his client had "requested that I move . . . to sever" his case and that "[h]e is still prepared to go forward to trial on Monday." Because the new witness created an attorney conflict only for co-defendant Washington, the court continued Washington's trial date and left appellant's trial as scheduled, to begin on May 18.

May 15, 2015 — STATE'S MOTION TO CONTINUE – VICTIM/WITNESS MEDICAL EMERGENCY

The State filed an emergency motion to continue the May 18 trial date, asserting that "[y]esterday morning, one of the State's essential witnesses, Mr. Gordon, was hospitalized for complications related to previous cancer treatment," and that "[i]t is not known yet when Mr. Gordon will be released from the hospital and available to testify." Defense counsel's objection "*for the record*" was noted.

**May 15, 2015** — **SIXTH CONTINUANCE – 57 DAYS – PROSECUTION WITNESS UNAVAILABLE – MEDICAL EMERGENCY**

Without a hearing, the court granted a continuance, delaying appellant's trial date from May 18 to July 14, 2015.

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| June 9, 2015 | STATE'S MOTION TO CONTINUE – RE-JOINDER<br>Because Washington's new counsel needed more time to prepare for trial, he had moved to continue the July 14 trial date as to his client. In light of that motion, the State requested that appellant's trial date also be continued so the two defendants could be tried together. |
| June 12, 2015 | **SEVENTH CONTINUANCE – 105 DAYS – JOINDER**<br>Without a hearing, the court granted the State's motion to continue, moving trial from July 14 to October 27, 2015. |
| August 26, 2015 | DEFENSE MOTION FOR SPEEDY TRIAL DISMISSAL<br>Defense counsel filed a speedy trial motion to dismiss all charges, complaining that "[a]s of September 2, 2015, the Defendant will have been held a total of 567 days without bond in this matter."[4] |
| October 27, 2015 | TRIAL DATE – SPEEDY TRIAL MOTION DENIED<br>On the scheduled trial date, co-defendant Washington pleaded guilty. Ruling on appellant's speedy trial motion, the court found the delay "of some constitutional dimension" but denied dismissal. The court attributed six months of the delay to appellant and the balance "to the State or to this issue with the co-defendant." It found that appellant had not "shown any prejudice to his ability to defend himself[.]"<br><br>After a jury was selected, defense counsel asked the court to address a motion to exclude Sherrod Weaver, the State's newly identified witness, the next morning. |
| **October 28, 2015** | **EIGHTH CONTINUANCE – 139 DAYS – TRIAL – MOTION HEARING – NEW PROSECUTION WITNESS**<br>Defense counsel moved to exclude testimony by Weaver, a former cellmate of appellant. The State had an initial proffer session with Weaver on July 22, 2015; proffered a cooperating |

[4] Bond review hearings were conducted on April 11, 2014; September 16, 2014; and September 9, 2015. The court declined defense requests to set a bond, citing the nature of the charged offenses, appellant's prior weapons convictions and failures to appear, the fact that he was on home detention at the time of these offenses, and the "volatility of the setting as it still . . . exists between victims and defendants[.]"

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| | agreement to Weaver on September 30; and received the executed agreement on October 20, then notified defense counsel the next morning, on October 21. Defense counsel complained that the State was not diligent in identifying and giving notice of this witness and that he had an inadequate opportunity to investigate or develop defenses based on appellant's "input." The court refused to exclude the witness, finding that the State acted diligently.<br><br>Defense counsel, after consulting with appellant, moved for a continuance. Trial was moved from October 28, 2015, to March 15, 2016. This continuance was charged to the defense. |
| March 15-18, 2016 | Trial proceeded, 28 months (827 days) after appellant's arrest. |

### C. Appellant's Speedy Trial Challenge

Appellant contends the 827-day delay between his arrest and trial violated his right to a speedy trial. Examining the record through the analytical framework established by *Barker,* we disagree.

#### 1. Length of the Delay

"[F]or purposes of a speedy trial analysis, the length of the delay is measured from the date of arrest." *State v. Kanneh*, 403 Md. 678, 688 (2008). This delay is both a factor in the *Barker* balancing formula and "a triggering mechanism[,]" because it is only when a delay is long enough to be "presumptively prejudicial" that it creates "the necessity for inquiry into the other factors that go into the balance." *Barker v. Wingo*, 407 U.S. 514, 530-31 (1972). *See Kanneh,* 403 Md. at 688. Although there is no numerical measure for when a defendant's right to a speedy trial has been violated, a delay of more than one year typically triggers "the balancing analysis required under *Barker*." *Kanneh*, 403 Md. at 688.

When evaluating the length of a particular delay as a factor in the overall "*Barker* balance," courts must consider the nature of the case. *See id.* The longer the delay and the less complex the trial, the more the delay will weigh in favor of the defendant. *See Divver v. State,* 356 Md. 379, 390-91 (1999). For example, "the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." *Barker*, 407 U.S. at 531; *cf., e.g., Divver,* 356 Md. at 389-91 (twelve-month delay in a "run of the mill District Court case" on driving under the influence charges "operates more heavily in [defendant's] favor than would usually be the case in many circuit court prosecutions"). Nevertheless,

> [t]he length of delay, in and of itself, is not a weighty factor, but rather the duration of the delay is closely correlated to the other factors, such as the reasonableness of the State's explanation for the delay, the likelihood that the delay may cause the defendant to more pronouncedly assert his speedy trial right, and the presumption that a longer delay may cause the defendant greater harm.

*Glover v. State,* 368 Md. 211, 225 (2002). *See Kanneh*, 403 Md. at 689.

Here, the period between appellant's arrest on December 10, 2013, and his trial on March 15, 2016, was 827 days. We do not, however, treat this entire period as delay for purposes of our *Barker* analysis, for two reasons. First, the initial period before the first scheduled trial date, which was over six months (from December 10, 2013, until June 11, 2014), is neutral and effectively "excluded from our calculations," because it was "necessary for the orderly administration of justice[.]" *Howell v. State*, 87 Md. App. 57, 82 (1991). *See also Lloyd v. State*, 207 Md. App. 322, 330-31 (2011) (period until first trial date is neutral). Second, as explained below, the final delay of nearly five months

(from October 28, 2015, until March 15, 2016) resulted from a continuance request by appellant and therefore can be excluded from the length of delay.

As the trial court recognized and the State concedes, the seven continuances during the intervening sixteen months (June 11, 2014, until October 28, 2015), in a complex case involving multiple charges, defendants, victims, and witnesses, as well as DNA evidence and changes of counsel, created a delay of constitutional dimension, requiring "*Barker* balancing." *See, e.g., Jules v. State*, 171 Md. App. 458, 482-83 (2006) (sixteen-month delay triggered *Barker* review). *See also Randall v. State*, 223 Md. App. 519, 544-45 (2015) (twenty-five-month delay was presumptively prejudicial, triggering a *Barker* review). The fact that a delay is long enough to trigger a *Barker* inquiry does not, absent more, require dismissal. Indeed, the length of the delay, by itself, "is the least determinative of the four factors that we consider in analyzing whether [a defendant's] right to speedy trial has been violated." *Kanneh,* 403 Md. at 690. For this reason, longer delays than the one experienced by appellant have been held not to violate the right to a speedy trial. *Cf., e.g., Barker*, 407 U.S. at 534-35 (five-year delay did not violate speedy trial right, because the defendant suffered minimal prejudice and did not ask for a speedy trial); *Howard v. State*, 440 Md. 427, 447 (2014) (twenty-five months); *Kanneh,* 403 Md. at 689-90 (thirty-five months); *Randall,* 223 Md. App. at 544, 554-56 (twenty-five months); *Malik v. State,* 152 Md. App. 305, 317-18 (2003) (twenty-three months); *Marks v. State,* 84 Md. App. 269, 282 (1990) (twenty-two months).

Because each period of delay is best evaluated in conjunction with the reason for it, we shall examine these two factors together as they relate to each delay. *See Glover*, 368 Md. at 225.

**2. Reasons for Delays**

> 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.

*Barker*, 407 U.S. at 531.

**First continuance, from June 11 until August 20, 2014 (70 days):** This continuance was granted because the lead prosecutor had a schedule conflict and defense counsel had difficulty accessing digitally delivered discovery documents. These compound reasons resulted in a joint request that is not chargeable to either party. *See, e.g., Howard*, 440 Md. at 448-49 (jointly caused delay was neutral); *Glover*, 368 Md. at 225-26 (joint postponement resulting "from dual factors"); *Marks*, 84 Md. App. at 283 (joint request for continuance is neutral and not chargeable to either party).

**Second continuance, from August 20 until August 27, 2014 (7 days):** This continuance was caused by the State's belated designation of experts related to the stolen watch. Given its short length and that it did not extend trial beyond appellant's *Hicks* date, this delay carries light weight against the State.

**Third continuance, from August 27 until October 27, 2014 (61 days):** This continuance moved trial beyond the *Hicks* date, but the trial court found good cause for postponement based on two factors: (1) the courthouse assault committed by victim/witness Mr. Gordon, which made him temporarily unavailable to the prosecution and required further investigation for potentially exculpatory information; and (2) the belated disclosure of several defense witnesses, including alibi witnesses, which required further investigation by the State. Like the first delay, this delay was jointly attributed to both appellant and the State, and counts against neither. *See Howard*, 440 Md. at 448-49.

**Fourth continuance, from October 28, 2014, until January 12, 2015 (77 days):** This continuance is charged against the State, which successfully moved to join the trials of appellant and Rashard Washington, to a date when counsel for Washington was available. *See, e.g., Kanneh,* 403 Md. at 691 (delay resulting from "the State's motion to consolidate" co-defendants was charged to the State). Because there was good cause for such a joinder-generated delay, it weighs lightly against the State. *See State v. Toney,* 315 Md. 122, 133 (1989) ("the inconvenience of trying several co-defendants separately is good cause for delay of all defendants' trials where one co-defendant is not ready to proceed to trial"); *Marks*, 84 Md. App. at 284 ("the delay attributable to the State was from appellant's co-defendant's request for continuances, and this type of delay is given less weight than a delay caused by the State attempting to deliberately hamper a defendant's case").

**Fifth continuance, from January 12 until May 18, 2015 (126 days):** This continuance is charged against appellant. Two months earlier, he moved to dismiss all

charges on speedy trial grounds. While that motion was still pending, appellant discharged his attorney and retained substitute private counsel, who "waived" appellant's *Hicks* rights and obtained a four-month delay to prepare for trial. *See, e.g.*, *Vermont v. Brillon*, 556 U.S. 81, 90 (2009) ("delay caused by the defense weighs against the defendant"); *Howard*, 440 Md. at 448 (defendant "caused 183 days of delay because he discharged his first lawyer and his second lawyer needed time to prepare").

We note that it was during this delay that the State secured the cooperation of Dodson, appellant's former cellmate, and also initiated DNA testing on newly discovered trace evidence – two of the developments that appellant cites as prejudicial. The State's notice of its intent to call Dodson as a witness, just days before the scheduled trial date of May 18, could have justified another defense continuance. *Cf. Toney*, 315 Md. at 133 (discovery of new evidence constitutes good cause for postponement beyond *Hicks*). This was particularly true because the new witness caused the public defender representing co-defendant Washington to be "conflicted out," necessitating appointment of a panel attorney. *Cf. Ratchford v. State*, 141 Md. App. 354, 362 (2001) (upholding denial of speedy trial motion to dismiss where eighteen-month delay was caused in part by withdrawal of defense counsel due to a conflict of interest). Nevertheless, during the hearing on May 14, 2015, appellant insisted that he wanted to proceed to trial as scheduled, just four days later. Notably, defense counsel did not express any concern that he could not be prepared for trial. The court accommodated appellant's demand, denying the State's request to

postpone that trial date, while simultaneously delaying Washington's trial pending appointment of substitute counsel, which effectively severed their cases.

**Sixth continuance, from May 18 until July 14, 2015 (57 days):** Mr. Gordon's medical emergency caused this delay. Although the unavailability of a critical prosecution witness due to illness counts against the State, such delays are for "a valid reason" that "should serve to justify appropriate delay." *See, e.g., Barker*, 407 U.S. at 534 (seven month delay due to illness of witness provides "strong excuse" for delay); *Howard*, 440 Md. at 448 ("The State caused 270 days of delay due to State's witnesses' unavailability; however, 'a valid reason, such as a missing witness, should serve to justify appropriate delay.'"). This delay carried no weight because of this "valid reason." *Cf. Jules*, 171 Md. App. at 484 (delay caused by unavailability of State witness was charged to State but treated as neutral).

**Seventh continuance, from July 14 to October 27, 2015 (105 days):** This was a second delay to facilitate joinder of co-defendants. It occurred after Washington obtained a continuance to accommodate his newly appointed counsel, who had a scheduling conflict and needed more time to prepare. The court granted the State's request to move appellant's trial date to a jointly available date, resulting in re-joinder. Because rescheduling to permit a joint trial is charged to the State, this second and longer continuance for that purpose carries greater weight. *See Kanneh*, 403 Md. at 691.

**Eighth continuance, from October 28, 2015, until March 15, 2016 (139 days):** In August 2015, appellant filed another speedy trial motion to dismiss, which was denied

on October 27. That same day, co-defendant Washington entered a guilty plea. After a jury was selected, but before it was sworn the following day, the court denied a defense motion to exclude the State's second inmate witness. Although the State was prepared to proceed to trial against appellant, defense counsel requested a continuance in order to investigate the new witness and prepare for trial. This continuance – the longest, at 139 days – is charged against appellant because he requested it. *See Ratchford*, 141 Md. App. at 362 (defendant cannot complain about delay he requested).

We acknowledge that appellant's request for a continuance stemmed from the late discovery and disclosure of a critical prosecution witness. But the record supports the trial court's factual finding that the State did not intentionally attempt to "sandbag" the defense by withholding the existence or identity of the witness. (*See* discussion *infra* at Part II.) Defense counsel had a week before trial to investigate this second inmate witness; this was three days more than he insisted was sufficient to prepare for trial when the State disclosed the first inmate witness. In these circumstances, the trial court did not err or abuse its discretion in concluding that, although appellant could have been ready for trial, he made a strategic decision to delay trial. The continuance, therefore, may fairly be charged to him.

In summary, the total delay between the first trial date and appellant's trial was 642 days. Because there was joint responsibility for the seventy-day and sixty-one-day continuances in June and August 2014, these 136 days of delay are not charged to either party. Responsibility for the remaining 511 days of delay is split between the State and appellant.

Of the 246 days charged to the State, fifty-seven days were caused by Mr. Gordon's medical emergency, which is a neutral reason that does not weigh against the State. A one-week continuance cured the State's late disclosure of expert witnesses; and its remaining two continuances, for seventy-seven days and 105 days respectively, were to schedule a joint trial of appellant and his co-defendant. The three continuances that weigh against the State total 189 days.

The remaining 265 days of delay are charged to appellant. In January 2015, appellant's change of counsel caused a 126-day delay. In October 2015, appellant's request for additional time to prepare for trial after Sherrod Weaver agreed to testify against him delayed trial another 139 days.

Whether or not we include the delay caused by Mr. Gordon's medical emergency in the total delay caused by the State, the delay caused by appellant was longer. In the absence of any "gamesmanship" on the part of either prosecutor or defense counsel, we find no reason to assign heavier weight to the continuances caused by the State than to the continuances caused by appellant. To the contrary, we have held that "continuances for three short periods . . . are given less weight because . . . 'a lengthy uninterrupted period chargeable to one side will generally be of greater consequence than an identical number of days accumulating in a piecemeal fashion over a long span of time.'" *Marks*, 84 Md. App. at 284 (quoting *Jones v. State*, 279 Md. 1, 7 (1976)). Consequently, the first two *Barker* factors – the length and reasons for the delay – weigh against appellant.

### 3. Assertion of the Right

When evaluating speedy trial claims, courts recognize that "[t]he more serious the deprivation, the more likely a defendant is to complain." *Barker,* 407 U.S. at 531-32. For that reason, a "defendant's assertion of his speedy trial right . . . is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." *Id*. Conversely, "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Id.* at 532. Moreover, although a defendant may initially assert the right, "his failure to assert it later at critical points undercuts his ability to rely upon his assertion of it." *Marks*, 84 Md. App. at 285.

Appellant asserted his right to a speedy trial in August 2014, when the State obtained a continuance that took the case two months beyond the 180-day *Hicks* deadline, and again three months later, when he filed a written motion to dismiss on speedy trial grounds. But while that motion was still pending – and less than a month before his scheduled trial date of January 12, 2015 – appellant substituted new counsel, who then asked for a continuance and waived appellant's right to assert his rights under *Hicks*. *Cf. Brillon*, 556 U.S. at 93-94 (defendant's dismissal of counsel "on the eve of trial" "should have factored into the court's analysis of subsequent delay"). This effectively negated appellant's previous speedy trial demands. *See Marks*, 84 Md. App. at 285.

After obtaining a 126-day continuance, appellant, at the next trial date in May 2015, reasserted his right to a speedy trial. When the State notified him of its intent to present testimony by his former cellmate, appellant refused another continuance. Although trial

was again continued due to Mr. Gordon's medical emergency, appellant's objection was noted "for the record." In August 2015, appellant again asserted his right to a speedy trial, via a motion to dismiss. After the court denied that motion and allowed the State's second inmate witness to testify, appellant secured a second lengthy continuance, again undercutting his prior demands for a speedy trial.

This record establishes that in January 2015, just six months after appellant's initial trial date and two months after appellant moved for a speedy trial dismissal, the State was prepared to try the case, but appellant delayed trial. Similarly, in October 2015, two months after appellant sought a speedy trial dismissal for the second time, the State was prepared to proceed, but appellant again delayed trial. Given appellant's strategic abandonment of his speedy trial demands at these critical points, this factor also weighs against appellant. *See Barker*, 407 U.S. at 529; *Kanneh*, 403 Md. at 693; *Marks*, 84 Md. App. at 285.

**4. Actual Prejudice**

We evaluate the fourth *Barker* factor, actual prejudice, in light of the three interests protected by the constitutional right to a speedy trial: "(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." *Barker*, 407 U.S. at 532. "Of these, the most important is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id.* In particular, the accused's right to a speedy trial is designed to prevent problems such as "defense witnesses becoming unavailable and memories becoming faulty." *Fraiden v. State*, 85 Md. App. 231, 268 (1991). Although

the "[p]assage of time . . . may impair memories, cause evidence to be lost, deprive the defendant of witnesses, and otherwise interfere with his ability to defend himself[,]" a merely theoretical "possibility of prejudice at trial is not itself sufficient reason to wrench the Sixth Amendment from its proper context." *Glover*, 368 Md. at 231 (quoting *United States v. Marion*, 404 U.S. 307, 321-22 (1971) (emphasis in *Glover* deleted).

Appellant has never contended that his defense was actually impaired during the delay in the sense that witnesses or other evidence became unavailable due to the passage of time. Instead, appellant claims that he was prejudiced by both his lengthy pre-trial incarceration and the improvements in the State's case against him during that time. In particular, appellant maintains that

> [a]fter the *Hicks* date of August 27, 2014, the [S]tate: (1) investigated and secured the testimony of jailhouse informant Sherrod Weaver (2) investigated and secured the testimony of jailhouse informant George Dodson and (3) initiated and secured the DNA analysis of material recovered from the crime scene.

Appellant ignores that two of these improvements in the prosecution's case occurred during the continuance attributable to appellant and after the State was prepared to proceed to trial in January 2015. He also fails to acknowledge that this delay was "to benefit [himself] by allowing time for him to [obtain] a new lawyer after he discharged his first lawyer and allowing time for the second lawyer to prepare." *Howard*, 440 Md. at 449.

Most importantly, appellant mistakenly equates the strengthening of the State's case with a weakening of his defense. As this Court has pointed out, mere improvement in the State's case, without a corresponding impairment to a defendant's ability to present his

case, does not constitute prejudice for speedy trial purposes. *See Brady v. State*, 36 Md. App. 283, 293 (1977); *see, e.g., White v. State*, 223 Md. App. 353, 385–86 (2015) (finding no prejudice where there was no discernible "impairment to the defendant's case.").

Appellant's corollary complaints about "oppressive pre-trial incarceration" causing "undue anxiety" are similarly unsupported by the record. He does not claim that, but for the delay in this trial, he would not have been incarcerated; indeed, by September 16, 2014, he was being held on "no bond" for violating probation on a prior conviction for a weapon offense. *Cf. White*, 223 Md. App. 385-86 (finding "no oppressive pre-trial incarceration because Appellant was already incarcerated"). Appellant offered "no specific testimony that [he] suffered any anxiety" or distress "beyond that which is expected when charges are pending[.]" *See Marks*, 84 Md. App. at 286. Moreover, this Court has "considered a defendant's conscious choice to endure further the anxiety and risk of impairment to his or her defense by requesting continuances in weighing the prejudice caused to a defendant by continuances." *Id*. at 285–86. Because appellant's requests for postponement caused nearly half (265 days) of the delay that occurred after his *Hicks* date (567 days), we may fairly conclude that his pre-trial incarceration was not as onerous as he now claims. *Cf. Malik*, 152 Md. App. at 322 (weight of defendant's pre-trial incarceration was "not as great as it would have been had [he] not caused a portion of the delay").

Because courts may "accord great weight to the lack of any significant prejudice resulting from the delay," *Wilson v. State*, 148 Md. App. 601, 609 (2002), this factor also weighs against appellant. *See Jules*, 171 Md. App. at 488-89.

## 5. *Barker* Balancing

After independently weighing each of the *Barker* factors, we conclude that the delay in this case did not violate appellant's right to a speedy trial. The supporting record may be summarized as follows:

| | **Delay** | **Length** | **Reason(s)** | **Assertion of right** | **Prejudice** | **Responsibility/Weight** |
|---|---|---|---|---|---|---|
| **First Continuance** | June 11 to August 20, 2014 | 70 days | Defense discovery problem + Prosecutor schedule conflict | None (pre-*Hicks*) | None | Joint – dual reasons |
| **Second Continuance** | August 20 to August 27, 2014 | 7 days | Late disclosure of experts by State | None (pre-*Hicks*) | None | State – light weight, given length |
| **Third Continuance** | August 27 to October 27, 2014 | 61 days | Witness altercation + Late disclosure of alibi witnesses by defense | Speedy trial demand, *Hicks* not waived | None | Joint – dual reasons |
| **Fourth Continuance** | October 27, 2014, to January 12, 2015 | 77 days | Joinder of co-defendant | Defense objection "noted" | None | State – light weight given good cause to go beyond *Hicks* date |
| ***Speedy Trial Motion*** | *November 13, 2014* | | | *Speedy trial right asserted* | | *Negated by January 2015 continuance for change of counsel* |
| **Fifth Continuance** | January 12 to May 18, 2015 | 126 days | Substitution of defense counsel | *Hicks* waiver, negating speedy trial motion | None | Defense – significant weight, given timing, reason, length, impact |
| **Sixth Continuance** | May 18 to July 14, 2015 | 57 days | Medical emergency of State witness | Defense objection noted for the record | None | State – no weight, given reason |
| **Seventh Continuance** | July 14 to October 27, 2015 | 105 days | Joint trial of co-defendants | None | None | State – moderate weight, given second joinder-related delay |
| ***Speedy Trial Motion*** | *August 26, 2016* | | | *Speedy trial right reasserted* | | *Undercut by subsequent October 2015 continuance* |
| **Eighth Continuance** | October 28, 2015, to March 15, 2016 | 139 days | New prosecution witness + defense investigation/prep | *Hicks* waiver, negating speedy trial motion | None | Defense – moderate weight, given timing, length, reason |
| **Totals** | **June 11, 2014, to March 15, 2016** | **642 days** | | | | **Joint: 131 days<br>State: 246 days<br>Defense: 265 days** |

Although a series of eight postponements, stretching over twenty-one months (642 days) following the initial trial date, requires close scrutiny, some of that delay is excluded from our *Barker* analysis. We may disregard the two joint delays, which caused 131 days of delay, because they were caused by reasons attributable to both the prosecution and defense. This reduces the total delay that may be charged against either the State or appellant to 511 days – far fewer than the 827 days following arrest, but still of constitutional concern. After examining these delays, we conclude that all four *Barker* factors weigh against appellant.

Even the best case scenario for appellant does not bring the length and reasons for the delay into equipoise. The four delays charged to the State totaled 246 days, with only 189 days of those actually weighing against the State, because the unavailability of a prosecution witness due to illness is a neutral factor. All of the State's delays were shorter than the two delays charged to appellant, whose 265 days accounted for nine of the last fourteen months of delay.

The remaining two factors – appellant's assertion of his right to a speedy trial and his showing of prejudice – also weigh against him. At two critical times – shortly after appellant moved to dismiss on speedy trial grounds, when the State was prepared to proceed to trial – appellant obtained lengthy continuances, undercutting his speedy trial complaints. Although both decisions to delay trial were for good cause and were strategically justified, appellant may not complain about delays that he caused. Nor may he claim prejudice because the State's case improved during that time, because he remained

incarcerated on other charges, or because his strategic postponements prolonged the anxiety inherent in awaiting trial.

Based on this record, we are satisfied that appellant was not denied his right to a speedy trial.

## II. Inmate Witness

Appellant next challenges the denial of his motion to exclude Weaver, the State's second inmate witness. In his view, "the trial court abused its discretion in postponing [his] case, rather than excluding the testimony[.]" For the reasons that follow, we agree with the trial court that exclusion of the witness was not warranted.

### A. Discovery Requirements and Remedies

Under Maryland's discovery rules, the State must disclose the name of prosecution witnesses "within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court[.]" Md. Rule 4-263(d)(3), –(h)(1). With respect to witnesses identified thereafter, the State must promptly provide that information. *See generally* Md. Rule 4-263(j) ("Each party is under a continuing obligation to produce discoverable material and information to the other side. A party who has responded to a request for discovery and who obtains further material information shall supplement the response promptly.").

If the State fails to comply with these rules, the court may "strike the testimony to which the undisclosed matter relates, grant a reasonable continuance, prohibit the party from introducing in evidence the matter not disclosed, grant a mistrial, or enter any other

order appropriate under the circumstances." Md. Rule 4-263(n). Nevertheless, "[t]he failure of a party to comply with a discovery obligation in this Rule does not automatically disqualify a witness from testifying." *Id.*

"[W]e apply an abuse of discretion standard to a Court's decision whether to strike testimony due to a discovery violation." *Silver v. State*, 420 Md. 415, 433 (2011). *See* Md. Rule 4-263(h) ("If a motion is filed to disqualify the witness's testimony, disqualification is within the discretion of the court."). "In exercising its discretion regarding sanctions for discovery violations, a trial court should consider: (1) the reasons why the disclosure was not made; (2) the existence and amount of any prejudice to the opposing party; (3) the feasibility of curing any prejudice with a continuance; and (4) any other relevant circumstances." *Thomas v. State*, 397 Md. 557, 570-71 (2007) (footnote omitted). Moreover, when "fashioning a sanction, the court should impose the least severe sanction that is consistent with the purpose of the discovery rules[,]" which are designed "to assist the defendant in preparing a defense and to protect the defendant from surprise." *Id.* at 567, 571; *see Francis v. State,* 208 Md. App. 1, 25 (2012).

For this reason, "[t]he exercise of discretion contemplates that the trial court will ordinarily analyze the facts and not act, particularly to exclude, simply on the basis of a violation disclosed by the file." *Taliaferro v. State*, 295 Md. 376, 390 (1983). Indeed, because exclusion of evidence is "one of the most drastic measures that can be imposed[,]" it is "not a favored sanction[.]" *Thomas*, 397 Md. at 572. Instead, when a criminal

defendant's trial preparation is hindered by the State's belated disclosure of evidence, "a continuance is most often the appropriate remedy." *Id.* at 573.

Moreover, because "[t]he discovery law is not an obstacle course that will yield a defendant the windfall of exclusion every time the State fails to negotiate one of the hurdles[,]" courts are skeptical when a defendant seeks "a sanction which is excessive." *Ross v. State*, 78 Md. App. 275, 286 (1989). As the Court of Appeals has recognized:

> Although the purpose of discovery is to prevent a defendant from being surprised and to give a defendant sufficient time to prepare a defense, defense counsel frequently forego requesting the limited remedy that would serve those purposes because those purposes are not really what the defense hopes to achieve. The defense, opportunistically, would rather exploit the State's error and gamble for a greater windfall. As Chief Judge Gilbert explained . . . in *Moore v. State*, 84 Md. App. 165, 176 (1990), however, the 'double or nothing' gamble almost always yields 'nothing.'

*Thomas*, 397 Md. at 575 (quoting *Jones v. State*, 132 Md. App. 657, 678 (2000)).

**B. The Record**

On October 21, 2015, a week before trial was scheduled to begin, the State disclosed to defense counsel that it intended to present testimony by Weaver, appellant's former cellmate. On October 27, the court and counsel addressed preliminary matters and selected a jury. The next morning, before the jury was sworn, defense counsel moved to exclude Weaver's testimony, arguing that the State violated its discovery obligations by disclosing the witness only one week before the scheduled trial date.

The trial court, finding that the State could not have disclosed the witness before he signed a cooperating agreement, denied the motion to exclude, but offered a continuance, explaining:

I find that an agreement for Sherrod Weaver to testify against Mr. Ford was reached October 20th, 2015.

The offer from the State was extended September 30th, but again not accepted, and thus, no agreement until October 20th.

The agreed upon fact is that the State disclosed this agreement the following day, October 21st, with a copy of the written agreement, which includes a summary of, I guess, Mr. Weaver's anticipated testimony, the substance of the agreement, promises made to, the considerations offered and accepted by Mr. Weaver in exchange for his testimony.

And then follow up, further discovery including the notes from their first discussion in July, July 22nd, from the police officers' first discussion with Mr. Weaver.

All of this provided – well, that initial – that subsequent or supplemental discovery was provided two days later. That would be October 23rd.

I do recognize that it was – the disclosure was seven days or six – seven days before today, six days before the scheduled trial date, we haven't yet sworn the jury, but the jury was selected yesterday, and that this case has been pending a while.

On the other hand, I find that the State couldn't disclose a witness, a cooperating witness, until a cooperation agreement was obtained and reached.

**So the State does have under Rule 4-263(j), a continuing duty to disclose. And I find they met that duty by disclosing this information the day after . . . the agreement was reached. . . .**

Just based on this summary of his anticipated testimony, it appears to be important, I would say crucial information . . . .

**I would say crucial information and admissions by Mr. Ford to Mr. Weaver regarding the crime at issue here. So based on all of that, I find that exclusion is not the appropriate remedy**. . . .

If the Defendant wants a continuance to do further investigation . . . . First of all, I don't find there to be any reason why in the intervening week, whether it's six or seven days, that counsel couldn't have discussed this with

> his client and gotten a great deal of information regarding his version of the encounters if any and the verify [sic].
>
> Do I recognize that – however, that six or seven days is not sufficient to do any independent investigation, so there is some prejudice, but I don't find that exclusion is the appropriate remedy.
>
> **If the Defense wants a continuance in order to do that investigation, I will consider that.**

(Emphasis added.)

In light of this decision, defense counsel requested a continuance, which was granted.

### C. Appellant's Exclusion Challenge

Appellant argues that after the State violated its discovery obligation by belatedly disclosing this critical witness, the trial court abused its discretion in fashioning an inadequate remedy, denying the exclusion requested by appellant, which effectively forced appellant to obtain another continuance. The State responds that there was no discovery violation and that appellant nevertheless received a continuance, which would have been an appropriate remedy if there had been a violation, so that "[n]othing more was required."

We agree that the State did not violate its discovery obligations under Maryland Rule 4-263. The record refutes appellant's contention that the State "offered no explanation for the delay" in disclosing Weaver. The prosecutor proffered that disclosure of this inmate witness, who was incarcerated at the same facility as appellant and his co-defendant, could not be made until after the State met with Weaver, conducted an investigation into his allegations, secured his safety, allowed him to consult with counsel,

and obtained his signed agreement. The day after Weaver agreed to testify, the State disclosed his existence, as well as his anticipated testimony and the terms of his cooperating agreement. Based on this record, the trial court did not err in finding that the State exercised diligence in preparing its case for trial and disclosing this witness.

Nor did the court abuse its discretion in denying appellant's request to exclude the witness. As the court noted, defense counsel had seven days to discuss Weaver's anticipated testimony with appellant. This was three days longer than appellant insisted would be sufficient to prepare for trial when the State disclosed that it intended to call appellant's other former cellmate, Dodson.[5] Even if there had been a discovery violation, exclusion is highly disfavored when, as here, the evidence in question is "critical" and a continuance affords sufficient time for defense counsel to investigate and prepare for such evidence. *See Thomas*, 397 Md. at 572-73. In these circumstances, the trial court was entitled to view appellant's request for the disfavored remedy of exclusion as an unjustified "double or nothing" demand. *Cf*. *id*. at 572, 575 (trial court did not abuse discretion in admitting evidence that was disclosed immediately upon receipt and in sufficient time to interview witness and prepare for cross-examination, where defendant requested only exclusion and "was not interested in a continuance nor an opportunity to talk to" the witness). We hold that, regardless of whether the State violated its discovery obligations, the court did not abuse its discretion in denying appellant's motion to exclude Weaver.

[5] For details regarding that hearing on May 14, 2015, see *infra* Part I.B.

## III. Hearsay

In his third assignment of error, appellant contends that the trial court erred in admitting a hearsay report that was authored and peer-reviewed by cell phone and cell tower location experts who did not testify at trial. The State responds that appellant did not preserve the argument he makes on appeal and that, in any event, the trial court did not err or abuse its discretion in admitting the report as information supporting the testimony of the cellular location expert who did testify. We hold that the trial court did not err in admitting the report over appellant's limited and belated objection.

### A. Standards Governing Review of Hearsay Challenges

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). Unless it fits within an established exception, "hearsay is not admissible." Md. Rule 5-802. This Court makes a *de novo* determination of whether evidence constitutes inadmissible hearsay. *See Parker v. State*, 408 Md. 428, 436 (2009).

Under Maryland Rule 5-103(a)(1), "[e]rror may not be predicated upon a ruling that admits . . . evidence unless the party is prejudiced by the ruling, and . . . a timely objection or motion to strike appears of record[.]" Similarly, under Maryland Rule 4-323(a), "[a]n objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objections become apparent. Otherwise, the objection is waived." This contemporaneous objection requirement prevents error that requires re-trial and precludes "sandbagging" of the trial judge, by "requiring counsel to bring the

position of their client to the attention of the lower court . . . so that the trial court can pass upon, and possibly correct any errors." *Peterson v. State*, 444 Md. 105, 126 (2015) (citation omitted).

**B. The Record**

Before the jury entered the courtroom on the last day of trial, defense counsel challenged the State's plan to present rebuttal testimony by an expert in cellular location technology. Defense counsel complained that after the State substituted Thomas Hannon for other individuals previously identified as experts, defense counsel had not "received any indications that he's done an independent test related to the cell tower information in this case and provided no results for any testing that he may have done independently[.]" Defense counsel objected "that to the extent that he'd be testifying off of those reports that were completed and authorized or approved by a particular authorizing officer to that extent, he'd be testifying to hearsay[.]" When counsel "move[d] to suppress any such proposed testimony[,]" the following colloquy ensued:

> [PROSECUTOR]: I'll address [defense counsel's] first concern – notice. [Defense counsel] was previously given notice that either Sergeant James Seager, Sergeant Jordon Swonger or Corporal Sujit Batth[6] would be testifying as to cell phone information in this case. He was provided with reports that they prepared and the corresponding cell phone records.
>
> Sergeant Swonger, Sergeant Seager and Corporal Batth became unavailable, so the State made [defense counsel] aware that we would be seeking to use Corporal Hannon as an expert. His testimony will be consistent with the information and the notices that [defense counsel]

[6] Relying on the spelling of these names in the disputed report, we have corrected the excerpted transcript.

previously received, so this is no new information, no different conclusions that have been reached.

**Corporal [sic] Hannon used the raw cell phone data. He will testify that he completed an analysis himself and that his analysis is the same [a]s that which is contained in the cell phone plotting mapping report that was generated previously by Corporal Bat[t]h and reviewed by Sergeant Swonger.**

**So he has, in fact, he's not simply looking at a map and testifying about how Sergeant Swonger, Corporal Batth would have reached those conclusions and how one would go about doing that. He's actually reviewed the records. He's actually done plotting. He's just using maps that were created by other individuals, which he will say are the same as the conclusions that he reached.**

[DEFENSE COUNSEL]: The notice obviously contains three names . . . of people who were involved with the testing[,] three people who were announced. . . . The existence of the subsequent expert based on . . . unavailability of the State's witness isn't acceptable under this particular situation.

I don't believe that they're unavailable as it relates to an analysis for hearsay purposes and I haven't heard any proffer that they are unavailable because of an inability to serve or because of any meritorious reason. I believe that they're just unavailable because they can't be here today.

THE COURT: Okay.

[DEFENSE COUNSEL]: And none of . . . Hannon's results have been turned over to me. I only have the results that were the work of Corporal Batth approved by Swonger and I think maybe even reviewed by Seager as well.

THE COURT: Okay. So what testing was done? Somebody made a reference to testing.

[DEFENSE COUNSEL]: Well, coordinates were identified. They were inputted, and then there were plotting done and demonstrative evidence placed on maps as a result thereof.

THE COURT: But not testing, but –

[DEFENSE COUNSEL]: Well, that is testing of sorts. . . .

That's what I'm going to characterize it as testing.

THE COURT: Okay, as long as I understand what it is you're saying.

I'm not inclined to exclude that testimony at this point. I don't know if it's relevant rebuttal . . . but **I'm not going to exclude it on the basis of notice. In essence, he's testifying, as I understand it, to opinions, the substance of which are the same or very similar to what was previously provided to you earlier. It's just a different person saying it.**

**As I understand what the State has said, nonetheless, he has made his own independent analysis and he's not doing it based on someone else's analysis. If that turns out to be the case, I'll revisit the issue.**

**[DEFENSE COUNSEL]: As I understand it, he'd be relying on and testifying to documents that were prepared by the previous experts who are unavailable.** And for a completeness off the record –

THE COURT: Yes, but when I look at a map and I rely on the map, you know, I'm relying on it not because I'm relying on the map, that doesn't necessarily mean that it's hearsay.

[DEFENSE COUNSEL]: Well, it's a map that has an addition. It's a map that has the location of cell towers.

THE COURT: Here's what we'll do: I'm denying the motion. **If and when the State chooses to call this witness in rebuttal, I'll hear you or revisit the issue as to whether or not he has made his independent analysis. He may use the same map and say this point here, even though he didn't create the map, but if he's independently determined that that's the point, then it's his as well. So we'll revisit that issue if and when it happens.**

[DEFENSE COUNSEL]: I don't want to argue it any further, but I just do ask, though, that the State, who I believe claims that their witnesses are unavailable just for the record specify how they are unavailable.

THE COURT: Okay.

[PROSECUTOR]: Two of the witnesses are out of the country, the third is out of the state.

> [DEFENSE COUNSEL]: And there was no continuance filed in this case based on their unavailability.

(Emphasis added.)

Later that day, Detective Hannon took the stand in the State's rebuttal case. Following voir dire by the prosecutor, defense counsel conceded that the detective was qualified to testify "as an expert in the field of cell phone and cell phone technology." Detective Hannon explained that a cell phone initiating a call typically connects through one of three equal, 120-degree sectors on the cell tower that is broadcasting "the closest most available signal." Cell phone service providers record that data. He confirmed that he independently reviewed AT&T data records for the cell phone assigned to a telephone number identified as one used by Rachel Ford, which were admitted as State's Exhibit 108.

Defense counsel then asked for a bench conference to lodge the following objection:

> **[DEFENSE COUNSEL]: This is what I would just like to register my objection. I think that the foundation that's been laid thus far, it would be an independent review of those records, and I want to know if it's an independent reading over that report making that determination or if he actually mapped it himself and reaching [sic] his own conclusion.**
>
> [PROSECUTOR]: I can ask him that question.
>
> THE COURT: Okay.
>
> [DEFENSE COUNSEL]: **Will you just note my objection to him testifying at all** so I don't have to –
>
> THE COURT: Yes. I mean I thought it was just a definitive ruling, but I'll note it again for purposes of this.
>
> (Counsel returned to the trial tables, and the proceedings resumed in open court.)

BY [PROSECUTOR]: So I'm clear, Detective Hannon, did you actually go through the steps to map those calls yourself?

[DET. HANNON]: Yes. I actually went through and did a peer review on the information to verify that these records were done properly.

[PROSECUTOR]: And what does a peer review entail?

[DET. HANNON]: Basically, what it is, is that **another expert actually done [sic] the initial report on this and then another one actually peer reviewed it. Based on their unavailability this week, I went back and I basically redid the work.**

So I went back – and I assumed during a peer review that something's wrong with the data, something is wrong with the map, so I go back through and I look at everything that was done from the original data and make sure that the maps actually reflect what I would have done. And **based on that, these are properly done based on the work I did.**

[PROSECUTOR] In the course of doing that analysis, did you have the opportunity to take a look at a report that had previously been generated?

[DET. HANNON]: Yes.

**[PROSECUTOR]: Showing you what's been marked as [S]tate's Exhibit 109.**

**[DET. HANNON]: Yes, this is the report.**

**[PROSECUTOR]: -- do you recognize that?**

**[DET. HANNON]: Yes.**

**[PROSECUTOR]: Is that the report that you consulted?**

**[DET. HANNON]: Yes.**

[PROSECUTOR]: **And when you redid all of the work, what was your expert opinion as to the validity of that report?**

**[DET. HANNON]: This is done properly. This is a valid report.**

[PROSECUTOR]: Do you keep that kind of report in the normal course of business?

[DET. HANNON]: Yes, we keep these reports.

[PROSECUTOR]: At this time, State moves to [sic] Exhibit 109 into evidence.

[DEFENSE COUNSEL]: **Just note my previous objection.**

THE COURT: Okay. Overruled.

(Emphasis added.)

The challenged report, admitted as Exhibit 109 and titled "Forensic Cellular Analysis Summary," synthesized cell data from the AT&T records (Exhibit 108) for the cell phone assigned to Rachel Ford's phone number. On page one, the report states that Corporal Batth

> analyzed the provided phone records for calls made on November 16th, 2013 at 18:43:00 hours through 21:11:00 hours. During this period there were five calls with cellular phone #202-304-8105 which resulted in cell site communication. These calls were plotted using AT&T Cell Site/Tower locations. The plotted areas indicate the most likely area where the phone would have been at the time each call was initiated.

Pages two through five of the report are maps showing the location of the two AT&T cell towers through which Rachel Ford's cell phone connected on the five calls made during that period. Above each map is the date, time, and duration of each call that connected through the tower shown on the map. On each map, the cell tower and sector within which Mrs. Ford's phone connected are indicated. For the first map, a marker within that sector points to the address in Capitol Heights where the birthday party occurred. The same information is provided in the second, third, and fourth maps, which show the address in Suitland where appellant and Rachel Ford lived within the sector where those calls originated.

At the bottom of each page is a "footer" stating:

| | |
|---|---|
| REPORT/RECORDS PREPARED BY: | Cpl. Batth #3347 |
| REPORT/RECORDS PEER REVIEWED BY: | Detective J. Swonger #2998 |
| DEPARTMENT/DISTRICT: | PGPD/NED Technical Operations Unit |

Using the maps prepared by Corporal Batth, Detective Hannon proceeded to testify that on November 16, 2013, Rachel Ford's phone connected through the cell tower located near her great-grandmother's birthday party, at 6:43 p.m. Thereafter, the same phone connected through a different cell tower located nearest the Fords' residence, at 8:04 p.m., 8:23 p.m., 8:42 p.m., and 9:11 p.m.

In closing, the State asked the jury to infer from this evidence that appellant and his wife lied about leaving the party together after 8 p.m., in order to create an alibi for appellant during the Gordon robbery. The prosecutor argued that

> the cell phone records show you that by 8:04, [Rachel Ford is] in the vicinity of [her residence on] John Street. She's in the vicinity of John Street every call thereafter. It's only after that first call at 6:43 that she's in the vicinity of the party.
>
> What happened, ladies and gentlemen, yeah, they went to the party. Yep, that was the excuse to get out of the house, get out of the house in my party clothes, go over there, maybe serve out a couple of dishes of food to people and then we left. And then people who care about Ray, people who loved Ray came and told you, oh, no, they never left until well after this incident occurred. That's not supported by the evidence. It's not supported by the cell phone records.

### C. Appellant's Hearsay Challenge

Appellant contends that the trial court erred in admitting State's Exhibit 109, the report written by Corporal Batth and peer reviewed by Detective Swonger, because it contains inadmissible hearsay by those two non-testifying experts. Such evidence, he

argues, violated "blackletter law that a party 'may not, through one expert, offer independently the opinions of . . . other experts.' *Cirincione v. State*, 75 Md. App. 166, 183 (1988)." *See also Gregory v. State*, 40 Md. App. 297, 326 (1978) (error to admit document for truth of opinions rendered by three staff psychiatrists that defendant "was 'sane' at the time" of offense). In appellant's view, the jury learned through this inadmissible document that "Batth and Swonger had concluded that Ford's alibi was false[,]" which "impermissibly bolstered the opinion of Hannon."

The State counters that appellant's only objection to the report was that Detective Hannon "may not have independently done the work described in the report," which is a concern that was fully resolved by the State's proffer and Hannon's subsequent testimony. The State argues that appellant's "new attack on the judge's ruling that the report was *de facto* inadmissible regardless of whether Detective Hannon reproduced the analysis reflects a fundamental shift in strategy, and one that the trial judge did not have the opportunity to address." On the merits, the State contends that under Maryland Rule 5-703, the trial court "had the discretion to admit 'basis' evidence as part of Detective Hannon's testimony," because "it was the type of evidence used in the field."

As a threshold matter, we reject appellant's contention that Exhibit 109 contains hearsay opinions that his "alibi was false." To be sure, the maps showing the cell tower locations for each call may be considered "expert opinions" in the sense that each plotted call represented the application of forensic expertise in interpreting raw cell phone and cell tower data. *See generally State v. Payne*, 440 Md. 680, 701-02 (2014) (testimony regarding

location based on cell phone and cell tower records must be presented by an expert); *Hall v. State*, 225 Md. App. 72, 92, 94 (2015) ("expert testimony is required . . . to plot cell phone data onto a map"; qualifications of police officer in "plotting and mapping cell phone tower data" were "more than sufficient to qualify him as an expert"). Yet nothing in that report mentions appellant's alibi, much less expresses an opinion regarding its accuracy.

We agree with the State that appellant did not preserve his "bolstering expert hearsay" challenge to Exhibit 109. As the excerpted transcript shows, defense counsel initially objected only to *testimony* by Detective Hannon, citing (1) the State's belated switch of experts, (2) its failure to establish the unavailability of its previously identified experts, and (3) counsel's concern that the detective's conclusions lacked an adequate foundation and would be hearsay to the extent he relied on data analysis performed by others. After the trial court rejected appellant's notice objection and the prosecutor established that its previously identified experts were not present in the State, defense counsel stated that he still "want[ed] to know" whether Detective Hannon was relying on the report or whether he conducted his own location mapping using Rachel Ford's cell phone data.

In response, the State proffered that Detective Hannon reviewed the same data and independently reached the same conclusions as the two "expert[s]" who prepared and peer reviewed Exhibit 109. Based on that foundation, the trial court preliminarily refused to exclude Detective Hannon's testimony. As the lack of objection by defense counsel indicates, the detective's subsequent testimony was consistent with the State's proffer. The

detective's testimony that he used the same data to produce the same results established a non-hearsay foundation for the evidence that during the robbery, Rachel Ford's phone connected through the cell tower nearest her home.

We are not persuaded that the trial court erred or abused its discretion in overruling appellant's ensuing objection to Exhibit 109, the document about which Detective Hannon had just testified. By that time, the detective had already testified, without objection, that he mapped the calls initiated from Rachel Ford's phone "to verify that these records were done properly," because "another expert actually [had] done the initial report on this and then another one actually peer reviewed it." Hannon then identified Exhibit 109 as "the report [he] consulted" and gave his "expert opinion" that it "is properly done based on the work I did," that "[i]t is properly done," and that it "is a valid report." When the State then moved the report into evidence, defense counsel merely renewed his "previous objection."

This was both too little and too late. *See* Md. Rule 4-323(a). As the record shows, defense counsel's prior objection was that there was only a hearsay foundation for the detective's testimony, to the extent that it did not reflect Detective Hannon's independent review of the raw data. When the detective then testified that he replicated the work and results of other experts, as set forth in Exhibit 109, defense counsel did not challenge that testimony on the separate ground that it related bolstering hearsay. Consequently, even if defense counsel had expressly objected to the report itself on the "bolstering expert hearsay" ground he advances in this Court, such an objection would have been overruled because the jury had already heard – without any objection – that Detective Hannon was

the third expert to map the calls as shown in that report. *See generally DeLeon v. State*, 407 Md. 16, 31 (2008) ("Objections are waived if, at another point during the trial, evidence on the same point is admitted without objection.").

We acknowledge that, to the extent the challenged report reveals the conclusions of Corporal Batth and Detective Swonger, it may have been the better practice to redact references to such non-testifying experts, then allow Detective Hannon to adopt the redacted report as his own, based on his independent analysis and conclusions. *Cf., e.g., Gregory*, 40 Md. App. at 326 (trial court should not have admitted medical record revealing opinions of non-testifying experts regarding defendant's mental condition and criminal responsibility). In the absence of a timely request for such a simple and effective remedy, however, appellant cannot complain that the trial court did not redact the report, *sua sponte.*[7]

## IV. Sentencing Merger

In his final claim of error, appellant contends the trial court erred in failing to merge, for sentencing purposes, his convictions for first degree assault against Debra and Eric Gordon, into his armed robbery convictions involving the same victims. The State

[7] Appellant's failure to challenge admission of the evidence contained in the report makes it unnecessary for us to address the State's contention that the unredacted report was admissible under Maryland Rule 5-703 ("If determined to be trustworthy, necessary to illuminate testimony, and unprivileged, facts or data reasonably relied upon by an expert . . . may . . . be disclosed to the jury even if those facts and data are not admissible in evidence.").

concedes that first-degree assault merges into armed robbery when based on the same incident and victim. *See Morris v. State,* 192 Md. App. 1, 44-45 (2010).

There is disagreement, however, about the appropriate remedy for this sentencing error. Appellant asks us to vacate both of the twenty-five year sentences for the first degree assault counts, leaving his remaining sentences intact, so that his term of incarceration would be reduced by fifty years. The State counters that the appropriate remedy is to remand for resentencing on all unmerged convictions, which would allow the State to seek an aggregate sentencing package that preserves the 190-year term of incarceration, by altering which unmerged sentences are to be served concurrently and consecutively.

As the Court of Appeals has explained, "after an appellate court unwraps the package and removes one or more charges from its confines, the sentencing judge, herself, is in the best position to assess the effect of the withdrawal and to redefine the package's size and shape (if, indeed, redefinition seems appropriate)." *Twigg v. State*, 447 Md. 1, 28 (2016). For this reason, "a bright-line rule requiring an appellate court to vacate all sentences where only one sentence is found to be deficient is not warranted. It is properly left to the discretion of the appellate court, based on the circumstances of the case, whether to vacate the deficient sentence alone or all sentences imposed." *Scott v. State*, 454 Md. 146, 199 (2017). Accordingly, when this Court determines that a sentence must be merged, we have discretion to either vacate that sentence or to vacate all sentences and remand for resentencing on all unmerged convictions,

> so as to provide the court maximum flexibility on remand to fashion a proper sentence that takes into account all of the relevant facts and circumstances.

> The only caveat, aside from the exception set forth in § 12–702(b)(1)–(3), is that any new sentence, in the aggregate, cannot exceed the aggregate sentence imposed originally.

*Twigg*, 447 Md. at 30 n.14.

We agree with the State that remand for resentencing on all counts is appropriate here. The sentencing court imposed the maximum term of imprisonment for each conviction and ordered all sentences, except the four for offenses against the child victims, to run consecutively. Because the first-degree assault and robbery convictions relating to Debra and Eric Gordon must be merged, it is for the sentencing court to fashion a revised sentencing package that takes into account all the circumstances. *See Scott*, 454 Md. at 199. In doing so, the court must exercise anew its discretion in determining the length of each sentence, whether any part of it should be suspended, and whether it is to be served consecutively or concurrently, as long as the total sentencing package does not exceed the aggregate of the previously imposed sentences, and appellant is credited with the time he has served. *See Twigg*, 447 Md. at 30 ("a defendant's sentence will be considered to have increased under § 12–702(b) only if the total sentence imposed after retrial or on remand is greater than the originally imposed sentence").[8]

[8] Md. Code (1988, 2013 Repl. Vol.), section 12-702 of the Courts and Judicial Proceedings Article, governing proceedings after remand for resentencing, provides:

> **(a) Criminal cases remanded to lower court for judgment or sentence**. – If an appellate court remands a criminal case to a lower court in order that the lower court may pronounce the proper judgment or sentence, the lower court shall deduct from the term of the new sentence the time served by the defendant under the previous sentence from the date of his

**JUDGMENTS OF CONVICTION AFFIRMED. SENTENCES ON ALL COUNTS VACATED AND CASE REMANDED FOR RESENTENCING CONSISTENT WITH THIS OPINION. COSTS TO BE DIVIDED EQUALLY BETWEEN APPELLANT AND PRINCE GEORGE'S COUNTY.**

conviction. If the previous sentence was a statutory maximum sentence, the lower court also shall give credit for any period of incarceration prior to the previous sentence, if the incarceration was related to the offense for which the sentence was imposed.

**(b) Convictions following a new trial**. – If an appellate court remands a criminal case to a lower court in order that the lower court may pronounce the proper judgment or sentence, . . . the lower court may impose any sentence authorized by law to be imposed as punishment for the offense. However, it may not impose a sentence more severe than the sentence previously imposed for the offense unless:

(1) The reasons for the increased sentence affirmatively appear;

(2) The reasons are based upon additional objective information concerning identifiable conduct on the part of the defendant; and

(3) The factual data upon which the increased sentence is based appears as part of the record.