Circuit Court for Anne Arundel County
Case No. 02-K-14-000249

UNREPORTED

IN THE COURT OF SPECIAL

APPEALS

OF MARYLAND

No. 2018

September Term, 2015

TROY ANTHONY WRIGHT, JR.

v.

STATE OF MARYLAND

Graeff,
Kehoe,
Moylan, Charles, E., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: September 15, 2017

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

At the conclusion of a bench trial in the Circuit Court for Anne Arundel County, Troy Anthony Wright, Jr., appellant, was convicted of assault in the first degree, attempted sexual offense in the first degree, sexual offense in the third degree, and false imprisonment. The court sentenced appellant to twelve years' imprisonment, all but nine years suspended, for the conviction of assault in the first degree, a consecutive term of ten years' imprisonment for the conviction of attempted sexual offense in the first degree, and concurrent terms of three years for the convictions of sexual offense in the third degree and false imprisonment.

On appeal, appellant presents the following three questions for our review, which we have rephrased slightly, as follows:

1. Did the trial court err in failing to dismiss the charges based on unconstitutional pre-indictment delay and/or a violation of appellant's Sixth Amendment Right to speedy trial?

2. Did the trial court violate Maryland Rule 4-246 and appellant's constitutional rights by failing to ensure that he knowingly and voluntarily waived his right to a jury trial?

3. Was the evidence legally insufficient to sustain appellant's conviction for attempted first degree sexual offense?

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

FACTUAL AND PROCEDURAL BACKGROUND

The victim, who was in the Navy during the time period associated with the events of this case, was stationed in Maryland at Fort Meade from fall of 2010 until her discharge in 2011. She lived off-base in a townhome in Glen Burnie. In early September 2010, appellant, who was living in New York, met the victim through an on-line dating website.

Over the ensuing week, the two had numerous telephone conversations, exchanged photographs, and decided to meet in person. On September 12, 2010, the two met at the home of appellant's family members. The two eventually left that home and went to the victim's home with the intention of ordering Chinese food.

Once at the victim's home, while appellant was using the victim's computer to buy a bus ticket back to New York, he saw a photograph of the victim with another man. The victim testified that appellant reacted violently and aggressively to the photograph. He told the victim she was "disrespectful," and he called her a "bitch" and a "ho." Appellant then followed her into the kitchen and began to choke her with both hands around her neck, forcefully enough "to let [her] know that he was not playing."

When appellant released her, the victim tried to grab her keys and leave, but appellant blocked her exit and closed the door. He then instructed her to get a knife from the kitchen and stand in the corner of the living room. Appellant held her in the corner, threatening her with the knife and taunting her. Appellant then pushed her over the arm of the couch and began choking her from behind with both hands "way more aggressive[ly]" than when he choked her earlier. At this point, the victim "started to fear for [her] life and fear for what he was going to do next" because she "couldn't breathe."

After the victim stopped fighting and went limp, appellant "started laughing at [her]." Appellant then taunted her by dialing 9-1-1 on her phone and asking her to press "talk," which she declined to do out of fear.

The victim testified that she went into "immediate preservation mode," and "to make sure that she was safe . . . began to listen to everything that he told [her] to do to

avoid being injured any further." She then complied with appellant's instruction to go upstairs to her bedroom. Once in the bedroom, appellant "pulled [her] pants down, bent [her] over the bed," and raped her. During the sexual intercourse, the victim was crying and screaming "No. Please." After appellant asked her to get some "lubrication," he rubbed the lotion she provided on her anus, "insinuated that he was going to penetrate [her] anally," and rubbed his penis against her anus. When the victim began "screaming hysterically," appellant's demeanor changed and he turned her around, wiped her tears, and told her everything would be okay.

He then asked her to get a blanket so they could go downstairs and take a nap before she took him to the bus station. Once on the blanket on the floor, and after appellant "suggested that he wanted to make love to [her] this time," "he climbed back on top of [her], and started having sex with [her] again." She said that while engaging in sexual intercourse, appellant told her not to make any noise and he said "[t]hat's my girl[,] [t]hat's my girl" before he got "rough" with her and asked her "[d]o you want to scream 'Rape'?" When it was over, appellant fell asleep on the blanket with his arm around her. She laid with him until he awoke, and she then drove him to the bus station.

The victim did not immediately report the attack to the police, and she continued to communicate with appellant via text message and telephone. She explained that she did so out of fear, stating that she felt safer if she knew appellant's location. In addition, she was afraid of the "backlash" she would suffer in the form of losing her security clearance, and possibly her job, if the Navy learned about the rape. When she went to work, however, her chain of command noticed injuries to her eyes and neck and ordered her to undergo a

medical evaluation. Appellant disobeyed that order out of fear that she would have to report the attack.

On September 16, 2010, four days after the attack, appellant called the victim and told her that he was in the area and he was going to kill her. Appellant contacted her mentor, Petty Officer Amie Arizmendi, and told her about the attack. The Navy then undertook an investigation and contacted the police. At the time, the victim told the police that she did not want to go forward with prosecuting appellant. A couple of months later, however, the victim agreed to participate in the prosecution of appellant.

Additional facts will be discussed as necessary in the discussion that follows.

DISCUSSION

I.

Pre-Indictment Delay & Right to Speedy Trial

Appellant contends that the circuit court erred in denying his motion to dismiss. In support, he asserts that his constitutional rights were violated due to unnecessary pre-indictment delay and the lack of a speedy trial.

A.

Factual Background Common to Both Contentions

Appellant filed an omnibus demand for a speedy trial on July 24, 2014. On June 4, 2015, he filed a Motion to Dismiss for Pre-Indictment Delay. A hearing was held on

September 2, 2015, during which the following timeline of events was developed.[1] The offense occurred on September 12, 2010. On March 25, 2011, after the victim advised that she was willing to pursue prosecution, a statement of charges was filed against appellant and lodged as a detainer because he was incarcerated in New York awaiting trial for two unrelated rapes. The prosecutor advised that New York "made it clear" that it would not release appellant until the rape charges were resolved. In December 2013, after appellant was convicted and sentenced, New York cleared appellant to be released to Maryland officials. On February 7, 2014, an indictment was filed. Approximately a year and a half later, on October 13, 2015, trial commenced.

In support of his motion to dismiss, appellant argued that he was prejudiced by both the pre-indictment and post-indictment delays. He alleged that the victim made conflicting statements regarding the events leading up to, and subsequent to, the events of September 12, 2010. According to appellant, some of those statements were made to her superiors in the Navy who had moved out of state and could not be located. Moreover, appellant claimed that, due to the passage of time he could no longer obtain relevant surveillance footage, that witnesses' memories had faded, and Facebook postings had expired. Appellant asserted that the State had engineered a tactical advantage by purposefully delaying proceedings in Maryland while appellant was prosecuted in New York for two unrelated, but factually similar, rapes. Appellant argued that all four of the *Barker v.*

[1] During the hearing on the motion to dismiss, no witnesses were called and no evidence was taken. Thus, all of the "facts" adduced during the hearing were proffered by counsel for appellant and the State.

Wingo, 407 U.S. 514 (1972) test utilized for evaluating speedy trial claims tilted in his favor.

The State argued that appellant had failed to establish any actual prejudice. Although it was true that certain witnesses had moved out of State, that did not make the witnesses unavailable, but rather, it just made it more difficult to secure their attendance. Regarding any surveillance footage, the State asserted that some of the initial pre-indictment delay was caused because the victim declined to "go forward" with the prosecution in September 2010, and even if no further delay had occurred after March 2011, when the victim decided to press charges, the footage might have been unavailable at that point, approximately six months after the incident. The State explained that it did not delay in prosecuting appellant to gain a tactical advantage. Rather, appellant was being held in New York facing two other rape prosecutions, and New York authorities declined to permit Maryland to take appellant into custody until his trials had concluded. The State argued, in contrast to appellant, that the *Barker* factors tilted in favor of the State.

The court denied appellant's motion to dismiss, stating that it was not persuaded that appellant had demonstrated any prejudice by the delay or that the State had purposefully delayed the prosecution to obtain a tactical advantage. The court explained, as follows:

> I do note preliminarily most of what I heard as far as the prejudice resulting from speculative video, the faded memories, the changing stories of the – the faded memory and changing stories I should say of the victim, all of those, if you will, rest upon the State as well as the Defendant. After all it is the State who has the highest burden under the law to prove its case. The Defendant has no obligation to prove his innocence.

So to the extent that there is, a detrimental effect of those things it's at best equal to the parties and more likely it would be more dangerous to the -- or I should say more prejudicial to the State.

In any event, the Constitution does not protect the right to the speediest trial, but a speedy trial. And certainly the circumstances involved in any case of delay have to be put into context of the events as they presented themselves to the State and, of course, to the Defendant.

So the Constitution also does not provide to a defendant an easy trial such that I have heard here today. That the State was required to do this and provide that. Make it so we didn't have to investigate the alleged facts. We don't know where these witnesses are assuming that's correct. Now in this case we got to go find these people to talk with them.

Nor does the Constitution provide for an[] easier trial th[a]n might otherwise exist had pretrial circumstances not been what they are. You know, folks have to present their defense based -- or actually more to the point the State has to prove its case based on what's available to them not what might have been. I'm sorry. Base their prosecution on what is available to them and the Defense has no entitlement to some other set of circumstances or fact that might make their Defense easier.

Nor does, of course, the Constitution in any way provide or require -- provide to the defendant or require the State to somehow assure that the defendant has the easiest conceivable defense. It just requires a speedy trial and a fair trial under the circumstances that reality thrust upon the parties

I don't see any intentional delays by the State. I don't see any prejudice to the Defendant in this case thrust upon him by the State so that they could obtain any type of advantage. The court is just simply unpersuaded by the arguments of the Defendant based on the record that in any way there was a purposeful act of any type by the State to gain an advantage. And before that in deed [sic] before I can even reach that conclusion I don't see any particular prejudice to the Defendant, having been demonstrated.

All of the problems that the Defendant maintains he now faces because of this delay are true and faced by the prosecution as well. And remember the prosecution has to prove its case beyond reasonable doubt. The Defendant is not obliged to prove a defense or his innocence.

So even assuming the burden of proof would not figure into this analysis, because frankly I think it is important, but even taking that away I

> don't see any prejudice resulting from this delay in any way that was harmful, is harmful, to the Defendant, or caused intentionally by the State for the purpose of gaining an advantage, so the motion is denied.

B.

Pre-Indictment Delay

In *Clark v. State*, 364 Md. 611, 624-31 (2001), the Court of Appeals adopted a two-prong test for evaluating claims of excessive pre-indictment delay. Under that test, to establish a violation of due process rights arising from pre-indictment delay, a defendant is required "to prove *both* (1) that he suffered actual prejudice from the delay, *and* (2) that the delay was the result of a purposeful attempt by the State to gain a tactical advantage over him." *Willis v. State*, 176 Md. App. 1, 3-4 (2007), *cert. denied*, 404 Md. 153 (2008).

1.

Prejudice

This Court explained the requirement of a showing of "actual prejudice" in *Smallwood v. State*, 51 Md. App. 463, 472 (1982), as follows:

> It is the required showing of actual prejudice that distinguishes Sixth Amendment speedy trial matters from the Fourteenth Amendment "Due Process" and Article 24 "Law of the land" cases. The distinction is not a matter of mere semantics; it is crucial because in Sixth Amendment cases, "prejudice" may be presumed from delay, but in pre-indictment delay . . . prejudice may not be presumed but must be proven.

Clark, 364 Md. at 618-19, is an example of actual prejudice. In that case, the State conceded that Clark was prejudiced by the 15-year pre-indictment delay because several witnesses had died.

Here, by contrast, appellant does not explain on appeal how he was prejudiced by the delay, claiming instead that the circuit court concluded that there was actual prejudice, which he asserts "was obviously correct." The trial court, however, as set forth in detail, *supra*, made no such finding. Indeed, he ultimately concluded: "I don't see any prejudice resulting from this delay in any way that was harmful, is harmful, to the Defendant." Appellant has not convinced us that the circuit court erroneously concluded that appellant did not satisfy his burden of showing actual prejudice.

2.

Tactical advantage

Nor did appellant show that the pre-indictment delay was the result of a purposeful attempt by the State to gain a tactical advantage over the defendant. Although counsel below asserted her opinion that the State delayed the case until appellant was convicted in New York so it could call the rape victims in those cases as witnesses against him under Md. Rule 5-404(b),[2,3] when the court asked what evidence there was that would allow the court to reach the conclusion that the State delayed to gain a tactical advantage, appellant

[2] Md. Rule 5-404(b) provides as follows:

> Evidence of other crimes, wrongs . . . is not admissible to prove the character of a person in order to show action in conformity therewith. Such evidence, however, may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident.

[3] The trial court initially allowed the testimony of the victims from appellant's New York rape prosecutions, but it later struck the testimony.

responded merely that the court could infer it from the circumstances. The court disagreed, stating:

> I mean, you know, I can't infer that just because a rooster crows in the morning that the rooster is the one who brings about the morning. I mean these things may appear to somebody that, you know, coincidence or sequence may appear to be what you say, but it also may have a hundred other explanations.

The State explained the reasons for the delay, including that the victim did not initially want to pursue prosecution and that, once she did, New York was not willing to release appellant until the charges there were resolved against him. We perceive no error in the motions court's finding that appellant failed to prove that the State purposefully delayed filing the indictment in the case to gain a tactical advantage over the defense. Accordingly, the circuit court properly denied the motion to dismiss based on pre-indictment delay.

C.

Speedy Trial

Appellant next contends that the court erred in denying his motion to dismiss based on a violation of his constitutional right to a speedy trial.[4] The State disagrees, asserting that appellant was not deprived of his right to a speedy trial.

In reviewing a motion to dismiss for violation of the right to a speedy trial, we make "our own independent constitutional analysis" to determine whether this right has been denied. *Glover v. State*, 368 Md. 211, 220 (2002). "We perform a *de novo* constitutional

[4] *See* U.S. CONST. amend. VI; MD. DECL. RIGHTS, art. 21.

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.

The United States Supreme Court has established a four-factor balancing test to assess whether a defendant's right to a speedy trial has been violated. *Barker*, 407 U.S. at 530-32. These four factors include: "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id.* at 530; *State v. Kanneh*, 403 Md. 678, 688 (2008). None of these factors is "'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.'" *Jules v. State*, 171 Md. App. 458, 482 (2006) (quoting *Barker*, 407 U.S. at 533), *cert. denied*, 396 Md. 525 (2007).

1.

Triggering of the Right to Speedy Trial

Prior to conducting the four-factor *Barker* analysis, a court must determine whether the length of delay is of such constitutional dimension as to trigger the more in-depth analysis. *Kanneh*, 403 Md. at 687-88; *Glover*, 368 Md. at 222-23. Although "no specific duration of delay constitutes a *per se* delay of constitutional dimension . . . we have employed the proposition that a pre-trial delay greater than one year and fourteen days was 'presumptively prejudicial' on several occasions." *Glover*, 368 Md. at 223.

The parties disagree on the overall length of the delay, disputing the date when the speedy trial clock began to run in this case. Appellant claims that the speedy trial clock began to run on March 25, 2011, the day the statement of charges was filed in the District

Court of Maryland and a detainer was lodged in New York.[5] The State contends that the clock started on February 7, 2014, the day the indictment was filed in the circuit court and an arrest warrant was served on him.

We agree with the State in this regard. In *State v. Gee*, 298 Md. 565, *cert. denied*, 467 U.S. 1244 (1984), the Court of Appeals explained that when a statement of charges cannot be tried in the District Court, the speedy trial clock does not begin to run, as follows:

> We think that the document consisting of a warrant of arrest and statement of charges on which the warrant is based (warrant-statement of charges) is a "formal charge" in the contemplation of the speedy trial right *when a defendant is subject to be tried on that document*. In that event the criminal prosecution has truly commenced and the putative defendant has become an "accused." The State has committed itself to prosecute and the adverse positions of State and defendant have solidified. "It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." *Kirby v. Illinois*, 406 U.S. at 689, 92 S.Ct. at 1882. A warrant-statement of charges on which a defendant can be tried is tantamount to an indictment or an information. Therefore, its mere issuance marks the commencement of the "criminal prosecutions" to which alone the explicit guarantees of the Sixth Amendment are applicable. *Id*. at 690, 92 S.Ct. at 1882.
>
> On the other hand when the defendant cannot be tried under the warrant-statement of charges he is not held to answer a criminal charge on the basis of that document. Its issuance does not mark the onset of formal prosecutorial proceedings to which the Sixth Amendment guarantee is applicable, nor has the putative defendant thereby become an "accused." The State has not by the issuance of such a warrant-statement of charges committed itself to prosecute. Before it can proceed the grand jury must indict or the State's Attorney must file an information. Neither is obliged to do so. Until an indictment has been returned or an information filed the

[5] We note that appellant is somewhat inconsistent with his argument. For the purposes of appellant's pre-indictment delay contention, he chooses the end point of that analysis as the date the indictment was filed, February 7, 2014. For purposes of his speedy trial contention, however, he claims the start point was March 25, 2011. Appellant cannot have it both ways.

> adverse positions of State and defendant have not solidified, nor is the defendant at that point faced with the prosecutorial forces of organized society and immersed in the intricacies of substantive and procedural law. In such circumstances the warrant-statement of charges is not the equivalent of an indictment or an information. It is not a "formal charge" and thus, its mere issuance does not activate the speedy trial provision.

Id. at 574.

Here, appellant could not have been tried on the Statement of Charges in the District Court because it charged a felony. Except for certain exceptions not here applicable, under Md. Code (2012 Repl. Vol.) § 4-302(a) of the Criminal Law Article ("CR"), the circuit court has exclusive jurisdiction over a case charging charged a felony. Pursuant to *Gee*, 298 Md. at 577, because appellant could not be tried in the District Court on the statement of charges, the speedy trial clock did not begin to run at the time when the District Court statement of charges was filed.[6] Accordingly, the speedy trial clock started on February 7, 2014, and the length of delay until trial began on October 13, 2015, was approximately twenty months.

A delay of one year and fourteen days has been found to be of sufficient constitutional dimension to trigger the *Barker* analysis. *Glover*, 368 Md. at 223. Accordingly, the length of delay is of constitutional dimension, and we shall proceed to assess the relevant speedy trial factors in this case.

[6] There was no evidence presented that the detainer impacted appellant at all; he was pending trial in New York on two separate rape charges at the time the detainer was lodged.

2.

The *Barker v. Wingo* Factors

a.

The Length of the Delay

In addition to being a triggering factor, the length of the delay is a factor that must be weighed in the *Barker* analysis. As indicated, the delay here, from the filing of the indictment to trial, was approximately twenty months. Delays of much greater length have been found not to violate the constitutional right to a speedy trial. *See Barker*, 407 U.S. at 533-36 (five years); *Kanneh*, 403 Md. at 689-90 (35 months); *Randall v. State*, 223 Md. App. 519, 558 (2015) (25 months); *Malik v. State*, 152 Md. App. 305, 317-18 (23 months), *cert. denied*, 378 Md. 68 (2003); *Wheeler v. State*, 88 Md. App. 512, 517 (1991) (22 months); *Marks v. State*, 84 Md. App. 269, 282 (1990) (22 months), *cert. denied*, 321 Md. 502 (1991). The Court of Appeals has stated that the length of the delay "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.

The Court of Appeals has, however, looked to the nature of the case in determining the weight to be given to the length of the delay. *Divver v. State*, 356 Md. 379, 390-91 (1999). In *Divver*, where the Court found that a delay of one year and sixteen days constituted a violation of the right to a speedy trial, the Court stated as follows regarding the length of the delay:

> [T]he delay is of uniquely inordinate length for a relatively run-of-the-mill District Court case. Trial of the case to verdict on guilt or innocence presented little, if any, complexity. There was one witness for the State, a

> police officer whose appearance was subject to the control of the State, and the only witness for the defense was the accused himself. Given these circumstances, the length of the delay in the instant matter operates more heavily in Divver's favor than would usually be the case in many circuit court prosecutions.

Id. Accord State v. Bailey, 319 Md. 392, 411 (the nature of the charges involved affects the length of delay since "the delay that can be tolerated for an ordinary street crime is considerably less than a serious, complex … charge.'") (quoting *Barker*, 407 U.S. at 531), *cert. denied*, 498 U.S. 841 (1990).

Here, unlike in *Divver*, which involved a trial in District Court, this case involved a twenty-count indictment filed in the circuit court charging serious and complex crimes carrying potentially substantial penalties, including imprisonment for life. Under these circumstances, the length of delay weighs against the State, but only slightly.

b.

The Reason for the Delay

The next factor we consider is the reason for the delay. "[D]ifferent reasons should be assigned different weights." *Kanneh*, 403 Md. at 690. In *Jones v. State*, 279 Md. 1, 6 (1976), *cert. denied*, 431 U.S. 915 (1977), the Court of Appeals explained:

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

Id. at 6-7.

The roughly twenty-month delay in this case can be divided into the following four time periods.

Delay between the filing of the indictment on February 7, 2014, and October 28, 2014, the date on which trial was originally scheduled to begin (eight months, and 21 days):

The period leading up to the first scheduled trial date generally is considered pre-trial preparation, which is neutral and not weighed against either party. *See Malik*, 152 Md. App. at 318. Here, the period of eight months and 21 days between the filing of the indictment and the first scheduled trial date is consistent with a reasonable pre-trial preparation period, particularly considering that this case involved a 20-count indictment charging numerous felonies. Ordinarily, "'[t]he span of time from charging to the first scheduled trial date is necessary for the orderly administration of justice, and is accorded neutral status.'" *White v. State*, 223 Md. App. 353, 384 (2015) (quoting *Howell v. State*, 87 Md. App. 57, 82 (1991)). Accordingly, the roughly nine month delay between the filing of the indictment and appellant's first scheduled trial date is deemed neutral.

Delay between the first scheduled trial date on October 28, 2014, and the March 2, 2015, trial date (four months, and two days):

The period of delay between the first scheduled trial date on October 28, 2014, and March 2, 2015, was due to two, separate, joint requests for postponement, one on October 10, 2014, and one on December 12, 2014. Because the postponements were jointly requested by both parties, this delay of approximately four months is accorded neutral status. *Marks*, 84 Md. App. at 283; *Ferrell v. State*, 67 Md. App. 459, 464 (1986).

Delay between the March 2, 2015, trial date, and the June 22, 2015 trial date (three months, twenty days):

On February 23, 2015, the State filed a request for postponement noting that a new prosecutor had just been assigned the case and was having difficulty locating witnesses and the report of an expert. Additionally, the State noted that it now was required to obtain an out-of-state subpoena to secure the attendance of the victim. The motion for postponement was granted on February 26, 2014, and trial was rescheduled for June 22, 2015. This period of approximately four months weighs against the State, but only slightly.

Delay between the June 22, 2015, trial date and the October 13, 2015, trial date (three months, twenty-one days):

On two occasions, appellant sought to postpone the case just days before trial was scheduled to commence, once on June 19, 2015, and once on October 9, 2015. Appellant's June 15, 2015, request to postpone the June 22, 2015, trial date was granted, and trial was rescheduled to begin on Tuesday, October 13, 2015. This roughly four month period weighs against appellant. On Friday, October 9, 2015, appellant once again requested a postponement, but that request was denied.

In sum, of the twenty month and six day total delay in this case, twelve months and 23 days (the time period leading up to the first trial date, plus the delays involved with the joint requests for continuance) are accorded neutral status. The remaining delays are split between appellant and the State. Three months and twenty days weigh against the State, and three months and twenty-one days weigh against appellant. Accordingly, the reasons for the delay are overall neutral and do not weigh in favor of a finding of a speedy trial violation.

c.

Assertion of the Right

The third *Barker* factor requires analysis of whether and to what extent a defendant asserted his or her right to a speedy trial. 407 U.S. at 531. As the Court of Appeals observed: "'The more serious the deprivation, the more likely a defendant is to complain.'" *Bailey*, 319 Md. at 409 (quoting *Barker*, 407 U.S. at 531). "Because the strength of the defendant's efforts will be affected by the length of the delay, asserting the speedy trial right weighs heavily in determining if the right has been denied." *Dalton v. State*, 87 Md. App. 673, 688 (citation and quotations omitted), *cert. denied*, 325 Md. 16 (1991). In analyzing this factor, we "weigh the frequency and force of the objections as opposed to attaching significant weight to a purely pro forma objection." *Barker*, 407 U.S. at 529.

Here, appellant included a request for a speedy trial in the omnibus pre-trial motion that he filed on July 24, 2014, when his counsel entered her appearance in the case. That request for a speedy trial contained no detail specific to this case; it was a pro forma request that deserves little weight. Appellant next asserted his right to a speedy trial approximately a month before trial; during the September 2, 2015, hearing on his written motion to dismiss based on pre-indictment delay, counsel orally pressed appellant's right to a speedy trial. Appellant, however, either jointly with the State, or individually, sought and obtained four separate continuances, causing a delay of seven months and 23 days. Under these circumstances, where appellant did raise the issue of his right to a speedy trial, but his demand was not frequent or forceful, and he requested several postponements, this factor weighs against dismissal.

d.

Prejudice

"[T]he most important factor in the *Barker* analysis is whether the defendant has suffered actual prejudice." *Henry v. State*, 204 Md. App. 509, 554 (2012). Prejudice should be considered in light of the interests the speedy trial right was designed to protect: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Barker*, 407 U.S. at 532. Of these factors, the last is the most serious because "the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id*.

Appellant makes the following argument regarding the prejudice he allegedly suffered as a result of the delay in his prosecution:

> Any person in appellant's position would have felt a great deal of anxiety and concern at the prospect of facing a life sentence. Appellant suffered actual prejudice from the delay because of the anxiety he undoubtedly experienced waiting for trial. Moreover, the existence of the detainer would have impeded his rehabilitation in the New York prison system. *See Stone v. State*, 344 Md. 97, 107 n.6, 685 A.2d 441 (1996) (recognizing adverse effects of detainers on prisoners). Most importantly, however, Appellant's defense was impaired in his articulated inability to pursue avenues of investigation, particularly as it regarded: Facebook records, video footage from the gas station, and medical records, or interviews with co-workers and relocated supervisors as potential witnesses.

Initially, we note that, although the crime occurred on September 12, 2010, the speedy trial clock did not begin to run until February 7, 2014, when the indictment was filed in this case. Accordingly, to the extent that there was hardship to appellant's investigative inabilities, it existed before the speedy trial clock began to run. *See White*, 223 Md. App. at 386 (noting that any damage to White's case would have resulted from

the pre-indictment delay from 1979 to 2011, not from the delay between the institution of prosecution and the trial). With respect to appellant's claim of pre-trial incarceration anxiety, this Court previously rejected such a claim in the absence of testimony that the defendant actually suffered anxiety. *Id.* at 385-87. And appellant failed to show any impairment to his defense. Although certain witnesses had moved out of state, and it was difficult to locate those witnesses, appellant did not demonstrate that he was unable to locate the witnesses. Additionally, appellant's claim that he was prejudiced by a lack of medical records was disputed below, where the nurse who examined the victim was available for trial and the State had disclosed all relevant medical records to appellant. Although the doctor who signed the medical orders could not be located, that individual never examined the victim, and appellant did not explain what testimony the doctor would have provided if located.

Appellant did not make a showing of prejudice. Accordingly, this factor does not weigh in favor of dismissing the charges.

e.

Balancing

With regard to the final step in the analysis, the Court of Appeals has noted:

> Balancing the four factors is undoubtedly a sensitive task, completely dependent on the specific facts presented by each unique case. In carrying out this difficult task, we are mindful that our task is to ensure that the petitioner's right to a speedy trial has not been violated; we are also mindful, however, that delay is often the result of efforts to ensure the highest quality of fairness during a trial.

Glover, 368 Md. at 231-32.

Here, although the length of delay weighs against the State, it does so only slightly, and the reasons for delay were neutral. Appellant did assert his right to a speedy trial, but he also sought and obtained continuances of the trial date on four occasions. And he failed to demonstrate that he suffered any prejudice warranting dismissal of the case.

Under these circumstances, we hold that the delay in this case did not violate appellant's right to a speedy trial. Accordingly, the trial court did not err in denying his motion to dismiss.

II.

Waiver of Jury Trial

Appellant contends that the circuit court erred in "failing to ensure that he knowingly and voluntarily waived his right to a jury trial." He asserts that the court mis-advised appellant about his right to elect a court trial versus a jury trial, "ultimately calling into question whether such a waiver can be deemed to have been truly knowing and voluntary."

The factual predicate for appellant's argument is the following statement:

> [I]f I conclude that the State has not proven its – carried its burden of proof with regard to a count, *I'm **not** going to find you not guilty of the count*. Now, it may occur to you that I am obviously not going to be hung on a count because there is only one decision maker and that's going to be me.
>
> ***
>
> So all that stuff we just went through about a hung jury won't apply. I am going to take the evidence under advisement and find you guilty or not guilty of each and every count.

(emphasis added).

The factual predicate of appellant's argument, however, is incorrect. On December 15, 2016, the State filed an unopposed motion to correct the record, which this Court granted on December 20, 2016. That motion contained a corrected copy of the relevant page of the transcript, which reads as follows:

> [I]f I conclude that the State has not proven its – carried its burden of proof with regard to a count, *I'm going to find you not guilty of the count*. Now, it may occur to you that I am obviously not going to be hung on a count because there is only one decision maker and that's going to be me.
>
> ***
>
> So all that stuff we just went through about a hung jury won't apply. I am going to take the evidence under advisement and find you guilty or not guilty of each and every count.

Accordingly, the corrected record makes clear that the circuit court did not make the asserted error in its advisement to appellant about electing a court trial or a jury trial. Appellant is not entitled to reversal of his convictions on this ground.

III.

Sufficiency of the Evidence - Attempted Sexual Offense in the First Degree

Appellant contends that the evidence was insufficient to support his conviction for attempted sexual offense in the first degree, which was based on an attempt to engage in anal intercourse with the victim. The State disagrees, asserting that there was sufficient evidence to support the conviction.

The test of appellate review of evidentiary sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Gutierrez*, 446 Md. 221, 231-32 (2016). As this Court has explained:

> The Court's concern is not whether the verdict is in accord with what appears to be the weight of the evidence, "but rather is only with whether the verdicts were supported with sufficient evidence-that is, evidence that either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant's guilt of the offense charged beyond a reasonable doubt. We must give deference to all reasonable inferences that the fact-finder draws, regardless of whether the appellate court would have chosen a different reasonable inference.

Donati v. State, 215 Md. App. 686, 718 (2014) (internal citation and quotation omitted).

An attempted sexual offense in the first degree requires an attempt to:

> (1) engage in a **sexual act** with another by **force, or the threat of force**, without the consent of the other; **and**
>
> (2) (i) employ or display a dangerous weapon, or a physical object that the victim reasonably believes is a dangerous weapon;
>
> (ii) suffocate, strangle, disfigure, or inflict serious physical injury on the victim or another in the course of committing the crime;
>
> (iii) threaten, or **place the victim in fear, that the victim**, or an individual known to the victim, **imminently will be subject to** death, **suffocation**, **strangulation**, disfigurement, serious physical injury, or kidnapping;
>
> (iv) commit the crime while aided and abetted by another; or
>
> (v) commit the crime in connection with a burglary in the first, second, or third degree.

CR § 3-305(a) (emphasis added).

Included within the definition of a "sexual act" is anal intercourse. CR § 3-301(d)(1)(iv). "'The crime of attempt consists of a specific intent to commit a particular offense coupled with some overt act in furtherance of the intent that goes beyond mere preparation.'" *Spencer v. State*, 450 Md. 530, 567 (2016) (quoting *State v. Earp*, 319 Md. 156, 162 (1990)).

Appellant contends that the evidence was insufficient to support his conviction of attempted first degree sexual offense, based on an attempt to have anal intercourse with the

victim, for two reasons. First, he asserts that there was insufficient evidence of an "attempt" to engage in anal intercourse. Second, he argues that there was insufficient evidence of actual or threatened death, suffocation, strangulation, disfigurement, serious physical injury, or kidnapping, to aggravate the sexual offense to the first degree. Appellant's arguments are meritless.

With respect to the evidence supporting a finding that appellant attempted to engage in anal intercourse with the victim, his actions in asking for "lubrication," rubbing the lubricant on the victim's anal opening, and then rubbing his penis against her anus, was sufficient for the court to find an overt act in furtherance of an intent to engage in anal intercourse. This is especially true given that appellant had just vaginally raped the victim.

The fact-finder also heard evidence that, just prior to engaging in sexual intercourse, appellant choked the victim forcefully enough that she thought she was going to die. The victim testified that, after being choked, she went into "immediate preservation mode," and "to make sure that she was safe [she] began to listen to everything that he told [her] to do to avoid being injured any further." This evidence was sufficient for the court to find that appellant attempted to engage in anal intercourse by force, or threat of force, and placed the victim in fear that she imminently would be subject to suffocation or strangulation. The evidence was sufficient to support appellant's conviction.

JUDGMENTS OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.