Circuit Court for Worcester County
Case No. C-23-CR-17-000018

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2061

September Term, 2017

ANTHONY MARLIN TUNNELL

v.

STATE OF MARYLAND

Graeff,
Beachley,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: March 22, 2019

A jury sitting in the Circuit Court for Worcester County convicted Anthony Marlin Tunnell, appellant, of one count of first-degree murder and acquitted him of one count of use of a firearm in the commission of a crime of violence.[1] The court sentenced appellant to life in prison without the possibility of parole.

Appellant presents four questions for our review, which we have rephrased:

> I. Did the circuit court fail to comply with Md. Rule 4-271, *i.e.* "the *Hicks* Rule," when it permitted appellant to be tried beyond the 180-day deadline?
>
> II. Did the trial court err by failing to ascertain if the State committed a discovery violation?
>
> III. Did the trial court abuse its discretion by denying appellant's motion for a mistrial?
>
> IV. Was the evidence legally sufficient to convict appellant?

For the following reasons, we answer the first three questions in the negative and the fourth question in the affirmative. We therefore affirm the judgment of the circuit court.

FACTS AND PROCEEDINGS

On the night of December 1, 2016, James Allen, known as "Bumpy," was shot and killed outside of a residence in Pocomoke City, Maryland. Ten days later, appellant was arrested and charged with the first-degree murder of Mr. Allen, and related charges. Appellant was tried by a jury on September 11 and 12, 2017. The following relevant facts were adduced at trial.

[1] At the close of the State's case, the trial court granted defense counsel's motion for judgment of acquittal on one count of use of a firearm by a disqualified person.

The State presented a circumstantial case based primarily upon text messages sent and received from a cell phone number linked to appellant. The messages revealed that appellant believed Mr. Allen was involved in the theft of appellant's marijuana stash and that appellant intended to kill in revenge for the theft.

Appellant's niece, Unique Tunnell ("Unique"), testified in the State's case. Unique's father is appellant's brother. Unique's boyfriend of many years and the father of her child was Darryl Dennis, known as "Cooch." On Thursday, November 24, 2016, which was Thanksgiving Day, Unique and Mr. Dennis spent time with appellant and other family members in and around Mappsville, Virginia, approximately a twenty-five minute drive from Pocomoke City.

A week later, on December 1, 2016, just before 4:00 a.m., Unique exchanged text messages with a sender from the number (757) 894-2963 ("the 2963 Number").[2] Unique did not know appellant's phone number, but she testified that she was certain the texts were from appellant because the sender called her "hunni," "niece," and "Unique," referenced Unique's father, and discussed their time together over Thanksgiving.

The sender from the 2963 Number said that Mr. Dennis had stolen marijuana from him.[3] Unique testified that appellant gave her marijuana over Thanksgiving. The sender threatened that if he did not get his property back from Mr. Dennis, he would be "spazzin tf out til [he was] dead r in jail!!!" Unique responded by defending Mr. Dennis, asserting

[2] Unique was using Mr. Dennis's phone because her's was broken.

[3] Unique had been staying with her father at Thanksgiving when appellant visited her there.

that he had not stolen from anyone.

Dewayne Cane, who lived near the scene of the crime and knew both appellant and Mr. Allen, also testified for the State. He lived with his mother and other family members in a house on Fourth Street in Pocomoke City. There is a large, grassy vacant lot next to the Cane residence. On November 30, 2016, Mr. Allen hung out at Mr. Cane's house along with several other men. Around dusk that same day, Mr. Cane saw appellant outside of his house and spoke to him for a few minutes. Appellant was a "little upset" because he said that Unique and her boyfriend "Cooch" had stolen property from him. Mr. Cane knew "Cooch" to be Mr. Allen's cousin.

The next night, December 1, 2016, Mr. Cane went to a convenience store around 9:20 p.m. to buy kerosene. When he returned to his house at 9:25 p.m., he observed appellant standing in the vacant lot next to his house, near the passenger side door of a car parked on the grass. Mr. Cane thought he could see four or five people in the car, but could not be certain because it was very dark and appellant was standing by the car. He spoke to appellant for a few minutes and then went inside his house. Around twenty minutes later, he heard gunshots outside.

At 10:10 p.m. that same night, Sara Bryant was driving from her home in Pocomoke City to her overnight shift at the Eastern Correctional Institution in Westover. She observed Mr. Allen, whom she had known for a long time, staggering across Market Street at its intersection with Fourth Street, about two blocks from Mr. Cane's house. She saw what appeared to be blood on the back of his pants. She pulled over, jumped out of her car, and yelled for him to stop and sit down. Mr. Allen collapsed in the middle of Market

Street. Ms. Bryant ran to him, realized he had been shot, and returned to her car to retrieve her cell phone. At 10:13 p.m., Ms. Bryant called 911.

As Ms. Bryant ran back towards Mr. Allen, she saw Mr. Dennis approaching. He walked over to Mr. Allen, and placed his hand on Mr. Allen's shoulder for a moment while Ms. Bryant was speaking to the 911 operator. Mr. Dennis left before police and emergency medical responders arrived.

Mr. Allen was pronounced dead at the scene. An autopsy revealed that he sustained a single "through and through" gunshot wound that entered the right side of his back and exited near his collarbone. In the autopsy report, the assistant medical examiner concluded that the gun was not fired from close range.

Sergeant Sabrina Metzger with the Homicide Division of the Maryland State Police, the lead investigator on the case, responded to Market Street and later to the vacant lot next to Mr. Cane's house. Physical evidence and witness interviews revealed that Mr. Allen had been shot near the rear of the vacant lot. Crime scene investigators collected four 9 mm and two .380 spent bullet casings, a black ski mask, and a tube of ChapStick from the vacant lot. Investigators were unable to determine the caliber of the bullet that killed Mr. Allen, however, DNA analysis of the ski mask revealed DNA consistent with an individual by the name of Aaron Bowen.

Sgt. Metzger interviewed Mr. Cane twice in relation to the shooting. During the first interview, on December 8, 2016, Mr. Cane stated that on the night of the shooting he observed two men sitting in the backseat of the car that appellant stood next to and that

both men were wearing ski masks.[4] A third man sat in the front seat, but Mr. Cane could not determine if he was wearing a ski mask. During the December 8 interview, Mr. Cane showed Sgt. Metzger a text message his mother had received from "Gank," which he knew to be a name appellant used, asking for Mr. Dennis's phone number. Sgt. Metzger recorded in her investigative notes the 2963 number was associated with "Gank."

Sgt. Metzger was unable to obtain subscriber information for the 2963 Number because it was a prepaid cell phone. The police never recovered the phone associated with the 2963 Number.

Maryland State Police Detective Kyle Clark testified "as an expert in basic cell phone analysis." He testified that the police had subpoenaed the phone records for the 2963 Number from Verizon. The records included all calls made and received from that number, as well as the "SMS text content," which was the substance of text messages that number sent and received. As part of his analysis, Detective Clark identified "text message chains," which were "continuous conversation[s] between one person and another in text messaging." The State introduced into evidence six exhibits reflecting the text message chains between the 2963 Number and various other numbers.

Exhibit 2 showed the exchange Unique described in her testimony. It commenced on December 1, 2016, shortly before 4:00 a.m. and ended shortly before 5:00 a.m.[5]

[4] During his trial testimony, Mr. Cane claimed it was too dark to see inside the car.

[5] The first text message in the chain was sent by the 2963 Number at 12:15 a.m. on December 1, 2016, but the messages that precipitated Unique's responses did not begin until 3:52 a.m.

Exhibit 20 reflects an exchange between the 2963 Number and (757) 694-1321 ("the 1321 Number"). On December 1, 2016, at 12:01 a.m., the 2963 Number texted the 1321 Number: "Found da spot he nt dere at da moment heard he mite be wit some dude named bumpy."[6] The 1321 Number responded that "Bumpy" had been robbing people in Pocomoke City. The 2963 Number replied, asking if the 1321 Number knew what "Bumpy" looked like because he thought he might be "tied up wit it." The 2963 Number added that he was going to "smke dat n****." The 1321 Number responded that he would send a photograph of Bumpy.[7] Also in that chain, the 2963 Number texted "I Gotta get anotha phone."

Exhibit 24 reflects an exchange between the 2963 Number and (253) 231-2799 ("the 2799 Number"). Sgt. Metzger had testified earlier that that number was associated with a Maurice Tunnell in Tacoma, Washington. On December 1, 2016, at 9:49 a.m., the 2963 Number texted the 2799 Number, "Ima kill bout dis[,]" adding "Unique boyfriend gt me im airin sh*t tonite I told him get dat to me by tonite or pcity of fire tonite." The 2799 Number later asked, "What neke say??" to which the 2963 Number replied, "Protectin him f*** her fr."

Exhibit 23 included text exchanges both before and after the shooting between the 2963 Number and (757) 854-8897 ("the 8897 Number"). As pertinent, on December 2, 2016, at 1:03 p.m., the 8897 Number texted the 2963 Number: "Cops were here[.]" The

[6] As previously stated, Mr. Allen's nickname was "Bumpy."

[7] The SMS text content did not include images, so Detective Clark could not determine if the 1321 Number sent a photograph of Bumpy.

2963 Number responded, "Lookn fo me?"

Detective Clark testified that he was present when appellant was arrested on December 11, 2016. Appellant and his girlfriend were staying at the Motel 6 in Salisbury. Detective Clark executed a search warrant for their motel room and a car parked outside. Inside the car, Detective Clark recovered five cellular phones, including one with the phone number (234) 517-4325 ("the Motel 6 Phone"). Detective Clark downloaded all the data from the Motel 6 Phone and analyzed it.

On the Motel 6 Phone, Detective Clark found text messages exchanged with the 1321 Number, the number with which the 2963 Number had texted about needing to get another phone. The Motel 6 Phone also texted with a phone with the number (757) 694-7367 ("the 7367 Number"). In that text exchange, the Motel 6 Phone sender was asking for the phone number of a person called "slim" who was identified later in the chain as "Aaron Bowens." As mentioned earlier, the DNA found on the ski mask from the crime scene was consistent with the DNA for a man named Aaron Bowen.

Detective Clark testified that the phone with the 2963 Number was turned off from 7:36 p.m. on the night of the murder until around 6:30 a.m. the next morning.

The final witness called by the State was Kristina Taylor, who worked at the Econo Lodge in Pocomoke City. Ms. Taylor went to high school with appellant. She testified that appellant and his girlfriend stayed at the Econo Lodge for approximately three months before December 1, 2016. On December 2, 2016, when Ms. Taylor went to clean their room, she discovered that they had checked out.

At the close of the State's case, defense counsel made a motion for judgment of

acquittal as to all charges, but made a particularized argument only as to the handgun charges. The court granted the motion as to the charge of possession of a firearm by a disqualified individual.

In his case, appellant elected not to testify and called one witness: his girlfriend's sister, Karen Harmon. Ms. Harmon testified that on December 1, 2016, around 10:00 p.m., she saw appellant outside of her residence drinking with her nephew. As we shall discuss *infra*, Ms. Harmon came forward with this alibi more than eight months after the murder.

At the close of all the evidence, defense counsel did not renew her motion for judgment of acquittal. The jury convicted appellant of first-degree murder and appellant noted this timely appeal.

We shall include additional facts as necessary in our discussion of the issues.

DISCUSSION

I.

Hicks Violation

In a criminal case, a defendant's trial date must be scheduled no later than 180 days after the earlier of the defendant's initial appearance in circuit court or the appearance of counsel, unless the administrative judge, or his or her designee, finds "good cause" for a postponement. Md. Code (2001, 2018 Repl. Vol.), § 6-103 of the Criminal Procedure Article ("CP"); Md. Rule 4-271. The 180-day deadline, known as the "*Hicks* date," emanates from *State v. Hicks*, 285 Md. 310 (1979). "Dismissal is the appropriate remedy where the State fails to bring the case to trial within the 180-day period and good cause has

not been established." *Choate v. State*, 214 Md. App. 118, 139 (2013) (citing *Hicks*, 285 Md. at 318).

The "critical order by the administrative judge, for purposes of the dismissal sanction, is the order having the effect of extending the trial date beyond 180 days." *State v. Frazier*, 298 Md. 422, 428 (1984); *see also State v. Brown*, 355 Md. 89, 108-09 (1999) ("critical postponement for purposes of Rule 4-271 is the one that carries the case beyond the 180-day deadline").

> On review of an administrative judge's decision to postpone for good cause, "the trial judge (as well as an appellate court) shall not find an absence of good cause unless the defendant meets the burden of demonstrating either a clear abuse of discretion or a lack of good cause as a matter of law."

Choate, 214 Md. App. at 139 (quoting *Frazier*, 298 Md. at 454).

In the case at bar, appellant's *Hicks* date was August 1, 2017, and his trial was scheduled for May 9, 2017. A little over a month before trial, on April 7, 2017, the parties appeared before Judge Thomas Groton, the circuit court administrative judge. The prosecutor advised Judge Groton that he had recently provided defense counsel with a "large package of discovery," but that there were "outstanding reports . . . [and] audio recordings" that still needed to be provided. Some DNA testing had been performed and the results provided to defense counsel, but a "secondary DNA examination" had not yet been completed. On those grounds, the State requested a postponement. The prosecutor suggested that the original trial date be converted to a "status conference." He also mistakenly informed the court that a postponement based upon pending DNA test results would "*toll* the 180-day rule of the *Hicks* date" pursuant to Md. Code (1989, 2013 Repl.

Vol.), § 10-915 of the Courts and Judicial Proceedings Article ("CJP").[8] (Emphasis added.)

Defense counsel did not oppose or consent to a postponement, but asserted appellant's right to a speedy trial and stated that appellant was ready and able to go to trial on May 9, 2017.

Judge Groton granted the State's request, finding that "the need to complete discovery" was "good cause for a continuance" and, accepting the prosecutor's argument that the pending DNA analysis would "toll the *Hicks* date." The court did not set a new trial date at that time, but left the May 9, 2017 date on the calendar for motions.

On May 9, 2017, the parties appeared before Judge Theodore Eschenberg. Ten days before that hearing, on April 29, 2017, the Office of the Public Defender had withdrawn its appearance and private counsel had entered her appearance for appellant. The prosecutor made a "motion to continue what is an ongoing postponement in this matter." He explained that he had recently provided new defense counsel with "a voluminous amount of discovery" that had previously been provided to appellant's former attorney. He further explained that he had received a "preliminary report" on the outstanding DNA test and expected the full report within the week. The prosecutor requested a "postponement to a date not yet determined so that [the State could] retain the report[.]" The prosecutor stated that after the DNA report was received, "[the State would] promptly call assignment and set it in for a date that is convenient to both the Court and to the Defendant."

[8] CJP § 10-915(d) governs DNA evidence. At subsection (d), it permits a court to "grant a continuance" if a party seeking to introduce DNA evidence to prove or disprove identity is unable to provide certain enumerated information to the opposing party at least thirty days before trial. It does not, however, provide a mechanism to "toll" *Hicks*.

Judge Eschenberg inquired as to whether it was a "joint motion" given the discovery that had just been turned over to defense counsel. Defense counsel answered affirmatively. The court granted the joint motion to continue the postponement, noting that defense counsel "[o]bviously . . . need[ed] time to go over those documents" and to "see the DNA results." The court did not set a new trial date at that time.

On August 8, 2017, a week after the expiration of the *Hicks* date, the parties appeared before the court for a status conference at the State's request. The prosecutor asked the court to correct the docket entries to reflect a "new *Hicks* date" and to then determine if a three-day jury trial could be set in before the new date. He explained that the "original reasoning for the tolling of *Hicks* was pending DNA[,]" but that the DNA results had since been received on May 18, 2017 and disclosed to appellant through his counsel. The State did not intend to use the DNA results at trial. The prosecutor took the position that the good cause finding at the April 7, 2017 hearing based upon the pending DNA results had "tolled" *Hicks* until the DNA report was received, on May 18, 2017, a period of forty-two days. Thus, he argued that appellant's new *Hicks* date was September 12, 2017. He suggested that trial be scheduled to commence on September 11, 2017.

Defense counsel responded that she was unaware of any statute or case law permitting the "tolling" of *Hicks* pending receipt of DNA results. She argued that because the DNA results were received on May 18, 2017 – more than two months before the August 1, 2017 *Hicks* date – the State had ample time to schedule the trial in compliance with *Hicks*. She maintained that there was no postponement decision taking the trial beyond the 180-day deadline because neither Judge Groton nor Judge Eschenberg set a new trial date

beyond August 1, 2017.

The court noted that Judge Eschenberg had instructed the prosecutor *and* defense counsel to jointly schedule a trial date after the parties were ready to proceed. Defense counsel agreed with this assertion. The court accepted the State's position that the pending DNA test results tolled *Hicks* for forty-two days, extending appellant's *Hicks* date to September 12, 2017. In the alternative, the court ruled that Judge Groton made a "good cause" finding at the April 7, 2017 hearing that indefinitely postponed the trial date and that the court's original good cause finding "still stands." Trial was scheduled for September 11, 2017 and went forward on that date.

On appeal, appellant contends the court erred by permitting him to be tried beyond the August 1, 2017 *Hicks* date. He asserts that there was no legal basis upon which the running of the 180-day clock was "tolled." He further claims that because the court "did not order the critical postponement putting trial past the 180-day deadline, [it] did not make a finding of good cause shown for trying [a]ppellant after the 180-day deadline."

The State responds that appellant failed to preserve and/or waived this issue because defense counsel never moved to dismiss the charges based upon a *Hicks* violation. Alternatively, it maintains that Judge Groton did not abuse his discretion when, on April 7, 2017, he granted an indefinite postponement of the trial date pending the completion of DNA testing and that, because an indefinite postponement necessarily may extend beyond the *Hicks* date, it was the "critical postponement" for purposes of our analysis.[9] Further,

[9] The State does not advance on appeal the argument made repeatedly by the prosecutor in the circuit court that the *Hicks* date was "tolled" because of the outstanding

because defense counsel expressly consented to a "continuing indefinite extension of the trial date" at the May 9, 2017 hearing, it would have been inappropriate for the court to dismiss the charges even if defense counsel had moved for that relief.

We agree with the State that this issue is not preserved for our review. It is a "fundamental tenet[] of appellate review" that "[o]nly the judge can commit error, either by failing to rule or by ruling erroneously when called upon, by counsel or occasionally by circumstances, to make a ruling." *DeLuca v. State*, 78 Md. App. 395, 397-98 (1989). The appellate cases interpreting CP § 6-103 and Rule 4-271 review for error a trial court's decision to deny a motion to dismiss premised upon that alleged violation. *See, e.g.*, *Moody v. State*, 209 Md. App. 366, 374-75 (2013) (affirming denial of motion to dismiss for *Hicks* violation); *Collins v. State*, 192 Md. App. 192, 209-10 (2010) (reviewing for error the trial court's denial of motion to dismiss for *Hicks* violation); *Frazier*, 298 Md. at 449-50 n.20 (stating that, "if a case is not tried within the 180-day deadline, and if there was no order by or approved by the administrative judge [or that judge's designee] having the effect of postponing the trial past the deadline, *a motion to dismiss . . . must ordinarily be granted* even if there may have been good cause for such a postponement") (emphasis added). In the instant case, appellant's counsel identified a possible *Hicks* violation, but did not seek any relief from the court either at the August 8, 2017 hearing, at the September 1, 2017 motions hearing, or at trial. While defense counsel took issue with the prosecutor's theory

DNA test results. Our research reveals no support in the law for this contention. *See Thompson v. State*, 229 Md. App. 385, 398 n.5 (2016) (noting that there is no "provision in Maryland statutory or case law that 'tolls' the 180-day statutory limit[,]" though other states do allow tolling by statute).

that the *Hicks* date had been tolled, her failure to move to dismiss the charges against appellant leaves us nothing to review.[10]

Even if this issue were properly before us, we would perceive no error. Appellant relies primarily on *Calhoun v. State*, 299 Md. 1 (1984). In that case, the circuit court postponed a criminal defendant's trial until August 4, 1981, five days before the *Hicks* date. *Id*. at 3. On August 4, 1981, the defendant and his codefendant appeared for trial. *Id*. Their cases recently had been severed and the State elected to proceed with the codefendant's trial, necessitating a postponement of the defendant's trial. *Id*. The prosecutor never went before the administrative judge to request a postponement, however. *Id*. at 4. When the parties next appeared before the administrative court, it was beyond the *Hicks* date, but the court still set a new trial date. *Id*. On the first day of trial, defense counsel moved to dismiss the charges for a *Hicks* violation. *Id.* The court denied the motion and the defendant was tried and convicted. *Id*. at 5. His appeal reached the Court of Appeals, which reversed, holding that the motion to dismiss should have been granted because "the trial date was in effect postponed beyond the [*Hicks* date] without *any action* by the administrative judge or his designee." *Id*. at 9 (emphasis added).

We agree with the State that the decision in *Calhoun* is inapposite because, here,

[10] In his reply brief in this Court, appellant contends that when his counsel "asserted that *Hicks* had been violated, it was obvious that he was seeking to have his charges dismissed." Defense counsel never made such an assertion. She argued that the August 1, 2017 *Hicks* date was not "tolled" and stated that there had not been a "postponement to take it past the 180 days." After discussion about whether defense counsel consented to a postponement at the May 9, 2017 hearing, the court asked defense counsel: "what are we arguing now?" Even with prompting, defense counsel did not move to dismiss or even assert that *Hicks* had been violated.

there *was* action by the administrative judge. The decision in *Rosenbach v. State*, 314 Md. 473 (1989), is analogous. There, the defendant was charged with driving while intoxicated. *Id*. at 476. His *Hicks* date was October 20, 1987, and his trial was set for July 15, 1987. *Id*. at 476-77. On the day of trial, the defendant's trial was postponed because a witness was unavailable. *Id*. at 477. The Central Assignment Office ("CAO") for the Circuit Court for Baltimore City reset the trial date for August 26, 1987. *Id*. On that date, no courtroom was available and the judge designated by the circuit administrative judge postponed the trial date a second time. *Id*. The CAO set the trial for November 12, 1987, which was beyond the *Hicks* date. *Id*. On the morning of trial, the defendant moved to dismiss the indictment based on a *Hicks* violation. *Id*. His motion was denied. *Id*. After he was tried and convicted, the defendant appealed. *Id*. The case reached the Court of Appeals, which affirmed. *Id*. at 480-81.

The Court rejected the defendant's argument that the August 26, 1987 postponement was not the postponement that took the case beyond 180 days because the administrative judge's designee did not set a post-*Hicks* trial date and the CAO failed to "reset the case promptly." *Id*. at 477-78. The Court emphasized that the postponement that has *the effect* of carrying a case beyond 180-days is the "critical one," regardless of whether the judge granting the postponement is aware that it will "of necessity" have that effect. *Id*. at 478 (citing *Goins v. State*, 293 Md. 97 (1982)). The postponing judge need not "personally reset or cause the case to be reset for a particular date," though it is often desirable to do so. *Id*. at 479. So long as the postponement is granted and is supported by a finding of good cause, it is "valid." *Id*. The only remaining issue is whether there was an "inordinate

delay in bringing the case to trial" after the valid postponement decision. *Id*. The defendant bears the burden of demonstrating "in view of all the circumstances" that the delay was inordinate. *Id*. Because the defendant in *Rosenbach* failed to meet his burden in that regard, the Court held that the trial court had not erred by denying the motion to dismiss. *Id*.

We return to the case at bar. On April 7, 2017, Judge Groton granted a postponement of the trial date based upon a finding of good cause occasioned by ongoing discovery *and* pending DNA results.[11] No new trial date was scheduled at that time, but the original trial date was converted to a status conference. At the status conference, the parties agreed to a continuation of the April 7, 2017 indefinite postponement and again, no trial date was set. The trial date ultimately was set at the August 8, 2017 hearing, which was one-week post-*Hicks*. As *Rosenbach* makes clear, because the indefinite postponement granted on April 7, 2017 had the effect of carrying the trial date beyond the 180-days, it was the critical postponement. *See also, e.g.*, *State v. Parker*, 347 Md. 533, 540 (1995) (finding no error where an "indefinite postponement granted [by the administrative judge] carried the defendant's second trial date beyond the 180-day limit" even though the judge did not determine when it postponed the case that the trial date would be set post-*Hicks*). Under *Rosenbach*, Judge Groton was not obligated to "personally reset or cause to be reset" a particular trial date. 314 Md. at 379. Because we discern no abuse

[11] As noted, Judge Groton's finding, in the alternative, that *Hicks* was "tolled," was mistaken. Because Judge Groton also made a good cause finding based on ongoing discovery, however, this error caused no prejudice.

of discretion in Judge Groton's determination of good cause for that postponement, the only remaining issue would be whether the delay between that postponement and the trial date was inordinate. And because Appellant did not argue before the trial court that there had been an inordinate delay (nor does he make that argument on appeal), that issue is not before us.[12]

II.

Discovery Violation

On September 1, 2017, the parties appeared for a pretrial motions hearing. Trial was scheduled to commence ten days later. At the outset of the hearing, defense counsel advised the court that two days before the hearing she had received notice from the State that it intended to call Detective Clark as an expert witness in cell phone analysis. She explained that text messages linked to appellant were "integral" to the case and that the defense was "hampered" by the late notice because she was unable to find a defense expert at this late juncture. She closed by stating "[s]o that's one issue we want to bring up."[13]

[12] Even if this issue were before us, there was not an inordinate delay as a matter of law. In the interim between Judge Groton's April 7, 2017 good cause finding and September 11, 2017 trial, appellant engaged private counsel and his new counsel expressly consented to an extension of the indefinite postponement to permit her to review "voluminous" discovery (and to await the still pending DNA results). Thus, the same two circumstances underlying Judge Groton's good cause finding supporting the indefinite postponement persisted. Appellant's trial went forward just over one month post-*Hicks* and four months after that interim hearing.

[13] Pursuant to Md. Rule 4-263(d)(8) & (h), the State is obligated to disclose expert reports and other specified information within thirty days after the earlier of the appearance of counsel or the first appearance of the defendant, unless the court orders a different deadline. In this case, that thirty-day deadline passed on January 10, 2017.

The court then turned to a pending motion to suppress. Defense counsel did not raise the belated expert notice again during the hearing. The prosecutor raised it at the end of the hearing, however, noting that if defense counsel was requesting a postponement to hire her own expert, then that issue needed to be "flushed out." The court responded that it was up to defense counsel to request a postponement and that it had not heard her make that request. The prosecutor explained that he was raising it out of an abundance of caution because if defense counsel was alleging that her client was prejudiced by the late notice, the court could potentially exclude Detective Clark's testimony. After the prosecutor raised this issue, the court asked, "All right. Anything else?" Defense counsel responded by raising a new issue, but never sought any relief for the alleged discovery violation. She also made clear that appellant wanted to go to trial on September 11, 2017.

On appeal, appellant contends the trial court abused its discretion by failing to ascertain whether there had been a discovery violation. The State responds that the late disclosure plainly violated Rule 4-263, as the court recognized, but because defense counsel did not request any relief, such as a postponement or exclusion of Detective Clark as an expert witness, the trial court did not abuse its discretion by failing to impose a sanction for that violation. We agree.

In *Morton v. State*, 200 Md. App. 529, 540-42 (2011), this Court considered whether the trial court erred by failing to exclude a late-disclosed expert witness. The defendant filed a pre-trial motion *in limine* to exclude the witness's testimony as a discovery sanction, which the trial court denied on the first day of trial. *Id.* at 541. When the witness was called by the State, defense counsel objected to the expert's qualifications, but did not

renew his objection to her testifying based upon the discovery violation. *Id*. Under those circumstances, this Court held that the defendant "failed to preserve his 'discovery sanction' objection[.]" *Id*.

In the case at bar, defense counsel did not request *any* sanction for the discovery violation, affirmatively rejected the prosecutor's suggestion of a postponement, *and* did not object at trial when Detective Clark was called to testify. Even more so than in *Morton*, this issue is not preserved for appellate review. *Cf. Grandison v. State*, 305 Md. 685, 765 (1986) ("By dropping the subject and never again raising it, [the defendant] waived his right to appellate review of this issue.").

III.

Motion for Mistrial

On cross-examination of Ms. Harmon, appellant's alibi witness, the prosecutor sought to impeach her credibility by questioning why she did not contact law enforcement or otherwise disclose the alibi in the months after appellant was arrested and charged with first-degree murder. On re-cross examination, the prosecutor sought to further impeach Ms. Harmon by showing that she only came forward after meeting with appellant in August 2017, more than eight months after the murder and just a few weeks before trial. The following pertinent exchange occurred:

> [PROSECUTOR]: Okay. Have you had any contact with the defendant in the time period from August [2017] until now?
>
> [MS. HARMON]: Yes.
>
> [PROSECUTOR]: How?

[MS. HARMON]: I went and visited him.

[PROSECUTOR]: *At the jail?*

[MS. HARMON]: *Uh-huh.*

[DEFENSE COUNSEL]: Objection, Your Honor.

THE COURT: Overruled.

[PROSECUTOR]: How many times?

[MS. HARMON]: About once or twice.

[PROSECUTOR]: Okay. Once or twice since when?

[MS. HARMON]: *Since he's been locked up.*

[PROSECUTOR]: Do you recall the first time you would have went?

[MS. HARMON]: No, not really, not the date. But I know that I went with my sister, and his mother was there.

[PROSECUTOR]: Would it surprise you to learn that you were at the jail on August 20th of 201[7]?

[MS. HARMON]: No.

(Emphasis added.)

Following this colloquy, defense counsel briefly questioned Ms. Harmon on re-redirect examination and, after Ms. Harmon was excused, the defense rested. Defense counsel then moved for a mistrial because the prosecutor had "willfully admitted the fact that [appellant] [was] incarcerated on this offense, and it [was] prejudicial to the jury." The State responded that the temporal proximity of Ms. Harmon's visit with appellant and her meeting with defense counsel in which she claimed to be able to offer an alibi for the murder was highly relevant to her credibility. The court ruled that a mistrial was not

"appropriate" but offered to instruct the jurors that to the extent they heard evidence that appellant was incarcerated pretrial in this case, they should not consider that in their deliberations. Defense counsel agreed that the court should so instruct the jury and the court's instructions complied with that request.

On appeal, appellant contends the trial court committed reversible error by denying the motion for mistrial because appellant's "character was crucial in this case" and because the prejudicial testimony was "intentionally elicited" by the prosecutor. The State responds that any prejudice to appellant was minimal and was cured by the instruction given by the trial court.[14]

As this Court has explained, "[t]he declaration of a mistrial is an extraordinary act which should only be granted if necessary to serve the ends of justice." *Barrios v. State*, 118 Md. App. 384, 396 (1997) (quoting *Hunt v. State*, 321 Md. 387, 422 (1990)). "[A] request for a mistrial in a criminal case is addressed to the sound discretion of the trial court[.]" *Cooley v. State*, 385 Md. 165, 173 (2005) (quoting *Wilhelm v. State*, 272 Md. 404, 429 (1974)), *abrogated on other grounds as recognized by Simpson v. State*, 442 Md. 446 (2015)). "An appellate court will not reverse a denial of a mistrial motion absent clear abuse of discretion and certainly will not reverse simply because it might have ruled differently." *Winston v. State*, 235 Md. App. 540, 570, *cert. denied* 458 Md. 593 (2018) (citations omitted).

[14] The State implicitly concedes that the evidence of appellant's pretrial incarceration was inadmissible.

Appellant analogizes this case to *Rainville v. State*, 328 Md. 398 (1992). There, in a child sexual abuse trial, the prosecutor inadvertently elicited testimony from the mother of the victim that the defendant had previously been incarcerated for abusing the victim's brother. *Id*. at 401. A motion for mistrial was denied, but the court gave a curative instruction. *Id*. at 401-02. The case reached the Court of Appeals which applied the factors set out in *Guesfeird v. State*, 300 Md. 653, 659 (1984),[15] and reversed. *Id*. at 408-11. The Court reasoned that even though the reference to the inadmissible evidence had been an "isolated" blurt, it was highly prejudicial and, because it went to the defendant's credibility, which was the crucial issue at trial, the giving of a curative instruction was insufficient and a mistrial was required. *Id*. at 410-11.

The State counters that this case is more analogous to *Mitchell v. State*, 132 Md. App. 312 (2000), *rev'd on other grounds*, 363 Md. 130 (2001)). There, a State's witness testified that the defendant had been "locked up" for a period pending trial. *Id.* at 323. Defense counsel objected and immediately moved for a mistrial, which the court denied. *Id*. at 324. Instead, the court gave a curative instruction that the defendant had been incarcerated pre-trial because he "was not able to make his bond" and that the jurors should

[15] The *Guesfeird* factors are:

> whether the reference to [the inadmissible evidence] was repeated or whether it was a single, isolated statement; whether the reference was solicited by counsel, or was an inadvertent and unresponsive statement; whether the witness making the reference is the principal witness upon whom the entire prosecution depends; whether credibility is a crucial issue; [and] whether a great deal of other evidence exists . . . .

300 Md. 653, 659 (1984).

not consider that information in their deliberations. *Id*. at 325. On appeal, this Court affirmed. *Id*. at 329. We distinguished *Rainville*, noting that the facts before us were not "nearly as compelling" and the curative instruction was sufficient to "ameliorate[] any prejudice" to the defendant." *Id*. at 328.

We return to the case at bar. As in *Mitchell*, the prosecutor's question put before the jury the fact that appellant was incarcerated while awaiting trial. We agree with the State that this was minimally prejudicial. Unlike in *Rainville*, where the inadmissible evidence was highly prejudicial propensity evidence in a case in which the defendant's credibility was crucial, here the jurors merely learned that appellant was incarcerated pending trial on the same charges that were before the jury. Also, like in *Mitchell*, the court gave a timely and effective curative instruction. Any prejudice inuring to appellant was cured by the trial court's instruction directing the jurors to disregard that evidence in their deliberations. The trial court did not abuse its broad discretion in declining to impose the extraordinary sanction of a mistrial.

IV.

Sufficiency of the Evidence

Finally, appellant contends the evidence was legally insufficient to convict him of first-degree murder. This issue is wholly unpreserved and, in any event, lacks merit.

Rule 4-324 provides, in pertinent part:

> (a) **Generally**. A defendant may move for judgment of acquittal on one or more counts, or on one or more degrees of an offense which by law is divided into degrees, at the close of the evidence offered by the State and, in a jury trial, at the close of all the evidence. *The defendant shall state with particularity all reasons why the motion should be granted.* No objection to

> the motion for judgment of acquittal shall be necessary. A defendant does not waive the right to make the motion by introducing evidence during the presentation of the State's case.
>
> ***
>
> (c) **Effect of Denial**. A defendant who moves for judgment of acquittal at the close of evidence offered by the State may offer evidence in the event the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made. *In so doing, the defendant withdraws the motion.*

(Emphasis added.)

As discussed, appellant moved for a judgment of acquittal at the close of the State's case as to all the charges. Defense counsel only argued with particularity on the handgun charges, however. (The court granted the motion as to one of the handgun charges and the jury ultimately acquitted appellant on the other charge.) Thereafter, appellant called Ms. Harmon, thereby withdrawing his motion. *See* Md. Rule 4-324(c). Defense counsel did not renew her motion for judgment of acquittal at the close of all the evidence.

Appellant did not preserve his challenge to the sufficiency of the evidence because he failed to renew the motion for judgment of acquittal at the close of the evidence. *See, e.g.*, *Williams v. State*, 131 Md. App. 1, 5-6 (2000) (holding that it was "clear beyond dispute that the [defendant] ha[d] not preserved for appellate review" his challenges to the legal sufficiency of the evidence when he made his motion at the end of the State's case, introduced evidence in his case, and did not renew his motion at the close of all the evidence). The sufficiency challenge is also unpreserved because defense counsel failed to make any particularized argument on the charge of first-degree murder. *See Taylor v. State*, 175 Md. App. 153, 159-60 (2007) ("When no reasons are given in support of the

acquittal motion, this Court has nothing to review.").

Even if this issue were properly before us, we would hold that the evidence, viewed in a light most favorable to the State, was legally sufficient to convict appellant of first-degree murder. Our standard of review for sufficiency of the evidence is "whether any rational trier of fact could have found the essential elements of the crime[] beyond a reasonable doubt." *Moye v. State*, 369 Md. 2, 12 (2002). As the court instructed, appellant could be convicted of first-degree murder if there was evidence that he perpetrated the shooting, *or* if there was evidence that he acted as an accomplice in the shooting. Here, there was evidence believable by rational jurors that showed that appellant was the user of the 2963 Number; that he sent text messages evidencing his belief that Mr. Allen and Mr. Dennis were involved in the theft of appellant's property; that he sent text messages indicating his intent to kill as revenge for the theft; that he was present at the scene of the crime shortly before it occurred; and that a phone found in a car linked to appellant connected him to Mr. Bowen, whose DNA was found on a ski mask at the scene of the crime. This evidence plainly was legally sufficient to sustain appellant's conviction for the first-degree murder of Mr. Allen under an accomplice theory of liability.

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