Circuit Court for Baltimore City
Case No. 118120014

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2247

September Term, 2019

DANTE HENDERSON

v.

STATE OF MARYLAND

Fader, C.J.,
Wells,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Fader, C.J.

Filed: March 18, 2021

A jury sitting in the Circuit Court for Baltimore City convicted the appellant, Dante Henderson, of first-degree murder, use of a firearm in the commission of a crime of violence, wearing, carrying, or transporting a handgun, and illegal possession of a regulated firearm. Mr. Henderson argues that the trial court: (1) erred in denying his motion to dismiss the charges for violations of the "*Hicks* rule" and his constitutional right to a speedy trial; (2) abused its discretion by denying a request to remove a juror; (3) erred in allowing a State's witness to testify that the witness feared that he and his family were "in jeopardy"; and (4) improperly admitted video evidence and testimony in which the lead detective narrated a surveillance video and identified Mr. Henderson in it. We hold that the trial court complied with the *Hicks* rule and did not violate Mr. Henderson's right to a speedy trial; that the trial court did not abuse its discretion in declining Mr. Henderson's request to replace a juror; and that Mr. Henderson did not preserve and/or waived his challenges to the court's evidentiary rulings. Accordingly, we will affirm the judgments of the circuit court.

BACKGROUND

The charges against Mr. Henderson arose from the shooting death of Marquis Johnson on April 7, 2018 outside of Bill's Place, a carryout restaurant on West Baltimore Street. Surveillance video from inside and outside Bill's Place was central to the case, as was the testimony of Konstantinos Kelepesis, a part-owner of Bill's Place, who was working at the time of the shooting.

Mr. Kelepesis was close friends with Mr. Johnson, who he knew by the nickname "Dude." Mr. Kelepesis recounted that, on April 7, Mr. Johnson entered the carryout along with the "club crowd" that typically arrived between 2 a.m. and 3 a.m., after the nightclubs closed. Mr. Henderson, who Mr. Kelepesis did not know but later identified, also was a customer at the carryout that night and socialized with Mr. Johnson.

Shortly before 3 a.m., Mr. Kelepesis went outside to speak to a customer about a discrepancy in his order. When he did so, he observed Mr. Johnson walk out of the carryout. Mr. Kelepesis said goodnight to Mr. Johnson, turned back to face the disgruntled customer, and "that's when [he] heard shots." Mr. Kelepesis spun around and saw Mr. Henderson standing over and shooting a now prone Mr. Johnson. Mr. Henderson ran westbound toward Gilmor Street, before "hopp[ing] in [the backseat of] a car" that drove away. Mr. Kelepesis banged on the window of the carryout and yelled for an employee to call 911.

Mr. Johnson was transported to Shock Trauma, where he was pronounced dead. The autopsy revealed that he had been shot four times, once from close range in the back of his neck, twice in the left side of his chest, and once in his right thigh. A firearms examiner concluded that four bullets, three recovered during the autopsy and one at the scene, all had been fired from the same weapon. That weapon was never located.[1]

[1] Police recovered a pistol from Mr. Johnson's waistband area that was later excluded as the weapon used in the shooting.

At trial, the State introduced security camera footage recovered from three cameras at Bill's Place—one positioned outside facing westbound (Camera 1), another located outside facing eastbound (Camera 4), and one located inside at the back of the restaurant, facing the door (Camera 2). The footage showed Mr. Henderson arriving on foot outside the carryout at 2:26 a.m.[2] He wore his hair in shoulder-length dread locks and was clad in a black leather jacket, a white t-shirt, blue jeans, and white sneakers. Mr. Johnson arrived on foot at 2:34 a.m., wearing a blue jacket with a white stripe, a beanie, and glasses. He and Mr. Henderson greeted each other outside the carryout, hugging and shaking hands. They walked away together, off camera, only to return into the camera's view a minute later and then separate. Mr. Johnson then entered Bill's Place, followed about a minute later by Mr. Henderson. At 2:56 a.m., Mr. Henderson exited Bill's Place holding a food container. He stood directly outside, to the west of the front door, sometimes in view of Camera 1 and sometimes out of view. At 2:57 a.m., Mr. Kelepesis emerged holding an order ticket, and began speaking to the customers with the order discrepancy. Just before 2:58 a.m., Mr. Johnson walked out of Bill's Place holding his food and heading northeast. The man Mr. Kelepesis identified as Mr. Henderson followed behind Mr. Johnson, with a gun in his right hand pointed at his back, as they disappeared off camera. One second later, Mr. Kelepesis spun around,

[2] The timestamps within the surveillance footage are three minutes earlier than the actual time. We have corrected the times for purposes of our discussion.

appearing shocked, and the man identified as Mr. Henderson ran back into view, westbound past Mr. Kelepesis, and off camera.

From Camera 4, just the left side of Mr. Johnson's body could be seen from behind as he walked away from the carryout at 2:58 a.m., before collapsing face first into the gutter at 2:58:02 a.m. The man identified as Mr. Henderson then appeared behind Mr. Johnson, holding a food container in his left hand. He bent over Mr. Johnson's body for less than a second with his right arm extended downwards, before running off camera in a westbound direction. The police arrived four minutes later.

Detective Christopher Kazmarek, the lead investigator, testified that other officers pulled still shots from the surveillance video, publicized them on social media, and asked for help identifying the shooter. Around 5 a.m., officers showed the still shots to Mr. Kelepesis, who pointed out Mr. Johnson and the shooter in the shots.

By 11 a.m. that same day, Det. Kazmarek had developed Mr. Henderson as a suspect and had Mr. Kelepesis brought back to the Homicide Division to view a photographic array containing six photographs. Mr. Kelepesis identified a photograph of Mr. Henderson and wrote "ressembles [sic] the shooter" below the image.

At trial, Mr. Kelepesis viewed the surveillance footage from his store and identified Mr. Johnson, Mr. Henderson, and others. He identified Mr. Henderson standing "right next to" Mr. Johnson in the seconds before the shooting. Mr. Kelepesis also was shown the same still shots from the video that he had viewed at the police station, and he identified Mr. Henderson as the man holding a gun pointed at

Mr. Johnson's back. He further testified that nobody else was near Mr. Johnson just before the shooting.

Mr. Henderson's mother, Darlene Kinnard, was called as a State's witness. Three days after the shooting, the police had executed a search warrant at her house and asked her to come to the Homicide Division for questioning. Det. Kazmarek played the surveillance footage for her on his computer while another detective's body-worn camera captured Ms. Kinnard and Det. Kazmarek viewing the surveillance footage together. The body-worn camera video, which was admitted as an exhibit at trial, shows Ms. Kinnard identifying Mr. Henderson as the man in the black leather jacket and white t-shirt in the surveillance video and in still shots from the surveillance video taken inside the carryout that night.

Mr. Henderson was arrested on April 10, 2018. After signing a *Miranda* waiver, Mr. Henderson was interviewed by Det. Kazmarek and another detective at the Homicide Division. A recording of that interview was admitted into evidence and played for the jury. During the interview, Det. Kazmarek showed Mr. Henderson still shots from the surveillance footage, and Mr. Henderson identified himself in three still shots from inside Bill's Place, including one in which he was greeting Mr. Johnson, whom he called "Dude." When Det. Kazmarek showed Mr. Henderson a still shot from Camera 1, which depicted a man following Mr. Johnson, Mr. Henderson said that the image was "blurry" and that he did not recognize anyone in it. He also denied during the interview that he shot Mr. Johnson.

In executing a search warrant at the apartment where Mr. Henderson was arrested, officers recovered clothing similar to that worn by the person identified as the shooter in the surveillance footage. The officers also found identification cards bearing Mr. Henderson's name.

After Mr. Henderson's conviction, the court sentenced him to a combined term of life plus 20 years in prison. This timely appeal followed.

DISCUSSION

I. THE CIRCUIT COURT DID NOT ERR IN FINDING NO VIOLATION OF THE *HICKS* RULE OR OF MR. HENDERSON'S CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL.

The right to a speedy trial in criminal cases is guaranteed by the Sixth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, and by Article 21 of the Maryland Declaration of Rights. *Phillips v. State*, 246 Md. App. 40, 55-56 (2020). "[I]ndependent of a defendant's constitutional right to a speedy trial," the *Hicks* rule, which takes its name from *State v. Hicks*, 285 Md. 310 (1979), requires that a criminal defendant's trial date in the circuit court 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 that judge's designee, finds "good cause" for a postponement. *See Tunnell v. State*, 466 Md. 565, 571-72 (2020); Md. Code Ann., Crim. Proc. § 6-103 (2018 Repl.; 2020 Supp.); Md. Rule 4-271.

Mr. Henderson contends that the circuit court erred in denying his motion to dismiss the charges for violations of both the *Hicks* rule and his constitutional right to a

speedy trial, which he made on the first day of trial. The State responds that the postponement relevant to the *Hicks* analysis was supported by good cause and the delay was not inordinate. With respect to the constitutional claim, the State maintains that although the total delay of over 500 days was of constitutional dimensions, the court did not err in making its findings on the relevant factors or in its ultimate conclusion that dismissal of the charges was not warranted. We agree that the court did not err.

A. Relevant Procedural Background

Mr. Henderson was arrested on April 10, 2018, indicted on April 30, and arraigned on June 1. Defense counsel entered her appearance on May 24, 2018, though her appearance was not docketed until June 11, 2018, when she filed a second entry of appearance with an omnibus discovery motion. A five-day trial was scheduled to begin on October 3, 2018.

One week before the scheduled trial date, the prosecutor submitted an advance request for a postponement, which identified multiple reasons for the request, including that Mr. Henderson was being housed at the Cecil County Detention Center, "making it very difficult for [defense] counsel to visit [him]"; that the parties were in plea negotiations; that the prosecutor had an older case set to begin on October 9, 2018;[3] that the prosecutor recently had returned from an extended medical leave and was still providing discovery to defense counsel; that defense counsel did not object and needed

[3] October 3, 2018 was a Wednesday and Monday, October 8, 2018 was a holiday. If the trial had spanned the anticipated five days, it would not have ended until October 10, 2018.

additional time to prepare; and that the parties could potentially pick a new date in advance of the *Hicks* date.

Counsel appeared for a hearing on the postponement request on September 28, 2018, but Mr. Henderson was not transported from Cecil County for the hearing. The prosecutor explained to the court that she had been out of the office on medical leave and, consequently, still was providing discovery to defense counsel. The prosecutor further explained that because she was scheduled for surgeries related to her medical condition in November 2018 and January 2019, she and defense counsel had "picked a date" in March 2019 for trial. Defense counsel did not object to that date, noted that the parties were making progress on a plea agreement and stated that, if a plea deal were reached, they would ask to "set it in earlier." The court found good cause to postpone the trial beyond the *Hicks* date, which it identified as November 29, 2018,[4] noted that the request would be charged to the State, and scheduled trial to begin on March 19, 2019.

On March 19, counsel appeared for trial, but Mr. Henderson again had not been transported from Cecil County. The prosecutor advised the court that she was "specially set to start" an unrelated trial the next day, and suggested resetting Mr. Henderson's trial for June 4, adding that she was "specially set all the way up till then." Defense counsel responded, "That date's fine with me, Your Honor." The court found good cause to postpone the trial date and set it in for a four-day trial beginning June 4.

[4] November 29, 2018 is 181 days after Mr. Henderson was arraigned on June 1, 2018. As we shall discuss, we calculate the correct *Hicks* date to be November 20, 2018.

On June 4, when Mr. Henderson again was not present, the State requested another postponement. The prosecutor explained that she was currently in trial in another courtroom, was scheduled to be on medical leave from June 23 through the end of July, and was fully scheduled for August. She also stated that she had two trials scheduled for September but suggested that a date later that month might work. Defense counsel stated, "[T]hat's fine with me, Your Honor." The court found good cause for the postponement and reset the trial for September 26. Thereafter, defense counsel asked to note her objection for the record, adding that this was "the third or fourth postponement." The court clarified that it was the third postponement and agreed that the trial should not be postponed again.

B. The Motion to Dismiss

A week before the September 26 trial date, Mr. Henderson moved to dismiss the charges based upon a violation of the *Hicks* rule and a violation of his constitutional right to a speedy trial.[5] Mr. Henderson argued that because the prosecutor's medical condition was the primary reason for the three postponements, the State should have substituted different counsel and, consequently, the court had erred in repeatedly finding good cause for the postponements. Mr. Henderson argued that all of the speedy trial factors weighed

[5] The motion erroneously stated that December 10, 2018 was the *Hicks* date, which defense counsel computed based upon a triggering date of June 11, 2018, the date defense counsel's entry of appearance was docketed. The motion also erroneously stated that Mr. Henderson was arrested on April 18, 2018, eight days after his actual arrest date. These mistakes reappear in the briefs on appeal.

in his favor and that dismissal also was warranted for violation of his rights under the federal and state constitutions.

The circuit court heard argument on the motion on the first day of trial. Defense counsel acknowledged that she had agreed to the first postponement, which took the trial beyond the *Hicks* date, but argued that it was the State that had requested all three postponements, which caused an inordinate delay of Mr. Henderson's trial. Defense counsel did not directly dispute the existence of good cause for the postponements but maintained that the total delay had violated Mr. Henderson's constitutional rights.

The prosecutor responded that the postponements all were supported by good cause. She explained that although her medical condition was a factor in the critical postponement that extended the trial date beyond the *Hicks* date, it was one of several reasons justifying it, including that a witness for the State had been in a serious accident and was unavailable, and that Mr. Henderson was being housed in Cecil County, which made it difficult for defense counsel to meet with him. The prosecutor argued that the subsequent two postponements were beyond her control based upon the "practice of the reception court" to "specially set" older cases, and further maintained that the circumstances of her medical leave did not justify a reassignment of the case to another prosecutor. In any event, the prosecutor argued, assistant state's attorneys are not "fungible,"—especially in homicide cases—and so reassignment was not possible or appropriate.

The court denied the motion to dismiss. The trial court found that the length of delay was not a significant factor for multiple reasons, including that Baltimore City is the "largest jurisdiction with the largest case load"; the first postponement request was made by the State, but was supported by defense counsel's need for more time to prepare; the State had cases "stacked back to back to back"; and because all of the reasons given for the postponement requests were "appropriate[.]"

C. The Court Did Not Err in Concluding that the State Had Not Violated the *Hicks* Rule.

Appellate review of a postponement of a criminal trial past the *Hicks* date involves two inquiries: "(1) Was there 'good cause' for the administrative judge to grant a postponement of the scheduled trial date? [and] (2) Was there an inordinate delay from the scheduled trial date to the new trial date in commencing the trial?" *Tunnell*, 466 Md. at 589. Both the "good cause" and the "inordinate delay" prongs of the test involve an exercise of the trial court's discretion and are subject to reversal only for an abuse of that discretion. *Id*. "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).

As a threshold matter, we conclude that Mr. Henderson's *Hicks* date was November 20, 2018. That date was 180 days after May 24, 2018, which was the date on which defense counsel entered her appearance, even though it was not docketed until later. *See* Crim. Proc. § 6-103; Md. Rule 4-271. Two *Hicks* dates were used in the circuit court: November 29, 2018, which apparently was calculated from

Mr. Henderson's arraignment on June 1, 2018, and December 3, 2018, which was calculated from defense counsel's second entry of appearance. In any event, less than two weeks separates the dates at issue and the difference does not affect our resolution.

In assessing "good cause," we are concerned only with the critical postponement, which is "the postponement that extends the trial date beyond the Hicks date[.]" *Tunnell*, 466 Md. at 589. Here, the first postponement, granted at the September 28, 2018 hearing, was the critical postponement that extended Mr. Henderson's trial date beyond November 20, 2018.

We hold that the trial court did not abuse its broad discretion in granting this critical postponement. "[T]he unavailability of a judge, prosecutor, or courtroom – or general court congestion in a particular jurisdiction – c[an] satisfy the good cause standard for a continuance under the Hicks rule." *Id.* at 587. Mr. Henderson acknowledged in his motion to dismiss that the prosecutor's unavailability due to medical leave supported the good cause finding for the critical postponement. Further, defense counsel's inability to see her client weighed in favor of granting the postponement. As defense counsel acknowledged, she did not object to the request for postponement both because she was sympathetic to the prosecutor's medical condition and because she "just couldn't see [Mr. Henderson] easily" because of his confinement in Cecil County. In ruling on the motion to dismiss, the trial court found that the location where Mr. Henderson was housed at the time was a factor weighing in favor of postponement and was outside of the parties' control.

As the Court of Appeals explained in *Tunnell*, though allowing scheduling conflicts and general court congestion to support good cause for postponements may not further the public policy in favor of the swift disposition of criminal cases, it furthers the competing and equally weighty "public interest in the disposition of criminal cases *on the merits* – whether acquittal or conviction." 466 Md. at 588. Further, the State is not obligated "to resolve schedule conflicts by reassigning prosecutors, because 'the State's interest in maintaining prosecutorial continuity is a significant interest which in some instances may qualify as good cause for a postponement.'" *Choate*, 214 Md. App. at 140 (quoting *State v. Toney*, 315 Md. 122, 135 (1989)). Here, both interests were served by the grant of the State's postponement request and amounted to good cause.

We also conclude that there was no "inordinate delay between the time of the good cause postponement and the [rescheduled] trial date" that would require dismissal of the charges. *See State v. Parker*, 347 Md. 533, 540 (1995). It is the defendant's "burden [to] demonstrate[] that a delay was excessive, in view of all the circumstances of the case." *Tunnell*, 466 Md. at 589. "[W]hen deciding whether to dismiss a case for inordinate delay, it is the length of the delay between the postponed trial date and the rescheduled date that is significant." *State v. Brown*, 355 Md. 89, 109 (1999). Mr. Henderson's rescheduled trial date of March 19, 2019 was 167 days after the postponed trial date. It was selected to accommodate the prosecutor's trial schedule and her scheduled surgeries, to allow defense counsel time to prepare for trial, and to further plea negotiations. Mr. Henderson has not met his burden to show that the length of this delay amounted to a

"clear abuse of discretion . . . as a matter of law." *Choate*, 214 Md. App. at 139 (quoting *State v. Frazier*, 298 Md. 422, 424 (1984)) (affirming the court's decision to postpone trial 119 days past the *Hicks* date for good cause shown).

D. The Court Did Not Err in Concluding that the State Had Not Violated Mr. Henderson's Constitutional Right to a Speedy Trial.

In *Barker v. Wingo*, the Supreme Court adopted "a balancing test . . . in which the conduct of both the prosecution and the defendant are weighed[,]" and enunciated four factors to be balanced by a court: "[l]ength of delay, the reason for the delay, the defendant's assertion of his [or her] right, and prejudice to the defendant." 407 U.S. 514, 530 (1972) (footnotes omitted). The Court explained that the first factor "is to some extent a triggering mechanism" because "[u]ntil there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Id*. The Court of Appeals has adopted the same four-factor test for analyzing alleged violations of Article 21. *See Divver v. State*, 356 Md. 379, 388 (1999).

On review of the denial of a speedy trial motion, this Court accepts the trial court's findings of fact unless clearly erroneous. *Glover v. State*, 368 Md. 211, 221 (2002). We conduct "our own independent constitutional analysis," however, of the trial court's application of the balancing test to those facts. *Id*. at 220.

We begin by assessing whether the length of the delay was of constitutional dimensions, thus triggering analysis of the remaining *Barker* factors. Here, the trial court and the parties agree that the delay—534 days, measured from the date of arrest to the

date of trial, *see Ratchford v. State*, 141 Md. App. 354, 357-58 (2001)—was of constitutional dimension, and we agree as well.[6] *See, e.g.*, *Glover*, 368 Md. at 224 (concluding that a 14-month delay was of constitutional dimension).

As "a factor on the merits, . . . the 'length of delay' is the net period of time that may be chargeable to the State or to the court system as true 'delay,' some of which, depending on other circumstances, may be given great weight and some of which may be given only slight weight." *Ratchford*, 141 Md. App. at 360. "[D]eliberate attempt[s] to delay the trial" are weighted heavily against the State, whereas "[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." *State v. Kanneh*, 403 Md. 678, 690 (2008) (quoting *Barker*, 407 U.S. at 531).

Here, the trial court found that the length of delay was not a significant factor for multiple reasons, including Baltimore City's case load generally and the prosecutor's specifically, the fact that the defense also benefitted from the first postponement, and that all of the reasons provided were "appropriate[.]" The court emphasized that there was no evidence of any purposeful or malicious action on the part of the State. All of these findings were supported by the record and were not clearly erroneous.

[6] Because the parties mistakenly use an arrest date of April 18, 2018, they calculate the length of delay to be 526 days.

Of the total 534-day delay, 358 days were chargeable to the State but not weighted heavily against it. The initial delay of 176 days between Mr. Henderson's arrest and his original trial date was an ordinary period necessary for trial preparation and is neutral in our analysis. *See White v. State*, 223 Md. App. 353, 384 (2015) ("The span of time from charging to the first scheduled trial date is necessary for the orderly administration of justice, and is accorded neutral status." (quoting *Howell v. State*, 87 Md. App. 57, 82 (1991))). The 167-day period between the October 3, 2018 trial date and rescheduled date on March 19, 2019, was initiated by the State's request. As defense counsel acknowledged during argument on the motion to dismiss, however, she also had been unable to see her client and, at that juncture, anticipated that a possible plea agreement might be reached. Thus, although this delay was attributable to the State, it did not weigh heavily against it. The 77-day delay between the March 19, 2019 trial date and the second rescheduled trial date on June 4, 2019 was occasioned by a scheduling conflict for the State, as was the final 114-day delay between the June 4, 2019 trial date and September 26, 2019. Those delays both also weigh against the State, but again, not heavily.

Although Mr. Henderson focuses upon the prosecutor's medical condition, arguing that the case should have been reassigned, the record reveals that, at most, this accounted for two or three months of the delay. The bulk of the delay was occasioned by scheduling conflicts caused by overcrowded court dockets, which required the prosecutor to be in two places at once. The trial court did not err in concluding that although the

358-day delay was largely attributable to the State, it was not a significant factor in the ultimate balance.

The next factor under *Barker* is the "defendant's responsibility to assert his right." *Henry v. State*, 204 Md. App. 509, 554 (2012) (quoting *Barker*, 407 U.S. at 531). This factor "is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." *Barker*, 407 U.S. at 531-32. We must "weigh [both] the frequency and force of the objections[.]" *Id*. at 529; *see also Glover*, 368 Md. at 228 (the strength of a defendant's assertion, and not just its occurrence, may "indicate whether the delay has been lengthy and whether the defendant begins to experience prejudice from that delay"). The trial court's finding that Mr. Henderson "very rarely" objected to the postponements was not clearly erroneous. Although Mr. Henderson demanded a speedy trial on June 11, 2018 in his omnibus discovery motion, he did not raise the issue again until he filed his motion to dismiss a week before trial. Mr. Henderson's counsel did not oppose either of the first two postponement requests and objected to the third postponement only after it had already been granted. Even then, counsel did not assert any prejudice to Mr. Henderson from the postponement. Thus, although we are satisfied that Mr. Henderson asserted his right in a timely manner, he did not do so vigorously at any time before the eve of trial.

The final and "the most important factor in the *Barker* analysis is whether the defendant has suffered actual prejudice." *Phillips v. State*, 246 Md. App. 40, 67 (2020) (quoting *Henry*, 204 Md. App. at 554). The prejudice factor is "weighed with respect to

the three interests that the right to a speedy trial was designed to preserve": (1) avoiding "oppressive pretrial incarceration"; (2) minimizing "anxiety and concern of the accused"; and (3) limiting potential impairment of the defense. *Kanneh*, 403 Md. at 693 (quoting *Barker*, 407 U.S. at 532). "Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id*.

In his motion to dismiss, Mr. Henderson argued that all three factors weighed heavily in favor of dismissal. He emphasized that he was incarcerated pretrial during the entire 534 days, first in Baltimore City and, later, after threats were made against his life, at the Cecil County Detention Center. He alleged that he was held in isolation in Cecil County, which caused his mental health to decline, and that the distance made it difficult for him to meet with defense counsel.

The trial court's finding that Mr. Henderson suffered little prejudice from the delay is supported by the record and is not clearly erroneous. Although Mr. Henderson was detained before trial and alleged generalized anxiety, he did not identify any specific way in which his defense was impaired, beyond the distance his attorney was required to travel to meet with him. Although that may have made trial preparations slightly more onerous, he has not alleged any way in which it actually impaired his defense. Moreover, the distance also weighed in favor of the delay, as discussed earlier, because defense counsel's inability to meet with him necessitated additional time to develop a trial strategy. Given that the primary evidence against Mr. Henderson was the surveillance footage and Mr. Kelepesis's eyewitness testimony, we discern no way in which the delay

could have impaired his defense. The trial court did not err in concluding that any prejudice to Mr. Henderson was minor.

In sum, we hold that although the delay was constitutionally significant, it was not excessive considering the seriousness of the charges and the largely neutral reasons justifying the postponements. Mr. Henderson timely asserted his right to a speedy trial but did not do so vigorously until the eve of trial, and the prejudice to Mr. Henderson occasioned by his pretrial incarceration, though not insignificant, did not impair his defense. Under the circumstances, dismissal of the charges was not warranted.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN NOT REMOVING JUROR NUMBER 8.

The court seated 12 regular jurors and one alternate juror to serve in Mr. Henderson's three-day trial. The alternate juror was the last remaining member of the venire panel and, after a brief discussion on the record, much of which is identified in the transcript as inaudible, the case proceeded with just one alternate.

After the jury was sworn and excused for the day, the trial court received notice that there was "an issue with Juror No. 8[.]" The court advised counsel that it had just learned that Juror No. 8 was on disability for "problems with his feet" and was scheduled for a medical appointment on Monday, September 30, 2018, which was the third day of trial. Juror No. 8 was summoned to the bench and addressed the court as follows:

> Oh, yes. I apologize. I wasn't paying attention when you were asking about the disability. I have a problem with my feet. I have a doctor's appointment and therapy. I'm currently on disability through my work – through my job. I really didn't think I was going to get picked.

The court reminded the juror that he had an opportunity during voir dire to make the court aware of any medical issues or conflicts but did not do so. The court admonished Juror No. 8, "You're going to be here[,]" adding, "[i]f you need to stand, you can stand" and directed him to reschedule his medical appointment. Juror No. 8 replied, "Okay. Thank you." The court thanked the juror and excused him. After the juror left, the prosecutor expressed concern about his "whole demeanor" following the exchange and said that she would "move to strike him, but then, of course that means there's no alternates." The trial judge responded that Juror No. 8 gave "no reason to strike," emphasizing that the juror had had the opportunity to advise the court of his medical condition and appointment earlier. Defense counsel then joined the State's motion to strike, noting that the juror appeared "angry[.]"[7] The court denied the motion.

Mr. Henderson contends that the trial court abused its discretion in denying the motion to strike without asking additional questions to ascertain whether the juror could remain fair and impartial despite his medical issue or whether it would impact his ability to concentrate. This contention lacks merit.

Rule 4-312(g)(3) empowers the trial court to "replace any jury member whom the trial judge finds to be unable or disqualified to perform jury service with an alternate [juror]" at any time before the jury retires to deliberate. That determination is reserved to the sound discretion of the trial court, subject to reversal only if "arbitrary and abusive in

[7] As the State points out in its brief, the colloquy between the court and defense counsel contains numerous inaudible sections that were not transcribed.

its application." *Williams v. State*, 231 Md. App. 156, 195-96 (2016) (quoting *James v. State*, 14 Md. App. 689, 699 (1972)). Crucially, "the trial judge is physically on the scene, able to observe matters not usually reflected in a cold record[.]" *Diaz v. State*, 129 Md. App. 51, 59-60 (1999) (quoting *State v. Cook*, 338 Md. 598, 615 (1995)).

Here, the trial court did not act arbitrarily or abuse its discretion in declining to replace Juror No. 8. The juror was apologetic for not advising the court of the appointment earlier and did not express any concern when the court advised him that he would need to reschedule it. Nor does the record reveal any issues arising during trial that were related to Juror No. 8. The trial court was in the best position to observe the juror's demeanor and did not abuse its discretion by relying on its assessment of the juror's ability to continue to serve.

III. MR. HENDERSON DID NOT PRESERVE HIS OBJECTION TO MR. KELEPESIS'S TESTIMONY ON REDIRECT EXAMINATION.

Mr. Kelepesis testified on direct examination about the events he witnessed at Bill's Place on April 7, 2018 and his identification of Mr. Henderson in the photographic array. On cross-examination, defense counsel pointed out inconsistencies in Mr. Kelepesis's testimony, including that he initially had wavered in his certainty about the identification from the photographic array and that there was no notation in the police reports about him having seen Mr. Henderson flee the scene in a car.

On redirect examination, the prosecutor asked:

> [PROSECUTOR]: And one final question, Mr. Kelepesis. How difficult is it for you to come in here and testify about what happened on that day, April the 7th, 2018?

> [MR. KELEPESIS]: It's beyond words. It's really beyond words. 'Cause I worked there. That guy [Mr. Johnson] was my – one of my closest friends down there. I work in that neighborhood. People know me, my mother, my sister. Coming down here puts me and them in jeopardy.

At that point, defense counsel objected and the court sustained the objection. Defense counsel then moved to strike. At an ensuing bench conference, the court asked defense counsel for the basis of her objection. She responded, "It's all this – it's the street stuff that the State is not supposed to get into about the intimidation and fear and all this other stuff. It's we don't speak. We don't speak." The court overruled the objection, which it previously had sustained, implicitly denied the motion to strike. Despite the ruling in its favor, the State did not ask any additional questions of Mr. Kelepesis.

On appeal, Mr. Henderson challenges on the basis of relevancy the admission of Mr. Kelepesis's "emotionally charged description of 'how difficult' it was for him to come to court" and his testimony that he and his family were placed "in jeopardy" because he was testifying against Mr. Henderson. He maintains that the testimony was irrelevant and unfairly prejudicial because it improperly suggested to the jurors that Mr. Henderson, or someone acting on his behalf, had threatened Mr. Kelepesis with retaliation for his testimony. The State responds that Mr. Henderson did not preserve either his relevancy challenge or his contention regarding prejudice. Even if preserved, the State maintains that the court properly exercised its discretion in admitting Mr. Kelepesis's testimony to explain inconsistencies elicited during cross-examination

and rehabilitate his credibility. In any event, any error was harmless beyond a reasonable doubt in the State's view.

We review the trial court's decision to admit or exclude evidence for an abuse of discretion. *Bernadyn v. State*, 390 Md. 1, 7 (2005). Relevant evidence ordinarily is admissible unless "otherwise provided" by law. Md. Rule 5-402. Among other reasons, it may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice[.]" Md. Rule 5-403.

Mr. Henderson did not preserve an objection to Mr. Kelepesis's testimony based on relevance. As an initial matter, defense counsel did not object when the prosecutor asked a question framed to elicit the very testimony that he challenges on appeal as irrelevant. *See Bruce v. State*, 328 Md. 594, 627 (1992) ("[I]f opposing counsel's question is formed improperly or calls for an inadmissible answer, counsel must object immediately." (quoting 5 L. McLain, *Maryland Evidence* § 103.3, at 17 (1987))). He also did not argue to the court at the bench conference following his belated objection that the testimony was irrelevant or prejudicial. "[W]hen particular grounds for an objection are volunteered or requested by the court, 'that party will be limited on appeal to a review of those grounds and will be deemed to have waived any ground not stated.'" *State v. Jones*, 138 Md. App. 178, 218 (2001) (quoting *Leuschner v. State*, 41 Md. App. 423, 436 (1979)), *aff'd*, 379 Md. 704 (2004); Md. Rule 4-323(a) ("The grounds for the objection need not be stated unless the court, at the request of a party or on its own initiative, so directs."). The only basis offered by defense counsel for her objection and

her motion to strike was that Mr. Kelepesis's answer improperly brought out "street stuff" and "intimidation and fear." We understand this to be a reference to the well-known "stop snitching" culture in Baltimore that discourages witnesses from speaking to the police or cooperating with the State. *See, e.g.*, *Moore v. State*, 194 Md. App. 327, 360 (2010) (describing a defendant's reference to "no snitch" during a police interview, as "a phrase of such notoriety 'as to be a matter of common knowledge'") (quoting *Lee v. State*, 405 Md. 148, 168 (2008)), *rev'd on other grounds*, 422 Md. 516 (2011)). Mr. Henderson did not argue that the testimony improperly suggested that a threat had been made against Mr. Kelepesis and we decline to consider this argument on appeal.

Even if we had concluded that this appellate contention was preserved, we would hold that Mr. Kelepesis's testimony that he felt fearful about testifying was admissible on redirect because it was relevant to his state of mind to rehabilitate his credibility, which had been impeached on cross-examination. *See Claybourne v. State*, 209 Md. App. 706, 743 (2013) (explaining that "it is generally held that evidence of threats to a witness or fear on the part of a witness, in order to explain an inconsistency, is admissible in criminal cases for credibility rehabilitation purposes *even if the threat or fear have [sic] not been linked to the defendant*" (quoting *Washington v. State*, 293 Md. 463, 470 (1982) (emphasis and alteration in *Claybourne*)). And the prejudice to Mr. Henderson arising from this evidence was minimal, given that Mr. Kelepesis did not suggest that his fear was linked to any specific threats connected to Mr. Henderson.

IV. MR. HENDERSON DID NOT PRESERVE HIS CHALLENGE TO THE BODY-WORN CAMERA FOOTAGE AND WAIVED HIS CHALLENGE TO DETECTIVE KAZMAREK'S TESTIMONY.

Mr. Henderson contends that the trial court erred in (1) admitting body-worn camera footage showing Ms. Kinnard viewing the surveillance video while Det. Kazmarek commented upon it and (2) permitting Det. Kazmarek to identify him in a still shot from that video during his trial testimony. Mr. Henderson relies upon Rule 5-701, which prohibits a lay witness from testifying to opinions or inferences that are not "rationally based on the perception of the witness" and helpful to the jury. He maintains that it was the sole province of the jury to watch the video and determine who and what it depicted. The State responds that Mr. Henderson's challenge to the body-worn camera footage is unpreserved and without merit. It also maintains that Mr. Henderson waived his challenge to Det. Kazmarek's trial testimony by acquiescence. We agree with the State.

A. Mr. Henderson's Challenge to the Body-Worn Camera Footage Is Not Preserved.

When Ms. Kinnard was brought to the Homicide Division on April 10, 2018, Det. Kazmarek showed her the surveillance footage from Bill's Place on his computer while another detective stood behind them and activated his body-worn camera. When Ms. Kinnard was called as a witness at trial, the State advised the court that it planned to ask her if she had identified her son, Mr. Henderson, in the surveillance video. Defense counsel objected "to *her* testimony as an identification" on the ground that it was within

"the purview of the jury" as the factfinders to decide what the video showed. (Emphasis added.) The court overruled the objection and permitted Ms. Kinnard to testify.

On direct examination, Ms. Kinnard said that she remembered going to the Homicide Division and reviewing the surveillance video, but claimed that she did not remember if she had recognized anyone in the surveillance video because she was heavily intoxicated. The prosecutor then played an excerpt of the surveillance footage for her and asked her if she remembered identifying her son in the video. Ms. Kinnard responded that she did not recall. At that point, the prosecutor requested the court's permission to play the body-worn camera footage. The court said to defense counsel, "I assume you object to that?" Defense counsel replied, "I do, again." The court overruled the objection, stating that it would "again" find that the probative value outweighed any prejudice.

The body-worn camera footage was then admitted into evidence and played for the jury. As pertinent here, the video showed Det. Kazmarek playing two clips from the surveillance footage before the shooting and asking Ms. Kinnard if she recognized anyone in the clips. In each instance, she pointed out Mr. Henderson. Ms. Kinnard asked Det. Kazmarek what Mr. Henderson had done, to which Det. Kazmarek replied, "Well, you know where you're at, right?" adding, "if I played that video any further, you'd find out what Dante did." Ms. Kinnard exclaimed, "You didn't say Dante shot nobody." Det. Kazmarek answered, "You're at the Homicide office. I can promise you this, Dante is not walking up behind him to escort him across the street."

The video then showed Ms. Kinnard beginning to cry as Det. Kazmarek continued to ask her questions about Mr. Henderson and other people shown in the surveillance footage. Later, Det. Kazmarek comforted Ms. Kinnard, saying, "I'm sure you didn't raise Dante to do anything like this." Ms. Kinnard cried out, "I can't believe – Lord, Jesus. He killed someone. Oh, dear God." Det. Kazmarek told Ms. Kinnard that the motive for the shooting was unknown and that maybe someday her son would tell her why he did it.

On appeal, Mr. Henderson contends that Det. Kazmarek's commentary amounted to improper lay opinion testimony that invaded the province of the jury. *See* Md. Rule 5-701 (testimony by a lay witness "in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue"). The only argument Mr. Henderson made before the circuit court, however, was that Ms. Kinnard's identification of her son invaded the province of the jury. Mr. Henderson never made any argument with respect to the comments made by Det. Kazmarek during the video, nor did he raise Rule 5-701 as the basis for his objection. Because this argument was not raised before the circuit court, we decline to address it.

B. Mr. Henderson Waived His Challenge to Detective Kazmarek's Trial Testimony.

During direct examination of Det. Kazmarek, the prosecutor showed him: two still shots from the surveillance video taken from Camera 1 depicting Mr. Johnson

walking out of Bill's Place with his food and the man identified as Mr. Henderson behind him pointing a gun at his back; and two still shots from Camera 4 showing the man identified as Mr. Henderson standing over Mr. Johnson's body. The prosecutor asked Det. Kazmarek if "he recognize[d] what those are." The detective responded, "They are still images from the video outside of 1516 West Baltimore Street that shows Mr. Henderson approaching the victim with his hand extended, then you can see his hand extended with a –" Defense counsel objected and asked to approach.

At the bench, defense counsel argued that Det. Kazmarek should not be "narrating what the photos are. It's for the jury to decide who's in that picture, not from the officer. It's a conclusion that he's making." The prosecutor responded that she would "just ask [Det. Kazmarek] if they're still shots off the video." The court replied, "Thank you" and the bench conference ended. On resumed direct examination, Det. Kazmarek verified that the photographs were still shots from the surveillance video.

On appeal, Mr. Henderson challenges Det. Kazmarek's testimony as improper lay opinion testimony. This contention is waived. Based on defense counsel's objection, the prosecutor offered to reformulate her question to limit it to whether the still shots were images from the video. Defense counsel did not raise any objection to this course of action or request any other relief, such as moving to strike the testimony already given. Defense counsel therefore acquiesced to the suggestion. *See, e.g.*, *Hyman v. State*, 158 Md. App. 618, 631 (2004) (holding that a failure to move to strike or seek other relief, such as a curative instruction, waives contention of error on appeal).

Furthermore, even if not waived, we conclude that any error in admitting Det. Kazmarek's testimony identifying Mr. Henderson in the still shots was harmless beyond a reasonable doubt. As discussed above, the evidence was overwhelming. In addition, Mr. Kelepesis and Ms. Kinnard—as well as Mr. Henderson himself—had identified him as the person in the video wearing the distinctive black jacket and white t-shirt. Det. Kazmarek also had pointed out Mr. Henderson in the surveillance video when showing it to Ms. Kinnard on the body-worn camera footage. The admission of Det. Kazmarek's testimony identifying Mr. Henderson in the still shots was thus cumulative of other evidence admitted at trial. *See Dove v. State*, 415 Md. 727, 743 (2010) ("In considering whether an error was harmless, we also consider whether the evidence presented in error was cumulative evidence.").

We will therefore affirm the judgments of the circuit court.

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