Circuit Court for Baltimore City
Case No. 115236022

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2331
September Term, 2016

DANNY TROTMAN

v.

STATE OF MARYLAND

Woodward, C.J.,**
Meredith,
Davis, Arrie W., ***
(Senior Judge, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: January 15, 2019

**Woodward, C.J., participated in the hearing and conference of this case while an active member of this Court; he participated in the adoption of this opinion as a specially assigned member of this Court.

***Davis, Arrie W., J., did not participate in the adoption of this opinion. See, Md. Code, Courts and Judicial Proceedings Article, § 1-403(b)

At the conclusion of a jury trial in the Circuit Court for Baltimore City, correctional officer Danny Trotman, appellant, was convicted of second degree assault upon a prisoner and misconduct in office. For the assault, Trotman was sentenced to ninety days that were suspended in favor of eighteen months of probation plus 200 hours of community service; for misconduct in office, he was sentenced to sixty days that also were suspended in favor of a concurrent eighteen months of probation.

Challenging his convictions, Trotman presents four questions that we have reordered chronologically, as follows:

1. Did the court err in denying the motion to dismiss on speedy trial grounds?

2. Did the court abuse its discretion in striking for cause all veniremen who could not climb 25 stairs [to the floor on which the assigned jury room was located]?

3. Did the court abuse its discretion in denying appellant the right to watch [a] video in open court, thereby burdening both the right to be present and the right to counsel?

4. Did the court err in its instructions to the jury (both the original charge and during deliberations) regarding the elements of the crime of assault?

Because we perceive no reversible error, we will affirm the judgments of the circuit court.

FACTS AND PROCEDURAL HISTORY

On December 2, 2014, Sergeant Danny Trotman was working at the Central Booking facility of the Department of Public Safety and Correctional Services ("DPSCS") in Baltimore. That afternoon, he and other correctional officers responded to the mental health unit to assist in moving certain prisoners, including Eric Wise. During

the ensuing altercation, Trotman and another correctional officer struck Wise, who sustained a broken jaw that required surgery. At Trotman's trial, the primary issue was whether Trotman's use of force was justified.

A surveillance video that captured most of the altercation was played for the jury. The video, which does not include audio, shows Wise in the doorway of a cell after the door is remotely opened. As Wise conversed with Sergeant Brett Thomas, eight other correctional officers, including Trotman, stood in the hallway. Approximately thirty seconds into their verbal exchange, Thomas suddenly threw an "uppercut" punch to Wise's jaw. Then Thomas, Trotman, and other officers entered Wise's cell, where the altercation continued out of camera view. After approximately ten seconds, several officers dragged a struggling Wise out of the cell. As the officers attempted to force Wise to the ground, Trotman struck Wise. Wise was then placed face down on the floor, naked and prone, with his hands handcuffed behind his back. At that point, Thomas stood over Wise and delivered another blow to his head.

The State alleged that Sergeant Trotman's closed-fist punch was unjustified, amounting to second degree assault, conspiracy to assault, and misconduct in office. In support of that prosecution theory, DPSCS Detective-Sergeant Christian Boodhoo testified that, when Trotman struck Wise while the prisoner was already restrained and in the physical custody of other correctional officers, Trotman violated DPSCS policy requiring use of the minimum force necessary in subduing a combative prisoner.

Sergeant Trotman contended that he merely slapped Wise, and did so in a justified effort to control the combative prisoner. Although Trotman did not testify, his defense

counsel elicited testimony from Lieutenant David Gilmore, another correctional officer at the scene, who testified that "there's a portion of [the altercation] that is missing" from the video, "when Mr. Wise comes running out. He actually stops and you can see he's urinating on himself and then he gets up and runs toward the exit, and that's when Sergeant Trotman comes around and strikes and slaps him" with an open hand. In addition, Trotman presented expert opinion testimony of a private contractor with expertise in defensive tactics used by Maryland correctional officers. The expert opined that Trotman's use of force, as seen in the video, was reasonable and consistent with institutional training in the use of the minimum force necessary to gain control of a combative prisoner.

The jury found Trotman guilty of second degree assault and misconduct in office, but acquitted him of conspiring with other correctional officers to commit the assault. We shall provide additional facts in our discussion of the issues raised by Trotman.

DISCUSSION

I. Speedy Trial

Trotman contends that he was denied his right to a speedy trial, and points to a series of seven postponements that delayed his trial for 479 days after he was charged in district court. Based on the following examination of the record, we recalculate the relevant delay period and agree with the trial court's conclusion that, although this delay was of constitutional dimension, Trotman was not denied his right to a speedy trial.

A. Standards Governing Review of a Speedy Trial Challenge

Maryland courts have

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

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

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

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

B. Speedy Trial Record

Before trial, Trotman moved to dismiss the charges against him on speedy trial grounds. The record pertinent to that motion and to this appellate speedy trial challenge is set forth in the following time line, with postponements shown in bold type.

December 2, 2014	INCIDENT
August 1, 2015	STATEMENT OF CHARGES FILED IN DISTRICT COURT
August 15, 2015	SUMMONS ISSUED by district court on first degree assault and related charges.
August 25, 2015	TRANSFER TO CIRCUIT COURT + FIRST APPEARANCE Defense counsel entered his appearance on behalf of co-defendants Trotman and Thomas.
August 31, 2015	OMNIBUS MOTIONS + SPEEDY TRIAL DEMAND Trial was scheduled for October 27, 2015.
October 27, 2015	**FIRST POSTPONEMENT – 62 DAYS – LATE DISCOVERY FROM STATE + CONSENT + POTENTIAL CONFLICT IN JOINT REPRESENTATION OF CO-DEFENDANTS** Because the State had just provided discovery to defense counsel, trial was continued, with the express consent of defense counsel. During a hearing, the court and prosecutor raised concerns about defense counsel's representation of both co-defendants. The court advised the two defendants that there were "great difficulties in having one attorney represent two people whose interests now seem to be the same, but as time goes on, . . . may be different." This possibility prompted the court to caution the defendants that, if they continued to be represented by the same lawyer, they "may be compromising [their] ability to present [an]

individual defense," and that if they later changed their minds, they "may be derailing the entire case and extending the length of time this case takes to develop." Trial was continued to December 28, 2015, and the court "encourage[d]" Trotman and his co-defendant "to find individual representation before then."

December 28, 2015

SECOND POSTPONEMENT – 70 DAYS – STATE REQUEST – PROSECUTOR UNAVAILABLE + CONSENT

The State asked for a postponement, and defense counsel stated that he "absolutely consent[ed]," noting that, when this date was assigned, counsel for all parties knew that the prosecutor would be out of the country.

March 7, 2016

THIRD POSTPONEMENT – 37 DAYS – STATE REQUEST – NEW EVIDENCE + FURTHER INVESTIGATION

The State requested a postponement because the prosecutor learned about two competency evaluations of the victim that the State believed it was obligated to obtain via a court order to unseal the record, in order to satisfy the State's discovery obligation. Defense counsel objected to another postponement on the ground that "[t]his could've been done a lot sooner" and the co-defendants had been placed on "desk duty." The prosecutor explained that, although one evaluation occurred the prior August, another had just been done, and the prosecutor had just learned about both, then immediately notified defense counsel and contacted counsel for the victim. The court concluded that trial could proceed as scheduled only if defense counsel waived his right to obtain those evaluations. Defense counsel declined to do so, explaining that "those reports, they're going to go directly to the case." The court, telling defense counsel that "you've got a cake and you can't eat it too[,]" found good cause to postpone beyond the impending *Hicks* date and granted "the State one more postponement," subject to the proviso that it would be "the last postponement possible for discovery purposes." Trial was rescheduled for April 13, 2016.

March 17, 2016	*HICKS* DATE[1] 180-day statutory deadline for Trotman's trial.
April 13-14, 2016	PRE-TRIAL MOTIONS + TRIAL DATE The court resolved the previous concerns regarding the victim's competency evaluations and denied a related motion to dismiss based upon *Hicks*, finding that there had been good cause for delaying trial beyond the *Hicks* date. The court also denied defense requests to sever the trials of the two co-defendants, again raising a concern about the potential conflict in having one attorney represent them both at a consolidated trial. After the court ruled on motions *in limine* not relevant to this appeal, defense counsel requested that the case be either held over or postponed to accommodate his personal commitment to attend a function at his grandchildren's school on the morning of April 15. The court allowed counsel to return at 1 p.m. the following day, warning that the case would likely be postponed, "which will be charged to the defense."
April 15, 2016	**FOURTH POSTPONEMENT – 47 DAYS – DEFENSE REQUEST TO OBTAIN EXPERT** After defense counsel advised the court that he would "need to get an expert based on what happened in the motions" the previous day, **the court postponed trial to June 1, 2016**, charging the delay to the defense.
May 13, 2016	**FIFTH POSTPONEMENT – 90 DAYS – CO-DEFENDANT'S REQUEST – SUBSTITUTION OF NEW DEFENSE COUNSEL + CONSENT** New counsel for Trotman's co-defendant (Sergeant Brett Thomas) requested a postponement to prepare for trial. Counsel for Trotman stated he had no objection. In light of

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

	commitments of co-counsel, counsel for Trotman agreed to a new trial date at the end of August. Finding good cause, **the court postponed the joint trial from June 1, 2016, to August 30, 2016**.
August 30, 2016	**SIXTH POSTPONEMENT – 45 DAYS – STATE REQUEST – PROSECUTION WITNESS NOT TRANSPORTED + PROSECUTOR CONFLICT** The prosecutor asked for a postponement because the victim witness had not been transported to court as the State requested, and the prosecutor had another trial starting the next day. Over objections by counsel for both defendants, who noted that their clients and witnesses had taken off work and were present, the court found good cause to postpone trial until October 14, 2016. The court charged the delay to the State.
September 13, 2016	DEFENSE FILES MOTION TO DISMISS BASED UPON HICKS + SPEEDY TRIAL
October 14, 2016	**SEVENTH POSTPONEMENT – 38 DAYS -- COURTROOM UNAVAILABLE + NEW PROSECUTOR** By the time the case was sent out for trial around 10:30 a.m., the scheduled courtroom was no longer available. The court declined to hold the case over (for a second day) and rescheduled trial for November 18, 2016, over objections from both defendants but accommodating the newly assigned prosecutor.
November 21-22, 2016	TRIAL Trial began 454 days after Trotman's first appearance in circuit court.

Before jury *voir dire*, the court addressed Trotman's motion to dismiss all charges on speedy trial grounds. In support of his claim of prejudice, defense counsel argued that Trotman's defense had been "impaired" because "one of the witness[es], a Lieutenant Berman is ret[ir]ed and unavailable now." The court then inquired about the basis for that claim:

THE COURT: What makes him unavailable?

[DEFENSE COUNSEL]: We can't find him. We've tried to find him, we can't get his address.

THE COURT: What steps have you taken to find him?

[DEFENSE COUNSEL]: My client has tried to find him, he knew him.

THE COURT: What steps has your client taken to find him?

[DEFENSE COUNSEL]: He's checked over at the jail, people he knew, to see where he went to. And he can't find an address to get him.

THE COURT: Have you filed a FOIA request with the Central Booking? A Freedom of Information Act request for his address?

[DEFENSE COUNSEL]: No, Your Honor.

THE COURT: Looked on the computer?

[DEFENSE COUNSEL]: Yes, Your Honor.

THE COURT: Talked to the State?

[DEFENSE COUNSEL]: No, Your Honor. Yes, talked to previous State, but not [the current prosecutor], no.

THE COURT: So you asked the State to track down the address of this personnel with Central Booking?

[DEFENSE COUNSEL]: I asked for other things like that, they said we've given you all we have. We've given you everything we have.

THE COURT: But you never asked specifically for that?

[DEFENSE COUNSEL]: No, no. Did not, no.

When the court then asked defense counsel if there was "[a]nything else you want to argue[,]" counsel pointed to the loss of opportunity in Trotman's employment, prompting the following colloquy:

[DEFENSE COUNSEL]: Yes. Sergeant Trotman has had to work out of position until this case is resolved, for almost two years now, especially since August of 2015.

THE COURT: Work out of position? What do you mean?

[DEFENSE COUNSEL]: Yes. Sergeant Trotman works . . . in the jail in the facility. He's in charge to – he helps run the institution. He gets promotions based on his work he does in there over time.

THE COURT: Right.

[DEFENSE COUNSEL]: Okay. Since this they've removed him from that . . . .

THE COURT: Since this they've removed him from that.

[DEFENSE COUNSEL]: They've put him in a bubble.

THE COURT: Meaning he has not been permitted to be promoted or have new responsibilities?

[DEFENSE COUNSEL]: Not only that, he doesn't work in the jail, they put him in a bubble where he just is away from every –

THE COURT: What does that mean? . . . .

[DEFENSE COUNSEL]: He usually runs the towers, he's a supervisor, he runs the inmates. Now he's in a bubble where he literally pushes buttons and just sits there all day and does next to nothing. Until this case is resolved.

THE COURT: So he still has a job, but it's not a job with the responsibilities he had before. Is that what you're talking about?

[DEFENSE COUNSEL]: Yes, and it's kept him from getting promotions. It's kept him from getting ahead. It will hurt him in his career, even if this Court says there's no case here whatsoever. He's been prejudiced beyond belief. He lacked pay for a period of time as a result of this. . . .

He's had the anxiety and concern over this, over this period of time, the sixteen months since charged. It is [sic] impaired our defense in memory and occurrence of events . . . and who did what, . . . from two years ago.

> And that these were routine assault charges that could have been resolved in District Court, Your Honor. . . . But he's been greatly prejudiced by this.

The trial court found the nearly sixteen-month delay "of some constitutional dimension" but "not excessive." Denying the defense motion to dismiss, the court reasoned that, although the five postponements charged to the State were "too many" and weighed "in favor of the Defendant," Trotman's belated filing of a speedy trial motion "certainly weighs in favor of the State," and there was little or no prejudice to him given that "he's not been incarcerated," had "kept his job[,]" and had not "shown any prejudice to his ability to defend himself[.]"

C. Trotman's Speedy Trial Challenge

Trotman contends the delay between the summons and the trial violated his right to a speedy trial. After evaluating the record in light of the four factors identified in *Barker*, we disagree for the reasons discussed below.

1. Length of the Delay

In our speedy trial analysis, the total length of the challenged delay is 454 days, measured from August 25, 2015 (the transfer to circuit court and first appearance) until November 21, 2016 (the date trial began). *See State v. Kanneh*, 403 Md. 678, 688 (2008); *White v. State*, 223 Md. App. 353, 379-80, 383-83 (2015). This period is both a factor in the *Barker* balancing formula and "a triggering mechanism[,]" because, when a delay is long enough, it may be considered "presumptively prejudicial," raising "the necessity for inquiry into the other factors that go into the balance." *Barker v. Wingo*, 407 U.S. 514, 530-31, 92 S. Ct. 2182 (1972). *See Kanneh*, *supra*, 403 Md. at 688.

Although there is no bright-line measure for when a defendant's right to a speedy trial has been violated, courts typically hold that a delay of more than one year triggers "the balancing analysis required under *Barker*." *Kanneh, supra,* 403 Md. at 688.

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

Nevertheless,

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

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

Moreover, the entire period before the first scheduled trial date – in this case sixty-two days from August 25 to October 27, 2015 – is "excluded from our calculations" and treated as "neutral" because it was "necessary for the orderly administration of justice[.]" *Howell v. State,* 87 Md. App. 57, 82 (1991). *See also Lloyd v. State,* 207 Md. App. 322,

330-31 (2011) (period until first trial date is neutral). But, as the trial court recognized and the State concedes, seven continuances during the ensuing 389 days (nearly thirteen months, from October 27, 2015, until November 21, 2016) created a delay of constitutional dimension that requires "*Barker* balancing." *Cf., e.g., White, supra*, 223 Md. App. at 384 (undertaking *Barker* review because delay of less than nine months "might be construed as presumptively prejudicial and of constitutional dimension"); *Jules v. State*, 171 Md. App. 458, 482-83 (2006) (sixteen-month delay triggered *Barker* review).

The trial court concluded that the length of this delay was "not excessive," noting "[t]hat the Supreme Court has ruled many times that as much as two years is not excessive" and that the court's docket "in Baltimore City" has "historically" experienced even longer delays in bringing cases to trial.

Although we caution that there is no presumptively acceptable period of delay, the fact that a delay is long enough to trigger a *Barker* inquiry does not, absent more, require dismissal. Indeed, the length of the delay, by itself, "is the least determinative of the four factors that we consider in analyzing whether [a defendant's] right to speedy trial has been violated." *Kanneh, supra*, 403 Md. at 690. For this reason, delays longer than the delay Trotman experienced have been held not to violate the right to a speedy trial. *Cf., e.g., Barker, supra*, 407 U.S. at 534-35 (five-year delay did not violate speedy trial right because the defendant suffered minimal prejudice and did not ask for a speedy trial); *Howard v. State*, 440 Md. 427, 447 (2014) (twenty-five months); *Kanneh, supra*, 403 Md. at 689-90 (thirty-five months); *Randall v. State*, 223 Md. App. 519, 544, 554-56

(2015) (twenty-five months); *Malik v. State*, 152 Md. App. 305, 317-18 (2003) (twenty-three months); *Marks v. State*, 84 Md. App. 269, 282 (1990) (twenty-two months).

Here, neither the full fifteen months between the first appearance in circuit court and the trial, nor the thirteen-month delay following the initially scheduled trial date was excessive given that the case involved: two co-defendants, 137 days of delay caused by those defendants, consented delays, a victim whose legal competency was in question, and a conflict in the defendants' representation that necessitated a change of counsel and eventual appearance of separate counsel for the co-defendant. Accordingly, the length of the delay weighs lightly against the State.

2. Reasons for Delays

Not all delays carry equal weight because each one must be evaluated in light of the reason for it. The Supreme Court has explained:

> Closely related to length of delay is the reason the government assigns to justify the delay. Here, too, different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

Barker, *supra*, 407 U.S. at 531 (footnote omitted).

Because each period of delay is best evaluated in conjunction with the reason for it, we examine each delay in turn. *See Glover*, *supra*, 368 Md. at 225.

First postponement, from October 27 to December 28, 2015 (62 days): This continuance was granted with the express consent of defense counsel because the State

provided last-minute discovery material and because the court, concerned about defense counsel's representation of both co-defendants, encouraged the parties "to find individual representation before" the rescheduled trial date. To the extent this consensual delay was caused by dual factors, it carries light weight. *Cf., e.g.*, *Howard, supra*, 440 Md. at 448-49 (jointly caused delay was neutral); *Glover, supra*, 368 Md. at 225-26 (joint postponement resulting "from dual factors"); *Marks, supra*, 84 Md. App. at 283 (joint request for continuance is neutral and not chargeable to either party).

Second postponement, from December 28, 2015, until March 7, 2016 (70 days): The State requested this postponement, to which defense counsel said he "absolutely consent[ed]," because the lead prosecutor was out of the country. Defense counsel acknowledged that, when trial was rescheduled to December 28, he was aware of the prosecutor's calendar conflict. When the court proposed a January trial date, defense counsel responded: "[W]e'll never be ready by then." Under these circumstances, the delay, although charged to the State based on the unavailability of the prosecutor, weighs less heavily because of Trotman's consent and contribution to its length, as well as the rescheduling of trial before Trotman's *Hicks* date.

Third postponement, from March 7 to April 13, 2016 (37 days): This delay occurred because the incarcerated victim, who was a critical prosecution witness, had been evaluated for competency. The prosecutor explained that, as soon as she learned that there had been two evaluations of the victim's competency since the previous August, she sought the related documents in order to comply with the State's discovery obligation. Because both competency evaluations were under seal, and counsel for the

victim would not waive that protection, the State planned to seek a court order to obtain access to those records. Upon considering the State's postponement request, the court found good cause to reschedule trial beyond Trotman's impending *Hicks* date of March 17. *Cf. Toney*, 315 Md. at 133 (discovery of new evidence constitutes good cause for postponement beyond *Hicks*). The court then admonished defense counsel again against continuing to represent co-defendants with potentially conflicting interests, warning Trotman that trial would likely be delayed if it became necessary to secure separate counsel. Given the good cause for this delay and its relatively short length, it carries light weight against the State.

Fourth postponement, from April 15 to June 1, 2016 (47 days): After preliminary matters were considered on April 13 and April 14, defense counsel for Trotman "waived" his *Hicks* rights on April 15 and asked for a continuance in order "to get an expert based on what happened in the motions" the previous day. Trial was rescheduled for June 1, 2016, with the full delay charged to the defense. *See, e.g., Brillon*, *supra*, 556 U.S. 81, 90 (2009) ("delay caused by the defense weighs against the defendant"); *Ratchford v. State*, 141 Md. App. 354, 362 (2001) (defendant cannot complain about delay he requested).

Fifth postponement, from June 1 to August 30, 2016 (90 days): The longest continuance occurred in response to a request by Trotman's co-defendant after separate counsel entered her appearance for the co-defendant and sought a postponement to prepare for trial. Counsel for Trotman stated that he had no objection. In light of prior commitments of co-counsel, counsel for Trotman agreed to a new trial date at the end of

August. Finding good cause, the court delayed the consolidated trial to August 30, 2016. *Cf. Howard*, *supra*, 440 Md. at 448 (defendant "caused 183 days of delay because he discharged his first lawyer and his second lawyer needed time to prepare"); *Ratchford*, *supra*, 141 Md. App. at 362 (upholding denial of speedy trial motion to dismiss where eighteen-month delay was caused in part by withdrawal of defense counsel due to a conflict of interest); *Marks*, *supra*, 84 Md. App. at 284 ("the delay attributable to the State was from [Marks's] co-defendant's request for continuances, and this type of delay is given less weight than a delay caused by the State attempting to deliberately hamper a defendant's case").

Sixth postponement, from August 30 to October 14, 2016 (45 days): This delay occurred because Eric Wise, the incarcerated victim-witness, was not transported to court as requested by the State, and the prosecutor had another trial starting the next day. Over objections by counsel for both co-defendants, who noted that their clients and witnesses had taken off work and were present, the court found good cause to postpone trial. This post-*Hicks* delay was appropriately charged to the State because it was caused by the unavailability of a prosecution witness due to the negligence of State agents. *See, e.g., Barker, supra*, 407 U.S. at 531 (negligence weighs less heavily against the government).

Seventh postponement, from October 14 to November 21, 2016 (38 days): This delay occurred because there was no courtroom available. It is attributed to the State but weighed lightly. *See generally Barker, supra*, 407 U.S. at 531 ("A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but

nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant."); *accord Peters, supra*, 224 Md. App. at 361-62.

Summary of first and second *Barker* factors:

In summary, the total delay between the first trial date and Trotman's trial was 389 days, with 252 days of delay attributed to the State and the remaining 137 days to the defense. We agree with the trial court that, on balance, the first two *Barker* factors – the length and reasons for the delay – weigh lightly against the State.

3. Assertion of the Right

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

Here, Trotman undercut his previous demands for a speedy trial when his own request for a postponement in order to secure an expert witness in April 2016 delayed trial. *See Marks, supra,* 84 Md. App. at 285. *Cf. Brillon, supra,* 556 U.S. at 93-94 (defendant's dismissal of counsel "on the eve of trial" "should have factored into the court's analysis of subsequent delay"). At that point, six months after Trotman's initial

trial date, the State was prepared to try the case, but Trotman delayed his trial. Similarly, it appears that the State was prepared for trial when, as the court had feared from the outset, defense counsel's conflict caused another substantial delay. Given Trotman's strategic abandonment of his speedy trial insistence in April, and the inevitable delay that was required to cure the conflict in defense counsel's representation of co-defendants, this factor weighs against Trotman. *See Barker*, *supra*, 407 U.S. at 529; *Kanneh*, *supra*, 403 Md. at 693; *Marks*, *supra*, 84 Md. App. at 285.

4. Actual Prejudice

Courts evaluating the fourth *Barker* factor --- actual prejudice --- consider the three interests protected by the constitutional right to a speedy trial, *i.e.*, "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Barker*, *supra*, 407 U.S. at 532. "Of these, the most important is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id.* In particular, the accused's right to a speedy trial is designed to prevent problems such as "defense witnesses becoming unavailable and memories becoming faulty." *Fraiden v. State*, 85 Md. App. 231, 268 (1991). Although the "[p]assage of time . . . may impair memories, cause evidence to be lost, deprive the defendant of witnesses, and otherwise interfere with his ability to defend himself[,]" a merely theoretical "possibility of prejudice at trial is not itself sufficient reason to wrench the Sixth Amendment from its proper context." *Glover*, *supra*, 368 Md. at 231 (quoting *United States v. Marion*, 404 U.S. 307, 321-22 (1971)) (emphasis in *Glover* deleted).

Here, defense counsel argued that Trotman had "had the anxiety and concern over this," but Trotman offered "no specific testimony that [he] suffered any anxiety" or distress "beyond that which is expected when charges are pending[.]" *See Marks, supra,* 84 Md. App. at 286. Moreover, this Court has "considered a defendant's conscious choice to endure further the anxiety and risk of impairment to his or her defense by requesting continuances in weighing the prejudice caused to a defendant by continuances." *Id*. at 285–86. As noted above, Trotman requested a postponement in April 2016, which delayed his trial. *Cf. Malik, supra,* 152 Md. App. at 322 (weight of defendant's pre-trial incarceration was "not as great as it would have been had [he] not caused a portion of the delay").

We agree with the trial court that Trotman was not significantly prejudiced by the delay. As set forth above, the court gave defense counsel ample opportunity to produce support for Trotman's claim of prejudice. Trotman's principal complaint about the impact of the delay (limiting his opportunity for promotions) did not establish that his defense was impaired, which is the prejudice most pertinent to a speedy trial violation. *Cf. White, supra*, 223 Md. App. at 385–86 (finding no prejudice where there was no discernible "impairment to the defendant's case."). Although the proffered unavailability of a potential defense witness might have suggested such harm, Trotman did not establish that Lieutenant Berman's unavailability was caused by the delay or that diligent efforts had been made to locate the witness. And he did not proffer that the missing witness would have definitely been available at one of the earlier trial dates.

We agree with the trial court that this factor weighs heavily against Trotman. *Wilson v. State,* 148 Md. App. 601, 609 (2002); *Jules*, *supra,* 171 Md. App. at 488.

5. *Barker* Balancing

We conclude, based on our independent evaluation of each *Barker* factor, that the delay in this case did not violate Trotman's right to a speedy trial. The supporting record may be summarized as follows:

	Delay	**Length**	**Reason(s)**	**Assertion of right**	**Prejudice**	**Responsibility/Weight**
First Continuance	October 27 to December 28, 2015	62 days	Late discovery by State + defense consent	None (consent + pre-*Hicks*)	None	State – neutral given consent + reasons
Second Continuance	December 28, 2015, to March 7, 2016	70 days	Consent + prosecutor unavailable + defense not ready	None (consent + pre-*Hicks*)	None	State – neutral given consent + reasons
Third Continuance	March 7 to April 13, 2016	37 days	New evidence + further investigation + witness competency	None (good cause under *Hicks*)	None	State – light weight given reasons, length
Fourth Continuance	April 15 to June 1, 2016	47 days	Defense expert + investigation	None (*Hicks* waived)	None	Defense – moderate weight given timing, reason
Fifth Continuance	June 1 to August 30, 2016	90 days	Entry of separate counsel for co-defendant due to conflict	None (*Hicks* waived)	None	Defense – significant weight, given timing, reason, length
Sixth Continuance	August 30 to October 14, 2016	45 days	Prosecution witness not transported to courtroom	Defense objection noted for the record	None	State – light weight given reason
Speedy Trial Motion	*September 13, 2016*			*Speedy trial/Hicks rights reasserted*		*Undercut by April + June defense postponements*
Seventh Continuance	October 14 to November 21, 2016	38 days	No courtroom available	None	None	State – light given reason
Totals	**August 25, 2015, to November 21, 2016**	**389 days**				**State: 252 days** **Defense: 137 days**

Although a delay of thirteen months (389 days) following the initial trial date requires close scrutiny, we exclude from our *Barker* analysis the two defense-requested continuances, which caused 137 days of post-*Hicks* delay. Because the remaining 252 days of delay charged against the State is of constitutional concern, we must examine the impact of the delay through the analytical framework established by *Barker*.

We are satisfied there was no constitutional violation. As the trial court recognized, the delay of thirteen months between the initial and the actual trial dates was not excessive for a case involving multiple defendants, a victim-witness whose competency was under scrutiny, and a conflict in defense representation necessitating a post-*Hicks* interjection of separate counsel. Moreover, three of the five delays charged to the State, totaling 170 days, carry light weight given the neutral, compound, and consensual reasons. Although the remaining 82 days of delay are charged to the State, they are offset in the *Barker* calculus by the third and fourth factors.

As discussed, Trotman's weak assertion of his right to a speedy trial in an omnibus motion was undercut by his own counsel's conduct. When the State was prepared to proceed to trial on April 15, six months after the initial trial date, defense counsel obtained a continuance to conduct further investigation. Counsel then waited another five months to file a motion to dismiss on speedy trial grounds. Moreover, the delay necessitated by the entry of separate counsel for Trotman's co-defendant was fairly charged against Trotman because, from the outset of this case, the court had admonished him and his attorney that joint representation of co-defendant Thomas would likely cause such delay. Although both defense postponements were for good cause and were

strategically justified, Trotman may not complain about delays that he caused. Nor may he claim that he was unduly prejudiced by the prolonged anxiety inherent in awaiting trial, given his willingness to postpone his trial date well past his *Hicks* date.

Most importantly, we agree with the trial court that Trotman's defense was not significantly prejudiced by the delay. Although the delay allegedly complicated Trotman's search for the missing witness, Trotman did not establish when the witness retired, and we cannot speculate that the witness would have been available if trial had not been delayed. In any event, the trial court's inquiry established that Trotman and defense counsel did not exercise diligence in attempting to locate the witness.

Based on this record, we conclude that Trotman was not denied his right to a speedy trial.

II. Disability Disqualification of Prospective Jurors

Trotman contends that the trial court "erred in striking for cause all of the veniremen who claimed to be unable to climb 25 stairs." This claim stems from the trial court's determination that jurors empaneled for this trial would need to be physically able to use stairs in order to reach the assigned jury room. Arguing that it is just as unconstitutional to exclude physically disabled people from jury service as it is to exclude racial minorities and women, Trotman maintains that the trial judge committed "decisional process error" because "she took no steps whatsoever to inform herself about the availability of accessible courtrooms." For the reasons that follow, we conclude that the trial judge did not err or abuse her discretion in excusing four members of the venire

who said they would be unable to climb the stairs to the jury room assigned for the trial of this case.

A. Standards Governing Review of Strikes for Cause Based on Disability

The general rule is: "The decision to excuse a potential juror for cause is left to the sound discretion of the trial judge and will not be disturbed on appeal except for an abuse of discretion." *Miles v. State*, 365 Md. 488, 568 (2001) (citing *Ware v. State*, 360 Md. 650, 666 (2000)). A court abuses its discretion when its decision is "well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *Evans v. State*, 396 Md. 256, 277 (2006) (citation and internal quotation marks omitted); *see Cousins v. State*, 231 Md. App. 417, 438, *cert. denied*, 453 Md. 13 (2017). Nevertheless, as we noted in *Anand v. O'Sullivan*, 233 Md. App. 677, 690, *cert. denied*, 456 Md. 503 (2017):

> Because a court does not have discretion to misapply the law, we review the circuit court's rulings of law nondeferentially, even when the rulings are made in the course of deciding a discretionary matter. *Wilson–X v. Department of Human Resources*, 403 Md. 667, 675–76, 944 A.2d 509 (2008) ("trial judges do not have discretion to apply inappropriate legal standards, even when making decisions that are regarded as discretionary in nature"); *Ehrlich v. Perez*, 394 Md. 691, 708, 908 A.2d 1220 (2006) ("[E]ven with respect to a discretionary matter, a trial court must exercise its discretion in accordance with correct legal standards. We review *de novo* a trial judge's decision involving a purely legal question." (Citations and internal quotation marks omitted.)).

By statute in Maryland, "[a] citizen may not be excluded from jury service due to . . . disability . . . ." *See* Maryland Code (1973, 2013 Repl. Vol.), Courts & Judicial Proceedings Article ("CJP"), § 8-102. But the statute also contemplates that an individual "is not qualified for jury service" if he or she "[h]as a disability that, as

documented by a health care provider's certification, prevents the individual from providing satisfactory jury service[.]" CJP § 8-103(b)(3). CJP § 8-402(a) authorizes a "jury judge or . . . jury commissioner" to "disqualify" an individual "on the basis of information provided on a juror questionnaire or during an interview or other competent evidence." CJP § 8-402(b). And an individual may be struck from a particular jury by a trial judge "[f]or good cause shown." CJP § 8-404(b)(2)(ii).

In reviewing a decision to strike a juror for cause, we examine whether the record supports the court's determination that the prospective juror would be unable to perform his or her duties in accordance with the instructions and the oath. *See Evans v. State*, 333 Md. 660, 673-74 (1994).

B. The Voir Dire Record

At the outset of jury selection, as prospective jurors entered the courtroom, the trial judge notified counsel that four individuals had disclosed in their juror questionnaires that they had physical limitations preventing them from climbing the approximately twenty-five stairs to the jury room assigned to the courtroom where Trotman was to be tried. To further investigate whether the prospective jurors would be unable to access the jury room, the court conducted individual interviews of the individuals who had reported having a problem with stairs.

After calling **Juror 376** to the bench, the trial court confirmed her inability to climb stairs before excusing her:

> THE COURT: Ms. [Juror 376], I understand from the Jury Commissioner's Office that you have difficulty doing stairs, is that correct?

[JUROR 376]: Yes.

THE COURT: There are 25 steps to the jury room, so I'm going to excuse you from serving on this jury because you're unable to do the stairs. Okay?

[JUROR 376]: Okay.

THE COURT: So you should go back to the jury assembly room now.

[JUROR 376]: Okay. Now, in the future, I don't feel that I – I have the ability to – I know that you don't want to discriminate against me –

THE COURT: Correct.

[JUROR 376]: But I feel that in serving on the jury you need to use your visual cues as well as, you know, the evidence and everything –

THE COURT: Well, and you would let the Judge know that. Not every person who's blind feels that way.

[JUROR 376]: Okay.

THE COURT: But you would just, the Judge will always ask you if there's anything else, if there's any other reason why you shouldn't serve as jury. You can tell them that. Okay?

[JUROR 376]: Okay. All right.

THE COURT: You can go back now to Room 239, where you were at.

Next, the court questioned and excused **Juror 408**, after the following colloquy:

THE COURT: Ms. [Juror 408], you told the Jury Office that you were unable to do steps. There are 25 steps to the jury room in this courtroom. Will you be able to do those?

[JUROR 408]: I have a hard time going across the street.

THE COURT: No? Okay. Well, for that reason, there are courtrooms that are on the same level, but this is not one of them. So I'm going to excuse you and ask you to go back to the jury assembly room.

[JUROR 408]: Okay. All right. Thank you.

Calling **Juror 624** up to the bench, the court confirmed that she would need an elevator to access a different floor:

> THE COURT: I understand that you're unable to do steps, is that correct?
>
> [JUROR 624]: Yes.
>
> THE COURT: There's 25 steps to the jury room in this courtroom, so are you telling me that you don't think you can do 25 steps?
>
> [JUROR 624]: No. Do you have, is there an elevator? I can do that.
>
> THE COURT: We don't have an elevator. You have to walk up and down the steps. Up and down the steps.
>
> [JUROR 624]: No. No.
>
> THE COURT: So you're excused now. They do have courtrooms on the same level, so there are no steps involved.
>
> [JUROR 624]: Okay.
>
> THE COURT: So you may be selected for one of them, so you're free to go back.
>
> [JUROR 624]: Okay. Okay. Thank you.

After swearing the remaining members of the panel and questioning several regarding unrelated matters, the court questioned and excused **Juror 404**, as follows:

> THE COURT: Let me ask you, Ms. [Juror 404], you told the jury commissioner that you couldn't serve on the jury because you couldn't go up and down stairs, is that correct?
>
> [JUROR 404]: Umm –
>
> THE COURT: I've got 25 stairs. Could you go up and down 25 stairs?
>
> [JUROR 404]: No.
>
> THE COURT: Okay. I'm going to excuse you then.
>
> [JUROR 404]: Okay.

THE COURT: You can report back to the Jury Assembly Room now.

[JUROR 404]: Thank you.

After concluding voir dire, the trial court asked the prosecutor which jurors he sought to strike for cause and confirmed that all four of these jurors had been stricken for cause based on their inability "to use stairs."

THE COURT: . . . Page 1. Strike for cause?

[PROSECUTOR]: Juror 376.

THE COURT: Reason?

[PROSECUTOR]: Unable to use stairs.

THE COURT: Well, I struck her for cause already. She's gone.

[DEFENSE COUNSEL]: When do we make objections on cause?

THE COURT: No.

[PROSECUTOR]: 404.

THE COURT: 404, your reason?

[PROSECUTOR]: Unable to use stairs.

THE COURT: All the unable to use stairs people have [been] struck for cause already. They're gone.

When the court asked defense counsel whether he had "any strikes for cause," counsel challenged the "stairs" strikes as follows:

[DEFENSE COUNSEL]: Can I ask when I object to the ones you did for cause that I haven't had a chance to object to yet? Like the ones on the stairs as to voir dire?

THE COURT: No. You've already put on the record that you object, Mr. [Defense Counsel].

[DEFENSE COUNSEL]: I'd like to make – no, my –

THE COURT: You're slowing me down.

[DEFENSE COUNSEL]: I'm sorry. I have a motion on the ones you objected that couldn't make the stairs.

THE COURT: Mr. [Defense Counsel], –

[DEFENSE COUNSEL]: Can I make a motion on that please.

THE COURT: Sure.

[DEFENSE COUNSEL]: I'd like to make a motion on the stairs, particularly number 408 [sic] that said that they would love to serve if they could be accommodated with like an elevator.

THE COURT: And how would you have suggested I accommodate her?

[DEFENSE COUNSEL]: That we go to another courtroom, on behalf of Mr. Trotman, who's on trial here, for him to have a fundamentally fair trial as a Defendant versus the need to have steps in a particular courtroom, that's a reason they're going to get struck when they're randomly picked jurors. That's my objection.

THE COURT: Okay. Unfortunately in the Baltimore City Circuit Court every single courtroom is being used. I, as a senior judge, fill up the empty courtroom. Judge Cox's courtroom, which is what we're in. He's assigned to juvenile, that's why we're here. It's the only courtroom that's available. So you're [sic] made your record. Now, will you make any motions you have on Page 1 for strikes for cause.

C. Trotman's Challenge

Trotman does not contest the trial court's factual finding that these four jurors were unable to use the stairs to reach the jury room assigned to the available courtroom. Nor does he dispute that such physical inability to participate in jury deliberations could constitute statutory grounds for juror disqualification. Instead, Trotman disputes the court's determination that this jury room, which could only be accessed by stairs, was the only location in the courthouse available for this trial. In Trotman's view, the court

lacked a sufficient basis to make that finding because it failed to conduct an adequate investigation into alternative accommodations. In his brief, he contends:

> The judge took no steps whatsoever to inform herself about the availability of accessible courtrooms. The Circuit Court for Baltimore City fills two large courthouses, 100 North Calvert Street, and 111 North Calvert Street. Both buildings have multiple elevators. The court is comprised of 35 judges, most of whom have his or her own courtroom. It strains credulity to think that by the time court had been in session for a while (275 pages of transcript, the entire pretrial motions and jury selection), no courtroom had become available. One would think that some criminal case would have pled out; some civil case settled; some divorcing couple reconciled. Yet, the court took no action to find this out. She called herself the "senior judge." The meaning of that is unclear, but what is clear is that this judge retired from the bench in 2014. *See*, the Maryland Manual online. She was sitting as a retired, specially assigned judge. As such, it was unlikely that she had her finger on the pulse of everything that was happening in both courthouses that day. Her failure to investigate this avenue of accommodating both the defendant and the disabled jurors is decisional process error. Her priority seemed to be getting the case finished quickly.

But Trotman proffers no evidence that there was, in fact, another courtroom that was available to accommodate these prospective jurors. The State asserts in its brief: "Trotman is not entitled to relief based on speculation or facts outside the record." Trotman urges us to apply constitutional and statutory principles governing nondiscriminatory access to the courts to mandate that circuit courts accommodate prospective jurors who are unable to climb stairs. In his view, "remedies to make courtrooms accessible are usually fairly simple[.]" He cites, *inter alia*, *Tennessee v. Lane*, 541 U.S. 509, 531, 124 S. Ct. 1978 (2004) ("Recognizing that failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion, Congress required the States to take reasonable measures to remove architectural and other barriers to accessibility."); *J.E.B. v. Alabama,* 511 U.S. 127, 141-

42, 114 S. Ct. 1419 (1994) ("All persons, when granted the opportunity to serve on a jury, have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination. Striking individual jurors on the assumption that they hold particular views simply because of their gender is 'practically a brand upon them, affixed by the law, an assertion of their inferiority.'") (footnote and citation omitted); *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S. Ct. 1712 (1986) ("the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race").

Trotman contends in his brief:

> Considering the ease with which the parties could have moved to another courtroom, or a conference room on the same floor could have been pressed into service as a jury room, or the jury room of a judge on the same floor who was hearing non-jury matters could have been used, it was an abuse of discretion to strike for cause all of the venire members who claimed that they could not walk 25 steps. Reversal is required.[2]

The State characterizes Trotman's appellate contentions as unpreserved and speculative complaints that are premised on "facts outside the record" and factually and legally inapposite case law. With respect to Trotman's claim "that the judge should have done . . . more than she did to find an accommodation for the disabled jurors[,]" the State points out that defense counsel did not request further investigation or object to the trial court's factual finding that no other courtroom was available.

[2] Trotman made no argument, either at trial or in his brief in this Court, that the trial court misapplied CJP §§ 8-103 or 8-404, or any other statutory provision of CJP Title 8.

On the merits of Trotman's constitutional claim, the State notes that "appellate courts that have considered the issue have held that the principles of *Batson* and *J.E.B.*, which bar peremptory strikes based on race or gender, do not extend to peremptory strikes based on disability." *See, e.g.*, *United States v. Watson*, 483 F.3d 828, 829, 832 (D.C. Cir. 2007) (*Batson*-level scrutiny for peremptory strikes based on race does not extend to peremptory strikes based on visual impairment because "the Supreme Court has declined to treat the disabled as a suspect class in recognition of the reality that the States may have legitimate reasons for treating differently persons whose disabilities reduce their ability to perform certain functions"); *Donelson v. Fritz*, 70 P.3d 539, 544-45 (Colo. App. 2002) ("*Batson* does not apply to peremptory challenges to persons with disabilities") (collecting cases). The State also emphasizes that the excused jurors were not excluded from serving on juries in other cases. In this case, the State contends, "the judge made a factual finding, which was not clearly erroneous, that the four disabled jurors could not be accommodated, and on this basis, rationally concluded that they should be excused from serving on *this* jury."

D. Juror Disqualification

We are not persuaded that the court erred or abused its discretion in striking these four jurors for cause based on their physical inability to use the stairs necessary to reach the jury room. The trial judge, a retired and specially assigned veteran of the Circuit Court for Baltimore City, drew upon her current and historical knowledge of the courthouse. As set forth above, when defense counsel suggested that another courtroom might possibly be able to accommodate the physical disabilities of these jurors, the judge

explained that Trotman's trial had been assigned to her, along with the courtroom usually occupied by a judge who was temporarily sitting in juvenile court, and, according to the trial judge, there was no other courtroom available for Trotman's two-day trial.

When the trial judge provided that explanation at trial, defense counsel did not dispute the lack of alternative courtrooms or challenge the adequacy of the trial court's investigation into alternative accommodations. Nor did he suggest any of the alternative jury deliberation scenarios set forth in Trotman's appellate brief.

In the absence of any evidence in the record that there was another courtroom available, the trial court's finding is not clearly erroneous. *See generally Biglari v. State*, 156 Md. App. 657, 668 (2004) ("A judge's decision is not clearly erroneous if the record shows that there is legally sufficient evidence to support it."). The court did not err in concluding that there was good cause to strike the four jurors who were unable to navigate the stairs to the only jury room available for use by this particular jury.

III. Surveillance Video

Trotman contends that the trial court "abused its discretion in refusing to allow [him] to watch the video" of the incident "as it was played in the courtroom, thereby burdening both the right to . . . counsel and the right to be present." We disagree.

A. Relevant Record

Trotman's challenge stems from incidents when a video recording was played, during the State's case-in-chief and again during the State's rebuttal closing, while Trotman remained seated at the trial table, ostensibly unable to see the video as the State played it for the jury. During testimony by Lieutenant David Gilmore (one of the

correctional officers present during the altercation), the video was admitted into evidence without objection as State's Exhibit 1. Before the recording was played, the court addressed the respective positions of counsel and client in the courtroom, prompting the ruling now challenged by Trotman:

> THE COURT: Now, would you like to publish State's 1 to the jury.
>
> [PROSECUTOR]: Yes, Your Honor. State would, with permission of the Court, would like to publish State's Exhibit Number 1 to the jury.
>
> THE COURT: You may proceed.
>
> [PROSECUTOR]: Court's indulgence. Can I have the law clerk help, Your Honor?
>
> THE COURT: I thought – okay.
>
> [DEFENSE COUNSEL]: Can I have permission to move around?
>
> THE COURT: I don't know yet where this is going to be, so just have a seat next to your client. Do you have to start all over? . . . Mr. [Prosecutor], what would you like to happen?
>
> [PROSECUTOR]: Your Honor, for the record, I'm just publishing for the jury State's Exhibit Number 1.
>
> THE COURT: Are you going to move it in front of the witness?
>
> [PROSECUTOR]: Moving it, for this purpose of publishing it for right now in front of the jury.
>
> THE COURT: So the witness has to see it.
>
> [PROSECUTOR]: Yes, Your Honor. . . .
>
> Your Honor, I'd ask that he approach.
>
> THE COURT: All right. Counsel, approach the bench.
>
> [DEFENSE COUNSEL]: Come up?
>
> (Counsel approached bench and the following occurred:)

THE COURT: Yes, you're part of counsel. What is it you're trying to do now?

[PROSECUTOR]: Your Honor, after I play it once through I'm going to go back and I'm going to ask him if you see himself in there, to identify individuals. . . .

THE COURT: You have to ask me for permission to let him get off the bench. . . .

(Counsel returned to trial table, and the following occurred in open court:)

THE COURT: Mr. Gilmore, can you step down and out of the witness chair and up to the TV? We're going to give you a pointer. All right. Mr. [Defense Counsel], have a seat on that front pew. Can everybody in the jury see the TV? Alternate Juror No. 1, can you see the TV?

THE JUROR: Not now.

THE COURT: Not now, Mr. [Prosecutor's] in the way. Mr. Gilmore you're going to have to step back closer to me. Can you see it?

[PROSECUTOR]: No.

THE COURT: Push it back, Mr. [Prosecutor], push it back. How about now, can you see it now?

MR. GILMORE: Yes.

THE COURT: All right. Alternate Number 1 – no, your client needs to go back to the –

[DEFENSE COUNSEL]: He can't watch it too?

THE COURT: No. You have to ask for permission for anybody to move in the courtroom.

[DEFENSE COUNSEL]: May he have permission to sit and watch it?

THE COURT: No. You may sit down on the front pew and watch it.

[DEFENSE COUNSEL]: (Indiscernible.)

THE COURT: Sit down on the front pew.

[DEFENSE COUNSEL]: Yes, Your Honor.

(Emphasis added.)

The prosecutor then played the video and Lieutenant Gilmore identified Trotman, Thomas, and Eric Wise. During Lieutenant Gilmore's testimony, the trial court repeatedly directed the prosecutor not to "stand in front of Alternate Number 1[.]"

The State also replayed portions of the video during its examination of Eric Wise (the victim).

In neither instance did Trotman complain that he was unable to see the video while it was being played or that he was unable to consult with defense counsel.

During closing arguments, after defense counsel emphasized Lieutenant Gilmore's comment that the video was "missing" a portion of the incident, the prosecutor received permission to play the video during her rebuttal argument. The trial court, *sua sponte*, advised defense counsel that he had "permission to move[.]" Counsel did not request that Trotman be permitted to move. Although counsel complained when the prosecutor was obstructing his view of the video, there was no analogous complaint that Trotman was unable to see it.

B. Trotman's Challenges

According to Trotman, the court's refusal to allow him to move to a location in the courtroom where he could view the video as it played impinged upon his rights to confrontation, to confer with counsel, and to be present during meaningful trial proceedings. *See generally Pinkney v. State*, 350 Md. 201, 208-09 (1988) ("The right to be present at trial implicates a panoply of rights" and "affords a defendant the ability to

communicate with counsel during trial, assist in presentation of a defense, and in the process of cross-examination."). We are not persuaded that Trotman was deprived of those rights.

The video, which Trotman aptly characterizes as "the most important arrow in the State's quiver," was disclosed in discovery and available for review by Trotman before trial. Notably, Trotman does not contend that he was unable to discuss the video with counsel, either before or during trial. Instead, he asserts that "his right to confrontation was abridged, as well as his right to confer with his counsel during the showing of the meat of the State's case," and that "[t]he abridgement of these rights is not subject to harmless error analysis." Trotman raises the same constitutional complaints based on the re-publication of the video during the State's rebuttal closing argument even though Trotman did not assert these objections at that point in the trial.

A trial judge "has broad discretion to control the conduct in his or her courtroom[.]" *Biglari v. State*, 156 Md. App. 657, 674 (2004). *See In re Elrich S.*, 416 Md. 15, 36 (2010). Absent an abuse of such discretion with an attendant showing of prejudice, we do not interfere with such decisions. *Cooley v. State*, 385 Md. 165, 176 (2005).

The trial court did not abuse its discretion in this instance. As we understand the excerpted exchange between court and counsel, the challenged ruling was not a blanket prohibition against Trotman watching the video or consulting with counsel when the State played it. Instead, the court merely responded to Trotman's unauthorized movement in the courtroom by admonishing defense counsel that he was required "to ask

for permission for anybody to move in the courtroom" and instructing counsel that his client "needs to go back," presumably to his seat at the trial table. In requiring prior permission for any movement in her courtroom, the trial court merely imposed on Trotman the same code of conduct that applies to "anybody" in her courtroom. This is not the chilling prohibition against participating in his defense that Trotman posits in his appellate brief.

Nothing in this record suggests that Trotman was deprived of his constitutional rights to be present in the courtroom, to confront prosecution witnesses, to present evidence or argument, to consult with defense counsel, or to participate in his defense. To the contrary, Trotman remained in the courtroom while the video, which he presumably reviewed before trial, was being played, and while witnesses testified regarding its content. We see nothing in the challenged ruling specifically or the trial record generally that can reasonably be construed as a restriction on Trotman's right to question witnesses, to present evidence, or to communicate with defense counsel. In these circumstances, we are satisfied that the trial court did not abuse its discretion in the manner in which it controlled the movement of the defendant in the courtroom.

IV. Jury Instructions

Trotman contends that the trial court "erred, both in its original charge and in its answer to a jury question during deliberations, in giving an unclear or misleading description of the elements of assault." In our view, neither the record nor the law supports Trotman's contention.

A. The Instructions

When the trial court announced that it planned to use *Maryland Pattern Jury Instruction – Criminal* ("MPJI-Cr") 4.01 (2d ed. 2013), defense counsel acknowledged that he wanted "Part C," which addresses the battery modality of assault, as follows:

> Assault is causing offensive physical contact to another person. In order to convict the defendant of assault, the State must prove:
>
> (1) that the defendant caused [offensive physical contact with] [physical harm to] (name);
>
> (2) that the contact was the result of an intentional or reckless act of the defendant and was not accidental; and
>
> **(3) that the contact was [not consented to by (name)] [not legally justified].**

MPJI-Cr 4:01 Second Degree Assault (bold emphasis added).

Defense counsel did not specify whether the court should replace the brackets in the pattern instruction with an "and" or an "or." The court instructed the jury as follows:

> Assault in the second degree is causing offensive physical contact to another person. In order to convict the defendant of assault in the second degree, the State must prove (1) that the Defendant caused physical harm to the victim; (2) that the contact was the result of an intentional or reckless act of the Defendant and was not accidental; and (3) ***that the contact was not consented to by the victim, nor legally justified.***

(Emphasis added.)

After the instructions were given, defense counsel excepted to this instruction on the ground that the trial court should have added language explaining that "acting in the course of employment" qualified as "legal justification."

> [DEFENSE COUNSEL]: Your Honor, I asked for [an exception] and after hearing the definition of assault, you did say "or justified" but some

> clarification, if he was acting the course of his employment, that could be a justification.
>
> THE COURT: I can't hear you.
>
> [DEFENSE COUNSEL]: Acting in the course of employment could be considered a justification if they found he was acting the course of his employment. . . . I think that should be added in there.

Later, during deliberations, the jury asked for the court to provide the elements of all the charged crimes. When the trial court stated that it was typing up a response, the prosecutor observed, "I think there's a typo. It says 'Or not legally justified.' Is that right, 'Not legally justified?'" The court stated, "Yes. That's true." The court then invited the prosecutor to "go back" to check the pattern jury instruction and asked defense counsel whether he had "any problems[.]"

Defense counsel made the following comments:

> [DEFENSE COUNSEL]: Yeah, again, I don't like the definition of second degree assault. I think it more – it just – I know Your Honor said it's a Pattern but this is exactly what I think they're confused with.
>
> THE COURT: Okay.
>
> [DEFENSE COUNSEL]: It has everything in there that says, except the very end, "Not legally justified." A second degree assault has to be a – I don't know how to word it – a criminal act.

The trial court sent the jury supplemental written instructions that included the following definition for second degree assault:

> 2nd Degree Assault is causing offensive physical contact to another person. In order to convict Defendant of 2nd Degree Assault, the State must prove beyond a reasonable doubt that Defendant caused offensive physical contact with physical harm [sic] to the victim; that the contact was the result of an intentional or reckless act of Defendant and was not accidental;

and that the contact was not consented to by the victim or not legally justified.

(Emphasis added.)

B. Trotman's Instruction Challenges

In Trotman's view, both the oral and written instructions were defective because "[t]he crime of assault requires that the State prove both that there was no consent and that there was no justification." Trotman argues that neither version of the instruction was correct because neither informed the jury that it could "only convict if BOTH consent AND justification are absent." In his view, the instruction "removed from the State the burden of disproving justification, a burden which was properly the State's." Trotman contends this "error which went straight to the heart of" his justification defense, by allowing "the jury to conclude that prong (3) of the assault definition was satisfied because there was no consent."

We agree with the State that defense counsel challenged these instructions on different grounds than those asserted on appeal. As the State points out, "[d]efense counsel never objected at trial that the oral language 'not consented to . . . , nor legally justified' needed to be re-worded to make clear that a conviction would require both lack of consent and lack of legal justification." Later, when the trial court responded to the jury's note, defense counsel, after reviewing the proposed supplemental instruction, failed to challenge the conjunction in the written instruction given to the jury.

Under Maryland Rule 4-325(e), "[n]o party may assign as error the giving or failure to give an instruction unless the party objects on the record promptly after the

court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection." We agree with the State that "[n]othing Trotman said at trial would have put the judge on notice that he was dissatisfied with the grammatical construction of the second-degree assault instruction's final phrase, either in the oral or written instruction."

Because Trotman failed to request clarification at a time when the trial court easily could have instructed the jury more explicitly that both lack of consent and lack of justification are necessary to convict on a charge of second degree assault, his only avenue for appellate relief is plain error review. *See* Md. Rule 4-325(e); Md. Rule 8-131(a).

As the Court of Appeals explained in *Yates v. State*, 429 Md. 112, 130-31 (2012):

> Plain error review is reserved for errors that are "compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." *Savoy*, 420 Md. at 243, 22 A.3d 845 (2011) (quoting *State v. Hutchinson*, 287 Md. 198, 203, 411 A.2d 1035 (1980)). Among the factors the Court considers are "the materiality of the error in the context in which it arose, giving due regard to whether the error was purely technical, the product of conscious design or trial tactics or the result of bald inattention." *Id*. This exercise of discretion to engage in plain error review is "rare." *Id.* at 255, 22 A.3d 845.

See also Morris v. State, 153 Md. App. 480, 507 (2003) ("appellate invocation of the 'plain error doctrine' 1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon").

We perceive no error in the court's oral instruction, much less error warranting consideration of an unpreserved argument. The court correctly instructed the jury that the State was required to prove beyond a reasonable doubt that "the contact was not

consented to by the victim, nor legally justified." In our view, the use of "nor" in the instruction makes it clear that, to qualify as assault, the offensive contact must be neither consensual, *nor* legally justified. Alternatively stated, the instruction directs jurors to determine whether the offensive contact was not consensual "and not" legally justified.

Similarly, with respect to the trial court's written instruction, which uses "or" in place of "nor," we are not persuaded that it was misleading to jurors who were viewing it in the context of both the oral instruction and the parties' arguments. *Cf. Lamb v. State*, 93 Md. App. 422, 462 (1992) (approving battery instruction with language that the State must prove "that the contact was not legally justified *or* consented to by" the victim) (emphasis added). Whether Mr. Wise consented to the punch by Trotman was never a contested issue in this case. Indeed, the jury was informed from the outset that the central dispute was whether Sergeant Trotman was legally justified in striking Mr. Wise. Given that focus throughout trial and during closing arguments, the instruction as written was not clear legal error.

JUDGMENTS AFFIRMED. COSTS TO BE PAID BY APPELLANT.