UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2761

September Term, 2013

WAHKEAN ALI TAYLOR

v.

STATE OF MARYLAND

Krauser, C.J.,
Reed,
Zarnoch, Robert A.
(Retired, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: December 22, 2015

After waiving his right to a trial by jury, appellant, Wahkean Ali Taylor, was convicted by the Circuit Court for Baltimore County of attempted first-degree murder, first-degree assault, robbery with a dangerous and deadly weapon, robbery, theft under $1000, use of a handgun in the commission of a crime of violence, and wearing, carrying, or transporting a handgun.[1] The trial court sentenced appellant to life in prison, suspending all but a total of 65 years,[2] after which he filed a timely notice of appeal.

Appellants present three questions for our consideration, which we quote:

> 1. Did the court below plainly err by denying Appellant's motion to dismiss based on a violation of his Constitutional right to a speedy trial?
>
> 2. Did the court err in denying Appellant's motion to suppress the pre-trial photographic identification made by Richard Chase?
>
> 3. Is the evidence legally insufficient to sustain Appellant's convictions?

We answer all questions in the negative. For the reasons that follow, we shall affirm the judgments of the trial court.

[1]The court granted appellant's motion for judgment of acquittal on a charge of unlawful possession of a firearm after having been convicted of a felony.

[2]The court imposed a life sentence, suspending all but 60 years, on the attempted first-degree murder conviction and a consecutive 20 years, suspending all but the mandatory first five years, on the use of a handgun in the commission of a crime of violence conviction. Sentences on the remaining charges were either merged into, or imposed to run concurrently with, the sentence on the handgun and attempted murder convictions.

FACTS AND LEGAL PROCEEDINGS

Hearing on the Motion to Suppress

Just prior to the start of trial on December 4, 2013, appellant was heard on his motion to suppress the victim's pre-trial photo identification of him as the perpetrator of the crimes, on the ground that the photographic array was unduly suggestive. The following testimony was adduced at the suppression hearing.

In the early morning hours of June 11, 2012, Richard Chase walked to an Exxon gas station in Reisterstown to purchase snack items. As Chase left the gas station's convenience store, appellant beckoned Chase to his vehicle and inquired whether Chase might be able to help him procure marijuana. Chase responded that he had "a little bit" and could "help [him] out with that."

Chase entered the car and handed appellant several plastic baggies of marijuana from which to choose. Appellant offered to drive Chase toward his home, but once on the road, appellant instead turned into a court, reached into the glove compartment, pulled out a gun, and instructed Chase to "[g]ive me everything you got or I'm going to fucking kill you." As appellant reached into Chase's pocket, Chase grabbed his book bag and jumped out of the car. As he did so, appellant fired the gun at him, shattering the passenger side window of the car. Chase called 911, describing his assailant as a darker skinned African-American, approximately six feet tall, heavy set, with facial hair, wearing blue jeans and a baseball cap, and driving a late model Honda Accord. After speaking with police at the

scene of the shooting, Chase proceeded to the police station where Detective Jennifer Bartfeld-Sutton may have shown him some photographs.

The next day, Detective Bartfeld-Sutton asked Chase to look at some photographs; Chase believed the detective may have told him "that they got him," that is, had arrested a suspect. Chase reviewed his statement from the night before to ensure its accuracy and was then shown several sheets of paper, each containing multiple photographs, and asked if he could identify the man who had shot at him. Chase stated, "I looked through the photos, I saw him, I said, It's him. It was that simple." He said that although he spent 15 to 30 seconds reviewing the photos, he knew "instantly" that the photo of appellant represented the man who had shot at him.

Chase did not recall any words being written on the sheets of photographs and denied that any lettering on the array influenced his decision in any way. He also denied having ever seen appellant before their encounter at the gas station or knowing the man's name. He asserted that Detective Bartfeld-Sutton did not suggest a person to choose or indicate that he had to choose someone, although, given the detective's statement that someone had been arrested, Chase expected to see a photo of the person who had assaulted him.

Detective Bartfeld-Sutton testified that during her interview of Richard Chase on June 11, 2012, Chase described the man who had shot him as a black male in his late 20s to 30s, five feet, eleven inches tall, 260 pounds, with a full beard, wearing a black baseball

cap with red on it, a black shirt, and black Nike shoes. Chase denied prior knowledge of or acquaintance with the assailant.

Detective Bartfeld-Sutton showed Chase a photo array on June 14, 2013, but she denied having shown him any photos prior to that date. She did not recall telling Chase that police had arrested a suspect before he identified his assailant. The detective said she had created the photo array with six photos, with appellant in position number three, if proceeding top to bottom, left to right. The array included a report name—Wahkean 3—and report number—15767. Detective Bartfeld-Sutton remembered that Chase "immediately pointed to" appellant's photo and wrote, "That's him, I will never forget his face. Seeing this picture again is like looking at the devil." Chase also answered, "No" to the written question on the array, "Have you ever seen this picture before?" The detective denied telling Chase that a suspect was present in the array or that he had to choose someone. She also reiterated that Chase did not know appellant's name when he made the identification, so that the name "Wahkean" on the report likely meant nothing to him.

At the close of the testimony, defense counsel argued that the photo array was unduly suggestive because Detective Bartfeld-Sutton had advised Chase that a suspect had been arrested before asking him to view the photographs. Moreover, the photo array was entitled "Wahkean 3," which at least allowed "some interpretation" that the suspect's photo was in the third position, where it indeed was located. Whether Chase had consciously realized it or not, counsel concluded, the indication "Wahkean 3," led him to choose photo number three, an unreliable identification.

The court ruled:

> Your motion is denied. Court has had an opportunity to review the evidence in this case including the testimony. Court does not find that the Defendant had met its initialed–initial burden of showing that the pre-trial identification was unduly suggestive.
>
> The detective testified, and I'm not going to reiterate what she said, but basically that she didn't provide that much information to Mr. Chase in asking him to come to the police station to pick out a photograph. Mr. Chase says, as you—as you argued a moment ago, that he was give additional information. The Court is not persuaded that he's clear in time of when that happened. But even if the Court were persuaded that the information, that the —Mr. Chase testified to in direct examination in this motion was given to him prior to viewing the—the photographs, none of that information would have aided him in any fashion into—into picking out a particular photograph.
>
> In addition, the Detective testified that—that he—that he—Mr. Chase picked the photograph immediately. Mr. Chase indicated at one point that he picked it out immediately. Ultimately he said he looked at all of them, took between 15 and 30 seconds, but he's absolutely clear that he read nothing of the printed information. Even if he read the printed information, Wahkean would have meant nothing to him because he didn't know the name of the Defendant at the time, and number 3 could mean anything.
>
> There's a host of numbers on—on this particular form. The report number, for example, is 15767. That's a five-digit number. The photographs under photographic source for each one of the photographs that appears on this form are six—six or seven digits, and they don't have any relationship whatsoever to the report number. Number 3 could mean anything.
>
> Your suggestion that it could have been, you know, that the literature suggests a lot of things. Yeah, the literature—

> psycho-babble suggests a lot of stuff, okay? But it's not—what the Court has to deal with is evidence in the case. And the Court is persuaded that the pre-trial identification was not in any way suggestive to require the State to then go on and bear an additional burden.
>
> So your motion to suppress the pre-trial identification, and therefore subsequent in-court identification, if there is one, is denied. (T. 12/4/13, 109-11).

Trial

At trial, Richard Chase testified consistently with the information he had provided at the suppression hearing, adding that the gun appellant pulled from his glove compartment was a black 9mm weapon that looked new. Chase said that as he got his right foot out of the car to flee the scene, he heard a loud bang, after which appellant's passenger side front window shattered and appellant took off. Although Chase did not realize it at the time, a bullet had grazed his left shoulder, ultimately leaving a scar, which he displayed to the court.

Chase also made an in-court identification of appellant as the person who put the gun to his head. He further identified himself, appellant, and appellant's vehicle in the security video taken at the Exxon gas station on the night in question.

Baltimore County Police Officer Cynthia Spriggs responded to Chase's 911 call. She observed him with a small injury to his arm and located and collected broken glass in the area of the street where Chase said appellant had shot through his own car window.

Detective Bartfeld-Sutton described her investigation of the crimes against Chase, which included obtaining the security video from the Exxon station; the video showed a

dark colored Honda. Because Chase had advised that the passenger window of the car had been broken by gunshot, Detective Bartfeld-Sutton contacted auto glass suppliers to determine if anyone had inquired about repair to a Honda. She found an auto glass supplier in Dundalk who had placed an order for a front passenger window for a 2006 Honda Accord. An employee at the glass supplier provided the name "Brittany" and a phone number for the person who was going to bring in the car; further investigation revealed that Brittany Powell lived on Tarragon Road in Reisterstown, about one-half mile from the Exxon gas station where Chase met appellant. The employee related that "Brittany" planned to bring the Accord in for service at 1:00 on June 11, 2012, so Detective Bartfeld-Sutton and other officers proceeded to the auto glass supplier to conduct surveillance of the vehicle. The Accord and a BMW arrived at the auto glass supplier, each with a male and a female inside. Appellant, whom Detective Bartfeld-Sutton recognized from the Exxon security video, exited the driver's side of the Accord, went into the glass business, and then proceeded down the road with the other three people with whom he had arrived.

Detective Bartfeld-Sutton examined the Accord, which had a broken window and a "divot" on the passenger side window molding, along with what appeared to be gunshot or powder residue. The Honda was towed to police headquarters, and Detective Bartfeld-Sutton obtained a search and seizure warrant for the vehicle.[3]

[3]The search of the vehicle did not yield a weapon or ammunition.

Forensic services technician Leah Carter examined the Honda Accord after it was impounded. She noted a broken front passenger window and "small marks" on the exterior and interior of the window frame. Aware that a shooting may have occurred near the passenger side door of the vehicle, Carter processed the car for gunshot residue. She also lifted fingerprints from the interior and exterior of the vehicle. The suitable fingerprints recovered matched appellant; no suitable prints matched Chase.

Forensic services manager Cassandra Burke, accepted by the court as an expert in gunshot residue analysis and glass comparison, testified that gunshot residue was found on glass obtained from the interior passenger side window of appellant's Honda. Moreover, a piece of glass removed from the shirt Chase had been wearing on the night in question and the broken glass retrieved from the street at the scene of the shooting likely had a common source of origin, appellant's Honda Accord.

Based on a conversation with Brittany Powell, identified as appellant's girlfriend and the passenger in the Honda when appellant dropped the car at the auto glass supplier, Detective Bartfeld-Sutton obtained a search and seizure warrant for Powell's apartment on Tarragon Road. Officers recovered a baggie containing what was later confirmed to be marijuana, along with papers and a cell phone bill in the name of Wahkean Taylor, from the master bedroom of that apartment; they found no gun or ammunition.

After appellant was arrested, Detective Bartfeld-Sutton presented Chase with the photo array containing a photo of appellant and five other men. Chase immediately picked

appellant as the man who had shot at him, after which he was "freaked out" and "visibly upset."

At the close of the State's case, appellant moved for judgment of acquittal, arguing, first, that the victim, Richard Chase, had not offered any testimony that the crimes against him occurred in Baltimore County, so the court's jurisdiction had not been established. In response, the State noted that when it showed a photo of the gas station to Chase, the witness did state the gas station was in Baltimore County. In any event, the prosecutor added, jurisdictional deficiencies should have been raised before trial.

Appellant also argued that the State had presented no evidence in support of count seven in the indictment against him, the charge of possession of a firearm following the commission of a crime of violence. Appellant submitted generally on the remainder of the counts in the indictment.

Although the parties had discussed stipulating to the fact that appellant had a disqualifying prior crime, the court did not recall a formal on-the-record stipulation to that effect. As such, the court granted the motion as to count seven of the indictment, but denied the motion as to the remainder of the charges.

Appellant elected to testify, stating that in June 2012, he had been on probation, with a "very strict level of supervision," requiring urinalyses and daily reporting. He said that if he were involved in a crime in any way, whether as the perpetrator or a complaining witness, he would be in violation of his probation.

On June 11, 2012, appellant continued, he drove his girlfriend's car to the Exxon gas station to get something to eat. As he left the store, a man—Richard Chase—called out, "Hey, main man?" and asked if appellant could do him the favor of driving him down the street to pick up a friend and then take the two men to a girl's house, in exchange for $15 and a bag of marijuana. Notwithstanding his probationary status, appellant agreed.

When Chase saw his friend walking down the street, he rolled up the passenger window, which had been down, and instructed appellant to make a U-turn and enter a nearby court. As Chase's friend approached the car, appellant noticed the man had a gun. Chase then went through appellant's pockets and took money. When Chase opened the door to exit the car, a gun went off, and the passenger window broke.

Chase and his friend ran off, and appellant fled in his vehicle without alerting police or anyone else, afraid that a report of the incident would result in a violation of his probation. Instead, he simply made plans to have the car's window fixed, at a facility about 30 miles away from his home.

When he was arrested, appellant said, he had no idea what he had done. He denied having a gun on his person, or possessing a gun, on the night in question. He further denied robbing, attempting to rob, assaulting or attempting to murder Richard Chase. Appellant did admit to have a prior impeachable offense, robbery with a dangerous and deadly weapon.

The defense presented no other witnesses. At the close of the entire case, appellant, at the suggestion of the court, incorporated his renewed motion for judgment of acquittal

into his closing argument. In closing, defense counsel, stating that both appellant and Chase had told stories that were consistent with the physical evidence, conceded that the case "obviously" came down to what "the Court believes in terms of what happened inside that vehicle." But, as appellant's credibility had not been successfully impeached, he should "be given the benefit of the doubt" and found not guilty.

The court, agreeing that the case hinged on "simple credibility," that is which witness it believed, ruled that Chase, whose testimony was entirely consistent with his pre-trial explanation of the events to police, had no reason to lie and was the more credible witness, while appellant's version of events was "preposterous." As such, the court found appellant guilty of all the charges remaining after the grant of motion for judgment of acquittal on count seven of the indictment.

Additional relevant facts will be set forth as necessary.

DISCUSSION

I.

Appellant first argues that the trial court erred in denying his motion to dismiss the charges against him on constitutional speedy trial grounds.[4] In his view, the 18 month delay between his arrest and the start of his trial was presumptively prejudicial, and the motion

[4]It is unclear why appellant, in his questions presented, frames the issue as one requiring plain error review. He makes no reference to plain error in his argument, and appellant clearly raised the issue in a pre-trial motion and was heard thereon by the trial court. Plain error review is not implicated under the particular facts of this matter.

should have been granted, especially in light of the court's allegedly insufficient findings of fact pertinent to the argument of a violation of the constitutional right to a speedy trial.

The constitutional analysis to be applied in the speedy trial context was set forth by the United States Supreme Court in *Barker v. Wingo*, 407 U.S. 514 (1972). "A post-indictment, pre-trial delay of sufficient length becomes presumptively prejudicial and thereby triggers scrutiny under the *Barker* factors. Once such a delay is demonstrated, courts must balance the following four factors to determine whether [the delay impinges on the defendant's constitutional rights]: the length of the delay, the reasons for the delay, the defendant's assertion of his speedy trial right, and the presence of actual prejudice to the defendant." *Glover v. State*, 368 Md. 211, 222 (2002) (citing *Barker,* 407 U.S. at 530). The Court of Appeals has "consistently applied the [four] *Barker* factors when considering an alleged violation of both the Sixth Amendment of the United States Constitution and Article 21 of the Maryland Declaration of Rights."[5] *Id.* at 221.

In weighing the relevant factors, none is "'either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant.'" *Jules*

[5]The Sixth Amendment states, in pertinent part: "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ." Article 21 of the Maryland Declaration of Rights states, in pertinent part: "in all criminal prosecutions, every man hath a right. . . to a speedy trial by an impartial jury. . . ."

v. State, 171 Md. App. 458, 482 (2006), *cert. denied*, 396 Md. 525 (2007) (quoting *Barker*, 407 U.S. at 533).

The *Barker* Factors

Length of Delay

The length of the delay involves a "double inquiry" because a delay of sufficient length is first required to trigger a speedy trial analysis, and the length of the delay is then considered as one of the factors within that analysis. *Glover*, 368 Md. at 222-23. The Court of Appeals has noted that, for purposes of a speedy trial analysis, the length of the delay is generally measured from the date of the defendant's "arrest or filing of indictment, information, or other formal charges to the date of trial." *Divver v. State*, 356 Md. 379, 388-89 (1999) (citation omitted).

The time between appellant's arrest on June 11, 2012 and the start of his trial on December 4, 2013, just under 18 months, was more than the one year, 14 day delay that the Court of Appeals has held was sufficiently inordinate to trigger the speedy trial balancing analysis. *See Epps v. State*, 276 Md. 96, 111 (1975). Therefore, the delay in the instant case was of sufficient duration to require a "length of delay" analysis; the State concedes as much.

We note, however, that "[t]he length of the delay, in and of itself, is not a weighty factor[.]" *Glover,* 368 Md. at 225 (citations omitted). In fact, "the length of the delay is the least determinative of the four factors that we consider in analyzing whether [a

defendant]'s right to a speedy trial has been violated." *State v. Kanneh*, 403 Md. 678, 690 (2008).

Reasons for Delay

Appellant was accused of committing the charged crimes in the early morning hours of June 11, 2012, and he was arrested later that day. The State indicted appellant on July 5, 2012. His attorney entered her appearance and filed a written demand for a speedy trial on August 9, 2012.

Appellant's trial was originally set for October 16, 2012. On that date, the defense requested a postponement as a result of "some unresolved discovery matters." With no opposition from the State to the first postponement request, the court granted the postponement and set trial for November 29, 2012.

On November 29, 2012, the defense again requested and was granted a postponement until March 19, 2013 due to delayed discovery. Made aware by the court that the applicable *Hicks* date would pass in mid-February, appellant agreed to waive his right to a trial within 180 days under the *Hicks* deadline.[6]

The defense again requested a postponement on March 19, 2013, on the ground that counsel did not have enough time to prepare for trial after receipt of gunshot residue and

[6]*See State v. Hicks*, 285 Md. 310, 318 (1979) (Unless there is good cause for postponing the trial date beyond the 180 day period, the court must dismiss the charges).

glass analyses from the State on March 5, 2013. The court, finding good cause for the postponement, agreed to the parties' characterization of the request for postponement as joint and reset the trial date for July 10, 2013.

On June 26, 2013, the defense requested a postponement in advance of the July trial date, arguing that a witness would not be available on July 10, 2013 and that personal issues would interfere with counsel being available to try the case that day. Although noting the case had been postponed before, the State agreed to a postponement if the court were to find good cause. The court, warning that it would be the last postponement for any reason, granted the request and set the trial for August 28, 2013.

On August 28, 2013, however, the State requested a postponement, on the ground that the victim, Richard Chase, had not been served with a summons to appear and was not present to testify. The defense objected to the postponement, arguing that the State had not presented good cause for the delay. The court denied the State's request, but the court administrator's office advised that no judge was available to hear the case, so, over defense objection, the matter was again postponed, until October 21, 2013.

Again on October 21, 2013, no judge was available to hear the case, so the matter was postponed until December 4, 2013, when the trial began. Prior to the start of trial, defense counsel moved for dismissal on constitutional speedy trial grounds, setting forth all the information related above. While conceding that some of the delays were attributable to the defense, counsel argued that the delay fell primarily upon the State, as a

result of its untimely provision of discovery and the unavailability of the victim, its key witness.

Ignoring the time period between appellant's June 11, 2012 arrest and the assignment of the first trial date of October 16, 2012–*see Jules*, 171 Md. App. at 484(holding that the time between arrest and the first trial date is usually accorded neutral status)–it was the defense that requested several postponements, amounting to approximately seven months of the delay. Although appellant claims the delays were necessitated by discovery delays and the unavailability of a State's witness, we perceive no negligence or gamesmanship on the part of the State. *See id.* at 485 ("a deliberate attempt to hamper the defense would be weighed most heavily against the State, a prolongation due to negligence of the State would weigh less heavily against it, and a delay caused by a missing witness might be a neutral reason chargeable to neither party and a delay attributable solely to the Defendant himself would not be used to support the conclusion that he was denied a speedy trial." (citation and internal quotation marks omitted)). As such, the bulk of the delay must be attributed to the defense or lightly attributed to the State.

The State requested only one postponement, which was denied, although two postponements amounting to a total of just over three months were nonetheless granted due to a lack of available judges to hear the case. Although attributable to the State, we do not weigh these administrative delays heavily against it. *See Butler v. State*, 214 Md. App. 635, 659-60 (2013) (quoting *Strunk v. United States*, 412 U.S. 434, 436 (1973)) ("'Unintentional delays caused by overcrowded court dockets or understaffed prosecutors

are among the factors to be weighed less heavily than intentional delay, calculated to hamper the defense, in determining whether the Sixth Amendment has been violated but ... they must 'nevertheless . . . be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.'").

Although the delay between appellant's arrest and trial was lengthy, the delay was caused primarily by defense requests and weighs more against appellant than the State. The administrative delays due to lack of availability of a judge, which must be charged to the government, at best weigh only slightly against the State.

Assertion of the Right to a Speedy Trial

"Often the strength and timeliness of a defendant's assertion of his speedy trial right indicate whether the delay has been lengthy and whether the defendant begins to experience prejudice from that delay." *Glover*, 368 Md. at 228 (citing *Barker*, 407 U.S. at 531-32. As noted in *Barker*, the strength of a defendant's "efforts to assert his right to a speedy trial will be affected by the length of the delay, to some extent by the reason for the delay, and . . . by the personal prejudice he experiences." 407 U.S. at 531. As such, "[t]he more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." *Id.* at 531-32.

Here, appellant's only written demand for a speedy trial came shortly after his indictment, on August 9, 2012. Thereafter, he waived his right to a speedy trial under the *Hicks* rule and did not specifically raise a speedy trial argument again until the start of trial

on December 4, 2013. As noted in *Barker*, a gauge of the prejudice to a defendant is that the more severe the deprivation, the more likely the defendant is to complain. We observe that appellant's speedy trial demands were not extraordinary. On the other hand, although appellant filed only a single written motion arguing for a speedy trial before the actual start of his trial, he did object to a postponement on August 28, 2103, and we cannot say that he stood idly by without objecting to the delay. We therefore conclude this factor weighs lightly in appellant's favor.

Prejudice to Appellant

Whether a defendant has suffered prejudice because of the pre-trial delay is the most significant factor in our analysis of whether the right to a speedy trial has been violated. *Jules*, 171 Md. App. at 487. According to *Barker*, the prejudice to a defendant should be assessed in light of the interests the right to a speedy trial was designed:

(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. . 407 U.S. at 532. "Impairment of a defense is the most serious form of prejudice to a defendant." *Howard v. State*, 440 Md. 427, 449 (2014) (citation and internal quotation marks omitted)

Defense counsel argued that appellant had been prejudiced generally by his incarceration since June 2012, which had resulted in the loss of his job, absence from his family, stress, and uncertainty of knowing his future. The court, advising that it had reviewed the court file, ruled:

> The—the Defendant certainly has served his right through the pre-trial motion. The Court is not persuaded that there has been any actual prejudice to the Defense in terms of the defending against this action. So under the totality of the circumstances, your request to dismiss the matter, alleging a violation of speedy trial, is denied.

Appellant did not, before the trial court, and does not, in his brief, suggest, much less proffer, that the delay caused any evidence to go missing, any witnesses to become unavailable, or any memory to fade. Moreover, he made no specific claim of heightened anxiety or concern in his argument, only the general claims of stress attendant to anyone incarcerated prior to trial. The trial court found no actual prejudice to the defense in terms of defending the action, and we see nothing in the record to persuade us that determination is erroneous.

Conclusion

A balancing of the *Barker* factors is case specific. *SeeGlover* 368 Md. at 231-32. Although there was a delay in bringing appellant to trial, we consider his actions in delaying the trial, along with the lack of bad faith on the part of the State. The length of the delay and the reasons for the delay do not weigh heavily against the State. Appellant did assert his right to a speedy trial prior to the actual start of trial but was not zealous in doing so; that factor weighs only lightly in his favor.

On balance, and considering the *Barker* factors, we find that, despite the delay, appellant has not suffered prejudice that rises to the level of a violation of his constitutional right to a speedy trial. Notwithstanding appellant's claim that the trial court made

insufficient findings of fact before denying his motion to dismiss, we perceive no error in the trial court's fact-finding following appellant's lengthy argument on the motion (taking into account its knowledge of the history of postponements in the case), nor error in its ultimate ruling denying the motion to dismiss.

II.

Appellant next contends that the suppression court erred when it denied his motion to suppress Chase's pre-trial identification of him as the perpetrator of the charged crimes. The photo array employed by the police, he says, was impermissibly suggestive, as it contained appellant's name and the position of his photograph. Thus, appellant concludes that Chase's resulting identification was unreliable.

Our review of a circuit court's denial of a motion to suppress evidence is limited to information contained in the record of the suppression hearing and not the record of the trial. *Brown v. State*, 397 Md. 89, 98 (2007). When the motion to suppress has been denied, we are further limited to considering the facts in the light most favorable to the State as the prevailing party. *Id.* In considering the evidence presented at the suppression hearing, we extend great deference to the fact-finding of the suppression court and "as to the credibility of witnesses, unless those findings are clearly erroneous." *Id.* We review *de novo*, however, all legal conclusions, making our own independent determinations of whether a constitutional right has been violated. *See Wengert v. State*, 364 Md. 76, 84 (2001).

"[D]ue process protects the accused against the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive

procedures." *McDuffie v. State*, 115 Md. App. 359, 366 (1997) (citations and internal quotation marks omitted).Maryland case law establishes a two-prong test for resolving challenges to extrajudicial identifications. *Thomas v. State*, 213 Md. App. 388, 416-17 (2013), *cert. denied*, 437 Md. 640 (2014). First, the defense bears the initial burden of showing that the identification procedure employed was impermissibly suggestive. *Id.* at 416. If the suppression court rules that "the out-of-court identification was not made under suggestive circumstances, the inquiry ends, and the identification evidence is admissible." *Id.* at 417.

If, however, the defendant demonstrates that the identification was tainted by suggestiveness, the inquiry proceeds to a second stage, in which the suppression court assesses whether the State proved that the totality of the circumstances shows that the identification was reliable. *Id.* "The following factors are relevant to whether, under the totality of the circumstances, the identification was reliable[,]" even if the procedure employed was suggestive: [(i)]The opportunity of the witness to view the criminal at the time of the crime, [(ii)] the witness's degree of attention, [(iii)]the accuracy of the witness's prior description of the criminal, [(iv)] the level of certainty demonstrated by the witness at the confrontation, and,[(v)] the length of time between the crime and the confrontation. *Jenkins v. State*, 146 Md. App. 83, 125 (2002), *rev'd on other grounds*, 375 Md. 284 (2003) (citing *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972) (citations and internal quotation marks omitted),). Exclusion is only warranted when the identification cannot be found to

be reliable. *See Turner v. State*, 184 Md. App. 175, 184 (2009). Short of that point, it is up to the jury to weigh the evidence. *Id.*

Turning to the matter at hand, the threshold question is how suggestive, if at all, the photo array was. We conclude that the identification procedure employed by the police was not impermissibly suggestive.

The testimony at the suppression hearing showed that Detective Bartfeld-Sutton created the photo array shown to Richard Chase several days after the assault upon him, entitling the array report "Wahkean 3." Appellant argues that because appellant's first name is Wahkean and his photo was placed in position three of the array, the title of the array report suggested to Chase that he should choose the photograph of the person in the third position as his assailant.

Chase testified credibly, however, that he did not know appellant's name at the time he made the pre-trial identification and that he did not notice any words or lettering on the photo array, having focused only on the photos. Chase stated, and Detective Bartfeld-Sutton agreed, that he identified appellant from the photo array immediately, writing on the array, "I will never forget his face." In considering the totality of the circumstances of the pre-trial identification procedure, we are not persuaded it was impermissibly suggestive.

Even assuming, *arguendo*, that the photo array was impermissibly suggestive, we still cannot say that, under the circumstances, there was a "very substantial likelihood of irreparable misidentification," and in the absence of such likelihood, it was for the fact-

finder, here the court, to weigh. *Turner*, 184 Md. App. at 186. In determining the ultimate reliability of Chase's identification of appellant, we consider the criteria enunciated in *Biggers*,409 U.S. at 199, and which this Court repeated in *Jenkins*,146 Md. App. at 125.

Looking at the first consideration, Chase had the opportunity to view appellant at the time of the crime. Chase said he first saw appellant inside the gas station convenience store. Thereafter, he was beckoned to appellant's car, spoke with appellant about a marijuana deal, and entered appellant's car where he made small talk with appellant until the robbery and shooting. There is no question he had a good opportunity to view the criminal prior to and during the crime. This factor weighs in favor of reliability. Next, appellant was in a position to pay a high degree of attention to the crime as it was being committed against him. We presume that a person being robbed with the threat of a gun is likely to pay close attention to the events. Chase was not a "casual or passing observer." *See Turner*, 184 Md. App. at 187 (citation and internal quotation marks omitted). Again, he viewed the suspect at length at the gas station, during the car ride, and when the gun was pointed at him. He was able to give the police a fairly detailed description of the man, which Detective Bartfeld-Sutton verified as accurate through her review of the gas station security video and comparison of it to appellant when she saw him at the auto glass supplier. This factor also tends in favor of reliability of the pretrial identification.
Thirdly, Chase's description of the assailant was ultimately accurate, and this factor also points to reliability.

In applying the fourth consideration, Chase's out-of-court identification showed a high level of certainty.–At the pre-trial identification, Chase "immediately" identified appellant as the man who had robbed and shot at him, stating he would never forget the man's face. This factor militates strongly in favor of reliability

Finally, the time lapse between the crime and the subsequent identification by the witness was just three days.–The crime occurred on June 11, 2012, and Chase identified appellant from the photo array on June 14, 2012, according to Detective Bartfeld-Sutton. The amount of time between the crime and the identification was not very long, a factor tending toward reliability.

For the foregoing reasons, the suppression court's denial of appellant's motion to suppress Richard Chase's pretrial identification of appellant from the photo array was not erroneous.

III.

Finally, appellant avers that the evidence presented at trial was insufficient to sustain his convictions because appellant's version of the events of the night in question was more credible than Chase's, as Chase admitted to being a shoplifter[7] and a drug dealer. Furthermore, the physical evidence did not establish for certain which witness's version of events was accurate.

[7]At both the suppression hearing and trial, Chase admitted to shoplifting a bottle of ketchup from the Exxon convenience store on the night in question, although he purchased other snack items.

"This appeal concerns the sufficiency of evidence at a bench trial. Md. Rule 8–131(c) provides that [w]hen an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. We review sufficiency of the evidence to determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[8] *White v. State*, 217 Md. App. 709, 713 (2014) (citations and internal quotation marks omitted).

It is not "the function or duty of the appellate court to undertake a review of the record that would amount to, in essence, a retrial of the case." *Rivers v. State*, 393 Md. 569, 580 (2006) (citation and internal quotation marks omitted). "Rather, [b]ecause the fact-finder possesses the unique opportunity to view the evidence and to observe first-hand the demeanor and to assess the credibility of witnesses during their live testimony, we do not re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence." *State v. Mayers*, 417 Md. 449, 466 (2010) ((alteration in original) (citation and internal quotation marks omitted).

[8]The question of evidentiary sufficiency is properly before us. At the close of the State's case-in-chief, appellant made a generalized motion for judgment of acquittal, which the court denied. "Had his case been tried before a jury, in order to preserve issues of evidentiary sufficiency on appeal, [appellant] would have had to make his motion by 'stat[ing] with particularity all reasons why the motion should be granted.'" *Harrison v. State,* 382 Md. 477, 487 n.12 (2004) (quoting Md. Rule 4–324(a)). In this case, "however, the trial court acted as the trier of fact; therefore, no particularized motion was necessary." *Id.*

Here, appellant's only argument regarding the sufficiency of the evidence relating to all the charged offenses is that his version of the events on the night in question was more credible than Chase's, and, as such, he, as the accused, should be given the "benefit of the doubt." We disagree.

As noted above, it is not the function of this Court to re-weigh the credibility of the witnesses or attempt to resolve conflicts in the evidence, which is exactly what appellant implores us to do. That role is properly left to the trial court, which, in this matter, determined that appellant's version of events was "preposterous," while simultaneously ruling that Richard Chase, who had no reason to lie, provided considerably more credible testimony. Given the physical evidence presented at trial, Chase's credible testimony, appellant's incredible testimony, and appellant's acknowledgment that a conviction may properly rest exclusively upon the testimony of a single eye witness, we cannot say that the trial court erred in finding the evidence presented at trial sufficient to convict appellant of all charged crimes, beyond a reasonable doubt.

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