Circuit Court for Montgomery County
Case No. 136661C

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 0577

September Term, 2022

GREGORY TERRELL JONES

v.

STATE OF MARYLAND

Nazarian,
Zic,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: June 3, 2024

After trial before a jury in the Circuit Court for Montgomery County, Gregory Terrell Jones was found guilty of five counts arising from a double homicide. On appeal, he argues that (1) he was denied his constitutional right to a speedy trial due to delays caused by the State, (2) he was denied his constitutional right to due process because the State dismissed and re-filed the charges against him in order to evade the court's pretrial evidentiary ruling, and (3) the court abused its discretion in denying his motion to strike the State's firearms expert's testimony in its entirety after the expert offered an inadmissible opinion before the jury repeatedly. We see no violation of Mr. Jones's speedy trial or due process rights, but hold that the court abused its discretion by denying Mr. Jones's motion to strike the firearms expert's testimony. We reverse and remand for further proceedings consistent with this opinion.

I. BACKGROUND

A. The Incident & Investigation.

On the evening of February 15, 2018, Montgomery County Police responded to a call about a "suspicious situation" involving a bullet hole through the window of a car. Upon arriving at the scene, police found a woman in the driver's seat of the car and a man in the passenger's seat. Both were slumped over and appeared to be dead. Officers saw that they had suffered wounds to their heads and that there was a large amount of blood in the car. After investigating the scene, police determined that both victims had been shot fatally, but officers were unable to identify any eyewitnesses to the shooting.

Further investigation revealed that the male victim, Joshua Frazier, had made plans to collect money from Mr. Jones on the day of the shooting. That afternoon, at about 1:00 p.m., Mr. Frazier texted Mr. Jones that he was sending his "man" to "scoop that cash." Mr. Jones agreed to pay, but insisted on handing the money to Mr. Frazier directly. After Mr. Frazier agreed to pick up the money himself, Mr. Jones texted Mr. Frazier to meet him at an apartment complex located at 3407 Robey Terrace in Silver Spring, Maryland. The apartment complex was less than half a mile away from the scene of the shooting. Mr. Frazier began travelling to Maryland from Richmond, Virginia and around 4:25 p.m., Mr. Frazier and the female victim were seen driving into the apartment complex.

A few minutes before they arrived at the complex, at 4:17 p.m., Mr. Jones called Mr. Frazier. The call lasted about sixty-two seconds. Within an hour after the call, both Mr. Frazier's and Mr. Jones's phones connected to cellular towers providing coverage to the murder scene located at 14133 Aldora Circle in Burtonsville. By 7:02 p.m., all of Mr. Jones's text messages with Mr. Frazier had been deleted from Mr. Jones's phone, including the messages scheduling their meet-up. Between 9:30 p.m. to 10:00 p.m., police responded to Aldora Circle and found the victims' bodies.

The next morning, Mr. Jones's phone conducted a Google search for "Fox News Silver Spring." Approximately three weeks later, police searched a house associated with Mr. Jones[1] and found a nine-millimeter bullet in a dresser that also contained Mr. Jones's birth certificate, social security card, and health records. The State's firearms expert

[1] Mr. Jones's cousin, a conspirator, lived there.

concluded that the unfired bullet found in the dresser had marks that were "consistent with the other fired cartridge cases" found on the scene of the murder.

B. Procedural History.

The events of February 15th led to two separate indictments. In the first, filed on April 26, 2018, Case No. 133703C (Circuit Court for Montgomery County), Mr. Jones was charged with (1–2) two counts of first-degree murder, (3) armed robbery, (4) use of a firearm in the commission of a crime, and (5) conspiracy to commit murder. On August 9, 2019, the State entered a *nolle prosequi* for those charges.[2] In the second indictment, filed on November 21, 2019, Case No. 136661C (Circuit Court for Montgomery County), Mr. Jones was charged with (1–2) two counts of murder, (3) conspiracy to commit murder, and (4–5) two counts of the use of a firearm in the commission of a violent crime.

After extensive pretrial litigation that we'll discuss in detail below, Mr. Jones was tried by a jury on December 6–17, 2021. The jury found him guilty on all counts. The court sentenced Mr. Jones to two consecutive terms of life without the possibility of parole for the first-degree murder counts, a concurrent term of life imprisonment for conspiracy to commit murder, and two consecutive terms of fifteen years' incarceration for the firearm counts.

Mr. Jones appealed. We provide additional facts as necessary below.

[2] The entry of a *nolle prosequi* is "'an official declaration by the State, announcing that it will not pursue the charges in a particular charging document.'" *State v. Simms*, 456 Md. 551, 557 (2017) (*quoting Gilmer v. State*, 389 Md. 656, 659 n.2 (2005)); *see* Md. Rule 4-247.

II. DISCUSSION

Mr. Jones raises three issues on appeal:[3] *first*, whether he was denied his constitutional right to a speedy trial; *second*, whether he was denied his constitutional right to due process; and *third*, whether the court abused its discretion in denying his motion to strike all testimony from the State's firearms expert. We see no violation of Mr. Jones's speedy trial and due process rights, but we hold that the court abused its discretion in denying Mr. Jones's motion to strike the firearms expert's testimony in light of the prejudice caused by the repeated introduction of the expert's inadmissible opinion. And on that last ground, we reverse and remand for further proceedings.

[3] Mr. Jones phrased his Questions Presented as:

> 1. Was Mr. Jones denied his constitutional right to a speedy trial?
>
> 2. Was Mr. Jones denied his due process rights?
>
> 3. Did the court err in refusing to strike the firearms expert's entire testimony?

The State phrased its Questions Presented as:

> 1. Did the circuit court properly deny Jones's motion to dismiss on constitutional Speedy Trial grounds?
>
> 2. To the extent properly before this Court, did Jones establish a "due process" violation based on the State obtaining an opinion from a second firearms expert?
>
> 3. Did the trial court properly exercise its discretion in denying Jones's request to strike the firearms expert's trial testimony entirely and instead instructing the jury on how to interpret that testimony?

A. Mr. Jones Was Not Denied A Speedy Trial.

"In reviewing the judgment on a motion to dismiss for violation of the constitutional right to a speedy trial, we make our own independent constitutional analysis." *Glover v. State*, 368 Md. 211, 220 (2002). "We perform a *de novo* constitutional appraisal in light of the particular facts of the case at hand; in so doing, we accept a lower court's findings of fact unless clearly erroneous." *Id.* at 221.

Mr. Jones contends that the circuit court erred in denying his motion to dismiss on speedy trial grounds because the "[t]he State was responsible for more than twice the delay for which [he] can be blamed" and "[he] was prejudiced by the delay, both personally and in the impairment of his defense." The State counters that there was no speedy trial violation because "[t]he reasons for the delays were largely neutral or due to [Mr.] Jones's motions to exclude or limit the testimony of the State's firearms experts." Although we disagree with the State's contention that Mr. Jones should be penalized for filing (successful) motions to limit the testimony of the State's firearms experts, we conclude that the factors governing the reasonableness of the delays weigh against a finding of a speedy trial violation.

The Sixth Amendment of the United States Constitution and Article 21 of the Maryland Declaration of Rights guarantee all criminal defendants the right to a speedy trial. *Divver v. State*, 356 Md. 379, 387–88 (1999). The Supreme Court established the constitutional analysis to be applied for speedy trial issues in *Barker v. Wingo*, 407 U.S. 514 (1972). The 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.'" *State v. Kanneh*, 403 Md. 678, 687–88 (2008) (*quoting Barker*, 407 U.S. at 530). The Court defined four factors for us to balance: the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Barker*, 407 U.S. at 530. We assess each one in turn and conclude that on balance, Mr. Jones was not deprived of a speedy trial.

We begin with a chronology of the relevant events throughout the pendency of the first and second indictments and list the time that elapsed between each:

> **March 5, 2018:** Initial arrest of Mr. Jones.
>
> **April 26, 2018** (a month-and-a-half later): Initial indictment filed.
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> **May 7, 2018** (two weeks later): Trial scheduled to start on September 17, 2018.
>
> **September 18, 2018** (four-and-a-half months later): Trial postponed to March 18, 2019, pursuant to a joint motion for a continuance by the State and Defense. The joint motion stated that "despite all efforts, counsel[] [we]re simply not yet ready" for trial and the court at the time found "good cause" for the postponement.
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> **March 12, 2019** (six months later): Trial postponed to August 12, 2019 pursuant to Mr. Jones's motion for a continuance. The court found that there was "good cause" for the postponement because, among other reasons, the defense needed time to review evidence that the State intended to introduce regarding a then-recent shooting in West Virginia that allegedly involved Mr. Jones.
>
> **July 12, 2019** (four months later): The court excluded evidence that Mr. Jones was involved in the West Virginia shooting pursuant to the defense's motion.
>
> **August 5, 2019** (one month later): The court ruled that the State's firearms expert would not be able to testify that the fired casings found on the scene of murder were cycled through the

same gun as the unfired bullet found in the house associated with Mr. Jones.

August 9, 2019 (four days later): The State entered a *nolle prosequi* to all charges in the initial indictment, asserting that it was "not able to go forward ethically and in good faith" given "the state of the evidence at this point."

November 20, 2019 (three-and-a-half months later): Mr. Jones removed an ankle bracelet that he was required to wear as part of an unrelated armed robbery case and fled from Maryland.

November 21, 2019 (one day later): Second indictment filed.

January 10, 2020 (a month-and-a-half later): Mr. Jones was extradited to Maryland.

December 6, 2021 (a year and eleven months later):[4] Trial began.

With this timeline in mind, we turn to the four-factor balancing test set forth in *Barker v. Wingo.*

1. Length of the delay.

"The length of delay for speedy trial analysis is measured from the earlier of the date of arrest, filing of indictment, or other formal charges, to the date of trial." *Greene v. State*, 237 Md. App. 502, 512–13 (2018). If the State drops charges against a defendant formally and then re-files the charges in good faith, the speedy trial clock will begin with the second indictment. *State v. Henson*, 335 Md. 326, 336 (1994) ("[T]he period between the good faith termination of a prosecution and the reinstitution of that prosecution . . . will not be considered in the speedy trial analysis."). "The length of the delay is to some extent

[4] Mr. Jones acknowledges that a year-and-a-half of this delay was caused by the COVID-19 pandemic and four months of the delay was due to a mistake by his defense counsel.

a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Barker*, 407 U.S. at 530; *Glover*, 368 Md. at 222–23 ("[T]he length of delay is a 'double enquiry' as it both triggers constitutional analysis and is a factor in determining whether a defendant's constitutional right to a speedy trial has been violated.").

The circuit court assumed, without deciding, that the delay began on Mr. Jones's March 5, 2018, arrest date because the court "would not find a speedy trial violation even if [it] used the initial date" of Mr. Jones's arrest rather than the date of the second indictment. Neither party challenges the court's decision to use Mr. Jones's initial arrest date as the starting point for its analysis. And we agree with the circuit court that there was not a speedy trial violation even when measuring the delay from Mr. Jones's initial arrest, so we assume as well that the delay began on March 5, 2018.

The total delay between Mr. Jones's initial arrest and his trial was three years and nine months. A delay of that length is "presumptively prejudicial" and triggers the *Barker* balancing test. *Divver*, 356 Md. at 389 (delay of one year and sixteen days was presumptively prejudicial); *Reed v. State*, 78 Md. App. 522, 537 (1989) (delay of one year and one month was presumptively prejudicial).

As a factor in the balancing test, "[t]he length of delay, in and of itself, is not a weighty factor." *Glover*, 368 Md. at 225 (*citing Erbe v. State*, 276 Md. 541, 547 (1976)). The significance of the delay's length lies mainly in its connection to the other factors, such as its effect on the legitimacy of the reasons offered for the delay and the likelihood of

prejudice. *Id.* Moreover, the reasonableness of the length of the delay depends on the nature and complexity of the criminal case. *Compare id.* at 224 (pretrial delay of two years and eleven months was not unreasonable in a "murder case involving complex DNA evidence") *with Divver*, 356 Md. at 390 (delay of one year and sixteen days was unreasonable "for a relatively run-of-the-mill [driving under the influence of alcohol] District Court case").

The case here was relatively complex. Mr. Jones faced serious charges that included the murder of two people and turned on expert testimony. As Mr. Jones acknowledges, the case involved "voluminous evidence" and "complex, lengthy pretrial litigation." In that context, the delay of three years and nine months "is certainly sufficient to merit constitutional scrutiny" but it's "the least determinative of the four factors that we consider in analyzing whether [Mr. Jones]'s right to speedy trial has been violated." *Kanneh*, 403 Md. at 690.

2. Reasons for the delay.

In considering the reasons for the delay, we note that "'deliberate attempt[s] to delay the trial in order to hamper the defense should be weighted heavily against the [State].'" *Glover*, 368 Md. at 225 (*quoting State v. Bailey*, 319 Md. 392, 412 (1990)). And "more neutral reason[s] 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 [State] rather than with the defendant." *Id.* (*quoting Bailey*, 319 Md. at 412).

The circuit court found that the initial six-month delay between Mr. Jones's March 5, 2018 arrest and the first trial date scheduled for September 17, 2018 was attributable, although "not heavily," to the State. Mr. Jones does not challenge this finding and we agree with the circuit court.

We turn next, then, to the first postponement of the trial date. On September 18, 2018, the trial was postponed to March 18, 2019 pursuant to a joint motion for a continuance by the State and Defense. This postponement amounted to a delay of six months. The circuit court found that this was a "neutral delay" and Mr. Jones does not challenge this finding on appeal. We agree with the court that the joint postponement should be weighed neutrally.

The trial was postponed for the second time on March 12, 2019 pursuant to Mr. Jones's motion for a continuance and rescheduled for August 12, 2019, a five-month delay. The circuit court found that this five-month delay was attributable to Mr. Jones because he requested the continuance to prepare for the "issue about other evidence that was coming from West Virginia" about a then-recent shooting that allegedly involved Mr. Jones. Mr. Jones contends that the court erred in weighing this delay against him because "the only reason that the defense needed the postponement was that, on the eve of the meeting with the State's firearms expert, the State abruptly cancelled the meeting. [And] [d]efense counsel . . . was therefore unable to adequately prepare for the *Frye-Reed* hearing."

We see no error in the court's decision to attribute the second postponement to the defense. Mr. Jones requested the continuance for multiple reasons, some of which had

nothing to do with the State's cancellation of the meeting with its firearms expert. For example, in his motion for continuance, Mr. Jones stated that "a new witness had come forward in West Virginia who claims to have observed events material to Mr. Jones'[s] case" and "[t]he Defense Investigator has not yet been able to locate this new witness for interview." Mr. Jones stated as well that "[i]n addition to the entire West Virginia discovery having been provided so recently, the State has continued to give the Defense more discovery . . . [including] more than sixty-three [63] hours of recorded phone calls made by, or regarding, [Mr. Jones] during his detention," "a 'redo' of all forensic reporting related to the crime scene in [Mr. Jones]'s case," and "new Firearms Identification Unit reports." Mr. Jones also "request[ed] time to receive [Mr. Frazier's] physical phone in order to have [Mr. Jones's] expert analyze the contents . . . ." Moreover, the court stated that it found good cause for the continuance because of the (1) "[d]iscovery from West Virginia," (2) the "[n]ew potentially material witnesses in West Virginia," (3) the "[n]umerous hours of recorded phone calls of [Mr. Jones]," and (4) the fact that "[Mr. Jones] want[ed] to hire [an] expert to review ballistics." So contrary to Mr. Jones's assertion, the canceled meeting with the State's firearms expert was not "the only reason that the defense needed the postponement" and the court did not err in weighing this delay against Mr. Jones.

On August 9, 2019, the State entered a *nolle prosequi* to all charges in the initial indictment and then re-filed the charges three months later on November 21, 2019. The court attributed this three-month delay to the State, but Mr. Jones argues that the delay "should weigh heavily against the State." He emphasizes that "the *nol pros* not only

delayed trial, [but] it also triggered a whole new round of complex, lengthy pretrial litigation" and it "was the delaying event that carried Mr. Jones'[s] case into the COVID-19 pandemic." The State counters that the delay caused by the *nol pros* "was neutral" because it "was a result of defense counsel's decision to seek to have the firearms experts' testimony excluded."

We disagree with the State that the delay caused by the *nol pros* should be weighed neutrally because Mr. Jones moved to exclude testimony from the State's firearms expert. Defendants should not be penalized for defending themselves, and no defendant forfeits his speedy trial rights by challenging the State's (improper, as it turns out) expert testimony. Mr. Jones was entitled to seek to exclude evidence to secure the best outcome for his defense. His motion to exclude testimony by the State's firearms expert was hardly frivolous—he succeeded in excluding testimony that the fired casings found on the scene of the murders were a "match" to the unfired bullet found in the dresser with his documents. The State determined then that it did not have sufficient evidence to go forward with the charges, had another firearms expert re-examine the ballistics evidence, and decided ultimately to re-file the charges after determining that the new expert's "opinion was so much better supported that it would carry more weight with the jury." The time the State used to re-examine its ballistics evidence certainly should not be weighed against Mr. Jones—that time was used for the State's benefit and should be attributed to the State. However, we turn down Mr. Jones's request to weigh the delay "heavily against the State"

because the State entered the *nol pros* as a result of insufficient evidence and not as a bad faith attempt to delay the trial. *See Glover*, 368 Md. at 225.

Mr. Jones was not in Maryland when the State re-filed the charges on November 21, 2019. He had fled the jurisdiction the day before and was extradited back to Maryland one month and twenty-two days later, on January 10, 2020. The circuit court attributed this time to Mr. Jones and we agree with the court's decision. Mr. Jones does not challenge this finding.

Mr. Jones acknowledges that the year-and-a-half delay between his extradition on January 10, 2020 and August 2, 2021 was due to the COVID-19 pandemic and is neutral in the analysis. He acknowledges as well that the four-month delay between August 2, 2021 and December 6, 2021 (the day the trial began) "was caused by [his trial counsel's] mistake and would therefore be charged to the defense."

This leaves only two delays amounting to nine months (the initial six-month delay before the first scheduled trial date and the three-month delay between the *nol pros* and the re-indictment) to weigh against the State, and neither of them weighs heavily. Three delays amounting to ten-and-a-half months (the five-month continuance requested by Mr. Jones, the one-and-a-half-month delay caused by his flight, and the four-month delay caused by his counsel's mistake) weigh against Mr. Jones. The remaining delays, amounting to a year-and-a-half, were caused by the COVID-19 pandemic and weigh neutrally. This factor, therefore, does not move the needle in Mr. Jones's favor.

3. Assertions of the speedy trial right.

A defendant's assertion of his speedy trial right "'is entitled to strong evidentiary weight . . . .'" *Kanneh*, 403 Md. at 692 (*quoting Barker*, 407 U.S. at 531–32). When weighing the defendant's assertions, we "'weigh the frequency and force of the objections as opposed to attaching significant weight to a purely *pro forma* objection.'" *State v. Ruben*, 127 Md. App. 430, 443 (1999) (*quoting Barker*, 407 U.S. at 529). "'[F]ailure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.'" *Kanneh*, 403 Md. at 693 (*quoting Barker*, 407 U.S. at 531–32).

Here, the circuit court found that "while there [wa]s some assertion of [Mr. Jones's] right, it was not a significant and continuous assertion." The court described Mr. Jones's initial assertion, in an omnibus motion, as a "perfunctory request" that weighed "only slightly" in his favor. The court emphasized, moreover, that "the Defense sought continuances of their own, and in conjunction with the State . . . ." Ultimately, the court found that this factor was "neutral in th[e] analysis." Mr. Jones contends that the court's finding was incorrect because he "persistently asserted his speedy trial rights." We agree with Mr. Jones.

Although the circuit court is correct that Mr. Jones's initial assertion in the omnibus motion was not entitled to much weight, *Ruben*, 127 Md. App. at 443, Mr. Jones asserted his right to a speedy trial repeatedly and forcefully after his initial request. For example, he asserted the right in written motions on five separate occasions—on August 7, 2019, December 23, 2019, February 19, 2020, March 4, 2020, and March 13, 2020. And on two

occasions when Mr. Jones asserted his right in open court, the court assured him that the assertion had been noted and discouraged him from pursuing further argument. And although it is true that Mr. Jones sought and agreed to continuances, we are not persuaded that he failed to assert his speedy trial right adequately in the process.

4. Prejudice to Mr. Jones.

"In analyzing the fourth factor, actual prejudice to the defendant, we are, in essence, considering the harms against which the speedy trial right seeks to protect: (i) oppressive pre-trial incarceration; (ii) anxiety and concern of the accused; and (iii) impairment of the accused's defense." *Glover*, 368 Md. at 229. "Of the three elements, the most serious is the potential that a delay will impair the ability to present an adequate defense and thus skew the fairness of the entire adversarial system." *Id.* at 230.

As for the first element, the circuit court found that the fact that Mr. Jones had been "incarcerated during the entire period of the first case" was an "important factor" that prejudiced Mr. Jones. The court also found, however, that because Mr. Jones absconded from Maryland after being placed on pretrial release in an unrelated case, his incarceration between his extradition and the trial was not prejudicial. We see no error in the court's finding.[5]

[5] Mr. Jones contends that "the court erred in finding no prejudice as to [his] incarceration from November 20, 2020 onward, due to him removing a location monitor and leaving the State . . . because, even after the *nol pros*, Mr. Jones remained under the constant threat of indictment." His argument is hard to decipher. Mr. Jones was not incarcerated onward from November 20, 2020—that was the day he fled from

Continued . . .

The court did not make an explicit finding as to the second element, Mr. Jones's anxiety and concern during his pretrial incarceration. We recognize nevertheless that Mr. Jones's prolonged incarceration likely caused emotional stress and anxiety. But we note as well that "[a]ctual prejudice requires more than an assertion that the accused has been living in a state of constant anxiety due to the pre-trial delay." *Id.* at 230.

As to the third element, the impairment of Mr. Jones's defense, the court also did not make an explicit finding. Mr. Jones argues that his defense was impaired because multiple witnesses in the case had "faded memories" that "compromised his ability to show that he was not at Aldora Circle during the shooting." He cites to *Epps v. State*, and argues that a defendant is prejudiced if defense witnesses are unable to recall events accurately. In *Epps*, the Maryland Supreme Court noted that the defendant's alibi witness was "prepared to testify that the [defendant] was not at the scene of the robbery," but then "was inducted into the armed forces and was serving [abroad] at the time of the trial." 276 Md. 96, 119 (1975). The Court concluded that "the delay created an impairment of [the defendant's] defense" because the alibi witness was "the only witness in his behalf" and the witness's testimony "might have been sufficient to have generated a 'reasonable doubt' as to his guilt." *Id.* at 120.

Maryland. The second indictment was filed the next day, on November 21, 2020, and he was extradited to Maryland a month-and-a-half later, on January 10, 2021. To the extent that Mr. Jones argues that the court erred in finding no prejudice from his incarceration after being extradited, we disagree because Mr. Jones's decision to flee the jurisdiction during the pendency of another case justified the pretrial detention that followed and the "threat of indictment" after the *nol pros* does not change that.

Mr. Jones does not argue in this case that he had an alibi witness who was "prepared to testify that [he] was not at the scene of the [shooting]." *Id.* at 119. He contends instead that his defense was compromised because the State's witnesses "had diminished memories of the time at which they saw the [victims' car]." Mr. Jones argues further that one of the State's witnesses had a "faded memory" about when he left her house on the day of the murder and that her testimony was "critical to whether [he] could have been at Aldora Circle when the shootings occurred."

But Mr. Jones's argument requires us to speculate about whether the State's witnesses would have provided a timeline of events beneficial to him if they had a clearer memory. Put another way, Mr. Jones's argument leaves us guessing about whether clearer memory from the State's witnesses would have helped his defense or the State's case. Such an argument "does not convince us that the claim of a lost defense is anything more than the assertion of the possibility of dimmed memories." *Daniels v. State*, 30 Md. App. 432, 441 (1976) (no prejudice found where defendant claimed that "he [couldn't] remember if he might have had an alibi, but even if he did he couldn't prove it at trial because he had lost contact with his acquaintances" due to the pretrial delay); *see also Thompson v. State*, 15 Md. App. 335, 340 (1972) (no prejudice found where "there was no proffer to show what [defense witnesses'] testimony, if available, would have been"); *Barker*, 407 U.S. at 532 (noting that there is "prejudice if *defense* witnesses are unable to recall accurately events of the distant past") (emphasis added).

5. Balancing the Barker *factors.*

Weighing all of the *Barker* factors, we conclude that Mr. Jones has fallen short of establishing a speedy trial violation. Although his trial was delayed long enough to warrant constitutional scrutiny and he asserted his speedy trial rights adequately, the delays were neither tactical nor deliberate attempts to hamper the defense. Indeed, the reasons behind most of the pretrial delays weigh neutrally or against Mr. Jones. Moreover, Mr. Jones has not established that the delays impaired his ability to present testimony or evidence that would have benefitted his defense. We affirm the circuit court's decision to deny his motion to dismiss.

B. Mr. Jones's Due Process Rights Were Not Violated.

Mr. Jones asserts that his due process rights were denied because "[t]he State's use of the *nol pros* violated the rudimentary demands of fair procedure and fundamental fairness . . . ." He contends that "[b]y *nol prossing* and re-indicting the case, the State gained a continuance and evaded the court's decision to foreclose reanalysis of the firearms evidence." The State responds that Mr. Jones's due process claim was not preserved because "it is not clear whether any such claim was raised in or decided by the circuit court." And "[i]n any event," the State contends, "[Mr.] Jones does not explain why the remedy should not be the same as in the *Hicks* context—measuring the delay from an earlier date—which the circuit court did anyway in this case."

We begin by assessing whether Mr. Jones's due process claim was preserved for appellate review. We find that Mr. Jones argued in both written motions and in open court that the entry of the *nol pros* and the re-indictment violated his due process rights. In a

memorandum of law supporting his motion to dismiss the second indictment, filed on March 4, 2020, Mr. Jones argued that the State's use of a *nol pros* violated due process because it allowed the State to evade the court's rulings:

> The State repeatedly requested a continuance when the ballistics evidence was challenged and [the court] was very clear that no continuance would be granted. Now, the State would like to start over with a new examination of the same shell casings and have all the same arguments a second time. This is unfair and would deny Mr. Jones'[s] right to Due Process of the Law.

In another motion filed on March 13, 2020, Mr. Jones argued again that the re-litigation of the State's firearms evidence under the second indictment violated his due process rights:

> [Mr. Jones] respectfully requests that the [court] preclude any new expert testimony based on the same scientifically unreliable conclusions that this court previously held to be inadm[issi]ble at trial. Mr. Jones is also entitled to speedy trial and due process of law which cannot occur if the State is allowed to re-litigate every issue that has previously been decided in this case.
>
> * * *
>
> The [S]tate cannot claim that they could not ethically go forward based on the evidence they had and then re-indict based on the exact same evidence.
>
> * * *
>
> The State has no new evidence to support an indictment in this case.

Moreover, in open court on April 15, 2021, Mr. Jones restated his objection to the second indictment on speedy trial *and* due process grounds:

> [COUNSEL FOR MR. JONES:] . . . I would ask to restate briefly my argument on speedy trial and due process, and—

> THE COURT: We're not going to address that today. . . .
>
> * * *
>
> [COUNSEL FOR MR. JONES:] Can I say two sentences then? Just for the record.
>
> THE COURT: You can—for the record, but let's move along.
>
> [COUNSEL FOR MR. JONES:] Okay. Your Honor, I just want to remind you on August 5th, in the—on the record, when you ruled on this motion in case 133703, you said that it had been a year and a half, and we weren't going to continue the case upon two [S]tate requests. The only reason I'm putting this on the record right now is that we don't think there should even be this hearing because there's no new evidence . . . . [A]ll the State has done is re-indict based on expert shopping and trying to get another expert. So, we don't even think this hearing should happen because this case should have been dismissed, and now, instead of a year and a half, it has actually been three years and 44 days since Gregory Jones was charged with this crime, and we believe that his speedy trial and due process rights have been violated, and that there is no reason to reopen this case. Thank you.
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> THE COURT: All right, . . . I denied it initially primarily on the basis that . . . the Court's initial determination was even, if we went from the initial trial date, that there wouldn't be a speedy trial violation under the applicable law. Time is continuing to march on, and so that may change depending on the circumstances as we go forward. I don't know if the evidence is new or not new because that's what I'm going to learn today, I would imagine.

Further, on November 30, 2021, Mr. Jones objected to the State proceeding under the second indictment after its firearms evidence had been ruled inadmissible again and reiterated its motion to dismiss on speedy trial and due process grounds:

> [COUNSEL FOR MR. JONES:] . . . [B]ased on your ruling two years ago, the case was nol-prossed when the State said, based on the firearms ruling, that they could not in good faith and ethically go forward on this case, and I would ask that they consider that, because basically the Court's ruling has been the

> same now that your ruling today occurred.
>
> They have firearm evidence that is not a match. It is simply—they're able to say there's marks that look similar to other marks. So I would move for a motion to dismiss the case—
>
> THE COURT: Yes. I deny that.
>
> [COUNSEL FOR MR. JONES:]—but I would also ask the State to consider that.
>
> THE COURT: They can proceed, and . . . the State is certainly able to weigh whether or not they want to go forward with the case, . . . that[] is their sole discretionary call to make, and I'm not going to interfere with that in any fashion whatsoever.
>
> [COUNSEL FOR MR. JONES:] And, as I have always stated, we would just state our motion to dismiss on speedy trial and due process grounds and restate our motion on the irrelevance of the casing from West Virginia . . . .
>
> THE COURT: Well, I mean, like I said, I haven't heard—that's going to come up with respect to what evidence connects the defendant to that house and the evidence at issue, and so all those motions are denied.

As reflected in this dialogue, the court denied defense counsel's motions to dismiss on both speedy trial *and* due process grounds.

The State is right that the bulk of Mr. Jones's arguments in his written motions focused on *res judicata*, collateral estoppel, and speedy trial case law. But Mr. Jones nevertheless articulated his argument that the *nol pros* and re-indictment allowed the State to evade and re-litigate the court's ruling on the firearms evidence and he objected on due process grounds. That is good enough.

On the merits, Mr. Jones relies mainly on two cases, *State v. Reimonenq*, 286 So. 3d 412 (La. 2019), and *State v. Goodman*, 696 So. 2d 940 (Fla. Dist. Ct. App. 1997), to argue that the State's *nolle prosequi* of the first indictment violated his due process rights.

In *State v. Reimonenq*, the State entered a *nolle prosequi* and re-filed the charges after the court excluded its expert's testimony based on the State's untimely and deficient notice of its intent to call the expert at trial. 286 So. 3d at 414. The Supreme Court of Louisiana concluded that "the [S]tate violated the defendant's right to due process and fundamental fairness when it exercised its authority to dismiss and reinstitute a prosecution not only to gain a continuance, but to nullify a trial court's correct evidentiary ruling . . . ." *Id.* at 417. The court distinguished the case, however, from dismissals based on "the absence of a witness or exhibit that was crucial to the [S]tate's case." *Id*. at 416.

In *State v. Goodman*, the court denied the State's peremptory strike against a potential juror. 696 So. 2d at 940. After the jury was selected, but before it was sworn, the State entered a *nolle prosequi* and re-filed the charges thirty minutes later. *Id.* The court decided that "the *nol pros* was done solely to avoid the jury just selected, and . . . it [wa]s a denial of due process for the [S]tate to *nol pros* in order to avoid having a jury so constituted." *Id.* at 942–43. The court noted that the case was different from other cases in which "the prosecutor's *nol pros* was based on permissible tactical reasons, [such as] the unavailability of a witness and the acquisition of recent information." *Id.* at 942.

We agree with the circuit court that Mr. Jones has failed to establish a due process violation in this case. Although the State entered a *nol pros* after the court limited the admissibility of its firearms evidence, the State did so because it was "not able to go forward ethically and in good faith." Mr. Jones agreed at the time that the State did not have enough evidence to proceed and stated that he "appreciate[d] that the State is ethically

doing what they should do." Unlike *Reimonenq* and *Goodman*, the State here did not enter the *nol pros* solely to avoid the court's ruling, but because it determined that it could not proceed ethically in light of the court's ruling. This case is more like the one that *Reimonenq* distinguished, where there was an absence of evidence that the State deemed was "crucial" to its case. 286 So. 3d at 416. The decision to drop charges against Mr. Jones after determining that there was insufficient evidence against him fell within the "'broad discretion vested in the State's Attorney.'" *Simms*, 456 Md. at 561 (*quoting Food Fair Stores, Inc. v. Joy*, 283 Md. 205, 214 (1978)).

As to the State's decision to re-file the charges, we acknowledge that it violates due process for the State to re-file charges dismissed for insufficient evidence unless the State can show that new evidence has surfaced. But the State *did* obtain new evidence in this case before it re-indicted Mr. Jones. When the court asked the State how its evidence changed between the first and second indictments, the State asserted that it had had only eight photos of the ballistics evidence before it entered the *nol pros*, but eighty-seven photos of the evidence at the time of the second indictment. The State explained as well that the new firearms expert came to "a much more emphatic opinion than [the previous expert]." In addition, the new expert "found three marks" that were consistent between the casings found on the murder scene and the bullet found alongside Mr. Jones's documents, whereas the previous expert saw "just one mark." Ultimately, the State expressed that the opinion from their new firearms expert was better supported and would carry more weight

with the jury whether or not the court rendered the same ruling about the scope of the expert's testimony:

> [W]e had hopes that perhaps we could change Your Honor's mind, but even if we couldn't, we felt that the opinion was so much better supported that it would carry more weight with the jury, and we felt that we had confidence in our ability to prove the case with this opinion in a way that we didn't think we could with the other opinion.
>
> So I guess that's two-fold how it's changed. That perhaps we could convince Your Honor, but even if we couldn't, we felt that we were left with much more than we were left with the last examiner.

The State obtained new evidence between the *nol pros* and the new indictment that strengthened its case. We affirm the circuit court's decision to deny Mr. Jones's motion to dismiss on due process grounds.

C. The Court Abused Its Discretion By Denying Mr. Jones's Motion To Strike The Testimony From The State's Firearms Expert.

1. Proceedings below.

After the State re-indicted Mr. Jones, the circuit court denied Mr. Jones's motion to exclude the State's firearms expert, just as it did under the first indictment, but did agree to limit the expert's testimony. In particular, the court ruled that State's expert, Richard Ernest, "shall be permitted to testify regarding the class characteristics and the similarities between the two fired shell casings and the single unfired shell casing recovered in this matter." The court added that the expert "may opine that based on those similarities, [he] cannot rule out whether the three shell casings were chambered through the same firearm at some point in time." When Mr. Jones's counsel asked for "clarity with respect to the

firearms ruling," the court explained that "he won't be able to say that they were—that there is a match, that they were chambered through the same firearm . . . ." Although our Supreme Court had not yet issued its opinion in *Abruquah v. State*, 483 Md. 637 (2023), at the time of this trial, the circuit court obviously was concerned that this ballistics expert would express an opinion that overstated the certainty of the connection between the gun and the material found on the scene. And the court was right to be concerned—the precision of expert ballistics testimony was a live issue that everyone knew was before our Supreme Court, and Mr. Ernest's testimony, even had he stuck to the court's limits, flunked the test that the Supreme Court ultimately adopted in *Abruquah*, 483 Md. at 696–97 (finding abuse of discretion when circuit court admitted testimony linking a particular unknown bullet to a particular known firearm). Viewed through the *Abruquah* retrospectoscope, Mr. Ernest's proposed testimony should have been excluded up front; even before *Abruquah*, it was a close call as limited, and Mr. Ernest ignored the limits. The result prejudiced Mr. Jones, and the curative instruction didn't cure it.

At trial, the State indicated that it had sent the transcript of the court's admissibility ruling to its firearms expert, Mr. Ernest, "so he would be familiar" with it. During the trial, though, Mr. Ernest violated the court's ruling repeatedly:

> [MR. ERNEST:] . . . There was another item of evidence that was provided at some point to me, and then I did comparisons of it, and I realized that those bullets matched each other.
>
> [COUNSEL FOR MR. JONES:] Objection.
>
> [MR. ERNEST:] Matched.
>
> THE COURT: I'll sustain the objection.
>
> [COUNSEL FOR MR. JONES:] Move to strike.

THE COURT: Yes, I'll strike the response.

* * *

[MR. ERNEST:] . . . That particular mark of unknown origin is very, very similar to the other mark of unknown origin on the other cartridge case. These, these marks here and here and here, those are three extractor marks that are extremely similar—

[COUNSEL FOR MR. JONES:] Objection.

THE COURT: I'll sustain the objection as to the characterization.

* * *

[MR. ERNEST:] It has been chambered and run through the gun—

[COUNSEL FOR MR. JONES:] Objection.

THE COURT: I'll sustain as to the gun.

* * *

[MR. ERNEST:] . . . [T]his is an array of different stria that are, that are there from imperfections along the edge of the extractor that are then—

[COUNSEL FOR MR. JONES:] Objection.

[MR. ERNEST:]—raked along the edge—

THE COURT: Sustained.

[MR. ERNEST:]—of the cartridge case.

THE COURT: I'll sustain the objection, and I'll strike the response.

* * *

[MR. ERNEST:] It is another array of the extractors on these two different items, having the same pattern.

[COUNSEL FOR MR. JONES:] Objection.

THE COURT: I will—again, I'll—I'm going to sustain the objection as to the characterization. I'm going to ask counsel to come up here right now.

At the bench conference that followed, the court stressed that the State's expert was violating its ruling, but the court denied defense counsel's request to strike the word "matching":

> THE COURT: I understand that it's going to be difficult for Mr. Ernest to, with 40-some years of what he believes to be science in this case, but he cannot be saying that things are the same and matching. I—
>
> [THE STATE:] I know.
>
> THE COURT:—said that he can say that they are consistent and similar and it's—
>
> [THE STATE:] And we've discussed it.
>
> THE COURT:—the words mean a lot.
>
> [THE STATE:] I know.
>
> * * *
>
> [COUNSEL FOR MR. JONES:] . . . We would be asking Your Honor to tell the jury to strike the word matching, what he's just said like, three or four times.
>
> THE COURT: Well, I think we're just going to highlight the issue with that . . . .

During cross-examination, Mr. Ernest continued to offer the inadmissible opinion:

> [MR. ERNEST:] . . . [A]ll of these exhibits have been cycled over and over again, in a particular pistol, that is making a very similar, or consistent mark on these items. . . .
>
> * * *
>
> [MR. ERNEST:] . . . [I]ndeed, if you get your lighting just right, yes, they do match, or they do, they, they, are consistent with each other.

Then, on re-direct examination, the State elicited the inadmissible opinion through the phrasing of its question:

> [THE STATE:] Isn't your understanding that [the Montgomery County Firearms Examiners] too came to the conclusion that

all three pieces of evidence were cycled through the same—were consistent with having been cycled through the same firearm at some point in time?

[MR. ERNEST:] Yes.

[THE STATE:] Isn't it true that they too also—

THE COURT: Please come up here real quick. That is not what I ruled.

(Bench conference follows:)

[THE STATE:] That it was consistent with having been—

THE COURT: Being the same firearm? No. That is absolutely not what I ruled. I said that they could not be ruled out.

On re-cross examination, the excluded testimony continued:

[MR. ERNEST:] . . . [A]re you talking about the line that says VH05, and DH35 or ID's as having—

[COUNSEL FOR MR. JONES:] I'm talking about—

[MR. ERNEST:]—been fired in the same firearm?

THE COURT: Sir. Come up, right now.

(Bench conference follows:)

THE COURT: . . . [Y]ou know he shouldn't have done that.

[THE STATE:] I didn't—I didn't ask—

THE COURT: He was told not to do that.

[THE STATE:] I told him the language to use for everything that he was supposed to say.

THE COURT: All right. But he keeps on going (unintelligible) which way he wants to go. He's done it a number of times. This is outrageous. It is outrageous that he said that.

[THE STATE:] Your Honor, I don't—I didn't ask questions that elicit that. I told him many times what language to use. I tried to lead. I tried to do everything I could to do it right.

THE COURT: All right. The witness did not care, and he seems to not follow your directions. And he is your witness.

* * *

[COUNSEL FOR MR. JONES:] We'd like to come up with a

> possible curative instruction. . . .
>
> * * *
>
> (Bench conference concluded.)
>
> THE COURT: All right, so, I'm going to strike the last answer. I would instruct the jury you are not to consider anything that he just referred to in your deliberations in this matter.

The next day, Mr. Jones asked the court to strike Mr. Ernest's testimony entirely based on the repeated introduction of the excluded opinion:

> [I]t's our position that he intentionally flouted the Court's order when he said that he . . . had identified the cartridges as coming through the same firearm, and given how complicated this issue is, how difficult it must be for the jury to kind of parse these different opinions, I do not believe there's any way to unring this bell for them . . . . [W]e are entitled to a mistrial, I believe, although we're not asking for one, and the only alternative for the Court's ruling to have any effect would be to strike Mr. Ernest's testimony.

The court denied Mr. Jones's request to strike Mr. Ernest's testimony and gave the jury a curative instruction instead:

> Mr. Richard Ernest, during his testimony, implied that the cartridge casings and unfired cartridge were cycled through the same firearm. The Court, after a previous hearing, ruled that this opinion was unreliable. Because it was unreliable, the Court held that such opinion was not admissible and could not be considered by the jury.
>
> The only permissible opinion that you, as the jury, may consider is that in Mr. Ernest's opinion, the similarities he observed between the fired casings and the unfired cartridges are consistent with each other and cannot—and he cannot rule out that the casings and the cartridge were chambered through the same firearm at some point in time.

2. The prejudice caused by the repeated introduction of Mr. Ernest's inadmissible opinion could not be cured by a jury instruction.

We review the circuit court's decision to give a jury instruction and deny Mr. Jones's motion to strike for abuse of discretion. *Thompson*, 393 Md. at 311 ("We review a trial judge's decision whether to give a jury instruction under the abuse of discretion standard."); *Leidig v. State*, 475 Md. 181, 197 (2021) ("The decision to admit evidence is ordinarily reviewed for abuse of discretion."); *Jenkins v. State*, 375 Md. 284, 295–96 (2003) (Abuse of discretion "occurs when a trial judge exercises discretion in an arbitrary or capricious manner or when he or she acts beyond the letter or reason of the law.").

Mr. Jones argues on appeal, as he did in the circuit court, that the curative instruction was insufficient to cure the prejudice caused by Mr. Ernest's inadmissible testimony, not least because the instruction indicated that Mr. Ernest concluded that the unfired round had been chambered through the same gun as the fired casings. He contends that "[a] more drastic remedy—the striking of his entire testimony—was required." The State responds that the court exercised its discretion properly in denying Mr. Jones's motion to strike the testimony because Mr. Jones failed to request a mistrial and the instruction the court gave was sufficient to cure the prejudice.

In reviewing whether the court abused its discretion, we determine whether prejudice caused by the inadmissible evidence "'transcended the curative effect of the instruction.'" *Medical Mut. Liab. Ins. Soc. of Md. v. Evans*, 330 Md. 1, 19–20 (1993) (*quoting Rainville v. State*, 328 Md. 398, 408 (1992)). "The question is whether the

prejudice to the defendant was so substantial that he was deprived of a fair trial." *Kosmas v. State*, 316 Md. 587, 594–95 (1989). We consider five non-exclusive factors to help us resolve that question:

> [1] whether the reference to the inadmissible evidence was repeated or whether it was a single, isolated statement; [2] whether the reference was solicited by counsel, or was an inadvertent and unresponsive statement; [3] whether the witness making the reference is the principal witness upon whom the entire prosecution depends; [4] whether credibility is a crucial issue; and [5] whether a great deal of other evidence exists.

Rainville, 328 Md. at 408 (cleaned up).

Beginning with the first factor, the inadmissible opinion involved in this case was not introduced in "'a single, isolated statement.'" *Id.* As the circuit noted during the trial, Mr. Ernest gave the inadmissible opinion "a number of times" and it "[wa]s outrageous." To be exact, Mr. Ernest violated the court's ruling *nine times*. As to the second factor, whether the reference was "solicited by counsel" or was "inadvertent," the circuit court declined to make a finding that the State or Mr. Ernest violated its ruling intentionally, but we can see in the transcript that the State solicited the inadmissible opinion through the wording of its question on re-direct examination and that the court expressed at trial that Mr. Ernest "did not care" to follow the admissibility ruling and was testifying the "way he want[ed] to go."

The third factor asks whether Mr. Ernest was a "'principal witness'" for the State. *Id.* It's clear that he was. The State's case against Mr. Jones was circumstantial. There were no eyewitnesses to the murder and the only physical evidence that placed Mr. Jones at the

shooting was the fact that the casings found on the murder scene had marks that were similar to or a "match" to the bullet found in the dresser with Mr. Jones's documents. If the jury believed that the casings at the crime scene had been cycled through the same gun as the bullet found alongside Mr. Jones's documents, the jury likely believed that Mr. Jones was connected to the casings found at the crime scene.

Aside from the firearms evidence, the State's case relied mainly on Mr. Jones's deleted text messages, cell phone tower connections, and internet search of the local news after the shooting. Although the State exalts this evidence as "exceptionally strong," Mr. Ernest's opinion as to the firearms analysis mattered a great deal because it drew the only direct connection between Mr. Jones and the murder weapon. For the same reason, we find as to the fourth factor that Mr. Ernest's "'credibility [wa]s a crucial issue.'" *Id.* And as to the fifth factor, whether a "'great deal of other evidence exist[ed],'" *id.*, the significance of the other evidence did not render Mr. Ernest's expert opinion irrelevant or marginal.

Under these circumstances, the repeated introduction of Mr. Ernest's opinion that the casings on the scene "matched" the bullet found alongside Mr. Jones's documents and that they had been "cycled through the same firearm" prejudiced Mr. Jones beyond the point that an instruction to disregard the opinion could cure. Mr. Jones argued as much when he asked the court to strike Mr. Ernest's testimony in its entirety, contending that a curative instruction would not "unring this bell" for the jury. The State complains that Mr. Jones "made a strategic 'all or nothing' type of choice" by requesting complete exclusion of Mr. Ernest's testimony instead of a mistrial, but there's no practical difference under

these circumstances: a mistrial would, if granted, have gotten him a new trial without the improper testimony, the same as he would have had if the testimony had been excluded in the first place (and the same that he'll receive on remand now). We hold that the court abused its discretion when it denied Mr. Jones's motions to exclude and strike Mr. Ernest's testimony. Accordingly, we reverse his convictions and remand for further proceedings consistent with this opinion.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY REVERSED AND CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. MONTGOMERY COUNTY TO PAY COSTS.