UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0670

September Term, 2014

ANTHONY B. HOPKINS

v.

STATE OF MARYLAND

Wright,
Reed,
Sharer, J. Frederick
(Retired, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: June 25, 2015

Following a trial in the Circuit Court for Baltimore City, a jury convicted appellant, Anthony B. Hopkins, of attempted first-degree murder, use of a handgun in the commission of a crime of violence, wearing, carrying, or transporting a handgun, and discharging a firearm within Baltimore City limits. The trial court sentenced Hopkins to a total of 30 years in prison, the first five years without the possibility of parole, after which he filed a timely notice of appeal.[1]

Hopkins presents the following questions for our consideration:

> 1. Did the court below err by denying Hopkins's motion to dismiss based on a violation of Maryland Rule 4-271?
>
> 2. Did the court below err by denying Hopkins's motion to dismiss based on the violation of his Constitutional right to a speedy trial?
>
> 3. Is the evidence legally sufficient to sustain Hopkins's convictions?

For the reasons that follow, we shall affirm the judgments of the trial court.

BACKGROUND

Marion Shepherd testified that on the afternoon of August 5, 2012, he rode a Maryland Transit Administration ("MTA") bus as part of his commute to his place of employment in downtown Baltimore. While seated on the bus, Shepherd heard a man he did not know, later identified as Hopkins, making a lot of noise "entertaining a bunch of other individuals around him," but he did not interact with Hopkins on the bus.

[1] The court imposed a life sentence, suspending all but 30 years, on the attempted murder conviction. The remaining sentences were all imposed to run concurrently with the 30 year sentence.

Shepherd exited the bus at the Patapsco light rail station. As he sat on a bench awaiting the train, Hopkins and other people who had been on the bus approached him. Hopkins stood very close to Shepherd, which agitated him. Shepherd asked Hopkins to step away, but Hopkins refused. Shepherd again asked Hopkins to move away, as he felt threatened, but Hopkins did not move. Shepherd stood up, and Hopkins backed away. The two men had words, and Hopkins moved behind a silver utility box and put his hand on something, which Shepherd believed to be a weapon.

Hopkins then walked down an embankment near the train tracks, pulled a silver revolver from his waistband, and called Shepherd names. As the light rail train approached the station, Hopkins tucked the gun back into his waistband, high-fived another man, and entered one of the two cars; Shepherd chose to enter the other car. At the next stop, however, Hopkins moved to Shepherd's car, "mouthing off" to him. Shepherd walked to Hopkins's end of the train and sat in front of Hopkins in an effort to minimize the chance of anyone other than him being hit by bullets should Hopkins fire his gun.

As the train doors opened at the Westport light rail station, Shepherd lunged toward Hopkins in an attempt to disarm him. Both men exited the train, with Hopkins training his gun on Shepherd. He then opened fire on Shepherd, who ran. When Shepherd realized that

the shooting had ceased, he turned around to find that Hopkins was gone. Shepherd re-boarded the train and continued on to work. He did not alert the police of the incident.[2]

Ten days later, Shepherd again encountered Hopkins, whom he recognized immediately, on the number 64 MTA bus. Shepherd said that when Hopkins noticed him on the bus, Hopkins backed up and appeared to reach for a weapon, although Shepherd did not actually see a weapon. The two engaged in an altercation, with Shepherd striking Hopkins on the head with a knife. As Shepherd walked away from the scene, he was approached by police and arrested, charged with first-degree assault and related crimes.[3]

[2] Christian Wolfe and his wife, Elizabeth, were passengers on the light rail train along with Shepherd on August 5, 2012. Mr. Wolfe testified that he and his wife became alarmed when two men on the train began arguing; the argument became increasingly heated to the point that Elizabeth Wolfe felt uncomfortable enough to exit the train at the next stop. As the couple exited the train, they heard a gunshot behind them and dropped to the ground, scared for their lives.

While Mr. Wolfe was on the phone making a 911 call, the man who had acted aggressively on the train approached him and his wife, inquired if they were alright, assured them he had no "beef" with and would not hurt them, and asked them not to call the police. He then walked away. Mr. Wolfe described the man as having darkly complected black skin and a "fairly big build," wearing a hat and a gold Redskins shirt. He was, however, unable to make a positive in-court identification of Hopkins as the shooter.

[3] Shepherd's charges relating to the incident on the bus were placed on the stet docket, on the ground that he had likely acted in self-defense, and the required elements of the crime of first-degree assault could not be proven. The stet was not, he said, a quid pro quo for testifying against Hopkins.

After his arrest, Shepherd was placed in one holding cell at the Baltimore City jail, with Hopkins in a nearby cell. Shepherd heard Hopkins yell that he was going to kill Shepherd and that Shepherd was in danger.

During a second encounter in the jail's medical department, Hopkins told Shepherd that if Shepherd remained silent to the police about their altercations, Hopkins would be acquitted, and if Hopkins remained silent, Shepherd would be acquitted. Shepherd explained to Hopkins that he needn't say anything to the police, as everything Hopkins had done had been captured on security videos.

At trial, Shepherd identified himself and Hopkins on the light rail security video from August 5, 2012.[4] He also identified the photo array presented to him by an MTA police officer, from which he had selected the photo of Hopkins as the man who shot at him on August 5, 2012. Shepherd further made an in-court identification of Hopkins, indicating that he had "[n]o doubt at all" that Hopkins was the man who shot at him, as his facial structure is unique and his voice is unmistakable.

MTA Police Detective Andre Jackson testified that he responded to the bus disturbance on August 15, 2012, which was later upgraded to an assault. By the time he arrived, Baltimore City Police detectives had Shepherd in custody. The detectives had

[4] MTA technician Elmer Nickens had retrieved the security video of light rail train cars 5049 and 5050, which had been coupled, from 2:00 to 3:00 p.m. on August 5, 2012, and downloaded the video onto a thumb drive. The State introduced the video through Mr. Nickens's testimony.

discerned that Shepherd had been involved in an altercation with the assault victim a few weeks earlier.

Det. Jackson asked Shepherd to look at a photo array, which included a photo of Hopkins, whom the Baltimore City detectives believed had been involved in the shooting on August 5, 2012. Shepherd identified Hopkins as the man who had shot at him. Armed with Hopkins's name and likeness, Det. Jackson compared the photo with the images of the assailant shown in the light rail security video of the altercation on August 5, 2012, determining that the man on the video was Hopkins.

Further investigation revealed that Hopkins was known to frequent a motel in Glen Burnie, so Det. Jackson obtained a search and seizure warrant for that location. Upon serving the warrant upon the hotel manager on August 17, 2012, Det. Jackson learned that Hopkins had been evicted for nonpayment and that all of his belongings had been removed from his room and placed in a secure storage area. Among Hopkins's belongings, Det. Jackson recovered a blue gym bag, which contained a loaded silver .357 Colt Magnum revolver, along with a Maryland identification card and pay stub bearing Hopkins's name.[5]

Over defense objection, the State introduced a recorded jailhouse phone call, made under Hopkins's unique identification number to his girlfriend, while he was an inmate at

[5] The gun was later test-fired and deemed operable. At trial, Shepherd identified the gun recovered from Hopkins's bag as the "exact" weapon Hopkins brandished on August 5, 2012.

the Baltimore City Detention Center. The transcript of the call reflects the following pertinent dialogue:[6]

[Hopkins]: Hey. Hey. Did you get all my stuff from the um . . . um motel?

[Female]: You know they was already there before I got there.

[Hopkins]: Who the police?

[Female]: Yup.

[Hopkins]: You serious?

[Female]: Yes . . . I'm dead serious.

[Hopkins]: They got it?

[Female]: I don't know.

[Hopkins]: They got all my belongings?

[Female]: No. I have your stuff.

[Hopkins]: You got the big blue bag?

[Female]: Yup.

[Hopkins]: Alright . . . that's where it's at.

[Female]: No it's not in that bag.

[Hopkins]: It's not in there?

[Female]: No.

[6] The transcript of the call was marked for identification only, to be used by the jurors to follow along with the recording, and not admitted into evidence.

[Hopkins]: Oh shit . . . that means somebody got it.

At the close of the State's case-in-chief, Hopkins moved for judgment of acquittal, arguing that the State had not met its burden of proving any of the counts charged. The court denied the motion.

Hopkins chose to testify, stating that the first time he had ever seen Shepherd was on the number 64 bus on August 15, 2012. He said he had been sitting on the bus looking at photographs on his cell phone when Shepherd boarded the bus, looked at him, and, completely unprovoked, "flip[ped] out a knife." Hopkins ran to the front of the bus screaming that a man had a knife and asking the driver to open the door. Before he could exit the bus, however, he was stabbed three or four times on his face and torso. Hopkins professed to having no idea why Shepherd stabbed him and denied having possessed any weapons himself.

Before he could get himself to the hospital, Hopkins said, police officers approached him, believing him to be a suspect in a drug sale.[7] When they observed his injuries, however, they summoned an ambulance, which took him to Shock Trauma. After being treated, Hopkins was arrested for the August 5, 2012 shooting.

[7] Hopkins testified that he encountered the police officers 45 minutes to an hour after he was stabbed on the bus, but the police report indicated that the stabbing occurred at approximately 8:00 p.m., and Hopkins was located at approximately 11:00 p.m., without having called the police or sought medical attention.

Hopkins said he saw Shepherd at central booking where they "started exchanging words." He saw Shepherd again in medical, although he attempted to avoid the man. Later, Hopkins said, Shepherd was placed in Hopkins's jail cell; Shepherd swung at him, hitting him on the side of the head, where he had been stabbed. The guards broke up the fight, ordering the two men to stay away from each other. Hopkins was removed to a different cell and did not see Shepherd again.

Hopkins denied having seen Shepherd on the light rail train on August 5, 2012. In fact, he denied having been on the light rail train at all on August 5, 2012, stating that he rarely rides the light rail, favoring the bus. Hopkins further denied that it was he who appeared in the light rail security video, contending that the man in the video was about 15 pounds heavier than he and had a different facial shape.

Hopkins admitted to having rented a motel room beginning at the end of July 2012, after a falling out with his girlfriend. He stated that during his stay at the motel, about nine "other young dudes" he knew from Brooklyn Park came and went from his room when they needed a place to sleep; they all drank, smoked, and did drugs in the room.

Hopkins claimed that the blue gym bag recovered by the police contained his clothes and some ecstasy pills and marijuana. During the jailhouse phone call to his girlfriend, he said he had been referring to the drugs and not a gun when he worried that the police "got

it."[8] Hopkins denied ownership of the revolver found in the bag, stating he had seen it for the first time at trial the day before. He speculated that perhaps one of the young men who had stayed in his motel room had placed the gun in his bag.

The defense called no further witnesses. At the close of all the evidence, Hopkins did not renew his motion for judgment of acquittal. He was convicted and sentenced, as noted.

Additional information will be supplied as relevant to a discussion of the issues raised by Hopkins.

DISCUSSION

I.

Hopkins first contends that the lower court abused its discretion when it granted a postponement that pushed his trial past the *Hicks* date, and it thereafter declined to dismiss the charges against him on that ground.[9] Appearing to concede that the administrative judge acted within his discretion in finding good cause to postpone the trial past the *Hicks* date, Hopkins nonetheless argues that the 10 month delay in bringing his case to trial following

[8] Det. Jackson's recitation of items recovered from the gym bag did not include any drugs.

[9] *See Hicks v. State*, 285 Md. 310 (1979). *Hicks* analyzed the requirement that criminal cases be brought to trial within 180 days after the earlier of the appearance of counsel or the first appearance by the defendant in circuit court and held that dismissal of the charges pending against a defendant is the sanction for a failure to bring the matter to trial within the 180 day time frame. The 180th day is often referred to as the "*Hicks* date."

the critical postponement was inordinate and based on factors primarily outside of his control.

The scheduling of a trial date in a criminal matter is governed by Md. Code (2008 Repl. Vol., 2013 Supp.), § 6-103 of the Criminal Procedure Article ("CP"), which states, in pertinent part:

> (a) *Requirements for setting date*.–(1) The date for trial of a criminal matter in the circuit court shall be set within 30 days after the earlier of:
>
> (i) the appearance of counsel; or
>
> (ii) the first appearance of the defendant before the circuit court, as provided in the Maryland Rules.
>
> (2) The trial date may not be later than 180 days after the earlier of those events.
>
> (b) *Change of date*.—(1) For good cause shown, the county administrative judge or a designee of the judge may grant a change of the trial date in a circuit court:
>
> (i) on motion of a party; or
>
> (ii) on the initiative of the circuit court.

To be read in tandem with CP § 6-103 is Md. Rule 4-271, which states, in pertinent part:

> (a) **Trial date in circuit court**. (1) The date for trial in the circuit court shall be set within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the circuit court pursuant to Rule 4-213, and shall be not later than 180 days after the earlier of those events . . . . On motion of a party, or on the court's initiative, and for good cause shown, the county administrative judge or that judge's designee may grant a change of a circuit court trial date. If a circuit court trial date is changed, any subsequent changes of the trial date may be made only by the county administrative judge or that judge's designee for good cause shown.

CP § 6-103(a) and Md. Rule 4-271(a) require that "a criminal case be brought to trial within 180 days of the appearance of counsel or the appearance of the defendant before the

circuit court, whichever occurs first." *Choate v. State*, 214 Md. App. 118, 139, *cert. denied*, 436 Md. 328 (2013). Pursuant to the statute and the rule, a county administrative judge or that judge's designee may grant a postponement beyond the 180-day deadline "for good cause shown."

The 180-day rule is "mandatory and dismissal of the criminal charges is the appropriate sanction for violation of that time period" if good cause has not been established.[10] *Ross v. State*, 117 Md. App. 357, 364 (1997). "[T]he critical postponement for purposes of Rule 4-271 is the one that carries the case beyond the 180 day deadline." *State v. Brown,* 355 Md. 89, 108-09 (1999).

On review of an administrative judge's decision to postpone for good cause, "the trial judge (as well as an appellate court) shall not find an absence of good cause unless the defendant meets the burden of demonstrating either a clear abuse of discretion or a lack of good cause as a matter of law." *State v. Frazier,* 298 Md. 422, 454 (1984). "If it is the administrative judge who extends the trial date and the order is supported by necessary cause, the postponement is valid and both the requirements and purposes of the statute and rule have

[10] The Court of Appeals has explained, however, that while the rule was adopted to facilitate the prompt disposition of criminal cases, the *Hicks* rule serves "as a means of protecting society's interest in the effective administration of justice. The actual or apparent benefits [CP § 6-103] and Rule 4-271 confer upon criminal defendants are purely incidental." *Choate,* 214 Md. App. at 140 (quoting *State v. Price*, 385 Md. 261, 278 (2005)). Unlike the Sixth Amendment speedy trial guarantee, "the *Hicks* rule is a statement of public policy, not a source of individual rights." *Id.*

been fulfilled." *Fields v. State*, 172 Md. App. 496, 521 (2007) (citations omitted), *rev'd on other grounds*, 432 Md. 650 (2013).

The *Hicks* date in this matter was March 25, 2013.[11] On March 19, 2013, the trial was postponed until April 10, 2013, making it the critical postponement for the purposes of *Hicks*.[12]

On March 19, 2013, the State and the defense made a joint request for a postponement, based on: (1) defense counsel's scheduling conflict with the March 26, 2013 trial date and (2) the State's discovery of Hopkins's damaging jailhouse call, the recording of which had been subpoenaed but not yet received. The administrative judge found good cause and granted the postponement on that date for both reasons.

[11] The 180th day after defense counsel's entry of appearance in the circuit court was actually March 23, 2013, but that date fell on a Saturday. Pursuant to Md. Rule 1-203(a)(1), then, the *Hicks* date was Monday, March 25, 2013.

[12] At the postponement hearings and on the written postponement forms made a part of the record, the parties and the trial court appear to have operated under the misapprehension that the *Hicks* date was April 17, 2013. In their briefs, however, both Hopkins and the State acknowledge that the *Hicks* date was actually March 25, 2013. As such, our discussion centers on the critical postponement of March 19, 2013.

Even were we to consider the April 10, 2013 postponement of trial until June 25, 2013, as the critical one for a *Hicks* analysis, we would find that the administrative judge did not abuse his discretion in finding good cause for the postponement, based on the State's discovery of new evidence to be produced to the defense. Neither would we find the two and one-half month delay until the next trial date inordinate under the totality of the circumstances.

Crucially, defense counsel did not object to, and, in fact, jointly requested, the postponement that pushed Hopkins's trial past the expiration of the *Hicks* date. As the Court of Appeals stated in *Hicks*, 285 Md. at 335:

> [One] circumstance where it is inappropriate to dismiss the criminal charges is where the defendant, either individually or by his attorney, seeks or expressly consents to a trial date in violation of Rule [4-271(a)(1)]. It would, in our judgment, be entirely inappropriate for the defendant to gain advantage from a violation of the rule when he was a party to that violation.

For that reason alone, Hopkins's claim of error in the trial court's denial of his motion to dismiss on the ground of a *Hicks* violation must fail.

Hopkins further argues, however, that a valid postponement of the trial date still may mandate dismissal of the charges if there is an inordinate delay in bringing the matter to trial. The nearly 11 month delay from the critical postponement until the start of trial, he says, was inordinate, with dismissal being the appropriate remedy.

Indeed, even a case postponed for good cause "may yet run afoul of the statute and the rule if, after a valid postponement, there is inordinate delay in bringing the case to trial." *Rosenbach v. State*, 314 Md. 473, 479 (1989) (citations omitted). The burden of showing that the post-postponement delay is inordinate, in view of all the circumstances, however, is on the defendant. *Id*. Hopkins has not met that burden here.

In assessing whether the delay was inordinate, we are concerned only with the amount of time between the critical postponement date and the rescheduled trial date that follows it. *See Brown*, 355 Md. at 107-09 ("when deciding whether to dismiss a case for inordinate

delay, it is the length of the delay between the postponed trial date and the rescheduled date that is significant"). Subsequent post-*Hicks* postponements are irrelevant. The critical postponement in this matter occurred on March 19, 2013. At that hearing, the trial was postponed until April 10, 2013, only 22 days later. In view of all the circumstances, we cannot say that the delay was inordinate.

For all of the foregoing reasons, the trial court did not abuse its discretion in denying Hopkins's motion to dismiss as a result of a *Hicks* violation.

II.

Hopkins also argues that the trial court erred in denying his motion to dismiss the charges against him on constitutional speedy trial grounds. In his view, the 18-month delay between his arrest and the start of his trial was presumptively prejudicial, and the court should have granted his motion.

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 *Barker. Glover v. State,* 368 Md. 211, 222 (2002). Once such a delay is demonstrated, the trial court must balance the following four factors to determine whether the delay has impinged upon 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. *Id.* (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 to the Constitution and Article 21 of the Maryland Declaration of Rights.[13] *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 v. State*, 171 Md. App. 458, 482 (2006) (quoting *Barker*, 407 U.S. at 533).

The *Barker* Factors

Length of Delay

The length of the delay involves a "double enquiry" 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. *Divver v. State*, 356 Md. 379, 388-89 (1999).

The time between Hopkins's arrest on August 16, 2012, and the start of his trial on February 12, 2014, just under 18 months, was more than the one year, 14-day delay that the

[13] 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 . . . ."

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 the length of the delay, in and of itself, is not a weighty factor. *Glover,* 368 Md. at 225. In fact, the length of the delay is the least determinative of the four factors we consider in analyzing whether a defendant's right to a speedy trial was violated. *State v. Kanneh*, 403 Md. 678, 690 (2008).

Reasons for Delay

We consider all reasons for delay, but "some carry greater weight than others:

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

Henry v. State, 204 Md. App. 509, 550-51 (2012) (quoting *Barker,* 407 U.S. at 531).

Hopkins was accused of having committed the charged crimes on August 5, 2012; he was arrested on August 16, 2012. The State filed its indictment against Hopkins on September 11, 2012. His attorney entered his appearance and filed a written demand for a speedy trial in his omnibus defense motions on September 24, 2012. Hopkins was arraigned on November 27, 2012. He pled not guilty and made an oral speedy trial request at the arraignment hearing. Hopkins's trial was originally set for January 22, 2013.

In a speedy trial analysis, we ignore the time period between Hopkins's August 16, 2012 arrest and the assignment of the first trial date of January 22, 2013. *Jules*, 171 Md. App. at 484 (the time between arrest and the first trial date is usually accorded neutral status).

On the first scheduled trial date of January 22, 2013, the State requested a postponement because: (1) one of the investigating detectives was on pre-approved vacation; (2) Shepherd's status as both a witness in Hopkins's case and a defendant in the related case in which Hopkins was the victim complicated the matter, and; (3) it maintained additional discovery not yet produced to the defense. Defense counsel objected "for the record" but noted that it was not "disadvantageous to my client to have some additional time." The trial court granted the postponement and set trial for March 26, 2013.

Although the State caused this initial delay, "'a valid reason, such as a missing witness, should serve to justify appropriate delay.'" *Howard v. State,* 440 Md. 427, 448 (2014) (quoting *Barker,* 407 U.S. at 531). And, because defense counsel, although objecting to the delay for the record, conceded that the delay would be beneficial to Hopkins, this delay does not weigh heavily upon the State.

On March 19, 2013, the parties made a joint request for postponement in advance of the March 26, 2013 trial date, on the grounds that defense counsel had a scheduling conflict and the State had become aware of newly discovered evidence. The trial court found good cause for the postponement and rescheduled trial until April 10, 2013. When both parties cause the delay, the reason for the delay is neutral. *Id.*

The State requested a postponement on April 10, 2013, advising the trial court that "[q]uite a bit of new evidence has come to light." Defense counsel again objected "for the record" but acknowledged he had many things to review to create a complete defense. The court, finding good cause for the postponement, reset the trial date for June 25, 2013. When the delay results from the unavailability of evidence, and there is no evidence that the State failed to act in a diligent manner, the grounds for postponement are essentially neutral and justified, *Kanneh*, 403 Md. at 690, particularly when, as here, the defense implicitly accepted the time offered by the delay to work on Hopkins's defense strategy.

On June 25, 2013, both parties were prepared to go forward with trial, but once the attorneys advised the trial court that the trial would likely last four days, the court noted there was no judge available to try a four-day attempted murder case. Both parties agreed to a postponement until September 2013, and the court set trial for September 4, 2013. Although attributable to the State, we do not weigh this type of administrative delay heavily against it. *See Butler v. State,* 214 Md. App. 635, 659-60 (2013) ("'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.'") (Quoting *Strunk v. United States,* 412 U.S. 434, 436 (1973)).

On August 29, 2013, the defense requested an advance postponement of the September 4, 2013 trial date, on the ground that Hopkins's request for a substance abuse evaluation was still outstanding. The State did not object to the postponement, and the trial court granted the request, acknowledging that the *Hicks* date had passed and postponing trial until November 12, 2013. This delay is attributable solely to the defense.

On November 12, 2013, the State requested a postponement, as the prosecutor was not available to try the case. The case was once again postponed, until February 11, 2014. This delay must be attributed to the State, but not heavily, as "prosecutors are not 'fungible' and are not readily able to trade off serious cases." *State v. Toney*, 315 Md. 122, 135 (1989).

On February 11, 2014, the parties appeared in the trial court to advise that they wished to have another pending case featuring Hopkins as a defendant postponed, and the court advised that it would "see if one of the judges is available;" none was available until the next day. Defense counsel orally moved for a speedy trial. Again, the one day unavailability of a court must be weighed against the State, but not heavily.

Trial began on February 12, 2014. 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.

Although the delay between Hopkins's arrest and trial was lengthy, as noted above, the delays attributable to the State were not the result of negligence or gamesmanship on the

part of the State and are only lightly attributable to the State or neutral, with several months of the delay attributable to the defense.

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 has begun to experience prejudice from that delay. *Glover,* 368 Md. at 228. 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 the reason for the delay, and by the personal prejudice he experiences. 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." 407 U.S. at 531-32.

Here, Hopkins's only written demand for a speedy trial came during his omnibus defense motions on September 24, 2012. Although he objected to trial postponements on several occasions, the objections were often only "for the record" and contradicted by defense counsel's acceptance of the delays in favor of further trial preparation. Not until the postponement request on November 12, 2013 did Hopkins specifically assert his constitutional right to a speedy trial. He made another such assertion the day before trial started, on February 11, 2014.

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 Hopkins's speedy trial demands were not extraordinary. On the other hand, although Hopkins filed only a single written motion arguing for a speedy trial before the actual start of his trial, he did object to several postponements, and he did argue on two occasions that his right to a speedy trial had been violated. Therefore, we cannot say that he stood idly by without objecting to the delay. We, therefore, conclude that this factor weighs lightly in Hopkins'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 his 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 to protect: 1) the prevention of oppressive pre-trial incarceration; 2) the minimization of anxiety and concern of the accused; and 3) the limiting of 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) (citing *Doggett v. United States*, 505 U.S. 647, 654 (1992)).

During argument on the motion to dismiss, defense counsel argued that Hopkins had not only been incarcerated since his arrest in August 2012 but threatened and "beaten up" by other inmates. In addition, Hopkins had not been given his five daily medications for bi-

polar disorder, anxiety, and attention deficit disorders while in jail, which affected his memory and his ability to recall events so as to argue a valid defense upon the stand at trial. Finally, the lengthy pre-trial incarceration had led to a break-up between Hopkins and his fiancee, who was intended to be an alibi witness at trial; instead, she no longer returned defense counsel's calls and had cut off all communication with Hopkins.

The trial court found that Hopkins's complaints of threats and violence in jail had been addressed in "early August 2012," by his seclusion in the women's area of the jail, a fact borne out by his failure to make any motions for bail review after that time. With regard to the lack of medication, the court noted that there had been no testimony, nor documents filed, to provide any proof of memory loss or the like or to show that Hopkins had been evaluated for such issues. As for the loss of Hopkins's former fiancee as an alibi witness, which would have related to Hopkins's ability to prepare his defense, the court pointed out that Hopkins had not filed a notice to the State of the fiancee as an alibi witness, as required by the Maryland discovery rules. Such a failure would have precluded her testimony at trial in any event. As a result, 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 its determination is erroneous.

Conclusion

A balancing of the *Barker* factors is case specific. *Glover,* 368 Md. at 231-32. Although there was a delay in bringing Hopkins 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. Hopkins 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. Hopkins's claims of prejudice were refuted by the findings of the trial court.

On balance, and considering the *Barker v. Wingo* factors, we find that, despite the delay, Hopkins has not suffered prejudice that rises to the level of a violation of his constitutional right to a speedy trial. We perceive no error in the trial court's fact-finding following Hopkins'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 on constitutional speedy trial grounds.

III.

Finally, Hopkins avers that the evidence adduced at trial was insufficient to sustain his convictions. Acknowledging that defense counsel, at trial, did not renew his motion for judgment of acquittal at the close of all the evidence, as required for appellate review of the sufficiency of the evidence, Hopkins urges us to invoke our discretion to review the matter for plain error. Alternatively, he argues that defense counsel's failure to renew the motion for judgment of acquittal at the close of all the evidence amounted to ineffective assistance of counsel, which this Court may address on direct appeal if the record is sufficiently developed to establish that counsel's failure was not based on any sound trial strategy.

The sufficiency of the evidence issue clearly has not been preserved for our review. By presenting evidence in his own defense after the denial of his motion for judgment of acquittal at the close of the State's case-in-chief, Hopkins brought himself under the provisions of Md. Rule 4-324(c), which provides:

> (c) **Effect of denial**. A defendant who moves for judgment of acquittal at the close of the evidence offered by the State may offer evidence in the event the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made. In so doing, the defendant withdraws the motion.

Maryland Rule 4-324(c) has "'been construed to preclude appellate courts of this state from entertaining a review of the sufficiency of the evidence, in a criminal case tried before a jury, where the defendant failed to move for judgment of acquittal at the close of all the evidence.'" *Williams v. State,* 131 Md. App. 1, 6 (2000) (quoting *Ennis v. State*, 306 Md. 579, 585 (1986)) (emphasis omitted). Having withdrawn his original motion by offering his own evidence, there was no motion pending before the trial court at the close of the case, and the trial court can thus hardly be said to have refused to grant Hopkins's motion for judgment of acquittal, a predicate for appellate review of the sufficiency of the evidence. *Hobby v. State*, 436 Md. 526, 540 (2014). Hopkins's failure to renew his motion at the close of all the evidence "effectively precluded the trial court from considering [his] insufficiency contention. Consequently, there [is] nothing for [this Court] to consider[.]" *Ennis*, 306 Md. at 587.

Conceding that his sufficiency argument is unpreserved, Hopkins first asks us to exercise our discretion to address the issue of the trial court's ruling of sufficiency for plain error. As the State points out, however, "'no Maryland case has utilized the plain error doctrine to reverse a trial judge's denial of a motion for judgment of acquittal when the ground raised on appeal was never advanced before the trial court at the time the motion for judgment of acquittal was being considered.'" *Claybourne v. State*, 209 Md. App. 706, 750 (quoting *McIntyre v. State*, 168 Md. App. 504, 528 (2006)), *cert. denied*, 432 Md. 212 (2013). We perceive no reason to deviate from that precedent in this matter, and we, therefore, decline Hopkins's invitation to review his unpreserved sufficiency challenge for plain error.

Hopkins also argues that to the extent that defense counsel did not renew the motion for judgment of acquittal at the close of all the evidence, his actions constituted ineffective assistance of counsel. As such, he continues, this Court should review the ineffectiveness of counsel in failing to renew the motion. We decline to do so.

Under the settled rules of appellate procedure, "'a claim of ineffective assistance of counsel not presented to the trial court generally is not an issue which will be reviewed initially on direct appeal, although competency of counsel may be raised for the first time at a[ ] post conviction proceeding.'" *Crippen v. State*, 207 Md. App. 236, 250-51 (2012) (quoting *Tetso v. State*, 205 Md. App. 334, 378 (2012)).

In *Mosley v. State*, 378 Md. 548 (2003), the Court of Appeals explicated at length on the reasons that claims of ineffective assistance of counsel are most appropriately handled in post-conviction proceedings, rather than upon direct appeal. The Court reasoned that the Maryland Uniform Post Conviction Act, embodied in Title 7 of the Criminal Procedure Article, provides a defendant with the possibility of an evidentiary hearing in which testimony may be taken, evidence received, and factual findings made as to the basis of the allegations of attorney error. *Id.* at 560. Post-conviction proceedings are preferred with respect to ineffective assistance of counsel claims because "the trial record rarely reveals why counsel acted or omitted to act, and such proceedings allow for fact-finding and the introduction of testimony and evidence directly related to allegations of the counsel's ineffectiveness." *Id.* at 560-61 (citations and footnote omitted).

Only in cases where the trial record reveals counsel's ineffectiveness to be so blatant and egregious that review on direct appeal is appropriate do appellate courts undertake a review because, to proceed otherwise, would entangle the appellate courts in "'the perilous process of second-guessing' without the benefit of potentially essential information." *Id.* at 561 (quoting *Johnson v. State*, 292 Md. 405, 435 (1982)). If, for example, the alleged error is one of commission, the record may reflect the action taken by counsel but not the reasons for it; without additional factual information, an appellate court may not be able to ascertain whether the alleged error was unfairly prejudicial to the defendant. *Id.* at 561 (citing *Massaro v. U.S.*, 538 U.S. 500, 504-05 (2003)).

In having the ability to hear counsel's testimony and description of why he or she acted, or failed to act in the manner complained of, the post-conviction court is best suited to determine whether the attorney's actions met the applicable standard of competence. If the record sheds no light on why counsel acted as he or she did, direct review by an appellate court may result in an unnecessary reversal in a case where sound but unapparent reasons existed for counsel's actions. *Colvin v. State*, 299 Md. 88, 113 (1984) (citing *Johnson,* 292 Md. at 435)). The record often cannot and does not adequately reveal counsel's trial strategy, and the "'mission of the appellate judiciary is neither to mull theoretical abstractions nor to practice clairvoyance.'" *Mosley*, 378 Md. at 565 (quoting *State v. Miller*, 459 S.E.2d 114, 125-26 (W.Va. 1995)).

Whether an appellate court should review the ineffective assistance of counsel claim on direct appeal depends on the criteria established in *In re Parris W.*, 363 Md. 717 (2001), being met, that is, whether "the critical facts are not in dispute and the record is sufficiently developed to permit a fair evaluation of the claim." *Id.* at 726. Thus, only in limited circumstances may a convicted person raise the claim of ineffective assistance of counsel on direct appeal without the benefit of a post-conviction proceeding. *Mosley,* 378 Md. at 564.

This is not one of those instances. The reasons for defense counsel's actions are not apparent from the record at trial, Hopkins's attorney did not admit to any error, and Hopkins did not raise the issue of ineffective assistance of counsel before the trial court. Therefore,

additional fact-finding is necessary to evaluate Hopkins's claim of ineffective assistance of counsel. *See Crippen*, 207 Md. App. at 254.

Moreover, the entire basis of Hopkins's claim of insufficiency of the evidence, that the State failed adequately to prove that it was he who argued with, and shot at, Shepherd at the light rail station, rests on the credibility of the witnesses's identification of Hopkins as the shooter, when he claimed he was not there. His argument goes to the weight of the evidence, for the jury to determine, not its sufficiency, and we would not find the evidence insufficient to prove the charged crimes in any event.

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