Circuit Court for Baltimore City
Case No.: 117285009

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 639

September Term, 2018

RONNIE WHITENER

v.

STATE OF MARYLAND

Fader, C.J.,
Reed,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Fader, C.J.

Filed: August 8, 2019

A jury in the Circuit Court for Baltimore City convicted Ronnie Whitener of participation in a criminal gang and five counts related to the possession and distribution of heroin. A judge sentenced Mr. Whitener to a total of 20 years' imprisonment with ten years suspended. Mr. Whitener contends that the trial court erred in: (1) denying his motion to dismiss based on violations of Rule 4-271 and his constitutional right to a speedy trial; (2) denying his motion for judgment based on sufficiency of the evidence as to the conviction for participation in a criminal gang; and (3) permitting a detective to testify as an expert on gangs. Finding no error or abuse of discretion by the trial court, we will affirm.

BACKGROUND

In 2015, Detective Michael Coleman of the Baltimore City Police Department and a joint task force with the federal Bureau of Alcohol, Tobacco and Firearms began investigating "Brick City," a criminal organization known for selling heroin in "the Edmondson Avenue corridor adjacent to Harlem Avenue, Pulaski Street, Lanvale [Street], Kirby Lane" in Baltimore City. At trial, Detective Coleman described in detail his lengthy investigation into Brick City's distribution of heroin, which included direct surveillance, field interviews, confidential informants, controlled buys, and wiretaps, among other techniques.

During the course of his investigation, Detective Coleman conducted surveillance in the Edmondson Avenue area, where he observed individuals engaged in multiple drug transactions, and also conducted field interviews to identify individuals of interest. Through these mechanisms, he determined that the Soul Source restaurant was a meeting

place for Brick City members and a location where Brick City drugs were sold. He also learned that Brandon Pride was the leader of Brick City, that the organization sold heroin through multiple drug "shops" throughout the Edmondson Avenue neighborhood, and that Mr. Pride owned a tire shop in the neighborhood that he used as a stash house for the drugs.

Detective Coleman also determined through his investigation that Mr. Whitener sold heroin for Mr. Pride and Brick City. Unlike other "street lieutenants" in the Brick City organization, who were assigned to sell heroin from specific shops, Mr. Whitener traveled the neighborhood selling the Brick City product in multiple locations. Mr. Whitener's co-defendant, Mark Rice,[1] was a Brick City street lieutenant and "enforcer" who sold and supervised the sale of heroin from shops in the neighborhood.

Detective Coleman employed at least three confidential informants during his investigation of Brick City. The first, Tahlil Yasin, was shot and killed outside the Soul Source restaurant in 2015. The second, Armani Smythe, was a former member of Brick City who testified that she started working for Mr. Pride watching out for police at a corner and was eventually promoted to selling heroin at a Brick City shop run by Jason Summers. Ms. Smythe, who was also a heroin user, provided Detective Coleman with information regarding Mr. Pride and Brick City's operations, including the locations of the shops, the names of the individuals selling heroin in the shops, and their roles within the Brick City

[1] At one point in his testimony, Detective Coleman identified Mr. Rice and Mr. Whitener as brothers. At another point, the detective identified the two as cousins. Whether they were related and, if so, how is irrelevant to our decision.

organization. In return, Detective Coleman provided Ms. Smythe with phones, money, shelter, clothes, shoes, and drug rehabilitation.

At the direction of Detective Coleman, Ms. Smythe also conducted controlled heroin buys from Brick City members, including two from Mr. Whitener.[2] The first of these occurred on October 1, 2015 and the second on October 16, 2015, both under the supervision of Sergeant Craig Street in Brick City territory. The State offered testimony about these two controlled drug buys from Detective Coleman, Sergeant Street, and Ms. Smythe. Detective Coleman testified that he set up the controlled buys and provided Ms. Smythe with money for them. Sergeant Street testified that he drove Ms. Smythe to the locations for the controlled buys on both dates and that she returned with baggies containing heroin on both occasions.[3]

Ms. Smythe testified that on October 1 she used money supplied by Detective Coleman to purchase four or five baggies of Brick City heroin from Mr. Whitener. On October 16, in coordination with Detective Coleman and Sergeant Street, she made another purchase of Brick City heroin from Mr. Whitener, this time at Soul Source restaurant. Ms. Smythe testified that she had also purchased heroin from Mr. Whitener on prior occasions

[2] Detective Coleman testified that he directed confidential informants to conduct approximately 20 controlled drug purchases from members of Brick City between 2015 and 2017.

[3] Sergeant Street testified that he drove Ms. Smythe to three different locations to attempt to make controlled buys on October 1. After the first stop, Ms. Smythe did not tell him whether she had been successful. Ms. Smythe was unsuccessful at the second stop but, upon returning to the car, gave Sergeant Street five green baggies that she stated she had purchased during the first stop. As discussed below, at trial Ms. Smythe identified Mr. Whitener as the seller at that first stop.

before she started working with Detective Coleman. An analyst from the Baltimore Police Department Drug Analysis Unit testified that the powder substances contained in the baggies submitted by Detective Coleman from the two controlled buys tested positive for heroin.

The third confidential informant involved in Detective Coleman's investigation was Vernon Hudson, who testified that he began to work for Mr. Summers selling Brick City heroin in 2015. Mr. Hudson described the operations of a Brick City "shop," which consisted of a "corner man," who monitored street corners and alerted the shop members to any police in the area; a "hitter," who served the purchased drugs to the customer; a "catcher," who collected the money from the customer; and a "lieutenant," who was responsible for managing the "pack" of heroin and ensuring that the correct amount of money was received. In the shop in which Mr. Hudson worked, Mr. Summers was the lieutenant and Mr. Hudson was the corner man. The other two employees in the shop were Ms. Smythe and a man named Raheem. The shop sold Brick City heroin as "raw dope" in powder form that it received in "packs" worth $5,000 and sold in miniature Ziploc baggies for $20 or $40 apiece. Mr. Hudson, who briefly served as a shop lieutenant after Mr. Summers died, testified that when they sold all of the heroin from a pack, they would pay Mr. Pride $3,600 to obtain another pack and split the remainder among the shop employees. His shop averaged selling two to four packs per day.

Mr. Hudson identified Mr. Whitener as a Brick City lieutenant who was "spoiled" because, unlike other lieutenants, he "did his own thing" and sold the heroin without a team. Brick City, which had five shops operating within a three-block radius, used

"enforcers" to protect its business and "negotiate" any problems with customers or "anybody in general."

In August 2015, Mr. Summers was arrested with a pack of heroin he had just received from Mr. Pride, but then returned to the area only three hours later. A woman affiliated with Brick City, who was also carrying heroin at the time, was then arrested shortly after speaking with the recently-released Mr. Summers. The following morning, Mr. Hudson, Mr. Whitener, Mr. Summers, and others were at the shop when Mr. Pride arrived and then left with Mr. Summers. Two hours later, Mr. Hudson learned that Mr. Summers was dead.[4] Mr. Hudson was arrested several months later, after selling heroin to Ms. Smythe, and eventually became a confidential informant.

The court, without objection, qualified Detective Coleman as an expert in the "identification, distribution and sales" of controlled dangerous substances. Over defense objection, the court also qualified Detective Coleman in gang identification, definition, existence, and organization. Detective Coleman testified that based on his training and experience, Brick City was a gang and Mr. Whitener was a member of it.

The court also qualified Sergeant Joseph Landsman, who had participated in the investigation of Brick City and Mr. Pride, as an expert in the "identification, organization, and structure of" criminal gangs. Sergeant Landsman testified, without objection, that Brick City was a criminal gang operating in the area of Edmondson Avenue and Pulaski

[4] On August 20, 2015, Mr. Summers was found deceased on the 1100 block of West Saratoga Street as a result, it was later determined, of multiple gunshot wounds. Other testimony revealed that Mr. Summers had pointed the police to the woman who was arrested after him.

Street and that Mr. Pride was "[a]t the top of that organization." Sergeant Landsman further testified that, in September 2017, he had interviewed Michael Gray, a former leader of the Black Guerilla Family ("BGF"). Mr. Gray provided Sergeant Landsman with information regarding Mr. Pride and the Brick City gang.

Mr. Gray testified as a witness for the State that, in February 2013, as "a highranking member of BGF" in Baltimore City, he met with Mr. Pride, whom he identified as the "boss" of Brick City, to discuss a BGF member who was drawing unwanted police attention. As a result of the meeting, he and Mr. Pride agreed to divide up the drug trade on corners in West Baltimore, with Brick City keeping the areas in which the events at issue unfolded. According to Mr. Gray, the heroin sold by Brick City was, at times, known as "the best in the city."

Mr. Gray also testified to a meeting between himself and Mr. Pride in 2015 in which Mr. Pride asked him to have Mr. Yasin killed. Mr. Gray testified that he did not act on Mr. Pride's request because Mr. Pride did not provide documents showing that Mr. Yasin was working with police. Mr. Gray learned two months later that Mr. Yasin had been killed.

A jury convicted Mr. Whitener of participation in a criminal gang and five counts related to the possession and distribution of heroin.[5] Mr. Whitener appealed.

[5] The trial court had previously granted Mr. Whitener's motion for judgment of acquittal as to charges of conspiracy to maintain and promote a criminal organization, two counts of witness intimidation, and obstruction of justice. The State entered a nolle prosequi as to a charge of participation in a criminal gang resulting in death.

DISCUSSION

I. THE TRIAL COURT DID NOT ERR IN DENYING MR. WHITENER'S MOTION TO DISMISS.

A. The State Did Not Violate Rule 4-271.

Mr. Whitener argues that the circuit court erred in denying his motion to dismiss based on the State's violation of the requirement that his trial be scheduled within 180 days of his first appearance before the circuit court, pursuant to Rule 4-271 and § 6-103(a) of the Criminal Procedure Article (Repl. 2018). We find no error.

We review a circuit court's grant of a motion to dismiss for violation of Rule 4-271 for legal correctness, although we will accept the court's findings of fact unless clearly erroneous. *See Glover v. State*, 368 Md. 211, 220-21 (2002). Rule 4-271 provides that "[t]he 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." In *State v. Hicks*, the Court of Appeals held that the 180-day requirement is "mandatory," and that "dismissal of the criminal charges is the appropriate sanction where the State fails to bring the case to trial within the" 180-day period, absent "'extraordinary cause' justifying a trial postponement . . . ." 285 Md. 310, 318 (1979). The "*Hicks* date" is the date on which the 180-day period expires.

We agree with the circuit court that there was no violation of the *Hicks* rule because on both occasions on which the 180-day deadline passed, Mr. Whitener consented to, and the court concluded that there was good cause for, the relevant postponement.

The relevant chronology of the case is:

- March 3, 2016 – The State filed Indictment No. 116063016 (the "First Indictment"), charging Mr. Whitener with conspiracy to distribute heroin and two counts of: distribution of heroin, distribution of heroin in a school zone, possession with intent to distribute heroin, possession with intent to distribute heroin in a school zone, and possession of heroin.

- March 10, 2016 – Mr. Whitener was arrested.

- March 11, 2016 – Mr. Whitener's bail hearing was held, at which bail was set at $25,000. He was released on bail the following day.

- April 7, 2016 – Mr. Whitener's counsel entered her appearance, setting the *Hicks* date as October 6, 2016. The court set trial for June 10, 2016.

- June 10, 2016 – The State moved to postpone the trial on the ground that it had just provided discovery and its request for a protective order remained pending. The court found good cause for the postponement and reset trial for September 26, 2016, before the *Hicks* date.

- September 23, 2016 – Mr. Whitener's counsel requested a postponement in order to conduct further investigation. The court found good cause for the postponement and reset the trial date to December 7, 2016.[6] This postponement extended trial past the *Hicks* date.

- September 28, 2016 – Mr. Whitener was arrested on an unrelated case and held in custody without bail.

- December 7, 2016 – The State requested a further postponement on the ground that it had provided additional discovery and the defense needed additional time to investigate. The postponement was attributed to both parties and the court set trial for February 6, 2017.

[6] The September 23, 2016 Criminal Postponement Form indicates that Mr. Whitener executed a "valid *Hicks* waiver." At the hearing on Mr. Whitener's motion to dismiss, defense counsel disputed that he had waived *Hicks*, arguing that Mr. Whitener was not present at the hearing on September 23, 2016 and the form had not been signed. Our conclusion that the court did not err in denying the motion to dismiss is not based on waiver.

- January 31, 2017 – The State filed Indictment No. 117031044 (the "Second Indictment"), charging Mr. Whitener, in addition to the charges in the First Indictment, with conspiracy to maintain and promote a criminal organization by unlawful means, witness intimidation, and obstruction of justice.

- February 6, 2017 – State entered nolle prosequi as to the First Indictment.

- February 9, 2017 – Mr. Whitener was arraigned on the Second Indictment, establishing a *Hicks* date of August 7, 2017, and denied bail.

- June 19, 2017 – Trial was postponed at the State's request on the ground that the State had provided discovery and its motion for a protective order remained pending. The court found good cause for the postponement and continued the trial date to October 23, 2017. This postponement extended trial past the *Hicks* date.

- October 12, 2017 – The State filed Indictment No. 117285009 (the "Third Indictment"), charging Mr. Whitener, in addition to the offenses contained in the Second Indictment, with gang participation and gang participation resulting in the deaths of Tahlil Yasin and Jason Summers.

- October 17, 2017 – State entered nolle prosequi as to the Second Indictment. Mr. Whitener's counsel appeared, establishing a new *Hicks* deadline of April 16, 2018.

- March 26, 2018 – The State entered nolle prosequi as to the unrelated charges on which Mr. Whitener had been held since September 28, 2016.

- April 2, 2018 – Mr. Whitener's counsel filed a motion to dismiss for violation of Rule 4-271 and his right to a speedy trial.

- April 9, 2018 – First day of trial.

- April 10, 2018 – After a hearing on Mr. Whitener's motion to dismiss for violation of his right to a speedy trial, the court denied the motion.

There were three *Hicks* deadlines applicable to Mr. Whitener, one set in connection with each of the three indictments. The first two were passed as a result of postponement

for which the court found good cause. The third *Hicks* deadline was met. The trial court denied Mr. Whitener's motion to dismiss, finding no abuse of discretion in the good cause determinations. We agree.

In reviewing a trial court's denial of a motion to dismiss, we will "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). Mr. Whitener has not demonstrated either, nor does he attempt to do so. Instead of focusing on the postponements that took the cases past the *Hicks* dates, which is what is relevant for purposes of his *Hicks* claims, Mr. Whitener incorrectly focuses on the nol prosses that followed. In arguing that the nol prosses had the "necessary effect" of circumventing each 180-day period, Mr. Whitener misses the significance of the fact that the *Hicks* dates had, in each case, already passed.

Generally, when criminal charges are nol prossed and the same or similar charges are subsequently refiled, the 180-day period for commencing trial starts again after the refiling. *Curley v. State*, 299 Md. 449, 460 (1984); *see also State v. Huntley*, 411 Md. 288, 293 (2009); *Collins v. State*, 192 Md. App. 192, 205 (2010). That is, in part, because a nol pros "is a legitimate and accepted way of doing prosecutorial business." *Baker v. State*, 130 Md. App. 281, 288 (2000). In *Curley*, however, the Court of Appeals "identified two exceptions to this general rule. Where (1) the purpose of the State's nol pros, or (2) the necessary effect of its entry, is to circumvent the statute and rule governing time limits for trial, the 180-day period for trial begins with the triggering event under the initial prosecution, rather than beginning anew with the second prosecution." *Huntley*, 411 Md.

at 293 (discussing *Curley*, 299 Md. at 459). In those circumstances, if the trial on the new prosecution does not begin by the original *Hicks* date, the second indictment must be dismissed. *Huntley*, 411 Md. at 293-94.

However, "these exceptions will not apply where the prosecution acts 'in good faith or so as to not evade or circumvent the'" 180-day rule. *Id.* (quoting *Curley*, 299 Md. at 459) (internal quotations omitted). Indeed, we have noted that "the 180-day limit is not absolute," and may be excused when the defendant or his counsel "'seeks or expressly consents to a trial date'" beyond the *Hicks* date for good cause. *State v. Farinholt*, 54 Md. App. 124, 131 (1983) (quoting *Hicks*, 285 Md. at 335) (holding that defendant waived his challenge when he requested a postponement due to the unavailability of a witness).

Relying on *Jules v. State*, 171 Md. App. 458 (2006), the State argues that its nol prosses of the first two indictments did not, and could not, have the necessary effect of avoiding the *Hicks* dates because the trial dates had already been extended beyond the *Hicks* dates for good cause shown and with Mr. Whitener's consent. We agree. In *Jules*, the trial date was rescheduled beyond the *Hicks* deadline in response to the defendant's request for a continuance. *Id*. at 464-65. Before the rescheduled trial, the court denied a State motion to amend the indictment. *Id*. at 465. In response, the State nol prossed the original indictment and filed a new one. *Id*. The defendant filed a motion to dismiss for violating Rule 4-271 and his speedy trial rights, which the trial court denied. *Id*. On appeal, the defendant argued that the State had nol prossed the original indictment to circumvent the consequence of the denial of its motion to amend the indictment. *Id*. at 476-77. We concluded that the State's nol pros of the indictment was not even subject to the analysis

of whether it had the necessary effect of violating *Hicks*, because "[o]nce appellant consented to a trial date on or after the Hicks period had expired, the provisions of the statute and rule were no longer implicated." *Id*. at 477.

Here, as in *Jules*, Mr. Whitener's nol pros-based claims are not subject to the *Hicks* analysis because the nol prosses both occurred after the *Hicks* dates had already passed. Although Mr. Whitener's September 23, 2016 request for a postponement extended his trial date on the First Indictment beyond the *Hicks* date of October 6, 2016, (1) the trial court found good cause for that postponement, (2) Mr. Whitener affirmatively sought the postponement, and (3) the State did not nol pros that indictment until February 6, 2017, four months after the *Hicks* date. The State's subsequent filing of the Second Indictment, which contained additional charges, established a new *Hicks* date of August 7, 2017, and Mr. Whitener's trial was scheduled to occur before that date. The trial court subsequently found good cause to postpone the case beyond that *Hicks* date, however, due to the State's disclosure of additional discovery and its outstanding request for a protective order. Mr. Whitener did not object to this postponement. The State's nol pros of the Second Indictment did not occur until October 17, 2017, well after the *Hicks* deadline.

As we explained in *Jules*, "[w]henever the extension of the trial date beyond the prescribed period is the result of a legally unassailable finding . . . that the cause for delay is 'good,' or . . . a defendant makes a motion, affirmatively requests or consents to a continuance beyond the 180 days, the inquiry as to the imposition of the sanction of dismissal under the statutory right to a speedy trial ends." *Id*. at 480-81. Here, we have both: (1) findings of good cause for postponements beyond the *Hicks* dates as to which

Mr. Whitener does not even mount a case for abuse of discretion; and (2) Mr. Whitener's affirmative request for the postponement past the first *Hicks* deadline and consent to the postponement past the second *Hicks* deadline. It is these postponements, not the State's subsequent nol prosses, that first pushed the trial dates past the *Hicks* dates. We therefore find no error in the trial court's denial of Mr. Whitener's motion to dismiss for violation of Rule 4-271.

B. The State Did Not Violate Mr. Whitener's Constitutional Right to a Speedy Trial.

In addition to his *Hicks* claim, Mr. Whitener also contends that the delay in trying him violated his right to a speedy trial under the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights. The United States Supreme Court has established a four-factor balancing test to assess whether a defendant's right to a speedy trial has been violated. *Barker v. Wingo*, 407 U.S. 514, 530-33 (1972). These four factors include: "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id.* at 530; *State v. Kanneh*, 403 Md. 678, 688 (2008). Maryland courts apply this standard as well "when applying [A]rticle 21." *Divver v. State*, 356 Md. 379, 387-88 (1999).

In reviewing a claim for a violation of the right to a speedy trial, we make "our own independent constitutional analysis" to determine whether this right has been denied. *Howard v. State*, 440 Md. 427, 446-47 (2014) (quoting *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." *Glover*, 368 Md. at 221. The "threshold consideration is whether the delay is deemed to be of constitutional dimension." *Smart v. State*, 58 Md. App. 127, 131 (1984). If the delay is not of a "constitutional dimension," there is no need to apply the *Barker* four-factor analysis. *Id*.

1. The Start Date for Our Analysis Is the Date of the First Indictment.

Mr. Whitener calculates the length of time before trial for purposes of the constitutional analysis beginning with the First Indictment. He argues that the delay of more than two years from that date is presumptively of constitutional dimension. The State responds that the Third Indictment is the relevant beginning date and, therefore, that the delay of only 174 days is not of constitutional dimension. Alternatively, the State argues that the delay from the filing of the First Indictment did not violate Mr. Whitener's speedy trial rights.

For purposes of calculating the length of delay when initial charges are nol prossed and the defendant is re-indicted, we must determine whether the delay is calculated from the date of defendant's first arrest or on the date of the indictment that proceeds to trial. *See Clark v. State*, 97 Md. App. 381, 387 (1993). "If the prior termination of charges is done in good faith, we start the speedy trial clock at the [final] indictment." *Id*. at 393-94 (footnote omitted) (applying the "*MacDonald* Rule," set forth in *United States v. MacDonald*, 456 U.S. 1, 7 (1982), that the time "after the Government, acting in good faith, formally drops charges" is not included in a speedy trial analysis). Where, however, the State's dismissal of an indictment, "although not amounting to bad faith, simply is not the

same as a good faith dismissal sanctioned by the *MacDonald* [C]ourt[,]" we analyze the delay from the period of the first indictment. *Lee v. State*, 61 Md. App. 169, 176-78 (1985) (calculating the period of delay from the first indictment where the trial court dismissed the indictment due to the State's failure to comply with the Intrastate Detainer Act and the State re-indicted the defendant on the same charges two days later).

Here, there is no evidence of bad faith on the part of the State. However, although the State's two nol prosses and re-indictments of Mr. Whitener do not rise to the level of bad faith, they are also not the same type of good faith dismissal as was at issue in *MacDonald* and its progeny. As a result, we agree with the trial court that the appropriate start date for our analysis is the date of the First Indictment.

2. The More than Two-Year Delay Before Trial Is of Constitutional Dimension, Triggering a More In-Depth Analysis.

The initial determination we must make is whether the length of delay is of such constitutional dimension as to trigger the more in-depth analysis. *Kanneh*, 403 Md. at 687-88; *Glover*, 368 Md. at 222-23. For purposes of this determination, "'length of delay' is the gross period of time between the arrest and the trial or the hearing on the motion." *Ratchford v. State*, 141 Md. App. 354, 360 (2001). Although "no specific duration of delay constitutes a *per se* delay of constitutional dimension . . . we have employed the proposition that a pre-trial delay greater than one year and fourteen days was 'presumptively prejudicial' on several occasions." *Glover*, 368 Md. at 223. Here, the delay of approximately 25 months between the filing of the First Indictment and the first day of trial was sufficient to trigger the speedy trial analysis under *Barker*.

3. The Barker Factors.

In addition to serving as the threshold for engaging in further analysis, the length of delay is also the first factor in that further analysis. *Kanneh*, 403 Md. at 688. For these purposes, "the 'length of delay' is the net period of time that may be chargeable to the State or to the court system as true "delay," some of which, depending on other circumstances, may be given great weight and some of which may be given only slight weight." *Ratchford*, 141 Md. App. at 360. Of course, not all delays are treated equally, as "the delay that can be tolerated for an ordinary street crime is considerably less than a serious, complex . . . charge." *State v. Bailey*, 319 Md. 392, 411 (1990) (finding that drug charges, independent of the other factors, did not justify a two-year delay) (quoting *Barker*, 407 U.S. at 531). "[T]he length of the delay is the least determinative of the four factors that we consider in analyzing whether [a defendant's] right to speedy trial has been violated." *Kanneh*, 403 Md. at 690.

Here, the delay was 761 days. Although the delay was undoubtedly lengthy, this case was also undeniably complex, leading to charges against at least 21 individuals involved in a heroin distribution gang arising from an investigation that involved confidential informants, controlled drug buys, and recorded conversations. Considering the nature of the charges and the complexity of the case, we conclude that the length of delay weighs against the State, but not as much as it would in a simpler case.

The second *Barker* factor, the reasons for the delay, is "closely related" to the first. *Bailey*, 319 Md. at 412. Here, the reasons for the delay can be broken into stages. The initial ten-month delay from the filing of the First Indictment to the nol pros of that

indictment was occasioned by three postponements. All three were approved by the court as founded on good cause. One of these was requested by the State, one by the defense, and one was charged to both parties. Although this period counts against the State, the findings of good cause—none of which are undermined by Mr. Whitener's appellate arguments—mitigate the weight of that. *See Dalton v. State*, 87 Md. App. 673, 687-88 (1991) (concluding that, in the absence of "prosecutorial neglect or indifference," any delay chargeable to the State will not weigh heavily against it in a constitutional analysis).

In the Second Indictment, the State added charges of witness intimidation and obstruction of justice resulting from Mr. Whitener's conduct in December 2016, while he was incarcerated on an unrelated charge. The nine-month delay from the filing of the Second Indictment until the nol pros and the filing of the Third Indictment resulted from a combination of the State's tactical decision to add additional charges. The reasons for this delay weigh slightly against the State.

The State argues that the Third Indictment was necessary to add charges against Mr. Whitener for participation in a criminal gang, which was based on information obtained from Sergeant Landsman's September 2017 interview with Mr. Gray. The Third Indictment followed in October 2017. Although the State has broad authority to nol pros charges and seek a superseding indictment, *see Ward v. State*, 290 Md. 76, 83 (1981), its decision to do so in this case resulted in an additional six-month delay. Because that delay resulted from the State's tactical decision to charge Mr. Whitener and his eight co-defendants with additional offenses, that six-month delay weighs against the State.

"The third *Barker* factor concerns the 'defendant's responsibility to assert his right.'" *Henry v. State*, 204 Md. App. 509, 554 (2012) (quoting *Barker*, 407 U.S. at 531). Whether and how a defendant asserts his right to a speedy trial is indicative of the degree of the deprivation since "[t]he more serious the deprivation, the more likely a defendant is to complain." *Bailey*, 319 Md. at 409 (quoting *Barker*, 407 U.S. at 531-32). "Because the strength of the defendant's efforts will be affected by the length of the delay, asserting the speedy trial right weighs heavily in determining if the right has been denied." *Dalton*, 87 Md. App. at 688.

Here, with the exception of boilerplate language in an omnibus motion, Mr. Whitener failed to assert that his speedy trial right was being violated until the motion to dismiss he filed days before trial. Although Mr. Whitener may be correct that he never formally waived his right to a speedy trial, his failure affirmatively to assert the right until days before trial weighs against him.

The fourth, and most important, *Barker* factor is prejudice to the defendant. Although "[a] defendant's speedy trial right can be violated even absent a showing of actual prejudice . . ., 'he has a stronger case for dismissal'" if he can show prejudice. *Fields v. State*, 172 Md. App. 496, 543 (2007) (quoting *Jones v. State*, 279 Md. 1, 17 (1976)). We analyze claims of prejudice in light of the three interests for which the right to a speedy trial was created: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Barker*, 407 U.S. at 532. "Actual prejudice requires more than an assertion that

the accused has been living in a state of constant anxiety due to the pre-trial delay." *Glover*, 368 Md. at 230.

Mr. Whitener failed to demonstrate any actual prejudice. After the First Indictment, Mr. Whitener was released on bail. He remained on bail until he was arrested and incarcerated on unrelated charges, which were only dismissed less than a month before trial. Although he was denied bail in connection with the Second Indictment, he would have remained incarcerated on the unrelated charges during the vast majority of that time anyway. Very little of his pretrial incarceration time was thus due solely to this case. Mr. Whitener also presented no evidence that he suffered any special amount of anxiety or concern as a result of the delay, which would, in any event, be belied by his failure to object to any postponements or affirmatively to assert his speedy trial rights. Most importantly, Mr. Whitener does not argue that he was "hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense." *Barker*, 407 U.S. at 533. We cannot say that the trial court was clearly erroneous in finding that Mr. Whitener made no meaningful showing of actual prejudice to his defense.

We conclude that, on balance, the *Barker* factors weigh against a finding that Mr. Whitener's constitutional right to a speedy trial was violated. Although the length of the delay was significant, the nature of the charges and complexity of the case mitigate the weight of its length, and Mr. Whitener's failure to assert his speedy trial right or to demonstrate any actual prejudice weigh against him. We therefore conclude that the circuit court did not err in denying Mr. Whitener's motion to dismiss.

II. THE EVIDENCE WAS SUFFICIENT TO CONVICT MR. WHITENER OF PARTICIPATION IN A CRIMINAL GANG.

Mr. Whitener argues that the evidence was insufficient to sustain his conviction for participating in a criminal gang in violation of § 9-804(a) of the Criminal Law Article (Repl. 2012) because, he contends, the State failed to establish that he participated in a gang knowing that the members of the gang engaged in a pattern of criminal gang activity. Mr. Whitener does not challenge the sufficiency of the evidence as to his drug-related offenses.

"When reviewing the sufficiency of evidence, we view the evidence and any reasonable inferences therefrom in the light most favorable to the State and determine whether 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Sewell v. State*, 239 Md. App. 571, 607 (2018) (quoting *Donati v. State*, 215 Md. App. 686, 718 (2014)). "We defer to the fact finder's 'opportunity to assess the credibility of witnesses, weigh the evidence, and resolve conflicts in the evidence.'" *Neal v. State*, 191 Md. App. 297, 314 (2010) (quoting *Sparkman v. State*, 184 Md. App. 716, 740 (2009)). "We defer to any possible reasonable inferences the jury could have drawn from the admitted evidence." *State v. Mayers*, 417 Md. 449, 466 (2010). Our role is to determine whether there is legally sufficient evidence to support the conviction; we do not weigh the evidence to determine whether the State has proved its case beyond a reasonable doubt. *Lindsey v. State*, 235 Md. App. 299, 311, *cert. denied*, 458 Md. 593 (2018). Thus, "the limited question before an appellate court 'is not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only

whether it *possibly could have* persuaded *any* rational fact finder.'" *Allen v. State*, 158 Md. App. 194, 249 (2004) (quoting *Fraidin v. State*, 85 Md. App. 231, 241 (1991)).

The jury convicted Mr. Whitener of participation in a criminal gang under § 9-804 of the Criminal Law Article, which states in relevant part:

> (a) A person may not:
>
> (1) participate in a criminal gang knowing that the members of the gang engage in a pattern of criminal gang activity; and
>
> (2) knowingly and willfully direct or participate in an underlying crime . . . committed for the benefit of, at the direction of, or in association with a criminal gang.

The statute defines a "criminal gang" as "a group or association of three or more persons whose members (1) individually or collectively engage in a pattern of criminal gang activity; (2) have as one of their primary objectives or activities the commission of one or more underlying crimes . . . ; and (3) have in common an overt or covert organizational or command structure." Crim. Law § 9-801(c). "Pattern of criminal gang activity" is, in turn, defined as "the commission of, attempted commission of, conspiracy to commit, or solicitation of two or more underlying crimes . . . provided the crimes [] were not part of the same incident." Crim. Law § 9-801(e). Distribution of a controlled dangerous substance, which includes heroin, is an "underlying crime" for purposes of the statute. *See* Crim. Law § 9-801(g)(3).

This is not a close issue. The State presented substantial evidence to support all of the necessary elements of the offense of participation in a criminal gang. The State's witnesses described the operation and organization of the Brick City heroin distribution

gang, organized hierarchically with Mr. Pride at the top, a set of lieutenants, and lower-level individuals carrying out enforcement activities and the day-to-day sale of heroin in multiple shops within a particular neighborhood. Other evidence the State presented included (1) testimony that Mr. Summers, Mr. Hudson, Ms. Smythe, Mr. Rice, and Mr. Whitener all worked in the organization during the relevant time period; (2) Mr. Gray's testimony that he, as a then-leader of BGF, and Mr. Pride agreed to divide the neighborhood into separate drug-dealing areas for BGF and Brick City; (3) witnesses' testimony specifically describing Mr. Whitener's role in the Brick City organization as a freelance lieutenant who sold heroin in multiple areas within the neighborhood; (4) testimony from multiple witnesses about two controlled buys of Brick City heroin that Ms. Smythe made from Mr. Whitener; and (5) Ms. Smythe's testimony that she had purchased Brick City heroin from Mr. Whitener on other occasions. The State also introduced expert testimony from Detective Coleman and Sergeant Landsman that, based on their observations and experience, Brick City was a gang. Detective Coleman also opined specifically that Mr. Whitener was a member of the gang.

Mr. Whitener's sufficiency argument relies heavily on this Court's decision in *In re Kevin T.*, 222 Md. App. 671 (2015), which he contends supports his position that the State failed to establish that he participated in a gang knowing that its members engaged in a pattern of criminal activity. His reliance on *In re Kevin T.* is misplaced. There, in attempting to adjudicate a juvenile defendant as delinquent under § 9-804, the State adduced testimony consisting only of general assertions that the defendant was associated with a certain gang and that he had been involved in "incidents of gang activity" that

occurred within a school. *Id*. at 681-82. We determined that the State's evidence amounted only to "non-specific incidents of gang activity," which were "insufficient to satisfy the State's burden of proof." *Id*. at 681. Here, by contrast, the State introduced evidence of significant and regular Brick City heroin sales in which Mr. Whitener directly participated as a part of the Brick City operation.

Mr. Whitener's other arguments that the State failed to establish that he engaged in a pattern of criminal behavior with other individuals or participated in a criminal gang ultimately go to the weight and credibility of the evidence adduced at trial, not its sufficiency. *See Correll v. State*, 215 Md. App. 483, 502 (2013) ("It is the jury's task to resolve any conflicts in the evidence and assess the credibility of witnesses.") (citation and quotation marks omitted). Viewed in the light most favorable to the State, the State's evidence was sufficient to sustain Mr. Whitener's conviction for participating in a criminal gang knowing that its members engaged in a pattern of criminal activity.

III. MR. WHITENER DID NOT PRESERVE HIS CONTENTION THAT DETECTIVE COLEMAN LACKED A RELIABLE METHODOLOGY TO SUPPORT HIS EXPERT OPINION.

Mr. Whitener's third contention is that the trial court erred in permitting Detective Coleman to testify as a gang expert because his testimony lacked a reliable methodology to support his conclusions that Brick City constituted a criminal gang and that Mr. Whitener was a member of that gang. The State responds that Mr. Whitener's claim is not preserved because although he objected to Detective Coleman's testimony at trial, he did not object based on "the reliability of the methods that the detective used to formulate his expert opinions." Alternatively, the State argues that the trial court did not abuse its discretion in

permitting Detective Coleman to testify as a gang expert because his testimony was sufficiently reliable. We agree that Mr. Whitener failed to preserve this argument for appeal.

Before trial, defense counsel sought to preclude the introduction of expert gang testimony from Detective Coleman on the ground that the basis for his testimony had not been adequately disclosed in pretrial discovery. The court denied the motion, but said that it would have its "antenna up" and would "listen very carefully to the qualifications of the expert, to see whether they're qualified to render opinions. If there are objections, . . . then we can have a bench conference." The court specifically stated that it was "not necessarily going to let [the expert testimony] in."

The State offered Detective Coleman as a gang expert at trial. Counsel for a co-defendant conducted an extensive *voir dire* probing primarily whether the basis for Detective Coleman's opinion testimony was information he learned from others as opposed to information from personal observation. Mr. Whitener's counsel joined in that challenge. Following *voir dire* by defense counsel, the court accepted Detective Coleman as an expert in gang identification, definition, existence, and organization. Mr. Whitener's counsel then renewed his earlier objection made in the pretrial motion, arguing that "[t]he officer is relying on other witnesses' testimony. He doesn't – didn't formulate the information himself. He is relying on the statements of other witnesses." Mr. Whitener did not argue that Detective Coleman lacked a reliable methodology for his testimony or that his analysis was unreliable. The court overruled the objection and allowed Detective Coleman to testify.

As the State asked Detective Coleman about his investigation of Mr. Whitener, and specifically about Mr. Whitener's "role within Brick City," Mr. Whitener objected on the ground of hearsay. Mr. Whitener did not object when Detective Coleman testified, based on his training and expertise, that Brick City was a gang, nor did he object when Detective Coleman testified that it was his opinion that Mr. Whitener "was a member of the Brick City organization" and that Mr. Pride "was the leader of the organization, Brick City."

We agree with the State that Mr. Whitener's objections failed to preserve the argument that he now raises. Under Rule 8-131(a), we "will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court." Here, Mr. Whitener's objections at trial were based on the specific grounds of hearsay and on the inadequacy of the State's pretrial disclosures, arguments that he does not raise on appeal. Because he "state[d] specific grounds when objecting to evidence at trial," he thus "has forfeited all other grounds for objection on appeal." *Perry v. State*, 229 Md. App. 687, 709 (2016). Mr. Whitener did not specifically challenge before the trial court the reliability of the methodology that Detective Coleman used to arrive at his conclusions. *See Hollander v. Hollander*, 89 Md. App. 156, 174 (1991) (holding that the defendant failed to preserve for review his objection to the methodology used by the plaintiff's expert to determine the value of the property at issue, where defendant's objection at trial was limited to the date of the expert's valuation of the property). Mr. Whitener also waived any objection to Detective Coleman's testimony that Brick City was a gang and that Mr. Whitener was a member of that gang by failing to object when that testimony was offered. *See* Md. Rule 2-517(a) ("An objection to the admission of evidence shall be made at the

time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived."). *Cf. Gutierrez v. State*, 423 Md 476, 487-89 (2011) (concluding that where court granted a "continuing objection" to gang expert testimony, and did not ask counsel to state its grounds for the objection, the issue of admissibility of such evidence was preserved for appeal).

Furthermore, even if defense counsel had objected to Detective Coleman's testimony that Brick City was a gang, that objection was waived and rendered harmless beyond a reasonable doubt when Sergeant Landsman, who was accepted without objection as a gang expert, testified that, in his expert opinion, Brick City was a criminal gang. "Objections are waived if, at another point during the trial, evidence on the same point is admitted without objection." *DeLeon v. State*, 407 Md. 16, 31 (2008); *see also Ridgeway v. State*, 140 Md. App. 49, 66 (2001) ("A challenge to the trial court's decision to admit testimony is not preserved unless an objection is made each time that a question eliciting that testimony is posed."). Accordingly, Mr. Whitener failed to preserve and waived his contention that the trial court abused its discretion in permitting Detective Coleman to offer expert gang conclusions regarding Brick City.

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