MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Darwish Bowlds,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

June 28, 2023

Court of Appeals Case No. 22A-CR-2703

Interlocutory Appeal from the Grant Superior Court

The Honorable Jeffrey D. Todd, Judge

Trial Court Cause No. 27D01-2112-MR-6

Memorandum Decision by Judge Crone
Judge Brown and Senior Judge Robb concur.

Crone, Judge.

Case Summary

[1] Darwish Bowlds appeals the denial of his motion to dismiss the charges filed against him in December 2021 for the alleged murder of Jessie Pete Flowers in December 2001. Bowlds argues that the State's delay in filing charges unduly prejudiced his due process right to a fair trial. We disagree and therefore affirm.

Facts and Procedural History

[2] According to the probable cause affidavit, around 8:40 p.m. on December 28, 2001, Marion Police Department officers responded to a 911 call from Nathan Callahan, who reported that "someone had crashed into his" vehicle at his residence in the 100 block of West 15th Street. Appellant's App. Vol. 2 at 13. "Callahan was with Sam Harris at the time of the 911 call. Both Callahan and Harris knew the driver of the crashed vehicle and identified him as Pete Flowers." *Id*. Callahan told the officers "that a boy, identified as a Walker boy, walked up to him and told him that he had heard shots fired." *Id*. Flowers was slumped in the driver's seat of the vehicle with a $10 bill on his chest, and there was "a lot of blood" in the vehicle. *Id*. The officers "observed what they thought to be gunshot wounds to" Flowers, and they called for assistance. *Id*.

[3] Officers "began to speak with individuals that they saw in the area and also complete a neighborhood canvass." *Id*. at 14. Timothy Walker stated "that he heard what he thought were three to four gun shots near his residence" in the 1400 block of South Washington Street. *Id*. Joshua Kierstead "stated that he was walking south in the 1500 block of South Gallatin Street and heard some

arguing and then three or four gun shots." *Id.* Al Pulliam, who resided in the 1500 block of South Boots Street, stated that he "heard four or five gun shots." *Id.* Donald Johnson, who resided in the 1500 block of South Gallatin Street, "stated that he heard some gun shots." *Id.* "He … immediately got up and looked out his window and observed a vehicle pulling forward on Boots Street and a black male wearing a grey type sweat suit with a hood on it running diagonal across the open field." *Id.* "He … observed a hat fly off the black male as the male was running." *Id.*

[4] George Sanders "stated that he was coming out of his residence" in the 1700 block of South Boots Street

> when he heard gun shots and he got on his bike and started riding towards the Triangle Liquor Store and as he was riding he saw a man he knew as "Loc", later determined to be Darwish Bowlds, running to the South. Sanders stated that "Loc" was running so fast there was no way "Loc" saw him. Sanders stated that he saw a hat fly off "Loc's" head as "Loc" was running. Sanders advised that he did not see anyone else running at all in that area. Sanders then picked "Loc" out of a photo array shown to him, and "Loc" was in fact Darwish Bowlds ….

Id.

[5] "One of the pieces of evidence located was a blue 'North Carolina' baseball-style hat located in the field just as … Johnson stated he observed fall off the head of the male he saw running and … Sanders stated he observed a hat fly off [Bowlds'] head as he was running." *Id.* An autopsy determined that Flowers' "cause of death was homicide and that the gunshot wound that entered through

his back and traveled striking the [a]orta, parts of the left and right lung, and the [a]nterior [v]ena [c]ava was the fatal shot of all the shots that struck the victim." *Id*.

[6] In November 2004, Thabit Gault told detectives that Bowlds "contacted him immediately following the shooting" and asked Gault to come to Bowlds' house near 20th and Gallatin Streets "right away." *Id*. at 15. When Gault arrived, Bowlds stated that Flowers "was trying to buy cocaine off" him near 16th and Boots Streets and "began to drive away while [Bowlds] was still learning in the car[.]" *Id*. Bowlds told Gault that "he had to shoot [Flowers] because he was dragging him down the road in his car because [Bowlds] was stuck on something." *Id*. Gault told the detectives that he "could not remember what [Bowlds] was wearing that night but did state that [Bowlds] told him that he had lost his hat while running from the shooting." *Id*. "Gault stated that they went to Tara Davis's residence and that Melissa Davis gave [Bowlds] a ride to Indianapolis that night because [Bowlds] wanted to get out of town." *Id*.

[7] Tara Davis told a detective that she and her sister Melissa gave Bowlds "a ride to Indianapolis on the night Pete Flowers was murdered." *Id*. Melissa told the detective "that [Bowlds] gave her money to take him there and that once she dropped him off, she came straight back to Marion." *Id*. "She stated that they did not have any conversation about the murder and that she never saw a gun." *Id*.

[8] In May 2005, Bowlds "had two active warrants for his arrest unrelated to the Pete Flowers homicide investigation that was ongoing. [Bowlds] was stopped on a traffic stop and subsequently arrested on the … warrants and taken to the Grant County Jail." *Id*. Bowlds refused to talk to police about the Flowers case and claimed that he had nothing to do with the shooting. Police got a warrant to obtain a blood sample from Bowlds. In October 2005, police received lab test results indicating that DNA from Bowlds' blood sample matched DNA obtained from the blue North Carolina hat found in the field near the homicide scene.

[9] On December 1, 2021, the State charged Bowlds with murder and felony murder in connection with Flowers' death. Bowlds filed a motion for discovery, and the trial court ordered the State to produce a copy of "[a]ny and all discovery" in its possession. *Id*. at 23. In March 2022, the State filed a notice of discovery compliance. In June 2022, Bowlds filed a motion to dismiss, alleging that the nearly twenty-year delay in filing charges "prejudiced his right to a fair trial and has given the State a tactical advantage over [him]." *Id*. at 26.

[10] In August 2022, after an evidentiary hearing, the trial court issued an order in which it noted that "the State offered no explanation for the delayed filing of the charge, other than to imply that a prior elected prosecutor was to blame." Appealed Order at 2. The court then made the following findings:

> The difficult question for the Court to resolve is whether the State's unjustifiable delay in filing the charge has caused Bowlds to suffer actual and substantial prejudice to his right to a fair trial.

As to this issue, the Court finds that Bowlds did prove by a preponderance of the evidence that the delay has resulted in actual prejudice; however, he failed to prove the prejudice is substantial.

Bowlds asserts that there are numerous deceased witnesses including Henry Hull, Robert Klette, Sammie Lee Harris, Jr., Nyeusi McCreary, DeCarlos Bledsoe, and Al Pulliam. As to each of these deceased potential witnesses, the Court makes the following findings and conclusions[:]

1. Henry Hull. Hull told the police that he heard Nathan Callahan or Jerome Greer killed Flowers, but Bowlds did not present evidence that Hull was present and personally witnessed any events associated with Flowers' death. Furthermore, it is noteworthy that Hull also told the police "If I knew who did it man … I would tell you all." Hull's unavailability does not support Bowlds' claim of prejudice. Hull died on February 18, 2020.

2. Robert Klette. Klette's DNA matched DNA from [a] second hat found in the area where Flowers died. Police interviewed Klette and he denied any involvement in Flowers' death or even that he knew Flowers. The defense has offered no evidence to contradict Klette's statements; however, the unavailability of a witness who can be connected to the scene of a killing by physical evidence is prejudicial to Bowlds' right to a fair trial. Klette died on June 4, 2012.

3. Sammie Lee Harris. Harris died in 2005. Bowlds claims Harris told police that he found Flowers dead at the scene and that Harris' version of events differs from a version of events provided by Nathan Callahan. Bowlds called no witnesses at the hearing on his Motion to Dismiss, but did enter into evidence seventeen exhibits, including prior statements given by potential witnesses. No statement from Harris was entered into evidence; therefore, the importance of his testimony and value as a witness is

speculative.

4. Nyeusi McCreary. Mr. McCreary died in February of 2006. On February 12, 2004, and January 17, 2006, McCreary gave statements to police in which he asserted that Bowlds confessed to him that he killed Flowers. Bowlds has presented no evidence to the Court that McCreary might have been able to provide exculpatory evidence. Bowlds has failed to demonstrate that McCreary's unavailability prejudices his right to a fair trial. Instead, McCreary's absence hinders the State's case.

5. DeCarlos Bledsoe. Mr. Bledsoe died on November 14, 2012. On June 15, 2005, Bledsoe told police that he overheard his aunt tell his mother that a person named "Loc" killed Flowers. Bowlds presented nothing to suggest that Bledsoe could provide any other evidence relevant to Flowers' death. Instead, the evidence presented demonstrates that Bledsoe's comments regarding Bowlds are merely hearsay.

6. Al Pulliam. Mr. Pulliam died on October 6th, 2018. On the night Flowers was killed in 2001, Pulliam told the police that he was in his home which was located in the area where Flowers' body was found and he heard four or five gunshots that evening. To claim that Pulliam may have been able to provide other relevant evidence is speculative.

Bowlds also argues that surviving witnesses Thabit Gault, and Donald Johnson live outside the jurisdiction making it "more difficult" to locate them. The Court finds this is not an unusual circumstance in a criminal case and that any such difficulty does not constitute evidence that Bowlds' right to a fair trial is prejudiced in any manner.

Bowlds next complains that police never interviewed potential witnesses Jerome Greer, Tavaris Turner, and Charles Greer. Bowlds suggests that these witnesses may have information about Flowers' death, but their memories have possibly faded. Whether

> the memories of these potential witnesses have faded is speculative.
>
> In the realm of physical evidence, Bowlds has presented uncontroverted evidence that the car in which Flowers was found no longer is available for inspection, or even in the custody of law enforcement, foreclosing any opportunity to conduct fingerprint, DNA, and other forensic analyses. It is unknown to the Court whether the State conducted any testing of the car or whether Bowlds could glean valuable evidence after testing. However, it is common for vehicles linked to homicides to yield important evidence. The Court finds that the unavailability of the car for testing does prejudice Bowlds' right to a fair trial.
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> Bowlds' remaining complaints relate to discovery issues which do not rise to the level of specific and concrete allegations of prejudice that are supported by evidence.
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> Having considered all of Bowlds' allegations of prejudice, the Court finds that some are supported by evidence while most are not. Those allegations supported by evidence demonstrate that the State's delay in charging Bowlds with murder will prejudice his right to a fair trial to some degree. However, Bowlds has not shown the Court that the delay will substantially prejudice his right to a fair trial or that the State delayed filing the charge to gain a tactical advantage. Accordingly, Bowlds' Motion to Dismiss Information is denied.

Id. at 3-5. This interlocutory appeal ensued.

Discussion and Decision

[11] "A defendant has the burden of proving, by a preponderance of the evidence, all facts necessary to support a motion to dismiss." *Barnett v. State*, 867 N.E.2d 184, 186 (Ind. Ct. App. 2007), *trans. denied*. Because Bowlds is appealing from a

negative judgment, we will reverse only if the evidence is without conflict and leads inescapably to the conclusion that he is entitled to a dismissal. *Id*.

[12] "Generally, prosecutors are invested with broad discretion in the decision of such matters as when to prosecute and are not under any duty to bring charges as soon as probable cause exists." *Schiro v. State*, 888 N.E.2d 828, 834 (Ind. Ct. App. 2008), *trans. denied*. That discretion is not unlimited, however. *Ackerman v. State*, 51 N.E.3d 171, 189 (Ind. 2016), *cert. denied*. "The United States Supreme Court has recognized that a pre-indictment delay in prosecution can result in a Due Process Clause violation." *Id*.[1] Criminal charges filed within the statutory limitation period are generally considered timely. *Barnett*, 867 N.E.2d at 186. "Nevertheless, even where charges have been brought within the statutory period, or, as here, where there is no statute of limitations for the charged crime, undue delay in filing charges that causes prejudice to the defendant may constitute a violation of the due process rights of the defendant." *Id*.; *see* Ind. Code § 35-41-4-2(d) (providing that murder prosecution "may be commenced … at any time").

[13] "However, the mere passage of time is not presumed to be prejudicial, and the burden is on the defendant to show that the delay was unduly prejudicial by

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[1] The State observes that "[a]lthough Bowlds mentions Article 1, Section 12 of the Indiana Constitution, he makes no separate argument regarding the Indiana Constitution" and instead "discusses the factors for reviewing a claim of a due process violation under the U.S. Constitution." Appellee's Br. at 13 n.1. We agree with the State that Bowlds has therefore "waived any argument based on the Indiana Constitution." *Id*. (citing *Abel v. State*, 773 N.E.2d 276, 278 n.1 (Ind. 2002)).

making specific and concrete allegations of prejudice that are supported by the evidence." *Barnett*, 867 N.E.2d at 186. More specifically, our supreme court has explained that

> the defendant has the burden of proving that he suffered "actual and substantial prejudice to his right to a fair trial," and upon meeting that burden must then demonstrate that "the State had no justification for delay," which may be demonstrated by showing that the State "delayed the indictment to gain a tactical advantage or for some other impermissible reason."

Ackerman, 51 N.E.3d at 189-90 (quoting *Schiro v. State*, 888 N.E.2d at 834).[2]

[14] "When a defendant claims he will be prejudiced by delayed prosecution due to deceased witnesses, witnesses with fading memories, or those who are unavailable, he must do more than show that a particular witness is unavailable and that the witness' testimony would have helped the defense." *Williams v. State*, 188 N.E.3d 472, 477 (Ind. Ct. App. 2022). "The defendant must demonstrate how the witness would have aided his defense by articulating reasonable inferences regarding the knowledge the witness likely possessed and

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[2] Bowlds advocates for the elimination of the second evidentiary burden, asserting, "If the delay actually caused a tactical advantage, what difference does it make if the gained advantage was intentional or unintentional. Shouldn't the only criteria be whether the delay resulted in a tactical advantage that substantially prejudices the defense?" Appellant's Br. at 8 n.4. This question should be addressed to the Indiana Supreme Court, which decided *Ackerman*. Bowlds also suggests that it would be nearly impossible for a defendant to establish "that the prosecutor delayed filing in order to gain a tactical advantage. Is it expected that the prosecutor would admit to this unethical behavior on the record or would leave clues for the defense to decipher that [the prosecutor] delayed the filing in order to gain a tactical advantage?" *Id*. The first option seems highly unlikely, but it is readily conceivable that a defendant could discover and present sufficient circumstantial evidence from which a court could reasonably infer that the prosecutor delayed filing to gain a tactical advantage. Obviously, the trial court in this case concluded that Bowlds failed to meet this burden.

what relevance that information would have had to his defense." *Id*. "The court will not speculate on how the witness would have helped the defense." *Id*.

Deceased witnesses

[15] The bulk of Bowlds' argument focuses on the alleged prejudice resulting from the unavailability of the six deceased witnesses mentioned in the trial court's order.

1. Henry Hull

[16] Bowlds claims that Hull "could have provided detailed information that could lead the defense to other witnesses or evidence that would exonerate" Bowlds. Appellant's Br. at 19. The trial court found, and Bowlds does not dispute, that there is no evidence that Hull personally witnessed Flowers' shooting, and thus he had no firsthand knowledge of the identity of Flowers' killer. In January 2002, Hull told police that he had heard that either Nathan Callahan or Jerome Greer killed Flowers and that Lee Henry was Greer's accuser, and Bowlds made no attempt to show that any of these potential witnesses are currently unavailable. Moreover, Hull flatly stated that he did not believe that Callahan shot Flowers. *See* Ex. Vol. 3 at 24 ("Nate wouldn't do that.").[3] Hull told police that he had heard "a thousand different stories" and that if he knew who did it, he would tell them because Flowers was "like [his] little brother." *Id*. at 23, 25.

[3] Here, and elsewhere, we have altered the typography of interview transcripts printed in all caps.

[17] Hull also told police that Thabit Gault and Jerome Greer attempted to bribe him to lie on the stand in a recent criminal trial against Bowlds' uncle, and that George Sanders threatened to "start some stuff" if either Hull or Flowers testified at all. *Id*. at 13-16. Hull stated that Flowers told Sanders, "Don't threaten me, I'm gonna go tell what happened." *Id*. at 16. Both Flowers and Hull testified. Hull told police that a few days after the trial, he was at a liquor store and saw several people in a car, including an unknown member of the Bowlds family, and that those people pointed him out as "the one that testified" at trial. Ex. Vol. 3 at 18. Hull later heard that he "was next on the list" and that he "got [him] something" for "protection[.]" *Id*. at 22.

[18] Bowlds asserts that "[t]he loss of [Hull's] testimony is especially prejudicial due to the fact that Thabit Gault and George Sanders are still alive and able to testify without any contradiction from [Hull] or the detailed information that [Hull] may have been able to provide." Appellant's Br. at 20. But Bowlds could depose Gault and Sanders about Hull's statements to police (which would not be offered in evidence to prove the truth of the matters asserted therein) and further explore the issue at trial in an effort to expose and exploit inconsistencies, challenge their credibility, and suggest that either or both of them had a motive to murder Flowers. Bowlds' assertion that Gault would deny attempting to bribe Hull is pure speculation. In sum, Bowlds has failed to establish that Hull's unavailability would substantially prejudice his right to a fair trial.

2. Robert Klette

[19] The record indicates that Klette was arrested on an unrelated matter in March 2009 and was asked by a detective "if he could recall any events from December of 2001." Ex. Vol. 3 at 28.[4] Klette "stated that he had just come to Marion around that time period after living in Muncie for the past fifteen years" and was "probably" living at the Grant County Rescue Mission or the Bradford Apartments. *Id*. He denied knowing Flowers or having anything to do with his killing, and he stated that he did not "hang out" in that neighborhood. *Id*. When the detective told Klette "that a hat with his DNA was found near the crime scene[,] Klette stated that he did not know how that had happened other than one of his hats could have been stolen by someone at the mission or he could have left it in a tavern." *Id*. The trial court properly acknowledged that Klette's unavailability due to his death in June 2012 was "prejudicial to Bowlds' right to a fair trial." Appealed Order at 3.

[20] But the State suggests, and we agree, that the prejudice is not substantial, not least because "it is highly unlikely that Klette would have testified at Bowlds' trial and stated that he was involved in Flowers' murder." Appellee's Br. at 17. Bowlds posits that Klette "could have testified as to his whereabouts on the night of the murder and his knowledge of Thabit Gault, George Sanders,

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[4] The excerpts in this paragraph are from the detective's summary of the interview. Bowlds asserts that the actual interview and a subsequent polygraph have not been provided to his counsel, Appellant's Br. at 22, but he does not specifically allege that the State violated the trial court's discovery order.

Jerome Greer, or" Bowlds himself. Appellant's Br. at 23. The State points out, however, that "Bowlds offered no evidence from any of these witnesses that they knew Klette. Therefore, there is no reason to believe that Klette had any contact with them." Appellee's Br. at 18. The State further observes that

> Klette's death … hurts the State's case because he can no longer testify and explain why his hat was found at the scene. Bowlds may argue to the jury that Klette was actually the killer. The State's ability to counter that defense will be hindered by the fact that the State will no longer be able to call Klette to testify about why his hat was found there.

Id.; *see State v. Azania*, 865 N.E.2d 994, 1010 (Ind. 2007) (recognizing that "delay is a two-edged sword" and that "passage of time may make it difficult or impossible for the Government" to prove its case beyond reasonable doubt) (alteration omitted) (quoting *United States v. Loud Hawk*, 474 U.S. 302, 315 (1986)).

3. Sammie Lee Harris

[21] Harris died in July 2005, several months before DNA test results established a link between Bowlds and the blue hat found near the homicide scene. The State notes that "even if the previous prosecutor had concluded that there was sufficient evidence to charge Bowlds after the DNA results were known, Harris would not have been able to testify at trial." Appellee's Br. at 16-17. Furthermore, as the trial court observed, Bowlds offered no statements from Harris into evidence at the hearing on the motion to dismiss, and thus "the

importance of his testimony and value as a witness is speculative." Appealed Order at 4.[5]

4. Nyeusi McCreary

[22] McCreary, who informed police that Bowlds "told him that he shot Flowers[,]" Ex. Vol. 3 at 31, died in February 2006, only a few months after the police received the DNA test results linking Bowlds to the blue hat. The State points out that even if charges had been filed "shortly after the DNA report was issued on October 7, 2005, it is unlikely that McCreary would have been alive to testify at Bowlds' trial since most murder cases do not proceed to trial within four months of the filing of charges." Appellee's Br. at 18. Moreover, and more important, we agree with the State that "rather than suffering any substantial prejudice from McCreary's unavailability, Bowlds will benefit from McCreary not testifying at trial that Bowlds admitted to killing Flowers." *Id*.

5. DeCarlos Bledsoe

[23] As for Bledsoe, the bottom line is that his statements tending to implicate "Loc"/Bowlds as Flowers' murderer "are merely hearsay[,]" as the trial court properly found, and therefore would not have been inadmissible at trial.

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[5] Bowlds argues that the State, "in theory, could have filed charges without the DNA results, meaning Harris would have been alive at that point and available for cross-examination." Reply Br. at 10-11. We decline to speculate whether the State had probable cause to charge Bowlds without the DNA test results because, in theory, the State could have had credibility and/or other concerns about the witnesses who provided statements implicating Bowlds in Flowers' homicide. *See Allen v. State*, 813 N.E.2d 349, 368 (Ind. Ct. App. 2004) ("It is proper for a prosecutor to delay filing charges 'until he is completely satisfied that he should prosecute and will be able promptly to establish guilt beyond a reasonable doubt.'") (quoting *United States v. Lovasco*, 431 U.S. 783, 795 (1977)), *trans. denied*.

Appealed Order at 4; *see* Ind. Evidence Rule 802 ("Hearsay is not admissible unless these rules or other law provides otherwise."). Furthermore, as the State observes, "the absence of a witness identifying Bowlds as the killer clearly benefits his defense." Appellee's Br. at 19.

6. Al Pulliam

[24] Approximately two hours after Flowers was killed, Pulliam told police that he heard what "seemed like four or five" gunshots earlier that evening, but that he "didn't hear anything" else because he "had the TV on[,]" and he did not look out the window and had "no idea" about "what had happened [that] evening[.]" Ex. Vol. 3 at 61-62. Bowlds claims that Pulliam's testimony would have been critical because Gault told police that Bowlds told him that he "shot" Flowers twice. *Id*. at 110. We fail to see how Bowlds' inability to further explore this minor discrepancy with Pulliam would substantially prejudice his right to a fair trial, especially since Bowlds has failed to establish the unavailability of potential witnesses Timothy Walker and Joshua Kierstead, both of whom told police that they heard three or four gunshots.

Other witnesses

[25] In his motion to dismiss, Bowlds also argued that "other witnesses[,]" namely Donald Johnson and Thabit Gault, "are outside of the jurisdiction, making it more difficult to locate and/or receive information from them." Appellant's App. Vol. 2 at 39. On appeal, Bowlds does not specifically challenge the trial court's finding that "this is not an unusual circumstance in a criminal case and

that any such difficulty does not constitute evidence that Bowlds' right to a fair trial is prejudiced in any manner." Appealed Order at 4. Instead, Bowlds raises additional arguments regarding Johnson and Gault that he did not raise in his motion to dismiss. This he may not do. *See State v. Allen*, 187 N.E.3d 221, 228 (Ind. Ct. App. 2022) ("Arguments raised for the first time on appeal, even ones based upon constitutional claims, are waived for appeal."), *trans. denied*; *Griffin v. State*, 16 N.E.3d 997, 1006 (Ind. Ct. App. 2014) (noting that waiver rule in part protects integrity of trial court, as it cannot be found to have erred as to an "argument that it never had an opportunity to consider") (quoting *Showalter v. Town of Thorntown*, 902 N.E.2d 338, 342 (Ind. Ct. App. 2009), *trans. denied*).

Other evidence

[26] Finally, Bowlds argues that the State's delay in charging actually and substantially prejudiced his right to a fair trial because certain evidence is now unavailable: the vehicle in which Flowers was shot, a set of keys and a pager found near the scene, and the audiotapes of Hull's and McCreary's interviews. The trial court found that the unavailability of the vehicle prejudices Bowlds, but it did not find the prejudice to be substantial. Bowlds contends that it is, noting that Gault told police that "Flowers was trying to buy some cocaine off of [Bowlds] and [Flowers] was trying to pull off while [Bowlds] was still half-way in the car talking to him.[…] so I guess [Bowlds] just let off a couple shots." Ex. Vol. 3 at 74-75. Bowlds argues that, "[w]ithout the vehicle, there is no way to confirm whether or not [his] DNA was in the vehicle; or if another person's DNA, such as [Gault's], was present." Appellant's Br. at 30-31. On the

flip side, the State points out that "it is possible that fingerprint testing of the vehicle would have implicated Bowlds[.]" Appellee's Br. at 22. Bowlds has the same access to the available evidence as the State, so he is not laboring under a disadvantage, and we decline to speculate how the vehicle would have helped his defense. *See Johnson v. State*, 810 N.E.2d 772, 776 (Ind. Ct. App. 2004) (making similar observations in burglary case where witnesses had died, no photographs of crime scene were available, and police did not sweep scene for fingerprints), *trans. denied*. We also decline to speculate about the missing set of keys and pager, which may or may not have been tested for DNA or fingerprints.

[27] As for the missing audiotapes, Bowlds complains about the number of times that "inaudible" appears in the transcripts of Hull's and McCreary's interviews, and he states that, without the audiotapes, he is unable to determine what was actually said. But he does not specifically allege, let alone establish, that the inaudible portions appear in critical portions of the transcripts, and we have already determined that Bowlds can only benefit from McCreary's absence.

[28] Based on the foregoing, we conclude that Bowlds has failed to establish that the evidence is without conflict and leads inescapably to the conclusion that his due process right to a fair trial was actually and substantially prejudiced by the State's delay in bringing charges. Consequently, we need not consider whether the delay was used to gain a tactical advantage. We affirm the trial court's denial of Bowlds' motion to dismiss.

[29] Affirmed.

Brown, J., and Robb, Sr.J., concur.