IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM EUGENE MOON,

Petitioner Docket No. _____

v.

STATE OF TENNESSEE,

Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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FILED
04/20/2022
Clerk of the
Appellate Courts

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE
October 6, 2021 Session[1]

STATE OF TENNESSEE v. WILLIAM EUGENE MOON

Appeal by Permission from the Court of Criminal Appeals
Circuit Court for Coffee County
No. 44,905F L. Craig Johnson, Judge

No. M2019-01865-SC-R11-CD

William Eugene Moon ("Defendant") was convicted of attempted second degree murder and unlawful employment of a firearm during the commission of or attempt to commit a dangerous felony. Defendant appealed his conviction and asserted, among other things, that he had been denied the right to a speedy trial and that the trial court erred by allowing improper impeachment of a defense witness. The Court of Criminal Appeals affirmed the judgments of the trial court, holding that Defendant was not denied a speedy trial and, although the trial court erred in allowing the prosecution to improperly impeach a defense witness, the error was harmless. This Court granted Defendant's application for permission to appeal to consider whether the Court of Criminal Appeals applied the proper standard of review to Defendant's claim that he was denied a speedy trial, to address the merits of Defendant's speedy trial claim, and to determine whether the trial court committed reversible error in allowing improper impeachment of a defense witness. We hold that the standard of review for an alleged speedy trial violation is de novo with deference to the trial court's findings of fact unless the evidence preponderates otherwise. When reviewed under this standard, we determine that the Court of Criminal Appeals properly held that the Defendant was not denied a speedy trial. Further, we agree with the intermediate court that the trial court erred in allowing improper impeachment of a defense witness. However, we hold that this error was not harmless and is reversible error. Accordingly, we reverse the judgment of the Court of Criminal Appeals and vacate the judgments of the trial court. The case is remanded to the trial court for further proceedings consistent with this opinion.

Tenn. R. App. P. 11 Appeal by Permission; Judgment of the Court of Criminal Appeals Reversed; Judgments of the Trial Court Vacated; Case Remanded to Trial Court

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[1] We heard oral argument through videoconference under this Court's emergency orders restricting court proceedings because of the COVID-19 pandemic.

ROGER A. PAGE, C.J., delivered the opinion of the court, in which SHARON G. LEE, JEFFREY S. BIVINS, and HOLLY KIRBY, JJ., joined.

Paul Andrew Justice, III, Murfreesboro, Tennessee, for the appellant, William Eugene Moon.

Herbert H. Slatery III, Attorney General and Reporter; Andrée S. Blumstein, Solicitor General; Sophia S. Lee, Senior Assistant Attorney General; Benjamin A. Ball, Senior Assistant Attorney General; Samantha L. Simpson, Assistant Attorney General; Craig Northcott, District Attorney General; and Jason Ponder, Assistant District Attorney, for the appellee, State of Tennessee.

OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

On December 17, 2017, Corporal Michael Wilder[2] was on patrol near apartments he previously searched for drug trafficking when he saw a black sports utility vehicle with spray-painted windows. Corporal Wilder drove by the vehicle and observed four individuals he believed to be avoiding him. He parked in a side alley and watched the vehicle, noticing the occupants entering and exiting the vehicle to walk to a trailer park on the other side of the road. Corporal Wilder considered this to be strange behavior and drove through the trailer park "to figure out what [was] going on." At the trailer park, Corporal Wilder observed several people outside, including one man who lowered his head and ran up to a trailer when he saw Corporal Wilder approaching.

Corporal Wilder spoke with Larry Woods, an employee of the trailer park,[3] outside of Mr. Woods' trailer. Corporal Wilder asked Mr. Woods who was inside the trailer, and Mr. Woods told Corporal Wilder it was Defendant. Corporal Wilder asked Mr. Woods to retrieve Defendant from the trailer, and Mr. Woods complied. Defendant emerged from the trailer, standing atop a set of steps. Corporal Wilder believed Defendant appeared "fidgety" and "nervous" and that Defendant's breathing "start[ed] to pick up." To Corporal Wilder, these were signs of "evasion" or "possible violence." Corporal Wilder noticed a plastic bag inside Defendant's mouth that he believed contained methamphetamine. He instructed

[2] At the time of the incident, Michael Wilder was senior corporal on day shift and acting sergeant for the Tullahoma Police Department. At the time of trial, he had transferred to the Manchester Police Department. For clarity, we will refer to him as "Corporal Wilder" throughout this opinion.

[3] The record is unclear as to whether Larry Woods was the manager or maintenance man at the trailer park.

Defendant to spit out the plastic bag, and a tussle ensued between Corporal Wilder and Defendant. Precisely what happened during that conflict is at the core of this case.

According to Corporal Wilder, Defendant began cursing and actively fighting against him. Corporal Wilder testified that, during the scuffle, Defendant pulled a gun and held it against Corporal Wilder's abdomen. Corporal Wilder tried to get the gun away from Defendant. He believed Defendant was attempting to use deadly force against him. According to Corporal Wilder, as a "last resort" he pushed Defendant back and shot at him.

Defendant's version of events differs substantially. While he admitted he had a gun in the waistband of his pants that day, Defendant insisted he did not fight against Corporal Wilder and he never took the gun out. Rather, Defendant claimed that the gun fell out of his pants and underneath him after Corporal Wilder shot him.

It is undisputed that Corporal Wilder shot Defendant five times. Defendant was transported to a hospital in Alabama for medical treatment, and his arrest warrant was issued by the General Sessions Court on December 21, 2017, while he was still hospitalized. The record indicates that Defendant was served with the warrant for his arrest and incarcerated in Tennessee on January 24, 2018.

On April 10, 2018, Defendant was indicted for attempted first-degree murder, resisting arrest, aggravated assault, and two counts of unlawful employment of a firearm during the commission of or attempt to commit a dangerous felony. He was arraigned in circuit court on April 17, 2018. At a court appearance on May 9, 2018, he requested a trial date. On May 23, 2018, the trial court set the trial for November 28, 2018. As the trial date approached, the State moved for a continuance due to a scheduling conflict with a multi-day rape trial that had been pending for three years. Defendant opposed the motion, but the trial court reset his case for February 1, 2019. On January 16, 2019, Defendant filed a motion to dismiss the charges against him for violation of his right to a speedy trial.[4] The trial court issued a written order denying Defendant's motion to dismiss on February 7, 2019. Thereafter, the trial court sua sponte moved the trial to February 11, 2019, to allow Defendant's trial to proceed over three consecutive weekdays.

Before the trial began, the State moved to dismiss three counts of the indictment: Count 2 (resisting arrest), Count 3 (aggravated assault), and Count 4 (one count of unlawful employment of a firearm during the commission of or attempt to commit a dangerous felony). Thus, the trial proceeded against Defendant on Count 1 (attempted first-degree murder), and Count 5 (unlawful employment of a firearm during the commission of or

[4] Defendant previously filed a "Demand for Speedy Trial" in General Sessions Court.

attempt to commit a dangerous felony). The trial began on February 11, 2019, and concluded on February 14, 2019.

In addition to Defendant and Corporal Wilder, the court heard testimony from several other law enforcement officers and eyewitnesses.[5] Most notably, and relevant to the issues presented on appeal before this Court, the State called as a witness Detective Karl Pyrdom. Detective Pyrdom testified that he arrived at the scene after Officer Wilder called for backup. He arrived in time to see a "scuffle," and ran toward the trailer. He heard Corporal Wilder shouting instructions but did not hear him tell Defendant to drop a weapon. He stated that he could not see either party's hands and that he could not see Defendant holding a weapon. After gunshots were fired, Detective Pyrdom was instructed by Officer Wilder to "get that gun," and Detective Pyrdom testified that he picked up a weapon that he saw on the ground at the foot of the steps to the trailer.

The defense, in turn, called eyewitness Larry Woods. Mr. Woods described witnessing the altercation from close range. He emphasized that he did not see Defendant holding a gun and that, after Corporal Wilder shot Defendant, he did not initially see a gun on the ground. He later saw Detective Pyrdom kick a gun out from under Defendant, who was lying on the ground. Mr. Woods son, Donald, was also present at the scene and testified that he never saw a gun in Defendant's hand. In addition, J.J.,[6] a friend of Defendant's who was fourteen years old at the time of the incident, testified that he saw Defendant place a gun in his pants prior to the altercation with Corporal Wilder. He stated that he observed the altercation and that there was not a gun in Defendant's hands.

The jury convicted Defendant of the lesser-included offense of attempted second-degree murder and also convicted him of unlawful employment of a firearm during the commission of or attempt to commit a dangerous felony. The trial court sentenced Defendant to consecutive sentences of ten years for the attempted second-degree murder conviction and six years for the employment of a firearm conviction, for a total effective sentence of sixteen years imprisonment.

The Court of Criminal Appeals affirmed the judgments of the trial court. *See State v. Moon*, No. M2019-01865-CCA-R3-CD, 2021 WL 531308, at *1 (Tenn. Crim. App. Feb. 12, 2021), *perm. app. granted*, (Tenn. May 13, 2021). Relevant to this appeal, the intermediate appellate court concluded that Defendant's right to a speedy trial had not been

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[5] For a more thorough recitation of the facts, see the Court of Criminal Appeals opinion, *State v. Moon*, No. M2019-01865-CCA-R3-CD, 2021 WL 531308 (Tenn. Crim. App. Feb. 12, 2021), *perm. app. granted*, (Tenn. May 13, 2021).

[6] It is this Court's custom to use initials when referring to juvenile witnesses.

violated. *Id.* at *20. The court determined that the delay was not unreasonable and that Defendant failed to establish he had been prejudiced by the delay. *Id.* at *19-*20. The intermediate court also declined relief to Defendant on his argument that "the trial court improperly permitted impeachment of defense witness Mr. Larry Woods with prior bad acts of alleged drug dealing." *Id* at *12. While agreeing with Defendant that the trial court admitted the impeachment evidence in error, the court found the error to be harmless and affirmed Defendant's convictions. *Id.* at *15.

We granted Defendant's application for permission to appeal to consider whether the Court of Criminal Appeals applied the proper standard of review to Defendant's claim that he was denied a speedy trial, to address the merits of Defendant's speedy trial claim, and to determine whether the trial court committed reversible error in allowing improper impeachment of defense witness Larry Woods.

II. ANALYSIS

A. Standard of Review for Violation of Right to Speedy Trial

Both the United States Constitution and the Tennessee Constitution guarantee criminal defendants the right to a speedy trial.[7] *See* U.S. Const. amend. VI; Tenn. Const. art. 1 § 9. Defendant argues that his Sixth Amendment right to a speedy trial was violated and the charges against him must be dismissed. As always, our analysis of an allegation of error is subject to a particular standard of review, but the parties here disagree on the proper standard of review to apply to an allegation of a speedy trial violation.

The State urges this Court to apply an abuse of discretion standard of review, which is consistent with the standard applied by the intermediate court in this case. *See Moon*, 2021 WL 531308, at *19. As the Defendant notes, however, it appears that the abuse of discretion standard of review may have arisen inadvertently. As support for its use of the abuse of discretion standard of review, the intermediate court cited *State v. Hudgins*, 188 S.W.3d 663, 667 (Tenn. Crim. App. 2005). *Hudgins* and another oft-cited Court of Criminal Appeals case *State v. Easterly*, 77 S.W.3d 226, 236 (Tenn. Crim. App. 2001), both refer back to the case of *State v. Jefferson*, 938 S.W.2d 1, 14 (Tenn. Crim. App. 1996) as the source of the standard of review. However, the intermediate court in *Jefferson* simply concluded that "the trial court did not abuse its discretion in finding that the appellant's right to a speedy trial had been violated" without citation. *See Jefferson*, 938 S.W.2d at 14. The State acknowledges "several unreported cases" have applied de novo review but faults

[7] Tennessee Code Annotated section 40-14-101 (2018) also provides a statutory right to a speedy trial that is not at issue in this appeal.

those cases for improperly relying on *State v. Hawk*, 170 S.W.3d 547, 549 (Tenn. 2005), which did not analyze a speedy trial claim.

Defendant urges this Court to adopt a de novo standard of review and asserts that the majority of intermediate court panels have conducted a de novo review. *See, e.g.*, *State v. Hutchings*, No. M2008-00814-CCA-R3-CD, 2009 WL 1676057 at *5 (Tenn. Crim. App. June 16, 2009); *State v. Watson*, No. W2004-00153-CCA-R3-CD, 2005 WL 659020, at *4 (Tenn. Crim. App. Mar. 22, 2005); *State v. Picklesimer*, No. M2003-03087-CCA-R3-CD, 2004 WL 2683743, at *2 (Tenn. Crim. App. Nov. 24, 2004) (explaining that the question regarding the right to a speedy trial is a mixed question of law and fact subject to de novo review). Defendant concedes, however, that a number of intermediate court panels have applied the abuse of discretion standard without noting the conflict in authority. *See, e.g.*, *State v. Crippen*, No. E2011-01242-CCA-R3-CD, 2012 WL 5397109, at *3 (Tenn. Crim. App. Nov. 6, 2012); *Hudgins*, 188 S.W.3d 663 at 667; *Easterly*, 77 S.W.3d 226 at 236; *Jefferson*, 938 S.W.2d 1 at 14.

Defendant further cites to cases from several federal circuits that have adopted the de novo standard of review, giving deference only to the trial court's view of the facts. *See, e.g.*, *United States v. Molina-Solorio*, 577 F.3d 300, 303-04 (5th Cir. 2009); *United States v. Brown*, 498 F.3d 523, 530 (6th Cir. 2007); *United States v. Arceo*, 535 F.3d 679, 684 (7th Cir. 2008); *United States v. Aldaco*, 477 F.3d 1008, 1016 (8th Cir. 2007); *United States v. Sutcliffe*, 505 F.3d 944, 956 (9th Cir. 2007); *United States v. Schlei*, 122 F.3d 944, 986 (11th Cir. 1997). Defendant also suggests that the United States Supreme Court would conduct de novo review of all constitutional claims. *See U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge*, ----U.S.----, 138 S.Ct. 960, 967 n.4 (2018) ("In the constitutional realm, for example, the calculus changes. There, we have often held that the role of appellate courts 'in marking out the limits of [a] standard through the process of case-by-case adjudication' favors *de novo* review even when answering a mixed question primarily involves plunging into a factual record." (alteration in original)).

In contrast, the State suggests that, although the United States Supreme Court has not explicitly announced a standard of review for speedy trial claims, the Court's analysis in *Barker v. Wingo*, 407 U.S. 514 (1972), indicates it would use discretionary review. Further, the State submits that the Court should adopt the abuse of discretion standard because Tennessee courts apply this standard to a trial court's decision to dismiss an indictment for pre- or post- indictment delay under Tennessee Rule of Criminal Procedure 48(b). *See State v. Benn*, 713 S.W.2d 308, 311 (Tenn. 1986).

After review, we agree with Defendant that de novo review is appropriate. More specifically, we conclude that the standard for appellate review of whether a criminal defendant was denied his constitutional right to a speedy trial is de novo review with

respect to whether the court correctly interpreted and applied the law. The appellate court should give deference to the trial court's findings of fact unless the evidence preponderates otherwise. We determine this to be the most appropriate standard because, by nature, a speedy trial violation claim is a mixed question of law and fact. Many of the material facts required to analyze such claims are undisputed and require no discretion by the trial court. Determining whether such facts violate a defendant's right to a speedy trial is a question of law to be determined de novo by a reviewing court.

B. Defendant's Speedy Trial Claim

Having determined the proper standard by which we review a speedy trial claim, we now turn to the merits of Defendant's assertion that his right to a speedy trial was violated.

The relevant undisputed facts in this case are as follows: After being shot on December 17, 2017, Defendant was transported to a hospital in Alabama to recover. He was charged in general sessions court on December 21, 2017, and held in an Alabama jail awaiting transport to Tennessee after his release from the hospital. On January 24, 2018, Defendant was transported to Tennessee and served with an arrest warrant charging him with attempted first-degree murder and resisting arrest. February 2, 2018, was Defendant's first court date in general sessions court, but the preliminary hearing was continued to March 8, 2018. On March 7, 2018, Defendant filed a motion for a speedy trial. At the preliminary hearing on March 8, 2018, Defendant was bound over to circuit court. On April 10, 2018, Defendant was indicted by the Coffee County Grand Jury for attempted first-degree murder, resisting arrest, aggravated assault, and two counts of possession of a firearm during the commission or attempt to commit a dangerous felony. Defendant was arraigned in circuit court on April 17, 2018. Defendant's trial was set for November 28, 2018, but on November 6, 2018, the State moved to continue the trial due to a scheduling conflict with a three-year-old rape case. The trial court granted the State's motion over Defendant's objection and rescheduled the trial for February 1, 2019. On January 16, 2019, Defendant filed a motion to dismiss the indictment due to the violation of his right to a speedy trial. On February 7, 2019, the trial court entered a written order denying Defendant's motion to dismiss. The trial was again continued four more days to allow Defendant's trial to proceed over three consecutive weekdays. Ultimately, the trial began on February 11, 2019, and concluded on February 14, 2019.

Defendant argues the Court of Criminal Appeals erred in holding that his constitutional right to a speedy trial was not violated. In determining whether a criminal defendant was denied a speedy trial, the court examines four factors: (1) the length of the delay; (2) the reason for the delay; (3) whether there was a demand for a speedy trial; and (4) the presence and extent of prejudice to the defendant. *Barker*, 407 U.S. at 530. We will analyze each factor in turn.

(1) Length of Delay

Defendant asserts that the pretrial delay in this case of little more than one year weighs in favor of dismissal, but he admits only "moderately so." The State submits that the trial was minimally delayed and that the length of the delay was "not egregious." Defendant was charged with four felonies in this case, including attempted first-degree murder. The trial itself required three days on the court's calendar and testimony from multiple witnesses. The trial began less than fourteen months after the alleged crimes were committed and less than thirteen months after Defendant was served with the arrest warrant and transferred to a Tennessee jail. In light of the complex nature of this case, we agree with the Court of Criminal Appeals that the Defendant received his trial with "customary promptness" of Tennessee courts and that this factor weighs against Defendant's claim. *See Moon*, 2021 WL 531308, at *19-20.

(2) Reason for Delay

Defendant asserts that the delay was caused almost entirely by the government, which should weigh in favor of dismissal. The trial court acknowledged that the delay in this case was caused almost exclusively by the State, and the evidence does not preponderate otherwise. The only delay that appears to have been mutually agreed upon by the State and Defendant was at arraignment to allow time for discovery.

While we agree that the State was responsible for the majority of the (very brief) delays in this trial, Defendant has pointed to nothing in the record to support his assertion that the State's requests for delays were due to its "negligence or bureaucratic indifference." *See Doggett v. United States*, 505 U.S. 647, 657 (1992) (noting that negligence on the part of the government "falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun"). Defendant's trial date was initially set for November 28, 2018. The two continuances that followed delayed the trial only minimally and were to accommodate a rape trial in a significantly older case and to ensure that Defendant's case could be tried over three consecutive weekdays. We agree with the Court of Criminal Appeals that the reasons for delay were valid and reasonable. This factor also weighs against Defendant.

(3) Defendant's Demand for a Speedy Trial

The third factor contemplates that a defendant requested a speedy trial. *See State v. Berry*, 141 S.W.3d 549, 568-69 (Tenn. 2004). It is undisputed that Defendant requested a speedy trial in this case. We agree with the intermediate court that this factor weighs in Defendant's favor.

(4) Prejudice to Defendant

The State argues that Defendant can only show minimal prejudice, if any, as a result of the pretrial delay in this case. Defendant asserts he suffered prejudice in the form of pretrial anxiety and pretrial incarceration. There is no evidence in the record, however, that the circumstances of Defendant's pretrial incarceration were unusual or egregious. As the Court of Criminal Appeals has previously noted, pretrial "anxiety and concern are 'always present to some extent, and thus absent some unusual showing [are] not likely to be determinative in [a] defendant's favor.'" *State v. Hernandez*, No. M2016-02511-CCA-R3-CD, 2019 WL 2150171 at *40 (Tenn. Crim. App. May 15, 2019), *perm. app. denied*, (Tenn. Sept. 18, 2019) (alterations in original) (quoting 5 -Wayne Lafave, Criminal Procedure, § 18.2(e) (4th ed. 2017) (footnotes omitted)). Defendant was incarcerated for barely more than a year before his trial began. He points to no witnesses whose testimony he lost during that time nor to any other impairments in his ability to prepare a defense caused by the delay. In the absence of any discernable prejudice to Defendant, we determine that this factor also weighs against him.

In consideration of the foregoing, the only *Barker* factor that weighs in Defendant's favor is that he requested a speedy trial. Indeed, he received one. We agree, therefore, with the Court of Criminal Appeals that Defendant was not denied his constitutional right to a speedy trial.

C. Impeachment of Defense Witness

Next, we consider Defendant's assertion that the Court of Criminal Appeals improperly conducted a harmless error analysis after concluding that the trial court erred in allowing the State to impeach defense witness Larry Woods by prior bad acts.

Larry Woods was called as a defense witness at trial. During cross-examination, the State sought to question him about his prior bad acts.[8] Mr. Woods was an employee at the trailer park where the incident occurred, and it was his trailer at which the incident took place. Mr. Woods had known Defendant for approximately twelve to thirteen years. During direct testimony, Mr. Woods testified that Defendant asked to use the restroom inside his residence, and Mr. Woods obliged. While Defendant was inside the trailer, Corporal Wilder pulled his car into the trailer park. Mr. Woods testified that he approached the Corporal's vehicle and asked if he could help him. Corporal Wilder responded that Mr. Woods had a lot of people in his yard that day. Mr. Woods said he did not see a problem with that and people were outside because the sun was out after a period of bad weather.

[8] To clarify, Larry Woods' son, Donald Woods, was also a defense witness at trial. By "Mr. Woods," we refer to Larry Woods, whose testimony was most relevant to the issues presented on appeal.

Corporal Wilder asked Mr. Woods if he could speak with Defendant. Mr. Woods found Defendant in the trailer and told him that the Corporal would like to speak with him. Thereafter, Mr. Woods continued looking for something in his yard, and Defendant emerged from the trailer.

Continuing his direct testimony, Mr. Woods stated that Defendant was not upset or cursing during the ensuing conversation between Corporal Wilder and Defendant. This directly contradicted Corporal Wilder's testimony. At some point during the conversation, Defendant asked Corporal Wilder if he could have a beer. Another man who was present during the incident gave a beer to Defendant, and Corporal Wilder did not respond to Defendant's drinking a beer. Mr. Woods testified that he never heard Corporal Wilder mention Defendant being under arrest and he never heard Defendant say he would not allow Corporal Wilder to arrest him.

Defense counsel asked Mr. Woods what led Corporal Wilder to "put his hands on" Defendant. Mr. Woods responded that he did not know but heard Defendant say "Why have you got to be like that?" and Corporal Wilder say "Stop, or I'm going to taze you." Mr. Woods testified that Corporal Wilder then "jumped back and shot" Defendant. Defendant fell off the stairs he was standing on and was lying on the ground on his back. Throughout his testimony, Mr. Woods unequivocally maintained that he did not see Defendant with a gun during the altercation. When asked whether he would have been able to see a gun if Defendant was holding one, Mr. Wilder stated: "I was three feet away. I stepped back around where I could see, you know. If he would have had a gun, I would have seen the gun. I didn't see no gun." According to Mr. Woods, after shooting Defendant, Corporal Wilder turned the gun on Mr. Woods. Mr. Woods testified that he put his hands up. Mr. Woods did not see a gun on the ground near Defendant. After the shooting, officers found it and kicked it out from under Defendant.

On cross-examination, without any apparent foundation, the State very quickly began to question Mr. Woods about whether he sold methamphetamine out of his trailer. Defense counsel objected to the line of questioning and the court excused the jury. The court conducted a jury-out hearing, during which defense counsel argued that the State had no basis to pursue this line of questioning. The State responded by saying that Mr. Woods had been indicted for selling drugs to a confidential informant three months prior to the incident at issue. According to the State, the evidence that Mr. Woods sold methamphetamine showed Mr. Woods "ha[d] motivation not to be completely honest with what happened that day." The State insisted that "the fact that [Mr. Woods] is a drug dealer selling drugs from that location would suggest maybe he is not going to be fully cooperative with police." Without any additional proof, the trial court found the evidence relevant and that any potential unfair prejudice was outweighed by the probative value. The State then introduced the indictments against Mr. Woods for identification purposes only – not as

evidence. The trial court warned Mr. Woods about implicating himself in a crime and recessed for the day to allow Mr. Woods to consult with counsel.[9]

When trial resumed the next morning, defense counsel renewed his objection to the questioning of Mr. Woods. The trial court once again overruled the objection, finding that the allegation that Mr. Woods was selling drugs was probative "as it gives a complete story of motivation[ ], bias, and other things that involve witnesses and a complete story of the crime." The jury returned to the courtroom, and as the prosecution resumed its questioning, Mr. Woods invoked his Fifth Amendment privilege against self-incrimination regarding the indicted drug sales. Later in the trial after Defendant's testimony, the trial court returned to its earlier ruling concerning Mr. Woods' drug charges and noted that his prior bad acts had been proven by clear and convincing evidence.

Tennessee Rule of Evidence Rule 404(b) states as follows:

> **(b) Other Crimes, Wrongs, or Acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. It may, however, be admissible for other purposes. The conditions which must be satisfied before allowing such evidence are:
>
> (1) The court upon request must hold a hearing outside the jury's presence;
>
> (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence;
>
> (3) The court must find proof of the other crime, wrong, or act to be clear and convincing; and
>
> (4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

We note that Rule 404(b) has been held to only apply to criminal defendants. *State v. Stevens*, 78 S.W.3d 817, 837 (Tenn. 2002). However, the unusual 404(b) type of evidence at issue here falls under Tennessee Code Annotated section 24-7-125 (2017), which is essentially identical to Rule 404(b) except for the following language of the statute: "[i]n a criminal case, evidence of other crimes, wrongs, or acts is not admissible to

[9] The same warning was extended to Mr. Woods' son who, as noted above, was also a defense witness.

prove the character of any individual, including a deceased victim, the defendant, a witness, or any other third party, in order to show action in conformity with the character trait." Tenn. Code Ann. § 24-7-125 (known as the "Channon Christian Act" which expanded Rule 404(b)'s protections to all witnesses in a criminal case).[10] Thus, section 24-7-125 makes Mr. Woods, as a witness, within the scope of people against whom this evidence is to be excluded.

Obviously, the type of evidence the State successfully sought to admit against Mr. Woods falls squarely within the scope of evidence excluded by Rule 404(b) and section 24-7-125. The State was attempting to prove Mr. Woods was of bad character in order to show he was acting in conformity therewith when testifying. The Court of Criminal Appeals provided a lengthy and thorough examination of precisely why the questioning of Mr. Woods was in error. It concluded that the trial court's decision to allow the State to cross-examine the witness regarding prior bad acts violated Tennessee Rule of Evidence 404(b) because the prior bad acts had not been proven by clear and convincing evidence, the evidence was not relevant to any material issue, the evidence was not admissible to give the "complete story," and the evidence could not be used to establish bias. *Moon*, 2021 WL 531308, at *13-*14.[11] Indeed, neither party appears to take issue with this portion of the Court of Criminal Appeals' holding.

Defendant instead argues that the Court of Criminal Appeals improperly determined that the trial court's error was harmless. As this Court has previously explained:

> The harmlessness of non-constitutional errors is analyzed using the framework provided by [Tennessee Rule of Appellate Procedure] 36(b). Where an error is not of a constitutional variety, Tennessee law places the

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[10] We note that whether the statutory extension of Rule 404(b) by and through the Channon Christian Act is constitutional is not at issue in this case, and our holding does not attempt to answer that question as it has not been raised by either party.

[11] As for the standard of appellate review of this issue, this Court has previously explained that

> when we consider evidence that implicates Tenn. R. Evid. 404(b), we review the trial court's admissibility ruling de novo unless the trial court substantially complied with the procedures outlined in Rule 404(b). If the trial court substantially complied with Tenn. R. Evid. 404(b), we will overturn the ruling only if the trial court abused its discretion.

State v. Clark, 452 S.W.3d 268, 287 (Tenn. 2014) (citing *State v. Kiser*, 284 S.W.3d 227, 288-89 (Tenn. 2009); *State v. DuBose*, 953 S.W.2d 649, 652 (Tenn. 1997)). Here, the Court of Criminal Appeals concluded that the trial court did not state on the record at the time of its 404(b) hearing and ruling that it found the prior bad acts of Mr. Woods were established by clear and convincing evidence and thereby failed to substantially comply with the procedural requirements of Rule 404(b). The intermediate court, therefore, reviewed the trial court's decision de novo. Again, this issue has not been raised by either party on appeal.

> burden on the defendant who is seeking to invalidate his or her conviction to demonstrate that the error "more probably than not affected the judgment or would result in prejudice to the judicial process."

State v. Rodriguez, 254 S.W.3d 361, 371-72 (Tenn. 2008) (citing Tenn. R. App. P. 36(b); *State v. Ely,* 48 S.W.3d 710, 725 (Tenn. 2001); *State v. Harris,* 989 S.W.2d at 315).

The intermediate appellate court did not discuss the issue at length—the entirety of the discussion and determination on that issue is set forth below:

> While the trial court's admission of Mr. Larry Woods's prior bad acts was error, we nevertheless conclude that the error was harmless. Mr. Larry Woods's testimony was improperly impeached by the admission of prior bad acts; however, Mr. Donald Woods, J.J., and Defendant all testified to virtually the same sequence of events as Mr. Larry Woods. Mr. Donald Woods and J.J. both testified that they did not see Defendant with a gun in his hand and that [Corporal] Wilder shot Defendant within seconds of removing his hand from Defendant's face or neck. Defendant said that he did not pull a gun on [Corporal] Wilder. Each of the eyewitnesses gave far more information under oath at trial than they did in their statements to police, and the jury was free to conclude their testimonies were suspect. *See State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997) (stating that the credibility of witnesses is resolved by the fact finder). The jury clearly rejected Defendant's and the eyewitnesses' accounts and accredited [Corporal] Wilder's account that Defendant pointed a gun at [Corporal] Wilder and pulled the trigger. Thus, the error was harmless.

Moon, 2021 WL 531308, at *15.

While we agree with the Court of Criminal Appeals that the improper impeachment of Mr. Woods was error, we are inclined to disagree with its harmless error analysis. The improper impeachment evidence arguably sullied the reputations of multiple defense witnesses—not just that of Mr. Woods—by emphasizing the witnesses' association with the alleged drug dealer and their proximity to his trailer. The "drug dealer" evidence was presented by the prosecution multiple times and in the questioning of three different witnesses. Initially, it was introduced as evidence of Mr. Woods' actions/character. It was also included in the prosecution's cross-examination of Defendant himself. The evidence was again repeated in the cross-examination of Mr. Woods' son. *See Judge v. State*, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976) (noting that the length and repeated nature of improper remarks by a prosecutor can impact whether they were indeed harmful).

In our view, the evidence used to convict Defendant was not overwhelming. Four eyewitnesses in close proximity to the incident testified that they never saw Defendant holding a gun. This includes Detective Pyrdom, one of Corporal Wilder's fellow officers. It also includes Larry Woods, Donald Woods (Larry Woods' son), and J.J. (another defense witness). This does not include Defendant himself who obviously denied he wielded a gun, stating that his gun remained in his pants and he never pulled it out. "[T]he line between harmless and prejudicial error is in direct proportion to the degree by which the proof exceeds the standard required to convict." *State v. Toliver*, 117 S.W.3d 216, 231 (Tenn. 2003) (internal citation omitted). And again, the State's proof was not overwhelming. Corporal Wilder himself—who, as Defendant points out in his brief, arguably had ample reasons to assert Defendant drew a gun—was the only witness to say Defendant used a gun or otherwise struggled against him during their encounter. On the other hand, Defendant presented multiple witnesses who gave consistent accounts undermining Corporal Wilder's testimony. In the end, the jury viewed all of the witnesses and chose to accredit Corporal Wilder's version of events, but it is extremely difficult to assess the impact the improper impeachment may have had on the verdict under these particular circumstances.

In sum, we agree with Defendant that the evidence of bad acts against Mr. Woods was not trivial or harmless. We conclude that the improper impeachment of defense witness Larry Woods more probably than not affected the judgment, and thus, the trial court committed reversible error.

III. CONCLUSION

We hold that the standard of review for whether a criminal defendant was denied the constitutional right to a speedy trial is de novo with deference to the trial court's finding of facts unless the evidence preponderates otherwise. Under this standard, Defendant's right to a speedy trial was not violated. However, allowing impeachment evidence of a material defense witness without sufficient evidence and findings to support its admission constitutes reversible error in this case. Therefore, the judgment of the Court of Criminal Appeals is reversed and the judgments of the trial court are vacated. We remand to the trial court for proceedings consistent with this opinion. The costs of this appeal are taxed to the State of Tennessee.

Roger A. Page

ROGER A. PAGE, CHIEF JUSTICE

Appendix B

Opinion of the
Tennessee Court of Criminal Appeals

FILED
02/12/2021
Clerk of the
Appellate Courts

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
December 8, 2020 Session

STATE OF TENNESSEE v. WILLIAM EUGENE MOON

Appeal from the Circuit Court for Coffee County
No. 44,905F L. Craig Johnson, Judge

No. M2019-01865-CCA-R3-CD

A Coffee County jury convicted William Eugene Moon, Defendant, of attempted second degree murder and unlawful employment of a firearm during the commission of or attempt to commit a dangerous felony. On appeal, Defendant argues that the trial court erred by allowing the improper impeachment of a defense witness, that there was insufficient evidence to support his convictions, and that he was denied the right to a speedy trial. After a thorough review of the record and applicable case law, the judgments of the circuit court are affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

ROBERT L. HOLLOWAY, JR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and TIMOTHY L. EASTER, JJ., joined.

Andrew Justice, Murfreesboro, Tennessee, for the appellant, William Eugene Moon.

Herbert H. Slatery III, Attorney General and Reporter; Sophia S. Lee, Senior Assistant Attorney General; Craig Northcott, District Attorney General; and Jason Ponder, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual and Procedural History

Pretrial Procedure and Hearings

On April 10, 2018, the Coffee County Grand Jury indicted Defendant for attempted first degree murder in count one, resisting arrest in count two, aggravated assault in count three, unlawful possession of a firearm with intent to commit or attempt to commit a dangerous felony in count four, and unlawful employment of a firearm during the

commission of or attempt to commit a dangerous felony in count five. Defendant was arraigned on April 17, 2018. The case was reset for May 9, 2018, to allow Defendant to obtain discovery. According to Defendant, on May 9th, he asked to set a trial date, but, because the prosecutor handling his case was not present, the case was reset to May 23, 2018. On May 23, 2018, the trial court set the case for trial on November 28, 2018.

On November 6, 2018, the State moved for a continuance of Defendant's trial due to a scheduling conflict with a multi-day rape trial set to begin November 29, 2018. The motion claimed that the other trial involved an alleged rape that occurred on September 7, 2015, and the case had been set by a different assistant district attorney. The motion also claimed that the rape case was "ready for trial," that the State did "not anticipate any resolution of that case," and that the sixteen-year-old victim had "mentally and emotionally prepared herself for trial . . . and very much wants and needs that matter to come to a conclusion."

By agreement, the motion to continue was heard on November 7, 2018, one day after the motion was filed. The State argued that Defendant's case "was less than a year old, so the speedy trial rights ha[d] not yet been implicated under Tennessee state law, whereas the other matter ha[d] been pending for three years." Defense counsel opposed the continuance, arguing that Defendant had been incarcerated since January 2018 and that defense counsel had filed a speedy trial demand shortly thereafter.[1]

The trial court weighed the circumstances of the two cases set for the last week in November 2018, and concluded that the age of the cases was paramount and granted the motion to continue. Defense counsel estimated that Defendant's trial was "likely to take either two or three days, and three is . . . probably the most likely[.]" After discussing possible trial dates on the record, the transcript of the motion hearing states: "(A recess was taken, during which the trial date of February 1, 2019, was scheduled by the [c]ourt and counsel in chambers[.])"

On January 16, 2019, Defendant filed a motion to dismiss for violation of the right to a speedy trial. On January 23, 2019, the trial court heard testimony and arguments on Defendant's motion to dismiss. Defendant testified that, after the date of the offenses, he was transported to a hospital in Huntsville, Alabama, where he remained for three weeks. Defendant recalled that, after spending "a couple weeks" in the "Huntsville Jail," he was returned to Coffee County where he was "served with a warrant." He said that being incarcerated in the Coffee County Jail was "pretty bad" and that he was "locked up" for

[1] Defendant filed a "Demand for Speedy Trial" in the General Sessions Court for Coffee County on March 7, 2018.

twenty-two hours per day. He stated that he never got to go outside and see the sunlight. Defendant explained that he had no prior felony convictions.

Defendant explained that, on the night of the offenses, he was shot five times and had several medical issues. He stated that the medical treatment at Coffee County Jail was "not very good." Defendant said that he had to return to "medical" to receive additional stitches. Defendant testified that he worried about the charges in this case "every day" and that facing the prospect of years in prison made him "depressed." Defense counsel argued that Defendant was prejudiced by the delay because Mr. Donald Woods[2] agreed to testify at trial that Defendant did not have a gun during the encounter, but, during the delay, Mr. Donald Woods left the state and was missing.[3]

Following argument, a discussion took place involving the length of Defendant's trial. Defense counsel stated that he "was under the impression [the trial] would start on February 1st and then continue to the 4th[.]" The trial court noted that February 1st was a Friday and that he had a motion docket set on that day. The court asked the parties to look at their calendar, and after conferring with counsel, reset Defendant's trial for the first available date: February 11, 2019.

On February 7, 2019, the trial court issued a written order denying Defendant's Motion to Dismiss. It explained:

> When this Motion [to Dismiss] was argued, it had only been less than nine (9) months since [D]efendant was arraigned in this matter. The initial date of November [28, 2018,] for the first trial was set in the presence of both parties. In fact, the only trial continuance in the case was from the original trial date in November, which was only approximately two-and-one-half (2.5) months ago. The short two (2)-month delay for the resetting of a new trial date was necessitated by having to try another case that had been on the docket longer and dealt with just as sensitive facts. Being an attempted murder trial, this case is complicated, and therefore, would necessitate some months' preparation. However, [D]efendant argues that this case is comparable to a normal "street crime." This [c]ourt respectfully disagrees. Several months of preparation, a lengthy witness list, and a projection of three (3) days to try it show otherwise.
>
> As to the assertion of the right, [D]efendant did file a Motion for Speedy Trial in the General Sessions Court. He also asked for a first-

[2] Because two witnesses share the same last name, we will refer to each of them by their full name.
[3] Mr. Donald Woods was obviously located because he testified as a witness for Defendant at trial.

> available trial date in May of 2018, which precipitated the early trial settings. As far as prejudice to the accused, again, the [c]ourt cannot ascertain when [D]efendant's witness went missing or the real efforts made in locating him. However, from reading the defense counsel's affidavit and the statement given by the witness at the time of the incident, it appears his testimony would be neutral at best for the defense. He stated at the time of the incident that he saw [D]efendant start to fumble around with the policeman and then heard shots fired. Defense counsel's affidavit basically states that the witness did not see [Defendant] try to shoot the officer. It is also important to note that [D]efendant argues that [D]efendant's bond is high, but the defense has not filed a motion to reduce bond in the Circuit case, and it appears his pre[]trial incarceration has been a relatively normal one, considering the circumstances.

Trial

State's Proof

On February 11, 2019, the State dismissed counts two, three, and four of the indictment and proceeded to trial on count one, attempted second degree murder, and count five, unlawful employment of a firearm during the commission of or attempt to commit a dangerous felony.

Officer Michael Wilder testified that, in December 2017, he was employed with the Tullahoma Police Department ("TPD"). During his patrol around noon on December 17, 2017, he saw a black SUV outside some apartments where he had once executed a search warrant for drug trafficking. As he passed by the SUV, he noted that there were four individuals inside and that the windows were "spray painted." Officer Wilder recalled that he parked on a side alley and observed the SUV. He saw that the occupants of the SUV "kept getting in and out of the vehicle and walking over to the trailer park on the opposite side of the road." Officer Wilder decided to drive through the trailer park to try "to figure out what [wa]s going on." Once Officer Wilder was inside the trailer park, "one person lowered his head and ran through the crowd and ran up into the trailer." Officer Wilder spoke with the trailer park manager, Mr. Larry Woods, who told Officer Wilder that the man who just ran through the crowd was Defendant. Officer Wilder knew that there were "aggravated assault warrants" against Defendant and asked Mr. Larry Woods to ask Defendant to come out and speak with him. Mr. Larry Woods yelled for Defendant to come outside. When Defendant came outside, Officer Wilder asked Defendant his name. Defendant first lied about his identity before admitting his real name. Officer Wilder asked Defendant to come with him and Defendant stepped down from the porch. Officer Wilder recalled that Defendant began to "get kind of fidgety" and "nervous" and that his "breathing

start[ed] to pick up." Officer Wilder testified that Defendant's reactions were "signs [that] evasion [wa]s about to happen or violence, possible violence[.]" During the subsequent conversation, Officer Wilder noticed a plastic bag in Defendant's mouth that Officer Wilder believed contained methamphetamine. Officer Wilder placed his "right hand up against the side of [Defendant's] throat" and told Defendant to "spit it out." Officer Wilder continued:

> I asked him repeatedly to spit it out. He finally [did]. . . . I push[ed] him back down on the steps with my knee and like my side. [He] [s]tart[ed] to move with his left side as well. I grab[bed] that, trying to keep him pinned down so he wouldn't get up. . . . At that point, he [wa]s getting agitated and saying, "F---, no. This ain't happening. F---, no." . . . . [I] [r]eached back over and was able to grab his hand again because he had it on the rail at that time, trying to pick his body up. At this point, I [was] just trying to keep him pinned. . . . As I looked to my right, I s[aw] the other Tullahoma [police] unit slide past the driveway, and . . . I c[ould] hear him pulling into the driveway.
>
> At this point, I'm still just trying to watch [Defendant] because I haven't patted him down. I mean, he was wearing a black T shirt and black shorts. I c[ould] hear the door shut by the other police officer, and at this point, I just glance[d] over to my right, and I sa[id], "Hurry up. Hurry up," and as soon as I did that, I could feel the lower right side of [Defendant], his right hand lower down, and as I c[a]me back with my eyes, he pulled a gun from somewhere. It was directly at my ribs and my stomach. At this point, I immediately tensed up. I was like, "Is it going to hit my vest? Is it going to hit my hip or anything like that?" [S]o I grabbed a hold of the gun and started pushing it away from my body. The first kind of natural instinct [wa]s to try to disengage it. It's a semiautomatic weapon. If you can disengage it, sometimes you can prevent it from firing.

Officer Wilder explained that, when he "disengaged the gun," he "push[ed] the firing pin back from where it can strike the primer of the bullet." He recalled, "[O]nce I got [the gun] away from me, I was losing grip on it, and I kept trying to keep it pushed away from me, but [Defendant] had more on the handle of the gun, and he kept torqu[e]ing it, and it got closer and closer." Officer Wilder thought, "Well, if [Defendant] gets on top of me, he's got me." He explained that, with Defendant's gun "coming back at [him]," he "felt like [Defendant] was really trying to kill [him]." Officer Wilder explained, "The gun [wa]s still getting closer. I c[ould]n't stop it. He [had] more leverage on it, and I [] just got the end of the barrel." He said that, when he was struggling with Defendant for the gun, he could feel Defendant's "right hand gripping the firearm." Officer Wilder testified

that he could not hear "clicking" and that he was "not really trying to look down and see if the trigger [wa]s being pulled" but that he "could feel the gun pulsing" and "shaking" in Defendant's hand. Officer Wilder explained, "I don't know if [Defendant] was trying to pull the trigger or not, but I wasn't going to look down there to see." Officer Wilder stated that his "last resort" was to push Defendant off and "start firing as soon as [he] could." He said, "At this point, there [was] no other choice. I knew I had to shoot or be shot. . . . I fired until basically [Defendant's] head rolled backwards slightly, and I could see his eyes go up, and he rolled off of the steps."

Officer Wilder noticed that Defendant attempted "to raise[] up" and that the gun had fallen by the trailer steps where Defendant "could have very easily gotten the gun again." Officer Wilder testified that Mr. Larry Woods was nearby and observed the altercation between Defendant and Officer Wilder. Other officers approached the scene and helped secure the area. Detective William Pyrdom[4] secured Defendant's gun and told Officer Wilder that it was a nine-millimeter. Officer Wilder began administering medical aid while an ambulance was en route. Defendant kept saying, "Just let me f-ing die. Just let me f-ing die." Then Defendant said to Officer Wilder, "I wasn't really going to shoot you." Officer Wilder replied, "Well, you just keep telling yourself that." When EMS arrived, Officer Wilder stepped away from Defendant and "felt sick to [his] stomach."

While reviewing the dashcam video before the jury, Officer Wilder pointed out that a .22 round fell from Defendant's pocket. Officer Wilder also observed a nine-millimeter round on the ground.

Officer Wilder said that, after the incident, agents from the Tennessee Bureau of Investigation ("TBI") interviewed him and took pictures of the scene.

Officer Wilder testified that, based upon his training and experience, there was no doubt in his mind that Defendant was attempting to use deadly force against him. He explained, "There's no doubt in my mind. I mean, you pull a firearm on a police officer that's trying to scuffle with you, I mean, there is no other intent that I can see."

On cross-examination, Officer Wilder agreed that, after he shot Defendant, Defendant repeatedly asked Officer Wilder why he shot Defendant. Officer Wilder agreed that, at the scene, Defendant denied pulling a gun on Officer Wilder. Officer Wilder denied any prior incident in which he threatened to "get [Defendant and his brother] off the streets" by shooting them. Officer Wilder denied that he saw a gun in Defendant's pants and "got

[4] Detective Pyrdom was a patrolman at the time of the offense. For the sake of clarity, however, we will refer to him by his title at the time of trial.

scared." Officer Wilder explained that a police officer who shot a "non-threatening civilian" would likely face criminal charges, would lose his job, and may face a lawsuit.

Officer Wilder agreed that he never told Defendant that he was under arrest. Officer Wilder explained that, when "someone pulls a gun on you, I mean, you don't really have a lot of time to say, 'You are under arrest.'" Officer Wilder denied that he "grab[bed] [Defendant] by the throat" but explained that he tried to "inflict discomfort" on Defendant's neck to get Defendant to spit out the methamphetamine. Officer Wilder agreed that, when Defendant began to "tussle" with him, Officer Wilder started to get "more nervous." He recalled that, at the preliminary hearing, he testified that a bullet may have ejected from Defendant's gun. Officer Wilder said that he did not know at what point he thought to turn on his dashcam recorder. Officer Wilder agreed that, at the preliminary hearing, he testified that Detective Pyrdom was "fifteen or twenty" feet away at the time of the shooting.

On redirect examination, Officer Wilder stated that he had arrested hundreds of offenders in his career but had never used deadly force until this case.

Detective Pyrdom testified that he received a call from Officer Wilder for back up, so he proceeded to East Moore Street. Officer Wilder called again, and Detective Pyrdom noted that he "could hear some stress in [Officer Wilder's] voice," so Detective Pyrdom sped up. Detective Pyrdom parked and could see the "scuffle" next to a trailer. Detective Pyrdom ran towards the trailer, but his view of the scene was partially obstructed by the door to a truck. He stated that he "could see [Officer Wilder] fighting with somebody coming down the steps" but that he could not see Defendant's or Officer Wilder's hands. Detective Pyrdom heard shots fired and saw Defendant fall. He explained,

> [Defendant was] on his back at the foot of the steps. When the shots were fired, I immediately drew my weapon. At that point, I didn't know what [was] going on, and [Officer] Wilder [wa]s hollering, "Get that gun. Get that gun." When he hollered that, I picked up the weapon that was at the foot of the steps and secured it behind my belt.

Detective Pyrdom stated that the firearm was not under Defendant because he could clearly see it on the ground next to him. Detective Pyrdom recalled that Officer Wilder rendered medical aid to Defendant and that Detective Pyrdom and TPD Officer Tim Brandon secured the scene.

Detective Pyrdom stated that, at the time of the offense, Officer Wilder was his superior officer and that Officer Wilder was "competent and good at his job." He said, "I've never seen him lose control or even act like he was going to lose control."

On cross-examination, Detective Pyrdom testified that, as he approached the scene, he did not see a weapon in Defendant's hand. Detective Pyrdom did not draw his weapon as he approached because he believed it was "just a fight." He agreed that he never saw a gun "hit the ground" after Defendant was shot. Detective Pyrdom testified that Officer Wilder shot Defendant from very close range. He stated that, as Defendant fell, he did not notice whether Defendant had a weapon in his hand and that he did not hear anything hit the ground. Detective Pyrdom recalled that Officer Wilder told Defendant to "stop resisting" and "stop fighting" but that he did not hear Officer Wilder tell Defendant to drop a weapon. Detective Pyrdom agreed that, on the audio recording from the dashcam, one of the officers told the TBI investigators that the gun was lying under Defendant when they reached the scene, but Detective Pyrdom could not tell who made the statement. Detective Pyrdom agreed that, when he approached Defendant lying on the ground, Defendant was still "rolling around" and that, theoretically, a weapon that had been in Defendant's waistband may have "come loose." Detective Pyrdom agreed that Officer Wilder reported that Defendant's weapon was a ".22" and that a ".22 shell" was ejected from the weapon.

On redirect examination, Detective Pyrdom testified that nothing that Officer Wilder did on the day of the offense was inappropriate and that he had no reason to disbelieve Officer Wilder's account. He stated that, while it was possible that a weapon could have "come loose" from Defendant's waistband while he was on the ground, he did not believe that was what happened based on how quickly he approached the scene.

TPD Investigator Harry Conway testified that he responded to an officer-involved shooting on December 17, 2017. When he arrived, Lieutenant Jason Ferrell was already present and processing the scene. Investigator Conway took photographs and turned them over to the district attorney general. He took possession of the gun that Detective Pyrdom retrieved from the scene. Investigator Conway and Lieutenant Ferrell inventoried the weapon and observed a "live round inside the chamber" as well as twelve rounds inside the magazine. Investigator Conway explained that the gun was a nine-millimeter Taurus Millennium G2 and that the weapon would not be able to fire if the "slide" was back. He stated that he transferred the weapon to the TBI.

Investigator Conway testified that he knew Officer Wilder very well for several years. He stated that he never had any reason to be concerned about Officer Wilder and that he had never known Officer Wilder to be dishonest.

On cross-examination, Investigator Conway demonstrated pulling the trigger when the slide was back and agreed that pulling the trigger made a sound. Investigator Conway agreed that, when an officer served a warrant, he should "notify that person that [he was] placing them under arrest." Investigator Conway explained that, if a person was not compliant with an officer's request to spit out drugs, it would be a "proper restraint" for an

officer "to apply pressure to the throat area maybe to prevent the swallowing of drugs[.]" Investigator Conway stated that he "couldn't correlate a .22 round" being ejected from the weapon he obtained from Detective Pyrdom.

TBI Special Agent Elizabeth Williams testified that she, Agent Dan Friel, Agent Darren Shockey, and Agent Hunter Locke all investigated the December 17, 2017 officer-involved shooting. When Agent Williams arrived at the scene, she spoke with members of the TPD, did a video walk-through of the scene, and took photographs. Agent Williams interviewed three witnesses: Mr. Donald Woods, Mr. Larry Woods, and Mr. James Beck. She stated that the trailer park was "a very hostile environment," so she tried to give orders for bystanders to return to their homes "in the most friendly way" she could.

On cross-examination, Agent Williams testified that other TBI agents interviewed Officer Wilder and Detective Pyrdom. She agreed that there was "stuff" on the nine-millimeter shell casing that was "potentially rust." Agent Williams stated that there was a "small" amount of drugs in the baggie found at the scene. She said that, a few days after the shooting while Defendant was hospitalized, Defendant was willing to speak with her and cooperate but that she decided he was too heavily medicated at the time.

On redirect examination, Agent Williams testified that Defendant's attorney[5] told her that Defendant did not want to speak with her.

Defense Proof

Mr. Steve Moon[6] testified that he was Defendant's brother and that he met Officer Wilder "a few months" prior to the day of the shooting on two separate occasions. Mr. Steve Moon stated that, in the first encounter with Officer Wilder, Officer Wilder came to his home and removed Defendant's son for "about half an hour" for questioning. Mr. Steve Moon said that, in the second encounter, Officer Wilder came to his home looking for Defendant and Defendant's son because "they had warrants on them," but Mr. Steve Moon did not know where they were. He said that Officer Wilder told him that "[Officer Wilder] would do whatever he had to do to take [Defendant] and his son off the streets, even if [Officer Wilder] had to shoot them."

[5] Agent Williams identified this attorney by name, and he was not Defendant's attorney at trial or on appeal.

[6] Because this witness has the same last name as Defendant, we will refer to him using his entire name for the sake of clarity.

On cross-examination, Mr. Steve Moon stated that he never told Defendant about his second conversation with Officer Wilder and that he did not report the conversation to the TPD.

Mr. Larry Woods testified that he knew Defendant for "twelve or thirteen years" and that he was present when Defendant was shot. Mr. Larry Woods stated that, on December 17, 2017, Defendant asked Mr. Larry Woods if Defendant could use his restroom, and Mr. Larry Woods agreed. Mr. Larry Woods explained that Officer Wilder then pulled into the trailer park. Mr. Larry Woods walked over to Officer Wilder's vehicle and asked Officer Wilder if he could help. Mr. Larry Woods heard the name "William Eugene Moon" come over Officer Wilder's car radio. Officer Wilder then asked Mr. Larry Woods if the man who went into the trailer was Defendant, and Mr. Larry Woods said yes. While Officer Wilder was still in his vehicle, he asked Mr. Larry Woods if he could speak to Defendant. Mr. Larry Woods agreed to retrieve Defendant from his residence. Mr. Larry Woods testified that, after he "walked up two stairs" towards his trailer, Defendant exited the front door. Mr. Larry Woods informed Defendant that Officer Wilder wanted to speak with him, and Defendant agreed to speak to Officer Wilder.

Mr. Larry Woods stated that he stepped about three feet away. He said that he did not hear Defendant upset or "cussing" and that he did not see a gun on Defendant. Mr. Larry Woods recalled that Mr. Beck handed Defendant a beer and that Mr. Beck then approached Mr. Larry Woods. He said that he never heard anyone say anything about arresting Defendant. Mr. Larry Woods saw that Officer Wilder "seemed like he had ahold of [Defendant]. . . by his throat or something." He stated that he heard Defendant say, "Why have you got to be like that?" Mr. Larry Woods testified that he did not see Defendant "actively fighting" Officer Wilder. Mr. Larry Woods said that he heard Officer Wilder say, "'Stop, or I'm going to taze you,' and then [Officer Wilder] jumped back and shot [Defendant]." Mr. Larry Woods stated that he never saw a gun in Defendant's hand. He said that, after Officer Wilder shot Defendant five times, Officer Wilder turned the gun on Mr. Larry Woods and told him to put his hands up, but Mr. Larry Woods said that his hands were already up. Mr. Larry Woods feared that Officer Wilder would shoot him and said, "My hands are up. Don't shoot me. What's wrong with you? Call the ambulance, call the ambulance." Mr. Larry Woods testified that he never saw a gun on the ground near Defendant after the shooting. He explained,

> When [Detective Pyrdom] came up, [Officer Wilder] told him, "Get the gun," and [Detective Pyrdom] was looking and looking, "Where is the gun?" He couldn't find the gun. He put his foot under [Defendant] and moved his foot and kicked the gun out, and then I [saw] the gun.

On cross-examination, Mr. Larry Woods read his statement to TBI:

> [Defendant] came by, asked to use the restroom. Told him to go ahead, went back to what I was doing. Officer pulled up, asked who it was and told him it was [Defendant]. Told [me] to tell him that he wanted to talk to him. Said yes and was out of viewing. Heard him tell [Defendant] to stop or he was going to taze him, and then gunshot. Could not see from where I was.

Mr. Larry Woods explained that his last statement -- that he "could not see from where [he] was" -- referred to the gun and that he could see the interaction between Defendant and Officer Wilder from his vantage point. Mr. Larry Woods testified that he was facing his trailer but saw the encounter "out [of] the corner of [his] right eye." He said, "I mean, this happened so quick, and every time, it's like that day when I wrote that statement [--] [a]n hour later, it seemed different in my head."

Mr. Larry Woods denied that Defendant was at his trailer to buy methamphetamine. He denied that he sold methamphetamine from his residence. Defense counsel objected to the line of questioning, and the jury was excused.

During a jury-out hearing, trial counsel argued that the State had no good faith basis to ask Mr. Larry Woods about selling methamphetamine to Defendant. The State responded that Defendant had methamphetamine in his mouth when he was shot and that Mr. Larry Woods had been indicted for selling methamphetamine at his residence to a confidential informant three months before the present offense. Defense counsel argued that the question violated Tennessee Rule of Evidence 404(b) and "the Channon Christian Act, which generally prohibits throwing prior bad acts at either a defendant or, in this case, a witness." The prosecutor responded,

> Your Honor, it's not about impugning character. It's about establishing that Mr. [Larry] Woods has motivation to not be completely honest with what happened that day, and the fact that he is a drug dealer selling drugs from that location would suggest maybe he is not going to be fully cooperative with the police. It would also go to explain how that meth got in [D]efendant's mouth that day and what they were doing there, and so I think it's relevant, and any potential unfair prejudice is minimal to [D]efendant and certainly is outweighed by the probative value.

Defense counsel responded that Mr. Larry Woods's alleged prior bad acts had not been established by clear and convincing evidence. The trial court overruled the objection and explained,

> Given this is a witness and given the fact that meth has already been shown and proven at the scene and given that there has been shown a good faith basis in regards to the question, the [c]ourt finds that any prejudice is not -- any prejudice is outweighed by the probative value to give a complete story of what was going on at the time of the crime. The [c]ourt will not exclude the evidence because it bears on a material issue aside from character.

The trial court then allowed the State to introduce the indictments against Mr. Larry Woods for identification purposes only. The trial court explained to Mr. Larry Woods his Fifth Amendment right against self-incrimination, and Mr. Larry Woods stated that he wanted to speak to an attorney before he answered any further questions. The trial court expressed concern about having Mr. Donald Woods, Mr. Larry Woods's son, testify before he understood his Fifth Amendment right against self-incrimination. The trial court recessed for the day so that the witnesses could consult legal counsel.

The following day, defense counsel renewed his objection to relevance and stated that the defense witnesses' prior bad acts would serve only to "inflame the jury." The trial court again overruled his objection. It stated:

> I ruled under rule 404 yesterday that the matter of meth being present was already in front of the jury, so I don't really think the additional question of, was there a meth transaction going on is unfairly prejudicial, and even if it was somewhat prejudicial, the probative value of the question as it gives a complete story of motivations, bias, and other things that involve witnesses and a complete story of the crime, I think it's relevant, so I have repeated most of what I said yesterday.

When the jury returned, Mr. Larry Woods invoked his right against self-incrimination regarding prior alleged drug sales on September 19, 2017, and October 12, 2017. Mr. Larry Woods invoked his Fifth Amendment right when asked if he was indicted for selling methamphetamine, if he spoke to any police officers regarding the indictments, whether he confessed to drug transactions, whether he allowed other individuals to sell methamphetamine from his residence, and whether one such individual was a female. Mr. Larry Woods again denied selling methamphetamine to Defendant on December 17, 2017. He affirmed that Mr. Donald Woods was his son.

On redirect examination, Mr. Larry Woods testified that police searched his home on the night of the shooting and that they did not find any drugs in his home.

Following a *Momon* hearing, Defendant testified that he did not "pull a gun" on Officer Wilder or try to kill him, and he stated that he had never pointed a gun at anyone.

Defendant stated that he did not know that there was a warrant out for his arrest for aggravated assault but learned about it when he was in the hospital in Alabama. He explained that the aggravated assault warrant was ultimately dismissed, but he did not recall why. Defendant stated that his level of memory of the event was "not very good." He said that, on December 17, 2017, he asked Mr. Larry Woods if he could use the bathroom and then went inside Mr. Larry Woods's trailer. He stated that, as he came out of the bathroom, Mr. Larry Woods told him that Officer Wilder wanted to speak with him. Defendant admitted that he had a "nine-millimeter Taurus" gun tucked into his shorts at the time. Defendant stated that he agreed to speak with Officer Wilder. Officer Wilder did not place him under arrest.

Defendant recalled sitting down and asking someone for a drink and that he was handed a beer. He stated that he was "chewing on a baggie" with drug residue in it. Defendant explained that he had used most of the drugs in the baggie on the day before. He said that he was not under the influence when speaking with Officer Wilder and that he felt "normal." Defendant said that, when Officer Wilder noticed that Defendant was chewing on the baggie, Officer Wilder took the beer from Defendant and put his hand around Defendant's throat. He explained that it was not a "gentle hand" on his throat and that it was not just on the sides of his neck. Defendant stated that he did not know what was going on and that Officer Wilder still had not placed him under arrest. Defendant recalled spitting the baggie on the ground and stated that he "took and grabbed [Officer Wilder's] hand" with Defendant's left hand "and had to push to get [Officer Wilder's] hand off [Defendant's] throat." Defendant did not recall whether Officer Wilder ever took hold of Defendant's arms or whether he struggled with Officer Wilder. He stated that he never fought with police in the past and had no reason to fight with Officer Wilder. Defendant testified that he never reached for his gun, which was on his right side.

On cross-examination, Defendant denied that he went to Mr. Larry Woods's home to buy methamphetamine and denied any knowledge that Mr. Larry Woods was a "meth dealer[.]" He denied that the reason he asked for a drink was to swallow the evidence in the baggie. Defendant agreed that he had a concealed gun on his right hip during his encounter with Officer Wilder and that the gun was fully loaded. Defendant denied that he pointed the gun at Officer Wilder but agreed that being shot "messed up [his] memory."

On redirect examination, Defendant agreed that, in the dashcam video, Officer Wilder told other officers that Defendant "pulled a gun" and pointed it at him. Defendant agreed that, on the video, he responded by saying, "No I didn't." Defendant recalled hearing himself on the video asking, "Why did you shoot me?" and stating, "I didn't try to pull the gun" and "I wasn't going to shoot you." Defendant stated that he did not go quietly with Officer Wilder because Officer Wilder started choking him. He said that, if he had it

to do over, he would have raised his hands and told Officer Wilder that he had a gun in his waistband.

Following Defendant's testimony, during a jury-out recess, the trial court said that it could not remember whether he found Mr. Larry Woods's prior bad acts were true by clear and convincing evidence. It explained, "So just for the record, just to make sure that's clear for the record, I find that by clear and convincing evidence, those incidents did happen."

Upon the jury's return, the Defendant recalled Agent Williams. She testified that she interviewed Mr. Larry Woods. She explained,

> In my oral interview with Mr. [Larry] Woods, he stated how he was near a blue ladder approximately [fifteen] feet from this incident, and to me at the time, it sounded like everything that he observed was auditory hearing, and he said at the end of it he never saw a gun.

Mr. Donald Woods testified that Mr. Larry Woods was his father and that he was present at the time of the offense. Mr. Donald Woods stated that Defendant was an acquaintance and that he had no reason to "cover" for Defendant. He explained that Defendant pulled into the driveway, followed by Officer Wilder. Mr. Donald Woods told Mr. Larry Woods that an officer was there, and Mr. Larry Woods walked over to Officer Wilder. He said, "The officer got out and asked my dad if that was [Defendant] that just got out of the car and entered the home, and Dad said, 'Yeah' and the officer asked him, if you don't mind, tell him to come outside and talk[.]" Mr. Donald Woods stated that Mr. Larry Woods "walked up to his doorstep and hollered for [Defendant], 'Hey, there's an officer out here that wants to talk to you.'" Mr. Donald Woods saw Defendant walk up to the door and then the officer said, "[Defendant], if you don't mind coming out here and talking to me, I would like to speak to you[.]" Mr. Donald Woods said that Defendant agreed and that Officer Wilder then said, "'[Defendant], I'm asking. Come out here and speak to me, or I can tell you to come out here and speak to me.'" Mr. Donald Woods explained that Defendant agreed and "stepped through the front door, and the officer stepped all the way up to the stairs, so both of them -- the officer was on second stair from the top, and [Defendant] was on the top stair." Mr. Donald Woods recalled that he observed this encounter from the passenger side of his truck, "so [Mr. Donald Woods] was basically right beside the stairs." Mr. Donald Woods continued,

> [Defendant] didn't step down at the time. He c[a]me out to the top of the step and sat right there, and they started exchanging words, and [Defendant] hollered to [Mr.] Beck, "Jimmy, give me my beer out of the car[.]" [Mr.]

> Beck asked the cop [if that] was [] fine. [Mr.] Beck walked around and grabbed the beer. . . .
>
> [W]henever [Mr.] Beck handed [Defendant] the beer, [Defendant] took the top off of his beer, and as he went to take a drink, he threw something in his mouth and didn't get the beer to his mouth, and the cop said, "Don't do it, [Defendant]" and grabbed him by his throat and literally like squeezed him, and the cop stepped down one stair. [Defendant] sat down and spit it out, and that's when [Defendant] said, "You ain't got to be so rough on me, man." I [saw] [Defendant] grab his -- just his hand because both hands -- or the cop's hands was on [Defendant]'s neck. Whenever [Defendant] went to grab [Officer Wilder's] hand, [Defendant's] body got shoved down, . . . and the cop stepped off because he was at the -- probably the third step up, and he stepped off, and that fast, the shots was being fired. I grabbed J.J. that was right beside me, and I hit the ground, and I said that was it. The other cop -- at that time, the other cop was running up to me and J.J. and had his gun drawn at us, which I told him, "You're crazy. All I have is a pocket knife on me," and that's how it went down.

Mr. Donald Woods testified that Defendant never cussed at the officer and that "they w[ere] just talking at the top of the steps." Mr. Donald Woods stated that he never saw a gun in Defendant's hand. He explained,

> I didn't see the gun until [Defendant] was shot, and he rolled forward and finished rolling off of the steps, and the gun was right basically, right behind [Defendant] in the little pocket. [Defendant] rolled forward off [the stairs]. I [saw] the gun on the ground. . . . It fell right behind [Defendant] . . . within a foot of him.

Mr. Donald Woods testified that Officer Wilder never told Defendant he was arresting him. He stated that, if Defendant had a gun in his hand, he would have seen it. Mr. Donald Woods stated that it was a matter of one or two seconds between the time Officer Wilder let go of Defendant's neck and the time that Officer Wilder shot Defendant. Mr. Donald Woods stated that he saw Defendant's left hand trying to push Officer Wilder's hands away from his throat but that he did not see where Defendant's right hand was. Mr. Donald Woods agreed that, from his vantage point, Defendant's right hand would have been furthest away from Mr. Donald Woods and that Officer Wilder would have been in between Mr. Donald Woods and Defendant.

On cross-examination, Mr. Donald Woods explained that all the doors of his truck were open because he was cleaning out his truck. He stated that, when the shooting

happened, he was sitting in the driver's seat of his truck, watching through his windshield. Mr. Donald Woods denied that Mr. Larry Woods sold methamphetamine out of his residence. Mr. Donald Woods read his statement: "All I [saw] was . . . [a] cop asking [Defendant] to come outside. Stepped on stairs and started to fumble around with the cop. Shots fired. I hit the ground."

J.J.[7] testified that he was fifteen years old and that Defendant was a "good friend" of his. J.J. denied that he ever consumed alcohol or drugs with Defendant. He said that, on the day of the shooting, Defendant parked his car and went inside a trailer, and then Officer Wilder "pulled up." J.J. stated that Mr. Larry Woods spoke to Officer Wilder and then "went and got [Defendant.]" J.J. said that, when Officer Wilder first arrived, J.J. went inside the trailer to get his phone and that he could see Defendant in the living room. J.J. explained that he saw Defendant in the living room "holstering" the gun "in his pants somewhere."

J.J. stated that Officer Wilder never said anything about arresting Defendant or that there was a warrant for Defendant. He recalled that Officer Wilder threw Defendant's beer on the ground. He said that Officer Wilder told Defendant to "spit it out" and that Officer Wilder "put[] his hands on [Defendant's] face" to try "to get whatever was in [Defendant's] mouth out." He said that "they w[ere] wrestling around, and [Defendant] pushed [Officer Wilder] back, and [Officer Wilder] started shooting." J.J. explained that Defendant pushed Officer Wilder with both of Defendant's hands and that there was not a gun in Defendant's hands. J.J. stated that it was "[p]robably four seconds" between the time Officer Wilder had his hands on Defendant's face and the time Officer Wilder shot Defendant.

J.J. stated that he was in the back seat of the truck during the incident and that he observed it through two open doors. He agreed that, from his vantage point, he would have seen if Defendant had pulled a gun on Officer Wilder.

On cross-examination, J.J. said that he was fourteen years old at the time of the shooting. He said that, when he was in the truck, Mr. Donald Woods was beside him. J.J. said that he never spoke to police about the incident but only spoke to defense counsel. He agreed that, when Defendant put the gun in his waistband, he "concealed" it.

Miranda Barkve testified that she was J.J.'s mother and that she knew Defendant but was not Defendant's friend. Ms. Barkve said that she lived behind Mr. Larry Woods. She said that, on the day of the shooting, she was in her living room and heard a "ruckus" with "somebody hollering or screaming," so she looked outside. She walked down her porch steps and heard Defendant say, "Are you going to taze me?" She said that, within

[7] It is this court's custom to use initials for juvenile witnesses.

five seconds of Defendant's statement, she heard gunshots. Ms. Barkve ran towards her son, who was near Mr. Larry Woods's trailer, and found him on the ground. When she rounded the corner of the trailer, the officers told her, "Get on the f***ing ground!" Ms. Barkve admitted that she was rude to the officers and that she "cuss[ed] back" at them because she was upset that her son was right there during a shooting.

Ms. Barkve said that a "lady" officer requested to speak to J.J. but that she did not want her minor son to speak with police. Ms. Barkve stated that she did not believe the police would be happy to hear what J.J. had to say about the shooting and that she was concerned that J.J. would not be safe if he testified that an officer shot Defendant unprovoked. Ms. Barkve stated that her son is truthful.

State's Rebuttal

TPD Officer Tim Brandon testified that he responded to Officer Wilder's call for backup and that, while he was en route, Officer Wilder "got on the radio and said there were shots fired" and that the suspect was "down." Officer Brandon stated that, about forty-five seconds later, he pulled up to the scene. He saw that Officer Pyrdom "had one person on the ground[,]" and he saw Officer Wilder "down on the ground." Officer Brandon did not recall seeing a juvenile on the scene.

On cross examination, Officer Brandon reviewed the dashcam video but denied that he heard anyone say, "He's just a kid." He heard "something that sound[ed] like 'kid.'" After further review of the video, Officer Brandon agreed that he heard someone say, "not my baby" or "something like that."

Agent Williams testified that no one on the scene approached her to tell her that there was a juvenile on the scene. She explained:

> I remember walking toward the trailer that Ms. Barkve described, and I remember her coming up to me screaming, saying excitedly I was not talking to her son. At the moment, I didn't really know why I would need to, other than the fact maybe he was on the general property.

The jury convicted Defendant of the lesser-included offense of attempted second degree murder in count one and of employing a firearm during the commission of or attempt to commit a dangerous felony in count five. The trial court sentenced Defendant as a Range I standard offender to ten years' incarceration with a thirty percent release eligibility in count one and to a consecutive sentence of six years' incarceration with 100 percent release eligibility in count five.

Defendant filed a timely Motion for New Trial which raised, in part, insufficient evidence; improper impeachment of Mr. Larry Woods; and that Defendant was denied a speedy trial. The trial court denied the motion in a written order, and Defendant now timely appeals.

Analysis

Impeachment of Witness Based on Alleged Prior Bad Acts

Defendant claims the trial court improperly permitted impeachment of defense witness Mr. Larry Woods with prior bad acts of alleged drug dealing. He contends that the court did not substantially comply with the requirements of Tennessee Code Annotated section 24-7-125 and Tennessee Rule of Evidence 404(b) because it made its ruling without hearing any evidence and thus could not have found that the prior bad acts occurred by clear and convincing evidence.

The State responds that the trial court substantially complied with the procedural requirements of Rule 404(b) and properly exercised its discretion in allowing the State to cross-examine Mr. Larry Woods regarding prior bad acts. It contends that the impeachment evidence was properly admitted to show Mr. Larry's Woods's bias against the State. It also asserts that the probative value of the evidence of prior bad acts outweighed its prejudicial effect because the record already showed Defendant was using methamphetamine at the time of the offense.

Tennessee Rules of Evidence Rule 404(b)

Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. It may, however, be admissible for other purposes. The conditions which must be satisfied before allowing such evidence are:
>
> (1) The court upon request must hold a hearing outside the jury's presence;
>
> (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence;

(3) The court must find proof of the other crime, wrong, or act to be clear and convincing; and

(4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

In *State v. Stevens*, 78 S.W.3d 817, 837 (Tenn. 2002), our supreme court held that "a person" for purposes of Rule 404(b) meant only the defendant. In 2014, the General Assembly enacted Tennessee Code Annotated section 24-7-125. The statute and Rule 404(b) were identical, except the for the following italicized language of the statute: "*[i]n a criminal case*, evidence of other crimes, wrongs, or acts is not admissible to prove the character of *any individual, including a deceased victim, the defendant, a witness, or any other third party*, in order to show action in conformity with the character trait." (emphasis added). Since the enactment of section 24-7-125, two opinions of this court have addressed the impact of section 24-7-125 on Rule 404(b). *See State v. Christian Blackwell*, No. W2018-01233-CCA-R3-CD, 2019 WL 2486228, at *6 (Tenn. Crim. App. June 13, 2019) *perm app. denied* (Tenn. June 5, 2020); *State v. Devin Buckingham*, No. W2016-02350-CCA-R3-CD, 2018 WL 4003572, at *14 (Tenn. Crim. App. Aug. 20, 2018) *perm app. denied* (Tenn. Jan. 16, 2019). In both cases, the trial courts' decisions were based on Rule 404(b), and this court reasoned, citing Tennessee Code Annotated section 24-7-125, that even though our supreme court previously determined that Rule 404(b) applied only to the accused, the rules governing Rule 404(b) now applies to "any individual." *Christian Blackwell*, 2019 WL 2486228, at *6; *Devin Buckingham*, 2018 WL 4003572, at *14.

Standard of Review

Prior 404(b) case law still has precedential value, now applied to any individual in criminal trials and not just defendants. Thus, if a trial court substantially complies with the procedural requirements of section Rule 404(b) when it applies Tennessee Code Annotated section 24-7-125, we will review the trial court's determination for an abuse of discretion. *State v. Thacker*, 164 S.W.3d 208, 240 (Tenn. 2005) (citing *State v. DuBose*, 953 S.W.2d 649, 652 (Tenn. 1997); *State v. Baker*, 785 S.W.2d 132, 134 (Tenn. Crim. App. 1990)). However, if the trial court fails to substantially comply with the requirements of the rule, then the trial court's decision should be afforded no deference by the reviewing court. *DuBose*, 953 S.W.2d at 652.

Clear and Convincing Evidence

Here, the trial court held a jury-out hearing where it agreed to admit evidence of Mr. Larry Woods's prior bad acts to show the "complete story," and it stated that the probative value of the evidence was not outweighed by unfair prejudice. The court allowed the State

to cross-examine Larry Woods about whether he sold methamphetamine at the location where the shooting occurred. The court did not state on the record at the time of its ruling that it found the prior bad acts were established by clear and convincing evidence. However, the trial court did make that finding the next day, saying, "So just for the record, just to make sure that's clear for the record, I find that by clear and convincing evidence, those incidents did happen." Regardless of its subsequent finding on the day after the 404(b) hearing, the trial court "'had an obligation at the time of the hearing to state on the record whether the prior act was proven by clear and convincing evidence,' and, therefore, there was no substantial compliance" with Rule 404(b). *State v. Sexton*, 368 S.W.3d 371, 404 (Tenn. 2012), *as corrected* (Oct. 10, 2012).

Thus, we conclude that the trial court did not substantially comply with the procedural requirements of Rule 404(b), and we review the trial court's decision de novo. *See DuBose*, 953 S.W.2d at 652; *see also State v. Willie J. Cunningham*, No. 02C01-9801-CR-00022, 1999 WL 395415, at *2 (Tenn. Crim. App. June 15, 1999) (finding that a trial court did not substantially comply with the requirements of Rule 404(b) where it failed to make a finding of clear and convincing evidence and where there was a dispute as to whether the prior bad act occurred).

Rule 404(b) Error

Initially, we note that there is little evidence in the record to support admission of the prior bad acts under Rule 404(b). Officer Wilder testified that he saw a suspicious SUV with "painted windows" whose occupants walked over to the trailer park where Mr. Larry Woods lived. Moreover, Defendant walked out of Mr. Larry Woods's residence with a baggie with methamphetamine residue in his mouth. However, Mr. Larry Woods and Mr. Donald Woods both denied that Mr. Larry Woods sold drugs from his residence, Mr. Larry Woods asserted his Fifth Amendment right against self-incrimination in response to the State's questions, and the State presented no other evidence to establish any prior drug dealing. Mr. Larry Woods's indictments were admitted for identification purposes only and were not evidence. Moreover, while it is true that evidence of prior bad acts is not limited to criminal convictions, "[i]t is a well settled principle that 'indictments are not evidence of the commission of a prior crime.'" *State v. Raymond Griggs*, No. W2005-00198-CCA-R3-CD, 2006 WL 1005176, at *6 (Tenn. Crim. App. Apr. 17, 2006) (quoting *State v. Miller,* 674 S.W.2d 279, 284 (Tenn. 1984)), *perm. app. denied* (Tenn. Aug. 21, 2006); *see e.g., State v. Marvin D. Nance*, No. E2005-01623-CCA-R3-CD, 2007 WL 551317, at *11 (Tenn. Crim. App. Feb. 23, 2007) (stating that an arrest, without more, cannot be used to enhance a sentence). The connection is tenuous between the suspicious SUV witnessed by Officer Wilder and Defendant's possessing a methamphetamine baggie in his mouth with the State's assertion that Mr. Larry Woods was a drug dealer. Thus, the evidence was insufficient to satisfy Rule 404(b)(3).

Even if the State had provided clear and convincing evidence that Mr. Larry Woods was a drug dealer in the past, we cannot see how that information would be relevant to any material issue at trial. Defendant did not dispute that he had methamphetamine in his mouth. Officer Wilder was not present to arrest Defendant on a drug charge but for aggravated assault. That Mr. Larry Woods allegedly sold drugs from his residence in the past does not make it more or less likely that Defendant committed the charged crimes. The evidence of prior bad acts did not "make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" because Defendant was not arrested or charged in connection with a drug crime. Tenn. R. Evid. 401. Thus, the evidence did not satisfy Rule 404(b)(2).

Because the evidence was not relevant, its probative value was not outweighed by its prejudicial effect in impeaching an eyewitness called by the defense. Tenn. R. Evid. 403. The admission of the evidence of prior bad acts served only to "prove the character" of Mr. Larry Woods "in order to show action in conformity with the character trait[,]" namely, that Mr. Larry Woods cannot be trusted because he is a drug dealer. Tenn. R. Evid. 404(b). Thus, the evidence does not satisfy Rule 404(b)(4).

State v. Gilliland and "The Complete Story"

Moreover, our supreme court has held that, in terms of Rule 404(b),

> when the [S]tate seeks to offer evidence of other crimes, wrongs, or acts that is relevant only to provide a contextual background for the case, the [S]tate must establish, and the trial court must find, that (1) the absence of the evidence would create a chronological or conceptual void in the –[S]tate's presentation of its case; (2) the void created by the absence of the evidence would likely result in significant jury confusion as to the material issues or evidence in the case; and (3) the probative value of the evidence is not outweighed by the danger of unfair prejudice.

State v. Bruce Turner, No. W2010-02513-CCA-R3-CD, 2012 WL 12303681, at *15 (Tenn. Crim. App. May 25, 2012) (quoting *Gilliland*, 22 S.W.3d at 272). "Crimes introduced to tell the 'complete story' will rarely be probative of a fact in issue in the trial of the crime charged and, therefore, rarely justify the prejudice created by their admission." *State v. Darius Alexander Cox*, No. M2017-02178-CCA-R3-CD, 2019 WL 1057381, at *8 (Tenn. Crim. App. Mar. 6, 2019) (quoting Neil P. Cohen, Sarah Y. Sheppeard & Donald F. Paine, *Tennessee Law of Evidence*, § 4.04[13] (6th ed. 2011)). "Crimes admitted to tell the 'complete story' should be only those 'so inextricably connected in time, place, or manner'

that the jury would be baffled by the charged crime without hearing the evidence of the other crime." *Id.*

The trial court allowed the evidence of Mr. Larry Woods's prior bad acts for the "complete story" but made no explicit findings regarding a conceptual void or jury confusion. While evidence of Defendant's use of methamphetamine was relevant to explain why Officer Wilder put his hands on Defendant, it was not relevant where that methamphetamine came from. No void or confusion would have resulted from completely omitting the evidence of Mr. Larry Woods's past arrests. *See Gilliland*, 22 S.W.3d at 272. Thus, we conclude that the trial court erred in allowing the State to question Mr. Larry Woods regarding his alleged prior bad acts under Rule 404(b).

Bias

The State argues on appeal that Mr. Larry Woods's prior bad acts were admissible under Rule 404(b) because it showed Mr. Larry Woods's "specific bias against the State," which influenced his testimony. Per the State's reasoning, any witness with a criminal record could have their criminal history admitted in a criminal trial, in contravention of the purpose and limits of Rule 404(b) and Tennessee Code Annotated section 24-7-125, because they would have a "specific bias against the State" due to their prior arrests. *See e.g.*, *Vining v. Taylor*, No. CV 08-419 LH/LFG, 2010 WL 11590670, at *3 (D.N.M. Aug. 10, 2010) ("If the [c]ourt were to accept Defendant's argument that criminal history demonstrates a bias against law enforcement officers, then virtually every plaintiff's criminal history would be admissible to prove bias against law enforcement in nearly every claim against the police, in contravention of Rule 403 and 404(b)'s limitations."). We reject this reasoning.

Harmless Error

The original purpose of Rule 404(b) was to protect a defendant against conviction based on his or her "overall character" or "believed propensity to commit crimes[.]" *State v. Jarman*, 604 S.W.3d 24, 49 (Tenn. 2020). In 2014, the General Assembly extended the protections of Rule 404(b) to witnesses. Tenn. Code Ann. § 24-7-125 (2014). Since a trial witness is not in jeopardy of conviction based on his or her "overall character" or "believed propensity to commit crimes[,]" the effect of the 2014 statute is to protect a trial witness against challenges to the witness's credibility based on character evidence.

While the trial court's admission of Mr. Larry Woods's prior bad acts was error, we nevertheless conclude that the error was harmless. Mr. Larry Woods's testimony was improperly impeached by the admission of prior bad acts; however, Mr. Donald Woods, J.J., and Defendant all testified to virtually the same sequence of events as Mr. Larry

Woods. Mr. Donald Woods and J.J. both testified that they did not see Defendant with a gun in his hand and that Officer Wilder shot Defendant within seconds of removing his hand from Defendant's face or neck. Defendant said that he did not pull a gun on Officer Wilder. Each of the eyewitnesses gave far more information under oath at trial than they did in their statements to police, and the jury was free to conclude their testimonies were suspect. *See State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997) (stating that the credibility of witnesses are resolved by the fact finder). The jury clearly rejected Defendant's and the eyewitnesses' accounts and accredited Officer Wilder's account that Defendant pointed a gun at Officer Wilder and pulled the trigger. Thus, the error was harmless.

Sufficiency

Defendant argues that there was insufficient evidence to support his conviction for attempted second degree murder because the facts, taken in the light most favorable to the State, prove aggravated assault at most. He asserts that there is insufficient evidence to support his conviction for employment of a firearm in the commission or attempt to commit a dangerous felony because there is insufficient evidence to support his conviction for the predicate felony.

The State responds that, taken in the light most favorable to the State, the evidence was sufficient to support Defendant's convictions.

Our standard of review for a sufficiency of the evidence challenge is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original); *see also* Tenn. R. App. P. 13(e). Questions of fact, the credibility of witnesses, and weight of the evidence are resolved by the fact finder. *Bland*, 958 S.W.2d at 659. This court will not reweigh the evidence. *Id.* Our standard of review "is the same whether the conviction is based upon direct or circumstantial evidence." *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011) (quoting *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn. 2009)) (internal quotation marks omitted).

A guilty verdict removes the presumption of innocence, replacing it with a presumption of guilt. *Bland*, 958 S.W.2d at 659; *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). The defendant bears the burden of proving why the evidence was insufficient to support the conviction. *Bland*, 958 S.W.2d at 659; *Tuggle*, 639 S.W.2d at 914. On appeal, the "State must be afforded the strongest legitimate view of the evidence and all reasonable inferences that may be drawn therefrom." *State v. Vasques*, 221 S.W.3d 514, 521 (Tenn. 2007).

Attempted Second Degree Murder

As relevant here, second degree murder is "[a] knowing killing of another[.]" Tenn. Code Ann. § 39-13-210(a)(1) (2017). Second degree murder is a "result of conduct" offense. *See State v. Brown*, 311 S.W.3d 422, 431-32 (Tenn. 2010); *State v. Ducker*, 27 S.W.3d 889, 896 (Tenn. 2000). Accordingly, the appropriate statutory definition of "knowing" in the context of second degree murder is as follows: "A person acts knowingly with respect to the result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result." Tenn. Code Ann. § 39-11-302(b) (2017); *see Brown*, 311 S.W.3d at 431.

A person commits criminal attempt who, acting with the kind of culpability otherwise required for the offense:

> (1) [i]ntentionally engages in action or causes a result that would constitute an offense, if the circumstances surrounding the conduct were as the person believes them to be;
>
> (2) [a]cts with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's part; or
>
> (3) [a]cts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense.

Tenn. Code Ann. § 39-12-101(a) (2017). In *Joseph Jackson, Jr. v. State*, this court explained the three subsections of our criminal statute:

> Subsection (1) of the criminal attempt statute addresses the classic situation where a pickpocket attempts to steal a wallet. The pickpocket puts his hand in the jacket pocket of a passerby, only to find there is no wallet there. He would still be guilty of criminal attempt. Subsection (2) . . . addresses the situation where one does some act, with the appropriate intent, that would cause an element of the offense to be satisfied without the person doing anything else (i.e., *pulling the trigger on a gun while aiming it at someone*). Finally, subsection (3) is the substantial step subsection, whereby one can be convicted of criminal attempt when he makes a substantial step towards the completion of a crime.

W2006-00606-CCA-R3-HC, 2007 WL 273649, at *3 (Tenn. Crim. App. Jan. 31, 2007) (internal citations omitted) (emphasis added), *no perm. app. filed*.

Taken in the light most favorable to the State, the evidence showed that, when Officer Wilder saw that Defendant had a plastic bag in his mouth, he placed his hand on Defendant's throat and told Defendant to spit out the plastic bag. After Defendant complied with Officer Wilder's command to spit out the bag of methamphetamine, Officer Wilder "push[ed] [Defendant] back down on the steps" with his knee. Defendant became agitated and said, "F---, no. This ain't happening. F---, no." Officer Wilder attempted to "keep [Defendant] pinned," but Defendant pulled a gun he concealed in his waistband and pointed it at Officer Wilder's "ribs" and "stomach." Officer Wilder and Defendant struggled over the gun, and Officer Wilder disengaged the slide so that the gun could not fire. Defendant kept "torqu[e]ing" the gun towards Officer Wilder, and Officer Wilder "could feel the gun pulsing" and "shaking" in Defendant's hand. Officer Wilder believed that meant that Defendant was pulling the trigger.

Defendant argues that there is no evidence that he pulled the trigger, and therefore, Defendant did not commit a "substantial step" as required under subsection (3) of the criminal attempt statute. We disagree. A reasonable juror could conclude that Officer Wilder's description of the gun "pulsing" and "shaking" was the result of Defendant's pulling the trigger, especially in light of Defendant's struggle with Officer Wilder over the weapon and Defendant's statement, "F--- no. This ain't happening." Moreover, as we previously explained in *Joseph Jackson, Jr.*, pointing a gun and pulling the trigger satisfies subsection (2) of the criminal attempt statute because the result Defendant intended would be caused "without further conduct on [his] part." *Joseph Jackson, Jr.*, 2007 WL 273649, at *3*; see* Tenn. Code Ann. § 39-12-101(a)(2) (2017).

We determine that a rational juror could determine that, coupling Defendant's statement, "F---, no. This ain't happening" with his pointing the gun at Officer Wilder and pulling the trigger, Defendant acted with the intent to commit a knowing killing. Further, a rational juror could conclude that, by Defendant's struggling over the gun with Officer Wilder, "torqu[e]ing" the gun at Officer Wilder during the struggle, and pulling the trigger, Defendant "act[ed] with intent to cause the result" of Officer Wilder's death. *See* Tenn. Code Ann. § 39-12-101(a)(2) (2017); *State v. Ricky Lee Womac*, No. E2019-00643-CCA-R3-CD, 2020 WL 4380956, at *5 (Tenn. Crim. App. July 30, 2020) (finding sufficient evidence to support attempted murder where the defendant brandished a gun, the defendant struggled with deputies over control of the weapon, and the defendant pulled the trigger). We conclude the evidence was sufficient to support Defendant's conviction for attempted second degree murder.

Employment of a Firearm During the Commission of or Attempt to Commit a Dangerous Felony

As relevant here, "[i]t is an offense to employ a firearm during the (1) [c]ommission of a dangerous felony; [or] (2) [a]ttempt to commit a dangerous felony[.]" Tenn. Code Ann. § 39-17-1324(a) (2017). Attempted second degree murder is a "dangerous felony" under Tennessee Code Annotated section 39-17-1324(i)(1)(B) (2017). Employment of a firearm during the commission of or attempt to commit a dangerous felony "is comprised of three separate elements: '(1) that the defendant possessed a firearm; (2) that the possession was with the intent to go armed; and (3) that the first two elements occurred during the commission or attempted commission of a dangerous felony.'" *State v. Duncan*, 505 S.W.3d 480, 485 (Tenn. 2016) (quoting *State v. Fayne*, 451 S.W.3d 362, 369-370 (Tenn. 2014)). Defendant argues that the third element has not been met because there was insufficient evidence of the predicate felony.

Defendant admitted that he had a firearm, and a rational juror could conclude that he intended to "go armed" because a police officer followed him into the trailer park and he had an outstanding arrest warrant. Moreover, J.J. testified that, after Officer Wilder pulled up to the trailer, J.J. witnessed Defendant put the gun in his waistband. As noted previously, there was sufficient evidence to support Defendant's conviction for attempted second degree murder. Thus, Defendant's argument fails. There was sufficient evidence to support Defendant's conviction for employment of a firearm during the commission of or attempt to commit a dangerous felony.

Speedy Trial

Defendant argues that he was denied the right to a speedy trial because the pretrial delay was greater than one year and was due to bureaucratic indifference. He contends that he suffered prejudice in the form of pretrial incarceration and pretrial anxiety.

The State responds that the length of delay in Defendant's case was "not egregious," that the delay was "necessary to the fair and effective prosecution of the case," and that Defendant's pretrial anxiety and incarceration did not outweigh the other factors. We agree with the State.

Both the United States and Tennessee Constitutions guarantee criminal defendants the right to a speedy trial. U.S. Const. amend. VI; Tenn. Const. Art. I § 9. The Supreme Court noted in *Barker v. Wingo*,

> [T]he right to speedy trial is a more vague concept than other procedural rights. It is, for example, impossible to determine with precision when the

> right has been denied. We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate. As a consequence, there is no fixed point in the criminal process when the State can put the defendant to the choice of either exercising or waiving the right to a speedy trial. If, for example, the State moves for a 60-day continuance, granting that continuance is not a violation of the right to speedy trial unless the circumstances of the case are such that further delay would endanger the values the right protects. It is impossible to do more than generalize about when those circumstances exist.

407 U.S. 514, 521-22 (1972).

The *Barker* court established a balancing test involving four factors to be considered when determining whether a defendant's right to a speedy trial has been violated: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) prejudice to the defendant. *Barker*, 407 U.S. at 530. The *Barker v. Wingo* balancing test "necessarily compels courts to approach speedy trial cases on an ad hoc basis." *Id*. The Tennessee Supreme Court "recognized and adopted" the *Barker v. Wingo* balancing test "as the method to determine whether a defendant's right to a speedy trial was violated." *State v. Bishop*, 493 S.W.2d 81, 83-85 (Tenn.1973). Additionally, the Tennessee Supreme Court has stated that the strength of the State's case as to guilt can be used to help judge the four *Barker* factors. *Bishop*, 439 S.W.2d at 85.

"The purpose of the speedy trial guarantee is to protect the accused against oppressive pre-trial incarceration, the anxiety and concern due to unresolved criminal charges, and the risk that evidence will be lost or memories diminished." *State v. Utley*, 956 S.W.2d 489, 492 (Tenn. 1997). The reasons offered to justify delay are assigned different weight in the balancing analysis. *Barker*, 407 U.S. at 531. Possible reasons for the delay are said to fall within four identifiable categories: (1) intentional delay to gain a tactical advantage over the defense or to harass the defendant; (2) bureaucratic indifference or negligence; (3) delay necessary to the fair and effective prosecution of the case; and (4) delay caused, or acquiesced in, by the defense. *State v. Wood*, 924 S.W.2d 342, 346-47 (Tenn. 1996). The State's deliberate attempt to delay trial to hamper the defense must be weighed heavily against the State. *Barker*, 407 U.S. at 531. However, "a valid reason, such as a missing witness, should serve to justify appropriate delay." *Id.* Finally, *Barker* lists three areas in which a defendant could suffer prejudice due to a delay: (1) oppressive pre-trial incarceration; (2) anxiety and concern of the accused; and (3) impairment of the defense. *Id.* at 532. Of the three, impairment of the defense is the most serious way in which a defendant can be prejudiced. *Id.*

"While such a delay must approach one year to trigger the *Barker v. Wingo* analysis, the line of demarcation depends on the nature of the case. The presumption that pre-trial delay has prejudiced the accused intensifies over time." *State v. Utley*, 956 S.W.2d 489, 494 (Tenn. 1997) (citing *Doggett v. U.S.*, 505 U.S. 647, 652 (1992)).[8] Courts take into account the complexity of the case in evaluating the reasonableness of the length of delay. *Wood*, 924 S.W.2d at 346; *State v. Easterly*, 77 S.W.3d 226, 235 (Tenn. Crim. App. 2001). The delay "that can be tolerated for 'an ordinary street crime' is generally much less than for a serious, complex felony charge." *Easterly*, 77 S.W.3d at 235 (quoting *Barker*, 407 U.S. at 530-31).

Motion to Dismiss for Violation of the Right to a Speedy Trial

On January 13, 2019, Defendant filed a "Motion to Dismiss for Violation of the Right to a Speedy Trial." The motion was heard on January 23, 2019, and the court took the matter under advisement. Defendant asserts that the trial court erred when it failed to make findings on any of the four speedy trial factors and based its ruling on the fact that the case was "complex." This assertion is not supported by the trial court's February 7, 2019 Order denying Defendant's motion to dismiss in which the court addressed all four of the *Barker* factors. *See Barker*, 407 U.S. at 530.

Standard of Review

A trial court's determination that a defendant's right to a speedy trial was or was not violated is reviewed under an abuse of discretion standard. *State v. Hudgins*, 188 S.W.3d 663, 667 (Tenn. Crim. App. 2005) (citing *State v. Jefferson*, 938 S.W.2d 1, 14 (Tenn. Crim. App. 1996)); *Easterly*, 77 S.W.3d at 236. If the defendant's right to a speedy trial was

[8] *Utley*'s "approach one year" language comes from footnote 1 in *Doggett* which states:

> Depending on the nature of the charges, the lower courts have generally found post accusation delay "presumptively prejudicial" at least as it approaches one year. *See* 2 W. LaFave & J. Israel, Criminal Procedure § 18.2, p. 405 (1984); Joseph, SPEEDY TRIAL RIGHTS IN APPLICATION, 48 Ford. L. Rev. 611, 623, n. 71 (1980) (citing cases). We note that, as the term is used in this threshold context, "presumptive prejudice" does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* enquiry. *Cf.* Uviller, *BARKER V. WINGO*: SPEEDY TRIAL GETS A FAST SHUFFLE, 72 Colum. L. Rev. 1376, 1384-1385 (1972).

505 U.S. at 671, n.1.

violated, the only remedy is to dismiss the charges against him. *Barker*, 407 U.S. at 522; *State v. Bishop*, 493 S.W.2d 81, 83 (Tenn. 1973).

Defendant's arrest warrant was issued December 21, 2017, but he was hospitalized in Alabama at that time. Based on the record before us, Defendant was not incarcerated in Tennessee until January 24, 2018. Defendant's trial began February 11, 2019. Because the timeframe of pretrial incarceration slightly exceeds one year, we will review the balancing factors for a speedy trial violation.

Regarding the length of delay, *Barker* factor (1), Defendant was incarcerated from the time he was incarcerated until trial for one year and eighteen days. At Defendant's arraignment on April 17, 2018, the case was reset to May 9, 2018, so that the State could provide discovery. Defendant claims that, on May 9th, he asked to set a date for trial, but because the prosecutor handling his case was not present, the hearing was reset to May 23, 2018. The court's order, entered on June 18, 2018, stated that the November 28, 2018 trial date was set on May 23, 2018; therefore, Defendant's trial date was set one month and four days after he was arraigned. The short interval between Defendant's arraignment and the setting of Defendant's trial certainly indicates that there was no intentional delay by the State to gain a tactical advantage over the defense or to harass Defendant and that there was no bureaucratic indifference or negligence on the part of the trial court.

On November 6, 2018, the State asked for a continuance of Defendant's trial scheduled to begin November 28, 2018, due to a scheduling conflict with a three-year-old multi-day rape trial scheduled to begin November 29, 2018. The trial court heard the motion to continue the next day, again indicating that there was no bureaucratic indifference on the part of the trial court to Defendant's speedy trial rights. At the November 7, 2018 hearing, both sides agreed that Defendant's case was expected to take several days. The trial court noted the difficulty in finding three days in a row on the docket during the holidays. After a meeting in chambers, it was announced that the case was reset to begin Friday, February 1, 2019. Whether the parties intended to start a multi-day jury trial on a Friday is not clear. As the date approached, the trial court sua sponte moved the trial date to February 11, 2019, because of a scheduled Friday motion docket and so that the trial could continue for three days without a weekend interruption.

We reject Defendant's assertion that a scheduling conflict resulting in a brief delay over the holidays was "bureaucratic indifference" due to an "overcrowded docket." *See Simmons*, 54 S.W.3d at 759. Moreover, Defendant has not shown how the circumstances of his case were such that granting a two-and-one-half month continuance "endanger[ed] the values the right [to a speedy trial] protects." *Barker*, 407 U.S. at 521-22. We conclude, based on the nature of the charges against Defendant and the numerous witnesses involved at trial, the case was sufficiently complex that any delay was not unreasonable, and the

scheduling conflict was a valid reason for delay. *See Barker*, 407 U.S. at 521-22. *Barker* factor (2) weighs against Defendant. *But see State v. Turnbill*, 640 S.W.2d 40, 43 (Tenn. Crim. App. 1982) (stating that, for a thirteen-month delay, a "retirement of the judge who presided over the court to which the case was assigned, the subsequent appointment of his successor, the usual overcrowded docket, and somebody's attendance at an FBI School" were all "either valid or neutral reasons for delay" and "should not be weighed heavily against the State"); *State v. Daniel M. Bailey*, No. 02C01-9612-CR-00456, 1998 WL 70647, at *3 (Tenn. Crim. App. Feb. 23, 1998) (stating that, because "a continuance was necessitated due to scheduling conflicts in the court's trial calendar[,]" the reason for delay was "neutral" and should be "weighed less heavily" against the State).

"[A] delay of thirteen (13) months is not *per se* unreasonable." *State v. Bernard Woodard*, 1993 WL 20123, at *3 (Tenn. Crim. App. Feb. 2, 1993), *perm. app. denied* (Tenn. June 7, 1993). Moreover, Defendant was charged with four felonies ranging from Class A to Class D, and a Class B misdemeanor; therefore, the length of delay was not unreasonable when compared to other cases of the same complexity. *See Easterly*, 77 S.W.3d at 236 (concluding that a twenty-month delay was "not egregious, given the fact that the defendant [wa]s charged with a Class A felony"); *State v. Broderick Joseph Smith*, No. M2009-01427-CCA-R3-CD, 2011 WL 322358, at *6 (Tenn. Crim. App. Jan. 14, 2011) (concluding that a seventeen-month delay was not egregious where the defendant was charged with "six felonies ranging from Class D to Class B"), *perm. app. granted* (Tenn. May 26, 2011). Defendant received his trial with the "customary promptness" of Tennessee courts. *Doggett*, 505 U.S. at 652 (A defendant "cannot complain that the government has denied him a 'speedy' trial if it has, in fact, prosecuted his case with customary promptness."). *Barker* factor (1) weighs against Defendant.

Defendant asserted his right to a speedy trial on March 7, 2018, so *Barker* factor (3) weighs in favor of Defendant. *Simmons*, 54 S.W.3d at 760.

Whether Defendant was prejudiced by the delay is the "final and most important factor," and its purpose is "(1) preventing oppressive pretrial incarceration; (2) minimizing the accused's anxiety and concern; and (3) limiting the possibility of impairment to preparation of the defense." *Easterly,* 77 S.W.3d at 237. Defendant was incarcerated over one year while awaiting trial, and he testified to pretrial anxiety and that he received inadequate medical care at the prison facilities. However, we do not believe Defendant's thirteen-month delay "created undue and oppressive incarceration, maximized his anxiety and concern beyond the normal levels of anxiety and concern that accompany a criminal prosecution, or impaired the ability of [D]efendant to aid in his defense." *See State v. John Wesley Wright*, No. M2011-00436-CCA-R3-CD, 2011 WL 5326282, at *10 (Tenn. Crim. App. Nov. 4, 2011); *see also State v. Alex Biles*, No. C.C.A. 86-104-II, 1987 WL 13446, at *5 (Tenn. Crim. App. July 10, 1987) (finding no "oppressive pretrial incarceration"

where the defendant was incarcerated for fourteen months prior to trial). Because there is no prejudice, *Barker* factor (4) weighs against Defendant.

After balancing the *Barker* factors, we conclude that Defendant was not denied the right to a speedy trial. He is not entitled to relief.

Conclusion

For the foregoing reasons, the judgments of the trial court are affirmed.

_____
ROBERT L. HOLLOWAY, JR., JUDGE

Appendix C

Circuit Court Order Denying Motion to Dismiss

IN THE CIRCUIT COURT FOR THE FOURTEENTH JUDICIAL DISTRICT

SITTING AT MANCHESTER, COFFEE COUNTY, TENNESSEE

FILED

FEB 07 2019

CIRCUIT COURT
COFFEE COUNTY, TN
HEATHER HINDS DUNCAN, CLERK
TIME_____AM/PM

STATE OF TENNESSEE,

Plaintiff,

vs.

WILLIAM EUGENE MOON,

Defendant.

CASE NO. 44,905F

ORDER

This matter is before the Court on the Defendant's Motion to Dismiss for violation of his right to a speedy trial. The matter was heard on January 23, 2019. After an evidentiary hearing and oral arguments of counsel, the Court finds the following:

As was argued by the Defendant, this Court has the inherent authority and responsibility to see that any case is not delayed. The incident that is the basis for this case occurred on December 17, 2017. On December 21, 2017, arrest warrants were issued against the Defendant for attempted first-degree murder and resisting arrest. The Defendant was in the hospital at the time, and Tennessee placed a hold on him. On January 24, 2018, the Defendant was brought back to Tennessee and served with the arrest warrants. On February 2, 2018, he attended his first court date, and his

RECORDED
ON MINUTES

FEB 07 2019

Heather Hinds Duncan, Clerk
Coffee County TN

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preliminary hearing was eventually reset for March 8, 2018. On March 7, 2018, the Defendant filed his formal demand for a speedy trial to ensure he got a preliminary hearing. The case was bound over to the Circuit Court on March 8, 2018. After the Grand Jury met, the Defendant was arraigned on April 17, 2018. On June 18, 2018, the Defendant asked the Court to set the case for trial on the soonest trial date available. After offering several trial dates, the parties agreed to a trial date on November 28, 2018. In early November 2018, the State moved to continue the trial because it had another case before this Court that was several years old that dealt with the rape of a minor. The matter was reset for February 1, 2019, for trial. Per the affidavit of defense counsel, one of the witnesses who may have observed the incident in question has allegedly left the state, and when this case was argued, the defense could not locate him.

Because the speediness of a trial can vary depending on the circumstances, the courts usually look to four factors to decide whether the right has been violated: (1) The length of the delay; (2) The reason for the delay; (3) Whether the right was asserted; and (4) Any prejudice to the defendant.

Based on the facts above and for the following reasons, the Court finds that the current trial date of February 11, 2019, does not violate the Defendant's right to a speedy and public trial. As to the length of delay and the reason for the delay, February 11, 2019, was chosen, instead of February 1, 2019, because it provides three (3) consecutive weekdays that the Court now understands this matter will need to reach

its conclusion. When this Motion was argued, it had only been less than nine (9) months since the Defendant was arraigned in this matter. The initial date of November for the first trial was set in the presence of both parties. In fact, the only trial continuance in the case was from the original trial date in November, which was only approximately two-and-one-half (2.5) months ago. The short two (2)-month delay for the resetting of a new trial date was necessitated by having to try another case that had been on the docket longer and dealt with just as sensitive facts. Being an attempted murder trial, this case is complicated, and therefore, would necessitate some months' preparation. However, the Defendant argues that this case is comparable to a normal "street crime." This Court respectfully disagrees. Several months of preparation, a lengthy witness list, and a projection of three (3) days to try it show otherwise.

As to the assertion of the right, the Defendant did file a Motion for Speedy Trial in the General Sessions Court. He also asked for a first-available trial date in May of 2018, which precipitated the early trial settings. As far as prejudice to the accused, again, the Court cannot ascertain when the Defendant's witness went missing or the real efforts made in locating him. However, from reading the defense counsel's affidavit and the statement given by the witness at the time of the incident, it appears his testimony would be neutral at best for the defense. He stated at the time of the incident that he saw the Defendant start to fumble around with the policeman and then heard shots fired. Defense counsel's affidavit basically states that the witness did not see Moon try to shoot the officer. It is also important to note that the Defendant argues that

the Defendant's bond is high, but the defense has not filed a motion to reduce bond in the Circuit case, and it appears his pre-trial incarceration has been a relatively normal one, considering the circumstances.

Respectfully, the Court denies the Defendant's Motion.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED this 7 day of Feb, 2019.

L. CRAIG JOHNSON
CIRCUIT COURT JUDGE, PART I

Appendix D

Motion to Dismiss for Violation of the Right to a Speedy Trial

Appendix 55

FILED
JAN 16 2019
CIRCUIT COURT
COFFEE COUNTY, TN
HEATHER HINDS DUNCAN, CLERK
TIME ____ AM/PM

IN THE CIRCUIT COURT
FOR COFFEE COUNTY, TENNESSEE

STATE OF TENNESSEE,

Plaintiff

v.

44,905-F

WILLIAM EUGENE MOON,

Defendant

MOTION TO DISMISS
FOR VIOLATION OF THE RIGHT TO A SPEEDY TRIAL

Based on the Sixth Amendment, the Defendant William Moon moves to dismiss the indictment because the State has violated his right to a speedy trial. The length of the delay has been substantial, a speedy trial was demanded long ago, the reason for the delay is bureaucratic indifference, and prejudice has occurred — both in the form of pretrial incarceration, and also a lost witness. Dismissal is required.

STATEMENT OF FACTS

On December 17, 2017, Officer Michael Wilder shot William Moon five times. To justify himself after the fact, he claimed that Moon was trying to shoot him. Notably, Moon did indeed have a gun on his person. But while in severe pain and while pleading for one last favor before (what he assumed would be) his death, Moon denied the accusation. He said that he had not tried to shoot anybody. After Moon did *not* die, on December 21, 2017 warrants were issued against him for Attempted First-Degree Murder, and Resisting Arrest. Moon was in the hospital at that

time in Alabama, recovering from his injuries. Tennessee placed a hold on him, resulting in his imprisonment in Alabama until he was brought to Tennessee.

On January 24, 2018, the Defendant was brought back to Tennessee and served with the warrants. His bond was one million one hundred thousand dollars ($1,100,000). On February 02, 2018, he and his defense counsel attended court, expecting to have the preliminary hearing as required by Rule of Criminal Procedure 5.[1] The State was unready, though, so the hearing was reset for March 08, 2018. On March 07, 2018, Moon filed a formal demand for a speedy trial. The case was bound over to the Circuit Court on March 08, 2018. Notably, at the preliminary hearing, the officer claimed that the whole incident was recorded on his dashboard video.

On April 17, 2018, Moon was arraigned. The defense agreed to reset the case for just a few weeks, to let Moon get the supposed video and other discovery from the State. After getting discovery, Moon appeared for his next court date on May 09, 2018, and he asked to set the case for trial. However, the prosecutor was not present in court that day, so the defense was not allowed to set the case for trial that day. The case was reset again. On June 18, 2018, Moon again asked the Court to set the case for trial. He asked for the soonest trial date available, citing his desire for a speedy trial. For a multitude of reasons, the State said that it could not attend various trial dates that the judge first offered. Finally, the prosecutor said that he could do the trial on November 28, 2018. The trial was set for November 28, 2018.

On November 06, 2018, the State moved to continue the trial, because it had another case that it wanted to try that week instead. Over defense objection citing the prior speedy trial demand, the State's motion was granted. The trial was continued until February 01, 2019.

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1 Effective July 2018, the rule was amended to require that preliminary hearings occur within fourteen days, instead of ten. Tenn. R. Crim. P. 5 (Commission Comments, 2018).

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Moon has remained incarcerated throughout.

One of Moon's witnesses, Donald Allen Woods, who observed the officer shoot Moon without being threatened by any gun, has since left the State. (Affidavit of Drew Justice, attached). Defense counsel spoke with him this summer, around the time of the trial setting. (*See id.*). His absence from the locality was discovered on or about November 02, 2018. (*Id.*) The defense cannot presently locate or contact him. (*Id.*)

ARGUMENT

William Moon has been deprived of his right to a speedy trial. The Sixth Amendment guarantees this right for the accused in any criminal proceeding. Moon has not waived, or otherwise forfeited, that right. Indeed, he has continuously asserted it. The only available remedy for the denial of a speedy trial is dismissal, which is the proper remedy here.

Because the speediness of a trial can vary depending on the circumstances of a given case, courts look to several factors to determine whether the right is officially violated: The length of the delay, the reason for the delay, whether the right was asserted, and prejudice to the accused. *Barker v. Wingo*, 407 U.S. 514, 530 (1972). The last three factors all weigh in favor of dismissal here, and the first factor (length of delay) is satisfied sufficiently as well. Hence, the right has been violated.

First of all, Tennessee courts will not even consider a motion to dismiss unless the pretrial delay has "approach[ed]" one year. *State v. Utley*, 956 S.W.2d 489 (Tenn. 1997). In this case, Moon was formally served 364 days ago (January 24, 2018). A period of 364 days clearly approaches one year. Hence, the threshold is satisfied. Such a period is presumptively

prejudicial. *See Doggett v. United States*, 505 U.S. 647, 652 n. 1 (1992). Notably, the State also placed a "hold" on Moon even before that date, while he was held in Alabama. Ultimately, the length of a delay justified for "ordinary street crime" can differ from the length allowable for a trial on more complicated charges, such as a complex drug conspiracy. *Barker*, 407 U.S. 514 at 531. The present charge — pointing a gun at someone — would easily qualify as "ordinary street crime," so no lengthy delay was justified. *See id.* Nonetheless, while the threshold inquiry (approaching one year) is satisfied, the length-of-delay factor does not weigh especially heavily in Moon's favor, because the time in excess of one year is so minor. *See Doggett*, 505 U.S. 647 at 652. As such, the Court must consider the other factors to determine whether the right has truly been violated.

The next factor, reason for the delay, weighs in favor of dismissal because the delay was caused by the State's bureaucratic indifference. Delays typically fall into the following categories: 1) Delay needed for fair adjudication of the case, or acquiesced in by the defense, 2) Delay caused by the State's negligence or bureaucratic indifference, or 3) Delay intentionally caused by the State for tactical gain, or else to harass the accused. *State v. Wood*, 924 S.W.2d 342, 346-347 (Tenn. 1996). Delays caused by the State are weighed against the State and in favor of dismissal. *Id.* Here the *only* continuance acquiesced in by the defense was a delay of three weeks following arraignment — namely, so the defense could get copies of discovery. At the preliminary hearing, the officer (falsely) testified that the whole incident was recorded on video, so getting discovery seemed pretty important. Other than this brief delay, the remainder of the delay has been caused by the State. Delays caused by overcrowded trial dockets count as bureaucratic indifference. *Id.* at n. 10. The State of Tennessee determines how many

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judges and prosecutors to hire. The State's representative, the local prosecutor, determines which cases to try. Bureaucratic indifference is thus an apt description for the problem of overloaded dockets. Here the initial setting of the case for trial on November 28, 2018 — further out than Moon wanted — was brought about by the prosecutor's unavailability. Later, the same prosecutor continued the case again, because his office wanted to try another felony case that week instead. Apparently there were not enough judges and courtrooms to do both. Given the logistical problems caused by an overloaded judicial system, the State's bureaucratic indifference has caused the chief delay here. This reason for delay weighs in favor of dismissal.

The third factor, the presence of a demand for a speedy trial, weighs in favor of dismissal. Moon formally demanded a speedy trial in a filing on March 07, 2018. "The defendant's assertion of his speedy trial right . . . is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." *Barker*, 407 U.S. 514 at 531-532. Notably, Moon expressly filed this demand in response to the illegal failure to give him a hearing within ten days as required by Rule 5 of Criminal Procedure. Later, he again brought up the speedy trial demand when asking for trial dates, and when opposing the State's last continuance. Moon's demand for a speedy trial is entitled to strong weight. The State has simply not taken the speedy trial demand seriously.

The last factor, prejudice, weighs most strongly in favor of dismissal. Prejudice to the accused is often considered the most important factor of all. *But see Doggett*, 505 U.S. 647, 651 and 657 (Overruling a Sixth Circuit decision that strictly required a specific showing of prejudice, but noting that prejudice is an important factor to examine, in combination with the length and reasons for delay). Here Moon has suffered massive prejudice, most importantly

because he has been incarcerated for a year. He is presumed innocent. Yet because of his immensely high bond, he has remained incarcerated, and suffered prejudice thereby. Oppressive pretrial incarceration is a major evil that the Sixth Amendment was designed to minimize. *Barker*, 407 U.S. 514 at 532. Moreover, one of the eyewitnesses to the shooting, Donald Woods, has gone missing during the lengthy period of delay. Hence, Moon has suffered not just from incarceration, but from a strategic setback as well. An impaired defense over time is another major evil that the speedy trial right was designed to combat. *Id.* Given these two substantial forms of prejudice, this factor weighs heavily in favor of dismissal.

CONCLUSION

WHEREFORE, William Moon asks that the Court dismiss the indictment for violation of his right to a speedy trial.

Drew Justice #29247
Attorney for William Moon
1902 Cypress Drive
Murfreesboro, TN 37130
(615) 419-4994
drew@justicelawoffice.com

Certificate of Service

The undersigned lawyer certifies that this January 16, 2019, he has mailed and also emailed a copy of this motion to District Attorney Craig Northcott, P.O. Box 147, Manchester, TN 37349.

Drew Justice #29247

THIS MOTION IS EXPECTED TO BE HEARD ON JANUARY 23, 2019 AT 9:00 A.M. BEFORE THE HONORABLE CRAIG JOHNSON, CIRCUIT JUDGE

Appendix 61

AFFIDAVIT OF DREW JUSTICE

Comes now the affiant, Drew Justice, being duly sworn and testifying as follows:

Originally I was informed that Donald Allen Woods saw the shooting, but that he hated lawyers and the police, and that he would not be inclined to attend court.

In late May 2018 and/or sometime in June 2018, I was able to speak with Donald Woods by phone multiple times. Specifically, his father Larry Woods (also a witness) was in jail, and he needed help getting bonded out. He gave me the phone numbers of his two children, one of whom was Donald Woods. I called Donald Woods and spoke with him about the bond issue on multiple occasions. After I gained some rapport with him through this joint task, he told me what he had seen. Donald Woods reported that he had observed the officer shoot William Moon unprovoked, and that Moon did not try to shoot the officer. (A rather cursory statement that he gave the TBI is attached.) I last spoke with the witness in approximately June of 2018.

On or about November 02, 2018, I attempted to serve a subpoena on Donald Woods, but I was informed that he had gotten into an argument with his father, that he was not speaking to him anymore, and that he had moved away to North Carolina. His father did not have any contact information for him. Nor have I been able to find any myself.

And further the affiant saith not.

Drew Justice

Drew Justice
1902 Cypress Drive
Murfreesboro, TN 37130
(615) 419-4994

Sworn and subscribed before me this 16TH day of January 2019

Notary

Appendix E

Transcript of Hearing on Motion to Dismiss

M2019-01865-CCA-R3-CD Vol 3

TRANSCRIPT OF STENOGRAPHIC RECORDING
OF PROCEEDINGS

IN THE CIRCUIT COURT OF COFFEE COUNTY, TENNESSEE

AT MANCHESTER

FILED

JUL 17 2019

CIRCUIT COURT
COFFEE COUNTY, TN
HEATHER HINDS DUNCAN, CLERK
TIME _____ AM/PM

STATE OF TENNESSEE,

Plaintiff,

vs.

CASE NO. 44,905

WILLIAM EUGENE MOON,

Defendant.

FILED

FEB 04 2020

Clerk of the Appellate Courts
Rec'd By _____

MOTION HEARINGS

November 7, 2018
January 23, 2019

APPEARANCES:

THE HONORABLE L. CRAIG JOHNSON
Presiding Judge

FOR THE PLAINTIFF:

C. Craig Northcott, Esq.
Jason Ponder, Esq.
District Attorney General's Office
P.O. Box 147
Manchester, TN 37355

FOR THE DEFENDANT:

Andrew Justice, Esq.
1902 Cypress Drive
Murfreesboro, TN 37130

I N D E X

the Court and counsel in chambers, and these were all the proceedings reported in this case on the 7th day of November, 2018. The following proceedings were reported on the 23rd day of January, 2019:)

(A recess was taken.)

THE COURT: The Moon motion to dismiss.

(The defendant entered the courtroom.)

THE COURT: Mr. Justice, whenever you are ready, sir.

MR. JUSTICE: The defense will call William Moon.

THE COURT: All right. Mr. Moon, if you'll come up, please, sir, and have a seat in the witness chair and raise your right hand the best you can.

WILLIAM EUGENE MOON,

called as a witness on his own behalf and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. JUSTICE:

Q Mr. Moon, the incident that you are being charged here with occurred on December 17th, 2017. Can you tell us where you were taken

immediately after that -- after the incident?
A To Alabama, Huntsville Hospital.
Q Okay, and how long were you at that hospital in Alabama?
A About three weeks.
Q Okay, and if you were to estimate -- where did you go after the hospital in Alabama?
A To Huntsville Jail.
Q And at that point, you had apparently been charged in this case; is that right?
A Yes.
Q And about how long would you estimate you were at the Huntsville Jail?
A A couple weeks.
Q Okay, and then according to the court record, I believe you were served with a warrant here on January 24, 2017 (sic). Does that seem about right?
A Yes.
Q And when you got to General Sessions Court in Coffee County, did you ask for any continuances of this case?
A No.
Q And could you just estimate for us, about how long have you been incarcerated on this

case?
A About a year.
Q And are you being held on any other cases?
A No.
Q Now my understanding is that one of the reasons the officer was interacting with you in this case is, he was trying to serve a warrant for another case. Are you aware of what that other case was?
A It was another felony warrant.
Q Okay, and what happened with that case?
A It was dismissed.
Q Okay, and when was it dismissed?
A I don't know exactly.
Q Was it dismissed at the same time as your preliminary hearing in this case?
A It could have been, I think.
Q Okay, and so since March 8th of 2018, have you been held on any charges other than this one, to your knowledge?
A No.
Q Now tell me in terms of being incarcerated for about a year, what is it like to be incarcerated at the Coffee County Jail?

A Oh, it's -- it's pretty bad.
Q In terms of like -- what has your security classification been?
A It's on max.
Q And in terms of -- can you tell us, to your knowledge, do you have any prior felony convictions?
A No.
Q And being under a max or security or whatever they call it, about how much time have you had to get out of your cell each day?
A We are locked up 22 hours, and we get out 2.
Q Okay, and I think you told me that may have changed recently; is that correct?
A Yeah. About a month or so ago, they let us -- now we get 12 hours out.
Q Okay, so up until about a month or so ago, they were keeping you in jail -- or keeping you in your cell and letting you out about two hours a day?
A Yes.
Q And during this incident, did you suffer any injuries from being shot?
A Yes.

Q And were you, in fact, shot five times?
A Yes, sir.
Q And if you had to give an opinion about the quality of the medical treatment you have received at the Coffee County Jail, what would your opinion be?
A It's not very good.
Q And why do you say that?
A Well, they took a bullet out and they sewed me up, and then I just started -- they didn't even put enough stitches in it, and I had to go back and get some more stitches.
Q While you are at the jail, other than being transported to places like coming to and from court, are you allowed to go outside and see the sunlight?
A No. They said we do, but no, we don't ever get to go out.
Q And what is it like -- are you aware that if you were convicted in this case, you could potentially go to prison for many years?
A Yes.
Q What is it like having those kinds of charges hanging over your head over the course of the year?

A I worry about it every day.
Q Okay, and how does it make you feel?
A Depressed.
MR. JUSTICE: No further questions.
THE COURT: Okay.

CROSS-EXAMINATION

BY MR. PONDER:

Q Mr. Moon -- or excuse me -- yeah. Mr. Moon, do you know why you are here today?
A Yes.
Q Can you tell the Court why you are here today?
A For --
MR. JUSTICE: -- Your Honor, I would object based on the irrelevance of it, if the DA is just asking about what happened. It seems like this would be the type of questions you would ask if he testifies at trial, which he very well might, but not if he testifies for these limited purposes.
THE COURT: It's your motion. I am going to allow it. Go ahead.

BY MR. PONDER:

Q Do you know why you are here today?
A I thought it was for a plea because

that's what everybody was saying.
Q Okay. Are you familiar with the motion to dismiss and for a speedy trial violation that your attorney filed?
A Yes.
Q Did you get a chance to read it?
A No.
Q But he explained it to you?
A Yes.
Q Did he explain to you why you have been -- are at a disadvantage in your trial because of a delay?
A Not really. He probably has but I --.
Q Fair enough, Mr. Moon. Do you know a Mr. Donald Woods?
A Yes.
Q Donald Allen Woods?
A Yes, yes.
Q How long have you known him?
A A couple of years, I guess.
Q A couple years. Would you classify him as a friend?
A Yeah.
Q Was he there the night this incident happened?

A Yes.
Q Do you remember him being there?
A Yeah.
Q Okay, and did he witness everything that happened?
A I think he did.
Q Okay. Do you know about the statement that he gave the police that night?
A No, sir.
Q You didn't hear that?
A No.
Q Okay. Do you know about anything that he said since then? Have you had any conversations with him or heard him say --
A -- No, no. I have not been able to talk to anybody, but some of this stuff has probably been told to me that I am saying no.
Q That's fair enough, okay, so as far as you know, does Mr. Woods have anything favorable to say about you?
A I think he would tell the truth of what happened.
Q Okay. Do you think he told the truth that night?
A Yeah.

Q Okay, when he talked to the police?
A Uh-huh.
Q But you are not familiar with what he said?
A No.
MR. PONDER: All right, thank you. I don't have any further questions.
THE COURT: Mr. Justice, anything else from Mr. Moon?
MR. JUSTICE: No, Your Honor.
THE COURT: Thank you, Mr. Moon. You may step down.
THE WITNESS: Thank you. I can sit back down?
THE COURT: Yes, sir.
(Witness Excused.)
***
THE COURT: Any other witnesses, Mr. Justice?
MR. JUSTICE: No, Your Honor.
THE COURT: Any witnesses for the State?
MR. PONDER: None, Your Honor.
MR. JUSTICE: Your Honor, the purpose of this motion is to address the violation by the State of Mr. Moon's right to a speedy trial. The

law is clear for violation of that right, the only available remedy is dismissal, and so dismissal is the remedy that we want. Mr. Moon's speedy trial rights have been violated because he has been incarcerated for one year, and for essentially that entire time, he's been pressing for a trial, and the State has basically just been stalling. You have heard testimony that he was the -- the court record reflects that he was served with the warrant -- that the warrant was taken out on December 21, 2017, four days after the incident. He was formally served with it on January 24th, 2018. You have heard him testify that he was apparently held in a jail for a couple weeks leading up to that. Once he was brought to court, his first court date, I believe, was February 2nd, 2018. He came with a lawyer. He came with me there, and we were prepared to go ahead and do the preliminary hearing. The State was not ready, so in violation of the ten-day rule, the case was put off. It was put off specifically until March 8th, and after that, we filed a speedy trial demand on March 7th, and after that, the only delay that -- the only reset that we've ever consented to was a delay of three weeks starting at arraignment. I

think the arraignment was mid April, and we agreed to a continuance of, I think, 22 days until May 9th. Frankly, the only reason we didn't go ahead and set it for trial at arraignment was because the officer testified at the prelim that the video -- that he was going to have a dashboard video that showed the whole thing and was turned on and all that. As Your Honor will find out if this makes it to trial, that turned out not really to be true, but given that information, we were -- you know, it seemed like a good idea to put the case off for a few weeks to get the video before we set it for trial. It turns out to have been sort of a waste of three weeks, but the point is, three weeks are the only delay that we have ever really acquiesced to in this case. When deciding a speedy trial motion, the courts are supposed to look at four factors, and basically three out of the four strongly weigh in the defense's favor in this case. The remaining factor doesn't weigh against the defense exactly. It just isn't particularly strong in the defense's favor. Those factors are supposed to be whether the defendant ever asked for a speedy trial, whether -- (2) what the raw length was of time of the delay; (3) what

the reason was for the delay; and (4) whether the defendant was prejudiced. In this case as discussed, we demanded a speedy trial and have been pressing for a trial all along, and we formally demanded one on March 7th, 2018, so that factor is satisfied. In terms of the raw length of time, the way that works is, you are only allowed to file a motion to dismiss once the delay has reached a threshold period that is presumptively prejudicial, so basically, you've got to wait to at least close to one year before you can file a motion to dismiss. Well, that's been done here. Once that threshold period is satisfied, then any amount over one year is weighed even more heavily in favor of the defense. Since here we have just got one year, that factor doesn't really weigh any more heavily in favor of the defense. The third factor is reason for the delay, and specifically, whether it was the defense or the State that caused the delay. In this case, I don't have any specific evidence that the State purposely stalled this case out with the intent of harassing or gaining a tactical advantage, but the State's -- so I am just going to call it negligence. It's negligence or

bureaucratic indifference is the term that the courts have used. If the State is unavailable, if the judges are unavailable, if courtrooms are unavailable, those are delays that are attributed to the State as bureaucratic indifference because the State funds the judges, the courts, the DAs, and so any delay in getting a defendant to trial basically tends to show that the State doesn't care that much about getting him to trial speedily, and so the delays here, all of them but about three weeks, were caused by the State, so that reason weighs heavily in favor of the defense. Then finally, we've shown prejudice. I suspect the most important prejudice is that Mr. Moon has been in jail this whole time. The courts specifically talk about the importance of that factor. They say, in *Barker v. Wingo*, the Supreme Court said "The time spent in jail awaiting trial has a detrimental effect on the individual. It often means loss of a job, it disrupts family life, and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time." Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence,

contact witnesses, or otherwise prepare his defense. Imposing those consequences on anyone who has not yet been convicted is serious. Mr. Moon has not been convicted. If this case were to go to trial, I would submit Your Honor will see the evidence is not very strong, either, but regardless of that, he has not been convicted. He is presumed innocent, and most of this directly applies to him. I mean, he talked about the lack of recreational programs in the jail, the fact that he never even gets to go outside, the fact that he was, for most of that, limited to being two hours outside of his cell. That is a serious prejudice that he has suffered, and then in addition to that, he talked about he feels like the medical treatment he has received from his five gunshot wounds has been mediocre at best, so that's all prejudice from the incarceration. In addition, as we explained on the affidavit that's attached to my motion, there was another witness that we were hoping to call at trial, but when I tried to serve him, it turned out he had left the state and can't be tracked down anymore. That was Mr. Donald Woods, and specifically, the affidavit explains he told me that Mr. Moon was innocent

essentially, that Mr. Moon did not pull a gun. I also attached his statement that he gave to law enforcement. The statement doesn't have a whole lot of detail on it. It's like two sentences --

THE COURT: -- Yes. I read it.

MR. JUSTICE: -- but one thing that is notably missing from the statement is any statement about Mr. Moon pulling a gun, so the fact that that witness is gone is very harmful to our case, so that's a second form of prejudice. All together, three out of the four factors weigh in our favor, and they are frankly the most important factors, I submit. All together, I would just say in a case like this where a defendant is incarcerated and when he is overtly asking for a speedy trial and trying to push things along, the State is simply not allowed to just keep putting the case off, and that's what they did here, and it violates the right to a speedy trial.

THE COURT: When you say they keep putting the case off, he was arraigned in April, and then there was a setting in May, and the prosecutor for the State wasn't there, and then shortly thereafter, it was set for trial in

November with you being here and agreeing to that date, although you may have wanted something quicker, so what other continuances are you talking about, other than the one for the Corak case where the prosecutor asked for a continuance of a short period of time? What other continuances are you talking about?

MR. JUSTICE: Well, there was the initial continuance at the preliminary hearing.

THE COURT: Are you talking about when it was bound over?

MR. JUSTICE: I'm talking about when we showed up on February 2nd to ask to go ahead and do the prelim, and they weren't ready, so it got put off a month for that, and then a month to have it bound over, and then a month -- then three weeks, like I said, that I agreed to to get the video, but Your Honor summarized basically accurately. I'm not saying there was much more than that. However, when we show up the first discussion date and say we want to set it for trial and the State is not available, and then it gets put off another month, I mean, that's seems, you know, not too terribly severe if that is all it was, but then we showed up on the next court

date on June 16th, I think, and we did want it sooner than November. I mean, showing up in June and then getting a trial date that is five months out is kind of --

THE COURT: -- Pretty normal.

MR. JUSTICE: Well, if it is pretty normal, then that is just unfortunate.

THE COURT: Bureaucratic indifference.

MR. JUSTICE: Well, right, but Your Honor summarized it correctly. I'm not saying -- I think you have got the facts.

THE COURT: Okay. I just wanted to make sure I wasn't missing anything.

MR. JUSTICE: But I will just say, we did want a trial earlier than November, and we didn't get one, and then --

THE COURT: -- Yes. I remember that.

MR. JUSTICE: -- when November came, it got put off again and again --

THE COURT: -- And then you and I have talked about this being a three-day trial and trying to find three days together makes it difficult as well, even with the date that it is set now. We are looking at a four- or five-day period in between days because of regularly set

things that also have priorities.

MR. JUSTICE: If we do it that way, then we do. I was under the impression it was going to start on February 1st and then continue to the 4th --

THE COURT: -- Right --

MR. JUSTICE: -- But if that has changed --

THE COURT: -- Which is a Friday. Well, I've got regularly set civil matters and motions that day, some which may have priority, and then I've got, I think it's maybe Grand Jury the next day and then a docket like this the next day, but yes. It looks like Thursday would be the next day. We will talk about that in a minute. Go ahead. General Ponder?

MR. JUSTICE: I don't have anything further to add. I just submit the law is fairly clearly on our side, and I do ask the indictment be dismissed.

THE COURT: Okay. Thank you, Mr. Justice. General Ponder?

MR. PONDER: Your Honor, what Mr. Justice is asking the Court to do is to look at the Court's calendar as bureaucratic indifference

and delay, both in the General Sessions Court and the Circuit Court. The one date missed by General Northcott, he was in a jury trial. I spoke with General Northcott about this matter, and there did not appear to be any attempts to get a trial date by agreement with the Court by using a telephone, a letter, or e-mail, during this time, so the court dates were utilized to do this. As far as the witness that is purportedly missing, to date, there has been no request by the defense to get the State's assistance in locating this witness, although we are independently trying to do so. I think when you look at the factors, the length of the delay is not significant -- well, it's significant, but it's not unreasonable given the seriousness of this case. This is an attempted murder of a police officer in the City of Tullahoma. The reasons for the delay have been simply schedules. There was one request by the State to try another case that was --

THE COURT: -- Significantly older and --

MR. PONDER: -- Much older.

THE COURT: -- and just as serious.

MR. PONDER: Yes, and so there was that

delay, and I would argue that would fall into the prosecution of cases fairly effectively, and that was a delay that was necessary under the considerations are articulated by the history of cases, *Baker* and *Bishop*, and of course, *Barker v. Wingo*. Obviously, this defendant has a right to a speedy trial. I believe if this case goes forward, if the defense doesn't ask for a continuance to find this witness that they say is important to them, then this case will be tried very nearly a year after it happened, so I don't think this is a delay that is unreasonable, and so I don't think that dismissal is a remedy that would be appropriate in this case, Your Honor.

THE COURT: Okay. Mr. Justice?

MR. JUSTICE: Your Honor, the rule isn't that the State gets to wait a year and then just argue that the delay was not unreasonable. The rule is that one year is presumptively unreasonable, and once it gets to one year, then the defendant can file a motion to dismiss, and then the State can try to explain away whatever the reasons were for the delay. I also submit that the seriousness of the charge just underscores the fact that the State should have

been more desirous of going ahead and getting the case resolved, but regardless of that, the seriousness of the charge just has nothing do with the speedy trial analysis. The speedy trial analysis looks not at the seriousness of the charge, but at the complexity of the charge. In this case, this will be easily classified as ordinary street crime. There is nothing -- this is not a complex drug conspiracy. There's one police officer who shot Mr. Moon and says Mr. Moon pulled a gun on him and that that was his reason for shooting him. There's some eyewitnesses. There's some other statements the officers made that may be gotten into, but it's a pretty cut and dried case, so because the case was not complex, the State can't say, "Well, this was -- the one year we needed due to the complexity of the case." It is not a reasonable delay, and therefore, the right to a speedy trial was violated.

THE COURT: All right. Well, I am going to do some of my own research on the speedy trial. It's been a while since I have looked at that, so I'm not going to make a ruling on it today. What I am going to do, and I've asked both sides to look at their calendars, I will have three to four

days in a row February 11th, which is a Monday instead of February 1st, which is a Friday. I have asked both sides to look at their calendars. I think you were okay, Mr. Justice, as I recall, although you may have a deposition?

MR. JUSTICE: It's a deposition we just scheduled yesterday, so if I need to bump that, I can be free the whole week of the 11th.

THE COURT: Okay, and you had checked, I think, with General Northcott's calendar and it looked okay, except there's a lot of people subpoenaed.

MR. PONDER: And I will say this, Your Honor, if the Court is inclined to move the case, the sooner we know, the better because we have a lot of people to call.

THE COURT: Just call -- subpoenas remain good. They are still bound here, but let's move it to the 11th. That's not but a little over a week further delay. Then I will get something -- in the meantime, the State is going to keep trying to look for Mr. Woods. I'm sure you will as well. I will take it and get you something out here real soon on the motion for speedy trial, okay?

MR. JUSTICE: All right. Thank you.

THE COURT: Thank you. Yes, that would be on the Square, Mr. Justice. It will be on the Square.

MR. JUSTICE: Okay, thank you.

THE COURT: I know you were asking about the Square earlier.

MR. JUSTICE: Yes. I didn't see it.

(And these were all the proceedings reported in this case on the 23rd day of January, 2019.)

REPORTER'S CERTIFICATE

STATE OF TENNESSEE

COUNTY OF COFFEE

I, Bonnie C. Brown, Certified/Licensed Court Reporter for the State of Tennessee, do hereby certify that I reported in machine shorthand the motion hearings in the case of STATE OF TENNESSEE vs. WILLIAM EUGENE MOON, Case Number 44,905, on the 7th day of November, 2018, and the 23rd day of January, 2019, in the Circuit Court of Coffee County, before the Honorable L. Craig Johnson, Judge; that the foregoing pages constitute a true record of the proceedings had and evidence entered in the above-entitled case.

I further certify that I am not an attorney or counsel of any of the parties, nor a relative or employee of any attorney or counsel connected with the action, nor financially interested in the action.

Witness my hand and seal in the City of Manchester, County of Coffee, State of Tennessee, this 8th day of July, 2019.

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Bonnie C. Brown, CCR, LCR

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