COURT OF APPEALS OF VIRGINIA

Record No. 1111-25-4

COLLINS YAW AGYEI
v.
COMMONWEALTH OF VIRGINA

Present: Judges O'Brien, Friedman and Frucci
Argued at Fredericksburg, Virginia

Opinion Issued October 27, 2026[*]

FROM THE CIRCUIT COURT OF FAIRFAX COUNTY
Randy I. Bellows, Judge

Liza Greenspun Yang (Greenspun Shapiro PC, on briefs), for appellant.

Ken J. Baldassari, Assistant Attorney General (Jason S. Miyares,[1] Attorney General; Justin B. Hill, Assistant Attorney General, on brief), for appellee.

MEMORANDUM OPINION BY
JUDGE MARY GRACE O'BRIEN

Following a jury trial, Collins Yaw Agyei (appellant) was convicted of malicious wounding, in violation of Code § 18.2-51, and using a firearm during the commission of a felony, in violation of Code § 18.2-53.1. Appellant argues that the court erred by not dismissing all charges after finding a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972); by admitting a video recording of the victim's statements; by violating his speedy-trial rights; and by finding sufficient evidence of identity and malice. For the following reasons, we affirm.

[*] This opinion is not designated for publication. *See* Code § 17.1-413(A).

[1] Jay C. Jones succeeded Jason S. Miyares as Attorney General on January 17, 2026.

BACKGROUND[2]

A. The Shooting

Appellant and the victim, Esther Arko, had been in a relationship for approximately five years and had one child. The three initially lived together in a first-floor apartment in Fairfax County; appellant, however, no longer lived there as of February 2023—when the incident giving rise to this appeal occurred.

On the morning of February 7, 2023, Arko walked their child to the school bus stop and returned to the apartment at approximately 9:00 a.m. Appellant was waiting for her outside. The two spoke briefly. A neighbor, who was walking back to her apartment, recognized them and had seen appellant waiting for Arko.

Appellant and Arko walked into the apartment building, down a common hallway, and toward the front door of Arko's unit. Arko started recording the interaction on her cellphone. Appellant, who was wearing black latex gloves, pulled out a gun while they stood in the hallway. Appellant began hitting Arko and shoved her head against a wall.

Arko screamed for help and tried to run to a neighboring apartment. Appellant fired at least one shot in the hallway, striking the doorway to the laundry room. Arko ran outside and fell to the ground, before getting up and limping toward her apartment's back patio. Appellant followed and shot her multiple times before running to his car and driving away. Outdoor surveillance cameras captured much of the incident.[3]

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[2] We review the evidence in the light most favorable to the prevailing party at trial—here, the Commonwealth. *See Commonwealth v. Cady*, 300 Va. 325, 329 (2021).

[3] The surveillance footage does not clearly depict the actual shooting, which occurred behind the apartment wall, but it does depict appellant following Arko to the back patio with his arm outstretched.

Several residents of nearby apartments called 911 to report the shooting. Officers Hannah Isabella and Keith Haydu responded within minutes and found Arko lying on her patio, with several gunshot wounds to her abdomen and arm. The officers provided first aid while awaiting emergency medical technicians, and Officer Isabella asked Arko, "[C]an you tell us anything?" Arko, who was barely conscious, whispered back, "[M]y son's father." Officer Isabella asked, "Your son's father shot you? What's his name?" Arko responded, "Collins." This exchange was captured on Officer Isabella's body-worn camera.

EMTs arrived and transported Arko to the hospital where she was treated for life-threatening injuries. She spent 27 days in the hospital and was still receiving medical care during trial.

B. Arrest and Investigation

Within an hour of the shooting, police stopped appellant's car on the interstate. Appellant, the driver and sole occupant, was wearing the same clothes he had worn at Arko's apartment. Officers arrested appellant and interviewed him at the police station.

During the interview, appellant denied seeing Arko that morning and denied any involvement in the shooting. He claimed that he had been working for a delivery company when the incident occurred. Although detectives said they had surveillance video showing him at Arko's apartment and watching her take their son to the bus stop, appellant continued to deny he had been there.

Officers obtained search warrants for appellant's car and residence. Inside the car, they found black latex gloves. Subsequent testing identified gunshot residue on one glove, and additional black latex gloves were recovered from appellant's residence. The car also contained an empty box of 9-millimeter Luger ammunition, manufactured by Yavascalar Troy Holding. No firearm was recovered.

At Arko's apartment, police seized various bullet projectiles, spent cartridge casings, and unfired cartridges. Bullet fragments were also surgically recovered from Arko in the hospital. A total of two projectiles, six cartridge casings, and three unfired cartridges were recovered. The cartridges and casings were all stamped, "Troy 9-millimeter Luger." Subsequent testing confirmed that the same gun fired all projectiles and casings.

C. Procedural History Relevant to Speedy-Trial Issue

Appellant was arrested and charged with aggravated malicious wounding and use of a firearm in a felony. A general district court found probable cause for the charges at a preliminary hearing on June 1, 2023, and appellant was held in custody without bond. Appellant's initial speedy-trial calculation indicated that trial should begin within five months—by November 1, 2023. *See* Code § 19.2-243.

On July 10, 2023, the Commonwealth moved to set a trial date beyond the speedy-trial deadline because Arko would be unable to testify due to ongoing medical problems from the shooting. The court denied the motion without prejudice due to insufficient medical evidence and set the trial for October 16, 2023.

On October 6, 2023, the Commonwealth filed a second motion to set a trial beyond the speedy-trial deadline, providing additional medical evidence and noting that Arko was scheduled for surgery on November 6. At an October 16 hearing on the Commonwealth's motion, the court granted a continuance to October 30, so that trial would still begin within the five-month bounds of Code § 19.2-243.[4]

On October 30, defense counsel moved for a competency evaluation of appellant. Agyei advised the court that he agreed with his attorney's motion and understood that it would delay

[4] As the Commonwealth acknowledges on brief, the court's order mistakenly states that appellant had moved to continue the trial, when in fact it had been the Commonwealth's motion.

the start of his trial. Defense counsel added that appellant "retain[ed] his right to a speedy trial, [but] the enjoyment of that speedy[-]trial right would be delayed until such time as he were competent." The court granted the motion and ordered the evaluation.

The parties returned for a hearing on the competency evaluation on February 23, 2024. Based on a psychologist's report and recommendation, defense counsel moved to have appellant further evaluated in a secure psychiatric hospital as an inpatient. The court granted the motion.

Following a contested hearing, the court determined on August 7, 2024 that appellant was competent to stand trial. The Commonwealth and court proposed a trial date of August 12, but defense counsel was not available that day. On defense counsel's request, the court set a status hearing for August 16 to determine a trial date and tolled the speedy-trial clock until then.

At the August 16 hearing, defense counsel advised that his earliest date for trial was December 2, 2024. Agyei addressed the court and "ask[ed] for [his] speedy trial" because he was "not about to sit all the way to December to go to [his] trial." The court explained that Agyei could "go hire [his] own lawyer who can do the case sooner," but that December was the soonest that his current counsel could try the case. The court set a December 2 trial date and noted that the speedy-trial clock would remain tolled until then.

D. Commonwealth's Motion *in Limine* to Admit Arko's Recorded Statements

The Commonwealth filed a pretrial motion *in limine* to admit Arko's statements recorded by Officer Isabella's body-worn camera. Appellant countered that the statements were inadmissible hearsay and that their introduction would violate his Confrontation Clause rights.

At a hearing, the Commonwealth called Dr. Erick Teicher to testify about Arko's unavailability as a trial witness. Dr. Teicher, who was one of Arko's trauma surgeons and still providing her care, testified that he had just met with Arko and she could not speak above a whisper due to a tracheostomy. A tracheostomy, he explained, is a surgically created hole in a

person's windpipe for the placement of a breathing tube to assist with "prolonged ventilation needs."

Dr. Teicher also testified that Arko had a "paralyzed vocal [cord]," which not only necessitated the tracheostomy but also prevented her from speaking audibly. He explained that the vocal cord paralysis resulted from an emergency intubation "in the initial trauma bay." Dr. Teicher testified that the "tracheostomy is going to remain until [Arko] . . . has an ENT [ears, nose, throat] procedure to help restore [her] vocal [cord] function."

The court granted the Commonwealth's motion and determined that Arko's recorded statements were admissible, ruling that the statements were made during an ongoing emergency and therefore nontestimonial. The court also determined that Arko's statements qualified as excited utterances and were thus exempt from the rule against hearsay. *See* Va. R. Evid. 2:803(2).

E. Commonwealth's *Brady* Violation

In between the two days of the motion *in limine* hearing, and before the court ruled, Dr. Teicher told prosecutors that he had made a mistake in his testimony: Arko did not have vocal cord paralysis; she had tracheal stenosis—a narrowing of the trachea. Dr. Teicher had confused Arko with another patient. Prosecutors did not disclose the mistake to defense counsel.

At trial, the Commonwealth again called Dr. Teicher. On cross-examination, he testified that Arko had tracheal stenosis, not vocal cord paralysis as he had testified in the pretrial hearing. Outside the presence of the jury, Dr. Teicher explained that his pretrial testimony had been accurate as to Arko's symptoms but inaccurate as to the cause: he now knew the symptoms were caused by tracheal stenosis. He said he had confused Arko with another patient and realized his error after returning to the hospital and reviewing Arko's chart, at which point he emailed the prosecutor.

The prosecutor acknowledged that he received Dr. Teicher's email, they had spoken by phone about the mistaken testimony, and he did not disclose the issue to defense counsel. The prosecutor explained that he thought the difference in testimony was not important because the evidence only related to Arko's availability as a trial witness—an issue the court did not reach in granting the Commonwealth's motion *in limine* to admit Arko's recorded statement. The prosecutor emphasized that the Commonwealth was not relying on evidence of Arko's tracheal condition to prove a permanent injury for aggravated malicious wounding.

Defense counsel moved the court to find that the Commonwealth violated its discovery obligations under *Brady* and to dismiss the indictments. In the alternative, defense counsel asked the court to strike the aggravated portion of the malicious wounding charge.

The court found that the Commonwealth had committed a *Brady* violation when it failed to disclose to defense counsel the fact that Dr. Teicher "had made a mistake with regard to his reference to vocal [cord] paralysis." The court held that Dr. Teicher's incorrect testimony related to the permanent injury element of the aggravated malicious wounding charge and was also "clearly impeachment material."

The court, however, denied appellant's motion to dismiss the indictments in their entirety and instead granted his motion to strike the aggravated portion of the malicious wounding indictment. The court thus allowed the Commonwealth to proceed on the lesser-included charge of malicious wounding. The court also struck all of Dr. Teicher's testimony and instructed the jury to disregard it.

F. Jury Conviction

The Commonwealth's evidence consisted of testimony from several police officers, Arko's doctors, forensic scientists who tested evidence—ballistics and the black latex gloves—collected during the investigation, Arko's neighbor, and Arko's brother. The Commonwealth

introduced Officer Isabella's body-worn camera footage in which Arko identified appellant as the person who shot her. The jury saw video surveillance footage from the apartment complex showing appellant waiting for Arko, talking to her, following her inside, and Arko collapsing back outside, as well as the video Arko recorded on her cellphone in which appellant pointed a gun at her and attacked her, before multiple gunshots and screams can be heard. Appellant presented no evidence.

The jury convicted appellant of malicious wounding and using a firearm in a felony. The court denied appellant's subsequent motion to dismiss his convictions or set aside the verdict.

ANALYSIS

A. *Brady* Violation

Appellant argues the court erred by not dismissing all charges due to the Commonwealth's violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972).[5] Emphasizing that the Commonwealth withheld information about Dr. Teicher's "false testimony" for the entire month between the motions hearing and trial, appellant asserts that he spent that time preparing an extensive cross-examination of the doctor and other witnesses, researching vocal cord paralysis as a permanent injury, and organizing his trial strategy around the issue. Appellant asserts that he was "forced to proceed ill[-]prepared" after being purposefully misled by the Commonwealth and that dismissal of all charges was the

[5] *Brady* held that the prosecution's suppression of favorable, material evidence violates due process, and *Giglio* extended this disclosure obligation to encompass impeachment evidence—specifically, evidence that undermines the reliability or credibility of a key government witness on a matter important to the defendant's guilt or innocence. *See Lawlor v. Davis*, 288 Va. 223, 224 (2014). For simplicity, we use the phrase "*Brady* violation."

only remedy to protect his constitutional rights. We hold that, assuming arguendo a *Brady* violation occurred, the court fashioned an appropriate remedy.

"A *Brady* violation infringes on a defendant's due process rights and sows doubt as to the fundamental fairness of a criminal proceeding." *Scott v. Commonwealth*, 87 Va. App. 762, 779 (2026). "The remedial relief to be granted by the trial court following a discovery violation or upon the late disclosure of evidence is within the trial court's discretion and will not be disturbed on appeal unless plainly wrong." *Id.* at 775 (quoting *Moreno v. Commonwealth*, 10 Va. App. 408, 420 (1990)). "In evaluating whether a trial court abused its discretion, . . . 'we do not substitute our judgment for that of the trial court. Rather, we consider only whether the record fairly supports the trial court's action.'" *Id.* (alteration in original) (quoting *Carter v. Commonwealth*, 293 Va. 537, 543 (2017)).

"Dismissal is appropriate only when the *Brady* violation causes irreparable prejudice to the defendant, or the record supports a finding of egregious and pervasive prosecutorial misconduct." *Id.* at 776. "Because *Brady* violations involve 'the constitutional disclosure obligations of the prosecution—not the guilt or innocence of the defendant . . . the proper remedy for a proven violation includes a continuance, a mistrial, or some lesser remedy.'" *Id.* at 776-77 (alteration in original) (quoting *Romero v. Commonwealth*, No. 0050-13-4, slip. op. at 27 (Va. Ct. App. Mar. 25, 2014)). "[N]o Virginia appellate court has ever dismissed an indictment when the prosecutor failed to disclose *Brady* material." *Id.* at 777; *see, e.g.*, *Bly v. Commonwealth*, 280 Va. 656, 663, 664 (2010) (reversing a drug conviction where the Commonwealth withheld evidence of the informant's "obvious pecuniary incentive to fabricate" but "remand[ing] . . . to the circuit court for a new trial"); *Workman v. Commonwealth*, 272 Va. 633, 651 (2006) (ordering a "new trial because of *Brady* violations").

In *Scott*, this Court found no abuse of discretion in denying a motion to dismiss following a *Brady* violation. 87 Va. App. at 776-78. A jury found Scott guilty of seven charges related to a shooting. *Id.* at 772. After learning that the Commonwealth failed to disclose an agreement with one of the witnesses to reduce his drug charges in exchange for testimony, Scott filed a post-conviction motion to dismiss with prejudice or grant a new trial with a special prosecutor. *Id.* at 774. The court denied the motion but vacated Scott's conviction and granted a new trial. *Id.*

At the second trial, the prosecutor who committed the *Brady* violation did not participate, but the witness again testified and was cross-examined about his agreement with the Commonwealth and the reduction of his drug charges. *Id.* at 778. The jury again convicted Scott. *Id.* at 775.

On appeal, Scott argued that the court abused its discretion by refusing to dismiss the charges with prejudice. *Id.* at 776. We disagreed, stating that although the Commonwealth's failure to disclose impeachment evidence was "deeply troubling," it did not cause irreparable damage or reflect systemic prosecutorial misconduct. *Id.* "[A] *Brady* remedy is not a tool used to punish the prosecution; it is one that safeguards the threshold requirements of the Due Process Clause." *Id.* at 778. Further, dismissal was not warranted even if the prosecutor had acted intentionally or in bad faith, as "the nature of the suppression by the prosecution does not impact the *Brady* remedy so long as the remedy cures any lingering prejudice." *Id.* at 779. Because retrial gave Scott the opportunity to use the *Brady* material for impeachment, we held that the "court acted within its discretion when it declined to dismiss the charges and instead vacated the conviction and ordered a new trial." *Id.*

Here, the court remedied the *Brady* violation in two ways. It struck Dr. Teicher's testimony and dismissed the "aggravated" portion of the malicious wounding charge, thereby

reducing the maximum penalty appellant faced. Aggravated malicious wounding carries a prison term of 20 years to life, but malicious wounding carries 5 to 20 years. *Compare* Code § 18.2-51.2, *with* Code § 18.2-51; *see also* Code § 18.2-10.

These remedies resolved the prejudice from the *Brady* violation. The undisclosed material was impeachment evidence for one witness, Dr. Teicher, whose testimony was struck and no longer subject to impeachment. Moreover, the undisclosed material related to whether Arko suffered a permanent injury, an issue the court eliminated by reducing the charge to malicious wounding. *See Scott*, 87 Va. App. at 776-77. Permanent injury is not an essential element of malicious wounding. *See Commonwealth v. Perkins*, 295 Va. 323, 330 (2018) (stating that malicious wounding requires proof of intent to permanently injure, not proof of a resulting permanent injury).

Yet, appellant insists that these remedies were insufficient to cure the prejudice he suffered because the Commonwealth's *Brady* violation forced him to research vocal cord paralysis and permanent injuries—and purportedly left him "ill prepared" on other issues—"even on the lesser included charge of malicious wounding." But the fact that counsel spent time researching vocal cord injuries does not establish that he was ill-prepared on issues that remained in contention—identity and malice. Additionally, although the individual prosecutor withheld the *Brady* material for a month, appellant has not shown any systemic misconduct that would warrant dismissal. *See Scott*, 87 Va. App. at 776-77.

"[A] *Brady* remedy is not a disciplinary sanction but rather one that safeguards the rights of the accused." *Id.* at 779. Here, because the court's remedies cured the prejudice from the violation, we find no abuse of discretion.

B. Victim's Statements

Appellant argues that the court erred by admitting Arko's statements recorded in footage from Officer Isabella's body-worn camera. According to appellant, the admission of this evidence violated his Confrontation Clause rights under the Sixth Amendment, the statements did not qualify for the "excited utterances" exception to the rule against hearsay, and they were not responsive to the officer's questions and therefore unreliable and irrelevant.

Determining the "'admissibility of evidence is within the discretion of the trial court,' and an appellate court will not reject such decision absent an 'abuse of discretion.'" *Williams v. Commonwealth*, 71 Va. App. 462, 487 (2020) (quoting *Tirado v. Commonwealth*, 296 Va. 15, 26 (2018)). "Only when reasonable jurists could not differ can we say an abuse of discretion has occurred." *Nottingham v. Commonwealth*, 73 Va. App. 221, 231 (2021) (quoting *Grattan v. Commonwealth*, 278 Va. 602, 620 (2009)). We review de novo "whether the admission of evidence violates a defendant's confrontation right." *Logan v. Commonwealth*, 299 Va. 741, 745 (2021).

I. Arko's statements fell under the "excited utterances" exception to the hearsay rule.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Va. R. Evid. 2:801(c). Hearsay evidence "'is inadmissible unless it falls within one of the recognized exceptions' to the rule against hearsay." *Atkins v. Commonwealth*, 68 Va. App. 1, 7-8 (2017) (quoting *Robinson v. Commonwealth*, 258 Va. 3, 6 (1999)). One exception is an excited utterance, defined as a "spontaneous or impulsive statement prompted by a startling event or condition and made by a declarant with firsthand knowledge at a time and under circumstances negating deliberation." Va. R. Evid. 2:803(2). "Excited utterances prompted by a startling event, and not the product of premeditation, reflection, or design, are admissible, but the

declaration must be made at such time and under such circumstances as to preclude the presumption that it was made as the result of deliberation." *Goins v. Commonwealth*, 218 Va. 285, 287 (1977).

Whether an out-of-court statement is admissible as an excited utterance "depends on the circumstances of each case and 'rests within the sound judicial discretion and judgment of the trial court.'" *Hicks v. Commonwealth*, 60 Va. App. 237, 245 (2012) (quoting *Clark v. Commonwealth*, 235 Va. 287, 292 (1988)). "[T]he lapse of time between the 'startling event' and a declaration offered in evidence is relevant to a determination whether the declaration was spontaneous and instinctive, or premeditated and deliberative." *Synan v. Commonwealth*, 67 Va. App. 173, 184 (2017) (quoting *Doe v. Thomas*, 227 Va. 466, 471 (1984)).

Another factor for determining whether a statement qualifies as an excited utterance is "whether the declarant made an exclamation impulsively on his [or her] own initiative, or a statement in response to a question." *Id.* at 184 (quoting *Martin v. Commonwealth*, 4 Va. App. 438, 441 (1987)). But even answers to questions can qualify as excited utterances during emergencies. *See Caison v. Commonwealth*, 52 Va. App. 423, 433-34 (2008) (rejecting argument that a declarant's statements, in response to questions from a 911 operator, were not sufficiently spontaneous to be admitted under the excited utterance exception). The fact that a declarant is answering questions, "rather than relaying a spontaneous narrative, does not indicate [that the statements] were not excited utterances." *Id.* at 433. "To pivot the admissibility of a subsequent statement, however spontaneous, on the question[] of whether it was prompted by an equally spontaneous inquiry would serve no useful purpose." *Id.* at 432 (alteration in original) (quoting *Bowling v. Commonwealth*, 12 Va. App. 166, 176 (1991)).

Appellant argues that Arko's statements were neither spontaneous nor impulsive but were made under circumstances that allowed for deliberation, "as she was receiving medical attention

from the responding officers." He notes that Arko only spoke when questioned by police officers in uniform and with "delays between the question and the answer, indicating deliberation of her response." He characterizes her statements to the police as "so non-responsive to the questions that they cannot possibly be considered reliable or relevant" and therefore should have been excluded.

Contrary to appellant's argument, the court properly exercised its discretion in admitting Arko's recorded statements under the excited utterances exception. Arko made her statements within minutes of appellant shooting her multiple times. The court found that she was "about as close to death as somebody could be and still be alive" and "barely conscious." The medical evidence supports these findings, demonstrating that she arrived at the hospital a short time after the shooting with a multitude of life-threatening injuries.

The record also supports the court's finding that Arko's statements were not the "product of premeditation, reflection, or design." *Goins*, 218 Va. at 287. Her answers to Officer Isabella's questions were whispered snippets of information: when Officer Isabella asked if Arko could "tell us anything," Arko said, "[M]y son's father." This statement was not a coherent, responsive narrative of a completed incident; she had been severely wounded, suffering from trauma, and was in or approaching a state of shock. Her statements, therefore, were similar to those admissible as excited utterances in *Clark v. Commonwealth*, 235 Va. 287 (1988).

In *Clark*, a victim was shot multiple times and, approximately five to ten minutes later, "blurted the identity of his assailant" to an individual asking what happened. 235 Va. at 293. The Supreme Court affirmed the admission of the statement as an excited utterance, noting that the victim was "in 'profound shock' and appeared 'in an almost death-like state' when examined in the hospital" shortly thereafter. *Id.* Similarly, here, Arko made statements minutes after being shot multiple times. Rather than responding to specific questions, she "blurted the identity of

[her] assailant." *Id.* Arko was suffering from manifest trauma. Although appellant claims that Arko's "non-responsiveness" made her statements unreliable and irrelevant, we see no error in the court's opposite determination: Arko's statements were reliable because they were impulsive bursts of information, and they were not made any less so because they were prompted by inquiry from the officers.

II. Arko's statements were nontestimonial and did not violate the Confrontation Clause.

The Confrontation Clause of the Sixth Amendment "guarantees that a criminal defendant will have the opportunity 'to be confronted with the witnesses against him.'" *Cody v. Commonwealth*, 68 Va. App. 638, 657 (2018) (quoting U.S. Const. amend. VI). But "the Confrontation Clause applies only to 'testimonial' statements." *Id.* (quoting *Crawford v. Washington*, 541 U.S. 36, 68-69 (2004)).

"[W]e review *de novo* whether a particular category of proffered evidence is 'testimonial hearsay.'" *Caison*, 52 Va. App. at 434 (quoting *Jasper v. Commonwealth*, 49 Va. App. 749, 755 (2007)). When determining whether a statement is testimonial, "we objectively evaluate the circumstances in which the encounter occur[ed] and the statements and actions of the parties." *Adjei v. Commonwealth*, 63 Va. App. 727, 744 (2014) (alteration in original) (quoting *Michigan v. Bryant*, 562 U.S. 344, 359 (2011)). The issue is whether the statement was made with the primary purpose of creating "a substitute for trial testimony." *Canada v. Commonwealth*, 75 Va. App. 367, 385 (2022).

"Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Davis v. Washington*, 547 U.S. 813, 822 (2006). "[W]here the primary purpose of 'an interrogation is to respond to an "ongoing emergency," its purpose is not to create a record for trial and thus is not within the scope of the

[Confrontation] Clause.'" *Canada*, 75 Va. App. at 382 (second alteration in original) (quoting *Bryant*, 562 U.S. at 377).

Relevant factors for the "ongoing emergency" determination include whether: (i) the declarant's statements were "about current events as they were actually happening, 'requiring police assistance' rather than describing past events"; (ii) a "reasonable listener" would "conclude that the declarant was facing an ongoing emergency"; (iii) the elicited statements "were necessary to be able to resolve the present emergency" or instead learn about past events; and (iv) the statements were "frantic" or made in "an environment that was neither tranquil nor safe." *Wilder v. Commonwealth*, 55 Va. App. 579, 590-91 (2010) (quoting *United States v. Cadieux*, 500 F.3d 37, 41 (1st Cir. 2007)); *see also Davis*, 547 U.S. at 827. Courts "consider the totality of the circumstances when determining whether out-of-court statements are nontestimonial." *Canada*, 75 Va. App. at 383.

These factors support the court's holding that Arko's statements were nontestimonial because of the ongoing emergency. Arko was speaking about an unfolding current event—an unresolved shooting—that required immediate police assistance, and she made these statements within minutes of the shooting. Appellant remained at large and potentially a threat. Thus, as Arko spoke, the events of the crime and the need for police assistance were ongoing, and a reasonable listener would conclude that she was still facing an emergency. *See Caison*, 52 Va. App. at 436-37.

Additionally, the officers were not questioning Arko simply to learn about past events but were eliciting statements to resolve the present emergency and prevent further criminal action by the at-large assailant. *See Wilder*, 55 Va. App. at 591. The circumstances were frantic and urgent, considering appellant's unknown whereabouts and the likelihood that he was armed. *See id*. The totality of circumstances makes clear that the primary purpose of Arko's out-of-court

statements was not to create a substitute for trial testimony but to convey information about an ongoing emergency. *See Canada*, 75 Va. App. at 383. Because Arko's statements were nontestimonial, their admission did not violate the Confrontation Clause.

C. Speedy Trial

Appellant claims the court erred by not granting his motion to dismiss all charges against him because the Commonwealth violated both his constitutional and statutory rights to a speedy trial. *See* U.S. Const. amend. VI; Va. Const. art. I, § 8; Code § 19.2-243. He claims he was severely prejudiced by the lapsed time between August 16, 2024 (the status hearing to set the trial date) and December 2, 2024 (when trial commenced) because "the possibility of a lengthy sentence weigh[ed] on him every single day he was incarcerated in the county jail." Appellant also contends that he was not bound by defense counsel's purported "assent to delay" when, at the August 16 status hearing, defense counsel proffered that his earliest available trial date was December 2.

I. Appellant's statutory speedy-trial right was not violated.

A statutory speedy-trial claim "presents a mixed question of law and fact." *Ali v. Commonwealth*, 75 Va. App. 16, 29 (2022) (quoting *Young v. Commonwealth*, 297 Va. 443, 450 (2019)). Appellate courts "defer[] to the trial court's factual findings but review[] statutory interpretations and legal conclusions *de novo*." *Osman v. Commonwealth*, 76 Va. App. 613, 657 (2023).

The speedy-trial statute, Code § 19.2-243, sets the time limit within which an accused must be tried. *See Brown v. Commonwealth*, 75 Va. App. 399, 406 (2022). The statute provides that an accused who is held "continuously in custody . . . shall be forever discharged from prosecution" if trial does not start within five months from the date of the preliminary hearing at

which probable cause was found. Code § 19.2-243; *see Turner v. Commonwealth*, 68 Va. App. 72, 78 (2017) (noting that this timeframe "translates to 152 and a fraction days").

The five-month period "is not absolute." *Young*, 297 Va. at 451. The calculation is tolled for time attributed to a

> continuance granted on the motion of the accused or his counsel, or by concurrence of the accused or his counsel in such a motion by the attorney for the Commonwealth, or by the failure of the accused or his counsel to make a timely objection to such a motion by the attorney for the Commonwealth.

Code § 19.2-243(4). Additionally, the time calculation is tolled during any period caused "[b]y evaluations or restoration" related to the accused's competency. Code § 19.2-243(1).

"Any delay in the trial . . . [that] is attributable to the defendant will not be counted in determining whether the Commonwealth complied with the statutory speedy[-]trial mandate." *Shearer v. Commonwealth*, 9 Va. App. 394, 399 (1990); *see O'Dell v. Commonwealth*, 234 Va. 672, 681 (1988). Continuances necessitated by a defendant's actions remain attributable to the defendant even if he or she objects to the continuance. *See Shearer*, 9 Va. App. at 400.

Appellant's preliminary hearing was June 1, 2023. Unless one of the tolling provisions applied, the Commonwealth was obligated to commence trial by November 1, 2023. *See* Code § 19.2-243.

Defense counsel moved for a competency evaluation on October 30, 2023—the day before trial was set to begin on October 31, 2023. Appellant was ultimately deemed competent to stand trial on August 7, 2024. Although the court could begin trial on August 12, defense counsel was unavailable and suggested a status hearing for August 16. At that hearing, defense counsel advised that his first available trial date was December 2. Trial was scheduled for, and commenced on, that first-available date for defense counsel. Accordingly, the speedy-trial clock remained tolled from October 30, 2023 to December 2, 2024.

Only the duration from June 1, 2023 to October 30, 2023 can count for purposes of the statutory speedy-trial claim. That period amounts to 151 days, which is less than the statutory speedy-trial clock of "152 and a fraction days." *Turner*, 68 Va. App. at 78. Nevertheless, appellant insists that his statutory speedy-trial rights were violated because he articulated a personal objection to his lawyer's unavailability until December 2, 2024. The record reflects, however, that Agyei did not maintain this personal objection and, in fact, consented to the delay. At the August 16 status hearing, the court explained that Agyei had the option to "go hire [his] own lawyer who can do the case sooner" but that December 2 was the earliest trial date for his current lawyer. Agyei's failure to hire another lawyer constituted acquiescence to the continuance and triggered the mandated tolling of Code § 19.2-243(4). *See Heath v. Commonwealth*, 261 Va. 389, 393 (2001) (stating that a defendant's acquiescence in a continuance tolls the speedy-trial period).

II. Appellant's constitutional speedy-trial right was not violated.

Like the statutory speedy-trial challenge, a constitutional claim also "present[s] 'a mixed question of law and fact.'" *Osman*, 76 Va. App. at 657 (quoting *Young*, 297 Va. at 450). We defer to the trial court's factual findings but review legal issues de novo. *Id.*

But unlike the statutory right, the constitutional right to a speedy trial is "governed by a balancing test that is not tied inextricably to calendar dates." *Brown*, 75 Va. App. at 407. The United States Supreme Court outlined four factors for a court to consider when analyzing a constitutional speedy-trial claim: the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Barker v. Wingo*, 407 U.S. 514, 530 (1972); *see Kelley v. Commonwealth*, 17 Va. App. 540, 544 (1994) (applying *Barker* factors).

The "length of delay" factor is calculated from the date of the defendant's arrest, *see Fowlkes v. Commonwealth*, 218 Va. 763, 766 (1978), and a "delay 'approach[ing] one year' is

'presumptively prejudicial' and requires further review," *Ali*, 75 Va. App. at 35 (alteration in original) (quoting *Doggett v. United States*, 505 U.S. 647, 652 n.1 (1992)). Although on brief appellant calculated his delay only from August 16, 2024 to December 2, 2024 (109 days), the total amounts to 665 if calculated from the date of his arrest on February 7, 2023. This delay is presumptively prejudicial and requires further review under the *Barker* factors. *See Ali*, 75 Va. App. at 35.

The "reason for delay" factor puts the burden on the Commonwealth to show (1) "what delay was attributable to the defendant and not to be counted against the Commonwealth" and (2) "what part of any delay attributable to the prosecution was justifiable." *Beachem v. Commonwealth*, 10 Va. App. 124, 131-32 (1990) (quoting *Fowlkes*, 218 Va. at 767).

Here, the specific delay challenged by appellant—between the August 16 status hearing and the December 2 trial—was attributable to appellant. At the August 16 status hearing, defense counsel advised that his first available date for trial was December 2, and trial was scheduled for that day and began that day.

Considering the "assertion of right" factor, there is no question that appellant regularly asserted his right to a speedy trial, as early as June 22, 2023. And Agyei himself asserted it at the August 16 status hearing, after defense counsel requested the December 2 trial date. But, again, the record reflects that Agyei ultimately acquiesced to the delay to December 2. The court explained that Agyei had the option to hire a different lawyer who could try the case sooner. Agyei's failure to pursue that option constituted acquiescence to the continuance and weighs against finding a constitutional speedy-trial violation. *See Osman*, 76 Va. App. at 670 (finding that a defendant's acquiescence to continuances "limits the weight given to [his] assertion of his [constitutional speedy-trial] right").

The "prejudice" factor protects three interests: "(1) preventing oppressive pretrial incarceration; (2) minimizing the accused's anxiety; and (3) limiting the possibility that the defense will be impaired." *Id.* at 666 (quoting *Kelley*, 17 Va. App. at 546). Here, appellant's sole claim regarding prejudice was that "the possibility of a lengthy sentence" weighed on him while incarcerated. But the "prejudice" factors aim to minimize anxiety, not eliminate it, and appellant has not established that he experienced a level of anxiety that exceeded a level faced by others awaiting trial. Finally, the delay he specifically challenges—between August 16 and December 2, 2024—was attributable to his lawyer's availability, and the record reflects that the Commonwealth proceeded with reasonable diligence throughout the pretrial process. Where the Commonwealth bears no fault in the delay and proceeds "with reasonable diligence," a speedy-trial claim will fail. *Doggett*, 505 U.S. at 656.

Considering these factors and the record before us, we hold that the court did not violate appellant's constitutional right to a speedy trial.

D. Sufficiency of Evidence

Finally, appellant argues that the evidence was insufficient to support his convictions for malicious wounding and using a firearm in a felony. Specifically, he claims there was insufficient evidence of identity and malice.

When reviewing the sufficiency of the evidence underlying a criminal conviction, we affirm the judgment unless it is "plainly wrong or without evidence to support it." *Pijor v. Commonwealth*, 294 Va. 502, 512 (2017) (quoting Code § 8.01-680).

The evidence was sufficient to sustain appellant's convictions. As to identity, Arko identified appellant as her assailant in the immediate aftermath of the shooting, as recorded by Officer Isabella's body-worn camera. Much of the attack was also captured on the apartment complex's surveillance footage. It showed appellant waiting for Arko before following her into

the building. It showed Arko trying to escape, falling down, and then hobbling back toward her patio, at which point appellant followed her with his arm outstretched and then ran to his car to flee the scene. A neighbor, who had seen appellant waiting for Arko, confirmed that the shooter in the footage was appellant.

The neighbor also testified that she saw appellant assault Arko in the hallway just before the shooting occurred. She heard Arko screaming and saw appellant hit Arko and then reach toward his waist, and then she heard gunshots. Arko's cellphone recording corroborates this testimony, showing appellant wearing black latex gloves and pointing a gun at her. The cellphone video depicts a struggle between Arko and appellant, and Arko shouts, "Help!" and gunshots are fired all within a minute. Arko's brother testified that the voices on the video belonged to appellant and Arko.

When appellant was arrested less than an hour later, he was wearing the same clothes as seen in the surveillance footage, and police found black latex gloves in his car that tested positive for gun powder residue. Officers also found a box of ammunition in his car that matched the ammunition used in the shooting.

Appellant challenges the reliability of the neighbor's in-court identification on grounds that "she had never met or spoken" to him and only saw the altercation "through the peephole of her apartment door." Further, appellant argues that the neighbor's identification of appellant "cannot be given any weight" because the Commonwealth had shown her a suggestive photograph of him immediately before trial. He also attempts to discredit Arko's cellphone video as showing mere fragments of the assailant rather than his full face or body type. But "on appeal we do not reweigh the evidence or substitute our judgment for that of the factfinder." *Lambert v. Commonwealth*, 70 Va. App. 54, 64 (2019). Here, the evidence was overwhelming that appellant was the person who shot Arko.

The evidence was also sufficient to prove malice. Malice is "the doing of a wrongful act intentionally, or without just cause or excuse, or as a result of ill will." *Watson-Scott v. Commonwealth*, 298 Va. 251, 255-56 (2019) (quoting *Dawkins v. Commonwealth*, 186 Va. 55, 61 (1947)). "Malice is evidenced either when the accused acted with a sedate, deliberate mind, and formed design, or committed a purposeful and cruel act without any or without great provocation." *Witherow v. Commonwealth*, 65 Va. App. 557, 566 (2015) (quoting *Robertson v. Commonwealth*, 31 Va. App. 814, 823 (2000)). Malice is "implied by law from any deliberate, willful, and cruel act against another, however sudden." *Id.* (quoting *Epperly v. Commonwealth*, 224 Va. 214, 231 (1982)). Malice also "may be inferred from the deliberate use of a deadly weapon." *Id.* at 566-67 (quoting *Williams v. Commonwealth*, 64 Va. App. 240, 249 (2015)).

Whether malice exists is a question of fact. *Robertson*, 31 Va. App. at 823. The record contains ample evidence supporting the jury's finding of malice. Appellant shot Arko several times as she ran away. The jury could have inferred malice solely from appellant's use of a deadly weapon. *See Witherow*, 65 Va. App. at 566-67. Additionally, the jury could have found that appellant acted maliciously because he shot her repeatedly. *See Watson-Scott*, 298 Va. at 258 (finding it "patently obvious" in a second-degree murder prosecution "that firing multiple shots" from a firearm shows malice).

Furthermore, the evidence established that appellant acted with premeditation. He drove to Arko's apartment and waited outside while she took their son to the bus stop. He followed her into the building, showed his gun, and attacked her in the hallway. He was wearing black latex gloves, reflecting a preconceived plan and intent to conceal evidence of him handling and firing the gun. When she tried to flee, he followed her outside and shot her multiple times. He then fled the scene and disposed of the gun before his arrest, reflecting a conscious effort to conceal

his guilt. This evidence reflects that appellant committed a "deliberate, willful, and cruel act," *Witherow*, 65 Va. App. at 566, and it was sufficient to prove malice.

Nonetheless, appellant seeks reversal based on a "gap" in its evidence between "what is shown in the surveillance video" and "what is shown in the cellphone video." According to appellant, "[t]here is a reasonable likelihood that provocation occurred in the off-screen moments," which caused the shooter to act impulsively and therefore without malice. *See Witherow*, 65 Va. App. at 567.

Appellant's reliance on a "gap" in the evidence is unpersuasive. The incident occurred in a matter of minutes, and the totality of circumstances established that appellant acted with malice. *See Commonwealth v. Richerson*, ___ Va. ___, ___ (Apr. 23, 2026) (emphasizing that appellate review requires consideration of the "totality of circumstances" and distinguishing cases with "clear evidentiary gaps wherein some essential circumstance was not proven"). The evidence, viewed in the light most favorable to the Commonwealth, did not show any provocation, and the Commonwealth was only required to exclude hypotheses of innocence that "flow[ed] from the evidence itself, and not from the imagination" of appellant. *Kelley v. Commonwealth*, 69 Va. App. 617, 629 (2019) (quoting *Pijor*, 294 Va. at 512). Instead, the record reflects that appellant planned his attack on Arko in advance and carried it out deliberately and willfully.

CONCLUSION

We affirm appellant's convictions. The court fashioned an appropriate remedy for the Commonwealth's *Brady* violation. Additionally, the court did not err by admitting the victim's recorded statements or by denying appellant's motion to dismiss on speedy-trial grounds.

Finally, the evidence was sufficient to support the convictions for malicious wounding and using a firearm in the commission of a felony.

Affirmed.