IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

LEROY HARRIS **APPELLANT**

VS. **NO. 2013-KA-02009-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: BILLY L. GORE
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. 4912

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

STATE RULES

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

LEROY HARRIS **APPELLANT**

VERSUS **NO. 2013-KA-02009-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

Want of a speedy trial, the admissibility of an allegedly irrelevant digital disk preserving a 911 audio recording, and the sufficiency and weight of the evidence used to convict the appellant of armed robbery with firearm enhancement provide the focal points in this appeal.

LEROY HARRIS, a forty-two (42) year old African-American male, father of three, prior convicted felon, and a non-testifying defendant (C.P. at 5; R. 13, 171, 211-12), prosecutes a criminal appeal from the Circuit Court of Washington County, Richard A. Smith, Circuit Judge, presiding.

Harris had been continuously incarcerated for two and a half years awaiting trial. (R. 6)

Following a two (2) day trial by jury conducted on November 13-14, 2013, Harris was convicted of armed robbery and firearm enhancement in violation of Miss. Code Ann. §97-3-79 and 97-37-37(1), respectively. (R. 195-97; C.P. at 167)

At the close of a separate sentencing hearing conducted on November 18, 2013, during which several relatives testified in extenuation and mitigation of Harris's sentence (R. 200-13), Harris was

sentenced to twenty (20) years in the custody of the MDOC for armed robbery with fifteen (15) years to serve followed by five (5) years of PRS.

Harris was sentenced to another five (5) years for firearm enhancement, said sentence " . . . to run concurrent to the sentence imposed for armed robbery." (R. 213; C.P. at 151)

A joint indictment returned on June 12, 2012, charged

> [t]hat WARREN CUNNINGHAM and LEROY HARRIS, each acting in concert with the other, on or about the 23rd day of April, 2011, in Washington County did unlawfully, willfully, and feloniously make an assault upon Jing Rosella and, they, the said WARREN CUNNINGHAM and LEROY HARRIS did then and there by the exhibition of a deadly weapon, to-wit: a gun, unlawfully, willfully and violently take, steal and carry away, [a] large red purse containing currency and checks, the property of Jing Rosella, having a total and aggregate value of more than one dollar from the presence or from the person and against the will of the said Jing Rosella; and,
>
> They, the said WARREN CUNNINGHAM and LEROY HARRIS, did willfully, unlawfully and feloniously use or display a firearm at the time of the commission of the offense of ARMED ROBBERY , IN VIOLATION OF Section 97-37-37(1) of the Mississippi Code of 1972, as annotated and amended: * * * " (C.P. at 1)

On October 16, 2013, a month prior to trial on-the-merits on November 13-14, and two days after the trial judge entered, on October 14th, his order denying Harris's motion to dismiss for want of a speedy trial, Harris filed a motion for severance which was granted on November 12th, one day prior to trial on-the merits. (R. 15; C.P. at 102-05,106-07)

The defendant did not testify in this cause and called only one witness in his behalf. Harris's defense appears to have been a general denial coupled with mistaken identification made by the victim. (R. 188-89)

The jury, in the wake of a jury instruction dealing with, *inter alia*, the State's burden of

proving the accuracy of identification testimony, retired to consider its verdict at 11:43 a.m. (R. 194) Less than an hour later, at 12:28 p.m., the jury returned with the following two verdicts:

> "We, the jury find the defendant guilty as charged of Armed Robbery."
>
> "We, the jury, find the defendant guilty as charged of the firearm enhancement." (R. 195-97; C.P. at 143)

A poll of the jury, individually by name and/or number, reflected the verdicts returned were unanimous. The jury failed to fix the penalty for armed robbery at life imprisonment.

At the close of a sentencing hearing conducted four (4) days later on November 18, 2013, the trial judge, after hearing testimony proffered in extenuation and mitigation of sentence, sentenced Harris to twenty (20) years with fifteen (15) years to serve followed by five (5) years of PRS for armed robbery and to five (5) years, concurrent, for firearm enhancement. (R. 213; C.P. at 151)

Harris was represented very effectively at trial by Michael Williams, an Assistant Public Defender in Greenville.

Brandon Dorsey, a practicing attorney in Jackson, has been substituted on appeal. His representation has been equally effective.

Harris raises four (4) issues in his appeal to this Court.

I. Whether the lower court violated Harris's constitutional right to a speedy trial.

II. Whether the verdict finding Harris guilty of armed robbery was against the overwhelming weight of the evidence.

III. The trial court erred in admitting into evidence Exhibit S-1, a certain DVD preserving a 911 audio recording, because its probative value was allegedly outweighed by its prejudicial effect.

IV. Whether the trial court erred in overruling Harris's motion for a directed verdict.

STATEMENT OF FACTS

Proof proffered during Harris's trial for armed robbery and firearm enhancement demonstrated that the victim, Ms. Jing Rosella, identified Leroy Harris, both in court and in a pretrial photographic lineup, as the man who, after pointing a firearm at her and placing her in fear of her life, reached his hand inside her motor vehicle and unlocked her door. After opening the door on the driver's side Harris took, from Rosella's presence and against her will, a red bag belonging to Rosella which contained both money and some checks.

Ten (10) witnesses testified for the State of Mississippi during its case-in-chief, including the victim, **Ms Jing Rosella** whose native tongue was Mandarin Chinese. Her broken English necessitated the presence of a Mandarin certified interpreter at Harris's trial for armed robbery. (C.P. at 55-58, 67)

Ms Rosella testified via the Mandarin interpreter that after leaving her place of employment, Factory Furniture, on the afternoon of April 23rd, 2011, she proceeded to her home on Carol Street in Greenville. She was followed by two men in a blue pickup truck, a Ford Ranger (R. 110), and after turning into the driveway of her home the pickup truck pulled in behind her.

The passenger in the truck, identified in court as the defendant, Leroy Harris, went to the driver's side brandishing a firearm that glittered and demanded Ms Rosella's purse and money after pointing the gun at her.

After reaching inside and unlocking her door, Harris snatched Rosella's red purse, re-entered the blue truck, and sped away.

Ms Rosella immediately dialed 911 and reported that she had been robbed at gunpoint.

Deputy **Marvin Marshall,** responding to a dispatch, spotted the blue truck and stopped it near an apartment complex. Both the driver and his passenger jumped out of the truck and fled in

different directions after ignoring Marshall's commands. Marshall called dispatch and gave them a description of the two suspects. (R. 93)

The driver of the blue truck was arrested later that day by another deputy. (R. 93)

The authorities were unable to locate the passenger who got away. To their good fortune, a cell phone was found inside the blue truck with a tell tale photograph of the defendant stored inside as a screen saver. (R. 94, 106, 116) Harris's arrest came later that evening. He was taken to the station house where Marshall identified him as the passenger. (R. 95,100)

Mitch Ramage, deputy sheriff, testified he went to the scene of the investigatory stop and recovered from the blue truck a cell phone, a large red purse containing $5,000 in cash, $10,000 in checks ready to be deposited, and a .32 nickel-plated revolver. (R. 113, 117)

Ramage processed the vehicle for latent fingerprints. (R. 114) Not surprisingly, Harris's prints " . . . were lifted from the passenger side door on the outside under the door handle." (R 118, 131, 136)

Harris personally declined to testify at trial. During counsel's closing argument Harris suggested misidentification as a defense to the charge of armed robbery and firearm enhancement.

SUMMARY OF THE ARGUMENT

I.

The trial court did not err in finding that Harris was not denied his statutory right to a speedy trial. *See* **Sharp v. State,** 786 So.2d 372 (Miss. 2001); **Ransom v. State,** 435 So.2d 1169 (Miss. 1983), as viewed in harmony with Miss. Code Ann. § 1-3-67.

Harris's argument he was denied his constitutional, as opposed to his statutory, right to a speedy trial is procedurally barred because neither Harris nor his lawyer ever pressed for a timely

ruling. **Martin v. State,** 354 So.2d 1114 (Miss. 1978); **Marr v. State,** 159 So.2d 167 (Miss. 1963).

The trial judge should not be placed in error on a ruling he had no chance to make until the day prior to the first day of trial.

In any event, the familiar analysis found in **Barker v. Wingo** [citation omitted] favors the State, although barely.

"[I]f a continuance is granted to a co-defendant for good cause, then it operates as a good cause delay as to a jointly charged defendant." **Horton v. State,** 726 So.2d 238, 246 (¶32) (Ct. App. Miss. 1998).

"[B]eing incarcerated alone, without proof of any anxiety and stress above and beyond that which normally occurs with being incarcerated or demonstrating how the particular incarceration is oppressive is insufficient to show sufficient prejudice for this factor to weigh in [Harris's] favor." **Jefferson v. State,** 818 So.2d 1099, 1108 (¶22) (Miss. 2002).

II. and IV.

Sufficiency of the Evidence

The evidence, viewed in its entirety and construed in a light most favorable to the State's theory of the case, was legally sufficient to sustain Harris's convictions of armed robbery and firearm enhancement.

An inventory of the blue truck in which Harris was a passenger resulted in the discovery of a cell phone. Stored inside the cell phone was a photograph of the defendant who was identified as the passenger who fled the vehicle. Harris was arrested later that day at an address on South 9th Street. (R. 100, 106-07)

Deputy Parson testified that "[a]bout the 27th of that month, [he] went down and showed Ms. Rosella a photo lineup where she identified Mr. Harris in the photo lineup." (R. 107)

Any rational, fair-minded trier of fact could have found beyond a reasonable doubt Rosella's eyewitness identification credible, as well as finding the other essential elements of each offense. **Bush v. State,** 895 So.2d 836 (Miss. 2005). Put another way, reasonable and fair-minded men could have reached different conclusions on the elements.

Weight of the Evidence

Weighing the evidence in the light most favorable to the verdict, it cannot be said that to allow the verdict to stand would sanction an unconscionable injustice.

III.

"The relevancy and admissibility of evidence are largely within the discretion of the trial court and reversal may be had only where that discretion has been abused." **Fulks v. State,** 110 So.3d 764, 769 (¶19) (Miss. 2013), quoting from **Johnson v. State**, 567 So.2d 237, 238 (Miss. 1990).

In making evidentiary rulings trial judges enjoy "a great deal of discretion as to the relevancy and admissibility of evidence." **Love v. State,** *supra,* 21 So.3d 952, 954 (¶11) (Ct. App. Miss. 2013) citing **Shaw v. State,** 915 So.2d 442, 445 (¶8) (Miss. 2005).

No abuse of judicial discretion has been demonstrated here.

ARGUMENT

I.

THE CIRCUIT JUDGE DID NOT ERR IN DENYING THE DEFENDANT'S MOTIONS TO DISMISS FOR WANT OF A SPEEDY TRIAL.

Leroy Harris was arrested on April 23, 2011, the day he committed his offense. (R. 100, 106-07)

Harris was indicted on June 12, 2012, and arraigned on July 16, 2012. (C.P. at 1-2, 22)

Harris was brought to trial on November 13, 2013. (R. 17)

It appears that Harris was continuously incarcerated from April 23, 2011, until the date of his trial, November 13, 2013, a period of 933 days give or take a day or two.

We have done our math although, admittedly, we are often prone to error. The following figures are approximate which is good enough for our purposes here.

There were approximately 933 days between arrest on April 23, 2011, and trial on November 13, 2013; 415 days between arrest and indictment on June 12, 2012; 520 days between indictment and trial, and 485 days between arraignment on July 16, 2012 and trial.

Harris claims both his statutory and constitutional rights to a speedy trial were violated. (Brief of Appellant at 7 of 12)

Admittedly, over 900 days of continuous incarceration without a trial is troublesome and requires a great deal of explanation.

We respectfully submit, for the reasons stated by the circuit judge in his four (4) page order and chronology denying Harris's motion to dismiss and for other reasons as well, there were good causes for the delay, and neither Harris's statutory right nor his constitutional right to a speedy trial was violated.

There is probative evidence, which is both substantial and credible, supporting the trial court's finding of "good cause" for the delay.

A. Statutory Right to a Speedy Trial.

Miss. Code Ann. Section 99-17-1 states that

> Unless good cause be shown, and a continuance duly granted by the court, all offenses for which indictments are presented to the court shall be tried no later than two hundred seventy (270) days after

the accused has been arraigned.

According to Harris, the trial court erred in not holding that Harris's trial commenced more than 270 days after his arraignment in violation of § 99-17-1, Mississippi Code Annotated (1972). (Brief of Appellant at 7 of 12)

Harris argues that "[t]he State failed to demonstrate good cause in its explanation that it presented to the lower court" and that such a violation requires reversal of Harris's conviction and a dismissal of the charge. (Brief of Appellant at 7-8, 11 of 12)

If good cause is shown for the delay and a continuance is duly granted there is no statutory violation. **Golden v. State,** 968 So.2d 378 (Miss. 2007).

The State's "explanation" of "good cause" for the delay was presented to the trial court during a pretrial hearing conducted on September 30, 2013. (R. 2-7) The court at that time took the matter under advisement with trial scheduled to begin the following morning. (R. 6-7)

Mr. Perkins, Public Defender, informed the court at that time that Mr. Williams, lead defense counsel, was sick and there was some question as to whether or not defendant Harris would agree to allow Perkins to proceed with Harris's defense instead of Williams. (R. 7)

Apparently not.

Trial did not take place until a month and a half later on November 13, 2013, at which time Mr. Williams was present and announced ready for the defense. (R. 17)

On November 12, 2013, the day prior to trial, Harris's motion for severance filed a month earlier on October 16, 2013, was granted. (C.P. at 106-07; R. 11, 15)

No violation of the so-called 270-rule has been demonstrated by Harris because "good cause" in the form of continuances requested by a co-defendant and duly granted by the court was shown for the delay.

Continuances duly granted for good cause to a defendant or co-defendant toll the running of the statute and should be deducted from the total number of days. **Flores v. State,** 574 So.2d 1314 (Miss. 1990).

On July 16, 2012, Harris waived formal reading of the indictment and entered a plea of not guilty. (C.P. at 22) The waiver signed by Harris reads, in part, as follows: "The Two Hundred Seventy (270) day period for the trial of this case pursuant to MCA §99-17-1 begins from the date of the filing of this waiver." (C.P. at 22)

The case of **Sharp v. State,** 786 So.2d 372, 378 (Miss. 2001), contains the following language which is helpful:

> * * * The first step is to calculate the total number of days between arraignment (the statute clearly states that is when the right attaches) and the actual trial. For this purpose, "[t]he date of arraignment is not counted but the date of trial is and weekends are counted unless the 270th day is a Sunday." *Johnson v. State*, 756 So.2d 4, 11 (Miss. Ct. App. 1999) (citing *Adams v. State*, 583 So.2d 165, 167 (Miss. 1991). According to this rule, Sharp was tried 644 days after arraignment. * * *

According to our calculations, Harris was tried 485 days after his arraignment on July 16, 2012.

Unless good cause was shown for any delay, Harris should have been brought to trial by April 12, 2013, nine (9) months or 270 days from July 16, 2012.

Trial took place much later on November 13-14, 2013, nearly sixteen (16) months after July 16, 2012, the date of Harris's arraignment and waiver.

485 days is well beyond the 270 day window.

Good cause in the form of continuances granted to a co-defendant on September 20, 2012, October 8, 2012, February 20, 2013, and May 1, 2013, was demonstrated for the delay.

Judge Smith, after carefully analyzing the issue, made specific findings of fact and concluded that Harris's statutory rights had not been violated because "[i]f a continuance is granted to a co-defendant for good cause, it operates as a good cause delay as to a jointly charged defendant." (C.P. at 104 citing **Horton v. State**, *supra,* 726 So.2d 238, 246 (¶32) (Ct.App.Miss. 1998))

This Court should give great deference to the findings made by the circuit judge.

"[F]indings of fact adopted and approved by the circuit judge may not be disturbed unless manifestly wrong or clearly erroneous. A circuit court judge sitting without a jury is accorded the same deference with regard to his findings as a chancellor." **Puckett v. Stuckey**, 633 So.2d 978, 982 (Miss. 1993). *See also* **Neal v. State**, 451 So.2d 743, 753 (Miss. 1984).

B. Constitutional Right to a Speedy Trial.

A defendant's constitutional right to a speedy trial attaches at the time of a formal indictment, information, or arrest. **Anderson v. State,** 874 So.2d 1000 (Ct. App. Miss. 2004), reh denied. *See also* **Wheeler v. State,** 826 So.2d 731, 737 (Miss. 2002) ["The time begins to run from the date of indictment."]; **Adams v. State,** 583 So.2d 165, 167 (Miss. 1991)["Unlike the statutory right to speedy trial, Adams' constitutional guarantee to a speedy trial attached at the time he was arrested."]; **Smith v. State,** 550 So.2d 406, 408 (Miss. 1989) ["(T)he constitutional right to a speedy trial attaches when a person has been accused."]; **Jackson v. State,** 864 So.2d 1047 (Ct. App. Miss. 2004).

Harris was arrested on April 23, 2011, indicted on June 12, 2012, and arraigned on July 16, 2012, at which time he entered a plea of not guilty. (C.P. at 2, 22)

Harris was brought to trial on November 13, 2013, approximately 933 days following his arrest on April 23, 2011, 520 days after his indictment on June 12, 2012 , and 485 days following

his arraignment on July 16, 2012.

The case was first set for trial on February 20, 2013, following a belated omnibus hearing brought about by a continuance requested by and granted to co-defendant Cunningham. (C.P. at 54)

Trial was re-set thereafter on multiple occasions, including May 21, 2013, July 10, 2013, October 1, 2013, and November 13, 2013.

On December 6, 2012, nearly a year prior to trial-on-the merits held on November 13-14, 2013, Harris filed a *pro se* motion to dismiss for failure to provide him a speedy trial. (C.P. at 48-53) Harris sought dismissal of the charges based upon a denial of his constitutional right to a speedy trial which he had requested on June 2, 2011, prior to indictment. (C.P. at 6)

Harris filed a second motion to dismiss for want of a speedy trial on August 6, 2013. (C.P. at 79-85) Harris complained he " . . . is sitting in the Washington County Regional Jail while the State of Mississippi sits idle in this case." (C.P. at 81)

The motion(s) to dismiss were formally denied by an order entered on October 14, 2013, following a hearing conducted on September 30, 2013. (R. 2-10; C.P. at 102-05)

Since Harris failed to press for an earlier ruling on the constitutional aspect of his motion to dismiss, we think he waived that part of his motion. **Martin v. State,** 354 So.2d 1114, 1119 (Miss. 1978) ["It is the responsibility of the movant to obtain a ruling from the court on motions filed by him and failure to do so constitutes a waiver of same."]; **Marr v. State,** 159 So.2d 167 (Miss. 1963). *See also* **Willie v. State,** 585 So.2d 660, 671 (Miss. 1991) ["Generally, when a trial court has not ruled on a motion, a defendant is procedurally barred on appeal from claiming error."], appeal after remand 738 So.2d 217 (Miss. 1999).

The lesson to be gleaned from **Martin**, **Marr**, and **Willie** is this: Insist on a ruling!

Notwithstanding the procedural bar, if any, we respond briefly to Harris's constitutional

claim which we address without any intent of waiving a bar.

We rely upon **Noe v. State**, 616 So.2d 298, 300 (Miss. 1993), where this Court stated:

> When a defendant's constitutional right to a speedy trial is at issue, the balancing test set out in **Barker v. Wingo**, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), is applicable. The factors to consider are: (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant has asserted his right to a speedy trial; and (4) whether the defendant was prejudiced by the delay.

On balance, an analysis of the so-called **Barker** factors, when considered together with other relevant circumstances favors the State, although barely.

(1) Length of the Delay.

Harris was tried on November 13-14, 2013, approximately 933 days following his arrest on April 23, 2011.

Pre-indictment Delay: 415 days or approximately 14 months.

Harris was not indicted, however, until June 12, 2012. Thus, there was a 415 day pre-indictment delay.

According to the State, fingerprint examination and gun analysis were reasons for this delay. (R. 4)

Post-indictment Delay: 518 days or approximately 17months.

Harris was indicted on June 12, 2012, and brought to trial on November 13, 2013.

The Sixth Amendment right to a speedy trial applies only to post-indictment delays. **United States v. Ballard,** 779 F.2d 287 (5th Cir. 1986). Pre-indictment delays are controlled exclusively by the statute of limitations. **Speagle v. State,** 390 So.2d 990 (Miss. 1980).

Although Harris was not indicted until 415 days following his arrest, his constitutional right to a speedy trial attached on the date of his arrest and not on the date of his indictment. **Smith v.**

State, *supra,* 550 So.2d 406 (Miss 1989); **Bell v. State,** 769 So.2d 247 (Ct. App. Miss. 2000).

A total of 933 days elapsed between arrest and trial.

This factor clearly favors Harris.

(2) Reasons for the Delay.

Four (4) continuances requested by and granted to co-defendant Cunningham: September 20, 2012, October 8, 2012, February 14, 2013, and April 30, 2013. (C.P. at 102-03)

One continuance requested by the State on July 8, 2013, because the victim was visiting outside the continental USA. (R. 7; C.P. at 103) Trial was subsequently reset for October 1, 2013. (R. 7; C.P. at 103)

Harris failed to bring up for hearing his *pro se* motions for dismissal filed on December 6, 2012, and again on August 6, 2013. A notation in the trial court's order denying the motion reflects that " . . . counsel for Harris specifically requested this *pro se* motion not be heard at one of the previous attempts for the Omnibus hearing due to the District Attorney's policy concerning the effect of motions on plea negotiations." In the absence of any rebuttal, this observation should be given great deference.

"If the defendant cause[s] the delay, he will not be allowed to complain." **Perry v. State,** 419 So.2d 194, 199 (Miss. 1982).

While there was both pre-indictment and post-indictment delay, there were reasonable and legitimate reasons and justifications for these delays.

Aside from the co-defendant's four (4) requested continuances on the dates identified above, the State requested a continuance of its own on July 8, 2013, because the victim, a key witness, was visiting relatives outside the continental USA. (R. 7; C.P. at 103)

In addition to this, the victim's native tongue was Mandarin Chinese which necessitated the

presence of a certified Mandarin interpreter at trial. The State filed a motion for an interpreter on February 13, 2013. (C.P. at 55-58) An agreed order granting this motion with defense counsel's approval was signed on February 20, 2013, and filed on February 21, 2013. (C.P. at 67)

Given the totality of the circumstances, this factor favors the State.

(3) Assertion of Right.

The defendant's only assertion of his right to a fast and speedy trial is contained in a demand made on June 2, 2011, a year prior to indictment.

Pro se motions to dismiss for failure to provide a speedy trial were filed on December 6, 2012, and again on August 6, 2013. (C.P. at 48-53, 79-83)

These motions were heard on September 30, 2013. Following argument the matter was taken under advisement. (C.P. at 6-7)

An omnibus hearing was conducted on December 10, 2012, having been delayed by co-defendant Cunningham's motion to continue the omnibus hearing filed on September 20, 2012. The hearing was reset for October 8, 2012. (C.P. at 102)

On or about October 8, Cunningham made a motion *ore tenus* to again continue the date for an omnibus hearing. The omnibus hearing was again reset for November 5, 2012, and finally conducted on December 10, 2012, at which time the case was set for trial on February 20, 2013. (C.P. at 54, 102)

Several other re-settings thereafter followed. (C.P. at 102-03)

Rule 9.08 of the Uniform Circuit and County Court Rules sets the tone and guidelines for omnibus hearings which may be held at the request of an attorney or on the court's own initiative if the defendant has entered a plea of not guilty. Harris had entered a plea of not guilty.

Two of the many purposes of the omnibus hearing are to "[m]ake rulings on any motions then

pending and ascertain whether any additional motions will be made at the hearing or continued portions thereof" and "[a]scertain whether there are any procedural or constitutional issues which should be considered." UCCC Rule 9.08 (4.) (5.).

The delay in bringing about the omnibus hearing must be attributed to co-defendant Cunningham and should not be held against the State, especially where, as here, the trial court's order of dismissal states that " . . . counsel for Harris specifically requested this *pro se* motion [for speedy trial] not be heard at one of the previous attempts for the omnibus hearing due to the District Attorney's policy concerning the effect of motions on plea negotiations." (C.P. at 103) This factor appears to be neutral; it favors neither party.

Harris's only assertion of his right to a speedy trial was made in June, 2011, over a year prior to his indictment in June, 2012. Although Harris later filed two motions to dismiss for want of a speedy trial, a demand for dismissal is not the equivalent of a demand for a speedy trial.

(4) Prejudice by the Delay.

Finally, there is an absence of any suggestion in the record of actual prejudice to Harris other than a suggestion his incarceration was "anxiety producing." (Brief of Appellant at 9 of 12) The mere specter of prejudice is not a viable basis for reversal. **Adams v. State**, 583 So.2d 165 (Miss. 1991); **Wiley v. State**, 582 So.2d 1008 (Miss. 1991); **Handley v. State**, 574 So.2d 671 (Miss. 1990); **Jaco v. State**, 574 So.2d 625 (Miss. 1990).

Harris elected to remain silent at trial and was convicted based upon the eyewitness identification, both at trial and in an earlier photographic lineup, made by the victim.

Corroborating evidence was elicited from several deputies, e.g., Harris's digital photograph was stored as a screen saver on his cell phone which was found inside the get-a-way vehicle. (R. 106-07)

Harris was hopelessly guilty.

Harris suffered not one whit of prejudice. His claims at trial of prolonged incarceration, anxiety and stress and deterioration of his mental state are not persuasive because, as noted by the circuit judge, Harris is a prior convicted felon with a history of criminal activity. (R. 211-12)

This factor favors the State.

In **Noe**, *supra,* 616 So.2d at 300, this Court also stated the following with respect to the four **Barker** factors:

> This Court recognized in **Beavers v. State**, *supra*, 498 So.2d 788, 790 (Miss. 1986), that
>
> > [n]o methodical formula exists according to which the **Barker** weighing and balancing process must be performed. The weight to be given each factor necessarily turns on the quality of evidence available on each and, in the absence of evidence, identification of the party with the risk of nonpersuasion. In the end, no one factor is dispositive. The totality of the circumstances must be considered.

We are mindful that no one factor is dispositive of the question. Nor is the balancing process restricted to the **Barker** factors to the exclusion of any other relevant circumstances. In **Barker**, *supra*, 33 L.Ed.2d at 118, the Supreme Court opined:

> We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process.

Considering the absence of other than presumptive prejudice and the fact that a significant part of the delay is attributable to Harris and his co-defendant, we do not think Harris was denied his constitutional right to a speedy trial.

On balance, an analysis of the **Barker** factors, when considered together with other relevant circumstances, appears precariously to favor the State. Even if there was an extensive delay in bringing Harris to trial, it does not appear the delay was for the purpose of gaining a tactical advantage.

This Court has said, perhaps most recently in **Johnson v. State**, 666 So.2d 784, 793 (Miss. 1995), that " [a] balance is struck in favor of rejecting a defendant's speedy trial claim if 'the delay is neither intentional nor egregiously protracted, and where there is a complete absence of actual prejudice.' "

II. and IV.

THE EVIDENCE, VIEWED IN ITS ENTIRETY AND CONSTRUED IN A LIGHT MOST FAVORABLE TO THE STATE'S THEORY OF THE CASE, WAS LEGALLY SUFFICIENT TO SUSTAIN CONVICTIONS OF ARMED ROBBERY AND FIREARM ENHANCEMENT.

HARRIS HAS FAILED TO DEMONSTRATE THE TRIAL JUDGE ABUSED HIS JUDICIAL DISCRETION IN OVERRULING HARRIS'S MOTION FOR A NEW TRIAL.

AFFIRMATION OF THE JURY'S VERDICT WOULD NOT SANCTION AN UNCONSCIONABLE INJUSTICE.

At the close of the State's case-in-chief, Harris moved generically for a directed verdict on the ground that

> " . . . the State has failed to meet its burden of proving Mr. Leroy Harris guilty of the crime charged." (R. 167)

Judge Smith thereafter overruled the motion for a directed verdict with the following rhetoric:

> BY THE COURT: * * * I'm required to accept as true all the evidence favorable to the State, including all reasonable inferences.

> Of course, we don't need any inferences in this case as far as I can tell. But taking that as the test, that will be denied. (R. 169)

Peremptory instruction was also denied. (C.P. at 135)

Judge Smith also overruled Harris's motion for JNOV or, in the alternative, for a new trial which contained a claim the verdict of the jury was contrary to the law and the credible evidence. (C.P. at 160)

On appeal Harris assails both the sufficiency - denial of his motion for a directed verdict - and the weight of the evidence - denial of his motion for a new trial.

In abbreviated arguments, Harris, reciting the correct legal standards of appellate review, says " . . . there was absolutely no evidence whatsoever, presented by any witness, that Appellant Harris were ever seen with one another." (Brief of Appellant at 10 of 12)

We have yet to fully grasp the gist of Harris's observation that he was never "seen with one another." Admittedly, there is no direct evidence that Cunningham was the other man observed by Deputy Marshall in the presence of Harris, both of whom fled from the scene of the stop.

No matter.

Appearing at the top of a digital photograph stored as the screen saver on the cell phone found inside the blue truck were the words "Tony the Tiger." (R. 106)

Deputy **Jeffrey Parson** described Harris's arrest as follows:

> Q. [BY PROSECUTRIX PERKINS:] And after you cross-referenced that number to an address on South 9th Street, what, if anything, did you do next?
>
> A. [BY PARSON:] At that time, several deputies got in a couple of cars, and we went to South 9th where once we was on the scene on South 9th, there was a black male standing on the south side of the house by a garbage can. Get out – that black [male], I looked at the phone and I identified the subject on the phone as Mr. Harris.

> I asked Mr. Harris was that him on the phone, and I asked him was his nickname "Tony the Tiger." He advised me yes. At that time, Mr. Harris was placed in custody and transported to the Washington County Sheriff's Department. (R. 106-07)

In addition to Harris's self-identification there was unequivocal eyewitness identification made by **Jing Rosella** who identified Harris in court as the robber. (R. 162) She also identified him prior to trial in a photographic lineup. (R. 107, 159-60)

Ms Rosella knew Warren Cunningham, Harris's severed co-defendant, because she and her husband hired him as a warehouse worker in their furniture store. (R. 153) She described the robber as having a gun in his left hand " . . . and [he] shook the gun in front of me and says, if you close the window, if you lock the window, you know what I'm going to do with this gun." (R. 155)

The gun was a "glittering gun, very shiny gun." (R. 155-56)

According to **Starks Hathcock,** the State's forensic scientist specializing in firearm identification, the gun in question was a .32 revolver that was a real gun that was capable of firing. (R 146-47)

Obviously, all that glitters is not gold. This testimony satisfies the firearm/deadly weapon element of the crimes charged.

According to Ms Rosella, "I was not crying, but I was - - I was almost frozen. I was just so, so scared." (R. 156, 158, 164)

"I thought I'm a goner." (R. 158)

This testimony satisfies the elements of fear and violent taking from the presence and against the will of Jing Rosella.

Nathaniel Watkins, Jr. testified he was the owner of the blue pickup truck and that Cunningham borrowed the truck from him on the day of the robbery, April 23, 2011. At that time

the truck did not contain a purse or a weapon of any kind. (R. 130-40)

Gerald Turner, Ms Rosella's next door neighbor, testified that on the day of the robbery he observed a blue pickup truck pull in behind Ms Rosella who had just driven up in her driveway. One of the occupants, a black male, exited from the passenger side of the truck and approached the driver's side of Ms Rosella's vehicle. (R. 88)

Turner thought something was not right and followed the blue truck. After meeting Mr. Rosella coming home at a high rate of speed Turner returned to Rosella's residence where he purportedly learned of the robbery. (R. 88-89)

The jury was given instruction S-8 requiring the jury to find beyond a reasonable doubt it was Harris and not another who committed the crime. (C.P. at 133-34)

The jury was invited via S-8 (C.P. at 133-34) to consider the following factors:

1. Opportunity of the Witnesses to View the Offender.

Excellent.

Ms Rosella viewed Harris face to face, almost eyeball to eyeball. He was at her window on the driver's side leaning forward.

"I was looking at him." (R. 164)

"He was very close to my window of my vehicle window." (R. 166)

2. Witnesses' Degree of Attention.

Solid & Deliberate.

Harris's activity at Rosella's automobile window while holding a firearm that glittered attracted her attention. (R. 164) She was looking right at him. (R. 164)

3. Accuracy of the Witnesses' Prior Description.

On target.

Q. Do you recall what the person was wearing?

A. I believe a white T-shirt. There is some kind of pattern in the front.

Q. Did this person have any distinguishing marks or features?

A. "He had a beard short beard." (R. 164)

This description matched the description given by Deputy Marshall. (R 93)

Ms Rosella made a photographic identification on April 17th, four days after the robbery. (R. 159-60)

4. Level of Certainty Demonstrated by the Witnesses.

On a scale of 1 to 10, a 10.

Q. Are you positive you saw the person that took your purse out of your vehicle?

A. Yes.

Q. Are you positive you saw the person that held the gun to you?

A. Yes.

5. Length of Time Between the Crime & the Confrontation.

Four (4) days on the photo identification. (R. 107)

In-court identification made two years after the crime. (R. 164)

In the end, the weight to give the identifications was a matter for the jury to resolve in the manner explained in jury instruction S-8. (C.P. at 133-34)

The identification evidence and evidence in toto pass the standards of review articulated in **Bush v. State,** *supra,* 895 So.2d 836, 842-45 (Miss. 2005), with high flying colors.

III.

THE TRIAL COURT DID NOT ABUSE ITS JUDICIAL DISCRETION IN ADMITTING INTO EVIDENCE STATE'S EXHIBIT S-1, A DIGITAL DISC PRESERVING AN AUDIO RECORDING OF A 911 CALL.

Harris, in another abbreviated argument, contends the trial court erred in admitting State's exhibit S-1 - a digital recording of Ms Rosella's 911 call - after finding, implicitly, its probative value outweighed its prejudicial effect.

According to **David Burford,** the Director of Emergency Management for Washington County, S-1 " . . . is a recording off of the 9-1-1 recording machine for two calls placed from 2148 Carol Street." (R. 85)

Harris objected to the introduction of the DVD recording as follows:

> BY MR. HERZOG: Your Honor, at this time, the State would move to have that DVD tape received into evidence and the calls it contains therein.
>
> BY THE COURT: Any objection?
>
> BY MR. WILLIAMS: We object under 403.
>
> BY THE COURT: 403?
>
> BY MR. WILLIAMS: Yes, Your Honor.
>
> BY THE COURT: The objection will be overruled. It passes through the filter of 403 and be received as S-1.

See **Foster v. State,** 508 So.2d 1111, 1117 (Miss. 1987) [The 403 factor must "substantially outweigh" the probative value before the evidence may be excluded."]

The 403 factor is the "ultimate filter through which all otherwise admissible evidence must pass." **Jenkins v. State,** 507 So.2d 89, 93 (Miss. 1987).

The recordings were thereafter played for the benefit of the jury. (R. 85)

Harris laments the trial judge " . . . failed to articulate 'what aspects' of said evidence 'passed' through the filter of Rule 403 of the Mississippi Rules of Evidence." (Brief of Appellant at 10 of 12)

We opine, on the other hand, that Harris's objection was itself pretty superficial and devoid of the various aspects of 403 relied upon. There is no question but that the 911 recording was relevant under Miss.R.Evid. 402. Evidence is "relevant" if it has any tendency to prove a consequential fact. **Ferguson v. State,** 137 So.3d 240 (Miss. 2014), reh denied, cert dismissed.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Miss.R.Evid. 403.

Harris failed to identify at trial the particular part of 403 he was relying upon for exclusion of the proffered evidence. The trial judge found as a fact, implicitly, if not directly, that the 911 call was more probative than prejudicial.

We wholeheartedly agree.

It was the 911 call that immediately set in motion a search by the local authorities for the two robbers who left the scene of the holdup in a blue pickup. But for the timely dispatch in the immediate wake of the 911 call, the perpetrators may well have evaded capture. The Supreme Court has consistently held that "[t]he relevancy and admissibility of evidence are largely within the discretion of the trial court and reversal may be had only where that discretion has been abused." **Fulks v. State,** *supra,* 110 So.3d 764, 769 (Miss 2013) quoting from **Johnson v. State**, 567 So.2d 237, 238 (Miss. 1990).

In making evidentiary rulings trial judges enjoy "a great deal of discretion as to the relevancy

and admissibility of evidence." **Love v. State,** *supra,* 121 So.3d 952, 954 (¶11) (Ct. App. Miss. 2013) citing **Shaw v. State,** 915 So.2d 442, 445 (¶8) (Miss. 2005). *See also* **Hardy v. State,** 137 So.3d 289 (Miss. 2014) [A trial judge enjoys a great deal of discretion as to the relevancy and admissibility of evidence, and the Supreme Court will reverse only in the event that judicial discretion is abused.]

Reversal is required only where the trial court's abuse of judicial discretion can be shown to cause prejudice to the defendant. **Franklin v. State,** 136 So.3d 1021 (Miss. 2014), reh denied.

No abuse of judicial discretion and no prejudice has been demonstrated here. Ms Rosella testified she went to her neighbor's house and made a 911 call " . . . asking for help because I have just been robbed." (R. 158)

There has been no harm, no foul, and clearly not one whit of prejudice to Harris who is patently guilty.

CONCLUSION

Admittedly, 933 days of continuous incarceration from arrest on April 23, 2011, to trial on November 13, 2013, is troublesome. The prejudice factor is diluted, however, by the fact that Harris will receive credit for time served which will effectively reduce his period of incarceration from 15 years to 12 ½ years.

Appellee respectfully submits that no reversible error took place during the trial of this cause and that the judgments of conviction for armed robbery and firearm enhancement, as well as the twenty (20) year sentence with fifteen (15) years to serve followed by five (5) years of PRS and another five (5) years, concurrent, for firearm enhancement, should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: /s/ Billy L. Gore
BILLY L. GORE
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. 4912

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

CERTIFICATE OF SERVICE

I, BILLY L. GORE, hereby certify that on this day I electronically filed the foregoing pleading or other paper with the Clerk of the Court using the MEC system which sent notification of such filing to the following:

Further, I hereby certify that I have mailed by United States Postal Service the document to the following non-MEC participants:

Honorable Richard A. Smith
Circuit Court Judge
P.O. Box 10239
Greenwood, MS 38935-1953

Honorable Dewayne Richardson
District Attorney
P.O. Box 426
Greenville, MS 38702

Brandon I. Dorsey, Esq.
P. O. Box 13427
Jackson, MS 39236-3427

This the 10th day of November, 2014.

/s/ Billy L. Gore
BILLY L. GORE
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE NO. 602-359-3680
FAX NO. 601-576-2420
Email: