

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT JACKSON  
Assigned on Briefs July 11, 2023

**FILED**  
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Appellate Courts

**STATE OF TENNESSEE v. ANTHONY CARPENTER**

**Appeal from the Criminal Court for Shelby County**  
**No. 19-05286 Carolyn W. Blackett, Judge**

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**No. W2022-01710-CCA-R3-CD**

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A Shelby County jury convicted the Defendant, Anthony Carpenter, of intentionally evading arrest in a motor vehicle. The trial court sentenced the Defendant to one year in confinement. The Defendant appeals, contending that: (1) the trial court erred when it denied his motion to suppress; (2) the evidence is insufficient to support his conviction; (3) the trial court erred when it allowed the State to impeach the Defendant with a prior conviction; (4) the trial court erred when it denied his request to sit at counsel table; and (5) the trial court erred when it admitted the audio portion of the body camera recordings of the incident. After review, we affirm the trial court’s judgment.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which CAMILLE R. MCMULLEN, P.J., and JILL BARTEE AYERS, J., joined.

Phyllis Aluko, Shelby County Public Defender and Barry W. Kuhn, Assistant Public Defender, Shelby, Tennessee, for the appellant, Anthony Carpenter.

Jonathan Skrmetti, Attorney General and Reporter; Brent C. Cherry, Assistant Attorney General; Steven J. Mulroy, District Attorney General; and Robert Steele and Carrie Shelton Bush, Assistant District Attorneys General, for the appellee, State of Tennessee.

**OPINION**

**I. Facts**

This case arises from the initiation of a traffic stop based upon the Defendant’s unlawfully driving in the emergency lane at the scene of an accident on Interstate 240 in Shelby County, Tennessee. After a Memphis police officer directed the Defendant to stop, the Defendant came to a stop, but he failed to follow further police instruction and drove

away. Based upon this incident, a Shelby County grand jury indicted the Defendant for intentionally evading arrest in a motor vehicle.

### **A. Suppression Hearing**

The Defendant filed a motion to suppress, contending that a police officer waved him down from the side of the road without a legal basis to conduct a traffic stop. The Defendant argued that, because there was no legal basis to conduct the stop, officers seized him in violation of his Fourth Amendment rights, so all the evidence resulting from the stop should be suppressed.

The State responded that on May 3, 2019, police officers were working a crash on I-240 when Officer Pickens observed the Defendant driving on the shoulder of the interstate. Officer Pickens flagged the Defendant down to issue a citation for the violation, and the Defendant evaded. The State argued that the stop was lawful under the automobile exception to the warrant requirement on the basis that the officer observed the Defendant violating Tennessee Code Annotated section 55-8-118(d)(1) by driving on the shoulder of the interstate while other traffic was present on the road.

At the suppression hearing, Memphis Police Department (“MPD”) Officer Michael Pickens testified that on May 3, 2019, he was on I-240 westbound, east of the Airways Boulevard exit. He had responded to an accident on the interstate. While working on the accident, traffic was “kind of at a crawl.” Officer Pickens explained that the shoulder or “emergency lane” was designed for emergency vehicle use. He observed a dark-colored Cadillac on the shoulder attempting to bypass the slowed traffic due to the accident. When the driver, later identified as the Defendant, saw police cars, he pulled back into the lane of traffic. When the Defendant drove closer to where Officer Pickens was standing, Officer Pickens flagged the Defendant to the side of the road. The Defendant complied and lowered his window “a few inches” when Officer Pickens approached. Officer Pickens instructed the Defendant to lower the window, and the Defendant raised the window. Officer Pickens then instructed the Defendant to open the door, and the Defendant pulled away.

Officer Pickens advised other officers through his police radio of the Defendant’s flight, and the Defendant was detained east of the accident and charged with unlawfully driving in the emergency lane and evading arrest. Officer Pickens confirmed that he wore a body camera during the incident. The State asked to play the “relevant part” of the video recording. The Defendant objected, arguing that “any audio of that is being presented for the truth of the matter would be hearsay.” The State responded that any statements would be present sense impressions by witnesses who were subject to cross-examination and any

statements made by the Defendant would be admissible as statements against interest. The trial court overruled the Defendant's objection.

The Defendant testified that on May 3, 2019, he had gone to a job interview for a second job. He took the interstate home and drove into slow traffic close to the exit he planned to take. He sat in traffic for roughly five minutes. He denied driving on the shoulder at any point; however, a police officer flagged him over to the side of the road.

After hearing the evidence the trial court denied the motion finding:  
It's a question for the jury - - for the jury to decide whether or not based on him seeing the response of the police, the response of the [D]efendant, and also particularly to figure out in this video if they can figure out which car we're talking about.

. . . .

[I]t's not enough to suppress that - - there's no question about whether the body camera was working. There's no question about what the purpose of - of the police being out on the street. Clearly as I state before, there's no question that, you know, there was a reason for the stop. . . . [T]he jury needs to decide whether the stop was first of all legal and whether or not there was an evading of an arrest.

## **B. Trial**

At trial, the parties stipulated to the introduction of video "excerpts" from body cameras worn by police officers. The State sought to introduce recordings from Officer Pickens and Officer Tran, and the Defendant sought to introduce the recording from Officer Bowers. The parties then presented the following evidence: MPD Officer Pickens testified about the May 3, 2019 accident on the I-240, westbound between Lamar Avenue and Airways. Due to the accident, the traffic was "at a crawl." Officer Pickens explained that, when this occurs, impatient drivers often will drive in the emergency lane. He explained that the "shoulder" is the designated lane for emergency responders. This designation provides a way for police and medical technicians to access the scene and render help if needed. Because of the importance of allowing emergency responders access to people in need, it is illegal to drive in the emergency lane.

Officer Pickens testified that he and his trainee, Officer Bowers, were controlling the traffic just east of the accident. He explained that part of his role at the scene was to prevent vehicles from traveling in the emergency lane. Officer Pickens had pulled over a vehicle for driving in the emergency lane when he noticed a dark-colored Cadillac that had

entered the emergency lane. Upon seeing the flashing blue lights of Officer Pickens's police cruiser that was parked on the shoulder, the Cadillac merged back into the lane of traffic. At the time, Officer Bowers was writing a citation for the vehicle that had already been stopped, so Officer Pickens began walking toward the Cadillac, maintaining "a visual" on the Cadillac. Officer Pickens recalled saying aloud, "black Cadillac" to reinforce his identification of the car, although he later learned upon closer inspection that the Cadillac was dark brown. As the Cadillac drew closer, Officer Pickens motioned for the driver, later identified as the Defendant, to pull the Cadillac over to the shoulder with the intent of issuing a citation.

Officer Pickens approached the Defendant, who had rolled his window down three inches. Officer Pickens instructed the Defendant to roll the car window down completely, and the Defendant refused. Officer Pickens repeated, "roll your window down," and the Defendant raised the window and drove away. Officer Pickens was able to see the driver clearly before he pulled away. At trial, he identified the Defendant as the driver.

Officer Pickens testified that he used his police radio to advise the officers west of his location of the situation. Based upon Officer Pickens's description of the vehicle, officers at the accident scene stopped the Defendant. Officer Pickens drove to where the Defendant's Cadillac was stopped for the second time and ordered him out of the Cadillac. Officer Pickens confirmed that, upon arriving at the location of the second stop, he identified the Cadillac and the driver as the same Cadillac and driver he had previously seen.

Officer Pickens arrested the Defendant for evading and driving in an emergency lane. Officer Pickens identified a recording taken from the body camera he wore during the incident. The State played the recording for the jury without objection. The recording is consistent with Officer Pickens's testimony about the stop. Officer Pickens identified the Defendant's Cadillac in the recording.

Officer Pickens testified that he wore the body camera around the center of his chest. He explained that the body camera did not capture everything that Officer Pickens saw due to the stationary nature of the device.

On cross-examination, Officer Pickens confirmed that on the recording he stated "Cadillac and black car" in reference to the Defendant's vehicle. He stated that, in making this statement, he was referring to only one vehicle, the "Cadillac," and a description of the Cadillac as "black." Officer Pickens agreed that in one portion of the video, the Cadillac had only one headlight over the white line of the lane as opposed to two headlights. He explained that that portion of the video depicted the Cadillac as it was merging back into traffic. He agreed that the video depicted five cars passing him before he stepped into the

lane of traffic and flagged over the Defendant. Officer Pickens confirmed that a weapon was not found on the Defendant's body during the pat down. The following exchange then occurred:

Defense Counsel: "did you, or your colleagues find illicit substances on [the Defendant]'s person when you took him into custody?"

Officer: Not on his person, it was actually he had broke it lo[o]se and it actually was wasted all over his leg and his car area, it wasn't a lot.

On redirect examination, Officer Pickens clarified that he had seen "a small baggie" the first time he approached the Defendant's Cadillac before the Defendant drove away. By the time the second officer had stopped the Defendant, it appeared that the Defendant had torn the baggie due to the presence of a "green leafy substance" on the Defendant's pants and in several parts of the Cadillac. Officers at the scene did not collect the substance, but Officer Pickens testified that, in his experience, green, leafy substances are often marijuana.

On re-cross examination, Officer Pickens testified that the Defendant was not charged with driving under the influence.

Shelby County Sheriff's Office Deputy Jhontavious Bowers testified that in May 2019, he had recently begun work at the MPD. On May 3, 2019, Officer Pickens was training him and, as they drove toward the precinct, they came to an area on I-240 where other officers were "working" an accident. Deputy Bowers observed a car avoiding the slowed traffic by driving in the emergency lane. He and Officer Pickens initiated a traffic stop of the car and issued a citation. As they issued the citation, they observed other cars driving in the emergency lane.

Upon observing a Cadillac driving in the emergency lane, Officer Pickens flagged the Cadillac to the side of the road. Deputy Bowers was busy issuing a citation when he heard Officer Pickens "yelling." Deputy Bowers turned and saw Officer Pickens telling the driver of the Cadillac to, "Turn the car off, turn the car off," and then the Cadillac sped away.

Deputy Bowers testified that he and Officer Pickens followed in their patrol car and another officer assisting with the accident pulled the Defendant over about "a football field and a half" down the road. Officer Pickens and other officers at the scene of the accident

ordered the Defendant out of the vehicle. Once the Defendant exited the Cadillac, Deputy Bowers handcuffed him.

On cross-examination, Deputy Bowers estimated that he and Officer Pickens issued three to five citations on May 3, 2019, to drivers who were driving in the emergency lane. Deputy Bowers confirmed that, at the time of these events, he wore an MPD uniform, a body camera, and the emergency lights were activated on the patrol car. The recording from Deputy Bowers's body camera was played for the jury. Deputy Bowers can be seen on the recording issuing a citation. As he does so, Officer Pickens can be heard in the background, and then Deputy Bowers returns the driver's items and tells the driver he will not be receiving a citation. Officer Pickens is seen on the recording running up behind a vehicle and there is footage of Deputy Bowers placing handcuffs on the Defendant.

On redirect examination, Deputy Bowers clarified that he observed Officer Pickens flag the Cadillac over and then focused on paperwork. He next looked up when he heard Officer Pickens yelling, and he watched the Defendant drive away.

Tennessee Bureau of Investigation Agent Michael Tran testified that he was an MPD officer in May 2019 and was present at the May 3, 2019 accident on I-240. While at the accident scene he heard a radio call, "Stop that vehicle," "Stop that car right there." He turned and observed a Cadillac in the emergency lane merge into traffic, almost striking another car. He stopped the Cadillac and instructed the Defendant to turn off the engine and remove the keys from the ignition. The Defendant failed to comply initially, but eventually turned the engine off. Next, law enforcement told the Defendant to exit the Cadillac, and he "transitioned to the passenger side of the vehicle," exited the passenger door, and law enforcement detained him shortly thereafter.

Agent Tran testified that, as the Defendant maneuvered through the front seat to exit the Cadillac, he observed the Defendant grab a bag of green, leafy substance and "start[] breaking it and dispers[ing] it, before moving over to the passenger side of the seat." Agent Tran testified that in his experience the green, leafy substance appeared to be consistent with the appearance and odor of marijuana.

Agent Tran also wore a body camera during the incident, and he identified the recording taken on his body camera of the incident. The recording was played for the jury and was consistent with Agent Tran's testimony. When asked how Agent Tran was able to identify which car Officer Pickens was referring to, he stated that he both observed the Cadillac leave the emergency lane and merge back into traffic and that the Defendant's Cadillac was the only one in the identified group of cars.

After hearing this evidence, the jury convicted the Defendant as charged. At a subsequent sentencing hearing, the trial court imposed a one-year sentence in confinement. It is from this judgment that the Defendant appeals.

## **II. Analysis**

On appeal, the Defendant asserts that: (1) the trial court erred in denying his motion to suppress; (2) the evidence is insufficient to support his conviction; (3) the trial court erred in allowing the State to impeach the Defendant with a prior conviction for second degree murder; (4) the trial court erred when it prevented the Defendant from sitting at the counsel table at trial; and (5) the trial court improperly allowed the State to play the audio portion of the body camera recordings.

### **A. Motion to Suppress**

The Defendant contends that Officer Pickens had no legal basis to stop his car; therefore, the trial court should have granted his motion to suppress. In his motion to suppress, the Defendant asserts that “he was unlawfully detained without reasonable suspicion or probable cause and consequently illegally seized when the officer flagged down his car.” He asked the trial court to “suppress all evidence, including testimonial and recorded evidence, obtained as a result of the warrantless seizure” of his vehicle.

On appeal, it appears that the Defendant argues that any evidence of his flight is unlawful because Officer Pickens’s initial stop was illegal. This court has previously stated that, “evidence of a defendant’s ‘criminal conduct committed subsequent to an illegal arrest, or even as a result thereof, should not be suppressible under the exclusionary rule.’” *State v. Abernathy*, 159 S.W.3d 601, 604 (Tenn. Crim. App. 2004). “A contrary rule would virtually immunize a defendant from prosecution for all crimes he might commit that have a sufficient causal connection to the police misconduct.” *United States v. Bailey*, 691 F.2d 1009, 1017 (11th Cir.1982). Therefore, the Defendant could not prevail on a motion to suppress because his subsequent conduct of evading the police in a vehicle was a new and distinct crime from the original violation of driving in the emergency lane.

We, however, do not agree that this issue was properly raised as a motion to suppress. “The term ‘motion to suppress’ commonly refers to the suppression of illegally obtained tangible and intangible evidence.” *See* W. MARK WARD, TENNESSEE CRIMINAL TRIAL PRACTICE § 14:25, at 388 (2006). Here, there is no evidence of contraband, fruits of crimes, or instrumentalities to suppress. “The purpose of a motion to suppress evidence is to prevent the state from introducing evidence that was obtained by violating a constitutional right of the accused.” *State v. Campbell*, No. 02-C-01-9408-CR-00165, 1996 WL 368224, at \*4 (Tenn. Crim. App. June 28, 1996); *see also State v. Foote*, 631

S.W.2d 470, 473 (Tenn. Crim. App. 1982). As there was no evidence to exclude from the stop in this case, the motion to suppress was moot. It appears the Defendant was attempting to assert the defense set out in Tennessee Code Annotated section 39-16-603(b)(2), not seeking to suppress evidence that was illegally obtained.

The Defendant was charged with intentionally evading police with a motor vehicle pursuant to Tennessee Code Annotated section 39-16-603. This statute prohibits intentionally evading arrest in a motor vehicle, and provides for a defense to the charge as follows: “[i]t is a defense to prosecution under this subsection (b) that the attempted arrest was unlawful.” T.C.A. § 39-16-603(b)(2). Thus, it was a jury determination as to whether the attempted arrest (first stop) was lawful, and the jury in this case was charged accordingly.

Therefore, we conclude that the trial court properly denied the motion because the Defendant was not entitled to the suppression of the evidence of the alleged criminal conduct. As the trial court found, the Defendant’s remedy was to raise the statutory defense of an illegal stop at trial and allow the jury to decide whether the statutory defense had merit under the facts of this case. The Defendant is not entitled to relief as to this issue.

### **B. Sufficiency of the Evidence**

The Defendant argues the sufficiency of the evidence on the same basis as his challenge to the denial of his motion to suppress. He contends that the police officer had no legal basis to stop the vehicle; therefore, the evidence is insufficient to support his conviction. The State responds that there is sufficient evidence to support the Defendant’s conviction for intentionally evading arrest in a motor vehicle. We agree with the State.

When an accused challenges the sufficiency of the evidence, this Court’s standard of review is whether, after considering the evidence in the light most favorable to the State, “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); see Tenn. R. App. P. 13(e); *State v. Goodwin*, 143 S.W.3d 771, 775 (Tenn. 2004) (citing *State v. Reid*, 91 S.W.3d 247, 276 (Tenn. 2002)). This standard applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999) (citing *State v. Dykes*, 803 S.W.2d 250, 253 (Tenn. Crim. App. 1990)). In the absence of direct evidence, a criminal offense may be established exclusively by circumstantial evidence. *Duchac v. State*, 505 S.W.2d 237, 241 (Tenn. 1973). “The jury decides the weight to be given to circumstantial evidence, and ‘[t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury.’” *State v. Rice*, 184 S.W.3d 646, 662 (Tenn.



2006) (quoting *Marable v. State*, 313 S.W.2d 451, 457 (Tenn. 1958)). “The standard of review [for sufficiency of the evidence] ‘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)).

In determining the sufficiency of the evidence, this Court should not re-weigh or reevaluate the evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from the evidence. *State v. Buggs*, 995 S.W.2d 102, 105 (Tenn. 1999) (citing *Liakas v. State*, 286 S.W.2d 856, 859 (Tenn. 1956)). “Questions concerning the credibility of witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact.” *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). “A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State.” *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973). The Tennessee Supreme Court stated the rationale for this rule:

This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

*Bolin v. State*, 405 S.W.2d 768, 771 (Tenn. 1966) (citing *Carroll v. State*, 370 S.W.2d 523, 527 (Tenn. 1963)). This Court must afford the State of Tennessee the ““strongest legitimate view of the evidence”” contained in the record, as well as ““all reasonable and legitimate inferences”” that may be drawn from the evidence. *Goodwin*, 143 S.W.3d at 775 (quoting *State v. Smith*, 24 S.W.3d 274, 279 (Tenn. 2000)). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000) (citations omitted).

The criminal offense of intentionally evading arrest in a motor vehicle requires the State to prove that the Defendant: (1) operated a motor vehicle on a public road in Tennessee; and (2) received a signal from a law enforcement officer to stop the vehicle; and (3) after receiving the signal, intentionally fled from the law enforcement officer. T.C.A. § 39-16-603(b)(1). The statute also provides that, “[i]t is a defense to prosecution

under this subsection (b) that the attempted arrest was unlawful.” T.C.A. § 39-16-603(b)(2).

We note that, although the Defendant contests the sufficiency of the evidence, he does not challenge any of the elements of the charged offense. Instead, the Defendant repeats much of the same argument as he did in support of his motion to suppress.

The evidence, viewed in the light most favorable to the State, proved that the Defendant was driving in slow-moving traffic caused by a car accident. He moved into the emergency lane, where a patrol car with emergency lights illuminated was also located in the emergency lane further down the interstate. The Defendant then merged back into traffic. As the Defendant approached officers on the side of the road, an officer flagged him over for the emergency lane violation. The Defendant pulled over and lowered his car window a few inches. When instructed to lower the window completely, he closed the window and drove away. Police officers at the scene of the accident were alerted and stopped the Defendant’s Cadillac and ultimately arrested the Defendant. This is sufficient evidence to support the Defendant’s conviction for intentionally evading arrest in a motor vehicle.

In his brief, the Defendant argues that the emergency lane statute that Officer Pickens alleged the Defendant violated was not presented to the jury. Officer Pickens, however, testified thoroughly about the statute prohibiting drivers from blocking the emergency lane. He explained what conduct the statute prohibited and the rationale behind the statute. He testified about the importance of providing emergency personnel with quick access to parties in need of medical attention after an accident. As to the Defendant’s claim that there was no basis for the stop, as discussed previously related to the motion to suppress, the jury was instructed as to the statutory defense. By its verdict, the jury concluded that Officer Pickens’s initial stop was lawful based upon the Defendant’s violation of the emergency lane statute, Tennessee Code Annotated section 55-8-118(d)(1).

Accordingly, we conclude that a rational jury could find beyond a reasonable doubt that Officer Pickens lawfully flagged the Defendant to the side of the road for driving in the emergency lane, the Defendant stopped his vehicle, but then intentionally drove away to avoid a citation for the emergency lane violation. The Defendant is not entitled to relief as to this issue.

### **C. Prior Conviction**

The Defendant challenges the trial court’s ruling that would have allowed the State to impeach the Defendant with a second degree murder conviction if he testified at trial.

The State responds that the Defendant has failed to show that the trial court abused its discretion. We agree with the State.

Subject to certain conditions, evidence of a witness's prior convictions may be used to impeach that witness's testimony. Tenn. R. Evid. 609(a). The prior conviction, however, "must be punishable by death or imprisonment in excess of one year under the law under which the witness was convicted or, if not so punishable, the crime must have involved dishonesty or false statement." Tenn. R. Evid. 609(a)(2).

Additionally, evidence of a prior conviction is not admissible if more than ten years have elapsed since the date the witness was released from confinement, or if the witness was not confined, the date of conviction. Tenn. R. Evid. 609(b). When the witness to be impeached is the defendant in a criminal prosecution, "the State must give the accused reasonable written notice of the impeaching conviction before trial, and the court upon request must determine that the conviction's probative value on credibility outweighs its unfair prejudicial effect on the substantive issues." Tenn. R. Evid. 609(a)(3).

With respect to this provision, our supreme court instructs us that,

[I]n determining whether the probative value of a conviction on the issue of credibility outweighs its unfair prejudicial effect upon the substantive issues, two criteria are especially relevant. A trial court should first analyze the relevance the impeaching conviction has to the issue of credibility. Trial courts should explain on the record how the impeaching conviction is relevant to the defendant's credibility. If the conviction is probative of the defendant's credibility, the trial court should secondly "assess the similarity between the crime on trial and the crime underlying the impeaching conviction." When an impeaching conviction is substantially similar to the crime for which the defendant is being tried, there is a danger that jurors will erroneously utilize the impeaching conviction as propensity evidence of guilt and conclude that since the defendant committed a similar offense, he or she is probably guilty of the offense charged. Accordingly, the unfairly prejudicial effect of an impeaching conviction on the substantive issues greatly increases if the impeaching conviction is substantially similar to the crime for which the defendant is being tried. Therefore, trial courts should carefully balance the probative value of the impeaching conviction on credibility against its unfairly prejudicial effect on substantive issues.

*State v. Mixon*, 983 S.W.2d 661, 674 (Tenn. 1999) (citations omitted). A trial court's ruling on the admissibility of a prior conviction for impeachment purposes is reviewed on appeal under an abuse of discretion standard. *State v. Waller*, 118 S.W.3d 368, 371 (Tenn. 2003).

In this case, the conviction at issue is a second degree murder, Class A felony, punishable by imprisonment for more than a year. *See* T.C.A. § 40-35-111(b)(1) (2019). The record reflects that the State properly filed notice of its intention to impeach the Defendant with prior convictions if he testified at trial. The Defendant filed a motion in limine and two subsequent amended motions. In the second amended motion in limine, the Defendant focused on the second degree murder conviction, requesting that the trial court rule the second degree murder conviction be inadmissible. The motion states,

The State . . . seek[s] introduction of [the Defendant]’s 22-year-old conviction for Second-Degree Murder in Shelby County Case No. 98-08762-98004774. Because [the Defendant] was not released from his sentence in that case until 2017, the conviction meets the time requirement under Rule 609(b). This Court must therefore weigh its probative value against its risk of unfair prejudice.

After a hearing on the matter the trial court ruled that the State would be allowed to impeach the Defendant with the prior conviction if he chose to testify. Defense Counsel responded, “Thank you, Your Honor.” During the hearing, there was never a request for the trial court to make a finding as to the issue of the probative value of the murder conviction on credibility balanced against the unfairly prejudicial effect on the substantive issues at trial.

On appeal, however, the Defendant argues that the trial court failed to make a determination of whether the conviction’s probative value outweighs any unfair prejudice. The State responds that the trial court implicitly found the probative value to outweigh the prejudicial effect in its ruling and also relies on the trial court’s findings when this issue was raised in the motion for new trial.

At the motion for new trial, the trial court found that the prior conviction, a Class A felony, was “very serious.” The trial court then considered the similarity between the prior conviction and the instant charge, finding that the two offenses were entirely different types of crimes, thus lessening the harm of prejudice. After considering these factors, the trial court ruled that, if the Defendant testified, the prior conviction for second degree murder would be admissible.

We note that the trial court’s findings as to this issue should have been made prior to the trial rather than following the motion for a new trial. Additionally, the trial court’s findings should have been more detailed and specific. A trial court’s proper analysis of an evidentiary issue is both necessary for adequate review on appeal as well as invaluable to the parties in assessing how best to proceed at trial and post-trial.

However, we are able to ascertain that the basic relevant issues requiring consideration here were touched on by the trial court. First, the trial court needed to consider the relevance of the conviction to the Defendant's credibility. *See Mixon*, 983 S.W.2d at 674. As to this factor, the trial court found that the Defendant's prior felony conviction for second degree murder, a Class A felony, was a very serious offense. This court has previously held that violent felonies "reflect on the moral character of a witness" and that "this evidence is not usually without probative value." *State v. Blanton*, 926 S.W.2d 953, 960 (Tenn. Crim. App. 1996) (quoting *State v. Daniel Strong*, No. 88-82-III, 1989 WL 34942, at \*2 (Tenn. Crim. App., Nashville, April 12, 1989)). Thus, the trial court presumably considered that a serious violent offense reflected on the Defendant's moral character as a witness.

Next, the trial court considered whether the impeaching conviction was substantially similar to the crime for which the Defendant was being tried. *See Mixon*, 983 S.W.2d at 674. In considering this factor, the trial court concluded that the present conviction for evading arrest was not substantially similar to the impeaching conviction of homicide, thereby reducing the chance of an unfair prejudicial effect. We agree that the significant difference in the type of offense – homicide versus evading arrest – arguably lessens the possibility of the jury automatically finding the Defendant guilty of the instant offense because of the prior conviction.

Accordingly, although trial court's evidentiary findings should have been more detailed and thorough, we cannot conclude that the trial court abused its discretion in allowing the prior conviction for impeachment purposes. The Defendant is not entitled to relief on this issue.

#### **D. Motion to Allow Defendant to be Seated at the Counsel Table at Trial**

The Defendant asserts that the trial court erred when it denied his motion to be allowed to sit at the counsel table during the trial. The State responds the trial court did not abuse its discretion by denying the Defendant's request; however, even if it was error, the Defendant has failed to show prejudice. We agree with the State.

A trial court's decision regarding whether a defendant should be permitted to sit at the table with defense counsel is reviewed for abuse of discretion. *State v. Smith*, 492 S.W.3d 224, 243 (Tenn. 2016); *State v. Rice*, 184 S.W.3d 646, 674 (Tenn. 2006) *abrogated on other grounds by State v. Shackelford*, - - S.W.3d - - 2023 WL 4537310 (July 14, 2023). "A trial court abuses its discretion when it applies an incorrect legal standard, reaches an illogical conclusion, bases its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party." *Smith*, 492 S.W.3d

at 243. When a trial court erroneously denies a defendant an opportunity to sit at counsel table, the defendant must demonstrate prejudice from the error. *Smith*, 492 S.W.3d at 244; *Rice*, 184 S.W.3d at 674-75.

In *Rice*, the trial court ordered the defendant to sit on a bench less than two feet behind counsel table, and the defendant asserted this was a due process violation. 184 S.W.3d at 674. The Tennessee Supreme Court concluded that the trial court did not abuse its discretion because “[t]he seating arrangement did not impair the defendant’s presumption of innocence” and because “the defendant’s ability to communicate with counsel” was not affected. *Id.* at 675. In *Smith*, on the other hand, the Tennessee Supreme Court concluded that arbitrarily denying the defendant the opportunity to sit at counsel table based solely on the fact that he was not an attorney was an abuse of discretion. 492 S.W.3d at 243. The court nevertheless concluded the defendant had not shown prejudice. *Id.* at 244.

In the case under submission, the Defendant filed a motion, relying on Rule 8.05 of the Rules of Practice and Procedure for the 30<sup>th</sup> Judicial District at Memphis. This rule provides, “[w]here space is available and *with permission of the court*, the defendant may sit at counsel table with his or her attorney.” (emphasis added). At a motion hearing, the trial court denied the motion without explanation. At the motion for new trial hearing, however, the trial court explained, as follows:

I feel like that the trial table each had two attorneys, that the [D]efendant was sitting directly behind both Counsel, was free to confer, pass notes, even take a recess and discuss the case with Counsel.

I think the only concern that this Court had is that the usual practice is not that the defendant cannot sit with Counsel, but the usual practice in Criminal Court, to make sure that people do understand who the Counsel is and who the Defendant is, because in most cases the Defendant’s dress out just like the attorneys.

So there is a difference in that, as well as making sure that this was not one of those cases where there was a constant need that counsel refer to the Defendant and that Defendant assist with his Counsel.

As far as the Court is concerned there was absolutely no prejudice [ ] whatsoever in not allowing him to, but there was a concern, because of the type of stop that was made and also even though the jury was not aware of the fact that he had been convicted of second degree murder, that was a

concern on the Court just in terms of security and making sure that everybody was appropriately noted in the courtroom as being safe.

I do not want and I did not want to draw any attention by having any deputies standing close, as if there was something wrong, and I felt that the most appropriate situation, in this particular situation, since he could speak to you at any given time, right behind you, was for him to sit there and not have any deputies, or draw any attention to any concerns that the Court may have had, as far as security was concerned.

The court noted that the Defendant was located close to counsel, which allowed them to confer. The Defendant does not contend that he was unable to communicate with Counsel, only that the trial court erred in denying the motion. Further, the trial court noted concerns about security and the effect on the jury of having deputies located near the Defendant. We are generally bound by a trial court's factual findings and credibility determinations unless the evidence preponderates against them. *See Kendrick v. State*, 454 S.W.3d 450, 479 (Tenn. 2015). Moreover, the Defendant has not cited to any authority that he has a constitutional right to sit at counsel table. *See United States v. Darden*, 364 F. Supp. 3d 798, 800 (M.D. Tenn. 2019) (noting that "neither the Sixth Amendment, nor federal law mandates that [sitting at counsel table] is constitutionally required"). The Defendant was seated behind counsel and able to consult with counsel. While we reiterate that "it is the better practice to allow a defendant to sit at counsel table," the trial court did not abuse its discretion or deny the Defendant due process in denying the motion. *See Rice*, 184 S.W.3d at 675. The Defendant is not entitled to relief as to this issue.

### **E. Body Camera Recordings**

On appeal, the Defendant asserts that the trial court erred in allowing hearsay statements by the arresting police officers contained in the body camera footage. The Defendant identifies Officer Pickens's and Officer Tran's body camera footage as containing statements about "weed." The Defendant contends that these statements were hearsay evidence and therefore inadmissible. The Defendant also argues for the first time on appeal that the admission was a violation of Tennessee Rule of Evidence 404(b) prohibiting proof of another act or crime.

The State responds that, by stipulating to the admissibility of the body camera footage at trial, the Defendant waived his right to now challenge its admissibility on appeal. The State also argues that the Defendant failed to raise a contemporaneous objection to the recordings at trial, again, waiving his right to challenge their admissibility. The State also offers that defense counsel elicited testimony about marijuana on cross-examination; thus, any reference in the recording was harmless.

The admissibility of evidence rests within the sound discretion of the trial court, and this court does not interfere with the exercise of that discretion unless a clear abuse appears on the face of the record. *State v. Franklin*, 308 S.W.3d 799, 809 (Tenn. 2010). “A trial court abuses its discretion only when it applies an incorrect legal standard or makes a ruling that is ‘illogical or unreasonable and causes an injustice to the party complaining.’” *Id.* However, the determination of “[w]hether the admission of hearsay statements violated a defendant's confrontation rights is . . . a pure question of law.” *State v. Brian Roberson*, No. E2013-00376-CCA-R3-CD, 2014 WL 1017143, at \*6 (Tenn. Crim. App., at Knoxville, Mar. 14, 2014) (quoting *Franklin*, 308 S.W.3d at 809 (Tenn. 2010)) (footnote omitted), *perm. app. denied* (Tenn. Sept. 18, 2014).

At the motion to suppress hearing, the Defendant raised a general objection to hearsay when the State sought to play an excerpt of the recording from Officer Bowers's body camera. The State responded that the witnesses were present for cross-examination, any statements were present sense impressions of the witness, and any statement made by the Defendant was a statement against interest. At trial, the parties stipulated to the recordings being played for the jury. We have reviewed both recordings and, based upon the record, it appears that the State only played a portion of the recording from Officer Bowers's body camera and during that portion there was no mention of “weed.” Officer Tran's recording of the incident was from the second stop of the Defendant and “weed” was mentioned in the dialogue between the officers.

As to the Defendant's contention that the admission is in violation of Tennessee Rule of Evidence 404(b), we conclude that he has waived our review of this issue. Ordinarily, issues raised for the first time on appeal are waived. It has long been established that an appellate court will not consider an issue raised for the first time in the appellate court. *Lawrence v. Stanford*, 655 S.W.2d 927, 929 (Tenn. 1983); *State v. Alvarado*, 961 S.W.2d 136, 153 (Tenn. Crim. App. 1996). Nor may a defendant litigate an issue in the trial court on one ground, abandon the ground, and assert a new basis or ground for his contention in this court. *State v. Matthews*, 805 S.W.2d 776, 781 (Tenn. Crim. App. 1990); *State v. Aucoin*, 756 S.W.2d 705, 715 (Tenn. Crim. App. 1988); *State v. Brock*, 678 S.W.2d 486, 489-90 (Tenn. Crim. App. 1984). Although this Court may, in certain circumstances, address as plain error an issue that would otherwise be waived, the Defendant has not requested plain error review of the 404(b) issue nor do we conclude that the application of the plain error doctrine is appropriate. Tenn. R. App. P. 13(b); *State v. Adkisson*, 899 S.W.2d 626, 638-39 (Tenn. Crim. App. 1994).

Additionally, we agree with the State that by stipulating to the admissibility of the body camera video recordings, the Defendant waived any right to complain about the admissibility of the evidence. *See* Tenn. R. App. P. 36(a) (“Nothing in this rule shall be



construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error.”) Moreover, in addition to agreeing to admission of the recordings, ostensibly because of the agreement, the Defendant raised no objection at trial to the recordings. *Id.* In cases of hearsay evidence in particular, this Court has stated that when such evidence is admitted without objection, “it is, therefore, rightly to be considered as evidence in the case and is to be given such weight as the jury think[s] proper.” *State v. Bennett*, 549 S.W.2d 949, 950 (Tenn. 1977).

Accordingly, we conclude that the Defendant has waived his right to challenge the admissibility of the body camera recordings. The Defendant is not entitled to relief as to this issue.

### **III. Conclusion**

In accordance with the foregoing reasoning and authorities, we affirm the trial court’s judgment.

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ROBERT W. WEDEMEYER, JUDGE