MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Ryan M. Gardner
Deputy Public Defender
Fort Wayne, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Robert M. Yoke
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Har San,

Appellant-Defendant,

v.

State of Indiana,

Appellee-Plaintiff.

December 28, 2023

Court of Appeals Case No. 23A-CR-784

Appeal from the Allen Superior Court

The Honorable Frances C. Gull, Judge

Trial Court Cause No. 02D05-2203-MR-2

Memorandum Decision by Judge Brown
Judges Bailey and May concur.

Brown, Judge.

[1] Har San appeals his conviction for murder and claims the trial court erred in denying his motions pursuant to Ind. Criminal Rules 4(A) and 4(B) and that the evidence is insufficient to sustain his conviction. We affirm.

Facts and Procedural History

[2] San and Ro Se Ma Re ("Ro Ma") were married and had a daughter.[1] In August 2020, Ro Ma called 911, and Fort Wayne Police Officer Gale Stelzer was dispatched with respect to a domestic battery call. Ro Ma appeared upset and "almost fearful." Transcript Volume IV at 86. Ro Ma said that San had hit her, and Officer Stelzer observed the left side of her face was red and had some swelling and a cut. Ro Ma also called her mother who went to her location and observed that there was "a big bulge" on the side of her face. Transcript Volume III at 41. San told Officer Stelzer that Ro Ma had woken him up late for work and he was angry. San also told Fort Wayne Police Detective Geraud Bartels that he did not hit Ro Ma and became angry because Ro Ma had packed to leave.

[3] On March 19, 2022, San and Ro Ma were in an apartment with their child, Ro Ma's younger brother, M.S., who was thirteen years old, and San's younger brother, M.Z., who was eleven years old. San and Ro Ma argued, San pulled out a gun, loaded it, aimed the gun at Ro Ma, and shot her. M.S. "was about to call 911," but San told him to wait a couple of minutes. *Id.* at 62. San ran in

[1] Ro Se Ma Re is referred to as "Ro Ma" at various points in the record.

and out of the house and threw items out of the house. M.S. eventually called 911. Ro Ma was transported to the hospital and pronounced dead. An autopsy later revealed that Ro Ma died as a result of a gunshot wound to the chest.

[4] Law enforcement responded to the scene beginning at about 11:09 p.m. and obtained video from a security camera at another apartment in the complex that showed "someone exit the back of the apartment and it appeared that they were throwing stuff out the back of the apartment into the ditch line." *Id.* at 131. Officers located an AR-15 style rifle on the ground as well as a large amount of marijuana in a glass jar and two backpacks that were dry on the wet ground. They discovered a bag of white powdery substance in the area, .45 caliber shell casings that had been in the yard more than just a few days, and tarnished rifle casings. They also recovered a digital scale, an AR-15 pistol, marijuana, blue pills which later tested positive for fentanyl, methamphetamine, and a Glock Model 48 nine-millimeter pistol. Fort Wayne Police Detective Brian Martin did not observe any signs of forced entry on the rear exterior door.

[5] On the way to the police department, M.S. observed San pull what appeared to be "[g]un pieces" from his jacket and give them to San's father.[2] *Id.* at 67. San told M.S.: "Don't tell them nothing. You don't know." *Id.* at 68.

[2] When asked what type of gun pieces, M.S. answered: "Like that he took out the gun." Transcript Volume III at 68.

[6] Detective Martin and Detective Darrin Strayer interviewed San during the early morning hours. Detective Martin also spoke with M.S. who provided "pretty limited information" which Detective Martin found to be "pretty vague." *Id.* at 231. Detective Martin later received a phone call from M.S.'s sister, Ra Be. Based on that call, he asked her to bring M.S. back to the police department so he could speak to him again. Ra Be brought M.S. back to the police station, and Detective Martin spoke to them. M.S. provided much more information. Based on that interview, Detective Martin asked other officers to look for a Glock nine-millimeter handgun with a drum magazine on it. Officers discovered that weapon on the rear patio behind a small refrigerator or freezer "approximately a building away, out the back door and down the building," *id.* at 246, or "just farther west." Transcript Volume IV at 55.

[7] On March 24, 2022, the State charged San with: Count I, murder; Count II, dealing in methamphetamine as a level 2 felony; Count III, dealing in cocaine or narcotic drug as a level 4 felony; Count IV, dealing in marijuana as a level 6 felony; and Count V, possession of a firearm by a domestic batterer as a class A misdemeanor. The State also alleged an "additional penalty for use of a firearm" as Count VI. Appellant's Appendix Volume VI at 40 (capitalization omitted).

[8] On May 4, 2022, San filed a Motion for Speedy Trial requesting a jury trial within seventy days pursuant to Ind. Criminal Rule 4. That same day, the court held a hearing. The court asked San if he required an interpreter, and San answered: "I – I don't – I'm not sure, like, I speak English, but when it comes to

court language, some words I don't understand." Transcript Volume II at 4. The court stated: "Then you need an interpreter. So, we can't do this today . . . ." *Id.* After further discussion, San stated: "I'll go without an interpreter." *Id.* The court stated: "He just said he doesn't understand some legal concepts, which is ripe for a PCR if he ever gets convicted." *Id.* Defense counsel replied: "Yes. Alright, we're asking the Court to appoint an interpreter for him." *Id.* at 4-5. That same day, the court reconvened the hearing with an interpreter. Defense counsel stated: "Trial dates, Judge, are September 13, 14, 15, 16." *Id.* at 7. The court asked San if he accepted those speedy trial dates, and San answered: "Yes, I agree." *Id.* Defense counsel indicated that those dates were the "first speedy trial" the scheduler could provide. *Id.* That same day, the court entered an order which scheduled the trial for 8:30 a.m. on September 13 through 16, 2022, scheduled a pretrial conference for August 9, 2022, and noted: "Defendant accepts dates." Appellant's Appendix Volume II at 67.

[9] On June 28, 2022, San filed a Motion for Continued Court Appointed Translator as Defendant is Indigent. On July 7, 2022, San filed a Motion for Speedy Trial which stated: "The Defendant acknowledges that the trial date of September 13, 2022 at 8:30 a.m., is within the seventy (70) days as required under Indiana Criminal Rule IV and confirms that trial date." *Id.* at 76.

[10] On September 2, 2022, the State filed a Motion to Amend Witness List indicating that "Owen Bisel (Witness 1) . . . will testify as to previously provided discovery." *Id.* at 157. On September 12, 2022, the court held a hearing.

[11] On August 9, 2022, the court held a pre-trial conference. The court asked defense counsel if San needed an interpreter, and defense counsel answered in the negative. The prosecutor indicated that San did need an interpreter. After some discussion, the court stated that if the court had ordered an interpreter "then we need to wait for the interpreter." Transcript Volume II at 11. The court confirmed the trial date of September 13, 2022.

[12] On September 12, 2022, the court held a hearing. With respect to the State's September 2, 2022 motion to add Bisel to the witness list, defense counsel stated:

> [W]e have an objection to Mr. Bisel being listed as a witness. The trial is scheduled for tomorrow. The defendant does not have an opportunity to effectively prepare a defense relating to this witness's testimony. We have had an opportunity to speak with the state in [sic] review the recorded statement of Mr. Bisel, but the defendant has got a speedy trial motion on file and he can't ask for a continuance because that will keep him in jail. Unless the Court is going to release him with pretrial conditions or Bissel [sic]. So, we would ask that the Court deny the State's Motion to add Bisel as a witness.

Id. at 33. Defense counsel also stated:

> [T]he State's representing they first knew about this September 2nd. So, I didn't get back to the State of Indiana until Thursday, and made arrangements to meet with the State to view the video. We, during the video, we observed the defendant has a notebook. We would like that produced. We also would like to be available to review any jail telephone calls that this inmate has made during the time that he's been in custody, if the Court grants the State leave to add the witness. Because we need to review those

> jail calls and we need to have the original of that notebook, or a copy produced.

Id. at 34. After some discussion, the court asked: "And I don't think [San] needs an interpreter, is that correct?" *Id.* at 39. Defense counsel answered: "He does." *Id.* The court stated: "He does need one? He seemed to be communicating just fine before." *Id.* Defense counsel replied: "I don't recall the last court hearing, whether the Judge excused the interpreter or not. She's here. Why don't we just go ahead." *Id.* The court indicated that it was not taking action on the State's September 2, 2022 motion to amend the witness list.

[13] At 8:17 a.m. on September 13, 2022, San filed a Motion to Suppress Defendant's Statement. That same day, the court and the parties met for the scheduled jury trial, and the court observed there were potential jurors "downstairs." *Id.* at 43. Defense counsel asserted that he would like to review the telephone calls from the Allen County Jail or to the Allen County Jail between Bisel and other persons and that, "[o]nly by my examination, either in court review or with Mr. Bisel and the State's being present, can provide for either exculpatory evidence or basis of cross examination of Mr. Bisel or for impeachment purposes." *Id.* at 47. He stated: "The Defendant does not seek a continuance of the trial, but he does object and ask the Court to deny the State's motion to amend the witness list as to Mr. Bisel . . . ." *Id.* He stated that he "can only effectively prepare his defense based upon previous requests made for jail phone records, audio recordings . . . ." *Id.* at 47-48. He asserted "there needs to be arrangements made for . . . either [a] deposition or interview of

Owen Bisel and the original of his notebook" and confirmed he was "not seeking a continuance and San was entitled to a speedy trial. *Id.* at 48.

[14] Defense counsel stated:

> The State does not address the ability of effective assistance of counsel can properly and effectively confront or cross examine Owen Bisel, a – as guaranteed under Indiana Constitution Article 1, Section 12 and 13, and the United States Constitution, Amendment 4, 5, and 6. The State knows and previously told the Court Defense Counsel was out of the state of Indiana and did not return – matter of fact, northern Michigan, did not return until Thursday evening, September 8, and was – made himself available with his client on September 9th to listen to this DVD. This is September 13th at about 9:30 a.m. We respectfully ask the Court, in weighing the points made, that the Defendant's relief be granted, which we submit is a reasonable alternative. If the State seeks this witness and the Court grants it to be admitted, it would be the State's request that the trial be continued, the Defendant would then be released on his own recognizance under the provisions of both the Indiana and the United States Constitutions and Indiana Rule 4, and he is ready for trial now.

Id. at 49-50. The prosecutor stated in part that Ind. Criminal Rule 4 "isn't a shield and a sword or shouldn't be." *Id.* at 51. The court stated that it did not find that the State had engaged in any blatant violations of discovery, "the case law is clear that the remedy is not exclusion," and granted the State's motion to add Bisel as a witness. *Id.*

[15] After some discussion, San's counsel mentioned that San had a court-appointed interpreter, stated that the police interview of San revealed that he requested an

interpreter at one point, and asserted that San's entire statement to police should be suppressed. After some discussion, the following exchange occurred:

> THE COURT: . . . . [W]ithout looking at the videotape myself, I cannot rule on this request. I mean . . . a motion to suppress filed morning of trial is extraordinarily untimely, and we've got jurors sitting downstairs, waiting to come upstairs. So what would you like me to do, [defense counsel]?
>
> [Defense Counsel]: Judge, I think, based upon the record before the Court, we have no objection to you making a ruling on it.
>
> THE COURT: I cannot rule without looking at the interview, sir.
>
> [Defense Counsel]: Then, we would ask that the Court, at an appropriate time, have an opportunity to review that.
>
> THE COURT: I – repeat that, please.
>
> [Defense Counsel]: At an appropriate time, have an opportunity to review that statement.
>
> THE COURT: That would be now.
>
> [Defense Counsel]: All right.
>
> THE COURT: Before jury selection. So, lady and gentlemen, I'd ask that you go get new trial dates, because I can't keep over a hundred people sitting downstairs in the jury assembly area for an undetermined amount of time so that I can review the videotaped interview of the Defendant –
>
> [Defense Counsel]: Judge, if I may –
>
> THE COURT: - so if you would, please, go get trial dates.
>
> [Prosecutor]: Yes, Your Honor.

[Defense Counsel]: Judge, if I may have a second, just one second. Judge, I spoke with my client. We withdraw our motion to suppress. We're prepared to proceed to trial and withdraw the motion to suppress.

[Prosecutor]: Your Honor, I'm concerned about the length of that conversation, which just entailed him literally whispering one second of something into the client's ear when he's making an allegation he doesn't understand English, so I would ask for a much more equivocal [sic] waiver.

THE COURT: I'm not going to allow error to be interjected into the record without the opportunity to correct it. Please go get new trial dates.

[Defense Counsel]: We would – Judge, for the record, we'd object; and if the new – we object to a new trial date and the Defendant be ordered either discharged under Criminal Rule 4 or released on his own recognizance.

THE COURT: The new trial date is being requested by this Court due to the untimely filing of the motion to suppress, the ruling that I am required to make to review the information that is being submitted. I cannot do that while we're in the middle of a jury trial.

[Defense Counsel]: And the Defendant –

THE COURT: It's not fair to Mr. San.

[Defense Counsel]: And the Defendant specifically withdraws his motion to suppress, he wishes to proceed with the trial, he withdraws the motion to suppress. He is prepared for trial. He specifically waives any alleged error, he specifically waives that.

THE COURT: Well, he can't waive ineffective assistance of counsel, and that's what you have now interjected into this record. I understand your concern, [defense counsel], but I will not proceed on the record that has now been laid by you and the

State of Indiana. Go get a new trial date. Could you release the jurors, please.

THE BAILIFF: Yes.

THE COURT: And if our interpreters could just stand by, if you would, please, so that we can finish. Jodie, you can go off the record.

* * * * *

THE COURT: All right. Were you able to obtain new trial dates, lady and gentlemen?

[Prosecutor]: We were, Your Honor.

THE COURT: Okay. What are those dates, please?

[Prosecutor]: They are February 7th through 10th, 2023.

THE COURT: Is there a need for another pre-trial conference?

[Prosecutor]: I would request one, Your Honor, just to be sure that the Defense has facilitated everything that he's requesting prior to –

* * * * *

THE COURT: Okay. Now, did you set this again as a speedy?

[Prosecutor]: We did.

THE COURT: Okay. And that was the first available speedy without another superseding speedy trial date?

[Prosecutor]: Yes, Your Honor.

THE COURT: Okay. All right. And since we're continuing this on the late filing of the Motion to Suppress the Defendant's Statement that was filed this morning at 8:17, may I have a copy

> of the DVD and the transcript, and I'll have Jodie mark those exhibits for purposes of the hearing on the Motion to Suppress.
>
> * * * * *
>
> [Defense Counsel]: Judge, just before we begin this, if I may go ahead and – may I just, for the record, re-confirm that my client did want to proceed with trial today and, for the record, does object to the trial setting of February 2nd [sic] through the 10th, and again ask the Court to reconsider proceeding to trial today, just wanted to make that record that he does withdraw the Motion to Suppress and wants to proceed to trial today, just want to make that record.

Id. at 65-69.

[16] The court then heard testimony regarding the police interview of San. Detective Martin testified that he spoke with San, at no time during the interview did he believe that San did not understand the questions, and that San's request for an interpreter during the questions regarding the details of the homicide was "a stalling tactic." *Id.* at 74. The prosecutor moved to admit State's Exhibits 1 and 2. Defense counsel objected and stated "the Defendant has previously waived the Motion to Suppress and again renews . . . his motion to proceed with trial and objects to the admissions." *Id.* at 75. The prosecutor stated that "[t]he State intends to introduce this evidence at trial, we wish to go forward with the Motion to Suppress." *Id.* at 76. The court admitted the exhibits. Detective Strayer testified that he interviewed San with Detective Martin and he believed that San understood them during the entire interview and that San's answers were appropriate and responsive.

[17] Defense counsel again renewed his motion to withdraw the motion to suppress and reconsider the motion to proceed with a jury trial. The court stated:

> Well, I would just note and point out what the State noted: When I indicated to Counsel that I was unable to rule on a videotaped deposition – or statement, excuse me, that I would have to take it under advisement, you spoke to your client without the use of an interpreter for less than two seconds to withdraw it. I note that Mr. San has been wearing – I don't know what they are – ear coverings I guess, so that he can hear appropriately the interpreter, and you spoke to him through those earphones, again for a very miniscule period of time. You have alleged you would be ineffective to proceed to trial if you didn't get the rulings that you were looking for, and it's important that Mr. San's trial be conducted with effective counsel, which this untimely pleading was filed to be heard in a hurried fashion while we are waiting to select a jury. I will take your Motion to Suppress under advisement to review State's Exhibits 1 and 2. Show that the new trial date is now scheduled as a speedy trial February 7th through the 10th, 2023 . . . ; that that is the first-available speedy trial date on the calendar that does not have another speedy trial set before it . . . . I'll show this is over the Defendant's objection and charge the Criminal Rule 4 time to the Defendant for the late filing of the Motion to Suppress and the attendant hearing that had to be conducted prior to jury selection. Your Motion for Release on your own Recognizance is denied.

Id. at 84-85. After some discussion, San's counsel asserted that following exchange occurred:

> [Defense Counsel]: . . . In response to my conversation with my client and understanding, he did tell me and advised me to withdraw the Motion to Suppress – . . . and also confirmed that again . . . and he wanted to proceed to trial today. He confirmed

> with me, after the Motion to Suppress hearing at 11:30, that he confirmed that he gave up or waived this Motion to Suppress, that he wanted to proceed to trial today. That was the information given to me. That – I just wanted to make that for the record: The Defendant did waive and give up this Motion to Suppress, wish[ed] to proceed to trial.
>
> THE COURT: At 11:30 this morning, is that what you're telling me?
>
> [Defense Counsel]: Two times. The first time we made the motion to withdraw the Motion to Suppress and proceed to trial, that was when the Court denied it; and then later, when the suppression hearing concluded at 11:30, confirmed that same information with me.
>
> THE COURT: Well, and I would just note that I instructed the bailiffs well prior to that time to release the jury and instructed counsel to go get new trial dates, which occurred prior to your client's comments – alleged comments to you. . . .
>
> [Defense Counsel]: Just for the record: The first conference and the waiver was – to withdraw the Motion to Suppress was made before the jury was released . . . .

Id. at 85-86.

[18] On October 10, 2022, the court entered an order denying San's motion to suppress. Specifically, the court found that San had a good command of the English language, understood the questions and answered appropriately, refused to answer certain questions, and clearly understood what was happening and participated voluntarily in the interview.

[19] Meanwhile, on September 22, 2022, San filed a Motion for Discharge asserting he was entitled to be discharged under Ind. Criminal Rule 4(B). On October 12, 2022, San filed a Motion for Discharge. The next day the court scheduled a hearing for December 16, 2022.[3] On November 17, 2022, San filed a "Motion for O.R. Release Pursuant to Ind. CR. 4(A)" which asserted that he had been in custody for 243 days. Appellant's Appendix Volume III at 4 (capitalization omitted). On December 16, 2022, the court held a hearing and took the matter under advisement. On January 3, 2023, the court denied San's motion for discharge asserting that San "caused the delay with the late [filing] of a Motion to Suppress" and ordered that San remain in custody. *Id.* at 20.

[20] On January 5, 2023, San filed a motion requesting release under Ind. Criminal Rule 4(A) and renewing his motion for discharge under Ind. Criminal Rule 4(B). On January 20, 2023, the court held a hearing at which the court heard argument and stated:

> We were scheduled for trial commencing September 13th, which is within the 180 days under CR4(A). On the morning of trial, a Motion to Suppress was filed, raising issues that needed to be addressed. On that date, we had to address the Motion to Suppress and I released the jury. That was done over your objection. And on September 13th, I charged the CR4 time to you due to the untimely filing of the suppression. Your Motion for Immediate O.R. Release is denied and I'll confirm the speedy

[3] On November 7, 2022, San filed a Verified Petition for Writ of Mandamus requesting that the Indiana Supreme Court order the trial court to discharge him under Ind. Criminal Rule 4(B). On November 9, 2022, the Indiana Supreme Court dismissed the action "[b]ecause [San] seeks a remedy that is not appropriate under the rules and law governing writs of mandamus and prohibition." Appellant's Appendix Volume III at 7.

> jury trial February 7th through the 10th at 8:30 on this Court's calendar.

Transcript Volume II at 103. Defense counsel stated: "Judge, if I just may for the record, we would again just renew our objection to the trial date of May – February the 7th and continue our Motion for Discharge and O.R. Release just for the record." *Id.*

[21] On February 7, 2023, the court began the jury trial.[4] Defense counsel moved for discharge under Ind. Criminal Rule 4(B) and renewed his previous motion for discharge, and the court denied the motion. The State presented the testimony of multiple witnesses including Ra Be, M.S., Bisel, Detective Martin, Detective Strayer, Officer Stelzer, and Detective Bartels. The State introduced and the court admitted the security video and a photograph of a page of San's calendar with the box for the date of March 19, 2022 containing red scribbles. On cross-examination, M.S. acknowledged that he initially told the police that he went to see what happened when he heard the shot and did not tell them that he saw San shoot his sister. The following exchange also occurred:

> Q You did not see the shooting, did you?
>
> A I did.
>
> Q You just heard the gunshot.

---

[4] The transcript of the trial states: "The Defendant in this cause, speaking the Burmese language, was interpreted for by Ahr Yu and Mi Non, who was [sic] duly sworn to interpret all proceedings given herein." Transcript Volume II at 105.

A I seen it, too, from the – through the curtains.

Q The police were right out of the apartment when they talked with you. You didn't tell the officer, "Hey, Har San shot my sister," did you?

A He was right there.

Q You didn't use those words immediately speaking with the police, did you?

A I knew everything. I was just playing smart.

Transcript Volume III at 88.

[22] After the State rested, M.Z. testified that he was eleven years old when Ro Ma was shot. He testified that when Ro Ma was shot, San was by the barber chair and he, M.S., and San ran from the living room to the bedroom. On cross-examination, M.Z. testified that he did not see San carry a long gun or a black gun out of the apartment that night, did not see him throw a backpack out of the apartment, did not see any guns or drugs that night, and that no one threw anything out of the apartment. After the defense rested, San's counsel moved the court to reconsider his previous motion for discharge, and the court indicated he had preserved the record on that issue. The jury found San guilty as charged in Counts I through IV. The prosecutor confirmed that the State was dismissing Count V and proceeding on Count VI. The jury found that the State had proven beyond a reasonable doubt that San used a firearm in the commission of a felony that resulted in death or serious bodily injury as alleged in Count VI. The court sentenced San to an aggregate sentence of 110 years.

San's counsel renewed the motion for discharge based on Ind. Criminal Rule 4(B), and the court denied the motion.

Discussion

I.

[23] San asserts that the delay beginning on September 13, 2022, prevented him from exercising his rights and superseded the stated purposes of Ind. Criminal Rules 4(B) and 4(A).[5] With respect to Ind. Criminal Rule 4(B), San does not dispute that his trial was set beyond the seventieth day following his request for a speedy trial and asserts that "he accepted that trial date due to Court congestion." Appellant's Brief at 15. He asserts the question "becomes whether the trial court had a basis to continue [his] speedy trial and/or whether his withdrawal of the motion was sufficient to remove or potential ineffective assistance." *Id.* at 15-16. He contends it was inappropriate for the trial court to assume such a withdrawal is tantamount to ineffective assistance. As for Ind. Criminal Rule 4(A), he asserts that the court erred when it denied him

---

[5] San phrases the issue as "[w]hether the trial court erred by continuing [his] speedy trial and denying his Criminal Rule 4(B) and 4(A) motions for release and discharge." Appellant's Brief at 22. At one point in his argument, San asserts that the right to a speedy trial is a violation of both the Indiana and the United States Constitutions. The protections of Ind. Criminal Rule 4 are not co-extensive with the protections guaranteed by the Sixth Amendment of the United States Constitution and Article 1, Section 12, of the Indiana Constitution. *See generally S.L. v. State*, 16 N.E.3d 953, 961 (Ind. 2014) (observing that the protections of Ind. Criminal Rule 4 are not co-extensive with the protections guaranteed by the Sixth Amendment of the United States Constitution and Article 1, Section 12, of the Indiana Constitution); *Austin v. State*, 997 N.E.2d 1027, 1037 n.7 (Ind. 2013) (emphasizing that "reviewing Rule 4(B) challenges is separate and distinct from reviewing claimed violations of those constitutional provisions"). San has waived any constitutional argument as he does not develop a cogent argument.

discharge as he was held in custody for more than 180 days prior to his trial commencing.

[24] At the time of his motions, Ind. Criminal Rule 4 provided in part:

> (A) Defendant in Jail. No defendant shall be detained in jail on a charge, without a trial, for a period in aggregate embracing more than six (6) months from the date the criminal charge against such defendant is filed, or from the date of his arrest on such charge (whichever is later); except where a continuance was had on his motion, or the delay was caused by his act, or where there was not sufficient time to try him during such period because of congestion of the court calendar . . . .
>
> (B)(1) Defendant in Jail--Motion for Early Trial. If any defendant held in jail on an indictment or an affidavit shall move for an early trial, he shall be discharged if not brought to trial within seventy (70) calendar days from the date of such motion, except where a continuance within said period is had on his motion, or the delay is otherwise caused by his act, or where there was not sufficient time to try him during such seventy (70) calendar days because of the congestion of the court calendar.[6]

---

[6] Effective January 1, 2024, Ind. Criminal Rule 4 will provide:

> (A) Defendant in Jail. If a defendant is detained in jail on a pending charge, a trial must be commenced no later than 180 days from the date the criminal charge against the defendant is filed, or from the date of arrest on such charge, whichever is later. Delays caused by a defendant, congestion of the court calendar, or an emergency are excluded from the time period. Any defendant detained beyond the time period of this section must be released on recognizance but continues to be subject to the criminal charge within the limitations provided for in section (C).
>
> (B) Defendant in Jail--Motion for Early Trial. A defendant held in jail on a pending charge may move for an early trial. If such motion is filed, a trial must be commenced no later than seventy calendar days from the date of such motion except as follows:
>
> > (1) delays due to congestion of the court calendar or emergency are excluded from the seventy-day calculation;

(Emphasis omitted).

[25] "The broad goal of Indiana's Criminal Rule 4 is to provide functionality to a criminal defendant's fundamental and constitutionally protected right to a speedy trial." *Austin v. State*, 997 N.E.2d 1027, 1037 (Ind. 2013). "It places an affirmative duty on the State to bring the defendant to trial, but at the same time is not intended to be a mechanism for providing defendants a technical means to escape prosecution." *Id.* The Indiana Supreme Court has noted "though Rule 4(B)'s intent is to effectuate the rights guaranteed by the Sixth Amendment to the U.S. Constitution and Article 1, Section 12 of the Indiana Constitution, we emphasize that reviewing Rule 4(B) challenges is separate and distinct from reviewing claimed violations of those constitutional provisions."[7] *Id.*

[26] "The purpose served by Crim. R. 4(B) is to prevent a defendant from being detained in jail for more than 70 days after requesting an early trial." *Williams v. State*, 631 N.E.2d 485, 486 (Ind. 1994), *reh'g denied*. "The onus is on the State, not the defendant, to expedite prosecution." *Jackson v. State*, 663 N.E.2d

---

> (2) the defendant who moved for early trial is released from jail before the expiration of the seventy-day period; or
> (3) an act of the defendant delays the trial.
>
> If a defendant is held beyond the time limit of this section and moves for dismissal, the criminal charge against the defendant must be dismissed.

(Emphasis omitted).

[7] In *Austin*, the Court noted that "[b]oth Criminal Rules 4(A) and 4(C) also contain language providing for continuances due to a congested calendar or emergency, and for then setting the trial within a reasonable time," it saw "no reason why the analysis for those issues arising under those rules would—or should—be any different than the analysis under Rule 4(B)," and that the "opinion's analysis in the context of Criminal Rule 4(B) should apply with equal force to Criminal Rules 4(A) and 4(C)." *Austin*, 997 N.E.2d at 1038 n.8.

766, 769 (Ind. 1996). A defendant has no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process. *Id.* A movant for an early trial must maintain a position which is reasonably consistent with the request that he has made. *Wilburn v. State*, 442 N.E.2d 1098, 1103 (Ind. 1982). "[I]t is incumbent upon defendant to object at the earliest opportunity when his trial date is scheduled beyond the time limits prescribed by Ind. R. Crim. P. 4(B)(1)." *Smith v. State*, 477 N.E.2d 857, 861-862 (Ind. 1985). "This requirement is enforced to enable the trial court to reset the trial date within the proper time period." *Dukes v. State*, 661 N.E.2d 1263, 1266 (Ind. Ct. App. 1996). "A defendant who permits the court, without objection, to set a trial date outside the 70-day limit is considered to have waived any speedy trial request." *Stephenson v. State*, 742 N.E.2d 463, 488 (Ind. 2001), *cert. denied,* 534 U.S. 1105, 122 S. Ct. 905 (2002).

[27] "[I]n cases where the issue is a question of law applied to undisputed facts, the standard of review – like for all questions of law – is de novo." *Austin*, 997 N.E.2d at 1039. In those cases where a trial court makes a factual finding of congestion or emergency under Criminal Rule 4 based on disputed facts, the standard of review for appellate courts is the clearly erroneous standard. *Id.* at 1040.

[28] On May 4, 2022, San filed a Motion for Speedy Trial requesting a jury trial within seventy days pursuant to Ind. Criminal Rule 4. Based upon Rule 4(B), he was to be brought to trial within seventy days of his May 4, 2022 motion or by July 13, 2022. The court scheduled the trial for September 13, 2022, or more

than seventy days after the May 4, 2022 motion. However, we note that San and his defense counsel accepted this date.

[29] At 8:17 a.m. on September 13, 2022, or approximately thirteen minutes before trial was scheduled to begin, San filed a motion to suppress his statement to police. On that day, while San's counsel indicated that he did not seek a continuance of the trial, he also stated that he "can only effectively prepare his defense based upon previous requests made for jail phone records, audio recordings," that "there needs to be arrangements made for . . . either [a] deposition or interview of Owen Bisel and the original of his notebook," and that the State did not address the ability of effective assistance of counsel with respect to cross-examining Bisel. Transcript Volume II at 47-48. The court stated that it did not find that the State had engaged in any blatant violations of discovery and granted the State's motion to add Bisel as a witness, which San does not challenge on appeal. The court observed that defense counsel had "interjected" the issue of ineffective assistance of counsel into the record. *Id.* at 68. The court scheduled the trial for February 7, 2023, and asked the prosecutor if this was "the first available speedy without another superseding speedy trial date," and the prosecutor answered affirmatively. *Id.* at 69. San does not challenge the February 7, 2023 date as being the first available date for

a speedy trial. Under these circumstances, we cannot say reversal is warranted.[8]

II.

[30] San argues that the State's "sole piece of direct evidence to support a conviction on any of the Counts relied upon a single eyewitness, [M.S.]."[9] Appellant's Brief at 18. He asserts that M.S.'s testimony was contradicted by his initial statements to law enforcement officers hours after the shooting and those statements made by M.Z. He contends M.S. testified that he used the Glock 17 G5, a nine-millimeter handgun, when he shot Ro Ma but officers did not recover a single nine-millimeter shell casing or match the ballistics of any recovered shell casings to the Glock 17 G5.

---

[8] To the extent San cites *Moreno v. State*, 166 Ind. App. 441, 336 N.E.2d 675 (1975), in that case, this Court observed that Moreno filed a motion to suppress his confession on May 5, 1971, and, on May 21, 1971, the trial was set for June 2, 1971. 166 Ind. App. at 453, 336 N.E.2d at 682. The Court observed that the trial court heard evidence on Moreno's motion to suppress on June 2, 1971, but trial was not held on that date. *Id.* at 455, 336 N.E.2d at 684. We were unable to ascertain from the order book entries why trial was not held on that date. *Id.* Unlike in *Moreno*, San's counsel raised the issue of ineffective assistance of counsel and filed the motion to suppress on the morning of the scheduled trial. Accordingly, we find *Moreno* distinguishable. *See generally Curtis v. State*, 948 N.E.2d 1143, 1150 (Ind. 2011) (holding that, when determining the extent of the delay caused by the defendant's actions, we must proceed on a case-by-case basis; observing that the defendant filed a motion to suppress approximately three weeks before trial was set, observing that Ind. Trial Rule 53.1 "affords trial courts more time—and reality likely requires more time—to deal with motions," and holding that "a pretrial motion's proximity to a set trial date weighs in favor of attributing a delay to a defendant").

[9] To the extent San referenced "the Counts," we note that he phrases the issue statement as "[w]hether the State of Indiana presented sufficient evidence to convict [him] in Count I beyond a reasonable doubt," argues that "the State failed to present sufficient evidence to support a finding of guilt for Count I, Murder" and asserts that "this Court must reverse the trial court's verdict in both [sic] Count I." Appellant's Brief at 5, 19. Accordingly, we focus our analysis on only his murder conviction.

[31] When reviewing claims of insufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. *Jordan v. State*, 656 N.E.2d 816, 817 (Ind. 1995), *reh'g denied*. Rather, we look to the evidence and the reasonable inferences therefrom that support the verdict. *Id.* A conviction may be sustained on the uncorroborated testimony of a single witness or victim. *Baltimore v. State*, 878 N.E.2d 253, 258 (Ind. Ct. App. 2007), *trans. denied*. We will affirm the conviction if there exists evidence of probative value from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. *Jordan*, 656 N.E.2d at 817.

[32] Ind. Code § 35-42-1-1 provides that a person who knowingly or intentionally kills another human being commits murder. "A person engages in conduct 'intentionally' if, when he engages in the conduct, it is his conscious objective to do so." Ind. Code § 35-41-2-2(a). "A person engages in conduct 'knowingly' if, when he engages in the conduct, he is aware of a high probability that he is doing so." Ind. Code § 35-41-2-2(b).

[33] The record reveals that M.S. testified that San and Ro Ma were arguing, San pulled out a gun, loaded it, aimed the gun at Ro Ma, and shot her. Bisel testified that he met San during his time at the Allen County Jail and shared a cell with him at one point. According to his testimony, San told him that Ro Ma "had gone through his phone," she had made accusations that he was seeing or talking to someone else, and that he felt the relationship would soon be over. Transcript Volume III at 187. San also "insinuated that from where he comes from and the way . . . his religion or heritage operates, that you just

don't let your wife or your woman leave." *Id.* According to Bisel's testimony, San said Ro Ma was planning to leave and he "wasn't gonna let her leave and he was gonna stop her from leaving, basically" and "we have to do everything we can to prevent them from leaving." *Id.* When asked if San told him how he stopped Ro Ma from leaving, he answered:

> Yes. He said that he had his Glock, referred to his drum round mag, 'cause he had bragged about those to begin with along with other firearms, but he said that he chose that one to walk into the room with and, there was an argument, and he said he had it to her face and her head and she kept swatting at it, and he said he brought it low and, basically, ended it, said he popped her.

Id. at 188. When asked if San said something about feeling bad or regretful about what he had done, he answered: "Actually, yes, the fact that his little girl was there." *Id.* He also testified that San told those in the house: "You're not gonna call the cops until we're finished putting things away." *Id.* at 189. He testified that: "Culturally, the female is supposed to respect the husband at all costs and they don't make the decision on whether they can leave or not, and if they do and you don't want them to leave, then you can stop them any way you want to." *Id.* The State also introduced video from a security camera that showed someone who appeared to be throwing items away from the apartment.

[34] Based upon the record, we conclude that evidence of probative value exists from which a trier of fact could have found San guilty beyond a reasonable doubt of murder.

[35] For the foregoing reasons, we affirm San's conviction.

[36] Affirmed.

Bailey, J., and May, J., concur.