2022 IL App (4th) 210317-U

NO. 4-21-0317

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
November 23, 2022
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DYONTAE BRIGHT, Defendant-Appellant.	) Appeal from the) Circuit Court of) Vermilion County) No. 18CF369)) Honorable) Nancy S. Fahey,) Judge Presiding.

JUSTICE CAVANAGH delivered the judgment of the court.
Presiding Justice Knecht and Justice Bridges concurred in the judgment.

ORDER

¶ 1 *Held*: (1) By finding the running of the speedy-trial period to be suspended during the time when the defendant's family was looking for private counsel to represent defendant in this murder case, the circuit court did not abuse its discretion.

(2) When all of the evidence is viewed in a light most favorable to the prosecution, a rational trier of fact could find, beyond a reasonable doubt, that the defendant was the shooter of the murder victim.

(3) By overruling defense counsel's irrelevancy objection to a detective's reasons for including the defendant's photograph in a photographic lineup, the circuit court did not abuse its discretion.

¶ 2 In the Vermilion County circuit court, the State charged defendant, Dyontae Bright, with the first degree murders of Albert Gardner and Tahji McGill. See 720 ILCS 5/9-1(a)(1) (West 2018). A jury found defendant not guilty of murdering McGill but guilty of murdering Gardner. For Gardner's murder, the court sentenced defendant to imprisonment for 50 years. He appeals on three grounds.

¶ 3 First, defendant complains that his statutory right to a speedy trial was violated. See 725 ILCS 5/103-5(a) (West 2018). Second, he claims it was unproven that he was the one who shot Gardner. Third, defendant argues the circuit court abused its discretion by overruling defense counsel's objections to the reasons why a detective included defendant's photograph in a photographic array. As we will explain, we find merit in none of those contentions. We affirm the judgment.

¶ 4 I. BACKGROUND

¶ 5 On April 19, 2019, defendant was jailed. He was never released on bond.

¶ 6 On April 22, 2019, defendant was arraigned in the Vermilion County circuit court. The court asked him whether he wanted to apply for the appointment of defense counsel or, alternatively, to hire private counsel. Defendant answered that "[his] people [were] looking to get *** a lawyer." The court appointed the public defender to represent defendant only in the arraignment, ordering that, immediately after the arraignment, the appointment would end. The court asked the public defender if defendant intended to plead not guilty and request a jury trial. The public defender answered in the affirmative. The court said, "So we'll show a not guilty plea, demand for trial, and get him on a pretrial jury call." The prosecutor told the court the parties had agreed to a trial date of May 6, 2019. Without explicitly scheduling a trial, the court ordered the prosecution to "tender discovery today," and the court gave the defense 30 days to respond to discovery. Then, remembering that the public defender "wasn't appointed," the court told the prosecutor that when "[defendant's] new lawyer gets involved[,] you can tender [discovery] to them."

¶ 7 On the same day as his arraignment, defendant filed a financial affidavit, in which he made a "statement as to [his] financial ability to hire counsel." The lines for employment, salary, assets, and debts were left blank.

¶ 8 The case was not called for trial on May 6, 2019. There is no docket entry for that date.

¶ 9 In a letter dated June 18, 2019, defendant informed the circuit court that his family lacked the funds to hire a lawyer for him and that, consequently, he wished to have defense counsel appointed. This letter was file-stamped July 1, 2019. On that date, the court appointed the public defender to represent defendant.

¶ 10 On July 8, 2019, the case was called for a jury trial. Defense counsel moved for a continuance, and the circuit court granted the motion. Defense counsel moved for further continuances on September 9 and December 2, 2019, and February 10 and July 6, 2020. The court allowed those continuances as well. In the hearing of July 6, 2020, the court scheduled the jury trial for August 18, 2020.

¶ 11 From August 18, 2020, onward, the circuit court granted motions for continuances by the State.

¶ 12 On October 20, 2020, defense counsel filed a motion for discharge on statutory speedy-trial grounds. See *id.*

¶ 13 On November 6, 2020, the circuit court held a hearing on the motion for discharge and denied the motion. The court's reason for the denial was that defendant's search for private counsel had consumed the period of April 22 to July 8, 2019. When that period, along with the defense-requested continuances, was attributed to defendant, the 120 days in section 103-5(a) had not yet run.

¶ 14 On December 7, 2020, pursuant to section 103-5(c) (*id.* § 103-5(c)), the circuit court found the State had exercised due diligence in its thus-far unsuccessful attempts to serve subpoenas on two eyewitness, Teerikka Felix and Leslie O'Neal. Over defense counsel's objection, the court expanded the speedy-trial period by 60 additional days, thereby giving the State more time to locate Felix and O'Neal. See *id*. The court rescheduled the jury trial for February 2, 2021.

¶ 15 On February 2, 2021, a jury was selected.

¶ 16 On February 3, 2021, defense counsel moved for a mistrial because one of the jurors was distraught, claiming she lacked the will to "convict a person." Both parties agreed that the sobbing juror should be dismissed. Defense counsel moved for the declaration of a mistrial. Over the State's objection, the circuit court granted the motion.

¶ 17 On March 1, 2021, the parties selected a new jury, and the trial proceeded.

¶ 18 The State called Felix, who testified substantially as follows. Between 1 and 2 a.m. on June 16, 2018, Felix was with her two cousins at a field meet at the Untouchables Motorcycle Club in Danville, Illinois. The physical facilities of this motor sport club were a building and an adjoining field. Felix was in the field, near the third row of parked vehicles. People were everywhere. She had been at the club for about 20 minutes and had been drinking. She was standing by her car when she was approached by a longtime acquaintance, Gardner. Just as Gardner began speaking with her, he was shot.

¶ 19 It seemed to Felix as if the gunfire were "[d]irectly in [her] face." She looked to her right, and the shooter, a man, was "walking *** right past [her]." He was "two feet away," as close to her as the microphone in the witness box. The field was bright, illuminated by pole lights, one to Felix's left and another behind her. In the shooter's left hand was a cup, from which the shooter

was drinking, and in his right hand was a pistol. According to Felix's testimony, the shooter was "drinking and shooting at the same time" and was shaking his head up and down, laughing.

¶ 20 The prosecutor asked Felix if the shooter was present in the courtroom. Felix answered she was unable to tell because everyone was wearing COVID-19 masks. The prosecutor requested the circuit court to order defendant to remove his mask. Defense counsel objected. In a sidebar conference, defense counsel argued it would be "leading the witness and very suggestive" to have defendant alone remove his mask, especially since Felix had not "given any kind of physical description other than she saw a guy laughing and drinking." The court decided that if the prosecutor would try to elicit from Felix a further physical description of the shooter, the court would then "order the defendant to remove his mask briefly and see whether or not she [could] identify him." Defense counsel requested to be understood as objecting nevertheless, and the court replied, "Okay. That's fine."

¶ 21 The direct examination of Felix resumed. In response to the prosecutor's inquiries of what the shooter looked like, Felix recounted that the shooter was a "husky" man wearing a red shirt and that "[h]e had a low fro and like a unique nose." The prosecutor asked her what about the shooter's nose was unique. She answered, "I don't know, it was just like you could see his nose more than you could see his face. You could see his nose more than you could see his face from the side."

¶ 22 The prosecutor then renewed his request that defendant be ordered to remove his mask. The circuit court ordered defendant to pull down his mask below his chin. He did so. The prosecutor asked Felix if she "[saw] the individual in the courtroom right now that shot [her] friend Albert." She identified defendant, in court, as the shooter. The court told defendant he could pull up his mask.

¶ 23 According to Felix's testimony, the shooter fired repeatedly. After the initial shot, Felix "was in shock." She just "sat there and watched him shoot Albert." She looked at no one else, just the shooter. She "could just see the side of his face as he was walking by." He was close enough that she could have touched him.

¶ 24 Felix and her cousin "sat there for like 20 seconds[,] waiting for them to stop shooting." Then the cousin "grabbed" Felix, and the two of them ran to the club building. As Felix was running, she heard gunshots behind her. After the gunfire ceased, she ran back into the field, to the scene of the shooting. Tahji was on the ground. She knew Tahji because she knew his mother. Six feet away, Gardner too was on the ground. A crowd had gathered around the two prone victims.

¶ 25 Police officers arrived, and Felix told them what she had witnessed. She agreed to accompany the police to the police station, which was near the motorcycle club. They had her sit in an interview room, and she spoke with a detective, whose name she could not remember. The detective questioned her about what she had seen. The prosecutor asked Felix:

> "Q. Did you describe [the shooter] to the police?
>
> A. Yes.
>
> Q. Other than what you talked about with us, the husky and the nose and the—I believe you said the little fro—
>
> A. Uh-huh.
>
> Q. —did you describe him in any other way to the police?
>
> A. Yes, I thought he was somebody else. Well, I described him as somebody else.
>
> Q. And who did you describe the shooter as?

A. I think his name was Tug.

Q. And how did you describe him as Tug?

A. I said they looked alike but it wasn't him.

Q. And did you add anything or give any additional description to he looked like Tug?

A. I said he looked like Tug but he was bigger."

¶ 26 After Felix assured the police she would be able to identify the shooter if she saw him again, the police left the interview room. Sometime later, a female detective returned with a photographic array. The detective explained to Felix the procedure for photographic identification, and she had Felix sign a lineup advisory form. The detective then exited the room, leaving with Felix the photographic array, which was folded and upside down. Alone in the room, Felix looked at the photographs and in "[t]wo seconds" recognized the shooter. She circled defendant's photograph and initialed it. Police officers reentered the room, and Felix told them about the identification. People's group exhibit Nos. 3-1 and 3-2 were, Felix testified, the lineup advisory form and the photographic array, respectively, with defendant's photograph circled and bearing her initials.

¶ 27 After Felix testified, the parties stipulated that Jodavius L. Jones—who, the trial evidence revealed, was nicknamed "Tug"—was in custody in the Vermilion County jail at the time of the shooting.

¶ 28 Phillip Wilson was another witness for the State. He testified he was a detective for the Danville police department and that at approximately 2:45 a.m. on June 16, 2018, in the police station, he interviewed Felix about the two homicides that had been committed about an hour earlier at the Untouchables Motorcycle Club. After interviewing Felix, Wilson left the room and

verified that Jodavius "Tug" Jones was in custody. Then, with the assistance of Detective Patrick Carley, Wilson gathered photographs to show Felix. Wilson testified that, "[b]ased off [Felix's] description," they "tr[ied] to find similar characteristics of the suspect and put it in a photo array" of "six individual photo images." "[N]ormally," in a photographic array, Wilson explained, one of the six photographs would be of "the person of interest."

¶ 29 At approximately 3:15 a.m. on June 16, 2018, as Wilson and Carley were choosing photographs for the photographic array, Wilson received some "additional information." The information, Wilson testified, was "[t]hat there was [a] shots fired call on the 300 North block of North Alexander Street in Danville." The prosecutor asked Wilson:

> "Q. Was the defendant in this case[,] Dyontae Bright[,] one of the individuals that you included in the photographic array?
>
> A. Yes.
>
> Q. Why did you include him?
>
> [DEFENSE COUNSEL]: Objection, Your Honor.
>
> THE COURT: What's your objection?
>
> [DEFENSE COUNSEL]: One, the relevance as to the reason to include. Secondly, it's highly prejudicial and there's no probative value of this question.
>
> THE COURT: I'm going to overrule the objection.
>
> QUESTIONS BY [THE PROSECUTOR]:
>
> Q. Why did you include his photograph?
>
> A. Due to the description provided by Teerikka Felix and also the fact that there was [a] shots fired call at the block where the suspect Dyontae Bright resides."

¶ 30 Wilson himself did not show the photographic array to Felix. Instead, he had an independent administrator do so, namely, Detective Danielle Lewallen, "who did not know who the suspect was at that time or where the suspect would be in the photo array." At approximately 4:09 a.m. on June 16, 2018, while Wilson watched via a closed-circuit monitor in a different room, Lewallen left the photographic array with Felix, and Felix circled defendant's photograph.

¶ 31 After Felix identified defendant in the photographic array, the investigation continued. At approximately 4:38 a.m. on June 16, 2018, Wilson telephoned Dan Dietz at 322 North Alexander Street in Danville, for Wilson knew that Dietz's house was equipped with "video surveillance cameras that covered his surrounding area." The prosecutor asked Wilson why this video surveillance system at Dietz's house had been of interest to Wilson. "Because we heard the shots fired call earlier in the night," Wilson answered, "and it also is right next door at 320 North Alexander is Mr. Bright's residence." In other words, Dietz, with his outside security cameras, was defendant's next-door neighbor.

¶ 32 The prosecutor asked Wilson if he had a conversation with Dietz regarding the camera that faced toward defendant's residence. After the circuit court overruled defense counsel's hearsay objection, Wilson answered in the affirmative. The prosecutor then asked Wilson if he had watched the surveillance video from that camera. Wilson answered that he had done so. Defense counsel then made a best-evidence objection, which the court overruled. Wilson then described the footage recorded at approximately 2:12 a.m. on June 16, 2018, by the camera facing defendant's residence:

> "A. I observed a SUV pull up in front of 320 North Alexander Street which is Mr. Bright's residence, a male passenger, larger stature exited the passenger side of the vehicle and walked towards the front door of the residence.

Q. Now, from that video were you able to see the face of that individual with the large stature?

A. Was not."

¶ 33 The prosecutor requested permission to publish the surveillance footage to the jury. Defense counsel objected on the ground of a lack of foundation. The circuit court sustained the objection, refusing permission to publish the footage.

¶ 34 On March 4, 2021, the jury found defendant guilty of the first degree murder of Gardner and not guilty of the first degree murder of McGill.

¶ 35 On March 8, 2021, defense counsel filed a posttrial motion. One of the contentions in the posttrial motion was that the circuit court had erred by denying the motion for discharge.

¶ 36 On April 22, 2021, the circuit court denied the posttrial motion.

¶ 37 On May 27, 2021, the circuit court sentenced defendant to imprisonment for 50 years.

¶ 38 On June 2, 2021, the clerk of the circuit court filed a notice of appeal on defendant's behalf.

¶ 39 II. ANALYSIS

¶ 40 A. The Statutory Right to a Speedy Trial

¶ 41 1. *Pandemic-Related Tolling*

¶ 42 Under section 103-5(a) of the Code of Criminal Procedure of 1963 (*id.* § 103-5(a)), a defendant who is in custody for an alleged offense must be tried within 120 days after he or she was taken into custody, "unless delay is occasioned by the defendant" (or by other circumstances specified in the statute, none of which are present in this case). "Delay," the statute adds, "shall be

considered to be agreed to by the defendant unless he or she objects to the delay by making a written demand for trial or an oral demand for trial on the record." *Id.*

¶ 43 Defendant challenges the finding by the circuit court that he caused or consented to a 77-day delay from April 22 to July 8, 2019, when he (or his family) was looking for private counsel. The parties agree, though, that the speedy-trial clock automatically began running on April 19, 2019, when Vermilion County obtained custody of defendant from United States marshals (see *People v. Hayes*, 23 Ill. 2d 527, 529 (1962)), and they further agree that the first three days of custody, April 19 to 22, 2019, are attributable to the State. They also agree that the 407 days from July 8, 2019, to August 18, 2020, were consumed by defense continuances and thus belong in defendant's column. By the State's understanding, however, the supreme court suspended the running of the speedy-trial clock from April 7, 2020, through the date of trial—meaning that on August 18, 2020, when the defense continuances ended, the clock did not resume running against the State. See *In re Illinois Courts Response to COVID-19 Emergency/Impact on Trials*, Ill. S. Ct., M.R. 303070 (Apr. 7, 2020); *In re Illinois Courts Response to COVID-19 Emergency/Impact on Trials*, Ill. S. Ct., M.R. 303070 (June 30, 2020). Thus, the State argues, even if defendant were correct that the 77 days from April 22 to July 8, 2019, should be moved to the State's side of the ledger (a claim the State disputes, as we will soon discuss), the tolling by the supreme court's administrative orders would result in the State's being responsible for "only 80 days of untolled time (from April 19, 2019[,] to July 8, 2019)."

¶ 44 This argument by the State, defendant counters, rests upon a misinterpretation of the supreme court's administrative orders. Defendant, unlike the State, understands these orders as having been "permissive in nature." The second paragraph of the order the supreme court issued on April 7, 2020, leaves it up to the chief judge of each circuit whether to continue trials:

> "The Chief Judges of each circuit may continue trials until further order of this Court. The continuances occasioned by this Order serve the ends of justice and outweigh the best interests of the public and defendants in a speedy trial. Therefore, such continuances shall be excluded from the speedy trial computations contained in section 103-5 of the Code of Criminal Procedure of 1963 (725 ILCS 5/103-5 (West 2018)) and section 5-601 of the Illinois Juvenile Court Act (705 ILCS 405/5-601 (West 2018)). Statutory time restrictions in section 103-5 of the Code of Criminal Procedure of 1963 and section 5-601 of the Juvenile Court Act shall be tolled until further order of this Court." *In re Illinois Courts Response to COVID-19 Emergency/Impact on Trials*, Ill. S. Ct., M.R. 303070 (Apr. 7, 2020).

In defendant's interpretation of this administrative order, speedy-trial periods in a judicial circuit are indeed tolled—but only if the chief judge of the circuit orders the continuance of trials.

¶ 45 We find defendant's interpretation to be sound. The final sentence of the supreme court's order of April 7, 2020, quoted above, might at first seem absolute. On closer inspection, though, the final sentence does not provide that speedy-trial computations *are* tolled. Instead, it provides that speedy-trial computations *shall be* tolled, that is, they shall be tolled in the event that the chief circuit judge orders a continuance of trials. If the final sentence were read as tolling speedy-trial computations regardless of whether the chief circuit judge ordered a continuance of trials, the penultimate sentence, which reads that "*such continuances* shall be excluded from speedy trial computations," would be superfluous. (Emphasis added.) *Id.* The above-quoted paragraph of the supreme court's order makes sense as a whole only if the tolling of the speedy-trial periods is tied to a decision by the chief circuit judge to continue trials.

¶ 46 According to an administrative order by the Vermilion County circuit court (a copy of which is in the appendix of defendant's reply brief), the chief judge of the Fifth Judicial Circuit, on April 7, 2020, "continu[ed] all civil and criminal jury trials and all juvenile trials within the 5th Judicial Circuit until further order of the court, and suspend[ed] speedy trial terms during said period." *Administrative Order No. 2021-3 Relaxing Some Mitigation Measures Pertaining to Court Operations During the COVID-19 Pandemic*, Vermilion County Cir. Ct., at 1 (June 2, 2021); see *People v. Harston*, 23 Ill. App. 3d 279, 282 (1974) (taking judicial notice of an administrative order issued by a chief circuit judge). This administrative order further recites that, pursuant to Illinois Supreme Court Rule 21(b) (eff. Jan. 1, 2021), the chief judge granted the presiding judge for Vermilion County "temporary emergency administrative authority to enter orders affecting the general operation of" the courthouse. *Id.* at 2. On May 26, 2020, this administrative order continues, the circuit judges of Vermilion County "deemed that public health conditions within the County then permitted a resumption of Courthouse operations in a measured and structured manner." *Id.* Later, on November 23, 2020, the circuit judges of Vermilion County "deemed that public health conditions within the County necessitated a temporary suspension of all jury trials in the Courthouse." *Id.* at 2-3. Finally, on January 15, 2021, the circuit court of Vermilion County "deemed that public health conditions within the County allowed for the resumption of jury trials." *Id.* at 3.

¶ 47 Defendant argues that these suspensions of courthouse activity ordered by the chief judge of the Fifth Judicial Circuit and by the Vermilion County circuit court judges are practically irrelevant to the determination of the speedy-trial issue in his case. It does not matter, defendant explains, that the chief judge ordered a continuation of trials in the spring of 2020, for this circuit-wide continuance is included in the period of defense continuances from July 8, 2019, to

August 18, 2020—a period that, defendant admits, should be counted against him. Nor does it matter, defendant further explains, that on November 23, 2020, the Vermilion County circuit court suspended jury trials again, for by then the court had already denied his motion for discharge (and if the motion had merit, the 120-day period expired before November 23, 2020).

¶ 48 We agree that, for the reasons that defendant sets out, the pandemic-related administrative orders are of no practical consequence to the determination of the speedy-trial issue in his case. The pandemic-related tolling of the speedy-trial period occurred either during defense-requested continuances or after the denial of the motion for discharge.

¶ 49 2. *Defendant's Alleged Consent to "Delay"*

¶ 50 Setting off to the side the administrative orders, the parties disagree on the attribution of only one period: the 77 days from April 22 to July 8, 2019. They agree on the remaining periods (administrative orders aside). They agree that the first three days of custody, April 19 to 22, 2019, should be counted against the State. They agree that, because of defense continuances, the 407 days from July 8, 2019, to August 18, 2020, should be counted against defendant. They agree that the 80 days from August 18 to November 6, 2020, should be counted against the State. If the disputed 77 days from April 22 to July 8, 2019, are counted against the State, defendant was denied his statutory right to be tried within 120 days attributable to the State (77 + 80 = 157). See 725 ILCS 5/103-5(a) (West 2018). If, on the other hand, the 77 days are counted against defendant, his statutory right to be tried within 120 days attributable to the State had not been violated as of November 6, 2020, when the circuit court denied his motion for discharge. In that event, only 80 days would be attributable to the State (August 18 to November 6, 2020).

¶ 51 Defendant points out that, during the sole period in dispute, April 22 to July 8, 2019, he never moved for a continuance and never filed any other motion. He argues that, given the definition of a "delay"—as "[a]ny action by either party or the trial court that moves the trial date outside [the] 120-day window" (*People v. Cordell*, 223 Ill. 2d 380, 390 (2006))—it would have been impossible for him to agree to a "delay" during the period of April 22 to July 8, 2019, for no "delay," so defined, had as of yet been proposed. No one had as of yet proposed holding the trial more than 120 days after the custody date of April 19, 2019. Defendant could not have agreed to a nonexistent proposal.

¶ 52 The State, on the other hand, maintains that "the delays from April 22, 2019, to July 8, 2019, were agreed to by defendant because he never demanded a speedy trial or objected to the delay, which resulted from his unsuccessful attempts to procure private counsel." The State acknowledges that, at the beginning of the arraignment, defense counsel answered, "That's correct, Your Honor," to the circuit court's question of whether his client requested a jury trial and that the court then stated, "The Court will show *** [a] demand for trial." But the State observes that this demand for trial was made before any delay—including the trial date of May 6, 2019—was proposed. The State cites *Cordell*, 223 Ill. 2d at 391-92, for the proposition that a preemptive demand for trial, made before any delay is proposed, is ineffective as an objection to subsequently proposed delays.

¶ 53 The germane question, however, is not whether, by failing to object, defendant effectively agreed to a delay from April 22 to July 8, 2019. As defendant observes, no "delay," properly speaking, was proposed during that period. Neither the prosecutor nor the circuit court had proposed, as of yet, holding the trial beyond the 120-day period. Thus, from April 22 to July 8, 2019, there was no occasion for defendant to agree to a "delay," for, during that period, neither

the prosecutor nor the court proposed holding the trial more than 120 days after defendant was taken into custody.

¶ 54 A defendant's agreement to a delay, however, is not the only reason why section 103-5(a) might allow a trial to be pushed beyond the one-hundred and twentieth day. Alternatively, "[d]elay is occasioned by a defendant when his *acts* caused or contributed to a delay resulting in a postponement of his trial." (Emphasis added.) *People v. Janusz*, 2020 IL App (2d) 190017, ¶ 57. The right question in the present case is whether defendant *did something* from April 22 to July 8, 2019, that ultimately contributed to making the trial date later than it otherwise would have been. See *id.* The rationale in *People v. Collum*, 98 Ill. App. 3d 385 (1981), suggests an answer to that question.

¶ 55 In *Collum*, the circuit court allowed the appointed defense counsel to withdraw (*id.* at 386) on the ground of a conflict of interest (*id.* at 387). Eighteen days later, the court appointed new defense counsel to represent the defendant (*id.* at 386), who was in custody (*id.* at 385). The defendant was convicted and sentenced. *Id.* He then appealed, arguing he was entitled to discharge because he had been brought to trial within 132 days instead of 120 days. *Id.* at 386. The State asserted, however, that, " '[u]nder Illinois law, a delay occasioned by the withdrawal of counsel"—in that case, a delay of 18 days—"may be chargeable to the defendant and [may] toll the running of the 120 day period.' " *Id.* at 387. The appellate court responded, "While this assertion is obviously correct[,] it ignores the equally true fact that under some circumstances the withdrawal of counsel may not be chargeable to [the] defendant." *Id.* If the defendant occasioned the withdrawal of counsel, such as by "becom[ing] disenchanted with defense counsel and seek[ing] a replacement," the speedy-trial period would be tolled during the search for a replacement. *Id.* If,

on the other hand, as in *Collum*, the public defender withdrew on his or her "own initiative" and "volition," without instigation from the defendant, the speedy-trial period would keep running. *Id.*

¶ 56 The present case is different from *Collum* in that defense counsel did not move to withdraw but, instead, the circuit court limited defense counsel's appointment to the arraignment. Even so, under the logic of *Collum*, we should ask whether defendant did anything to occasion this temporal limitation on defense counsel's appointment. He did do something: he told the court his family was looking for private counsel to represent him. In other words, when the court gave him a choice between appointed defense counsel and private counsel, defendant answered that his family was trying to obtain private counsel—as if to signify that, instead of being represented by appointed defense counsel, he wanted to be represented by private counsel. Until defendant had settled on the attorney who was going to represent him, the prosecution could not serve discovery on the defense, and the defense could not serve discovery on the prosecution. With discovery on hold while the search for private counsel was underway, the case was stalled. On July 1, 2019, when defendant notified the court that the search for private counsel was called off, the court, at defendant's request, appointed defense counsel to represent him throughout the rest of the proceedings. The next hearing was held with reasonable promptitude, only a week later. Arguably, then, the period of April 22 to July 8, 2019, was dead time, so to speak, for which defendant was responsible.

¶ 57 Therefore, we are unconvinced that the circuit court abused its discretion by placing this 77-day period on defendant's side of the speedy-trial ledger. See *People v. Pettis*, 2017 IL App (4th) 151006, ¶ 17 (explaining that "the abuse-of-discretion standard would apply where the court determines whether defendant *** caused *** a delay"). We cannot say it would be arbitrary or unreasonable to find that this period of inactivity contributed to delaying the trial date. See *People*

v. Higgs, 2021 IL App (1st) 191620-U, ¶ 28 (explaining that a trial court has abused its discretion only if its decision is "arbitrary, fanciful, or unreasonable" or only if "no reasonable person would take the view adopted by the trial court"); *People v. Tate*, 2022 IL App (5th) 200395-U, ¶ 30 (holding that "[i]t is the defendant's burden to establish that delays were not attributable to his or her conduct"). While deferring to the court's attribution of the 77 days, we conclude, *de novo*, that defendant's statutory right to a speedy trial was observed and that the court was correct to deny the motion for discharge. See *Pettis*, 2017 IL App (4th) 151006, ¶ 17 (holding that "whether defendant's statutory right to a speedy trial has been violated is a question of law subject to *de novo* review").

¶ 58 B. Whether Felix's Identification of Defendant as the Man Who Shot Gardner Is Reliable

¶ 59 Defendant notes the lack of evidence that he had any motive to harm Gardner or that he even had access to a firearm. Defendant also notes the lack of DNA evidence, fingerprint evidence, or any other physical evidence linking him to the shooting of Gardner. In fact, the only evidence implicating him was Felix's testimony. Defendant insists that Felix's "brief opportunity to observe the shooter, her poor degree of attention at the time of the incident, and the fact that she could not see the shooter's face (only his nose) from the side rendered her identification so unreliable that it cannot support a conviction." Felix admitted she was unacquainted with defendant and that, until the shooting incident, she had never laid eyes on him before. Arguing that "[i]dentifications in chaotic settings are particularly unreliable when the witness does not know the suspect beforehand," defendant claims that "only one conclusion may reasonably drawn from the record" (*People v. Cunningham*, 212 Ill. 2d 274, 280 (2004)), namely, that Felix's identification of him as the shooter of Gardner is unreliable.

¶ 60 The State maintains, on the other hand, that, in weighing the reliability of Felix's identification testimony, the jury took into account the five factors in *People v. Macklin,* 2019 IL App (1st) 161165, ¶ 22, as it had been instructed to do, and that the reliability of her identification testimony is a rationally defensible conclusion from those factors. Quoting from *People v. Gray*, 2017 IL 120958, ¶ 36, the State cautions that "an eyewitness's testimony may be found insufficient only where the record evidence compels the conclusion that no reasonable person could accept it beyond a reasonable doubt." (Internal quotation marks omitted.)

¶ 61 Indeed, we must be careful not to retry defendant. See *id.* ¶ 35. It was the jury's role, it is not our role, to weigh the evidence and to assess the credibility of Felix's identification testimony. See *id.* On such factual issues, we have no right to substitute our judgment for that of the jury. See *id.* This is not to suggest that guilty verdicts are unreviewable. We have an important gatekeeping function, but lest we become another jury, our gatekeeping on questions of fact should be deferential. We should view all the evidence in a light most favorable to the prosecution—meaning that if testimony in the State's favor is arguably credible, it should be credited and if an inference could reasonably be drawn in the State's favor, it should be drawn. See *id.* When the evidence is viewed in such a light, we are unable to say it would be impossible for a reasonable person to accept Felix's identification testimony. See *id.* ¶ 36. Arguably, the factors from *Macklin* militate in favor of a finding that her identification testimony is reliable.

¶ 62 The first factor is "the witness's opportunity to view the offender at the time of the offense." *Macklin,* 2019 IL App (1st) 161165, ¶ 22. Defendant interprets Felix's testimony as meaning that she "never got a clear look at the shooter's face" but that, instead, she "only saw the shooter's general build, nose, and hairstyle." Felix never testified, however, that she did not get a clear look at the shooter's face. Rather, she testified that she "could just see the side of his face as

he was walking by" and that she "could see his nose more than his face from the side." The nose is, after all, part of the face, and according to Felix's testimony, the shooter's nose was "unique," making the shooter distinctive in appearance (at least to Felix) and readily identifiable by her. To perceive that the shooter was laughing as he shot Gardner, Felix had to see the shooter's face. Granted, it was, as defendant says, "in the middle of the night." Nevertheless, the "area was bright," according to Felix's testimony, because two "light poles" were nearby. The shooter walked slowly in front of her, in the illumination shed by the utility lights to her left and behind her, and he approached as close to her as the microphone in the witness box. We decline to hold that a person whose face was viewed a couple of feet away, in profile, is as a matter of law unidentifiable by the viewer less than two hours later. Even though Felix did not get a frontal view of the shooter, a trier of fact could reasonably find that she had a sufficient opportunity to view the shooter.

¶ 63 The second factor is "the witness's degree of attention at the time of the offense." *Id.* Quoting Henry F. Fradella, *Why Judges Should Admit Expert Testimony on the Unreliability of Eyewitness Testimony*, 2006 Fed. Cts. L. Rev. 3, 22 (2006), defendant notes, "Studies indicate that witnesses confronted with threats to their safety tend to focus more on details related to the threat—such as a weapon—and 'pay less attention to the other details of the crime scene, such as characteristics of the perpetrator (*e.g.*, facial features, hair color and style, clothing, height, weight, etc.).' " As the title of defendant's source hints, such studies ought to be presented at trial, in the form of expert testimony, so as to (1) allow the State a fair opportunity to present opposing expert testimony and (2) have the jury weigh the competing expert opinions. See *People v. Lerma*, 2016 IL 118496, ¶ 26. No expert testimony on the reliability of eyewitness identification was presented in the trial. When assessing the sufficiency of the evidence, we are limited to the evidence in the record. *People v. Moore*, 2015 IL App (1st) 140051, ¶ 20. Arguably, evidence in the record tends

to prove that Felix was gazing steadily at the shooter. Citing to pages in the transcript of Felix's testimony, the State notes that Felix "kept her focus on defendant and kept watching him as he walked, fired, and shot Gardner" and that Felix "only stopped looking at defendant when one of her cousins finally grabbed her." It would be reasonable to characterize Felix as being highly attentive at the time of the offense.

¶ 64 The third factor is "the accuracy of any previous description of the offender by the witness." *Macklin*, 2019 IL App (1st) 161165, ¶ 22. Defendant argues that Felix's description of the shooter as having a "low fro and like a unique nose" and as being of a "husky" build was "vague and nonspecific." The State, on the other hand, claims that those descriptions "matched well with [Felix's] identification of defendant in the photo array." We agree that a "unique nose" is, as defendant protests, a vague description. Usually, though, language will be an imprecise means of describing a person's facial features. An individual's face is better represented pictorially. In a sense, Felix drew a picture for Wilson by telling him the shooter looked like Tug except that the shooter was bigger. We do not understand defendant to dispute that, except in size, he looks like Tug. Apparently, this comparison by Felix was accurate.

¶ 65 The fourth factor is "the degree of certainty shown by the witness in identifying the defendant." *Id.* The parties agree that, in the police station, Felix showed certainty in her selection of defendant's photograph. As defendant puts it, Felix "took a total of 13 seconds to reflect on the photographic array before selecting an image." To be sure, defendant regards this display of certainty as ill-founded, considering that Felix had seen the shooter's face only from the side. Even so, applying the fourth *Macklin* factor, a reasonable trier of fact could find that Felix showed a high degree of certainty in her selection of defendant's photograph. See *id.*

¶ 66 The fifth factor is "the length of time between the offense and the identification." *Id.* Defendant agrees with the State that because Felix "was administered a photographic array within hours" (more precisely, within two hours) "of viewing the shooter," "the time between the incident and the confrontation does not weigh against the credibility of the identification."

¶ 67 In sum, when we view all the evidence in a light most favorable to the prosecution, as we are required to do, we are unconvinced it would be impossible for "*any* rational trier of fact" to find a reliable identification in the circumstances of this case. (Emphasis in original and internal quotation marks omitted.) *Cunningham*, 212 Ill. 2d at 278. We acknowledge the supreme court's observation that "eyewitness misidentification is now the single greatest source of wrongful convictions in the United States, and responsible for more wrongful convictions than all other causes combined." (Internal quotation marks omitted.) *People v. Lerma*, 2016 IL 118496, ¶ 24. Nevertheless, until the supreme court instructs us otherwise, we are bound by the standard it laid down in *Gray*: "The testimony of a single witness is sufficient to convict if the testimony is positive and credible ***. [Citation] *** [E]yewitness testimony may be found insufficient only where the record evidence compels the conclusion that no reasonable person could accept it beyond a reasonable doubt." (Internal quotation marks omitted.) *Gray*, 2017 IL 120958, ¶ 36. By stating he had no objection to Illinois Pattern Jury Instructions, Criminal, No. 3.15 (approved Oct. 28, 2016), defense counsel agreed, on behalf of defendant, to have the reliability of Felix's identification evaluated through the *Macklin* factors. Parsing those factors deferentially, we cannot say that the acceptance of Felix's identification testimony would be rationally indefensible.

¶ 68 C. Wilson's Reasons for Including Defendant's Photograph in the Array

¶ 69 Defendant contends that the circuit court erred by "overrul[ing] defense objections to the prejudicial testimony regarding the reasons that detectives included [his] picture in the

photographic lineup." According to defendant, the court "deprived [him] of a fair trial when it allowed the State to buttress [Felix's] unreliable identification with the prejudicial and irrelevant hearsay testimony of *** Wilson."

¶ 70 The State counters that "[t]he *** complained-of parts of Detective Wilson's testimony related to the course of the police investigation" and that allowing such testimony, therefore, was not an abuse of discretion. The State cites *People v. Henderson*, 2016 IL App (1st) 142259, ¶ 177, in which the appellate court held, "When a police officer recounts the steps of his or her investigation for the limited purpose of showing only the course of the investigation, that testimony is not hearsay, because it is not being offered for its truth."

¶ 71 The only instance in Wilson's testimony, however, when the circuit court overruled a *hearsay* objection was when the prosecutor asked Wilson whether he had a conversation with Dietz regarding the security cameras. (The reason why the court overruled defense counsel's hearsay objection was that the prosecutor merely had asked Wilson whether he had a conversation with Dietz, not what was said in the conversation.) When the prosecutor asked Wilson why he had included defendant's photograph in the photographic array, defense counsel made a *relevance* objection, not a *hearsay* objection. Specifically, defense counsel stated his grounds of objection as follows: "One, the relevance as to the reason to include. Secondly, it's highly prejudicial[,] and there's no probative value of this question." The circuit court overruled this objection, whereupon Wilson testified he had included defendant's photograph "[d]ue to" (1) "the description provided by Teerikka Felix" and (2) "the fact that there was [a] shots fired call at the block where the suspect Dyontae Bright resides."

¶ 72 It may well be that this part of Wilson's testimony was, as defense counsel complained, "highly prejudicial." Prejudicialness, however, is not a legally recognizable ground

of objection. "The prosecutor should be expected to present evidence prejudicial to the defendant." *People v. Jones*, 2020 IL App (4th) 190909, ¶ 160. Granted, evidence is objectionable "if its probative value is substantially outweighed by the danger of *unfair* prejudice." (Emphasis added.) Ill. R. Evid. 403 (eff. Jan. 1, 2011). An objection under Rule 403, however, would presuppose that the evidence had *some* probative value that was substantially outweighed by the danger of unfair prejudice—in other words, that the evidence had at least marginal relevance. See *id.* "[*R*]*elevant* evidence may be excluded if its prejudicial effect substantially outweighs its probative value." (Emphasis added.) *People v. Eyler*, 133 Ill. 2d 173, 218 (1989). (Irrelevant evidence, that is, evidence devoid of probative value, is categorically inadmissible even if admitting the evidence would cause no prejudice. See Ill. R. Evid. 402 (eff. Jan. 1, 2011).) Defense counsel took the position that Wilson's reasons for including defendant's photograph in the photographic array had "no probative value"—in other words, that Wilson's reasons were irrelevant. Defense counsel's objection, therefore, was not an unfair-prejudice objection under Illinois Rule of Evidence 403 (eff. Jan. 1, 2011) but was, instead, an irrelevance objection under Illinois Rule of Evidence 402 (eff. Jan. 1, 2011).

¶ 73 A contemporaneous objection on a stated ground forfeits all other, unstated grounds of objection. *People v. Kelley*, 2019 IL App (4th) 160598, ¶ 86. With respect, then, to Wilson's reasons for including defendant's photograph in the photographic array, the only question is whether at least one of those reasons was arguably relevant. See *People v. Prather*, 2022 IL App (4th) 210427-U, ¶ 50 (holding that "[i]f a party objects to evidence as a unit and if the evidence is admissible in part and inadmissible in part, the trial court is justified in overruling the objection and admitting the evidence in its entirety" (internal quotation marks omitted)). We say "arguably" because "[a] trial court's decision concerning whether evidence is relevant and admissible will not

be reversed absent a clear abuse of discretion." *People v. Morgan*, 197 Ill. 2d 404, 455 (2001). An evidentiary ruling is a "clear abuse of discretion" only if it would be impossible to make a reasonable argument in favor of the ruling. In other words, "[a]n abuse of discretion will be found only where the trial court's decision is arbitrary, fanciful[,] or unreasonable or where no reasonable man would take the trial court's view." (Internal quotation marks omitted.) *Id.*

¶ 74 In his brief, defendant effectively admits the relevance of Wilson's explanation of why he included defendant's photograph in the photographic array. This admission is implied in defendant's criticism of the circuit court for "allow[ing] the State to *buttress* [Felix's] unreliable identification with the prejudicial and irrelevant hearsay testimony of *** Wilson." (Emphasis added.) Granted, in that quoted language, defendant asserts the irrelevance of Wilson's testimony, but he contradicts his claim of irrelevance by complaining that Wilson's testimony "buttress[ed]" Felix's identification of defendant as the shooter.

¶ 75 Setting this admission aside, one of Wilson's stated reasons for including defendant's photograph in the photographic array could be regarded as having relevance to the third *Macklin* factor: "the accuracy of any previous description of the offender by the witness." *Macklin*, 2019 IL App (1st) 161165, ¶ 22. If, as Wilson testified, it was partly "[d]ue to the description provided by Teerikka Felix" that he included defendant's photograph in the photographic array and if Felix selected defendant's photograph, that combination of facts tends to increase the likelihood that Felix originally provided Wilson an apt verbal description of defendant. We find no abuse of discretion, then, in the overruling of defense counsel's irrelevance objection.

¶ 76 III. CONCLUSION

¶ 77 For the foregoing reasons, we affirm the circuit court's judgment.

¶ 78 Affirmed.