No. 127907

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- LATRON Y. CROSS, Defendant-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, No. 4-19-0114. There on appeal from the Circuit Court of the Fifth Judicial Circuit, Vermilion County, Illinois, No. 17-CF-476. Honorable Nancy S. Fahey, Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLANT

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E-FILED
3/29/2022 11:20 AM
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NATURE OF THE CASE

Latron Cross was convicted of first degree murder after a jury trial and was sentenced to 59 years.

This is a direct appeal from the judgment of the court below. No issue is raised challenging the charging instrument.

ISSUE PRESENTED FOR REVIEW

Is it appropriate to attribute days of delay to a defendant as a discovery sanction for making a supplemental disclosure that does not delay the scheduled trial, and if not, were defendant's statutory speedy trial rights violated?

STATUTES AND RULES INVOLVED

725 ILCS 5/ 103-5. Speedy trial.

(a) Every person in custody in this State for an alleged offense shall be tried by the court having jurisdiction within 120 days from the date he or she was taken into custody unless delay is occasioned by the defendant . . . . Delay 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. The provisions of this subsection (a) do not apply to a person on bail or recognizance for an offense but who is in custody for a violation of his or her parole, aftercare release, or mandatory supervised release for another offense.

. . . .

(c) If the court determines that the State has exercised without success due diligence to obtain evidence material to the case and that there are reasonable grounds to believe that such evidence may be obtained at a later day the court may continue the cause on application of the State for not more than an additional 60 days . . . .

(d) Every person not tried in accordance with subsections (a), (b) and (c) of this Section shall be discharged from custody or released from the obligations of his bail or recognizance.

. . . .

Illinois Supreme Court Rule 413. Disclosure to Prosecution

(d) Defenses. Subject to constitutional limitations and within a reasonable time after the filing of a written motion by the State, defense counsel shall inform the State of any defenses which he intends to make at a hearing or trial and shall furnish the State with the following material and information within his possession or control:

(i) the names and last known addresses of persons he intends to call as witnesses, together with their relevant written or recorded statements, including memoranda reporting or summarizing their oral statements, and record of prior criminal convictions known to him; and

. . . .

(iii) and if the defendant intends to prove an alibi, specific information as to the place where he maintains he was at the time of the alleged offense.

Illinois Supreme Court Rule 415. Regulation of Discovery

(g) Sanctions.

(i) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, exclude such evidence, or enter such other order as it deems just under the circumstances.

(ii) Wilful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel or the defendant to contempt of court or other appropriate sanctions by the court.

STATEMENT OF FACTS

In May 2013, Ollie Williams pled guilty to second degree murder for the shooting death of Latifah Cross, during which he also shot up the home of Naomi Cross, Latifah's grandmother. (SUP2 C. 10, 19; R. 428).[1] On July 7, 2017, at around 12:50 p.m., Williams was shot while riding a bike on a street in Danville, Illinois, and died later that day. (SUP2 C. 10). Williams told a woman who immediately responded and the first arriving officer that Latron Cross, Latifah's brother and Naomi's grandson, was the man who shot him. (SUP2 C. 11). Latron was arrested on July 9, 2017, in County Club Hills, Illinois, and charged with Williams's murder. (C. 11-13; R. 320-21). He was arraigned on July 12, 2017, and, on July 27, 2017, the trial court found probable cause to hold Latron. (R. 4-8, 14-18). Latron's trial began on November 6, 2018.

Pre-trial Proceedings

On July 16, 2018, the defense answered ready for trial and demanded a speedy trial. (R. 54). The parties agreed to a trial date of September 24, 2018, and the trial court attributed the delay to the State. (R. 54-55). On August 21, 2018, defense counsel filed a supplemental discovery disclosure and answer that asserted an affirmative defense of an alibi from Naomi and attached a report of a defense investigator's conversation with her. (C. 97-98). On the same day, the State filed a response that asked the trial court to now attribute the delay in trial to the defense beginning on July 16, 2018, because the State would need to

[1] In addition to the report of proceedings (R.), common law record (C.), secured common law record (SEC C.), and exhibits (E.), the record contains four supplemental volumes (SUP2 C., SUP4 C., SUP5 E., and SUP7 C.). The record is complete despite the absence of volumes numbered SUP1, SUP3, and SUP6.

investigate further and because of "the information being known to the defendant and his late disclosure to defense counsel regarding any possible defenses." (SUP4 C. 4, ¶¶ 2, 5-6).

On August 24, 2018, at the hearing on the State's response, defense counsel explained that he had been fully prepared to go to trial on July 16th when he made his speedy trial demand. (R. 60). He learned of the alibi defense on August 15, 2018, and then took a few days to investigate by having his investigator conduct interviews, and then he disclosed the alibi to the State. (R. 60-61). Defense counsel confirmed to the trial court that he had been fully prepared to go trial on July 16th without an alibi defense; the new information simply meant he would now present a different defense at trial. (R. 61). He also explained there was no delay to attribute to Latron as the trial date was unchanged, still one month away, and the State had time to investigate the disclosed alibi witness. (R. 60). The trial court held that the time from July 16, 2018, to August 21, 2018 would be delay attributable to the State, while the time from August 21, 2018, to September 24, 2018 would be delay attributable to the defense. (R. 61-62).

On September 24, 2018, defense counsel again answered ready and demanded trial, but the State sought a continuance. (R. 65). Defense counsel acknowledged the trial court's earlier order had tolled his previous speedy trial demand and agreed that based on the court's previous order the speedy trial time would run on November 29, 2018. (R. 65). The parties agreed the trial would begin on November 6, 2018, with the delay attributable to the State. (R. 65-66).

On November 2, 2018, the trial court heard pre-trial motions, granting the State's motion to admit Williams's statement that Latron shot him as a dying

declaration and an excited utterance and denying the State's motion to admit evidence Latron and Williams were in rival gangs. (SUP2 C. 10-20; R. 73-88). The trial court also denied the defense's motion *in limine* to admit a rap video made by Albert Gardner, Latron's cousin and another of Naomi's grandsons, which counsel argued was a third-party confession to the shooting of Williams as it contained lyrics in which Albert said he had to put in the ground the person who shot up his grandmother's house, which only could have been Williams. (SUP2 C. 21-22; SUP7 C. 4; R. 91-99).

Trial Proceedings

Williams's mother, Velma Taylor, testified that a young woman, Latina Jones, would often take her to and from hospital appointments. (R. 222). They knew each other from where they lived before 2017, and Latina would sometimes bring her boyfriend, Latron, along on these trips. (R. 222-23).

Williams's shooting was witnessed by a bus driver and caught on the bus's forward facing camera. (R. 226-28, 230-31; People's Exh. #2). The driver testified she saw Williams on a bike and a car approaching her on her side of the road instead of the side they were supposed to be on. (R. 227). The car came up to the bike, Williams wobbled on the bike, and then fell into a ditch, which made her believe the car might have hit him. (R. 227-28). She stopped the bus and asked him if he was alright. (R. 228). Williams asked her to call an ambulance; the driver had already called dispatch for an ambulance and police. (R. 228-29). During her conversation with Williams he never told her he had been shot. (R. 234-35). Video footage was played that showed the car come up to the bike and Williams fall into the ditch, while a second video showed when the bus driver pulled up to Williams

to speak with him. (R. 231-33).

Kelia Howard testified that at around 1:00 p.m. on July 7, 2017, she was driving in the opposite direction of the bus when she saw Williams fall of his bike into a ditch. (R. 242-43). She stopped to help and called 911 as the man appeared injured; by that time the bus had left and other people were present. (R. 244-45). She identified her 911 recording and on it she was heard stating Williams told her he had been shot in the stomach and leg and the shooter was Latron Cross. (R. 246-48; People's Exh. #3).

Officer Josh Long was the first officer to respond. (R. 249-50). He testified that Williams told him Latron shot him and Latron was the only person in the car. (R. 250-54). Williams was taken away in an ambulance a few minutes later and did not speak to any other police officer before he died. (R. 253, 312-13). No gun or shell casings, or any other relevant forensic evidence, was collected from the scene. (C. 129-130; R. 257-67, 385-87; E. 44-49).

Latina Jones, Latron's former girlfriend, testified she was dating him at the time of the shooting. (R. 287). She had known Velma Taylor for five years beforehand and took her on errands; occasionally, Latron accompanied them. (R. 288). On the day of the shooting, Latron had spent the night at her place. (R. 289). He left her house and had her permission to take her cell phone and her car, a blue, 4-door, 2008 Chevy Impala. (R. 289-90, 302). She testified she was asleep when Latron left, but thought it might have been between 10:00 and 11:00 a.m. (R. 289). On cross-examination, she confirmed that on the day in question she told police officers that she had not seen Latron since around 9:00 and 10:00 a.m. as he had left with her car and phone at that time. (R. 301-02).

On July 7, 2017, police came to her house at around 1 p.m. and 5:30 p.m. to look for Latron. (R. 290-91). They searched her house each time with permission, but Latron was not present. (R. 268-71). She told them she had not spoken with Latron, though she had tried to contact him after the police's first visit. (R. 290-92). Albert, nicknamed "Man Man," was at her house when the police returned at 5:30 p.m. (R. 291, 308-09). After the police left the second time, Albert gave Latina directions to where her car was parked and Albert's girlfriend went with her to pick it up. (R. 292-93). When she got to her car, a person walked up and gave her the keys and she drove to her sister's house in Champaign, Illinois. (R. 293-94). She confirmed she earlier pled guilty to obstruction of justice in this case. (R. 294). She had not spoken with Latron by the time she arrived at her sister's house. (R. 294).

Once at her sister's house she spoke with Latron and he asked her to pick him up in Chicago. (R. 296). She left early the next morning and picked Latron up from an apartment building on the south side of Chicago based on directions he gave her. (R. 296-97). She then drove them to her sister's house in Country Club Hills, Illinois, and parked her car in the garage. (R. 297). They did not talk while going to her sister's house other than, "[h]e just told me why I didn't give them my car." (R. 299). Neither she nor Latron contacted the police during this time though they both knew the police were looking for him. (R. 299, 300-01).

On the morning of July 9, 2017, Latron was arrested at Latina's sister's house. (R. 299-300, 306). Later that day, Danville police officers arrived and Latina showed them where she had parked her car. (R. 300). State witnesses testified how Latina's car was returned to Danville (R. 306-08), and a crime scene investigator

with the Illinois State Police processed the car for gunshot residue, (R. 335-36, 337-43, 356; E. 57-73), and lifted fingerprints, (R. 343-46). The State's expert in trace evidence analysis and gunshot residue testified that all her tests for gunshot residue from samples taken from the car were negative. (R. 375-77). The stipulated testimony of an expert in fingerprint analysis was that eight prints were fit for comparison and three taken from the interior of the driver's door were from Latron; three were eliminated as belonging to either Latron or Albert; and two taken from the screen of a cell phone found in the car were inconclusive as belonging to Latron or Albert. (C. 127-128; R. 384-85).

A forensic medical examiner testified that Williams had two gunshot wounds as well as a minor graze wound. (R. 397, 399). One bullet lodged in the muscles of Williams's right hip after it struck bone causing a non-fatal injury. (R. 399-400). The other bullet was recovered from under the skin of Williams's left lateral abdomen. (R. 398). The bullet had traveled "from the right to left upwards, back to front, [and] went through the entire liver." (R. 398). This was the fatal wound. (R. 398). The two recovered bullets were .380 caliber and fired by the same gun. (C. 131; R. 316-18, 388, 397). The State then rested. (R. 402).

Naomi testified for the defense that on July 7, 2017, Latron came to her house in his girlfriend's car at around 8:30 or 9:00 a.m. to see his daughter who was staying with her. (R. 416-19). Albert had spent the night at her house and left in the car Latron arrived in around 9:30 or 10:00 a.m. to take his friend to court. (R. 417-19). Albert did not return that day and she did not see the car again. (R. 419). Latron was at her house at 1:00 p.m. along with several other people and did not leave until around 2:30 to 3:00 p.m., which was after Tyrell, who was

on his way to Chicago, had arrived. (R. 419-20, 423). Naomi testified that after she heard Latron was arrested she went to the police station to speak to someone. (R. 420). A person came out from the back and did not want to hear what she had to say, so she left. (R. 420). Police did not contact her from July 2017 until some time in September 2018. (R. 420-21). No one contacted her about this case until a defense investigator came to speak with her in August 2018. (R. 422, 425). She chose not to speak with the police detective who came to speak with her in September 2018 because she had tried to speak with the police earlier and they were not interested. (R. 426-27).

Latron testified he had known Williams since 2004, knew Williams pled guilty to killing Latifah, but did not know Williams was out of prison. (R. 428-29). He left Latina's house on the morning of July 7, 2017, with her car and phone because his phone had died and Latina let him borrow hers. (R. 429-30). He drove to his grandmother's house and let Albert borrow the car to take a friend of his to court and Latina's phone because Albert was taking out a woman after his errand. (R. 430-31). Albert left in Latina's car around 10:00 a.m. and Latron stayed at the house until Tyrell arrived, which was around 2:00 p.m. (R. 431-32, 436). When Tyrell arrived, he let Latron know the police were looking for him so they drove around in Tyrell's car looking for Latina's car and Albert. (R. 432-33).

They did not find either Latina's car or Albert so they went to Tyrell's house so he could get ready to go to a casino in Chicago. (R. 433). A short time later, Albert knocked on Tyrell's door and Latron had a heated discussion with him. (R. 433-34). Albert returned Latina's phone and left. (R. 434). Latron went to Chicago with Tyrell and later Latina picked him up and they went to her sister's house.

(R. 434-35). He was arrested there the next day on July 9, 2017. (R. 435-36). On cross-examination, he confirmed he did not tell the police about Albert and that Albert was killed on June 15, 2018. (R. 436-37).

The State called Detective Davis in rebuttal, who testified that, to his knowledge, Naomi never came to the police station to speak with him or any other officer and that she was not cooperative when he attempted to speak with her on September 7, 2018. (R. 443).

Closing arguments and jury instructions were given at the beginning of the day on November 8, 2018. (R. 459-502). During the deliberations, the jury was brought back to the courtroom to watch the video showing the shooting several times. (R. 503-11). Later that afternoon, the jury returned its verdicts that found Latron guilty of first degree murder, but that the State did not prove beyond a reasonable doubt that he personally discharged a firearm that proximately caused death to another person. (R. 512).

The trial court denied the defense's post-trial motions and sentencing was held on January 31, 2019. (C. 141-44, 147-48; R. 520-25, 530-32). At sentencing, the State presented Detective Patrick Carley whom the parties agreed was a gang expert for the purposes of sentencing. (R. 533-35). He testified about two loosely organized gangs in the area, that there had been an increase and violence between the two groups in 2013, and that the murder of Latifah Cross in May 2013 was part of that violence. (R. 535-37). He further testified that Ollie Williams and Kevin Marshall were members of one of the groups when they pled guilty to the murder of Latifah and that Cross was associated with the other group. (R. 536-37, 539-46, 548-49; SUP5 E. 9-12, 14; People's Exhibit H).

After hearing the parties' arguments, the trial court sentenced Latron to 59 years, asserting its belief Latron believed the entire process was funny, he had no remorse, and that it was going to make an example out of him and anyone else under similar circumstances because of what was going on the community with gun violence. (R. 557-58).

Appeal

On direct appeal, Latron raised four issues: (1) his statutory speedy trial rights were violated because he was not tried within 120 days of his arrest when the trial court erroneously decided 34 days were attributable to him even though the filing of a supplemental discovery disclosure did not cause any actual delay of his trial, (2) the evidence was insufficient to sustain his conviction because Williams made an unreliable identification and had a motive to lie and/or merely assume Latron shot him, (3) the exclusion of Albert's rap video denied Latron his constitutional right to present a defense, and, (4) the trial court relied on unsupported aggravating factors and ignored mitigation factors in sentencing him. *People v. Cross*, 2021 IL App (4th) 190114, ¶ 2.

The Fourth District appellate court affirmed Latron's conviction and sentence, unanimously finding the evidence was sufficient to uphold his conviction, Albert's rap video was properly excluded, and the trial court properly sentenced Latron. *Id.* at ¶¶ 117-21, 131-41, 143-48, 151.

A two-justice majority affirmed Latron's conviction with regard to the speedy trial issue, holding the trial court did not abuse its discretion by attributing the days between August 21, 2018 and September 24, 2018 to Latron because Illinois decisions routinely attributed delay to the defendant without a discussion of moving

the trial date. *Id.* at ¶¶ 85-89, 99, 101. The majority also asserted that the "final catchall phrase" of Illinois Supreme Court Rule 415(g)(i), allowing a trial court to "enter such other order as it deems just under the circumstances," "may" provide support for its position. *Id.* at ¶ 100. It also declined to follow *People v. Boyd*, 363 Ill. App. 3d 1027 (2d Dist. 2006) because it felt that *Boyd* was predicated on misreading this Court's prior decisions regarding speedy trial rights. *Id.* at ¶¶ 104-09.

The dissent reasoned that the majority's reasoning was inapplicable to the situation as Illinois cases, including those relied upon by the majority, consistently held that for a delay to be attributed to the defendant there had to be some actual delay to the trial, whether it was scheduled or not. *Id.* at ¶¶ 153-58 (J. Cavanagh, dissenting). Likewise, it found that *Boyd* properly interpreted this Court's prior decisions. *Id.* at ¶ 156. (J. Cavanagh, dissenting). The dissent also asserted it could find no case that had interpreted Rule 415(g)(i) as to allow a trial court to deprive a defendant of his statutory right to a speedy trial without an actual delay in trial. *Id.* at ¶ 159 (J. Cavanagh, dissenting).

Latron filed a timely petition for leave to appeal and this Court granted leave to appeal on January 26, 2022.

ARGUMENT

This Court should reverse the appellate court majority and find that Latron Cross's speedy trial rights were violated as the trial court abused its discretion when it attributed 34 days of delay to Latron even though a trial date had been scheduled and Latron's supplemental discovery disclosure, made more than a month before the original trial date, did not cause any actual delay in the trial.

Latron Cross was brought to trial after spending 485 days in continuous custody. While the parties agreed to numerous continuances, ultimately 131 days properly attributable to the State passed before his trial began on November 6, 2018, so that Latron was tried outside of the 120-day period statutorily required by 725 ILCS 5/103-5(a) (West 2018). Defense counsel did not file a motion to dismiss the charges based on a speedy trial violation, however, because the trial court had earlier ruled that 34 days, from August 21, 2018, to the scheduled trial date of September 24, 2018, were a delay attributable to Latron. (R. 61-62, 65). The trial court made this decision at the State's request because on August 21, 2018, defense counsel filed a supplemental discovery disclosure that asserted an alibi defense, identified the alibi witness and a defense investigator as trial witnesses, and provided a one page report of the investigator's conversation with the alibi witness. (C. 97; R. 61-62). The trial court attributed those 34 days of delay to Latron even though his scheduled trial date of September 24, 2018 did not change.

This case asks this Court to explicitly say what has long been implied in Illinois law: that for a delay to be attributed to a defendant for the purposes of his statutory speedy trial rights, an action taken by the defendant after his trial date has been scheduled must actually cause a delay in his trial date. Cross first argues that this Court's precedents have long established the straightforward principle that for a delay to be attributable to a defendant for the purposes of his

speedy trial rights in an instance when a defendant's trial has been scheduled, an action by the defendant has to actually delay the start of the trial. The appellate court majority erred in its reasoning because it relied on decisions in which delay was attributed to a defendant for filing motions or other actions that prevented the trial court from setting a trial date in the first place; it then held that a delay could be attributed to Latron for an action taken *after* a trial had been scheduled even if his supplemental disclosure did not cause any change in that trial date. *People v. Cross*, 2021 IL App (4th) 190114, ¶¶ 85-89, 99, 101.

Second, Illinois Supreme Court Rule 415(g)(i) does not support the trial court's decision to attribute 34 days of delay to Latron because discovery sanctions are meant to cure any prejudice a party may suffer from a supposed discovery violation. As defense counsel timely filed a supplemental discovery disclosure within days of learning of the alibi witness and the State never sought a continuance of the scheduled trial date, the State did not suffer any prejudice, so no sanction was justified. Accordingly, the appellate court majority's assertion that its decision "may" be supported by the "final catchall phrase" of Rule 415(g)(i) is at odds with Illinois law. *Cross*, 2021 IL App (4th) 190114, ¶ 100. Finally, while defense counsel did not preserve this issue in a motion for new trial, this Court should reach this issue as plain error or, in the alternative, review the case as defense counsel provided ineffective assistance.

Because the trial court abused its discretion and Latron was tried outside of the required 120-day period, this Court should reverse the appellate court majority and reverse his conviction.

A. The appellate court majority misinterpreted this Court's longstanding precedents when it held that the trial court

did not abuse its discretion by attributing 34 days of delay to Latron for filing a supplemental discovery disclosure that did not postpone the previously scheduled trial date.

A defendant's fundamental right to a speedy trial is guaranteed by both the United States and Illinois Constitutions, as well as by the Illinois Speedy Trial Act ("the Act"). U.S. Const., amends. VI, XIV; Ill. Const., 1970, art. I, § 8; 725 ILCS 5/103-5; *People v. Ladd*, 185 Ill. 2d 602, 607 (1999). The Act directs that, "[e]very person in custody in this State for an alleged offense shall be tried by the court having jurisdiction within 120 days from the date he or she was taken into custody unless *delay is occasioned by the defendant*." 725 ILCS 5/103-5(a) (emphasis added). "Delay 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.*

This Court long ago established the standards for determining whether "delay is occasioned by the defendant." "Proof of a violation of the statutory right requires only that the defendant has not been tried within the period set by statute and that defendant has not caused or contributed to the delays." *People v. Staten*, 159 Ill. 2d 419, 426 (1994) (citing *People v. Richards*, 81 Ill. 2d 454, 459 (1980)). Specifically, a "delay is occasioned by the defendant and charged to the defendant when the defendant's acts caused or contributed to a delay resulting in the postponement of trial." *People v. Kliner*, 185 Ill. 2d 81, 114 (1998) (citing *People v. Turner*, 128 Ill. 2d 540, 550 (1989), and *People v. Reimolds*, 92 Ill. 2d 101, 106 (1982)).

"Defendants who rely on the statutory right are not required to show prejudice resulting from the delay in trial or other factors that are part of the burden of

establishing a violation of the constitutional right to a speedy trial." *Staten*, 159 Ill. 2d at 426-27. Because the Act enforces the constitutional right to a speedy trial, its protections are liberally construed in favor of the defendant. *Ladd*, 185 Ill. 2d at 607 (citing *People v. Beyah*, 67 Ill. 2d 423, 427 (1977)).

Likewise, it has been long established that a defendant's action of filing a pre-trial motion is an action that causes delay attributable to the defendant because it "eliminates the possibility that the case could be immediately set for trial." *People v. McDonald*, 168 Ill. 2d 420, 440 (1995) (citing *People v. Donalson*, 64 Ill. 2d 536, 542 (1976)), *abrogated on other grounds by People v. Clemons*, 2021 IL 107821. "The defendant bears the burden of affirmatively establishing a speedy-trial violation, and in making his proof, the defendant must show that the delay was not attributable to his own conduct." *Kliner*, 185 Ill. 2d at 114 (citing *People v. Jones*, 104 Ill.2d 268, 280 (1984)). If more than 120 days not attributable to the defense pass before an incarcerated defendant is tried, the defendant is entitled to discharge from custody and the dismissal of the charges. 725 ILCS 5/103-5(d); 725 ILCS 5/114-1(a)(1) (West 2018); *People v. Woodrum*, 223 Ill. 2d 286, 299 (2006); *see also Ladd*, 185 Ill. 2d at 608 ("Whether delay should be attributed to the defense depends on whether the defendant's actions *in fact* caused or contributed to a delay.") (emphasis added); *People v. Boyd*, 363 Ill. App. 3d 1027, 1037 (2d Dist. 2006) (relying on five decisions of this Court when concluding a delay occasioned by the defendant required an act that "caused or contributed to a *delay resulting in the postponement of trial*.") (emphasis in original). "The trial court's determination as to who is responsible for a delay of the trial is entitled to much deference, and should be sustained absent a clear showing that the trial

court abused its discretion." *Kliner*, 185 Ill. 2d at 115.

In this case, the trial court abused its discretion because it attributed delay to Latron when there was no actual postponement of the scheduled trial date attributable to him. On July 16, 2018, defense counsel answered ready for trial and demanded a speedy trial. (R. 54). The State acknowledged the speedy trial term would run on October 27, 2018, and proposed a trial date of September 24, 2018. (R. 54-55). The parties agreed on that date and the trial court ordered that the delay from July 16th to September 24th would be attributable to the State. (R. 55).

On August 21, 2018, the defense filed a supplemental disclosure that asserted an alibi defense, identified Naomi Cross as the witness, and provided the one page report prepared by the defense investigator who interviewed her. (C. 97). That same day, the State filed its response and asked for the days between July 16, 2018 and September 24, 2018 now be a delay attributed to Latron. (SUP4 C. 4). The State's filing did not cite any authority for its request, but implied it was an appropriate discovery sanction because the State needed time to investigate the new information, and the alibi was known to Latron when he was appointed counsel on July 12, 2017. (SUP4 C. 4, ¶¶ 3-6). The State's response did not ask for a continuance to investigate, but only claimed the delay should now be attributed to the defense. (SUP4 C. 4).

The parties argued the State's request on August 24, 2018. (R. 58-60). The State did not present any additional argument other than what was in its filing. (R. 59-60). Defense counsel objected to attributing delay to Latron, explaining that he had been ready to go to trial on July 16, 2018, he was still ready to go

to trial, and the supplemental disclosure did not actually cause a delay as the State would have ample time to investigate before trial. (R. 60-61). The trial court then ruled the time from August 21, 2018 to September 24, 2018 would be attributable to Latron, giving no explanation other than to state "because of this late disclosure and because it's something that appears to the Court could have been known, or should have been disclosed, or should have been told to [defense counsel] a long time before August of this year." (R. 61-62). The State then agreed with the trial court that the trial date of September 24, 2018 remained unchanged, and it sought to interview the alibi witness on September 7, 2018. (R. 62, 443).

On September 24, 2018, defense counsel again answered ready for trial and demanded a speedy trial. (R. 65). The State asked for a continuance and the parties agreed to a new trial date of November 6, 2018. (R. 65-66). The trial court directed that the entire time from September 24th to November 6th would be attributable to the State. (R. 66).

The record shows that 18 days of delay were attributed to the State between Latron's arrest and the trial court's finding of probable cause, from July 9, 2017, to July 27, 2017. (C. 11-13; R. 4-8, 14-18). Absent the trial court's error, another 113 days were properly attributable to the State from when defense counsel demanded speedy trial on July 16, 2018, to the first day of trial on November 6, 2018. (R. 54, 65, 112). Thus, 131 days properly attributable to the State passed before Latron's trial began so that he was tried outside of the 120-day period statutorily required by 725 ILCS 5/103-5(a). *See Cross*, 2021 IL App (4th) 190114, ¶ 162 (J. Cavanagh, dissenting).

Illinois law shows that the trial court was wrong to attribute delay to Latron

even though there was no delay in his previously scheduled trial date. The appellate court in *People v. Boyd*, 363 Ill. App. 3d 1027 (2d Dist. 2006) correctly interpreted this Court's authority in regard to this issue and is instructive for this case. In *Boyd*, the defendant was arrested on March 30, 2003, and charged with various battery offenses. 363 Ill. App. 3d at 1034. The speedy trial deadline was set to run on July 28, 2003, but defense counsel agreed on July 2, 2003 to continue the trial to August 26, 2003. *Id.* at 1035. On July 24, 2003, 116 days after the original charges were filed, the State filed new home invasion charges based on the same incident with the arraignment set for the next day. *Id.* at 1034. Defense counsel did not appear and the arraignment was rescheduled and held on August 7, 2003, at which time defense counsel agreed to a trial on all charges for September 30, 2003. *Id.*

The *Boyd* court agreed with the defense's reasoning that there was no delay attributable to the defendant on the home invasion charges until counsel agreed to delay trial from August 26th to September 30th. *Id.* at 1037. This was because a delay attributable to the defendant must involve a postponement of trial. *Id.* The delay in the arraignment on the home invasion charges from July 25th to August 7th did not change the original trial date of August 26th, so that time was not attributable to the defense. *Id.* at 1037-38. Since the 120-day speedy trial period ran four days after the home invasion charges were filed, the defendant was entitled to have those charges dismissed because defense counsel was ineffective for failing to invoke his speedy trial rights. *Id.* at 1038-39.

Also instructive is this Court's decision in *Ladd*. In that case, the defendant filed a motion to dismiss charges on June 26, 1995, and a hearing on the motion

was set for July 12, 1995. *Ladd*, 185 Ill. 2d at 605. Nothing occurred on that date and the motions were ultimately disposed of just before trial, on October 16, 1995. *Id.* The only delay this Court attributed to the defendant was from the filing of the motion to July 12th; this Court did not attribute any delay to the defendant past the original July 12th hearing date because nothing showed the motion delayed the proceedings in any way past that date. *Id.* at 609. This Court noted the motions were uncomplicated, did not require extensive preparation by the State, and were ultimately disposed of after very brief argument by the State. *Id.*; *see also People v. Lendabarker*, 215 Ill. App. 3d 540, 554 (2d Dist. 1991) (finding that since the State obtained a continuance resulting in a scheduled trial date of April 10, 1989, the four days between April 6, 1989, when defense counsel sought a trial date continuance, and the original trial date were attributable to the State because it originally requested the continuance, and the "*actual* delay chargeable to [the] defendant did not begin until April 10, when his attorney was engaged in another trial") (emphasis in original).

Just as in *Ladd*, *Boyd*, and *Lendabarker*, the trial court abused its discretion when it attributed a 34-day delay to Latron from August 21, 2018 to September 24, 2018 once he filed a supplemental disclosure that asserted an alibi defense. (C. 97). The State never claimed it was unable to proceed because it had insufficient time to investigate the new disclosures in either its written response, at the hearing on that response, or at the scheduled trial date of September 24, 2018. (SUP4 C. 4; R. 59-62, 65-67). If it had needed more time, it could have requested a continuance under 725 ILCS 5/103-5(c), which expressly allows a trial court to grant the State additional time to obtain evidence material to the case as long

as the State explains why it needs additional time.

The appellate court majority erred, therefore, when it found the trial court did not abuse its discretion when it attributed 34 days of delay between August 21, 2018 to September 24, 2018 to Latron when there was no change in the scheduled trial date. The appellate court majority is correct that delay can be attributable to a defendant without considering the actual movement of the trial date when the action at issue, such as filing a pre-trial motion to suppress evidence, takes place *before* a trial date was established. *Cross*, 2021 IL App (4th) 190114, ¶¶ 85-86, 99, 108 (citing to *People v. Cordell*, 223 Ill. 2d 380 (2006), *McDonald*, *Jones*, *People v. Grant*, 68 Ill. 2d 1 (1977), *Donalson*, and *People v. Rankins*, 18 Ill. 2d 260 (1960)).

That is not the circumstances of this case, however, and, as the dissent ably explained, none of the decisions of this Court support the appellate court majority's ultimate conclusion that a delay can be attributed to a defendant for an action taken *after* a trial date had been scheduled when the action did not cause a change in the scheduled trial date. *Id.* at ¶¶ 153-55 (J. Cavanagh, dissenting). This Court has consistently required that there be an actual delay of a scheduled trial date or a delay in being able to schedule a trial date in order to attribute a delay to a defendant. *See Ladd*, 185 Ill. 2d at 608 ("Whether delay should be attributed to the defense depends on whether the defendant's actions *in fact* caused or contributed to a delay.") (emphasis added); *McDonald*, 168 Ill. 2d at 440 (stating that filing a pre-trial motion is an action that causes delay attributable to the defendant because it "eliminates the possibility that the case could be immediately set for trial").

Given that the protections of the Act are liberally construed in favor of a defendant and this Court's clear precedent that delay is attributable to the defendant only if there is an actual delay in the scheduled trial date or a delay in the ability to schedule a trial date, and there was no such delay in this case, this Court should reverse the appellate court majority's decision that the trial court did not abuse its discretion.

B. This Court's rules governing discovery do not support the trial court's decision to attribute 34 days of delay to Latron for filing his supplemental discovery disclosure when the State never sought to delay the trial and never explained how it was prejudiced by the supplemental disclosure.

In affirming the trial court's decision to attribute 34 days of delay to Latron, the appellate court majority asserted without explanation that the "final catchall phrase" for possible sanctions for a discovery violation under Illinois Supreme Court Rule 415(g)(i) "*may* provide some authority for the trial court in this case to attribute the days in question to defendant as a penalty for noncompliance with Rule 413(d)(i)." *Cross*, 2021 IL App (4th) 190114, ¶ 100 (emphasis added). This assertion, however, ignores the long established principle that sanctions for discovery violations are to further the purpose of the discovery rules and not to punish the offending party. The appellate court majority also failed to address that the State never explained why attributing delay to Latron was necessary for it to be ready for trial on September 24, 2018. (SUP4 C. 4-5; R. 59-62). As the State was not prejudiced by Latron's supplemental disclosure, no sanction was warranted, so the trial court attributing 34 days of delay was solely punishment.

As an initial matter, the record does not support the State's and appellate court majority's assertion the defense was in noncompliance with Rule 413(d)(i).

Cross, 2021 IL App (4th) 190144, ¶ 100; (SUP C. 4; R. 61). This rule requires that within a reasonable time "*defense counsel* shall inform the State of any defenses *which he intends* to make at a hearing or trial" and provide the State with the name, address, and statement of any witness he intends to call as a witness. Ill. S. Ct. Rule 413(d)(i) (emphasis added). Defense counsel answered ready for trial on July 16, 2018, planning to rely on the State's inability to prove Latron guilty beyond a reasonable doubt, and only learned of the potential alibi defense on August 15, 2018. (R. 54, 61). Counsel took a few days to investigate the potential alibi witness and disclosed the required information to the State six days later, on August 21, 2018. (C. 97-98; R. 61).

Counsel's actions, therefore, were consistent with his continuing duty to disclose discovery under Rule 415(b) in that he disclosed his intent to present an alibi defense in a timely manner once he made that decision. Both parties made supplemental discovery disclosures as the case awaited trial. In fact, the State made five disclosures and the defense one disclosure between September 19, 2018 and November 2, 2018. (C. 100, 103, 106, 110, 112, 118). The State's and majority's insistence that the defense did not comply with Rule 413(d)(i) is premised on their belief Latron *should* have spoken to his counsel earlier about the potential alibi witness. While Latron *could* have spoken to counsel earlier, nothing in Rule 413 requires a criminal defendant to speak to his attorney, nor does the State's desire that a defendant speak to his attorney sooner provide a basis for a discovery violation. Because counsel timely disclosed the alibi defense and witness once he intended to use that information, no discovery violation took place.

Assuming *arguendo* that the supplemental discovery disclosure violated

Rule 413(d), Rule 415(g)(i)'s broad catchall phrase of "enter such other order as it seems just under the circumstance" does not support the drastic sanction of attributing 34 days of delay to Latron, as doing so contravened the purpose of the discovery rules. Illinois courts have long recognized that the purpose of the discovery rules is "'to prevent surprise or unfair advantage and to aid in the search for the truth.'" *People v. Tally*, 2014 IL App (5th) 120349, ¶ 27 (quoting *People v. Daniels*, 75 Ill. App. 3d 35, 41 (1st Dist. 1979)); *see also Wardius v. Oregon*, 412 U.S. 470, 473-75 (1973) (stating that the ultimate purpose of discovery mechanisms is to increase the evidence available to all parties); Ill. S. Ct. Rule 413, Committee Comments para. (d) (discussing that the general justification of discovery is to "eliminate unfair surprise"). Moreover, the purpose of a sanction is to further the purpose of the discovery rules, not to punish the offending party, and a sanction should not encroach on a party's right to a fair trial. *Tally*, 2014 IL App (5th) 120349, ¶ 27; *People v. Houser*, 305 Ill. App. 3d 384, 391 (4th Dist. 1999); s*ee also People v. Ramsey*, 239 Ill. 2d 342, 427-28 (2010) (generally agreeing with *People v. Hawkins*, 235 Ill. App. 3d 39, 43 (5th Dist. 1992), "that the purpose of sanctions for discovery violations is to compel the party's compliance with discovery, not to punish him" when deciding whether a discovery sanction imposed on a capital defendant was excessive).

As discussed in the previous section, the State never claimed it was disadvantaged by the defense's August 21, 2018 supplemental discovery disclosure, as it never sought to move the trial date, asserting in its written response only that "[i]t will be necessary for the State to investigate all information provided by the defense." (SUP4 C. 4, ¶ 5; R. 59-62, 65-67). Nor did attributing 34 days

of delay to Latron for the time between August 21, 2018 and September 24, 2018 further the purpose of discovery, as the disclosure of his alibi defense had already been made and the State had a month to seek to interview the alibi witness, which it did on September 7, 2018. (R.443). Instead, attributing those 34 days of delay to Latron merely punished him, which was inappropriate, because continuances are the preferred sanction to cure an actual disadvantage suffered by the State due a late disclosure by the defense. *Tally*, 2014 IL App (5th) 120349, ¶ 30; *see also People v. Turner*, 367 Ill. App. 3d 490, 501 (2d Dist. 2006) ("When a violation is a failure to disclose information in a timely fashion, a recess or a continuance is the preferred sanction, as it protects the injured party from the consequences of surprise or prejudice.").

Finally, as detailed by the dissent, the appellate court majority's reliance on *People v. Murphy*, 47 Ill. App. 3d 278, 283 (2d Dist. 1977) is misplaced, as that decision did not hold that a failure to comply with a discovery order would justify a sanction of attributing delay to the defendant. *Cross*, 2021 IL App (4th) 190114, ¶ 159 (J. Cavanagh, dissenting). Instead, the *Murphy* court addressed a situation in which defense counsel's handling of discovery had caused a delay in trial, and whether that delay could be attributed to the defendant. *Id.* (citing *Murphy*, 47 Ill. App. 3d at 282).

Accordingly, Rule 415(g)(i) does not support the trial court's sanction, because the State never sought a delay in trial or explained how Latron's supplemental discovery disclosure prevented it from being prepared for trial. Moreover, no authority supports the appellate court majority's suggestion Rule 415(g)(i) may provide support for its decision as attributing 34 days of delay to Latron did not

further the purpose of the discovery rules.

C. Defense counsel's failure to include this issue in his motion for new trial does not preclude review by this Court as Latron's right to a speedy trial is a fundamental right and defense counsel provided ineffective assistance of counsel by failing to preserve Latron's right to a speedy trial.

As demonstrated in the previous two sections, the appellate court majority incorrectly held the trial court properly attributed 34 days of delay to Latron even though his supplemental discovery disclosure did not change the scheduled trial date. While defense counsel objected to the State's argument to attribute delay to Latron for filing the supplemental disclosure, the issue was not included in the motion for new trial. (SUP2 C. 23-25; R. 60-61). Just as the appellate court found no bar to reviewing this issue, this Court should review the issue for plain error.

As this Court has established, under the plain-error doctrine, a reviewing court may consider unpreserved errors when either: (1) the evidence is close, regardless of the seriousness of the error, or (2) when the error is serious, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). A defendant's statutory right to a speedy trial has its underpinnings in the Federal and Illinois Constitutions and is a fundamental right appropriately reviewed for plain error. *People v. Gay*, 376 Ill. App. 3d 796, 799 (4th Dist. 2007) (citing *People v. Cane*, 195 Ill. 2d 42, 46 (2001)); *see also People v. McKinney*, 2011 IL App (1st) 100317, ¶ 29 (finding speedy-trial right is fundamental, so issue reviewable as second-prong plain error). Accordingly, this Court should review the trial court's decision to attribute 34 days of delay to Latron so as to exceed the 120-day speedy trial period for plain error.

Alternatively, this Court should also review the issue as ineffective assistance of counsel for trial counsel's failing to adequately preserve Latron's right to a speedy trial and preserve the issue for review on appeal. A criminal defendant is guaranteed the right to effective assistance of counsel. U.S. Const. amends. VI, XIV; Ill. Const. 1970, art. I, § 8. A defendant is deprived of effective assistance where: (1) counsel's performance fell below an objective standard of reasonable representation; and (2) the deficient performance prejudiced the defense in that counsel's errors deprived the defendant of a fair trial with a reliable result. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Albanese*, 104 Ill. 2d 504, 526 (1984) (adopting *Strickland* standard).

This Court has previously concluded that failing to move for dismissal on speedy trial grounds when dismissal would likely be granted constitutes ineffective assistance:

> An attorney's failure to seek discharge of his client on speedy-trial grounds generally will be deemed ineffective assistance of counsel if there is a reasonable probability that the defendant would have been discharged had a timely motion for discharge been made and no justification has been proffered for the attorney's failure to bring such a motion.

People v. Staten, 159 Ill. 2d 419, 431 (1994); *see also People v. Mooney*, 2019 IL App (3d) 150607, ¶ 30 ("Where counsel's actions serve to undermine [the defendant's] right [to a speedy trial], those actions must be subject to an ineffectiveness challenge."); *People v. Boyd*, 363 Ill. App. 3d 1027, 1038-39 (2d Dist. 2006) (finding counsel ineffective where she allowed her client to stand trial on a count that could have been discharged on speedy trial grounds).

Of the few decisions addressing this issue, *Mooney* is the most instructive. In *Mooney*, defense counsel answered ready for trial on January 5, 2015, but then

agreed to two continuances that extended the trial term beyond the 160 days allowed for non-custodial defendants. 2019 IL App (3d) 150607, ¶ 23. Because counsel answered ready for trial on January 5th, there was "no apparent trial strategy motive for agreeing to any delay" so the appellate court held counsel was ineffective for failing to "zealously protect" her client's speedy trial rights by agreeing to the two continuances. *Id.* at ¶¶ 24-25. The court also found counsel's deficient performance prejudiced her client because had counsel not agreed to toll the speedy trial term, there was a reasonable likelihood the defendant's charges would have been dropped. *Id.* at ¶ 31.

Here, defense counsel announced he was ready for trial and demanded speedy trial on July 16, 2018, he maintained that demand until trial began on November 6, 2018, and he objected to the State's request that 34 days be attributed to Latron because of counsel's supplemental disclosure of an alibi defense. (R. 54, 59-62, 65). Since counsel had objected to the trial court's decision there was no strategic reason not to preserve the issue for appellate review; nor could there be any apparent strategic benefit to Latron from counsel agreeing to a trial date of November 6, 2018, which was past the 120-day statutory period, as counsel had opposed the State's attempt to attribute the 34 day of delay to Latron. *See Mooney*, 2019 IL App (3d) 150607, ¶ 24. Because defense counsel had answered ready for trial and was attempting to enforce Latron's right to a speedy trial by demanding a trial, "defense counsel was duty-bound to zealously protect that right." *Id.* at ¶ 25. Defense counsel's failure to enforce Latron's speedy trial right by filing a motion to dismiss the charges in the trial court or preserve the issue for appellate review was objectively unreasonable under prevailing professional norms, and it rendered

counsel's performance deficient. *See id.*

In addition, defense counsel's deficient performance was prejudicial because had counsel effectively preserved Latron's right to appeal this speedy trial issue, the outcome of Latron's case would have been different. As discussed in the first section, defense counsel's supplemental disclosure did not cause an actual delay to Latron's trial, so the trial court abused its discretion when it attributed 34 days of delay from August 21, 2018 to September 24, 2018 to him. Counsel's failure to preserve this issue prejudiced Latron as there is a reasonable likelihood the case would have been dismissed due to a speedy trial violation. *See Mooney*, 2019 IL App (3d) 150607, ¶ 27 (finding that counsel's deficient performance of agreeing to toll the speedy trial clock prejudiced the defendant).

The appellate court majority's conclusion that defense counsel was not ineffective is based solely on its erroneous finding the trial court did not abuse its discretion when it attributed 34 days of delay to Latron. *Cross*, 2021 IL App (4th) 190114, ¶ 101. Nor is there any merit in the majority's comment in *dicta* that defense counsel had little guidance in how to precede on this speedy trial issue. *Id.* at ¶ 102. The text of section 103-5(a) required a defendant to actually delay trial before delay was attributable to the defendant, this Court's previous decisions made clear a defendant's actions had to prevent the setting of a trial date or an actual delay in a scheduled trial, and *Boyd* had been decided more than a decade earlier. Thus, defense counsel had plenty of guidance to know he should protect Latron's speedy trial rights. *See Cross*, 2021 IL App (4th) 190114, ¶ 161 (J. Cavanagh, dissenting). Moreover, given defense counsel had initially opposed the trial court's decision to attribute 34 days of delay to Latron, he needed no further

guidance other than to continue to assert the same legal position in a motion to dismiss the charges for a violation of Latron's speedy trial rights and include the issue in a motion for new trial.

Latron's trial began on November 6, 2018, which was past the 120-day speedy trial period as defense counsel had consistently demanded speedy trial for the 113 days from July 16, 2018, to the start of trial, and 18 days had elapsed between Latron's arrest and his preliminary hearing. (R. 14-15, 319-21). Accordingly, this Court should review the merits of this issue, reverse the appellate court, and order that Latron's conviction be reversed because he was not tried within the 120-day statutory period.

CONCLUSION

For the foregoing reasons, Latron Cross, defendant-appellant, respectfully requests that this Court reverse the appellate court and order that his conviction be reversed.

Respectfully submitted,

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COUNSEL FOR DEFENDANT-APPELLANT

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342, is 31 pages.

/s/Christopher G. Evers
CHRISTOPHER G. EVERS
Assistant Appellate Defender

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APPEAL TO THE APPELLATE COURT OF ILLINOIS

FOURTH JUDICIAL DISTRICT

FROM THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT

VERMILION COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS

Plaintiff/Petitioner

Reviewing Court No: 4-19-0114
Circuit Court No: 2017CF000476
Trial Judge: NANCY S FAHEY

v.

LATRON CROSS

Defendant/Respondent

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Report of Proceedings ("R")

2021 IL App (4th) 190114

NO. 4-19-0114

FILED
October 21, 2021
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. LATRON Y. CROSS, Defendant-Appellant.	) Appeal from the) Circuit Court of) Vermilion County) No. 17CF476)) Honorable) Nancy S. Fahey,) Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court, with opinion.
Justice Holder White concurred in the judgment and opinion.
Justice Cavanagh concurred in part and dissented in part, with opinion.

OPINION

¶ 1 In November 2018, a jury found defendant, Latron Y. Cross, guilty of the first degree murder of Ollie Williams. See 720 ILCS 5/9-1(a)(1), (2) (West 2016). The trial court sentenced defendant to 59 years in prison.

¶ 2 Defendant appeals, arguing the trial court erred because (1) defendant was not tried within 120 days of his arrest in violation of his statutory right to a speedy trial, (2) the State did not prove defendant guilty of first degree murder beyond a reasonable doubt, (3) the trial court denied defendant his constitutional right to present a defense when it barred him from presenting evidence that another man, Albert Gardner, made a video in which Gardner took credit for shooting Williams, and (4) the court improperly relied on aggravating factors unsupported by evidence and ignored factors in mitigation when it sentenced defendant.

¶ 3 We disagree and affirm.

¶ 4 I. BACKGROUND

¶ 5 A. The Pretrial Proceedings Regarding Continuances

¶ 6 On July 9, 2017, defendant was charged, arrested, and jailed for the murder of Williams. Defendant was never released from custody.

¶ 7 On July 12, 2017, the trial court informed defendant of the charges, appointed the public defender, and set defendant's preliminary hearing for July 27, 2017. The court also set defendant's bond at $1 million.

¶ 8 On July 26, 2017, the State served upon defendant its motion for pretrial discovery. In its motion, the State requested the following:

> "an Order directing the Defendant and his attorney:
>
> 1. To give written notice to the People of the State of Illinois of any defenses, affirmative or non-affirmative, which the Defendant intends to assert at any hearing or at trial. RULE 413(d)
>
> 2. To furnish in writing to the People of the State of Illinois the names and last known addresses of persons the Defendant intends to call as witnesses, together with their relevant written or recorded statements, including memoranda reporting or summarizing their oral statements, and record of prior criminal convictions of such witnesses known to the defendant or his attorney. RULE 413(c)."

See Ill. S. Ct. R. 413(d)(iii) (eff. July 1, 1982) ("[I]f the defendant intends to prove an alibi, [he must furnish to the State] specific information as to the place where he maintains he was at the time of the alleged offense.").

¶ 9 On July 27, 2017, the trial court conducted defendant's preliminary hearing and found that the State had established probable cause, following which defendant agreed to a continuance. That same day, the court made a docket entry in which it ordered that defendant had "30 days to respond to discovery."

¶ 10 Over the next year, defendant made six motions to continue on the following dates: September 13 and 21, 2017; November 20, 2017; and January 16, March 19, and June 18, 2018. The trial court granted all of those motions, each time attributing the delay to defendant. On June 18, 2018, when granting defendant's sixth and final motion for a continuance, the court scheduled a pretrial hearing for July 16, 2018.

¶ 11 On July 16, 2018, the trial court conducted a pretrial hearing, at which the court inquired about the status of the case. Defense counsel responded, "Your Honor, at this point I'm answering ready for trial and demanding speedy trial." The State responded that it was not ready and asked if the court "would be willing to set it on September 24th[, 2018]." The court agreed to that date and ruled that the delay was attributable to the State.

¶ 12 On August 21, 2018, defense counsel filed a document, titled "Supplemental Disclosure I to the Prosecution," in which he raised an alibi defense, identifying Naomi Cross, who was defendant's grandmother, as the alibi witness. Attached to the supplemental disclosure was a one-page report by an investigator, Steven Blaine, who had interviewed Naomi Cross.

¶ 13 Later that same day, the State responded to the alibi disclosure by filing a document titled "People's Response to Defense Motion Demand For Speedy Trial in Lieu of Defense Disclosure I on August 21, 2018" (People's Response). Therein, the State claimed that all of the information regarding the asserted alibi would have been known to defendant since July 12, 2017, when the trial court appointed defense counsel. According to the State, "[d]efense counsel ha[d]

advised that there [would] be additional witnesses and statements forthcoming in disclosure" all of which the State would have to investigate. The State argued that the time since July 16, 2018, should be retroactively attributed to defendant because of defendant's late disclosure to defense counsel regarding any possible defenses. The State requested a judicial determination "that the time since July 16, 2018[,] to the next trial date of September 24, 2018[,] be [a] delay attributable to the defense."

¶ 14 On August 24, 2018, the trial court conducted a hearing on the People's Response at which the prosecutor reiterated the request in her motion. Defense counsel opposed that request and reminded the court that on July 16, 2018, defense counsel (1) announced his readiness for trial and (2) demanded a speedy trial. "We were ready to proceed on that day," he said. Subsequently, he "received new information," which he disclosed to the State as soon as he received it. Defense counsel noted that because "[t]he trial date [was] still approximately one month out," the State had "ample time" to investigate "one witness." Counsel added that "I don't believe at this point it's appropriate to attribute any delay to [defendant], because at this point, I don't know that there is a delay."

¶ 15 After considering these arguments, the trial court decided to split the difference and "attribute the delay from [July 16 to August 21, 2018,] to the State" but to attribute "the delay *** from [August 21 to September 24, 2018,] to the [d]efendant, because of this late disclosure." After so ruling, the court reminded the parties that "the trial date for September 24, 2018, at 9:00 a.m. still stands at this time."

¶ 16 At the next hearing, on September 24, 2018, the trial court inquired regarding the status of the case. Defense counsel answered, "Your Honor, it's actually set for trial today. The

speedy trial demand had been tolled. I'm going to be answering ready and demanding speedy [trial] again this morning." Again, however, the State moved to continue, explaining as follows:

> "Your Honor, at this time the State is moving to continue. [Defense counsel] and I have had conversations based upon other scheduling that was canceled to try this case the week of November 5th, if possible. It appears we agree that the speedy [trial term] would run November 29th of 2018. I have contacted my experts, they are available that week. And there was additional discovery that [defense counsel] had tendered to me, I have tendered supplementals to [defense counsel] and indicated to him the circumstances around my cellular phone record expert."

¶ 17 The trial court ruled as follows:

> "So State motion to continue over the objection of the Defendant, who announces ready for trial pursuant to the Speedy Trial Statute. The delay would be attributable to the State. *** [W]e are going to set it for trial actually November 6, 2018, at 9:00 AM."

¶ 18 B. The Pretrial Motions Pertaining to Evidence

¶ 19 In November 2018, the trial court conducted a hearing at which it heard the parties' pretrial motions. The State moved in limine to impeach defendant, if he testified, with a 2013 unlawful possession of a weapon by a felon conviction, a 2013 mob action conviction, and a 2010 burglary conviction. The court denied the State's motion as to the possession of a weapon by a felon conviction but granted it as to the others.

¶ 20 The State also moved in limine to introduce, as a dying declaration and excited utterance, Williams's statement that defendant shot him, and the trial court granted that motion.

¶ 21 Defendant moved in limine that he be allowed to introduce at trial a rap video made by defendant's cousin, Albert Gardner, which defendant argued was a third-party confession to the shooting of Williams. In the video, Gardner raps, "Nigga shot up Granny house. Had to hunt him down. He gone. Where he at? Body resting in the fucking ground. He gone."

¶ 22 In support of this motion, defendant noted that Naomi Cross was the grandmother of both Gardner and defendant. Defendant further argued that (1) defendant's sister, Latifa Cross, was killed when people shot up Naomi's house and (2) of the two men who pleaded guilty to Latifa's murder, Williams was now dead while the other man remained alive. Defendant asserted he would present evidence that on the very morning of the shooting, Gardner borrowed from defendant the car linked to Williams's shooting.

¶ 23 Defendant acknowledged that Gardner could not testify himself because he was later shot and killed in June 2018, but counsel argued that other relevant factors suggested Gardner's confession was trustworthy. The court denied defendant's motion, concluding that sufficient indicia of trustworthiness did not exist.

¶ 24 C. The Jury Trial

¶ 25 Later in November 2018, the trial court conducted defendant's jury trial.

¶ 26 1. The State's Evidence

¶ 27 Julie Groppi testified that she was a bus driver for Danville Mass Transit on July 7, 2017. Just before 1 p.m. that date, while driving her route, she saw a shooting, and it was captured on the cameras mounted on her bus. Groppi testified that she saw a car and a man on a bike approaching her bus on her side of the road instead of the side they were supposed to be on. (We note that other witnesses would later identify the man on the bike as Williams. For clarity, we will refer to him as Williams, even though Groppi never identified him as Williams.) She testified that

Williams was "trying to go [a] really pretty good speed, you know. It looked like he was trying to get away from that car." The car came up to the bike, at which point Williams wobbled on the bike and then fell into a ditch. Groppi thought the car might have hit him and stopped her bus to ask if he was alright. Williams asked her to call an ambulance, but Groppi explained she had already called dispatch for an ambulance and police. Another man walked up, and Groppi requested that he stay with Williams because she needed to continue with her route. During Groppi's conversation with Williams, he never told her that he had been shot.

¶ 28 Groppi identified a DVD that showed the camera views from the front of her bus and its front door. The State played the first video, which showed the car come up to the bike and Williams fall into the ditch. We note that the car was later identified as a blue, four-door, 2008 Chevrolet Impala owned by Latina Jones, defendant's former girlfriend. The State played the second video, which showed the interaction when Groppi pulled up to speak with Williams.

¶ 29 Antez Baxytum testified that on July 7, 2017, she was 13 years old and was walking down the street when she heard what she thought were firecrackers. Baxytum turned and saw a man fall off a bike into a ditch. A car sped away, and Baxytum did not see more than one person in the car. Baxytum could not remember if the driver was a man or a woman. Baxytum acknowledged that she told a detective a few days after the incident that (1) a black man was driving the car and (2) she estimated two or three other black men were in the car.

¶ 30 Kelia Howard testified that on July 7, 2017, at around 1 p.m., she was driving on the street in question when she saw a man fall off his bike into a ditch. She stopped to help and called 911 because he appeared injured. She described the man, who was Williams, as angry and hot-tempered. She identified a recording of her 911 call, and the State played it for the jury. In the

recording, Howard could be heard stating that Williams told her he had been shot in the stomach and leg and that the shooter was defendant.

¶ 31 Josh Long testified that he was an officer with the Danville Police Department and he was the first officer to respond to the scene. When he observed Williams, he saw a lot of blood near Williams's right hip. Long testified that Williams asked for an ambulance several times, told Long that defendant shot him, and told Long that defendant was the only person in the car. An ambulance arrived about two minutes later and took Williams to the hospital. No other police officer had a chance to speak with Williams before he died.

¶ 32 Cliff Hegg testified that he was an officer and evidence technician with the Danville Police Department and he collected evidence from the scene. Hegg testified that he collected a Red Bull energy drink can that looked as if it had been freshly discarded. Hegg further testified that he, along with other officers, thoroughly searched for shell casings but never found any. However, Hegg explained that while some firearms, such as semi-automatic pistols, eject shell casings, other firearms, such as revolvers, do not.

¶ 33 The parties then stipulated that an expert would testify that (1) the deoxyribonucleic acid (DNA) in the blood collected from the scene matched Williams and (2) the DNA found on the Red Bull can that Hegg collected did not match Williams or defendant.

¶ 34 Latina Jones testified that she was defendant's former girlfriend and was dating him at the time of the shooting. Defendant spent the night before the shooting at her residence. Jones testified that on the day of the shooting, she gave defendant permission to take her cell phone and her car a blue, four-door, 2008 Chevrolet Impala. Jones stated she was asleep when defendant left, but estimated that he may have left between 10 and 11 a.m.

¶ 35 Jones further testified that on July 7, 2017, the police came to her house "maybe about 12:00, 1:00, maybe," and then later that day around 5:30 p.m. to look for defendant. Jones told the police that she had not spoken with defendant. After the police left the first time, she unsuccessfully tried to contact defendant.

¶ 36 Jones also testified that Gardner was at her house at 5:30 p.m. during the second police visit. After the police left that second time, Gardner gave Jones directions to where her car was parked, and Gardner's girlfriend went with Jones to pick it up. Jones testified that when she got to her car, "Somebody gave [the car keys] to me, walked up and gave them to me." Neither party asked Jones to clarify who this person was. Jones then drove to her sister's house in Champaign.

¶ 37 Jones additionally testified that, later that night, she spoke with defendant and he asked her to come get him in Chicago. The following day, Jones picked up defendant from Chicago and drove him to her sister's residence in Country Club Hills, Illinois, a Chicago suburb. Jones testified that during the drive, they did not talk other than to discuss why Jones did not give the police her car. Jones testified that she knew the police wanted her to call them if she heard from defendant, but she did not call them. Jones testified that on the morning of July 9, 2017, the police came to her sister's home and arrested defendant. Later that day, Jones showed police officers where she had parked her car.

¶ 38 Jones acknowledged that she had previously pleaded guilty to obstruction of justice for her actions in this case and received probation in exchange for her agreement to cooperate and testify against defendant.

¶ 39 Thomas Davis testified that he was a detective with the Danville Police Department and went to Country Club Hills on July 9, 2017. Davis saw Jones's car in Jones's sister's garage.

Davis testified that it appeared that a portion of the driver's side roof was cleaner than the rest of the car.

¶ 40 Tim Lemasters testified that he was a crime scene investigator with the Illinois State Police and he photographed and processed Jones's car for gunshot residue and fingerprints. Lemasters testified that there was a "void" in the dust on top of the car above the driver's door but he could not say who or what caused it. Lemasters's examination revealed possible gunshot residue from the interior and exterior of the driver's side door, and he took samples from those areas. Lemasters also recovered two rags from the front passenger door console that he suspected might have been used to wipe down the car. Lemasters took 16 different fingerprint lifts from the car, focusing on the driver's area.

¶ 41 Ellen Chapman testified that she worked for the Illinois State Police Forensic Science Center in Chicago and explained her expertise in trace evidence analysis and gunshot residue testing. Chapman tested the shorts, shoes, rags, and kit used by Lemasters to take samples from the car. All of her tests were negative for gunshot residue. She explained that a negative result meant that there was no residue on any of the items when she did her tests, but she did not know if residue had been present and removed prior to the tests.

¶ 42 The parties stipulated that, if called to testify, Katharine Mayland would testify as to her expertise in fingerprint analysis and would opine that only eight of the fingerprint lifts collected were good for comparison to defendant and Gardner. She identified three of the fingerprints taken from the interior of the driver's side door as coming from defendant. She concluded that three of the fingerprints from the driver's side door area came from neither defendant nor Gardner. Finally, her analysis of two fingerprints, taken from the interior side of a

screen protector of a cell phone case located in the car, was inconclusive as belonging to either defendant or Gardner.

¶ 43 Shiping Bao testified that he was a medical doctor and forensic medical examiner, and he determined that Williams had two gunshot wounds as well as a minor graze wound. One bullet lodged in the muscles of Williams's right hip and caused a nonfatal injury. The other bullet was recovered from under the skin of Williams's left lateral abdomen and caused the fatal wound. Bao testified that the bullet traveled "from the right to left upwards, back to front, [and] went through the entire liver."

¶ 44 The parties further stipulated that, if called to testify, Carolyn Kersting would testify that she was an expert in the field of firearms analysis and that the two bullets were .380 caliber and fired from the same firearm.

¶ 45 2. The Defendant's Evidence

¶ 46 Naomi Cross testified that she was defendant's grandmother and on July 7, 2017, defendant came to her house in his girlfriend's car at around 8:30 or 9 a.m. to see his daughter, who was staying with Naomi for the summer. Gardner had spent the night at her house and left in the car defendant arrived in around 9:30 or 10 a.m. to take Gardner's friend to court. Gardner did not return that day, and she did not see the car again. Defendant was at her house at 1 p.m., along with several other people, and left around 2:30 or 3 p.m.

¶ 47 Naomi testified that after she heard defendant was arrested, she went to the police station in an attempt to speak with someone. The person she spoke to did not want to hear what she had to say, so she left.

¶ 48 The police did not contact her from July 2017 until sometime in September 2018. No one contacted her about the case until an investigator for the defense spoke with her in August

2018. Naomi testified that she chose not to speak with the police detective who came to speak with her in September 2018 because she had tried to speak with the police earlier and they were not interested in what she had to say.

¶ 49 Defendant testified that he had known Williams since 2004. Defendant knew Williams had pleaded guilty to killing Latifah Cross, defendant's sister, in 2013 but denied knowing Williams was out of prison. Defendant acknowledged that he had been convicted of burglary in 2010 and mob action in 2013.

¶ 50 Defendant testified that on July 7, 2017, he left Jones's house in the morning with her car and phone. Defendant had Jones's phone because his phone's battery had lost its charge and Jones had let him borrow hers. Defendant drove to his grandmother's house and let Gardner borrow the car to take a friend of his to court. Defendant also let Gardner borrow Jones's phone because Gardner was taking a woman out after his errand.

¶ 51 Defendant added that Gardner left in Jones's car around 10 a.m. Defendant stayed at his grandmother's house until a man named Tyrell arrived around 2 p.m. Tyrell told defendant that the police were looking for him, so he joined Tyrell as they drove around in Tyrell's car looking for Jones's car and Gardner. They found neither the car nor Gardner, so they went to Tyrell's house so he could get ready to go to a casino in Chicago.

¶ 52 Defendant testified that a short time later, Gardner knocked on Tyrell's door, and defendant had a heated discussion with him. Gardner returned Jones's phone to defendant and left. Defendant went to Chicago with Tyrell. Later, Jones picked defendant up, and they went to her sister's house where he was arrested on July 9, 2017.

¶ 53 On cross-examination, the State asked, "[W]hen you found out that the police were looking for you, you didn't go to the police station and tell them I have been at my grandma's

house all afternoon, all day?" Defendant responded, "No." The State continued, "You didn't call the police and tell them anything about *** Albert Gardner, right?" Defendant again responded, "No." Defendant also acknowledged that Gardner was killed on June 15, 2018.

¶ 54 3. The State's Rebuttal Evidence

¶ 55 Detective Davis testified that, to his knowledge, Naomi never came to the police station to speak with him or any other officer. He further testified that Naomi was uncooperative when he attempted to speak with her on September 7, 2018.

¶ 56 4. The Jury's Verdict

¶ 57 Following closing arguments, the jury returned a verdict of guilty as to first degree murder but not guilty as to the firearm enhancement.

¶ 58 D. Sentencing

¶ 59 In January 2019, the trial court conducted defendant's sentencing hearing. The State called Patrick Carley, a detective whom the parties stipulated was an expert in gangs. He testified that the Rude Boy Gang and the 450 Gang were rival gangs in Danville. Carley added that an increase in violence between the two gangs began in 2013 and the murder of Latifah Cross in May 2013 was a part of that violence. Carley further testified that Ollie Williams and Kevin Marshall were members of the Hot Boy Gang, a precursor to the 450 Gang, when they pleaded guilty to murdering Latifah.

¶ 60 Carley also testified that State exhibits showed defendant making hand signs associated with the Rude Boy Gang. Carley then identified an exhibit that was a screenshot from the Facebook profile of Antwanne Hall, showing emojis that referenced the shooting of Williams. The post was made the same day that Williams was killed. However, Hall was in prison at the time of the post, and Carley did not know who made the Facebook post. Carley further described other

screenshots and a video that formed the basis of his opinion that defendant was a member of the Rude Boy Gang.

¶ 61 The State recommended 60 years in prison for defendant because (1) he had been committing crimes since he was 15 years old, (2) he shot at Williams when others were around, (3) he and Jones befriended Williams's mother for the sole purpose of obtaining information about Williams, (4) the "cycle of violence needs to stop," and (5) a strong message of deterrence had to be sent.

¶ 62 Defendant recommended a sentence of 20 years in prison, arguing (1) no evidence had been submitted to the jury that the shooting was gang related, (2) no evidence was presented that Williams was in a gang upon his release from prison in 2017, and (3) the insinuation that defendant and Jones befriended Williams's mother to get information about Williams was contradicted by Jones's testimony that she knew Williams's mother for years before the shooting. Defendant further argued that he had earned his GED, took some college courses in prison, and had a relationship with his daughter.

¶ 63 Prior to sentencing defendant, the trial court stated the following:

> "Okay. Well, I've watched in the courtroom this morning and actually throughout the entire time, and you somehow think this is funny. You've been smiling, you've been smirking the whole time even while watching the video, even during the course of the trial. You have shown absolutely no remorse at all for what you did. You think it's funny. It's not funny. It's despicable. It's inexcusable, and I agree with [the State] that what is going on in this community, the back and forth, the hatred, the gun violence has got to stop, and I'm going to make an example out

> of anyone that comes in front of me under similar circumstances that I'm not [going to] tolerate this behavior.
>
> * * *
>
> *** I don't find any factors in mitigation that apply to this case.
>
> When I look at the factors in aggravation[,] I find that your conduct caused or threatened serious harm. Obviously this person died. Mr. Williams died. You have a history of prior delinquency or criminal activity, and most importantly the sentence is necessary to deter others from committing the same crime. And I would show note for the record that [defendant] continues to smile and smirk."

¶ 64 The trial court sentenced defendant to 59 years in prison.

¶ 65 This appeal followed.

¶ 66 II. ANALYSIS

¶ 67 Defendant appeals, arguing the trial court erred because (1) defendant was not tried within 120 days of his arrest, in violation of his statutory right to a speedy trial, (2) defendant's conviction for first degree murder was not proven beyond a reasonable doubt, (3) defendant was denied his constitutional right to present a defense when the trial court prevented him from presenting evidence that Gardner made a video in which Gardner took credit for shooting Williams, and (4) at sentencing, the court improperly relied on aggravating factors unsupported by evidence and ignored factors in mitigation.

¶ 68 We disagree and affirm.

¶ 69 A. The Statutory Speedy-Trial Claim

¶ 70 First, defendant argues that his statutory speedy-trial rights were violated because he was not tried within 120 days of his arrest. Specifically, defendant contends that (1) 131 of

defendant's days spent in pretrial custody should have been attributed to the State, (2) the trial court abused its discretion when it attributed 34 of those 131 days to defendant, and (3) defense counsel was ineffective because he failed at any point in the trial court to file a motion to discharge based upon a speedy-trial violation.

¶ 71 We conclude that (1) the trial court did not abuse its discretion and (2) defendant received effective assistance of counsel.

¶ 72 1. The Speedy-Trial Statute

¶ 73 Under section 103-5(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/103-5(a) (West 2016)) (hereinafter the "speedy-trial statute"), a defendant who is in custody must be tried within 120 days after arrest, excluding certain enumerated delays:

> "(a) Every person in custody in this State for an alleged offense shall be tried by the court having jurisdiction within 120 days from the date he or she was taken into custody unless delay is occasioned by the defendant, by an examination for fitness ordered pursuant to Section 104-13 of this Act [(725 ILCS 5/104-13)], by a fitness hearing, by an adjudication of unfitness to stand trial, by a continuance allowed pursuant to Section 114-4 of this Act [(Id. § 114-4)] after a court's determination of the defendant's physical incapacity for trial, or by an interlocutory appeal. Delay 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. The provisions of this subsection (a) do not apply to a person on bail or recognizance for an offense but who is in custody for a violation of his or her parole, aftercare release, or mandatory supervised release for another offense.

> The 120-day term must be one continuous period of incarceration. In computing the 120-day term, separate periods of incarceration may not be combined. If a defendant is taken into custody a second (or subsequent) time for the same offense, the term will begin again at day zero."

¶ 74 In tallying up the days of the speedy-trial term, courts exclude the first day but include the last day unless it is a Sunday or a holiday. See 5 ILCS 70/1.11 (West 2016); People v. Shaw, 24 Ill. 2d 219, 222, 181 N.E.2d 120, 121-22 (1962). Further, courts are also to exclude from that tally any of the delays described in section 103-5(a), including, most notably, delays "occasioned by the defendant" and delays to which he agreed.

¶ 75 2. The Trial Court's Discretion To Attribute Delays in the Speedy-Trial Term to the Parties

¶ 77 " 'The trial court's determination as to who is responsible for a delay of the [speedy-trial term] is entitled to much deference, and should be sustained absent a clear showing that the trial court abused its discretion.' " People v. Pettis, 2017 IL App (4th) 151006, ¶ 17, 83 N.E.3d 422 (quoting People v. Kliner, 185 Ill. 2d 81, 115, 705 N.E.2d 850, 869 (1998)). "A trial court abuses its discretion when its ruling is arbitrary 'or when no reasonable person would take the view adopted by the trial court.' " People v. Pope, 2020 IL App (4th) 180773, ¶ 28, 157 N.E.3d 1055 (quoting People v. Bates, 2018 IL App (4th) 160255, ¶ 60, 112 N.E.3d 657).

¶ 78 3. Defining Terms

¶ 79 Some confusion has arisen from the use of imprecise terminology when addressing speedy-trial issues. For instance, the final day of the speedy-trial term is sometimes called (1) the discharge date, (2) the final day of the speedy-trial term, or (3) something else entirely. Clearly defined terms are important for our analysis because one of the central questions in this case

indeed, in many if not most speedy-trial cases is what it means to have a "delay *** occasioned by the defendant." 725 ILCS 5/103-5(a) (West 2016). We conclude that in the interest of clarity, parties and courts ought to use the terminology employed by the Illinois Supreme Court.

¶ 80 First, the Illinois Supreme Court has described the "120-days" referred to in the speedy-trial statute as "the speedy-trial term." People v. Sandoval, 236 Ill. 2d 57, 69, 923 N.E.2d 292, 299 (2010). We adopt this terminology and deem it appropriate for use by courts and parties because it clearly and unambiguously identifies the period at issue.

¶ 81 Second, "discharge date" is the term that best describes the final day of the speedy-trial term. While "the final day of the speedy-trial term" is the most descriptive, we recognize that it is simply too lengthy a phrase to readily employ in busy trial courts. Using the term "discharge date" conveys the appropriate information on that date the defendant must be tried or else he or she "must be discharged from custody, and the charges must be dismissed." Kliner, 185 Ill. 2d at 114-15.

¶ 82 Third, "delay" is clearly the appropriate term for any action that slows down the criminal justice process and often directly or indirectly delays trial or the mere possibility of a trial. As we later explain, "delay" is used very broadly by Illinois courts, and any action that "eliminates the possibility that [a] case could be immediately set for trial" counts as delay. People v. McDonald, 168 Ill. 2d 420, 440, 660 N.E.2d 832, 840 (1995), abrogated on other grounds by People v. Clemons, 2012 IL 107821, 968 N.E.2d 1046. In the context of analyzing a particular defendant's speedy-trial term and determining his discharge date, a "delay" or, more precisely, a "delay attributable to the defendant" means a delay of the speedy-trial term, with the effect of moving back that defendant's discharge date. "Delay" does not mean a delay of defendant's trial or trial date, as we explain in greater detail below (infra ¶¶ 84-88).

¶ 83 Fourth, "tolling" is a well-recognized term that is employed in various contexts throughout the law, and it accurately captures what happens when a defendant causes a delay, thereby moving back the discharge date. See, e.g., United States v. Kwai Fun Wong, 575 U.S. 402, 407 (2015); McDonald, 168 Ill. 2d at 438-39 ("Any period of delay found to be occasioned by a defendant tolls the 120-day period under the speedy-trial statute."). Tolling refers to (1) suspending or stopping the running of the statutory speedy-trial term and then (2) having that term begin to run again (with a later discharge date) once whatever the action was that caused the tolling has been concluded. See People v. Cordell, 223 Ill. 2d 380, 391, 860 N.E.2d 323, 330 (2006).

¶ 84 4. The Trial Date Need Not Be Moved for a "Delay"

To Be Attributable to a Defendant

¶ 85 The Illinois Supreme Court has, on numerous occasions in the past 60 years, determined that a delay was attributable to a defendant without considering the actual movement of the trial date as a factor. See, e.g., id. at 390 ("There is nothing in the section [103-5(a)] to indicate that the 'delay' must be of a set trial date. *** To hold otherwise would contravene the purpose of the 120-day period of the section ***."). For example, in People v. Grant, the Illinois Supreme Court noted the trial date in its discussion of the background in that case, but wrote that defendant's motion to sever was per se attributable to the defendant without mentioning anything about moving the trial date. People v. Grant, 68 Ill. 2d 1, 5, 368 N.E.2d 909, 911 (1977) ("[G]ranting of a motion to sever per se tolls the 120-day provision of the 'speedy trial' statute."). In People v. Donalson, 64 Ill. 2d 536, 542, 356 N.E.2d 776, 778 (1976), the Illinois Supreme Court held that the delay caused by the defendant's motion to suppress evidence was attributable to defendant, and in so holding, the supreme court did not mention at all any movement of the trial date in that case. Instead, the court concluded, "The mere filing of the motion eliminated the

possibility that the case could be immediately set for trial. We therefore hold that the filing of the motion to suppress the confession was a delay occasioned by the defendant which tolled the running of the 120-day statutory period." Id.

¶ 86 Other Illinois Supreme Court cases have similar holdings. See People v. Jones, 104 Ill. 2d 268, 277, 472 N.E.2d 455, 459 (1984) (holding, without mentioning any movement of the trial date, that "the delay between the filing of the motion to dismiss and quash the indictment on May 21, 1981, *** and the date that the oral ruling on these motions was made by the court on July 24, 1981, is chargeable to the defendant."); People v. Rankins, 18 Ill. 2d 260, 263, 163 N.E.2d 814, 816 (1960) ("However, by procuring a change of venue on May 14, 1957, defendant occasioned a further delay which again interrupted the running of the four-months term and extended its termination until September, 1957."); McDonald, 168 Ill. 2d at 440 ("Regardless of the disposition of a motion, it has been held that the mere filing of a motion eliminates the possibility that the case could be immediately set for trial. [Citation.] Consequently, any delay resulting from this defendant's filing of his motion is attributable to him.").

¶ 87 The Illinois Appellate Court has also determined that a delay is attributable to a defendant without considering as a factor the actual movement of the trial date. See People v. Tucker-El, 123 Ill. App. 3d 955, 960, 463 N.E.2d 991, 996 (1984) ("The time required to hear and decide a motion for change of venue is delay attributable to the defendant [citation], and the trial court so advised him."); People v. Lilly, 2016 IL App (3d) 140286, ¶ 40, 53 N.E.3d 1028 ("[A]ny type of motion filed by defendant which eliminates the possibility that the case could immediately be set for a trial also constitutes an affirmative act of delay attributable to defendant."); People v. Lendabarker, 215 Ill. App. 3d 540, 553-54, 575 N.E.2d 568, 576-77 (1991) (disagreeing with defendant's argument that "the motion for substitution of judges did not in fact lead to a delay

chargeable to him" and instead concluding that "the filing of the motion and the petition made it impossible to set the case for trial before resolving the motions" (emphasis in original)).

¶ 88 This court has often determined that a delay was attributable to a defendant without considering actual movement of the trial date. Recently, in People v. Hartfield, 2020 IL App (4th) 170787, ¶¶ 39-46, this court determined that a delay was attributable to the defendant and ultimately concluded that,

> "under the plain language of section 103-5(a), an objection to a proposed delay, without a demand for trial, operates as an agreement to the delay period: no exceptions, no limitations, no qualifications. *** It follows that defendant is considered to have agreed to the first continuance and he has no valid statutory speedy-trial claim." Id. ¶ 45.

In other words, in Hartfield, this court determined that the delay was attributable to defendant because his actions amounted to agreement to a delay, and movement of the trial date was not a factor in our determination.

¶ 89 In People v. Phillips, 2017 IL App (4th) 160557, ¶¶ 68-69, 92 N.E.3d 544, and People v. Pettis, 2017 IL App (4th) 151006, ¶¶ 26-30, we likewise determined, without discussing any actual movement of the trial date, that the trial court appropriately attributed a delay to the defendant.

¶ 90 5. The Law Regarding Ineffective Assistance of Counsel

¶ 91 All defendants enjoy the constitutional right to effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. "To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defendant." Pope, 2020 IL App (4th) 180773, ¶ 61.

¶ 92 "To establish deficient performance, a defendant must show his counsel's performance fell below an objective standard of reasonableness." People v. Williams, 2020 IL App (4th) 180554, ¶ 80, 167 N.E.3d 233. It is not sufficient for a defendant to show that counsel's representation was imperfect because the constitution guarantees only a reasonably competent counsel. Harrington v. Richter, 562 U.S. 86, 110 (2011) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)). Instead, a defendant must show his counsel's representation undermined the proper functioning of the adversarial process to such an extent that the defendant was denied a fair trial. Id. (citing Strickland, 466 U.S. at 686).

¶ 93 To show prejudice, a defendant must demonstrate "that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " People v. Domagala, 2013 IL 113688, ¶ 36 (quoting Strickland, 466 U.S. at 694). "The likelihood of a different result must be substantial, not just conceivable." Harrington, 562 U.S. at 112. "A defendant must satisfy both prongs of the Strickland test and a failure to satisfy any one of the prongs precludes a finding of ineffectiveness." People v. Simpson, 2015 IL 116512, ¶ 35, 25 N.E.3d 601.

¶ 94 "Counsel's failure to assert a speedy-trial violation cannot establish either prong of an ineffective assistance claim if there is no lawful basis for raising a speedy-trial objection." People v. Phipps, 238 Ill. 2d 54, 65, 933 N.E.2d 1186, 1192 (2010).

¶ 95 6. This Case

¶ 96 The parties do not dispute the trial court's attribution of the vast majority of delays in this case. Their only dispute is over the trial court's decision regarding 34 of the days that is, the days between defendant's late disclosure of an alibi witness on August 21, 2018, and the next court hearing on September 24, 2018.

¶ 97 As an initial matter, defendant argues that "the State's request to retroactively attribute" the 34 days to defendant was improper. We note that only a small portion of the days in question so attributed to defendant would qualify as "retroactive." The trial court made its decision on August 24, 2018, attributing the days between August 21, 2018, and September 24, 2018, to defendant instead of the State. Only the days between August 21 and 24 could be considered "retroactive."

¶ 98 Of course, even if we were to agree with defendant that the court's retroactive assignment of those four days was improper, it would make no difference. The remaining days would still "make or break" defendant's claim. If the remaining days were properly attributable to defendant, his speedy-trial claim fails. On the other hand, if the trial court abused its discretion by attributing those days to defendant, then defendant prevails on his claim that he was not tried within the speedy-trial term. Because the days between August 21 and 24 do not make a difference in this case, we need not discuss them further.

¶ 99 Defendant argues that the trial court's reassignment of the days between August 24, 2018, and September 24, 2018, was an abuse of discretion. The court erred, in defendant's view, because his late disclosure of Naomi Cross as an alibi witness did not delay the jury trial. We conclude that the trial court did not abuse its discretion by so ruling. In so concluding, we reiterate what we wrote earlier: " 'The trial court's determination as to who is responsible for a delay of the [speedy-trial term] is entitled to much deference, and should be sustained absent a clear showing that the trial court abused its discretion.' " Pettis, 2017 IL App (4th) 151006, ¶ 17 (quoting Kliner, 185 Ill. 2d at 115); see supra ¶ 77. Given the totality of the circumstances before the trial court when it made its decision to reassign the days in question to defendant, thereby tolling the running

of the speedy-trial term and moving back defendant's discharge date, the court's decision to do so was not an abuse of its direction.

¶ 100 We note that some support for this conclusion may be found in Illinois Supreme Court Rule 415(g)(i) (eff. Oct. 1, 1971), which deals with discovery violations. When, in the trial court's judgment, a defendant has violated that obligation, the court could "order such party to permit the discovery of material and information not previously disclosed, grant a continuance, exclude such evidence, or enter such other order as it deems just under the circumstances." Id. That final catchall phrase "enter such other order as it deems just under the circumstances" (id.) may provide some authority for the trial court in this case to attribute the days in question to defendant as a penalty for noncompliance with Rule 413(d)(i). See also People v. Murphy, 47 Ill. App. 3d 278, 283, 361 N.E.2d 842, 846 (1977) ("The defendant's failure to comply with the trial court's discovery order *** constituted delay attributable to defendant."), aff'd, 72 Ill. 2d 421, 381 N.E.2d 677 (1978).

¶ 101 Thus, for the reasons we stated earlier, trial counsel could not have been ineffective for failing to move to dismiss because defendant was not prejudiced by defense counsel's actions related to the speedy-trial statute issue. In other words, had defense counsel so moved, the trial court's denial of that motion would have been correct.

¶ 102 In addition, although our decision does not turn on this issue, we recognize that limited guidance existed for defense counsel when he was determining how to proceed regarding the speedy-trial issue. For us to conclude that defense counsel performed deficiently, defendant must make a showing that defense counsel's action or inaction fell below an objective standard of reasonableness. People v. Evans, 209 Ill. 2d 194, 219-20, 808 N.E.2d 939, 953 (2004). Here, few objective standards existed that defense counsel could use to guide his actions. Insofar as they did

exist, like Illinois Supreme Court Rule 413(d)(i) (eff. July 1, 1982), that authority tended to cut against a dismissal based upon an alleged speedy-trial violation rather than support it. We are reluctant to deem a defense attorney's actions deficient when they have not violated a clear standard.

¶ 103 7. People v. Boyd

¶ 104 We note that defendant heavily relies upon a case from the Second District, People v. Boyd, 363 Ill. App. 3d 1027, 1037, 845 N.E.2d 921, 930 (2006), in which that court held, "Thus, unless the trial date is postponed, there is no delay to attribute to defendant." With all due respect to our sister district, this statement of the law is incorrect, overbroad, and misreads the authority upon which it purports to rest. Because this area of the law is so important and trial courts need clear direction, we explain how Boyd goes awry.

¶ 105 The Boyd court cites People v. Hall, 194 Ill. 2d 305, 326, 743 N.E.2d 521, 534 (2000), as support for its holding. In Hall, the Illinois Supreme Court wrote the following: "A delay is 'occasioned by the defendant' when the defendant's acts caused or contributed to a delay resulting in the postponement of trial." Id. at 326-27. However, a comparison of these words with the words used by the Second District in Boyd reveals a subtle but significant difference. In Hall, the Illinois Supreme Court decided that an action by a defendant that causes an actual delay of trial is sufficient for the court to determine that the delay in the speedy-trial term is attributable to the defendant. However, the Illinois Supreme Court did not say that a delay is occasioned by the defendant only if the defendant's acts caused or contributed to a delay resulting in the postponement of trial such a statement would make the condition necessary rather than merely sufficient. However, the Boyd court committed precisely that error, concluding that a delay is attributable to the defendant only if the trial date is postponed. See generally Norman Swartz, The

Concepts of Necessary Conditions and Sufficient Conditions, Simon Fraser Univ., https://***.sfu.ca/~swartz/conditions1.htm (last visited Oct. 14, 2021) [********perma.cc/33PT-LGCJ].

¶ 106 The remaining cases that Boyd cites similarly do not support its conclusion for the same reason. See Kliner, 185 Ill. 2d at 114 ("A delay is occasioned by the defendant and charged to the defendant when the defendant's acts caused or contributed to a delay resulting in the postponement of trial."); McDonald, 168 Ill. 2d at 438 ("A delay is held to be occasioned by a defendant when a defendant's acts caused or contributed to a delay resulting in the postponement of trial."), abrogated on other grounds by Clemons, 2012 IL 107821; People v. Turner, 128 Ill. 2d 540, 550, 539 N.E.2d 1196, 1199 (1989) ("In determining whether delay is occasioned by the defendant, the criterion is whether his acts in fact caused or contributed to the delay."); People v. Reynolds, 92 Ill. 2d 101, 106, 440 N.E.2d 872, 875 (1982) ("A delay is held to be occasioned by the defendant when the defendant's act in fact caused or contributed to the delay."). Read together, these cases form an unbreaking precedent from the Illinois Supreme Court that a defendant's acts that cause or contribute to a postponement of trial are sufficient for finding that a delay in the speedy-trial term is occasioned by defendant. However, none of these cases and no other cases that we could find stand for the proposition that a postponement of trial is necessary before a defendant can be deemed to have caused a delay under the statute.

¶ 107 Instead, defendant's assertion that the speedy-trial clock is tolled only if the trial date is in fact moved is contrary to longstanding Illinois Supreme Court case law. That court, when analyzing the speedy-trial statute, has written the following:

> "There is nothing in the section to indicate that the 'delay' must be of a set trial date. Rather, the section provides only a starting point the date custody begins, and an ending point 120 days later. Any action by either party or the trial court

> that moves the trial date outside of that 120-day window qualifies as a delay for purposes of the section. To hold otherwise would contravene the purpose of the 120-day period of the section, which is to guarantee a speedy trial and not to open a new procedural loophole which defense counsel could unconscionably use to obstruct the ends of justice." (Emphasis added and internal quotation marks omitted.) Cordell, 223 Ill. 2d at 390.

In other words, defendant's contention and the Second District's decision in Boyd is directly contradicted by the Illinois Supreme Court. (To be fair to the Second District, we note that Boyd was decided before the Illinois Supreme Court issued its decision in Cordell.)

¶ 108 Last, the notion that a delay could only be attributable to a defendant if a set trial date was in fact moved contradicts the Illinois Supreme Court's decisions regarding defendant's actions that per se toll the 120-day statutory speedy-trial period. In People v. Grant, 68 Ill. 2d 1, 5-6, 368 N.E.2d 909, 911 (1977), the Illinois Supreme Court said, "We believe that there is a sound basis for the holdings of the later cases that the granting of a motion to sever per se tolls the 120-day provision of the 'speedy trial' statute." In that same case, the court said, "We have also held that motions for substitution of judges per se toll the 120-day period of the speedy trial statute." Id. at 6. If defendant were correct that the trial court would have needed to move the trial date for a delay to be attributable to defendant, such a per se holding would be impossible.

¶ 109 Because Boyd is predicated on a misreading of Illinois Supreme Court cases, we decline to follow it.

¶ 110 B. The State Proved Defendant Guilty of First Degree Murder Beyond a Reasonable Doubt

¶ 111 Defendant next argues that the State did not prove him guilty of first degree murder beyond a reasonable doubt because the only person who identified defendant as the shooter "made an unreliable identification and had a motive to lie and/or merely assume that [defendant] shot him." We disagree.

¶ 112 1. The Law

¶ 113 The State bears the burden of proving each element of an offense beyond a reasonable doubt. People v. Gray, 2017 IL 120958, ¶ 35, 91 N.E.3d 876. When a defendant challenges his conviction, arguing that the evidence was not sufficient to prove him guilty, a reviewing court (1) considers all of the evidence in the light most favorable to the State and (2) determines whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. People v. Swenson, 2020 IL 124688, ¶ 35.

¶ 114 "It remains the firm holding of this court that the testimony of a single witness, if positive and credible, is sufficient to convict, even though it is contradicted by the defendant." People v. Siguenza-Brito, 235 Ill. 2d 213, 228, 920 N.E.2d 233, 242 (2009). "It is the responsibility of the trier of fact to resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from the facts." People v. Bradford, 2016 IL 118674, ¶ 12, 50 N.E.3d 1112. "[A] court of review will not substitute its judgment for that of the trier of fact on questions involving the weight of the evidence or the credibility of the witnesses." Gray, 2017 IL 120958, ¶ 35.

¶ 115 A reviewing court will not reverse a defendant's conviction "simply because there is contradictory evidence or because the defendant claims a witness was not credible." People v. Mendez, 2013 IL App (4th) 110107, ¶ 17, 985 N.E.2d 1047. "Instead, a reviewing court will

reverse a defendant's conviction only when the evidence is so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt of the defendant's guilt." People v. Sturgeon, 2019 IL App (4th) 170035, ¶ 56, 126 N.E.3d 703.

¶ 116 2. This Case

¶ 117 In this case, the State presented sufficient evidence for the jury to conclude that the State had proved defendant guilty beyond a reasonable doubt. We need not reiterate all of the evidence that was presented at trial but instead focus on some of the most significant evidence.

¶ 118 This case comes down to the credibility of crucial witnesses. The jury clearly believed Williams's statement, heard second-hand through Howard and Officer Long, that defendant was the shooter. Williams's statement was bolstered by the fact that, on the morning of the shooting, defendant borrowed the vehicle that was indisputably used in the shooting.

¶ 119 We also note that the bus driver, Groppi, testified that Williams was "trying to go [at a] really pretty good speed, you know. It looked like he was trying to get away from that car." This observation contributes to the inference that Williams knew who his attacker was and recognized him before the shooting occurred.

¶ 120 Defendant presented some evidence in his favor particularly, his grandmother, Naomi, who testified that defendant was at her house at the time of the shooting. However, because she was defendant's grandmother, the jury could have concluded that she had a strong motive to lie to protect her grandson, and the jury clearly did not believe her. Further, the jury obviously rejected defendant's assertion during closing argument that Williams made an unreliable identification.

¶ 121 In this case, the jury chose to believe Williams and to not believe defendant's grandmother, and we will not substitute our judgment for that of the jury. The evidence shows that the jury's decision was entirely justified.

¶ 122 C. The Trial Court Properly Excluded a Video in Which Defendant's Cousin Suggested That He Shot Williams

¶ 123 Next, defendant argues that he was denied his constitutional right to present his defense that he was not the shooter because the trial court prevented him from presenting evidence that Gardner made a music video in which he "took credit" for shooting Williams. We need not address the constitutional issue because we conclude that the evidence was properly excluded.

¶ 124 However, we do note that this is yet another case in which, "[s]trangely, instead of asserting that the court made an incorrect evidentiary ruling, defendant attempts to transform that ruling into a constitutional argument related to defendant's right to present a defense." People v. Woodring, 2020 IL App (4th) 180158-U, ¶ 54. A defendant is not denied his right to present a defense every time a trial court excludes an arguably favorable piece of evidence, and a defendant cannot transform a routine evidentiary issue into a constitutional claim through linguistic maneuvering. When a defendant does so, as in this case, it adds only clutter to whatever legitimate arguments he may have on appeal.

¶ 125 1. The Law

¶ 126 "The admission of evidence falls within the sound discretion of the trial court, and we will not reverse the trial court unless that discretion was plainly abused." People v. Rebollar-Vergara, 2019 IL App (2d) 140871, ¶ 79, 128 N.E.3d 1059. "A court abuses its discretion only if it acts arbitrarily, without the employment of conscientious judgment, exceeds the bounds

of reason and ignores recognized principles of law; or if no reasonable person would take the position adopted by the court." (Internal quotation marks omitted.) Id.

¶ 127 " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ill. R. Evid. 801(c) (eff. Jan. 1, 2011). Hearsay is not admissible unless it falls within a recognized exception. Ill. R. Evid. 802 (eff. Jan. 1, 2011).

¶ 128 "Generally[,] an extrajudicial declaration not under oath, by the declarant, that he, and not the defendant on trial, committed the crime is inadmissible as hearsay though the declaration is against the declarant's penal interest." People v. Bowel, 111 Ill. 2d 58, 66, 488 N.E.2d 995, 999 (1986). However, the Illinois Supreme Court has held that "where there are sufficient indicia of trustworthiness of such extrajudicial statements, a declaration may be admissible under the statement-against-penal-interest exception to the hearsay rule." Id. (citing Chambers v. Mississippi, 410 U.S. 284, 302 (1973)).

¶ 129 "The question to be considered in judging the admissibility of a declaration of this character is whether the declaration was made under circumstances that provide 'considerable assurance' of its reliability by objective indicia of trustworthiness." Id. at 67 (quoting Chambers, 410 U.S. at 300). Four factors that courts should consider are whether "(1) the statement was made spontaneously to a close acquaintance shortly after the crime occurred; (2) the statement was corroborated by other evidence; (3) the statement was self-incriminating and against the declarant's interest; and (4) there was adequate opportunity for cross-examination of the declarant." Id. These four factors "are to be regarded simply as indicia of trustworthiness and not as requirements of admissibility." Id.

¶ 130 2. This Case

¶ 131 Defendant does not appear to dispute that the statements contained in the Gardner video are hearsay but argues that (1) the video is admissible as a statement against penal interest and (2) considerable assurance of its reliability existed. We conclude that the trial court properly excluded the Gardner video.

¶ 132 First, the statements were not made spontaneously to a close acquaintance shortly after the crime occurred. Instead, the statements were made in a music video, which clearly required significant planning and effort. Also, the statements were not made to a close acquaintance or any acquaintance at all; instead, they were made to a wide audience of strangers, indeed, whoever would watch the music video. Nor were the statements made shortly after the crime occurred. Instead, it was made three months after the shooting.

¶ 133 Second, the statements lacked substantial corroboration. The only corroborating evidence identified by defendant on appeal is that (1) defendant and Naomi testified that Gardner took the vehicle used in the shooting on the morning of the shooting, (2) defendant and Naomi testified that Naomi's house had previously been shot at by Williams, and (3) Jones testified that Gardner was the person who told her where she could find her car after the shooting.

¶ 134 Part of the reason that this evidence only weakly corroborates Gardner's statements is that those statements are too vague. They lack any details, other than the killing itself, to corroborate.

¶ 135 Third, the statements were not particularly self-incriminating and against the declarant's interest because they were very vague. The only portion of the statements that could even arguably have implicated Gardner in the murder was "[h]ad to hunt him down." One could infer that he meant "I had to hunt him down," but one could just as easily infer "we had to hunt

him down" or "they had to hunt him down." As the State points out, Gardner raps at other moments in the video that "everybody got a gun, everybody shot" and "love my brothers *** be loyal killing for each other." This added context seems to imply that Gardner may not have been referring to himself specifically as the killer but instead could have been "glorifying" the murder of Williams by others, including defendant.

¶ 136 Fourth, clearly there was no opportunity to cross-examine Gardner because he was killed before trial.

¶ 137 Even if reasonable minds could differ about the second and third factors, we review the trial court's decision to exclude this evidence for an abuse of discretion. We conclude, on this record, that the trial court's decision does not come close to an abuse of its discretion.

¶ 138 Further, even if the second and third factors were present, we could not conclude that the trial court erred by deeming the video insufficiently reliable. As the Illinois Supreme Court has written, "The question to be considered in judging the admissibility of a declaration of this character is whether the declaration was made under circumstances that provide 'considerable assurance' of its reliability by objective indicia of trustworthiness." (Emphasis added.) Id. (quoting Chambers, 410 U.S. at 300). On this core question, the statements in the Gardner video fall far short.

¶ 139 Gardner made a music video, something that is commonly understood as an artistic endeavor. Musicians often embellish the details of a story when singing about a personal experience. Hip hop artists in particular frequently use their music to boast about crimes that either they had no part in or are even entirely fictional.

¶ 140 The New Jersey Supreme Court, although examining the admissibility of a defendant's statement instead of a third party's, astutely observed the following:

> "The difficulty in identifying probative value in fictional or other forms of artistic self-expressive endeavors is that one cannot presume that, simply because an author has chosen to write about certain topics, he or she has acted in accordance with those views. One would not presume that Bob Marley, who wrote the well-known song 'I Shot the Sheriff,' actually shot a sheriff, or that Edgar Allan Poe buried a man beneath his floorboards, as depicted in his short story 'The Tell-Tale Heart,' simply because of their respective artistic endeavors on those subjects." State v. Skinner, 95 A.3d 236, 251, 218 N.J. 496, 521-22 (N.J. 2014).

¶ 141 We conclude the same principle applies here namely, the reliability of a statement is diminished when it is created as a part of an artistic endeavor.

¶ 142 D. The Trial Court Properly Considered the Factors in Aggravation and Mitigation at Sentencing

¶ 143 Last, defendant argues that the trial court at sentencing improperly relied on aggravating factors unsupported by the evidence because the court stated that defendant (1) showed no remorse and (2) acted as a part of a gang. Further, defendant contends that the trial court improperly "ignored the mitigating factors that [defendant's] conduct was based on strong provocation and was the result of circumstances unlikely to recur when imposing a 59-year sentence." We reject these contentions.

¶ 144 First, the trial court is allowed to rely upon a defendant's lack of remorse in sentencing. People v. Donlow, 2020 IL App (4th) 170374, ¶ 84 ("However, trial courts may consider a defendant's lack of remorse or lack of veracity in imposing a sentence, since those are factors which may have a bearing on the defendant's potential for rehabilitation." (Internal quotation marks omitted.)).

¶ 145 Second, we need not consider whether a trial court is allowed to consider a defendant's gang affiliation because the trial court literally did not mention defendant's gang affiliation at all when describing its reasoning behind the sentence it gave defendant.

¶ 146 Third, nothing in the record suggests that the trial court ignored any factors in mitigation that may have been present. "We presume that the trial court considered the mitigating evidence before it, absent explicit evidence to the contrary." People v. Johnson, 2016 IL App (4th) 150004, ¶ 85, 55 N.E.3d 32.

¶ 147 III. CONCLUSION

¶ 148 For the reasons stated, we affirm the trial court's judgment.

¶ 149 Affirmed.

¶ 150 JUSTICE CAVANAGH, concurring in part and dissenting in part:

¶ 151 While otherwise agreeing with the majority opinion, I respectfully disagree with its analysis of the statutory speedy-trial issue. In finding no statutory speedy-trial violation and, hence, no ineffective assistance, the majority reasons as follows. A defendant can engage in delaying conduct within the meaning of section 103-5(a) of the speedy-trial statute (725 ILCS 5/103-5(a) (West 2016)) even if a trial date has not yet been set. Therefore, a delay, to be attributable to the defense, need not result in "any movement of the trial date." It follows, by the majority's reasoning, that the trial court in this case was within its authority under section 103-5(a) to attribute the 34 days from August 21 to September 24, 2018, to the defense, even though the alibi disclosure on August 21, 2018, caused no alteration of the previously set trial date of September 24, 2018 because a delay need not result in "any movement of the trial date."

¶ 152 I believe that reasoning is flawed. I agree, however, with how the reasoning begins. I agree that by moving to suppress his or her confession, for example, a defendant can delay the

trial even though, at the time of the motion, a trial date has not yet been set. See Donaldson, 64 Ill. 2d at 542. "The mere filing" of a pretrial motion might well "eliminate[ ] the possibility that the case could be immediately set for trial." Id. If, afterward, the case ends up going to trial beyond the 120-day deadline (see 725 ILCS 5/103-5(a) (West 2016)) and if, on that ground the defendant moves to be discharged, the defendant will have the burden of establishing that the motion for suppression caused no delay of the trial "which fact must be affirmatively established by the record." People v. Oakley, 109 Ill. App. 3d 165, 168 (1982). Usually, proving that negative will be all but impossible. The default assumption is that potentially dispositive motions filed before the scheduling of a trial take time to adjudicate and have the effect of delaying the scheduling of a trial and, hence, the trial itself. See Jones, 104 Ill. 2d at 281 (concluding that "[t]he defendants have not overcome the general rule that delay occasioned by the entry of the written order on the defendants' motions is delay occasioned by the defendants"). Normally, that assumption will be unassailable. Seldom will a defendant be able to prove that if the defense had refrained from filing its pretrial motions, the trial could not have been scheduled for an earlier date. So, to be clear, I have no quarrel with the proposition that by filing a motion that prevents the immediate scheduling of a trial, the defense can delay the eventual trial before the trial is even scheduled. See McDonald, 168 Ill. 2d at 440.

¶ 153 I perceive a gap, however, between that uncontroversial proposition and a further, quite different proposition namely, that the trial court may attribute a delay to the defense on the basis of something the defense did after the trial was scheduled that caused no alteration of that already scheduled trial date. To say that the latter proposition follows from the former strikes me as a rather strained application of cases such as McDonald. Adding to my difficulty, case law declares over and over again that "delay" means delay of the trial.

¶ 154 "Our supreme court determined that the word 'delay,' as used in the amended version of section 103-5(a), refers to any action by either party or the trial court that moves the trial date outside of the 120-day period." People v. Brexton, 2012 IL App (2d) 110606, ¶ 18. Or, as the appellate court puts it in People v. Janusz, 2020 IL App (2d) 190017, ¶ 57, "the relevant question" under the speedy-trial statute "is whether defendant occasioned the delay in his trial." A "[d]elay is occasioned by a defendant," the appellate court continues in Janusz, "when his acts caused or contributed to a delay resulting in a postponement of his trial." Id. To quote the supreme court, the question is whether "the defendant's conduct was responsible for the trial's delay." (Emphasis added.) People v. Goins, 119 Ill. 2d 259, 268 (1988). "[I]f an accused is not brought to trial within the 120-day term and he has not occasioned any delay in trial, he is entitled to a dismissal of the charges [citations]." (Emphasis added.) People v. Richards, 81 Ill. 2d 454, 459 (1980).

¶ 155 I struggle to square the majority opinion with those authorities when the majority opinion emphatically asserts, " 'Delay' does not mean a delay of defendant's trial or trial date ***." (Emphasis in original.) Supra ¶ 82. The majority defines "delay," instead, as "a delay of the speedy-trial term." Supra ¶ 82. But that definition of "delay" leaves unanswered the question of when the running of the speedy-trial term should be delayed. The answer is, when the defendant does something to delay his or her trial, scheduled or not. That, it seems to me, is what the majority's own cited authorities teach, including Lilly and Cordell. Lilly interprets Cordell as "conclud[ing] that a 'delay' is '[a]ny action by either party or the trial court that moves the trial date outside of [the] 120-day window.' " Lilly, 2016 IL App (3d) 140286, ¶ 34 (quoting Cordell, 223 Ill. 2d at 390).

¶ 156 Like the defendant in Boyd, defendant in the present case has affirmatively demonstrated, from the record, that his supplemental discovery disclosure did not change his already scheduled trial date and, therefore, did not move his trial date outside the 120-day window or contribute to doing so. See Oakley, 109 Ill. App. 3d at 168. In that respect, defendant has carried his burden. He has made the required showing from the record. As the appellate court observes in Boyd, with what seems to me impeccable logic, "unless the trial date is postponed, there is no delay to attribute to [the] defendant." Boyd, 363 Ill. App. 3d at 1037.

¶ 157 In this context, "the trial date" does not necessarily mean a date already written on the calendar but means, more broadly, the date of the trial or when the trial ultimately takes place. The majority criticizes Boyd as holding that "a delay could only be attributable to a defendant if a set trial date was in fact moved." That seems to me a misreading of Boyd. For one thing, Boyd does not use the term "set trial date." For another thing, trials generally are not scheduled at the arraignment, and Boyd holds that "any delay resulting from a defendant's failure to proceed with an arraignment is chargeable to the defendant." Id. As far as I can see, nowhere does Boyd state that a trial has to be scheduled to be delayed. Rather, Boyd's point is simply this: "Our supreme court has consistently held that a delay is occasioned by the defendant and charged to the defendant when the defendant's acts caused or contributed to a delay resulting in the postponement of trial." (Emphases in original.) Id.

¶ 158 Defendant's disclosure of the alibi witness, Naomi Cross, resulted in no postponement of the trial. That is clear from the record. Thus, the circuit court abused its discretion by attributing the 34 days from August 21 to September 24, 2018, to defendant.

¶ 159 The majority suggests that "some support" for the trial court's decision "may be found" (emphases added) (supra ¶ 100) in the catchall phrase of Illinois Supreme Court Rule

415(g)(i) (eff. Oct. 1, 1971), which authorizes a trial court to respond to discovery noncompliance by "enter[ing] such other order as it deems just under the circumstances." (Emphases added.) The noncommittal language that the majority uses in this context is understandable. As far as I know, no case has ever interpreted Rule 415(g)(i) as permitting a trial court to deprive a defendant of his or her statutory right to a speedy trial as punishment for a discovery violation that caused no delay of the trial. I am aware of cases holding, reasonably enough, that if a defendant's noncompliance with discovery necessitates a continuance of the trial, the trial court may attribute the delay to the defense. See People v. Tally, 2014 IL App (5th) 120349, ¶ 30 (holding that, in response to a discovery violation by the defense, the circuit court should have done as the defendant's attorney had suggested: continue the bench trial and attribute the delay to the defense). In support of its tentative interpretation of Rule 415(g)(i), the majority quotes from Murphy, 47 Ill. App. 3d at 283: "The defendant's failure to comply with the trial court's discovery order *** constituted delay attributable to defendant." The majority, however, does not quote the appellate court's framing of the issue at the beginning of the paragraph in Murphy: "The question has arisen in this regard as to whether or not a delay in trial is attributable to defendant for its handling of discovery." (Emphasis added.) Id. at 282. The Murphy court asked the same question with respect to a motion for suppression that the defendant had filed: "whether or not a motion to suppress evidence constitutes delay in trial caused by the defendant." (Emphasis added.) Id.

¶ 160 In short, my point is this. The speedy-trial statute should be liberally construed in the defendant's favor. People v. Bauman, 2012 IL App (2d) 110544, ¶ 16. Construing the statute as tolling the 120-day period for conduct by the defendant that, demonstrably from the record, had no effect on the date of the trial is not construing the statute liberally in the defendant's favor. I know of no case holding that a trial court may attribute a delay to a defendant even though the

record shows that the conduct in question did not delay the trial. See People v. Staten, 159 Ill. 2d 419, 426 (1994) (explaining that "[p]roof of a violation of the statutory right requires only that the defendant has not been tried within the period set by statute and that defendant has not caused or contributed to the delays"); People v. Nunnery, 54 Ill. 2d 372, 375-76 (1973) (explaining that "[t]he controlling question in determining if the defendant was entitled to discharge under the 120-day rule is whether the delay of the trial beyond 120 days was 'occasioned by the defendant,' and if answered affirmatively, he was not entitled to discharge" (emphasis added)).

¶ 161 Case law gave ample notice that a defendant was responsible for "delay" within the meaning of the speedy-trial statute only if the defendant had caused or contributed to a postponement of his or her trial beyond the 120-day term. See, e.g., Kliner, 185 Ill. 2d at 114 (holding that "[a] delay is occasioned by the defendant and charged to the defendant when the defendant's acts caused or contributed to a delay resulting in the postponement of trial"); People v. Murray, 379 Ill. App. 3d 153, 158-59 (2008) (same).

> " ' 'An attorney's failure to seek discharge of his client on speedy-trial grounds generally will be deemed ineffective assistance of counsel if there is a reasonable probability that the defendant would have been discharged had a timely motion for discharge been made and no justification has been proffered for the attorney's failure to bring such a motion.' ' " Murray, 379 Ill. App. 3d at 158 (quoting Boyd, 363 Ill. App. 3d at 1034, quoting Staten, 159 Ill. 2d at 431).

¶ 162 Apropos reasonable probability, here is my speedy-trial arithmetic. The 18 days from July 9 to 27, 2017, are attributable to the State. Also, the 113 days from July 16, 2018, to the beginning date of the jury trial, November 6, 2018, are likewise attributable to the State. The total comes to 131 days (113 plus 18 equals 131). The statutory speedy-trial deadline of 120 days was

missed. See 725 ILCS 5/103-5(a) (West 2016). That much was clear under Boyd and the supreme court cases that it cites. I would hold that by neglecting to file a motion for discharge and by failing to raise, in the posttrial motion, the statutory speedy-trial violation, defense counsel rendered ineffective assistance. The remedy that case law prescribes is reversal. See People v. Mooney, 2019 IL App (3d) 150607, ¶ 31.

No. 4-19-0114

Cite as:	People v. Cross, 2021 IL App (4th) 190114
Decision Under Review:	Appeal from the Circuit Court of Vermilion County, No. 17-CF-476; the Hon. Nancy S. Fahey, Judge, presiding.
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January 26, 2022

In re: People State of Illinois, Appellee, v. Latron Y. Cross, Appellant.
Appeal, Appellate Court, Fourth District.
127907

The Supreme Court today ALLOWED the Petition for Leave to Appeal in the above entitled cause.

We call your attention to Supreme Court Rule 315(h) concerning certain notices which must be filed.

Very truly yours,

Cynthia A. Grant

Clerk of the Supreme Court

No. 127907

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- LATRON Y. CROSS, Defendant-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, No. 4-19-0114. There on appeal from the Circuit Court of the Fifth Judicial Circuit, Vermilion County, Illinois, No. 17-CF-476. Honorable Nancy S. Fahey, Judge Presiding.

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 100 W. Randolph St., 12th Floor, Chicago, IL 60601, eserve.criminalappeals@ilag.gov;

Mr. David J. Robinson, Deputy Director, State's Attorney Appellate Prosecutor, 725 South Second Street, Springfield, IL 62704, 4thdistrict@ilsaap.org;

Jacqueline M. Lacy, Vermilion County State's Attorney, 7 N. Vermilion St., Suite 201, Danville, IL 61832, salacy@vercounty.org;

Mr. Latron Y. Cross, Register No. M18686, Menard Correctional Center, P.O. Box 1000, Menard, IL 62259

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On March 29, 2022, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

/s/Carol M. Chatman
LEGAL SECRETARY
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