No. 128687

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- CLAYTON T. MARCUM, Defendant-Appellant.	)))))))))))	Appeal from the Appellate Court of Illinois, No. 4-20-0656. There on appeal from the Circuit Court of the Eleventh Judicial Circuit, Ford County, Illinois, No. 20-CF-53. Honorable Matthew J. Fitton, Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLANT

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NATURE OF THE CASE

A jury found Clayton T. Marcum guilty of two counts of aggravated domestic battery, and the circuit court sentenced him to two consecutive terms of seven years in prison.

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

ISSUES PRESENTED FOR REVIEW

1. Whether the appellate court reversibly erred when it refused to review a clear violation of Clayton Marcum's statutory right to a speedy trial under Illinois Supreme Court Rule 615(a).

2. Whether the appellate court reversibly erred when it found that the circuit court substantially complied with Illinois Supreme Court Rule 401(a) even though Clayton Marcum was not accurately admonished under Rule 401(a)(2).

STATUTES AND RULES INVOLVED

725 ILCS 5/114-1 (eff. Jan. 1, 2018).

§ 114-1. Motion to dismiss charge.

(a) Upon the written motion of the defendant made prior to trial before or after a plea has been entered the court may dismiss the indictment, information or complaint upon any of the following grounds:

(1) The defendant has not been placed on trial in compliance with Section 103-5 of this Code.

(2) The prosecution of the offense is barred by Sections 3-3 through 3-8 of the Criminal Code of 2012.

(3) The defendant has received immunity from prosecution for the offense charged.

(4) The indictment was returned by a Grand Jury which was improperly selected and which results in substantial injustice to the defendant.

(5) The indictment was returned by a Grand Jury which acted contrary to Article 112 of this Code and which results in substantial injustice to the defendant.

(6) The court in which the charge has been filed does not have jurisdiction.

(7) The county is an improper place of trial.

(8) The charge does not state an offense.

(9) The indictment is based solely upon the testimony of an incompetent witness.

(10) The defendant is misnamed in the charge and the misnomer results in substantial injustice to the defendant.

(11) The requirements of Section 109-3.1 have not been complied with.

(b) The court shall require any motion to dismiss to be filed within a reasonable time after the defendant has been arraigned. Any motion not filed within such time or an extension thereof shall not be considered by the court and the grounds therefor, except as to subsections (a)(6) and (a)(8) of this Section, are waived.

(c) If the motion presents only an issue of law the court shall determine it without the necessity of further pleadings. If the motion alleges facts not of record in the case the State shall file an answer admitting or denying each of the factual allegations of the motion.

(d) When an issue of fact is presented by a motion to dismiss and the answer of the State the court shall conduct a hearing and determine the issues.

(d-5) When a defendant seeks dismissal of the charge upon the ground set forth in subsection (a)(7) of this Section, the defendant shall make a prima facie showing that the county is an improper place of trial. Upon such showing, the State shall have the burden of proving, by a preponderance of the evidence, that the county is the proper place of trial.

(d-6) When a defendant seeks dismissal of the charge upon the grounds set forth in subsection (a)(2) of this Section, the prosecution shall have the burden of proving, by a preponderance of the evidence, that the prosecution of the offense is not barred by Sections 3-3 through 3-8 of the Criminal Code of 2012.

(e) Dismissal of the charge upon the grounds set forth in subsections (a)(4) through (a)(11) of this Section shall not prevent the return of a new indictment or the filing of a new charge, and upon such dismissal the court may order that the defendant be held in custody or, if the defendant had been previously released on bail, that the bail be continued for a specified time pending the return of a new indictment or the filing of a new charge.

(f) If the court determines that the motion to dismiss based upon the grounds set forth in subsections (a)(6) and (a)(7) is well founded it may, instead of dismissal, order the cause transferred to a court of competent jurisdiction or to a proper place of trial.

Illinois Supreme Court Rule 615(a)

(a) Insubstantial and Substantial Errors on Appeal. Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court.

Illinois Supreme Court Rule 401

(a) Waiver of Counsel. Any waiver of counsel shall be in open court. The court shall not permit a waiver of counsel by a person accused of an offense punishable by imprisonment without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:

(1) the nature of the charge;

(2) the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences; and

(3) that he has a right to counsel and, if he is indigent, to have counsel appointed for him by the court.

(b) Transcript. The proceedings required by this rule to be in open court shall be taken verbatim, and upon order of the trial court transcribed, filed and made a part of the common law record.

STATEMENT OF FACTS

Clayton T. Marcum ("Marcum") met Greg Rudin ("Rudin") while at a friend's house and they both slept there overnight. (State's Exhibit J, at 3:02–53.) Rudin was a chronic alcoholic with severe liver issues and, although married, he had been separated from his wife for nearly 11 years. (R. 373, 480, 488.) The next morning, Marcum and Rudin went to Marcum's apartment, where Rudin performed oral sex on Marcum and, in exchange, Marcum "jacked [Rudin] off." (State's Exhibit J, at 4:48–5:07.) That day, Marcum and Rudin eventually returned to the friend's house, where others were jealous of them. (State's Exhibit J, at 5:21–55.) A few days later, on a Saturday night, Rudin and Tony Chickini ("Chickini") arrived at Marcum's apartment. (State's Exhibit J, at 6:43–54.) While Chickini left shortly thereafter, Rudin stayed at Marcum's apartment and drank alcohol. (State's Exhibit J, at 7:10–29.) Marcum and Rudin wrestled. (State's Exhibit J, at 8:08–28.)

The next day, on September 1, 2019 at around 7:30 in the morning, Officer Brandon Ryan ("Ryan") received a report of a naked man outside some apartments. (R. 304–06.) Arriving at the scene, Ryan reported that he observed a man–later identified as Rudin–laying in an alley by those apartments. (R. 305.) Rudin appeared wet from the rain and was without pants or underwear. (R. 305.) Mostly non-responsive, Rudin had dried blood on his swollen ears, black eyes, and what appeared to be a dislocated jaw. (R. 306.) An ambulance arrived and transported Rudin to a hospital. (R. 307.) At the hospital, Rudin was diagnosed with a subarachnoid hemorrhage (which was described as bleeding in the back of Rudin's brain) and with two or three broken ribs. (R. 358–59, 361.) Rudin's injuries were consistent with someone striking him. (R. 364, 381.) There was still some alcohol in Rudin's system when he arrived at the hospital. (R. 362.) Chronic alcoholics, such as Rudin, may have a slight increased tendency to have brain bleeds and to bruise. (R. 374, 376.)

Meanwhile, some bystanders informed Ryan that they had seen Rudin with Marcum, who lived at the apartment complex. (R. 308.) Ryan spoke with Marcum, and Marcum indicated that Rudin drank with him before leaving his apartment around 10:00 the previous night. (R. 309.) Ryan noticed that Marcum had dried blood on his clothing; Marcum's clothing was later tested and likely contained Rudin's DNA. (R. 310, 457.) Marcum clarified that he and Rudin wrestled and that he assisted Rudin down the stairs. (R. 311.) Marcum eventually relayed that Rudin fell down the stairs. (R. 312.)

Later that day, Ryan returned to Marcum's apartment but there was no answer. (R. 318.) That evening, Ryan came back with a search warrant. (R. 319.) During that search, Marcum acknowledged that Rudin was bleeding prior to leaving the apartment. (R. 324.) Officers found blood on a mattress in the apartment and in the stairwell outside the apartment, and took samples. (R. 344, 420, 424, 428, 459.) The blood on the mattress was later tested and likely contained Rudin's DNA, but the testing on the stairwell sample was inconclusive. (R. 344, 420, 424, 428, 459, 461.) The officers photographed the blood on the mattress and in the stairwell. (R. 418.) The officers arrested Marcum. (R. 328.) Marcum remained incarcerated throughout the entirety of the proceedings. (C. 49.)

Five days after the encounter, on September 6, 2019, investigating officers met with Marcum in the county jail, and the exchange was recorded. (R. 496, 499.) In that interaction, Marcum indicated that Chickini and Rudin arrived at his apartment around 5:00 pm and Chickini left shortly thereafter. (State's Exhibit J, at 14:30–50.) Marcum explained that, after drinking, they began to wrestle and engage in consensual horseplay. (State's Exhibit J, at 15:07–16, 19:40–50.) Marcum demonstrated the wrestling moves and acts he performed on Rudin. (State's Exhibit J, at 8:25–33, 39:57–59.) Marcum acknowledged that he struck Rudin while wrestling and that he did not know his own strength when intoxicated. (State's Exhibit J, at 16:43–48; R. 499.) When Rudin began bleeding, the wrestling stopped. (State's Exhibit J, at 16:22–31.)

Marcum and Rudin then left to walk to a bar. (State's Exhibit J, at 9:42–45.) On the way, an intoxicated Rudin fell down the stairs. (State's Exhibit J, at 15:42–56.) Marcum tried helping Rudin walk outside, but Rudin fell down repeatedly. (State's Exhibit J, at 9:45–53.) After Rudin fell for the last time, Marcum stomped on Rudin, and Rudin made an "ugg" noise. (State's Exhibit J, at 10:01–36; R. 498.) Marcum told Rudin to stay there, sleep it off, and take himself home in the morning. (State's Exhibit J, at 20:48–54; R. 497.) In that recording, Marcum also outlined the extent of his prior encounters with Rudin, including the fact that they had shared a sexual encounter and had both spent the night at a friend's house. (State's Exhibit J, at 3:02–53; 4:48–5:07, 5:21–55.)

Eventually, on September 27, 2019, the State charged Marcum in 19-CF-72 with one count of aggravated battery, for striking Rudin on the head and the body, a Class 3 felony. (Sup. C. 12.) At the preliminary hearing on September 30, 2019, the prosecutor questioned Ryan about the incident; Ryan reported that he was told Marcum and Rudin were in a dating relationship, that Marcum made admissions while in custody, and that Marcum admitted to stomping and striking Rudin on his head and body. (Sup. R. 41–46.)

More specifically, the prosecutor confirmed with Ryan that, in checking with the area hospital, he was notified that Rudin experienced several broken ribs as well as brain bleeds. (Sup. R. 36.) Ryan acknowledged that Marcum provided investigators with a recorded statement while in custody. (Sup. R. 46.) In so doing, Ryan reported that he was told that Rudin and Marcum "were in a dating relationship of sorts[.]" (Sup. R. 41.) When asked by the prosecutor if Marcum admitted to striking or hitting Rudin other than while wrestling, Ryan offered that Marcum also stomped on Rudin. (Sup. R. 44.) The prosecutor clarified "[a]nd you said it wasn't a light stomp; [Marcum] indicated and demonstrated a pretty hefty strike[,]" and Ryan answered affirmatively. (Sup. R. 44.) Ryan also explained that Marcum admitted to striking Rudin's head as well. (Sup. R. 44.) Reviewing the matter, the circuit court found probable cause for the charge. (Sup. R. 52.)

Following the preliminary hearing, the parties agreed to set the trial for January 6, 2020. (Sup. C. 4.) On January 6, 2020, the circuit court granted the State's motion to extend the speedy-trial term to complete DNA testing, over the defense's objection. (Sup. C. 4, 17, 59.) At a hearing on May 22, 2020, Marcum elected to proceed *pro se* and the trial was moved to July 13, 2020. (Sup. C. 5.)

On July 6, 2020, however, the State dismissed the sole count of aggravated battery and filed a two-count information in 20-CF-53 (the present case) alleging that Marcum committed two counts of aggravated domestic battery, a Class 2 felony. (C. 9–10; Sup. C. 6; R. 3.) Count One alleged that Marcum struck Rudin with his fist, causing a subarachnoid hemorrhage, and that Rudin was a family or household member. (C. 9.) Count Two claimed that Marcum stomped on Rudin with his foot, causing rib fractures, and that Rudin was a family or household member. (C. 10.) Both counts averred that Marcum was eligible for extended-term sentencing due to a prior residential-burglary conviction from Iroquois County. (C. 9–10.) During his first appearance, the circuit court read Count One, explained that Marcum was extended-term eligible, and advised him that he was facing 7 to 14 years in prison on that charge due to his prior residential-burglary conviction, instead of the ususal term of 3 to 7 years in prison. (R. 3–4.) When asked if he understood the penalties, Marcum inquired if he was being charged with aggravated battery, and the circuit court stated it was aggravated domestic battery. (R. 5.) The circuit court read Count Two and repeated the admonishments about his potential sentence. (R. 5–6.)

Thereafter, Marcum indicated that he would proceed *pro se.* (R. 7.) In response, the circuit court inquired whether Marcum understood the charges, to which Marcum replied, "[y]eah." (R. 7.) The circuit court advised Marcum if he understood the minimum and maximum penalties, including extended-term eligibility, the mandatory supervised release range, and the applicable financial obligations. (R. 7.) Marcum replied: "Uh-huh." (R. 7.) Finally, the circuit court confirmed with Marcum that he had the right to represent himself and that counsel

could be appointed for him if he was indigent. (R. 7.) After doing so, the circuit court asked Marcum whether he wished to waive his right to counsel, and Marcum responded affirmatively. (R. 8.) Marcum then repeatedly complained that the State could refile the charges without any impact on his speedy-trial rights. (R. 11–13.)

To be sure, Marcum inquired about spending 120 days in custody and whether that limitation was "completely out the window." (R. 11.) The circuit court specifically stated that the limitations were tolled by this Court's COVID-19 order. (R. 11–12.) Undeterred, Marcum pressed: "So I have to start all over again? Like be here, like be here over a year ago or three more months or four more months." (R. 12.) The circuit court posited that Marcum's case was continued by agreement and then there were pauses due to COVID-19. (R. 12.) Marcum pointed out, however, "[y]ou can see I been here for about a year, and this ain't a murder charge. I been here for about a year." (R. 12.) The circuit court acknowledged Marcum's frustration, but reiterated that the "case was continued" by agreement and "[s]o, the speedy trial starts over every time it is continued by an agreement." (R. 12.) The circuit court continued: "And the [COVID-19] situation came, and the Supreme Court gave the Courts authority–in fact, there are directives that the speedy trial was to start over again. So, that puts you where you are at." (R. 12.) Marcum inquired if there were "anymore curve balls I need to be aware of?" (R. 12–13.) The circuit court rejected that this was a "curve ball" as the State simply "elected to file a different charge." (R. 13.) Marcum unsuccessfully questioned the circuit court on whether the State could "do it again over and over if they want to" and "[c]an [the State] keep doing charges over and over if they wanted to, like different charges, and say, well, we want to go with this charge now?" (R. 13.) The circuit court declined Marcum's point. (R. 13.)

At the next proceeding, the circuit court found probable cause for the aggravated-domestic-battery charges. (R. 34.) After that finding, Marcum expressed some confusion as to the nature of the charges: "Question so is this still aggravated battery with intent at any time to do bodily

harm?" (R. 35.) The circuit court offered that, "[r]ight now[,] it is a straight domestic battery, which is a Class 2." (R. 35.) The circuit court set the case for an October jury trial. (R. 36.)

Before the jury-selection process, the parties had the following exchange:

Court: "So again, do you understand the nature of the charges and what you are charged with and the possible penalties?

Marcum: I am charged with aggravated domestic?

Court: Same thing I arraigned you on previously except this is on the trial. Do you understand what you are charged with and possible penalties?

Marcum: Yes. I just wanted to make sure it wasn't like two or three charges at one time.

Court: No. We are doing the one case, and we are doing two counts of aggravated battery.

State: Aggravated domestic battery.

Court: Aggravated domestic battery.

Marcum: So, I got one charge?

Court: Two charges, one case. One case, he has alleged two separate charges. One being the *** subarachnoid hemorrhage.

Marcum: If I am found guilty, I am charged with two charges?

State: If you are found guilty on both, you are going to be sentenced to one sentence.

Court: You will not be sentenced twice.

Marcum: Oh, so I would be looking at seven to 14 years?

Court: Yes." (R. 42–43.)

Next, the circuit court asked Marcum a series of questions admonishing him that he would be expected to comply with the technical rules governing trial and warned him that he may struggle to do so. (R. 45–48.) Finally, Marcum reaffirmed that he would proceed *pro se*. (R. 44.) The parties selected a jury. (R. 54–286.)

The State's evidence was consistent with the facts outlined above. During the middle of trial, the State proposed that Marcum was never previously convicted of residential burglary in Iroquois County, as alleged in the information, and so was not extended-term eligible. (R. 474–76.) When questioned if he had a residential-burglary conviction, Marcum responded negatively. (R. 474–76.) The circuit court instructed Marcum that he now only faced a single term of imprisonment between 3 and 7 years. (R. 474–76.)

After deliberating, the jury found Marcum guilty on both counts of aggravated domestic battery. (C. 42–43; R. 582.) Marcum's case proceeded to sentencing, where the State requested that the sentences be served consecutively. (R. 615.) Marcum responded: "What's that mean, Your Honor?" (R. 615.) Eventually, circuit court and Marcum discussed the possibility of consecutive sentencing:

> Court: Pursuant to [730 ILCS 5/5-8-4(c)], regarding consecutive terms and permissive consecutive sentences, [the prosecutor] did read the statute. *** So, based on that, based on the statute, permissive consecutive sentence, he is asking for not just one term of seven years. He is asking for one term of seven years in Count I and a separate term of seven years in Count II. They would be consecutive, meaning you would serve one after the other.
>
> Marcum: Like 14 years?
>
> Court: 14 and 85 percent, and he is asking 466 days to be given on the first count, and since these are consecutive, you would not get credit for that in the second." (R. 617–18.)

Granting the State's argument seeking consecutive sentences, the circuit court sentenced Marcum to the maximum penalty—seven years in prison—on each count and ordered them to run consecutively. (R. 635–36.) Confused, Marcum asked how many years he would have to serve, and the circuit court responded seven plus seven, for a total of 14 years. (R. 636–37.) Marcum appealed. (C. 54–55, 57; R. 638.)

On appeal, Marcum raised four points: (1) his statutory right to a speedy trial was violated where the State was allowed to bring new and additional aggravated-domestic-battery charges that were subject to the compulsory joinder with the initial aggravated-battery charge and were filed outside the applicable 120-day term, (2) he did not knowingly waive his right to counsel, (3) the State failed to prove him guilty of aggravated domestic battery when there was insufficient evidence that Rudin was his family or household member, and (4) the circuit court violated his right to remain silent when it ordered him to participate in the preparation of the presentence investigation report. *People v. Marcum*, 2022 IL App (4th) 200656-U, ¶ 3. Regarding the speedy-trial claim specifically, Marcum posited that forfeiture and waiver principles should not apply because the circuit court's incorrect admonishments and explanations of his speedy-trial rights effectively dissuaded him from filing a motion that was sure to be summarily rejected. *Marcum*, 2022 IL App (4th) 200656-U, ¶ 34. Additionally, in response to the State's forfeiture argument, Marcum pointed out that the State never asserted that plain-error review was not applicable or available for his speedy-trial claim; instead, the State only raised that no clear or obvious error transpired. (Appellate Court Reply Brief, p. 3.) Finally, Marcum relied on *People v. Smith*, 2016 IL App (3d) 140235, and *People v. McKinney*, 2011 IL App (1st) 100317, for the proposition that a statutory-speedy-trial violation is amenable to second-prong plain-error review under this Court's Rule 615(a). (Appellate Court Reply Brief, p. 3.)

In reviewing the case, the appellate court agreed that the evidence was insufficient to prove that Rudin was Marcum's family or household member, reduced Marcum's convictions to Class 3 aggravated batteries, and remanded for resentencing. *Marcum*, 2022 IL App (4th) 200656-U, ¶ 69. Regarding Marcum's waiver of counsel, the appellate court determined that Marcum was not prejudiced as he was informed that he faced the possibility of 14 years in prison prior to his waiver and he ultimately received a 14-year prison sentence. *Id.* at ¶ 59.

Additionally, the circuit court rejected that Marcum's right to silence was violated during sentencing. *Id.* at ¶ 75.

On the speedy-trial issue, the appellate court found that the State violated Marcum's statutory right to a speedy trial when it filed the subsequent aggravated-domestic-battery charges 9 months after filing the initial aggravated-battery charge, where the subsequent charges were subject to compulsory joinder with the initial charge and the delay attributable to the defense on the initial charge could not be attributed to the defense on the subsequent charges that were not yet before the court. *Id.* at ¶ 44. Nevertheless, the appellate court decided that Marcum's speedy-trial violation was not properly preserved for appellate review and declined to award any relief under the plain-error doctrine. *Id.* at ¶ 51. This appeal follows.

ARGUMENT

I.

Clayton Marcum's statutory right to a speedy trial was violated where the State was allowed to bring new and additional aggravated-domestic-battery charges that were subject to compulsory joinder with the initial aggravated-battery charge and were filed outside the applicable 120-day term. The appellate court reversibly erred when it refused to review that violation for plain error under Illinois Supreme Court Rule 615(a).

On appeal, the appellate court correctly determined that the State violated Marcum's statutory right to a speedy trial when it filed the aggravated-domestic-battery charges nearly 9 months after filing the initial aggravated-battery charge when they were based on the same physical altercation and subject to compulsory joinder. After all, at the time the State filed the initial aggravated-battery charge, it knew all of the facts it would later allege in the subsequently filed aggravated-domestic-battery charges. Despite having this knowledge, the State waited, obtained Marcum's agreement to continuances on the initial aggravated-battery charge, and allowed the in-custody Marcum to prepare his defense as to that specific charge for over 9 months, before belatedly filing the new and additional aggravated-domestic-battery charges. In so doing, the State forced the *pro se* and incarcerated Marcum to choose between spending additional time in custody or proceeding unprepared to trial on the new, elevated charges. Additionally, the aggravated-battery information never provided Marcum with any possible notice that the State would later prosecute him with two counts of the enhanced aggravated-domestic-battery offense as a result of his altercation with Greg Rudin ("Rudin"). To be sure, the appellate court correctly concluded that the State's conduct deprived Marcum of his statutory right to a speedy trial in this case.

But even though Marcum was clearly denied his statutory right to a speedy trial, the appellate court declined his invocation of the plain-error doctrine. In so doing, the appellate court erroneously found that the plain-error doctrine did not apply, overlooked the State's implicit

concession that speedy-trial violations were amenable to plain-error review, and disregarded its own precedent on the matter. As such, this Court should reverse the appellate court's decision, review Marcum's speedy-trial violation for plain error, and ultimately vacate his convictions and sentences.

1. Standard of Review

The reviewing court examines *de novo* whether charges are subject to compulsory joinder and the resulting speedy-trial consequences, if any, of that determination. *People v. Gonzalez*, 2019 IL App (1st) 152760, ¶ 57. Similarly, this Court analyzes *de novo* the question of whether a claim is reviewable as plain error. *People v. Johnson*, 238 Ill. 2d 478, 485 (2010).

2. Marcum's Statutory Right to a Speedy Trial Was Violated.

Under the statutory speedy-trial provisions, every person in custody in this state for an alleged offense must be tried by the proper court within 120 days from the date he or she was taken into custody unless the delay is occasioned by the defendant. *People v. Dryer*, 2021 IL App (2d) 190187, ¶ 16 (citing 725 ILCS 5/103-5(a) (2019)). In that calculation, a defendant's 120-day speedy-trial term commenced on the day when he or she is arrested and taken into custody. *People v. Hillsman*, 329 Ill. App. 3d 1110, 1118 (4th Dist. 2002). After its commencement, the 120-day speedy trial period is then tolled whenever the defendant causes a period of delay or otherwise agrees to a delay. *People v. Woodrum*, 223 Ill. 2d 286, 299 (2006). As provided by statute, a delay is 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. 725 ILCS 5/103-5(a). Excluding the delays he or she occasions, a defendant is entitled to release from custody and dismissal of the pending charges when he or she is not tried within this 120-day statutory period. *Dryer*, 2021 IL App (2d) 190187, ¶ 16; 725 ILCS 5/103-5(d) (2020).

While application of these provisions can be a straightforward counting exercise when the defendant is charged with a single offense, it becomes decidedly "more complicated when [a] defendant is charged with multiple, but factually related, offenses at different times[,]"

implicating the principles of compulsory joinder. *People v. Williams*, 204 Ill. 2d 191, 198 (2003). Where factually related offenses are charged at different times, the speedy-trial statute often interacts with the compulsory-joinder statute. *Gonzalez*, 2019 IL App (1st) 152760, ¶ 56. To that point, the compulsory-joinder statute generally requires the State to prosecute all known offenses within a single court's jurisdiction in a single criminal case if they are based on the same act. *Id.* More precisely, the compulsory-joinder statute demands: "If the several offenses are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution *** if they are based on the same act." 720 ILCS 5/3-3(b) (2019). If the State is compelled to bring charges in a single prosecution under the compulsory-joinder statute, the time within which trial must begin on any new and additional charges is *subject to the same statutory limitation that applied to the original charges*. *Gonzalez*, 2019 IL App (1st) 152760, ¶ 57. Quite simply, when the compulsory-joinder rule applies, the filing of a subsequent charge does not give rise to a new, separate speedy-trial period relative to that charge. *People v. Kazenko*, 2012 IL App (3d) 110529, ¶ 12; see *People v. Dalton*, 2017 IL App (3d) 150213, ¶ 21 (explaining that the 120-day speedy-trial limitation applies both to charges that have been filed against the defendant *and* charges that have not yet been filed but would be subject to mandatory joinder with the originally filed charges).

In conjunction with the above rule, any delays that may be attributable to the defense in connection with the original charges are not always attributable to the defense on the subsequently filed charges. *Dryer*, 2021 IL App (2d) 190187, ¶ 17. Indeed, a defendant can only agree to the continuance of a trial with respect to the offenses with which he is actually charged. *Williams*, 204 Ill. 2d at 207. Stated differently, if a defendant is in custody and charged with one offense and agrees to continue his or her trial, that agreement tolls the 120-day period with respect to the charged offense but cannot toll the 120-day period for any uncharged offenses based on the same act. *Dryer*, 2021 IL App (2d) 190187, ¶ 18. As such, when a defendant

is charged with an offense based on conduct that could support charges for multiple offenses, the State must file any additional charges based on that conduct within 120 days and any new and additional charges filed beyond the 120-day period violate the speedy-trial statute. *Id.*

That being said, compulsory joinder of the initial and subsequently filed charges is a necessary, but not sufficient, condition for the application of the well-established rule that any delays attributable to the defense in connection with the original charges are not attributable to the defense on the subsequently filed charges. *People v. Isbell*, 2020 IL App (3d) 180279, ¶ 16. Instead, whether a court should decline to attribute to the defendant delays in connection with the original charges should focus on whether the original charging instrument gave the defendant sufficient notice of the subsequent charges to prepare adequately for trial on those charges and ensure that he or she was not surprised by the new charge. *Isbell*, 2020 IL App (3d) 180279, ¶ 16.

And finally, while the State generally may refile cases before jeopardy attaches, its ability to do so can be complicated by speedy-trial concerns. See *People v. Van Schoyck*, 232 Ill. 2d 330, 340 (2009). To that end, a prosecutor's use of a *nolle prosequi* will not toll the statutory speedy-trial period if the State uses it to cause delay or to avoid statutory limitations. See *Hillsman*, 329 Ill. App. 3d at 1117.

A. The Appellate Court Correctly Concluded that the State's Conduct Violated Marcum's Statutory Right to a Speedy Trial.

On appeal, Marcum contended that the State's aggravated-domestic-battery charges were subject to compulsory joinder with the initial aggravated-battery charge filed by the State and that the State's belated attempt to file these new and additional charges occurred outside the applicable 120-day speedy-trial term. *People v. Marcum*, 2022 IL App (4th) 200656-U, ¶ 30. In reviewing that claim, the appellate court found that the aggravated-domestic-battery charges were based on the same act as the original aggravated-battery charge and that the prosecutor had conscious awareness of the facts giving rise to the later charges when the prosecutor filed the initial information. *Marcum*, 2022 IL App (4th) 200656-U, ¶¶ 41–42. Consequently, the appellate court held that the compulsory-joinder statute applied and that

the speedy-trial term for the later charges began to run when Marcum was in custody on the initial charge. *Id.* at ¶¶ 42–43. And, accepting Marcum's uncontested argument that the original information did not provide him with sufficient notice to prepare against the later aggravated-domestic-battery charges, the appellate court ruled that the continuances agreed to by the defense for the initial charge could not be attributed to the defense on the later filed charges; subsequently, the "120-day speedy trial period for the subsequent charges had expired well before the State filed them." *Id.* at ¶¶ 43–44. Ultimately, the appellate court concluded that the State's conduct violated Marcum's statutory right to a speedy trial. *Id.* at ¶ 44. The record reinforces that conclusion.

To be sure, Marcum was in Ford County custody the entire period from his arrest on September 1, 2019, through his sentencing on the aggravated-domestic-battery convictions. (C. 49, 53.) The State charged Marcum with one count of aggravated battery on September 27, 2019. (Sup. C. 12.) As acknowledged by the prosecutor, the speedy-trial term started when Marcum was arrested and placed in custody, and the time from his arrest through the parties' agreed continuance at the September 30, 2019 hearing should be attributed to the State (29 days). (Sup. C. 18, 58.) At issue here is whether the 98-day continuance from September 30, 2019, to January 6, 2020, on the original aggravated-battery charge can be attributed to the defense on the subsequently filed aggravated-domestic-battery charges. (Sup. C. 12.) It cannot. As such, the speedy-trial term for the aggravated-domestic-battery charges expired before the State successfully obtained an extension of the speedy-trial term on January 6, 2020 (29 days + 98 days = 127 days). (Sup. R. 57, 59.)

As found by the appellate court, the compulsory-joinder statute required that the State prosecute the originally filed aggravated-battery charge and the subsequent aggravated-domestic-battery charges in the same prosecution. See *id.* at ¶ 42; 720 ILCS 5/3-3(b). On this precise point, the prosecutor alleged in the initial aggravated-battery charge that Marcum knowingly caused great bodily harm to Rudin in that he struck Rudin about the head and the body. (Sup. C. 12.)

The charged, collective act of striking Rudin about the head and the body would include forceful contact to both Rudin's head and his chest. (Sup. C. 12.) As a result, the conduct charged in the subsequently filed charges–Marcum striking Rudin in the face with his fist (Count One) and stomping on Rudin's ribs with his foot (Count Two) during their physical altercation on September 1, 2019–was based on the exact same acts alleged in the original charges. (C. 9–10; Sup. C. 12.) See *Isbell*, 2020 IL App (3d) 180279, ¶ 18 (accepting the State's acknowledgment that batteries arising out of the same altercation were subject to the compulsory-joinder statute); cf. *People v. Moody*, 2016 IL App (1st) 130071, ¶ 2, 41 (determining that the subsequent charge of first-degree murder was subject to compulsory joinder with the initial charges of aggravated kidnaping, aggravated battery, aggravated unlawful restraint, and attempted murder when it was based on the same conduct). To reinforce this argument, the prosecutor even used "strike" interchangeably with "stomp" before the circuit court during the preliminary hearing on the initial charge, further evidencing the State's belief that the initial information included all of Marcum's acts of striking Rudin with his hands and his feet as one collective act. (Sup. R. 44, "And you said it wasn't a light *stomp*; he indicated and demonstrated a pretty hefty *strike*; correct?") (emphasis added). *Marcum*, 2022 IL App (4th) 200656-U, ¶ 42 (agreeing that, in the preliminary hearing on the original charge, the prosecutor used both "stomp" and "strike" in attempting to describe Marcum's use of his foot to make contact with Rudin's body).

Not only that, the information known to the prosecutor when filing the initial aggravated-battery charge on September 27, 2019, was sufficient to allege the two counts of aggravated domestic battery as well. Importantly, on September 6, 2019, five days after the altercation, Marcum relayed to the investigating officers in a recorded interview the nature of his precise relationship with Rudin as well as the fact that he struck Rudin in the face and stomped on him during their time together. (State's Exhibit J, at 3:15–5:07, 10:01–15, 30:50–59.) Under the circumstances, the information gathered from Marcum's interview with investigating officers was the basis of the two-count information charging aggravated domestic battery and the sole

evidence of any purported domestic relationship presented to the jurors at trial. (R. 557–58.) Additionally, Rudin's injuries were quickly diagnosed shortly after his arrival at the local emergency room before he was transferred. (R. 359–61, 369.)

To that end, the prosecutor, during the preliminary hearing on September 30, 2019 for the initial aggravated-battery charge (the next business day after the charges were filed), questioned responding officer Brandon Ryan ("Ryan") about the altercation, including that Ryan reported that both Marcum and Rudin were in a dating relationship, that Marcum made numerous admissions while in custody which were videotaped, and that Marcum admitted to striking Rudin's head and stomping on his body. (Sup. R. 41–46.) During that hearing, prosecutor also confirmed with Ryan that he checked with the area hospital and was notified that Rudin experienced several broken ribs as well as brain bleeds. (Sup. R. 36.)

Thus, all the information needed for the prosecutor to charge Marcum with aggravated domestic battery was available when the prosecutor filed the initial aggravated-battery charges on September 27, 2019. Because the initial and subsequent charges were based on the same act and known to the prosecution, the aggravated-battery and aggravated-domestic-battery charges were required to be joined in the same prosecution. See 720 ILCS 5/3-3(b). As such and importantly here, the speedy-trial term applicable to initial aggravated-battery charges applied to the later filed aggravated domestic battery charges. See *Dalton*, 2017 IL App (3d) 150213, ¶ 22 ("[W]hen a defendant is charged with an offense based on conduct that could support charges of multiple offenses, the State must file any additional charges based on that conduct within 120 days").

Just as importantly, the continuances granted on the aggravated-battery charges could not be attributed to the defense on the subsequent aggravated-domestic-battery charges, as the initial information did not provide Marcum with sufficient notice of the subsequent allegations to adequately prepare for trial. *Isbell*, 2020 IL App (3d) 180279, ¶ 16. In determining whether the subsequent charges were new and additional, reviewing courts can consider (1) whether the later-charged offense had the same elements as the original charge, (2) whether the later

charge alleged the same conduct as the original charge, (3) whether the later-charged offense carried the same potential penalties as the original offense, (4) whether both charged offenses are subject to the same defenses, and (5) whether the later charge follows naturally from the original charge and thus the original charge provides inherent notice. *Id.* at ¶ 25.

For the first factor, the later charge–aggravated domestic battery–does not contain the same elements as the initial charge of aggravated battery. To that point, aggravated domestic battery requires the State to prove the additional element that a domestic battery occurred, which is a battery committed against a family or household member. See 720 ILCS 5/12-3.3(a) (2019); 720 ILCS 5/12-3.2(a) (2019). Conversely, the initial aggravated-battery charge did not require proof that Rudin was a family or household member of Marcum. (Sup. C. 12.) See 720 ILCS 5/12-3.05(a)(1) (2019). And there was nothing in the original information that would provide Marcum with notice that he must potentially defend against the possibility that the State would later charge, and attempt to prove, facts about his tenuous relationship with Rudin. (C. 9–10; Sup. C. 12.)

On the second factor, while both the initial and later charges related to the same altercation, there was no notice in the original filing that the State would subsequently parcel out the charges into two separate counts, subject to potential consecutive sentencing. (C. 9–10; Sup. C. 12.) See 730 ILCS 5/5-8-4(c)(1) (2019). And similarly, even though the initial charge generally put Marcum on notice that he must defend against all acts of striking Rudin, it did not indicate to him that the State would specifically attempt to prove to the jury that he punched Rudin in the head causing a subarachnoid hemorrhage and that he stomped Rudin's ribs causing them to fracture, as alleged in the new information. (C. 9–10; Sup. C. 12.)

Concerning the third factor, the initial and subsequent informations did not contain the same penalties. As charged, aggravated battery is a Class 3 felony, subject to a potential term of imprisonment of 2 to 5 years. (Sup. C. 12.) See 720 ILCS 5/12-3.05(a)(1), (h) (2019); 730 ILCS 5/5-4.5-40(a) (2019). In contrast, as charged, aggravated domestic battery is a Class 2 felony,

subject to a potential term of imprisonment of 3 to 7 years. (C. 9–10.) See 720 ILCS 5/12-3.3(a), (b) (2019); 730 ILCS 5/5-4.5-35(a) (2019). Not only that, any term of imprisonment for aggravated domestic battery must be served at 85 percent. See 730 ILCS 5/3-6-3(a)(2)(vii) (2019). Additionally, at the time of sentencing, aggravated domestic battery required a period of mandatory supervised release of four years, whereas a Class 3 felony only mandated one year of mandatory supervised release. 730 ILCS 5/5-8-1(d)(3), (6) (2019). And finally, as mentioned before, the subsequent charges contained the potential of consecutive sentences, drastically increasing Marcum's potential time in prison. (C. 9–10.) See 730 ILCS 5/5-8-4(c)(1).

Addressing the fourth factor, the initial and later informations were not subject to the exact same defenses. The subsequent allegation of aggravated domestic battery could be contested on the ground that Rudin was not Marcum's family or household member. See 720 ILCS 5/12-3.3(a). Additionally, for the later charges, Marcum could dispute that separate acts caused the two distinct injuries, rather than both injuries merely being the result of the single act of stomping Rudin into the ground. As a result, there were viable new defenses to the later charges not available for the initial charge.

Pertaining to the fifth factor, there is nothing inherent about alleging a potential domestic relationship when filing the initial aggravated-battery charges. There would be no reason, based on the initial information, for Marcum to prepare for a subsequent two-count information alleging that he was in a domestic relationship with Rudin. Ultimately, the subsequent offenses alleged in the later information were new and additional charges to the initial information, and so the continuance from September 30, 2019, to January 6, 2020, granted on the aggravated-battery charge could not apply to the aggravated-domestic-battery charges. See *Isbell*, 2020 IL App (3d) 180279, ¶¶ 16, 28. Thus, the allotted time for filing the aggravated-domestic-battery counts expired before January 6, 2020, when the circuit court granted the State's motion to extend the speedy-trial term. As a result, the State should have been barred from dismissing the

aggravated-battery case and filing the new information containing the aggravated-domestic-battery allegations subsequently on July 6, 2020, when more than 120 days not attributable to the defense on the new charges had already passed. See *Hillsman*, 329 Ill. App. 3d at 1117 (explaining that the voluntary dismissal of a charge and the later institution of a new proceeding based on that same charge does not start a new speedy-trial period when the State does so to circumvent the defendant's right to a speedy trial); cf. *People v. Quigley*, 183 Ill. 2d 1, 16 (1998) (stating that the later-filed aggravated DUI charge "was essentially a new and additional charge that should have been brought with the misdemeanor DUI charge and was subject to the same speedy-trial limitation[;]" so, the State was required to timely bring the two related charges in a single proceeding). Quite simply, the record establishes that the appellate court was correct in holding that Marcum's statutory right to a speedy trial was violated, and this Court should concur with the court's analysis on that issue. *Marcum*, 2022 IL App (4th) 200656-U, ¶ 44.

B. The Circuit Court's Explanations for Restarting the Speedy-Trial Window Were Manifestly Erroneous.

While the appellate court rejected the circuit court's reasoning that Marcum's speedy-trial term started anew after Marcum disputed the propriety of the State's efforts to file the new charges, Marcum nonetheless finds it prudent to address the circuit court's statements. *Id.* at ¶ 35 (describing the circuit court's discussion of Marcum's statutory right to a speedy trial as not legally correct). In this case, Marcum orally complained to the circuit court that the State was belatedly allowed to refile the charges in his case. (R. 11, 13.) After the State dismissed 19-CF-72 to file 20-CF-53, Marcum queried the circuit court about his speedy-trial term. (R. 11.) In response, the circuit court determined that Marcum's speedy-trial clock started anew. (R. 11.) When Marcum complained that he would have to remain in custody indefinitely and "start all over again[,]" the circuit court decided that the delay was attributable to the continuances previously granted in 19-CF-72 as well as this Court's COVID-19 emergency order. (R. 12.)

After Marcum expressed his frustration, the circuit court continued: "I understand your frustration, but your case was continued. It was–early on it was agreed between you and [prior defense counsel] as well. So, the speedy trial starts over every time it is continued by an agreement." (R. 12.) Finally, Marcum questioned what would stop the State from dismissing and filing new charges repeatedly while keeping him in custody. (R. 13.) The circuit court did not accept Marcum's argument. (R. 13.)

As explained previously, the circuit court erred when it determined that the previous continuances in 19-CF-72 on the aggravated-battery charges were attributable to the defense on the aggravated-domestic-battery charges in 20-CF-53, as Marcum did not have notice of the new and additional allegations that were subject to compulsory joinder when he agreed to the continuances in the initial case. See *Isbell*, 2020 IL App (3d) 180279, ¶¶ 16, 28; *Hillsman*, 329 Ill. App. 3d at 1117. As such, the circuit court's response to Marcum's challenge to the State's conduct was not "legally correct." *Marcum*, 2022 IL App (4th) 200656-U, ¶ 35.

Similarly, the circuit court's pronouncement that this Court's orders relating to COVID-19 restarted Marcum's speedy-trial clock was erroneous. Admittedly, at the time the State filed the new aggravated-domestic-battery charges on July 6, 2020, this Court had issued an emergency order implicating all criminal defendant's statutory right to speedy trials. More specifically, on March 20, 2020, and April 3, 2020, this Court continued all cases with the time not attributable to the State for speedy-trial calculations. Thereafter, on April 7, 2020, this Court further ordered that chief judges may continue cases and such "continuances shall be excluded from speedy trial computations contained in section 103-5 of the Code of Criminal Procedure of 1963 (725 ILCS 5/103-5 (West 2018))[.] *** Statutory time restrictions in section 103-5 of the Code of Criminal Procedure of 1963 *** shall be tolled until further order of this Court." (Supreme Court Order, M.R. 30370, April 7, 2020) (included in the appendix as A-44).

In interpreting this order, the circuit court apparently inferred that Marcum's speedy-trial calculations started completely over. (R. 11–13.) Yet, the plain language of this Court's order appears to toll already existing speedy-trial computations. First, by excluding continuances due to the need to implement public-safety procedures for trials, this Court implied that it left in place time already accrued in speedy-trial computations. Similarly, this Court's ruling that it "tolled" the speedy-trial time restrictions indicates that it stopped time from accruing in any speedy-trial calculation, rather than it restarted the clock for all cases as found by the circuit court. (R. 12.) See TOLL, Black's Law Dictionary (11th ed. 2019) (defining "toll" as "(Of a time period, esp. a statutory one) to stop the running of; to abate). Thus, the plain language reveals an effort to toll or stop the accumulation of days towards a speedy-trial count, and there is no basis to conclude that it would impact cases where the time for filing new and additional charges had lapsed and the speedy-trial term was already violated.

Just as importantly, the circuit court should have interpreted this Court's order in a manner consistent with its purpose. This Court's emergency ruling should not be used to allow the State, likely knowing that the time period has lapsed to bring the more serious aggravated-domestic-battery charges, to nonetheless benefit from the emergency precautions and procedures necessitated and caused by a worldwide pandemic by allowing it to introduce enhanced charges it could not have otherwise brought at this juncture. Allowing the State to circumvent the speedy-trial provisions in this manner would not further the purpose of this Court's emergency order, which was to safeguard the public and prevent the spread of COVID-19; indeed, endorsing the State's efforts to belatedly and quickly usher in new and additional charges while restrictions were temporarily tolled would strip defendants of their statutory right to a speedy trial for no reason consistent with the basis of the emergency order. Clearly, the purpose of this Court's order was not to allow the State to belatedly add new and additional charges while speedy-trial restrictions were temporarily tolled.

Contrary to the circuit court's conclusion, Marcum's right to a statutory speedy trial was violated. As a result, this Court should reverse and ultimately vacate Marcum's convictions and sentences for aggravated domestic battery. See *Isbell*, 2020 IL App (3d) 180279, ¶¶ 16, 29; cf. *Hillsman*, 329 Ill. App. 3d at 1118.

3. The Statutory Speedy-Trial Violation is Reviewable under Rule 615(a).

While the appellate court found that Marcum was denied his right to a speedy trial, it improperly declined to review his argument as second-prong plain error. *Marcum*, 2022 IL App (4th) 200656-U, ¶ 51. Illinois Supreme Court Rule 615(a) allows that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." Under that doctrine, a reviewing court may examine forfeited errors if the defendant shows that clear or obvious error occurred and (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, or (2) the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *People v. Sebby*, 2017 IL 119445, ¶ 48. In this case, Marcum invoked second-prong plain-error review. *Marcum*, 2022 IL App (4th) 200656-U, ¶ 46.

At the onset, Marcum notes that, in its response brief before the appellate court, the State raised that Marcum forfeited his argument that his statutory right to a speedy trial was violated and recognized that Marcum would seek plain-error relief. (Appellate Court Response Brief, p. 2.) But, in that process, the State never contended that second-prong plain-error review was improper for speedy-trial claims. (Appellate Court Response Brief, p. 2–8.) Instead, the State only proposed that Marcum could not establish that clear or obvious error occurred under the plain-error doctrine. (Appellate Court Response Brief, p. 3–8.) To be clear, the State never articulated that Marcum's claim was not amenable to second-prong plain-error review in the event that he established there was clear or obvious error in his case. (Appellate Court Response Brief, p. 2–8.)

It is well established that the State can forfeit arguments of waiver or forfeiture. See *People v. Ringland*, 2017 IL 119484, ¶¶ 2, 36–37 (declining to consider the State's alternative argument against the suppression of evidence because it did not make that argument in the trial and appellate courts). By clearly anticipating Marcum's plain-error arguments in its response brief but only proposing that no clear or obvious error transpired, the State implicitly acquiesced that Marcum's statutory speedy-trial claim was amenable to plain-error review. As such, the appellate court should not have rejected Marcum's invocation of the plain-error doctrine on a basis not asserted by the State. See, e.g., *People v. Hilliard*, 2022 IL App (1st) 200744, ¶¶ 12, 26 (concluding that, where the State argues that no error occurred and made no challenge to the invocation of second-prong plain error, it would assume that any error constitutes second-prong plain error).

But even if this Court examines the propriety of reviewing a clear speedy-trial violation for plain error, it should affirm the numerous appellate court decisions that utilize the second prong of the plain-error doctrine to discuss the merits of such unpreserved errors. *People v. Smith*, 2016 IL App (3d) 140235; *People v. Mosley*, 2016 IL App (5th) 130223; *People v. McKinney*, 2011 IL App (1st) 100317; and *People v. Gay*, 376 Ill. App. 3d 796 (4th Dist. 2007). In each of these decisions, the appellate courts determined that the statutory right to a speedy trial was a substantial, fundamental right, rendering it amenable for Rule 615(a) review.

For example, in *Mosley*, the defendant never filed a motion to dismiss his charges based on a violation of his statutory right to a speedy trial, yet he raised the matter for the first time on appeal as plain error. *Mosley*, 2016 IL App (5th) 130223, ¶¶ 6–9. Reasoning that the speedy-trial statute enforces the federal and state constitutional rights to a speedy trial, the *Mosley* court concluded that non-compliance with the Illinois speedy-trial statute was subject to plain-error review. *Id.* at ¶ 9. More specifically, the *Mosley* court provided: "Despite defendant's failure to raise the issue below, we will address the issue under the plain-error doctrine because a speedy trial is a substantial fundamental right." *Id.*

Similarly, in *Smith*, although the *pro se* defendant filed a motion to discharge prior to trial and a motion to reconsider the adverse ruling, he failed to raise his speedy-trial contentions in his posttrial motion. *Smith*, 2016 IL App (3d) 140235, ¶¶ 9–10. On appeal, while recognizing that the speedy-trial claim was not properly preserved, the *Smith* court nevertheless accepted the defendant's request to review the argument's merits under the plain-error doctrine. *Id.* In that process, the *Smith* court explained that a speedy-trial issue is subject to plain-error review because it implicates fundamental, constitutional concerns. *Id.* at ¶ 10. After finding that the defendant's speedy-trial rights were violated, the *Smith* court held that the error was "so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *Id.* at ¶ 21 (internal quotations omitted). The *Smith* court concluded that the defendant "is therefore entitled to relief under the plain error doctrine[,]" vacating his convictions. *Id.* at ¶¶ 20–21, 24; cf. *People v. Nichols*, 60 Ill. App. 3d 919, 923, 925 (3d Dist. 1978) (concluding that the defendant's *constitutional* right to a speedy trial was "fundamental to our system of justice" and warranted plain-error relief).

Additionally, in *Gay*, the defendant asserted on appeal that his conviction must be reversed because it was obtained outside the applicable speedy-trial term. *Gay*, 376 Ill. App. 3d at 799. The problem was, however, the defendant failed to apply for discharge prior to his conviction and failed to assert the speedy-trial issue in his posttrial motion. *Id.* Nevertheless, the *Gay* court explained that, "a speedy trial is a substantial, fundamental right" and that "thus" it would review the claim under the plain-error doctrine "despite defendant's failure to file a motion to dismiss the charges or a file a postrial motion." *Id.* The *Gay* court then reviewed the defendant's speedy-trial argument on its merits. *Id.*; see *McKinney*, 2011 IL App (1st) 100317, ¶ 29 (deciding that it should "proceed to the merits of [the] issue" where the defendant invoked the plain-error doctrine after failing to properly preserve his speedy-trial argument for appellate review).

Inherent to the appellate courts' decisions in *Mosley*, *Smith*, *McKinney*, and *Gay* to reach the merits of the defendants' claims through the plain-error doctrine was the underlying premise that a defendant's rights under the speedy-trial statute are "substantial rights" as envisioned by Rule 615(a). That premise makes sense; it is well established that the right to a speedy trial "is fundamental" and guaranteed to a defendant under both the state and federal constitutions. See *People v. Mayfield*, 2023 IL 128092, ¶ 18. While the constitutional right and the statutory right to a speedy trial are "not necessarily coextensive[,]" both provisions "address similar concerns[.]" *People v. Kliner*, 185 Ill. 2d 81, 114 (1998). To that end, this Court has delineated that the statutory provisions implement the right to a speedy trial guaranteed by the federal and state constitutions, providing a definite time limit within which a defendant must be brought to trial. See *People v. Lacy*, 2013 IL 113216, ¶ 20; *People v. Crane*, 195 Ill. 2d 42, 48 (2001) ("Because of the imprecise nature of the constitutional guarantee to a speedy trial, our legislature enacted section 103-5 of the Code of Criminal Procedure of 1963," which "implements the constitutional guarantee" by "specif[ying] certain time periods within which a defendant must be brought to trial"). And, while a violation of the speedy-trial act does not, by itself, necessarily offend the federal or state constitution, the act does, just like the constitutional provisions, operate to prevent the wrongful incarceration of a defendant, recognize the right of the individual to liberty, and curtail the harms caused by lengthy delays in adjudicating a case. See *People v. Gooden*, 189 Ill. 2d 209, 220 (2000). Under this framework, as the speedy-trial statute actually sets forth the means to carry out critical constitutional guarantees, it affords the defendant substantial rights that are amenable to review under Rule 615(a). See *Mosley*, 2016 IL App (5th) 130223, ¶ 9; *Gay*, 376 Ill. App. 3d at 799.

Importantly here, the purpose underlying Rule 615 and the plain-error doctrine would not be compromised by permitting review of speedy-trial arguments even though they were not first presented to the circuit court. Unlike other claims of circuit-court error, there is no

real risk that a defendant would be encouraged to fail to assert a meritorious speedy-trial claim in order to gain some sort of advantage; a meritorious speedy-trial claim would result in the dismissal of the charges. See *People v. Ladd*, 185 Ill. 2d 602, 607 (1999) (reciting that the appropriate remedy for a violation of the speedy-trial provision at issue here is the dismissal of the charge); cf. *People v. Moon*, 2022 IL 125959, ¶ 81 (finding second-prong plain-error review appropriate where, *inter alia*, there was no viable strategic reason for the defense's failure to timely bring the error to the circuit court's attention). Additionally, unlike other potential errors where there is substantial value in requiring the defendant to timely raise the error to afford the State or the circuit court a meaningful opportunity to cure or remedy the injury, there is not the same harm wrought by the defense's belated assertion of a speedy-trial violation that has already transpired, as the State cannot retroactively cure a past violation.

Even so, the circuit court *was presented* with the opportunity to consider Marcum's objection to some degree. (R. 11–13.) To be sure, at the time the State filed the new and additional aggravated-domestic-battery charges, Marcum did inquire about his speedy-trial term and expressed his frustration that he remained in custody for nearly a year while the State was allowed to refile different charges. (R. 11, 13, vocalizing Marcum's disbelief that the State could "do it again over and over if they want to" and "[c]an [the State] keep doing charges over and over if they wanted to, like different charges, and say, well, we want to go charge with this now?") While Marcum neglected to present the matter in a written motion as required, Marcum's prompt complaint eliminates any concern that he was seeking some sort of undue advantage by failing to provide the court with his written objection or that the State or circuit court was deprived of any notice at all about this potential argument. Quite simply, this was not the case where the defense was wholly silent about the State's pretrial conduct before the circuit court or affirmatively indicated in any manner that he did not object to the State's actions violating his speedy-trial rights. Under the entirety of the circumstances, Marcum asks that

this Court review the merits of the speedy-trial violation pursuant to Rule 615(a). See *People v. Davis*, 50 Ill. App. 3d 163, 166 (3d Dist. 1977) (noting the propriety of applying Rule 615(a) in cases that involve substantial rights and where the objection before the circuit court was imperfectly presented).

Now, in rejecting Marcum's invocation of the plain-error doctrine, the appellate court here relied on the legislature's passage of 725 ILCS 5/114-1(b), which provides that any motion to dismiss based on the speedy-trial act not timely filed before the circuit court is "waived." *Marcum*, 2022 IL App (4th) 200656-U, ¶ 51 (referencing 725 ILCS 5/114-1(b) (2018)); cf. *People v. Johnson*, 2023 IL App (4th) 210662, ¶ 50 (offering that the distinction between wavier and forfeiture is important because courts generally find that waiver, but not forfeiture, precludes plain-error review). To the extent 725 ILCS 5/114-1(b), which calls for "waiver" of unpresented speedy-trial claims, conflicts with Rule 615(a), which dictates that plain errors may be noticed although they were not brought to the trial court's attention, this Court should reject it. See *Mayfield*, 2023 IL 128092, ¶ 31 (reasoning that, where a statute cannot be reconciled with a rule of this court adopted pursuant to its constitutional authority, the rule will prevail). And while the fact that the legislature called for waiver of dismissal motions not brought before the circuit court in compliance with 725 ILCS 5/114-1(b), it is important that waiver in this context can nonetheless mean mere forfeiture. See, e.g., *People v. Palen*, 2016 IL App (4th) 140228, ¶ 33 (suggesting that this Court has "held a procedurally defaulted double jeopardy claim may still be reviewed on appeal under the plain-error doctrine" despite non-compliance with 725 ILCS 5/114-1).

To exemplify that point, Illinois Supreme Court Rule 604(d) plainly states that, in the guilty-plea context, any issue not raised by the defendant in the appropriate and timely postplea motion "shall be deemed waived." Ill. S. Ct. R. 604(d). However, reviewing courts have still

found that the failure to present a claim in a postplea motion merely results in its forfeiture. See, e.g., *People v. Hammons*, 2018 IL App (4th) 160385, ¶ 12 ("Although the rule says 'waived,' it really means 'forfeited'"); *People v. Sophanavong*, 2020 IL 124337, ¶ 53 (Karmeier, J., dissenting) (explaining that Rule 604(d)'s dictate that any issue not raised in the defendant's postplea motion shall be deemed waived was "not ironclad" and may be "relaxed under appropriate circumstances" such as plain error).

In Marcum's case, the appellate court also surmised that, as the legislature provided for a forfeiture of untimely raised pretrial dismissal claims, it did not consider speedy-trial violations as infringing on a substantial right that would deprive the defendant of a fair trial or threaten the reliability of the judicial process. *Marcum*, 2022 IL App (4th) 200656-U, ¶ 51. But the appellate court's position overlooked that there are statutory requirements to preserve claims of trial errors in a written motion for new trial (725 ILCS 5/116-1 (2019)) and claims of sentencing errors in a written motion to reconsider the sentence (730 ILCS 5/5-4.5-50 (2019)); even so, the failure to specify the grounds for a new trial or new sentencing hearing does not foreclose plain-error review. See *People v. Enoch*, 122 Ill. 2d 176, 187 (1988).

Even more importantly than that, the appellate court ignored the nature of the particular error that occurred here. Indeed, the State invited Marcum's acceptance of delays on an initial, lesser charge for approximately nine months before eventually filing greater, more serious charges one week before the scheduled jury trial. (Sup. R. 6, 86–87.) As recognized by this Court, the harm in this situation is "obvious" as Marcum faced "a Hobson's choice between a trial without adequate preparation and further pretrial detention to prepare for trial." *Williams*, 204 Ill. 2d at 207. Consequently, Marcum spent over nine months in custody preparing his defense for a single charge of aggravated battery that the State would abandon right before trial and then was forced to choose between spending additional time in custody or proceeding

immediately to the next trial setting without properly preparing his new defense. See *id.* Contrary to the appellate court's conclusions, allowing the State to proceed in this manner and circumvent the statutorily implemented constitutional right to a speedy trial does actually result in unreliable trials and affect the trial's underlying fairness as defendants are rushed unprepared to trials in order to avoid indefinite pretrial incarceration. See *id.*

Nor has this Court found that 725 ILCS 5/114-1(b) prohibits plain-error review despite the opportunity to do so. See *People v. Hartfield*, 2022 IL 126729, ¶ 33; *People v. Staake*, 2017 IL 121755, ¶ 33 (declining to review appellate-court case law that concluded a waived statutory speedy-trial violation was amenable to second-prong plain-error review). Now, in *People v. Pearson*, 88 Ill. 2d 210 (1981), this Court found that the State violated the defendant's right to a trial held in compliance with 725 ILCS 5/103-5(a); however, this Court did not grant the defendant any relief as he failed to comply with 725 ILCS 5/114-1(b) by filing a pretrial motion to dismiss the charges. *Pearson*, 88 Ill. 2d at 219. Critically, there is no indication in *Pearson* that the defendant invoked the plain-error doctrine and specifically asked this Court to excuse his procedural default pursuant to Rule 615(a). See *id.* Absent the defendant's invocation of the plain-error doctrine, there would be no basis to excuse the failure of the *Pearson* defendant to properly preserve his speedy-trial argument for appellate review. See *People v. Hillier*, 237 Ill. 2d 539, 545 (2010) (ruling that a defendant who fails to even argue for plain-error review cannot establish that plain error occurred). Because the defendant in *Pearson* did not seek plain-error relief, this Court did not assess whether Rule 615(a) mitigates the harsh effects of a defendant's failure to abide by the statutory requirements of 725 ILCS 5/114-1(b).

In the end, clear and obvious violations of law that strip a defendant of his substantial rights should be redressed via plain-error relief. See *People v. Herron*, 215 Ill. 2d 167, 177 (2005) ("Fairness, in short, is the foundation of our plain-error jurisprudence"). As applied here, the

State, after allowing Marcum to prepare for trial on a single aggravated-battery charge for nearly nine months, filed the new, additional, and more serious aggravated-domestic-battery charges a week prior to his scheduled jury trial, forcing him to choose between hastily preparing his defense against the new charges for a jury trial at the next setting or to continue languishing in the county jail during a worldwide pandemic. Ultimately, Marcum asks this Court to hold that the speedy-trial violation in his case amounted to second-prong plain error and to vacate his convictions and sentences. See *Mosley*, 2016 IL App (5th) 130223, ¶ 9; *Smith*, 2016 IL App (3d) 140235, ¶¶ 10, 21; *McKinney*, 2011 IL App (1st) 100317, ¶ 29; *Gay*, 376 Ill. App. 3d at 799.

II.

Clayton Marcum's constitutional right to counsel was violated where he did not knowingly waive his right to counsel when the circuit court failed to substantially comply with Illinois Supreme Court Rule 401(a). The appellate court reversibly erred when it concluded that the circuit court's admonishments did not prejudice Marcum.

After Marcum expressed a desire to proceed *pro se*, the circuit court, contrary to its obligations under Illinois Supreme Court Rule 401(a), failed to correctly inform him of the possible penalties for the charges levied against him. Specifically, the circuit court misadvised Marcum that he was eligible to receive an extended-term sentence and wholly failed to notify him that he could receive consecutive sentences for the two charges. Not only that, the circuit court, in later proceedings, would actually affirmatively assure Marcum that he would only receive a single sentence and so essentially could not be subject to consecutive sentencing. Ultimately, the record established that Marcum, throughout the entirety of the proceedings, was confused as to the possible penalties for the charges and even to the exact nature of the charges themselves. In that process, the circuit court failed to substantially comply with the requirements of Rule 401(a), and Marcum did not knowingly waive his constitutional right to counsel.

The appellate court reversibly erred in finding otherwise. The appellate court concluded that, *inter alia*, because Marcum was aware that he could spend 14 years in prison, the circuit court's failure to advise Marcum that he could receive consecutive sentences was not consequential where he ultimately received two sentences of 7 years in prison, to be served consecutively for an aggregate sentence of 14 years in prison. However, the appellate court's position ignored the fundamental difference between being informed of the possible maximum aggregate prison exposure and being advised accurately as to the possible maximum prison exposure on each count (and that they could be served consecutively), especially as it could

influence Marcum's decision to proceed without counsel in order to employ or reject count-specific defenses at trial. Additionally, the appellate court's conclusion overlooked that Marcum continued to the next critical stage of the proceeding against him, sentencing, without counsel and with the belief–created by the circuit court's admonishments before and during trial that he would only receive one sentence and that he was only exposed to a single prison term of 7 years–that he could not spend 14 years in prison. In the end, this Court should reverse and remand for new proceedings with the assistance of counsel or a knowing waiver of the constitutional right to counsel.

1. Standard of Review

The reviewing court examines *de novo* the circuit court's purported compliance with an Illinois Supreme Court rule. *People v. Campbell*, 224 Ill. 2d 80, 84 (2006).

2. Marcum Did Not Knowingly Waive his Constitutional Right to Counsel.

A defendant has a constitutional right to counsel at every critical stage of the proceedings against him or her. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. This fundamental right to counsel is "a cornerstone of our criminal justice system." *People v. Black*, 2011 IL App (5th) 080089, ¶ 11. As such, while a defendant can waive his or her constitutional right to counsel, it should not be lightly deemed waived given the importance of that right. *People v. Bush*, 32 Ill. 2d 484, 487 (1965). To that point, reviewing courts must make every reasonable presumption against finding a waiver of counsel. *People v. Baez*, 241 Ill. 2d 44, 116 (2011).

To constitute an effective waiver of his or her constitutional right to counsel, the defendant's waiver must be made knowingly, voluntarily, and intelligently. *Black*, 2011 IL App (5th) 080089, ¶ 11. And to ensure that a waiver of counsel meets that very rigorous standard, a circuit court may not accept a waiver of counsel until and unless the defendant has been

admonished pursuant to Illinois Supreme Court Rule 401(a), which states:

> "Waiver of Counsel. Any waiver of counsel shall be in open court. The court shall not permit a waiver of counsel by a person accused of an offense punishable by imprisonment without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:
>
> (1) the nature of the charge;
>
> (2) the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences; and
>
> (3) that he has a right to counsel and, if he is indigent, to have counsel appointed for him by the court." Ill. S. Ct. R. 401(a) (2020).

It is well established that circuit courts do not have discretion to disregard this Court's rules; instead, these rules have the force and effect of law and must be followed as written. *Campbell*, 224 Ill. 2d 87. That being so, strict compliance with Rule 401(a) is not required and substantial compliance "will be sufficient to effectuate a valid waiver if the record indicates that the waiver was made knowingly and voluntarily, and the admonishment the defendant received did not prejudice his rights." *People v. Haynes*, 174 Ill. 2d 204, 236 (1996); cf. *People v. Sutherland*, 128 Ill. App. 3d 415, 431 (4th Dist. 1984) (noting that the fact that a Supreme Court rule only requires substantial compliance is "no occasion to disregard its terms"). The defendant must be admonished pursuant to Rule 401(a) prior to the waiving of the right to counsel. *People v. Span*, 2021 IL App (2d) 180966, ¶ 19. In that process, the circuit court's "admonitions regarding the *maximum* penalty must be 'accurate' before the court accepts the defendant's waiver of counsel." *People v. Bahrs*, 2013 IL App (4th) 110903, ¶ 15. And finally, "[t]o be accurate, the admonitions regarding the maximum penalty must be complete, and to be complete, the admonitions must inform the defendant of the consecutive running of any prison term, as the rule requires." *Bahrs*, 2013 IL App (4th) 110903, ¶ 15.

A. The Circuit Court Did Not Substantially Comply With Rule 401.

Turning to the facts of Marcum's case, the circuit court's instructions on the possible penalties and even the nature of the charges themselves shifted from hearing to hearing and reinforced that not only Marcum, but the State and the circuit court as well, were all thoroughly confused on the possible penalties associated with the aggravated-domestic-battery charges. In fact, Marcum was not accurately informed of the possible penalties that he was actually facing as to his charges until the middle of his sentencing hearing. As such, the circuit court's admonishments did not ensure that Marcum was aware of the possible penalties for the two aggravated-domestic-battery charges as required by Rule 401. See Ill. S. Ct. R. 401(a)(2) (stating that, before any waiver of counsel, the court must ensure that it informs, and the defendant understands, "the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences").

To be sure, at the initial hearing on July 6, 2020, the circuit court read the two aggravated-domestic-battery charges against Marcum and, for each offense, advised him that, if he did not receive probation or conditional discharge, he was facing 7 to 14 years in prison instead of the ususal 3 to 7 years because he was extended-term eligible based on a prior Iroquois County residential-burglary conviction. (R. 3–6.) But Marcum was not extended-term eligible. (R. 474–75.) As later recognized by the circuit court and the State, Marcum was never previously convicted of residential burglary and so was not extended-term eligible based on that non-existent conviction. (R. 474–75.) Thus, at the time of his wavier, Marcum was improperly instructed by the circuit court on the applicability of the extended-term provisions based on his prior convictions. (R. 4, 6.) See *People v. Koch*, 232 Ill. App. 3d 923, 926 (4th Dist. 1992) (explaining that the circuit court's failure to admonish the defendant about his eligibility for extended-term sentencing did not comply with Rule 401(a)).

At that initial hearing, the circuit court further instructed Marcum that his mandatory-supervised-release term was 4 years to life. (R. 4.) The circuit court was simply wrong. Contrary to the circuit court's belief, aggravated domestic battery requires the imposition of a four-year term. See 730 ILCS 5/5-8-1(d)(6) (2019) (explaining that, the term of mandatory supervised release "for a felony domestic battery, aggravated domestic battery, stalking, aggravating stalking, and a felony violation of an order of protection, [is] 4 years"). Consequently, at the time he waived counsel, Marcum was not admonished, nor did the circuit court ensure that he understood, the proper term of mandatory supervised release.

More importantly here, at no point in the initial hearing did the circuit court relay to Marcum that he could receive a prison sentence on each conviction that it could then order them to be served consecutively. Nor did the circuit court explain the concept of consecutive sentencing in relation to the two charges in any manner. But, by its plain language, Rule 401(a)(2) clearly requires the circuit court to inform the defendant and determine that he or she understands the penalty to which he or she may be subjected because of *consecutive sentences*. Ill. S. Ct. R. 401(a)(2). Despite the rule's unequivocal language, there was no indication in the record at all that Marcum was advised about, or that he understood, the possibility of consecutive sentencing. See *Bahrs*, 2013 IL App (4th) 110903, ¶ 14 (finding that the circuit court did not substantially comply with Rule 401(a) when it failed to inform the defendant that his prison term for aggravated fleeing would run consecutively to the other two prison terms, as it "was a failure to explicitly inform him of the true maximum penalty he faced").

Now, in assessing the circuit court's compliance with Rule 401, the focus is appropriately on the information relayed to the defendant prior to the waiver of counsel. See *Span*, 2021 IL App (2d) 180966, ¶ 19. That being said, the remainder of the proceedings against Marcum reinforce that he, in fact, did not comprehend the charges facing him, much less the possible range of penalties. In the process of waiving counsel, Marcum interrupted the circuit court to question whether the charges were aggravated batteries and the circuit court provided that

"[t]his is an aggravated domestic battery." (R. 5.) However, at the very next hearing on August 4, 2020, Marcum asked the circuit court: "Question so is this still aggravated battery with intent at any time to do bodily harm?" (R. 35.) The circuit court answered Marcum, albeit incorrectly, "[r]ight now[,] it is a straight domestic battery, which is a Class 2." (R. 35.) In reality, the State had charged Marcum with two counts of aggravated domestic battery. (C. 9–10.) Nevertheless, this exchange reinforces Marcum's continued struggles with comprehending the precise nature of the charges levied against him and the circuit court's ongoing difficulties in remedying that miscomprehension. (R. 5, 35.)

At the following proceeding (the jury trial starting on October 19, 2020), Marcum inquired if he was charged with "aggravated domestic," and the circuit court explained that he was charged with the "[s]ame thing" he was arraigned on previously, despite the most recent admonishment indicating that Marcum was charged only with domestic battery. (R. 35, 42.) The circuit court noted that the State was proceeding only on one case, which was two counts of aggravated battery, before offering it was aggravated domestic battery. (R. 43.) Marcum sought clarification that, if found guilty, he would have two sentences. (R. 43.) Both the State and the circuit court declared that, if Marcum was found guilty on both, he would only receive *one sentence*. (R. 43.) Specifically, the circuit court expressly advised him that he would "not be sentenced twice." (R. 43.) With that understanding, Marcum confirmed that he wanted to proceed to trial *pro se* and the parties started to select a jury. (R. 44, 52.)

Therefore, rather than ensuring that Marcum understood the possibility that he could receive two sentences run consecutively for the aggravated-domestic-battery charges, the circuit court instead affirmatively misinstructed him that he would only serve a single sentence on both of the charges during this crucial juncture of determining whether to proceed to the jury trial without the assistance of defense counsel. (R. 43.) The circuit court's misleading and incorrect instructions were critically important considering that it had previously failed to admonish Marcum about the possibility of consecutive sentencing at all. (R. 3–7.)

And the fact that Marcum did not even understand the concept of consecutive sentencing was further made clear at sentencing. During the middle of the jury trial, the State and the circuit court acknowledged that Marcum could not be sentenced to an extended term, as he was not previously convicted for residential burglary as the State had alleged. (C. 9–10; R. 474–75.) The circuit court thus assured Marcum that he was only "looking at three to seven years" in prison; "seven being the maximum." (R. 476.) Despite that admonishment, at the sentencing hearing, the State argued that the circuit court should impose discretionary consecutive sentencing for the two convictions. (R. 615.) Marcum interrupted the proceedings: "What's that mean, Your Honor?" (R. 615.) Once the State finished its argument, the circuit court, for the very first time, discussed consecutive sentencing with Marcum:

Court:	"Mr. Marcum, you were asking questions while [the prosecutor] was making his argument.
Marcum:	Yeah.
Court:	Pursuant to [730 ILCS 5/5-8-4(c) (2020)], regarding consecutive terms and permissive consecutive sentences, [the prosecutor] did read the statute. He is arguing based on the fact he wants the Court to find, make a finding there were two distinct and separate acts; the one which occurred in the apartment and the one that occurred outside the apartment. *** So, based on that, based on the statute, permissive consecutive sentence, he is asking for not just one term of seven years. He is asking for one term of seven years in Count I and a separate term of seven years in Count II. They would be consecutive, meaning you would serve one after the other.
Marcum:	Like 14 years?
Court:	14 and 85 percent, and he is asking 466 days to be given on the first count, and since these are consecutive, you would not get credit for that in the second.
Marcum:	God forbid that would happen for this misunderstanding." (R. 617–18.)

Disregarding its previous admonishments made during and prior to trial, the circuit court sentenced Marcum to 7 years in prison on each count, to run consecutively for a total of 14 years. (R.637.)

Thus, Marcum was sentenced to two terms of 7 years in prison for a total of 14 years when he was never informed about the possibility of consecutive sentencing before his waiver of counsel and where he actually proceeded to sentencing *pro se* with the belief that he would receive a single sentence with a maximum of between 3 and 7 years in prison. (R. 43, 474–76.)

The circuit court's admonishments fell far short of what Rule 401 requires. Contrary to the plain language of Rule 401(a), the circuit court did not admonish about, and determine Marcum's understanding of, the possibility of his maximum sentence, including consecutive sentencing prior to Marcum's waiver of counsel. See Ill. S. Ct. R. 401(a); *Bahrs*, 2013 IL App (4th) 110903, ¶ 14. Instead the circuit court only accurately relayed the possible prison exposure for each count and the concept of discretionary consecutive sentencing to Marcum during the middle of his sentencing hearing, far after he initially waived counsel and defended himself at trial. (R. 617–18.) Under entirety of the circumstances, the circuit court failed to substantially comply with the plain language of Rule 401(a) before Marcum proceeded *pro se*. See Ill. S. Ct. R. 401(a)(2); *Bahrs*, 2013 IL App (4th) 110903, ¶ 14.

B. The Appellate Court Reversibly Erred in Finding that the Circuit Court Substantially Complied with Rule 401.

In rejecting Marcum's arguments, the appellate court concluded that the circuit court substantially complied with Rule 401(a) as (1) the information received by the circuit court during the waiver indicated that Marcum was extended-term eligible and that the error was only discovered later, (2) the circuit court's parole admonishment was greater than the parole term actually imposed, and (3) Marcum was advised about the possibility of 14 years in prison prior to trial and sentencing and still elected to represent himself. *Marcum*, 2022 IL App (4th) 200656-U, ¶ 58. However, the fact that the State volunteered erroneous information does not absolve the circuit court of its independent duty to personally inform the defendant in open court and determine that he understands, *inter alia*, the minimum and maximum sentences

prescribed by law, including the penalty which the defendant may be subject to due to prior convictions. See Ill. S. Ct. R. 401(a)(2). And, while the circuit court's erroneous instruction on Marcum's mandatory-supervised-release term, by itself, does not mandate reversal, it does further underscore how the information the circuit court provided to Marcum about the possible penalties he was facing–which was often incorrect–shifted from hearing to hearing and ultimately precluded Marcum from understanding his actual penal exposure.

In making this argument, Marcum acknowledges that he agreed to appear *pro se* at trial, knowing that he faced the possibility of 14 years in prison on each of the aggravated-domestic-battery counts under the extended-term provisions. (R. 4, 6, 41–42.) But the appellate court's decision ignored the possibility that Marcum may have found it unlikely that he would receive an extended-term sentence when deciding to proceed without counsel's assistance, given his knowledge that he was never previously convicted of residential burglary. (R. 474–75.) Yet even if Marcum believed that he faced 14 years in prison, there is a critical difference in being informed that one faces 14 years in prison on either count as opposed to being advised that one could only be imprisoned for 14 years if convicted on both counts, run consecutively. Based on the admonishments he received, Marcum, to avoid an exposure of 14 years in prison, would have to obtain an acquittal on both counts; whereas, in reality, to avoid that exposure, Marcum merely needed to be acquitted on one count. Consequently, the circuit court's fundamentally erroneous misstatements prejudiced Marcum in the terms of his possible decision to reject counsel in order to employ or avoid any count-specific defenses.

Not only that, the appellate court's decision failed to account for the fact that Marcum did not eschew counsel for a reason wholly unrelated to, and regardless of, the admonishments he received by the circuit court. As indicated by the record, Marcum was dissatisfied with his appointed counsel's temperament and refusal to file certain motions on his behalf. (Sup. R. 68.) With accurate admonishments, however, Marcum may have been more likely to countenance

appointed counsel's ill-tempered demeanor and it may have impacted his belief on the viability or necessity of the proposed motions. And there was no evidence presented in this case that Marcum was legally sophisticated or had any experience in representing himself, and so desired to represent himself regardless of the charges. See *People v. Moore*, 2014 IL App (1st) 112592-B, ¶ 41 (finding a lack of substantial compliance when the court failed to inform the defendant of the proper sentencing range before the waiver of counsel and when the reviewing court had "no reason to believe" that the defendant was otherwise aware of that range).

Because the record does not demonstrate that Marcum's decision to proceed *pro se* was unrelated to the admonishments he received, this Court should not conclude that any errors in the circuit court's attempt to comply with Rule 401 were harmless. Cf. *People v. Reese*, 2017 IL 120011, ¶¶ 63–64 (stating that the circuit court's admonishments properly impressed upon the defendant the amount of time he was facing in prison if convicted when it informed him that some of his sentences could run consecutively, noted that two of the charges alone carried a maximum penalty of 160 years, and explicitly advised him that he was looking at "massive time" if he was convicted, which the defendant responded that he perfectly understood; thus, there was no reason to believe that the defendant would have desired counsel even had the circuit court specifically admonished him regarding the maximum amount of time he actually faced); *People v. Wright*, 2017 IL 119561, ¶¶ 55–56 (reasoning that, because the defendant's articulated reason for rejecting the public defender was speedy-trial concerns, there was no reason to suspect that inaccurate admonishment on the maximum sentence allowed for the charged offenses impacted the defendant's choice to waive counsel, especially where he received a sentence 25 years less than the actual maximum sentence and 10 years less than the maximum sentence the circuit court admonished him about prior to his waiver of counsel); *People v. Coleman*, 129 Ill. 2d 321, 338 (1989) (deciding that the inaccurate admonishments did not harm the defendant as he stated, on the record, that he preferred to represent himself, that he

had personal knowledge about his case that the public defender did not have, and that he wanted to speak on his own behalf rather than have the public defender speak for him).

All that being said, even if this Court finds that Marcum's waiver was voluntary as to his trial, it should still find that he did not knowingly waive his constitutional right to sentencing counsel. It is well established that a criminal defendant has a constitutional right to be represented by counsel at every stage of a criminal proceeding where his substantial rights may be affected, which includes sentencing. *People v. Baker*, 92 Ill. 2d 85, 90 (1982). Where a defendant does not limit his decision to waive counsel to a specific stage, courts generally apply the "continuing waiver" rule, which provides that, absent significantly changed circumstances or a later request for a counsel, a proper waiver of counsel applies to all phases thereafter. *People v. Simpson*, 172 Ill. 2d 117, 138 (1996). Examples of circumstances that would preclude the application of the continuing waiver rule and would require the circuit court to readmonish the defendant prior to sentencing include lengthy delays between phases, newly discovered evidence which might require or justify advice of counsel, new charges brought, or a request from the defendant. *Simpson*, 172 Ill. 2d at 138.

Here, the circuit court admonishing Marcum, prior to and during his trial, that he could only receive one prison sentence of 3 to 7 years was a change of circumstances when the court previously informed him that his possible prison exposure was 14 years. (R. 43, 474–76.) To that point, the recognition by the State and the circuit court that Marcum was not extended-term eligible, as specifically alleged in the charges, was essentially an amendment to the information pleaded in the charges, which would constitute a substantial change of circumstances requiring readmonishment. (C. 9–10.) See *id.* And it would be difficult for Marcum to argue against the application of consecutive sentencing to his case when he was previously told, in the course of affirming that he desired to proceed *pro se,* that he would only receive one sentence. (R. 43.)

The misleading nature of the circuit court's collective statements regarding his possible sentence rendered his prior waiver of counsel ineffective and resulted in a fundamentally unfair sentencing hearing. Under the entirety of the circumstances, Marcum should be afforded his constitutional right to counsel or at least the opportunity to prepare against the application of discretionary consecutive sentencing after providing a valid waiver of sentencing counsel.

In the end, because the circuit court did not substantially comply with the requirements of Rule 401(a), Marcum's purported waiver of counsel was not effective and he ultimately did not knowingly waive his constitutional right to counsel. See *Bahrs*, 2013 IL App (4th) 110903, ¶ 57. Without an effective waiver of counsel, Marcum's convictions and sentences cannot stand. See *Campbell*, 224 Ill. 2d at 84–85. As a result, this Court should reverse and remand for new proceedings with the assistance of counsel or the effective and knowing waiver of the constitutional right to counsel. See *Bahrs*, 2013 IL App (4th) 110903, ¶ 59. Alternatively, Marcum seeks a new sentencing hearing with the assistance of sentencing counsel or the effective waiver of his constitutional right to counsel. See *id.*

CONCLUSION

For the foregoing reasons, Clayton T. Marcum ("Marcum"), defendant-appellant, respectfully requests that this Court vacate his convictions and sentences. Alternatively, Marcum respectfully asks that this Court reverse his convictions and sentences and remand for a new trial with the assistance of counsel or the knowing and voluntary waiver of that fundamental, constitutional right. Marcum also seeks a new sentencing hearing with the assistance of sentencing counsel or the effective waiver of his right to sentencing counsel.

Respectfully submitted,

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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 forty-six pages.

/s/Edward J. Wittrig
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ARDC No. 6327792
Assistant Appellate Defender

APPENDIX TO THE BRIEF

Clayton Marcum, No. 128687

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
FORD COUNTY, ILLINOIS

PEOPLE	)	
Plaintiff/Petitioner	)	Reviewing Court No: 4-20-0656
	)	Circuit Court No: 2020CF53
	)	Trial Judge: Fitton, Matt
v	)	
	)	
	)	
MARCUM, CLAYTON T	)	
Defendant/Respondent	)	

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FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
FORD COUNTY, ILLINOIS

PEOPLE	)	
Plaintiff/Petitioner	)	Reviewing Court No: 4-20-0656
	)	Circuit Court No: 2020CF53
	)	Trial Judge: Fitton, Matt
v	)	
	)	
	)	
MARCUM, CLAYTON T	)	
Defendant/Respondent	)	

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FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
FORD COUNTY, ILLINOIS

PEOPLE	)	
Plaintiff/Petitioner	)	Reviewing Court No: 4-20-0656
	)	Circuit Court No: 2020CF53
	)	Trial Judge: Fitton, Matt
v	)	
	)	
	)	
MARCUM, CLAYTON T	)	
Defendant/Respondent	)	

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FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
FORD COUNTY, ILLINOIS

PEOPLE	)	
Plaintiff/Petitioner	)	Reviewing Court No: 4-20-0656
	)	Circuit Court No: 2019CF72
	)	Trial Judge: Fitton, Matt
v	)	
	)	
	)	
MARCUM, CLAYTON T	)	
Defendant/Respondent	)	

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FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
FORD COUNTY, ILLINOIS

PEOPLE	)	
Plaintiff/Petitioner	)	Reviewing Court No: 4-20-0656
	)	Circuit Court No: 2019CF72
	)	Trial Judge: Fitton, Matt
v	)	
	)	
	)	
MARCUM, CLAYTON T	)	
Defendant/Respondent	)	

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E-FILED
Transaction ID: 4-20-0656
File Date: 4/14/2021 1:52 PM
Carla Bender, Clerk of the Court
APPELLATE COURT 4TH DISTRICT

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
FORD COUNTY, ILLINOIS

PEOPLE	)	
Plaintiff/Petitioner	)	Reviewing Court No: 4-20-0656
	)	Circuit Court No: 2020CF53
	)	Trial Judge: Fitton, Matt
v	)	
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MARCUM, CLAYTON T	)	
Defendant/Respondent	)	

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APPEAL TO THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
FORD COUNTY, ILLINOIS

PEOPLE	)	
Plaintiff/Petitioner	)	Reviewing Court No: 4-20-0656
	)	Circuit Court No: 2020CF53
	)	Trial Judge: Fitton, Matt
v	)	
	)	
	)	
MARCUM, CLAYTON T	)	
Defendant/Respondent	)	

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Party	Exhibit #	Description/Possession	Page No
People	B	EXHIBIT B - RUDIN - MEDICAL REPORTS-12/9/2020	EI 14 - EI 57

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
FORD COUNTY, ILLINOIS

PEOPLE	)	
Plaintiff/Petitioner	)	Reviewing Court No: 4-20-0656
	)	Circuit Court No: 2020CF53
	)	Trial Judge: Fitton, Matt
v	)	
	)	
	)	
MARCUM, CLAYTON T	)	
Defendant/Respondent	)	

SUPPLEMENT TO THE EXHIBITS - TABLE OF CONTENTS

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IN THE CIRCUIT COURT OF Ford COUNTY, IL
ELEVENTH JUDICIAL CIRCUIT

FILED IN THE CIRCUIT COURT
OF FORD COUNTY ILLINOIS
DEC 09 2020
Kamala Johnson Anderson
CLERK

PEOPLE OF THE STATE OF ILLINOIS)
)
vs.)
)
Clayton T Marcum)
Defendant

Date of Sentence 12-9-2020
Case Number 20CF53
Date of Birth 08/16/1985
(Defendant)

JUDGMENT – SENTENCE TO ILLINOIS DEPARTMENT OF CORRECTIONS

WHEREAS the above-named defendant has been adjudged guilty of the offenses enumerated below; IT IS THEREFORE ORDERED that the defendant be and hereby is sentenced to confinement in the Illinois Department of Corrections for the term of years and months specified for each offense.

COUNT	OFFENSE	DATE OF OFFENSE	STATUTORY CITATION	CLASS	SENTENCE	MSR
I	Aggravated Domestic Battery	9-1-19	720 ILCS 5/12-3.3	2	7 Yrs. 0 Mos.	4 Yrs.
	To run (concurrent with) (consecutively to) count(s) II and served at 50%, 75%, 85%, 100% pursuant to 730 ILCS 5/3-6-3					
II	Aggravated Domestic Battery	9-1-19	720 ILCS 5/12-3.3	2	7 Yrs. 0 Mos.	4 Yrs.
	To run (concurrent with) (consecutively to) count(s) _____ and served at 50%, 75%, 85%, 100% pursuant to 730 ILCS 5/3-6-3					
					Yrs. Mos.	Yrs.
	To run (concurrent with) (consecutively to) count(s) _____ and served at 50%, 75%, 85%, 100% pursuant to 730 ILCS 5/3-6-3					

This Court finds that the defendant is:

_____ Convicted of a Class _____ offense but sentenced as a **Class X** offender pursuant to 730 ILCS 5/5-4.5-95(b).

X The Court further finds that the defendant is entitled to receive credit for time actually served in custody (of 466 days as of the date of this order) from (specify dates) Sept 1, 2019 – Dec 9, 2020. The defendant is also entitled to receive credit for the additional time served in custody from the date of this order until defendant is received at the Illinois Department of Corrections. AS TO COUNT I ONLY

X The Court further finds that the conduct leading to conviction for the offenses enumerated in counts I and II resulted in **great bodily harm** to the victim. [730 ILCS 5/3-6-3(a)(2)(iii)]

_____ The Court further finds that the defendant meets the eligibility requirements for possible placement in the **Impact Incarceration Program**. [730 ILCS 5/5-4-1(a)]

_____ The Court further finds that offense was committed as a result of the use of, abuse of, or addiction to alcohol or a controlled substance and recommends the defendant for placement in a substance abuse program. [730 ILCS 5/5-4-1(a)]

_____ The defendant successfully completed a full-time (60-day or longer) Pre-Trial Program ____ Educational/Vocational ___ Substance Abuse ___ Behavior Modification ___ Life Skills ___ Re-Entry Planning – provided by the county jail while held in pre-trial detention prior to this commitment and is eligible for sentence credit in accordance with 730 ILCS 5/3-6-3(a)(4). THEREFORE IT IS ORDERED that the defendant shall be awarded additional sentence credit as follows: total number of days in identified program(s)_____ x .50 = _____ days, if not previously awarded.

_____ The defendant passed the high school level test for General Education and Development (GED) on _____ while held in pre-trial detention prior to this commitment and is eligible to receive Pre-Trial GED Program Credit in accordance with 730 ILCS 5/3-6-3(a)(4.1). THEREFORE IT IS ORDERED that the defendant shall be awarded 60 days of additional sentence credit, if not previously awarded.

_____ IT IS FURTHER ORDERED the sentence(s) imposed on count(s) _____ be (concurrent with) (consecutive to) the sentence imposed in case number _____ in the Circuit Court of _____ County.

_____ IT IS FURTHER ORDERED that _____

The Clerk of the Court shall deliver a certified copy of this order to the sheriff. The Sheriff shall take the defendant into custody and deliver defendant to the Department of Corrections which shall confine said defendant until expiration of this sentence or until otherwise released by operation of law.

This order is (X effective immediately) (_____ stayed until _____).

DATE: December 9, 2020 ENTER: _____

Judge Matthews Fitton
(PLEASE PRINT JUDGE'S NAME HERE)

C 49

Approved by Conference of Chief Judges 6/20/14 (rev. 12/04/2014)

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
FORD COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,)
Plaintiff,)
vs.) Case Number 2020-CF-53
)
)
Clayton T. Marcum,)
Defendant.)

NOTICE OF APPEAL

An appeal is taken from the order or judgment described below.

(1) Court to which appeal is taken: **Fourth District Appellate Court, Springfield, Illinois**

(2) Name of Appellant and address to which notices shall be sent:
Name: **Clayton T Marcum**
Address: Ford County Correctional Center
235 N American Street
Paxton, IL 60957

(3) Name and address of Appellant's Attorney on Appeal:
State Appellate Public Defender
400 W. Monroe Ste. 303
P.O. Box 5240
Springfield, IL 62705-5240

(4) Date of Order: **December 9, 2020**
(5) Offense of which convicted: **Aggravated Domestic Battery**
Aggravated Domestic Battery

(6) Sentence: **7 years IDOC Count I (7 years IDOC consecutively Count II)**

(7) Order appealed from: **Defendant appeals Sentencing**

Dated: December 28, 2020

Kamalen Johnson Anderson
Ford County Circuit Clerk

2022 IL App (4th) 200656-U

NO. 4-20-0656

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
June 9, 2022
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Ford County
CLAYTON T. MARCUM,	)	No. 20CF53
Defendant-Appellant.	)	
	)	Honorable
	)	Matthew John Fitton,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Knecht and Justice Cavanagh concurred in the judgment.

ORDER

¶ 1 Held: The State failed to prove beyond a reasonable doubt defendant was in a dating relationship with the victim, warranting a reduction of defendant's aggravated domestic battery convictions to aggravated battery. Defendant failed to establish plain error as to his other claims.

¶ 2 In July 2020, the State charged defendant, Clayton T. Marcum, by information with two counts of aggravated domestic battery (720 ILCS 5/12-3.3(a) (West 2018)) for a September 1, 2019, attack on Greg Rudin. The State had previously charged defendant with aggravated battery (720 ILCS 5/12-3.05(a)(1) (West 2018)) for the attack on Greg in Ford County case No. 19-CF-72 (case 72). After an October 2020 jury trial, the jury found defendant guilty of both aggravated domestic battery charges in this case. At the December 2020 sentencing hearing, the Ford County circuit court sentenced defendant to consecutive prison terms of seven years on each count.

¶ 3 Defendant appeals, contending (1) his statutory right to a speedy trial was violated, (2) his right to counsel was violated due to incomplete admonishments under Illinois Supreme Court Rule 401 (eff. July 1, 1984), (3) the State's evidence was insufficient to prove him guilty beyond a reasonable doubt of aggravated domestic battery, and (4) his right to remain silent was violated. We affirm in part, reverse in part, and remand the cause to the circuit court for a new sentencing hearing.

¶ 4 I. BACKGROUND

¶ 5 At around 7:30 a.m. on September 1, 2019, Paxton police officer Brandon Ryan received a dispatch to Schoolhouse Apartments based on a report of a naked male lying behind the apartments. When Officer Ryan arrived, he observed a half-naked male, who was later identified as Greg Rudin. Greg appeared to have been lying outside on his back for a while and was not wearing pants and underwear. According to Officer Ryan, Greg looked to have been in a fight because he had swollen ears, dried blood on him, a dislocated jaw, and black eyes. An ambulance arrived and took Greg to the hospital where he was diagnosed with a subarachnoid hemorrhage and broken ribs. Two people at the scene told Officer Ryan they thought Greg had been upstairs with defendant. Officer Ryan located defendant and spoke with him. Defendant admitted he and Greg were friends and Greg had been in his apartment the previous evening. They had been drinking and wrestling. Defendant stated Greg left at 10 p.m. and went home. Later in the day, Officer Ryan obtained a search warrant for defendant's apartment. During the search, blood was found on a mattress in the apartment and in the stairwell outside defendant's apartment.

¶ 6 A. Case 72

¶ 7 On September 1, 2019, defendant was arrested for both aggravated battery (720

ILCS 5/12-3.05(a)(1) (West 2018)) and obstructing justice (720 ILCS 5/31-4(a) (West 2018)). On September 3, 2019, the trial court set defendant's bond, but defendant did not post bond. On September 27, 2019, the State charged defendant by information with one count of aggravated battery, which asserted that, in committing a battery, defendant knowingly caused great bodily harm to Greg, in that he struck Greg about the head and body. The charge also noted defendant may receive an extended-term sentence due to his prior conviction for aggravated battery in Iroquois County case No. 12-CF-11. See 730 ILCS 5/5-4.5-40(a) (West 2018). Three days later, the trial court held the preliminary hearing.

¶ 8 At the beginning of the preliminary hearing, the trial court appointed defendant counsel. The State presented the testimony of Officer Ryan. Officer Ryan testified he was told during the investigation defendant and Greg were in a "dating relationship of sorts." He also testified that, before the State filed the charge in this case, defendant made contact with Paxton police sergeant Robert Yates at the jail. Officer Ryan testified that, during defendant's conversation with Sergeant Yates, defendant explained he and Greg were "fighting like MMA fighters or UFC fighters" and not wrestling on September 1, 2019. Defendant admitted to Sergeant Yates that, during the fighting, he had struck Greg in the head causing blood to come out of Greg's mouth. When they were done fighting, defendant and Greg left defendant's apartment together, and Greg fell. After Greg fell, defendant stomped on him. Defendant demonstrated a "pretty hefty strike" for Sergeant Yates. At the conclusion of the hearing, the court found probable cause. At defendant's request, the case was set for the January 2020 jury term.

¶ 9 In January 2020, the State moved for an extension of the speedy-trial term under section 103-5(c) of the Code of Criminal Procedure (Procedure Code) (725 ILCS 5/103-5(c)

(West 2018)), noting it was still waiting on deoxyribonucleic acid analysis results. Defendant objected to the motion, and the trial court granted the State's motion. The court set defendant's jury trial for April 13, 2020. In March 2020, the State made an offer of an eight-year sentencing cap in exchange for defendant's plea of guilty. After consulting with his attorney, defendant rejected the State's offer and noted he wanted his attorney removed from the case. On April 13, 2020, the court continued the case to the July 2020 jury term due to an administrative order and the parties' agreement. After a May 22, 2020, hearing, the court allowed defendant to proceed pro se. On July 6, 2020, the State moved to dismiss the charge in case 72, which the court granted.

¶ 10 B. This Case

¶ 11 On July 6, 2020, the State filed the two aggravated domestic battery charges in this case. Count I alleged that, in committing domestic battery, defendant knowingly caused great bodily harm to Greg, defendant's family or household member, in that defendant struck Greg in the face with his fist and caused a subarachnoid hemorrhage. Count II asserted that, in committing domestic battery, defendant knowingly caused great bodily harm to Greg, defendant's family or household member, in that defendant stomped on Greg with his foot causing rib fractures. Both counts noted defendant may be sentenced to an extended term of 7 to 14 years' imprisonment due to his prior residential burglary conviction in Iroquois County case No. 13-CF-31.

¶ 12 The trial court held an arraignment hearing the day the State filed the charges in this case. The court read the two counts to defendant and noted he may be sentenced to an extended term of 7 to 14 years' imprisonment due to a prior residential burglary conviction. The court also explained defendant was subject to 85% sentencing and not day-for-day credit.

Defendant asked if the counts were aggravated batteries, and the court noted the charge was aggravated domestic battery. After reading the charges and explaining the possible penalties, the court noted defendant was representing himself in case 72 and asked defendant if he wanted to continue representing himself, hire counsel, or have the court appoint counsel. Defendant stated he still wanted to represent himself. The court then asked defendant if he understood the charges, and defendant replied in the affirmative. Next, the court asked the following: "The minimum and maximum penalties, including in this case the possible extended, you are extended term eligible? You also understand that the sentencing, the sentencing range, the mandatory supervised release and the applicable amount of probation, fines, assessments, restitution are applicable; you do understand that; right?" Defendant replied, "Uh-huh." The court also confirmed defendant understood he could have counsel appointed for him without cost if he was indigent and the attorney representing the State was an experienced prosecutor and not defendant's attorney. Last, the court asked defendant if he wished to waive his right to counsel, and defendant said, "Yeah."

¶ 13 After waiving his right to counsel, defendant questioned the filing of new charges, and the trial court noted its lack of involvement in that decision and told defendant, if he wanted to file any motion, he would need to put it in writing and send it to the circuit clerk's office. The court set the preliminary hearing, set bond, and noted the State's voluntary dismissal of the charge in case 72. Defendant continued to ask questions. The court again informed defendant he needed to file a written motion and explained the new charges against him, including the possible extended-term sentence of up to 14 years' imprisonment. Defendant then asked about the state of emergency due to COVID-19 and him being in custody, and the court told him the supreme court's ruling started the 120-day period over. Defendant then complained about being in

custody for almost a year, and the court told defendant the speedy-trial period starts over every time it is continued by agreement. Defendant then asked if the State could continue to file different charges, and the court told defendant to send the prosecutor a letter or file a written motion.

¶ 14 On August 4, 2020, the circuit court held the preliminary hearing, at which Officer Ryan and defendant testified. After hearing the testimony, the court found the State had proven probable cause. The court then explained to defendant what he was responsible for in preparing for trial. Defendant asked if his case was still aggravated battery with intent to do bodily harm, and the court responded the charge was a Class 2 felony of "straight" domestic battery.

¶ 15 At the beginning of defendant's October 2020 jury trial, the trial court again explained the two aggravated domestic battery charges and the sentencing possibilities, including an extended-term sentence of up to 14 years' imprisonment. The court asked defendant if he understood the charges and possible penalties, and defendant questioned the charge of aggravated domestic battery. The court noted he had arraigned defendant on aggravated domestic battery and again asked if he understood what he was charged with and the possible penalties. The following dialogue then took place:

> "MR. MARCUM [(DEFENDANT)]: Yes. I just wanted to make sure it wasn't like two or three charges at one time.
>
> THE COURT: No. We are doing the one case, and we are doing two counts of aggravated battery.
>
> MR. KILLIAN [STATE'S ATTORNEY)]: Aggravated domestic battery.
>
> THE COURT: Aggravated domestic battery.

MR. MARCUM: So, I got one charge?

THE COURT: Two charges, one case. One case, he has alleged two separate charges. One being the hemorrhage, subarachnoid hemorrhage.

MR. MARCUM: If I am found guilty, I am charged with two charges?

MR. KILLIAN: If you are found guilty on both, you are going to be sentenced to one sentence.

THE COURT: You will not be sentenced twice.

MR. MARCUM: Oh, so I would be looking at seven to 14 years?

THE COURT: Yes.

MR. MARCUM: Okay. Just want to make sure."

After the above dialogue, the court indicated its desire to again address defendant's waiver of counsel. Defendant indicated he had no problem representing himself. The court then asked defendant a series of questions admonishing him about the difficulties and pitfalls of self-representation. Defendant answered each question in the affirmative and did not have any questions at the end of the admonishments.

¶ 16 Next, the State's Attorney put on the record defendant had been offered a sentencing cap of 10 years' imprisonment if he pleaded guilty to one of the charges, and defendant declined the offer. In explaining the offer to defendant, the court noted defendant's mandatory supervised release term was four years. Defendant indicated he was still rejecting the State's offer.

¶ 17 The State presented the testimony of the following witnesses: (1) Officer Ryan; (2) Mark Day, an emergency room physician; (3) Paxton police officer Chad Johnson; (4) Coy Cornett, Chief of the Paxton Police Department; (5) Robin Stadeli, a paramedic; (6) Jennifer

Macritchie, an Illinois State Police forensic scientist; (7) Patti Rudin, the victim's spouse; and (8) Sergeant Yates. It also presented several exhibits, including the recording from Sergeant Yates's body camera during his conversation with defendant at the Ford County jail. Defendant did not present any evidence. The evidence relevant to the issues on appeal is set forth below.

¶ 18 Officer Ryan testified he decided to speak with defendant a second time on September 1, 2019, because Officer Ryan had learned "[t]here was more of a relationship between the two."

¶ 19 Patti testified she had been married to Greg for 29 years, but they had been separated for the past 11 years. At the time of the incident, Greg had his own apartment.

¶ 20 Sergeant Yates testified defendant wanted to meet with him on September 6, 2019. Sergeant Yates and Chief Cornett had a conversation with defendant that day. During the interview, defendant indicated he had formed a relationship with Greg, and the relationship had turned sexual.

¶ 21 The recording of Sergeant Yates's interview of defendant was played for the jury. During the interview, defendant stated he had the "hots" for a girl named Carrie and went with Carrie to a residence. There, he met Greg on the Tuesday morning before the incident. Defendant stated he stayed at the residence a couple of nights and then noted Tuesday morning until Wednesday morning. On Wednesday morning, he left the residence with Greg. Defendant again stated they spent the night. Defendant further stated they went to defendant's apartment on Wednesday morning and did things but suggested they did not have sex. He explained Greg gave defendant "a blow job" and defendant "jacked [Greg] off." Defendant denied they did things not to the extreme like sex. Defendant appeared uncomfortable talking about the sexual encounter. Greg left defendant's apartment. On Wednesday afternoon, defendant tried calling

Greg, but he would not answer. Defendant went back to the residence where he first met Greg, and Greg was there. Two females at the residence were jealous about defendant being "all over" Greg or Greg being "all over" defendant. Greg came over to defendant's apartment on Saturday. They drank together and had plans to go out to a bar when the incident occurred. During the interview, defendant stated he had nothing against Greg and Greg seemed like a nice guy.

¶ 22 On the third day of trial and after the State had presented its first six witnesses, the prosecutor noted the residential burglary case stated on the Law Enforcement Agencies Data Sheet (LEADS) under defendant's name was not actually defendant's case. The trial court asked defendant if he had been convicted of residential burglary, and defendant replied in the negative. The court noted defendant was not subject to extended-term sentencing. The prosecutor then offered defendant a sentence of seven years' imprisonment in exchange for a guilty plea to one count of aggravated domestic battery, and defendant declined the offer.

¶ 23 At the conclusion of the trial, the jury found defendant guilty of both aggravated domestic battery charges. The trial court then noted it believed a presentence investigation report should be ordered and asked for any objections. The prosecutor answered in the negative, and defendant did not reply. The court explained to defendant a member of court services would talk to him and prepare a presentence investigation report. The court then ordered the presentence investigation report and asked the parties the amount of time needed for sentencing. Defendant replied it could be today if possible. The court stated it could not conduct the sentencing hearing that day because it had ordered a presentence investigation report. The prosecutor stated two hours, and the court asked defendant if that sounded correct. Defendant asked, "Two hours today?" and the court again noted it had ordered a presentence investigation report. The court set the date of the sentencing hearing and stated the following: "And Mr.

Marcum, for your benefit, I would admonish you that you want to cooperate with the Court Services as to the pre-sentence investigation. I am not sure who will be sent over, but someone will come over and speak to you."

¶ 24 Defendant did cooperate with court services, and Rocky Marron drafted the presentence investigation report. The report noted defendant claimed he had put Greg in an Ultimate Fighting Championship (UFC) move in which defendant had his arm around Greg's neck and his leg around Greg's waist, stretching him out. Defendant demonstrated the move for Marron. Defendant also expressed his frustration of being in jail for horseplay and denied stomping Greg that hard. Additionally, without prompting, defendant noted he had punched another inmate in jail for bragging about beating up a woman. The report noted another cellmate of defendant's had been injured and defendant was kept in a solitary environment for most of his jail time due to concerns for the welfare of other inmates. Marron recommended a sentence other than a community-based option because he did not believe defendant could be trusted to not commit further acts of violence. He believed defendant posed a continuous risk to community safety.

¶ 25 On December 9, 2020, the trial court held the sentencing hearing, and the State presented the testimony of Marron and Patti, the victim's wife. During his testimony, Marron demonstrated the UFC move that defendant demonstrated during his interview with Marron. He also testified defendant's attitude about the incident was minimizing and defendant had no appreciation for the damage he caused. Marron further noted defendant had numerous prior convictions for violent acts. He opined a community-based disposition was not appropriate for defendant. Patti testified Greg was in the intensive care unit on life support with traumatic brain injuries, broken ribs, and other injuries for three weeks after the incident and spent another two

and a half months in the hospital. In November 2019, Greg was taken to the Danville Care Center because he could not care for himself.

¶ 26 In his argument, the prosecutor requested a seven-year sentence for both counts and the imposition of discretionary consecutive sentences under section 5-8-4(c)(1) of the Unified Code of Corrections (730 ILCS 5/5-8-4(c)(1) (West 2018)). He argued the charges were based on two separate and distinct acts. Defendant requested probation and noted he did not intend to hurt Greg. The trial court found defendant was a danger to the public and sentenced him to consecutive seven-year prison terms.

¶ 27 On December 28, 2020, defendant filed his timely notice of appeal in compliance with Illinois Supreme Court Rule 606 (eff. July 1, 2017), which stated he was only appealing his sentences. On January 4, 2020, defendant filed a timely amended notice of appeal, challenging both his convictions and sentences. Ill. S. Ct. Rs. 303(b)(5), 606(d) (eff. July 1, 2017). Accordingly, this court has jurisdiction of defendant's convictions and sentences under Illinois Supreme Court Rule 603 (eff. Feb. 6, 2013).

¶ 28 II. ANALYSIS

¶ 29 A. Speedy Trial Violation

¶ 30 Defendant first asserts his statutory right to a speedy trial provided by section 103-5(a) of the Procedure Code (725 ILCS 5/103-5(a) (West 2018)) was violated. He argues the State's aggravated domestic battery charges in this case were subject to compulsory joinder with the aggravated battery charge filed in case 72 and the aggravated domestic battery charges were filed outside the applicable 120-day term. The State asserts defendant has forfeited this argument for failing to file a motion to discharge before trial. In reply, defendant contends this court should not apply forfeiture because a motion would have been futile, and in the alternative,

he seeks review under the plain-error doctrine (Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967)).

¶ 31 1. Forfeiture

¶ 32 Our supreme court has instructed "one of the two most important tasks of an appellate court panel when beginning the review of a case *** is to determine which issue or issues, if any, have been forfeited." People v. Smith, 228 Ill. 2d 95, 106, 885 N.E.2d 1053, 1059 (2008). It is well-established that, to preserve errors for review, the defendant must (1) object to an alleged error at trial and (2) raise the alleged error in a posttrial motion to avoid forfeiture of the issue on appeal. People v. Enoch, 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1130 (1988). In this case, defendant did not file a posttrial motion.

¶ 33 Additionally, as argued by the State, section 114-1 of the Procedure Code addresses motions to dismiss criminal charges and lists the failure to place defendant on trial in compliance with section 103-5 as one of the grounds for a motion to dismiss. 725 ILCS 5/114-1(a)(1) (West 2018). Section 114-1(b) of the Procedure Code (725 ILCS 5/114-1(b) (West 2018)) then provides grounds not raised in a timely filed motion to dismiss are waived (two exceptions are listed but are inapplicable here). Thus, section 114-1 specifically provides a defendant forfeits the claim of a violation of the provisions of section 103-5 of the Procedure Code related to a speedy trial unless the defendant files a motion for discharge prior to trial. People v. Pearson, 88 Ill. 2d 210, 217, 430 N.E.2d 990, 993 (1981). Additionally, supreme court decisions have long held the defendant's right to discharge granted by the statute is forfeited if not asserted by the defendant prior to conviction. Pearson, 88 Ill. 2d at 216, 430 N.E.2d at 992. Here, defendant did not file a motion to discharge.

¶ 34 In his reply brief, defendant first asserts a motion to discharge would have been futile given the trial court's statements regarding speedy trial calculations and cites People v.

Davis, 378 Ill. App. 3d 1, 880 N.E.2d 1046 (2007). In *Davis*, 378 Ill. App. 3d at 10, 880 N.E.2d at 1054, the reviewing court noted the waiver rule is relaxed when the objection is to the circuit court's own conduct because the objection would have fallen on deaf ears. There, the reviewing court declined to relax the waiver rule because an objection would not have been a criticism of the court's decision and no reason was shown a request to clarify the defendant's answer would have fallen on deaf ears. *Davis*, 378 Ill. App. 3d at 10-11, 880 N.E.2d at 1055.

¶ 35 Here, defendant, who was *pro se*, was asking the trial court questions about his speedy trial term, and the court was responding. While the answers may not all have been legally correct, a motion to discharge would not have been directed at the court's conduct as in *Davis*. If defendant had filed a motion to discharge, then the State would have had an opportunity to reply, and the trial court could have further examined the issue. Nothing suggests the trial court would not have reconsidered the statements it made in court if it had the benefit of legal research. Thus, we disagree a motion to discharge would have necessarily been futile in this instance. Accordingly, we agree with the State defendant forfeited this issue.

¶ 36 Defendant further contends, if we find forfeiture, this court should review the issue under the plain-error doctrine. See *People v. Hartfield*, 2022 IL 126729, ¶ 33 (addressing the first step of the plain-error analysis where the defendant did not file a pretrial motion raising a speedy-trial violation and did not raise the matter in a posttrial motion). The plain-error doctrine permits a reviewing court to consider unpreserved error under the following two scenarios:

> "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred

> and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." People v. Sargent, 239 Ill. 2d 166, 189, 940 N.E.2d 1045, 1058 (2010).

We begin a plain-error analysis by first determining whether any error occurred at all. Sargent, 239 Ill. 2d at 189, 940 N.E.2d at 1059. If error did occur, this court then considers whether either of the two prongs of the plain-error doctrine has been satisfied. Sargent, 239 Ill. 2d at 189-90, 940 N.E.2d at 1059. "Under both prongs of the plain-error doctrine, the defendant has the burden of persuasion." People v. Hillier, 237 Ill. 2d 539, 545, 931 N.E.2d 1184, 1187 (2010). If the defendant fails to meet his or her burden of persuasion, the reviewing court applies the procedural default. Hillier, 237 Ill. 2d at 545, 931 N.E.2d at 1187. Accordingly, we address whether a statutory speedy-trial violation occurred.

¶ 37 2. Statutory Speedy Trial

¶ 38 This court reviews de novo the ultimate determination of whether a defendant's constitutional speedy-trial right has been violated. People v. Crane, 195 Ill. 2d 42, 52, 743 N.E.2d 555, 562 (2001). Under the speedy trial statute, a defendant in custody must be tried 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) (West 2018). Whenever the defendant causes a period of delay or otherwise agrees to a delay, the 120-day speedy trial period is tolled. People v. Woodrum, 223 Ill. 2d 286, 299, 860 N.E.2d 259, 269 (2006). The speedy-trial analysis "becomes more complicated when [the] defendant is charged with multiple, but factually related, offenses at different times." People v. Williams, 204 Ill. 2d 191, 198, 788 N.E.2d 1126, 1131 (2003). In those cases, "the speedy-trial guarantee is tempered by compulsory joinder

principles." *Williams*, 204 Ill. 2d at 198, 788 N.E.2d at 1131.

¶ 39 The compulsory joinder statute provides, in pertinent part, the following:

> "If the several offenses are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution, except as provided in Subsection (c) [(where the court may order a separate trial in the interest of justice)], if they are based on the same act." 720 ILCS 5/3-3(b) (West 2018).

However, the compulsory joinder statute does not apply to "the situation in which several offenses—either repeated violations of the same statutory provision or violations of different provisions—arise from a series of acts which are closely related with respect to the offender's single purpose or plan." (Internal quotation marks omitted.) *Williams*, 204 Ill. 2d at 199, 788 N.E.2d at 1132. Likewise, the "same act" language does not include independent acts, which constitute different offenses where the multiple offenses arise from a series of related acts. *Williams*, 204 Ill. 2d at 199, 788 N.E.2d at 1132.

¶ 40 The State asserts the compulsory joinder statute does not apply because defendant cannot establish (1) the facts for the aggravated domestic battery charges were known to the prosecutor at the time of the commencement of the prosecution and (2) the aggravated domestic battery charges were based on the same act as the original charge. Regarding the first issue, the compulsory joinder statute requires "the several offenses are *known* to the proper prosecuting officer at the time of commencing the prosecution." (Emphasis added.) 720 ILCS 5/3-3(b) (West 2018). The "knowledge" requirement provides a fairly high threshold to trigger compulsory joinder. *People v. Luciano*, 2013 IL App (2d) 110792, ¶ 72, 988 N.E.2d 943. Illinois courts have defined "knowledge" or "known to the proper prosecuting officer" as "the

conscious awareness of evidence that is sufficient to give the State a reasonable chance to secure a conviction." Luciano, 2013 IL App (2d) 110792, ¶ 78. "When the State has that awareness necessarily defies universal definition, and thus it must be determined on a case-by-case basis." Luciano, 2013 IL App (2d) 110792, ¶ 78. Additionally, the prosecution's discretion "should be considered when evaluating the State's knowledge of the evidence and facts for purposes of determining whether a later charge was subject to compulsory joinder with the original charge." Luciano, 2013 IL App (2d) 110792, ¶ 75.

¶ 41 Defendant notes that, five days after the altercation, he told investigating officers about the nature of his relationship with Greg and the fact he struck Greg in the face and stomped on him. That interview was three weeks before the State filed the original aggravated battery charge on September 27, 2019. The State asserts the record is silent as to whether the proper prosecuting officer was consciously aware of defendant's statements in the police interview when the original charge was filed. Defendant disagrees the record is silent and notes Police Officer Brandon Ryan's testimony at the September 30, 2019, preliminary hearing on the original aggravated battery charge. There, the prosecutor asked Officer Ryan, if during his investigation, he was told defendant and Greg were in "a dating relationship of sorts." The prosecutor also asked Officer Ryan about the conversation between Sergeant Yates and defendant at the county jail. Officer Ryan testified defendant demonstrated to Sergeant Yates how he stomped on Greg when he was on the ground and struck Greg's head during the altercation. The body camera recording of Sergeant Yates's conversation with defendant on September 6, 2019, was played for the jury at defendant's trial and was the State's sole evidence of a dating relationship between defendant and Greg. Given the prosecutor was aware at the preliminary hearing of Sergeant Yates's discussion with defendant and the relationship between

defendant and Greg, we find the prosecutor did have conscious awareness of evidence which in the prosecutor's view was sufficient to give the State a reasonable chance to secure a conviction for aggravated domestic battery.

¶ 42 Regarding the same act, the State contends defendant did not establish both charges of aggravated domestic battery were the same act as striking the victim about the head and body, which was alleged in the initial information. We disagree. When an incident consists of multiple, separate acts, Illinois courts look to the charging instrument to determine whether the defendant can be convicted of and sentenced on multiple offenses. See People v. Crespo, 203 Ill. 2d 335, 343-45, 788 N.E.2d 1117, 1122-23 (2001). If the State charges the incident as a collective act, our supreme court has held the State cannot argue after trial the multiple physical actions support multiple convictions. Crespo, 203 Ill. 2d at 343-45, 788 N.E.2d at 1122-23. As in Crespo, we examine the original aggravated battery charge and find the State charged the attack on Greg as a collective act, which would include defendant striking Greg with his hand and with his foot. As defendant notes, the prosecutor at the preliminary hearing on the original charge used both "stomp" and "strike" to describe defendant's use of his foot to make contact with Greg's body. Thus, we find the aggravated domestic battery charges were based on the same act as the original aggravated battery charge and the compulsory joinder statute applies.

¶ 43 When criminal charges are required to be brought in a single prosecution, the speedy-trial period begins to run when the defendant is in custody on the original charge, even if the State brings some of the charges at a later date. See People v. Quigley, 183 Ill. 2d 1, 13, 697 N.E.2d 735, 741 (1998) (addressing the 160-day term under section 103-5(b)). In other words, the new and additional charges are subject to the same statutory limitation applicable to the original charges. Williams, 204 Ill. 2d at 201, 788 N.E.2d at 1133. "Continuances obtained in

connection with the trial of the original charges cannot be attributed to defendants with respect to the new and additional charges because these new and additional charges were not before the court when those continuances were obtained." (Internal quotation marks omitted.) *Williams*, 204 Ill. 2d at 201, 788 N.E.2d at 1133. However, the aforementioned rule does not apply if the original charging instrument gives a defendant adequate notice of the subsequent charges because the defendant's ability to prepare for trial on those charges is not hindered in any way by the subsequent charges. *People v. Phipps*, 238 Ill. 2d 54, 67-68, 933 N.E.2d 1186, 1194 (2010). The State does not challenge defendant's argument the above exception to the rule in *Williams* is inapplicable to the subsequent charges in defendant's case. As such, we do not address the exception and find the *Williams* rule applies in this case.

¶ 44 Here, the State filed the subsequent charges more than nine months after the original charge. The State does not challenge defendant's explanation of how the 120-day period expired before the trial court granted the State an extension of the speedy-trial term in case 72 in January 2020. Since the delay attributable to defendant with the original charge is not applicable to the subsequent charges under the rule in *Williams*, the 120-day speedy trial period for the subsequent charges had expired well before the State filed them. Accordingly, defendant's statutory speedy trial right was violated.

¶ 45 3. Plain Error

¶ 46 Since we have found an error, we address whether the error constitutes plain error. As stated, defendant bears the burden of proving plain error. *Willis*, 237 Ill. 2d at 545, 931 N.E.2d at 1187. He asserts second-prong plain error and, thus, must show the error was so serious it affected the fairness of his trial and challenged the integrity of the judicial process. Defendant's entire plain-error argument is the following:

> "As a result, this Court should review for plain error as [defendant] established both that clear and obvious error occurred and the circuit court's speedy-trial error affected the fairness of his trial and challenged the integrity of the judicial process. (Opening Brief, p. 14-25). See Ill. S. Ct. R. 615(a); People v. Smith, 2016 IL App (3d) 140235, ¶ 10 (noting that where a defendant failed to properly preserve a speedy-trial matter for review, it is reviewable for plain error because it implicates fundamental constitutional concerns); McKinney, 2011 IL Ap (1st) 100317, ¶ 29."

Defendant did not assert plain error in his opening brief.

¶ 47 Our supreme court recently addressed a statutory speedy-trial claim and noted the following: "The people of Illinois possess both constitutional and statutory rights to a speedy trial. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8; 725 ILCS 5/103-5(a) (West 2020). Although Illinois's speedy trial statutes implement the constitutional right, the statutory and constitutional rights are not coextensive." (Emphasis added.) Hartfield, 2022 IL 126729, ¶ 32. In this case, defendant only claims a statutory violation.

¶ 48 Our supreme court has yet to address whether a statutory speedy-trial violation can constitute second-prong plain error. See People v. Staake, 2017 IL 121755, ¶ 33, 102 N.E.3d 217 (finding it unnecessary in that case to determine whether the appellate court precedent finding a forfeited error involving a statutory speedy-trial violation is reviewable as second-prong plain error should be overruled). In the appellate court cases cited by defendant, the courts found second-prong plain error based on a statutory speedy-trial violation with no analysis. See People v. Smith, 2016 IL App (3d) 140235, ¶¶ 10, 21, 55 N.E.3d 719 (citing People v. McKinney, 2011 IL App (1st) 100317, 962 N.E.2d 1084, and simply restating what constitutes

second-prong plain error); McKinney, 2011 IL App (1st) 100317, ¶¶ 29, 31 (finding no error and simply citing People v. Gay, 376 Ill. App. 3d 796, 799, 878 N.E.2d 805, 808 (2007), for the principle a statutory violation is second-prong plain error). In Gay, 376 Ill. App. 3d at 799, 801, 878 N.E.2d at 808, 810, the reviewing court found no error but noted it was reviewing the issue under the plain-error doctrine because "a speedy trial is a substantial, fundamental right (People v. Crane, 195 Ill. 2d 42, 46, 743 N.E.2d 555, 559 (2001))." Our supreme court's decision in Crane involved only the issue of whether the defendant's constitutional speedy-trial right had been violated. Crane, 195 Ill. 2d at 48-49, 743 N.E.2d at 560. Thus, the cases defendant cited do not establish the proposition any statutory speedy trial violation constitutes second-prong plain error.

¶ 49 In this case, the State did not have an opportunity to respond to defendant's plain error argument because defendant raised it in his reply brief. However, in Staake, 2017 IL 121755, ¶ 32, the State challenged the assertion all statutory speedy-trial violations are second-prong plain error. The State pointed out the constitutional and statutory rights to a speedy trial are not coextensive. It further noted the legislature, having created the statutory speedy-trial right, also took that right away from the defendant for failure to timely raise it, i.e., deeming it "waived" in the words of the statute. Last, the State urged only a speedy-trial claim rising to a constitutional dimension may be subject to second-prong plain error review.

¶ 50 Our supreme court has explained the plain error doctrine as follows:

> "The plain-error doctrine is not a general saving clause preserving for review all errors affecting substantial rights whether or not they have been brought to the attention of the trial court. [Citation.] Instead, it is a narrow and limited exception to the general rule of forfeiture, whose purpose is to protect the rights

> of the defendant and the integrity and reputation of the judicial process." (Internal quotation marks omitted.) People v. Allen, 222 Ill. 2d 340, 353, 856 N.E.2d 349, 356 (2006).

Moreover, under the second prong of the doctrine, "even constitutional errors can be forfeited [citation] if the error is not of such magnitude that it deprives the defendant of a fair trial." Allen, 222 Ill. 2d at 352, 856 N.E.2d at 356.

¶ 51 As noted earlier in our analysis, the legislature has provided for the forfeiture of a statutory speedy-trial violation if the violation is not timely raised. See 725 ILCS 5/114-1(b) (West 2018). Thus, a statutory speedy-trial violation does not alone result in an unfair trial or challenge the integrity of the judicial process. If it did, then the legislature would not have provided for its forfeiture. As such, a defendant must demonstrate his statutory speedy-trial violation deprived him of a fair trial or challenged the integrity of the judicial process to establish second-prong plain error. Defendant's very brief plain error argument does not establish that. Since defendant did not meet his burden, we apply the doctrine of forfeiture.

¶ 52 B. Right to Counsel

¶ 53 Defendant next asserts his right to counsel was violated because he did not knowingly waive the right because the circuit court failed to substantially comply with Illinois Supreme Court Rule 401(a) (eff. July 1, 1984). The State suggests the trial court did substantially comply with the rule and defendant was not prejudiced by any error. This court reviews de novo compliance with a supreme court rule. People v. Gallano, 2019 IL App (1st) 160570, ¶ 26, 147 N.E.3d 912.

¶ 54 Like the speedy-trial violation, defendant did not raise this issue in a posttrial motion. In his reply brief, defendant contends the State forfeited any claim of defendant's

forfeiture by failing to raise it. See People v. Bahena, 2020 IL App (1st) 180197, ¶ 29, 170 N.E.3d 1014. Regardless of whether defendant preserved the error for review or whether plain-error review is appropriate, the initial inquiry is whether an error occurred. See Hartfield, 2022 IL 126729, ¶ 33 (finding no error instead of addressing forfeiture or the appropriateness of plain-error review).

¶ 55 The sixth amendment to the United States Constitution (U.S. Const., amend. VI) "guarantees an accused in a criminal proceeding both the right to the assistance of counsel and the correlative right to proceed without counsel." People v. Haynes, 174 Ill. 2d 204, 235, 673 N.E.2d 318, 332 (1996). Rule 401(a) sets forth procedures for the waiver of the right to counsel and provides the following:

> "(a) Waiver of Counsel. Any waiver of counsel shall be in open court. The court shall not permit a waiver of counsel by a person accused of an offense punishable by imprisonment without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:
>
> (1) the nature of the charge;
>
> (2) the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences; and
>
> (3) that he has a right to counsel and, if he is indigent, to have counsel appointed for him by the court." Ill. S. Ct. R. 401(a) (eff. July 1, 1984).

Rule 401's purpose is "to ensure that a waiver of counsel is knowingly and intelligently made."

(Internal quotation marks omitted.) People v. Reese, 2017 IL 120011, ¶ 62, 102 N.E.3d 126. However, strict, technical compliance with Rule 401 is not always required. Reese, 2017 IL 120011, ¶ 62. "Substantial compliance is sufficient for a valid waiver of counsel if the record indicates the waiver was made knowingly and intelligently and the trial court's admonishment did not prejudice the defendant's rights." Reese, 2017 IL 120011, ¶ 62. As defendant notes, compliance with Rule 401 is examined based on the information provided to the defendant before his or her waiver. People v. Span, 2021 IL App (2d) 180966, ¶ 19, 185 N.E.3d 311. This court assesses each waiver of counsel on its own particular facts. Reese, 2017 IL 120011, ¶ 62. Defendant asserts the trial court erred by (1) informing him he was eligible for extended-term sentencing, (2) stating the wrong term of mandatory supervised release (MSR), and (3) failing to state defendant could receive consecutive sentences.

¶ 56 In Reese, 2017 IL 120011, ¶ 64, the defendant argued the trial court failed to provide sufficient Rule 401(a) admonitions because the court did not state defendant's sentences would run consecutively to his existing natural-life sentence for murder. There, the defendant was informed "he was facing 'massive time' if convicted of even some of the charged offenses in [the] case." Reese, 2017 IL 120011, ¶ 64. Specifically, the trial court told defendant the maximum sentence was 160 years' imprisonment on two of the charges alone. Reese, 2017 IL 120011, ¶ 64. The supreme court did not see how informing the defendant the potential 160-year sentence in this case would also be served consecutively to his natural-life sentence for murder could have affected his decision on whether to waive counsel and proceed pro se. Reese, 2017 IL 120011, ¶ 64. It found the record showed the defendant's waiver of counsel was made knowingly and intelligently and the admonitions did not prejudice the defendant's rights. Reese, 2017 IL 120011, ¶ 65. As such, the supreme court concluded the defendant's waiver of counsel

was valid, and the defendant had not established a clear or obvious error.

¶ 57 Defendant cites People v. Bahrs, 2013 IL App (4th) 110903, ¶ 14, 988 N.E.2d 773, where this court concluded the trial court failed to comply with Rule 401(a)(2). We found the trial court did not inform defendant of the true maximum penalty he faced because it did not tell the defendant a prison sentence for aggravated fleeing would run consecutively to the other two prison terms. Bahrs, 2013 IL App (4th) 110903, ¶ 14. We explained that, with concurrent sentences, the maximum penalty the defendant would have faced was only 30 years' imprisonment plus mandatory supervised release. Bahrs, 2013 IL App (4th) 110903, ¶ 14. However, if the prison term for aggravated fleeing had to run consecutively to the other 2 prison terms, the maximum penalty defendant would have faced was 33 years' imprisonment plus mandatory supervised release. Bahrs, 2013 IL App (4th) 110903, ¶ 14. Thus, the consecutive nature of the aggravated fleeing sentence made a difference in defendant's exposure. Bahrs, 2013 IL App (4th) 110903, ¶ 14. We noted a trial court's understating the maximum penalty does not satisfy Rule 401(a), "except, perhaps, in the unusual case in which the defendant has such a high degree of legal expertise that one may confidently assume he or she already knows the maximum penalty." Bahrs, 2013 IL App (4th) 110903, ¶ 15. As such, the trial court's admonitions regarding the maximum penalty must be accurate and complete, which includes informing the defendant of the consecutive running of any prison term. Bahrs, 2013 IL App (4th) 110903, ¶ 15.

¶ 58 First, the information provided to the trial court at the time of the Rule 401(a) admonishments did indicate defendant was extended-term eligible. The error in the LEADS sheet for defendant was not discovered until after defendant's trial had begun. Second, the court's MSR admonishment was greater than what the actual MSR term was. Defendant cites no

cases indicating a greater maximum term is prejudicial to the defendant in waiving his right to counsel. Third, while the trial court did not admonish defendant it had the discretion to impose consecutive sentences, the court did admonish defendant he could receive a prison sentence of up to 14 years. The court again admonished defendant at the beginning of trial he could receive up to a 14-year prison term due to extended-term sentencing. The record is clear defendant understood he could receive a 14-year sentence before his trial began, and defendant still chose to represent himself. In this case, the court informed defendant multiple times of his true maximum penalty when it informed him of a possible prison term of up to 14 years. Thus, this case is distinguishable from Baxter, where the defendant could have received a sentence beyond the admonished maximum due to consecutive sentencing.

¶ 59 Additionally, given defendant chose to proceed pro se knowing he faced a prison term of up to 14 years, we fail to see how an admonishment informing defendant he faced a maximum of 7 years' imprisonment on each count and the two counts could be consecutive would have affected his decision to proceed pro se. Defendant's counsel suggests defendant may have found it unlikely he would receive an extended-term sentence when deciding to proceed pro se given he was aware he did not have a prior residential burglary conviction. However, defendant indicated multiple times he understood he could receive a prison term of 14 years and did not give any indication he believed he was not subject to extended-term sentencing. Here, defendant had knowledge he could receive a 14-year prison term when he waived his right to counsel at arraignment and before trial. As such, his ultimate 14-year sentence was not prejudicial. On the facts of this case, we find the trial court substantially complied with Rule 401(a), and thus defendant's waiver of counsel was valid.

¶ 60 Defendant further asserts the trial court should have admonished him again under

Rule 401(a) before it proceeded to sentencing. Citing People v. Simpson, 172 Ill. 2d 117, 138, 665 N.E.2d 1228, 1239 (1996), defendant notes the "continuing waiver" rule, which provides an intelligently and knowingly made waiver of counsel applies to all phases of trial, except for "significantly changed circumstances or a later request for counsel." The supreme court noted, "Circumstances requiring readmonishment before sentencing include lengthy delays between trial phases, newly discovered evidence which might require or justify advice of counsel, new charges brought, or a request from defendant." Simpson, 172 Ill. 2d at 138, 665 N.E.2d at 1239. However, as previously explained, the change in circumstances, which was the discovery defendant was not extended-term eligible, did not alter the true maximum penalty defendant was facing. Defendant fails to assert how the court correctly explaining the details of why he could receive up to a sentence of 14 years' imprisonment would have affected his decision to proceed pro se. Defendant did not give any indication he wanted counsel's assistance at sentencing.

¶ 61 Accordingly, we find defendant's right to counsel was not violated.

¶ 62 C. Sufficiency of the Evidence

¶ 63 Defendant contends the State's evidence was insufficient to prove beyond a reasonable doubt he committed the offense of aggravated domestic battery because the State failed to establish Greg was defendant's family or household member. The State asserts its evidence was sufficient. A defendant may raise a challenge to the sufficiency of the evidence for the first time on appeal. People v. Carter, 2021 IL 125954, ¶ 41. Our supreme court has set forth the following standard of review for insufficiency of the evidence claims:

> "It is well settled that, when reviewing a challenge to the sufficiency of the evidence, a reviewing court must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have

> found the essential elements of the crime beyond a reasonable doubt. [Citation.] All reasonable inferences from the evidence must be drawn in favor of the prosecution. [Citation.] This court will not reverse the trial court's judgment unless the evidence is so unreasonable, improbable, or unsatisfactory as to create a reasonable doubt of the defendant's guilt." (Internal quotation marks omitted.) People v. Cline, 2022 IL 126383, ¶ 25.

¶ 64 Section 12-0.1 of the Criminal Code of 2012 (Criminal Code) (720 ILCS 5/12-0.1 (West 2018) provides, in pertinent part, the following:

> " 'Family or household members' include *** persons who have or have had a dating or engagement relationship ***. For purposes of this Article, neither a casual acquaintanceship nor ordinary fraternization between 2 individuals in business or social contexts shall be deemed to constitute a dating relationship."

The statute does not provide any further guidance on determining whether two individuals are in a dating relationship, but numerous appellate court decisions have addressed the issue. As the appellate court has previously recognized, a potential difficulty with this term might arise when a relationship is new because "[s]ome people might define one date as a 'dating relationship,' while others may not do so until after several dates." People v. Johnson, 341 Ill. App. 3d 583, 588, 793 N.E.2d 774, 778 (2003). However, Illinois courts have found one date is insufficient to establish a dating relationship. See Alison C. v. Westcott, 343 Ill. App. 3d 648, 653, 798 N.E.2d 813, 817 (2003); People v. Young, 362 Ill. App. 3d 843, 845, 852, 840 N.E.2d 825, 827, 832 (2005). Moreover, a reviewing court has found evidence of the defendant and the victim having numerous sexual encounters insufficient to show the defendant and the victim had a dating relationship. People v. Howard, 2012 IL App (3d) 100925, ¶ 10, 970 N.E.2d 63.

¶ 65 Illinois courts have defined a dating relationship as a " 'serious courtship': 'at a minimum, an established relationship with a significant romantic focus.' " People v. Allen, 2020 IL App (2d) 180473, ¶ 21, 161 N.E.3d 1201 (quoting Young, 362 Ill. App. 3d at 851, 840 N.E.2d at 832). "Romantic" is to be interpreted broadly, "encompass[ing] relationships that are 'romantic' in a conventional sense and those that are mainly sexual." (Emphasis in the original.) Allen, 2020 IL App (2d) 180473, ¶ 21. For a dating relationship to exist, a "degree of romantic reciprocity" must be present, but "complete reciprocity of interest" is not required. Allen, 2020 IL App (2d) 180473, ¶¶ 21-22. For example, a dating relationship may exist if "one party is seeking sex and the other a chocolate-and-flowers romance." Allen, 2020 IL App (2d) 180473, ¶ 22.

¶ 66 In Allen, 2020 IL App (2d) 180473, ¶ 23, the reviewing court concluded the State's evidence was sufficient for a reasonable trier of fact to find the defendant was in a "dating relationship" as defined in section 12-0.1. In reaching that conclusion, the court noted the defendant's suggestion, the victim wanted a "boyfriend" and he wanted sex, did not preclude the pair from having a dating relationship. Allen, 2020 IL App (2d) 180473, ¶ 23. Moreover, the victim testified she and defendant not only met to have sex but also regularly ate together and watched movies at the defendant's house. Allen, 2020 IL App (2d) 180473, ¶ 23. They "had done so 'on and off' for about eight months." Allen, 2020 IL App (2d) 180473, ¶ 23.

¶ 67 Here, the evidence at trial showed defendant met Greg on Tuesday morning at a friend's home. They both spent Tuesday night at the friend's home, and on Wednesday morning, they went to defendant's apartment where they engaged in sexual activity. Greg then left defendant's apartment. The two got together later in the day on Wednesday with friends, and two of the friends were jealous of defendant and Greg being all over each other. Defendant's

explanation is unclear about whether he and Greg spent Wednesday night together at the friend's residence. Greg then came over to defendant's apartment on Saturday. They were drinking together and were planning on going out to a bar when the incident occurred.

¶ 68 Unlike in Allen, defendant and Greg had only known each other for five days and had only one sexual encounter. They never spent the night together at one of their residences. Moreover, the State presented no evidence defendant and Greg referred to each other as boyfriend or considered the other one to be a boyfriend. Given the pair had only known each for a very short period of time, did not even see each other every day during that brief period, and had only one sexual encounter, we agree with defendant the State's evidence is insufficient for a rational trier of fact to have found beyond a reasonable doubt a dating relationship existed between defendant and Greg.

¶ 69 Given the insufficient evidence, defendant cannot be convicted of the Class 2 felony of aggravated domestic battery, and thus we reduce defendant's convictions to the Class 3 felony of aggravated battery. See Howard, 2012 IL App (3d) 100925, ¶ 11. Defendant's seven-year sentences are greater than the sentencing range for a Class 3 felony (730 ILCS 5/5-4.5-40(a) (West 2018)), and thus we remand the case to the circuit court for resentencing. We find no merit in defendant's request for the sentencing hearing to be before a different judge.

¶ 70 D. Right to Remain Silent

¶ 71 Defendant last asserts his right to remain silent was violated because the trial court ordered him to cooperate with the preparation of the presentence investigation report, despite defendant's desire to proceed directly to sentencing without the presentence investigation report. The State then presented some of the information obtained from defendant in aggravation at defendant's sentencing hearing. The State asserts defendant forfeited this claim by not raising

an objection in the trial court and in a motion to reconsider sentence. It further argues defendant cannot establish plain error because the trial court did not order defendant to cooperate with the probation department. In his reply brief, defendant seeks review under the plain-error doctrine and points out every argument the State failed to make. However, as previously stated, it is defendant who bears the burden of proving plain error, and the State's argument was anticipatory of the argument defendant did not make in his initial brief, despite the obvious forfeiture of the issue. Regardless, we agree with the State the trial court did not err.

¶ 72 In support of his argument, defendant cites People v. Woods, 2018 IL App (1st) 153323, ¶ 37, 140 N.E.3d 798, where the reviewing court found second-prong plain error based on the trial court insisting the defendant cooperate with the presentence investigation report and then using that information against him. There, the defendant was specifically told by the trial court he had to talk to pretrial services after the defendant had previously declined to answer any questions for the initial presentence investigation report. Woods, 2018 IL App (1st) 153323, ¶ 9. After the court's instruction, the defendant completed an interview for a new presentence investigation report, which was filed with the trial court. Woods, 2018 IL App (1st) 153323, ¶ 10. The reviewing court noted the trial court appeared to have taken only a negative view of information in the new presentence investigation report, which could have also been viewed as mitigating. Woods, 2018 IL App (1st) 153323, ¶ 35.

¶ 73 Here, after the jury verdict, the trial court indicated it believed a presentence investigation report should be ordered and asked if either party objected. The State answered in the negative. Defendant did not answer. The court then explained to defendant what a presentence investigation report was and then asked how much time was needed for sentencing. Defendant then noted that same day would work, if possible. The court noted that was not

possible because the court ordered a presentence investigation report. The State responded two hours, and defendant then asked whether it was two hours that day. The court again noted it had ordered a presentence investigation report and the report needed to be prepared for sentencing. The court stated a possible date for the sentencing hearing, and the State agreed with it. The court then stated to defendant, "I would admonish you that you want to cooperate with the Court Services as to the pre-sentence investigation."

¶ 74 While defendant wanted to have the sentencing hearing the same day as his trial, he did not expressly refuse to participate in a presentence investigation report like the defendant in *Woods*. We disagree with defendant the record indicates defendant clearly did not want to participate in the preparation of the presentence investigation report. Defendant did not make an objection when the court asked if there was any objection to its ordering a presentence investigation report. The only clear thing is defendant desired to have a sentencing hearing that day. Moreover, the court did not order defendant to cooperate with the presentence investigation like in *Woods*, but instead suggested defendant should want to cooperate with the presentence investigation report. Defendant takes issue with the court's failure to warn him anything he said during the presentence investigation could be used against him. However, it was defendant who chose to proceed without counsel, and counsel could have explained the positive and negatives of participating in the presentence investigation report.

¶ 75 Accordingly, we find defendant's right to remain silent was not violated.

¶ 76 III. CONCLUSION

¶ 77 For the reasons stated, we reverse defendant's convictions for aggravated domestic battery and remand the cause to the Ford County circuit court for sentencing on two counts of aggravated battery. The circuit court's judgment is affirmed in all other respects.

¶ 78 Affirmed in part and reversed in part.

¶ 79 Cause remanded.

IN THE
SUPREME COURT OF ILLINOIS

In re: Illinois Courts Response to COVID-19 Emergency/ Impact on Trials	)	M.R.30370

Order

In the exercise of the general administrative and supervisory authority over the courts of Illinois conferred on this Court pursuant to Article VI, Section 16 of the Illinois Constitution of 1970 (Ill. Const. 1970, art. VI, sec. 16); in view of the state of emergency that has been declared by the Governor of the State of Illinois in order to prevent the spread of the novel coronavirus; and in the interests of the health and safety of all court users, staff, and judicial officers during these extraordinary circumstances, and to clarify this Court's orders of March 20, 2020 and April 3, 2020, IT IS HEREBY ORDERED that the Court's orders of March 20, 2020 and April 3, 2020 are amended as follows:

The Chief Judges of each circuit may continue trials until further order of this Court. The continuances occasioned by this Order serve the ends of justice and outweigh the best interests of the public and defendants in a speedy trial. Therefore, such continuances shall be excluded from speedy trial computations contained in section 103-5 of the Code of Criminal Procedure of 1963 (725 ILCS 5/103-5 (West 2018)) and section 5-601 of the Illinois Juvenile Court Act (705 ILCS 405/5-601 (West 2018)). Statutory time restrictions in section 103-5 of the Code of Criminal Procedure of 1963 and section 5-601 of the Juvenile Court Act shall be tolled until further order of this Court.

Order entered by the Court.

SEAL OF THE SUPREME COURT
STATE OF ILLINOIS
AUG. 26, 1818

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Court, this 7th day of April, 2020.

Carolyn Taft Grosboll

Clerk,
Supreme Court of the State of Illinois

No. 128687

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- CLAYTON T. MARCUM, Defendant-Appellant.	)))))))))))	Appeal from the Appellate Court of Illinois, No. 4-20-0656. There on appeal from the Circuit Court of the Eleventh Judicial Circuit, Ford County, Illinois, No. 20-CF-53. Honorable Matthew J. Fitton, Judge Presiding.

NOTICE AND PROOF OF SERVICE

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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 April 5, 2023, 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 Springfield, 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/Amanda Mann
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