

No. 1-11-0677

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	08 CR 23247
)	
PIERRE SKIPPER,)	Honorable
)	Joseph M. Claps,
Defendant-Appellant.)	Judge Presiding.

JUSTICE EPSTEIN delivered the judgment of the court.
Justices Fitzgerald Smith and Pucinski concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court did not violate defendant’s right to a speedy trial, where trial commenced before statutory speedy trial term expired, and trial court did not abuse its discretion in granting continuances to secure testimony of an identification witness. Defendant’s 15-year sentencing enhancements for armed robbery and aggravated kidnaping were affirmed where defendant committed the armed robbery subsequent to the enactment of Public Act 95-688, which revived these sentencing enhancements by eliminating any proportional penalties violation.

¶ 2 Following a bench trial, defendant Pierre Skipper was convicted of armed robbery and aggravated kidnaping. The trial court sentenced defendant to 24 years in prison for each conviction, to be served concurrently. Defendant presses three arguments on appeal: (1) the State

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violated the Speedy Trial Act because although it answered ready for trial within the 120-day statutory term, it later sought several continuances in order to secure the testimony of Christopher Woods, an identification witness; (2) the 15-year firearm add-ons applied to his convictions should be vacated because they violate the proportionate penalties clause of the Illinois constitution; and (3) the mittimus should be corrected to reflect only one conviction and sentence for armed robbery, where each armed robbery count was based on the same physical act. For the reasons that follow, we affirm with instructions to correct the mittimus.

¶ 3 Defendant was arrested on November 19, 2008, and arraigned on December 30, 2008. From December 30, 2008 to June 8, 2010, the parties continued the case several times by agreement. On July 13, 2010, defendant demanded trial. The assistant State's Attorney informed the court that the State was unable to go forward and requested a continuance.

¶ 4 On August 19, 2010, the State answered ready for trial and presented the testimony of three eyewitnesses and a detective. Thaer Atieh, Eleanor Johnson, and Tony Hackett all testified that on November 8, 2008, they worked at Collection Clothing Store, located at 347 East 47th Street in Chicago. At approximately 3:30 p.m., four masked men entered the store, grabbed Atieh, Johnson, and Hackett, tied their hands behind their backs, and forced them to lie down on the floor in the storage room in the back of the store. Atieh testified that the man who grabbed him put a silver gun by his stomach, just above his hip. While one of the men stayed in the back room with the employees, holding a gun, the other three went into the store and pulled coats from the racks. The four men left the store, taking several leather jackets and a pair of jeans. Atieh, Johnson, and Hackett were all unable to identify any of the masked men. A surveillance camera

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at the store recorded the events. Chicago police detective Gary Bush testified that he searched the apartment of Arnold Counsel at 4316 South Martin Luther King Drive and recovered proceeds from the robbery.

¶ 5 The State then requested a continuance to call Woods. On September 7, 2010, after Woods did not appear in court, the State informed the trial court that it anticipated Woods' presence in court that day after several phone conversations in which he agreed to appear. Over defense counsel's objection, a continuance was granted until September 14, 2010. When Woods did not appear on September 14, 2010, the assistant State's Attorney told the court she might file paperwork to secure an out-of-state subpoena for Woods, who was currently living in Alabama: "I have personally spoken with this witness on several occasions. I have not been able to personally serve this witness. I'm asking for a one week continuance to obtain an address on this person and get a material witness packet together, if that's the case." Over defense counsel's objection, the trial court granted a one-week continuance. On September 15, 2010, the State filed a motion asking the trial court to adjudge Woods a material witness, informing the trial court that Woods' testimony was crucial to its case.

¶ 6 On September 21, 2010, the State requested a short continuance to file a motion for a 30-day extension under the Speedy Trial Act. The trial court continued the case to September 23, 2010. On September 23, 2010, the State presented an additional witness, Chicago police forensic investigator Donald Fanelli, who testified that he processed a vehicle at 4425 South King Drive and recovered two handguns, handcuffs, duct tape, a black bandana, "ninja" masks, clothing with price tags still attached, and proceeds from the robbery. The parties stipulated that Sergeant Jose

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Lopez would testify that on November 8, 2008, he observed a white Dodge SUV at 4316 South King Drive with Kenneth Bland and Christopher Ahmad inside. When he attempted to curb the vehicle, Ahmad crashed the SUV into a fire hydrant. As the officers approach, Ahmad pointed a gun at them. The officer fired at Ahmad, fatally wounding him. The parties also stipulated that DNA testing was done for swabs collected from inside the “ninja” masks. The forensic biologist who tested the swabs identified a mixture of at least three people, and defendant could not be excluded from the mixture, within a probability of 1 in 5.7 quadrillion African American males.

¶ 7 After the stipulated testimony, the State presented a “Petition for an Extension of Time under the 4th Term Act,” stating that Woods had moved to Alabama and subpoena papers had been filed on September 15. The State informed the court that Woods was brought before an Alabama judge and ordered to appear in court on September 21, 2010, and the State thus expected him to be in court. Counsel for the State and defendant marked September 28, 2010, as the end date of the 120-day speedy trial term, and defense counsel argued that the speedy trial term was continuing to run because the delay was not caused by defendant. The trial court did not rule on the State’s petition, finding that the State had sufficiently complied with the Speedy Trial Act by bringing defendant to trial within 120 days. The court noted that the State commenced the trial “with the belief that you could within a reasonable time complete it[.]” The trial court directed the State to file a petition for rule to show cause against Woods and granted a continuance over defendant’s objection to September 27, 2010. On September 27, the court granted the petition, issued an arrest warrant for Woods, and continued the case until October 13, 2010.

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¶ 8 Woods appeared in court and testified on October 13, 2010. Woods testified that he met up with defendant, Hicks, Bland, and Counsel on November 8, 2008. The men decided to “hit a lick,” so Counsel and Woods drove in Counsel’s car to the vicinity of the Collection clothing store. Skipper, Hicks, and Bland drove in a white SUV. Woods testified that defendant, Ahmad, and Bland were all armed at they drove off. Counsel went into a nearby store to buy laundry bags, gloves, and ninja masks. Woods did not participate in the robbery, but saw the men enter the store wearing masks.

¶ 9 Woods later met the men at the home of a friend. The men divided the proceeds of the robbery. Later that evening, Woods went to Counsel’s apartment at 43rd and King Drive. Ahmad and Bland were there, wearing new leather jackets from the Collection store. Ahmad and Bland left the apartment, and Woods heard sirens and gunshots. A few days later, Woods spoke to defendant on the phone, and defendant told him that he had sold all the jackets. Woods viewed the surveillance video from the store in court, and he identified defendant grabbing the arm of a woman in the video. On cross-examination, Woods testified that he had two prior felony convictions in Illinois and a pending theft case in Alabama. Woods testified that he told the State that he would voluntarily appear at a prior court date, but he waited until to the last minute to make arrangements and could not get a ride, despite the State’s offer to transport him. Defendant was found guilty and was sentence to six concurrent 24-year prison terms for armed robbery and aggravated kidnaping. The sentences included 15-year add-ons for possessing a handgun during the course of the offenses. The trial court denied defendant’s motion for new trial, in which defendant argued that the trial court violated his right to speedy trial by granting

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the State's continuances after the trial had commenced. This appeal followed.

¶ 10 Defendant first argues that the trial court erred when it granted the State several continuances to secure the presence of Christopher Woods at trial. The accused in a criminal case has both a constitutional and a statutory right to a speedy trial. *People v. Huff*, 195 Ill. 2d 87, 91 (2001). While the constitutional and statutory provisions are “not necessarily coextensive in their protections” (*id.*), here defendant focuses on his rights under the Speedy Trial Act (725 ILCS 5/103-5 (West 2010)). Where a defendant is in custody, the State has the duty to bring him to trial within the statutory period, 120 days, tolled only by periods of delay that are clearly attributable to the defendant. 725 ILCS 5/103-5(a) (West 2008).

¶ 11 Defendant claims that the State's conduct in this case reflects a bad-faith effort to avoid the 120-day speedy trial period. Even though the trial commenced well within the 120-day statutory deadline, defendant argues that the State violated the Speedy Trial Act by “pretextually answering ready for trial” and then seeking several continuances during trial to secure testimony from Christopher Woods. According to defendant, because Woods did not testify until after the 120-day speedy trial term ended, the State's conduct “violates the spirit of the Speedy Trial Act” and “this Court should discourage this sort of dilatory conduct in future cases by reversing [defendant's] convictions.”

¶ 12 Regardless of whether we accept that a delay after a trial begins should be viewed as a violation of a defendant's right to a speedy trial, here defendant must show that the trial court was wrong to grant the State's continuances. Once the trial has commenced, “a reasonably brief continuance may be granted to either side in the interests of justice.” 725 ILCS 5/114-4(f) (West

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2010). Additionally, the State's written motion for a continuance filed more than 30 days after arraignment may be granted when "a material witness is unavailable and the prosecution will be prejudiced by the absence of his testimony." 725 ILCS 5/114-4(c)(2) (West 2010).

¶ 13 In deciding whether to grant a continuance, the trial court must determine "whether the movant acted with diligence in attempting to obtain the evidence for which the continuance is sought and whether such evidence would have sufficient relevancy." *People v. Flores*, 269 Ill. App. 3d 196, 201 (1995); see also *People v. Bonds*, 401 Ill. App. 3d 668, 677 (2010) (noting that "[t]he State must also show that it exercised due diligence to obtain material evidence" when seeking a 30-day continuance beyond the 120-day period under section 103-5(c) of the Speedy Trial Act). Absent a clear abuse of discretion, a reviewing court will not disturb a trial court's ruling to grant or deny a continuance. *People v. Walker*, 232 Ill. 2d 113, 125 (2009).

¶ 14 Defendant does not dispute that Woods was a key witness for the State, but argues that the trial court abused its discretion in granting several continuances because the State was not diligent in securing his testimony. Defendant specifically complains that the State should not have answered ready for trial because Woods "was not under subpoena on the date that the trial commenced." According to defendant, because the State knew that Woods was outside Illinois, failure to take steps to legally ensure his presence "constitutes a lack of diligence as a matter of law."

¶ 15 This court has held that "[f]ailure to subpoena a witness suggests a lack of diligence, unless counsel has a reasonable expectation that the witness will appear without a subpoena and the witness is delayed by last-minute events." *People v. Boland*, 205 Ill. App. 3d 1009, 1014

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(1990). In this case, it is clear that the State believed that Woods would appear based on his assurances that he would come to court; the assistant State's Attorney told the court that Woods "has been aware of each and every court date that the matter has been set for trial and he had indicated to me on the phone that he would be present at the trial dates and he has failed to appear." The State had more than Woods' assurances: an Alabama judge ordered Woods to appear in court on September 21. As the trial court observed, "[i]t would [have] made any difference if they subpoenaed him for trial because he's demonstrated how he feels about that by ignoring the order by the Alabama judge for him to appear on the 21st."

¶ 16 In hindsight, Woods' promises to appear were not worth much; it was only after a warrant was issued that he finally appeared. But we cannot say the State was not diligent when it relied on Woods' assurances or expecting that the order of an Alabama judge would ensure his appearance. We agree with the trial court that the State commenced the trial "with the belief that [it] could within reasonable time complete it," and we find no abuse of discretion in the trial court's decision to grant the State's requests for continuances to secure Woods' testimony.

¶ 17 Defendant next claims that the trial court improperly imposed 15-year firearm add-ons to his armed robbery and aggravated kidnaping convictions. Defendant was sentenced to six concurrent 24-year prison terms for armed robbery (720 ILCS 5/18-2(a)(2) (West 2008)) and aggravated kidnaping (720 ILCS 5/10-2(a)(6) (West 2008)). The sentences included mandatory 15-year add-ons for possessing a handgun during the course of the offenses. See 720 ILCS 5/18-2(b) (West 2008) (15-year enhancement for armed robbery); 720 ILCS 5/10-2(b) (West 2008) (15-year enhancement for aggravated kidnaping). Defendant argues that both add-ons are void

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because they are unconstitutional under the proportionate penalties clause of the Illinois Constitution. See *People v. Hauschild*, 226 Ill. 2d 63, 86-89 (2007) (concluding that sentence applicable to the defendant for armed robbery while armed with a firearm, which included the 15-year add-on, violated the proportionate penalties clause because that sentence is more severe than the sentence for the identical offense of armed violence based on robbery with a category I or II weapon); *People v. Herron*, 2012 IL App (1st) 090663, ¶ 25 (following *Hauschild* and concluding that the 15-year enhancement for an aggravated kidnaping conviction violated the proportionate penalties clause because that sentence is more severe than the sentence for the identical offense of armed violence predicated on kidnaping). After the supreme court's decision in *Hauschild*, the Illinois legislature amended the armed violence statute, removing both armed robbery and aggravated kidnaping as predicate offenses for armed violence. Pub. Act 95-688, § 4 (eff. Oct. 23, 2007). Defendant claims that because the legislature had not re-enacted or amended the sentencing provisions of the armed robbery or aggravated kidnaping statutes at the time the offense in this case occurred (November 30, 2010), those sentencing provisions were void at the time. In defendant's view, the amendments to the armed violence statute, while eliminating any proportionality violation, did not revive the sentencing enhancements in the armed robbery or aggravated kidnaping statutes.

¶ 18 Our supreme court recently rejected this same argument in *People v. Blair*, 2013 IL 114122. In *Blair*, the court held that to remedy a proportionality violation, “[t]he legislature may amend the challenged statute held unconstitutional, amend the comparison statute, or amend both statutes.” *Blair*, 2013 IL 114122, ¶ 32. The 15-year enhancement for armed robbery applied in

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this case was therefore enforceable because “Public Act 95-688 revived the sentencing enhancement in the armed robbery statute by amending the armed violence statute.” *Id.* at ¶ 35.

The same is true for the aggravated kidnaping enhancement: Public Act 95-688 remedied any proportionality violation between that enhancement and the penalty for armed violence predicated on kidnaping. We therefore reject defendant’s request to vacate defendant’s sentences for armed robbery and aggravated kidnaping.

¶ 19 Defendant finally contends, and the State agrees, that his conviction on three separate counts of armed robbery violates the one-act, one-crime rule. The one-act, one-crime rule prohibits multiple convictions where more than one offense is carved from the same physical act. *People v. Crespo*, 203 Ill. 2d 335, 340-41 (2001). The presence of more than one victim at the scene of a robbery does not allow for multiple convictions. See, e.g., *People v. Hunter*, 42 Ill. App. 3d 947, 951 (1976) (finding that defendant committed one act of armed robbery when he stole from a cash register in the presence of two restaurant employees); *People v. Mack*, 105 Ill. 2d 103, 134-35 (1984) (finding two armed robbery convictions improper where defendant committed a single act of robbery in that he took money from a bank teller cage even though it occurred in the presence of two bank employees), judgment vacated on other grounds, 479 U.S. 1074 (1987). Here, that the property was taken from multiple store employees does not allow for more than one armed robbery conviction. We direct the clerk of the circuit court to correct the mittimus to reflect only one armed robbery conviction and sentence.

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¶ 20 CONCLUSION

¶ 21 For all the foregoing reasons, we affirm defendant's conviction and sentence and direct the clerk of the circuit court to correct the mittimus.

¶ 22 Affirmed and remanded with directions.