2013 IL App (1st) 111800-U

FIRST DIVISION
April 29, 2013

No. 1-11-1800

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.	)	No. 10 CR 3088 (03)
	)	
ANTHONY LEWIS,	)	Honorable
	)	Raymond Myles,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Hoffman and Justice Cunningham concurred in the judgment.

O R D E R

¶ 1 *Held:* Where the defendant was brought to trial within the statutory speedy trial period and the evidence was sufficient to prove the elements of the offenses charged beyond a reasonable doubt, trial counsel was not ineffective for not moving to dismiss on speedy trial grounds. Defendant's conviction for unlawful use of a weapon by a felon and reckless discharge of a firearm were affirmed.

¶ 2 Defendant Anthony Lewis appeals from a judgment of the circuit court of Cook County finding him guilty of unlawful use of a weapon by a felon in violation of section 24-1.1(a) of the Criminal Code of 1961 (Criminal Code) (720 ILCS 5/24-1.1(a) (West 2008)). On appeal, defendant argues that the State violated his right to a speedy trial under section 103-5 of the Code of Criminal Procedure of 1963 (hereinafter the Speedy Trial Act) (725 ILCS 5/103-5 (West 2008)) by causing more than 120 days of delay that were not agreed to by him between the date he was taken into custody and the date of his trial. Defendant also argues that his convictions

should be reversed because his trial counsel rendered ineffective assistance by failing to move to discharge defendant based on a violation of his statutory right to a speedy trial. Finally, defendant argues his convictions should be reversed because the State failed to prove him guilty beyond a reasonable doubt. We affirm.

¶ 3 BACKGROUND

¶ 4 Police arrested defendant and several others on January 1, 2010 after observing them discharge weapons from the porch of a building in a residential neighborhood. On January 1, 2010, Police Officer Daniel Markus signed complaints against defendant, Anthony Lewis, for reckless discharge of a firearm and unlawful use of a weapon by a felon. The complaints were filed on January 2, 2010, and defendant appeared in court on the same day, where bail was set. The circuit court continued the matter until January 8, 2010. On January 8, 2010, the public defender of Cook County entered an appearance and demand for trial on behalf of defendant. The court continued the matter to January 28, 2010. On January 28, 2010 the public defender entered another appearance and demand for trial on behalf of defendant. Following a hearing, the court made a finding of probable cause, transferred the matter to the criminal division, and continued the case until February 18, 2010.

¶ 5 On February 22, 2010 the grand jury indicted defendant for: (1) unlawful use of a weapon by a felon in that he knowingly possessed on or about his person a firearm after having been convicted of a felony; (2) unlawful use of a weapon by a felon in that he knowingly possessed on or about his person firearm ammunition after having been convicted of a felony; and (3) reckless discharge of a firearm in that he discharged a firearm in a reckless manner by shooting a firearm into the air in a residential neighborhood. The grand jury also indicted defendant on two counts of aggravated unlawful use of a weapon. On March 9, 2010, the court arraigned defendant and defendant pled not guilty. The State stated it was seeking leave to file a

motion for discovery and to answer discovery. The court instructed the parties to "pick a date that works for all of you." The court continued the matter until April 12 by agreement of the parties. On April 12, 2010, the court inquired as to the status of the case. Defendant's counsel suggested continuing the matter until May 7 for discovery status. The court continued the matter until May 7, 2010 by agreement.

¶ 6 On May 7, the court again asked the parties where the case stood. Counsel for one co-defendant raised an issue with regard to discovery and requested a Rule 402 conference as to two defendants. Defendant's counsel stated she needed an opportunity to review discovery she received that day. The court indicated it would continue the matter for all five defendants, or three if the two who requested the Rule 402 conference had their cases resolved, until May 24. On May 24, 2010, the proceedings began by addressing the discovery issue raised on the prior court date. The State represented it had no additional discovery. Defendant's attorney suggested "one final status date of June 8th so we can check this out and file our answers." Counsel for another co-defendant indicated he was prepared to set the matter for trial and suggested the court set a trial date and permit the other attorneys to file their answers to discovery in the interim. The court stated its concern with having a defendant return to court if discovery would not be complete by the next court date. Defendant's attorney indicated she anticipated being able to file her answers by June 8, 2010. The court chose to set the matter for a further status hearing on June 8 and set a reserve trial date of June 24, 2010 by agreement of the parties. On June 8, 2010 the court informed defendant that his attorney had appeared in court and agreed that the matter would proceed to trial on June 24, 2010. Defendant personally agreed to the trial date.

¶ 7 On June 24, 2010, the State informed the court it was not ready to proceed with the trial because of the absence of two crucial witnesses–the officers who first arrived on the scene and made the initial observations of the offenses. The State informed the court the officers were in

training. The court asked counsel for defendant: "Are you going to agree to a date or are you going to demand?" Counsel for one co-defendant stated she would not object if the State asks for "one date" and defendant's counsel responded: "We would also go by agreement." After briefly discussing a discovery issue, the court noted that "the defendants have been sitting in custody for at least five months" and the parties proceeded to look at trial dates. After coordinating calendars with the defense attorneys and the court, the parties selected July 29, 2010 as a trial date. Of the witnesses who were present the court asked: "Officers, I'd ask you to look at the calendar. Is there any problems with July 29th for any of you with regard to vacations, furloughs, training or anything like that?" The court also confirmed with the civilian witnesses that July 29 was an acceptable date. After receiving affirmative responses, the court stated:

> "Okay, I'm setting this case for a bench trial on the 29th of July. I expect the case to go on that day. If there is any chance, for whatever reason, that this cannot go, I want the parties to come to court beforehand so we can discuss alternative trial dates. These three defendants are in custody, and I want to make sure that they do have a prompt trial in this matter.
>
> Okay, this will be by agreement 7-29 *** for bench."

The court confirmed this was correct with each individual defendant. On July 29, 2010 counsel for co-defendant requested a continuance. Defendant's attorney suggested September 1, 2010. Due to scheduling conflicts, the court continued the matter by agreement until September 7, 2010 for bench trial.

¶ 8 On September 7, 2010, the State informed the court it was not ready to proceed. Defendant's counsel informed the court: "We have agreed on a new date of September 14th." Co-defendant's counsel informed the court that if the trial was continued to September 14, 2010, the matter would have to be continued from that date to provide additional time to make travel

arrangements for an out-of-state witness. The court wanted to "find a date that makes more sense" but the co-defendant's attorney informed the court that "[b]etween the schedules for the attorneys involved and the witnesses, that was the best we could come up with." The scheduling problems included furloughs for the State's witnesses and a conflicting jury trial for one defense counsel. The court agreed to continue the matter until September 14, 2010 "by agreement."

¶ 9 On September 14, 2010, the State was not ready to proceed because it had only one officer present. The court and the State discussed why the State's witnesses were not present. The court stated: "We will give it a two-week date. That's they only thing we can do." The court and the attorneys discussed scheduling. Defendant's counsel's only statement on the record was "Colleen Koch, waiving the defendant Mr. Lewis' appearance. By agreement, 10-27." On October 27, 2010 counsel for defendants answered ready to proceed with trial. The State informed the court it was not ready to proceed due to the absence of one officer. The State informed the court that one of the officers it needed would be out of the country until November 22. The following exchange with the Assistant State's Attorney occurred:

> "MR. O'MALLEY [Assistant State's Attorney]: If the Court would like to continue ths matter until next week, not schedule it for litigation, defendant demanding trial notwithstanding, perhaps I can reach out to the commanders and then on that date inform the court with a greater degree of certitude as for a trial date in which the state would anticipate being able to answer ready.
>
> THE COURT: And in the meantime what are they supposed to do?
>
> MR. O'MALLEY: Judge, they can avail themselves of the remedy for which the General Assembly has provided them and demand trial, and then it is up to the State to try them within 120 days."

The State moved to continue the matter until November 3 for status. On October 27, 2010, defendant filed a written demand for trial. On November 3, 2010, the parties appeared in court and the State moved to continue the matter until November 30, 2010 for trial.

¶ 10 On November 30, 2010, defendant waived his right to a jury trial and the case proceeded to a bench trial. Counsel for co-defendant moved to sever the trial of Willie Charman and the court granted the motion. Defendant's case proceeded on two counts of unlawful use of a weapon by a felon, aggravated unlawful use of a weapon by a felon, and reckless discharge of a firearm. Defendant pled not guilty to all of the charges. Police Officer Daniel Markus testified for the state. Officer Markus was working in the early hours of January 1, 2010 with Officer Salyers when he heard "very, very loud gunshots." Officers Markus and Salyers left their vehicle and approached the sound on foot. The officers approached 3606 West Huron Street in Chicago. Officer Markus described the area as a whole as residential. Officer Markus observed a two-story porch on the rear of the building. He testified that as he approached he could clearly observe both the back balconies and decking. He observed individuals on the end of the porch closest to him but did not observe anyone on the first-floor porch. There was a light directly above these individuals' heads and, he testified, "you could observe actually observe quite a bit out there." On cross-examination, he further described the light as "a yellow outdoor light that illuminated the whole entire porch of the second floor." The light was located at a door, and the individuals firing the weapons were in front of that door. Although the light did not illuminate the other doors to the porch as well as it illuminated the door where they were standing, Officer Markus explained that the light was "above the gentlemen that were discharging weapons."

¶ 11 Officer Markus testified he observed an individual he later learned to be defendant on the porch with a gun. Officer Markus identified defendant in court. He testified he observed defendant with a silver handgun in his hand and observed defendant discharge the gun into the

air. Officer Markus testified he could clearly observe the firearms in their hands and he could clearly observe them from the alley where he saw the shots being fired. Officer Markus illuminated the porch with a high-powered flashlight attached to his own rifle, announced "police" and instructed the individuals to drop their weapons, at which point they fled in different directions. Several went down the stairs into an apartment and two went into a side apartment.

¶ 12 Officer Markus and other officers who had responded to the location approached the building and entered the same apartment into which some of the individuals on the porch had fled. Inside the apartment Officer Markus found defendant and co-defendant Andre Whittington, but they did not have any weapons on them when the officer entered the apartment. Markus detained both defendant and Whittingham. Markus and other officers went to a first floor apartment where Markus observed an assault rifle, a lever action rifle, and a silver handgun in a kitchen pantry. The handgun was a silver Smith & Wesson .40 caliber handgun. Officer Markus testified police recovered three empty .40 caliber shell casings from the porch and from the gangway in the rear of 3606 West Huron. Police also found 19 empty shell casings of .223 caliber and nine shell casings for a 9 millimeter weapon. Officer Markus testified that a 9 millimeter round can be loaded into and fired from a .40 caliber handgun.

¶ 13 Officer Markus testified there were numerous people on the porch, so many that he "would not judge to even estimate how many." Nonetheless he was able to see which particular weapon was in which defendant's hand when everyone started to flee. Officer Markus approached the building "observing the weapons the whole entire time." Detective Nanninga testified that when she interviewed a co-defendant, he told Detective Nanninga that he began firing the handgun from the first floor, then went to the second floor. All of the weapons were being passed around among people including defendant.

¶ 14 The State entered a certified copy of defendant's conviction for possession of a controlled substance into evidence without objection.

¶ 15 Lasondia Chester resides in the second-floor apartment where police arrested defendant. Ms. Chester testified she heard gunshots begin close to midnight. She heard approximately four shots. Ms. Chester testified defendant was in her apartment the entire time between his arrival at approximately 11 p.m. until police arrived. Margaret James was in the apartment when police arrested defendant. Ms. James heard gunshots shortly afer midnight. She testified she remembers defendant at the New Year's Eve party but that defendant never left the apartment on the night in question. According to Ms. James, no one left the apartment between her arrival at approximately 11:45 until the police arrived. Michelle Beason, a witness for co-defendant Willie Charmon, testified she heard no gunshots at all on the night in question.

¶ 16 Defendant waived his right to testify.

¶ 17 Following arguments, the court made findings of fact and conclusions of law. The court found Officer Markus to be a credible witness. The court found the defense's witnesses were not credible. The court stated: "Therefore, the court gave little if any weight to their particular testimonies." The court found that Officer Markus heard gunshots and that he "was able to see what he testified that he saw." The court found that Officer Markus testified that he saw Anthony Lewis with a silver handgun firing it into the air. The court found that "despite rigorous cross-examination *** the credibility and the reliability of both officers stood up to the cross-examination."

¶ 18 After recounting the testimony of the defense witnesses, the court observed as follows:

> "The court as it stated, it had an opportunity to listen to the testimony of all of the people who testified, and the court find [sic] that it's very strange that with all the bullet casing found out there especially on that second floor porch that no one

> essentially heard anything ***. Somehow those bullet casing landed there. No one seems to give a reasonable explanation as to how they got there except that they were there as a result of people shooting out there."

The court found the State proved actual possession of the handgun by the defendant and that the State proved its case with regard to reckless discharge based on the fact that "when you shoot a gun into the air you endanger not only people in that community, but you endanger with those types of weapons, you endanger people potentially miles away."

The court found defendant guilty of two counts of unlawful use of a weapon by a felon and one count of reckless discharge of a firearm. The court found defendant not guilty of two counts of aggravated unlawful use of a weapon. Defendant's conviction for reckless discharge was merged with his conviction for unlawful use of a weapon.

¶ 19 On February 18, 2011, defendant filed a motion for a new trial. On May 5, 2011, defendant filed a motion to reconsider sentence. On June 9, 2011, the circuit court entered an order sentencing defendant to three years' imprisonment for unlawful use of a weapon by a felon.

¶ 20 ANALYSIS

¶ 21 I. Speedy Trial Violation

¶ 22 Defendant argues the judgment of the circuit court must be reversed because the State obtained his conviction in violation of his statutory right to a speedy trial and because his trial counsel rendered ineffective assistance for failing to move to dismiss the charges based on the speedy-trial statute violation. Claims of ineffective assistance of counsel are assessed under the standard articulated by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984) (adopting *Strickland* rule for challenges to effectiveness of counsel). "To prove ineffective assistance of counsel, the defendant must allege facts showing counsel's representation was both objectively unreasonable and counsel's

deficiency prejudiced him. The defendant bears the burden of demonstrating he received ineffective assistance of counsel. To do so, the defendant must overcome a strong presumption that counsel's performance fell within a wide range of reasonable professional assistance." (Internal citations omitted.) *People v. Wade*, 2013 IL App (1st) 112547 ¶ 13. The failure of counsel to raise a speedy trial violation does not satisfy either prong of *Strickland* where there is no lawful basis for arguing a violation. *Wade*, 2013 IL App (1st) 112547 ¶ 14. Therefore, "we must first determine whether defendant's speedy trial rights were violated, before addressing whether counsel was ineffective for failing to raise the issue." *Wade*, 2013 IL App (1st) 112547 ¶ 14.

¶ 23 "Criminal defendants possess both constitutional and statutory rights to a speedy trial." (Internal citations omitted.) *People v. Hunter*, 2013 IL 114100 ¶ 9. "While these provisions address similar concerns, the rights established by each are not necessarily coextensive." (Internal quotation marks and citations omitted.) *People v. Woodrum*, 223 Ill. 2d 286, 298 (2006). Defendant asserts solely a violation of his statutory right to a speedy trial and does not claim a constitutional violation. Therefore the statute alone determines whether a violation has occurred. See *Hunter*, 2013 IL 114100. In this case, defendant remained in custody from the time of his arrest until trial. Under those circumstances, section 103-5(a) of the Speedy Trial Act (725 ILCS 5/103-5(a) (West 2008)) applies. The statute states in pertinent part as follows:

> "Every person in custody in this State for an alleged offense shall be tried by the court having jurisdiction within 120 days from the date he was taken into custody unless delay is occasioned by the defendant ***. Delay shall be considered to be agreed to by the defendant unless he or she objects to the delay by making a written demand for trial or an oral demand for trial on the record." 725 ILCS 5/103-5(a) (West 2008).

¶ 24 The duty is on the State to bring a criminal defendant to trial within 120 days of the date he or she is taken into custody. *People v. Mayo*, 198 Ill. 2d 530, 536 (2002). The 120-day "clock" begins to run automatically from the day the defendant is taken into custody–the defendant is not required to make a formal demand for trial. *Mayo*, 198 Ill. 2d at 536. The speedy-trial clock "stops" during any period of delay caused by the defendant. *Wade*, 2013 IL App (1st) 112547 ¶ 16. If the State fails to bring the defendant to trial before 120 days have expired, not counting any period during which the speedy-trial period was suspended, then the defendant is entitled to be discharged from custody and to have the charges dismissed. *Mayo*, 198 Ill. 2d at 536; 725 ILCS 5/103-5(d), 114-1(a)(1) (West 2008). The burden is on the defendant to affirmatively establish a speedy trial violation by showing that the period of delay was not attributable to him or her. *Wade*, 2013 IL App (1st) 112547 ¶ 16.

¶ 25 A "delay" for purposes of the Speedy Trial Act results from any act by either party or by the trial court, including continuances, that results in moving the trial date outside "the starting point–the date custody begins, and [the] ending point–120 days later." *People v. Cordell*, 223 Ill. 2d 380, 389 (2006). To prevent the clock from stopping, the statute "requires defendants to object to any attempt to place the trial date outside the 120–day period. The statute does not mandate any 'magic words' constituting a demand for trial, but it requires some affirmative statement in the record requesting a *speedy* trial." (Emphasis in original.) (Internal citations omitted.) *People v. Phipps*, 238 Ill. 2d 54, 66 (2010). A basic request for trial, made before any delay was even proposed, does not qualify as an objection to "delays" not yet proposed. *Cordell*, 223 Ill. 2d at 391-92. Our supreme court has determined that this requirement comports with the intention of the Speedy Trial Act to permit a defendant to chose to "employ section 103–5(a) as a shield against any attempt to place his trial date outside the 120–day period" (*Cordell*, 223 Ill. 2d at 390), but not to provide defendants with a "sword to use after the fact to overturn their

convictions" (*Cordell*, 223 Ill. 2d at 392). A delay is charged to the defendant when the defendant's acts caused or contributed to a delay resulting in the postponement of trial. *People v. Kliner*, 185 Ill. 2d 81, 114 (1998). "In general, an agreed continuance constitutes an affirmative act of delay attributable to the defendant which tolls the speedy-trial term." *Kliner*, 185 Ill. 2d at 115-16.

¶ 26 Defendant claims that the State caused 143 days delay, therefore violating his right to a speedy trial. The State admits that it caused 101 days of delay that are not attributable to defendant. The periods of delay to which the State concedes are from defendant's arrest on January 1, 2010 until his arraignment on March 9, 2010 (67 days), and the period between October 27, 2010 and the trial date of November 30, 2010 (34 days). The State argues that every other period was agreed to by defendant. The periods on which the parties disagree are between June 24, 2010 and July 29, 2010 (35 days) and from September 7, 2010 until September 14, 2010 (7 days). Defendant does not dispute that his counsel agreed to a continuance from June 24, 2010 until July 29, 2010 for trial, and again from September 7, 2010 until September 14, 2010. Rather, defendant argues that an agreement to a trial date within the 120-day statutory period does not toll the speedy trial clock.

¶ 27 Defendant relies on *People v. LaFaire*, 374 Ill. App. 3d 461, 464 (2007), for the proposition that a defendant should not be charged with delay where counsel agrees to a trial date within the speedy-trial period. The *LaFaire* court affirmed the judgment of the circuit court of Will County granting the defendant's motion to dismiss based on section 103-5(b) of the Speedy Trial Act. *LaFaire*, 374 Ill. App. 3d at 466. Under section 103-5(b), "[e]very person on bail or recognizance shall be tried *** within 160 days from the date the defendant demands trial unless delay is occasioned by the defendant." *LaFaire*, 374 Ill. App. 3d at 463 (citing 725 ILCS 5/103-5(b) (West 2002).) The determinative period in *LaFaire* occurred between November 17, 2004,

the date the parties scheduled a trial date, and the proposed trial date of April 11, 2005[1]. The *LaFaire* court found that "the record does not show that defendant agreed to a mere continuance ***. Instead, he participated in scheduling a mutually agreeable trial date that fell within the 160-day speedy trial period." The court held that this "action is different from agreeing to a mere continuance or agreeing to a trial date that falls beyond the speedy trial period. Under such circumstances, we cannot say that the circuit court abused its discretion in declining to toll the speedy trial period for defendant's action on November 17, 2004." *LaFaire*, 374 Ill. App. 3d at 464. The *LaFaire* court found that because including the period at issue yielded a total period of 169 days not attributable to defendant, the circuit court correctly granted the defendant's motion to dismiss for violation of his speedy trial right. *Id*. at 465. *LaFaire* was issued after our supreme court issued its opinion in *Cordell*. In *Cordell*, our supreme court found that "in the instant case, when the trial court set a date for trial that fell outside of the 120-day limit of section 103-5(a), it was 'delaying' trial and defendant was obligated to object in order to prevent the speedy-trial clock from tolling." *Cordell*, 223 Ill. 2d at 390-91.

¶ 28 Defendant argues that due to the fact that, when he agreed to the continuance on June 24, 2010, a trial held on July 29, 2010 would have been within 120-day limit under the statute, when counsel agreed to the continuance to July 29, 2010, defendant "had not agreed to any delay, as the word is used in [the Speedy Trial Act.]" Defendant argues the same rationale applies to the period between September 7, 2010 and September 14, 2010. Thus, Defendant attempts to draw a distinction between "agreeing to a mere continuance, and setting a trial date within the 120-day term." Defendant argues that *Cordell* and *LaFaire* support his position. First, Defendant's reading of *Cordell* is incorrect. Our supreme court found, under the facts of that case, that the

[1] Prior to the proposed trial date, the State requested and was granted a continuance over the defendant's objection. *LaFaire*, 374 Ill. App. 3d at 462-63. The *LaFaire* court held, with regard to this period, that "defendant is clearly not responsible because he objected." *Id*. at 465.

defendant was obligated to object to prevent the speedy-trial clock from tolling when the trial court set a date for trial outside the 120-day limit. Defendant would read *Cordell* to hold that a defendant is *only* obligated to object when the trial court sets a date for trial outside the 120-day limit. In *Cordell*, our supreme court construed the language of the statute to determine the proper construction of "delay." *Id*. at 389. The court found "nothing in the section to indicate that the 'delay' must be of a set trial date." *Cordell*, 223 Ill. 2d at 390.

¶ 29 Our supreme court did go on to say that "[a]ny action *** that moves the trial date outside of that 120-day window qualifies as a delay for purposes of the section." *Id*. at 390. However, our supreme court did not limit the requirement that a defendant object to an action that postpones trial to actions that move the trial date outside the 120-day window. Once our supreme court determined that the setting of a trial date beyond the 120-day period was in fact a "delay" in that case, the court went on to consider whether the defendant objected in the manner prescribed by the statute. The court found that the defendant "voiced no objection to any proposed or actual delay." *Cordell*, 223 Ill. 2d at 391. This was true despite the fact that the defendant "did demand trial at his arraignment." *Cordell*, 223 Ill. 2d at 391 ("A simple request for trial *** is not equivalent to an objection for purposes of section 103-5(a)"). The court held that "[a]s amended, section 103-5(a) places the onus on a defendant to take affirmative action when he becomes aware that his trial is being delayed." *Cordell*, 223 Ill. 2d at 391.

¶ 30 Defendant's reading of *Cordell* would have the exact effect our supreme court sought to prevent. Defendant seeks to use not just his silence, but his *agreement* to the continuances on June 24, 2010 and September 7, 2010 as a "sword to use after the fact to overturn [his] conviction[]." *Cordell*, 223 Ill. 2d at 391. An action that postpones trial to a date within the 120-day window requires a defendant to object to prevent the speedy-trial clock from tolling. *Wade*, 2013 IL App (1st) 112547 ¶ 26 (citing *Cordell*, 223 Ill. 2d at 391). Thus, even under defendant's

reading of *Cordell*, no "delay" attributable to the State occurred until October 27, 2010, when defendant demanded trial in the face of the State's request for a continuance.

¶ 31 That *LaFaire*, decided after *Cordell*, found that the trial court in that case did not abuse its' discretion in declining to toll the speedy-trial period when the parties agreed to a trial date within the speedy-trial limit is of no help to defendant in this case. In *LaFaire*, the State argued that the speedy-trial clock should be tolled based on the language in section 103-5(a), stating that: "[d]elay shall be considered to be agreed to by the defendant unless he or she objects to the delay by making a written demand for trial or an oral demand for trial on the record." 725 ILCS 5/103-5(a) (West 2002). The *LaFaire* court noted that section 103-5(b), under which that case was decided, does not contain the language in subsection (a). The *LaFaire* court expressly distinguished *Cordell* based on the presence of that language in subsection (a). *LaFaire*, 374 Ill. App. 3d at 465 ("*Cordell* was a subsection 103-5(a) case and turned on the language in question").

¶ 32 This court has already rejected similar arguments. In *People v. Jones*, 2012 IL App (1st) 103237-U, we addressed a defendant's contention that a disputed period of delay was not attributable to him because "counsel 'merely agreed to a date within the 120-day limit.' " *Jones*, 2012 IL App (1st) 103237-U ¶ 14. Just as here, the disputed period "began with counsel setting a trial date and ended with the State moving for a continuance because one of its witnesses did not appear." *Jones*, 2012 IL App (1st) 103237-U ¶ 12. When the court set the trial date at the beginning of the disputed period "the State sought clarification from [defense] counsel as to whether he was acquiescing to the month-long continuance which would precede his proposed trial date in order to maintain an accurate record of the amount of time that could be attributed to it under the Speedy Trial Act." *Jones*, 2012 IL App (1st) 103237-U ¶ 16. The defendant's counsel stated the continuance was by agreement. The *Jones* court found that "[t]hese

circumstances show that defendant occasioned the delay ***. As a result, there was no lawful basis for asserting a speedy-trial violation and [the defendant's] ineffective assistance of counsel claim must fail." (Internal citations omitted.) *Jones*, 2012 IL App (1st) 103237-U ¶ 16.

¶ 33 In reaching its conclusion, the *Jones* court also considered *LaFaire*, as well as *People v. Zeleny*, 396 Ill. App. 3d 917, 920 (2009), both cited by defendant in this case. In *Zeleny*, the Second District "rejected the State's argument that 'any agreed trial date, whether before or after the 160-day period has run, is an agreed delay attributable to the defendant,' and found that there was no 'delay' where trial was set within the prescribed 160-day period." *Jones*, 2012 IL App (1st) 103237-U ¶ 17. The *Jones* court distinguished *LaFaire* and *Zeleny* on two grounds. First, the *Jones* court held those decisions did not apply because under the facts in *Jones*, the record showed that the defendant's counsel "agreed to the delay occasioned for the disputed time period." *Jones*, 2012 IL App (1st) 103237-U ¶ 18. Second, the court found as follows:

> "[I]n contrast to section 103-5(b) of the Speedy Trial Act, which was applicable in *LaFaire* and *Zeleny*, section 103-5(a) of the Speedy Trial Act provides that defendant is considered to have agreed to any delay unless he objects by making an oral or written demand for trial on the record. 725 ILCS 5/103-5(a) (West 2010). Thus, had defendant not specifically agreed to a continuance in the case at bar, the contested delay could still be attributed to him because he did not demand trial until [the end of the disputed period]. We therefore find defendant's reliance on *LaFaire* and *Zeleny* misplaced." *Jones*, 2012 IL App (1st) 1032137-U ¶ 18.

¶ 34 In *People v. Wade*, 2013 IL App (1st) 112574 ¶ 1, the defendant contended that his conviction must be reversed because it was obtained in violation of his statutory right to a speedy trial and where his trial counsel was ineffective for failing to move for dismissal of the charges on those grounds. There, as here, the defendant argued that he did not agree to any "delay" as

defined by *Cordell* when the State requested, and the defendant agreed, to new trial dates because the requested dates still fell within the 120-day period. *Wade*, 2013 IL App (1st) 112547 ¶ 21. The defendant in *Wade*, relying on *Cordell*, argued that because the dates fell within the statutory period, he was not required to take affirmative action by objecting to the new trial dates. *Id*. The defendant argued that he was merely acquiescing to a trial date within the 120-day period, which did not toll the statutory term. *Wade*, 2013 IL App (1st) 112547 ¶ 26. The *Wade* court found that "[n]othing in the plain language of section 103-5 supports defendant's interpretation." *Id*.

> "To invoke speedy trial rights, the statute requires a clear objection and demand for trial from defendant. There is no language in the statute suggesting this requirement does not apply when the case has been set for trial. An agreed continuance tolls the speedy trial period, whether or not the case has been set for trial. Defendant's contention illustrates what the *Cordell* court sought to prevent, the use of section 103-5(a), not as a shield to protect defendant's right to a speedy trial, but as a sword to defeat his conviction." *Id*.

¶ 35 The *Wade* court found *People v. Workman*, 368 Ill. App. 3d 778, 784-85 (2006), also cited by the defendant in this case, of no help in deciding the issue raised by the defendant. *Wade*, 2013 IL App (1st) 112547 ¶ 28. In *Workman*, which preceded our supreme court's decision in *Cordell*, the State argued that the speedy-trial clock stopped between March 22, 2000, when the defendant agreed to the original trial setting, and a date before the original trial setting when the trial court granted the State's motion for a continuance to complete DNA testing. *People v. Workman*, 368 Ill. App. 3d 778, 784-85 (2006). The *Workman* court held that "Workman had not agreed to any 'delay' in this case. She had merely agreed that the original trial setting of June 13, 2000, which was within the speedy-trial time limit, was amenable with her schedule. This agreement, however, did not toll the speedy-trial 'clock.' " *Workman*, 368 Ill.

App. 3d at 785. In construing *Workman*'s applicability to the arguments raised in *Wade* and in this case, the *Wade* court found *Workman* "unpersuasive." *Wade*, 2013 IL App (1st) 112547 ¶ 28. We agree. Here, as in *Wade*, *Workman* is "unhelpful in deciding the matter before us" because the decision "fails to specify the facts the court relied on in determining that defense counsel was *not* agreeing to a continuance." (Emphasis added.) *Wade*, 2013 IL App (1st) 112547 ¶ 28. We agree with the *Wade* court that where, as here, it is clear that a defendant *has agreed* to continuances and has failed to make a proper demand for trial, the fact that "the case had been set for trial on those dates is of no moment," and the delay is attributable to the defendant for purposes of the speedy-trial term. *Wade*, 2013 IL App (1st) 112547 ¶ 29.

¶ 36 The disputed time periods that defendant claims are not attributable to him for purposes of the Speedy Trial Act began on June 24, 2010 and September 7, 2010. The record reflects that on each date, defendant agreed to continue the matter for trial. Therefore, the delays between those dates and the trial dates set at those proceedings are attributable to defendant. Moreover, defendant did not demand trial on June 24, 2010, or September 7, 2010. Thus, even if defendant had not agreed to the delays between June 24, 2010 and July 29, 2010, and again between September 7, 2010 and September 14, 2010, those periods could still be attributed to defendant. Accordingly, while we do not condone the State's conduct in requesting so many continuances in a seemingly cavalier manner, the State did not violate defendant's rights under the Speedy Trial Act. Defendant's counsel had no legal basis to move to discharge defendant or to dismiss the charges against him. Therefore, defendant's ineffective assistance of counsel claim must fail.

¶ 37 II. Sufficiency of the Evidence

¶ 38 Next, defendant argues the State failed to prove him guilty beyond a reasonable doubt. Defendant argues two eyewitnesses testified he never left the apartment where he was ultimately arrested while shots were being fired. He also contends that Officer Markus's testimony is

unsatisfactory because: (1) he observed defendant under poor conditions due to his distance from the porch and the lighting, and (2) his testimony lacked detail. Specifically, defendant argues Officer Markus's testimony lacks detail in the number of shots fired, the exact number of shell casings recovered, the exact number of people on the porch, and a detailed physical description of defendant. Defendant also argues the evidence is insufficient because no physical evidence links him to the handgun recovered at the scene.

¶ 39 Our review of the trial court's judgment is deferential.

> "When a court reviews the sufficiency of the evidence, the relevant question is '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.' This standard of review does not allow the reviewing court to substitute its judgment for that of the fact finder on questions involving the weight of the evidence or the credibility of the witnesses. Further, reviewing courts apply this standard regardless of whether the evidence is direct or circumstantial, and circumstantial evidence meeting this standard is sufficient to sustain a criminal conviction. Thus, the standard of review gives 'full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.' " (Internal citations omitted.) *People v. Jackson*, 232 Ill. 2d 246, 280-81 (2009).

"A reviewing court will not reverse a conviction unless the evidence is 'unreasonable, improbable, or so unsatisfactory as to justify a reasonable doubt of the defendant's guilt.' " (Internal citations omitted.) *Jackson*, 232 Ill. 2d at 281.

¶ 40 The trial court specifically found the State's witness to be credible and the defense witnesses to be incredible. The trial court explained its reasons for finding the defense witnesses incredible. The defense questioned Office Markus about his ability to view the events and the court considered that evidence. After hearing all of the evidence, including any evidence that might cast doubt on Officer Markus's ability to view the defendant firing a handgun, the court found that Officer Markus saw what he testified he saw.

¶ 41 Defendant only challenged the sufficiency of the evidence that he possessed and fired a handgun to sustain his conviction under section 24-1.1(a) of the Criminal Code (720 ILCS 5/24-1.1(a) (West 2008)). Defendant does not challenge the sufficiency of the evidence to prove that discharging a handgun into the air in a residential neighborhood is reckless. Under section 5/24-1.1(a), "[i]t is unlawful for a person to knowingly possess on or about his person *** any weapon *** if the person has been convicted of a felony under the laws of this State ***." 720 ILCS 5/24-1.1(a) (West 2008). Officer Markus testified that he observed defendant in possession of a handgun and firing the handgun. Officer Markus was credible. "[P]ositive testimony from a single, credible witness is sufficient to support a conviction." *People v. Stanley*, 397 Ill. App. 3d 598, 611 (2009). The only evidence to the contrary was not credible. "[C]redibility determinations are within the province of the trier of fact, and we will not reweigh the evidence or substitute our judgment for that of the trial court where conflicting testimony exists." *People v. Lee*, 2012 IL App (1st) 101851 ¶ 32. The evidence is sufficient to prove every element of the offense. The record evidence is sufficient to support the trial court's finding that the State proved defendant guilty of unlawful use of a weapon by a felon beyond a reasonable doubt.

¶ 42 For the reasons stated above, the judgment of the circuit court of Cook County is affirmed.

¶ 43 Affirmed.