
IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Winnebago County.
)	
Plaintiff-Appellant,)	
)	
v.)	No. 11-CF-1418
)	
ANTWAN T. MAXEY,)	Honorable
)	Ronald J. White,
Defendant-Appellee.)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justice McLaren concurred in the judgment.
Presiding Justice Burke specially concurs.

ORDER

- ¶ 1 *Held:* The trial court correctly determined the time attributable to defendant and the State and properly held that defendant's statutory speedy-trial rights were violated.
- ¶ 2 The State appeals the judgment of the circuit court of Winnebago County dismissing the charges, including among others, murder, against defendant, Antwan T. Maxey, on the basis of a violation of section 103-5(a) of the Code Criminal Procedure of 1963 (Code) (725 ILCS 5/103-5(a) (West 2010)). The State argues that defendant agreed to the initial trial setting so that the elapsed time between the original speedy-trial demand and the original trial date was attributable to defendant. The State also argues that the trial court erred in determining that defendant was not

responsible, for speedy-trial purposes, for the time needed and incurred by the State in responding to defendant's pretrial motions and by defendant's purported late tender of discovery. We disagree and affirm.

¶ 3

I. BACKGROUND

¶ 4 In January 2011, Charles Spivey was shot to death, and five others were also shot in the same incident. On June 22, 2011, defendant, along with two codefendants, was charged by indictment with a number of crimes arising out of the January 2011 shooting. Defendant was charged with three counts of first degree murder, four counts of attempted first degree murder, four counts of aggravated battery with a firearm, three counts of unlawful possession of a weapon by a felon, one count of aggravated discharge of a firearm, one count of unlawful possession of a firearm by a street gang member, and mob action.

¶ 5 On August 10, 2011, defendant was arrested and, later the same day, defendant was presented in court for arraignment. Defendant immediately stated, before the court ascertained whether he had a lawyer, that he demanded a speedy trial. The trial court determined that defendant did not have a lawyer and appointed the public defender's office to represent defendant. The assistant public defender disavowed defendant's personal demand for speedy trial, stating that nobody in the public defender's office had been assigned defendant's case and no discovery on the case had been received. The attorney further stated that it would not be in defendant's interests to set the case for trial at that time. Despite the attorney's view, defendant continued to insist upon a speedy trial. Eventually, the trial court decided to set the case over for status in two days, on August 12. Defendant asserted that he would be able to hire a private attorney in the interim. The State inquired if the time until the next hearing would be attributed to defendant. The assistant public defender and

the trial court agreed it would be; the trial court stated that the speedy trial clock would be tolled and entered an order that also stated that the time was attributable to defendant.

¶ 6 On August 12, 2011, defendant next appeared before the trial court. He had not obtained a private lawyer and the trial court confirmed that the public defender would continue to represent defendant. In fact, the public defender represented defendant throughout the remainder of the proceedings. A different assistant public defender informed the trial court that Susan Kalbantner had been assigned the case within the public defender's office. Defendant again began talking. The attorney cut defendant off, warning him that he should not say anything in court until he spoke with his assigned attorney and cautioning him not to say anything that might be against his interest. The trial court set the case for status in a week, on August 19. This time, defendant agreed to the status date and agreed that the time was attributable to him.

¶ 7 On August 19, 2011, defendant appeared before the trial court for status once again. His assigned attorney was not present. The trial court continued the matter for another week and attributed the time to defendant.

¶ 8 On August 26, 2011, defendant was once again before the court for status. Yet another assistant public defender informed the trial court that attorney Kalbantner was leaving the office, and defendant's case would be reassigned to Nick Zimmerman, who was rejoining the office in a few days. Based on Zimmerman's return date, the attorney requested a continuance until September 9, 2011. The trial court granted the request and noted it was on motion of defendant.

¶ 9 On September 9, 2011, assistant public defender Zimmerman appeared on behalf of defendant. (Zimmerman would represent defendant throughout the remainder of the proceedings.) Zimmerman stated that he had met with defendant and had received and was reviewing discovery.

Zimmerman demanded a speedy trial on defendant's behalf and, when asked, suggested a date in October or November. The parties entered into a discussion attempting to reach consensus. The trial court determined that its regular trial calls of November 7 and November 28 would not work and resorted to a special setting of November 14, 2011, for trial. A status date of September 23, 2011, was also scheduled.

¶ 10 On September 23, 2011, defendant and Zimmerman appeared for status. At that hearing, defendant filed three motions: a motion for additional discovery, a motion to sever the unlawful possession of a firearm and weapon charges (counts 15, 20, 21, and 22 of the indictment) from the other charges, and a motion to dismiss count 15 (unlawful possession of a firearm by a street gang member) as unconstitutional. The State noted that it needed time to review defendant's motions, and Zimmerman agreed to giving the State two weeks to respond to the motions so long as the trial court maintained the November 14 trial date. The trial court agreed and entered an order reflecting the parties' agreement and set a status date for October 7, 2011.

¶ 11 The parties appeared for the October 7, 2011, status hearing. The main topic of the hearing was the State's compliance with defendant's motion for additional discovery. Defendant had requested specific items, including any recordings of 911 emergency calls related to the shooting, photographs and videos of the crime scene, witness statements, coroner's reports, and victims' medical records. The State informed the trial court that it was trying to comply with defendant's requests. The trial court ordered the State to comply with defendant's motion by the next court date, which was set for two weeks. The court also noted that defendant had again demanded and was maintaining his demand for a speedy trial. The State complained that defendant's discovery motion was problematic because defendant had been arrested about seven months after the shooting

occurred. Defendant reminded the trial court that, in addition to the discovery motion, he had filed two other motions that would require argument. Defendant requested a two-week date for those motions; the State acquiesced to the two-week date, but cautioned that they would accomplish only what they could because they were also busily working on many other matters. The parties scheduled a hearing on October 19, 2011; the trial court initially stated that the hearing should be listed for status, but then indicated that the hearing would be for argument on the motions.

¶ 12 On October 19, 2011, the trial court indicated that the matter was up for status and acknowledged that the matter was set for a November 14, 2011, trial. Defendant stated that he continued to demand trial, noted that he had three motions currently pending, and described the discovery he had not yet received. The trial court again ordered the State to complete delivery of outstanding discovery by the next court date, which it set for October 26, 2011. Defendant apprised the trial court of discussions he had been having with the State regarding the motions to sever and to dismiss. Defendant related that the State had indicated that it might agree to the motion to sever and, if that happened, then the motion to dismiss could be held in abeyance until after the trial on the murder counts had been completed. The trial court closed the hearing by noting that defendant continued to demand a speedy trial and reiterated that trial was set for November 14, 2011.

¶ 13 On October 25, 2011, defendant filed an amended motion to dismiss count 15 and a supporting memorandum of law. On October 26, 2011, the parties appeared before the trial court. The State noted that it had been working on completing discovery, but had been stymied due to the illness of the secretary handling the task. The trial court set the matter for a November 2, 2011, hearing on the status of discovery. Defendant stated that he continued to demand a speedy trial and also asked if the motions to sever and to dismiss could be heard on November 2. The State asserted

that it needed time to review defendant's amended motion to dismiss, having just received it the day before, but noted that an attorney had been assigned to prepare a response and might be able to argue the amended motion to dismiss on the next date. The trial court attempted to ascertain where the speedy-trial clock stood: it determined that defendant had been taken into custody on August 10, 2011, and stated that the speedy-trial clock stood at about 90 days. The State disagreed, asserting that defendant's agreement to setting trial on November 14, 2011, tolled the speedy-trial clock. The trial court expressly disagreed with the State, observing that the speedy-trial clock had been running all along. The order entered that day indicated that the matter was continued to November 2, 2011, on defendant's motion.

¶ 14 On November 2, 2011, the trial court indicated that the matter had come before it on defendant's motion to dismiss and motion for discovery. Defendant reminded the trial court that he also had an outstanding motion to sever. Defendant informed the trial court that he had received some of the discovery he had been seeking and the State had notified him that it was preparing to give him additional information it had just received. The State confirmed that it had just received 122 photographs and 20 CDs. It was copying them and planning to turn them over to defendant during the next week.

¶ 15 The trial court reiterated that the trial was set for November 14, 2011, which was rapidly approaching. The State informed the trial court that the Deputy State's Attorney was personally working on the State's response to defendant's motion to dismiss and was gathering statistics from the police department. Additionally, the State needed time to further consider whether to agree with defendant's motion to sever because the Deputy State's Attorney was busy with another three-codefendant matter. Nevertheless, both defendant and the State agreed that, if the motion to sever

were granted or agreed to, it would not be necessary to consider the motion to dismiss before the trial. The trial court again noted that the trial was set for the next week and defendant continued to demand his speedy trial rights. The State told the trial court that they had recently discussed “where they were” on the speedy-trial clock and promised the trial court that they would calculate the amount of speedy-trial time that had passed. The State suggested November 9, 2011, for hearing on the motion and for status on discovery. The trial court agreed and entered the appropriate order.

¶ 16 On November 9, 2011, the State announced that it had additional discovery for defendant. The State then requested to take the matter off the November 14, 2011, trial call, which would allow the State to assess precisely what discovery had been completed and how to address defendant’s motions. Defendant objected and continued to demand a speedy trial. The State acknowledged that it would be accountable for any time occasioned by its request. The trial court reset the matter for trial on December 12, 2011, but left the matter for status on the November 14 date.

¶ 17 On November 14, 2011, the State informed the trial court that it continued to work on its response to defendant’s motion to dismiss and stated that it might still agree to defendant’s motion to sever. The trial court noted that the trial was then scheduled for December 12, 2011. Defendant continued to demand trial and noted that the motion could be heard “whenever” it was convenient for the parties and the court. The trial court insisted that defendant’s motions needed to be heard. The State pressed for a hearing date later in the week or during the next week. The trial court, with the parties’ agreement, set the motions for November 30, 2011. Defendant commented that he had received all the discovery he had requested except the victims’ medical records or signed releases from the victims to obtain their medical records. The State acknowledged that defendant had raised

the issue with it that morning and promised to follow up with the victim advocate or the families of the victims.

¶ 18 On November 30, 2011, the State filed its response to defendant's motion to dismiss. The court stated that it needed time to consider the State's response, and defendant also indicated that he would need time to review the response. Defendant maintained his demand for trial and noted that trial was scheduled for December 12, 2011. The State averred it was available to argue the motion to dismiss whenever it was scheduled for hearing. Defendant reminded the trial court that there was outstanding discovery and his motion to sever, with which, he believed, the State might agree. The State asserted that it was still working on completing discovery. The State suggested that, because defendant was still demanding trial, it wanted to set a date to argue the motion to dismiss. The trial court set the matter for a December 5, 2011, hearing on the motion to dismiss.

¶ 19 On December 5, 2011, the matter came before the trial court for argument on defendant's motion to dismiss. After argument, the trial court denied defendant's motion to dismiss. The court noted that the matter was set for trial the following week and the motion to sever was still pending. The trial court agreed to the State's request and set the matter for status on December 9, 2011.

¶ 20 On December 9, 2011, the State requested a continuance because the second chair for the trial was on maternity leave and a replacement had to be found and brought up to speed; the State was still checking over the completeness of its discovery to defendant; and the State needed to update the addresses and serve subpoenas on some of the planned witnesses because they had moved. The trial court granted the continuance over defendant's objection and renewed demand for trial. The court set the matter for trial on January 9, 2012, and held that the time was attributable to the State. The trial court also scheduled a status hearing for January 4, 2012.

¶ 21 On Wednesday, January 4, 2012, the parties appeared for the status hearing. The State announced that it was trying to verify that all their subpoenas had been served. Further, a question had arisen as to whether they had obtained all of the relevant police reports and had turned them over to defendant in discovery. Defendant noted that the trial was scheduled for the next Monday and continued to demand trial. To address the State's concerns, defendant suggested a status hearing on the Friday before trial, January 6, 2012. The trial court voiced a concern over the 120-day speedy-trial period. The court further commented that it might attribute to the State any delay accruing as a result of newly discovered police reports. The court set the case over for a January 6, 2012, status.

¶ 22 On Friday, January 6, 2012, the parties appeared for the status hearing. The State requested a continuance until February, offering as justification the facts that there were still some witness subpoenas that had not been served and there were some additional police reports that had been tendered recently to defendant. Defendant maintained that he would be ready for trial on January 9, 2012, objected to the continuance, and continued to demand a speedy trial. The trial court denied the State's request for a continuance and instructed the parties to appear on January 9, 2012, for trial.

¶ 23 On Monday, January 9, 2012, the scheduled trial date, the State submitted a written motion, pursuant to section 114-4(d) of the Code (725 ILCS 5/114-4(d) (West 2010)), seeking a continuance. In its motion, the State explained that it was seeking the continuance in order to investigate a purported affidavit of a prosecution witness, Davon Lewis, recanting his report to the police and his May 4, 2011, grand jury testimony in which he identified defendant as a shooter. As additional grounds for the continuance, the State noted the continuation of its difficulties in locating and serving subpoenas on some of its planned trial witnesses. The State argued that, although the purported affidavit was dated October 27, 2011, it had received the document on Saturday, January

7, 2012. Defendant objected to the motion and again demanded a speedy trial. The trial court granted the State's motion for a continuance. Trial was rescheduled for January 23, 2012, with interim status hearings set for January 11 and 18. The trial court explained that the continuance was granted in light of the discovery issues, that it was over defendant's objection, and that the time would be attributed to the State. Following the court's ruling, the State brought in a number of trial witnesses who had been subpoenaed to appear that day. The State continued the subpoenas to the January 18, 2012, pretrial hearing. Among those whose subpoena was continued was Davon Lewis. It does not appear from the record that the State tried to interview Lewis then or subsequently, despite its assertion that it needed to do so.

¶ 24 On January 11, 2012, the parties appeared for a status hearing. The proceedings were devoted to the subpoena of a witness for trial by both the State and defendant. Nothing regarding the speedy-trial term was raised during this hearing.

¶ 25 On January 18, 2012, defendant filed a motion to dismiss the charges against him, alleging that he had not been brought to trial within the 120-day speedy-trial term. Preliminary discussion between the court and the parties narrowed the focus of the motion to the time period between September 9, 2011, and November 14, 2011, although the attribution of the first two days of custody, August 10 to August 12, was still in issue. The trial court set the matter over for the next day. Once again, after the case-related discussion, the State continued witness subpoenas for the trial date of January 23, including the subpoena for Davon Lewis, who apparently remained uninterviewed.

¶ 26 On January 19, 2012, the trial court heard argument on defendant's motion. The State argued that the speedy-trial term was tolled because defendant did not ask for the first available trial date and agreed to the date of November 14, 2011, for trial. The State also contended that, on January

9, 2012, defendant delayed the trial by presenting the Davon Lewis affidavit recanting his statements to police and the grand jury. Still unable to reach a decision, the trial court again adjourned the proceedings until the next day. On January 20, 2012, the trial court heard additional argument and then presented its ruling.

¶ 27 During the argument, defendant maintained that the only days for which he was responsible were between August 12 and September 9, 2011. Defendant argued that the remainder of the time was attributable to the State. In contrast, the State argued that all of the time from August 10 to September 9, 2011, was attributable to defendant because he did not effectively request a speedy trial until the September 9 hearing. The State further argued that the time from September 9 to November 14, 2011, was attributable to defendant because his attorney agreed to the November 14, 2011, trial date as well as by defendant submitting substantive motions for determination. The State additionally argued that defendant caused more delay on January 9, 2012, by his late tender of the affidavit in which a State's witness purportedly recanted his anticipated trial testimony. The State further contended that the speedy-trial term could be extended 21 days pursuant to section 13-5(f) of the Code (725 ILCS 5/103-5(f) (West 2010)), even though the State had made no formal request for continuance under that section. Finally, the State argued that, even if the trial court were to find a speedy trial violation, a proper remedy would be to release defendant from custody and bond rather than to dismiss the charges.

¶ 28 The trial court held that, in spite of the fact that the August 10, 2011, order attributed to defendant the time from that date to the August 12, 2011, hearing, that time was properly attributable to the State. Next, the trial court held that the time from August 12, 2011, to September 9, 2011, was attributable to defendant. The trial court then held that the remaining time was attributable to the

State. The trial court concluded that, from August 10, 2011, to January 9, 2012, a total of 124 days of delay were attributable to the State. Therefore, the trial court held that defendant's speedy-trial rights had been violated and granted his motion to dismiss.

¶ 29 The State filed a timely motion to reconsider. In addition to its previous arguments, the State also contended that, upon filing his motion to dismiss count 15, motion to sever, and motion for additional discovery, the time until those motions were disposed was attributable to defendant. Following argument, the trial court denied the State's motion to reconsider. Particularly, the trial court held that the time from August 10 to August 12, 2011, was attributable to the State because defendant personally invoked his speedy-trial right; the time from August 12, to September 9, 2011, was attributable to defendant; the time from September 9 (the date on which defendant demanded trial) to the original trial date of November 14, 2011, was attributable to the State because defendant agreed to the trial date and not the delay; the time from November 14 to December 12, 2011, was attributable to the State because the delay was due to the State's motion to continue; an additional determination that the September 23 filing of defendant's motions did not toll the speedy-trial term because the motion to dismiss was disposed on December 5, 2011, before the trial date of December 12, 2011, which did not cause a delay of the trial; the time from December 12, 2011, to January 9, 2012 was attributable to the State because the trial was continued on the State's motion; the court further noted that the State's January 9, 2012, written motion to continue the trial was a general motion to continue because the State justified its necessity so it could check the completeness of the discovery disclosure, turn over any necessary impeaching information for its witnesses, and try to contact some witnesses; the trial court particularly noted that the continuance was neither requested nor allowed under section 103-5(c) of the Code (725 ILCS 5/103-5(c) (West 2010) (allowing the

speedy-trial term to be extended for 60 days under certain circumstances not at issue here)); and the time from January 9 to January 23, 2012, was attributable to the State because the trial was continued on the State's motion. The trial court noted that January 9, 2012, was the 124th day of the speedy-trial term, so defendant's speedy-trial rights were violated as of that date. The continuance granted on that date further continued the trial date outside of the speedy-trial term. Last, the trial court expressly determined that, on January 18, 2012, defendant's motion to dismiss for speedy-trial violation was filed after the defendant's right to a speedy trial had been violated. The State timely appeals.

¶ 30

II. ANALYSIS

¶ 31 On appeal, the State raises two issues. First, the State argues that the trial court erred in attributing the time from September 9, 2011 (the original trial demand), to November 14, 2011 (the originally scheduled date of trial), to the State, because defendant agreed to the trial date, so the time should have been "by agreement," thereby tolling the speedy-trial term. Second, the State argues that the trial court should have found that the time from August 10 to August 12, September 23 (the date defendant filed his substantive motions) to December 5, and January 9, 2012 (the date the court was notified that defendant had turned over the Davon Lewis affidavit to the State), to January 23 (the rescheduled trial date) should have been attributable to defendant. We consider each argument in turn.

¶ 32 As an initial matter, we note that, on appeal, the State does not invoke any of the statutory provisions that provide for an extension to the speedy-trial term. Likewise, the State did not try to utilize the provisions in the trial court. To the extent, then, that the State might be able to suggest

that the speedy-trial term could have been extended through operation of the statute, these contentions have been forfeited.

¶ 33 A. Attribution of Time Between September 9 and November 14, 2011

¶ 34 The State's initial argument on appeal concerns the attribution of the time from September 9, 2011, when, after several agreed delays, defendant again expressly demanded trial under section 103-5(a) of the Code (725 ILCS 103-5(a) (West 2010)), and November 14, 2011, the date initially set for trial, a period which totals 66 days. As noted, defendant is claiming a violation of his statutory right to a speedy trial and not his constitutional right. Every defendant has a constitutional right to a speedy trial, and the statutory speedy-trial provision was enacted to implement that constitutional right. *People v. Bauman*, 2012 IL App (2d) 110544, ¶ 16. The provision at issue states:

“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 2010).

When reviewing the trial court's decision, its determination as to whether a period of delay is attributable to the defendant is entitled to much deference, and we will sustain the trial court's decision absent a clear showing that the trial court abused its discretion. *People v. Mayo*, 198 Ill. 2d 530, 535 (2002).

¶ 35 At the outset, before directly engaging the State's arguments, we make some important observations. First, our standard of review is the extremely deferential abuse-of-discretion standard. An abuse of discretion occurs only where the trial court's ruling is arbitrary, fanciful, or so

unreasonable that no reasonable person could take the trial court's view. *People v. Rivera*, 2013 IL 112467, ¶ 37. We have carefully examined the record in this case, and we have carefully scrutinized the trial court's orders and the reports of proceedings in the record. The attribution of time for speedy-trial purposes is left to the trial court's discretion (*Mayo*, 198 Ill. 2d at 535); having reviewed the trial court's attributions of speedy-trial time in this case, we cannot say that the trial court abused its discretion in any of the challenged attributions, meaning that the trial court's determinations were neither fanciful, arbitrary, nor unreasonable to the extent it would defy common reason. Rather, the trial court offered reasoned and cogent explanations and carefully explained the bases of its various attributions. While we could reasonably end our analysis at this point, we will nevertheless address each of the State's arguments in detail as an alternate basis for our decision.

¶ 36 Our second preliminary point considers our supreme court's relatively recent decision regarding the interpretation and implementation of the speedy-trial provisions in *People v. Cordell*, 223 Ill. 2d 380 (2006). In that case, the supreme court interpreted "delay" in a technical sense, stating that it included any action by the parties or the court that moved the trial date outside of the statutory 120-day window. *Id.* at 390. The court emphasized, however, that, while "delay" might have a technical meaning, it was supposed to be interpreted in a fashion that allowed the defendant to use the speedy-trial provisions only as a shield, and foreclosed defendant from using them as a sword to avoid conviction after the fact. *Id.* In other words, if defendant was using the speedy-trial provisions as a shield, he could always demand trial and object to continuances that would delay his trial, but he could not acquiesce to a continuance or delay and then, after conviction, claim that his speedy-trial rights had been violated. *Id.* This idea of sword versus shield usage of the speedy-trial provisions seemed to be a primary factor in the *Cordell* court's analysis. In this case, after the

September 9 hearing, when defendant first demanded trial, defendant consistently invoked his speedy-trial rights, demanded that the trial date remain unchanged, and objected to the State's requests for continuances. In other words, in this case, defendant consistently invoked his speedy-trial rights to act as a shield in securing his prompt trial. This realization further supports our determination that the trial court's attributions of speedy-trial time were not an abuse of discretion, because defendant consistently used the speedy-trial provisions to promote a prompt trial, and he did not acquiesce to continuances and delay and then try to use the provisions in an attempt to avoid the effect of a conviction.

¶ 37 The key to this case encompasses two distinct elements. First, a workable vocabulary to distinguish among agreed continuances, agreed delays, agreed trial dates, agreed trial dates that do not constitute delays, agreed continuances that do not constitute delays, and the like. It is an altogether too true maxim that words are blunt instruments incapable of mathematical precision. *People v. Schwartz*, 64 Ill. 2d 275, 280 (1976) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972)) (“ ‘Condemned to the use of words, we can never expect mathematical certainty from our language.’ ”). Second, we must hammer those words into a framework to predictably attribute delay to the party responsible for it.

¶ 38 Among recent authority, three cases stand out. First, our supreme court, in *Cordell*, 223 Ill. 2d 380, construed section 103-5(a), holding that delay was any action by the parties or the court that moved the trial date outside of the speedy-trial term. *Id.* at 390. “Delay,” then, has a specific and specialized meaning in the context of determining a speedy-trial term and violation. Next, *People v. LaFaire*, 374 Ill. App. 3d 461 (2007), presented a discussion highlighting the difference between setting a trial date and agreeing to a continuance or delay. The majority held that agreeing to a trial

date within the speedy-trial period did not constitute either delay or an agreed continuance. *Id.* at 464-65. The special concurrence amplified this position, noting that Cordell stated that there was nothing in the statute that indicated that delay must refer to a set trial date. *Id.* at 466 (Lytton, J., specially concurring) (quoting *Cordell*, 223 Ill. 2d at 390). Finally, the dissent took the position that any time the defendant agreed to a date, (hearing or trial, it did not matter), the defendant was agreeing to delay and the time would be attributable to him. *LaFaire*, 374 Ill. App. 3d at 467-68 (Carter, J., dissenting). *LaFaire* can be seen as presenting a discussion between the viewpoint that scheduling a trial date within the speedy-trial term is different than agreeing to a continuance or delay, and the bright-line viewpoint that any agreement made by a defendant as to scheduling any activity in front of the court will be attributable to the defendant for speedy-trial purposes.

¶ 39 The final case in our triptych is *People v. Zeleny*, 396 Ill. App. 3d 917 (2009). *Zeleny*, relying on *Cordell* and *LaFaire* held that a defendant's agreement to a trial date within the speedy-trial term was not attributable to the defendant for speedy-trial purposes, but a defendant's agreement to a trial date outside of the speedy-trial term tolled the running of the speedy-trial term. *Id.* at 922-23. *Zeleny* further rejected the dissent's viewpoint in *LaFaire*, noting that the dissent's position was "at odds with our supreme court's definition of 'delay.'" *Id.* at 922.

¶ 40 The three cases, taken together, suggest a technical definition for delay that is of an initial concern. Next, one must consider whether the parties are setting a mutually agreeable trial date or simply agreeing to a continuance. If it is a convenient trial date within the speedy-trial term, we will not attribute the time to the defendant; if it is outside the term, the time becomes delay attributable to the defendant. Last, if it is a continuance, if the defendant agrees to it, then it becomes attributable to the defendant; if the defendant objects, the time is attributable to the State. With this framework,

we consider the time period between defendant's first demand and the first trial setting in light of our brief discussion of *Cordell*, *LaFaire*, and *Zeleny*.

¶ 41 On September 9, 2011, defendant demanded a speedy trial and set the date for November 14, 2011, a date convenient to the parties and the court. November 14, 2011, was also within the speedy-trial term. Because defendant was demanding a trial date, this time should not be attributable to him. The trial court also scheduled a September 23, 2011, status hearing. On that date, defendant submitted motions, but reiterated his demand for trial on November 14. The State asked for a two-week status date, but did not request that the time be specifically attributed to defendant as a result of filing the motions. The State and trial court thus appeared to acquiesce to defendant's speedy-trial demand/objection notwithstanding the fact that defendant had filed motions that could have possibly caused the time to be attributed to him. The remaining statuses proceeded similarly. Defendant reiterated his demand and the State did not challenge the demand or the attribution of time to the State. Based on this record, we conclude that the trial court did not abuse its discretion in attributing the time to the State. The initial trial setting was just that. The intervening statuses could have caused some time to be attributed to defendant if the State had insisted. Nevertheless, defendant, at each of the intervening status hearings, reiterated his demand and objected to any time being attributed to him and the State did not push the issue.

¶ 42 We now turn to the State's specific contentions. The State argues that the 66-day period between defendant's demand and the first trial setting should be attributed to defendant because his attorney, on defendant's behalf, asked for a trial date and agreed to the November 14, 2011, date rather than the first available trial date after September 9. In support, the State argues that *Zeleny* misconstrued the supreme court's consistent holdings. See, e.g., *Cordell*, 223 Ill. 2d 380; *People v.*

Kliner, 185 Ill. 2d 81 (1998). The State purports to analyze recent appellate authority in order to demonstrate its shortcomings. The State concludes that the dissent in *LaFaire*, 374 Ill. App. 3d at 466-68 (Carter, J., dissenting), is both better reasoned and better captures the supreme court's understanding and intentions regarding the speedy-trial provisions. To better understand the State's argument, we take a closer look at the State's anathema, *Zeleny*.

¶ 43 In *Zeleny*, the issue concerned allocating the period from July 9 to September 24, 2007 to the defendant or to the State. *Zeleny*, 396 Ill. App. 3d at 919. This court noted that, as of March 22, 2007, the speedy-trial count stood at 45 days attributable to the State, and as of July 9, 2007, the count stood at 154 days attributable to the State. *Id.* at 922. This court held that, when the defendant agreed to set trial on July 9, 2007, it was within the 160-day period applicable to defendants on bond (see 725 ILCS 5/103-5(b) (West 2010)), so there was no delay of the trial for purposes of the speedy-trial determination, and the time was not attributable to the defendant. *Zeleny*, 396 Ill. App. 3d at 922. As we noted, this left the speedy-trial count at 154 days on July 9. *Id.* The court next turned its attention on the period from June 24 to September 24, 2007, even though the period had not been directly argued to the trial court. The appellate court reasoned that it could reach this period because it could affirm the trial court's judgment on different grounds than those used by the trial court. *Id.* The court noted that, on June 12, 2007, the State made a motion to continue, which was addressed on June 19. On that date, the defendant, through counsel, "actively participated in a discussion about setting a new trial date, expressly stated that there was no objection, and expressly stated her agreement to the trial date." *Id.* The court concluded that the defendant had expressly agreed to a trial date that was clearly outside of the speedy-trial period thereby attributing the period from June 19 to trial to the defendant. *Id.* at 922-23.

¶ 44 The ultimate holding in *Zeleny* is that any agreement by the defendant to a trial date that is outside of the speedy-trial period is attributable to the defendant; conversely, any agreement by the defendant to a trial date within the speedy-trial period is not attributable to the defendant. *Id.* In reaching this holding, the court focused on the meaning of “delay occasioned by the defendant.” *Id.* at 920. The court relied on *Cordell* to interpret “delay.” According to the court’s analysis, “delay” included any action by the parties or the court that moved the trial date outside of the speedy-trial term. *Id.* at 921, quoting *Cordell*, 223 Ill. 2d at 390. The court accepted the reasoning of the supreme court, which noted that the its definition of delay preserved the trial court’s flexibility in managing its case load by proposing a trial date outside of the speedy-trial term, because the defendant could still object, thereby preserving his right to trial within the speedy trial term (*i.e.*, the defendant uses the speedy-trial provision as a shield), while foreclosing the defendant’s ability to use the speedy-trial provision as a sword by acquiescing to a date outside of the speedy-trial term and then obtaining a dismissal on the ground that he was denied a speedy trial. *Zeleny*, 396 Ill. App. 3d at 921-22, quoting *Cordell*, 223 Ill. 2d at 390.

¶ 45 The court further relied on *LaFaire*, which similarly interpreted the supreme court’s *Cordell* decision. *Zeleny*, 396 Ill. App. 3d at 921 (“*LaFaire* is in line with our supreme court’s holding in [*Cordell*]”). In looking at *LaFaire*, this court accepted the majority holding, that an agreement to a date within the speedy-trial term does not toll the speedy-trial clock. *Id.* Further, the court expressly rejected the *LaFaire* dissent’s position, stating that the *LaFaire* dissent’s position, that any agreement by the defendant tolls the speedy-trial clock, was “at odds with our supreme Court’s definition of ‘delay.’ ” *Id.* at 922. Thus, this court, relying on *Cordell* and *LaFaire*, concluded that a defendant’s agreement to a date within the speedy-trial term did not stop the speedy-trial clock, but

only agreement to delay, meaning a date outside of the speedy-trial term, tolled the speedy-trial clock.

¶ 46 The State vehemently disagrees with the holding in *Zeleny*. It looks to discredit *Zeleny* by discrediting its underpinnings as improperly or inexplicably reasoned. The State first considers *LaFaire*, noting that it relied on *People v. Workman*, 368 Ill. App. 3d 778 (2006), for its holding that time was not attributable to a defendant who agreed to a trial date within the speedy trial term. *LaFaire*, 374 Ill. App. 3d at 464. The State then notes that *Workman* cited no authority for its proposition that agreeing to a trial date within the speedy-trial term does not result in time being attributable to the defendant. *Workman*, 368 Ill. App. 3d at 785. According to the State, at least implicitly, *LaFaire*'s reasoning, by relying on *Workman*, which, according to the State, appears to have created the proposition from whole cloth, is equally suspect and infirm. The State then notes that *Zeleny* relied on *LaFaire* in determining that, by agreeing to a trial date within the speedy-trial term, no speedy-trial time was attributable to the defendant. *Zeleny*, 396 Ill. App. 3d at 922. According to the State's implicit reasoning, because *LaFaire* was unfounded, *Zeleny*'s reliance on *LaFaire* also was unfounded, and its ultimate holding as applied to the instant case is equally unfounded.

¶ 47 Such reasoning appears to be reasonable. In effect, the State is saying that the holding of a case is only as strong as the authority on which it is based. Thus, if the authority underpinning a certain case turns out to be illusory, weak, or flawed, then that case is similarly unsuitable for use as authority. While we accept the State's implied line of reasoning, we reject its application in this case.

¶ 48 A close reading of *Workman* reveals that the court did not offer a citation immediately after stating that, by agreeing to a trial date within the speedy-trial term that was amenable to counsel's schedule, the defendant did not toll the speedy-trial clock. *Workman*, 368 Ill. App. 3d at 785. However, the key statement in *Workman*'s analysis is the appellate court's holding that "we find that *Workman* had not agreed to any 'delay' in this case." *Id.* We note that the court offset "delay" by the use of quotation marks, suggesting it was using the term in a technical sense. The use of the term, "delay," is related to the court's analysis of section 103-5(a) as explained by *People v. Peco*, 345 Ill. App. 3d 724, 731 (2004). The court noted that the speedy-trial clock commenced running under section 103-5(a) when the defendant was taken into custody and not, as advocated by the State in that case, when the defendant made a demand. *Workman*, 368 Ill. App. 3d at 784. The *Workman* court explained that, to accept the State's position would effectively invalidate section 103-5(a). *Id.* Thus, according to the *Workman* court, the speedy-trial clock began running and was not stopped by the defendant's agreement to a date that worked for counsel because it was within the speedy-trial term because it did not cause "delay," which the *Workman* court implicitly determined to be moving the trial date outside of the speedy-trial term. *Id.* at 785. This reasoning is further substantiated by the court's emphasis that the trial court pushed to have the date set in mid-June, " 'or sooner,' " because the defendant had been in custody since February 25, and the court did not want the speedy-trial term to run. *Id.*

¶ 49 Accordingly, although *Workman* did not provide a direct citation to support its claim that the agreement to a date within the speedy-trial term did not result in time attributable to the defendant, that statement was the product of careful and deliberate reasoning based on case law and the statute.

As a result, we do not accept the State's implied contention that *Zeleny* is suspect because it relied on a chain of cases grounded on illusory and ill-reasoned authority.

¶ 50 Returning to the State's argument, the State next focuses on *Zeleny*'s reliance on *Cordell*. The State criticizes *Zeleny* for expanding the holding in *Cordell*. The particular passage in *Cordell* upon which *Zeleny* relied begins by quoting the relevant provision in section 103-5(a), which states, “ ‘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 ***.’ ” *Cordell*, 223 Ill. 2d at 389-90, quoting 725 ILCS 5/103-5(a) (West 2002). *Cordell* then explained:

“There is nothing in the section to indicate that ‘delay’ must be of a set trial date. Rather, the section provides only a starting point—the date custody begins, and an ending point—120 days later. Any action by either party or the trial court that moves the trial date outside of that 120-day window qualifies as delay for purposes of the section.” *Cordell*, 223 Ill. 2d at 390.

The State criticizes *Zeleny* specifically for interpreting the quoted passage to mean that “no time is attributable to [a defendant] when a trial date is set within the speedy[-]trial term.” According to the State, our supreme court “never stated [in *Cordell*] that an agreed trial setting within the speedy trial term was not delay.” We disagree.

¶ 51 *Zeleny* focused on the passage quoted above, which clearly states that any action that moves the date outside of the speedy-trial term qualifies as delay. *Id.* Further, the supreme court framed the terms of the speedy-trial provision very starkly: it gives us a beginning and ending date, and defines delay as any action that moves the trial date outside of the term. *Id.* The supreme court's unambiguous and precise language requires the inference that any action that does not move the trial

date outside of the relevant speedy-trial term must not qualify as delay under the speedy-trial provision. It is this inference that *Zeleny*, properly, drew.

¶ 52 We note that a First District court agreed that *Cordell* used “delay” in a technical and specialized sense. In *People v. Wade*, 2013 IL App (1st) 112457, ¶ 16 (quoting *Cordell*, 223 Ill. 2d at 388-89), the court stated, in its recitation of applicable boilerplate, that “[a] ‘delay’ for purposes of the Speedy Trial Act is a ‘term of art used to describe any event that places a trial date beyond the 120-day period.’ ” *Wade* nevertheless rejected the defendant’s contention that any agreement to a trial date within the speedy-trial term does not constitute a “delay” attributable to the defendant (*Wade*, 2013 IL App (1st) 112547, ¶ 24). The rejection, however, is factually distinguishable from the situation here. In *Wade*, the defendant both actually agreed to the continuances and did not make an objection or demand for his speedy-trial rights. *Id.* at ¶ 25-27. Here, by contrast, defendant consistently objected to any attribution of the time to him and reiterated his speedy-trial demands clearly on the record. Thus, we conclude that *Wade* supports our view here.

¶ 53 The State has assailed *Zeleny* for relying on *LaFaire* and for misinterpreting *Cordell*. Our reading of both cases, their underpinnings, and recent cases, confirms the viability of *Zeleny*. The proper view in the ultimate attribution of the November 14, 2011, original trial date is not one of a defendant suggesting and agreeing to the November 14, 2011 date; rather, defendant demanded trial and the trial court set the date (with the parties’ logistical input) for November 14, 2011, a date within the speedy trial term. Thus, the November 14 date came about as a result of defendant’s trial demand, not as a result of defendant’s request for a continuance.

¶ 54 The State argues that its interpretation of section 103-5(a), that any agreed continuance can be attributed to the defendant, is consistent with statutory and supreme court authority, as well as

defendant's cases. The State points first to the provision in 103-5(a) that states, "[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 2010). It argues that its position does not contradict the provision within section 103-5(a). While not wholly incorrect, the State's argument is not really on point. The quoted provision is concerned with "delay," not the attribution of time within the speedy-trial term; the State's argument is concerned with the attribution of time, not delay. The key term "delay" is the focus of the provision and, in *Cordell*, the supreme court explained that "delay" was any action that moved a trial date outside of the speedy-trial term. *Cordell*, 223 Ill. 2d at 390. Thus, the State's argument is not inconsistent with section 103-5(a) precisely because it is not concerned with the subject matter of section 103-5(a), namely, delay.

¶ 55 The State's argument also seems to posit that, because it is not inconsistent, it is actually supported by the statutory provision. The step from "not-inconsistent-with" to "supported-by" is a step too far. While "not-inconsistent-with" is accurate, it is only accurate because the State's argument is not concerned with the subject of the provision. Because there is no intersection with the subject matter of the provision, there can be no support for the argument drawn from the provision. The State's position, then, is wholly unmoored from the language and subject matter of section 103-5(a).

¶ 56 That is not to say, however, that the State cannot find authority to support its position. It can. See *People v. Woodrum*, 223 Ill. 2d 286, 299 (2006) ("An agreed continuance generally constitutes an act of delay attributable to the defendant."); *People v. Cabrera*, 188 Ill. App. 3d 369, 371 (1989) ("A delay is considered to have been occasioned by the defendant if his acts have caused or

contributed to the delay or where he has expressly agreed to a continuance on the record.”). These cases represent good law. But, contrary to what we have said above, the defendants in *Woodrum* and *Cabrera* are actually agreeing to the proposed continuance. The factual scenario, then, is inapposite to facts of this case, in which defendant consistently and repeatedly objected to continuances, the attribution of time to him, and demanded adherence to the scheduled trial date. For example, time was properly attributed to defendant because he agreed to hearing dates of August 19, August 26, and September 9, 2011. However, on September 9, defendant demanded a trial date, and, pursuant to logistical discussions between the parties and the trial court, agreed to a November date. Thus, while defendant voiced “agreement” to various dates, he still persisted in his speedy-trial demand and objected, at least in speedy-trial terms, to the date. This dual nature may be difficult to process, but the key, in addition to defendant’s demand and objection, is the State’s passivity and acquiescence at the time. In no case did the State make a contemporaneous request that the time be specifically attributed to defendant, or explain to the trial court that, due to defendant’s action, it had to expend time responding to that action. Meanwhile, defendant persisted in his demands and objections, leading the trial court, on reviewing the various hearing, to conclude that the time was attributable to the State, and this attribution was neither against the manifest weight of the evidence nor an abuse of discretion.

¶ 57 *Cabrera* further illustrates our point. It divides “delay” into two categories: acts by the defendant which cause delay (which *Cordell* defines to be moving a trial date outside of the speedy-trial term) and a defendant’s agreement to a continuance. *Cabrera*, 188 Ill. App. 3d at 371. The State, however, looks to *Cabrera* to support its position that, when a defendant agrees, the time is always attributable to him. We think that the State’s view here is too simplistic: defendant “agreed”

to a trial date, therefore defendant agreed to a date and this should toll the speedy-trial clock. While this reasoning is better suited to the agreed continuances of August 19 and August 26, where the court offered a status hearing in a week, for the September 9, hearing, defendant demanded a trial date. Consistent with our discussion above, the demand and scheduling do not implicate “delay,” at least where the eventual trial date is within the speedy-trial term.

¶ 58 The State seems to argue for a bright-line rule: any time a defendant agrees to anything, it will toll the speedy-trial clock. The State thus ignores the nuances presented here. Further, the State’s argument for such a bright-line rule cannot be squared with the requisites of interpreting the statute as it is currently written. The cardinal rule of statutory construction is to discern and give effect to the intent of the legislature by giving the language used in the provision its plain and ordinary meaning. *People v. Williams*, 2012 IL App (2d) 111157, ¶ 10. *Cordell*, *LaFaire*, and *Zeleny* all have done so. The focus of the provision at issue is delay, not attribution of time. This focus does not entirely jibe with the State’s proposed analysis. Further, the State advocated its bright-line view in the context of demonstrating that the cases used by defendant and relied upon by the trial court were analytically infirm. We do not agree. *Zeleny* and similar cases remain on strong footing, so we cannot say that the State’s contentions attempting to diminish the defendant’s or the trial court’s reliance on those cases has succeeded.

¶ 59 As we noted above, the State strenuously contends that *Cordell* “never stated that an agreed trial setting within the speedy[-]trial term was not a delay.” While true, context and circumstance is dispositive. *Cordell* defined the meaning of “delay” used in section 103-5 precisely, and *Workman*, *LaFaire*, and *Zeleny* were on the same page in understanding that definition, and applied it when it was contextually appropriate. The State also points to *People v. Murray*, 379 Ill. App. 3d

153, 159 (2008); and *People v. Boyd* 363 Ill. App. 3d 1027, 1037 (2006), as instances in which this court was misinterpreting *Cordell*. What we have said previously in relation to *Workman*, *LaFaire*, and *Zeleny* fully applies to *Murray* and *Boyd*. The State perseveres in its position that the “teaching of *Cordell* that there need be no postponement of a set trial date to attribute delay to a defendant.” We note that the State fails to point to that message in *Cordell* through a pinpoint citation (or any citation). In conformity with our analysis above, we reject the State’s contention about the interpretation of *Cordell*. This court has issued, relatively recently, cases which consistently accord with what *Cordell* expressly held and the reasonable and necessary inferences arising therefrom. We continue to adhere to the holdings in *Zeleny*, *Murray*, and *Boyd*.

¶ 60 Last, the State urges us to abandon *Zeleny* and to follow the dissent in *LaFaire* and the holding in *People v. Sanchez*, 392 Ill. App. 3d 1084 (2009). *Zeleny* dismissed the dissent in *LaFaire*, noting that, although the “dissent cited *Cordell*, its reasoning was at odds with our supreme court’s definition of ‘delay.’ ” *Zeleny*, 396 Ill. App. 3d at 922. Looking at the dissent in *LaFaire*, the only citation to *Cordell* comes in an observation that “the appellate court’s ruling in *Workman* seems to conflict with the subsequent opinion of our supreme court in [*Cordell*, 223 Ill. 2d at 391-92].” *LaFaire*, 374 Ill. App. 3d at 467 (Carter, J., dissenting). For its proposition that a defendant’s agreement to any date tolls the speedy-trial term, the dissent relied on *Woodrum* and *Cabrera*. *Id.* (Carter, J., dissenting). *Woodrum* appears to apply in different circumstances. Further, it is distinguishable from *Cordell* (and this case) due to its focus not on a speedy-trial violation, but on the interplay between the compulsory joinder provisions and the speedy-trial provisions. Likewise, *Cabrera* suggested the existence of two rules for attributing delay to a party: actions causing delay and agreement to a continuance. Here, the more appropriate rule to use is whether defendant’s

actions caused delay, namely setting or moving a trial date outside of the speedy-trial term. Neither *Woodrum* nor *Cabrera* offer a better analytical handle for the facts of this case than *Zeleny*. Accordingly, we are not persuaded by the dissent in *LaFaire*. We again emphasize that we are applying *Zeleny* narrowly and in light of the considerations of the standard of review and the manner in which defendant is attempting to use the speedy-trial provision (defensively as opposed to offensively). Further, while rejecting an argument similar to that we are making here (albeit, there, the argument was the blanket expansion of *Zeleny* to stand for the proposition that any agreement to a trial date within the speedy-trial term results in an attribution of the time to the State), *Wade* still accepts the division between “delay” and agreed continuances. *Wade*, 2013 IL App (1st) 112547, ¶ 16, 26.

¶ 61 Turning to *Sanchez*, we first observe that Justice Carter, who authored the dissent in *LaFaire*, also authored *Sanchez*. The circumstances in *Sanchez* were different than those here. In *Sanchez*, the defendant requested a short status and agreed to it. *Sanchez*, 392 Ill. App. 3d at 1094. These circumstances suggest the application of the rules from *Woodrum* and *Cabrera* that agreeing to a continuance causes the delay to be attributed to the defendant. And, indeed, this is precisely what *Sanchez* does. *Id.* at 1094-95 (the “defendant’s affirmative act of requesting a status date and agreement to it caused the [eight-day delay]”). Notably, defendant did not demand a trial date and then search for a date that was mutually acceptable to counsel, the State, and the court. Thus, *Sanchez* is distinguishable. Because both the *LaFaire* dissent and *Sanchez* do not offer appropriate guidance, they do not persuade us that we need to abandon *Zeleny*.

¶ 62 Summing up on this issue, the State has extensively challenged *Zeleny* and this court’s interpretation of *Cordell*. We have carefully considered the State’s arguments and found that, while

started. He [the public defender] don't want my case to start. I need my case to start. I need my life back though. That's all I am trying to do, Your Honor."

Despite defendant's repeated and final demand, the public defender and the trial court agreed that the speedy-trial term would be tolled until the August 12 hearing. The trial court entered an order acknowledging that the speedy-trial term was tolled.

¶ 67 When defendant moved to dismiss this matter for a speedy-trial violation, the trial court ruled that the two-day period from August 10 to August 12 was attributable to the State. Later, the State moved to reconsider, and the trial court revisited the attribution of the two-day period. The court reviewed the August 10, 2011, report of proceedings and entertained argument from counsel. The court ruled:

"I think it quite clear to this court that the defendant made on August 10th of 2010 [sic] a formal oral demand for speedy trial. I think there's no question.

I would state that the right to speedy trial is the defendant's right. And while the docket entry indicates that from the first court appearance on August 10th of 2011 until the next court date, which would have been August 12th, is on defendant's motion. I think it is quite clear that in this time period defendant was demanding speedy trial. And I do believe I was correct in my first assessment; that the time between August 10th and August 12th, excluding the day of arrest, is attributable to the State. So that's two days. He had a right to a speedy trial."

¶ 68 The State argues that this attribution is simple: defendant is bound by the decision of his attorney, the public defender. While we agree that a defendant is generally bound by his attorney's actions (*People v. Rollins*, 382 Ill. App. 3d 833, 841-42 (2008)), and whether to agree to a

continuance generally is not a decision that a defendant must personally make (*People v. Phillips*, 217 Ill. 2d 270, 281 (2005) (only five decisions, whether to enter a plea, whether to waive a jury trial, whether to testify at trial, whether to ask for a lesser-included-offense instruction, and whether to appeal, belong personally to the defendant; the attorney may make any other tactical or strategic decisions on the defendant's behalf)), in this case, the circumstances present a case far outside of the general circumstances to which the rules apply. Instead, we believe that this case presents the converse of the circumstances described in *People v. Bowman*, 138 Ill. 2d 131 (1990), and requires the opposite result than that in *Bowman*.

¶ 69 In *Bowman*, the court held that a continuance was attributable to the defendant where the defendant acquiesced to the appointment of a new attorney and did not try to repudiate the new attorney's request for a continuance. *Id.* at 143. This case presents the converse to that situation. Here, defendant's first words to the trial court were a demand for a speedy trial. Then the trial court appointed the public defender's office as counsel for defendant. The assistant public defender present in the courtroom acknowledged that no attorney in the public defender's office had been assigned to the case as of that time. The assistant public defender then stated he did not want to exercise defendant's speedy-trial claim at that moment. Defendant objected and continued to demand a speedy trial. Defendant also indicated that he would try to procure private counsel. Defendant's final statement to the trial court reiterated his desire to invoke his speedy-trial rights.

¶ 70 In *Bowman*, the court attributed a continuance to the defendant because he acquiesced to the appointment of a new attorney, and he acquiesced to the new attorney's request for a continuance. Conversely, here, defendant did not acquiesce to the appointment of the public defender's office; instead, he asserted that he would procure independent counsel. We acknowledge that defendant did

not actually go so far as to discharge the public defender's office. Nevertheless, despite being appointed to represent defendant, the fact remains that no attorney in the public defender's office was, at that time, actually responsible for defendant's case. We believe that defendant's non-acceptance of the appointment coupled with the reality that no attorney from the public defender's office was actually responsible for defendant's case is enough to show that defendant did not acquiesce to the appointment of an attorney during the August 10, 2011, hearing. In addition, defendant continuously maintained that he wanted to exercise his speedy-trial rights, and he wanted to make sure that the speedy-trial term had commenced. When the assistant public defender asked to waive the speedy-trial count until the next hearing, defendant expressly disagreed and offered to provide a private attorney. Based on this, we believe that the trial court's conclusion that defendant effectively repudiated the assistant public defender's attempt to waive the invocation of defendant's speedy-trial rights was not against the manifest weight of the evidence. Accordingly, the trial court did not abuse its discretion in not attributing the time from August 10-12 to defendant.

¶ 71 This view is confirmed by considering how the next hearing, on August 12, proceeded. At the August 12 hearing, while the particular assistant public defender responsible for defendant's case was not present, his case finally had been assigned to an individual attorney. Defendant did not provide a private attorney, and defendant acquiesced to or accepted the appointment of the public defender. In addition, defendant did not make any request for a speedy trial and acquiesced to or accepted the assistant public defender's choice to waive the running of the speedy-trial clock until the next hearing. Defendant's behavior during the August 12, 2011, hearing, showed no indication at all that he was trying to exercise his speedy-trial rights. By contrast, in the August 10, hearing, defendant was focused on and explicitly exercising his speedy-trial rights. Finally, looking at the

standard of review that applies, namely, abuse of discretion (*Mayo*, 198 Ill. 2d at 535), under the circumstances described, we cannot say that the trial court abused its discretion in attributing the two-day period of time between August 10 and August 12 to the State.

¶ 72 The special concurrence disputes our attribution of the time between August 10 and August 12 to the State. The special concurrence relies on *People v. Carr*, 9 Ill. App. 3d 382 (1972), for the proposition that, because the defendant did not discharge his attorney, the attorney's agreement to a continuance over the defendant's objection will result in the attribution of the time of the continuance to the defendant. In other words, at best, the special concurrence relies on the general rule without attempting to account for any special circumstances that might serve to take the case outside of the general rule. Moreover, *Carr*, itself, represents a unique and inapposite situation that undercuts any persuasive force to be gleaned from it. In *Carr*, the attorney demanded a continuance because he had just been appointed to the case, the case was up for trial, and the attorney had not had any time to prepare for trial. *Id.* at 384. Had the trial court acceded to the defendant's demands and had the defendant been convicted, an ineffective-assistance claim could have been raised, and likely succeeded. *Id.* Here, by contrast, there is no time pressure of a trial date; likewise there is no conflict between the defendant's rights to effective representation and to a speedy trial. *Carr* represents an extreme situation in which the court could undertake only a single viable action, namely, grant the attorney's request for a continuance over the defendant's objection and attribute the time to the defendant. Here, because defendant was appearing before the court for the first time, his speedy-trial clock had not yet begun, and the court, in its discretion, was free to act in any appropriate manner. The trial court's attribution of the time from August 10 to August 12 to the State does not constitute an abuse of discretion.

¶ 73

2. Defendant's Motions

¶ 74 Next, the State argues that the trial court erred by failing to attribute any time to defendant for filing his motions for additional discovery, to dismiss count 15 as unconstitutional, and to sever. The State, correctly, argues that, when the defendant files a motion, the time necessary for the State to process and respond to it, as well as the time until the trial court hears and decides the motion is usually attributable to the defendant. *E.g.*, *People v. McDonald*, 168 Ill. 2d 420, 440 (1995) (abrogated on other grounds, *People v. Clemons*, 2012 IL 107821, ¶ 40); *People v. Childress*, 321 Ill. App. 3d 13, 20 (2001). This rule, however, is neither automatic nor *per se*. The court must examine the circumstances in order to determine if the defendant's motion actually caused delay that should be attributed to the defendant. *People v. Ladd*, 294 Ill. App. 3d 928, 931-32 (1998); see also *People v. Myers*, 352 Ill. App. 3d 684, 688 (2004) (a "motion filed by the defendant which eliminates the possibility that the case could immediately be set for a trial also constitutes an affirmative act of delay attributable to the defendant;" delay "cannot be attributed to the defendant when the record is silent;" "whether a motion in fact causes delay depends on the facts and circumstances of each case"); *People v. Andrade*, 279 Ill. App. 3d 292, 300 (1996) (whether a motion causes delay depends on the facts and circumstances of the case); *People v. Colts*, 269 Ill. App. 3d 679, 684 (1993) (not all motions filed by a defendant cause delay, and whether a motion causes delay depends on the facts and circumstances of the case). Finally, when examining the circumstances in order to attribute delay, the court must keep in mind that delay is an action undertaken by any party or the court that moves the trial date outside of the speedy-trial term. *Cordell*, 223 Ill. 2d at 390; *Wade*, 2013 IL App (1st) 112547, ¶ 16; *Zeleny*, 396 Ill. App. 3d at 921-22.

¶ 75 The State’s argument, essentially, is that any motion filed by a defendant should automatically stop the speedy-trial clock for at least some period of time. In addition to the three motions filed on September 23, the State complains that defendant’s amended motion to dismiss also did not interrupt the speedy-trial clock and no time was attributed to defendant as a result of filing an amended motion that took even more time to review the new motion and to prepare a response. We disagree.

¶ 76 We first give an overview of the record. The record presents silence on the part of the State in attempting to fulfill its obligation to bring this matter to trial within the statutory speedy-trial period. The State could have asked that the trial court attribute time to defendant as a result of the filing of his motions, but it did not. Instead, the trial court apparently determined that the motions did not “eliminate[] the possibility that the case could immediately be set for a trial” when it determined that the trial date would stand despite the filing of defendant’s motions. *Myers*, 352 Ill. App. 3d at 688. The record is simply silent, and silence will not cause the time to be attributed to the defendant. *Id.* Finally, we note that the record reveals that the motions were in fact resolved before the trial date, and, once again, is resoundingly silent regarding the State’s request or necessity to take time (which would be attributed to defendant) to prepare its response to the motions. On this record, generally, we cannot conclude that the trial court’s attribution of the time to the State constituted an abuse of discretion.

¶ 77 We now turn to a close examination of the record. A careful examination of the record reveals that none of defendant’s motions, neither the three September 23 motions nor the amended motion to dismiss, resulted in a delay of the trial. On September 9, 2011, defendant demanded trial, and the court set the trial date for November 14, 2011. The speedy-trial time elapsed stood at two

days. On September 23, 2011, defendant filed the three motions. The trial court, in open court, noted that defendant maintained his demand for a speedy trial, and did not strike the trial date, but kept it on November 14, 2011. The State, therefore, had clear notice that the trial date was not going to be postponed as a result of defendant's motions. In reviewing defendant's motion to dismiss based on a speedy-trial violation, the court noted that, had the State needed extra time to process the motions, it could have sought a continuance to toll the speedy-trial clock or to extend the speedy-trial term. As of September 23, the speedy-trial time elapsed stood at 16 days; trial had been scheduled for day 68 of the speedy-trial term.

¶ 78 The matter was routinely continued on October 7, 2011, and October 19, 2011. In both of those hearings, defendant maintained his demand for trial and the trial court explicitly stated that trial remained scheduled for November 14. Likewise, on each of the dates, the State noted that it had not completed the discovery due to defendant and asserted it was diligently working to produce the pending discovery as well as it was working on responses to defendant's motions. During the October 19 hearing, defendant informed the trial court that he and the State had discussed the motion to dismiss count 15 and the motion to sever. Defendant indicated that the State might be willing to sever the matter by agreement, and if the matter were severed, then the motion to dismiss count 15 would not need to be dealt with before trial was had on the murder counts. As of the October 19, the speedy-trial clock stood at day 42.

¶ 79 On October 25, 2011 (day 48 of the speedy-trial term), defendant filed an amended motion to dismiss count 15. The amendment did not change the motion to dismiss; instead, defendant also filed a memorandum in support, more clearly elucidating his arguments in the motion to dismiss. On October 26, 2011 (day 49 of the speedy-trial term), the next scheduled status hearing occurred.

The State once again indicated it was trying to fulfill its discovery obligations but had been hindered due to an illness in its office. Defendant maintained his demand for trial. The matter was set for status in a week, with the possibility that the parties would be ready to argue defendant's motions. The trial court inquired about where the case was in the speedy-trial term, estimating that it stood near day 90. The State disagreed, contending that defendant's agreement to the November 14 trial date had tolled the speedy-trial clock. The trial court disagreed with the State's contention and stated that the speedy-trial term had not yet been tolled in this case. Thus, as of October 26, the State had a clear indication that, in an important prosecution, the trial court was not accepting its suggestion as to how to count the passing of the speedy-trial term.

¶ 80 On November 2, 2011, the matter came up for hearing on defendant's motions for discovery and to dismiss. The speedy-trial term stood at day 56. The State again indicated that it was still trying to complete the discovery owed to defendant, noting it had just received pictures and recordings of statements which it was in the process of duplicating. The trial court reminded the State that the matter was still set for trial on November 14. The State indicated that the attorney working on the response to the motion to dismiss had to gather statistics from the police department. The parties agreed that an agreement on the motion to sever would obviate the need to hear the motion to dismiss before trial. The matter was set for November 9 for status.

¶ 81 On November 9 (day 63 of the speedy-trial term), the State delivered even more discovery to defendant. The State then moved to strike the November 14 trial date, indicating it was for the purpose of verifying that the State had fulfilled its discovery obligations. Defendant objected to striking the trial date and continued to demand trial. Over defendant's objection, the trial court granted the motion to continue, attributing the time to the State. The trial court set trial for

December 12, 2011. December 12 would have been day 96 of the speedy-trial term, still inside the statutory 120-day period. The trial court also let stand the November 14 date for status.

¶ 82 On November 14, 2011, the parties appeared for status; 68 days of the speedy-trial term had elapsed. The State continued to work on its response to defendant's motion to dismiss and indicated that it was still considering whether to agree to defendant's motion to sever. Defendant again demanded trial, noting that the hearing on his motions could be held at any time. The trial court insisted that the motions be heard before the trial and set them for hearing on November 30. Defendant noted that discovery had been completed with the exception of the victims' medical records or the signed release forms to obtain the medical records. The State agreed to facilitate completing the medical discovery.

¶ 83 On November 30, 2011 (day 84 of the speedy-trial term), the State filed its response to dismiss count 15. The court and defendant each stated that review of the State's response was needed. Defendant demanded that trial remain scheduled for December 12 and noted there was still outstanding discovery and the unheard motion to sever, to which the State could still agree. The State asserted that it was still working on discovery, and indicated its desire to argue the motion to dismiss count 15. The trial court set the matter for argument on December 5.

¶ 84 On December 5, 2011, the trial court heard and denied defendant's motion to dismiss count 15. The speedy-trial clock stood at 89 days. The matter was set for status on December 9.

¶ 85 On December 9, 2011 (day 93), the State requested a continuance into January. The State noted that its second chair was on maternity leave so it needed a replacement, it was double checking to make sure discovery was complete, and it needed to contact and serve subpoenas on witnesses who appeared to have moved. Over defendant's objection and demand for trial, the court granted

the State's motion for a continuance and set the matter for January 9, 2012. January 9 would have been day 124 for purposes of the speedy-trial term (meaning that January 5 would have been day 120, and January 6 would have been day 121). As this continuance moved the matter outside of the 120-day speedy-trial term, defendant was required to, and did, both object to the continuance and demand trial. The matter was set for a January 4, 2012, status.

¶ 86 On January 4, 2012 (day 119), the State indicated it had concerns about discovery as well as whether all its witnesses had been subpoenaed. The matter was set for status two days later. On January 6 (day 121 of the speedy-trial term), the Friday before the trial scheduled on Monday, January 9, the State requested a continuance into February due to witness-location and discovery problems. Defendant objected and asserted that he was and would be ready for trial. The trial court denied the State's motion and required the parties to appear on January 9 for trial.

¶ 87 On January 9, 2012, day 124 for purposes of counting the speedy-trial term, the State filed a written motion to continue the trial. The State asserted that, on January 7, 2012, defendant had provided it with the affidavit of Davon Lewis, one of the State's witnesses. In the affidavit, Lewis repudiated his statements to the police and to the grand jury identifying defendant as a shooter in the incident. The State asserted it needed time to investigate Lewis and the circumstances under which he delivered the affidavit. The State further pointed out that the affidavit was dated October 27, 2011, but had been delivered to the State about 10 weeks later, on January 7, 2012, the Saturday before trial was to commence. In addition, the State raised its ongoing witness-location-and-subpoena problems as a basis for granting the continuance. Defendant objected to the continuance and demanded trial. Over defendant's objection, the trial court granted the State's motion, citing all of the discovery issues raised by the State as the basis, and setting trial for January 23, 2012, with

statuses on January 11 and January 18, 2012. The trial court also stated that the time would be attributable to the State.

¶ 88 On January 11, 2012 (day 126), the hearing dealt with the subpoena for trial of a particular witness by both parties. On January 18, 2012 (day 133), defendant filed his motion to dismiss based on a speedy-trial violation by the State.

¶ 89 We have resolved the period between September 9 and November 14 and found it entirely attributable to the State. We also note that this matter was set for trial on November 14, December 12, January 9, and January 23. The November and December dates were within the speedy-trial terms. We also note that defendant's motions were heard and disposed December 5, 2012, before the second trial date, which was within the speedy-trial term. As we noted above, *Cordell* defined a delay as any action taken by any party or the court that moves the trial date outside of the speedy-trial term. *Cordell*, 223 Ill. 2d at 390; see also *Zeleny*, 396 Ill. App. 3d at 921-22. By resolving defendant's motions before the speedy-trial term had run and before the second trial date, which was within the speedy-trial term, no delay arose. The motions were all resolved well within the speedy-trial term. The State had clear and repeated notice about to which party the trial court intended to attribute the time, but it did not make a request to toll the speedy-trial term to allow it process defendant's motions. Further, we note that the State's argument boils down to an assertion that an automatic attribution of time to the defendant is necessary any time the defendant files any motion. This is not what the law says, and we see no good reason to adopt the State's argument on this point. Accordingly, we cannot say that the trial court abused its discretion in determining defendant's motions did not cause any delay that could be attributed to the defendant; further, we cannot say that

the trial court's interpretation and determination of the facts regarding the hearings during the pendency of this case was against the manifest weight of the evidence.

¶ 90 We further note that, when the State requested a continuance to January 9, 2012, trial was, for the first time, proposed outside of the speedy-trial term. Defendant objected to the continuance of trial to January 9 and demanded trial, reasserting his speedy-trial rights. We calculate that January 9 was day 124 of the speedy-trial term (2 days in August, 21 days for September 9-30, 31 days for October, 30 days for November, 31 days for December, and 9 days for January 1-9, totaling 124 days). This means that, on January 5, 2012, day 120 of the speedy-trial term elapsed without defendant receiving a trial. On January 6, 2012, day 121, the State requested a continuance to which defendant both objected and demanded trial on January 9. The trial court denied the motion to continue. On January 9, the trial court granted the State's motion to continue, and defendant objected and demanded trial, once again reasserting his already violated speedy-trial rights. In any event, on January 6, the speedy-trial term had been exceeded. Accordingly, we agree with the trial court that defendant's motion to dismiss for a speedy-trial violation was properly granted.

¶ 91 While the State disagrees with the trial court's decision not to attribute any time to defendant resulting from the filing of his motions, this argument is without merit. We have seen that the three motions were resolved within the speedy-trial term, and before trial was scheduled on December 12. The State, therefore, is unable point to anything that caused a delay as the term is used in section 103-5 and interpreted by *Cordell* and *Zeleny*. Instead, the State cites to general boilerplate and does not do a specific examination of the circumstances as required in *Ladd*, 294 Ill. App. 3d at 931-32. We cannot say that the trial court abused its discretion in determining that defendant had not delayed trial by filing the motions for discovery, to dismiss, and to sever.

¶ 92 3. Recantation Affidavit Produced on the Eve of Trial

¶ 93 As a result of our determination that, on January 6, 2012, the speedy-trial count stood at 121 days, we need not further consider the State's contentions surrounding the Lewis affidavit tendered to it on January 7, 2012. Because the speedy-trial term had already elapsed on January 6, even if the trial court should have attributed the time from January 9 (or even January 7) through January 18 to defendant, it would have no effect on the speedy-trial count, which stood at 121 on January 6.

¶ 94 III. CONCLUSION

¶ 95 For the foregoing reasons, the judgment of the circuit court of Winnebago County is affirmed.

¶ 96 Affirmed.

¶ 97 PRESIDING JUSTICE BURKE, specially concurring.

¶ 98 I concur with the majority decision to affirm. I find the speedy-trial analysis of the difference between a defendant demanding trial and acquiescing to a suggested trial date, and a defendant seeking a continuance to be well-reasoned.

¶ 99 I part company with the majority on the attribution of delay from August 10 to August 12. On August 10, the trial court, in defendant's presence, appointed the public defender to represent defendant. The deputy public defender who was present in court made a reasonable request for a two-day continuance on defendant's motion for the case to be assigned to an attorney in that office. The court granted that request and continued the case on defendant's motion, specifically noting in the written order that the speedy-trial term was tolled. At the hearing, defendant made clear his wishes for a speedy trial, but he was bound by the actions of his court appointed attorney. *People*

v. Rollins, 382 Ill. App. 3d 833, 841 (“accused is bound by the actions or omissions of his defense counsel”).

¶ 100 The majority bases its holding on a finding that defendant did not accept appointment of the public defender. This is not borne out in the record. On August 10, the trial court appointed the public defender to represent defendant in open court in defendant’s presence. Defendant never repudiated the appointment. Even in the face of the deputy public defender’s request for a two-day continuance, which defendant opposed, he did not discharge the public defender or make any statements that would intimate that was his wish. Since the public defender was his attorney when the request for continuance was made, defendant is bound by that request.

¶ 101 In *People v. Carr*, 9 Ill. App. 3d 382 (1972), the trial court granted the public defender’s request for a continuance where the defendant strenuously objected. On appeal, the defendant argued that the delay should not be attributable to him. The appellate court disagreed, noting that while the defendant objected to the continuance, he did not discharge the attorney who continued to represent him throughout the trial. *Id.* at 384, *cf.*, *People v. Pearson*, 88 Ill. 2d 210, 215 (1981), (defendant not bound by attorney’s request for a continuance where defendant clearly and convincingly attempted to assert his right to discharge his attorney and proceed to an immediate trial).

¶ 102 In *Carr*, the newly appointed attorney requested a continuance of the trial date in order to prepare for trial. While such was not the case here, I believe that the court and the state should be allowed to rely on the “general rule” that a defendant is bound by his attorney’s request. If the attribution of these two days had been the difference between the prosecution going forward and the dismissal of a murder indictment, the state would have acted reasonably in relying on the “general rule” and the trial court’s explicit tolling of the term in arguing against dismissal.

¶ 103 In the present case, after appointing the public defender, the trial court stated, “[b]ecause of the seriousness of the charges I want you represented right now.” Defendant replied, “Yes, Sir.” The court then explicitly informed defendant that his attorney could waive his speedy-trial rights even if defendant was against it. After this colloquy, like in *Carr*, defendant never made any comment that could be construed as requesting that the public defender be discharged. Therefore, defendant was bound by his attorney’s request, and the trial court properly tolled the speedy-trial term from August 10 to August 12. Thereafter, the trial court abused its discretion when it reversed its earlier ruling.

¶ 104 Subtracting these two days from the speedy-trial term means that the term would have run on Saturday, January 7, 2012. The state’s motion for continuance based on defendant’s late disclosure was filed on January 9, 2012, after the term had run. Therefore, the dismissal was proper.