



¶ 5 On March 3, 2010, the State charged defendant with aggravated discharge of a firearm (count I) and aggravated battery with a firearm (count II). Count I alleged defendant knowingly discharged a firearm in the direction of Anthony Forman. Count II alleged defendant committed a battery by means of discharging a firearm and causing Forman injury.

¶ 6 On August 5, 2010, defendant first appeared in custody in this case and was arraigned. The State requested a continuance until September 2, 2010.

¶ 7 On September 2, 2010, defendant requested a December 3, 2010, trial date.

¶ 8 On December 3, 2010, the matter was called for trial. Defendant's counsel orally moved to dismiss based on a violation of defendant's statutory 120-day speedy trial right pursuant to section 103-5 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/103-5 (West 2010)). The State argued because defendant was already incarcerated on an unrelated offense he was required to make a written 160-day speedy trial demand pursuant to the Intrastate Detainers Act (Act) (730 ILCS 5/3-8-10 (West 2010)). See *People v. Graham*, 392 Ill. App. 3d 1001, 1004, 910 N.E.2d 1263, 1267 (2009) (quoting *People v. Wooddell*, 219 Ill. 2d 166, 175, 847 N.E.2d 117, 122 (2006)) (" 'persons already incarcerated on unrelated charges enjoy a 160-day speedy-trial right, which begins to run only upon the filing of a demand' ").

¶ 9 On December 8, 2010, the trial court denied defendant's motion to dismiss, finding because defendant was incarcerated in the Department of Corrections he needed to file a demand under the Act. That same day, defendant's counsel filed a speedy trial demand for trial within 160 days pursuant to the Act. At the hearing, defendant's counsel requested a continuance so she could review the victim's medical records. Trial was set for March 4, 2011.

¶ 10 On December 14, 2010, defendant *pro se* filed a notice of appeal from the trial

court's December 8, 2010, judgment and a demand for speedy trial. This court docketed his appeal as appellate court case No. 4-10-1049.

¶ 11 On February 23, 2011, defendant filed a motion to voluntarily dismiss that appeal, which this court granted on February 24, 2011.

¶ 12 On March 4, 2011, the State filed a motion to continue, arguing it was having difficulty locating the victim's medical records due to confusion over the spelling of the victim's name. Defendant objected to the continuance. The trial court granted the State's motion over defendant's objection and continued the matter to May 13, 2011.

¶ 13 On May 16, 2011, jury selection began and defendant's trial commenced on May 17, 2011.

¶ 14 During defendant's trial, Anthony Forman testified he was sitting in his parked car in Danville, Illinois, late in the evening on March 1, 2010, when he noticed a van "circling around" the area. He knew the van belonged to Shannon Whorrall. The van continued to follow him. Forman observed Whorrall was driving the van and had a passenger. Forman parked on the street and the van pulled up along side of his vehicle. Forman got out of his vehicle and asked Whorrall why she was following him. Whorrall's passenger leaned across the driver's seat of the van and shot Forman in the chest. Forman saw the man who shot him around Danville for years and knew his street name was "Mo-Mo." Forman identified defendant as the gunman from a police photograph array. He also identified defendant in court as the man who shot him.

¶ 15 Whorrall testified she had known Forman since childhood. Whorrall knew defendant for three years, they were in a relationship, defendant lived with her, and they had a child together. She testified defendant's nickname is "Mo-Mo." Whorrall and defendant had

driven to Danville to purchase marijuana. While driving around they observed Forman sitting in his parked car. However, she denied following Forman or repeatedly driving past his vehicle. When Forman parked his car, she pulled the van up next to him. According to Whorrall, Forman "hopped out of his vehicle; and he screamed, 'What the fuck are you following us for?' " Whorrall testified defendant then shot Forman. She and defendant then drove away and went back to Champaign. Whorrall testified when they got back to Champaign, defendant "cleaned out my van for me, and he wiped down everything—everything in the van." Whorrall testified defendant told her he shot Forman because "it was street shit" and "didn't concern [her]." When asked if Forman had a weapon, Whorrall responded, "I don't know."

¶ 16 Mike Bransford, detective with the Danville police department, testified Forman picked defendant's photograph from an array of six photographs.

¶ 17 On May 19, 2011, the jury convicted defendant of aggravated battery with a firearm and aggravated discharge of a firearm.

¶ 18 On July 1, 2011, defendant filed a posttrial motion, arguing the trial court erred in denying his statutory right to a speedy trial as well as his right to a speedy trial under the Act. We note defendant did not raise an argument with regard to the denial of his constitutional speedy trial rights in his posttrial motion.

¶ 19 On July 6, 2011, the trial court denied defendant's posttrial motion. That same day, the court sentenced defendant as stated. After he was sentenced, defendant indicated he wanted to appeal, and the court appointed the Office of the State Appellate Defender (OSAD) to represent defendant.

¶ 20 On July 12, 2011, the circuit clerk filed a notice of appeal from defendant's

conviction and sentence. That appeal was docketed as appellate court case No. 4-11-0600.

¶ 21 On August 1, 2011, defendant filed a *pro se* notice of appeal, appealing the trial court's denial of his motion to dismiss as well as his conviction. Defendant's *pro se* notice of appeal was docketed as appellate court case No. 4-11-0690.

¶ 22 On October 7, 2011, OSAD filed a motion to consolidate appeal Nos. 4-11-0600 with 4-11-0690, arguing the interests of judicial economy would be served by consolidating the appeals where "they arise from the same jury trial, sentencing, and can be consolidated without prejudice to the defendant." On October 11, 2011, this court allowed OSAD's motion to consolidate the cases.

¶ 23 This appeal followed.

¶ 24 II. ANALYSIS

¶ 25 On appeal, defendant argues (1) he was denied his constitutional right to a speedy trial where his trial did not begin until 14 months after his arrest and (2) the trial court erred in the way it instructed the jury regarding the reliability of an eyewitness identification.

¶ 26 A. Speedy Trial Right

¶ 27 Defendant argues he was denied his constitutional right to a speedy trial where he alleges his trial did not begin until 14 months after his arrest. We disagree.

¶ 28 We note defendant did not raise the issue of the denial of his constitutional speedy trial right in his posttrial motion. Defendant acknowledges this failure but urges this court to review his claim under the plain-error doctrine. The plain-error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious,

regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 186-87, 830 N.E.2d 467, 479 (2005). However, before considering whether the plain-error doctrine applies, we must determine whether any error occurred at all. See *People v. Walker*, 392 Ill. App. 3d 277, 294, 911 N.E.2d 439, 456 (2009).

¶ 29 A criminal defendant has both a constitutional and statutory right to a speedy trial. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art I, § 8; 725 ILCS 5/103-5 (West 2010). Speedy trial rights are fundamentally guaranteed to all defendants pursuant to both the sixth and fourteenth amendments of the federal constitution. U.S. Const., amends. VI, XIV. The Illinois Constitution also guarantees speedy trial rights. Ill. Const. 1970, art. I, § 8. A defendant will be discharged from custody and have his charges dismissed, if his rights to a speedy trial are violated. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8; 725 ILCS 5/103-5(d) (West 2010).

¶ 30 On appeal, defendant does not argue either his statutory right to a speedy trial or his right to a speedy trial under the Act was violated. Instead, defendant contends only his constitutional right to a speedy trial was violated. *Cf. People v. Mays*, 2012 IL App (4th) 090840, ¶ 43, 980 N.E.2d 166. Accordingly, we will confine our review on appeal to the issue of defendant's constitutional right to a speedy trial.

¶ 31 The constitutional guarantee to a speedy trial has three commonly construed purposes: (1) to prevent an oppressive incarceration before trial, (2) to minimize a defendant's anxiety and concern that necessarily attaches to a public accusation, and (3) to prevent undue interference with the defendant's ability to defend himself. *Smith v. Hooey*, 393 U.S. 374, 377-78 (1969); *People v. Tetter*, 42 Ill. 2d 569, 572, 250 N.E.2d 433, 435 (1969).

¶ 32 In *Crane*, the Supreme Court of Illinois adopted the four-factor balancing test from *Barker v. Wingo*, 407 U.S. 514, 530 (1972), to determine whether a defendant's constitutional speedy-trial right has been violated. *People v. Crane*, 195 Ill. 2d 42, 48, 743 N.E.2d 555, 560 (2001). In making such a determination, courts balance the following four factors: (1) the length of the delay, (2) the reasons for the delay, (3) defendant's assertion of his right, and (4) the prejudice, if any, to the defendant. *Crane*, 195 Ill. 2d at 48, 743 N.E.2d at 560 (citing *Barker*, 407 U.S. at 530). We note "a constitutional speedy-trial violation will not be conditioned on the presence or absence of any single [*Barker*] factor." *Crane*, 195 Ill. 2d at 60, 743 N.E.2d at 566.

¶ 33 *1. Length of the Delay*

¶ 34 In looking at the length of the delay, defendant was charged in March 2010, arraigned in August 2010, and his trial began in May 2011. The constitutional right to a speedy trial is not tied to a specific time frame in which an accused must be brought to trial. *People v. Love*, 39 Ill. 2d 436, 442, 235 N.E.2d 819, 823 (1968). Generally speaking, however, a one-year delay has been found to be "presumptively prejudicial." See *Barker*, 407 U.S. at 530-31. However, that presumptive prejudice " 'simply marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* enquiry.' " *Crane*, 195 Ill. 2d at 53, 743 N.E.2d at 562-63 (quoting *Doggett v. United States*, 505 U.S. 647, 652 n.1 (1992)). The delay here is sufficient to trigger a speedy-trial analysis.

¶ 35 *2. Reason for the Delay*

¶ 36 We note defendant's date of arrest on these charges is unclear from the record. The State charged defendant on March 3, 2010. A warrant for defendant's arrest issued on March 4, 2010. Defendant did not appear in this case until August 5, 2010. According to the

presentence investigation report, on March 19, 2010, a hearing was called for a violation of defendant's probation in an unrelated case. Defendant's probation was revoked and he was sentenced to four years in prison. The docket entry in this case for July 13, 2010, states "Notice of hearing filed. Arraignment set for 8/5/10 at 1:00 in courtroom 107." That notice was sent to defendant at the Centralia Correctional Center. "[W]ithout actual service of process on the defendant (or an arrest without a warrant), a prisoner is not incarcerated on the charges underlying the warrant or process." *People v. Jackson*, 162 Ill. App. 3d 476, 479, 515 N.E.2d 390, 392-93 (1987). Thus, we will use as a starting point for our analysis defendant's August 5, 2010, arraignment date. See *People v. Wiseman*, 195 Ill. App. 3d 1062, 1064, 553 N.E.2d 46, 48 (1990).

¶ 37 During defendant's August 5, 2010, arraignment, the State requested a September 2, 2010, preliminary hearing date (a total of 28 days chargeable to the State). On September 3, 2010, defendant asked for and received a December 3, 2010, trial date. Thus, the delay between September 3, 2010, and December 3, 2010, is chargeable to defendant (a total of 91 days). On December 3, 2010, defendant orally moved to dismiss the cause, which delayed the proceeding until a proper written motion could be filed and disposed of on December 8, 2010, (a delay of five days charged to defendant). On December 8, 2010, defendant requested a continuance until March 4, 2011, which is charged to him (a total of 86 days). On March 4, 2011, the State requested a discovery-related delay. That request continued the cause until May 16, 2011, (a delay of 73 days charged to the State). In sum, the State occasioned the following delays in this case: 28 days between August 5, 2010, to September 2, 2010, and 73 days between March 4, 2011, to May 16, 2011. Thus, the State caused approximately a little over three months of delay

in this case. Our review of the record shows these delays were related to the State's administration of its case and not directed at hampering defendant's defense.

¶ 38 *3. Assertion of the Right*

¶ 39 Assertion of speedy trial rights is necessary before a court can reach the conclusion that a defendant's constitutional speedy trial rights have been violated. *Barker*, 407 U.S. at 530; *Doggett*, 505 U.S. at 651. In this case, however, defendant did not properly assert his speedy trial right until December 8, 2010. Defendant's trial started May 16, 2011.

¶ 40 *4. Prejudice*

¶ 41 The Supreme Court has found the prejudice factor should be assessed in terms of a defendant's following three interests: (1) to prevent oppressive pretrial incarceration, (2) to limit the possibility the defense will be impaired, and (3) to minimize anxiety and concern of the accused. *Hooey*, 393 U.S. at 378 (quoting *United States v. Ewell*, 383 U.S. 116, 120 (1966)).

¶ 42 As to the first factor, defendant's liberty had already been impaired in this case because of the unrelated offense for which he was incarcerated. Thus, this situation is different from one in which an individual is held for a substantial period of time before any determination of his guilt takes place. See *United States v. Loud Hawk*, 474 U.S. 302, 312 (1986) (primary speedy-trial concern is impairment of a person's liberty). In his brief on appeal, defendant concedes this factor is not at issue. Similarly, defendant does not argue his defense was impaired by the delay. Instead, defendant focuses his argument on appeal on his claim he was prejudiced because of the anxiety he had over this case while in prison. However, "the anxiety factor will count substantially in defendant's favor only if it is shown there was a rather special situation giving rise to an inordinate amount of anxiety." *Jackson*, 162 Ill. App. 3d at 481, 515 N.E.2d at

394. Here, defendant cites no evidence to support the claim he suffered an inordinate amount of anxiety.

¶ 43 Weighing the four *Barker* factors collectively, we find defendant was not denied his constitutional right to a speedy trial. Because we have found no error occurred, we need not engage in a plain-error analysis. Defendant's claim is thus forfeited.

¶ 44 B. Jury Instruction

¶ 45 Defendant argues the trial court erred in the way it instructed the jury regarding the reliability of an eyewitness identification. Defendant contends he was denied a fair trial where the jury was instructed it should consider the factors listed in the instruction explaining how the jury should evaluate the reliability of an eyewitness identification in the alternative.

¶ 46 Defendant concedes he failed to preserve the alleged error for review. However, he urges this court to review the alleged error under the plain-error doctrine. As previously stated, however, we must first determine whether any error occurred. See *Walker*, 392 Ill. App. 3d at 294, 911 N.E.2d at 456.

¶ 47 Illinois Pattern Jury Instruction No. 3.15 (Illinois Pattern Jury Instructions, Criminal, No. 3.15 (3rd ed. 1992) (Circumstances of Identification) (hereinafter, IPI Criminal 3rd No. 3.15)). IPI Criminal 3rd No. 3.15 provides the following:

"When you weigh the identification testimony of a witness,  
you should consider all the facts and circumstances in evidence,  
including, but not limited to, the following:

[1] The opportunity the witness had to view the offender at  
the time of the offense.

[or]

[2] The witness's degree of attention at the time of the offense.

[or]

[3] The witness's earlier description of the offender.

[or]

[4] The level of certainty shown by the witness when confronting the defendant.

[or]

[5] The length of time between the offense and the identification confrontation."

¶ 48 In 2003, the instruction was modified to remove the bracketed "ors." *Herron*, 215 Ill. 2d at 191, 830 N.E.2d at 482; Illinois Pattern Jury Instruction No. 3.15 (Illinois Pattern Jury Instructions, Criminal, No. 3.15 (4th ed. No. 3.15 (Supp. 2003) (Circumstances of Identification) (hereinafter, IPI Criminal 4th No. 3.15 (Supp. 2003))). The committee note for IPI Criminal 4th No. 3.15 states the instruction is not to be given with " 'or' or 'and' between the factors where more than one factor is used." IPI Criminal 4th No. 3.15 (Supp. 2003), Committee Note at 20.

¶ 49 Prior to deliberations in defendant's 2011 trial, the trial court instructed the jury as follows:

"When you weigh the identification testimony of a witness, you should consider all the facts and circumstances in evidence, including, but not limited to, the following:

the opportunity the witness had to view the offender at the time of the offense; or

the witness's degree of attention at the time of the offense; or

the witness's earlier description of the offender; or

the level of certainty shown by the witness when confronting the defendant; or

the length of time between the offense and the identification confrontation."

¶ 50 In *Herron*, our supreme court found error where the trial court read IPI Criminal 4th No. 3.15 and did not omit the bracketed "ors" from the instruction. *Herron*, 215 Ill. 2d at 191, 830 N.E.2d at 482. The *Herron* court reasoned "[i]f the instruction initially directs jurors to consider all the facts and circumstances surrounding the identification, but then, through the use of the conjunction 'or,' directs jurors to consider one of five factors regarding the reliability of the identification, then the instruction contains an internal inconsistency." *Herron*, 215 Ill. 2d at 191, 830 N.E.2d at 482. Here, the trial court erred where it did not omit the "ors" from the instruction. See *Herron*, 215 Ill. 2d at 191, 830 N.E.2d at 482. However, an error in giving IPI Criminal 4th No. 3.15 is not prejudicial where the evidence was not closely balanced. *Herron*, 215 Ill. 2d at 192, 830 N.E.2d at 483. Cf. *People v. Battle*, 393 Ill. App. 3d 302, 312, 912 N.E.2d 786, 795 (2009) (finding preserved jury instruction error harmless where the evidence of defendant's guilt is overwhelming).

¶ 51 In this case, the victim positively identified defendant as the one who shot him. Forman testified Whorrall was driving the van in which defendant was a passenger when

defendant shot him. Whorrall, defendant's girlfriend and mother of his child, testified defendant shot Forman. The evidence presented to show defendant was the person who shot Forman was not closely balanced. Thus, defendant was not prejudiced by the jury instruction error.

¶ 52

### III. CONCLUSION

¶ 53 For the foregoing reasons, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 54 No. 4-11-0600, Affirmed.

¶ 55 No. 4-11-0690, Affirmed.