

NOTICE
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2013 IL App (4th) 110872-U

NO. 4-11-0872

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
June 7, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Adams County
ERIC J. MASON,)	No. 11CF93
Defendant-Appellant.)	
)	Honorable
)	Mark A. Drummond,
)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Appleton and Knecht concurred in the judgment.

ORDER

- ¶ 1 *Held:* The appellate court affirmed in part and reversed in part, concluding (1) the trial court did not err in denying defendant's motion to dismiss for lack of a speedy trial; (2) the trial court committed plain error in tendering an inaccurate instruction regarding an element of the offense to the jury; and (3) it need not address whether trial counsel's failure to preserve these issues in a posttrial motion constituted ineffective assistance of counsel.
- ¶ 2 On February 18, 2011, the State charged defendant, Eric J. Mason, by information with seven counts of residential burglary (720 ILCS 5/19-3 (West 2010)). The case proceeded to a preliminary hearing in the Adams County circuit court in March 2011, at which time the court found probable cause only as to counts I and II. The court dismissed the remaining counts and scheduled the case for jury trial on May 9, 2011.
- ¶ 3 Meanwhile, on March 24, 2011, a grand jury indicted defendant on nine additional counts of residential burglary. The court arraigned defendant on the

indictment on April 5, 2011, then scheduled the case for trial on July 11, 2011, at defendant's request. The charges contained within both the information and the indictment were all filed under Adams County case No. 11-CF-93.

¶ 4 On July 11, 2011, defendant filed a motion to dismiss, asserting a speedy trial violation (725 ILCS 5/103-5 (West 2010)) for the State's failure to bring defendant to trial within 120 days of his initial arrest. The trial court denied the motion and the case proceeded to trial. Following the presentation of evidence, the parties held a jury instruction conference. The State tendered a non-pattern jury instruction defining the term "enter" with regard to the charge of residential burglary. Over defendant's objection, the trial court tendered the instruction to the jury. Following deliberations, the jury returned a guilty verdict.

¶ 5 Defendant filed no posttrial motions. Following a September 2011 sentencing hearing, the trial court sentenced defendant to 10 years in prison.

¶ 6 Defendant appeals, asserting (1) the trial court erred in denying his motion to dismiss for lack of a speedy trial, (2) the court erred in allowing a non-pattern jury instruction, and (3) defense counsel was ineffective for failing to preserve these issues in a posttrial motion. We affirm in part and reverse in part, remanding the case for further proceedings.

¶ 7 I. BACKGROUND

¶ 8 Defendant was arrested on February 15, 2011, in Adams County, Illinois. On February 18, 2011, the State charged defendant by information with seven counts of residential burglary allegedly occurring on February 14, 2011. The case proceeded to a preliminary hearing on March 1, 2011, at which time the trial court found probable cause as to counts I and II only. The court dismissed the remaining counts for lack of probable cause. The

court then scheduled the case for a May 9, 2011, jury trial, with a final pretrial hearing on April 27, 2011.

¶ 9 On March 24, 2011, a grand jury indicted defendant on nine additional counts of residential burglary allegedly occurring over the course of several dates: December 24, 2010, January 3, 2011, January 31, 2011, and February 14, 2011. The charges contained within both the information and the indictment were consolidated under Adams County case No. 11-CF-93. The trial court arraigned defendant on the indictment on April 5, 2011, and, at defense counsel's request, scheduled the case for trial on July 11, 2011. Defendant, personally present, also agreed to the July 11, 2011, trial date.

¶ 10 Defendant filed a motion to sever counts on June 24, 2011. On July 11, 2011, defendant filed a motion to dismiss counts I and II, asserting a speedy trial violation (725 ILCS 5/103-5 (West 2010)). At the hearing on defendant's motion to dismiss, defendant argued the State violated his right to a speedy trial by failing to take the case to trial during the May 2011 trial setting. Defendant explained, though he did request a continuance during the April 5, 2011, court appearance, that motion pertained only to those counts contained within the indictment, not the original two counts charged by information. The State countered, stating defendant's motion to continue on April 5, 2011, constituted a motion to continue the entirety of the case until July 2011, thus tolling the statutory 120-day speedy trial period. The State then explained, "it is *** crucial to note that under our system of docketing, a subsequent indictment obtains the same case number and remains part of the same case *in toto* with the original filing in this case and the original docket number." Based on this docketing system, the State argued, it would try the entire case at once, "unless a motion to sever has been filed and an order has been entered with

regard to that." After hearing arguments, the trial court denied the motion to dismiss and the case proceeded to jury trial solely on count II.

¶ 11 At trial, the State presented evidence showing an individual shot BBs through a closed window at the residence of Ronald Reddick. Reddick testified he habitually locked the deadbolt of his back door, but "hardly ever" locked the door handle. When Reddick returned home on February 14, 2011, however, he discovered the deadbolt to be unlocked while the tumbler was locked. He later acknowledged uncertainty as to whether the deadbolt was locked when he returned home. Reddick also noted his wife returned home from work before him.

¶ 12 Upon entering the residence, Reddick discovered a bent clothes hanger on a table near the kitchen window. As Reddick examined the area more closely, he discovered two small holes in one of the kitchen windows, as well as BBs on the floor and windowsill. Only one of the two window locks was in an unlocked position, and Reddick conceded no one could have entered the residence without breaking either the window or the door to gain access. No items were missing from the home. Investigator Bradley Waddill, who investigated the scene, failed to collect the clothes hanger or BBs. He did, however, locate impressions of shoe treads left in the snow near the window outside of the Reddick residence, though he did not compare those treads to any shoes owned by Reddick or his wife. Waddill opined an individual shot the window with BBs, then threaded a hanger through the hole to unlock the window.

¶ 13 Reddick's nephew and neighbor, Bradley Moulton, told Reddick about an incident earlier in the day. Moulton testified he returned home and noticed a gray or green Honda Accord parked in front of the Reddick entrance. Moulton parked his own vehicle in the driveway he shared with the Reddicks. Shortly thereafter, an individual, later identified as defendant,

approached Moulton's vehicle from the general area of the Reddick residence. Defendant asked Moulton if the Smith family lived in the residence. When Moulton explained it was not the Smith residence, defendant left in the Honda Accord.

¶ 14 Also on February 14, 2011, residents in the general area reported two additional residential burglaries. At the Goetz residence, officers discovered a broken window with BBs located on the floor of the residence. The homeowner reported a coin jar containing \$80-\$100 of loose change missing. Officers also found shoe impressions at the scene similar to those found at the Reddick residence. At the Potter residence, officers discovered the basement door pried open with no evidence of BBs. The homeowners reported as missing (1) 10 jars and 1 wooden box of silver change valuing approximately \$3,500 and (2) a prescription bottle containing 250 Trazedone pills. Officers also located shoe impressions similar to those at the Reddick residence.

¶ 15 Based on these residential burglary reports, officers asked local banks to report any individuals cashing in large amounts of silver change. Two banks reported an individual, later identified as defendant, cashing in loose change—\$876 in mostly silver coin at one location and \$834 in silver coin at another location.

¶ 16 Investigator Waddill obtained a search warrant for defendant's home and vehicle, a black Honda Accord. Within the home, he recovered shoes with a tread consistent with the shoe print left at the Reddick, Goetz, and Potter residences, surgical gloves, and a bent coat hanger. In the vehicle, Waddill discovered surgical gloves, BBs, a BB gun, carbon dioxide cartridges ordinarily used in the firing of a BB gun, and Trazedone pills within a surgical glove. Waddill conceded the shoe measurements did not reflect precise matches to one another, but he explained the tilt of the ruler caused the discrepancy.

¶ 17 Investigator Lohmeyer then interviewed defendant. Defendant denied committing any residential burglaries but expressed concern he might confess to a crime the police did not already know about. Therefore, defendant reasoned it was in his best interests not to confess to anything.

¶ 18 Following the presentation of evidence, the parties held a jury instruction conference. In addition to the customary jury instructions, the State tendered a non-pattern instruction defining the term "enter" with regard to the charge of residential burglary, citing to *People v. Beauchamp* (241 Ill. 2d 1, 944 N.E.2d 319 (2011)). Defendant objected, arguing the instruction misstated the law. Specifically, defendant argued the instruction would allow jurors to find defendant guilty if they found he placed a coat hanger through the BB hole, even though the law required defendant to use the instrument to actually commit the burglary. After reviewing *Beauchamp* and other case law, the trial court overruled the objection and modified the instruction to read:

"The term 'enter' means an intrusion by any part of the body, however slight, into the protected enclosure, or by an intrusion with an instrument, however slight the intrusion, into the protected enclosure, if done so with the intent to commit the offense of theft."

¶ 19 Later, during closing argument, the State first argued the jury should find defendant guilty beyond a reasonable doubt because the evidence suggested defendant was physically present within the Reddick residence. The State continued, adding,

"But even if we were to accept for purposes of discussion that he

[defendant] didn't get all the way in there, entry occurs when even a part of the body, however slight, crosses that imaginary plain [sic] or goes through the window after you have succeeded in getting it open with your BB gun and your hanger. It also means that entry into that building with any sort of instrument, like a BB gun, like a hanger, however slight an intrusion it is with that instrument, if your intent is to commit a theft."

¶ 20 On this evidence, the jury returned a guilty verdict. Counsel for defendant filed no posttrial motions. Following a sentencing hearing in September 2011, the trial court sentenced defendant to 10 years in prison.

¶ 21 This appeal followed.

¶ 22 II. ANALYSIS

¶ 23 On appeal, defendant contends (1) the trial court erred in denying his motion to dismiss for lack of a speedy trial, (2) the court erred in allowing a non-pattern jury instruction, and (3) defense counsel was ineffective for failing to preserve these issues in a posttrial motion. We address these assertions in turn.

¶ 24 A. Speedy Trial

¶ 25 Defendant first argues the trial court erred in denying defendant's motion to dismiss his case based on a speedy trial violation (725 ILCS 5/103-5 (West 2010)). A speedy trial is a fundamental right that will be reviewed under the plain-error doctrine, despite defendant's failure to preserve the issue for appeal. *People v. Gay*, 376 Ill. App. 3d 796, 799, 878 N.E.2d 805, 808 (2007). "[A]ny factual determinations made by the trial court, which are

contained in the record, shall be upheld on review unless they are against the manifest weight of the evidence." *People v. Crane*, 195 Ill. 2d 42, 51, 743 N.E.2d 555, 562 (2001). The court's ultimate ruling on a speedy trial violation will not be overturned unless the trial court abused its discretion. *People v. Buford*, 374 Ill. App. 3d 369, 372, 870 N.E.2d 995, 998 (2007). The relevant portion of the speedy-trial statute states as follows:

"Every person in custody in this State for an alleged offense shall be tried by the court having jurisdiction within 120 days from the date he was taken into custody unless delay is occasioned by the defendant[.] *** Delay shall be considered to be agreed to by the defendant unless he or she objects to the delay by making a written demand for trial or an oral demand for trial on the record." 725 ILCS 5/103-5(a) (West 2010).

¶ 26 This case turns on the nature of the charges filed both in the information and in the indictment. The State initially charged defendant with seven counts of residential burglary, all allegedly occurring on February 14, 2011. When the court dismissed five of those counts at preliminary hearing, the State obtained an indictment for those previously dismissed charges as well as other residential burglary charges. In other words, the charges contained within both the information and indictment alleged residential burglaries occurring on February 14, 2011.

¶ 27 The State maintains, by consolidating the information and indictment under one case number, the cases became joined under one prosecution. While it may have been the State's intention to try these counts simultaneously, we note it was not required to do so in this case. At any time during the pendency of the case, the State could unilaterally choose to proceed on any of

the counts individually and later proceed on the remaining counts, as the counts allege separate acts of residential burglary. Because the counts allege separate acts, the case was subject only to permissive joinder, as follows:

"(a) Two or more offenses may be charged in the same indictment, information or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are based on the same act or on 2 or more acts which are part of the same comprehensive transaction." 725 ILCS 5/111-4 (West 2010).

Only those new charges arising from the same act—in other words, those subject to compulsory joinder (720 ILCS 5/3-3 (West 2010))—would relate back to the initial speedy trial date of February 15, 2011. *People v. Gooden*, 189 Ill. 2d 209, 222, 725 N.E.2d 1248, 1255 (2000). During the pendency of the case, the State could elect to proceed on any of the charges independently from one another because those charges were joined permissively. *People v. Mueller*, 109 Ill. 2d 378, 385, 488 N.E.2d 523, 527 (1985).

¶ 28 Though there was only permissive joinder, defendant's April 5, 2011, request for a July trial is dispositive. When defendant made the July trial request, all of the charges, those stemming from the indictment, and those that survived preliminary hearing, were contained in one case. There was no mention of the May trial date. In addition, the trial court affirmed counsel's request for a July date with the defendant, who indicated his approval of the request. Moreover, after defendant requested a July trial date, neither party appeared to announce ready at the originally scheduled pretrial hearing in April 2011. Neither of the parties appeared for the

previously scheduled May 2011 trial. Had defendant believed his case still remained on the May trial calendar, one would assume his attorney would have been present in court, prepared to demand trial on that date. Instead, the record reflects the case was not called at all in May 2011. Moreover, defendant filed a motion to sever counts on June 24, 2011, which further demonstrates defendant's perception of the posture of the case (all charges set for trial in July). Based on the foregoing, we conclude the case was moved to July for trial at the request of the defendant, making the delay attributable to the defendant. We conclude the trial court's decision to deny defendant's motion to dismiss was not an abuse of discretion.

¶ 29 B. Non-Pattern Jury Instruction

¶ 30 Defendant contends the trial court erred in giving a non-pattern jury instruction defining the term "enter" with regard to the residential burglary charge. Because defendant failed to preserve this issue in a posttrial motion, defendant has forfeited the issue unless he can prove plain error. *People v. Brandon*, 243 Ill. App. 3d 515, 523, 611 N.E.2d 1314, 1320 (1993), Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999). Under the plain-error doctrine, a reviewing court may consider an unpreserved error when (1) "a clear or obvious error occurred" and (2) either the evidence "is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error" or the error "is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410-11 (2007); see also *People v. Herron*, 215 Ill. 2d 167, 186-87, 830 N.E.2d 467, 479 (2005).

¶ 31 1. *Whether Tendering a Non-Pattern Instruction Constitutes Clear or Obvious Error*

¶ 32 On review, our first step is to determine whether tendering a non-pattern instruction for the term "enter" constituted "clear or obvious error." Trial courts have discretion to tender non-pattern jury instructions when the parties can find no appropriate Illinois pattern jury instruction. *People v. Hudson*, 222 Ill. 2d 392, 400, 856 N.E.2d 1078, 1082 (2006). Though courts have the discretion to tender non-IPI instructions, "tendering such instructions is only proper if they are accurate, simple, brief, impartial, nonargumentative statements of the law." *People v. Bush*, 157 Ill. 2d 248, 254, 623 N.E.2d 1361, 1364 (1993).

¶ 33 The pattern instruction defining residential burglary reads as follows: "A person commits the offense of residential burglary when he knowingly and without authority enters the dwelling place of another with the intent to commit therein the offense of [theft]." Illinois Pattern Jury Instructions, Criminal, No. 14.13 (4th ed. 2000) (IPI Criminal 4th No. 14.13). Asserting, correctly, that no pattern instruction defines the word "enter," the State tendered a non-pattern definition of "enter" based on *People v. Beauchamp*, 241 Ill. 2d 1, 944 N.E.2d 319 (2011), which ultimately read, "[t]he term 'enter' means an intrusion by any part of the body, however slight, into the protected enclosure, or by an intrusion with an instrument, however slight the intrusion, into the protected enclosure, if done so with the intent to commit the offense of theft."

¶ 34 In *Beauchamp*, the State charged the defendant, Beauchamp, with burglary when circumstantial evidence indicated Beauchamp reached his arm into a motor vehicle to remove a window. *Id. Beauchamp*, 241 Ill. 2d at 9-10, 944 N.E.2d at 323-24. At trial, Beauchamp argued there was insufficient evidence to prove he "entered" the vehicle. *Beauchamp*, 241 Ill. 2d at 6,

944 N.E.2d at 321. The supreme court held "[a]n entry for purposes of the [burglary] statute does not require intrusion by a person's entire body; an intrusion by part of the body into the protected enclosure is sufficient, even if the intrusion is slight." (Internal citations omitted.) *Beauchamp*, 241 Ill. 2d at 8-9, 944 N.E.2d at 323. The supreme court also took note of the principle, "[a]n entry also may be accomplished by breaking the close with an instrument, rather than the defendant's person, but only if done with the intention of using the instrument to commit the intended felony or theft." *Beauchamp*, 241 Ill. 2d at 9, 944 N.E.2d at 323; see also *People v. Palmer*, 83 Ill. App. 3d 732, 736, 404 N.E.2d 853, 856 (1980).

¶ 35 Defendant argues the instruction misrepresents the holding in *Beauchamp*; therefore, defendant contends, the trial court made a clear or obvious error by tendering the instruction to the jury. We agree. Here, the jury instruction inaccurately stated the law with regard to breaking the close with an instrument. As the jury instruction is written, a reasonable jury could infer the BBs or clothes hanger breaking the close would be enough to constitute residential burglary, so long as defendant intended to commit a theft if and when he accessed the residence. That is not the law. To support a residential burglary conviction, the law requires a defendant who uses an instrument to break the close and who *intends to use the instrument to commit the intended felony or theft*. *Beauchamp*, 241 Ill. 2d at 9, 944 N.E.2d at 323.

¶ 36 Here, the State's evidence indicated defendant allegedly shot the victim's window with a BB gun, then threaded a hanger through the hole to unlock the window. No evidence at trial supported the finding defendant intended to use the hanger or BBs in the actual commission of a theft; rather, the evidence indicated defendant used those items to enable his entry into the

home. See *People v. Davis*, 3 Ill. App. 3d 738, 740, 279 N.E.2d 179,181 (1972) (an instrument used to create a hole in the wall failed to constitute "entry" under burglary statute).

¶ 37 Based on the inaccurate statement of the law, we conclude the trial court abused its discretion in allowing the non-pattern jury instruction defining "enter" with regard to a residential burglary case. Therefore, we hold giving the instruction was a clear or obvious error.

¶ 38 *2. Whether the Clear or Obvious Error Constitutes Plain Error*

¶ 39 Having determined the trial court committed clear or obvious error in giving the non-pattern jury instruction, we next look to whether the clear or obvious error requires reversal as plain error. This court will only reverse a clear or obvious error if (1) "the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error" or (2) the "error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *Piatkowski*, 225 Ill. 2d at 565, 870 N.E.2d at 410-11.

¶ 40 Defendant does not argue plain error under the closely balanced prong. He instead asserts the error was so serious that it affected the fairness of his trial and challenged the integrity of the judicial process. We agree.

¶ 41 Tendering an incorrect instruction to the jury regarding an element of the offense does not constitute reversible error *per se*. *People v. Hopp*, 209 Ill. 2d 1, 10, 805 N.E.2d 1190, 1196 (2004). However, as several cases have noted, the failure to correctly inform the jury "of the elements of the crime charged has been held to be error so grave and fundamental that the waiver rule should not apply." *People v. Ogunsola*, 87 Ill. 2d 216, 222, 429 N.E.2d 861, 864 (1981); see also *People v. Jenkins*, 69 Ill. 2d 61, 66-67, 370 N.E.2d 532, 534 (1977), *People v.*

Davis, 74 Ill. App. 2d 450, 454, 221 N.E.2d 63, 66 (1966), *People v. Lewis*, 112 Ill. App. 2d 1, 250 N.E.2d 812 (1969). "Jury instructions that incorrectly define the offense cause prejudice to a criminal defendant far more serious than instructions that do not include a definition of a term." *Ogunsola*, 87 Ill. 2d at 223, 429 N.E.2d at 864 (1981).

¶ 42 On review, "[t]he defendant need not prove that the error in the instruction actually misled the jury." *People v. Herron*, 215 Ill. 2d 167, 193, 830 N.E.2d 467, 483 (2005). A defendant must show the erroneous instruction "creates a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law, so as to severely threaten the fairness of the trial." *Hopp*, 209 Ill. 2d at 8, 805 N.E.2d at 1194. Alternatively, "[a]n error in a jury instruction is harmless if it is demonstrated that the result of the trial would not have been different had the jury been properly instructed." *People v. Pomykala*, 203 Ill. 2d 198, 210, 784 N.E.2d 784, 791 (2003) (citing *People v. Johnson*, 146 Ill. 2d 109, 137, 585 N.E.2d 78, 90 (1991)). An instructional error may be deemed harmless in circumstances in which evidence of guilt is clear and convincing. *People v. Dennis*, 181 Ill. 2d 87, 95, 692 N.E.2d 325, 330 (1998).

¶ 43 Defendant relies on *Ogunsola*, asserting the inaccurate instruction for "entry" in the case at bar failed to correctly inform the jury of the elements of the crime; thus, fundamental fairness requires reversal. In *Ogunsola*, the appellate court found plain error where jury instructions for the charge of deceptive practices omitted the element "intent to defraud," which was an issue disputed by the parties at trial. *Ogunsola*, 87 Ill. 2d at 222, 429 N.E.2d at 864. We find that case analogous and instructive.

¶ 44 In the present case, not only did the jury receive an inaccurate non-pattern instruction, the State emphasized the instruction during closing arguments. The State began by discussing, at length, facts to support defendant's physical presence within the home, specifically the switched door locks and the bent clothes hanger on a table. However, following that discussion, the State went on to say,

"Even if we were to accept for purposes of discussion that he [defendant] didn't get all the way in there, entry occurs when even a part of the body, however slight, crosses that imaginary plain [sic] or goes through the window after you have succeeded in getting it open with your BB gun and your hanger. It also means that entry into that building with any sort of instrument, like a BB gun, like a hanger, however slight an intrusion it is with that instrument, if your intent is to commit a theft."

¶ 45 The prosecutor's emphasis on the jury instruction, stating that the defendant is guilty of "entry" for purposes of a residential burglary conviction by shooting the window with a BB gun or threading a hanger through the window, is an incorrect statement of the law, as stated above, and lowers the burden of proof for the State. We have no way of knowing whether the jury's inquiry ended once it determined defendant pierced the window with the BB gun or threaded a hanger through the window, so we cannot say the result of the trial would have been the same, regardless of this instruction. See *People v. Taylor*, 166 Ill. 2d 414, 438, 655 N.E.2d 901, 913 (1995) ("The jury is presumed to follow the instructions that the court gives it"). Moreover, while the evidence strongly suggests a finding of guilty regarding attempt

(residential burglary), the evidence is substantially weaker regarding the physical entry required for residential burglary; thus, we conclude defendant's guilt is not so clear and convincing as to render the instruction harmless.

¶ 46 When a jury instruction contains an inaccurate statement of law, particularly with regard to a disputed element of the offense, which is magnified by the prosecutor discussing that inaccurate instruction during closing arguments, fundamental fairness requires us to reverse to preserve the integrity of the judicial process.

¶ 47 C. Ineffective Assistance of Counsel

¶ 48 Defendant asserts, alternatively, if he is not entitled to relief under the plain-error doctrine, he should be entitled to relief due to his counsel's ineffective assistance of counsel in failing to preserve the issues discussed above in a posttrial motion. We need not address these issues at this time because we conclude (1) the trial court correctly denied defendant's motion to dismiss for lack of speedy trial and (2) the error with regard to the jury instructions amounted to plain error, despite counsel's failure to preserve the issue. Thus, defendant has suffered no prejudice as a result of trial counsel's failure to preserve those issues in a posttrial motion. See *Strickland v. Washington*, 466 U.S. 668 (1984) (an attorney is ineffective if he makes an objectively unreasonable mistake that prejudices the client).

¶ 49 III. CONCLUSION

¶ 50 For the reasons stated, we affirm the denial of defendant's motion to dismiss on speedy trial grounds. We reverse and remand for a new trial based on the jury instruction issue, and we need not address defendant's final issue regarding ineffective assistance of counsel. The case is remanded for a new trial. As part of our judgment, we award the State its \$50 statutory

assessment against defendant as costs of this appeal. See *People v. Smith*, 133 Ill. App. 3d 613, 620, 479 N.E.2d 328, 333 (1985) (citing *People v. Nicholls*, 71 Ill. 2d 166, 178, 374 N.E.2d 194, 199 (1978)).

¶ 51 Affirmed in part, reversed in part, and cause remanded with directions.