

NOTICE

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2014 IL App (4th) 121028-U

NO. 4-12-1028

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

February 13, 2014
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
CRAIG RYAN WISSMILLER,)	No. 12CF76
Defendant-Appellant.)	
)	Honorable
)	Robert L. Freitag,
)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Appleton and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* Where defendant's motion to continue his trial in response to the testimony of a State's witness would result in a minimum 10-day delay in the conclusion of his trial and the impeachment evidence did not appear to be strong, the trial court did not abuse its discretion by denying the continuance.

¶ 2 In February 2012, a grand jury indicted defendant, Craig Ryan Wissmiller, with one count of home invasion (720 ILCS 5/12-11(a)(2) (West 2010) (text of section effective July 1, 2011)), one count of mob action (720 ILCS 5/25-1(a)(1) (West 2010)), and one count of criminal trespass to a residence (720 ILCS 5/19-4(a)(2) (West 2010)). After a June 2012 trial, a jury found defendant guilty of all three charges. In July 2012, defendant filed a posttrial motion, asserting, *inter alia*, the McLean County circuit court erred by denying his motion to continue his trial to secure the testimony of Normal police officer Robert Latz. In August 2012, the court denied defendant's posttrial motion and sentenced him to 12 years' imprisonment for home inva-

sion. Defendant filed a motion to reconsider his sentence. After an October 2012 hearing, the court reduced defendant's sentence to 10 years' imprisonment for home invasion.

¶ 3 Defendant appeals, arguing the trial court erred by denying his motion to continue his trial to allow him to subpoena Officer Latz. We affirm.

¶ 4 I. BACKGROUND

¶ 5 On January 21, 2012, Mark Schiewe, Martin Teresi, Jacob Cousin, and Samuel Dickie all resided at 606 Church Street, Apartment 6, in Normal, Illinois (hereinafter Apartment 6). Schiewe's and Cousin's bedrooms were in the basement of the three-level apartment, and Teresi's and Dickie's bedrooms were on the second floor. Late that night, the four roommates had a party on the main level of the apartment. Defendant's sons, Corey and Caleb Wissmiller, attended the party. At some point, Schiewe's iPod went missing, and the roommates decided to prevent guests from leaving until the iPod was found. While searching for the missing iPod, a fight broke out, which involved Corey. The roommates then decided to allow people to leave. Caleb exited the apartment out the front door, and Corey exited from the back door. After his exit, Corey attempted to reenter the apartment to look for Caleb, but the roommates would not let him. Corey then punched out the back light fixture of Apartment 6 and a neighbor's window. The police came to Apartment 6 and talked with the roommates. After the police left, Teresi and Cousin left Apartment 6.

¶ 6 Corey met up with his girlfriend, Ashley Miller, and had her drive him to where defendant was playing cards. Corey told defendant he and Caleb had been "jumped," and he could not find Caleb. Defendant, Corey, Ryan Holt, and an unknown male who had been playing cards with defendant got into Miller's car to search for Caleb. After driving around looking for Caleb for some time, the group went to Apartment 6. Miller remained in the car while the

four men went to the front door of Apartment 6.

¶ 7 According to Dickie, the four men entered Apartment 6 without invitation at about the same time Dickie reached the main level of the apartment. At some point, defendant told Dickie to get off his cellular telephone (cell phone), knocked the cell phone out of Dickie's hand, and kicked it away. Defendant asked Dickie about Caleb's and Cousin's whereabouts. Dickie took the four men to the basement. While there, Schiewe's bedroom door was forcefully opened. Schiewe confronted Holt, and Holt punched Schiewe several times in the face. When Holt ceased punching Schiewe, Cousin could be heard coming home. The four men went upstairs to talk with Cousin, and when Cousin did not know Caleb's whereabouts, the four men left. Once the four men went upstairs, Dickie called 9-1-1. Officer Latz was one of the responding officers that talked with Dickie after the second incident.

¶ 8 The grand jury's February 8, 2012, home-invasion and criminal-trespass-to-a-residence indictments asserted defendant's entry into Apartment 6 was without authority. The mob-action charge alleged defendant committed that offense by acting with Corey and Holt to force entry into "the residence of Mark Schiewe and battered Schiewe." The same three charges brought against defendant were also brought against Corey (No. 12-CF-80) and Holt (No. 12-CF-115). In March 2012, the State filed a motion to consolidate the three cases, which the trial court granted. The last order addressing subpoenas for the consolidated trial had a certificate of mailing that listed only the following members of the Normal police department: Darren Wolters and Jacob Zabukovec.

¶ 9 The consolidated jury trial commenced on Monday, June 18, 2012, with jury selection. The State presented the testimony of all four residents of Apartment 6; Megan Waiflein, a neighbor of the roommates; and Officer Wolters, who interviewed Holt. Defendant testified on

his own behalf, and Holt presented the testimony of Miller. The evidence relevant to the issue on appeal is set forth below.

¶ 10 Teresi testified Corey threatened to come back and kill them when they denied him reentry to Apartment 6. Schiewe also testified Corey threatened to come back. At around 3 a.m. on January 22, 2012, Dickie was talking to his girlfriend on his cell phone in his bedroom when he heard a regular knock on the front door. He heard it about three times. Dickie took his time getting to the door. As Dickie reached the base of the stairs, the four men entered Apartment 6. According to Dickie, he was four or five feet from the front door. He denied touching the door in any way before it opened. Dickie also testified he did not gesture in any way that would indicate he was welcoming someone into the apartment or say anything that would indicate they were allowed to enter. Dickie stated the front door was not locked, and he described the door opening as if "someone turned the knob and then walked in as they opened the door." Schiewe testified he heard a "loud commotion," followed by yelling and stomping.

¶ 11 Dickie further testified the four men came in "very fast" and were immediately within arm's reach of him. Defendant told him to get off the cell phone, and Dickie did not know what to do. Defendant then grabbed the cell phone from Dickie, threw it down on the ground, stomped on it several times, and kicked it into the kitchen. Defendant wanted to know where Caleb was. When Dickie indicated he did not know, they asked where Cousin was. Dickie stated he did not know, and Cousin was not at home. They then asked where Cousin's room was. During the questioning, they were shouting and cursing at Dickie.

¶ 12 Dickie picked up his cell phone and took the four men to the basement. Dickie knocked on Schiewe's door twice, and when Schiewe did not answer, Holt kicked the door open. Schiewe also testified his door was kicked in. Schiewe got out of bed and said something to

Holt, and Holt punched Schiewe. Dickie shouted for them to stop and leave. Dickie heard Cousin come home, and the four men ran upstairs to meet him. Dickie checked on Schiewe and then called 9-1-1. According to the transcript of the 9-1-1 call, Dickie gave the following explanation of the incident to the 9-1-1 operator:

"Yeah, Yeah. The kid was here earlier, and uh, he, he stole my roommate's iPod and he got chased down. He dropped the iPod and I'm not really sure what happened, but he, his dad came back here with a few friends. And then they banged on the door. And I was coming down, they opened the door and came in and then started yelling at me and shouting at me. They took my phone, threw it on the ground. And they were threatening me. They were asking me where my other roommate was. I told them I wasn't sure and they just went through my apartment looking for him."

Dickie noted several times during the 9-1-1 call that the men just came into the apartment. During cross-examination, Dickie denied telling Officer Latz one of the men grabbed him and knocked him down. Dickie did admit he told Officer Latz he was only three-fourths of the way down the stairs when the men entered and that, while he felt threatened, none of the men actually threatened him.

¶ 13 After Dickie's testimony, which took place on Wednesday, June 20, 2012, defendant's counsel and Holt's counsel noted they were trying to obtain the appearance of Officer Latz, who was not under a subpoena, to provide impeachment testimony. Holt's counsel explained as follows what the testimony of Officer Latz would address:

"By way of proffer in terms of what we're talking about here, Mr. Dickie indicated two separate things that can be used for impeachment here.

One is the inclusion of an act that he denied having occurred during his testimony and denied making a statement to Officer Latz that he was knocked down on the floor when entry was made into his apartment building.

Additionally, we will be able to show that Mr. Dickie, during that conversation that he had with Latz, who was one of the first responding officers after the 911 call, omitted any mention of any damage being done to his cell phone or any actions being taken to that. ****"

Counsel argued the testimony was important in terms of the believability of a key State witness. Defendant's counsel also explained an arrangement existed with the police department to secure its officer's testimony without a subpoena. The court stated it would allow defendant and his codefendants to present the testimony of Officer Latz the next morning. The defense attorneys later learned Officer Latz was on his honeymoon, and the State refused to stipulate to the admission of Officer Latz's police report.

¶ 14 Defendant testified that, on the early morning in question, he went looking for his son Caleb at Apartment 6. He knocked on the door of Apartment 6 for several minutes and eventually heard the dead bolt turn, and Dickie, who was on his cell phone, opened the door. Defendant explained who he was and that he was looking for Caleb. He also mentioned Cousin because Corey noted Cousin had been nice to Corey and Caleb at the party. Dickie waved them

into Apartment 6. The four men waited for Dickie to finish his call. When Dickie finished the call, he began to lead them to the basement. Dickie's cell phone rang, and defendant admitted knocking it out of Dickie's hand and kicking it into the kitchen. Defendant also testified it was Dickie who opened the door to Schiewe's room by forcefully shaking the door handle, and that Schiewe was the one who started the altercation with Holt.

¶ 15 Miller testified she remained in her car in front of Apartment 6 while the four men were on the apartment's porch. She saw a man wave the four men into the apartment. She did not see the four men kick in the front door or force entry into Apartment 6.

¶ 16 Officer Wolters also testified that, during his interview of Holt, Holt stated the men entered Apartment 6 after a resident answered the door.

¶ 17 The next morning (Thursday, June 21, 2012), after all of the other witnesses had testified, Holt and defendant moved to continue the cause to obtain Officer Latz's testimony, and the State objected. Holt's counsel asked for leave to provide the trial court with a copy of Officer Latz's police report. The court stated counsel could supplement the record with the police report, but it did not need the report to rule on the motion. The record on appeal does not contain a copy of Officer Latz's police report. The court denied the motion, noting if a short delay was possible, it would be appropriate to grant it. However, a short delay was not possible because Officer Latz could not appear the rest of the week and the court was on vacation the next week. The court noted it was looking at a minimum of a 10-day delay in the trial. The court also stated it did not believe the inability to perfect the impeachment of Dickie's testimony would deprive defendant and his codefendants of a fair trial.

¶ 18 At the conclusion of the trial, the jury found defendant guilty of all three charges. In July 2012, defendant filed a posttrial motion, challenging, *inter alia*, the trial court's denial of

his motion to continue the trial to secure Officer Latz's testimony. At a joint August 2012 hearing, the court denied defendant's posttrial motion and sentenced him to 12 years' imprisonment for home invasion. The court did not sentence defendant on the other two charges because it found those charges merged with the home-invasion charge. Defendant filed a motion to reconsider his sentence. After an October 5, 2012, hearing, the court reduced defendant's sentence to 10 years' imprisonment for home invasion.

¶ 19 On October 31, 2012, defendant filed a timely notice of appeal in sufficient compliance with Illinois Supreme Court Rule 606 (eff. Mar. 20, 2009), and thus this court has jurisdiction under Illinois Supreme Court Rule 603 (eff. Oct. 1, 2010).

¶ 20 II. ANALYSIS

¶ 21 On appeal, defendant's sole argument is the trial court erred by denying his motion to continue his trial to allow him to subpoena Officer Latz. The State asserts the court's denial was proper. Whether to grant or deny a continuance rests within the trial court's sound discretion, and "a reviewing court will not interfere with that decision absent a clear abuse of discretion." *People v. Walker*, 232 Ill. 2d 113, 125, 902 N.E.2d 691, 697 (2009). "A trial court abuses its discretion when its decision is 'fanciful, arbitrary, or unreasonable to the degree that no reasonable person would agree with it.'" *People v. Kladis*, 2011 IL 110920, ¶ 23, 960 N.E.2d 1104 (quoting *People v. Ortega*, 209 Ill. 2d 354, 359, 808 N.E.2d 496, 500-01 (2004)). "However, '[w]here it appears that the refusal of additional time in some manner embarrassed the accused in the preparation of his defense and thereby prejudiced his rights, a resulting conviction will be reversed.'" *Walker*, 232 Ill. 2d at 125, 902 N.E.2d at 697 (quoting *People v. Lewis*, 165 Ill. 2d 305, 327, 651 N.E.2d 72, 82 (1995)).

¶ 22 Initially, we note section 114-4(f) of the Code of Criminal Procedure of 1963

(Procedure Code) (725 ILCS 5/114-4(f) (West 2012)) provides that, "[a]fter trial has begun a reasonably brief continuance may be granted to either side in the interests of justice." Further, in determining whether an abuse of discretion occurred, reviewing courts must consider the case's facts and circumstances, and " '[t]here is no mechanical test *** for determining the point at which the denial of a continuance in order to accelerate the judicial proceedings violates the substantive right of the accused to properly defend.' " *Walker*, 232 Ill. 2d at 125, 902 N.E.2d at 697 (quoting *People v. Lott*, 66 Ill. 2d 290, 297, 362 N.E.2d 312, 315 (1977)). Our supreme court has set forth the following factors a court may consider in determining whether to grant a continuance request by a defendant in a criminal case: "the movant's diligence, the defendant's right to a speedy, fair and impartial trial and the interests of justice." *Walker*, 232 Ill. 2d at 125, 902 N.E.2d at 697. Other relevant factors include (1) whether counsel for defendant was unable to prepare for trial because he or she had been held to trial in another cause, (2) the case's history, (3) the matter's complexity, (4) the seriousness of the charges, (5) docket management, (6) judicial economy, and (7) inconvenience to the parties and witnesses. *Walker*, 232 Ill. 2d at 125-26, 902 N.E.2d at 697.

¶ 23 Here, the trial court was willing to grant "a reasonably brief continuance" as provided in section 114-4(f) of the Procedure Code, but the circumstances of Officer Latz's honeymoon and the court's upcoming vacation did not allow for a brief continuance. Thus, the court's denial of the continuance was in accordance with section 114-4(f). Similarly, a minimum 10-day delay in defendant's jury trial would have been harmful to the court's docket management and judicial economy, as well as being inconvenient to everyone involved in the proceedings. Moreover, such a significant delay near the end of a jury trial would impact the jury's recall of the testimony presented earlier and be more likely to deny defendant a fair trial than the minor im-

peachment evidence defendant sought to introduce, which we will now discuss.

¶ 24 According to codefendant's attorney, Officer Latz's police report stated Dickie told the officer Dickie was knocked to the floor when entry was made into the apartment, and the report failed to mention any actions taken against Dickie's cell phone. (The record on appeal lacks the police report, but under the facts of this case, the lack of the report does not prohibit our review of the issue as counsel's representation of the report does not warrant reversal.) However, Dickie denied telling the officer he was knocked down, and defendant admitted knocking Dickie's cell phone down to the ground and kicking it. Additionally, Dickie's 9-1-1 call was consistent with his trial testimony. During the call, he mentioned his cell phone getting knocked to the ground and made no mention of himself getting knocked to the ground. Thus, the alleged inconsistencies have little impeachment value considering the already consistent testimony on what was knocked down after the four men entered Apartment 6. The inconsistencies between Dickie's testimony and Officer Latz's report appear to be a misunderstanding of what was knocked to the ground. While we recognize Dickie's testimony was key in establishing defendant's unauthorized entry into Apartment 6, the lack of Officer Latz's testimony did not deny defendant a fair and impartial trial or harm the interests of justice. Additionally, we note defendant's home-invasion charge was serious, but the impeachment matter was not complex. Moreover, even assuming, *arguendo*, the defense attorneys were diligent in trying to obtain Officer Latz's testimony, that diligence did not outweigh all of the other factors supporting the denial of a lengthy delay in defendant's jury trial. Accordingly, we find the trial court did not abuse its discretion by denying defendant's motion to continue.

¶ 25

III. CONCLUSION

¶ 26 For the reasons stated, we affirm the McLean County circuit court's judgment. As

part of our judgment, we grant the State's request that defendant be assessed \$50 as costs for this appeal.

¶ 27 Affirmed.