2016 IL App (2d) 131320-U
No. 2-13-1320
Order filed March 9, 2016



IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>BERNARDINO HERNANDEZ,<br><br>Defendant-Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the Circuit Court of Kane County.<br><br><br><br>No. 08-CF-1767<br><br>Honorable Karen M. Simpson, Judge, Presiding. |

PRESIDING JUSTICE SCHOSTOK delivered the judgment of the court.
Justices McLaren and Zenoff concurred in the judgment.

**ORDER**

¶ 1 *Held*: (1) The defendant was not deprived of the effective assistance of counsel; (2) the trial court did not abuse its discretion in declining to sanction the State for a discovery violation; and (3) the defendant's conviction for aggravated battery with a firearm would be vacated for violating one-act, one-crime principles.

¶ 2 Following a jury trial, the defendant, Bernardino Hernandez, was convicted of attempted first-degree murder (720 ILCS 5/8-4(a) (West 2008), 720 ILCS 5/9-1(a)(1) (West 2008)) and aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2008)) and was sentenced to a total of 35 years' imprisonment. On appeal, the defendant argues that (1) he was deprived of the effective assistance of counsel; (2) the trial court erred in not sanctioning the State for its

destruction of the gun that he allegedly used to shoot the victim; and (3) his conviction for aggravated battery with a firearm should be vacated under one-act, one-crime principles. We affirm the defendant's conviction for attempted murder and vacate his conviction for aggravated battery with a firearm.

¶ 3 BACKGROUND

¶ 4 Shortly after 3 a.m. on June 26, 2008, the victim, Guadalupe Aguirre, was shot in the back several times. The victim had been crawling off her bed, away from her bedroom window, when the shooting occurred. The victim identified the defendant, the father of her daughter, as the shooter. The victim and the defendant had been in a relationship for over six years, and in the days prior to the shooting, the victim had threatened to end the relationship because of the defendant's infidelity. As a result of the shooting, the State charged the defendant with attempted first degree murder (720 ILCS 5/8-4(a) (West 2008), 720 ILCS 5/9-1(a)(1) (West 2008)) and aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2008)).

¶ 5 Between May 20 and May 28, 2013, the trial court conducted a jury trial on the charges against the defendant. The victim testified that she had started dating the defendant during her freshman year in high school. They dated for six and a half years, and had a daughter together in 2005. In June 2008, she discovered that the defendant was dating Thalia Manzanares. The victim ended her relationship with the defendant and told him that they would have to go to court to work out a custody and visitation arrangement for their daughter. The defendant apologized but told her "that if [she] wasn't going to be with him, [she] wasn't going to be with anyone else."

¶ 6 On the morning of June 26, 2008, she awoke when she heard a knock at her window. She pulled back the curtain and saw the defendant standing there. Although she could not

understand what he was saying, she recognized his voice. She let the curtain fall and began crawling off the bed, intending to let the defendant inside. While she was crawling off the bed, she heard the glass shatter and felt a gunshot in her back.

¶ 7 The police recovered five spent shell casings from the back of the victim's house, as well as several of the fired bullets, including one that was surgically removed from the victim. An expert determined that the bullets were all fired by the same weapon, a .380 caliber semiautomatic pistol. That pistol was recovered on November 19, 2009, from DeShun Blanks after he was arrested. Blanks testified that he stole the gun from his friend Joseph Fernandez's apartment after he saw the defendant place the gun in Fernandez's oven.

¶ 8 Banks pled guilty to possessing the gun and was sentenced to three years' imprisonment. An assistant state's attorney subsequently ordered that the gun be destroyed. On November 29, 2010, the Elgin police had the gun melted down in an industrial furnace.

¶ 9 While the defendant was awaiting trial, he was incarcerated at the Kane County Jail. His cellmate for a time, Jimmie Johnson, testified that the defendant told him that he wanted Manzanares killed because she had evidence that might connect him to the victim's shooting. The defendant offered him $3,000 in money and drugs in exchange for him arranging the hit. Johnson notified the police of the defendant's plans. (The defendant was subsequently charged with the solicitation of Manzanares' murder. He pled guilty to that charge and was sentenced to a total of 20 years' imprisonment.)

¶ 10 At the close of the trial, the jury found the defendant guilty of both attempted murder and aggravated battery with a firearm. The trial court sentenced the defendant to 35 years' imprisonment for the attempted murder and 10 years' imprisonment for the aggravated battery

charge, with both terms to run concurrently. The defendant thereafter filed a timely notice of appeal.

¶ 11 ANALYSIS

¶ 12 The defendant's first contention on appeal is that his statutory right to a speedy trial was violated and his trial attorney provided ineffective assistance by failing to raise that claim in a timely fashion.

¶ 13 To establish a claim of ineffective assistance of counsel, the defendant must show counsel's performance was deficient and the deficient performance resulted in prejudice. *People v. Houston*, 226 Ill. 2d 135, 143 (2007), citing *Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's failure to assert a speedy-trial violation cannot establish either prong of an ineffective assistance claim if there is no lawful basis for raising a speedy-trial objection. *People v. Cordell*, 223 Ill. 2d 380, 385 (2006). Accordingly, we must first determine whether defendant's right to a speedy trial was violated. *People v. Phipps*, 238 Ill. 2d 54, 65 (2010).

¶ 14 The speedy trial statute provides that if a person is simultaneously in custody upon more than one charge, such person shall be tried upon all of the remaining charges within 160 days from the date on which judgment relative to the first charge prosecuted is rendered. 720 ILCS 5/103-5 (e) (West 2008). A speedy trial period is calculated by excluding the first day of the period but including the last day. *People v. Murray*, 379 Ill. App. 3d 153, 158 (2008). It is the duty of the State, not the defense, to bring the defendant to trial within the statutory period. *People v. Turner*, 128 Ill. 2d 540, 550 (1989). If a defendant is not tried within the statutory period, he must be discharged from custody and the charge must be dismissed. *People v. Woodrum*, 223 Ill. 2d 286, 299 (2006).

¶ 15 Here, the State asserts that the defendant was in custody for 143 days chargeable to the State before he was brought to trial. The defendant insists that he was in custody for 174 days chargeable to the State.[1]

¶ 16 We note that the parties dispute two different periods as to whether those periods should be chargeable to the State: December 31, 2009, to January 25, 2010 (25 days) and January 22, 2013 to January 28, 2013 (6 days). Even if the January 2013 dates were chargeable to the State, those additional days would not implicate the defendant's right to a speedy trial. Thus, we will only consider the period between December 31, 2009, and January 25, 2010.

¶ 17 The defendant was arrested on June 28, 2008. On July 1, 2008, he filed a written demand for trial. On September 9, 2009, he was released on bail. On October 22, 2009, while out on bond, the defendant requested that the trial, which was set for late October 2009, be delayed until January 25, 2010. On December 31, 2009, the defendant was re-arrested and returned to custody. The defendant argues that section 103-5(a) of the Code specifically provides that where "a defendant is taken into custody a second (or subsequent) time for the same offense, the term

[1] The State notes that from January 28 to May 13, 2013, the speedy trial clock was tolled under section 103-5(c) of the Code (725 ILCS 103-5(c) (West 2008)), which allows the State a 60-day extension to obtain the presence of a material witness. The defendant acknowledges that the trial court properly granted the State an extension under section 103-5(c) of the Code, but argues that means the State had 220 days to bring a defendant to trial, not just 160. The defendant argues that the State still missed the extended deadline because it took the State 234 days to bring the defendant to trial. We need not determine whether the applicable statutory period is 160 days or 220 days because it does not affect our ultimate resolution of whether the defendant was deprived of his statutory right to a speedy trial.

will begin again at day zero." The defendant therefore insists that "[t]he in-custody speedy-trial term thus reset on December 31, 2009, irrespective of any agreements that applied to the on-bond term, which was, obviously, terminated when [he] was brought back into custody." The State responds that because the defendant requested the new trial date of January 25, 2010, the time from December 31, 2009 to January 25, 2010, remains chargeable to him.

¶ 18 We note that neither the State nor the defendant point us to any relevant case law on this point. The defendant implicitly suggests that he does not need to because it is "obvious" that the speedy trial clock started again once he was re-arrested.

¶ 19 Our research reveals that there are two competing considerations at issue. First, there is the consideration that the speedy trial clock automatically starts from the day that the defendant is taken into custody, even if the defendant does not formally demand trial. *People v. Murray*, 379 Ill. App. 3d 153, 158 (2008). The competing consideration is that *any* period of delay caused or contributed to by the defendant tolls the applicable statutory period. *People v. Mayo*, 198 Ill. 2d 530, 537 (2002). This is because section 103-5 of the Code is intended as a shield to protect one's right to be tried promptly, not a sword to defeat a conviction. *People v. Hampton*, 394 Ill. App. 3d 683, 688 (2009). Section 103-5 of the Code is intended to promote an expeditious trial on the merits, not gamesmanship. *People v. Ingram*, 357 Ill. App. 3d 228, 234 (2005).

¶ 20 Here, we believe the defendant's agreement to a trial date that was outside the speedy trial period trumps the fact that he was returned to custody after he entered into that agreement. Our supreme court has specifically held that "any" delay caused by the defendant tolls the applicable statutory period. *Mayo*, 198 Ill. 2d at 537. As this delay was attributable to him, he cannot now complain that this delay deprived him of a right to a speedy trial. To hold otherwise

would allow him to use section 103-5 as a sword and to defeat his conviction on the basis of gamesmanship. That, of course, we decline to do. See *Hampton*, 394 Ill. App. 3d at 688; *Ingram*, 357 Ill. App. 3d at 234.

¶ 21 Because we believe that a motion to dismiss the charges against the defendant on speedy trial grounds would have been futile, defense counsel was not ineffective for failing to file such a motion. *Cordell*, 223 Ill. 2d at 385.

¶ 22 We next address the defendant's argument that his trial counsel was ineffective when she cross-examined the State's witnesses and bolstered the State's case by eliciting several highly inculpatory and generally inadmissible statements. The defendant argues that all of these instances of cross-examination share a common trait: defense counsel elicited highly inculpatory information that would not have been admitted otherwise. The defendant asserts that even if defense counsel wanted to show that the victim possessed some uncertainty about who shot her, there was no need to introduce all of her statements. The defendant also insists that there was no strategic reason for defense counsel to question other witnesses in such a way as to draw more connections between the defendant and the gun that was used to shoot the victim.

¶ 23 The victim testified on direct examination that the defendant had shot her. On cross-examination, defense counsel questioned the victim regarding statements that she had made to the police following the shooting that she was "90 percent sure" that the defendant was the one who had shot her. The victim testified that she did not recall making those statements.

¶ 24 Blanks testified on direct examination that he saw the defendant in possession of a gun at Fernandez's apartment and that he took the gun after he saw the defendant hide the gun in the oven. On cross-examination, Blanks testified that he did not see the defendant place the gun in the oven.

¶ 25 Attorney Brian Erwin, a former assistant state's attorney, testified on direct examination that he filled out paperwork authorizing the destruction of the gun because he did not associate the weapon with the defendant. On cross-examination, defense counsel questioned Erwin about whether there were multiple references in the police report to the fact that the defendant was potentially connected to the gun. Erwin acknowledged that there were.

¶ 26 In closing arguments, defense counsel argued that the victim's identification of the defendant as her shooter had evolved from a less-than-certain identification at the time of the shooting. Defense counsel argued that the police had engaged in a rush to judgment and a slipshod investigation that overlooked Blanks' actual involvement in the crime. Defense counsel emphasized that Blanks was shown to be a liar and that the State's destruction of the gun prevented the defense from being able to show that.

¶ 27 A defendant is entitled to competent representation, not perfect representation. *People v. West*, 187 Ill. 2d 418, 432 (1999). Errors in strategy do not constitute ineffective assistance of counsel. *People v. Gonzalez*, 407 Ill. App. 3d 1026, 1038 (2011). Only when a strategic decision is shown to be so ill-chosen that it permeates the entire trial with obvious unfairness will the strategy constitute ineffective assistance of counsel. *People v. Manning*, 241 Ill. 2d 319, 343 (2011).

¶ 28 Here, we do not believe that defense counsel's strategy rose to the level of ineffective assistance of counsel. Defense counsel was confronted with some difficult evidence: the defendant's former girlfriend identified him as the person who shot her and the gun that was used in the shooting was traced to the defendant. Defense counsel tried to undermine the victim's testimony by accentuating that she was less than 100% certain that the defendant was the one who shot her immediately after the shooting. Defense counsel tried to portray Blank as a liar

who had given conflicting versions of how he got possession of the gun involved in the crime. Defense counsel tried to insinuate that Erwin's careless authorization to destroy the gun reflected the State's rush to judgment and its failure to find the person who had actually shot the victim. Based on the evidence in the case, defense counsel's strategy that focused on attacking the victim's and Blanks' credibility as well as faulting the State for its destruction of the gun was not unreasonable.

¶ 29 In so ruling, we find the defendant's reliance on *People v. Young*, 306 Ill. App. 3d 350 (1999), to be misplaced. In *Young*, defense counsel was found to be ineffective after he elicited testimony from the victim on cross-examination that he had made 14 prior consistent statements identifying the defendant as the shooter. *Id.* at 355. Here, defense counsel tried to establish that the victim's statements made following the shooting were inconsistent with her testimony at trial. Defense counsel also tried to show through his cross-examination of Blanks that Blanks' testimony was not reliable. Although defense counsel's strategy was ultimately unsuccessful, that does not mean it was unreasonable.

¶ 30 The defendant's next contention on appeal is that he was deprived of a fair trial when the trial court failed to sanction the State in any manner for its destruction of the gun that was allegedly used to shoot the victim.

¶ 31 The sanction for a discovery violation should be proportionate to the magnitude of the discovery violation. *People v. Kladis*, 403 Ill. App. 3d 99, 117 (2010). The trial court is in the best position to determine an appropriate sanction based upon the effect the discovery violation will have upon the defendant. *People v. Koutsakis*, 255 Ill. App. 3d 306, 314 (1993). As such, the correct sanction to be applied for a discovery violation is a decision appropriately left to the discretion of the trial court, and its judgment shall be given great weight. *People v. Morgan*, 112

Ill. 2d 111, 135 (1986). An abuse of discretion exists only where the decision of the trial court is fanciful, arbitrary, or unreasonable to the degree that no reasonable person would take the view adopted by the trial court. *People v. Kladis*, 2011 IL 110920, ¶ 42.

¶ 32 Here, during the pretrial proceedings, the defendant asked Judge Timothy Sheldon to bar the State from using the gun as evidence. The trial court found that such a sanction was too harsh and would not withstand appellate scrutiny. The trial court also found that it did not have "any tools to resolve this problem," other than to order a continuance, which it did not find to be appropriate. The trial court therefore did not impose any sanctions.

¶ 33 The defendant argues that the trial court's decision was improper as a matter of law because it could have sanctioned the State in numerous different ways. See *People v. Weaver*, 92 Ill. 2d 545, 558 (1982) (in response to a discovery violation, the trial court may order disclosure of the information, grant a continuance, exclude such evidence, or enter such other order as it deems just under the circumstances). The defendant argues that the trial court comments reflect that it failed to exercise any discretion in considering an appropriate way to sanction the State, and its failure to do so constitutes an abuse of discretion. See *Seymour v. Collins*, 2015 IL 118432, ¶ 50.

¶ 34 Although Judge Sheldon's comments suggest that he did not realize that he had discretion to sanction the State, his order was nonetheless an interlocutory order that the defendant was free to challenge again even after the case was reassigned to a different judge. See *Stevens v. Village of Oak Brook*, 2013 IL App (2d) 120456, ¶ 37 (court has inherent authority to reconsider prior interlocutory orders and there is nothing improper about second judge reaching a different decision than the first judge). However, the defendant did not request the new judge (Judge Karen Simpson) to bar the State from using the gun as evidence. Rather, the defendant requested

that the trial court instruct the jury that the missing evidence would have been adverse to the State. Specifically, the defendant requested the following instruction:[2]

"Failure to Produce Evidence or a Witness

If a party to this case has failed to offer evidence within his power to produce, you may infer that the evidence would be adverse to that party if you believe each of the following elements:

1. The evidence was under the control of the party and could have been produced by the exercise of reasonable diligence.

2. The evidence was not equally available to an adverse party.

3. A reasonable prudent person under the same or similar circumstances would have offered the evidence if he believed it to be favorable to him.

4. No reasonable excuse for the failure has been shown." Illinois Pattern Jury Instructions, Civil, No. 5.01 (2011) (hereinafter, IPI Civil (2011) No. 5.01).

The trial court declined to give the requested instruction, explaining that it thought the instruction would confuse the jury because it suggested that the defendant had a duty to present evidence in his defense.

¶ 35 We do not believe that the trial court abused its discretion in declining to give IPI Civil (2011) No. 5.01. We cannot say that the trial court's determination that the proposed instruction would possibly confuse the jury was fanciful, arbitrary, or a view that no reasonable person would take. See Kladis, 2011 IL 110920, ¶ 42.

[2] Although the exact jury instruction that the defendant wanted the trial court to give does not appear in the record, the State acknowledges that the record nonetheless supports a determination that the instruction at issue was IPI Civil (2011) No. 5.01.

¶ 36 Furthermore, even if we were to find that trial court should have suppressed gun evidence or given IPI Civil (2011) No. 5.01, we would find that its failure to do so was harmless error in light of the overwhelming evidence against the defendant. Here, the defendant's former girlfriend of over six years identified him, by both his appearance and his voice, as the person who had shot her. The defendant had a motive to try to kill her as she had recently told him that she intended to restrict the amount of time that he could visit their daughter. Also, the defendant's consciousness of guilt was evident in his attempt to have Manzanares killed because he believed that she had evidence that could implicate him in the victim's shooting. Accordingly, the State had ample evidence to convict the defendant even without the gun evidence. See *In re Rolandis G.*, 232 Ill. 2d 13, 43 (2008) (error is harmless if properly admitted evidence overwhelmingly supports the conviction).

¶ 37 The defendant's final contention on appeal is that his conviction for aggravated battery with a firearm should be vacated under one-act, one-crime principles. The State confesses error, and we agree that his conviction for aggravated battery with a firearm must be vacated.

¶ 38 Under *People v. Crespo*, 203 Ill. 2d 335, 344 (2001), multiple acts will not support multiple convictions if the State has treated all such acts as one offense. We review *de novo* whether the State has treated all of a defendant's acts as one offense. See *People v. Stanford*, 2011 IL App (2d) 090420, ¶ 33.

¶ 39 Here, both the attempted murder and aggravated battery with a firearm charges alleged that the defendant shot the victim with a handgun. Although the victim was shot multiple times, the charges do not differentiate between the separate gunshot wounds. As the indictment did not indicate that the State intended to treat the defendant's conduct as multiple acts, we vacate his conviction and sentence for aggravated battery with a firearm. See *Crespo*, 203 Ill. 2d at 345.

¶ 40 CONCLUSION

¶ 41 For the reasons stated, the judgment of the circuit court of Kane County is affirmed in part and vacated in part. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4–2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 42 Affirmed in part and vacated in part.