

2012 IL App (2d) 120546-U
No. 2-12-0546
Order filed December 21, 2012

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Lake County.
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 11-CF-2321
	)	
WILLIE DAVIS,	)	Honorable
	)	Daniel B. Shanes,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Jorgensen and Spence concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court properly dismissed on speedy trial grounds two first-degree murder counts added to an indictment 115 days after defendant was taken into custody, because the first-degree murder charges were based on the same act on which the original charges were based, the State knew of sufficient facts to charge defendant with first-degree murder at the time it filed the original charges, and the first-degree murder charges were “new and additional” when compared to the original charges.
- ¶ 2 The State appeals from the dismissal on speedy trial grounds of two first-degree murder counts of an indictment filed against defendant, Willie Davis. Police took defendant into custody on July 17, 2011. One month later, on August 17, 2011, a grand jury indicted defendant on 19

charges, including 6 counts of armed violence (counts I through VI) (720 ILCS 5/33A-2(a) (West 2010)), 1 count of involuntary manslaughter (count VII) (720 ILCS 5/9-3(a) (West 2010)), 5 counts of aggravated battery (counts VIII through XII) (720 ILCS 5/12-3.05(a)(1) (West 2010)), and 7 counts of reckless conduct (counts XIII through XIX) (720 ILCS 5/12-5(a)(2) (West 2010)). On November 9, 2011, which was 115 days after police took defendant into custody, a grand jury indicted defendant on two additional charges, consisting of one count of first-degree murder based on causing another's death while acting with knowledge that his acts created a strong probability of great bodily harm (count XX) (720 ILCS 5/9-1(a)(2) (West 2010)), and one count of first-degree murder based on causing another's death while committing the forcible felony of aggravated battery (count XI) (720 ILCS 5/9-1(a)(3) (West 2010)). On April 16, 2012, the trial court dismissed the two first-degree murder counts based on violation of section 103-5(a) of the Code of Criminal Procedure of 1963 (the Code) (725 ILCS 5/103-5(a) (West 2010) (entitled, "Speedy trial")). The State filed a certificate of impairment and timely appeals. For the following reasons, we affirm.

¶ 3

BACKGROUND

¶ 4 On July 17, 2011, defendant was in a house on Highmoor Drive in Round Lake Park, Illinois, when he saw Quashawn Burks running southbound down the street being chased by a grey Ford Excursion belonging to a rival gang. Quashawn turned right onto Locust Drive, and the Excursion followed. Defendant ran through the backyard of the Highmoor residence and through the yard of the house located directly behind it on Clifton Drive. Quashawn turned right from Locust Drive onto Clifton Drive, running northbound on the street. According to defendant's written statement, he saw Quashawn run by him, and the Excursion followed shortly thereafter, traveling approximately 35 to 40 miles per hour. As the vehicle approached defendant, an occupant threw a bottle out of the

window, just missing him. Defendant picked up a landscaping brick and threw it through the vehicle's windshield. The driver lost control of the vehicle, swerved off the roadway, and crashed the Excursion head-on into a large-diameter tree.

¶ 5 The Excursion contained six occupants: Carlos Luna, the driver; Alexander Huerta, the front-seat passenger; Omar Luna, Jose Martinez, and Rogelio Lopez, the second-row passengers; and Roger Tovar, the third-row passenger. Tovar sustained minor injuries. Carlos Luna, Omar Luna, Huerta, and Martinez sustained serious injuries including broken bones. Lopez died at the scene.

¶ 6 Police arrested defendant that day. The trial court set defendant's bond at \$1,000,000. Defendant remained in custody for the remainder of the proceedings leading up to this appeal.

¶ 7 On August 17, 2011, a grand jury indicted defendant on the original 19 charges. Three of those charges related to Lopez, the deceased victim, including count I (armed violence), count VII (involuntary manslaughter), and count XIII (reckless conduct). Notably, the testimony presented to the grand jury included Officer Hector Lepe's testimony that he had consulted with Detective Adam Hyde of the Major Crash Assistance Team of Lake County (MCAT), who had informed Officer Lepe of his opinion "that the cinder block that went through the windshield definitely was a contributing factor to the vehicle losing control and hitting the tree."

¶ 8 Defendant was arraigned on August 25, 2011. On that date, the court set the matter for trial on October 31, 2011. The parties appeared in court for status hearings on several occasions in September and October. At the status hearing on October 24, 2011, defense counsel told the court that the State had informed him that morning of the possibility of filing additional charges. The State responded that the case was scheduled before the grand jury on Wednesday, October 26th, and

that the State anticipated adding charges of first-degree murder. The court cautioned the State that defendant already had been in custody for approximately 100 days.

¶ 9 The next status hearing was on October 27, 2011. No additional charges had been filed, and neither party referenced the grand jury or the possibility of filing additional charges. The parties agreed to continue the trial date to December 12, 2011.

¶ 10 At a status hearing on November 9, 2011, the State informed the court that the case would be before the grand jury later that morning. That day, the grand jury indicted defendant on the two counts of first-degree murder, consisting of count XX (causing Lopez's death while acting with knowledge that his acts created a strong probability of great bodily harm) and count XI (causing Lopez's death while committing the forcible felony of aggravated battery).

¶ 11 On December 6, 2011, defendant filed a motion to dismiss the two first-degree murder counts on speedy trial grounds. Defendant subsequently agreed to continue the trial date to January 23, 2012, and then to April 23, 2012.

¶ 12 On February 9, 2012, the court conducted the evidentiary portion of the hearing on defendant's motion to dismiss. Detective Hyde from MCAT was the only witness to testify at the hearing. On July 17, 2011, he was called to investigate a fatal accident involving a Ford Excursion that had crashed into a large tree on Clifton Drive. He spent three to four hours at the scene and completed measurements of the tire marks on the roadway and various other duties. Two days later, on July 19, 2011, Detective Hyde returned to the scene and performed skid testing. He also met with Chief George Filenko and Detective Tony Colon of the Round Lake Park police department, who informed Detective Hyde of the location where defendant was standing when he threw the

landscaping brick. Also that day, Chief Filenko and an assistant State's Attorney requested that Detective Hyde complete a formal accident reconstruction report.

¶ 13 Detective Hyde testified to the documents he compiled from various sources to complete the accident reconstruction report. He estimated that he received the MCAT accident investigative report on July 29, 2011. The investigative report, which was admitted into evidence for purposes of the hearing, was dated July 26, 2011, and contained written narratives from five officers describing their investigations, as well as detailed information about the accident scene, the damaged Ford Excursion, and various other data, but it did not contain conclusions about the causes of the accident. The report also contained almost 200 photographs of the crashed vehicle and scene. Notably, one of the written narratives reported that an alleged gang member had run “through the backyards of the houses, picked up a landscaping block,¹ and allegedly hurled the block at the Excursion as it drove past at a high rate of speed.” The officer further reported that “the thrown block was still located in the Excursion on the floorboard of the 2nd row” and that “the subject who was alleged to have thrown the block had been located and had allegedly admitted to throwing the block at the vehicle.”

¶ 14 Detective Hyde further testified that he received lab reports with the results of the drug testing of the driver of the Excursion, medical records pertaining to the injured passengers, and the coroner's report concerning Lopez's death. He estimated that he received the coroner's report in late August or early September and the last of the medical records in “[e]arly mid-September.” Detective

¹While this officer used the term “block,” the parties have used the term “brick” in their briefs; therefore, we also have used the term “brick.”

Hyde also relied on the witness statements contained in the police reports he received from the Round Lake Park police department.

¶ 15 Detective Hyde testified that he finished the MCAT accident reconstruction report in early October and presented it to two assistant State's Attorneys and Chief Filenko on October 13, 2011. In the report, Detective Hyde estimated that the Excursion was traveling approximately 55 miles per hour at the moment defendant threw the brick at the vehicle. Detective Hyde concluded that the cause of the crash was the driver's excessive speeding and failure to keep his vehicle on the roadway. Contributing causes were the driver's impairment due to a combination of cocaine, cannabis, and opiates found in his system; the pre-crash dispute between the Ford's occupants and Quashawn Burks; and defendant's "actions involving the landscape brick."

¶ 16 Following additional briefing, the court heard argument at a hearing on April 16, 2012. At the conclusion of the hearing, the court found that, in August 2011, when the State indicted defendant on the original charges, "[a]ll that was lacking was [Detective] Hyde's finished report and opinion." The court further found that, while the report contained Detective Hyde's final opinion that defendant's acts were a contributing cause to Lopez's death, Detective Hyde had held the same preliminary opinion in August. The court determined that the first-degree murder charges were subject to compulsory joinder with the original charges. The court granted defendant's motion and dismissed the two first-degree murder counts based on a speedy trial violation. The State timely appeals.

¶ 17 ANALYSIS

¶ 18 On appeal, the State argues that the trial court erroneously concluded that defendant's statutory right to a speedy trial was violated. Specifically, the State contends that, because it did not

know the facts necessary to charge defendant with first-degree murder when it filed the original charges, the subsequently filed first-degree murder charges were not subject to compulsory joinder with the original charges and, thus, not subject to the same speedy-trial period as the original charges. Alternatively, the State contends that, even if the first-degree murder charges were subject to compulsory joinder with the original charges, any delays attributable to defendant on the original charges were also attributable to him on the subsequently filed first-degree murder charges, because the first-degree murder charges were not “new and additional.”

¶ 19 Section 103-5(a) of the Code provides, in pertinent part:

“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).

The 120-day speedy-trial period begins to run automatically when a defendant remains in custody pending trial. *People v. Phipps*, 238 Ill. 2d 54, 66 (2010). If a defendant is not tried within the statutory speedy-trial period, then the defendant must be released and the charges dismissed. 725 ILCS 5/103-5(d) (West 2010). “Application of the speedy-trial act is a straightforward counting exercise when the defendant is charged with a single offense. Its application, however, becomes more complicated when the defendant is charged with multiple, but factually related, offenses at different times.” *People v. Williams*, 204 Ill. 2d 191, 198 (2003). Our supreme court has approved the following rule to govern the latter situation:

“ ‘Where new and additional charges arise from the same facts as did the original charges and the State had knowledge of these facts at the commencement of the prosecution, the time within which trial is to begin on the new and additional charges is subject to the same statutory limitation that is applied to the original charges. Continuances obtained in connection with the trial of the original charges cannot be attributed to defendants with respect to the new and additional charges because these new and additional charges were not before the court when those continuances were obtained.’ ” *Phipps*, 238 Ill. 2d at 66 (quoting *People v. Williams*, 94 Ill. App. 3d 241, 248-49 (1981)).

Our supreme court has clarified that this rule applies only where the original and subsequent charges are subject to compulsory joinder. *Phipps*, 238 Ill. 2d at 67 (citing *Williams*, 204 Ill. 2d at 207).

¶ 20 Section 3-3 of the Criminal Code of 1961 (720 ILCS 5/3-3 (West 2010)) governs compulsory joinder of charges. It applies where a defendant faces multiple charges arising out of the same conduct and provides, in pertinent part, “[i]f the several offenses are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution *** if they are based on the same act.” 720 ILCS 5/3-3(b) (West 2010).

¶ 21 Here, it is undisputed that all 21 counts of the indictment were “based on the same act” of throwing the landscaping brick through the windshield of the Excursion. The State disputes, however, whether the facts necessary to charge defendant with first-degree murder were “known to the proper prosecuting officer” at the time it filed the original charges. In addressing this issue, we will uphold any factual determinations made by the trial court unless they are against the manifest weight of the evidence. See *People v. Crane*, 195 Ill. 2d 42, 51 (2001) (applying this standard of

review in the context of a constitutional speedy-trial claim). “A finding is against the manifest weight of the evidence if the opposite conclusion is clearly evident or the finding is arbitrary, unreasonable, or not based on the evidence.” *People v. Cardona*, 2012 IL App (2d) 100542, ¶ 36. However, we review *de novo* the ultimate legal question of whether the first-degree murder charges were subject to compulsory joinder with the original charges. *People v. Wells*, 2012 IL App (1st) 083660, ¶ 23.

¶ 22 Although not cited by either party, *People v. Ursery*, 364 Ill. App. 3d 680 (2006), provides a good example of a case in which the State did not know the facts necessary to charge a defendant with first-degree murder on the date it filed its original charges. In *Ursery*, the defendant was arrested on May 19, 2002, the same day on which a fatal shooting occurred. *Ursery*, 364 Ill. App. 3d at 690. The defendant gave a written statement in which he admitted to shooting the victim twice in self-defense after the victim had “jumped” him. *Ursery*, 364 Ill. App. 3d at 684. The defendant also stated that he had immediately dropped the gun and run away, and that as he ran away he had heard more shots fired. *Ursery*, 364 Ill. App. 3d at 684.

¶ 23 On June 21, 2002, the State charged the defendant with aggravated discharge of a firearm and aggravated unlawful use of a weapon. *Ursery*, 364 Ill. App. 3d at 685. While the defendant was in jail awaiting trial, he bragged to his cell-mate about shooting the victim in the chest in retaliation for the victim’s having stolen drugs from him. *Ursery*, 364 Ill. App. 3d at 685. The defendant further bragged that he had worn gloves so that he would not leave any fingerprints on the gun. *Ursery*, 364 Ill. App. 3d at 685. After the cell-mate gave a written statement to police about the defendant’s confession, on August 26, 2002, the State charged the defendant with first-degree murder. *Ursery*,

364 Ill. App. 3d at 685. The defendant subsequently was convicted of that offense. *Ursery*, 364 Ill. App. 3d at 681.

¶ 24 On appeal, the court held that the defendant's statutory right to a speedy trial on the first-degree murder charge had not been violated, because the murder charge was not subject to compulsory joinder with the original charges. *Ursery*, 364 Ill. App. 3d at 690. The court reasoned that, although the State may have suspected that the defendant had planned to kill the victim, it was not until the defendant confessed to his cell-mate that the State's evidence indicated that the defendant had committed murder. *Ursery*, 364 Ill. App. 3d at 690. Prior to the confession, the State's only evidence had been the defendant's written statement that he had fired the gun in self-defense and then run away. *Ursery*, 364 Ill. App. 3d at 690. Thus, the facts forming the basis for the murder charge were not " 'known to the proper prosecuting officer at the time of commencing the prosecution.' " *Ursery*, 364 Ill. App. 3d at 690 (quoting 720 ILCS 5/3-3(b) (West 2002)).

¶ 25 Here, the State contends that it did not have knowledge of all of the facts necessary to charge defendant with first-degree murder at the time it filed the original charges. It contends that, until it received the MCAT accident reconstruction report from Detective Hyde in October 2011, it did not know (1) the speed of the Excursion, (2) the location of the Excursion on the roadway, (3) the location of the Excursion in relation to defendant, or (4) the line of sight between defendant and the Excursion or between the Excursion's driver and defendant. The State contends that these facts gave it "a complete visual timing" and a "full picture of the crime" such that it could then "accurately charge" defendant with first-degree murder.

¶ 26 The State's argument is unpersuasive and ignores key aspects of the record. First, while it is clear how the defendant's confession in *Ursery* provided the State with new information which

formed the basis for a first-degree murder charge, the State never articulates how the purported new facts in this case provided it with a stronger basis for filing first-degree murder charges than had existed previously. By the end of the day on July 17, 2011, the date of the incident, the State already had obtained defendant's written statement in which he admitted to throwing the landscaping brick at the Excursion. By July 19, 2011, the State also had discovered the location where defendant had been standing when he threw the brick. If these facts were not sufficient to form the basis for a first-degree murder charge, it is unclear how having "a complete visual timing" and a "full picture of the crime"—statements which are too vague to be of any assistance—somehow supplied the missing link necessary to charge defendant with first-degree murder.

¶ 27 Second, the State ignores that, had it proven the charges of the original indictment, it would have proven all of the elements of first-degree murder based on causing another's death during the commission of a forcible felony (720 ILCS 5/9-1(a)(3) (West 2010)). If the State had proven aggravated battery as charged in counts VIII through XII of the original indictment, and had it proven that defendant's actions caused Lopez's death as charged in the involuntary manslaughter count of the indictment (count VII), then it would have proven felony murder. Clearly, the State did not need additional facts in order to add a first-degree murder count to the original indictment.

¶ 28 Third, and most importantly, all of the purported new facts contained in the MCAT accident reconstruction report were available to the State in some form prior to the date of the original indictment. The State argues that the speed of the Excursion was a new fact, but defendant, in his own written statement, admitted that he threw the brick at the vehicle as it was "fly[ing] down the street lik (sic) 35 or 40 mph." While, in his final report, Detective Hyde estimated the Excursion's speed at 55 miles per hour, it is unclear how a difference of 15 to 20 miles per hour between

defendant's and Detective Hyde's estimates could have meant the difference between charging defendant with involuntary manslaughter or charging him with first-degree murder. Moreover, the MCAT accident investigative report, dated July 26, 2011, contained the statement of an officer who reported that an alleged gang member had "picked up a landscaping block, and allegedly hurled the block at the Excursion as it drove past at a high rate of speed."

¶ 29 The State also argues that it did not know the location of the Excursion on the roadway prior to receiving Detective Hyde's reconstruction report. The State overlooks the fact that the tire marks in the roadway on the date of the incident clearly identified the Excursion's location. According to Detective Hyde, one of the tire marks was 175 feet long. A "yaw" tire mark, which indicated a side-slipping vehicle, began south of the driveway on which defendant was standing when he threw the brick and ended north of the driveway. Detective Hyde testified that he completed his measurements of the tire marks during the three to four hours he was on the scene on July 17, 2011. Thus, the location of the Excursion in the roadway was not a new fact.

¶ 30 Likewise, defendant's location in relation to the Excursion was not a new fact, because Detective Hyde testified that Chief Filenko and Detective Colon informed him of the location from which defendant had thrown the brick while Hyde was at the scene performing skid testing on July 19, 2011. Furthermore, determining the "line of sight" between defendant and the Excursion or between the Excursion's driver and defendant simply required comparing facts that were available as early as July 19, 2011, almost a month before the State indicted defendant on the original 19 charges. See *People v. Izquierdo-Flores*, 332 Ill. App. 3d 632, 639-40 (2002) (*Izquierdo-Flores I*) (holding that the State's delay in filing first-degree murder charges was not due to the discovery of new evidence, even though its medical expert was not available for two months, because the expert's

opinions given after he returned from an absence were based on an autopsy report prepared before the original indictment was filed).

¶ 31 Moreover, while not directly related to the contents of Detective Hyde's final report, it is important to point out, as defendant does, that the State presented virtually identical testimony to the grand jury in August and November. In August, Officer Lepe testified before the grand jury that he had consulted with Detective Hyde, who had informed Officer Lepe of his opinion "that the cinder block that went through the windshield definitely was a contributing factor to the vehicle losing control and hitting the tree." In November, Detective Colon testified before the grand jury that Detective Hyde had investigated the incident and had concluded "that the cinder block that went through the windshield was a contributing factor to the vehicle losing control and hitting the tree."

¶ 32 In sum, the trial court's findings (1) that, in August 2011, "[a]ll that was lacking was [Detective] Hyde's finished report and opinion," and (2) that Detective Hyde's final opinion contained in the report was unchanged from the preliminary opinion Detective Hyde held prior to August 2011, were not against the manifest weight of the evidence. Because the first-degree murder charges were based on facts that were "known to the proper prosecuting officer at the time of commencing the prosecution" (720 ILCS 5/3-3(b) (West 2010)), the trial court correctly determined that the first-degree murder charges were subject to compulsory joinder with the original charges and, thus, were subject to the same speedy-trial period as the original charges.

¶ 33 The State next argues that, even if the first-degree murder counts were subject to the same speedy-trial period as the original charges, any delays attributable to defendant on the original charges were also attributable to him on the first-degree murder charges because the murder charges were not "new and additional." Citing *Phipps* and *People v. Woodrum*, 223 Ill. 2d 286 (2006), the

State contends that, because the first-degree murder charges had elements that overlapped with the elements of the original charges, defendant could not claim surprise and had sufficient notice to allow him to prepare a defense to the murder charges. We review *de novo* the legal issue of whether charges are “new and additional.” *Phipps*, 238 Ill. 2d at 67.

¶ 34 In *Phipps*, the court held that a charge of aggravated driving under the influence was not “new and additional” when filed following an original charge of reckless homicide, because the later charge alleged the same conduct, contained “essentially the same elements,” and provided for the same penalty. *Phipps*, 238 Ill. 2d at 68-69. The State had modified the indictment because the legislature had amended both the reckless homicide and aggravated driving under the influence statutes and had “ ‘recharacterized the conduct that had been reckless homicide while under the influence of drugs or alcohol as aggravated driving while under the influence.’ ” *Phipps*, 238 Ill. 2d at 69 (quoting *People v. Gancarz*, 228 Ill. 2d 312, 322 (2008)). In *Woodrum*, the court held that a subsequent indictment did not contain “new and additional” charges where the original indictment was “virtually identical” to the subsequent indictment and contained the same statutory citations for the charges. *Woodrum*, 223 Ill. 2d at 301. The only change to the subsequent indictment was the addition of the statutory language “for other than a lawful purpose,” which the State had omitted from the original indictment. *Woodrum*, 223 Ill. 2d at 300-01. As in *Phipps*, the subsequent indictment was essentially a “re-indictment of the original charges.” *Woodrum*, 223 Ill. 2d at 301.

¶ 35 *Phipps* and *Woodrum* do not stand for the proposition, as the State would have it, that charges are not “new and additional” if they contain elements that can be pieced together from the original charges. Rather, in both *Phipps* and *Woodrum*, the “new” charges were essentially the same as the original charges and carried the same penalties. In *People v. Izquierdo-Flores*, 367 Ill. App. 3d 377

(2006) (*Izquierdo-Flores II*), by contrast, the court held that a first-degree murder charge was “new and additional” when filed after an original charge of second-degree murder, even though the State would have been required to prove the same elements for each offense. *Izquierdo-Flores II*, 367 Ill. App. 3d at 384. The court reasoned, in part, that the first-degree murder charge was a more serious offense with greater penalties. *Izquierdo-Flores II*, 367 Ill. App. 3d at 384. The court also relied on the consideration that a defendant on trial for first-degree murder has the burden of proving the existence of a statutory mitigating factor if he is to be found guilty of the lesser offense of second-degree murder. *Izquierdo-Flores II*, 367 Ill. App. 3d at 384.

¶ 36 Here, first-degree murder is not even similar, let alone “virtually identical,” to any of the original charges. Moreover, first-degree murder is a more serious offense with far greater penalties than any of the original charges. The most serious charge defendant faced in the original indictment was armed violence, which was a class 2 felony as charged because defendant allegedly was armed with a brick, which is a category III weapon. See 720 ILCS 5/33A-3(b) (West 2010) (armed violence while armed with a category III weapon is a class 2 felony); 720 ILCS 5/33A-1(c)(3) (West 2010) (defining “Category III weapon,” in pertinent part, as “a bludgeon *** or other dangerous weapon of like character”). The sentencing range for a class 2 felony is three to seven years (730 ILCS 5/5-4.5-35(a) (West 2010)), and the offense is probationable (730 ILCS 5/5-4.5-35(d) (West 2010)). First-degree murder, by contrast, has a sentencing range of 20 to 60 years (730 ILCS 5/5-4.5-20(a) (West 2010)) and is non-probationable (730 ILCS 5/5-4.5-20(d) (West 2010)). Given the significant difference in penalties between the original charges and the additional charges, we cannot assume that defendant would have agreed to the same continuances had he faced all 21 counts originally.

See *Izquierdo-Flores II*, 367 Ill. App. 3d at 384 (declining to “assume that defendant would have agreed to continuances” if he had faced charges of first-degree and second-degree murder).

¶ 37 The State points out that it notified defendant at the October 24, 2011, status hearing that it would be pursuing first-degree murder charges. This consideration does not alter our analysis. At the October 27, 2011, status hearing at which defendant agreed to continue the trial date to December 12, 2011, no additional charges had yet been filed, and no mention was made of filing new charges, even though the State had indicated at the October 24, 2011, hearing that the case was scheduled before the grand jury on October 26, 2011. Thus, we cannot say that defendant knew the State would be filing first-degree murder charges when it agreed to the continuance on October 27, 2011.

¶ 38 In sum, the State did not indict defendant on the two first-degree murder charges until defendant had been in custody for 115 days. Because the State had knowledge of sufficient facts to charge defendant with first-degree murder when it filed the original charges, and because the first-degree murder charges were “new and additional,” any delays attributable to defendant on the original charges were not attributable to defendant on the first-degree murder charges. *Phipps*, 238 Ill. 2d at 66 (citing *Williams*, 94 Ill. App. 3d at 248-49). The first delay attributable to defendant on the first-degree murder charges did not occur until December 7, 2011, when defendant agreed to continue the trial date to January 23, 2011. See *People v. Boyd*, 363 Ill. App. 3d 1027, 1037-38 (2006) (holding that the defendant’s agreement to continue the trial on original charges to August 26, 2003, was not attributable to the defendant on new charges filed July 24, 2003, because no delay was attributable to the defendant on the new charges until after August 26, 2003). By December 7, 2011, defendant had been in custody for 143 days. Therefore, the trial court properly dismissed the two first-degree murder counts of the indictment based on a violation of the speedy trial statute.

¶ 39

CONCLUSION

¶ 40 For the reasons stated, we affirm the judgment of the circuit court of Lake County.

¶ 41 Affirmed.