2014 IL App (3d) 120843-U

Order filed August 15, 2014

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Tazewell County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-12-0843
v.	)	Circuit No. 10-CF-675
	)	
TYSHAWN BURCH,	)	Honorable Scott A. Shore,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE LYTTON delivered the judgment of the court.
Justices McDade and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defendant received ineffective assistance of counsel where counsel failed to move for dismissal of additional charge for violation of speedy trial statute; (2) trial court's admission of a witness's prior consistent statement was not plain error; and (3) defendant should receive credit for an additional 23 days of pretrial incarceration.

¶ 2 After a jury trial, defendant, Tyshawn Burch, was found guilty of unlawful delivery of a controlled substance, a Class 2 felony (720 ILCS 570/401(d)(i) (West 2010)), and delivery of a controlled substance within 1,000 feet of a school, a Class 1 felony (720 ILCS 570/407(b)(2)

(West 2010)). Defendant was sentenced to four years' imprisonment for the conviction on the Class 1 felony. Because the two counts merged, no conviction or sentence was entered on the Class 2 felony. On appeal, defendant argues: (1) he received ineffective assistance of counsel because his trial counsel did not file a motion that would have resulted in the dismissal of the Class 1 charge; (2) the court committed reversible error in admitting a witness's prior consistent statement; and (3) he should receive credit for 23 days of presentence incarceration not reflected in his Department of Corrections (DOC) inmate status report. We affirm as modified in part, reverse in part, and remand.

¶ 3 FACTS

¶ 4 On December 8, 2010, defendant was charged by information in Tazewell County with the unlawful delivery of a controlled substance, a Class 2 felony (720 ILCS 570/401(d)(i) (West 2010)). The information was accompanied by an affidavit of probable cause, filed by the prosecutor, alleging that defendant sold Vicodin to another student at East Peoria High School on December 6, 2010, and was taken into custody the next day. On December 30, defendant posted bond. On the same day, defendant was indicted on the unlawful delivery charge.

¶ 5 On January 10, 2011, while on bond in Tazewell County, defendant was taken into custody by Peoria County. On January 24, the court granted defendant's motion to surrender his bond, effective as of January 13, 2011. Over the next 12 months, defendant's case was continued 12 times, either on defendant's motion or by agreement. Defendant made clear on multiple occasions that he wished to resolve the Peoria County matter before proceeding to trial in Tazewell County. Defendant was housed in the Peoria County jail throughout this period, and was transported to court for proceedings in this case by the Tazewell County sheriff's department.

¶ 6 At a status hearing on January 20, 2012, defendant moved for a continuance, again indicating that he wished to have the Peoria County matter resolved before proceeding to trial. The State objected, noting to the court that "[t]his case preceded the Peoria County case." The State also informed the court in its objection that "the State would be ready to proceed to trial on February 6th." The court granted defendant's motion for an extension.

¶ 7 On February 2, 2012, the State filed a new bill of indictment. The new indictment renewed the charge of Class 2 unlawful delivery of a controlled substance (720 ILCS 570/401(d)(i) (West 2010)) (count I), and also added a charge of unlawful delivery of a controlled substance within 1,000 feet of a school, a Class 1 felony (720 ILCS 570/407(b)(2) (West 2010)) (count II).

¶ 8 On February 14, 2012, the State told the court that the new indictment contained "an additional count to the original." Defense counsel, at defendant's request, objected to the indictment on grounds of prosecutorial vindictiveness and timeliness. Defendant himself then voiced these same concerns. Defense counsel asked for and was granted a status date for 10 days later, by which time he would decide whether he would file motions making the arguments urged by defendant. On March 5, 2012, defense counsel indicated to the court that he would not file a motion to dismiss the indictment.

¶ 9 On July 6, 2012, defendant was sentenced in the Peoria County matter. The next day, defendant was transferred to the Tazewell County jail. The matter proceeded to trial on August 7, 2012.

¶ 10 The State's first witness was Paige Ashton. Ashton testified that she sat directly next to defendant at lunch on December 6, 2010. Austin McGuire sat across the table from Ashton and defendant while Tara Cassidy was seated approximately 15 feet away. Defendant asked Ashton

if she knew anyone who wanted to purchase Vicodin, and Ashton indicated that she wanted one for herself. Ashton gave defendant a $10 bill and received a yellow oval-shaped pill and $5 change in return. Defendant then told Ashton that Cassidy was going to report the drug transaction, and Ashton attempted to talk Cassidy out of making such a report.

¶ 11 Ashton testified that the next day, December 7, 2010, she was called into the office at school and questioned regarding her transaction with defendant. Ashton gave a statement to school officials and police regarding what had happened on December 6. Upon being questioned, Ashton knew that she would be in trouble with the school authorities as well as the police. The State asked Ashton if, even knowing this, she provided a "truthful statement" to school officials and police, and Ashton confirmed that she did.

¶ 12 Cassidy testified that she had the same lunch period as defendant and Ashton on December 6, 2010, but that she was seated at a different table. She witnessed Ashton give money to defendant. She also saw defendant give Ashton something, but could not tell what it was. This exchange between Ashton and defendant took place under their table.

¶ 13 Cassidy and defendant had previously been in a sexual relationship, but that relationship had ended sometime between late August and early September of 2010. On the date of the alleged transaction, Cassidy was angry at defendant because he had told people stories about her, harassed her, and hit her with crutches. She reported what she saw at lunch to the school's deans, expecting that defendant would get in trouble with the police. Cassidy also gave a statement to police on December 7.

¶ 14 Austin Brown testified that on December 6, 2010, he had the same lunch period as defendant, Ashton, and Cassidy. Brown testified that he was school acquaintances with Ashton and defendant. On the day in question, two tables were between Brown's table and the table of

Ashton and defendant. Brown witnessed "a one hand motion from [defendant's] side across the table and a hand motion back." The hand motion back was a white fist, but Brown could not tell who it was. Brown could not see whether anything was exchanged.

¶ 15 The State then called Michael Sergenti, a liaison police officer for East Peoria High School. Sergenti testified that on the morning of December 7, 2010, he drove defendant to a pharmacy so that defendant could pick up a prescription medication. Sergenti later learned that this medication was hydrocodone. Sergenti saw defendant turn this medication in to the nurse when they returned to the high school, as was required of students bringing prescription medications to the school. Later that day, Sergenti was asked to retrieve defendant and to contact police because of a drug transaction. Sergenti testified that while defendant waited for the police in his office he seemed "slightly nervous."

¶ 16 Sergenti also searched defendant's school locker. During this search Sergenti "found one bottle with 7 10 milligram hydrocodone tablets in it in clear view sitting on the top shelf." Sergenti described the pills as "little yellow tablets" and identified People's Exhibit No. 1 as the bottle of pills he found that day. The parties stipulated to the fact that the pills found in defendant's locker contained hydrocodone.

¶ 17 The defense called only one witness, McGuire. McGuire testified that on December 6, 2010, he had the same lunch period as defendant, Ashton, Cassidy, and Brown. McGuire was friends with defendant and knew Ashton and Cassidy through classes. McGuire stated that he sat with defendant at lunch on the day in question and Ashton did not sit at the table, nor did he ever see Ashton near the table. McGuire testified that although he was with defendant at lunch, there may have been a "split second" where he was not focused on defendant.

¶ 18 At closing, the State referenced Ashton's honesty on the day after the incident. "Paige

Ashton, you saw her testimony. *** She came in brutally honest, just like she did the day she was called in on December 7th, she was brutally honest." Jury deliberations began in the morning on August 8, 2012. That afternoon, the jury informed the court that it was at "a stand still," but the court told the jury to continue deliberating. After being discharged for the night, the jury reached a verdict early the next morning, finding defendant guilty on both counts.

¶ 19 On October 3, 2012, the court sentenced defendant to four years' imprisonment on count II, the Class 1 felony. Count I merged, and no conviction or sentence was therefore entered on that count. The court also ordered that defendant receive 111 days' credit for time served. The court indicated that defendant would not be credited in this case for time served in Peoria County. The 111 days of credit, according to the order, covered the periods from December 7 through December 29, 2010 (when defendant posted bond) and July 7 through October 3, 2012, the day of sentencing.

¶ 20 ANALYSIS

¶ 21 On appeal, defendant argues that he received ineffective assistance of counsel where counsel failed to file a meritorious motion to dismiss count II of the second indictment on speedy trial grounds. Defendant also contends that the court's admission of Ashton's prior consistent statement was error. Finally, defendant argues that he is entitled to additional days of credit for time served in presentence incarceration.

¶ 22 I. Ineffective Assistance of Counsel

¶ 23 A. Right to Effective Assistance

¶ 24 Criminal defendants enjoy a constitutional right to effective counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8; *Strickland v. Washington*, 466 U.S. 668 (1984). To succeed upon a claim that counsel provided ineffective assistance, a defendant must show that:

(1) counsel's performance fell below an objective standard of reasonableness, and (2) but for counsel's poor performance, there is a reasonable probability that the result of the proceedings would have been different. *Strickland,* 466 U.S. 668. In order to establish the first prong, a defendant must show that counsel's performance was so inadequate that counsel was not functioning as the counsel guaranteed by the sixth amendment. *People v. Manning*, 241 Ill. 2d 319 (2011). Where the facts are not disputed, we review a claim of ineffective assistance of counsel *de novo*. *People v. Alfaro*, 386 Ill. App. 3d 271 (2008).

¶ 25 Counsel's failure to move for a speedy trial discharge of new and additional charges may constitute ineffective assistance of counsel. *People v. Stanley,* 266 Ill. App. 3d 307 (1994). Failure of defendant's counsel to seek discharge on speedy trial grounds generally will be deemed ineffective assistance of counsel if there is a reasonable probability that defendant would have been discharged had a timely motion been made. *People v. Boyd*, 363 Ill. App. 3d 1027 (2006). Defendant's present ineffective assistance claim, therefore, turns on whether a motion to dismiss the indictment would have been meritorious; *i.e.*, whether such a motion would have resulted in the discharge of count II.

¶ 26 B. Speedy Trial

¶ 27 Both the United States and Illinois Constitutions confer the right to a speedy trial upon a defendant. U.S. Const., amend. VI; Ill. Const. 1970, art. I, § 8. The constitutional right to a speedy trial is implemented by statute pursuant to section 103-5 of the Code of Criminal Procedure of 1963 (725 ILCS 5/103-5 (West 2010)). The speedy trial statute provides, in part, "Every person in custody in this State for an alleged offense shall be tried *** within 120 days from the date he was taken into custody unless delay is occasioned by the defendant." 725 ILCS 5/103-5(a) (West 2010). If a defendant is not tried within that statutory period, the charge must

be dismissed. *People v. Woodrum*, 223 Ill. 2d 286 (2006).

¶ 28 Our supreme court has held that application of the speedy trial act "becomes more complicated when the defendant is charged with multiple, but factually related, offenses at different times. In such cases, the speedy-trial guarantee is tempered by compulsory joinder principles." *People v. Williams*, 204 Ill. 2d 191, 198 (2003). In its analysis, the court quoted the long-followed general rule:

> " '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*.' " (Emphasis in original.) *Id*. at 201 (quoting *People v. Williams*, 94 Ill. App. 3d 241, 248-49 (1981)).

In *Williams*, 204 Ill. 2d 191, the court limited the *Williams* rule (referring to the 1981 appellate decision) to new and additional charges that would be subject to compulsory joinder. Explaining the reasoning behind the rule, the court explained:

> " '[T]he concerns that attend to the right to a speedy trial come into play in those cases where the later-filed charges are based on the "same act" as the original charges, *i.e.*, in cases where the charges must be brought in a single prosecution. *** The later date could not be used by the State to "restart" the speedy-trial period, and any delay occasioned by such a late filing would not be attributable to the defendant. The State

> would be required to bring defendant to trial on all of the charges within the original speedy-trial term or face dismissal of the new charges. In such cases, fairness dictates that those charges "relate back" to the date the original charges were filed.' " (Emphasis omitted.) *Id*. at 204-05 (quoting *People v. Gooden*, 189 Ill. 2d 205, 222 (1998)).

Count II of the State's reindictment in the present case would therefore be subject to the original speedy trial term of count I if it was both "new and additional" and subject to compulsory joinder.

¶ 29 1. New and Additional Charge

¶ 30 Determination of whether a charge in a subsequent indictment is "new and additional" requires a comparison between the original charging document and the amended charging document. *Woodrum*, 223 Ill. 2d 286. The supreme court in *Woodrum*, 223 Ill. 2d at 300, held that a subsequent charge was not new and additional. The court noted that the original indictments were "virtually identical" to the subsequent indictments, and that "[t]he original and subsequent indictments contained the same statutory citation for the charges." The court found that the subsequent indictments were "essentially a re-indictment of the original charges." *Id*. at 301; see also *People v. Phipps*, 238 Ill. 2d 54, 68 (2010) (subsequent charge not "new and additional" where, *inter alia*, it "had essentially the same elements and provided the same penalty" as initial charge).

¶ 31 In the present case, the amended indictment added a charge that is properly characterized as "new and additional." Count II required the State to prove an element not included in the original indictment—delivery within 1,000 feet of a school. Indeed, count II was a wholly different offense from count I, with harsher penalties. As a result of the amended charging

document, defendant faced up to 15 years' imprisonment for a Class 1 felony (see 730 ILCS 5/5-4.5-30 (West 2010)), as opposed to the maximum of 7 years he faced under the original indictment for a Class 2 felony (see 730 ILCS 5/5-4.5-35 (West 2010)). The amended indictment represented a fundamental change to the original, and the two cannot be said to have been "virtually identical."

¶ 32 2. Compulsory Joinder

¶ 33 Section 3-3 of the Criminal Code of 1961 requires that charges for certain offenses be joined in a single prosecution. That section provides:

> "(b) If 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, except as provided in Subsection (c), if they are based on the same act.
>
> (c) When 2 or more offenses are charged as required by Subsection (b), the court in the interest of justice may order that one or more of such charges shall be tried separately." 720 ILCS 5/3-3(b), (c) (West 2010).

In the present case, both charges were based on the same act. It was plainly known to the State on December 8, 2010, that the alleged incident took place in a high school, as the prosecutor attested to that fact in the affidavit of probable cause. The new and additional charge of unlawful delivery of a controlled substance within 1,000 feet of a school was thus subject to compulsory joinder with regard to the original charge of unlawful delivery of a controlled substance.

¶ 34 3. Charges Pending in Multiple Counties

¶ 35 The State here contends that even if count II of the amended indictment relates back to the original indictment for speedy trial purposes, the 120-day period never expired. Indeed, the

State argues that for much of the pendency of defendant's trial, Tazewell County was under no speedy trial obligation. The speedy trial clock, the State contends, did not begin to run until defendant had been returned to the custody of Tazewell County on July 7, 2012. Because the amended indictment predates the start of the speedy trial term on any Tazewell County charge, any motion to dismiss count II of the amended indictment would not have been meritorious.

¶ 36 The State relies on a number of cases in support of its proposition, including *People v. Davis*, 97 Ill. 2d 1 (1983). In *Davis*, the supreme court began its analysis by noting that "[t]here is no question that the 120-day period prescribed in section 103–5(a) commences to run on the date defendant is taken 'in custody' for the offense for which discharge is sought." *Id.* at 11. Although the defendant in that case was brought twice to Madison County for court appearances, the court found that St. Clair County never relinquished custody to Madison County, and Madison County was therefore not yet subject to the 120-day period. *Davis*, 97 Ill. 2d 1.

¶ 37 Similarly, in *People v. Wiseman*, 195 Ill. App. 3d 1062 (1990), another case relied upon by the State, resolution of the speedy trial issue turned on whether a county could be considered to have the defendant in custody. Citing *Davis*, the *Wiseman* court noted that

> "[a] defendant, however, who is in custody awaiting trial in one county with a charge pending against him in another county is not deemed in custody for the latter offense until such time as the proceedings against him in the first county are terminated and he then is either returned to or held in custody for the second county. [Citations.] This is true even if the defendant already has appeared before the court in the second county but been returned to the first county. The second county does not have custody until the proceedings in the first county are concluded." *Id.* at 1064.

¶ 38 In the present case, however, there can be no doubt that defendant was in the

simultaneous custody of both Tazewell and Peoria County. When defendant surrendered his bond in Tazewell County, effective January 13, 2011, it was for the express purpose of submitting to the custody of Tazewell County. See *People v. Arnhold*, 115 Ill. 2d 379, 383 (1987) ("[A] defendant who is out on bond on one charge, and who is subsequently rearrested and returned to custody on another charge, is not returned to custody on the first charge until his bond is withdrawn or revoked."). At that point, defendant was properly considered in the custody of both Tazewell and Peoria County. See, *e.g.*, *People v. Wigman*, 2012 IL App (2d) 100736 (finding defendant to be in simultaneous custody of two counties).

¶ 39 The *Wiseman* court's discussion of a "first county" and a "second county," *Wiseman*, 195 Ill. App. 3d at 1064, is not instructive in this case. Here, defendant was arrested, indicted, held in jail, and subsequently bonded out in Tazewell County before committing any offense in Peoria County. After surrendering his bond, defendant was then, once again, in the custody of Tazewell County, though housed in Peoria County. Defendant was regularly transported to Tazewell County court by the Tazewell County sheriff's department, and there was no impediment—practically or legally—preventing the State from proceeding to trial. Though defendant *requested* that he be allowed to resolve the Peoria County charges first, that did not bar the State from bringing defendant to trial.

¶ 40 Unlike the cases cited by the State here, Tazewell County was not bound to wait its turn. Indeed, the State even objected to defendant's motion for a continuance, insisting on proceeding to trial while defendant remained housed in Peoria County. The State even referenced the fact that the Tazewell County charges predated the Peoria County charges when urging the court to deny defendant's motion for a continuance. This indicates the State's tacit agreement with what we find today: that defendant was at all times in custody of Tazewell County and able to be

brought to trial there. We therefore must reject the State's contention that Tazewell County was not subject to speedy trial requirements while defendant was housed in the Peoria County jail.

¶ 41 Defendant's 120-day speedy trial period began in Tazewell County on January 13, 2011, the date on which he surrendered his bond. Prosecutors were required to bring defendant to trial on counts I and II of the amended indictment within that period. Because count II was both "new and additional" and subject to compulsory joinder, defendant's many requested continuances did not apply to that count. Count II was actually introduced more than a year after defendant's custody began, and was therefore subject to dismissal at any point after the amended indictment was filed. Since defense counsel did not file what would have been a meritorious motion to dismiss the charge, we find that defendant received constitutionally ineffective assistance of counsel, and we reverse defendant's conviction as to count II.

¶ 42 II. Prior Consistent Statement

¶ 43 Defendant also takes issue with the admission of prior consistent statements from Ashton concerning the incident. We review a trial court's admission of a prior consistent statement under an abuse of discretion standard. See *People v. Caffey*, 205 Ill. 2d 52 (2001). "An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *Id*. at 89.

¶ 44 Defendant failed to preserve this issue for review. To overcome this forfeiture, we must determine whether the alleged error can be reviewed under the plain error doctrine. *People v. Rippatoe*, 408 Ill. App. 3d 1061 (2011). First, we must determine whether a clear and obvious error occurred. *People v. Piatkowski*, 225 Ill. 2d 551 (2007). If an error occurred, we must then determine whether the error was reversible. *Rippatoe*, 408 Ill. App. 3d 1061. Reversible error occurs when: (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 551.

¶ 45 It is well-settled in Illinois that witness's prior consistent statements are generally inadmissible. *People v. Miller*, 302 Ill. App. 3d 487 (1998). This rule applies because the "[a]dmission of such testimony would 'unfairly enhance[s] a witness' credibility because a jury is more apt to believe something that is repeated.' " *Id*. at 492 (quoting *People v. Montgomery*, 254 Ill. App. 3d 782, 792 (1993)). As an exception to this general rule, prior consistent statements may be admitted where there is a charge that testimony has been recently fabricated or that the witness has a motive to testify falsely. *People v. Harris*, 123 Ill. 2d 113 (1988). "Evidence of a prior consistent statement is not admissible, though, to rebut a charge of mistake or inaccuracy." *Miller*, 302 Ill. App. 3d at 492.

¶ 46 Testimony may constitute a prior consistent statement even when the precise words of that prior statement are not repeated. See, *e.g.*, *People v. Henderson*, 142 Ill. 2d 258, 309-10 (1990) (prior consistent statement elicited where State asked witness whether he told "the police officers that night essentially the same thing that [you're] telling the ladies and gentlemen of the jury"). In this case, the State asked Ashton if she gave a "truthful statement" to school officials and police regarding the alleged drug transaction, and Ashton affirmed that she did. This is a prior consistent statement not subject to any exceptions that would allow for its admissibility. We therefore find that a clear error was committed in admitting the testimony.

¶ 47 Defendant does not argue that the admission of Ashton's prior consistent statement was a structural error that challenged the integrity of the judicial process, instead focusing his arguments on the "closely balanced" prong of plain error analysis.

¶ 48 Under the closely balanced analysis, we must reverse if the evidence in this case is so closely balanced that the error alone threatened to tip the scales of justice against defendant. "In determining whether the closely balanced prong has been met, we must make a 'commonsense assessment' of the evidence [citation] within the context of the circumstances of the individual case." *People v. Adams*, 2012 IL 111168, ¶ 22 (quoting *People v. White*, 2011 IL 109689, ¶ 139).

¶ 49 Ashton gave clear and detailed testimony that she purchased a pill from defendant. Though a prior consistent statement can add to a witness's veracity, nothing in the record indicates any reason that a trier of fact would have reason to doubt Ashton's veracity or credibility in the first place. Ashton's testimony was corroborated by Cassidy and, to a lesser extent, Brown. Further, Sergenti testified that he found prescription pills in defendant's locker, and the parties stipulated that those pills contained hydrocodone.

¶ 50 McGuire's testimony for the defense refuted the testimony of Ashton, Cassidy, and Brown. This included the assertion that there may have been a "split second" during the lunch period in which McGuire did not observe defendant. The jury in this case obviously found Ashton, Cassidy, and Brown more credible than McGuire. Our commonsense assessment of the evidence tells us that the error in this case—Ashton's admission that she gave a truthful statement to school officials and the police—is of little importance in light of all of the evidence against defendant, and did not tip the scales for the jury. We also cannot accept the argument that the nature of the jury's deliberations in the case is itself indicative of closely balanced evidence. See, *e.g.*, *People v. Cotton*, 393 Ill. App. 3d 237, 260 (2009) ("the mere fact that the jury indicated in one note that it could not reach a decision does not render the evidence closely balanced").

¶ 51 The admission of Ashton's prior inconsistent statement, therefore, does not constitute

reversible error.

¶ 52 III. Credit for Time Served

¶ 53 Finally, defendant argues that he is entitled to 23 days credit for time served ordered by the trial court but not reflected on his DOC inmate status report. The DOC lists the first day of defendant's sentence as January 10, 2011. Defendant thus has not received credit for the 23-day period from December 7 through December 29, 2010, when he was in custody on the present charge. The court ordered that this period should be included in the calculation of defendant's credit for time served. The State concedes that defendant should be given credit for the 23 days not included on the inmate status report. The mittimus should be amended to reflect this change.

¶ 54 The State also argues that the court improperly included the day of October 3, 2012—the day of sentencing—in its calculation of defendant's presentence credit. See *People v. Williams*, 239 Ill. 2d 503 (2011) (day of sentencing should not be included in calculation of days in presentence custody). However, while the order does clearly indicate a period from July 7 through October 3, 2012, (89 days) the actual calculation of 111 days does not include the day of sentencing. The 23 days of credit from December of 2010, plus the 89 days in 2012, less one day for sentencing, totals 111 days, which is the number originally ordered by the court.

¶ 55 CONCLUSION

¶ 56 Having reversed defendant's conviction on count II of the indictment, we affirm with respect to count I. Because defendant's two convictions merged at sentencing, he was only sentenced for his count II conviction. We remand so that defendant may be sentenced for his conviction under count I.

¶ 57 The judgment of the circuit court of Tazewell County is affirmed as modified in part and reversed in part, and the cause is remanded for resentencing on count I.

¶ 58 Affirmed as modified in part and reversed in part; cause remanded.