2022 IL App (4th) 190637-U

NO. 4-19-0637

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
March 17, 2022
Carla Bender
4th District Appellate
Court, IL

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| Plaintiff-Appellee, | ) | Circuit Court of |
| v. | ) | Vermilion County |
| JAHZIEL SHUMPERT, | ) | No. 17CF294 |
| Defendant-Appellant. | ) | |
| | ) | Honorable |
| | ) | Mark S. Goodwin, |
| | ) | Judge Presiding. |

JUSTICE STEIGMANN delivered the judgment of the court.
Presiding Justice Knecht and Justice Holder White concurred in the judgment.

**ORDER**

¶ 1 *Held:* The appellate court (1) affirmed defendant's conviction and sentence for home invasion and (2) reversed the trial court's restitution order and remanded for further proceedings.

¶ 2 In March 2017, defendant, 17-year-old Jahziel Shumpert, was arrested and detained in the Vermilion County Juvenile Detention Center. The State charged him with home invasion and several other serious crimes. After conducting a juvenile transfer hearing, the trial court transferred defendant to be prosecuted as an adult. In June 2019, a jury convicted defendant of home invasion causing injury. In August 2019, the trial court sentenced him to 20 years in prison.

¶ 3 Defendant appeals, arguing the trial court erred by (1) transferring him to criminal court when the State failed to present sufficient evidence of each of the juvenile transfer factors; (2) denying defendant's motion to dismiss his case for a violation of section 103-5(a) of the Code

of Criminal Procedure of 1963, commonly known as the Speedy Trial Act (725 ILCS 5/103-5(a) (West 2016)); (3) failing to ask jurors whether they understood the *Zehr* principles; (4) denying defendant a fair trial by (a) not allowing him to call a surrebuttal witness and (b) overruling defendant's objections to the State's closing argument; and (5) ordering defendant to pay restitution for the victims' medical bills without evidentiary support for that decision.

¶ 4 Although some of defendant's arguments are not without merit, because of the overwhelming evidence of defendant's guilt, we nonetheless affirm the trial court's judgment in all aspects except for restitution, and we remand the restitution issue for additional proceedings if the State so requests.

¶ 5 I. BACKGROUND

¶ 6 A. Charges

¶ 7 In March 2017, the State filed a petition for adjudication of wardship, charging defendant by information, with (1) home invasion (dangerous weapon) (720 ILCS 5/19-6(a)(1) (West 2016)), (2) armed robbery (firearm) (720 ILCS 5/18-2(a)(2) (West 2016)), and (3) two counts of aggravated battery (great bodily harm) (720 ILCS 5/12-3.05(a)(1) (West 2016)). Finding probable cause to believe defendant was delinquent, the juvenile court issued a warrant for his arrest. On March 15, 2017, defendant was arrested and detained at the Vermilion County Juvenile Detention Center.

¶ 8 B. Transfer Proceedings

¶ 9 On March 16, 2017, the trial court conducted a detention hearing and ordered defendant detained pending further proceedings.

¶ 10 On March 17, 2017, the State filed a "Motion to Permit Prosecution Under the Criminal Laws," commonly referred to as a "motion for discretionary transfer," in which the

State requested that defendant should be prosecuted under the criminal laws rather than the Juvenile Court Act of 1987 (Juvenile Court Act) (705 ILCS 405/1-1 *et seq.* (West 2016)). In support, the State alleged that (1) defendant was 17 years old; (2) he had prior arrests for battery and possession of stolen car parts; (3) he tested positive for cannabis upon his detention; (4) the offenses he committed were (a) serious in nature, (b) not charged by accountability, and (c) committed in an aggressive manner with a deadly weapon; and (5) the security of the public required that he be sentenced under the Criminal Code.

¶ 11 In April 2017, the trial court conducted a transfer hearing. The only evidence the State presented in support of its transfer motion was testimony from Detective Patrick Carley. Carley testified that police officers responded to the home of Ryan Stoens and Hannah Rhoades on March 10, 2017, at around 7:30 p.m. and spoke to the couple regarding a reported home invasion. Carley then recounted the statements Stoens and Rhoades gave the officers regarding the events of that night.

¶ 12 Stoens returned home, parked his car, and then two men, one with a gun (suspect 1), demanded his wallet as he stood outside his car. Suspect 1 was black, about six feet tall, and was wearing a gold jacket with patches and blue jeans with jewels on them. Suspect 1 then ordered Stoens into the house at gunpoint. Once inside the house, suspect 1 asked him for car keys, which Stoens provided (giving him the keys to his fiancée's car). The other man then left the house and stole her car.

¶ 13 At this point during Carley's testimony, the State asked Carley, "Was suspect [1] ever identified?" Carley responded, "He was ID'd as [defendant], the male, defense table in the white-gray sweatshirt." The court noted the in-court identification of the defendant by the witness.

¶ 14 Carley then testified to the following.

¶ 15 After the other man left the house, defendant demanded money, Stoens's cell phone, and electronics from Stoens. Rhoades then walked out of the bathroom naked. Seeing her, defendant ordered Rhoades on her knees and for her to give him oral sex, otherwise he would shoot Stoens. However, Rhoades refused. After another refusal, defendant pistol-whipped Rhoades across the face and then kicked her. He also kicked Stoens before taking various electronics, including a PlayStation.

¶ 16 Defendant then took the electronic items and Stoens's keys to the car. However, before leaving he had accidentally dropped Stoens's cell phone outside, so he returned to the house to make Stoens help him find the phone, telling Stoens, "he [(defendant)] always fucks something up like this when he does these types of things." Eventually, he found the phone and left the house in Stoens's Mazda. Stoens and Rhoades contacted friends for help, who then contacted police.

¶ 17 Carley further testified that, when defendant was arrested, he was in possession of Stoens's cell phone and wearing a gold jacket similar to the one Stoens described the gunman as wearing. In defendant's apartment, the police recovered jeans like those Stoens described the gunman as wearing. They also found Stoens's PlayStation in the apartment of defendant's girlfriend, which was located close to defendant's apartment. Carley testified that defendant's girlfriend told Carley that defendant had brought the PlayStation over several days earlier. Defendant would frequently stay at his girlfriend's place.

¶ 18 Carley ran a Law Enforcement Agencies Data System check on defendant, which showed that he had been arrested once for battery and once for possession of stolen auto parts. However, Carley had no further information regarding those cases.

¶ 19 After Carley testified, the trial court took judicial notice of a drug test defendant took after his arrest that showed defendant tested positive for cannabis. Neither party presented further evidence.

¶ 20 Defendant then argued that the State failed to "present evidence as to all of the factors that the [c]ourt must consider when making a decision to transfer the case to adult court." Specifically, counsel argued that the State did not present evidence of (1) defendant's previous abuse or neglect history; (2) his mental, physical, and education history; (3) the advantages of treatment within the juvenile justice system; (4) available services, defendant's previous participation in those services, and his willingness to meaningfully participate in such services; or (5) defendant's rehabilitative potential. Accordingly, defendant argued he could not be transferred to criminal court without more evidence.

¶ 21 The trial court began its discussion by pointing out that, "In making a determination, I am to take into consideration all the factors. It doesn't require, however, that the State present evidence on all of the factors."

¶ 22 Subsequently, the court found that defendant was 17 years and 4 months old at the time of the offense and would be 18 by the time he would be prosecuted. Regarding defendant's criminal history, there was "evidence of a previous battery in 2016, and a possession of stolen vehicle parts in 2014." The court concluded there was no evidence of abuse or neglect, or mental health, physical, or educational history. The court stated that defendant was charged with "extremely serious crimes, which if prosecuted as an adult, would require his mandatory incarceration *** for a minimum of 6 years." Furthermore, the court concluded probable cause existed to indicate that defendant was a direct participant in the crimes and that the crimes were conducted in an aggressive manner. The court also found that the evidence was unclear as to

whether a deadly weapon was involved because no deadly weapon was recovered.

¶ 23 The trial court considered the advantages of treatment in the juvenile justice system as follows:

> "There is nothing available in the juvenile court system for [defendant] that is any different than what would be available to him in the adult Department of Corrections. If psychological treatment or care is needed, he can receive it there. If some sort of counseling is needed, he can receive it there. Education opportunities, he can receive them there. Vocational opportunities, he can receive them there. There's nothing about the juvenile court system that provides any advantages to [defendant] compared to those available to him in the adult Department of Corrections."

¶ 24 The trial court also considered the fact that if defendant was convicted in juvenile court, he would serve significantly less time than he would statutorily be required to serve if convicted as an adult.

¶ 25 Regarding defendant's history of services and his willingness to participate meaningfully in available services, the trial court stated, "[W]e don't know, but they are far outweighed by the seriousness of the offense." The court further found that defendant was not reasonably likely to be rehabilitated before the expiration of the juvenile court's jurisdiction. The court based this conclusion on the nature of the offense and defendant's comment about how he "always fucks something up," which the court felt indicated that the crimes defendant was charged with were not the first he had committed.

¶ 26 Ultimately, the trial court granted the State's motion to permit prosecution under the criminal laws. Defendant was transferred to criminal court on April 19, 2017.

¶ 27 C. Charges Under the Criminal Code

¶ 28 In April 2017, the State charged defendant, by information, under Illinois criminal law, with home invasion with a firearm (count I) (720 ILCS 5/19-6(a)(3) (West 2016)), home invasion causing injury (count II) (720 ILCS 5/19-6(a)(2) (West 2016)), two counts of armed robbery with a firearm (counts III & IV) (720 ILCS 5/18-2(a)(2) (West 2016)), and two counts of aggravated battery causing great bodily harm (counts V & VI) (720 ILCS 5/12-3.05(a)(1) (West 2016)).

¶ 29 D. The Pretrial Proceedings Under the Criminal Code

¶ 30 From June 6, 2017, to March 4, 2019, defendant requested and was granted multiple continuances. In February 2019, defendant filed a motion to continue so that he could obtain an expert witness who would be able to testify in mid-April of 2019. In the motion, defendant stated he expected to call at trial Dr. Aaron Benjamin, "an expert in courtroom issues of human learning and memory specifically regarding cross racial identification issues."

¶ 31 At a status hearing in March 2019, defendant reiterated to the State that the report would not be ready until mid-April. The State objected to defendant's request for a continuance because it did not believe the expert was necessary. However, the trial court granted the continuance until April 29, 2019.

¶ 32 On April 24, 2019, defendant tendered Benjamin's report to the State. On April 29, 2019, the State informed the trial court that it had received the report but needed a continuance until May 13, 2019, to object to the report's use. The court granted the State's request and attributed the delay to defendant.

¶ 33 On May 15, 2019, the State filed a "Memorandum Regarding the End of the Defendant's 120 days pursuant to 735 ILCS 103-5(a)." The State asserted that the speedy-trial

term began to run on April 19, 2017, when defendant was transferred to criminal court, and the term was tolled on June 6, 2017, when the defense first asked for a continuance. The term began to run again on May 14, 2019, and that the trial date needed to start on or before July 24, 2019 (trial was then set for June 10, 2019).

¶ 34 Defendant disagreed, arguing that (1) the speedy-trial term should have begun when defendant was taken into juvenile detention because the supreme court's decision in *People v. Woodruff*, 88 Ill. 2d 10, 430 N.E.2d 1120 (1981), is no longer good law and (2) the April 29, 2019, to May 12, 2019, delay should not have been attributed to defendant.

¶ 35 After considering the parties' arguments, the trial court agreed with the State's assessment of the speedy-trial term finding (1) under *Woodruff*, juvenile detention did not cause the speedy-trial term to run and (2) the delay from April 29, 2019, to May 12, 2019, was attributable to defendant due to the late disclosure of the expert's report. Defendant later filed a motion to dismiss for violation of his right to a speedy trial, which the trial court denied.

¶ 36 E. The Trial

¶ 37 1. *Jury Selection*

¶ 38 Defendant's trial began on June 11, 2019. During jury selection the trial court asked most of the jurors only whether they "accepted" the principles set forth in Illinois Supreme Court Rule 431(b) (eff. July 1, 2012) but not whether they "understood" those principles. Following questioning by the parties, a jury was selected.

¶ 39 2. *Trial*

¶ 40 a. The State's Case

¶ 41 Stoens testified that on March 10, 2017, between 6 and 6:30 p.m., he had just returned home and parked his Mazda in front of his house. He noticed two black men walking up

the street. As he was removing his bag from the back seat of his car, he suddenly felt the firm metallic barrel of a what he believed to be a gun pressed against his upper back. Stoens turned around and the assailant repositioned the gun to Stoens's forehead. There were two men standing next to him, and one was brandishing a gun. (We note Stoens never identified defendant at trial as the assailant but because Rhoades did positively, we will discuss Stoens's testimony as if he had identified defendant at trial.)

¶ 42 The men took Stoens's cell phone, wallet, and keys before asking if anyone was home. Stoens responded, "No." But at that moment a light came on in the house's kitchen. Defendant asked who was inside, and Stoens told him it was his fiancée.

¶ 43 Defendant ordered Stoens to enter his home, all the while pointing the gun at the back of Stoens's head. The group entered the house through the kitchen. As they entered, Stoens's fiancée, Rhoades, emerged nude from the bathroom. She came into the kitchen to say something to Stoens but was shocked to find he was accompanied by two men, one holding a gun to Stoens's back. While pointing a gun at Stoens and Rhoades, defendant ordered them to kneel on the floor.

¶ 44 Defendant demanded that Stoens give him and his accomplice Rhoades's keys to her car (which was a Prius) and her cell phone. Stoens gave those items to defendant's accomplice, who then left and drove Rhoades's car away from the house. Defendant then noticed that Stoens had a PlayStation game console, so he ordered Stoens to unhook the PlayStation from the TV so defendant could take it.

¶ 45 While Stoens worked to unhook the console, defendant was looking at the nude Rhoades and commented about how pretty she was. Defendant then exposed his penis inches from Rhoades's face and ordered her to give him oral sex, but she refused. Defendant became

very angry and once again ordered her to give him oral sex or he would kill Stoens. He then began counting down, but again she refused his demand.

¶ 46 Stoens saw parts of this exchange but was fearful and kept his eyes down to concentrate on his task. While Stoens was struggling to unhook the PlayStation, defendant walked away from Rhoades and kicked Stoens in the head. Defendant also struck Rhoades across her face with the gun, which caused her to fall to the floor bleeding. Defendant then kicked her and left.

¶ 47 When defendant left the house, Stoens and Rhoades remained still, "traumatized, afraid to move." Shortly thereafter, defendant returned, wanting Stoens to tell him how to start his Mazda. Stoens told him how, and defendant left. However, defendant quickly returned, gun in hand, and this time accused Stoens of stealing his phone back. Stoens then went outside with defendant to search for the phone, which Stoens found and gave to defendant.

¶ 48 After returning inside, defendant marched the pair at gunpoint into their bedroom so he could look for more things to steal. As he was preparing to leave Stoens and Rhoades in the room, he brandished his gun, stating, he "had four bullets in the gun, two for each of [them]." Defendant also stated that he had people positioned outside watching the house.

¶ 49 Throughout the experience, Stoens and Rhoades had a good look at defendant's clothing, specifically the gold jacket and bejeweled jeans he was wearing.

¶ 50 Once defendant left, driving away in Stoens's Mazda, Stoens and Rhoades sat on the bed for 15 minutes until they figured out they could contact friends for help using their iPad, and their friends then called the police at 7:38 p.m. (according to police dispatch records).

¶ 51 Stoens identified various exhibits presented by the State—including, his stolen cell phone, the gold jacket with red accents on it, and a pair of jeans with jewels on the back

pockets. Stoens testified that the "male with the firearm" wore these articles of clothing during the home invasion. According to Stoens, he was able to get a good look at the male's clothing during the home invasion but not the male's face because he avoided "facial identification" out of fear for his life. However, Stoens admitted that the first description he gave to police of the male's jacket lacked red patches, red accents, or a zipper, which the gold jacket he identified in court did possess.

¶ 52 Detective Phillip Wilson testified that four days after the event, Stoens identified a man who was not defendant from a photo lineup as the gunman, despite being told he did not have to make an identification at that time. However, Stoens testified that he had told police he was only 95% sure about the photo identification. Stoens also rejected defendant's face as a possibility during the photo identification. When asked for a courtroom identification of the gunman, Stoens stated he was not 100% certain defendant was the gunman, but he did say he was 100% certain the clothing he identified was the gunman's.

¶ 53 Hannah Stoens (formerly Rhoades before marrying Stoens) also testified to the events of March 10, 2017, substantially the same as did Stoens. She added that, while Stoens was unhooking the PlayStation from the TV, defendant told her she was pretty and said that she was supposed to say "thank you" for the compliments. However, she remained silent, keeping her head down. Annoyed, defendant placed the barrel of the gun under her chin and used the barrel to tilt her head up to look at his uncovered face. He then pulled his penis out of his pants and began touching her all over—"with his penis, with his hands, [and] with the gun."

¶ 54 When asked for an in-court identification of the assailant from that night, Rhoades testified that she was 100% certain it was defendant based on him standing directly in front of her, "very, very close to [her] for what seemed like a long time." She had also previously

identified defendant in a photo lineup. She acknowledged that, when she first spoke to police after the home invasion, she described the assailant as being in his twenties.

¶ 55 The State also presented testimony from various law enforcement personnel that established the following: (1) the police were unable to recover defendant's DNA or fingerprints at the Rhoades-Stoens residence and (2) the police found Rhoades's Toyota Prius parked in an abandoned garage.

¶ 56 Officer Eric Kizer of the Danville Police Department testified that he found Stoens's Mazda at the Fair Oaks housing complex on March 10, 2017, parked in front of defendant's address. Kizer acknowledged that there were other apartment buildings surrounding the parking lot where the car was found. He testified that he took DNA swabs from the car's steering wheel and "gearshifter." Another officer took possession of the car and had it towed to a secured location.

¶ 57 Forensic scientists employed by the Illinois State Police analyzed the DNA collected from Stoens's Mazda and concluded that the DNA taken from the steering wheel was unsuitable for comparison. However, the DNA collected from the gearshift produced a minor profile from which defendant could not be excluded. The forensic scientist testified that one out of five people could possibly be included as a contributor.

¶ 58 Officer Doug Miller of the Danville Police Department testified that on March 15, 2017, he was advised that "a male wearing a gold jacket that was similar to that described during a home invasion a few days prior" was spotted getting into a car at the Fair Oaks housing complex. Miller located the car, conducted a traffic stop, and took defendant into custody. When he took defendant into custody, defendant told another passenger in the car to get his cell phone. Miller then retrieved the cell phone, which he identified in court as Stoens's stolen phone, and

transferred the phone to Officer Brian Lange, who then transported defendant to the police station.

¶ 59 Lange testified that defendant asked for the phone to be turned over to his mother or his girlfriend, Danna Dixon. Lange took the gold jacket that defendant was wearing when he was arrested, which was entered into evidence at trial. The police also later seized from defendant's residence a pair of jeans with jewels on the back pockets that was also entered into evidence.

¶ 60 Defendant's girlfriend's mother, Ruthie Dixon, gave the police permission to search her home, including her daughter's room. When the police searched the residence, they found a PlayStation console with the same serial number as Stoens's PlayStation. Officer Phillip Wilson testified that Danna Dixon told him the PlayStation belonged to defendant and defendant had brought it to her room.

¶ 61 Danna Dixon testified that she received calls from defendant that came from a number matching Stoens's phone number, which she learned after speaking with the police. Danna Dixon further testified that the cell phone previously identified as Stoens's was defendant's phone. Defendant's grandmother also testified that she received a call from defendant using that number.

¶ 62 AT&T custodian of records, Cici Caravello, testified that the company kept subscriber information on Stoens's phone. Stoens's phone records showed that someone placed a call to, or received calls from, Danna Dixon on that phone between March 12, 2017, and March 15, 2017. The record further showed that Danna Dixon received calls from Stoens's phone on March 13 and 14, 2017. In addition, the phone records showed defendant's grandmother received calls from Stoens's phone on March 10, 2017—the date of the home invasion—with the first call

occurring after 8:39 p.m.

¶ 63 Jaclyn Vinson, the executive director of the Housing Authority of the City of Danville, testified that, in March 2017, defendant was listed as a resident at an apartment in that complex, and Danna Dixon was a resident in a nearby apartment. The addresses were in the same apartment building and shared a parking lot. Vinson stated that the apartment complex had a camera surveillance system, and she provided video surveillance footage of the parking lot recorded on March 10, 2017, to the Danville police department.

¶ 64 The video was then played for the jury while Officer Phillip Wilson narrated selected portions of the video. The video showed that at 7:35 p.m. the stolen Mazda pulled up to the building where defendant's apartment was located. The video showed a black male who appeared to be wearing a gold or tan coat holding a phone in his hand. Later, the video depicted that a person dressed similarly drove the car. Wilson also testified that he believed a white Toyota Prius also seen during the video was Rhoades's car.

¶ 65 b. Defendant's Case

¶ 66 Defendant presented expert testimony from Dr. Aaron Benjamin. He opined that the best time to get information from an eyewitness to an event was as soon after the event as possible. Benjamin further testified that if police officers were in the room during a photo lineup identification and gave statements of affirmation, such as "good job" after an identification, then the person who viewed the lineup would later make an in-court identification of the suspect with greater confidence. He also stated that people are poorer at recognizing people of other races than of their own race. Furthermore, when a victim is confronted with an assailant brandishing a weapon, they tend to focus on the weapon, resulting in greater difficulty remembering other features of the assailant.

¶ 67 Defendant also called Officer Jacob Troglia as an impeachment witness. Troglia testified that he was the first officer to report to the Stoens-Rhoades residence. He also testified that Stoens and Rhoades described the assailant as wearing a gold jacket without mentioning red accents. Troglia further testified that neither Stoens nor Rhoades told him that the assailant pointed the gun at Stoens and began counting down. Furthermore, the officer testified that Rhoades did not tell him about the assailant making Rhoades look at him.

¶ 68 Defendant testified in his own defense that he did not go into the Stoens-Rhoades residence on March 10. Instead, he stated that at 7:30 p.m., he arranged through Facebook's buyer's market to meet someone behind his girlfriend's apartment to purchase a cell phone. When defendant met the seller, the seller also offered to sell him a PlayStation, which defendant purchased. Defendant provided no other evidence of this alibi. Defendant also testified that he was only five feet nine inches tall and that, in March 2017, he had tattoos on his left and right hands.

¶ 69 c. Rebuttal

¶ 70 After the defense rested its case, the State called Janya Cross, an employee at the juvenile detention center (JDC), in rebuttal. Cross testified that the JDC has its officers fill out intake forms during the regular course of business. One aspect of filling out the form was to document identifying marks on the detainee's body, such as the location of tattoos. Cross then reviewed defendant's intake form and explained that the officer who filled out the form on March 15, 2017, wrote that defendant had tattoos only on his forearms. The court admitted the form into evidence.

¶ 71 The parties rested and the trial court held the jury instructions conference. Thereafter, defendant informed the court that the State disclosed in discovery an arrest profile for

defendant from Chicago in 2016, in which a tattoo was noted that was not noted on the juvenile detention form. Defendant asked the court for leave to call a surrebuttal witness "from Chicago to say that they truly and accurately took the record and that [defendant] did have that tattoo on that date." Defendant believed "it would be inappropriate to allow the State to argue that the [JDC] was entirely accurate when they themselves disclosed a previous tattoo the [JDC] clearly didn't take note of." The court disagreed and denied defendant's request, stating, "You have rested. Your motion to reopen, if that's what this is, is denied. Everybody has had their due process."

¶ 72 d. Closing Arguments and the Verdict

¶ 73 During the State's closing and rebuttal arguments, defendant objected multiple times to the State's arguments regarding (1) testimony from Rhoades that defendant used the gun to make her look into his eyes, (2) Stoens's positive identification of defendant's gold jacket as the assailant's jacket, (3) the significance of the "minor DNA profile" the State created from the Mazda gearshift DNA swab, and (4) the credibility of defendant's testimony that he had hand tattoos in March 2017. The trial court overruled all of defendant's objections.

¶ 74 Regarding the minor DNA profile, defendant filed a motion *in limine* prior to trial to bar testimony or argument that defendant's DNA sample matched the DNA sample collected from Stoens's stolen Mazda. The court granted defendant's motion, stating, "If there's any attempt to mischaracterize the results by words such as a match or an absolute match or something that seeks to by label eliminate the possibility of probability or availability of him not being determined to have his DNA where it's found, then I'll jump in and correct that."

¶ 75 However, during closing arguments, the prosecutor stated, "[The expert] said that the DNA that was taken from that Mazda, there were only two contributors—two—the owner of

that vehicle and that defendant." Defendant objected to this characterization but was overruled by the trial court, which reasoned the State was "arguing an inference." The State then resumed its argument: "[D]efendant was a minor contributor in the Mazda. Only two: The owner and [Defendant]. Some things you just can't run away from." In defendant's closing argument, he characterized the DNA evidence as unhelpful to the jury.

¶ 76 Prior to deliberations, the trial court admonished the jury that closing arguments were not evidence and that any statement not based on evidence should be disregarded.

¶ 77 Subsequently, the jury found defendant guilty of home invasion causing injury as alleged in count II but acquitted him of home invasion involving use of a firearm (count I) and armed robbery with the use of a firearm (counts III and IV). (We note that counts V and VI were not taken to trial, and the trial court later made an entry of *nolle prosequi* regarding these counts.)

¶ 78 3. *Posttrial and Sentencing Proceedings*

¶ 79 In August 2019, the trial court rejected defendant's motion for new trial and the case proceeded to sentencing. At sentencing, the State presented to the court victim impact statements from Stoens and Rhoades. Stoens wrote, "The consistent threats to our lives that night that [defendant] attempt[ed] to take advantage of my wife *** changed my life for the last two years and will affect how I look at everything for the rest of my life." Rhoades wrote that defendant "destroyed what was supposed to be one of the happiest times of my life." The State recommended a sentence of 25 to 35 years in prison and a restitution order of $8861.86.

¶ 80 Defendant maintained that he was innocent and his conviction was the result of misidentification. Defense counsel argued that the State did not present evidence to support restitution for therapy, medical bills, chiropractic services, and dental surgery.

¶ 81 The trial court sentenced defendant to 20 years in prison and ordered him to pay restitution for (1) Stoens's therapy and medical bills, totaling $1975 and (2) Rhoades's car insurance deductible, medical bills, chiropractor, and dental surgery, totaling $1950. In doing so, the court noted that restitution was not limited to out-of-pocket losses but also out-of-pocket expenses.

¶ 82 This appeal followed.

¶ 83 II. ANALYSIS

¶ 84 Defendant appeals, arguing the trial court erred by (1) transferring him to criminal court when the State failed to present sufficient evidence of each of the juvenile transfer factors; (2) denying defendant's motion to dismiss his case for a violation of the Speedy Trial Act (see 725 ILCS 5/103-5(a) (West 2016)); (3) failing to ask jurors whether they understood the *Zehr* principles; (4) denying defendant a fair trial by (a) not allowing him to call a surrebuttal witness and (b) overruling defendant's objections to the State's closing argument; and (5) ordering defendant to pay restitution for the victims' medical bills without evidentiary support for that decision.

¶ 85 Although some of defendant's arguments are not without merit, because of the overwhelming evidence of defendant's guilt, we nonetheless affirm the trial court's judgment in all aspects except for restitution, and we remand the restitution issue for additional proceedings if the State so requests.

¶ 86 A. The Juvenile Transfer Claim

¶ 87 Defendant first argues that the trial court erred by granting the State's motion to transfer his case to the criminal court from juvenile court without receiving evidence regarding certain statutory factors—namely, (1) the availability and advantages of treatment services in the

juvenile court system as compared to the adult division of the Department of Corrections and (2) defendant's history of services, including his willingness to participate meaningfully in available services.

¶ 88 Because, in this case, defendant did not file a written posttrial motion raising the issue of the State's failure to present evidence regarding the above statutory transfer factors, defendant did not preserve the issue for appeal. Nonetheless, defendant argues that we should review this issue under the plain-error doctrine because (1) the trial court's ruling on the transfer motion without receiving evidence regarding the above statutory factors amounted to clear and obvious error and (2) the error constituted second-prong plain error by depriving defendant of due process.

¶ 89 The State concedes that the trial court's failure to receive evidence regarding the above statutory factors constitutes plain error but asserts that the trial court's ruling would not have been affected by evidence of defendant's history of services or his willingness to meaningfully participate in available services. Accordingly, the State argues that the transfer hearing was not fundamentally unfair to defendant.

¶ 90 We agree with the State.

¶ 91 1. *Forfeiture and Plain Error Review*

¶ 92 "A defendant forfeits an issue for purposes of appellate review by failing to object to the alleged error or raise it in a written posttrial motion." *In re M.P.*, 2020 IL App (4th) 190814, ¶ 44, 155 N.E.3d 577. Even so, the appellate court may review the issue under the plain-error doctrine provided first that a clear and obvious error occurred and, second, that (1) the evidence was "so closely balanced that the error alone threatened to tip the scales of justice against the defendant" or (2) the error was "so serious that it affected the fairness of the

defendant's trial and challenged the integrity of the judicial process." *People v. Sebby*, 2017 IL 119445, ¶ 48, 89 N.E.3d 675.

¶ 93 The Illinois Supreme Court has equated the second prong of the plain-error doctrine with structural error. *People v. Thompson*, 238 Ill. 2d 598, 613-14, 939 N.E.2d 403, 413 (2010). Structural error is "a systemic error which serves to 'erode the integrity of the judicial process and undermine the fairness of the defendant's trial.' " *Thompson*, 238 Ill. 2d at 614 (citing *People v. Glasper*, 234 Ill. 2d 173, 197-98, 917 N.E.2d 401, 416 (2009). Worded differently, structural error "renders a criminal trial fundamentally unfair or unreliable in determining guilt or innocence." *People v. Averett*, 237 Ill. 2d 1, 12-13, 927 N.E.2d 1191, 1198 (2010). "The defendant bears the burden of establishing plain error." *People v. Kitch*, 239 Ill. 2d 452, 461, 942 N.E.2d 1235, 1241 (2011).

¶ 94 2. *Juvenile Transfer and the Standard of Review*

¶ 95 The Juvenile Court Act provides that minors generally cannot be prosecuted under the Criminal Code. 705 ILCS 405/5-120 (West 2016). However, upon motion by the State, the trial court can "enter an order permitting prosecution under the criminal laws" if proceeding under the Act is not in the best interests of the public and there is probable cause that the allegations in the State's motion are true. 705 ILCS 405/5-805 (West 2016). The Act lists statutory factors that the court must consider when making its decision whether to permit prosecution under the criminal laws. See 705 ILCS 405/5-805(3)(b) (West 2016). In addition to those statutory factors, the court must also weigh nonstatutory factors when making its decision (see *id.*), "such as the resulting sentence if the minor is convicted under the Criminal Code." *People v. Moore*, 2011 IL App (3d) 090993, ¶ 20, 957 N.E.2d 555.

¶ 96 According to the Illinois Supreme Court, "[T]he purpose of any transfer

proceeding is to balance the best interests of the alleged juvenile offender, particularly as these interests relate to his or her potential for rehabilitation, against society's legitimate interest in being protected from criminal victimization perpetrated by minors." *People v. Clark*, 119 Ill. 2d 1, 12, 518 N.E.2d 138, 143 (1987).

¶ 97 Whether a juvenile is allowed to be prosecuted under the criminal laws is a matter of judicial discretion limited by the Act. *Moore*, 2011 IL App (3d) 090993, ¶ 21. A trial court abuses its discretion by transferring a minor when the record does not show that the court received and considered evidence on every statutory transfer factor. *Clark*, 119 Ill. 2d at 18.

¶ 98 3. *This Case*

¶ 99 A clear and obvious error occurred in this case because the trial court did not receive evidence at the transfer hearing regarding two factors that the trial court was statutorily obligated to receive: (1) the availability and advantages of treatment services in the juvenile system as compared to the adult division of the Department of Corrections and (2) defendant's history of services, including his willingness to participate meaningfully in available services. 705 ILCS 405/5-805(3)(b)(iv-v) (West 2016); *Clark*, 119 Ill. 2d at 18 (The Act requires "that the juvenile judge receive sufficient evidence on all statutory factors, including the minor's history and the availability of suitable treatment or rehabilitative services.").

¶ 100 Nonetheless, we conclude that the trial court's failure to receive evidence of these factors did not constitute second-prong plain error as defendant argues because the error here was not close to being severe enough to render the transfer hearing fundamentally deficient so as to be a trial in name only. We agree with the State that the trial court's ultimate ruling would be very unlikely on this record to have been affected by evidence of defendant's history of services or his willingness to meaningfully participate in available services. Accordingly, we reject

defendant's claim of second-prong plain error.

¶ 101 Recently, this court addressed another claim of second-prong plain error in *People v. Green*, 2021 IL App (4th) 200234-U, in which we discussed the rare instances in which second-prong error has been recognized by the courts.

> "The United States Supreme Court has found error to be structural [(second-prong)] only in a ' "very limited class of cases." ' *Neder v. United States*, 527 U.S. 1, 8 (1999) [citation]. Structural errors include 'a complete denial of counsel, denial of self-representation at trial, trial before a biased judge, denial of a public trial, racial discrimination in the selection of a grand jury, and a defective reasonable doubt instruction.' *Averett*, 237 Ill. 2d at 13 (citing *Washington v. Recuenco*, 548 U.S. 212, 218 n.2 (2006))." *Id.* ¶ 68.

In *Green*, we rejected defendant's attempt to paint an ordinary hearsay issue as structural error. *Id.* Here, too, we reject defendant's attempt to deem the trial court's failure to receive evidence of certain statutory factors regarding services as structural error.

¶ 102 In doing so, we note that the legislature affixed greater importance to some statutory factors about which the trial court received evidence and carefully considered. See 705 ILCS 405/5-805(3)(b) (West 2016) ("In considering these factors, the court shall give greater weight to the seriousness of the alleged offense, the minor's prior record of delinquency than to the other factors listed in this subsection."). Moreover, we do not see how the trial court's failure to receive evidence on less important, minor statutory factors—as opposed to a failure to consider the most important factors, which the court did here—in a case involving a 17-year-old's commission of a heinous crime could be structural error rendering the transfer hearing "fundamentally unfair or unreliable." *Averett*, 237 Ill. 2d at 12-13.

¶ 103 We have no doubt that, had a full record of services been presented to the trial court, that record would not have significantly affected the court's ruling, if at all. Society's best interests were protected when defendant was tried, convicted, and sentenced under the Illinois criminal laws.

¶ 104 B. The Statutory Speedy-Trial Claim

¶ 105 Defendant next argues that (1) the speedy-trial term should be counted from the day defendant was arrested as a juvenile—which, we note, would require us to hold that *Woodruff* is no longer good law—and (2) the trial court erred by attributing the delay from April 29, 2019, to May 12, 2019, to defendant. Defendant must prevail on both of these claims to obtain relief on this record on appeal.

¶ 106 We conclude defendant fails on his second argument. Accordingly, we need not address his first argument and will address only his second.

¶ 107 1. *The Speedy-Trial Statute and the Standard of Review*

¶ 108 A defendant taken into custody must be tried within 120 days of arrest, excluding, days where "delay is occasioned by the defendant." 725 ILCS 5/103-5(a) (West 2018). "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." *Id.* "In tallying up the days of the speedy-trial term, courts exclude the first day but include the last day unless it is a Sunday or a holiday." *People v. Cross*, 2021 IL App (4th) 190114, ¶ 74.

¶ 109 " 'The trial court's determination as to who is responsible for a delay of the [speedy-trial term] is entitled to much deference, and should be sustained absent a clear showing that the trial court abused its discretion.' " *Id.* ¶ 77 (quoting *People v. Kliner*, 185 Ill. 2d 81, 115, 705 N.E.2d 850, 869 (1998)). "A trial court abuses its discretion when its ruling is arbitrary 'or

when no reasonable person would take the view adopted by the trial court.' " *People v. Pope*, 2020 IL App (4th) 180773, ¶ 28, 157 N.E.3d 1055 (quoting *People v. Bates*, 2018 IL App (4th) 160255, ¶ 60, 112 N.E.3d 657).

¶ 110 Regarding who is responsible for a delay of the speedy-trial term, we review a trial court's determination of that issue for an abuse of discretion. *Cross*, 2021 IL App (4th) 190114, ¶ 77. However, the question of when the speedy-trial term begins to run is a purely legal issue we review *de novo*. *People v. Bonds*, 401 Ill. App. 3d 668, 671, 930 N.E.2d 437, 442 (2010).

¶ 111 2. *This Case*

¶ 112 Defendant disclosed his trial expert's report to the State on April 24, 2019. On April 29, 2019, the trial court granted the State's motion to continue the case to a May 13, 2019, trial setting because of defendant's late disclosure of the report. In doing so, the court attributed the resultant delay to defendant, reasoning that "[it was] an unfair expectation by defense counsel to assume that the State could be ready in less than a week." Defendant, however, asserts that the April 29, 2019, delay was caused by the State's need for additional time to file an objection—an objection that defendant asserts the State could have made "as early as the fall of 2018." Furthermore, defendant contends that the State's filed objection was a general objection without specific reference to the expert's report. Accordingly, defendant maintains the State did not need extra time to respond to the expert's report.

¶ 113 We conclude that the trial court did not abuse its discretion by attributing delay to defendant on this record. In so concluding, we reiterate that the trial court's determination of delay "is entitled to much deference." *Cross*, 2021 IL App (4th) 190114, ¶ 77 (quoting *Kliner*, 185 Ill. 2d at 115). Given the totality of the circumstances—including the fact that defendant first

obtained a continuance of the trial date to April 29, 2019, based on defendant's estimation that he would tender the expert report in mid-April—the trial court did not err by attributing the delay to defendant. The trial court's conclusion that defendant's late disclosure required that the State be given additional time to review the expert report and respond was entirely reasonable and certainly no abuse of the court's discretion.

¶ 114 C. The *Zehr* Principles Claim

¶ 115 Defendant next argues that the trial court erred by not asking potential jurors whether they "understood" all the *Zehr* principles as required by Illinois Supreme Court Rule 431(b) (eff. July 1, 2012). The State concedes that the trial court erred by not asking prospective jurors whether they understood the *Zehr* principles as required by Rule 431(b), and we accept the State's concession. However, the State contends that the plain-error doctrine does not apply because the evidence of defendant's guilt was not closely balanced. We agree with the State.

¶ 116 1. *First-Prong Plain Error Review*

¶ 117 Appellate courts may review unpreserved error as first-prong plain error "when a clear or obvious error occurs and *** 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." *People v. Jackson*, 2020 IL 124112, ¶ 81, 162 N.E.3d 223. "In determining whether the evidence adduced at trial was close, a reviewing court must evaluate the totality of the evidence and conduct a qualitative, commonsense assessment of it within the context of the case." *Sebby*, 2017 IL 119445, ¶ 53.

¶ 118 2. *The Overwhelming Evidence Against Defendant*

¶ 119 Defendant contends that the evidence was closely balanced, amounting to a credibility contest between defendant and his victims. We strongly disagree.

¶ 120 In support of our conclusion that the evidence of defendant's guilt was overwhelming, we will highlight only a portion of the significant evidence of defendant's guilt presented at trial:

(1) Stoens recognized with 100% certainty the gold jacket seized from defendant's person and the jeans recovered from defendant's mother's home as those worn by the assailant;

(2) Rhoades identified defendant at trial with 100% certainty based upon her observing his face within arm's reach when defendant forced Rhoades on her knees to look up at his face;

(3) The police recovered the PlayStation at an apartment in which defendant sometimes stayed, which was located next to defendant's mother's apartment;

(4) The police received a dispatch about an armed robbery at 7:38 p.m. on March 10, 2017, and phone records showed a call from Stoens's phone, which he testified the assailant stole, was made to defendant's grandmother at 8:39 p.m. that evening, and defendant's grandmother, mother, and girlfriend each testified to receiving multiple calls from Stoens's phone number after the phone was reported stolen;

(5) The police located Stoens's Mazda, which he testified the assailant stole, parked in front of defendant's apartment and, after swabbing the gearshift for DNA, developed a "minor DNA profile" from which defendant could not be excluded as a possible contributor along with approximately one in five people;

(6) Video surveillance footage from defendant's apartment complex showed Stoens's stolen Mazda pulling into the parking lot on March 10, 2017, at 7:31

p.m., and at 7:35 p.m., a man wearing a gold coat exited the Mazda holding a cell phone with its screen illuminated;

(7) The police retrieved Stoens's stolen cell phone during a traffic stop from underneath the driver's seat of the vehicle in which defendant was riding, and defendant was wearing the gold jacket—later identified by Stoens as the assailant's—when he was taken into custody;

(8) Defendant's testimony that he purchased the stolen cell phone and game console from a seller on Facebook was not corroborated.

¶ 121 Because the evidence in the trial court was not closely balanced, the plain-error doctrine does not apply, and we honor defendant's procedural forfeiture of this claim.

¶ 122 3. *Trial Courts Must Stop Deviating From the Requirements of Rule 431(b)*

¶ 123 Because trial courts must stop their noncompliance with Rule 431(b), we reiterate what we wrote in *People v. Neal*, 2020 IL App (4th) 170869, ¶ 188, 150 N.E.3d 984:

"[T]he failure of the trial court to strictly comply with Rule 431(b) *** should never have arisen, and, indeed, *should never arise in any case*. That is because there is no excuse for a trial judge to not strictly comply with the clear and explicit directions the supreme court has provided for trial courts when admonishing prospective jurors." (Emphasis in original.) *Id.*; see also Ill. S. Ct. R. 431(b) (eff. July 1, 2012) ("The court shall ask each potential juror, individually or in a group, whether that juror *understands and accepts* the following principles." (Emphasis added.)); *People v. Zehr*, 103 Ill. 2d 472, 477, 469 N.E.2d 1062 (1984) (setting forth four principles—the *Zehr* principles—nearly *38 years ago* that the trial court must instruct prospective jurors on to ensure defendant

receives a fair trial).

¶ 124 Failing to properly admonish prospective jurors as the supreme court has explicitly required—now for nearly 15 years in Rule 431(b)—is an inexcusable oversight that bespeaks of judicial malpractice. We also note that the prosecution should not sit idly by while the trial court makes such an easily correctable mistake. *Neal*, 2020 IL App (4th) 170869, ¶ 196 ("There is scarcely a clearer, more obvious, and more easily correctable error than a trial court's failure to precisely comply with Rule 431(b)."). Accordingly, the trial court and prosecution both bear responsibility to ensure Rule 431(b) is complied with.

¶ 125 We remind the trial court and the State that in a closely balanced case, the court's failure to comply with Rule 431(b) will result in a reversal of a defendant's conviction and remand for a new trial. *Sebby*, 2017 IL 119445, ¶ 78.

¶ 126 Although we have concluded in this case that the evidence was not closely balanced, the same cannot be guaranteed in the next case bungled by a trial court's failure to comply with Rule 431(b). (In fact, experience informs us that the evidence of a defendant's guilt is *often* closely balanced.) What is at risk is the continued, completely unnecessary suffering of victims who would be forced to once again relive on the witness stand the terrible trauma they suffered—for example, a married couple being forced to recount the night a violent criminal ushered the husband into his own home at gunpoint and demanded he loot his own belongings while his wife was made to kneel naked and repel the criminal's sexual advances.

¶ 127 That sort of testimony should be required to be given only once.

¶ 128 D. The Trial Court's Denial of Defendant's Request To Call a Surrebuttal Witness

¶ 129 Appellate courts review evidentiary rulings for an abuse of discretion. *People v. Wheeler*, 226 Ill. 2d 92, 132, 871 N.E.2d 728, 750 (2007). An abuse of discretion occurs when

the "the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *People v. Hall*, 195 Ill. 2d 1, 20, 743 N.E.2d 126, 138 (2000).

¶ 130 Defendant argues that the trial court abused its discretion by refusing to allow a continuance for the defense to obtain a surrebuttal witness, relying on *People v. Lott*, 66 Ill. 2d 290, 300, 362 N.E.2d 312, 316 (1977). The State disagrees, arguing that *Lott* can be distinguished from the instant case. We agree with the State.

¶ 131 In *Lott*, a surprise rebuttal witness testified that the defendant "admitted the crime to people in the jail." *Id.* This testimony was substantially probative of the defendant's guilt, and the trial court's denial of a continuance "prejudiced the accused's opportunity to adequately defend." *Id.* In other words, the surprise testimony was "critical testimony" to the case necessitating a reasonable opportunity to respond. *People v. Bingham*, 75 Ill. App. 3d 418, 424, 394 N.E.2d 430, 435 (1979).

¶ 132 Here, defendant was denied an opportunity to call a surrebuttal witness to present evidence that he had a tattoo on his left wrist that was not included on the detention intake form. The intent behind such evidence was to counter "the inference that [defendant] was a liar" because defendant had previously testified that he had a tattoo on his wrist. However, none of this is critical testimony to the case.

¶ 133 Whether defendant had a wrist tattoo prior to detention was hardly critical evidence regarding defendant's identification as the perpetrator. Rhoades testified extensively that she saw defendant's face and identified him with 100% certainty. Stoens testified that the jacket and jeans shown in court, which were obtained from defendant, were the same ones that the assailant wore. And that is to say nothing of the cell phone record and video evidence tying

defendant to Stoens's car and phone. Accordingly, the trial court did not abuse its discretion by denying defendant's motion to continue to obtain a surrebuttal witness.

¶ 134 Although we do not believe the trial court erred by rejecting defendant's request for a surrebuttal witness, our conclusion should not be construed as an endorsement of the way the court handled the situation. For instance, the court should have asked defense counsel (1) if he had in fact identified some witness from Chicago who could testify about the intake form that showed defendant had a tattoo on his left wrist and (2) when that witness would be prepared to come to Danville to testify.

¶ 135 E. The State's Alleged Misstatement of Testimony in Closing Argument

¶ 136 Defendant argues primarily that the State's misstatement concerning the DNA evidence constituted reversible error. We disagree. See *People v. Macri*, 185 Ill. 2d 1, 62, 705 N.E.2d 772, 800 (1998) ("[A] prosecutor's comments in closing argument will result in reversible error only when they engender 'substantial prejudice' against the defendant to the extent that it is impossible to determine whether the verdict of the jury was caused by the comments or the evidence."). Appellate courts review closing arguments in their entirety and the challenged remarks are viewed in context. *Id.*

¶ 137 Given the overwhelming evidence we earlier set forth of defendant's guilt, and the fact that (1) the trial court instructed the jury that closing arguments are not evidence and (2) defendant rebutted the State's alleged misstatement about the strength of the DNA evidence in his closing argument by pointing out that one out of five people could not be excluded as contributors, defendant fails to persuade us that the cumulative effect of alleged errors in the prosecutor's closing argument came anywhere close to denying him a fair trial.

¶ 138 F. The Improper Restitution Claim

¶ 139 Last, defendant argues—and the State concedes—that the restitution order was incomplete because (1) the trial court did not specify a particular time for the restitution payment(s) and (2) the record did not support the order for payment of Stoens's "therapy and medical bills." We accept the State's concession, vacate the restitution finding, and remand the case for a new restitution hearing if the State so requests.

¶ 140 III. CONCLUSION

¶ 141 For the reasons stated, we affirm the trial court's judgment in part, vacate that judgment in part, and remand for further proceedings consistent with this opinion.

¶ 142 Affirmed in part and vacated in part.

¶ 143 Cause remanded.