2021 IL App (4th) 200079-U

NO. 4-20-0079

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
December 29, 2021
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
CASEY TODD WILEY,	)	Nos. 18CF942
Defendant-Appellant.	)	18CF944
	)	
	)	Honorable
	)	James R. Coryell,
	)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Turner and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding (1) the trial court did not abuse its discretion in finding the delay from November 28, 2018, to February 14, 2019, attributable to defendant for speedy-trial purposes; (2) the trial court did not abuse its discretion in deciding to shackle defendant during trial where it held a hearing and considered the factors set forth in Illinois Supreme Court Rule 430 (eff. July 1, 2010); and (3) defendant's convictions for aggravated unlawful use of a weapon did not violate the proportionate penalties clause of the Illinois Constitution.

¶ 2 In June 2018, the State charged defendant, Casey Todd Wiley, with 23 offenses in Macon County case Nos. 18-CF-942 and 18-CF-944. In December 2019, a jury found defendant guilty of three counts of aggravated unlawful use of a weapon. In January 2020, the trial court sentenced defendant to concurrent terms of three years' imprisonment.

¶ 3 Defendant appeals, arguing (1) the trial court erroneously denied his motion to discharge his case when the State failed to bring him to trial within the 120-day speedy trial

period; (2) the court violated his right to due process when, during trial, it restrained defendant's hands and feet, preventing him from assisting in his own defense; and (3) his convictions for aggravated unlawful use of a weapon violated the proportionate penalties clause of the Illinois Constitution because felony aggravated unlawful use of a weapon and misdemeanor unlawful use of a weapon contain identical elements. For the following reasons, we affirm the trial court's judgment.

¶ 4 I. BACKGROUND

¶ 5 On June 21, 2018, defendant was arrested following an altercation with his mother, Amber Wiley, and his father, Randy Wiley. In June 2018, the State charged defendant, Casey Todd Wiley, with 23 offenses in Macon County case Nos. 18-CF-942 and 18-CF-944. Defendant ultimately went to trial on the following charges: armed violence, armed robbery, aggravated battery (counts I, II, and VII in Macon County case No. 18-CF-942), attempted first degree murder, aggravated discharge of a firearm, and three counts of aggravated unlawful use of a weapon (counts II, III, VI, VII, and VIII in Macon County case No. 18-CF-944).

¶ 6 During arraignment on June 29, 2018, private counsel entered his appearance on defendant's behalf. On July 18, 2018, the trial court held a preliminary hearing and found probable cause that defendant committed an offense in both cases, entered a not guilty plea on all charges, and set the cases for pretrial on September 6, 2018. On September 6, 2018, private counsel filed a motion to withdraw as counsel. On September 21, 2018, the court held a hearing on the motion to withdraw. Over defendant's objection, the court allowed private counsel to withdraw. The court appointed the public defender and set the cases for an appearance hearing. During the September 24, 2018, appearance hearing, Tiffany Senger entered her appearance as counsel for defendant. At an October 3, 2018, pretrial hearing, Senger requested a late

November pretrial, and the court set the matters for pretrial on November 28, 2018. Defendant was not present at the hearing.

¶ 7 On October 15, 2018, defendant filed a *pro se* "motion for speedy trial demand" in Macon County case No. 18-CF-944. On October 17, 2018, defendant filed a *pro se* "motion for speedy trial demand" in Macon County case No. 18-CF-942. The motions demanded a trial by jury, objected to any delays requested by either party, asserted his right to a speedy trial was absolute, and requested a speedy trial. On November 5, 2018, defendant filed motions to discharge in both cases, claiming his right to a speedy trial was violated. On November 27, 2018, defendant filed several *pro se* motions in both cases. The filings included motions for discharge, motions to expunge the record, motions to reduce bond, motions to suppress evidence, and a notice of intent to be present at all court dates.

¶ 8 At the November 28, 2018, pretrial hearing, Senger appeared for defendant who remained in custody. Senger requested an additional pretrial hearing because she had yet to review a number of *pro se* motions defendant filed. The court stated each case was continued for additional pretrial to January 4, 2019, on the motion of defendant. As to the *pro se* motions filed by defendant, the court further stated, "And I haven't seen the motions myself, but unless they're directed against you, Ms. Senger, they'll be stricken as he's represented by counsel." On January 4, 2019, Senger requested additional pretrial continuances for both cases due to outstanding ballistic labs in Macon County case No. 18-CF-944.

¶ 9 On February 6, 2019, the parties informed the trial court the State filed pretrial motions for joinder of the two cases and for consumptive deoxyribonucleic acid (DNA) testing. Senger agreed to a February 14, 2019, hearing on the State's motions. On February 14, 2019, the court held a hearing on the State's pretrial motions. Senger objected to the State's motion for

DNA testing, arguing the State had notice of the need for testing on October 31, 2018, and was not diligent in processing the evidence. The court granted the State's motion. Defendant interjected and stated his due process rights had been violated when he was not allowed to be present at pretrial hearings and stated he "asked for no continuances month ago." The court agreed it would make certain defendant was present for all substantive court proceedings and admonished defendant to be respectful. After an additional exchange where defendant asserted he was being respectful, the court had him removed from the courtroom. The court granted the motion to join the two cases and, at Senger's suggestion, set the cases for final pretrial on May 3, 2019, and jury trial on May 20, 2019. The court also struck defendant's *pro se* motions.

¶ 10 On April 22, 2019, defendant filed several *pro se* motions to dismiss default judgment. In two of the motions, defendant demanded that Senger file his motions and stated, if she refused, he would fire her and represent himself, although defendant noted he did not want to do that because he liked Senger and thought she was a good attorney. In one of the motions, defendant again demanded a jury trial and, although he was not firing Senger, he demanded that she follow his commands.

¶ 11 On April 30, 2019, the State filed a motion to continue due to the unavailability of witnesses. On May 2, 2019, at the rescheduled final pretrial, the trial court addressed the State's motion to continue. Senger objected, asserting defendant had been in custody for 11 months and the State had ample time to prepare and arrange witnesses. The court reserved ruling on the motion and set the cases for May 9, 2019.

¶ 12 On May 9, 2019, the trial court called the cases and directed defendant, who was seated in the jury box, to stay where he was. Defendant responded, "No. I want to—I want to be in front—" and the court ordered him removed from the courtroom. An altercation ensued, and

the proceedings went off the record. Back on the record in a different courtroom, the court indicated defendant attacked three or four court security officers and started toward the bench before being grabbed. Defendant was placed back into custody following a 20- or 30-minute struggle. The court granted the State's motion to continue over defendant's objection. The following day, the State filed a motion alleging a *bona fide* issue concerning defendant's fitness to stand trial. On May 10, 2019, the court indicated it needed to consider recusing itself.

¶ 13 On May 15, 2019, the trial court recused itself, and the cases were reassigned. At the first hearing before a new judge on May 17, 2019, the court addressed the State's motion to determine defendant's fitness to stand trial. Senger stated she had no basis to object to the State's motion. The court found a *bona fide* issue concerning defendant's fitness and appointed an expert to examine him.

¶ 14 In June 2019, the State filed a motion to restrain defendant for all court proceedings, alleging the May 9, 2019, incident demonstrated a manifest need for restraint. The State attached an incident report and further alleged defendant caused additional security concerns while in jail. On June 28, 2019, the court held a fitness hearing. Defendant, represented by Andrew Wessler, stipulated to the fitness report filed by the expert. The trial court found defendant fit to stand trial. Defendant informed the court he wished to represent himself. The court admonished defendant about representing himself and ultimately allowed defendant to waive his right to counsel.

¶ 15 During an August 8, 2019, pretrial hearing, the State requested a September jury trial date. When asked if he was ready for trial, defendant asked to be released immediately and said, "I have grievances against the court, and that I should be released on the grounds of *habeas corpus* because you failed to give me a fair, speedy, and public trial by a jury of my

peers." Later in the proceeding, defendant interrupted, "I'm—so you're setting both cases for September? I mean, that's not soon enough. I've been in custody over a year, demanding to go to trial."

¶ 16 On August 28, 2019, the trial court held a hearing on the State's motion to restrain defendant. Correctional Officer Tom Mounce testified that, on May 9, 2019, he escorted inmates to courtroom 6A. When defendant's case was called, he attempted to stand with his attorney and the court told him to remain seated in the jury box. According to Mounce, defendant resisted efforts to keep him in the jury box. Mounce used his taser on defendant more than once. Defendant was also pepper sprayed. Ultimately, 20 officers and deputies restrained defendant. At one point, it appeared as if defendant was going to head toward the judge. Mounce acknowledged that before the incident defendant told Senger he was going to fire her and proceed *pro se*. Defendant was handcuffed during the incident and was still able to fight.

¶ 17 Scott Flannery, the assistant jail superintendent, testified about the jail's phone call recording system and the State played an audio exhibit containing recorded calls from defendant. During the call, defendant made various comments such as stating, "they're going to have to bend to my will," and "If they're going to make up the rules as they go, then I'm going to do the same thing." Flannery testified defendant had been involved in a few physical altercations while in jail. Flannery stated, "But the—the overall demeanor, any time we deal with him is very stand-offish. We shackle him any time we move him to any kind of appointments or anything like that, and it's usually a struggle verbally to get him to comply." When asked if he would be comfortable with officers trying to handle defendant in an open courtroom, Flannery testified he directed all his officers to shackle defendant any time he was moved. Flannery testified, "Because of his actions that he had in the courtroom, the actions he's had in the jail,

statements he's made, they're directed to handcuff him or shackle him every time." Defendant stated he did not want to get violent or to look violent in front of the jury and being shackled would make it difficult to defend himself.

¶ 18 The trial court found the charge of attempted first degree murder to be very serious. The testimony before the court indicated defendant was disruptive in the courtroom and was involved in an altercation with correctional officers. The court noted defendant appeared to be in his early thirties and physically strong. The court addressed the remaining factors in Illinois Supreme Court Rule 430 (eff. July 1, 2010) as follows:

> "Pre-trial bond report indicates that he has a minimal, or almost non-existent, criminal history. Doesn't have any particular criminal history. I'm not aware of any escape attempt, or attempts to escape. Any threats made by him to cause a disturbance, and the tape I just heard, he said that—at one point that they make up the rules as they go along, and he further said that they, whoever they are, will have to bend to his will. The fact that what happened on the prior occasion testified to by Deputy Mounce—or Correctional Officer Mounce.
>
> Risk of mob violence, I don't see any risk, anything there. Possibility of attempt to rescue him [by] others, I don't see that. And I'm not aware of any mood or anything like that, the physical security of the defendant in the courtroom. There isn't much physical security in the courtroom. The jury's gonna be exposed to it.

> So I think considering all those factors, it is prejudicial to him, that I think the fact that he's going to do what he wants, essentially what he said in the phone call, then that demonstrated by his behavior on the prior occasion in front of Judge Griffith that I am going to order him restrained during the trial."

¶ 19 The trial court reinstated defendant's *pro se* motions. In response to defendant's speedy trial claims, the State conceded the time from defendant's arrest June 21, 2018, to the preliminary hearing on July 18, 2018, totaled 27 days attributable to the State. The State indicated the matter was continued without objection on July 18, 2019, and was continued various times on defendant's motion, by agreement of counsel, or without objection by defendant to May 9, 2019. On May 9, 2019, the matter was continued over defendant's objection to May 17, 2019, when a fitness examination was ordered. The State conceded that period of time totaled eight days attributable to the State. The State asserted the time from when the fitness evaluation was ordered to the fitness hearing on June 28, 2019, did not count toward the speedy trial clock. The State asserted the matter was continued without objection from June 28, 2019, to August 8, 2019. The State indicated the period from August 8, 2019, (where defendant did not specifically object to a continuance or demand immediate trial but stated the September trial date was not soon enough) to the September 23, 2019, trial date totaled 46 days, should the trial court find the delay was not occasioned by defendant. If the time from August 8, 2019, to September 23, 2019, was attributable to the State, then at most only 81 days of delay were attributable to the State.

¶ 20 On September 13, 2019, the trial court held a hearing on defendant's reinstated motions. Defendant argued the court prevented him from physically being in court to fire Senger

and object to continuances. The State stood on its written response and asserted it was never served with defendant's *pro se* motions. The court denied the motion regarding defendant's speedy-trial claims. After discussing defendant's other motions and pretrial matters, the court concluded the hearing, and defendant stated, "If there's any continuances after this by the State, I object to any continuances in both cases." On September 16, 2019, defendant filed a document indicating he wished to subpoena, as a witness at trial, the expert who performed his fitness evaluation.

¶ 21 On September 20, 2019, the trial court indicated it was reconsidering its decision to allow defendant to represent himself. The court reappointed the public defender's office over defendant's objections.

¶ 22 During the scheduled jury trial on September 23, 2019, Wessler represented defendant, and the following exchange occurred:

> "MR. WESSLER: Your Honor, I was appointed on Friday. I personally am not prepared to proceed to trial. [Defendant] would like to have his trial. I would not be prepared; so I would move to continue it on my behalf.
>
> THE COURT: Motion defendant, cause continued.
>
> THE DEFENDANT: No, it's not continued.
>
> THE COURT: Be quiet.
>
> THE DEFENDANT: It's not continued. He is not my lawyer.
>
> THE COURT: Remove him."

The court then scheduled a pretrial hearing for October 23, 2019.

¶ 23 On October 22, 2019, Wessler filed motions, including a petition to discharge defendant and dismiss. The petition asserted that, as of October 21, 2019, defendant had been in custody for 204 days for which he did not contribute nor acquiesce to any delay. The State reiterated its position that, at most, 81 days were attributable to it. On October 23, 2019, the trial court set the hearing on counsel's motions for November 15, 2019, and set the trial for December 16, 2019. At the November 15, 2019, pretrial hearing, the court denied the motion to discharge defendant. The court noted defendant could not demand to proceed with trial when his counsel agreed to or requested a continuance.

¶ 24 On December 16, 2019, the matter proceeded to a jury trial. Before jury selection, Wessler raised the issue of defendant's restraints. Counsel asserted he did not believe he could effectively represent defendant if defendant was completely bound and shackled. Counsel stated he understood the trial court's order keeping defendant bolted to the floor. However, counsel requested defendant have at least one hand free to write notes and communicate with counsel. Counsel also raised a concern that the defense table lacked a skirting to shield defendant's leg shackles from the jury's view.

¶ 25 The State noted the trial court heard all the evidence as to the reasons for shackling defendant and argued "[h]e certainly does pose a risk to anyone in this courtroom." The State had no objection to finding something to skirt the defense table so the jury could not see the shackles. The court allowed the parties to skirt the table but ordered defendant remain shackled. The court noted defendant was shackled due to his conduct on May 9, 2019, which created a dangerous situation in the courtroom and involved a "struggle[ ] with several correctional officers." The court indicated it would give defense counsel extra time to converse

with defendant during the course of the trial to alleviate any difficulty in communication with counsel. The court also instructed everyone present not to rise for the court or the jury.

¶ 26 As discussed above, defendant ultimately went to trial on the following charges: armed violence, armed robbery, aggravated battery (counts I, II, and VII in Macon County case No. 18-CF-942), attempted first degree murder, aggravated discharge of a firearm, and three counts of aggravated unlawful use of a weapon (counts II, III, VI, VII, and VIII in Macon County case No. 18-CF-944). The State dismissed the remaining charges. The evidence at trial showed defendant was in an altercation with his mother and father, Amber and Randy. Amber testified that defendant, while brandishing a gun, awakened her in her home during the early morning hours of June 21, 2018. Eventually, defendant left the home and Amber attempted to go to work but was unable to enter her detached garage, so she walked to Randy's house and Randy drove her home. While Amber and Randy were riding in Randy's vehicle, defendant began to chase Amber and Randy in his vehicle. The incident culminated in defendant crashing his vehicle into a power line pole and fleeing on foot. Officers found an uncased and loaded shotgun and an uncased AR-15 rifle with ammunition in the vehicle defendant was driving. A witness testified defendant had a black 9-millimeter handgun he kept showing. Another witness testified defendant shot a black semiautomatic gun into the air. Defendant had a valid Firearm Owner's Identification Card, but he did not have a concealed carry license.

¶ 27 Following the trial, the jury found defendant not guilty of armed robbery, aggravated battery, armed violence, aggravated discharge of a firearm, and attempted first degree murder. The jury found defendant guilty of aggravated unlawful use of a weapon (handgun), aggravated unlawful use of a weapon (rifle), and aggravated unlawful use of a weapon (shotgun).

In January 2020, the trial court sentenced defendant to concurrent terms of three years' imprisonment.

¶ 28 This appeal followed.

¶ 29 II. ANALYSIS

¶ 30 On appeal, defendant argues (1) the trial court erroneously denied his motion to discharge his case when the State failed to bring him to trial within the 120-day speedy trial period; (2) the court violated his right to due process when it restrained defendant's hands and feet, preventing him from assisting in his own defense; and (3) his convictions for aggravated unlawful use of a weapon violated the proportionate penalties clause of the Illinois Constitution because felony aggravated unlawful use of a weapon and misdemeanor unlawful use of a weapon contain identical elements.

¶ 31 A. Speedy Trial

¶ 32 Section 103-5(a) of the Speedy Trial Act provides that "[e]very 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 or she was taken into custody unless delay is occasioned by the defendant." 725 ILCS 5/103-5(a) (West 2020). "When a defendant is not released on bail and remains in custody, the 120-day statutory period begins to run automatically from the day the defendant is taken into custody and no formal demand for trial is required." *People v. Mayo*, 198 Ill. 2d 530, 536, 764 N.E.2d 525, 529 (2002). When the delay is occasioned by the defendant, the 120-day period temporarily suspends. 725 ILCS 5/103-5(f) (West 2020). A delay is attributable to the defendant "when the defendant's acts caused or contributed to a delay resulting in the postponement of trial." *People v. Hall*, 194 Ill. 2d 305, 326, 743 N.E.2d 521, 534 (2000). "When a defense attorney requests a continuance on behalf of a defendant, any delay caused by

that continuance will be attributed to the defendant. [Citation.] However, a defendant cannot be bound by his attorney's actions when he clearly and convincingly attempted to assert his right to discharge his attorney and proceed to an immediate trial." *Mayo*, 198 Ill. 2d at 537.

¶ 33 In evaluating speedy-trial issues, we consider two standards of review. First, we afford great deference to a trial court's determination as to who is responsible for a delay of the trial and we sustain that determination absent a clear showing that the court abused its discretion. *People v. Kliner*, 185 Ill. 2d 81, 115, 705 N.E.2d 850, 869 (1998). Second, the ultimate question as to whether defendant's statutory right to a speedy trial has been violated is a question of law we review *de novo*. *People v. Pettis*, 2017 IL App (4th) 151006, ¶ 17, 83 N.E.3d 422.

¶ 34 As an initial matter, we note defendant argues the State conceded 81 days attributable to the State. Specifically, defendant asserts the State conceded that defendant's arrest on June 21, 2018, through his preliminary hearing on July 18, 2018, totaled 27 days that should be occasioned against the State. The State also conceded that May 9, 2019, through May 17, 2019, totaled eight days that should be occasioned against the State. The State indicated the period from August 8, 2019, (where defendant did not specifically object to a continuance or demand immediate trial but stated the September trial date was not soon enough) to the September 23, 2019, trial date totaled 46 days, might not be attributable to defendant. On appeal, the State does not address whether these 81 days are attributable to the State. Defendant asks that this court accept the State's implicit concession. Assuming, *arguendo*, the 81 days were occasioned by the State, we turn now to the other time periods defendant contends should not be attributable to him.

¶ 35 At issue in this case are three periods of time: from November 28, 2018, through January 4, 2019, from January 4, 2019, through February 6, 2019, and from February 6, 2019,

through February 14, 2019. Defendant asserts this time should not be attributed to him because he filed two *pro se* motions in October 2018 that made clear he objected to any continuances or delays. Defendant acknowledges he was represented by counsel during this time period and counsel agreed to or requested continuances. However, defendant asserts that he was not present at the hearings to object to counsel's actions or to fire counsel and proceed *pro se*. According to defendant, he clearly would have fired counsel and proceeded *pro se* to preserve his right to be brought to trial within 120 days. We disagree.

¶ 36 On September 24, 2018, Senger entered her appearance as defendant's counsel. During an October 3, 2018, pretrial hearing, Senger requested a late November pretrial, and the court set the matters for pretrial on November 28, 2018.

¶ 37 On October 15, 2018, defendant filed a *pro se* "motion for speedy trial demand" in Macon County case No. 18-CF-944. On October 17, 2018, defendant filed a *pro se* "motion for speedy trial demand" in Macon County case No. 18-CF-942. The motions demanded a trial by jury, objected to any delays requested by either party, asserted his right to a speedy trial was absolute, and requested a speedy trial. On November 5, 2018, defendant filed motions to discharge in both cases, claiming his right to a speedy trial was violated. On November 27, 2018, defendant filed several *pro se* motions in both cases. The filings included motions for discharge, motions to expunge the record, motions to reduce bond, motions to suppress evidence, and a notice of intent to be present at all court dates. None of the motions indicated defendant wished to fire Senger and proceed *pro se*.

¶ 38 At the November 28, 2018, pretrial hearing, Senger appeared for defendant and requested an additional pretrial hearing because she had yet to review a number of *pro se* motions defendant filed. The court stated each case was continued for additional pretrial to

January 4, 2019, on the motion of defendant. On January 4, 2019, Senger requested additional pretrial continuances for both cases due to outstanding ballistic labs in Macon County case No. 18-CF-944.

¶ 39 On February 6, 2019, the parties informed the trial court the State filed pretrial motions for joinder of the two cases and for consumptive deoxyribonucleic acid (DNA) testing. Defense counsel agreed to a February 14, 2019, hearing. On February 14, 2019, the court held a hearing on the State's pretrial motions. During the hearing, defendant interjected and stated his due process rights had been violated when he was not allowed to be present at pretrial hearings and stated he "asked for no continuances months ago." The court agreed it would make certain defendant was present for all substantive court proceedings and admonished defendant to be respectful. After an additional exchange where defendant asserted he was being respectful, the court had him removed from the courtroom. The court granted the motion to join the two cases and, at Senger's suggestion, set the cases for a final pretrial on May 3, 2019, and a jury trial on May 20, 2019. The court also struck defendant's *pro se* motions.

¶ 40 The trial court found the delays occasioned by defense counsel on November 28, 2018, January 4, 2019, and February 6, 2019, were attributable to defendant. As noted, this finding is afforded great deference. We conclude the trial court properly determined these time periods were attributable to defendant. On November 28, 2018, Senger requested an additional pretrial hearing, in part because she had yet to review the *pro se* motions filed by defendant. On January 4, 2019, Senger again requested an additional pretrial continuance. On February 6, 2019, Senger agreed to a February 14, 2019, hearing.

¶ 41 Defendant argues that, because his October 2018 *pro se* motions objected to any delays requested by either party, his counsel lacked the authority to agree to or request a

continuance. With the exception of a motion raising a claim of ineffective assistance of counsel, a defendant represented by counsel "generally has no authority to file *pro se* motions, and the court should not consider them." *People v. Patrick*, 406 Ill. App. 3d 548, 564, 956 N.E.2d 443, 458 (2010). A defendant can either represent themselves or have counsel represent them, but they do not have the right to both. *Id.* The right to counsel and the right to self-representation cannot be exercised at the same time. *People v. Pondexter*, 214 Ill. App. 3d 79, 87, 573 N.E.2d 339, 345 (1991). Once a defendant elects counsel, "that counsel has control over the day-to-day conduct of the defense." *Id.* "[A] defendant is bound by his counsel's request for a continuance, even if the request is made in the accused's absence. This is because an ordinary, uncontested motion for a continuance does not involve rights of the accused of such a substantial nature as to invalidate the actions that occur without the accused's express consent." *People v. Bowman*, 138 Ill. 2d 131, 142, 561 N.E.2d 633, 639 (1990).

¶ 42 In support of his argument, defendant cites *People v. Pearson*, 88 Ill. 2d 210, 430 N.E.2d 990 (1981). In *Pearson*, the supreme court determined the controlling issue was waiver, and the court specifically noted "[t]he controlling issue in this case is not whether the continuances were properly charged to the defendant." *Id.* at 212-13. Rather, the court determined defendant waived his speedy-trial claim by failing to raise it prior to trial. *Id.* at 219. Moreover, the defendant in *Pearson* "object[ed] to his attorney's request for or acquiescence in a continuance by employing such terms as 'I'm ready for trial,' 'Forget the motion,' and 'you are not my attorney *** I'm ready for trial[.]' " *Id.* at 215.

¶ 43 The State argues this case is more like the supreme court's decision in *Mayo*. In *Mayo*, the defendant dismissed his attorney and later asked for the public defender to be reappointed. *Mayo*, 198 Ill. 2d at 532. During a hearing which occurred at the beginning of the

time period disputed by the parties for speedy trial purposes, the trial court asked the defendant if he wanted an attorney and the defendant responded that he did. *Id.* at 533. Following some discussion between defendant's counsel and the State, defendant interjected and said "I would like to take back my—I'm ready at this time. I don't need her [public defender] help. She is not helping me." *Id.* The public defender agreed to a continuance. *Id.*

¶ 44 The supreme court found *Pearson* distinguishable where the defendant did not clearly and unequivocally tell the trial court he wanted to represent himself and proceed to trial. *Mayo*, 198 Ill. 2d at 540. The supreme court noted the defendant had represented himself and then later asked for the public defender to be reappointed. *Id.* The supreme court concluded the defendant's equivocation "caused enough uncertainty on the part of the trial court to continue the matter for a short time so that the court could be sure of how defendant wanted to proceed." *Id.* The supreme court found it was not an abuse of discretion to attribute the delay to the defendant. *Id.*

¶ 45 We conclude the present case is more akin to *Mayo*. On September 21, 2018, defendant asked the trial court to appoint the public defender. Thus, at the time in question in this case, defendant was represented by counsel and he did not assert he wished to fire his counsel. While his October 2018 *pro se* motions indicated his disagreement with any delay requested by either party, he never suggested he wished to proceed *pro se*. Defendant argues he was denied the opportunity to fire his counsel because he was not present at the pretrial hearings. However, defendant filed numerous *pro se* motions prior to the November 28, 2018, hearing and none of those motions mention firing counsel. Moreover, "a defendant is bound by his counsel's request for a continuance, *even if the request is made in the accused's absence*. This is because an ordinary, uncontested motion for a continuance does not involve rights of the accused of such

a substantial nature as to invalidate the actions that occur without the accused's express consent." (Emphasis added.) *Bowman*, 138 Ill. 2d at 142.

¶ 46 Given the circumstances in this case, we conclude it was not an abuse of discretion to attribute the time from November 28, 2018, through February 14, 2019, to defendant where defense counsel requested or agreed to continuances on three occasions. Although defendant's *pro se* motions indicated he disagreed with any delay, he remained represented by defense counsel, and nothing indicates he wished to discharge her during the relevant time period.

¶ 47 B. Restraints

¶ 48 The supreme court has long held that physical restraints in criminal proceedings may be used only on a showing of manifest necessity. *In re Benny M.*, 2017 IL 120133, ¶ 27, 104 N.E.3d 313; *People v. Boose*, 66 Ill. 2d 261, 265-66, 362 N.E.2d 303, 305 (1977). Such restraint (1) tends to prejudice the jury against the defendant, (2) hinders the defendant's ability to assist in his defense, and (3) offends the dignity of the judicial process. *Boose*, 66 Ill. 2d at 265. "The determination of whether and how to restrain a criminal defendant is left to the trial court's discretion." *Benny M.*, 2017 IL 120133, ¶ 29. In *Boose*, the Illinois Supreme Court found the trial court should state on the record the reasons for allowing a defendant to remain shackled and provide counsel with the opportunity to present reasons why the defendant should not be shackled. *Boose*, 66 Ill. 2d at 266. Those proceedings should occur outside the presence of the jury. *Id.* The court listed a number of factors a court should consider when determining whether a defendant should be shackled. *Id.* at 266-67. The record must clearly disclose the reasons underlying the trial court's decision for the shackling and show that defense counsel had the opportunity to oppose the shackling. *Id.* at 267. The failure to follow the procedure set forth

in *Boose* is a due process violation. *People v. Allen*, 222 Ill. 2d 340, 349, 856 N.E.2d 349, 354 (2006).

¶ 49 Illinois Supreme Court Rule 430 sets forth the factors the trial court shall consider and make specific findings on when determining whether to physically restrain a defendant at trial. Ill. S. Ct. R. 430 (eff. July 1, 2010). Rule 430 sets forth the following factors:

> "(1) the seriousness of the present charge against the defendant;
>
> (2) defendant's temperament and character known to the trial court either by observation or by the testimony of witnesses;
>
> (3) defendant's age and physical attributes;
>
> (4) defendant's past criminal record and, more particularly, whether such record contains crimes of violence;
>
> (5) defendant's past escapes, attempted escapes, or evidence of any present plan to escape;
>
> (6) evidence of any threats made by defendant to harm others, cause a disturbance, or to be self-destructive;
>
> (7) evidence of any risk of mob violence or of attempted revenge by others;
>
> (8) evidence of any possibility of any attempt to rescue the defendant by others;
>
> (9) size and mood of the audience;
>
> (10) physical security of the courtroom, including the number of entrances and exits, the number of guards necessary to

provide security, and the adequacy and availability of alternative security arrangements." Ill. S. Ct. R. 430 (eff. July 1, 2010).

¶ 50 In this case, during the hearing on the State's motion to restrain defendant, Mounce testified about the May 9, 2019, incident where Mounce used his taser on defendant more than once and defendant was pepper sprayed. Ultimately, 20 officers and deputies restrained defendant. At one point, it appeared as if defendant was going to head toward the judge. Defendant was handcuffed during the incident and was still able to fight.

¶ 51 Flannery testified defendant had been involved in a few physical altercations while in jail. Flannery stated, "But the—the overall demeanor, any time we deal with him is very stand-offish. We shackle him any time we move him to any kind of appointments or anything like that, and it's usually a struggle verbally to get him to comply." When asked if he would be comfortable with officers trying to handle defendant in an open courtroom, Flannery testified he directed all his officers to shackle defendant any time he was moved. Flannery testified, "Because of his actions that he had in the courtroom, the actions he's had in the jail, statements he's made, they're directed to handcuff him or shackle him every time."

¶ 52 The trial court found the charge of attempted first degree murder to be very serious. The testimony before the court indicated defendant was disruptive in the courtroom and was involved in an altercation with correctional officers. The court noted defendant appeared to be in his early thirties and physically strong. The court addressed the remaining factors in Illinois Supreme Court Rule 430 (eff. July 1, 2010) as follows:

"Pre-trial bond report indicates that he has a minimal, or almost non-existent, criminal history. Doesn't have any particular criminal history. I'm not aware of any escape attempt, or attempts

to escape. Any threats made by him to cause a disturbance, and the tape I just heard, he said that—at one point that they make up the rules as they go along, and he further said that they, whoever they are, will have to bend to his will. The fact that what happened on the prior occasion testified to by Deputy Mounce—or Correctional Officer Mounce.

Risk of mob violence, I don't see any risk, anything there. Possibility of attempt to rescue him [by] others, I don't see that. And I'm not aware of any mood or anything like that, the physical security of the defendant in the courtroom. There isn't much physical security in the courtroom. The jury's gonna be exposed to it.

So I think considering all those factors, it is prejudicial to him, that I think the fact that he's going to do what he wants, essentially what he said in the phone call, then that demonstrated by his behavior on the prior occasion in front of Judge Griffith that I am going to order him restrained during the trial."

¶ 53 Defense counsel raised the issue of defendant's restraints again before trial. Counsel requested defendant have at least one hand free to write notes and communicate with counsel. Counsel also raised a concern that the defense table lacked a skirting to shield defendant's leg shackles from the jury's view. The State noted the trial court heard all the evidence as to the reasons for shackling defendant and argued "[h]e certainly does pose a risk to

anyone in this courtroom." The State had no objection to finding something to skirt the defense table so the jury could not see the shackles.

¶ 54 The trial court allowed the parties to skirt the table but ordered defendant remain shackled. The court noted defendant was shackled due to his conduct on May 9, 2019, which created a dangerous situation in the courtroom and involved a "struggle[ ] with several correctional officers." The court indicated it would give defense counsel extra time to converse with defendant during the course of the trial to alleviate any difficulty in communication with counsel. The court also instructed everyone present not to rise for the court or the jury.

¶ 55 Defendant argues the record does not demonstrate a manifest need for shackling where Flannery testified he directed the correctional officers "to handcuff him or shackle him every time." According to defendant, this testimony demonstrated that Flannery believed only one type of restraint or the other was necessary. Defendant also argues the State deferred to the trial court when defense counsel raised this issue a second time prior to trial. However, the State noted the court had already heard all the evidence it needed to make the decision about shackling and asserted defendant posed a risk to everyone in the courtroom. We recognize the severity of the action taken by the trial court. Here, where the standard of review is whether an abuse of discretion occurred, we defer to the trial court, who had the benefit of observing and hearing defendant and the witnesses who testified at the *Boose* hearing, when assessing what might be necessary to keep everyone in the courtroom safe during the trial. Given the May 9, 2019, incident, where it took 20 security officers to subdue defendant even when handcuffed, we conclude the record demonstrated a manifest need for shackling. Moreover, the trial court considered each of the factors set forth in Rule 430 and took steps to keep the shackles from the jury's view, including skirting the table and not having anyone in the room rise for the court or

the jury. Thus, we conclude the trial court did not abuse its discretion in determining that defendant should be shackled during his trial.

¶ 56 C. Proportionate Penalties Claim

¶ 57 Finally, defendant asserts his convictions for improperly handling the handgun and the shotgun violate the proportionate penalties clause of the Illinois Constitution because felony aggravated unlawful use of a weapon and misdemeanor unlawful use of a weapon contain identical elements, resulting in different penalties for identical offenses. The State contends the offenses are not identical where a person who is convicted of aggravated unlawful use of a weapon may meet the criteria for conviction of unlawful use of a weapon, but the opposite is not true.

¶ 58 "A statute is presumed constitutional, and the party challenging the statute bears the burden of demonstrating its invalidity." *People v. Graves*, 207 Ill. 2d 478, 482, 800 N.E.2d 790, 792 (2003). Courts have a duty to construe a statute in a manner that upholds its validity and constitutionality if it can reasonably be done. *Id.* The constitutionality of a statute is a question of law that we review *de novo*. *Id.* "[T]he proportionate penalties clause is violated 'where offenses with identical elements are given different sentences.' " *Id.*

¶ 59 The aggravated unlawful use of a weapon statute provides:

> "(a) A person commits the offense of aggravated unlawful use of a weapon when he or she knowingly:
>
> (1) Carries on or about his or her person or in any vehicle or concealed on or about his or her person except when on his or her land or in his or her abode, legal dwelling, or fixed place of business, or on the land or in the legal dwelling of another person

as an invitee with that person's permission, any pistol, revolver, stun gun or taser or other firearm; [and]

***

(3) One of the following factors is present:

(A) the firearm, other than a pistol, revolver, or handgun, possessed was uncased, loaded, and immediately accessible at the time of the offense; or

(A-5) the pistol, revolver, or handgun possessed was uncased, loaded, and immediately accessible at the time of the offense and the person possessing the pistol, revolver, or handgun has not been issued a currently valid license under the Firearm Concealed Carry Act[.]" 720 ILCS 5/24-1.6(a)(1), (3) (West 2018).

The unlawful use of a weapon statute provides:

"(a) A person commits the offense of unlawful use of weapons when he knowingly:

* * *

(4) Carries or possesses in any vehicle or concealed on or about his person except when on his land or in his own abode, legal dwelling, or fixed place of business, or on the land or in the legal dwelling of another person as an invitee with that person's permission, any pistol, revolver, stun gun or taser or other firearm, except that this subsection (a)(4) does not apply to or affect

transportation of weapons that meet one of the following conditions:

(i) are broken down in a non-functioning state; or

(ii) are not immediately accessible; or

(iii) are unloaded and enclosed in a case, firearm carrying box, shipping box, or other container by a person who has been issued a currently valid Firearm Owner's Identification Card; or

(iv) are carried or possessed in accordance with the Firearm Concealed Carry Act by a person who has been issued a currently valid license under the Firearm Concealed Carry Act[.]" 720 ILCS 5/24-1(a)(4) (West 2018).

¶ 60 Initially, we note defendant has not challenged his aggravated unlawful use of a weapon conviction for possessing the unloaded rifle with ammunition for the rifle immediately accessible. Defendant's argument pertains only to his convictions for possessing the loaded handgun and the loaded shotgun. Here, the State asserts aggravated unlawful use of a weapon and unlawful use of a weapon are not identical where the aggravated unlawful use of a weapon statute contains aggravating factors not required for conviction of unlawful use of a weapon. Although the statutes have been amended since the appellate court rendered its decision in *People v. McGee*, 341 Ill. App. 3d 1029, 794 N.E.2d 855 (2003), we find the reasoning persuasive. In *McGee*, the defendant was charged with aggravated unlawful use of a weapon for possessing a weapon that was uncased, loaded, and immediately accessible, in violation of section 24-1.6(a)(3)(A). See 720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2002). In *McGee*, the court pointed out this distinction between the two offenses: "If the weapon is loaded and

enclosed in a case, it does not come within aggravating factor A of the felony charge; it still may be charged as a misdemeanor, which excepts 'unloaded *and* enclosed in a case firearms.' " *McGee*, 341 Ill. App. 3d at 1036. There, as here, had defendant's guns been enclosed in a case, he could only have been charged with unlawful use of a weapon, not aggravated unlawful use of a weapon. *Id.* Moreover, the supreme court has held that the factors in section 24-1.6(a)(3) are additional elements that "transform the crime from 'simple' unlawful use of a weapon to aggravated unlawful use of a weapon." *People v. Zimmerman*, 239 Ill. 2d 491, 499, 942 N.E.2d 1228, 1233 (2010).

¶ 61 We conclude that unlawful use of a weapon and aggravated unlawful use of a weapon are not identical offenses in violation of the proportionate penalties clause of the Illinois Constitution. Accordingly, we decline to reduce two of defendant's convictions for aggravated unlawful use of a weapon to misdemeanor unlawful use of a weapon.

¶ 62 III. CONCLUSION

¶ 63 For the reasons stated, we affirm the trial court's judgment.

¶ 64 Affirmed.