

NOTICE

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2011 IL App (5th) 100300-U
NO. 5-10-0300
IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

NOTICE

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

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Fayette County.
)	
v.)	No. 09-CF-157
)	
WALTER I. BLACK,)	Honorable
)	S. Gene Schwarm,
Defendant-Appellant.)	Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.
Justices Welch and Goldenhersh concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion in denying the defendant's motion *in limine* where the evidence sought to be excluded provided a context for the charges against the defendant. The trial court did not commit plain error in allowing the trial judge to remove himself as a matter of right rather than for cause as requested by the defendant where the judge's action did not prejudice the defendant or challenge the integrity of the judicial process. The State's failure to turn over discoverable material was not plain error where the State did not act in bad faith and the defendant did not suffer prejudice.

¶ 2 On April 8, 2010, following a jury trial in the circuit court of Fayette County, the defendant, Walter Black, was convicted of aggravated battery in a public place. On May 7, 2010, the defendant filed a motion for a new trial. On May 29, 2010, the trial court denied the defendant's motion and sentenced him to 30 months' probation and imposed a \$500 fine. He filed a timely notice of appeal. We affirm.

¶ 3 **BACKGROUND**

¶ 4 On September 17, 2009, the defendant was charged with four counts of aggravated

battery in a public place and four counts of aggravated battery of an individual over 60 years of age. The charges flowed from two separate allegations of battery against the same victim, one of which occurred in the stairway of the Fayette County courthouse and the second that occurred in the hallway near the courthouse exit. One theory of each battery event alleged bodily harm to the victim, and the second alleged that the contact was of an insulting or provoking nature. The defendant was also charged with the same alternative theories for each of the alleged contacts in light of the fact that the victim was a person over 60 years of age.

¶ 5 On September 28, 2009, the defendant filed a *pro se* motion to recuse Judge Middendorff for cause. He argued that Judge Middendorff was prejudiced against him because at his father Ivan Black's hearing on September 16, 2009, the judge would not allow him to sit at the defendant's table with his father, but allowed the State to have two people sitting at their table. He also argued that, at the conclusion of his father's hearing, Judge Middendorff threatened him from the bench when he had done nothing to warrant the threat. The defendant asked that, if no cause was found, Judge Middendorff be recused as a matter of right.

¶ 6 In the September 30, 2009, docket notes, Judge Middendorff wrote "motion to recuse granted as a matter of right." On October 9, 2009, the State filed a response to the defendant's motion to recuse Judge Middendorff for cause asking the court to deny the defendant's motion.

¶ 7 At a status hearing on October 14, 2009, the trial court told the defendant, "Judge Middendorff's out, I'm on the case." The defendant argued that the recusal of Judge Middendorff should be held moot because he did not ask for a removal as a matter of right. The court stated:

"Whether or not Judge Middendorff is excused as a matter of right or whether he

voluntarily took himself off the case, his last docket entry says motion to recuse granted as a matter of right. That means to me that you have to—if you want to get me off you have to substitute me for cause. If you want to try to say that you can substitute me as a matter of right, you have to file that motion."

The defendant again asserted that Judge Middendorff erred in removing himself as a matter of right. The court informed him that he would have to "file a motion to reconsider or a motion in some way, shape and form." The court went on to state, "If you're satisfied with me in the case you don't have to worry about it." The defendant indicated that he understood that if he wanted the trial judge off the case he would have to "follow the rules and file something."

¶ 8 At a motion hearing on November 4, 2009, the defendant again argued that Judge Middendorff erred in granting the motion to recuse because "it says granted as a matter of right and I did a motion for cause." The trial court found that the motion was granted as a matter of right and that the defendant's time to challenge that ruling had expired.

¶ 9 On November 18, 2009, the defendant filed a *pro se* demand for discovery requesting, among other things, "any and all video of the alleged incident" and "any and all video of the events leading up to and surrounding the alleged incident." On November 19, 2009, the State filed a response to the defendant's discovery demand stating that there were no security cameras on the date of the offenses in the areas of the building where the offenses took place. At a pretrial hearing on November 25, 2009, the defendant informed the court that he had asked for the videotape from the courthouse's surveillance cameras, but the State had failed to provide it. The court ordered the State to comply with the defendant's discovery request by December 4, 2009. At a pretrial hearing on December 28, 2009, the defendant informed the court that the State never turned over the videotape. The State responded that, as stated in its November 19, 2009, response, there was no videotape to turn over because there were

no cameras in the areas where the incidents took place. The defendant argued that the State was being untruthful as there are "video cameras all over this courthouse." The court informed the defendant that because the State had formally complied with his discovery request, he would have to file a motion if he believed the State was being untruthful.

¶ 10 On December 31, 2009, the defendant file a *pro se* motion to compel asking the court to order the State to provide the defendant with any and all videotapes of the events leading up to and surrounding the incident from the courtroom camera, lobby camera, and front door camera. The court heard the defendant's motion to compel on January 4, 2010. The defendant argued that the videotape of the lobby would show where the security guard was stationed and whether he could see the hallway where the alleged aggravated battery took place. He requested audio from the video cameras on the grounds that it would show whether or not he made the statement the victim and witnesses alleged he made. The defendant argued that the videotape of the courtroom was necessary to identify any witnesses in the courtroom, to establish a timeline, and to show his intent. The State responded that this was the first time it was aware that the defendant wanted the courtroom and lobby camera videotapes and that before he asked only for the videotape of the events leading up to and including the actions for which he was charged. The State contended that both incidents happened in areas where there were no cameras. While there is a camera in the lobby, the State argued that the camera's position was such that it did not tape the area where the second incident took place. The trial court asked the State to find out if the videotape existed and if there was audio. After a recess, the State returned and said that, after contacting the sheriff's department, it learned that the recordings existed but that there was no audio. The court granted the motion to compel with respect to the lobby and courtroom videotapes that had been recorded from 8 a.m. until 2 p.m. on September 16, 2009.

¶ 11 On January 8, 2010, the State filed a disclosure to the accused which read in pertinent

part:

"Recordings from security cameras in the lobby of the Fayette County Building and in Courtroom A (the large courtroom) do not exist for the date of September 16, 2009. The prior oral representation to the court that the recordings did exist was based upon a misunderstanding of the date for which the recording was needed. The Fayette County Sheriff's Office believed the date requested was November 16, 2009, and did in fact provide a copy of the recordings for that date. When advised that the relevant date was September 16, 2009, the Sheriff's Office stated that the recordings for that date are unavailable."

The record shows that the hard drive for the cameras only hold recordings for approximately 45 to 60 days.

¶ 12 At trial, the State entered *nolle prosequi* dispositions on four of the counts against the defendant and proceeded only on the counts of aggravated battery on public property by making physical contact of an insulting or provoking nature to Gene Ireland in the stairway of the Fayette County courthouse; the charge of aggravated battery on public property by making physical contact of an insulting or provoking nature to Gene Ireland in the hallway of the Fayette County courthouse; the charge of aggravated battery by knowingly causing bodily harm to Gene Ireland, a person over 60 years of age, in the stairway of the Fayette County courthouse; and the charge of aggravated battery for knowingly causing bodily harm to Gene Ireland, a person over 60 years of age, in the hallway of the Fayette County courthouse.

¶ 13 At the start of the hearing, the defendant's attorney made an oral motion *in limine* that there be no reference to Ivan Black's aggravated battery case because the reference would be prejudicial to the defendant. The State argued that it was relevant because it explained why the spectators were present at the time of the incident, because it went to the defendant's

motive for hitting a spectator, and because it put the incident into context, specifically the defendant's statement at the time of one of the batteries, "I guess that's a felony too." The trial court denied the defendant's motion on the following ground: "[I]t is relevant and probative as to why the defendant was at the courthouse, why the alleged victim was at the courthouse, what they were doing. I think it's relevant to the way this charge developed."

¶ 14 The defendant testified that on September 16, 2009, he accompanied his father, Ivan Black, to the Fayette County courthouse. His father was there for a preliminary hearing on charges of aggravated battery of a person over the age of 60 and aggravated battery on a public way. Gene Ireland, Mike Wilhour, Robert Doty, Earl Frailey, and Jerry Miller came to the courthouse to watch the proceedings. He stated that after the hearing, he and his father were about to leave the building when he realized he left his hat in the courtroom. As he ascended the stairs to the courtroom, he said there was a "little traffic jam" of the people who came to watch his father's hearing. He brushed Mr. Ireland slightly. He retrieved his hat and exchanged pleasantries with the officer or security guard in the courtroom. He then headed back downstairs. The defendant testified that when he reached the small hallway that heads into the lobby, the group of men were standing there. As he passed Mr. Ireland, Mr. Ireland took a step backward and ran into the defendant. The defendant testified that he moved away and protected himself with his arm. He then continued walking out the door.

¶ 15 William Eugene Ireland (Gene) testified that he was 70 years old. He stated that he came to the courthouse on September 16, 2009, to watch Ivan's hearing. He said he sat with Ronnie Buzzard, Robert Doty, Mike Wilhour, Earl Frailey, and Jerry Miller. Mr. Ireland testified that after the hearing, he and the group he was sitting with waited until the defendant and his father left the courtroom. They then started down the stairs. Mr. Ireland testified that as he was descending the stairs, the defendant came hurrying through, took his elbow, and hit him in the chest. The defendant continued up the stairs. Mr. Ireland and his group

continued toward the door.

¶ 16 Mr. Ireland testified that as they were making their way through the hallway to the door, the group discussed the hearing. The defendant then hit or shoved him from behind. The defendant continued walking, and as he exited the door he turned, looked at Mr. Ireland, and said, "I guess that was a felony."

¶ 17 Earl Frailey testified that on September 16, 2009, he and Jerry Miller came to the courthouse to observe Ivan's pretrial hearing. At the hearing, he sat with Jerry Miller, Gene Ireland, and Mike Wilhour. After the hearing, he waited until Ivan and the defendant left, then he exited the courtroom. Mr. Frailey testified that, when he arrived at the bottom of the stairs with the group, the defendant started up the stairs at a "pretty fast" pace. When the defendant reached Mr. Ireland, he took his elbow and hit Mr. Ireland. Mr. Frailey testified that after the defendant struck Mr. Ireland with his elbow, he went halfway up the stairs, then stopped and looked down at the group before continuing up the stairs. The group then proceeded toward the front entrance. As they were in the hallway that leads to the lobby, the defendant came up from behind and elbowed Mr. Ireland again. Mr. Frailey testified that, as the defendant went out the door, he turned around and said, "I suppose this is a felony too."

¶ 18 Mike Wilhour testified that on September 16, 2009, he went to the courthouse to observe Ivan's hearing. He came to the courthouse alone but sat with Ronnie Buzzard, Earl Frailey, Jerry Miller, and Robert Doty. He stated that, at the conclusion of the hearing, they remained seated for a while waiting for "everybody else [to] clear out so we didn't have any run-ins with anybody, and then after probably five minutes or so, we got up and left together and we went down the stairs." As they headed down the stairs, the defendant was going up. Something occurred on the stairs, but Mr. Wilhour stated he was talking to somebody else and he did not witness it. When they were between the stairs and the doorway, the defendant

walked past the group and pushed Mr. Ireland. As the defendant exited the door, Mr. Wilhour heard him "holler," "I suppose that's a felony too."

¶ 19 Jerry Miller testified that he attended Ivan's hearing on September 16, 2009. His neighbor, Earl Frailey, told him that he planned to go watch the court proceedings, and Mr. Miller asked to go along because, although he did not know Ivan, he "always thought about doing that." When he and Mr. Frailey arrived, there were two or three people in attendance that he knew. He had not met Mr. Ireland until that day. When Mr. Miller arrived at the bottom of the stairs, he heard someone say something, and he looked up and saw the defendant going up the stairs. The group of men continued through the hallway toward the front lobby. The defendant came past the group in a "pretty good hurry. It was like coach used to tell you when you was playing football, and he whacked [Mr. Ireland] in the back shoulder with his elbow." Mr. Miller stated that he asked the security guard if he had seen what transpired, and the guard replied "yes." Mr. Miller testified that, as the defendant opened the door, he turned and stated, "I suppose that's a felony."

¶ 20 Ron Buzzard testified that he was at the courthouse on September 16, 2009, to observe Ivan's preliminary hearing. He said he came with his uncle, Robert Doty. Mr. Buzzard testified that, as they left the courtroom and went down the stairs, the defendant went up the stairs and elbowed Mr. Ireland. The defendant continued up the stairs, and the men walked down the hallway towards the exit. The defendant then came back and elbowed Mr. Ireland again. Mr. Buzzard testified that, as the defendant went through the door, he said, "I guess this is a felony too."

¶ 21 Larry Leininger testified that he is a corrections officer for the Fayette County sheriff's department. He stated that he does not have arrest powers for the sheriff's office. He stated that on September 16, 2009, he was sitting at the security table at the entrance door to the courthouse in the lobby. From that position he stated that he was able to see down the

hallway. Mr. Leininger testified that he saw the defendant walk back into the lobby and use his elbow to strike Mr. Ireland on the left shoulder. Mr. Ireland almost lost his balance. The defendant continued to the exit door, turned around, and said "I guess that was a felony too." Mr. Leininger testified that he did not know Mr. Ireland, the other men with him, the defendant, or the defendant's father.

¶ 22 The jury found the defendant guilty of aggravated battery on public property in the hallway and not guilty of the other charges. On May 7, 2010, the defendant filed a motion for a new trial alleging, among other things, that the trial court erred in denying his motion *in limine* to exclude evidence regarding Ivan Black's aggravated battery charge, that it erred in allowing the State to cross-examine the defendant about filing a motion for substitution of judge, and that the State did not prove the defendant guilty beyond a reasonable doubt. On May 25, 2010, the trial court held a posttrial motion and sentencing hearing. The defense attorney presented no argument and chose to stand on the motion. The State did not make an argument, stating that it argued all of the issues during the pretrial or the trial. The trial court denied the motion. The trial court sentenced the defendant to 30 months' probation and assessed a \$500 fine. The defendant filed a timely notice of appeal.

¶ 23

ANALYSIS

¶ 24 The defendant argues that the trial court abused its discretion when it denied his motion *in limine* to bar reference to his father's aggravated battery charges. A reviewing court will not disturb a trial court's evidentiary ruling on a motion *in limine* absent an abuse of discretion. *People v. Patrick*, 233 Ill. 2d 62, 68 (2009). A trial court's ruling is an abuse of discretion only where it is arbitrary or unreasonable or where no reasonable person would take the position adopted by the trial court. *Id.*

¶ 25 The defendant argues that allowing evidence of Ivan's aggravated battery charges was similar to admitting other-crimes evidence. Other-crimes evidence is admissible to prove

intent, *modus operandi*, identity, motive, absence of mistake, and any material fact that is relevant to the case other than propensity to commit crime. *People v. Donoho*, 204 Ill. 2d 159, 170 (2003). "Even if other-crimes evidence falls under one of these exceptions, the court still can exclude it if the prejudicial effect of the evidence substantially outweighs its probative value." *Id.* This rule is designed to eliminate prejudice against a defendant caused by the State's introduction of evidence of his other crimes. *People v. Turner*, 373 Ill. App. 3d 121, 127 (2007).

¶ 26 The defendant argues that the prejudicial effect of allowing evidence of Ivan's aggravated battery charges outweighed its relevance. He argues that allowing the evidence that the "defendant's father stood accused of identical forms of battery[] permitt[ed] the jury to infer that the 'apple did not fall far from the tree.' "

¶ 27 The rules regarding other-crimes evidence relate to other crimes committed by the defendant, not by a person with a relationship to the defendant. Nevertheless, any prejudice caused by allowing evidence of Ivan's charges is outweighed by its probative value. The evidence of the charges against Ivan furnished a context that made the evidence of the charge against the defendant coherent and understandable. It explained why the defendant and Mr. Ireland were at the courthouse. Testimony related to the charges against Ivan established that there was animosity between the defendant, his father, and Mr. Ireland. Mr. Ireland testified that he came to watch the proceedings against Ivan, but did not support him. Finally, allowing the evidence put the defendant's statement ("I suppose that's a felony too") into context.

¶ 28 When the trial court denied the defendant's motion *in limine* it stated that it would entertain a limiting instruction that the jury was not to consider the father's charges in relation to the defendant's guilt or innocence. It is the burden of the party wanting a specific instruction to present it to the court and request that it be given to the jury. *People v.*

Anderson, 266 Ill. App. 3d 947, 954 (1994). Defense counsel did not proffer a limiting instruction. In closing, the State cautioned the jury that it did not bring up the charges against the defendant's father to try to create a sense of guilt by association. The State argued that Ivan's charges go "to the defendant's motive, his knowledge and his state of mind that he knew Mr. Ireland was over 60, he was angry about what happened that morning in court, he was angry about who was there, and when he walked out after hitting Mr. Ireland twice and he said, 'I guess that's a felony too,' he was right."

¶ 29 The charges against Ivan were relevant to a determination of what took place in the courthouse after Ivan's preliminary hearing. The trial court did not abuse its discretion in denying the defendant's motion *in limine* and finding that the evidence was probative and relevant to the way the charge against the defendant developed.

¶ 30 The defendant argues that the trial court abused its discretion when the judge at whom a substitution for cause motion was directed *sua sponte* transformed the motion into a motion to substitute as a matter of right and then recused himself. He asserts that, although this was not raised in his motion for a new trial, his claim should be reviewed under the plain error doctrine.

¶ 31 "The plain-error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence." *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). In the first instance, the defendant must show that there was plain error and that, because the evidence was so closely balanced, the error threatened to tip the scales of justice against him. *Herron*, 215 Ill. 2d at 187. In the second instance, the defendant must show that there was plain error that was so serious that it affected the fairness of his trial and challenged the integrity of the judicial process. *Id.*

¶ 32 In the instant case, the defendant failed to show that there was a prejudicial error that may have affected the outcome of a closely balanced case. The defendant failed to show he was prejudiced by Judge Middendorff's decision to recuse himself as a matter of right. Because Judge Middendorff did not preside over the defendant's case, any bias or prejudice he may have had was eliminated. Once Judge Middendorff was removed from the case, the defendant did not file a motion to recuse any of the other judges who presided over his case. There is nothing in the record to indicate that the defendant believed any of the other judges were not fair and impartial. Finally, the case was not closely balanced. All of the witnesses testified they saw the defendant push Mr. Ireland in the hallway. Only the defendant denies this occurrence. As a result, the defendant did not establish prejudice.

¶ 33 The defendant failed to show that Judge Middendorff's decision to grant the motion to recuse himself as a matter of right was an error so serious that it affected the fairness of his trial and challenged the integrity of the judicial process. The defendant argues that Judge Middendorff's actions denied him the right to subsequently move for the substitution of another judge as a matter of right, thereby depriving him of his right to a fair trial. He argues that the public policy behind the right to recuse a judge as a matter of right is to enable the defendant to avoid having his liberty hang in the balance before a judge whose impartiality he in good-faith questions. The defendant alleged that Judge Middendorff was prejudiced, but he did not allege that any of the other judges involved with his case were prejudiced. The defendant did not file a motion to recuse another judge either as a matter of right or for cause. He did not file a motion to reconsider Judge Middendorff's recusal, even though he was told that he could file such a motion if he thought Judge Middendorff erred in recusing himself as a matter of right. Judge Schwarm presided over the defendant's jury trial, and there is nothing in the record that indicates the defendant felt Judge Schwarm was prejudiced. The defendant failed to show that his trial was unfair or that the integrity of the judicial process

was undermined.

¶ 34 The defendant failed to show that Judge Middendorff's recusal of himself as a matter of right was an error that resulted in the miscarriage of justice in a closely balanced case or affected the fairness of his trial and challenged the integrity of the judicial process. As a result, Judge Middendorff's decision to recuse himself as a matter of right was not plain error.

¶ 35 The defendant argues that the State's failure to turn over discoverable material was plain error. He argues that the State's failure tipped the scales of justice in its favor. To prove plain error when the evidence is close, "the defendant must show both that there was plain error and that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him." *Herron*, 215 Ill. 2d at 187.

¶ 36 A discovery violation can be analyzed as a due process violation or under Illinois Supreme Court Rule 415(g)(i) (eff. Oct. 1, 1971). *People v. Kladis*, 403 Ill. App. 3d 99, 105 (2010). The Supreme Court in *Brady v. Maryland*, 373 U.S. 83, 87 (1963), held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." The *Brady* analysis is ill-suited in cases where the evidence has been lost or destroyed. *People v. Sutherland*, 223 Ill. 2d 187, 235 (2006). Different treatment is necessary where the evidence is lost or destroyed because courts then face the treacherous task of divining the import of evidence whose content is unknown or disputed. *Sutherland*, 223 Ill. 2d at 236 (citing *Arizona v. Youngblood*, 488 U.S. 51, 57-58 (1988)). "[W]hen evidence is potentially useful, but not material exculpatory evidence, then failure to preserve potentially useful evidence does not violate due process unless the defendant can show bad faith by the prosecution." *Kladis*, 403 Ill. App. 3d at 105 (citing *Illinois v. Fisher*, 540 U.S. 544, 548-49 (2004)).

¶ 37 In the present case, the defendant initially made a discovery demand asking for "any

and all video of the alleged incident" and "any and all video of the events leading up to and surrounding the alleged incident." The next day, the State filed a response stating that the Fayette County sheriff's office had advised it that there were no security cameras in the areas of the courthouse where the offense occurred. The State further stated that it was unaware of any video of the alleged offenses or of any events leading up to and surrounding the incident. On December 31, 2009, the defendant filed a motion to compel asking the court to order the State to provide him with any and all videotape of the events leading up to and surrounding the incident from the courtroom camera, lobby camera, and front door camera. At a hearing on the motion to compel on January 4, 2010, the State argued that this was the defendant's first request for videotape from the courtroom and lobby cameras and that the incidents occurred in areas where there were no cameras. The trial court asked the State to find out if the requested video existed and if it had audio. After a brief recess, the State informed the court that it spoke with the sheriff's department and the video existed, but there was no audio. The trial court granted the defendant's motion to compel and ordered the State to produce the courtroom and lobby video from 8 a.m. until 2 p.m. on September 16, 2009. On January 8, 2010, the State filed a disclosure that the videotape did not exist and that the prior oral representation to the court that it did exist was based on a misunderstanding of the date for which the recording was needed. A note in the record indicated that the tapes are only kept for 45 to 60 days.

¶ 38 There was no bad faith on the part of the State. After receiving the defendant's first discovery request, it immediately informed him that there was no video of the incident or the events immediately surrounding the incident, since the hallway and stairway did not have cameras. When, more than three months after the incident, the defendant requested videotapes of the lobby and courtroom, the State made every effort to comply, but discovered that the tapes were not retained for more than 60 days.

¶ 39 The videotapes requested by the defendant were not material exculpatory evidence. The defendant speculates that he "was convicted solely upon the testimony of the court-security officer, as evinced by the fact that Defendant was acquitted of the battery event that the officer did not witness, but was convicted of the event that the officer testified that he personally observed." While it is true that the defendant was found guilty only of the event that Mr. Leininger observed, there is nothing in the record to indicate that he was convicted solely upon Mr. Leininger's testimony. Both Mr. Miller and Mr. Wilhour testified that they saw only the incident in the hallway. While they were both on the stairs, they did not see the incident there. The defendant argues that the videotape of the lobby would show whether Mr. Leininger could see the event in the hallway. Mr. Miller testified that, at the time of the incident, he asked Mr. Leininger if he saw the defendant push Mr. Ireland, and Mr. Leininger responded yes. Mr. Leininger testified that he did not know any of the witnesses. Mr. Miller's testimony provides corroboration that Mr. Leininger saw the incident in the hallway. Because the videotapes were not material exculpatory evidence and the defendant could not show bad faith by the State, the failure to preserve the videotapes was not a due process violation.

¶ 40 Under Supreme Court Rule 412(f), the State has a duty to ensure that a flow of information is maintained between various investigative personnel and its office sufficient to place within its possession or control all material and information relevant to the accused. Ill. S. Ct. R. 412(f) (eff. Mar. 1, 2001). "The purpose of the discovery provision is to afford the accused protection against surprise, unfairness, and inadequate preparation." *People v. Robinson*, 157 Ill. 2d 68, 79 (1993). The burden is on the defendant to show prejudice. *People v. Hood*, 213 Ill. 2d 244, 258 (2004). The "standard of review for evaluating a discovery violation is whether the trial court abused its discretion." *People v. Taylor*, 409 Ill. App. 3d 881, 908 (2011). A reviewing court will find an abuse of discretion when a

defendant is prejudiced by the discovery violation and the trial court fails to eliminate the prejudice. *Taylor*, 409 Ill. App. 3d at 908. Among the factors this court considers in determining whether the defendant suffered prejudice stemming from a discovery violation are the closeness of the evidence, the strength of the undisclosed evidence, the likelihood that prior notice could have helped the defense discredit the evidence, and the wilfulness of the State in failing to disclose the new evidence. *Robinson*, 157 Ill. 2d at 81.

¶ 41 The defendant argues that because he was found guilty of only one count of the four presented at trial, the evidence was closely balanced. While the evidence was closely balanced on the counts the defendant was acquitted of, it was not closely balanced on the count of which he was found guilty. The defendant was acquitted of two charges of aggravated battery of an individual over 60 years of age. The defendant testified he did not know Mr. Ireland was over the age of 60. The State's evidence that the defendant did know Mr. Ireland's age was based on inference. The defendant was acquitted of the charge of aggravated battery on the stairway. There was less evidence about the incident on the stairway than the incident in the hallway. In addition to Mr. Ireland, only two witnesses testified that they saw the defendant elbow Mr. Ireland on the stairway. Mr. Ireland testified that the defendant hit or shoved him from behind in the hallway and as he exited said, "I guess that was a felony." Five witnesses stated they saw the defendant push or elbow Mr. Ireland, and all of them testified that, as he exited the building, the defendant said, "I guess that is a felony too." The only person who disputed this occurrence was the defendant. Mr. Miller testified that he had not met Mr. Ireland until that day. Mr. Miller testified that he asked Mr. Leininger if he had seen the incident in the hallway, and Mr. Leininger responded "yes." Mr. Leininger testified that he did not know any of the witnesses, Ivan, or the defendant. The evidence was not closely balanced on the count of aggravated battery in the courthouse hallway.

¶ 42 The defendant argues that the undisclosed evidence had a strong evidentiary value. He asserts that "if a picture is 'worth a thousand words,' according to the cliché, a video recording of the actual event(s) at dispute is worth a million." A video of the actual event may be worth a million words, but there was no video of the event either on the stairway or in the hallway because there were no video cameras in those locations. At most, the videotape from the lobby would show if Mr. Leininger was in a position to see the incident in the hallway. As discussed, five witnesses plus the victim testified as to the events in the hallway, and the content of their testimony was virtually identical. The undisclosed evidence did not have a strong evidentiary value.

¶ 43 The defendant next argues that had the State provided the requested videotape before it was destroyed, it would have permitted him to discredit the evidence against him. He argues that he was convicted solely on Mr. Leininger's testimony and that the videotape could prove that Mr. Leininger was lying. This is purely speculative. As discussed above, the defendant was not convicted solely on the basis of Mr. Leininger's testimony. Additionally, Mr. Miller's testimony corroborates that Mr. Leininger witnessed the incident in the hallway. As a result, the videotape would not have helped discredit the evidence.

¶ 44 Finally, the defendant argues that the State wilfully failed to disclose the videotape. The State responded immediately to the defendant's first discovery request, stating that there were no video cameras in the stairway or hallway. When asked to provide the videotapes of the courtroom and lobby, the State made efforts to obtain the videotapes, only to discover that they had been destroyed. The videotapes were destroyed prior to the defendant's request. As discussed above, the State did not act in bad faith.

¶ 45 The defendant did not suffer prejudice as a result of the destruction of the videotapes. There were no videotapes of the hallway or stairway where the incidents took place, and the defendant was informed of this immediately upon his first discovery request. The defendant

merely speculates that the videotapes of the courtroom and lobby would have been exculpatory. He asserted that the videotape of the lobby would show whether Mr. Leininger could see the hallway. While the videotape would show this, there is nothing in the record to suggest Mr. Leininger was lying about what he saw. Mr. Leininger did not know any of the parties involved in the case. Mr. Miller's testimony corroborates Mr. Leininger's testimony that he witnessed the incident in the hallway. The defendant argued that the courtroom videotape would enable him to identify witnesses who might be helpful to his defense, would show his intent, and would establish a timeline in which the events happened. There was no issue as to the timeline of the events. While the courtroom video would show people in the camera's line of vision on the date in question, it is mere conjecture that there were people present who witnessed the incident who were unknown to the defendant. Finally, the defendant provides no explanation as to how the videotapes would show his intent.

¶ 46 The defendant failed to prove that the State's failure to turn over discoverable evidence was plain error. The evidence was not so closely balanced that the error tipped the scales of justice against him, and there was no error that was so serious that it affected the fairness of his trial and challenged the integrity of the judicial process.

¶ 47 The defendant also argues he was entitled to a \$5 *per diem* monetary credit against the fine imposed on him for the portion of the day that he spent in jail prior to sentencing. The State agrees. Accordingly, the defendant is entitled to a \$5 credit to be applied to his fine.

¶ 48 **CONCLUSION**

¶ 49 For the foregoing reasons, the defendant is entitled to a \$5 credit to be applied to his fine, and the remainder of the judgment of the circuit court of Fayette County is affirmed.

¶ 50 Affirmed as modified.