

No. 1-11-3031

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

---

IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

---

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07 CR 5836
	)	
JEFFERY HAZLE,	)	Honorable
	)	Brian K. Flaherty,
Defendant-Appellant.	)	Judge Presiding.

---

JUSTICE LAMPKIN delivered the judgment of the court.  
Presiding Justice Rochford and Justice Hall concurred in the judgment.

**ORDER**

¶ 1 *Held:* Defendant waived his claim for a new trial when he failed to request a continuance to review a lab report which indicated that the recovered gun had been successfully test-fired; the State's failure to provide defendant the lab report did not surprise or prejudice defendant.

¶ 2 Following a jury trial, defendant Jeffery Hazle was convicted of aggravated battery with a firearm pursuant to section 12-4.2(a)(1) of the Criminal Code of 1961 (720 ILCS 5/12-4.2(a)(1) (West 2006)) and sentenced to 12 years in prison. On appeal, defendant contends that he is entitled to a new trial because the State violated Supreme Court Rule 412 by failing to tender

evidence to the defense, specifically a lab report indicating that the police successfully test-fired the gun that was recovered from the Jeep defendant was driving. We affirm.

¶ 3 Defendant and co-defendant Oscar Williams, who is not a party to this appeal, were charged by indictment with multiple counts of attempted murder, aggravated battery with a firearm, aggravated discharge of a firearm, unlawful use of weapon in a school, and aggravated unlawful use of weapon. The State elected to proceed only on the two counts of attempted first degree murder and one count of aggravated battery with a firearm.

¶ 4 Because defendant does not challenge the sufficiency of the evidence, only a summary recitation of the facts is required. According to the State's theory of the case, on January 31, 2007, Denzel Franklin, Antwan Kinerman, and two other men went to a basketball game at Hazel Crest High School. After the game, the men went to the parking lot, where there were several fights occurring. While Franklin was in the parking lot, he saw his friends in an altercation involving a white Jeep. After the fights were broken up, Franklin and Kinerman walked toward Winston Drive. While waiting for a ride, Franklin noticed the same white Jeep that he had seen at the game driving on North Winston. An individual in the Jeep started shooting at Franklin. Franklin testified that he heard three or four shots; Kinerman testified he heard four shots. Franklin was shot in his left arm, and ran to 175<sup>th</sup> Street where he located police and told them what happened.

¶ 5 While Franklin was being treated for the wound, he and Kinerman saw a white Jeep driving and identified it to police as the same Jeep that was involved in the shooting. Officers stopped the Jeep within a couple of blocks of the school. Country Club Hills Police Department Detective/Sergeant Gregory Smith, retired at the time of trial, searched the Jeep and found a

loaded nine-shot, .22 caliber revolver in the glove box. The gun contained four empty casings, two live bullets, and three empty chambers. Both defendant and Williams were arrested and transported to the police station. At the station, the gun was submitted to the crime lab for testing and the men were given gunshot residue tests. The tests revealed gunshot residue on defendant's left hand.

¶ 6 The following day, the police returned to Winston Drive to investigate the crime scene in daylight. Smith located a bullet hole on the side of a house at 17508 Winston Drive, but was unable to locate the bullet.

¶ 7 At trial, Detective/Sergeant Smith identified a photo of the inside of the Jeep which shows the glove compartment open with the gun inside as it was before it was recovered. He also identified a photograph of the cylinder of the revolver, making note of the four empty casings and three empty chambers. The State then showed Smith People's Group Exhibit 19, an evidence box containing the evidence recovered from the glove box of the Jeep. People's Exhibit 19(A) contained the gun. People's Exhibit 19(B) contained the four empty casings and two live bullets that remained in the gun's cylinder. People's Exhibit 19(C) was a yellow envelope that Smith stated "contained test shots from this gun that were performed by the State analysts at the State Crime Lab showing functionality of that weapon." Smith noted that the gun could not be tested to see if it actually fired the bullet that struck the house because the bullet was never recovered.

¶ 8 During the recross examination of Smith, defense counsel requested a sidebar conference. Counsel stated that:

"we are taken aback completely aback by the fact that they did in fact test fire the gun, although it doesn't, I don't think it hurts the case of Mr. Hazle because the gun has to be compared. I think we should at least been apprised a test firing was made, Judge."

The State responded that the test fire was not a surprise because counsel had access to the evidence and that counsel knows that "every single gun has a test fire from the Illinois State Police Crime Lab \*\*\* and [o]n top of the box of evidence it clearly says Illinois State Police test fire." The court agreed with the State that there was "no surprise," and that the box had been sitting there for the last two days with the envelope on top of it.

¶ 9 On appeal, defendant contends that he is entitled to a new trial because the State violated Supreme Court Rule 412 by failing to tender evidence that the police successfully test-fired the gun that was recovered from the Jeep, and its failure surprised and prejudiced defendant.

¶ 10 The parties disagree on the standard of review. The State insists that the standard of review for a discovery violation is whether the trial court abused its discretion in determining a proper sanction. However, we agree with defendant that when, as in this case, the parties do not dispute the facts giving rise to the alleged discovery violation, the issue of whether there was a violation in the first place becomes one of law, which we review *de novo*. *People v. Hood*, 213 Ill. 2d 244, 256 (2004).

¶ 11 Supreme Court Rule 412 provides for the disclosure of materials and information within the State's possession. (134 Ill.2d R. 412.) Under Supreme Court Rule 412(f), the State has a duty to "ensure that a flow of information is maintained between the various investigative personnel and its office sufficient to place within its possession or control all material and

information relevant to the accused and the offense charged." *Id.* 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, 78 (1993). While compliance with the discovery requirements is mandatory, the failure to comply with these requirements does not require a reversal absent a showing of surprise or undue prejudice. *Id.*

¶ 12 In deciding prejudice, surprise and whether a discovery violation warrants a new trial for a criminal defendant, a reviewing court considers “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 willfulness of the State in failing to disclose the new evidence.” *People v. Woods*, 2011 IL App (1st) 091959, ¶ 27 quoting *Robinson*, 157 Ill. 2d at 81. The burden of showing surprise or prejudice is upon the defendant, and the failure to request a continuance is a relevant factor to consider in determining whether the undisclosed evidence actually surprised or unduly prejudiced the defendant. *Robinson*, 157 Ill. 2d at 78. When a defendant fails to request a continuance and elects to proceed with the trial, the claimed error, if any, is waived. *Id.*

¶ 13 The State does not explicitly concede that a discovery violation occurred, but does not dispute defendant's claim that he did not receive the lab report. We therefore find a violation of Rule 412 because the State never provided defendant with a copy of the lab report. However, in this case, defendant is not entitled to a new trial. After the State revealed that the gun had been test-fired successfully during its examination of Detective Smith, instead of requesting a continuance to further investigate the matter or requesting that the lab report be tendered before cross-examination, defendant proceeded with the trial. Indeed, defense counsel never asked the State to provide the lab report indicating that the gun had been successfully test-fired after being

made aware of its existence. Counsel briefly addressed the absence of a lab report that confirmed the gun's functionality in his closing argument. We find that when defendant decided to proceed with trial instead of requesting a continuance to review the lab report, he forfeited his claim that he was entitled to a new trial based on the State's discovery rule violation.

¶ 14 Defendant argues that even if the claim has been forfeited, he is entitled to a new trial because the State's discovery violation surprised and prejudiced him. We disagree. Because we decided that this claim was effectively forfeited, we review this claim under the plain error rule.

The plain-error doctrine is applied where:

"(1) a clear or obvious error occurred 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, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

In either circumstance, the burden of persuasion remains with the defendant. *People v. Herron*, 215 Ill. 2d 167, 182 (2005). The first step in the plain-error analysis is determining whether any error occurred. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 15 We find that the State's failure to produce the lab report was error; however, the error was not plain error and did not prejudice defendant because the evidence was not closely balanced and the error did not affect the fairness of defendant's trial.

¶ 16 First, we reject defendant's argument that the evidence in this case was close. Shortly after the shooting, both Franklin and Kinerman saw a white Jeep nearby and identified it to police as the same Jeep that was involved in the shooting. Defendant was later identified as the driver of that vehicle by police. The police also recovered the loaded gun from the Jeep and gunshot residue testing later revealed that defendant's hands tested positive for residue. Thus, we find that considering the evidence presented at trial, even if defendant was given notice of the test-fire, the testing did not make a comparison. It was, therefore, not prejudicial and it would not have changed the outcome of the case.

¶ 17 Second, we find that the State's failure to tender the lab report to defendant did not cause prejudice or otherwise affect the fairness of his trial. In this case, there is no indication that the State was willful in not disclosing that the gun had been test-fired. The record reveals that the State made all evidence, including the gun and two-test fired bullets, available to defendant prior to trial. The trial court also commented that the test fire should have come as no surprise as "every single gun has a test fire from the Illinois State Police Crime Lab." There is no indication that the State intended to surprise or trick defendant by referencing the test-fired bullets during the course of the trial.

¶ 18 Additionally, when the State revealed that the gun had been test-fired, instead of requesting a continuance, defendant explicitly stated that the late disclosure that the gun had been test-fired "did not hurt [his] case because the gun has to be compared." Because the failure to request a continuance is a relevant factor to consider in determining whether the defendant was surprised or unduly prejudiced, we find that counsel's willingness to immediately submit that the information was not relevant to the outcome of defendant's case is highly indicative that

1-11-3031

the failure to disclose the lab report was not unduly prejudicial to defendant's case. *Robinson*, 157 Ill. 2d at 78.

¶ 19 Finding that defendant forfeited his claim for a new trial and has failed to establish plain error or that he suffered surprise or prejudice from the State's failure to tender the lab report, we affirm the judgment of the circuit court of Cook County.

¶ 20 Affirmed.