

No. 1-13-0080

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IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 11 CR 12310
)	
GREGORY LUELLEN,)	Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Presiding Justice McBride and Justice Gordon concurred in the judgment.

ORDER

¶1 *Held:* Affirming defendant's conviction for first degree murder where defendant forfeited his federal due process claim, he failed to show his state due process rights were violated, and the trial court did not abuse its discretion in refusing to exclude gunshot residue evidence or give defendant's requested instruction regarding the disposal of defendant's van.

¶2 Following a jury trial, defendant, Gregory Luellen, was convicted of first degree murder and sentenced to 20 years' imprisonment for first degree murder with an additional term of 25 years' imprisonment for personally discharging a firearm causing death. On direct appeal, defendant contends that his federal and state due process rights were violated when the State

disposed of his van before trial. Defendant additionally asserts that the State violated the rules of discovery in disposing of the van and defendant suffered prejudice as a result, which the trial court failed to remedy in denying his motion to exclude evidence or issue a limiting instruction.

For the following reasons, we affirm.

¶3

I. BACKGROUND

¶4

A. Pretrial Proceedings

¶5 Defendant was charged with first degree murder, attempt first degree murder, and aggravated discharge of a firearm for the July 1, 2011, shooting death of David Cardine. The State alleged that defendant drove his van alongside the victim's van and shot the victim. As part of the investigation, defendant's van was seized by the police on July 1, 2011, and taken to a secured lot, where a search warrant was executed within a few days to process the van for evidence.

¶6 It subsequently came to light that the police disposed of defendant's van in September 2011. On May 24, 2012, defendant filed a motion to dismiss the indictment for destruction of evidence asserting that on August 19, 2011, his attorney filed a general motion for discovery which included the following request: "The defense specifically requests that any and all physical items seized from the defendant, from the deceased, from the crime scene or in any other way seized as evidence and/or inventoried in this case be preserved and made available to the defense for inspection and/or scientific testing." Defendant also asserted that on December 6, 2011, his attorney spoke with the prosecutor and requested that the van be preserved, but the prosecutor indicated that the police had disposed of the van. Defendant argued that this destroyed his best evidence that the passenger side window was not in working condition, as the State claimed that defendant shot the gun from inside his van through the passenger window. Citing

People v. Newberry, 116 Ill. 2d 310 (1995), defendant asserted that the charges should be dismissed as a sanction for violating the rules of discovery and his due process rights. He indicated that the destruction of evidence was likely not malicious, but bad faith by the police was irrelevant because the evidence was more than potentially useful. The prosecutor informed the trial court that the van had been sold at auction. The trial court denied the motion, finding the sanction of dismissal was "totally disproportionate to whatever may have happened here" and it was unknown whether the van would have provided favorable evidence, but the court allowed counsel to inform the jury that the police disposed of the van and "suggest some inferences perhaps about that."

¶7 On June 13, 2012, defendant filed a motion *in limine* to bar the introduction of the gunshot residue evidence that the police obtained from the van. Defendant asserted that, regardless of bad faith by the State, disposal of the van violated the rules of discovery and deprived him of the opportunity to have the van retested for gunshot residue or present the best evidence regarding the condition of the passenger window. At the hearing on the motion, defense counsel informed the court that "[w]e are not, to be clear at this point, alleging that there was some intentional act from the State, and so we are not suggesting as in *People versus Youngblood*, the Supreme Court case, that this is a due process violation, but we are in fact alleging that this is a statutory violation." Counsel requested exclusion of the gunshot residue evidence or the following non-Illinois Pattern Jury Instruction (IPI): "If you find that the State has allowed to be destroyed or lost any evidence whose content or quality are in issue, you may infer the true fact is against the State's interest." The prosecutor noted that the van was sold, not destroyed.

¶8 The trial court denied the motion, finding that the requested remedies were "way beyond

any remedy that the law entitles you to.” The court indicated that there was no indication that the evidence was exculpatory and that the police frequently “get people's cars, and they keep them for a period of time, and then they destroy them. *** It is not an intentional act. They are not trying to hide evidence or deny Mr. Luellen any opportunity to examine his own evidence. They just happened to destroy the van.” The court permitted the defense to “tell the jury all about it” and “make whatever inferences you want to.” However, counsel could not imply that there were any improprieties regarding the gunshot residue evidence examination or that the police were lying or attempting to frame defendant by destroying the van. The trial court found that the van was disposed of “as a matter of course” because the police do not have room to keep vehicles. The trial court held that the proposed instruction was “way out of context” and that the IPI instructions would cover the issue and inferences the defense could make. The court stated that counsel could argue that “because there is circumstantial evidence that the van was destroyed, that maybe there was some doubt that, if you had a chance to exam it, there might have been something different found out” and the court would give counsel “latitude to explore with the witnesses and the jury what happened to the van and when it was destroyed.”

¶9

B. Trial

¶10 At trial, the State presented evidence that the victim was 21 years of age when he was shot and killed on July 1, 2011. At the time, he was working for a family janitorial company, Executive Janitorial Services, and he was expecting his first child with Ashley Brooks, with whom he had been in a relationship for one year.

¶11 The State’s witness Christine Montgomery testified that she was at the Cardine family home at 1433 South St. Louis in Chicago on July 1, 2011. James Carter, the father of her three children, got into an argument with defendant in front of the house. She recognized defendant

from "being on the block." As the argument transpired, she went onto the front porch, where other family members had gathered. Defendant was standing just outside of the fence in front of the house and Carter was inside the fence. They argued loudly and both appeared upset. She observed defendant remove from his pocket a small, silver gun and poke Carter with it as they stood two or three inches from each other. According to Montgomery, the victim then positioned himself in between defendant and Carter. Montgomery testified that the victim, Carter, and Brooks then left and entered the victim's van, which was parked on the street in front of the house. Montgomery did not see Brooks holding a small pipe or hear her curse. The three drove away and turned left on 15th Street. Montgomery testified that defendant also left, along with the three or four men who were with him. Defendant entered his own van, which was parked on the same block near the house of defendant's sister, Wanda Luellen. Defendant drove in the same direction as the white van. Montgomery testified that defendant's van made a loud noise like a racecar or motorcycle.

¶12 Montgomery later learned that the victim had been shot when Brooks returned to the house on St. Louis later that day "banging on the door screaming and hollering." She testified that Brooks stated that the victim "got shot" and did not say, "they shot David." She denied that Brooks ran home after the shooting to stash a gun.

¶13 Montgomery spoke with the police the next day, July 2, 2011, at the police station and she viewed a lineup. She identified defendant as the man with the gun. She did not recall telling the police that Brooks said, "[t]hey killed him" when Brooks returned to the house following the shooting, but after reviewing the videotape of her interview, Montgomery testified that she had answered that Brooks stated, "[t]hey shot him."

¶14 Hens, who was 15 years of age at the time of trial and lived in the Cardine home on

South St. Louis, testified that the family janitorial business, Executive Janitorial Services, was owned by his uncle and it cleaned government buildings. Wanda Luellen lived on the same block four lots away, and her daughter, Kim Luellen, has a child with Carter's son. HERN has seen Wanda Luellen, her family, and defendant many times on the block. Defendant drove an old van that was "grayish, tan-ish," had rust spots, and was "real loud." He had observed defendant with that van on the block "[a] lot."

¶15 HERN testified that he was at home at approximately 2 p.m. on July 1, 2011. The victim, who was his cousin, entered the house to obtain his cellular telephone from the charger. HERN heard and saw Carter, who was his aunt's boyfriend, and defendant arguing outside. HERN observed defendant standing by the gate and there were four or five men with him. HERN testified that defendant pulled out a silver gun and poked Carter in the side with the gun and told Carter that he was "getting too close." HERN testified that Carter backed up slightly and the victim moved between Carter and defendant and told Carter "to come on and ride with him." The victim's work van was parked on St. Louis in front of the house and Brooks was in the passenger seat. The van was white with "Executive Janitorial Services" in red lettering. HERN testified that Brooks was telling Carter and the victim "to come on." He did not see a weapon in her hand. HERN observed the victim and Carter enter the van and the victim turned left on 15th Street. HERN observed that defendant went to his own van and departed "right behind them" and he also turned left on 15th Street. According to HERN, approximately two or three minutes after the victim left, Brooks returned to the house and was "hollering and screaming and crying."

¶16 HERN viewed a lineup on July 2, 2011, at the police station and he identified defendant as the individual who poked Carter with a gun. He also acknowledged he had a prior guilty plea conviction for possession of a stolen motor vehicle and that he was on court supervision.

¶17 Brooks, who was 19 years old at the time of trial, worked for Executive Janitorial Service, and, at the time of the shooting, she was in a relationship with the victim and nine months pregnant with his child. She testified that the company cleans government buildings, but not private residences or churches.

¶18 According to Brooks, she and the victim were shopping for her baby shower on July 1, 2011, which was supposed to take place the next day. They stopped at the house on St. Louis that morning to charge their cellular telephones and left. The victim's grandmother, aunt, and cousins lived at the house; Brooks and the victim lived with his sister at a different location. She testified that they returned to the house at approximately 1:55 p.m.; the victim was driving the white van with red lettering that he used for work.

¶19 She testified that the victim parked the van on South St. Louis and entered the house to obtain their cellular telephones. Brooks remained in the van in the front passenger seat. She saw Carter walk out of the house and onto the porch. She also noticed defendant approach the house accompanied by three or four people. Brooks testified that she knew defendant from "the block" and had seen him "[a] lot." She had also previously observed defendant's tan and gray van, which ran very loudly. Defendant stood at the gate and stated, "what's this I heard about we bitches or something like that." Brooks testified that Carter responded, "I don't know what you're talking about" and walked down the front steps. As they continued arguing, the victim came out onto the porch. Brooks observed defendant pull out a silver gun and point it and poke Carter with it in his upper right side. Brooks testified that the victim then descended the steps and "got in between them, and told James [Carter] come ride with me. Let's just go." Brooks yelled from the van, "come on, let's go," and she opened the driver's door. Brooks testified that the victim and Carter entered the van and the victim drove while Carter sat in a chair behind them.

¶20 Brooks testified that they turned left on 15th Street, left on Homan, and left on Douglas. She testified that as Douglas turned into Independence, Carter stated, "[t]he van is following us." Brooks looked in the rearview mirror and observed defendant's van swerve to the passenger side and then to the driver's side. The victim stopped at a stop sign, even though Brooks told him to keep going. Defendant pulled up on the driver's side and Brooks looked over at him. She testified that both the victim's driver side window and defendant's passenger side window were down. Brooks testified that nothing was blocking her view. She saw defendant point at the victim the same silver gun that she had observed him with earlier. She testified that defendant shot the gun and she heard "a couple of noises." The victim let go of the steering wheel and leaned over to the right and he was bleeding from his head. Brooks testified that Carter jumped into the victim's lap and took control of the wheel. Once Carter was able to stop the van, Brooks left through the passenger door, screaming and running because she was hysterical. A woman stopped and told her to get into her car because Brooks was pregnant and had blood on her. The woman took her to the house on St. Louis. Brooks testified that when she returned to the house, she yelled "he dead, he dead [*sic*]. He killed him." She did not recall stating, "they shot him."

¶21 Brooks identified defendant in a lineup the next day. She did not recall telling police that defendant pointed the gun at Carter's face instead of poking him in the side. She conceded that she told police that she heard three shots and then four more. She denied that she had a pipe or cursed and screamed at defendant's sister on July 1. Brooks testified that neither she nor the victim had any prior problems with defendant.

¶22 Carter testified that he was 45 years old at the time of trial and lived at 1433 South St. Louis with his longtime girlfriend, Lisa Cardine. He has 10 children and works for Executive Janitor Service. Carter testified that he was like an uncle to the victim, whom he called

"Smokey."

¶23 Carter testified that he saw the victim around 2 p.m. on July 1, 2011, at the house. Carter spoke with him and then went outside onto the porch. Carter observed that Brooks was in the work van. He saw defendant and a few men approach the gate in front of the house. He recognized defendant because he had seen him "a lot on the block" and at the house of defendant's sister down the street. Carter testified that defendant stated, "what I hear you saying, you going to go to jail for killing one of these B's." Carter approached defendant, who had passed halfway through the gate. Carter testified that defendant "kept saying what I hear about you talking about you gone [*sic*] go to jail for killing one of these B's." Carter asked defendant what he was talking about; defendant explained that he was referring to Carter's nieces and nephews. Carter responded that defendant "had to go through me to do that." Carter testified that he was "a little angry" when defendant said this, and they both raised their voices. Carter explained that his son, who also lived at 1433 S. St. Louis, had a baby with defendant's niece, and his son made two women pregnant at the same time. The niece "use[d] to send her kids down there to scratch up his car and write stuff on Facebook about the family ***" regarding the circumstances. Carter indicated that his own family also "got in it" and "go back and forth." He had talked to defendant about it in the past, and they "just left it alone. We kept our distance and they keep their distance."

¶24 Carter testified that defendant reached into his right pocket, pulled out a gun, poked Carter in the left side with it, and stated that he was too close. Carter asked defendant why he pulled out a gun, indicating that there were children present. Carter testified that the victim then walked down the steps, grabbed Carter's shirt and pushed him back, and tried to place himself in between him and defendant. The victim told Carter to "ride with him" and he and the victim

entered the white van. Brooks was still in the van, but had opened the driver's side door and was "hollering, y'all get in the truck." The victim drove and Carter sat in a chair in the back.

¶25 Carter testified that the victim turned left on 15th Street, left on Homan, and then left on Douglas. Where Douglas turned into Independence, Carter recognized the sound of defendant's van and observed the van in the driver's side mirror. He saw the van swerve toward the passenger side and then toward the driver's side. When the victim stopped at a stop sign, defendant's van came alongside the driver's side; Carter told the victim "to pull off." Carter testified that the victim leaned back in his seat, and then leaned forward and Carter heard a "pop" and observed the victim's head move to the right and his hand slip from the steering wheel. Carter grabbed the steering wheel and looked over and observed defendant, who had his mouth open and was holding the same gun defendant used to poke Carter with earlier. Concerned that defendant would continue shooting, Carter tried to turn the van onto a side street, but jumped the curb instead. He testified that defendant continued driving and turned right onto Roosevelt. Carter climbed over the seat and sat on the victim's lap and was eventually able to stop the van. Brooks was "hollering" and when the van stopped, she jumped out and shouted "they killed him" and "they killed my baby daddy." Carter testified that the victim was slumped over and mumbling. Carter did not see where Brooks went.

¶26 Carter stayed with the victim and the van, and when the police arrived, he told them who shot the victim. He did not know defendant's name at the time, so he directed the police to where defendant's sister lived. Carter was taken to the police station and identified a photograph of defendant as the person who shot the victim. The police took him back to the police station the next day, July 2, and he viewed a live lineup and again identified defendant. During his testimony, Carter was shown video footage from a police camera mounted in the area of the

shooting and he testified that it captured what occurred shortly after the victim was shot—Carter asking people if they could call an ambulance and speaking with police. He testified that he did not have a phone and both the victim's and Brooks' phones were dead. He believed that defendant's gun was a .22- or .32-caliber.

¶27 Carter admitted that he pleaded guilty to possession of a controlled substance during the pendency of defendant's case, but denied that he was promised anything by the State. He also admitted he had a drug addiction problem and had four prior convictions for possession of a controlled substance, but he maintained that he has not used drugs since 2010 and was not using drugs on the date of the incident. He testified that he did not have a gun. He admitted that he was previously a member of the gang Insane Vice Lords.

¶28 Chicago police officer Bill Caro testified that he responded to the call regarding shots fired at 2:29 p.m. on July 1, 2011. Caro spoke with Carter, who informed him of the identity of the shooter, although Carter did not give him a specific name at first. Carter told Caro that the shooter pulled out a 22-caliber semiautomatic pistol and threatened him with it. Carter took Caro to Wanda Luellen's house at 1421 South St. Louis, but defendant was not present.

¶29 Caro testified that no other witnesses besides Carter approached him at the scene, and no officers indicated that there were other witnesses present. He testified that there was a church near where the shooting occurred, but had an officer gone into the church to speak with someone about the shooting, he would have received this information and put it in his report. Caro testified that there was a police surveillance pod camera at the corner of Independence and Roosevelt which was aimed toward the location of the crime scene, and the video footage from that day showed the crime scene, officers, first responders, and the victim's van.

¶30 Chicago police evidence technician Myron Seltzer testified that he processed the scene of

the shooting on July 1, 2011. He photographed the white van with red lettering, took a sample of the blood on the driver's seat, and searched the van for evidence. There was one telephone, which he photographed. He did not observe any cartridge casings, guns, or pipes inside the van.

¶31 Chicago police detective Thomas Crain testified that he and his partner were assigned to investigate the shooting. There were two Chicago police pod cameras and two surveillance cameras from private businesses which showed footage from near the scene of the shooting. Crain testified that the footage from the pod camera at Independence and Roosevelt showed a gray 1991 Chevrolet conversion van matching the description of defendant's van turn east on to Roosevelt around the time of the shooting. He testified that the first call to 911 came in at 2:28 p.m. that day. Surveillance video from a grocery store showed Roosevelt Road, and surveillance video from a gas station showed Independence. He testified that in the gas station video footage from Independence, the van passed by on its way to Roosevelt Road at 2:27:47 p.m. He testified that the van passed the camera on Roosevelt Road at 2:27:50 p.m.

¶32 Crain testified that defendant turned himself into the police on July 2, 2011. Crain brought Carter, Brooks, Montgomery, and Hens into the police station to view a live lineup. They all identified defendant. Carter, Brooks, and Montgomery gave videotaped statements and Hens provided a written statement.

¶33 Crain learned that the gray and tan van had been located at 2237 South Keller and was registered in defendant's name. The van was towed and impounded in a secured area and the police obtained a search warrant on July 3, 2011, to process the van for evidence. Crain testified that he was not involved in the subsequent decision to dispose of the van. He learned that the van was disposed of in September. He submitted his final report for the investigation on December 19, 2011.

¶34 Chicago police department forensic investigator Paul Presnell testified that he went to the pound where defendant's van was secured on July 6, 2011. The van was locked and there was no key for the vehicle, so Presnell had a tow truck company open it. Presnell photographed the exterior and interior of the van. He collected gunshot residue test samples from the interior, including the driver's and front passenger's headliners and seat covers. He also collected the seat covers into evidence. He swabbed for DNA evidence, dusted for fingerprints, and searched for evidence of firearms, but did not find any firearms or fingerprints. He was unable to turn the van on or test the power windows because he did not have a key for the van. He testified that the passenger window was completely rolled up and he did not notice that it was out of alignment or otherwise appear to be broken.

¶35 Illinois state police trace evidence analyst Robert Berk testified that primer gunshot residue was composed of lead, barium, and antimony. When a gun is discharged, clouds of smoke are emitted and this deposits remnants of the firearm primer formulation. Berk testified that if all three particles are present, then it is considered a tricomponent gunshot residue particle. Other particles are categorized as "consistent particles" if there are only one or two of the three elements present, and these could come from gunshot residue or other environmental sources.

¶36 Berk tested the gunshot residue samples collected from the headliners and seats of defendant's van. All of the samples testified positive for the presence of primer gunshot residue. Berk testified that this indicated that those surfaces either had contact with an item that had primer gunshot residue on it, or they were in an environment where a firearm was discharged. The highest concentration of gunshot residue was on the passenger seat. The second highest concentration was found on the headliner on the passenger side. The third highest concentration was present on the driver's side headliner, and the lowest concentration was found on the driver's

seat. He explained that the passenger seat had a high concentration of both tricomponent particles and consistent particles, while the driver's seat and headliner had lower concentrations. Berk testified that this was consistent with the driver of the van pointing a gun toward the passenger side and shooting out of the passenger window. He testified that the gunshot residue could also have been deposited by contact with an item that had gunshot residue on it, but the item would have to come into contact with the entire surface of the headliners and seats to leave the residue.

¶37 Berk testified that he could not determine when the gunshot residue was deposited in the van, but no expert would be able to determine this. Berk testified that over time, the residue would dissipate as it was smeared, removed, transferred to other items, or worked its way into the fabric. He testified that the high concentration was indicative of "recent exposure" and "[i]t's not something that I would have expected to have been deposited, for instance, weeks ago or days ago and then the van being used in any kind of a normal fashion." On cross-examination, Berk testified that he believed "within a reasonable degree of scientific certainty" that the gunshot residue exposure occurred recently, but he could not give a specific time frame. He did not receive requests for retesting from other agencies, such as from the defense.

¶38 According to the medical examiner, the victim's cause of death was a gunshot wound to the head. The bullet entered near the left eye and lodged in the back of his head. The state police firearms expert, Tonia Brubaker, examined the bullet and determined that it was a .32-caliber bullet, but she could not determine whether it was fired from a revolver or semiautomatic firearm. She indicated that a .32-caliber bullet could not be fired from a .22-caliber weapon.

¶39 The defense presented the testimony of William Walton, pastor of New Deliverance Temple Bible Church in Chicago. At the time of the shooting, he was a pastor at the Lawndale

Missionary Baptist Church, located at 1227 South Independence, which is on the east side of Independence between Roosevelt and 13th Street. He testified that on July 1, 2011, at approximately 2:30 p.m., he was coming from the British Petroleum gas station located on the west side of the intersection of Independence and Roosevelt. He noticed a white van and a gold, four-door older model car that were close to each other on Independence. At that point, Walton was on the east side of the street. He testified that he had seen the white van "before because the guy had came [*sic*] the day before to the church and *** asked did we have any janitorial jobs for him. I told him at that time we already had a custodian." He testified that the white van with red lettering he saw on July 1 was the same van he had seen the day before.

¶40 Walton observed that the passenger in the front seat of the gold car "had his hand stuck out pointing into the van." The window was rolled down. Walton did not see a gun in the passenger's hand, but he heard a sound like firecrackers five or six times. He observed that the gold car then "took off," nearly hitting a child and running a red light at Roosevelt Road. The white van started to swerve and ultimately came to a stop. He saw a young African-American female who appeared to be pregnant exit from the passenger side of the van; she was hysterical and crying. Walton also observed a young African-American male exit from the passenger side of the van and state, "I told him don't do it, don't do it." Walton testified that both individuals "took off." He never saw the male return. Walton also observed that the driver of the van had been shot and was covered with blood. He recognized the driver as the same man who had visited the church the day before seeking a janitorial job.

¶41 Walton called 911 at approximately 2:29 p.m. and identified himself as Pastor Walton. His call was transferred to the Chicago Fire Department, and he again identified himself as Pastor Walton. He testified that both operators asked him about the white van, but did not ask

him about the gold car, and he did not inform them about the gold car. He testified that after he called 911, officers arrived within five or ten minutes, but he did not tell the officers about the gold car with the shooter. He stayed at the scene for 10 minutes and then returned to the church. He testified that two uniformed police officers came inside to speak with him and he related what he had seen, including the gold car. He does not know defendant and did not know the victim.

¶42 Walton testified that he never saw a gray van. He reviewed the video footage from the surveillance camera that showed Independence Boulevard. He saw a gray van pass by at 2:27:44 p.m. in the video, but he testified that this van "was not out there when I was out there." He further testified that the video showed a four-door gold car pass by, but he testified that this was not the same gold car that he had seen that day. Walton conceded that it was possible that he may have missed seeing a gray van because he was focused on several children near the street. He confirmed that he looked into the white van from 20 feet away and recognized the man who had been shot as the man who visited his church the day before asking for a janitorial job. Walton testified that two weeks after the shooting, on July 17, 2011, his church held an illegal meeting and voted him out of the church. He currently rents space to have his own church services and has approximately 15 to 20 parishioners. The parties stipulated that Investigator S. Ramsey would testify that Walton told him he saw the rear passenger window down on the gold car.

¶43 Defendant's cousin, John Hall, testified that he was at Wanda Luellen's house at 1421 South St. Louis on July 1, 2011, along with Wanda Luellen and other family members. Defendant arrived a few minutes after him. Hall testified that defendant parked on St. Louis and then walked down the street to another house. Hall followed behind him. Defendant stopped and spoke with someone on a porch. Hall had seen the man before, but did not know his name. He testified that the man and defendant were discussing "issues that was [sic] going on back and

forth with family." He testified that the man became angry and was yelling, but defendant appeared to "just actually want**** to talk *** to see what was the problem." Hall testified that the man then entered a white van with red lettering, which Hall had also seen before. He did not see defendant with a weapon at any time, and he did not see him pull out a weapon and poke the man or point a weapon at the man.

¶44 Hall testified that another man and a female entered the white van. Halls saw the woman "trying to get back out the [sic] vehicle using verbal words." He testified that she was yelling at Wanda Luellen, who was a few lots away, and the woman had an object in her hands, but he did not know what it was. The white van drove away.

¶45 Hall testified that defendant walked his sister home and told her to go inside and call the police if anything happened. Defendant left five or six minutes after the white van departed. Hall testified that when defendant left, he appeared calm.

¶46 Hall testified that he was last inside defendant's van three or four months before the incident, and he did not recall telling an Assistant State's Attorney that the last time was only one month before. He did not see whether any of the windows were open when he was last in the van. The parties stipulated that Assistant State's Attorney Jodi Peterson would testify that when Hall was interviewed on July 30, 2012, he stated that he was last in defendant's van one month before July 1, 2011.

¶47 The defense also presented the testimony of defendant's fiancé, Chimera McGee. She testified that she is 31 years old and she and defendant have been together for eight years. They had one daughter together, but she passed away. McGee testified that at the time of the shooting, defendant was living with her at 2237 South Keeler and he was employed as a school bus driver. He owned a Chevrolet van which he usually parked behind their home. McGee testified that she

was last in the van on June 30, 2011. At that time, all of the windows worked properly except the front passenger window. The window was controlled with a power switch, but it would not work when pressed, and the window stopped working the second week of June. She remembered this because she and defendant were leaving and she tried to put the window down, but it would not work. She did not know how the window broke. She did not attempt to roll down the passenger window the last time she was in the van on June 30. She testified that defendant had owned the van for approximately seven years and he did all of the work on it himself.

¶48 She testified that on July 1, 2011, at 2:45 p.m., she received a call and went home, arriving around 3:30 p.m., and discovered that the police were there by defendant's van. Defendant was not at home and she did not see him or talk to him that night. She learned on the news that defendant turned himself in on July 2, 2011. She tried to call his sister, but did not reach her. She visited defendant one week later, and at that point she found out that he was accused of shooting the victim from his van. She testified that she knew his passenger window was broken, but she did not tell the police about it.

¶49 Defendant testified in his own defense at trial. He confirmed that he was living at 2237 South Keeler with McGee and employed as a school bus driver. He was 40 years old. He grew up in the house at 1421 South St. Louis. He testified that he received a telephone call from Wanda Luellen on the evening of June 30, 2011, and she informed him that "her neighbors were giving her a problem," referring to Carter. She asked defendant to come by the house on St. Louis to "[s]traighten out a problem." He did not go to her house that night because he had to wake up at 4 a.m. for work.

¶50 Defendant testified that he finished working on July 1 at 2:15 p.m. and went to his sister's house on St. Louis to "see if I could straighten out that problem." He parked along South St.

Louis. He observed Carter exiting the Cardine home. He knew who Carter was, although he only knew him as "Mutt." He had also seen the white work van before. He noticed that Wanda Luellen, John Hall, Demond Hall, and his niece Kimberly were at the Luellen home, along with a few men he did not know. Defendant did not speak to any of his own family members; he instead approached the gate of the Cardine home as Carter descended the steps, and they met on the sidewalk. He asked Carter what happened the previous night, and Carter "told me to get the F on with that BS." Defendant testified that Carter appeared to be high on drugs and his eyes were red and glassy. Defendant testified that Carter became angry and started to yell, and defendant yelled back. Defendant acknowledged that he and Carter argued, but he denied that he pointed a gun at Carter or poked him in the side. He denied having a gun in his possession.

¶51 Defendant testified that Carter broke off the conversation and went to the white van. Defendant noticed the driver (the victim) and Brooks by the van. He testified that when Wanda Luellen "walked up, that is when she [Brooks] started going irate"; he observed Brooks with a "stick in her hand trying to get past the driver, but the driver pushed her back in the van." Defendant observed Brooks, Carter, and the victim enter the van. Defendant testified that Carter told him, "don't be standing there when he get back." Defendant interpreted this to be a threat and responded "[t]hat I was going to knock crack out of him." Defendant explained that this meant he would "[k]nock him down." He admitted that he was mad at Carter, but he denied that he planned to kill him.

¶52 Defendant testified that the white van drove away and defendant instructed his family to go in the house and call him or the police if needed. Defendant then drove toward the office of his automobile insurance provider to renew his insurance. He explained that he was paid that Friday and had money to pay the insurance. He did not intend to look for the white van. He left

approximately 10 minutes after Carter.

¶53 Defendant testified that he turned left onto 15th Street, left onto Homan, and then left on Douglas. He encountered the white van when it swerved at him and tried to cut him off near Central Park and Douglas. Defendant decreased his speed. Where Douglas turned into Independence, the road was wide enough to pass the van, so defendant increased his speed and "shot past them." However, he slowed as he approached a stop sign at Independence and 13th Street. Defendant testified that the white van "caught up with me. I look over through my tinted window and I see a gun coming around the driver's chest pointed at me. At that moment I accelerated." He could not tell what type of gun was pointed at him, but it was dark colored. He also could not see who was holding the gun, but he observed that it was not the driver; he saw only "an arm coming around the driver." Defendant indicated that the driver's side window of the white van was down. He testified that his van's muffler and speaker system were both loud, so he did not hear whether any gunshots were fired from the white van and he pulled away too fast to see if any shots were fired. Defendant turned right on Roosevelt. He did not see if, after he pulled away, the white van and a gold car had an altercation.

¶54 Instead of going to pay his insurance, defendant returned home because he did not want them to follow him and shoot at his van. He parked the van in the back of 2237 Keeler, where he usually parked. Defendant testified that he called a coworker, Cheryl, who picked him up and they drove to get food, visited a park, and then went to the friend's house. His sister called and informed him that the police were looking for him, but she did not know why. He turned himself in the next day.

¶55 Defendant testified that he did not have a gun in his van on July 1, 2011, and he did not point a gun at the white van. Defendant testified that he has never shot a gun inside his van, he

was unaware of anyone ever shooting a gun in his van, and he was the only one who drives the van. He testified that the only thing resembling gunpowder that might be in his van were fireworks. His van was a 1991 Chevrolet G20 conversion van, and he performed all the mechanical work on it himself. It had power windows and the motor for the front passenger window was not working on July 1, 2011. He first noticed that it stopped working during the second week of June on a Friday. He tested the motor and found that it had burned out. He had to order the part, so it had not been fixed at the time of the shooting.

¶56 The parties stipulated that Scott Rockowich would testify as an expert in trace evidence that there are no fireworks that contain all three particles—antimony, barium, and lead—which are the tricomponents contained in gunshot residue. Further, some professional fireworks contain barium and some contain antimony, but no fireworks contain lead.

¶57 In closing, the State contended that the physical evidence supported the testimony of Carter, Brooks, Hens, and Montgomery because there were tire tracks where Carter brought the van under control, the cameras in that area showed defendant's van pass by around the time of the shooting, and there was gunshot residue present in defendant's van. The State argued that the gunshot residue was concentrated on the passenger side, consistent with a person pointing a gun from the driver's seat and over the passenger seat, and that no fireworks contain the three component particles that gunshot residue contains. The State asserted that defendant's own behavior also pointed toward his guilt as he abandoned plans to pay his car insurance and left his van, locked, behind his apartment. The State contended that Walton was unreliable because he did not see a gray van and he was distracted by the children in the area.

¶58 The defense asserted that Carter was not reliable because he was a convicted felon and drug addict and his testimony contradicted Walton, who had no motivation to lie and his

testimony was corroborated by the 911 call he made. Counsel argued that the video footage did not support that defendant sped away from the scene. Counsel alleged that the State's witnesses must have conferred with each other before speaking to the police. The defense contended that the investigation was shaped by what Carter told police, and therefore the white van was never tested for gunshot residue. The defense argued that the gunshot residue expert could not give a specific time for when the residue was deposited. Counsel continued:

****The van is disposed of. It disappears from the pound. We, the defense attorneys, have a right to have that van, examine that van, and have it retested. If I go to a doctor, not my—

TRIAL COURT. Side bar.

DEFENSE COUNSEL. Let me tell you upfront we did not ask for the van to be retested. And let me also tell you why we didn't ask for the van to be retested. Detective Crain told you the van was disposed of in September.

ASSISTANT STATE'S ATTORNEY (ASA). Objection.

TRIAL COURT. Objection sustained. Let's move on to something else, please.

DEFENSE COUNSEL. If they destroy physical evidence that was important enough to be impounded, towed, and escorted, and then they have their expert testify about their findings, and they have their expert also testify that we could ask them, the same expert who says 'no legitimate gunshot residue analyst would be able to give you a time,' but says it anyway, it doesn't make any sense. There is no way for the State to even disprove or for us to prove that the window didn't go down but for the witnesses. My client and his fiancé. Not one evidence technician, not one forensic investigator, not one police officer, not one detective ever can tell you whether that passenger window can go down or not.

Because they didn't have the keys. But you also saw the pictures. The van was torn up. That is Gregory Luellen's man cave. He spent a lot of time there. He worked on it. If he could have had a flat screen TV and a small icebox for his beer, he would have lived there. It may not have looked great, but that was his pride and joy. They tore it up. But they couldn't start the engine. How many police officers do you need to put together, how many evidence technicians do you need to put together, how many forensic investigators do you need to put together to put two wires together to start the engine?"

¶59 Defense counsel asserted that the van was disposed of before the detective's final report was filed and that the gunshot residue evidence should not hold much weight. Further, counsel contended that although fireworks could not account for all three particles present in gunshot residue, there were numerous "partial" particles found in the van and the lead came from defendant's maintenance work on the car. The defense asserted that the gunshots came from the gold car, Carter and Brooks could not have seen the gold car from their vantage point inside the van, and Carter was a former gang member and had a gun.

¶60 The jury found defendant guilty of first degree murder. Defendant filed a posttrial motion for a new trial. The trial court held that the issues raised in the motion were addressed before and at trial and denied the motion. Defendant was sentenced to 20 years' imprisonment for the first degree murder conviction and an addition term of 25 years' imprisonment for personally discharging a firearm causing death.

¶61 II. ANALYSIS

¶62 A. Due Process

¶63 Defendant contends on appeal that, pursuant to *Arizona v. Youngblood*, 488 U.S. 51 (1988), his due process rights were violated when the State disposed of his van approximately

three months after his arrest. Defendant contends that the police disposed of the van in bad faith, despite his request to preserve it, and that the evidence formed a central part of his defense, *i.e.*, that the front passenger window was not functioning, and also deprived him of the opportunity to retest or examine the van as the gunshot residue evidence was State's most powerful physical evidence.

¶64 The State contends that defendant forfeited his federal due process claim because he raises it for the first time on appeal, and that, regardless of forfeiture, defendant failed to show bad faith by the police and the van was not critical evidence.

¶65 As previously discussed, in defendant's pretrial motion to dismiss for destruction of evidence, defendant relied principally on *Newberry*, 166 Ill. 3d 310, in arguing that dismissal of the charges was an appropriate sanction for the destruction of evidence for violations of both due process and the rules of discovery, regardless of bad faith. Defense counsel asserted at the hearing on the motion to dismiss that the destruction of evidence in *Newberry* was "not malicious, as it likely was not in this case." Further, counsel told the trial court that "[w]hether the destruction of the van was in bad faith or negligent is not relevant." Additionally, defendant did not contend in his subsequent motion in *limine* to exclude the gunshot residue evidence that his due process rights were violated. He cited the rules of discovery as a basis for exclusion, arguing that disposal of the van deprived him of the best evidence regarding the window and of the opportunity to retest the van, and he reiterated that bad faith was irrelevant. At the hearing on the motion in *limine*, defense counsel specifically told the trial court that "[w]e are not, to be clear at this point, alleging that there was some intentional act from the State, so we are not suggesting as in *People versus Youngblood*, the Supreme Court case, that this is a due process violation, but we are in fact alleging that this is a statutory violation ***."

¶66 In light of this record, we find that defendant specifically did not contend below that his federal due process rights were violated pursuant to *Youngblood*, 488 U.S. 51, *i.e.*, that the destruction of the van was due to bad faith by the State. Rather, he relied on *Newberry* in asserting that bad faith was irrelevant to his due process claim. As such, defendant did not advance the federal due process argument under *Youngblood* that he does now on appeal, and he has therefore forfeited this argument on appeal. See *People v. Sutherland*, 223 Ill. 2d 187, 241 (2006) (finding the defendant's state due process claim had been forfeited where he only asserted a federal due process claim in the trial court); *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (to preserve error, one must object at trial and must raise the issue in posttrial motion). We disagree with defendant's contention that the purpose of the rule of forfeiture was served in this case because he brought the disposal of the van to the trial court's attention, as defendant did not pursue a bad faith argument below and the trial court therefore did not conduct an extensive inquiry into the matter.

¶67 Nevertheless, even if we were to address this aspect of defendant's argument on appeal, we would conclude that he failed to establish an infringement of his federal due process rights. We review a trial court's denial of a motion to dismiss for an abuse of discretion. *People v. Sutherland*, 223 Ill. 2d 187, 235 (2006).

¶68 The United States Supreme Court and our supreme court have distinguished between instances where the lost or destroyed evidence is materially exculpatory and where it is only potentially useful. *Sutherland*, 223 Ill. 2d at 235; *Illinois v. Fisher*, 540 U.S. 544, 547 (2004). A denial of due process occurs if material exculpatory evidence is withheld or destroyed; good or bad faith by the State is irrelevant. *Sutherland*, 223 Ill. 2d at 235; *Brady v. Maryland*, 373 U.S. 83, 87 (1963). On the other hand, if the State fails to preserve evidence that is merely potentially

useful, our supreme court "has applied the analysis set forth by the United States Supreme Court in *Arizona v. Youngblood*, 488 U.S. 51 (1988)." *Sutherland*, 223 Ill. 2d at 236 (citing *In re C.J.*, 166 Ill. 2d 264, 273 (1995); *People v. Ward*, 154 Ill. 2d 272, 298 (1992); *People v. Hogley*, 159 Ill. 2d 272, 307 (1994)). That is, " 'unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.' " *Sutherland*, 223 Ill. 2d at 236 (quoting *Youngblood*, 488 U.S. at 58).

¶69 In *Youngblood*, defendant was charged with kidnapping and sexually assaulting a minor, but the police failed to refrigerate the victim's semen-stained clothing or promptly test the stains; the State presented no scientific identity evidence and the defendant was convicted based on the victim's testimony. *Youngblood*, 488 U.S. at 52-54. The Supreme Court of the United States found that, where the evidence is only potentially exculpatory, the defendant had to demonstrate bad faith by the government in failing to preserve the evidence in order to establish a denial of due process. *Id.* at 58. The court was unwilling to impose on the police an " 'undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution.' " *Sutherland*, 223 Ill. 2d at 236 (quoting *Youngblood*, 488 U.S. at 58). The court also wished to avoid rewarding a defendant for the inadvertent loss of evidence when other evidence sufficiently supported his conviction. *Hogley*, 159 Ill. 2d at 307 (citing *Youngblood*, 488 U.S. at 58). See also *California v. Trombetta*, 467 U.S. 479, 488-90 (1984) (no due process violation where the police failed to preserve the defendant's breath samples because the police acted in good faith, it was unlikely that the samples would have been exculpatory in his DUI prosecution, and there were alternative means of showing innocence available); *Fisher*, 540 U.S. at 547-49 (holding that the State's destruction of the alleged cocaine did not require reversal of the defendant's possession conviction as there was no showing of bad

faith by the State, and noting that the applicability of the bad-faith requirement did not depend on "the centrality of the contested evidence to the prosecution's case or the defendant's defense").

¶70 Accordingly, a defendant must affirmatively show that the police acted in bad faith in losing potentially useful evidence in order for a due process violation to occur. *Sutherland*, 223 Ill. 2d 237-38. Mere negligence by the police in losing evidence is insufficient. *Id.* at 237 (applying *Youngblood* and finding that the defendant failed to show any bad faith by the State where the police lost track of the defendant's vehicle in the years between his first and second trial); *People v. Ward*, 154 Ill.2d 272, 298 (1992) (merely negligent police conduct was insufficient to give rise to a due process violation). "Bad faith 'implies a furtive design, dishonesty, or ill will.' [Citation.] Factors to consider when examining the State's duty to preserve evidence include whether the State acted in good faith and per its normal practice and whether the evidence was significant in defendant's defense and was such that comparable evidence could not be obtained by other reasonable and available means." *People v. Nunn*, 2014 IL App (3d) 120614, ¶ 17 (citing *People v. Danielly*, 274 Ill. App. 3d 358, 364 (1995); *Trombetta*, 467 U.S. at 488-89).

¶71 In asserting that the police disposed of the van in bad faith, defendant relies principally on *People v. Walker*, 257 Ill. App. 3d 332 (1993). In *Walker*, the police destroyed clothing and a knife seized from the defendant eight months before trial. *Id.* at 333-34. An eyewitness to the robbery testified at trial that the defendant was wearing certain clothing during the robbery, but identified the defendant ten minutes after the robbery when he was wearing different clothing. *Id.* at 333. The trial ended in a deadlock and a mistrial and the trial court granted the defendant's motion to dismiss. *Id.* at 333-35. In affirming the dismissal, this court held that the police acted in bad faith as the evidence was destroyed only six weeks after the arrest and eight months

before trial, the destruction did not conform to normal police procedure, and a reasonably prudent officer would not assume that material evidence would no longer be needed six weeks after arrest. *Id.* at 335-36. Additionally, the evidence played a central role in the defendant's misidentification defense, the State used testimony regarding the lost evidence to convict the defendant, and the jury deadlock indicated that the destroyed evidence could have played a role. *Id.* at 336.

¶72 We find the present case to be distinguishable from *Walker*. Although defendant argues that, like in *Walker*, the police failed to follow police procedures in disposing of evidence, we disagree. The procedure cited by defendant for the first time on appeal dictates that property is to be disposed of "when the property is no longer needed as evidence." However, contrary to defendant's assertion, there is no indication that the police knew that the van would be used at trial or was necessary evidence or that it "rapidly" disposed of the van. The van was auctioned off approximately three months after defendant's arrest, not merely six weeks as in *Walker*. We reiterate that as defendant did not pursue a claim of bad faith below, the trial court's investigation was limited in this manner. As the trial court determined, there is no indication from the record available that it was done in bad faith. Indeed, when the prosecutor informed the trial court that the van had been auctioned off, defendant did not contest this statement, he did not argue to the trial court that it showed bad faith, and he did not offer any evidence to support a claim that it had been done in bad faith. As noted, defense counsel specifically represented that she was *not* contending that disposal of the van occurred maliciously or in bad faith. Based on this representation, the trial court had no reason to believe that further inquiry was necessary. We therefore reject defendant's contention that the trial court failed to conduct an adequate inquiry into the police's conduct. Additionally, we note that the evidence collected from the van was

otherwise properly preserved and made available to defendant.

¶73 Defendant also cites his August 16, 2011, general discovery request to preserve all physical items seized from him. As stated, however, the police collected from the van the evidence it believed was relevant and necessary after impounding it, and these items were preserved. We do not agree that the police disposed of the van in complete disregard of this general discovery request, as there is no indication that the police knew at the time that the operability of the windows was of any significance. In sum, defendant has failed to show any bad faith by the police in disposing of the van.

¶74 Also unlike in *Walker*, the State did not use destroyed evidence to convict defendant. The evidence used by the State was the gunshot residue evidence, not the van itself or the window. The gunshot residue evidence collected from the van—the gunshot residue test swabs and the seat covers—was in fact preserved, tested, and available to defendant for inspection or retesting. Defendant did not request to retest any of the items. He also chose not to present his own gunshot residue expert. In further contrast from *Walker*, where the lost evidence played a central role in proving guilt, defendant overlooks the other strong evidence demonstrating his guilt—the eyewitness testimony of Brooks and Carter regarding the shooting, the video footage showing defendant's van in the area of the shooting at the time it occurred, and the testimony about the altercation on St. Louis before the shooting took place.

¶75 Defendant also contends that the disposed of evidence was central to his defense like the evidence in *Walker*. However, this case differs from *Walker* in that defendant was in fact able to present some evidence to support his defense through his testimony and that of his girlfriend that the window motor had malfunctioned shortly before the date of the incident, that he performed all the mechanical work on the van himself, and that he had ordered a new motor but was waiting

for the part to arrive. He was assisted in this defense by Walton's testimony that the shooter was in a gold car, not defendant's gray van. Further, the fact that it was unknown whether the window mechanism functioned properly at the time of the shooting could have worked equally to his advantage or the State's advantage. Defendant was able to press this point in closing arguments and he was also able to argue to the jury about the State's failure to preserve the van.

¶76 Accordingly, even if this claim were not forfeited, we would find that defendant has not shown a deprivation of his federal due process rights occurred pursuant to *Youngblood* as defendant has failed to demonstrate bad faith by the police or that the disposed of evidence was crucial to the State's case or to his defense.

¶77 Defendant alternatively contends that his state due process claim is still valid under *People v Newberry*, 166 Ill. 2d 310, 315 (1995), which does not require that he show bad faith where the State disposes of critical evidence and the defense has requested its preservation. The State urges this court to continue adherence to *Youngblood's* bad faith requirement, and follow *People v. Sutherland*, 223 Ill. 2d 187 (2006), which noted that *Newberry* was rejected by the Supreme Court of the United States in *Illinois v. Fisher*, 540 U.S. 544 (2004).¹

¶78 In *Newberry*, our supreme court distinguished *Youngblood*, 488 U.S. 51, and *Trombetta*, 467 U.S. 479, and held that where the defense requests evidence in a discovery motion, thereby placing the State on notice to preserve it, the defendant is not required to show that the evidence was exculpatory or that the destruction was in bad faith in order to establish a due process violation. *Newberry*, 166 Ill. 2d at 317. In *Newberry*, the defendant was charged with unlawful

¹ "State courts are free to interpret their own constitutional provisions more broadly than the Supreme Court of the United States interprets similar federal constitutional provisions." *People v. Kizer*, 365 Ill. App. 3d 949, 960 (2006). We note that for purposes of defendant's federal due process claim, *Fisher* supersedes *Newberry* (2063 *Lawrence Avenue Building Corp. v. Van Heck*, 377 Ill. 37, 39 (1941)). As discussed, defendant was required to show bad faith in order to support his claim that his federal due process rights were violated by the destruction of merely potentially useful evidence, but he failed to do so.

possession of a controlled substance and his counsel filed a discovery motion which included a request to examine all tangible objects seized from the defendant, but the police mistakenly destroyed the suspected drugs. *Id.* The trial court granted the defendant's motion to dismiss and our supreme court affirmed the dismissal. *Id.* at 313-15. The court distinguished *Youngblood* on grounds that the disputed evidence in *Youngblood* was "not essential for establishing the defendant's guilt or innocence," it was speculative, and it played no role in the State's case. *Id.* at 315. In contrast, the disputed substance in *Newberry* was "essential to and determinative of the outcome" of his drug possession case, there was no alternative manner of proving innocence through other evidence, and the two tests performed on the substance before its destruction yielded contradictory results. *Id.* at 315-16. Additionally, unlike in *Youngblood* and *Trombetta*, the defendant's discovery request placed the State on notice to preserve the evidence. *Id.* at 317.

¶79 The State counters that the analysis in *Newberry* was disapproved of by the United States Supreme Court in *Illinois v. Fisher*, 540 U.S. 544 (2004). In that case, the defendant was charged with possession of cocaine and he filed a discovery motion, but he then became a fugitive for 10 years before being apprehended and having the charge reinstated. *Id.* at 545. By that time, the alleged cocaine had been destroyed following normal police procedures. *Id.* at 546. Relying on *Newberry*, this court reversed his conviction and held that although there was no indication of bad faith, the evidence was his only hope of exoneration and was essential to the outcome of the case. *Id.* at 546-47. However, the Supreme Court of the United States disagreed and reaffirmed its determination that where lost or destroyed evidence is only potentially useful, a defendant must show bad faith. *Fisher*, 540 U.S. at 547-48. The court held that *Newberry*'s rule that no bad faith showing is required when a discovery request is made "would negate the very reason we adopted the bad-faith requirement in the first place: to 'limi[t] the extent of the police's obligation

to preserve evidence to reasonable grounds and confin[e] it to that class of cases where the interests of justice most clearly require it.' [Citation.]" *Id.* at 548. The court also disagreed with *Newberry's* holding that the bad faith requirement was inapplicable where the evidence provides a defendant's only chance of exoneration and is essential to the case. *Id.* at 548-49.

¶80 Our supreme court addressed the validity of *Newberry* following *Fisher* in *Sutherland*, 223 Ill. 2d at 240-41. In *Sutherland*, the defendant's vehicle was seized and processed for evidence four months after the victim's murder and the defendant was thereafter charged with kidnapping, sexual assault, and murder. *Id.* at 193. The police lost track and disposed of the vehicle in the ten years between the defendant's first trial and retrial, but the evidence collected from the vehicle—including hairs, carpet fibers, fabric, steering wheel, and the front seat—were preserved and available to the defendant. *Id.* at 237. Prior to his second trial, the defendant filed a general discovery request for any tangible objects belonging to him and later filed a specific motion for production of the vehicle, and the State's investigation revealed that the vehicle had been disposed of at some point after the defendant's direct appeal years before. *Id.* at 233. The court analyzed the claim under *Youngblood* and found no evidence of bad faith considering the length of time involved, the fact that the evidence collected from the vehicle was preserved, and the State's efforts to find the vehicle after the defendant's request. *Id.* at 236-38. The defendant relied on *Newberry* in asserting that the vehicle was essential and outcome-determinative evidence about which several State witnesses testified. *Id.* The court observed, however, that *Newberry's* "outcome-determinative analysis" was called into question in *Fisher*. *Id.* at 239-40. Ultimately, the *Sutherland* court declined to decide whether *Newberry* was still valid following *Fisher* because it found *Newberry* inapplicable, as the alleged drugs in *Newberry* constituted the very basis of the State's case, whereas the vehicle in *Sutherland* did not. *Id.* at 240. Rather, the

evidence removed from the vehicle constituted the critical evidence, and this was available to the defendant. *Id.* The court also distinguished *Newberry* on grounds that the drug evidence was destroyed following a "specific discovery request." (Emphasis added.) *Id.*

¶81 Given the holding in *Sutherland*, we find no indication that our supreme court would interpret the state due process clause any broader than as set forth in *Fisher* in requiring a defendant to show that potentially useful evidence was lost or destroyed in bad faith. We note that in *Sutherland*, the supreme court determined that even if it chose to address defendant's forfeited state due process claim, the court would reach the same result and follow *Youngblood* and *Trombetta*. *Sutherland*, 223 Ill. 2d at 241. See also *People v. Kizer*, 365 Ill. App. 3d 949, 956, 960-61 (Fourth District, 2006) (concluding that our supreme court would adopt *Fisher*'s analysis and find that *Newberry*'s distinction of *Youngblood* is no longer good law); *People v. Voltaire*, 406 Ill. App. 3d 179, 183 (Second District, 2010) (finding that the supreme court would follow *Fisher* in requiring a showing of bad faith even where the disposed of evidence is outcome-determinative); *People v. Kladis*, 403 Ill. App. 3d 99, 106-07 (First District, 2010) (discussing *Fisher* and *Newberry* but addressing the destruction of evidence issue on discovery violation grounds instead). Accordingly, with regard to defendant's state due process claim, we reach the same result as we have in his federal due process claim. That is, defendant has failed to show bad faith or that the evidence was of such critical importance that his due process rights were violated when the police sold the van at auction.

¶82 Like the supreme court in *Sutherland*, we further conclude that the present case is distinguishable from *Newberry*. *Sutherland*, 223 Ill. 2d at 240. Here, similar to the circumstances in *Sutherland*, the gunshot residue evidence used by the State, including the gunshot residue tests and the seat covers, were collected from the van and available to him for inspection or retesting.

Further, the evidence involving the van—whether the window or the gunshot residue—did not form the sole basis of the charges against defendant. Rather, as discussed, there was ample other evidence demonstrating his guilt. Also as previously discussed, there is no evidence that the police disposed of the van in bad faith or in response to defendant's general discovery request. By the time defendant filed a specific discovery request months later, the van had already been sold at auction. Unlike the destruction of the alleged cocaine in *Newberry*, defendant here was not deprived of the only means reasonably available to prove his innocence, that is, he was able to present evidence of his defense that the window could not roll down through his own testimony, the testimony of his girlfriend, and the testimony of the pastor.

¶83 B. Discovery Violation

¶84 Defendant next argues on appeal that the State's failure to preserve the van constituted a discovery violation under Illinois Supreme Court Rule 412 and that the trial court erred in denying his motion *in limine* to exclude the gunshot residue evidence or issue a curative jury instruction.

¶85 "Our 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). An abuse of discretion arises when a defendant is prejudiced by a discovery violation and the trial court failed to eliminate the prejudice. *Id.*

¶86 Rule 412(a)(v) provides that the State "shall, upon written motion of defense counsel, disclose to defense counsel *** any *** tangible objects which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belong to the accused." Ill. S. Ct. R. 412(a)(v) (eff. Mar. 1, 2001). Rule 412(g) provides that "[u]pon defense counsel's request and designation of material *** which would be discoverable if in the possession or control of the

State, and which is in the possession or control of other governmental personnel, the State shall use diligent good-faith efforts to cause such material to be made available to defense counsel."

Ill. S. Ct. R. 412(g) (eff. Mar. 1, 2001). "Once a trial court determines that a discovery violation has occurred, the court may impose any sanction which, in its discretion, it deems just. [Citation.] The correct sanction to be applied for a discovery violation is a decision appropriately left to the discretion of the trial court, and its judgment shall be given great weight." *People v. Koutsakis*, 255 Ill. App. 3d 306, 312 (1993).

¶87 Defendant relies on *Koutsakis* in arguing that he made a specific and timely request for preservation of the van but the State nevertheless disposed of the van, and the trial court erred in failing to impose sanctions. However, we find *Koutsakis* distinguishable. In that case, the defendant specifically requested in a pretrial discovery motion "the original or a copy of any radio transmissions" between police officers after being charged with cannabis trafficking following a traffic stop, but the tape was subsequently destroyed pursuant to routine procedure. *Koutsakis*, 255 Ill. App. 3d at 307-09. The court held that "where there is a request for specific evidence, a defendant does *not* need to show the exculpatory value of the evidence because the specific request puts the State on notice to preserve the evidence." (Emphasis in original.) *Id.* at 311. The court found that the specific request obliged the State to preserve the tape and failure to do so violated the rules of discovery. *Id.* "[A]ppropriate sanctions may be imposed by the trial court after evidence has been destroyed following a discovery request even where there has been no showing of bad faith on the part of the State," including where the discovery violation was inadvertent. *Id.* at 312 (citing Ill. S. Ct. R. 415 (eff. Oct. 1, 1997)).

¶88 Here, in contrast, defendant filed a general discovery motion in August 2011 requesting only that "physical items" seized from him be preserved. The police preserved the evidence

collected from the van, *i.e.*, photographs of the van, the gunshot residue samples taken from the interior, and the seat covers. There is no indication that the police or the State was aware in the early stages of the case that the operation of the passenger window was relevant or that the State should have otherwise been on notice to preserve the van. "It is incumbent upon the parties to tailor their discovery to the specific facts of the case." *In re Julio C.*, 386 Ill. App. 3d 46, 51 (2008). By the time defendant made a specific request with respect to the van in December 2011, it had already been disposed of. Additionally, based on the record before us, we disagree with defendant that the disposal was in violation of police procedure. There is no indication from the record that the auction of the van followed anything but normal protocol. As previously stated, defendant did not dispute the State's representations in that regard in the trial court.

¶89 Defendant alternatively relies on *People v. Madison*, 264 Ill. App. 3d 481 (1994), in asserting that if his initial discovery request was insufficiently specific, his specific request in December 2011 to inspect the van was still timely and the prejudice he suffered from the discovery violation was not remedied by the trial court. In *Madison*, the defendant was charged with possession of a controlled substance, but the police disposed of the substance approximately three years later. *Id.* at 482-83. The State knew the evidence had been destroyed, but did not inform the defendant until he requested to inspect it shortly before trial. *Id.* at 483-84. The appellate court found request timely because the State failed to disclose the destruction of the evidence until after the defendant moved for independent testing. *Id.* at 494. The court also held that the defendant was prejudiced because the charge hinged "exclusively on proof that defendant possessed or controlled heroin that the officers allegedly recovered"; the amount recovered elevated the severity of the charge; the State failed to disclose its destruction despite defendant's refusal to stipulate to the chain of custody or the chemical test results; and the trial

evidence was closely balanced. *Id.* at 489, 494. Notably, the State extensively used brown sugar as a substitute demonstrative exhibit, which failed to accurately depict the real evidence. *Id.* at 484, 489, 496.

¶90 The present case differs from *Madison* in several important respects. First, there is no evidence that the State knew the van had been disposed of and failed to disclose this information to defendant. As noted, there is no indication that the State knew that the passenger window was significant to defendant's defense at the time the van was disposed of. Further, the van was not of "critical importance" in proving the murder and did not form the essence of the State's case. The evidence collected from the van—the gunshot residue evidence—was important to the State's case and was preserved, and the State's evidence against defendant also included the video footage, testimonial evidence, autopsy findings, and defendant's admission to being near the scene of the shooting around the time it occurred. In further distinction from *Madison*, defendant had available to him alternative evidence to support his defense. Unlike the controlled substance in *Madison*, the fact that neither party could test the window here could have worked to either party's favor or disadvantage, whereas the drug testing results were clearly detrimental to the defendant in *Madison*. We also do not find that the evidence was closely balanced, in contrast to *Madison*, given the other evidence presented by the State in this case.

¶91 Although the trial court did not find that the State violated a rule of discovery, it nevertheless allowed defense counsel latitude to argue about the disposal of the van to the jury. As a result, even if we were to find that a discovery violation occurred, we would decline to find that the trial court abused its considerable discretion in dealing with the disposal of the van in this manner. *Koutsakis*, 255 Ill. App. 3d at 312. "The trial court is in the best position to determine an appropriate sanction based upon the effect the discovery violation will have upon

the defendant." *Id.* at 314. Taking advantage of this leeway, defense counsel argued to the jury that the police disposed of the van despite the important physical evidence taken from it, that the van was disposed of before the detective filed his final report, that the jury should consequently give the gunshot residue evidence less weight, that police failed to test the window, and that if defendant had a chance to examine the van, different information may have been discovered. In addition, we disagree with defendant that the trial court failed to abide by its promise to allow counsel leeway to argue about the van to the jury. The trial court appropriately prohibited counsel's arguments from venturing into misleading territory, *i.e.*, suggesting that that police purposely disposed of the van in order to hide exculpatory evidence or that defendant had, in fact, attempted to retest the van but was denied the opportunity.

¶92 Based on this record, we find no abuse of discretion in the trial court's decision to deny defendant's motion to exclude evidence. The record does not support that the State committed a discovery violation or that, even assuming one occurred, defendant suffered prejudice that the trial court failed to remedy.

¶93 C. Non-IPI Instruction

¶94 In defendant's final claim on appeal, he contends that the trial court erred in denying his request for a non-IPI instruction regarding the disposal of the van. Defendant raised this issue in both his pretrial motion *in limine*, during trial, and in a posttrial motion.

¶95 As stated, we review for an abuse of discretion the trial court's determination regarding a request for sanctions for violating the rules of discovery. *Koutsakis*, 255 Ill. App. 3d at 312, 314. "[W]hether to give a non-IPI instruction is within the sound discretion of the trial court." *People v. Danielly*, 274 Ill. App. 3d 358, 367 (1995). An abuse of discretion occurs if "the jury is not instructed on a defense theory of the case which is supported by the evidence." *Id.* at 367-68.

"Whenever applicable, an [IPI] should be used whenever it accurately states the law. A non-IPI instruction should be used only if the pattern instructions for criminal cases do not contain an accurate instruction and if the tendered non-IPI instruction is simple, brief, impartial, and free from argument." *Danielly*, 274 Ill. App. 3d at 367.

¶96 Defendant's requested instruction was as follows: "If you find that the State has allowed to be destroyed or lost evidence whose contents or quality are at issue, you may infer the true fact is against the State's interest." In denying the request, the trial court held that the instructions as given sufficiently instructed the jury on the law and it found defendant's proposed instruction to be "somewhat misleading because of the circumstances as to how that evidence came to be disposed of."

¶97 In arguing that his proposed instruction was appropriate under the circumstances, defendant relies on *Danielly*, where the defendant's request for the following instruction was rejected by the trial court: "When one party has exclusive control over evidence that if produced would be enlightening on the issue and fails to do so, the trier of fact can make an inference that the evidence if produced would be unfavorable to that party." *Danielly*, 274 Ill. App. 3d at 367. The defendant, who was charged with aggravated criminal assault, requested this instruction because the police returned the complainant's underwear to her and it was subsequently destroyed, which limited the defendant's ability to prove that the underwear was not torn. *Id.* The appellate court held that the requested instruction was inappropriate because the State did not have the ability to produce the underwear at the time of trial. *Id.* at 368. Having reversed the defendant's conviction on other, unrelated grounds, the court indicated that upon remand, an instruction discussed in *Youngblood* would be appropriate: "If you find that the State has allowed to be destroyed or lost any evidence whose content or quality are in issue, you may infer that the

true fact is against the State's interest." *Id.* The court found this instruction and the defendant's ability "to argue the 'missing evidence' issue to the jury in closing, serves as an effective protection to defendants from any uncertainty that might arise from missing evidence." *Id.* The instruction also encouraged careful handling of evidence by the police. *Id.* The court observed that the instruction was "particularly important in those cases, as here, where the police have in their possession evidence and subsequently fail to properly preserve the evidence for trial." *Id.*

¶98 In the case at bar, we conclude that the trial court did not abuse its discretion in denying defendant's proposed non-IPI jury instruction. As previously discussed, the record does not support that the State violated the rules of discovery in disposing of the van. As such, the requested instruction was unnecessary and inapplicable. However, even if we were to conclude that a discovery violation occurred, we would hold that the trial court properly denied defendant's requested remedy of the non-IPI instruction. Again, we recognize the trial court's considerable discretion in deciding whether to impose a sanction for a violation of the rules of discovery and determining what the sanction might be. *Koutsakis*, 255 Ill. App. 3d at 312, 314. Whether to provide a non-IPI instruction also falls within the trial court's sound discretion. *Danielly*, 274 Ill. App. 3d at 367. We note that Rule 415 provides that in determining whether and what type of sanction to impose for a discovery violation, the trial court "may *** exclude such evidence, or enter such other order as it deems just under the circumstances." (Emphasis added.) Ill. S. Ct. R. 415(g) (eff. Oct. 1, 1971). Significantly, the rule does not provide that the trial court *must* impose a sanction. Given the circumstances in the present case, we decline to disturb the trial court's resolution of the issue and we do not find that reversal of defendant's conviction is warranted. As stated, although the trial court denied defendant's request for the instruction, the trial court permitted the defense to make arguments in closing regarding the

disposal of the van.

¶99 Defendant also relies on *People v. Camp*, 352 Ill. App. 3d 257, 262 (2004), in which the State conceded that a discovery violation occurred when the police lost the videotape of the defendant's DUI field sobriety tests, and the appellate court observed that the trial court could consider giving a missing evidence instruction. In contrast, the State here has not conceded that a discovery violation occurred. Further, we again note that the *Camp* court cited the instruction as a possible, but not mandatory, remedy. *Id.* Here, the trial court exercised its discretion in determining whether a discovery violation occurred and in fashioning an appropriate remedy, and we decline to disturb that determination under the facts of this case.

¶100 Defendant also cites *In re Julio C.*, 386 Ill. App. 3d at 51, where the State violated the rules of discovery in releasing the defendant's vehicle despite its representations that it would not do so. The appellate court held that the sanction of dismissal was an abuse of discretion because the vehicle constituted merely potentially exculpatory evidence and there was no evidence of bad faith. *Id.* at 53. The court observed that upon retrial, the trial court could give an IPI instruction that the failure to produce evidence within a party's control gives rise to an adverse inference. *Id.* However, the court did not hold that such an instruction *must* be given when a party fails to properly preserve evidence or that it would be an abuse of discretion not to give such an instruction. In the present case, the State never represented to the defense that it would preserve the van and the defense never had reason to rely on such a representation to its detriment. Accordingly, *In re Julio C.* supports our conclusion that reversal is not warranted and would not be a proportionate sanction in this case.

¶101 In addition, we disagree with defendant that any error in failing to give the instruction amounted to more than harmless error. *People v. Grover*, 93 Ill. App. 3d 877, 878 (1981) (failing

to give an appropriate jury instruction as a sanction against the State when the State fails to comply with a discovery order is subject to harmless error analysis). "[I]nstructional errors are deemed harmless if it is demonstrated that the result of the trial would not have been different had the jury been properly instructed." *People v. Washington*, 2012 IL 110283, ¶ 60. We do not find that the non-IPI instruction would have changed the outcome of the case. As previously stated, the State's case consisted of damaging testimony from numerous witnesses regarding the altercation before the shooting and the subsequent shooting, in addition to the physical evidence such as the gunshot residue, autopsy, and the video footage from nearby surveillance cameras.

¶102

III. CONCLUSION

¶103 For the reasons discussed, we affirm defendant's convictions and sentences.

¶104 Affirmed.