2017 IL App (2d) 150151-U
No. 2-15-0151
Order filed December 4, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 13-CF-1926
MANUEL CARRILLO,	)	Honorable George D. Strickland,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Presiding Justice Hudson and Justice Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The State's failure to disclose a booking photograph of defendant intended for use in rebuttal was a violation of discovery rules. As a result, defendant was prejudiced by the discovery violation and the trial court failed to eliminate said prejudice. Reversed and remanded.

¶ 2 Defendant, Manuel Carrillo, appeals his conviction of two counts of attempted first-degree murder and unlawful possession of a firearm by a street gang member. He was sentenced to an aggregate 45-year prison term. Defendant's appeal contends that: (1) the State's case against him was not sufficient to prove his guilt beyond a reasonable doubt; (2) the State violated discovery rules by failing to disclose evidence of defendant's hair length from a photograph

taken near the time of the crime after forming the intent to use such evidence far in advance of trial; and (3) defendant's trial counsel was ineffective where he failed to present testimony to challenge the victim's identification of defendant, failed to present evidence that the prosecutor formed the intent to use the undisclosed photo evidence before trial, and failed to object to the prejudicial nature of the undisclosed photo as other-crimes evidence. We reverse and remand for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 Defendant was indicted in January 2014 for attempt murder, aggravated battery with a firearm, aggravated discharge of a firearm, and unlawful possession of a firearm by a street gang member. The charges were related to a June 28, 2013, shooting in Waukegan in which Trevor Linder and Antonio Lara were the targeted victims.

¶ 5 Pursuant to the trial court's order on February 20, 2014, both parties were to disclose all witnesses and photographs intended to be introduced at trial. The State, in its disclosure Statement to the accused, said that the discovery materials consisted of "[t]he names of persons whom the State intends, at this time, to call at the time of hearing or trial ***", including "[t]o the extent that said witnesses prepared relevant written or recorded Statements or memoranda *** including police reports, criminal history of the defendant, photographs, ***." Additionally, the State's disclosure Statement listed "[b]ooks, papers, documents, photographs or tangible objects which the State intends to use at hearing or trial ***." The State listed the following as a list of witnesses to be called at trial:

"BRIAN FALOTICO, #738, WAUKEGAN POLICE DEPT

MICHAEL SLIOZIS, #733, WAUKEGAN POLICE DEPT

OFC JOHN A. SZOSTAK, #757, WAUKEGAN POLICE DEPT

OFFICER ELIAS AGALIANOS, #674, WAUKEGAN POLICE DEPT

RIGOBERTO AMARO, #707, WAUKEGAN POLICE DEPT

SCOTT CHASTAIN, #611, WAUKEGAN POLICE DEPT

SGT EDGARDO NAVARRO, #659, WAUKEGAN POLICE DEPT

ANTONIO LARA, [address listed]

TREVER M. LINDER, [address listed]"

The State tendered no further disclosures to the defendant during the proceedings.

¶ 6 In response to the State's motion for discovery, defendant tendered a disclosure Statement on April 10, 2014. Defendant's disclosure Statement articulated that he was not guilty of the charges and further disclosed that he would be proceeding with an alibi defense; that at the time in question, he was in Kenosha, Wisconsin. Further, his presence in Kenosha was witnessed by one or more of the following witnesses:

"A. Manuel Carrillo, the Defendant

B. Fransisco Carrillo, [DOB listed] [address listed]

C. Martha Amanza, [DOB listed] [address listed]

D. Nancy Carrillo, [DOB listed] [address listed]

E. Marlene Carrillo, [DOB listed] [address listed]

F. Hector Ramirez, information pending

G. Noami Ramirez, information pending

H. All witnesses named in the police reports, and/or previously disclosed by the State in its disclosure."

Also on April 10, 2014, defendant filed a motion to suppress identification. Defendant's motion to suppress identification stated that the photo array presented to victim and eyewitness, Trevor

Linder, for identification of the shooter on the evening in question was impermissibly suggestive. The trial court held a hearing on defendant's motion to suppress evidence on June 4, 2014.

¶ 7 Judge Victoria Rossetti presided over the June 4, 2014, hearing. Defendant's sister, Nancy Carrillo, testified that defendant had shoulder-length hair on the day of the shooting. The State commented on the record during arguments that Nancy Carrillo's testimony "may go to weight with regard to whether or not the witness identification was accurate or not." He added, "I'm sure that may be an issue that might come up at trial ***." Judge Rossetti ultimately denied defendant's motion to suppress identification.

¶ 8 Defendant filed a motion in limine on June 16, 2014, asking the court to prohibit the introduction of certain evidence, testimony, argument, inference, reference, and comment by the prosecution. Also on June 16, 2014, defendant filed an amended answer to the State's original motion for discovery and listed the following five persons as potential witnesses at trial:

"I. Mireida Alvarez [DOB listed] [address listed]

J. Leticia Garcia, [address listed]

K. Narcisso Ocamp, [address listed]

L. Leticia Guerrero, same as M.

M. Yesenia Zalvaca, [address listed]"

¶ 9 On July 15, 2014, a hearing on the motions in limine was held in front of Judge George Strickland, who would preside over the remainder of the proceedings. Relevant here, defendant's counsel argued to the court that victim Trevor Linder identified the defendant "at a time when [defendant] had very long hair, strong facial hair, and otherwise didn't match the description." Linder indicated to the police that the perpetrators he observed on the night of the

crime were clean shaven and had short hair. Following the hearing on the motions in limine, the matter proceeded to a jury trial, held July 21-25, 2014.

¶ 10 The State's first witness was victim Trevor Linder, and he testified as follows. On the evening of June 28, 2013, he was at his girlfriend's home at 909 Forest Avenue, Waukegan, Illinois. At approximately 11:00 p.m. he left the house with his friend Tony Lara and an acquaintance named Smalls, to get something to eat. The three men headed down an alley adjacent to Linder's girlfriend's home. There was a streetlight in the alley. After walking south through the alley for about fifteen yards, Linder heard a voice asking who he was. Before he could turn around to respond, he heard a voice say "King love" and then gunshots. He was struck once in the middle finger of his left hand and once in his right thigh.

¶ 11 Linder testified that he was able to observe the individual who yelled out "King love" and fired a weapon at him. He testified that the gun was a 9mm pistol and pointed out defendant in the courtroom as the person he saw shooting at him. Linder said that after being shot in the finger he headed toward Lara's residence which was just to the southeast of his girlfriend's home. He then heard gunshots from another shooter. The second shooter was crouching down in such a way that defendant could not give a positive identification but defendant was standing up while shooting. Linder and Lara arrived at Lara's property shortly thereafter and hid near the garage on the side of the house until police and paramedics came a few minutes later. He heard four shots in total. He described his emotional state as being overwhelmed and anxious, and said "I didn't really know what was going on." He described the perpetrators to the police and was taken to the hospital about ten minutes later for treatment of his injuries.

¶ 12 Linder was admitted the hospital at 11:48 p.m. on June 28, 2013, and discharged at approximately 2:00 a.m. on June 29, 2013. After returning home from the hospital, Linder

received a visit from the police at approximately 3:00 a.m. He provided the police with a handwritten statement on what had transpired earlier that evening.

¶ 13 On cross-examination, Linder said that his middle finger was shot before he could give a verbal response to the voice he heard ask who he was. Linder then agreed with defense counsel that the shooter was at a 90-degree angle to his left when he was shot in the thigh. Linder admitted that he told the initial police officer responding to Lara's residence following his retreat from the shooting that the assailant was a taller male Hispanic, about five foot ten, wearing all black, and had a clean-shaven face. When asked by defense counsel if the person who shot him had short hair, Linder answered in the affirmative. When asked by defense counsel if clean-shaven means no moustache, Linder answered in the negative and said "[i]t means nice, clean-shaven like clean, like not scruffy, not rough looking." Linder then admitted he told police in his statement that the shooter was clean-shaven. Defense counsel then asked Linder whether or not the individual who shot him had a moustache or not. Linder said, "Yes. He had a moustache. He had a clean-shaven face." Linder then agreed with defense counsel that his written statement made no mention of a moustache. He said he told police about the shooter's height and the length of his hair, which he deemed to be short. Linder said the shooter was illuminated by the streetlight in the alley and that the light was behind the shooter, who wore all black. Linder admitted that he never indicated the presence of a second shooter in his handwritten Statement to police on the night of the shooting. He didn't know there was a second shooter until the police told him sometime later.

¶ 14 On redirect examination, Linder said that he was unable to actually "square up" the shooter on his left. He said he had to push Lara out of his way as Lara was directly in front of him when the shots were fired. His hands were near his navel and they went up when his middle

finger was shot. He did not begin running until the shot hit his finger. He admitted to being "frozen there" when turning around to answer "nobody" to the shooter's question of who he was. He then testified that he actually saw the second shooter crouching down in the bushes across the alley from his girlfriend's house. Linder could not say that he actually saw the second shooter firing at him and Lara but observed someone wearing a white t-shirt but could not see him as well as he could the defendant.

¶ 15 On recross and further redirect examination, Linder could not recall speaking with any police officers at the scene or giving any description of the perpetrators. He could only remember talking to the paramedics.

¶ 16 The State next called Officer Peter Lyons of the Waukegan Police Department. Officer Lyons testified that he was the first officer to respond to the call of shots fired and that he spoke with Linder on the scene. He described Linder as having been shot in one of his fingers and one of his legs, and that he was "a little worked up because he had just been shot." Lyons said that Linder described the shooters as "two Hispanic males, mid 20's, dressed in all black, and they had short, dark hair." He stayed with Linder until the paramedics arrived, after which Lyons had no further contact with Linder.

¶ 17 On cross-examination, Lyons testified that Linder said nothing about one of the assailants wearing a white t-shirt, only that they were in black and had short hair. Officer Lyons did not locate any shell casings in the alley, nor were any brought to his attention by other officers searching for them.

¶ 18 The State then called Sergeant Edgar Navarro of the Waukegan Police Department's Gang and Drug Unit. Sergeant Navarro testified that he arrived on the scene with three detectives, including Detective Falotico. He never spoke with victim Trevor Linder but recalled

hearing that some other officers had stopped a vehicle for speeding near the scene of the shooting. The three men in the vehicle that was stopped were taken to the police station but had been released by the time Sergeant Navarro returned. During cross-examination, Sergeant Navarro acknowledged that the three men taken to the police station following the traffic stop were named Ivan Hernandez, Jonathan Carlin, and Antonio Diaz. All three men were interviewed, photographed, and released. Sergeant Navarro did not interact with or observe any of the men.

¶ 19 Terry King of the Lake County Sheriff's Department next testified for the State. He testified to speaking with defendant on December 6, 2010. During that conversation, defendant stated that he "hung around with some Latin Kings." Defendant indicated that his nickname with Latin King gang members was Frosty.

¶ 20 The State then called Detective Brian Falotico of the Waukegan Police Department. Falotico testified that he worked in the Waukegan Gang Intelligence Unit. He arrived on the scene of the shooting sometime after 11:00 p.m. on June 28, 2013. He spoke with Tony Lara at the scene and then again at the Waukegan Police Department. Lara indicated to Falotico that he could not describe any of the perpetrators, so he presented no photo lineup array to Lara for identification. He then met with Linder at approximately 3:00 a.m. on June 29, 2013, following Linder's release from the hospital. At that time, Linder described the perpetrator to Falotico as "[m]ale Hispanic, approximately five foot ten, in his 20's wearing all black." Falotico further relayed Linder's description of the shooter's physical characterstics as "[c]lean-shaven" or "short hair."

¶ 21 Falotico put together two, six-person photographic arrays of potential suspects based on Linder's description and statement that "King Love" was exclaimed by one of the perpetrators on

June 28, 2013, just prior to the shooting. Linder was presented with the photo arrays on July 1, 2013. Linder identified defendant as the person who shot him in the first photo array, although the photo of defendant depicted him with long hair. Linder identified the second shooter as a person named Jesus Catalan from the second photo array tendered by Falotico.

¶ 22 After lengthy questioning by the State regarding his training and other experience, Detective Falotico was qualified by the court as a gang expert. He then stated that the area of the crime scene was territory of the Maniac Latin Disciples, a rival street gang of the Latin Kings. It was Falotico's opinion that the exclamation "King Love" prior to the shooting was indicative that Latin Kings were responsible. He said, "King Love" basically means they're honoring the Latin King Nation. They're going in and they're representing that gang and they're making it aware to the person, the victim, they're making it aware that a Latin King is the one responsible for this." Falotico further opined that a Maniac Latin Disciple street gang member would not shout out "King Love" because "they just don't do it *** [t]hey're not going to go and pay homage to their rival gang." Although, Falotico said, Latin King members would perpetuate such a shooting in their rival's territory as a sign of disrespect.

¶ 23 Falotico then testified to his awareness of the stopped vehicle containing Ivan Hernandez, Jonathan Carlin, and Antonio Diaz near the scene shortly after the shooting. Falotico was familiar with photos of all three men as members of the Maniac Latin Disciples street gang. He admitted to having numerous interactions with these men. Falotico then testified that the police had brought Carlin and Hernandez to the crime scene for a show-up before Linder was taken to the hospital, but Falotico was not present nor did he include the show-up in his report on the shooting.[1] Linder said that neither was involved in the shooting at the show-up, according to

[1] The State did not disclose the show-up with Linder until July 22, 2014, after jury

Falotico's testimony. Hernandez, Carlin, and Diaz were then eliminated as suspects and not included in either of Falotico's photo arrays presented to Linder. Falotico, through his experience as an agent with the Gang Intelligence Unit, was familiar with defendant as a member of the Latin Kings who went by the gang nickname, Frosty.

¶ 24 On cross-examination, Falotico testified that Waukegan is home to over 120 active members of the Latin Kings street gang, about 90% of which are Latino. He admitted to never having personally met or interacted with the defendant, only that his co-workers had. Falotico admitted that typical Waukegan Latin King gang members would be considered young, dark haired, Hispanic men. Falotico further admitted that sometimes street gang members engage in what is known as a "false flag." "False flag," according to Falotico "is when somebody, either a rival gang or somebody that is a child or that doesn't have any gang ties, will go into a gang territory and try and represent a gang member with the thing of false advertising that they're a gang member." He then admitted that Hernandez and Carlin, Maniac Latin Disciples both, were dressed in black when photographed on the night of the shooting and had the same physical characteristics as the shooter described by Linder. Falotico said the demographics of the Waukegan Maniac Latin Disciples largely mirror those of the Waukegan Latin Kings. Falotico did not test Hernandez, Carlin, or Diaz for gunpowder residue because they were eliminated as suspects following the show-up with Linder at the scene of the shooting, although he was not present at the show-up.

¶ 25 Detective Falotico testified that the photo arrays presented to Linder for identification were compiled by entering certain physical characteristics into a police data base and pulling out

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selection. The trial court found that the non-disclosure was a discovery violation, albeit not an intentional discovery violation. The State prosecutor was unable to identify which officer conducted the show-up with Linder on the night of the shooting.

known Latin King members that fit the description. He did not include Hernandez, Carlin, or Diaz in either of his photo arrays because they were eliminated on the scene during a show-up with Linder that Falotico was not present for. The photograph of defendant used in the photo array, which Linder identified defendant as the shooter, was taken from a four-year old driver's license photograph. Falotico admitted that he never spoke with defendant or any member of his family at any time during the investigation.

¶ 26 On redirect examination, Falotico opined that Diaz, who lived next to where the shooting occurred, was incensed that a rival had come into Maniac Latin Disciple territory and shot it up. Diaz and his two passengers, Hernandez and Carlin, then went out and tried to apprehend the fleeing shooters. Falotico reasoned that they did this because gang members do not like to involve the police and would rather handle shootings that occur on their territory themselves.

¶ 27 As to the formation of the photo array, Falotico testified that at the time he compiled the photographs for the lineup, defendant's driver's license photo was the only picture of him that the Waukegan Police Department had on record. Later, Falotico became aware of other photographs of defendant due to a misspelling of defendant's last name. His last name was entered into the police system with only one 'r' instead of two.

¶ 28 Following Detective Falotico's testimony, the trial court allowed the State to read into evidence a stipulation that defendant was a member of the Latin Kings street gang on June 28, 2013, and that his nickname with that gang was Frosty. The State then rested.

¶ 29 Following the trial court's denial of defendant's motion for a directed finding, defendant called Sergeant Timothy McGurn of the Waukegan Police Department. McGurn and other officers stopped the speeding minivan occupied by Hernandez, Carlin, and Diaz on the night of the shooting. McGurn said that the occupants of the minivan were observed throwing items out

of the window when pulled over by officers. All three men were put in patrol cars; Diaz was in McGurn's car. McGurn spoke via radio with his commanding officer at the scene of the shooting about performing a show-up with Linder, but he was already headed to the hospital. McGurn transported Diaz to the police station while Hernandez and Carlin were also escorted there by other officers. According to McGurn, he was unaware of any show-up being conducted with Linder with regard to Hernandez, Carlin, and Diaz.

¶ 30 The defense then presented eight alibi witnesses. All witnesses testified to essentially the same thing; that defendant and more than a dozen of his family members spent the weekend of June 28-30, 2013, in Kenosha, Wisconsin, to commemorate the death of defendant's older brother who passed away from cancer the previous year. Seven of the eight witnesses were asked by the prosecutor about the length of defendant's hair on that weekend. Each witness asked replied that it was shoulder-length. Nancy Carrillo, defendant's sister who testified at the June 4, 2014, hearing on defendant's motion to suppress identification, was defendant's eighth and final witness. Like her testimony at that earlier hearing, she testified here that defendant had shoulder-length hair on the weekend in question when asked on cross-examination.

¶ 31 Following Nancy Carrillo's testimony, outside the presence of the jury, the prosecutor informed the court that he had Detective Falotico "pull up any booking photos *** of the defendant in the Waukegan system because [Falotico] had indicated that there were two different spellings of his last name." The prosecutor had a photo from defendant's arrest on June 7, 2013, and wanted to call the arresting officer, Andrew Orozco, as a rebuttal witness to rebut defendant's alibi witnesses' testimony that his hair was shoulder-length on June 28-30, 2013. The prosecutor also sought to present the June 7, 2013, booking photo.

¶ 32 During arguments on the admission of this evidence, the prosecutor said that he had learned of this booking photo about six weeks before trial. He had asked Detective Falotico after the June 4, 2014, suppression hearing to look for other photos of defendant. Falotico found the June 7, 2013, photo and told the prosecutor that defendant had short hair. The prosecutor then told Falotico: "Let's wait and see what [defendant's] witnesses say. I don't know if they're going to confirm that he had short hair at the time. Let's see if they're going to say something different."

¶ 33 Defendant's counsel moved for a mistrial, arguing that neither the June 7 photo nor the arrest was previously disclosed by the State. The prosecutor said that he had not formed the intent to use the photo or rebuttal witness until after defendant's alibi witnesses had testified to defendant having shoulder-length hair at the time in question. Defendant's counsel told the court that the prosecutor had texted him the previous evening to say the State would call a police officer in rebuttal but did not specify what the officer would rebut. The trial court, after expressing serious apprehension with the revelation of the State's rebuttal evidence, suggested excluding the June 7 booking photo and allowing Officer Orozco to testify to the length of defendant's hair at the time of the arrest. The prosecutor insisted on the admission of the booking photo because defendant's hair length was "not a matter of credibility," but rather "stone cold, iron clad fact." The court did not find that the State had committed a discovery violation and allowed the admission of the photo and Officer Orozco's rebuttal testimony.

¶ 34 Officer Orozco testified that he had occasion to have contact with defendant on June 7, 2013, and that defendant's hair on that day was short. The State then presented the booking photo from defendant's arrest on June 7, 2013. Orozco said that the photo was a true and accurate depiction of defendant's appearance on that date. His arrest report contained the correct

spelling of defendant's last name but said an incorrect spelling in the booking system may impede photo searches.

¶ 35 Defendant called Detective Falotco in surrebuttal. He said that he had not found the June 7 booking photo at the time he put the photo array together for Linder. This, he explained, was due to his own misspelling of defendant's name when he searched for photos in the police database. Falotico agreed that lineups are typically more reliable when a recent photo is used. He also agreed that defendant's appearance in the June 7 booking photo looked completely different from the photo he gave to Linder for identification in the photo array.

¶ 36 On July 25, 2014, following closing arguments, the jury found defendant guilty of two counts of attempt first-degree murder and unlawful possession of a firearm by a street gang member. Defendant moved for a new trial in August 2014, arguing that the admission of the June 7, 2013, booking photo violated due process and the discovery rules. The trial court held a hearing on the motion but ultimately denied defendant's motion. Defendant was sentenced to an aggregate 45-year prison term. This appeal followed.

¶ 37 II. ANALYSIS

¶ 38 We begin by addressing defendant's contention that this court should reverse his convictions because the State's case against him depended on an eyewitness identification that was not sufficiently reliable to prove his guilt beyond a reasonable doubt.

¶ 39 When reviewing the sufficiency of the evidence, a court should consider whether the evidence, viewed in the light most favorable to the State, demonstrates that a rational trier of fact could have found that the State proved the elements of the offenses beyond a reasonable doubt. *People v. Milka*, 211 Ill. 2d 150, 178 (2004). This court will not retry the defendant or determine issues of credibility or the weight to be given to the witnesses' testimony. *Id*. This court will

only reverse the jury's finding when the evidence is so unreasonable, improbable or unsatisfactory that it creates a reasonable doubt as to the defendant's guilt. *People v. Wheeler*, 226 Ill. 2d 92, 115 (2007). The testimony of a single witness is sufficient to convict, even if the testimony is contradicted by the defendant. *People v. Deenadayalu*, 331 Ill. App. 3d 442, 450 (2002).

¶ 40 The testimony described above in the present case shows that Linder was able to identify defendant as one of the shooters on the evening in question. Linder chose defendant's picture from a photo array created by Detective Falotico. Linder also pointed out defendant in open court as the person who shot him on the night of June 28, 2013. Any weakness in Linder's eyewitness identification of defendant as one of the perpetrators is an issue for the trier of fact to resolve. *People v. Slim*, 127 Ill. 2d 302, 323 (1989). Insofar as defendant's alibi defense went to contradict Linder's identification, the weight to be given alibi evidence is a question of credibility for the jury in this case, and there was no obligation on the jury to accept alibi testimony over positive identification of the defendant. *Id*. Therefore, even though the State's case may have largely relied on Linder's eyewitness identification of defendant, we cannot say that said identification was not sufficiently reliable to prove defendant's guilt beyond a reasonable doubt. But the eyewitness identification in this case, while sufficient to sustain a finding of guilt beyond a reasonable doubt, was significantly bolstered by the State's rebuttal introduction of the June 7, 2013, booking photograph of defendant. This leads us to defendant's second contention in this appeal.

¶ 41 Defendant's second contention is that the State violated discovery rules by failing to disclose evidence of defendant's hair length from a photograph taken near the time of the crime after forming the intent to use such evidence far in advance of trial. Whether the State violated

the discovery rules is a question of law which we review *de novo*. *People v. Hood*, 213 Ill. 2d 244, 265 (2004).

¶ 42 In this case, defendant argues that the State's entire case came down to whether Linder misidentified him. Linder told the police that the perpetrators had short hair, but defendant's sister testified at the June 4, 2014, pretrial hearing that she would testify that he had long hair at the time of the shooting. Defendant argues that this put the State on notice that defendant's hair length would be an issue at trial. Defendant further asserts that the State's subsequent discovery of defendant's short hair in the June 7, 2013, booking photo six weeks prior to trial and the prosecutor's decision not to disclose it to the defense when it had formed the intent to use the photo at trial, amounted to a discovery violation.

¶ 43 The State responds to defendant's arguments with the assertion that there was no rule requiring disclosure of the June 7, 2013, booking photo because the State did not plan to use the photograph in their case-in-chief, the photograph was not a statement by the defendant, and it was not exculpatory. Because the photograph was used for rebuttal, the State argues, the only requirement was to disclose it when the State formed the intent to use it. The State maintains that the intent to use the photograph of defendant was not formed until after the defendant's alibi witnesses consistently testified to the length of defendant's hair as shoulder-length.

¶ 44 Supreme Court Rule 412(a) requires the State, upon motion of the defendant, to disclose certain material and information within the State's possession or control, including the following:

> "(i) the names and last known addresses of persons whom the State intends to call as witnesses, together with their relevant written or recorded Statements, memoranda containing substantially verbatim reports of their oral Statements, and a list of memoranda reporting or summarizing their oral Statements. ***

***

(v) any books, papers, documents, photographs or 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)(i), (a)(v) (eff. Mar. 1, 2001) (West 2014).

¶ 45 Supreme Court Rule 413(d) requires the defendant, upon the filing of a written motion by the State, to inform the State of any defenses he intends to make at a hearing or trial and disclose certain material and information within the defendant's possession or control, including the following:

"(i) The names and last known addresses of persons he intends to call as witnesses ***.

***

(iii) and if the defendant intends to prove an alibi, specific information as to the place where he maintains he was at the time of the alleged offense." Ill. S. Ct. R. 412(d)(i), (d)(iii) (eff. Mar. 1, 2001) (West 2014).

¶ 46 Supreme Court Rule 412 additionally provides the following:

"If the State has obtained from the defendant, pursuant to Rule 413(d), information regarding defenses the defendant intends to make, it shall provide to defendant not less than 7 days before the date set for the hearing or trial, *** the names and addresses of witnesses the State intends to call in rebuttal, *** and a specific Statement as to the substance of the testimony such witnesses will give at the trial of the cause.

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(f) The State should 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." Ill. S. Ct. R. 412(a), (f) (eff. Mar. 1, 2001) (West 2014).

¶ 47 With these statutory requirements regarding discovery in mind, we will consider whether the failure to disclose the June 7, 2013, booking photo of defendant amounted to a discovery violation.

¶ 48 The law is well-settled in Illinois that the State's duty to disclose rebuttal evidence does not arise until the State forms the intent to present it. *People v. Hood*, 213 Ill. 2d 244, 259 (2004). Rebuttal evidence is meant to explain, contradict, or disprove defendant's evidence and the State cannot *typically* know the need for rebuttal until after the defense testimony is heard. *Id*. (emphasis added). Thus, the State's intent to present rebuttal evidence *frequently* does not arise until the defendant has presented his case. *Id*. (emphasis added). The supreme court's use of the terms *typically* and *frequently* indicate that the State may very well have formed its intent to use certain rebuttal evidence long in advance of the presentation of defense testimony.

¶ 49 In *People v. Kunze*, 193 Ill. App. 3d 708 (2004), defendant was found guilty of residential burglary. He contended on appeal that the State violated Rule 412 by failing to provide him with certified copies of his prior convictions which were subsequently used to impeach his own testimony. *Id*. at 721. The State's contention was that it did not form the intent to use defendant's prior conviction until after defendant testified at trial, and thus, Rule 412 did not apply. *Id*. at 722. The court found the State's contention "unpersuasive and contrary to the spirit and intent of the supreme court rules on discovery in criminal cases." *Id*. at 723. The *Kunze* court stated that the actions of the State in failing to disclose defendant's prior conviction before trial were akin to "the discredited 'sporting theory of justice,' in which each side in a criminal case would hide evidence and witnesses it intended to present, hoping to surprise the other side."

Rules 412 and 413 were created by the Illinois Supreme Court to correct such abuses. *Id.* "The primary purpose of these rules was the elimination, where possible, of surprise, particularly with regard to documents and other tangible objects." *Id.*

¶ 50 The court in *Kunze* acknowledged that the State cannot always know in advance what evidence it will be using in rebuttal. *Id.* at 724. However, the only unknown to the State in *Kunze* was whether or not the defendant would actually testify on his own behalf. *Id.* The State knew that it would be offering defendant's previous convictions in rebuttal if defendant testified, which he did. *Id.* The court called the State's argument that it did not formulate the intent to use defendant's prior convictions until defendant actually testified "at best, disingenuous." *Id.* Supreme Court Rule 412(a)(v) required the State to furnish to defendant, in advance of trial, any records of defendant's prior convictions which were in the State's possession, and the failure to do so was a discovery violation. *Id.*

¶ 51 The same reasoning applies to the facts of the present case. Defendant here disclosed his alibi defense and a list of witnesses to the State far in advance of trial. One of those disclosed witnesses was Nancy Carrillo. The State knew on June 4, 2014, that Nancy, if called to testify, would say not only that defendant was in Kenosha at the time of the shooting, but that his hair was shoulder-length. The State commented on the record at the hearing that it anticipated defendant's hair length being an issue at trial; so much so that the prosecutor ordered Detective Falotico to find any additional photographs of defendant, which he did and notified the prosecutor of its character at least six weeks before trial. The prosecutor told Falotico: "Let's wait and see what [defendant's] witnesses say. I don't know if they're going to confirm that he had short hair at the time. Let's see if they're going to say something different." The State does not dispute the timeline or the prosecutor's comments to Falotico. The State merely leans on the

argument that it could not have formed the intent to introduce the June 7, 2013, booking photo until defendant presented the testimony of his alibi witnesses. To quote the court in *Kunze*, we find this argument "at best, disingenuous." *Id*.

¶ 52 Here, the only unknown to the prosecutor was whether or not Nancy Carrillo would actually testify as she was disclosed as a potential witness in defendant's Rule 413 disclosure. The State knew in advance of trial that if Nancy testified, the State would be offering in rebuttal the booking photo of defendant. The State cannot claim that it could not form the intent to use the photo until the occurrence of the inevitable. Therefore, we hold that Supreme Court Rule 412(a)(v) required the State to furnish the booking photograph of defendant which was in the State's possession. The State's failure to do so after forming the intent to use the photograph in rebuttal at least six weeks prior to trial was a violation of the discovery rules. However, this does not end our analysis of this issue.

¶ 53 The failure to comply with discovery rules does not require a new trial in every instance. *People v. Lovejoy*, 235 Ill. 2d 97, 120 (2009). A new trial should only be granted if defendant, who bears the burden of proof, demonstrates that he was prejudiced by the discovery violation and the trial court failed to eliminate the prejudice. *Id*. Several factors are considered when determining whether a new trial is warranted, including the closeness of the evidence, the strength of the undisclosed evidence, and the likelihood that prior notice would have helped the defense discredit the evidence. *Id*. We also consider the remedies sought by defendant, such as whether defendant requested a continuance when determining if actual surprise or prejudice existed. *Id*.

¶ 54 The evidence in this case was undoubtedly close as the State's case largely depended on the strength of Linder's identification of defendant as one of the shooters. Linder was being

fired upon in an alley at night, illuminated slightly by a single streetlight. He had been shot in the finger and thigh. He was frantically trying to escape the gunmen and said he could not turn to "square up" the shooter on his left. He later identified defendant as the shooter through a DMV photo even though defendant had long hair in the photo, and despite Linder's description of the perpetrator as having short hair and being clean-shaven. Additionally, there were three men identified as Maniac Latin Disciple gang members pulled over by police in close proximity to the shooting, all of whom matched the description given by Linder. Detective Falotico testified that the description given by Linder of the perpetrator could fit a very high percentage of known gang members associated with either the Latin Kings or Maniac Latin Disciples. Indeed, the State seems to acquiesce through omission of argument in the briefs presented to this court that the evidence was close in this case.

¶ 55 The State argues that defendant was not prejudiced by the conduct of the prosecutor because defendant has not contended that he could impeach the accuracy of the photograph in any way. We disagree with this reasoning. If the State had disclosed the photo to defendant in conformity with the discovery rules, defendant would have had several avenues to explore. Defense counsel could have chosen to submit the case to the jury following the close of the State's case-in-chief without calling any witnesses. Had the State properly disclosed the photo, defense counsel could have used it before or even during the trial to attempt to discredit the photo or evaluate his witnesses' credibility; perhaps he could have shown the photo to the alibi witnesses to ask if the photo accurately depicted defendant's hair length at the relevant time or perhaps the photo could have jogged the memory of the witnesses who may have had a hard time remembering defendant's appearance on the that particular weekend. The list of trial strategies

not afforded to defense counsel based on the State's discovery violation is potentially exponential.

¶ 56 Defendant here requested the extreme sanction of mistrial following the State's introduction of the booking photo. The State argues that the booking photo was actually inculpatory and would have helped Linder in identifying defendant in the photo arrays created by Falotico. We find this argument wholly unpersuasive. The State is attempting to frame the issue of the booking photo's introduction as more simple than is justified, which is why defendant's request for a mistrial after its introduction was not a drastic request but, rather, the only effective request available to defendant at the time. See *People v. Weaver*, 92 Ill. 2d 545, 561 (1982) (the closer the evidence, the stronger is the case for excluding evidence or declaring a mistrial). If the undisclosed photograph of defendant was so inculpatory, it is hard to fathom why the State would not have sought its introduction during its case-in-chief; unless the State had formed the intent to use the photo for the impeachment of defendant's witnesses, long in advance of trial. While it is true, as the State argues here, that a request for mistrial is a disfavored sanction when an alternative exists, a reviewing court cannot refuse it when it is the only effective sanction available. *Id*.

¶ 57 Based on the State's failure to disclose the booking photograph after it formed the intent to use it at trial, we hold that the defendant was unfairly prejudiced. The defendant was deprived of information "necessary ** to prepare for trial." *People v. Kunze*, 193 Ill. App. 3d 708, 723 (1990). The primary purpose of the discovery rules is the "elimination *** of surprise, particularly with regard to documents and other tangible objects." *Id*. Therefore, based on the State's violation of the discovery rules and the resulting prejudice, we reverse his convictions and remand for further proceedings.

¶ 58 In light of our finding that the State violated the discovery rules, we need not address defendant's remaining contention in this appeal. However, we must address the effect that our reversal of defendant's conviction has for the purposes of the double jeopardy clause.

¶ 59 Our supreme court in *Mink* stated:

> "The United States Supreme Court has repeatedly distinguished, for double jeopardy purposes, between judgments reversing convictions because of trial error and those reversing convictions for evidentiary insufficiency. *Lockhart v. Nelson*, 488 U.S. 33 (1988); *Burks v. United States*, 437 U.S. 1 (1978). Reversal for trial error is a determination that the defendant has been convicted through a judicial process which is defective in some fundamental respect; *e.g.*, incorrect receipt or rejection of evidence, incorrect instructions or prosecutorial misconduct. *Burks v. United States*, 437 U.S. 1, 15 (1978). The double jeopardy clause does not preclude retrial of a defendant whose conviction is set aside because of an error in the proceedings leading to the conviction. *Burks v. United States*, 437 U.S. 1 (1978).
>
> Reversal for evidentiary insufficiency, on the other hand, occurs when the prosecution has failed to prove its case and the only proper remedy is a judgment of acquittal. The double jeopardy clause precludes the State from retrying a defendant once a reviewing court has determined that the evidence introduced at trial was legally insufficient to convict. *Tibbs v. Florida*, 457 U.S. 31 (1982); *Burks v. United States*, 437 U.S. 1 (1978; *People v. Holloway*, 92 Ill.2d 381 (1982)." *People v. Mink*, 141 Ill. 2d 163, 173-74 (1990).

Although we have found that the evidence in the present case was sufficient to support a guilty verdict, the case is being reversed for the State's failure to comply with the discovery rules and

the prejudice to defendant as a result of that violation. Hence, the double jeopardy clause does not preclude the State from retrying the defendant. See *Mink*, 141 Ill. 2d at 173-74.

¶ 60 III. CONCLUSION

¶ 61 For the reasons stated, we reverse the judgment of the circuit court of Lake County.

¶ 62 Conviction reversed and the cause is remanded for further proceedings.