No. 2—09—0514
Order Filed April 11, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 08—CF—824
WILLIAM F. SOSA,	)	Honorable Timothy Q. Shelton,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices McLaren and Hutchinson concurred in the judgment.

ORDER

Held: (1) The trial court alleviated any prejudice accruing from the State's discovery violation and late disclosure of a witness and his testimony when it precluded the witness from testifying on the first day of the trial and allowed the defendant as much time as necessary to interview the witness;
(2) The trial court did not abuse its discretion in allowing the defendant to cross-examine the victim about his pending cases before the circuit court while precluding further examination into the details of the pending cases;
(3) The State proved beyond a reasonable doubt that defendant possessed burglary tools.

Following a jury trial, defendant, William F. Sosa, was convicted of burglary (720 ILCS 5/19—1(a) (West 2008)) and possession of burglary tools (720 ILCS 5/19—2(a) (West 2008)).

On appeal, defendant contends that the trial court erred by (1) denying the defense a continuance when the victim's father was disclosed as a witness for the first time three days before the trial commenced; and (2) restricting defendant's cross-examination of the victim, Jose Herrera. Defendant also contends that the evidence was insufficient to prove him guilty beyond a reasonable doubt of the offense of possession of burglary tools. We affirm.

We summarize the facts appearing of record. In July 2008, defendant was indicted for the March 23, 2008, burglary of Jose's car, along with unlawful possession of burglary tools, namely, a wire cutter. The public defender was appointed to represent defendant. On July 21 2008, defendant filed a motion for discovery requesting, among other things, a list of all persons whom the State might call as witnesses at defendant's trial. Defendant also requested that the State turn over any record of prior convictions or pending charges against any of the witnesses included on the list.

On January 21, 2009, the State filed an answer to defendant's discovery request, listing Jose, Aurora police officers Cox and Wullbrandt, an Aurora police investigator, and anyone else mentioned in the police reports as potential witnesses at trial. The trial court ordered that all discovery be completed on or before February 11, 2009. On February 11, 1009, the State issued a subpoena for Oscar Herrera, Jose's father, summoning him to testify at the March 30, 2009, trial of defendant. On February 17, 2009, the return for Oscar's subpoena was filed with the court.

On Friday, March 27, the trial court presided over the final pretrial conference before the March 30, 2009, scheduled beginning of the trial. At that hearing, defendant alerted the trial court that the State had not tendered any criminal history on Jose, even though defendant believed that Jose had pending misdemeanors and juvenile adjudications. The State responded

that Oscar had a traffic conviction and Jose received supervision on a misdemeanor. The State also agreed to run another search for the witnesses' criminal histories. Finally, at that hearing, the State tendered an updated witness list that included Oscar.

On March 30, 2009, the date defendant's trial was scheduled to begin, defendant requested that Oscar be precluded from testifying. Defendant explained that Oscar had not been listed as a potential State's witness in the documents provided during discovery, and that he was a surprise witness who had not been identified until March 27, 2009, three days before trial. Defendant further represented that he had just learned that Oscar was supposed to be an eyewitness to the alleged offense. Alternatively, defendant requested a continuance in order to prepare his case for Oscar as a witness. Defendant also requested that the trial court allow Dominique Sosa, defendant's sister, to testify, even though she had not been listed previously as a witness. Defendant explained that Dominique had come forward just that morning, stating that defendant had given her a key to his car.

The State responded to defendant's requests, stating that it had believed that Oscar was mentioned in the police reports, and it was only on the morning of March 30, 2009, the date the trial was scheduled to begin, that the State learned that Oscar was not, in fact, mentioned in the police reports. The State explained that Oscar would testify that, during the early morning hours of March 23, 2008, he heard a noise, investigated, and observed defendant, whom he knew personally and could identify, with a car stereo in his hand. Defendant responded that Oscar's testimony would be the first and only testimony that would place defendant at the scene of the offense, and this increased defendant's need for a continuance to allow his attorney to adjust her approach to the case.

The trial court noted its concern that Oscar had been omitted from the witness lists and had not been mentioned in the police reports. Nevertheless, the trial court refused to preclude Oscar from testifying. Instead, the trial court ordered the State to get Oscar to the courthouse and allowed the defense as much time as it needed to question him and investigate his testimony. The trial court maintained, however, that the trial would not be postponed. In denying defendant's request for a continuance, the trial court noted that the case was more than a year old. Additionally, every Monday and Friday, there was a flurry of discovery, about which the court "begged" attorneys to use more diligence. The trial court also noted that, under *People v. Rubino*, 305 Ill. App. 3d 85 (1999), the preferred penalty for a discovery violation was a continuance. The trial court indicated, however, that it believed that a continuance was actually a reward and not a sanction for those who did not wish to go to trial. The trial court also granted defendant's request to allow Dominique Sosa to testify, but ordered that the State would have to be allowed to meet with her that day. The trial court then began jury selection.

At about 11:45 a.m., following the completion of jury selection, defense counsel asked to be given until about 2 p.m. for the purposes of conferring with her investigator about the interviews with Oscar, Jose, and Dominique that morning and working that information into her opening statement, direct examinations, and cross-examinations of the witnesses. The trial court declined the request, giving the parties an hour and forty-five minute lunch break.

When the parties returned from the lunch break, defendant again requested that the trial court preclude Oscar's testimony, arguing that counsel's entire strategy of the case and every decision–such as taking or refusing plea offers or choosing between a bench or jury trial–had been based on only Jose testifying and no eyewitnesses, because Jose had a falling out with defendant and was the only witness who asserted that defendant took the stereo from the car.

Defendant argued further that Oscar told the defense investigator that he had never been interviewed by the police, but, in February 2009, the State nevertheless served him with a subpoena. Defendant also contended that, pursuant to Supreme Court Rule 413 (eff. July 1, 1982), the State should have tendered a memo summarizing Oscar's statements.

The State responded, noting that, the previous Friday, March 27, 2009, it had disclosed Oscar as a possible witness. The State acknowledged that it had not produced a memo regarding Oscar's statements, but it had proffered what his testimony would be, and the defense had an opportunity to interview him. The trial court maintained its position and refused to preclude Oscar's testimony. The trial court reasoned that the February 2009 subpoena of Oscar was a matter of public record and easily uncovered in the court file, so the defense should have been on notice despite defense counsel's argument that she did not need to continuously check the court file because she relied upon the State's representations. The trial court reiterated that, if needed, the defense could have more time with Oscar at the end of the day. The trial court also noted that, in light of *Rubino*, it would likely be committing an abuse of discretion if it precluded Oscar's testimony.

The trial commenced. Jose, the complainant, testified that, as of the date of trial, he was 19 years old and lived on a cul-de-sac near Randall Road with his father, mother, younger sister, and grandmother. On March 23, 2008, at about 3 a.m., he was awakened by his father. Jose went outside to his car, an Isuzu Rodeo, parked in front of the garage and discovered that the radio was missing, and its wires were hanging out. Jose testified that there was no damage to the outside of his car. He also testified that the speakers had been yanked out of the car, but acknowledged that, at the time he had overlooked the speakers and, when he discovered them missing, he did not go back to the police and tell them.

Jose testified that, after ascertaining that his radio was missing, he began to drive away from his house in search of the perpetrator, and a police van pulled up. Jose told the officer that someone that stolen his radio out of his car. Jose testified that he followed the officer, who was heading to Plum Street along Randall Road, when he saw defendant turning onto Randall Road from Plum Street, heading in the direction of his house. Jose honked his horn at the officer and he observed the officer make a U-turn to pull over defendant. Jose pulled in behind the officer. Shortly thereafter, an officer showed Jose a radio that had been found in defendant's car. Jose identified it as his radio. At trial, Jose testified the radio was his, noting a special plug that was unique to his vehicle and bent metal on the face of the radio, as if it had been yanked out of his car. Jose testified that he was also shown a key recovered from defendant's car and identified it as belonging to his car. When the key was placed in his car's lock, it was able to operate it.

Jose positively identified defendant in court as the person driving the car that the police van stopped. Jose testified that he and defendant had been friends and had known each other for eight months before the incident. Jose testified that defendant had lived in his house with his family for a couple months. Jose testified that he had several copies of his car keys made, one of which was lost by his aunt, who often used the car. Jose denied that he gave the keys to his friends to hold in case he got into trouble with his parents and had his car key taken away. Jose testified that, as of March 23, 2008, he and defendant were no longer friends, and he did not invite defendant into his home or give him permission to enter his car or to remove his radio.

At the time of the trial, Jose had a total of four cases currently pending against him, with three in Kane County, and they all had upcoming court dates. Defendant tried to ask Jose about pending marijuana cases, but the State objected to any mention of the nature of the cases. Defendant argued that the questions were designed to elicit evidence on Jose's bias and motive

to lie in order to help the State' case. Defendant cited *People v. Triplett*, 108 Ill. 2d 463 (1985), to support his position that the defense is allowed to inquire as to any promises or expectation of leniency relating to a witness's potential bias, interest, or motive to lie, notwithstanding the fact that evidence of an arrest, an indictment, or a complaint is not usually admissible to impeach a witness. Defendant further contended that bringing out the details of the charges would allow him to emphasize to the jury Jose's potential interest or bias in testifying for the State. The trial court sustained the State's objection, interpreting *Triplett* to allow the defense to discuss pending charges without getting into the specifics of each charge. Jose testified that the State had not given or promised him any benefits in exchange for his testimony in this case.

Peter Wullbrandt, a patrol officer with the Aurora police department, testified that, on March 23, 3008, around 3:30 a.m., he was driving a police transportation van when he received a dispatch to Randall Court. Wullbrandt drew a diagram of the streets around and including Randall Court. He testified that, when he arrived at Randall Court, he was met by Jose, who was driving a white SUV. Jose informed him that someone had stolen his car stereo and was running to the north. Wullbrandt testified that he drove north on Randall Road and turned onto Plum Street. As he turned onto Plum Street, his headlights illuminated the driver of a car coming toward him. The driver matched the description given by the dispatcher, and Wullbrandt made a U-turn, activated his flashing lights, and stopped the driver on Randall Road, near Randall Court.

Wullbrandt testified defendant was driving the car that he stopped. Wullbrandt asked defendant for his driver's license and proof of insurance. Wullbrandt testified that defendant appeared to be nervous, and defendant repeatedly reached towards the center console of the car, despite Wullbrandt's instructions not to do that. Wullbrandt testified that people pulled over for a traffic stop often are nervous, some cry, and others instinctively reach for their license,

insurance information, and registration. Wullbrandt asked defendant where he was headed, and where he was coming from. To both questions, defendant replied Fifth Street. Wullbrandt testified that Fifth Street was on the other side of Aurora than the Randall Road location. Wullbrandt testified that the car was registered to a woman named Olson who lived on Fourth Street. Defendant asked Wullbrandt why he had been pulled over, and Wullbrandt replied that it was for suspicion of a burglary in the area. Wullbrandt testified that he directed defendant to exit the SUV, and he placed defendant in handcuffs for his own safety due to defendant's reaching for the center console, but he did not arrest defendant at that time. Officer Cox, also of the Aurora police department, arrived at the scene and took over talking with defendant.

Even though Cox was talking with defendant, Wullbrandt continued to observe. Wullbrandt testified that defendant continued to appear nervous. Wullbrandt observed Cox retrieve a car stereo, a car key, and a wire cutter from the car defendant had been driving. Cox then placed defendant under arrest.

Chris Cox, a patrol officer with the Aurora police department, testified that, at about 3:30 a.m. on March 23, 2008, he was dispatched to Randall Court. Arriving, he observed Wullbrandt with defendant. Cox took over speaking with defendant, and asked him if there was anything in the car that the police should be aware of, and defendant said no. Defendant asked why he was being stopped, and Cox replied that a car stereo had been taken from a car parked around the corner. Cox then asked if defendant had a stereo in his car. Defendant replied that he had one under the driver's seat and gave permission for it to be retrieved from his car. Cox retrieved the stereo and showed it to Jose, who had by then arrived at the scene. Cox testified that, as he was showing the stereo, he observed no signs of forcible entry to the outside of Jose's car. Jose identified that stereo as the one taken from his car. Cox placed defendant under arrest.

Cox testified that, after placing defendant under arrest, he searched the remainder of defendant's car, locating a car key in the center console and a wire cutter on the front passenger seat. Cox testified that the car key operated the door lock on Jose's car when he tested it. Cox testified that the wire cutter was the kind of tool that could be used to pry as well as to cut, and he was aware that wire cutters had been used in other car burglaries that he had investigated. Cox testified that wire cutters also had benign uses, could be used in someone's trade or business, and people frequently brought tools to and from work in their cars.

After Cox finished testifying, the trial court adjourned the proceedings until the next day. On the next day when the trial resumed, Oscar Herrera testified.

Oscar testified through an interpreter. He testified that, as of May 2009, he had been living in the house at Randall Court for 11 years. Oscar, his wife, his mother-in-law, his daughter, and Jose all lived there with him at his house. Oscar testified that defendant was Jose's friend and had lived with them at their house for more than two months.

Oscar testified that, on March 23, 2008, at about 3:30 a.m., he was awake and watching television in his bedroom when he heard a noise outside. Believing that Jose had made the noise, he investigated. He looked outside and saw someone in Jose's car. He went into the basement where Jose was sleeping and awakened Jose. As Oscar was going upstairs, he heard the garage door opening. Oscar looked into the garage and saw defendant there, holding a car stereo. Oscar testified that, when defendant saw him, he ran away through the yards of the adjacent homes.

Oscar testified that he believed that Jose had given the garage code to defendant while defendant was living with his family. Oscar explained that he had never informed the police that he personally observed defendant with the car stereo because he had never spoken with the

police. Oscar also stated that, until the previous morning (the first day of the trial) he had not spoken with the prosecutors either. Oscar testified that, when he spoke with the prosecutors, Jose translated for him.

The State rested and defendant moved for a directed verdict. Defendant argued that the State had failed to meet its burden of proof for either burglary or possession of burglary tools. The trial court denied defendant's motion.

Defendant's sister, Dominique, testified on his behalf. She testified that, as of the date of the trial, she was working as a secretary for a hospital emergency room. Dominique testified that, in March 2008, defendant was 18 years old and had a girlfriend named Tabitha Olson, who lived on Fourth Street in Aurora. Dominique testified that she had known Jose for 2½ years. Jose had dated Dominique's cousin, and he had become friends with her and defendant. Dominique testified that defendant had lived with Jose and his family for a two-month period. Dominique testified that, while they were friends, Jose had allowed defendant to drive his car. She recalled that, on one occasion, defendant picked up Jose's car for him. During the summer of 2007, Jose had given copies of his car keys to her and defendant because Jose's mother and aunt used the car and took his keys. Dominique testified that, at the time of trial, she was unable to locate her key to Jose's car, and she was not sure how long that key had been missing.

Defendant did not testify. The jury found defendant guilty of both burglary and possession of burglary tools.

On May 13, 2009, defendant moved for the entry of a judgment notwithstanding the verdict, or, in the alternative, for a new trial. Defendant reiterated his argument that the trial court erred by not precluding Oscar's testimony or allowing a continuance because of the State's discovery violation of failing to timely disclose Oscar as a witness. Defendant also argued that

he was prejudiced when the State failed to provide the defense with information about Jose's pending cases before the trial began. The trial court denied defendant's motion. The trial court then sentenced defendant to a 24-month term of probation along with all the mandatory fees and costs. Defendant timely appeals.

On appeal, defendant first argues that the trial court erred in denying him a continuance when Oscar was disclosed as a witness only three days before the trial commenced, and the substance of his testimony was disclosed on the first day of trial. Defendant initially asked that Oscar's testimony be barred, or in the alternative, that the defense be granted a continuance in order to assess Oscar's testimony and to integrate it into the trial strategy, including opening statements, closing arguments, and cross-examination.

We generally assess the manner in which a trial court addressed a discovery violation for an abuse of discretion, finding such an abuse of discretion where the defendant has been prejudiced by the discovery violation and trial court's remedy has failed to eliminate the prejudice incurred. *People v. Weaver*, 92 Ill. 2d 545, 559 (1982). On the other hand, where the facts giving rise to the alleged discovery violation are not in dispute, then the issue becomes a legal question, the application of the law to a specific set of facts, and this is reviewed *de novo*. *People v. Lovejoy*, 235 Ill. 2d 97, 118 (2009).

As an initial matter, defendant asserts that our review in this case should be *de novo*, because the facts giving rise to the discovery violation are not in dispute. The State, by contrast, maintains that our review in this case should be for an abuse of discretion, asserting that the issue to be addressed involves whether the trial court fashioned an appropriate remedy for the conceded discovery violation and not whether a discovery violation was committed. We agree with the State. The State has conceded that a discovery violation took place. We are reviewing,

then, whether the trial court's relief, postponing Oscar's testimony and allowing defendant as much time as was needed to interview Oscar, was sufficient to cure the prejudice, if any, accruing from the discovery violation. *Weaver* sets forth the appropriate standard of review for this sort of case: while the judgment of the trial court is given "great weight," "[a] reviewing court will find an abuse of discretion *** when a defendant is prejudiced by the discovery violation and the trial court fails to eliminate that prejudice." *Weaver*, 92 Ill. 2d at 559.

As an initial matter then, we must determine whether defendant was prejudiced by the late disclosure of Oscar and the subject matter of his testimony. Oscar was disclosed as a witness during the final pretrial conference, occurring on Friday, three days before the trial was scheduled to commence on Monday. On the date the trial was due to begin, defendant filed a motion seeking to preclude Oscar's testimony, or, in the alternative, seeking a continuance in order to rework the defense's theory of the case in light of Oscar's testimony. The trial court implicitly determined that the late revelation of Oscar prejudiced defendant. We agree. Oscar was the only witness to place defendant at the scene of the burglary. Before Oscar had been revealed as a witness, defendant had to contend with only circumstantial evidence and Jose's testimony. Defendant indicates that Jose could be impeached with bias, as Jose and defendant had a falling out. The addition of Oscar, an eyewitness placing defendant at the scene with the stolen stereo in his hands, unquestionably causes defendant more difficulty in mounting a defense. Accordingly, we conclude that the late disclosure of Oscar caused a measure of prejudice to defendant.

Next, we must consider whether the trial court's remedy cured the prejudice caused by the late disclosure of Oscar as a witness. Illinois Supreme Court Rule 415(g)(I) authorizes the trial court to impose sanctions for discovery violations, including "order[ing a violating] party to

permit the discovery of material and information not previously disclosed, grant[ing] a continuance, exclud[ing] such evidence, or enter[ing] such other order as it deems just under the circumstances." Ill. S. Ct. R. 415(g)(I) (eff. Oct. 1, 1971). The trial court precluded Oscar from testifying during the first day of trial and also ordered the State to make Oscar available and gave defendant as much time as necessary to interview Oscar. At the same time, however, the trial court allowed jury selection to proceed and gave a shorter lunch break than the defense requested. Following the lunch break, the trial court commenced the trial with opening statements and the examination of several witnesses. Defense counsel had an investigator interview Oscar and, apparently, met with the investigator during the lunch break and after the proceedings had recessed for the day. Oscar testified the next morning, which was the final day of the trial.

It is well established that the purpose of discovery is to eliminate unfairness and surprise and to give the parties an opportunity to investigate. *People v. Hawkins*, 235 Ill. App. 3d at 39, 41 (1992). The purpose of the sanctions is to further the goals of eliminating unfairness and surprise and to compel the parties' compliance with discovery orders rather than punishing them. *Hawkins*, 235 Ill. App. 3d at 41. The sanction of exclusion is not favored, and it should be used only as a last resort where a lesser sanction, such as a continuance or a recess, would be ineffective. *Hawkins*, 235 Ill. App. 3d at 41. The sanctions listed in Supreme Court Rule 415(g) are not exclusive and should be proportionate with the magnitude of the discovery violation. Ill. S. Ct. R. 415(g), Committee Comments (adopted Oct. 1, 1971). With these rules in mind, we turn to defendant's contentions.

Defendant contends that the trial court's remedy was insufficient to cure the prejudice accruing from the State's tardy disclosure of Oscar as a potential witness. According to

defendant, every aspect of his trial strategy had to be retooled upon the disclosure of Oscar. Before Oscar was disclosed, defendant focused on Jose, seeking to impeach him with evidence of bias, including the pending cases before the Kane County circuit court and the falling out between Jose and defendant. Before Oscar's disclosure, defendant was faced only with circumstantial evidence and did not have to contend with any eyewitness testimony. Once Oscar was disclosed, however, the defense had to rethink its theory of the case to account for the eyewitness testimony, to revise the opening statement and closing argument, as well as its examinations of witnesses. Defendant contends that the remedy of being granted as much time as necessary to interview Oscar was insufficient to cure the prejudice caused by his late disclosure, especially in light of all of the revisions that he needed to make to his case-strategy. We disagree.

In determining whether the prejudice accruing from a discovery violation resulted in reversible error, the court must consider a number of factors. The factors to be considered include the strength of the undisclosed evidence, the closeness of the case, the likelihood that prior notice could have helped the defense to discredit the evidence, and the willfulness of the State in failing to disclose the evidence. *People v. Harris*, 123 Ill. 2d 113, 152 (1988); *People v. Cisewski*, 118 Ill. 2d 163, 172 (1987). We now turn to evaluate each individual factor.

As an initial matter, we briefly review the circumstances of the trial court's attempt to effectuate a remedy for the discovery violation. The trial court precluded Oscar from testifying on the first day of the trial. It also allowed defendant as much time as needed to interview Oscar. We believe that this was a sufficient remedy. The case was not terribly complex: four witnesses testified for the State (including Oscar), one for the defense, and the trial was concluded in less than two days. The facts were straightforward: defendant was found with a stereo hidden under

the driver's seat of his car, a key to Jose's car, and a pair of wire cutters in the front passenger seat of his car. He was stopped in close proximity to Jose's house, within a very short time of the reported burglary of Jose's car.

With this evidence adduced at trial, and not including Oscar's challenged evidence, we now consider the factors set forth in *Harris* and *Cisewski*. Based on the foregoing, we conclude that, even without Oscar's testimony, the evidence against defendant is overwhelming. While the evidence is all circumstantial, the fact that defendant was close to the site of the burglary, had actual physical possession of the stereo removed from Jose's car, had a pair of wire cutters that, according to the evidence, could be used to cut or pry, and, in the experience of the police witnesses, similar wire cutters to the pair found in defendant's car had been used in other car burglaries, all overwhelmingly points to defendant's guilt.

The strength of the undisclosed evidence is high. Oscar's testimony was the only eyewitness evidence directly placing defendant at the scene of the offense and holding the proceeds of the crime. This is powerful evidence. However, as noted, the circumstantial evidence, standing alone, is overwhelmingly against defendant. Thus, Oscar's evidence, while powerful, is nevertheless relatively unimportant to proving defendant's guilt, in light of the overwhelming circumstantial evidence of defendant's guilt. This factor favors the State.

The next factor weighs slightly in defendant's favor. Earlier (or timely) disclosure might have allowed defendant a greater opportunity to discredit it, but this is true of almost any imaginable evidence. Specifically on appeal, however, defendant offers no suggestion as to how the evidence could have been better challenged than actually occurred. Defendant was given the opportunity to interview Oscar and given as much time as the defense felt it needed to adequately complete the interview. Oscar was also precluded from testifying on the first day of

trial (and the State avers that Oscar was called to testify out of its preferred order of witnesses). At trial, defendant vigorously cross-examined Oscar and brought out the fact that Oscar had not told the police about what he saw until the first day of trial. From this, defendant argued that Oscar's tardy disclosure of what he had observed was due to Oscar being Jose's father and trying to support his son, leading to the inference that Oscar's testimony was recently fabricated. Defendant offers no other suggestion of how he could have confronted the undisclosed evidence, and the manner in which he did confront it appears to be as effective as it could have been, even with timely disclosure. This factor, then, favors defendant, but only slightly.

The final factor favors the State. On the Friday before trial, when the State first disclosed Oscar as a witness, the prosecutor stated that she believed Oscar's name was included in the police reports. On Monday, the day the trial was scheduled to commence, the prosecutor acknowledged that she was incorrect, and Oscar had not been included in the police reports. From this, it appears that the State's failure to disclose the witness was not willful, but was inadvertent. Having considered the factors, we conclude that the trial court's efforts to remedy the State's discovery violation were sufficient to alleviate any prejudice that resulted. Accordingly, we hold that no reversible error occurred by the trial court's actions to postpone Oscar's testimony and to allow defendant as much time as needed to interview Oscar.

Defendant argues that the trial court's frustration with discovery problems in his courtroom led him to err by not imposing the preferred sanction of a continuance. When defendant moved for a continuance on the first day of trial, the trial court noted that the case was over a year old and that every Friday and Monday there was a flurry of discovery, about which the court had repeatedly asked the attorneys to use more diligence. Considering *Rubino*, the court stated that a continuance was more of a reward for those who did not want to go to trial

than it was a sanction. Defendant argues that these thoughts were extraneous to the issue of the discovery sanction and persuaded the trial court to ignore the proper and preferred sanction of ordering a continuance. We disagree. Initially, we note that *Rubino* stated that "[t]he preferred sanction for a pretrial discovery violation is a continuance if it would protect the defendant from surprise and prejudice, and the exclusion of evidence is a last resort to be used only where a continuance would be ineffective." *Rubino*, 305 Ill. App. 3d at 88. Our supreme court, however, has stated that "[t]he rules of this court are not suggestions; rather they have the force of law, and the presumption must be that they will be obeyed and enforced *as written*." (Emphasis added.) *People v. Campbell*, 224 Ill. 2d 80, 87 (2006). Supreme Court Rule 415(g) (eff. Oct. 1, 1971), authorizing the imposition of sanctions for discovery violations, as written, contains no preference among the various options available to the court to remedy a particular violation. Additionally, while the trial court did make the statements highlighted by defendant, we have considered the circumstances of the discovery violation pursuant to the factors set forth in *Harris* and *Cisewski* and have determined that the trial court's remedy of ordering that the defense be allowed to question Oscar for as much time as it needed, along with postponing his testimony until after the first day of trial was adequate to address the admitted discovery violation. It is the trial court's judgment, and not its reasoning that we review on appeal. *People v. Primbas*, 404 Ill App. 3d 297, 301 (2010). Even if the trial court's statements demonstrate an erroneous rationale for ordering that the defense be given as much time as needed to question Oscar, the result was an appropriate remedy amongst the various available sanctions for the State's discovery violation, and the result is all that we review on appeal. *Primbas*, 404 Ill. App. 3d at 301. Accordingly, we reject defendant's contention on this point.

Defendant also contends that the testimony of Oscar, as the only eyewitness placing defendant at the scene with the proceeds was much more harmful to his case that we have determined. Defendant cites to *People v. Wilken*, 89 Ill. App. 3d 1124, 1129 (1980), to support his argument, and for the proposition that defense surprise caused by an unknown and undisclosed eyewitness should be reversible error. We find *Wilken* to be distinguishable. In *Wilken*, the State did not turn over an officer's report, so the defense was caught by surprise when the officer turned out to be the only independent eyewitness to the offense. *Wilken*, 89 Ill. App. 3d at 1126-27. The appellate court reasoned that the defense was hindered because the report had not been disclosed. *Wilken*, 89 Ill. App. 3d at 1129. Here, we weighed each of the factors set forth in *Harris* and *Cisewski*. Additionally, we note that Oscar was disclosed and the defense learned of the subject matter of his testimony before the trial began, even though the latter revelation occurred on the day the trial was scheduled to begin. The trial court also fashioned an effective remedy for the discovery violation, unlike the trial court in *Wilken*, which did not attempt to remedy the discovery violation. These facts serve to distinguish *Wilken* from this case. Accordingly, we are not persuaded by *Wilken* despite its similar fact pattern.

Defendant next offers *Lovejoy* for the proposition that the "defense should have been granted a continuance and not left to deal with [the] discovery violation *** in the midst of trial." *Lovejoy*, 235 Ill. 2d at 121-23. In *Lovejoy*, the discovery violation involved expert testimony. Additionally, the defendant sought and offered his own expert to testify and to rebut the surprise testimony, but the trial court refused. *Lovejoy*, 235 Ill. 2d at 121-23. In this case, however, the trial court fashioned a remedy rather than precluding the defendant from trying to address the evidence. Further, in *Lovejoy*, the violation came to light after the testimony had been given, so the defendant could not counter it, as opposed to here, where the subject matter of

Oscar's testimony was disclosed before Oscar testified, even if that disclosure was still a discovery violation, and defendant was allowed to interview Oscar before he testified, so as to be able to address his testimony and more effectively cross-examine him. Based on these differences, we find *Lovejoy* to be distinguishable and we reject defendant's argument on this point.

Defendant cites to *People v. Millan*, 47 Ill. App. 3d 296, 300 (1977), and *People v. Mourning*, 27 Ill. App. 3d 414, 420 (1975), for the proposition that an interview of the surprise witness during the trial is insufficient to cure the prejudice resulting from the discovery violation, and that, barring timely disclosure, the surprise witness should not have been allowed to testify. We find these cases to be distinguishable.

In *Millan*, the defendant's codefendant, who, three months before the trial began, had pleaded guilty, was disclosed for the first time as a witness during the trial. The witness had decided to testify only a short time before trial, but was still not disclosed until the trial had commenced. *Millan*, 47 Ill. App. 3d at 300. Additionally, the State represented that it would not call the codefendant during its case in chief, but later, called him nevertheless. *Millan*, 47 Ill. App. 3d at 301. The court determined that there was no reason for the State to wait until after the trial commenced to disclose the codefendant and held that the interview during the trial was insufficient to alleviate prejudice compared with a timely pretrial disclosure. *Millan*, 47 Ill. App. 3d at 300. The court also found the State's conduct regarding the codefendant to approach deliberate misconduct. *Millan*, 47 Ill. App. 3d at 300-01. Here, by contrast, there was no determination of improper manipulation or deliberate misconduct surrounding the disclosure of Oscar. Likewise, while helpful, Oscar's testimony was not necessary in light of the

overwhelming evidence against defendant without it. Accordingly, the midtrial interview here was not insufficient to cure any prejudice and we find *Millan* to be distinguishable.

In *Mourning*, the defendant requested a continuance but the trial court allowed only a recess. The appellate court determined that the recess given to the defendant to interview the surprise witness was manifestly insufficient to cure the prejudice caused by the late disclosure. *Mourning*, 27 Ill. App. 3d at 419-20. The court held that the State's misconduct prevented the defendant from properly preparing for trial. *Mourning*, 27 Ill. App. 3d at 421. While it is more desirable for the State to have timely disclosed Oscar, we find the lack of misconduct on the State's part here to distinguish this case from *Mourning*. Accordingly, we do not accept defendant's contention that the interview with Oscar was insufficient to cure any prejudice arising from the State's discovery violation.

Defendant next argues on appeal that the trial court improperly restricted his cross-examination of Jose. Specifically, defendant contends that the trial court erroneously precluded him from inquiring about Jose's pending charges on cross-examination, which, in turn, interfered with defendant's ability to show that Jose had an interest or bias to testify favorably for the State in order to receive lenient treatment on his pending charges. Defendant maintains that, rather than restricting his cross-examination of Jose and preventing him from exploring the details of the pending cases, he should have been given the widest latitude to develop any facts that would reasonably show Jose's bias or motive to testify for the State.

Generally, evidentiary rulings are within the trial court's discretion and will not be disturbed absent an abuse of discretion. *People v. Caffey*, 205 Ill. 2d 52, 89 (2001). Similarly, the scope and latitude of a party's cross-examination is also within the trial court's discretion. *People v. Kirchner*, 194 Ill. 2d 502, 536 (2000). Evidentiary rulings may, however, be reviewed

de novo in situations in which the trial court's exercise of discretion has been frustrated by the use of an erroneous rule of law. *Caffey*, 205 Ill. 2d at 89. Nevertheless, the circumstances of this case require the deferential abuse-of-discretion review, because the trial court ruled after considering the circumstances of the case, and not by using a broadly applicable rule of law. See *Caffey*, 205 Ill. 2d at 89-90.

Cross-examination is the primary method by which a witness's believability and credibility may be challenged. *People v. Blue*, 205 Ill. 2d 1, 12 (2001). A party cross-examining a witness has generally been allowed (subject to the trial court's discretion to limit cross-examination) to test the witness's perceptions and memory, as well as to impeach or discredit the witness, either through introducing evidence of prior convictions or revealing the witness's prejudices and biases as they relate to the parties involved in the case at hand. *Blue*, 205 Ill. 2d at 13, quoting *Davis v. Alaska*, 415 U.S. 308, 316 (1974). For the impeachment-by-conviction sort of cross-examination, only actual convictions may be proved, and arrests, indictments, charges, or actual commissions of crime are not admissible. *Triplett*, 108 Ill. 2d at 475. For the latter sort of cross-examination (bias, interest, or motive to testify), however, " 'the fact that a witness has been arrested or charged with a crime may be shown or inquired into where *it would reasonably tend to show that his testimony might be influenced by interest, bias or a motive to testify falsely.*' " (Emphasis in original.) *Triplett*, 108 Ill. 2d at 475, quoting *People v. Mason*, 28 Ill. 2d 396, 401 (1963). With these principles in mind, we examine defendant's cross-examination of Jose as it developed during the case.

Defendant, through his motion for discovery, sought to obtain information from the State that could be used to demonstrate the witness's interest, as well as any information regarding criminal convictions or juvenile adjudications. Initially, the State turned over nothing in

response to defendant's discovery request. Defense counsel pursued her own investigation and determined that Jose had pending misdemeanors as well as some juvenile court history. At the March 27, 2009, final pretrial conference, defense counsel pressed the State to run its witnesses through the LEADS database; the State asserted that it knew only that Jose had received supervision on a misdemeanor. The trial court directed the State to double check the records.

On March 30, 2009, the first day of trial, the State provided the defense with additional information about Jose's pending cases. Jose had four pending cases, three of which were in Kane County. At least one of the cases involved a cannabis charge, and Jose faced the possibility of receiving time in jail. During defendant's cross-examination of Jose, the State objected to defendant's efforts to probe the details of the pending charges, and the trial court sustained the objection. Defendant was, however, able to establish that Jose had pending charges. During the State's redirect examination of Jose, the State elicited that Jose had not made any agreements with the State in his cases concerning his testimony in defendant's case.

Defendant argues that the trial court erred by forbidding his questions about the details of Jose's pending cases because defendant wanted to use those details to show that Jose might have had a bias or interest in testifying for the State in order to receive lenient treatment on the pending cases. We disagree.

The trial court refused to allow defendant to elicit details of Jose's pending cases because he was concerned that the inquiry would launch an irrelevant trial within a trial. We agree with the trial court's concern. We note that, while defendant argues that he should have been allowed to bring out the details of Jose's pending cases, defendant cites no authority supporting that argument. Defendant did elicit from Jose that he had pending cases and that three of the cases

were in Kane County with upcoming hearings before the circuit court. Thus, information from which the jury could infer bias or motive to testify for the State was placed before it.

Defendant cites *Triplett* and *People v. Wilkerson*, 87 Ill. 2d 151, 156 (1981), for the proposition that he is allowed to inquire about the details of any pending charges or arrests of the witness in an effort to demonstrate the possibility of the witness's bias. Defendant reads too much into the cases. *Triplett* states only that "evidence of an arrest or indictment *** is admissible to show that the witness' testimony may be influenced by bias, interest, or motive to testify falsely." *Triplett*, 108 Ill. 2d at 475. Nowhere in *Triplett* does the court say that the details of the arrest or indictment must (or may) be allowed to be investigated during cross-examination. Likewise, in *Wilkerson*, the court stated only that "[t]he defendants should have been permitted on cross-examination to develop matters that would reasonably show the bias, motive or willingness of the State's witnesses to testify, and this included the fact that Katie Bolden was charged with a crime." *Wilkerson*, 87 Ill. 2d at 156. Again, in *Wilkerson*, there is no mention that the defense should be allowed to prove the underlying facts of the witness's charge. Indeed, *Wilkerson* appears to specifically limit the inquiry to the fact that the witness has been charged with a crime. Defendant's reliance on *Triplett* and *Wilkerson* to support his contention that he should have been allowed to elicit the underlying circumstances of Jose's pending charges is misplaced, and we reject his contention on this point.

Defendant cites to *People v. Flowers*, 371 Ill. App. 3d 326, 329-30 (2007), for the proposition that bias may be shown by eliciting the fact that the witness is in custody, on probation, or on supervision. We agree with defendant's statement of the law. It is, however, inapplicable to the facts of this case: Jose was not in custody, on probation, or on supervision at the time of trial in this case. Defendant's broader point, that a witness's bias may be shown by

producing evidence that the State has leverage over the witness, such as a pending charge, being on probation or supervision, or something else over which the State has control and the witness may lose at the State's discretion, is also a correct statement of the law. See, *e.g.*, *Triplett*, 108 Ill. 2d at 481-82 (charges that have been stricken with leave to reinstate give the State sufficient leverage over a witness to be the subject of an examination into the witness's bias or motive to testify for the State). Again, we believe that Jose's potential bias or motive to testify favorably for the State in this matter was adequately covered by eliciting that he had three pending charges in the Kane County circuit court. *Flowers*, then, does not compel a different result.

Defendant also cites to *People v. Balayants*, 343 Ill. App. 3d 602 (2003), and *People v. Paisley*, 149 Ill. App. 3d 556 (1986), in support of his contention that the trial court erred by improperly restricting his cross-examination of Jose. These cases, however, are distinguishable. In both cases, the defendant was precluded from any cross-examination about the witness's pending charges. *Balayants*, 343 Ill. App. 3d at 605-06; *Paisley*, 149 Ill. App. 3d at 560. Here, by contrast, defendant was allowed to elicit the information that Jose had pending charges before the Kane County circuit court. *Balayants* and *Paisley* are thus distinguishable and provide little guidance or support.

Defendant argues that, after determining that error has occurred due to the improper limitation of his cross-examination of Jose, we must next proceed to determining whether that error was harmless beyond a reasonable doubt, citing *Balayants*, 343 Ill. App. 3d at 606, and *Paisley* 149 Ill. App. 3d at 561. While this is again a correct statement of law, it has no applicability in this case because we have determined that the trial court did not improperly restrict defendant's cross-examination of Jose. Accordingly, we reject defendant's contentions on this point.

Defendant finally argues on appeal that the evidence adduced at trial was insufficient to prove him guilty beyond a reasonable doubt of possession of burglary tools. When a defendant challenges the sufficiency of the evidence to support his conviction, we review the evidence of record to determine whether, after viewing the evidence in the light most favorable to the to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Collins*, 214 Ill. 2d 206, 217 (2005). We will not reverse a conviction unless the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of the defendant's guilt. *Collins*, 214 Ill. 2d at 217. With these principles in mind, we turn to defendant's specific contentions.

Defendant argues that the State failed to prove his mental state. The offense of possession of burglary tools is committed when an accused possesses a tool (like wire cutters) suitable for use in breaking into a building or car with the intent to enter and therein commit a felony or theft. 720 ILCS 5/19—2(a) (West 2008). Defendant concedes that the wire cutter found in his car was a tool suitable for burglarizing a car, satisfying two of the elements of the offense. Defendant contends, however, that his possession of the wire cutter was innocent, because it could be used for other purposes than committing a burglary. Defendant further contends that, because the car was his girlfriend's, it is unclear whether he was even aware that the wire cutter was in the car, because the evidence adduced from the police witnesses did not reveal whether the wire cutter was in plain sight in the car. Because, according to defendant, there is no evidence that he intended to commit a theft or felony, the State has failed to prove all of the elements of the offense of possession of burglary tools beyond a reasonable doubt.

We disagree. It has been well established that, in order to supply the mental state for a conviction of possession of burglary tools, all that is required "is proof that a burglary was

committed and that [the] defendant was found to have burglary tools in his possession shortly thereafter." *People v. Johnson*, 88 Ill. App. 2d 265, 280 (1967). Accord, *People v. Darrah*, 18 Ill. App. 3d 1018, 1022 (1974) (the defendant's possession of keys to open coin boxes in a laundromat and proximity to the scene of the just-committed burglary was sufficient to prove the defendant's mental state). Likewise here. Defendant was found in possession of a wire cutter and a key to the victim's car (along with a stolen car stereo) close in time and space to the car that had just been burglarized. Defendant's mental state, pursuant to *Johnson* and *Darrah* is sufficiently established to support his conviction beyond a reasonable doubt. Accordingly, we hold that the evidence was sufficient to sustain defendant's conviction for possession of burglary tools.

For the foregoing reasons, the judgment of the circuit court of Kane County is affirmed.

Affirmed.