2011 IL App (2d) 100620-U
No. 2—10—0620
Order filed July 7, 2011

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. 09—CF—1603
LEROY KUFFEL	)	Honorable Daniel B. Shanes,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BOWMAN delivered the judgment of the court.
Presiding Justice Jorgensen and Justice McLaren concurred in the judgment.

ORDER

Held: The trial court did not err in: admitting testimony regarding pertinent telephone records; barring an irrelevant witness; limiting cross-examination; denying defendant's motion to dismiss the indictment; and denying a motion for a mistrial after improper remarks by the prosecutor in closing statements. The judgment of the circuit court was therefore affirmed.

¶ 1 Defendant, Leroy Kuffel, was convicted of one count of aggravated criminal sexual abuse (720 ILCS 5/12—16(d) (West 2008)) and sentenced to 36 months' probation with a term of 60 days' imprisonment and 30 months of periodic imprisonment. On appeal, defendant argues that the trial court erred when it: (1) denied his motion *in limine* to prohibit the State from eliciting testimony

regarding certain telephone records of defendant and the victim, N.V.; (2) *sua sponte* raised a motion *in limine* to bar Jed Stone as a witness; (3) denied him the right to cross-examine N.V. regarding her motives in making the allegations against him; and (4) denied his motion to dismiss the indictment after the State disclosed new statements by N.V. after jury selection commenced. Additionally, defendant argues that he is entitled to a new trial because of the State's violation of a motion *in limine* ruling and improper comments during closing statements. Defendant argues that even if one error is insufficient to warrant reversal, the cumulative effect of the multiple errors warrants reversal or a new trial. We affirm.

¶ 2 I. BACKGROUND

¶ 3 On May 20, 2009, the State indicted defendant with one count of aggravated criminal sexual abuse, alleging that between March 1 and March 31, 2009, defendant committed an act of sexual penetration with N.V., who was at least 13 years old but under 17 years old, in that defendant knowingly placed his penis inside the vagina of N.V. when defendant was at least five years older than N.V. On October 2, 2009, defendant moved *in limine* to prohibit the State from eliciting any testimony relative to the phone records of defendant and N.V. and from mentioning the records in the presence of the jury, arguing that the records were irrelevant to proving whether he penetrated N.V. On November 4, 2009, before the Honorable Victoria Rossetti, the parties argued defendant's motion *in limine.* The trial court denied defendant's motion, finding that the phone records were probative to show a relationship existed between defendant and N.V. The records also corroborated N.V.'s testimony and there were reasonable inferences that could be drawn from the extensive contacts between the two. The court determined that the probative value of the information outweighed any prejudice.

¶ 4 The trial date was continued several times due to N.V. attending an out-of-state therapeutic school. N.V. was unavailable for interviews to both the State and the defense. On January 4, 2010, just before the trial proceedings were to begin, the State filed a notice of its intent to admit evidence of other crimes pursuant to section 115—7.3 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115—7.3 (West 2010)). The State orally explained that there was one incident of sexual activity between defendant and N.V. prior to March 2009, sometime in January or February 2009, on Super Bowl Sunday. According to the State, after the sexual encounter, N.V. disclosed her age to defendant. The State did not charge defendant for that incident but sought to admit the evidence to show propensity and to rebut any innocent explanation of their relationship. The trial court agreed that the incident satisfied the requirements of section 115—7.3 and allowed the evidence. The State additionally advised the court that it had planned to speak with N.V. that day as it had previously been unable to speak to her while she was attending an out-of-state school.

¶ 5 The next day, January 5, 2009, defense counsel advised the court that the State just tendered to him a two-paragraph statement stating that N.V. was now describing other instances of sexual contact with defendant on February 14, 2009, and numerous times after that. The State informed the court that it just learned of these additional encounters the day before, and that N.V. was represented by Jed Stone and he had denied access to N.V. any earlier. Defense counsel orally moved to dismiss the indictment for violation of due process and argued that the State has committed a *Brady* violation by failing to disclose N.V.'s statements earlier. Defense counsel argued that the State could have and should have spoken to N.V. earlier and not accepted her private attorney's refusals and that the State allowed N.V. to manipulate the judicial system. In the alternative to a dismissal, defense counsel asked the court to bar the State from using the new statements on direct examination but to

allow him to use the statements on cross-examination. The court ruled that the State timely disclosed the new statements but the new information would be prejudicial to the defense given trial was to begin. The court barred the State from introducing incidents of sexual contact between defendant and N.V. on any dates other than one incident in March 2009 that was charged in the indictment and February 1, 2009, which was allowed in as other crimes evidence. The court stated that if the defense opened the door, that was another situation but the State was barred from entering that evidence first. The court denied the motion to entirely dismiss the indictment.

¶ 6 The court then asked that "both parties not *** promise the jury they are going to meet Mr. Stone in opening statements" because the court was not sure that his testimony was admissible. The court was willing to consider it, but it did not want to "throw something in front of the jury that may not actually happen." Defense counsel informed the court that Stone was going to be the centerpiece of his opening. The court stated that they should argue the issue, and it would decide the issue before opening statements. Defense counsel argued that it would not go into specifics of Stone's representation of N.V. because that would be privileged information, but he would focus on N.V.'s motive for financial benefit from the outcome of the case. Defense counsel argued that Stone's letter to the State's Attorney and himself that advised that N.V. was receiving residential therapy for the "emotional and psychological damage inflicted upon her by [his] client and the police department that entrusted him," and she was not available to be interviewed by either side, was evidence that N.V. planned to sue defendant's employer, Round Lake Beach police department. Defense counsel also argued that Stone had previously represented a Waukegan police officer and argued that the complaining witness in that case filed a lawsuit seeking a million dollars in damages against the City of Waukegan. Defense counsel stated that Stone's testimony would show that N.V. was either being

used by her attorneys or she was manipulating the case herself so she could financially profit. The fact N.V. sought private counsel, according to defense counsel, showed her motive, interest, and bias.

¶ 7 The trial court stated that it was responsible for determining the relevancy and admissibility of evidence regardless of how the issue came up. The court ruled that the proffered testimony of Stone regarding the Waukegan case could only be relevant to impeach his credibility. However, the only potential testimony of Stone that would be admissible related to his letter regarding N.V.'s unavailability for interview. Any other conversation between N.V. that Stone had was protected by the attorney-client privilege or hearsay. The court thus ruled that Stone's testimony was inadmissible. The court explained that the attorneys could directly question N.V. regarding her motives or bias in hiring an attorney or the possibility of filing a civil lawsuit.

¶ 8 Following these *in limine* rulings, the case proceeded to trial. N.V. testified first for the State. In late 2008, N.V. worked as a waitress at the Blue Bay Diner in Round Lake Beach. She worked part-time and attended high school. She met Nathan Kuffel, defendant's son, through a friend in September 2008, and they began dating. Nathan was 21 years old at the time. N.V. met defendant at Nathan's home, and he recognized her from the Blue Bay Diner. N.V. had seen defendant at the Blue Bay Diner on previous occasions when he would go there to eat with other police officers working the nightshift. When N.V. was having a lot of problems with getting to work on time, defendant gave her his cell phone number and said that he would drive her to work if she needed help getting to work. N.V. could not recall the first time that she called defendant. This phone number exchange occurred sometime in January 2009 as N.V. and Nathan were still dating.

¶ 9 On the weekend of Super Bowl Sunday (February 1, 2009), N.V. went on a road trip with a friend to Ohio to see that friend's boyfriend. Defendant had given N.V. some money for that trip. He also wired them money because they had run out of money and were "stuck." N.V. called defendant to ask for money. She returned on the night of Super Bowl Sunday. N.V. stopped at defendant's home to see Nathan. He was in his bedroom with his door closed but would not answer. Defendant was in the home. N.V.'s friend left. Nathan eventually came out of his room and "stormed out" of the house. N.V. tried to call her friend to pick her up but the friend did not answer. Defendant agreed to drive her home. After he agreed to give her a ride home, N.V. testified that "he was hitting on" her. N.V. testified that defendant made statements that Nathan did not treat N.V. right and that she deserved better. Defendant had been drinking and was on the couch while speaking to N.V. N.V. admitted that she was under the influence of marijuana but not alcohol. After they had a conversation, N.V. stated that they had "sexual contact that night."

¶ 10 At this point during N.V.'s testimony, the court advised the jury that the evidence pertaining to February 1, 2009, involved conduct other than that which was charged in the indictment and it was relevant to what occurred in March 2009 to show the relationship between defendant and N.V. The court advised that it was for the jury to determine whether defendant was involved in the conduct and if so, what weight should be given to the evidence.

¶ 11 N.V. admitted that she was a "willing participant" in the sexual contact on February 1. She admitted that she was the "instigator." After they had sex on February 1, defendant drove N.V. home. They began to eat meals out together and generally spent more time together. They began exchanging phone calls and text messages. N.V. considered them a couple, and she told defendant that she loved him. She stated that defendant told her that he loved her too. Later that month, N.V.

had a conversation with defendant in which he asked her how old she was. N.V. stated 18. Defendant questioned her more, and N.V. admitted that she was 16.

¶ 12 In March 2009, N.V. testified that she had sex with defendant. In light of the court's bar on any discussion of "multiple" sexual encounters, Assistant State's Attorney Victor O'Block attempted to limit N.V.'s testimony to one incident in March 2009. The trial court advised ASA O'Block that it could admonish N.V. outside the presence of the jury to limit her testimony to one incident but ASA O'Block did not want the interruption in questioning and promised to control his questioning appropriately. The following questioning then occurred:

¶ 13 "Q. Now, one of the times you had intercourse in March, about how long did it take?

A. Do you want an estimate?

[Defense Counsel Smith]: Your Honor--

[ASA Block]: Q. About how long--

[Defense Counsel Smith]: Your Honor--

THE COURT: Ma'am, you don't have to answer that. Ask another question please."

¶ 14 N.V. then testified to the number of occasions she had breakfasts, lunches, and dinners with defendant and what types of gifts defendant bought her, which included shoes and cell phones. N.V. and defendant continued the relationship until the detectives went to N.V.'s home at the end of March. After that, she saw defendant only one more time. N.V. admitted she lied to the detectives when they first questioned her about her relationship with defendant because she did not want to send the person she loved to jail. After the detectives left, N.V. called defendant. During this portion of the questioning, Attorney Smith objected and moved for a mistrial out of the hearing of the jury. Attorney Smith argued that ASA Block violated the court's *in limine* order when he asked

N.V. about "one of the times" she had sex with defendant. The court noted that it had sustained his objection for that very reason and denied that there was any prejudice that warranted a mistrial. At this point, the jury was given a break. Outside the presence of the jury, the trial court admonished N.V. that she was not to make any reference to any other sexual encounters in March and that she should limit her testimony to just one encounter.

¶ 15 Continuing with the questioning, N.V. testified that she told defendant that the police were asking her whether she had sex with him. She told defendant that she denied having sex with him when the police asked. The trial court instructed the jury that N.V.'s testimony about her conversation with defendant was being admitted for the purpose of showing what each of them knew and the circumstances of their subsequent conduct. N.V. then admitted that she later informed Detective Kates on April 19, 2009, that she had sex with defendant on Super Bowl Sunday and in March 2009.

¶ 16 On cross-examination, N.V. again admitted she lied to detectives the first time they questioned her, which was on March 31. She then admitted that she called the detectives on April 3 and told them to leave her alone. Attorney Smith then questioned N.V. as follows:

¶ 17 "Q. Okay. The next time you talked to the police after April 3 was on April 19; is that correct:

A. Yes, sir.

Q. What were you doing on April 17 and 18th right before going to the police?"

¶ 18 ASA Block objected to the relevancy of this question. The court asked Attorney Smith what the answer was expected to be, and he stated that she was a runaway and that she picked up a new phone. The court reminded Attorney Smith that N.V.'s April 19 statement to detectives was not

admitted into substantive evidence per his motion *in limine* and that the circumstances surrounding the statement were not relevant.[1] Attorney Smith sought to impeach N.V.'s testimony using statements she made in the April 19 statement, specifically that: (1) N.V. testified she loved defendant but on April 19 stated defendant was not a good person; (2) N.V. had smoked pot all weekend long on Super Bowl Sunday weekend and was not just under the influence from earlier that day as she testified; and (3) N.V. stated that Nathan told her to tell the police the truth on the tape. Regarding the marijuana usage, the trial court advised the defense that it could question N.V. on how much and how often she smoked pot that weekend, and if her testimony was inconsistent with the April 19 statement, it could proceed to impeach her with that portion of the statement. However, N.V. had not yet inconsistently testified. Regarding N.V.'s characterization of her feelings towards defendant, the trial court stated the defense was allowed to explore whether she considered him a good person and impeach her if necessary. Regarding N.V.'s motivations for making the April 19 statement, the trial court advised that if the statement did not come in through cross-examination for a prior inconsistency, then the motivation aspect was irrelevant.

¶ 19 The next day the court heard arguments about the April 19 statement again. The court ruled that the defense could introduce only portions of the April 19 statement that were inconsistent with her trial testimony.

¶ 20 Continuing with cross-examination of N.V., she admitted that on the weekend of Super Bowl Sunday she smoked pot heavily all weekend. She denied that she and Nathan broke up before

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[1] There is no motion *in limine* pertaining to the April 19 statement contained in the record, and the substance of the statement is also not contained in the record.

Valentine's Day and denied telling Detective Kates that they broke up a week before Valentine's Day. N.V. admitted that when she went to defendant's home on February 1 to see Nathan, she had feelings for Nathan. N.V. testified that she still had feelings for Nathan and that Nathan had been the one to end their relationship.

¶ 21 Attorney Smith then asked N.V. if she was with defendant on Valentine's Day. She stated they had dinner very late that night. Attorney Smith then asked the following:

¶ 22 "Q. You testified yesterday that there was an act of sex with my client in March of 2009; is that correct?

A. Yes, sir.

Q. And that act took place after you went to dinner with my client; isn't that correct:

[ASA O'BLOCK]: Objection, Judge. I don't believe that was testified to yesterday.

THE COURT: If you can answer the question, you may.

THE WITNESS: A. There were numerous times that that happened in the month of March. So I don't know if you are asking about a specific time; or, what you are asking for, sir."

¶ 23 N.V. was then asked if she spoke with Faya Shiu, an investigator employed by the defense, on April 16, 2009. N.V. denied that Shiu asked her if she had sex with defendant. N.V. also denied stating to Shiu that she did not have a sexual relationship with defendant. N.V. explained she spoke to Shiu about arranging a meeting for a statement but that they never actually met. N.V. never gave her a statement. When asked if she then spoke with Detective Kates on April 19 "because of Nathan," the trial court sustained the State's objection as N.V. had not testified inconsistently with the April 19 statement, the April 19 statement was not in evidence, and the motivation in making that

statement was irrelevant. When asked whether she told Detective Kates that defendant was a bad person, N.V. stated that "I said he–I know he is a good person, but I said that he was–he just needs help." N.V. did not know whether she told Detective Kates that defendant was a bad person. Defense counsel did not seek to admit the alleged portion of the April 19 statement to impeach N.V. to prove that she told Detective Kates that defendant was a bad person.

¶ 24 N.V. admitted that after April 19, she spoke to defendant's friend, Ernie Emery. She denied telling Emery that she lied to the police about defendant. She also denied telling Emery that she was going to hire a lawyer and make things right. N.V. admitted Jed Stone was hired to be her attorney in April 2009. She denied that Stone was retained so that she could financially gain from the alleged sexual encounters with defendant. She admitted that she has talked about a filing a civil suit with her present attorney. When asked about whether she initially lied to detectives, N.V. admitted she did. She admitted she then told detectives that she had sex with defendant twice. Defense counsel then asked "you told the police on April 19th that you had sex with my client twice, and twice only?". N.V. answered yes. Counsel asked "so, that was a lie too?" to which the State's objection was sustained based on the court's previous ruling that N.V.'s most recent statements to the State were inadmissible. The court specifically asked defense counsel, "Based upon my previous rulings at your request, how much more of this do you want to go into?". Attorney Smith stated "I think we have enough inconsistencies," and moved on from any reference to the new statements by N.V.

¶ 25 On redirect, N.V. admitted that defendant gave her the idea to call the detectives on April 3 to tell them to leave her alone. She admitted that she spoke to defendant many times during the month of April and discussed the investigation with him. N.V. stated that defendant asked her to

say certain things to investigators, and he asked her to make statements to his private investigator.

¶ 26 On further cross-examination but outside the presence of the jury, N.V. identified a letter that she wrote to Nathan, dated October 2009. In the letter, N.V. professed her love for Nathan and her desire for him to contact her. She also discussed that she was in an out-of-state residential school program but was coming home soon. She wrote about her desire to open a restaurant in Chicago and plans to do so with a friend, and that they were considering a 9,000 square foot space. N.V. admitted she had not yet completed high school at the time she wrote the letter. When asked whether she expected to use money from her civil suit against defendant to fund her restaurant plans, N.V. said "no." She explained that her father knew investors and her friend's parents already owned a restaurant. N.V. stated that these were people that she planned to talk to because she wanted to pursue restaurant ownership for her future. N.V. testified that it was "a dream" to open a restaurant.

¶ 27 Next, Attorney Smith made his offer of proof on certain issues that the court had ruled against for the record. The first issue pertained to N.V.'s motivation coming from Nathan for making the April 19 statement to police. Regarding N.V.'s April 19 statement to police, she stated that Nathan told her to give the statement. Nathan told her to do this around April 17th or 18th when N.V. had run away from home. N.V. stated that she was sitting in Nathan's car when he told her to go to the police. N.V. denied that when she was at Nathan's house, he walked in, saw her, and left immediately. She denied that when she went to Nathan's car, there was another woman in the car. N.V. denied that Nathan locked the car and refused to speak to her.

¶ 28 The next issue pertained to N.V.'s motivation for financial gain in making the allegations. Attorney Smith sought to establish Jed Stone's area of expertise and N.V.'s purpose in hiring him.

The trial court stopped Attorney Smith, pointing out that Stone's area of expertise was irrelevant and that N.V. had already testified that she hired Stone and had considered filing a civil lawsuit against defendant. Therefore, Attorney Smith's offer of proof was nonsensical on this issue.

¶ 29 Having heard these offers of proof, the trial court declined to change its previous rulings that these issues were collateral matters and irrelevant. The parties then entered a stipulation into evidence. The stipulation maintained that: (1) People's Exhibit No. 1 contained 52 pages of records for N.V.'s cell phone for time between April 1 and April 21, 2009; (2) People's Exhibit No. 2 contained 94 pages for N.V.'s phone between March 18 and April 2, 2009; (3) People's Exhibit No. 3 contained records for defendant's cell phone between April 1 and April 20, 2009; and (4) People's Exhibit No. 4 contained American Express billings made to defendant for the time between December 2008 and March 2009.

¶ 30 Back in the presence of the jury, the State called Detective Andrea Usry. An anonymous complaint was reported to the Lake County Sheriff's Department regarding the relationship between defendant and N.V. On March 31, 2009, Detective Usry, along with Detective Harris and Sergeant Jonites, went to N.V.'s home to meet with N.V.'s father and N.V. The next day, Detective Usry went to defendant's home and spoke to him. Defendant told Detective Usry that he knew N.V., knew her cell phone number, and knew that she was approximately 16 years old. He admitted that he went to dinner with N.V., saw a movie with her, paid some of her bills, and purchased shoes for her one time. He denied that they had a sexual relationship. Detective Usry subpoenaed cell phone records and discovered that between March 18 and April 2, 2009, N.V. called defendant's phone 184 times, and defendant called N.V.'s phone 107 times. During that same time, Nathan called N.V. only nine times, and N.V. called Nathan 34 times. Between April 1 and April 17, 2009, N.V. called

defendant 279 times, and defendant called N.V. 111 times. On cross-examination, Detective Usry denied that some of these calls were text messages as she believed the text messages were separated from the actual phone calls. She also admitted that she did not know what was said during the phone calls and did not know the content of any text messages between the two.

¶ 31 The State rested, and defendant moved for a directed verdict, which the court denied. The defense then called Faya Kacos-Shiu, defendant's private investigator. Shiu called N.V. on April 15, 2009, and left a voicemail. N.V. called her back the next day. Shiu answered the call. At this point, the trial court instructed the jury that the substance of the conversation was being admitted only to show that on some former occasion, a witness made a statement that was inconsistent with Shiu's testimony and that the jury would have to decide what weight to put on the various witnesses' testimony. Shiu then testified that N.V. told her that she did not have sex with defendant. N.V. agreed that she would speak to Shiu and would call her back on April 17 to schedule an in-person interview. On April 16, Shiu and N.V. exchanged text messages to decide when and where they would meet. However, Shiu never met N.V. in person on April 16 because Shiu had a medical emergency. They never rescheduled and never met in person.

¶ 32 Ernest Emery testified that he had been a friend of defendant's for approximately 10 to 15 years. Emery came to know N.V. when she began "calling all the time" in early April 2009. She called Emery approximately 25 times or more. On April 22, 2009, Emery spoke to N.V. while he was driving downtown with his employee, Chris. He placed N.V. on speakerphone. Emery testified that N.V. denied ever having sex with defendant. The court advised the jury that this testimony was not being admitted substantively but only for impeachment purposes. On cross-examination, Emery admitted that he never personally met N.V. but had spoken to her only on the phone.

¶ 33 Christian Soenksen testified that a female who identified herself as N.V. called Emery while they were driving downtown to a worksite. Emery placed the call on speakerphone so Soenksen heard what N.V. said. N.V. denied ever having sex with defendant during the phone call. Again, the jury was advised the testimony was coming in for impeachment purposes and not as substantive evidence. Soenksen admitted that he never met N.V. and had known defendant for approximately one year.

¶ 34 After the defense rested, the trial court read to the jury two additional stipulations. The first pertained to records of defendant's employment and hours worked. The second was a stipulation to the testimony of Detective Karen Kates, who would have testified that she arrested defendant on April 20, 2009.

¶ 35 During closing arguments, ASA O'Block made the following remarks:

¶ 36 "But not only that, [N.V.] had to face the man, the 51-year-old man that did this to her. And she had to look over there and identify him. She had to feel his stare as he sat there and stared at her for the amount of time that she was on the stand, which was significant."

¶ 37 Defense counsel did not object to these comments. Later, in rebuttal, ASA O'Block made the following remarks:

¶ 38 "All she knows is that the man, that man (indicating), [defendant], she loved and still has feelings for–but the law says she can't do that.

She came here and told the truth in front of all of you; and, most importantly, in front of him as he sat there for the hours that she testified.

And I know I looked over; and if you did too, what you saw, you saw him stare at her and look at her."

¶ 39 Defense counsel objected to this comment to which the court stated "move on please."

¶ 40 The jury found defendant guilty. Subsequently, defendant moved for a new trial or judgment *n.o.v.* and later for a reduction in sentence. Those motions were denied. Defendant was sentenced and then timely appealed.

¶ 41 II. ANALYSIS

¶ 42 We first address defendant's argument that the trial court erred in denying his motion *in limine* to prohibit the State from eliciting testimony regarding telephone records of defendant and N.V. Defendant argues that the telephone records were irrelevant and immaterial to the allegations against him. Additionally, defendant argues that the telephone records had no probative value to any of the elements of the alleged crime because the content of the calls or text messages were not disclosed.

¶ 43 The admission of evidence is within the sound discretion of the trial court. *People v. Becker*, 239 Ill. 2d 215, 234 (2010). We will not reverse an evidentiary ruling by the trial court absent an abuse of that discretion. *Id.* An abuse of discretion occurs only where the trial court's decision is arbitrary, fanciful or unreasonable, or where no reasonable person would agree with the position of the trial court. *Id.* The test of the admissibility of evidence is whether it fairly tends to prove the particular offense and whether what is offered as evidence tends to make the question of guilt more or less probable. *People v. Caffey*, 205 Ill. 2d 52, 80 (2001). A trial court may reject offered evidence on grounds of irrelevancy if it has little probative value due to its remoteness, uncertainty, or its possibly unfair prejudicial nature. *Id.*

¶ 44 Here, we cannot find that the trial court abused its discretion where the cell phone records presented were limited to the short time frame that corroborated the time frame of the alleged

conduct and where the excessive number of calls and text messages seemed to corroborate N.V.'s allegations that she and defendant were in a relationship. While the content of the phone calls and text messages were not admitted, this fact was brought out during the testimony of the witnesses and affected the weight to be put on the evidence but not its admissibility.

¶ 45 In *People v. Chromik*, No. 3—09—0686 (Mar. 29, 2011), the State, in an aggravated sexual abuse case, produced similar records of excessive phone calls and text messages between the defendant and the teenaged victim. Additionally, the State produced a document created by the teen's principal, who typed up some text messages that the teen received from the defendant as she read them aloud. *Chromik*, slip op. at 35. The principal and the victim acknowledged the text message transcript and admitted it might not be 100% accurate but the times and dates corresponded with the phone records. *Id.* While the defendant in *Chromik* only challenged the text message transcript evidence, it is clear that the court, in discussing the sufficiency of the evidence, found the number of phone calls made during the short timeframe in question to be relevant and that the jury could make reasonable inferences as to whose explanation was more believable. *Id.* at 36. Similarly, in this case, the fact that the subject of the phone calls or the content of the text messages were not presented was not hidden from the jury. The State also limited its argument to its point that there was an excessive number of phone calls and text messages between defendant's and N.V.'s phones during the short timeframe in question. As the trial court determined the phone records were probative to show a relationship existed between defendant and N.V., it was for the jury to decide whether the evidence more reasonably led to an inference supporting N.V.'s claim that the two were involved in a romantic relationship or the defense's theory that defendant was acting as a fatherly

figure. Under the facts and circumstances of this case, we do not find that the trial court abused its discretion in admitting the phone records into evidence.

¶ 46 Defendant relies on *People v. Salgado*, 353 Ill. App. 3d 605 (2004), for his position on the phone calls/text messages. We find *Salgado* distinguishable. In *Salgado*, the trial court admitted evidence regarding his posting of bail in an unlawful possession of cannabis with intent to deliver trial. *Id.* at 609. The appellate court determined that this evidence was irrelevant to the alleged crime. *Id.* The central issue of the case concerned the defendant's knowledge of the cannabis, and the State's theory was that the defendant was the person who was to receive the delivery from two others. The defendant argued that he was an "innocent dupe." *Id.* The appellate court failed to see how the fact that the defendant, or someone on his behalf, was able to quickly raise $75,000 for bail made either the State's or the defendant's position more or less probable. *Id.* While the State argued that the defendant's access to such a large sum of money when he claimed to be a day laborer and waiter undermined the defendant's credibility that he was not involved in drug dealing, the appellate court stated that without some evidentiary link between the $75,000 and the illegal activity, the State's claim was pure speculation. *Id.* In addition to being irrelevant to the issues of the case, the appellate court determined its admission was also prejudicial because it allowed the jury to speculate about the source of the funds. *Id.* at 610. Unlike in *Salgado*, in this case, the State presented N.V., who testified that she had a romantic relationship during the dates which the phone calls and texts were placed, that she exchanged phone numbers with defendant, and that she had called defendant many times. The State therefore presented some evidentiary link between the calls and the alleged sexual encounters of N.V. and defendant. The excessive calls were relevant to the State's theory that the two had a romantic relationship. Further, the evidence was not prejudicial because the jury did

not have to speculate as to the contents of the phone calls and texts but just determine whether the excessive number of contacts made N.V.'s allegations of a romantic relationship or defendant's claim that they had an innocent relationship more or less probable. The jury, whether relying on this evidence or N.V.'s sole testimony, obviously found N.V.'s allegations more probable. Accordingly, we do not find *Salgado* persuasive under the facts of our case.

¶ 47 Next, defendant argues that the court erred when it *sua sponte* raised a motion *in limine* to bar Jed Stone as a witness. Defendant relies on *The Village of Kildeer v. Munyer*, 384 Ill. App. 3d 251, 257 (2008), for this point. In *Munyer*, the defendant moved for a directed finding following the Village resting its case. *Id.* The Village did not ask the trial court to consider the defendant's other bad acts to demonstrate that he intended to commit the charged crime. *Id.* The trial court, however, indicated that it would *sua sponte* consider the other crimes as evidence. *Id.* The appellate court determined that it was an abuse of discretion for the trial court to consider the other-crimes evidence without seeking the Village's input and allowing defense counsel to respond because it created the appearance that the trial court was assisting the prosecution. *Id.* at 261.

¶ 48 The facts of this case are distinguishable from *Munyer*. First, the trial court here did not consider evidence without hearing the arguments from both parties. Second, defendant sought to have Jed Stone testify unlike in *Munyer* where neither party sought to admit the other-crimes evidence. In this case, the trial court merely questioned the relevancy of defendant's witness and after hearing the arguments of both parties, determined, as is within its sound discretion to do so, that the proffered testimony of Stone was inadmissible. Defendant sought the testimony of Stone to show that his letter that N.V. was seeking residential therapy for emotional and psychological damage inflicted by defendant and the police department was evidence that she was planning to sue the

police department. Defendant also sought to elicit from Stone that he was previously involved in a similar case involving a Waukegan police officer. According to defendant, Stone's testimony was necessary to attack N.V.'s motive, interest, and bias. We cannot say that the trial court abused its discretion in determining that defendant could attack N.V.'s potential motive, interest, or bias in filing a civil suit and seeking monetary damages by simply cross-examining N.V. regarding her retainment of Stone and the potential civil lawsuit. The Waukegan case could only be used to impeach Stone's credibility but the court noted, and defense counsel conceded, that any conversations that N.V. had with Stone would be protected by the attorney-client privilege. Thus, the issue of N.V.'s motives could not really be introduced through Stone as he could only testify regarding the letter he wrote to counsel.

¶ 49 Unlike in *Munyer*, where the trial court crossed the line into advocacy for the State by considering evidence not presented by either party, the trial court here merely acted within its wide discretion to control the course of the trial. See *People v. Jackson*, 250 Ill. App. 3d 192, 204 (1993) (holding that the trial court did not abuse its discretion in refusing to admit certain testimony during trial even though the State had not objected to it). The admissibility of evidence is left to the sound discretion of the trial judge and is dependent upon a showing that it is legally relevant. *People v. Hope*, 168 Ill. 2d 1, 23 (1995). Relevant evidence is evidence that has any tendency to make the existence of any fact in consequence to the determination of the action more or less probable than it would be without the evidence. *Id.* Here the trial court determined that the proffered testimony of Stone was irrelevant as he could only testify to the contents of his letter.

¶ 50 Further, the defense did in fact cross-examine N.V. regarding her potential financial motives in accusing defendant so he was not deprived of the ability to impeach N.V. as argued in his brief.

Thus, even if the trial court's conduct was improper, reversal would not be warranted. *Jackson*, 250 Ill. App. 3d at 204 (reversal for trial court's improper exclusion of testimony would be warranted only if the court's conduct played a material role in the defendant's conviction or prejudiced him). Since defendant raised the issue of N.V.'s retention of private counsel and possible plan to sue the Round Lake police department, we cannot see how defendant was prejudiced by barring Stone's testimony, which was proffered to show N.V.'s financial motives. We therefore conclude that the trial court's *sua sponte* consideration of the relevancy of Stone's testimony was not error and even if it was, it was harmless error.

¶ 51 Next, defendant argues that the trial court abused its discretion in refusing to allow defense counsel to present Nathan Kuffel and Sarah Keippel to impeach N.V. regarding her reason for telling police on April 19 that she had sex with defendant. According to defendant on appeal, N.V. saw Nathan with Sarah at a party on April 18, 2009, became hurt and angry, and then gave her statement to police the next day in order to "punish" Nathan. Significantly, the April 19 statement was not admitted substantively, and the complete contents of that statement are unknown. The only information that the jury heard regarding the April 19 statement was that N.V. told Detective Kates that day that she had sex with defendant on Super Bowl Sunday and in March 2009. Regarding N.V.'s motives for making the April 19 statement, the trial court advised defense counsel that if the statement did not come in substantively somehow through cross-examination for a prior inconsistency, the motivation aspect was irrelevant. After lengthy and confusing arguments by the parties regarding the admission of the April 19 statement, the trial court ruled that the defense could only introduce portions of the April 19 statement that were inconsistent to N.V.'s trial testimony, otherwise it was just a prior consistent statement. Defense counsel never admitted any portion of

the April 19 statement during cross-examination. Upon further cross-examination, the trial court sustained the State's objection to defense counsel's question if N.V. spoke with Detective Kates on April 19 "because of Nathan." Outside the hearing of the jury, defense counsel proffered that N.V. stated on the tape of the April 19 statement that she was "doing this for Nathan. Nathan is a good person; [defendant] is a bad person." According to defense counsel that was a quote at 11 minutes and 60 seconds into the tape.

¶ 52 Later, in defense counsel's offer of proof, N.V. admitted that she spoke to Nathan on April 18 but denied that there was another woman present and denied that Nathan refused to speak to her. N.V. stated that Nathan told her to tell the truth about her relationship with defendant. Defense counsel submitted a two-page statement as to Sarah Keippel's proffered testimony, which would be that on April 18, she and Nathan came home and N.V. was at the house; she and Nathan went into Nathan's vehicle; and Nathan refused to speak to N.V. There was no offer of proof regarding Nathan's proffered testimony cited in the record, and this court did not find such proffer in its review.

¶ 53 We agree with the trial court that the motives surrounding the April 19 statement were irrelevant since the statement did not come into evidence substantively. The April 19 statement was consistent with N.V.'s trial testimony. The record does not reflect that N.V. stated on the April 19 tape that she spoke to Nathan on April 18, but it was only alleged that she stated Nathan told her to tell the truth. It does not follow then that counsel should have been allowed to impeach N.V. on this point. Defense counsel was free to cross-examine N.V.'s motives in her general accusations against defendant, including her possible motive in retaliating against Nathan for ending their relationship. Perhaps it would have been allowable for counsel to cross-examine N.V. as to whether Nathan

refused to speak to her, whether she was angry with Nathan, and whether she was now testifying against defendant to retaliate against Nathan, but attempting to impeach her on inconsistencies with the April 19 statement properly failed. In fact, N.V. did admit on cross-examination that Nathan ended the relationship and that she still had feelings for Nathan. Counsel was free to argue to the jury that N.V. changed her story to retaliate against Nathan. Thus, if the trial court had erred, the error was harmless as the attack on N.V.'s motives was before the jury.

¶ 54 We similarly reject defendant's argument that the trial court erred in not allowing Jed Stone to testify or admitting the letter that Stone sent to the ASA and defense counsel. Defendant argues that the trial court's ruling prevented the jury from being able to accurately assess N.V.'s financial motives to lie. According to defendant, "Mr. Stone's testimony and his letter to the defendant's attorney were relevant because they tended to show that [N.V.] retained Mr. Stone because she believed she would have a civil suit against the Village of Round Lake Beach." Defendant further states in his brief that Stone's May 14, 2009, letter "indicated that [N.V.] was contemplating action against the Village of Round Lake Beach Police Department." Defendant is incorrect. The May 14 letter merely stated: that Stone was representing N.V., the "complaining witness and prosecutrix" in the case against defendant; that N.V. was at a "residential placement out-of-State receiving therapy for the emotional and psychological damage inflicted on her by [defendant] and the police department that entrusted him;" and that she was not available to be interviewed by either side. The letter does not indicate whether N.V. planned to file a civil suit. Further, defense counsel conceded at trial that Stone could not be questioned about his conversations with N.V. because of the attorney-client privilege. The fact that Stone was involved in another case involving a Waukegan police officer was a collateral matter. Therefore, we find that trial court properly ruled that defense counsel

could raise the issue of potential financial motives directly with N.V., which he did and to which N.V. admitted that she hired private counsel and was contemplating filing a civil suit.

¶ 55 For the same reasons, we reject defendant's argument that N.V.'s letter to Nathan dated October 31, 2009, should have been admitted to show N.V.'s financial motives to lie. The letter merely discussed N.V.'s dreams of opening a restaurant in Chicago; it made no mention of funding, a civil lawsuit, or otherwise. Further, in the offer of proof, N.V. stated her father and her friend's family would help with investing in the business sometime in the future. Under these facts, we agree that the trial court properly ruled that the letter was a collateral matter and irrelevant.

¶ 56 Next, defendant argues that the trial court should have granted his motion to dismiss the indictment after the State's disclosure on the second day of *voir dire* proceedings that N.V. stated on the day before that she and defendant had sex multiple times in March 2009, not just once. Defendant relies on *People v. Matthews*, 299 Ill. App. 3d 914 (1998), to support his argument that the State's discovery violation required reversal. We disagree with defendant that the State violated the rules of discovery and therefore disagree that he was entitled to a dismissal of the indictment.

¶ 57 In this case, the State was not able to interview N.V. in a timely fashion before trial because of her placement in a residential facility in Arizona and her refusal to speak to either party. While it is unclear as to when N.V. returned to Illinois, there was no evidence to indicate that the State unreasonably delayed speaking to N.V. or had any knowledge that she would change her story when it did gain access to her. The State interviewed N.V. the evening after *voir dire* commenced and promptly disclosed the statement to the defense the next morning in court. We believe, as did the trial court, that this satisfied the prosecution's continuing discovery duties. Regardless, even if the

State's conduct constituted a discovery violation, we fail to see how defendant was prejudiced in this case.

¶ 58 Supreme Court Rule 412 (Ill. S. Ct. R. 3 (eff. Mar. 1, 2001)), requires that the prosecution disclose materials and information within its possession or control, including anything that tends to negate the guilt of the accused. The prosecution's duty to disclose under this rule is a continuing one, requiring prompt notification to the defendant of the discovery of any additional material or information, up to and during trial. *Matthews*, 299 Ill. App. 3d at 919. Compliance with discovery rules is mandatory, but the failure to comply does not necessarily require a reversal. *Id.* A new trial should be granted only if the defendant is prejudiced by the discovery violation, and the trial court fails to eliminate the prejudice. *Id.* Illinois courts have considered the following factors to determine whether a defendant is entitled to a new trial as a result of a discovery violation: (1) the closeness of the evidence; (2) the strength of the undisclosed evidence; (3) the likelihood that prior notice would have helped the defense discredit the evidence; and (4) the wilfulness of the State in failing to disclose the new evidence. *Id.*

¶ *59* In this case, we must make special note that the evidence at issue is *not* evidence that is favorable to the defense other than to argue another change in N.V.'s story. The new information that the State disclosed was that N.V. had changed her statement from alleging one sexual encounter in March to *multiple* sexual encounters. Defense counsel moved to bar the State from introducing the evidence, arguing the evidence was *Brady* material. See *People v. Barrow*, 195 Ill. 2d 506, 534 (2001) ("To establish a *Brady* violation, the undisclosed evidence must be both favorable to the accused and material"). The trial court determined that the new information would be prejudicial to the defense since the trial was set to begin that day and barred the State from introducing the

evidence of *additional* sexual contacts other than the dates already disclosed, including one incident in March 2009 and the February 1, 2009, incident. The court noted that the defense could open the door to the information if it chose since the defense had indicated that it wanted to use the statement in its cross-examination. Thus, any prejudice to defendant by evidence of N.V.'s new allegations was eliminated by the trial court's ruling barring the State from introducing the statement. In defendant's brief, counsel simply glosses over the fact that the trial court ruled *in his favor* on this evidentiary issue and continues to argue that reversal is required. If defendant felt like the statement was favorable to his argument that N.V. was not credible, then he was free to agree to the admissibility of the evidence or use it to impeach N.V. on cross-examination. Defendant further argues that he was simply not afforded time to investigate N.V.'s new allegations. We point out to defendant if we accept his earlier statement that the State should have interviewed N.V. earlier, then we could ask why did defense counsel not interview N.V. earlier? Regardless, the trial court did not err in refusing to dismiss the indictment as it prevented prejudice against defendant by granting defendant's motion to bar the newly disclosed statement by N.V.

¶ 60 Next, defendant argues the trial court abused its discretion in denying his motion for a mistrial after the State violated the court's limiting instruction as to N.V.'s statement that she had sex with defendant on more than one occasion in March 2009. According to defendant, when the State prefaced one of its questions to N.V. with "one of the times you had intercourse in March," it violated the trial court's ruling that the State could not refer to any more than one incident in March. Here, the trial court interrupted and advised N.V. that she did not have to answer the question and instructed the State to ask another question.

¶ 61 A mistrial should be granted where an error of such gravity has occurred that it has infected the fundamental fairness of the trial, such that continuation of the proceeding would defeat the ends of justice. *People v. Bishop*, 218 Ill. 2d 232, 251 (2006). The trial court's denial of a defendant's motion for a mistrial will not be disturbed unless the denial was a clear abuse of discretion. *Id.* In this case, the trial court did not allow N.V. to answer the question posed by the State that alluded to "more than one" sexual encounter in March. The State made no other reference to more than one incident after that question. Accordingly, we agree with the trial court that the State's question, which was sustained before the witness could answer, did not deprive him of a fair trial warranting a reversal. See *People v. Hall*, 194 Ill. 2d 305, 342 (2000) (finding the State's two questions regarding previously barred other crimes evidence did not constitute a ground for a mistrial where the trial court sustained the objections).

¶ 62 Defendant next argues that the State's misconduct in closing statements warrants reversal. Prosecutors are given wide latitude in argument and may comment on facts and legitimate inferences that may be drawn therefrom. *People v. Campbell*, 332 Ill. App. 3d 721, 727 (2002). Prosecutors may respond to comments made by defense counsel, denounce the activities of the defendant, and highlight inconsistencies or weaknesses in the defendant's arguments. *Id.* In reviewing allegations of prosecutorial misconduct, the arguments of both the prosecutor and the defense counsel must be examined in their entirety, and the allegedly improper remarks must be placed in the proper context. *Id.*

¶ 63 Defendant relies on *People v. Crabtree*, 162 Ill. App. 3d 632, 636-37 (1987), for his argument that the State's comments that N.V. testified against defendant while he "stared" at her requires reversal. While we agree the comments regarding a defendant's behavior outside of the

witness stand are improper, we disagree that the comments always require reversal. In *Crabtree*, the appellate court specifically stated that it did not need to decide whether the prosecutor's improper comments about the defendant's apparent laughter while other witnesses testified "was of sufficient magnitude, of itself, to require reversal." *Id.* at 637. Rather, the appellate court reversed and remanded for retrial based on other reasons. *Id.* at 635.

¶ 64 The State's case, *Campbell*, is applicable as it more closely resembles the facts of our case. In *Campbell*, the prosecutor stated in closing arguments that a witness was afraid when he testified because the defendant was " 'sitting right there staring daggers at him.' " *Campbell*, 332 Ill. App. 3d at 728. The appellate court determined that while the comment was error, the "single, isolated comment" was harmless error because the jury was instructed that closing arguments made by counsel were not evidence and that any argument or statement made by counsel not based on the evidence should be disregarded. *Id.* The court's instruction on this has been held to cure any prejudice to the defendant because of the prosecutor's improper remarks. *Id.*

¶ 65 In the case at bar, the prosecutor's two references to defendant "staring" at N.V. were isolated, given the extensive remarks made overall by the prosecution. The court advised ASA O'Block to "move on" after defense counsel objected to the second reference to "staring," and the court fully admonished the jury that the closing statements were not evidence and any comments not based on evidence should not be considered.[2] Therefore, even though the comments regarding

[2] While we admonish the trial court that "move on" does not clearly indicate whether the objection was sustained or overruled, it did sufficiently indicate to the State that the court did not want to hear anymore arguments about N.V. having to endure "stares" from defendant. The State did not continue to make any further statements about defendant staring at N.V. after the trial court's

staring were improper, reversal is not warranted because the trial court properly instructed the jury and the comments were isolated.

¶ 66 Finally, we reject defendant's argument that even if one error was insufficient to warrant reversal, the cumulation of errors warrants reversal. We found only one actual error, that being the prosecutor's improper remark in closing statements, and we determined that error was insufficient to warrant a reversal. Thus, there is no cumulative error for us to consider.

¶ 67 III. CONCLUSION

¶ 68 For the reasons stated, we affirm the judgment of the circuit court of Lake County.

¶ 69 Affirmed.

"move on" indicator.