2017 IL App (5th) 140202-U

NO. 5-14-0202

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Madison County.
	)	
v.	)	No. 08-CF-670
	)	
KEVIN REID,	)	Honorable
	)	James Hackett,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Justices Goldenhersh and Cates concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant was not entitled to the dismissal of the charges based on the State's loss of potential DNA evidence where there was no evidence that police acted in bad faith when they released the decedent's vehicle to a lienholder. The defendant was not entitled to a nonpattern jury instruction telling jurors that they could draw an inference in his favor due to the loss of the vehicle where the court did not find that police released the vehicle because they believed it to contain evidence favorable to the defendant. The prosecution did not shift the burden of proof to the defendant during cross-examination.

¶ 2 In November 2005, Anquiaette "Tweety" Parker and her four-year-old cousin, Cermen Toney, Jr. (CJ), went missing. Her vehicle was abandoned in the parking lot of a lounge. There were bloodstains on a jacket found in the back seat of the vehicle and on

surfaces of the vehicle itself. This led police investigating the disappearance of Parker and CJ to believe they were likely injured or murdered. Police held the vehicle for a period of five weeks, during which they collected evidence from it. They then released the vehicle to a lienholder, which subsequently sold or destroyed the vehicle. The remains of Parker and CJ were discovered in March 2008 in a cistern in a wooded area behind the house where the defendant, Kevin Reid, lived at the time of the murders. The defendant was charged with the murders. The defendant appeals his convictions, arguing that (1) the State's failure to preserve Parker's vehicle as a source of potentially-exculpatory evidence constituted a violation of due process; (2) the court erred in denying his request for a jury instruction allowing jurors to infer that the vehicle contained evidence favorable to the defendant; and (3) the court erred in allowing the prosecution to shift the burden of proof to the defendant during cross-examination by asking him to explain how some of the evidence against him came to be found near his house. We affirm.

¶ 3 On Sunday, November 6, 2005, 19-year-old Tweety Parker was living with her grandmother, Daisy Brown, in East St. Louis. Parker was eight months pregnant at the time. CJ Toney was spending the weekend at Brown's home. Although Brown was babysitting CJ, he spent much of his time with Parker. As CJ's mother, LaToya Franklin, testified at trial, Parker "loved her CJ." When Brown left the house to go to church that morning, Parker and CJ were sitting in the kitchen together after eating breakfast. That was the last time Brown saw them.

¶ 4 When Brown returned home that afternoon, Parker and CJ were not home, and they did not come home in the evening. Brown initially thought Franklin must have picked up CJ before she got home. Franklin did stop by Brown's home to pick up CJ before Brown got home, but he was not there. Franklin was not concerned at that point because she assumed CJ was with either Brown or Parker. It was not until the following morning, when Franklin called Brown to tell her she was coming to pick up CJ, that the two women realized something was wrong. They spent that day—Monday, November 7, 2005—attempting to locate Parker and CJ. They called hospitals and police stations, went to Parker's boyfriend's house, and drove around looking for Parker and CJ. The following morning, they filed a missing persons report with the East St. Louis Police Department.

¶ 5 That same morning—November 8, 2005—police in Collinsville responded to a call concerning an unrelated burglary at the VFW Lounge. The owner of the lounge asked police to tow an abandoned vehicle that had been parked in the parking lot for a few days. That vehicle turned out to be registered to Tweety Parker, who was reported missing two hours after the vehicle was towed.

¶ 6 The Illinois State Police took possession of Parker's vehicle. Special Agent Benjamin Koch was the crime scene investigator who processed the vehicle. Agent Koch found a reddish brown substance that appeared to be blood on some of the surfaces of the car. He collected samples of the substance using a "clean swab" technique. He also found a steak knife and a screwdriver in the driver's seat door pocket, and he found another screwdriver and a license plate in the passenger's seat door pocket.

¶ 7 Initially, Agent Koch did not do a general search of the vehicle or collect any additional evidence from the vehicle because he was only asked to look for blood or weapons. Subsequently, another crime scene investigator recovered a black and white bloodstained jacket from the back seat of the vehicle. A few weeks later, Agent Koch worked with forensic scientist Amy Hart to lift fingerprints from the vehicle. Hart analyzed the prints they were able to lift from the vehicle. None matched the defendant's prints, and none matched any fingerprints in the law enforcement databases.

¶ 8 Meanwhile, officers involved in the investigation conducted searches of the area near where Parker's vehicle was found. A few days after the vehicle was found and Parker and CJ were reported missing, Lt. Donald Watson and Officer Tracy Long were searching on foot in a wooded area less than half a mile from the VFW Lounge. Lt. Watson found a ladies' denim jacket in the dirt. It had holes in it and what appeared to be a bloodstain. Nearby, Officer Long found a blue sleeping bag, which also appeared to be stained with blood. These items were found approximately 700 feet behind a dilapidated house that was then owned by the defendant. Ultimately, the remains of Parker and CJ would be found in the same area, closer to the house. A foot path led from this wooded are to the parking lot of the VFW lounge, which took approximately five to six minutes to walk.

¶ 9 Forensic scientist Donna Rees conducted DNA testing on samples taken from these pieces of evidence. At this point, the investigation was considered a missing persons investigation. However, in light of the blood found in the vehicle, police believed that Parker and CJ had been injured or murdered. By this point in the investigation, the

defendant was considered a suspect. Rees therefore developed DNA profiles for the defendant, Parker, and CJ for purposes of comparison.

¶ 10 Rees extracted DNA from a sample of blood found near the trunk switch of Parker's vehicle, which matched the defendant's DNA profile. DNA extracted from blood found elsewhere in the vehicle matched the DNA profiles of Parker and CJ. A DNA sample extracted from the denim jacket found behind the defendant's house yielded only a partial profile. Rees explained at trial that this was likely because DNA degrades when exposed to the elements. Rees was able to determine that the DNA matched the profile she had for Parker. A sample taken from the black and white jacket found in Parker's vehicle yielded a mixed profile, meaning DNA from more than one individual was present. Rees was able to determine that the sample contained DNA that matched CJ's DNA profile. Rees tested several different samples from the sleeping bag that was found behind the defendant's house. She found DNA that matched both Parker and the defendant on the sleeping bag.

¶ 11 At some point, the defendant sold his property to Bob Bellistri. In May 2007, the defendant's brother, Scotty Reid, was working for Bellistri attempting to clear brush from the property. While working in the area behind the house, he discovered a driver's license belonging to Tweety Parker, and notified the police.

¶ 12 In November 2007, another worker discovered the existence of the cistern when he drove a backhoe over it. We note that the cistern is not actually on the Reid property. It is on an adjacent parcel that was once owned by CC Cain and used by him to raise horses. It is not clear from the record who owned the Cain property at the time of the

murders; however, it apparently was not in use. The distance from the Reid house to the cistern was 70 feet.

¶ 13 The discovery of the cistern was reported to the Illinois State Police; however, the cistern was not searched until March 26, 2008, when workers discovered what appeared to be human bones. Matthew Davis, a crime scene investigator and forensic anthropologist, supervised the removal of the remains from the cistern. During this process, police encountered the defendant and his brother, Scotty Reid, lying in some nearby weeds, apparently watching the excavation of the cistern. Both brothers were arrested, but police released Scotty with no charges.

¶ 14 The remains of three individuals were recovered from the cistern—an adult female, a young child, and a fetus. In addition, articles of clothing, several rings, and a bracelet were recovered. Parker's sister was able to identify the jewelry as Parker's. The remains of Parker and CJ were identified through dental records. Forensic pathologist Dr. Raj Nanduri later examined the remains to determine the cause of death of each individual. She determined that Parker was stabbed at least 23 times and died as a result of sharp force trauma. She determined that CJ experienced both blunt force trauma and sharp force trauma. She found no injury to the fetus and concluded that Parker's unborn baby died only because Parker died.

¶ 15 The defendant was charged with two counts of first-degree murder (720 ILCS 5/9-1(a)(1) (West 2004)) in the deaths of Tweety Parker and CJ Toney and with one count of intentional homicide of an unborn child (720 ILCS 5/9-1.2(a)(1) (West 2004)) in the death of Parker's unborn baby. Prior to trial, the defendant filed a motion to dismiss the

charges. He alleged that the vehicle had been destroyed, and he argued that the destruction of DNA evidence located inside violated both the State's statutory duty to preserve biological evidence (725 ILCS 5/116-4 (West 2004)) and his right to due process of law. The court denied the motion.

¶ 16 The matter proceeded to trial in March 2014. (We note that this case involved extensive discovery as well as numerous pretrial motions, most of which are not at issue in this appeal.) Several witnesses testified about the events of November 6, 2005. Reginald Moses was Parker's boyfriend and the father of her unborn baby. Moses was incarcerated at the time, awaiting trial on a charge of aggravated battery. He testified that prior to his arrest, he sold crack cocaine, and Parker sometimes came with him. Among his customers were the defendant and his brother, Scotty Reid. After Moses was arrested, he asked Parker to answer his cell phone in case any of his customers called. Parker essentially took over his business for him while he was in jail. Moses testified that he spoke with Parker on the phone a lot while he was in jail. On the day she disappeared, he spoke to her "around five times," the last of which was at 1 or 2 in the afternoon. He testified that during one of these calls, he could hear the defendant's voice in the background. He tried to call Parker later, but got no reply. Moses never heard from Parker again.

¶ 17 Telephone records obtained from Verizon showed that Parker's phone did indeed receive five phone calls from the St. Clair County jail between 11:56 a.m. and 1:27 p.m. The calls each lasted approximately 15 minutes, which is the maximum length of time an inmate can use the phone before the call is automatically terminated. The phone records

showed that the defendant also called Parker during this time period. One call was answered; the other two were forwarded to voice mail. The records also showed that all of the calls to Parker's number that were placed after 1:27 were forwarded to voice mail.

¶ 18 Scotty Reid, the defendant's brother, testified that their parents bought the Reid property in 1962 and sold it to the defendant in the late 1980s. Although the property is on Collinsville Road, a busy street, the property is wooded and the house is set back far enough that it is not visible from the road. As previously noted, the Reid property was adjacent to land owned by CC Cain. At the time the events at issue took place, the defendant was living in the house on the Reid property, and Scotty was living in an apartment approximately one-half of a mile away. Scotty testified that the defendant slept in the house on the property, but he spent most of his days at Scotty's apartment.

¶ 19 Scotty testified that he met Parker about a year before she disappeared. He met her through her boyfriend, Reggie. During the relevant time period, he saw her often because he bought crack from her. He testified that he did not see Parker on the day she disappeared, but he did buy crack from her the day before that. He could not remember whether CJ was with her. He testified that he tried to call Parker on the evening of November 6, but she did not return his call.

¶ 20 Scotty was employed by Joe's Carpet Store, which was located on Collinsville Road between Scotty's apartment and the Reid property. The owner of the store was also Scotty's landlord. On the Sunday at issue, Scotty worked at Joe's from 11 a.m. until 3 p.m. He testified that the defendant was at his apartment before he left. Scotty made multiple trips back to the apartment during the day. He explained that his landlord was

angry at him about the condition of the apartment, so he was working to fix the place up. He returned home with a pair of blinds he intended to install, but they did not fit the window, so he returned a second time with a different set of blinds. He returned to the apartment a third time to bring the defendant some chicken from Church's Chicken. Although Scotty got off of work at 3 p.m., he testified that he did not return home until 5 or 6 p.m. because he stayed at the store to watch football with some of his coworkers.

¶ 21 Scotty testified that the defendant was in the apartment alone each of the times he came home during the day. However, he did see the defendant walk past the store at some point during the day. According to Scotty, the defendant told him that he was going to get money from a friend who was keeping his dogs on the defendant's property. Each time Scotty returned to his apartment, the defendant was wearing the same clothes. Scotty did not see any blood on the defendant's clothing or any apparent injuries to the defendant. When Scotty returned home in the evening, the defendant was in the apartment with Becky SanSoucie, a friend of Scotty's. SanSoucie and the defendant had crack, which the defendant told Scotty they had purchased from a dealer named Juan.

¶ 22 Marshall Lehner testified that the defendant allowed his deceased sister's dogs to stay in a shelter on the property, in exchange for which Lehner paid someone to mow the grass on the property. Lehner went to the property daily to care for the dogs. He testified that on a Sunday in November 2005, he went to the property to feed the dogs, give them water, and take them out for a run. Lehner could not remember which week it was. He testified that he saw the defendant and asked what had happened to him because there was blood on his face. The defendant told him that he had been cutting tree branches.

Lehner gave the defendant some of the water he had brought for the dogs so he could clean the blood off his face. Lehner noted that the blood came off easily with water, and the defendant did not appear to have any cuts. Lehner then took the dogs for a run. He testified that before he left with the dogs, he saw a car parked in the vicinity. When he returned, however, the car was gone, and the defendant was sweeping the dirt and gravel with a broom.

¶ 23 Becky SanSoucie testified to a timeline of events that was mainly consistent with Scotty Reid's account. Significantly, however, Becky testified that when she arrived at Scotty's apartment at around 3 p.m., she noticed that the defendant had a small cut on his hand that appeared to be bleeding. The defendant told her that he cut himself while making enchiladas. According to SanSoucie, the defendant already had crack when she arrived, and he told her that he bought it from Parker. She testified that at some point during the afternoon, the defendant went to Joe's Carpet Store at her request to ask Scotty when he would be home. She also testified that the defendant left the apartment another time to buy more crack for them to smoke. She initially testified that he was gone for an hour and a half to two hours. Later, however, she was recalled to the stand. She acknowledged that she told police that the defendant was only gone for half an hour when he left to get more crack. She testified that her statement to police was correct and acknowledged that she had short-term memory problems. Finally, SanSoucie testified that it was not until after Scotty returned home that the trio bought crack from the dealer named Juan.

¶ 24 The defendant testified on his own behalf. He, too, gave an account of events that was generally similar to those given by Scotty and SanSoucie. In his account, however, he did not arrive at Scotty's apartment until noon, after Scotty left for work, and he let himself in with a spare key. The defendant denied telling his brother he was going home to give Lehner money. He testified that at some point while he was alone in the apartment, Tweety Parker arrived. He told her about Scotty's problems with his landlord and explained that as a result, it would not be a good time for them to make any deals "of a businesslike nature." He stated that Parker then left. He further testified that a dealer named Juan Farias came to the apartment while the defendant and Becky were waiting for Scotty to return. Farias sold them some crack, and they each paid half. Both the defendant and SanSoucie testified that Scotty returned home from work late not because he was watching football, but because he was waiting to be paid while his boss played cards.

¶ 25 The defendant acknowledged that he had been in Parker's vehicle twice shortly before she was killed. He explained that he sat in the vehicle while buying crack from her the day before she disappeared. He also testified that he attempted to fix the driver's side door for her a few days earlier. He explained that the front driver's side door was sticking and Parker was unable to open it. He was able to force it open, and he tried to adjust a latch at the bottom of the door, but he was not successful. The defendant testified that he never drove Parker's car.

¶ 26 Michael Scott testified that the defendant admitted to being Parker's killer while the men were in neighboring cells in the Madison County jail. Scott admitted that he

entered into a plea deal that included his testimony. Scott explained that the defendant made this confession over the course of several conversations, which involved both Scott and his cellmate, Charles Hollis. The defendant denied making this admission, and Hollis did not testify.

¶ 27 According to Scott, the defendant told him and Hollis that he was angry with Tweety Parker over past drug deals. He arranged to meet her "at a place that used to be his house *** that he had lost that was like in a wooded area or something." The defendant promised Parker he would have a combination of marijuana and cash to trade for crack. Parker reluctantly met the defendant in the wooded area. When she got there, the defendant had no marijuana or cash. Instead, he asked her to "front" him the crack and told her he would pay her later. According to Scott, Parker "snapped on him a little," and the defendant then "snapped back, and he said that he stabbed her to death."

¶ 28 Scott testified that the defendant told him and Hollis that he stabbed Tweety Parker 20 times with a screwdriver and then drove her car to the VFW lounge in an effort to frame someone else for the murder. According to Scott, the defendant lamented to them that "he thought he had taken care everything" and that he could not believe he left behind a jacket for the police to find. Scott testified that the defendant did not say anything about the little boy and did not tell them where he hid the bodies. Scott claimed that he did not hear about the case from media reports, but he acknowledged that he had access to television, and he admitted on cross-examination that he did know some things about the investigation other than what he heard from the defendant.

¶ 29 Rodney Fults was the owner of A&E Auto Sales, which sold Parker her vehicle and held a lien on the vehicle. Fults testified that he asked for the return of the vehicle when he learned it was in police possession. He explained that he wanted the vehicle returned because no one was making payments on it. In response, police notified Fults that they wanted to keep the vehicle for investigative purposes. On December 1, 2005, Fults wrote a letter giving police permission to keep the car as long as needed and to remove any parts necessary for their investigation. In the letter, he also requested that they tow the vehicle to A&E's lot when they finished with it, no matter what condition it was in. Fults testified that the vehicle was returned on December 14, 2005. Asked what happened to the car after that time, Fults testified that he did not remember what happened, but he thought he put new seats in the car and tried to resell it. In any case, the vehicle was no longer in his possession.

¶ 30 Captain James Morrisey testified about the decision to release Parker's vehicle to A&E Auto Sales. He noted that the investigators involved in the case discussed the matter. He explained, "the crime scene investigators had processed the car on multiple occasions, [and] I think the decision was [that] there wasn't anything left that could be done with the car."

¶ 31 Three State witnesses testified about the use of touch DNA samples, which is at the heart of the defendant's contention that valuable evidence remained in the car after it was returned to A&E. Special Agent Ben Koch, the crime scene investigator who processed the vehicle, testified that DNA can be found either in bodily fluids, such as blood, or in skin cells or oil that may be deposited on any surface a person touches.

Forensic scientist Donna Rees explained that this is referred to as "touch DNA." Brian Hapack is a forensic scientist who was involved in preparing DNA samples for Donna Rees to test. He testified that bodily fluids such as blood, semen, or saliva are usually the best sources of DNA because they are the most likely sources of sufficient quantities of DNA for testing purposes. However, he explained, touch DNA samples can also be collected by swabbing surfaces that are likely to have had a lot of contact with the skin.

¶ 32 Special Agent Koch testified that he did not swab the door handles or steering wheel in Parker's vehicle, but he acknowledged that it was possible for DNA to be found there. Asked if such evidence would have been important, he replied, "In retrospect, yes, but at the time in 2005 we weren't doing that, sir." Hapack testified that he cut out swatches of bloodstained fabric from the sleeping bag and the two jackets for Rees to test. He did this because blood is likely to contain DNA. He looked for stains on the sleeping bag from other types of bodily fluids—such as semen or saliva—but found none. Instead, he took touch DNA swabs of the zipper and the elastic bands that held the sleeping bag together.

¶ 33 Forensic scientist Stephanie Beine testified as a DNA expert for the defendant. She testified that "in this day and age," many DNA samples collected at crime scenes come from touch DNA swipes. She explained that skin cells—which, like all other human cells, contain DNA—can rub off on an item that has been handled. She opined that there were many surfaces in Parker's vehicle that would have been good sources for touch DNA testing. She noted that the arm rest, the door handles, and the controls on the door and dashboard were all potential sources for DNA. However, Beine believed the

steering wheel was the "single most important place to swab for DNA." She explained that the rough surface of the steering wheel made it likely that the skin cells of anyone driving the vehicle rubbed off on it. In addition, she noted that it was impossible to drive the vehicle without touching the steering wheel.

¶ 34 Beine acknowledged that although the steering wheel was a good source for obtaining touch DNA samples, it was not certain that the DNA of anyone driving the car would be found there. She further acknowledged that DNA deteriorates over time, although she opined that DNA deposited inside the vehicle would likely remain suitable for testing as long as it was kept dry. Beine also discussed two potential problems with touch DNA testing. First, she explained that touch DNA samples have a "high probability" of yielding mixed DNA profiles. Mixed profiles are often more difficult to interpret than profiles containing the DNA of only one individual. Second, Beine explained, DNA can be transferred from surface to surface by anyone touching a surface after DNA has been deposited on it. We note that this explanation is consistent with the testimony of Donna Rees, who explained that the fact that the defendant's DNA was found in the sample taken from the trunk switch did not necessarily mean that the defendant touched the switch.

¶ 35 At the close of evidence, the defendant renewed his motion to dismiss the case based on the State's decision to release Parker's vehicle to A&E Auto Sales. The court again denied the motion.

¶ 36 The defendant requested a nonpattern jury instruction that would have informed the jury that it could infer that Parker's vehicle likely contained evidence favorable to the

defendant based on the State's failure to retain the vehicle and preserve that evidence. He tendered an instruction based on Illinois Pattern Jury Instructions Civil, No. 5.01 (2011) (hereinafter, IPI Civil (2011) No. 5.01). That instruction applies if a party in a civil suit fails to produce evidence that is (1) under that party's control, (2) "not equally available" to the other party, and (3) the type of evidence that "[a] reasonably prudent person under the same or similar circumstances would have offered *** if he believed it to be favorable to him" unless there is a reasonable explanation for party's failure to produce the evidence. IPI Civil (2011) No. 5.01. Under such circumstances, courts may instruct jurors that they may infer from the party's failure to introduce the evidence that the evidence was adverse to the party. IPI Civil (2011) No. 5.01. The court in this case refused to give a similar instruction for three reasons. First, the court found that the instruction did not accurately state the law. Second, the court noted that it was a nonpattern instruction. Third, the court noted IPI Civil (2011) No. 5.01 is given only after the court makes a finding that the missing evidence was likely favorable to the opposing party, a finding the defendant did not request the court to make in this case. The court also noted that the circumstances did not warrant such a finding in this case.

¶ 37 The jury returned verdicts of guilty. The defendant filed posttrial motions raising numerous claims of error, including those he raises in this appeal. The court denied those motions and sentenced the defendant to natural life in prison. This appeal followed.

¶ 38 The defendant raises three issues. First, he argues that the State violated his right to due process by failing to preserve potentially-exculpatory touch DNA evidence, either by retaining Parker's vehicle or by taking and preserving such samples. Second, he argues

that the court erred and deprived him of a fair trial by refusing to instruct the jury that it could infer from the loss of the vehicle that it would have contained evidence favorable to the defendant. He contends that such an instruction could have cured the prejudice he suffered due to the State's failure to preserve the evidence. Third, the defendant argues that the court allowed the prosecutor to impermissibly shift the burden of proof during cross-examination of the defendant by asking him to explain how various pieces of evidence came to be found near his house. We reject all three contentions.

¶ 39 The defendant first argues that the State violated his right to due process of law by failing to retain and preserve potential DNA evidence inside Parker's vehicle. He explains that the State's decision to release the vehicle early in the investigation adversely impacted his ability to present a defense in two ways. First, he contends that he was deprived of the ability to collect additional touch DNA samples from surfaces in the car that investigators did *not* test. Second, he asserts that DNA tests performed by the State's forensic scientists consumed all the DNA in the samples, thereby depriving him of the opportunity to conduct his own testing of that evidence.

¶ 40 The defendant's claim that the loss of the potential evidence constituted a due process violation is based on the United States Supreme Court's decision in *Arizona v. Youngblood*, 488 U.S. 51 (1988). That case involved charges that the defendant molested, kidnapped, and sexually assaulted a 10-year-old boy. The offenses occurred in the fall of 1983. *Id*. at 52. Physicians who treated the child used a sexual assault kit to collect semen samples from his rectum and mouth. *Id*. at 52-53. Police properly stored the kit in a

secure refrigerator. Police also collected the child's underwear and T-shirt as evidence, but did not store this clothing in a refrigerator or freezer. *Id*. at 53.

¶ 41 Initially, investigators examined the slides included in the sexual assault kit to determine whether any sexual contact had occurred. They did not conduct any additional tests on the kit at the time, and they did not conduct any tests on the child's clothing. *Id*. Subsequently, the State's attorney requested that an ABO blood group test be performed in order to determine the assailant's blood type. *Id*. at 54. The ABO test—which was not done routinely by the Tucson Police Department at the time (*id*. at 53)—"failed to detect any blood group substances in the sample" (*id*. at 54). A police criminologist then attempted to conduct two different types of tests on the stains on the boy's clothing—the ABO test and a P-30 protein test. However, these tests were likewise inconclusive, in part because there was only a small amount of semen in the stains on the child's clothing. *Id*.

¶ 42 At trial, the defense argued that the victim misidentified the defendant as his assailant. The defense further argued that he might have been able to support this theory of the case had the police stored his clothing in a refrigerator to preserve the biological material available for testing. *Id*. The defendant was convicted, but his conviction was overturned by the Arizona Appellate Court. That court found that the destruction of evidence that may have eliminated the defendant as the assailant constituted a denial of due process, even though the court expressly found that the Tucson police did not act in bad faith. *Id*. The State appealed that ruling to the United States Supreme Court, which reversed. *Id*. at 55.

¶ 43 The Court first noted that the case involved an issue of " 'what might loosely be called the area of constitutionally guaranteed access to evidence.' " *Id*. (quoting *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982)). The Court went on to point out that some cases involving access to evidence—those cases in which the State fails to disclose to the defense any "material exculpatory evidence"—hold that "the good or bad faith of the State [is] irrelevant." *Id.* at 57. But the Court reasoned that "the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subject to tests, the results of which might have exonerated the defendant." *Id*. The Court held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process." *Id*. at 58.

¶ 44 The Court found this difference in treatment appropriate for two reasons, both of which are pertinent to the circumstances of this case. First, the Court explained that when " 'potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed.' " *Id*. at 57-58 (quoting *California v. Trombetta*, 467 U.S. 479, 486 (1984)). Second, the Court believed "that requiring a defendant to show bad faith on the part of the police *** limits the extent of the police's obligation to preserve evidence to reasonable bounds." *Id.* at 58. Both of these concerns are implicated in this case. As the defendant acknowledges, there is no way to know whether touch DNA would have revealed the presence of *any* DNA on the steering wheel, let alone the DNA of an individual other than Tweety Parker

or the defendant. Also, imposing on police a duty to store something as large as a vehicle indefinitely would exceed "reasonable bounds."

¶ 45 In *California v. Trombetta*, decided a few years before *Youngblood*, the Supreme Court discussed one limit on the duty to preserve evidence that is imposed on police by the Constitution. The Court explained that this "duty must be limited to evidence that might be expected to play a significant role in the suspect's defense." *Trombetta*, 467 U.S. at 488. The Court held that to meet this standard, the exculpatory value of the evidence must be apparent before its loss or destruction. *Id*. at 489.

¶ 46 We reject the defendant's due process argument for three reasons. First, we believe that the evidentiary value of retaining the vehicle for touch DNA testing of the steering wheel was not apparent at the time the police decided to release the vehicle, as required under *Trombetta*. Second, we find that the record before us does not demonstrate that the State Police acted in bad faith, as required under *Youngblood*, when they released the vehicle to the lienholder, A&E Auto Sales. Third, we are not persuaded that the loss of the vehicle impaired the defendant's ability to mount a defense.

¶ 47 Contrary to the defendant's contention, we do not believe the evidentiary value of retaining the vehicle for further testing was apparent at the time police decided to release it to the lienholder. We reach this conclusion based on a review of the state of the investigation at the time the vehicle was released. The defendant argues that DNA from the steering wheel was crucial to his defense because it might have proven that someone other than the defendant drove the vehicle. He contends that the importance of this inquiry was obvious from the beginning of the investigation because "the State's theory of

the case hinged on Mr. Reid driving and dumping Parker's car so that he could implicate someone else." We disagree.

¶ 48 At the time police returned the vehicle to A&E, they had no way to know that the car was necessarily driven after Parker was killed. It was not until the remains of the victims were found behind the defendant's house that this became apparent. As multiple witnesses explained at trial, bloodstains appeared to be the best source of DNA evidence because bodily fluids are more likely than touch DNA samples to contain sufficient quantities of DNA for testing. Thus, it is not surprising that crime scene investigators and forensic scientists focused on those. In light of what police knew at the time, the value of looking for DNA elsewhere in the vehicle was not apparent. Thus, under *Trombetta*, the police were under no constitutional obligation to conduct such searches or retain the vehicle.

¶ 49 We likewise find that the defendant has not demonstrated that the police acted in bad faith in deciding to release the vehicle to the lienholder. The defendant points to various circumstances surrounding the release of the vehicle in support of his argument that the police acted in bad faith. We do not agree that any of the circumstances he points to demonstrate bad faith.

¶ 50 The defendant argues that the evidentiary significance of the vehicle was apparent to both parties before the car was released, which shows that the police acted in bad faith when they released it. We have already rejected that claim. He points to the short period of time that police held the car before returning it to the lienholder as evidence of bad faith. As discussed earlier, however, a group of officers involved in this investigation

discussed the matter and decided to return the vehicle to the lienholder only after concluding that they had already collected all of the evidence the vehicle was likely to yield. The defendant points to the letter Rodney Fults sent to the police authorizing them to take apart the vehicle—and, thus, destroy it—if need be. He contends that the police asked Fults for permission to take apart the vehicle. The record contains no evidence that they in fact made such a request, however.

¶ 51 The defendant argues that disposal of the vehicle violated a statutory obligation, thereby demonstrating bad faith. The statute at issue is section 116-4 of the Code of Criminal Procedure of 1963, which requires police investigating a murder to preserve "any physical evidence in their possession or control that is reasonably likely to contain forensic evidence, including *** biological material." 725 ILCS 5/116-4(a) (West 2004). The trial court explained that the vehicle itself was not "evidence" in this case and that the police complied with this requirement by preserving the blood swabs and items of physical evidence such as the jackets and the sleeping bag. We agree with this interpretation. Similarly, the defendant contends that bad faith is evident because the police failed to follow their own internal policy when releasing the vehicle. Courts have found that the fact that police followed standard procedure can support a finding of good faith. See, *e.g.*, *Trombetta*, 467 U.S. at 488 (quoting *Killian v. United States*, 368 U.S. 231, 242 (1961)); *People v. Campbell*, 252 Ill. App. 3d 624, 630 (1993). However, it does not follow from this that a failure to follow standard procedures necessarily negates a finding of good faith. See *People v. Schutz*, 344 Ill. App. 3d 87, 95 (2003) (finding that

failure to follow the guidelines contained in internal policies does not automatically constitute a violation of due process).

¶ 52 Finally, the defendant points to the fact that crime scene investigator Ben Koch's testimony that the Illinois State Police were not doing touch DNA testing in 2005 was contradicted by the fact that Brian Hapack in fact took touch DNA samples from the sleeping bag. We are not persuaded. Hapack was a forensic scientist specializing in DNA analysis, while Koch was a crime scene investigator. A specialist such as Hapack would be more likely to know about tests that were not done routinely. Viewing all of the circumstances surrounding the release of the vehicle, we find nothing in the record to suggest the Illinois State Police acted in bad faith.

¶ 53 We must also consider the extent to which the loss of the potential evidence deprived the defendant of the ability to mount an adequate defense. As stated earlier, there are two components to the defendant's claim that he was prejudiced by the loss of the vehicle. First, he argues that touch DNA testing of the steering wheel may have shown that someone other than Parker or the defendant drove the vehicle. Based on the testimony elicited at trial, however, the existence of such evidence is highly speculative. Moreover, even assuming such evidence existed, it would not necessarily have exonerated the defendant. Both the State's DNA expert and the defendant's DNA expert testified that there was no way to determine how or when DNA found on a surface was deposited there. The defendant frames the crucial question as "the identity of who last drove Parker's car." According to the experts who testified at trial, however, this was a question that could not be answered.

¶ 54 The defendant also claims that he was harmed because the DNA evidence that was collected was consumed by the State's testing, thereby depriving him of an opportunity to test it. Again, we are not persuaded. We note that DNA experts for both the State and the defense testified that although the State's testing *did* consume the DNA in the sample taken from the trunk switch, which was the sample that contained the defendant's DNA, the other two samples taken from the vehicle could still be tested. We also note that the defendant's DNA expert, Stephanie Beine, reviewed the reports of the State's DNA expert and found that all of her tests were performed correctly. Moreover, the defendant acknowledged that he was in Parker's vehicle twice shortly before she was murdered, and the State's DNA expert conceded that the fact that the defendant's DNA was found on the trunk switch did not necessarily mean that he touched it. The defendant was not deprived of a meaningful opportunity to challenge the State's DNA evidence.

¶ 55 To sum up, we find that the evidentiary value of a touch DNA test of the steering wheel was not apparent at the time police released the vehicle; that there is no evidence that the Illinois State Police acted in bad faith; and that any prejudice to the defendant was minimal at best. We therefore conclude that there was no due process violation. The trial court did not err in denying the defendant's motion to dismiss.

¶ 56 The defendant next contends that the court erred by refusing to instruct the jury that it could draw an inference that the vehicle would have yielded evidence favorable to him. Trial courts are required to give the appropriate pattern jury instruction whenever an appropriate instruction exists. *People v. Bigham,* 226 Ill. App. 3d 1041, 1044 (1992). When no appropriate pattern instruction exists, however, the decision to give a nonpattern

instruction that accurately states the relevant law rests within the discretion of the trial court. *Id*. at 1045. We find no abuse of discretion in the court's decision here.

¶ 57 The defendant's argument that the instruction he requested was necessary to cure the prejudice from the State's loss of potential evidence is based on language approving a similar instruction in *Youngblood* and *People v. Danielly*, 274 Ill. App. 3d 358 (1995). In *Youngblood*, Chief Justice Rehnquist mentioned in the majority opinion that the trial court there instructed the jury that if it found that the State had lost or destroyed evidence, jurors could " 'infer that the true fact is against the State's interest.' " *Youngblood*, 488 U.S. at 54. However, this fact was not considered in the Court's analysis. In his concurrence, Justice Stevens did find the instruction significant. *Id*. at 59-60 (Stevens, J., concurring). He noted that because the instruction was given, "the uncertainty as to what the evidence might have proved was turned to the defendant's advantage." *Id*. at 60 (Stevens, J., concurring). This was one reason that Justice Stevens found it "unlikely that the defendant was prejudiced" by the police department's failure to preserve the evidence. *Id*. at 59 (Stevens, J., concurring). However, nothing in either the majority opinion or the concurrence suggests that a similar instruction is *required*.

¶ 58 In *Danielly*, however, a panel of the First District suggested that the instruction is mandatory. That case involved a charge of aggravated criminal sexual assault. *Danielly*, 274 Ill. App. 3d at 360. The victim and the defendant were acquaintances, and the assault took place in the defendant's house. When the victim was able to get away from the defendant, she fled from his house, leaving behind her clothes, underwear, shoes, and purse. *Id*. Two days after the assault, the victim went to the police station and asked

police to return the belongings she had left in the defendant's house. *Id*. at 361. Among the items returned to her was a pair of underwear. She testified at trial that they were torn, and she threw them in the trash. *Id*. At trial, the defendant claimed that he had consensual sex with the victim. *Id*. at 362. However, the jury believed the victim and found the defendant guilty.

¶ 59 On appeal from his conviction, the defendant there argued that the decision of the police to return the underwear to the victim deprived him of due process under *Youngblood*. *Id*. at 362-63. He asserted that if he could have introduced the underwear as evidence at trial, there may have been physical evidence to contradict the victim's claim that they had been torn, which would have supported his claim that the sex was consensual. *Id*. at 363. The appellate court rejected this argument (*id*. at 364), but the court reversed on other grounds (*id*. at 366). The court then addressed a jury instruction issue similar to the issue here because the court found that the issue was likely to recur on remand. *Id*. at 367.

¶ 60 The defendant there requested a nonpattern jury instruction which would have told jurors that if "one party has exclusive control over evidence" and fails to produce it, jurors "can make an inference that the evidence[,] if produced[,] would be unfavorable to that party." *Id*. The *Danielly* court found that the trial court correctly refused to give that instruction because the underwear was not within the State's exclusive control at the time of trial. *Id*. at 368. The court noted, however, that the instruction discussed in *Youngblood*—which made no mention of evidence being in the exclusive control of the

State—would be more appropriate. *Id*. The court held that the defendant would be entitled to such an instruction on remand if he requested it. *Id*.

¶ 61 We first note that although not discussed by the *Danielly* court, there were circumstances in that case to justify an adverse inference other than the fact that the State allowed the evidence to be lost. If the underwear were torn, this fact would have been immediately apparent to police. The evidentiary value of the torn underwear would likewise have been readily apparent. Police in that case would not have expected to find any semen in the underwear because the victim stated that the defendant tore them off of her before raping her, and she ran from the house without putting them back on. *Id*. at 360. However, torn underwear would be relevant evidence to prove that the sex was not consensual. See *id*. at 363-64 (pointing out that the State argued at trial that the torn underwear was evidence of the defendant's "guilty knowledge"). Here, as we have already discussed at length, neither the existence of touch DNA nor its evidentiary value were readily apparent at the time police released the vehicle to the lienholder.

¶ 62 In any case, to the extent the *Danielly* decision can be read as requiring a *Youngblood*-like instruction in every case involving lost evidence, we decline to follow it. See *People v. Pruitt*, 239 Ill. App. 3d 200, 209 (1992) (noting that this court is not required to follow the decisions of other districts of the appellate court). As we already noted, there is no support in *Youngblood* for the proposition that such an instruction is mandatory in all cases involving lost or destroyed evidence. Moreover, before giving the civil pattern jury instruction the defendant's proposed instruction is modeled after, a trial court must first make a factual determination that, in light of all the surrounding

circumstances, the party would likely have produced the missing evidence unless the party knew that the evidence was unfavorable to its position. *Tuttle v. Fruehauf Division of Fruehauf Corp.*, 122 Ill. App. 3d 835, 843 (1984). The trial court here was not asked to make such a finding, and for all the reasons we have discussed, we do not believe the circumstances of this case would have justified such a finding. We conclude that the trial court's refusal to give the defendant's requested instruction was not an abuse of discretion.

¶ 63 The defendant's final contention is that the court allowed the prosecution to impermissibly shift the burden of proof during cross-examination. His argument centers on the following exchange between one of the prosecutors and the defendant:

> "Q. You can't explain why the police found Tweety and that little boy's body 70 feet from your property, can you?
>
> A. It's not my property.
>
> Q. You can't explain why the police found those bodies 70 feet from your old front door, can you?
>
> A. No.
>
> Q. You can't explain why they found Tweety's ID 157 feet from your front door, can you?"

At this point, defense counsel objected, arguing that the prosecutor was shifting the burden of proof to the defendant. The court overruled the objection. The prosecutor asked the question again, and the defendant replied, "No." The exchange then continued.

Q. And you can't explain why her bloody jacket is found 702 feet from your front door, can you?

A. No.

Q. And you can't explain why a sleeping bag with your DNA and her blood all over it is found 748 feet from your front door, can you?

MR. REKOWSKI [defense counsel]: Show my continuing objection to the shifting of burden, Your Honor.

THE COURT: Overruled.

MS. VUCICH [prosecutor]: Can you, Mr. Reid?

THE WITNESS: No, except that that area that you're talking about is not my property, and it's well known that it's a devil's playground for that area, and many people go back there.

* * *

Q. And you can't explain why you called Tweety at 1:17 that day, at 1:27 that day, at 1:30 that day, and then she's dead, can you?

A. I called her, yes."

The defendant argues that this line of questioning shifted the burden of proof to him by implying that he "needed to explain away the State's own circumstantial evidence before the jury could acquit him." He also argues that the court exacerbated the problem by overruling his objections, thereby indicating to jurors that the questioning was appropriate. See *People v. Kidd*, 147 Ill. 2d 510, 544 (1992). We disagree.

¶ 64 The propriety of cross-examination is a determination within the discretion of the trial court. We will not reverse a conviction unless the court clearly abused this discretion and its decision resulted in "manifest prejudice." *People v. Turner*, 128 Ill. 2d 540, 557 (1989); *People v. Millighan*, 265 Ill. App. 3d 967, 971 (1994). If a defendant chooses to testify, his credibility becomes an issue, and he is subject to cross-examination that tests the credibility of his testimony. See *Millighan*, 265 Ill. App. 3d at 971; see also *People v. Adams*, 129 Ill. App. 3d 202, 207 (1984) (explaining that witness credibility is always a relevant question). It is therefore proper to ask any witness, including a criminal defendant, about matters which may either explain or discredit his testimony. *Millighan*, 265 Ill. App. 3d at 971.

¶ 65 One of the most fundamental principles in criminal law, as the defendant correctly asserts, is that the State bears the burden of proving each element of the offenses charged beyond a reasonable doubt. *People v. Yonker*, 256 Ill. App. 3d 795, 800 (1993); *Millighan*, 265 Ill. App. 3d at 971. If the jury finds that the State has not met this burden, it must find the defendant not guilty whether or not it finds his testimony to be credible. *Yonker*, 256 Ill. App. 3d at 800. Thus, it is impermissible for the State to shift its burden of proof to the defendant. *People v. Phillips*, 127 Ill. 2d 499, 527 (1989). We do not believe that the cross-examination of the defendant in this case had the effect of shifting the burden of proof.

¶ 66 It is worth noting, as the State points out, that all of the cases cited by the defendant address improper remarks made during closing arguments. See, *e.g.*, *People v. Fluker*, 318 Ill. App. 3d 193, 202 (2000); *Yonker*, 256 Ill. App. 3d at 797. There is an

important difference between cross-examination and closing argument. During closing argument, a prosecutor is directly addressing jurors and telling them what they should consider in reaching their verdict. The danger of burden-shifting is thus more acute during closing arguments than it is during cross-examination. While this distinction is not necessarily dispositive in all cases, we find the cases cited by the defendant to be so different from this case that they are completely inapposite.

¶ 67 In *Fluker*, for example, the prosecutor rhetorically asked jurors, " 'Did anybody come on that stand and say that man didn't do it?' " *Fluker*, 318 Ill. App. 3d at 203. The trial judge overruled the defendant's objection, and the prosecutor then "repeated the comment in various forms." *Id*. The appellate court found that these repeated comments improperly shifted the burden of proof to the defense because they gave jurors "the impression that [the] defendant should have brought in a witness to say he was not the shooter." *Id*. That case also involved other "pervasive misconduct" during the prosecutor's rebuttal argument. *Id*. at 202.

¶ 68 In *Yonker*, the prosecutor explicitly told jurors that the sole issue in the case was the defendant's credibility as a witness. *Yonker*, 256 Ill. App. 3d at 797. The prosecutor then argued, " 'The only way that you can return a verdict of anything other than guilty *** is if you believe him. *** If you don't believe that story[,] then he's guilty of first degree murder.' " *Id*. at 797-98. The appeals court found this argument to be "a flagrant misstatement of the law because it shifted the burden of proof to the defendant." *Id*. at 800.

¶ 69 The difference between the closing arguments at issue in those cases and the cross-examination involved here could not be more stark. As the Illinois Supreme Court has explained, "There is a great deal of difference between an allegation by the prosecution that [the] defendant did not prove himself innocent and statements questioning the relevance or credibility of a defendant's case." *Phillips*, 127 Ill. 2d at 527.

¶ 70 We find the supreme court's decision in *People v. Turner* to be far more on point. There, the prosecutor asked the defendant whether all of the witnesses who testified against him were lying. He also asked the defendant about the testimony of one particular witness, who was not present when the crimes were committed. Specifically, the prosecutor asked the defendant where this witness got his information if the defendant did not discuss the murder with the witness. *Turner*, 128 Ill. 2d at 557. On appeal, the defendant did not argue that these questions shifted the burden of proof, but he did argue that it was prejudicial to allow the prosecutor to ask him to comment on the credibility of other witnesses. *Id.* at 555. The supreme court rejected this argument, finding that these questions were merely a proper attempt "to have him explain his story in light of the overwhelmingly conflicting evidence." *Id.* at 558. The questioning involved in *Turner* was similar to the questioning at issue here. We, too, conclude that the prosecutor's questions were nothing more than a proper attempt to undermine the defendant's credibility. Because the questions did not shift the burden of proof to the defendant, we conclude that the court did not abuse its discretion in allowing the prosecutor to ask them.

¶ 71 For the reasons stated, we affirm the defendant's convictions.

¶ 72 Affirmed.