

trial court erred by denying his motion for sanctions with regard to the State's failure to disclose the existence of discoverable material, (2) the State failed to prove beyond a reasonable doubt that the defendant knew the victim was over the age of 60, (3) the court erred by preventing him from reading from an excerpt of a book during his opening statement, and (4) the court abused its discretion by sentencing him to 100 days in the county jail and 48 months' probation. For the reasons that follow, we affirm.

¶ 3 The following evidence was adduced at the defendant's jury trial. We will set forth only those facts pertinent to our disposition of the specific issues on appeal. On June 29, 2009, Nelvin Wilson was employed by Millers Ag Service to haul chemicals to farmers so the farmers could spray their fields. On his last stop of the day, he parked his truck on a county road because the farmer was already spraying the field and Wilson had to wait to refill the sprayer. He was unable to park completely off the road because the road was too narrow; however, he testified that over half of the road was clear. As he was waiting on the farmer, he noticed a tractor approaching from behind. He testified that there was not enough room for the tractor to pass him on the road because it was pulling a planter. Wilson intended to back into a dirt road behind him to allow the tractor to pass, but the tractor quickly approached and he did not have enough time to back up.

¶ 4 Thereafter, he noticed the defendant running toward him, and he heard the defendant angrily yelling for him to get out of the road. Wilson testified that he pointed at the dirt road behind him and asked if it would be alright if he backed the truck up instead of traveling farther down the road away from the farmer's field. The defendant again told him to get out of the road. Wilson then put the truck in gear and slowly started driving away from the defendant. As the truck moved forward, Wilson asked the defendant for his name. In response, the defendant jumped on the running board of Wilson's truck, said he was Ivan Black, and smacked Wilson in the nose.

¶ 5 The defendant's son, Walter Black, testified that he was present at the scene when the altercation occurred. He did not see his father reach into Wilson's truck and punch him in the nose. Instead, he observed Wilson strike the defendant with the door of the truck and then drive away. The defendant, who proceeded *pro se* during the trial, testified consistently with his son's version of events.

¶ 6 After hearing all of the evidence, the jury found the defendant guilty of (1) one count of vehicular invasion predicated on an aggravated battery committed on a person over the age of 60, (2) one count of vehicular invasion predicated on an aggravated battery committed on a public way, (3) one count of aggravated battery committed against a person over the age of 60, and (4) one count of aggravated battery committed on a public way. The trial court sentenced him to 100 days in the county jail and 48 months' probation.

¶ 7 The defendant first argues that the trial court erred by not awarding him discovery sanctions because the State failed to disclose the existence of discoverable material and thereby failed to comply with Illinois Supreme Court Rule 412 (eff. Mar. 1, 2001). Specifically, the defendant notes that a report generated by the arresting officer referenced a videotape of the arrest and indicated the tape had been mailed to the Fayette County State's Attorney's office. The defendant maintains that he never received a copy of this videotape in discovery and, consequently, he is entitled to discovery sanctions.

¶ 8 Prior to jury selection on August 2, 2010, the defendant presented to the trial court a *pro se* motion to dismiss the charges against him and to sanction the State for its failure to turn over the videotape of his arrest (titled by the defendant as a motion to quash). He pointed out that the arrest report referenced videotape number 12-07-260 and indicated that copies of this videotape were sent to the State's Attorney's office. The defendant argued that the arresting officer had made statements to him during the arrest that may have been relevant to his case, and that these statements may have been captured on the video. The

State informed the court that it was unaware that a videotape of the arrest existed, but it argued that a video of the arrest would be insignificant because the defendant was arrested hours after the offense occurred, no issue regarding the arrest was raised by the defendant, and the victim was not present during the arrest. The court reserved its ruling on the *pro se* motion to give the State an opportunity to locate the tape. The court informed the defendant that if the tape was found, he would be given appropriate time to review it and determine whether he required additional time to prepare his defense.

¶ 9 Thereafter, the State reported that the tape was not located in its files, and it contacted the Illinois State Police to determine whether a tape existed. The Illinois State Police reported that it was unable to locate the tape, and a videotape of the defendant's arrest was never entered into the police's tape log, which indicated that the tape was never received from the arresting officer. Therefore, the Illinois State Police was unable to determine the tape's location or whether it actually existed.

¶ 10 The State argued that the existence of an arrest tape was not important to the proceedings because the only individuals present during the arrest were the arresting officer and the defendant, and the State had no intention of offering any evidence relating to the arrest or any statements made by the defendant at the time of the arrest. The State also pointed out that the defendant never explained how the videotape was important to his case other than making "a very vague reference to things [that] were said" during the arrest.

¶ 11 The defendant argued that the videotape was crucial to his defense because he believed that the police officers said "things *** relevant to [his] case." He also believed that he made statements relevant to his case. He argued that the tape would reveal evidence concerning his innocence and the credibility of the arresting officer. The court asked the defendant whether he could instead elicit the exculpatory information from the arresting officer on cross-examination or on direct examination. The defendant responded that the

video may contain things that he did not recall and that he could not clearly hear the statements made by the arresting officer when he was sitting in the back of the police cruiser. He reiterated that prejudicial statements were made by the police officers, and he believed that he was being framed by the officers. When the court asked who made the prejudicial statements, he responded that he was unsure because a lot of police officers were present during the arrest.

¶ 12 After hearing the arguments on the defendant's *pro se* motion, the trial court stated as follows:

"Based on the information, the proffers that I have been provided with by the State's Attorney's Office regarding this video, I am going to deny the defendant's motion to quash the charges that have been brought against him, which is the specific relief that he's asking for, and sanctions against the Fayette County State's Attorney.

Do you want to be heard further? We've made a record of this. The reasons for *** this ruling, first of all, by the proffer made by the State, if that video was in existence then they don't have it now. Earlier today I was inclined to wait and see if *** there was a video, let's look at the video, but by proffer from *** the state police[,] *** the State is saying they don't have the video so there's no video to view.

If there is information material to prove your innocence, Jourdan, the arresting officer, is going to be a witness in the case, subject to your cross-examination, subject to being called in your case in chief.

The third thing we've got on the reason for my ruling is concerning the vagueness of your response on just what is this information material that would prove your innocence, so for those reasons I'm going to deny your motion to quash."

¶ 13 The trial court's determination as to the appropriate sanction for a discovery violation will not be disturbed on appeal unless the court abused its discretion. *People v. Hood*, 213

Ill. 2d 244, 256 (2004). "Although the judgment of the trial court is given great weight, a reviewing court will find an abuse of discretion when a defendant is prejudiced by the discovery violation and the trial court fails to eliminate the prejudice." *People v. Hendricks*, 325 Ill. App. 3d 1097, 1102 (2001).

¶ 14 Pursuant to Illinois Supreme Court Rule 412(c) (eff. Mar. 1, 2001), the State is required to disclose to defense counsel any material or information within its possession or control tending to negate the defendant's guilt as to the charged offense or tending to reduce his punishment for a conviction under the charged offense. "The duty of the State to disclose under Rule 412 is a continuing one, requiring prompt notification to the defendant of the discovery of any additional material or information, up to and during trial." *Hendricks*, 325 Ill. App. 3d at 1103. Although compliance with these discovery rules is mandatory, the State's failure to comply does not require reversal absent a showing of prejudice. *Id.*

¶ 15 Here, the defendant argues that the State committed a discovery violation when it failed to disclose the existence of the videotape of his arrest and failed to provide him with a copy of the tape. In the arresting officer's report, which is included in the record, entry number 16c labeled "Video Tape Number" contains the following entry: 12-07-260, and entry 16d labeled "Copies to" contains the following entry: "Fayette County States Attorney [*sic*]."

¶ 16 Therefore, the record indicates that at some point a videotape of the defendant's arrest may have existed. A letter from the Illinois State Police revealed that the tape was never located and was never entered in the police tape log, which indicated that the tape was never received from the arresting officer. Because the defendant did not present any evidence concerning the procedures followed by the Illinois State Police when arrests are videotaped, we can only speculate as to what the entries in the boxes contained in the police report indicate. However, despite some evidence in the record that the videotape existed, nothing

in the record indicates that the State was aware of the tape's existence. When the defendant informed the trial court prior to trial that the State failed to provide him with a copy of the tape, the State responded that it was unaware that an arrest tape was in existence, and it made an attempt to locate the missing tape. It was later discovered that this tape was not included in the state police's tape log. Therefore, we conclude that the State did not commit a discovery violation by failing to give the defendant a copy of a videotape that was not in its possession and control, a videotape that was either missing or never in existence.

¶ 17 Assuming *arguendo* that a discovery violation did occur, we conclude that the defendant suffered no prejudice as a result. When the trial court realized that the defendant would be unable to view the missing tape, it inquired whether the defendant would be able to present the alleged exculpatory information through the arresting officer's testimony. The defendant's response was vague, which suggested that he did not know what exculpatory evidence may be contained on the videotape. The defendant indicated that some of the arresting officers (he did not know their names) made prejudicial statements, and these statements would reveal that he was being framed. However, he never revealed the substance of these statements. The court specifically told the defendant that he could cross-examine Jourdan, the arresting officer, on any materially relevant evidence to prove his innocence. However, the defendant never asked Jourdan about the statements that he claimed were captured on the videotape. Accordingly, the defendant suffered no prejudice as a result of not having the videotape. Because the defendant cannot prove that he suffered any prejudice, the trial court did not abuse its discretion in denying his motion for sanctions.

¶ 18 The defendant next argues that the State failed to prove that he knew the victim was age 60 or older when he committed the battery. The defendant was convicted of the following: (1) one count of vehicular invasion based on an aggravated battery on a person over the age of 60, (2) one count of vehicular invasion based on an aggravated battery

committed on a public way, (3) one count of aggravated battery committed against a person over the age of 60, and (4) one count of aggravated battery committed on a public way. During the sentencing hearing, the trial court announced it would sentence the defendant on count II of the amended information (vehicular invasion based on an aggravated battery committed on a public way). Because the record reveals that the trial court did not sentence him on count I (vehicular invasion based on an aggravated battery committed against a person over the age of 60) or count III (aggravated battery committed against a person over the age of 60), an appeal on these convictions cannot be entertained. See *People v. Childress*, 321 Ill. App. 3d 13, 26 (2001) ("There is no final judgment in a criminal case until the imposition of a sentence, and, in the absence of a final judgment, an appeal cannot be entertained.").

¶ 19 The defendant also argues that the trial court abused its discretion by preventing him from reading an excerpt from a book to the jury during his opening statement. The court requested that the defendant, who was acting *pro se*, give his opening statement outside the presence of the jury to save time by resolving any objections from the State. The defendant complied without objection. He informed the court that he intended to read the following excerpt from a book titled "Too Politically Sensitive" written by Michale Callahan, a lieutenant investigator commander for the Illinois State Police:

"An investigator's job is to gather leads, find facts and corroborate those facts and conduct an unbiased, truthful and objective investigation. It's a search for the truth no matter what or where the answer leads you. During the course of our investigation, information will come forward that turns up various leads and witnesses. It is an investigator's job to follow-up on those leads and develop additional leads from the information. It is an investigator's job to seek out credible witnesses, ascertain the credibility of those witnesses, and to corroborate the

information provided by those witnesses to determine if there is sufficient evidence for charges.' "

The defendant sought to use this quote to support his arguments that "there was a bias or lack of investigation by the police" and that the State's Attorney was biased in bringing the charges against him. He indicated that his follow-up comment to the quote would be that "[b]y altering the truth it can make an innocent man look guilty before the eyes of a jury."

¶ 20 The defendant also informed the court that he intended to state the following concerning the investigation and the bias of the State's Attorney and the arresting officer:

"The State's Attorney, Stephen Friedel, has a grudge for me and my family. The State's Attorney has made a statement to my son, Walter Black, and I that if anything happened to the Blacks, we would be arrested, *** right or wrong. I was arrested without a warrant for my arrest and taken to jail while being abused by State Trooper Jourdan.

As a good citizen, I've spent a lot of time preserving my rights under law and to protect against false prosecution. In Fayette County, I am penalized for knowing my rights and standing up for my rights.

I actually campaigned against Stephen Friedel. I contributed time, money and campaign signs for Dan Goggin for State's Attorney. I worked campaigning, which has created a motive for the State's Attorney's vendetta against me.

The evidence will show I was acting in a legal manner, doing business with farming close to my home, when I encountered Nelvin Wilson backing the truck on the road with a tank on the truck. When I asked him to move the truck, he became angry and hit me with the door of the truck. The jury should look at the dangerous situation Nelvin Wilson put me and my son in. Ask yourself, was Nelvin Wilson violating the law and why wasn't he charged with breaking the law? The evidence

will show I acted reasonably and lawfully and Mr. Wilson was the one breaking several laws and lying to make himself appear to be the victim.

I want you, the jury, to look at the shoddy and improper one-sided investigation by the police. The evidence will show that I am innocent of all the charges and the government had a grudge against me. The government, using its powers, by not doing [*sic*] a fair and proper investigation before arresting me.

The jury should ask why there were four counts instead of one count for one alleged incident. If it wasn't for overzealous and bias prosecution by the government, I wouldn't be here today.

I want the jury to watch the judge try to limit—who tries to limit my evidence. Mr. Chancey will object and try to block out the truth from coming out what really happened that day.

I am not an attorney and I do not want to be an attorney. Please bear with me since I am representing myself. This is the only way I can get justice. I am doing the best to defend myself, so be aware of the tricks and lies the government may use to find me guilty, and look for the truth of the incident."

¶ 21 In response, the trial court concluded (after hearing arguments on the State's objections) that the defendant was not allowed to read the excerpt from the book to the jury. The court stated as follows regarding its determination with regard to the book excerpt and the statements concerning the bias of the State's Attorney and the arresting officer:

"[T]he purpose of the opening statement is to indicate to the jury what this case is about, what you think the facts will be in the case. *** The inappropriate parts [of the opening statement] are your references to the bias of the prosecutor, the reference to Steve Friedel and his election, the references to the Court and that [the jury] should watch how the Court limits the evidence that goes in.

Now we'll see what evidence comes in and what evidence is presented to the jury. There may be parts of this that I would allow in closing argument, but I'm not going to allow it in opening statement and I'm not going to allow you to read the quote from the book in opening statement. Again, concentrate—the purpose of the opening statement is what are the facts that are going to come before the jury. That is with the caveat of if you attempt to present evidence of bias of the prosecutor in bringing this charge, I'm not going to allow that. I'm not going to allow that in this case."

¶ 22 "The purpose of an opening statement is to apprise the jury of what each party expects the evidence to prove." *People v. Kliner*, 185 Ill. 2d 81, 127 (1998). During opening statement, counsel may discuss the evidence and matters that may reasonably be inferred from the evidence. *People v. Arroyo*, 339 Ill. App. 3d 137, 149 (2003). "Counsel may summarily outline the expected evidence and reasonable inferences from the evidence, but no statement may be made in opening that counsel does not intend to prove or cannot prove." *Id.* The trial court has great discretion when defining the allowable scope of the opening statements. *People v. Abrams*, 260 Ill. App. 3d 566, 581 (1994). In order to show the court abused this discretion, a defendant must establish that he was somehow harmed by the court's actions against him. *People v. Lee*, 342 Ill. App. 3d 37, 50 (2003). "To constitute reversible error, an improper interference with an opening statement must have been a material factor in the defendant's conviction." *Id.*

¶ 23 In this case, the defendant argues that the trial court erred by preventing him from reading the above-quoted book excerpt during opening statements and this prejudiced him because he was unable to show that the arresting officer and the State's Attorney were biased against him. Specifically, the defendant argues that he was prejudiced in the following ways: (1) he was unable to use the excerpt as support for his inference that the disappearance of the arrest video was intentional because it was not favorable to the State, (2) he was prevented

from eliciting testimony from the arresting officer that the State's Attorney was prejudiced against him, and (3) he was prevented from cross-examining the arresting officer concerning bias in the investigation.

¶ 24 We find that the defendant suffered no prejudice as a result of the trial court's ruling. First, the defendant failed to identify any specific statement made by the arresting officer that indicated the officer or the State's Attorney was prejudiced against him. He argued that the arresting officers made prejudicial statements which revealed that he was being framed, but he failed to identify the substance of these statements. When asked whether he could elicit the exculpatory statements from the officer on cross-examination, he responded that the video may contain things that he did not remember and that he could not clearly hear the officer's statements from his seat in the back of the police vehicle.

¶ 25 Additionally, he was not prevented from arguing that the investigation was biased. In fact, he cross-examined the arresting officer about statements made in the police report, his knowledge of the road where the incident occurred, how he obtained the information he gathered during the investigation, whether he knew the parties involved in the incident, and whether he spoke to any of the witnesses to the incident. Further, the record reveals that the defendant was allowed to read the excerpt from the book during his closing arguments (over the State's objection), and he used that quote as support for his argument that the arresting officer was biased in his investigation. Specifically, the defendant stated as follows regarding the officer's investigation in the case:

"There was a very great lack of investigation by a state policeman. If there was an incident, wouldn't you want the state policeman to do a thorough investigation? Did he talk to any of the witnesses? No. He just decided that I was guilty and he went out and arrested me."

Therefore, we conclude that the defendant was not prejudiced by the trial court preventing

him from reading an excerpt from the book titled "Too Politically Sensitive" during opening statements.

¶ 26 Last, the defendant argues that his sentence was excessive. Specifically, the defendant argues that the trial court abused its discretion by sentencing him to 100 days in jail and 48 months' probation because (1) he had a limited criminal history, (2) his physical health had deteriorated, and (3) the victim's harm consisted of a bloody nose.

¶ 27 It is well established that the trial court is vested with considerable discretion in imposing a sentence, and the court's sentencing decision is entitled to great deference. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). The court is given great deference because it generally is in a better position to determine the appropriate sentence. *Id.* "The trial judge has the opportunity to weigh such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age." *Id.* "Consequently, the reviewing court must not substitute its judgment for that of the trial court merely because it would have weighed these factors differently." *Id.* The reviewing court will not reverse the trial court's sentencing decision absent an abuse of discretion. *People v. Goyer*, 265 Ill. App. 3d 160, 169 (1994). A sentence within the statutory limits will not be disturbed on appeal unless it is manifestly disproportionate to the nature of the offense. *Id.*

¶ 28 In this case, a four-day sentencing hearing occurred where the State presented, as evidence in aggravation, testimony which indicated that the defendant was intimidating, hard to get along with, and threatening. The defendant presented, as evidence in mitigation, testimony from neighbors and friends indicating that he was reasonable to deal with in business, helpful and generous to his neighbors and friends, and a good family man. The defendant also presented evidence concerning his poor health.

¶ 29 In determining the defendant's sentence, the trial court stated as follows regarding how it weighed the factors in aggravation and mitigation:

"Let me first of all comment on the evidence at the trial. Like the jury, I did find the testimony of Nelvin Wilson credible, and I found the testimony of the defendant and Walter Black on what occurred as incredible. And that testimony of [the defendant] which I did not find to be credible is considered, as was argued by counsel, as an aggravating fact. As far as his history of criminality, I find that he had one back in 1977, he has a conviction for resisting a peace officer and a battery, and he has two speeding tickets, one in 2004 and one in 2000, and disobeying a stop sign in 1988. And I am finding that his history of criminality serves as a mitigating factor. And I have heard evidence of other offenses. And I—although the State has argued that it—the evidence of the other offenses goes to criminal offenses for which he was not convicted, I really saw that as evidence regarding his character. And a case was cited early on that the court can hear evidence involving moral character, habits, social environment, abnormal tendencies, age, natural inclination or aversion to commit crime, and stimuli in motivating his conduct, in addition to his family life, occupation, and criminal record. And we have heard a great deal of evidence regarding that.

One other comment I was going to make on the facts of the case, when I heard the facts of the case, what struck me is a term we hear in our society these days of 'road rage,' but it was road rage out in the country, in a farming community ***. And it struck me as an act of what we would call road rage today, and which certainly we want to deter those type of actions by individuals from acting out in that way.

You know, from the State's evidence, I started to draw some conclusions from the evidence that the State was presenting from its various witnesses. And some of the conclusions I was drawing, that [the defendant] is intimidating, he is threatening, he is hard to get along with, he is strong-willed, he is abrasive, he is belligerent, he

is disrespectful. In a sentencing hearing not too long ago, I used the term 'bully,' that he acts out like a bully. Now, you know there's different sides to people, and *** in mitigation *** I heard some different facts, and I wrote down the words he was 'helpful and concerned,' and he was 'generous with those who do not have much,' and he is 'caring,' and he is 'responsive.' And he is an individual that 'pays his bills promptly.' And in that respect, a good citizen. ***

In saying all of that, and let me say this too, the mitigating factor, *** it was a substantial blow to the face that Mr. Wilson took, and the picture with the bloody nose bore that out. But as far as causing serious physical harm, I find that it did not. A mitigating factor is his health concerns which might come into play more so on a sentence to the Department of Corrections."

Thereafter, the court sentenced the defendant to 100 days in jail and 48 months' probation on the conviction for vehicular invasion based on an aggravated battery committed on a public way.

¶ 30 The statutory penalty range for vehicular invasion predicated on an aggravated battery committed on a public way, a Class 1 felony, is from 4 to 15 years' imprisonment. 730 ILCS 5/5-4.5-30(a) (West 2010). The maximum term of probation for a Class 1 felony is four years. 730 ILCS 5/5-4.5-30(d) (West 2010). The court was required to impose a sentence of probation unless it found that a sentence of imprisonment was necessary to protect the public or that probation or conditional discharge would deprecate the seriousness of the offense and would be inconsistent with the ends of justice. 730 ILCS 5/5-6-1(a) (West 2010).

¶ 31 Here, the defendant's sentence was well within that sentencing range. During the sentencing proceedings, the trial court considered the mitigating factors set forth by the defendant in this appeal. In particular, the court noted that it considered the defendant's

health, his limited criminal history, the mitigating evidence presented that indicated he was generous and helpful, and the harm to the victim. The defendant is asking us to reconsider these mitigating factors and accord more weight to them. As explained above, the trial court is given great deference to fashion an appropriate sentence, and we will not disturb this decision absent an abuse of discretion. We hold that the sentence imposed by the trial court does not constitute an abuse of discretion.

¶ 32 The defendant notes that he subsequently suffered a heart attack and a stroke while he was incarcerated in the county jail. As a result, the trial court granted him a medical furlough on January 28, 2011, and he was placed on home confinement on March 24, 2011, to serve the remainder of his 100-day sentence. The defendant argues that his sentence was excessive in light of his subsequent medical history. However, he has already gained appropriate relief based on the medical problems he suffered after his sentence was imposed. Presently, his 100-day sentence is complete, and he is serving the term of probation. As explained above, we find that the trial court did not abuse its discretion by imposing a sentence of 48 months' probation.

¶ 33 For the foregoing reasons, the judgment of the circuit court of Fayette County is hereby affirmed.

¶ 34 Affirmed.