2016 IL App (2d) 150714-U
No. 2-15-0714
Order filed October 12, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RAUL GONZALEZ, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 13-CF-1256 Honorable Clint T. Hull, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice Schostok and Justice McLaren concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court abused its discretion in finding that manifest necessity required granting the State a mistrial. Accordingly, defendant's motion to dismiss on double jeopardy grounds should have been granted. Reversed.

¶ 2 In September 2013, defendant was charged with committing 9 counts of criminal sexual assault (720 ILCS 5/11-1.20(a)(4) (West 2012)) and 15 counts aggravated criminal sexual abuse (720 ILCS 5/11-1.60(d) (West 2012)) against G.B., who was older than 13 but younger than 17 years of age at the time of the alleged offenses. The indictment alleged that the acts were

committed "on or about" or "on or between" August 2, 2012, and July 12, 2013 (*i.e.*, an almost 11-month period).

¶ 3 Trial commenced on May 4, 2015, with jury selection taking the entire first day. The next day, the State objected to a portion of defense counsel's opening statement, alleging that he mentioned information that had not previously been disclosed. The court sustained the objection, defense counsel's opening statement concluded without further objection, and the State presented its first witness. Thereafter, the State moved for a mistrial, arguing that the information not previously disclosed to it was so prejudicial that a mistrial was of manifest necessity. The court heard argument from the parties and, over defendant's objection, granted the motion for mistrial.

¶ 4 On June 5, 2015, defendant, arguing that the trial court erred in granting the State's motion for a mistrial, moved to dismiss the indictment on double-jeopardy grounds. After briefing and oral argument, the court denied the motion. Defendant appeals. For the following reasons, we reverse.

¶ 5 I. BACKGROUND

¶ 6 The following information, summarizing pre-trial motions and information produced in discovery, provides context to the State's motion for mistrial and the court's ruling thereon and it sheds light on the alleged materiality and prejudice of the non-disclosed information that formed the basis of the State's motion.

¶ 7 A. Pre-Trial Discovery and Motions

¶ 8 On January 31, 2014, the State moved *in limine* to admit other-crimes evidence. Within the motion, the State recounted that, in an interview with investigators on July 12, 2013, G.B. disclosed that defendant is her best friend's, Lidia Gonzalez's, father and that she had intercourse

with him multiple times, including in his bedroom, garage, attic, basement, and in his Jeep.[1] (The court ultimately granted the State's motion).

¶ 9 In June 2014, defendant filed a bill of particulars, seeking dates, times, locations, and a description of each alleged act that formed the basis of the charges. In argument, defendant asserted that, without specifics from the State regarding the acts that allegedly occurred over an 11-month period, he could not know if he had any alibi defenses or witnesses who may have been present at the time of the alleged incidents. The State responded that child sex offense cases are unique and that G.B. (at the time age 15 and in the 10th grade) could offer only a limited time period for the alleged offenses. The State represented that G.B. had been interviewed for 30 minutes by an investigator and was asked when the conduct first started, when it last happened, and what grade she was in at the time. More specificity was unreasonable, argued the State, because "she is a child." Accordingly, the State asserted that the charging documents, along with tendered discovery materials and answers to defendant's requests with the best information available to the State, were sufficient to allow defendant to prepare a proper defense and the bill of particulars should be denied. The court found that the State had acted in good faith and disclosed the information it had and, accordingly, denied defendant's motion for a bill of particulars.

¶ 10 On September 30, 2014, however, the State moved the court to compel defendant to comply with discovery in accord with Illinois Supreme Court Rule 413(d) and (e), which states:

[1] Later, in a separate motion, the State further alleged that G.B. told an investigator that defendant had her touch his private parts approximately five times, in his living room, Lidia's bedroom, and in one of defendant's cars. The State apparently withdrew the motion.

"(d) Defenses. Subject to constitutional limitations and within a reasonable time after the filing of a written motion by the State, defense counsel shall inform the State of any defenses which he intends to make at a hearing or trial and shall furnish the State with the following material and information within his possession or control:

(i) The names and last known addresses of persons he intends to call as witnesses, together with their *relevant written or recorded statements, including memoranda reporting or summarizing their oral statements,* any record of prior criminal convictions known to him; and

(ii) any books, papers, documents, photographs, or tangible objects he intends to use as evidence or for impeachment at a hearing or trial;

(iii) and *if the defendant intends to prove an alibi, specific information as to the place where he maintains he was at the time of the alleged offense*.

(e) Additional disclosure. Upon a showing of materiality, and if the request is reasonable, *the court in its discretion may require disclosure to the State of relevant material and information not covered by this rule*." (Emphasis added.) Ill. Sup. Ct. R. 413(d), (e) (eff. July 1, 1982).[2]

¶ 11 The State argued that the defense had not provided it with any additional memoranda reporting or summarizing oral statements, or any notes, memoranda, or reports from

[2] The committee comments note that "Paragraph (e) allows the court to order additional discovery not covered by the remainder of the rule but only upon a showing of materiality and reasonableness. The provision is parallel to Rule 412(h)." Ill. S. Ct. R. 413, Committee Comments (adopted Oct. 1, 1971).

investigators employed by the defense who may have interviewed other witnesses. "The State requires this information to adequately prepare for trial and for hearing. This information is material and relevant to avoid the State from being surprised by any inconsistent statements of its witnesses and it is necessary for the State to prepare for impeachment and rehabilitation of its witnesses." In particular, the State was concerned about possible surprise if defendant raised an alibi defense. It argued that the court should either order defendant to provide certain discovery or bar admission of an alibi defense at trial, as it had not received from defendant any specific information as to where he maintained he was at the time of the alleged offenses.

¶ 12 Before argument on the motion was heard, on October 2, 2014, defendant filed an amended witness list, which included defendant's wife, Nancy Gonzalez, who would testify that she knew G.B. as Lidia's friend, she was aware of when G.B. visited at all times, and that she communicated with G.B. on a regular basis. In addition, the list included Lidia, who would testify she lived with her mother and father, G.B. was her friend, and she was present at the home at all times when G.B. visited. Also, the list included Jacob Gonzalez, defendant's son, and Jacob's friend, Jorge Favela, who would testify that they knew G.B. and were present in the home at all times when G.B visited between February 9, 2013, and June 29, 2013 (Jacob), and almost every day between that period (Jorge) when G.B. was present. Further, defendant stated that no written or recorded statements or any other documents pertaining to those witnesses existed.

¶ 13 On October 8, 2014, the court commenced hearing arguments on the pending motions. Defendant reiterated that, without more specific details from the State about when the acts allegedly occurred, it was difficult for him to know whether he had an alibi for any particular time so as to formally plead an alibi defense. Defendant noted that he had provided the State

with the names of all individuals he might call in his case, most of whom were also on the State's witness list.

¶ 14 The court noted that trial was scheduled to commence on October 20, 2014, and if defendant planned to assert an alibi defense, some discovery must comport with that. The court noted that it was not expecting defendant to provide specific dates and times, but, rather, if he planned to argue that he could not have committed the offenses because he was somewhere else, there would need to be discovery produced in that regard. Further, the court noted:

> "[W]ith regards to the Supreme Court Rules, both parties are required to give the name and last known address of the persons they intend to call as witnesses, together with their relevant written or recorded statements, including [a] memorandum that summarizes or reports oral statements, any records of any prior convictions.
>
> It doesn't matter whose witness it is, the same thing applies to the State that applies to the Defense. The fact that there's nothing in writing doesn't preclude, again, either party from having to summarize conversations they've had with witnesses, to tender those over to the other side. And regardless of whose witness it may be, if a conversation takes place which supplements or adds additional details, that party who had that conversation, I believe, pursuant to Supreme Court Rules, has an obligation to disclose that.
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> ***
>
> If there are any conversations that you have prior to [witnesses] appearing in court, those would have to be summarized and sent over."

¶ 15 The court reiterated that, if, at the time of trial, a witness were to testify to something that had not been disclosed, the party arguing that there existed a discovery violation could bring it to

the court's attention and "the most natural thing would be to strike the testimony and have the jury disregard. Another thing would be to sanction the appropriate party, which is the last thing I want to do. Again, the whole idea of the trial is the truth-seeking part."

¶ 16 The hearing continued on October 10, 2014. The court again asked defendant whether he was pleading an alibi defense. Defendant explained that, if G.B. were to state that a certain occurrence happened on a particular date and time, he might be able to provide a specific alibi; as it stood, however, the court had denied the bill of particulars and all defendant knew was that he was accused of acts over an almost 11-month period. He could not, therefore, be anything more than general; however, if G.B. testified to something specific happening on a certain date, he would perhaps then be able to rebut it. Defendant confirmed, however, that he had already disclosed any witnesses who would be called, should he need to establish where he was on a given date or time and, moreover, that he would not be claiming that he was out of the state or country during the alleged period.

¶ 17 When asked for a response, the State asserted: "Judge, it sounds like they are intending on asserting the defense of alibi, but they haven't pled it, and without the proper pleading, the Defendant cannot get up there and testify that he was somewhere else. He cannot have other witnesses get up there and say that they can vouch for his whereabouts on certain dates and times." The court acknowledged defendant's position, noting for the State that, unlike a murder or another crime with a clear date of occurrence that might, in turn, lend itself to a clear alibi defense, the State had provided only a date range, making complicated its position that it could not or would not try to extract more specific dates from G.B., but yet expecting defendant to specify an alibi or bar an alibi altogether. The State replied that, if trial commenced without defendant properly pleading the alibi defense and without complying with Rule 413(d), "again,

this brings us back to this element of surprise, and that completely defeats the purpose of having a trial in this case and that one side would be allowed to catch the other side off guard."

¶ 18 The court ultimately denied the State's motion to require defendant to plead the alibi defense (other than for the other-crimes dates for which a specific date was known). As defendant had indicated that he planned to impeach G.B. and to call witnesses concerning her general reputation for untruthfulness and her character, the court ordered both sides to disclose any character witnesses regarding G.B. Defendant stated: "the majority of the people on our witness list that are family and friends will be able to testify to that." The State had also objected that it wanted more specific information from defendant concerning certain witnesses and what they might testify to (*e.g.*, defendant's work supervisor would testify to defendant's work schedule, and the State requested specific information about the work schedule).

¶ 19 Defense counsel noted his concern that he was being asked to provide the defense theory and strategy: "[it] seems like what is happening is the defense is pretty much having to tell the State what our defense is." In contrast, defendant, argued, it appeared that the State was able to simply say it did not know what its witnesses would say. But, "they are their witnesses. They have the opportunity to interview their own witnesses. As you said before, we're all lawyers, we all do this, they assume the questions the defense is going to ask and the way the defense is going to go, so why don't they make those inquiries based on their assumptions?" The court reiterated that the attorneys are held to the discovery rules or "the trial gets messy" and, although it does not always happen, "it would be great if we go into a trial knowing everything that everybody is going to say and how they are going to say it." The court did not want a situation where one side had to object because the other side did not disclose certain evidence and "once information is disclosed and it's out there, I'm going to order that information be disclosed so that we avoid

having to knock the jury out." Further, if information is contained in a document produced in discovery, then "it's been disclosed, it's done, it's over[;]" however, the court stated that, if, prior to trial, a witness was interviewed and provided additional information, the additional information must be disclosed to the other side. Still, "if all of a sudden the victim on the witness stand says, well, I do remember now and gives a specific date and time, I'm not going to bar you from presenting evidence at that time if you have information about that specific date and time, if the first time you hear about it is when the witness testifies. So we're just going to have to play that out."

¶ 20 The State moved the court to reconsider its ruling and to bar admission of an alibi defense. On October 16, 2014, the court ordered that defendant comply with Rule 413 and, if the defense possessed information to establish defendant's whereabouts between August 1, 2012, to July 12, 2013, that information be provided to the State.

¶ 21 Also on October 16, 2014, defendant filed an amended witness list, in part adding that Nancy and Lidia would both provide character opinion testimony concerning G.B.'s reputation and veracity. Further, defendant disclosed that he planned to rely on the defenses of: (1) presumption of innocence and the State's inability to prove him guilty beyond a reasonable doubt; and (2) for the dates on or about February 8, 2013, and June 29, 2013 (presumably the other-crimes dates), an alibi defense. For his alibi defense, defendant stated that he might call Nancy as a witness.

¶ 22 Trial was scheduled to commence on October 20, 2014. On October 17, 2014, defendant moved to continue the trial because, on October 16, 2014, the State gave defendant a memo dated October 11, 2014, recounting a conversation it had with G.B. on October 10, 2014. In that conversation, information was disclosed about an alleged incident that may have occurred

between defendant and G.B. "at the movies," but it did not give a date, time, or exact location of the incident. Defendant told the court he spoke to defense witnesses the day after receiving the memo and learned that there were witnesses present at the movies with defendant and G.B. on more than one occasion who could testify that it did not happen the way G.B. suggested in the memo. Further, defendant wanted a continuance due to difficulty procuring work records, which were material to his defense. *Based on the second ground,* the court granted defendant a continuance. Thereafter, continuances were granted by agreement.

¶ 23 At this juncture, we summarize some impounded documents that were produced in discovery. Although they were produced to the court in the context of defendant's motion to dismiss the indictment on double-jeopardy grounds, they are relevant to considering what information the State knew when it moved for, and was granted, a mistrial. Indeed, all of the documents have the marking "SAO" and a number written on the bottom, suggesting (as defendant states) that they were produced by the State.

¶ 24 The documents include a 2013 investigative report, summarizing an interview with G.B.'s parents. It recounts that G.B. had been friends with Lidia for three years, that she frequently went to the Gonzalez home, had stayed the night there several times, and would go to the movies with the Gonzalez family.

¶ 25 A report summarizing an interview with defendant included his statement that G.B. was best friends with his daughter. G.B. loved his family and considered defendant a parent. He explained that G.B. wrote the family letters, expressing that she wanted to be adopted by them, and she told him and the family that she loved them. G.B. expressed her love and affection with calls, texts, and hand-written messages, telling defendant how much she loved being around him and his family.

¶ 26 Several letters appear in the record that were apparently written by G.B. to defendant, Nancy, and Lidia. One letter is labeled "Letter #1" and it contains one paragraph, stating to Nancy that G.B. loved and appreciated her.

¶ 27 Other letters are much longer and contain stronger sentiments expressing that G.B. loved Nancy, defendant, and Lidia, and wished that she was part of their family. G.B.'s letters noted that she enjoyed cleaning their house and loved helping them.

¶ 28 Multiple letters to defendant expressed admiration for him and his family. For example, one letter recounts, in part, that G.B. loved when they went to the movies and they all had a good time, and that she was glad defendant considered her a daughter because she considered him a father. Again, G.B. recounted that she tried to help the family by cleaning the house.

¶ 29 A September 2014 document reflects that G.B.'s father told the State that defendant and Nancy had asked if G.B. could come to their home for a variety of reasons, including to help with the housecleaning. G.B. told them that defendant and Nancy gave her money for helping them to clean their house.

¶ 30 An October 2014 document reflects that G.B. told the State that defendant and his family would go to the movies and they would sneak in without paying. G.B. said that everyone in the family would go into separate theaters and, on one occasion, she and the defendant were in a dark area of the theater before getting to the seats when defendant kissed her and she kissed him back.

¶ 31 Another document with a "SAO" notation reflects that it is from "Miguel" to "Nancy" and shows a drawing of a monster with "Monsters University 2013" written on it.

¶ 32 An April 2015 memo reflects that the State discussed with G.B. an incident she said happened in the living room of defendant's home. G.B. said she was sitting on the couch next to

Lidia, and defendant was on the other side of Lidia. Defendant's sons were also on the couch. G.B. said defendant switched seats with Lidia to sit by her while watching a movie. The lights were off, and G.B. had a blanket covering her and partially covering defendant. She said that she touched defendant on his private part over his clothes, then put her hand under his clothes and touched his private part on the skin. Then she took her hand away. She said that Nancy had gone to sleep early that night.

¶ 33 Finally, another April 2015 memo recounted a defense witness reporting she saw multiple text messages that G.B. sent to Nancy telling Nancy that she, G.B., loved her and thought of her as a mom and wanted to come over. According to the witness, G.B. frequently texted Nancy.

¶ 34 B. Trial and Mistrial

¶ 35 1. Trial

¶ 36 Trial commenced on May 4, 2015. Jury selection took the entire day, with the potential juror pool being exhausted mid-day and new potential jurors called in. Several jurors were excused due to personal experience with child sexual abuse. Others were removed for cause on defendant's motion or through the use of his peremptory challenges.

¶ 37 The next morning, the State noted that it had subpoenaed Nancy and Lidia Gonzalez, with the intent to call Lidia as a witness that same day, but neither were present in court. Defense counsel was surprised, as both were planning to testify, and he said he would telephone them.

¶ 38 The State commenced opening statements, noting that G.B. was Lidia's best friend and they did "everything" together. G.B. lived close by, and she was "always over" at Lidia's home, spent the night there, went to movies with the family, and got to know everyone in the family

well. The State argued that defendant took advantage of G.B.'s vulnerability. The State noted that the jury would not hear that G.B. suffered particular trauma or experienced a change in behavior; rather, she liked being with defendant and felt special and thought they were sharing a special secret. That secret was exposed when G.B.'s older sister, Blanca, found out about the situation and went with her parents and G.B. to the police.

¶ 39 Defense counsel's opening statement commenced, and he explained that G.B. and Lidia met in the seventh grade. They were not close friends right away, and Lidia thought G.B. was awkward, strange, and tried to be too close to her too quickly. In October of eighth grade, G.B.'s mother came to the Gonzalez home and asked Nancy if she could give G.B. rides to school. Nancy did not know G.B. or her mother, and G.B.'s mother explained that the girls went to school together. Nancy felt sorry for G.B., who appeared to be "little, strange, awkward," and agreed to drive her to school if G.B. came over to the house every morning so that she could just jump in the car when it was time to drive the other kids to school. At first, G.B. would show up in the morning, knock on the door, and they would let her in. She would sit on the couch until the family was ready to go.

¶ 40 At this point, the State objected and requested a sidebar. The assistant State's Attorney said that "this whole sequence of she would show up in the morning. She would sit on their couch and wait for everybody to get ready" had not been previously disclosed. The court asked defense counsel if he had disclosed the information, and counsel replied that it was the State's witness that it was planning to call that day. The court replied that it did not matter if it was the State's witness, the information needed to be disclosed. Counsel explained that he spoke with the family the previous night while preparing his opening statement. The court asked, "So was supplemental discovery done based upon the conversations last night to the State for this

morning?" When counsel answered in the negative, the court sustained the State's objection. The court instructed the jury that the objection was sustained, and it reminded the jury that opening statements are not evidence, "they are only an opportunity for the attorneys to acquaint you with what they believe the evidence should show."

¶ 41 Defense counsel continued and finished his closing argument without any further objections from the State. In part of his argument, counsel explained that G.B. started writing love letters to Lidia and Nancy, almost weekly, first about being Lidia's best friend, then wanting to be Lidia's sister and part of the Gonzalez family. Counsel stated that the letters continued, then changed, reflecting that G.B. wanted to be Nancy's only daughter and commenting that Lidia was not a good daughter. G.B. also wrote love letters to defendant about wanting to be on the same level as Nancy and be his daughter. "You are going to hear that it progressed. And at some point, in her mind, she wanted to be [defendant's] wife." Counsel told the jury that it would hear G.B. say that she had sex with defendant in a number of places and that the first time they had contact was at the movies:

> "At the movies with all the Gonzalez family, about eight people.
>
> She is going to say that the family broke off into two separate movies. The boys went to see an action movie. And the young ladies and the kids went to go see a cartoon.
>
> You are going to hear that [defendant] went to go see the action movie with the men and [G.B.] went to go see the cartoon with the kids and the women [who] were watching the kids.
>
> She is going to say that during this time at the movies [defendant] kissed her. But you are going to hear evidence there was never any opportunity with all these people around for [defendant] to kiss her."

¶ 42 After defense counsel concluded his opening statement, the State called G.B.'s sister, Blanca, as its first witness. Blanca testified consistent with her anticipated testimony.

¶ 43 Before calling its next witness, G.B., the State asked the court to confirm that there was no additional information that the defense had not provided. Defense counsel said he was preparing a summary of the conversation he had at 10 p.m. the night before to provide the State. The State explained that, depending on what was in that summary, it might wish to speak with G.B. before she testified. The court recessed for a short break, and defense counsel confirmed that Nancy and Lidia were on their way to the courthouse.

¶ 44 2. Motion for Mistrial

¶ 45 After the recess was taken, the court confirmed with the State that it had received a summary from defense counsel and asked the State whether it was ready to proceed. The State moved for a mistrial.

¶ 46 The State later highlighted the information on defendant's summary that it claimed was new and warranted a mistrial. For context of the arguments, we provide defendant's entire summary, italicizing the information the State alleged was new and warranted mistrial:

> "On May 4, 201[5], Attorney Richard Irvin and Attorney Brittany Pederson met with Nancy Gonzalez at the Gonzale[z] home to complete trail [*sic*] preparations. During the interview of Mrs. Gonzalez she detailed the period of time when she gave G.B. rides to school. *Mrs. Gonzalez stated that she met with G.B. and her mother in [ ] mid October. She stated that G.B. and her mother showed up at Nancy's home and G.B.'s mother requested that Nancy Gonzalez begin to drive G.B. to school. Nancy Gonzalez at that point had never met G.B. or her mother before, yet agreed to give G.B. a ride to school daily as long as G.B. walked down to Nancy's home each morning as G.B. lived*

down the block. Initially when G.B. would come to get a ride she would knock on the door and wait to be let in. She would sit on the couch and wait for everyone to ride to school. After a couple of weeks she learned the lock code on the door and began letting herself in the Gonzalez home. She copied the younger children entering the code. A few weeks after that she would start allowing herself in the home and freely roaming around the Gonzalez home. A few weeks after that she would show up even earlier in the morning, allow herself in and wake the family for the day. A few weeks after that she would get there early, wake the family and begin cleaning the Gonzalez home without request or permission. Right around that time she began writing letters to Nancy stating that she loved Nancy Gonzalez. The letters came almost weekly and progressed in seriousness of love. *Eventually G.B. would talk bad about Lidia Gonzalez to Nancy and constantly tell make [sic] likes up about Lidia. Not long after, G.B. would come into the home early in the morning and leave love letters for [defendant] on his nightstand while he slept. Nancy was in the bedroom getting ready for the day when G.B. would leave the letters for [defendant]. Nancy Gonzalez normally took the letters G.B. left for [defendant] and hid[ ] them.* After [defendant] and Nancy Gonzalez split in May of 2013, G.B. became even more attached to Nancy and wanted to be Nancy's best friend. The letters progresse[d] from Lidia's best friend, to Lidia's sister, to Nancy's daughter, to Nancy's best friend, to [defendant's] daughter, to [defendant's] best friend.

On May 4, 2014, *Lidia Gonzalez advised that the movies that they saw when G.B. was with them were World War Z and Monster's University. G.B. was only with them at the movies one time when the[y] snuck in and did not pay. Lidia further stated that she learned the movies were released in June of 2013.*

> On May 4, 2014, Lidia Gonzalez stated that G.B. only spent the night *2 times*. And that one time when they all watched TV together, *G.B. always sat by her or G.B. was in the kitchen with Nancy Gonzalez. There was never a blanket to cover them and [defendant] sat on the opposite side of the couch as G.B.*"

¶ 47 The State told the court that it was now at a "horrible disadvantage" because the aforementioned information had been provided to it "in the middle of trial" and it had already been mentioned to the jury. The State explained that it was not prepared for the information and asserted that it was so prejudiced that it would be unable to have a fair trial. The court took a 15-minute break to review caselaw concerning mistrials and for the parties to prepare arguments.

¶ 48 After the recess, the court noted that 30 minutes had passed since the State moved for mistrial. The State confirmed that it still wished to move for mistrial. Defendant objected to the mistrial. The State argued that it was a great disadvantage because defense counsel told the jury information, not previously known to the State, that: (1) G.B. and her mother went to defendant's home and asked Nancy to drive G.B. to school; and (2) once they arrived at the movies, defendant went to an action movie and G.B. went to a cartoon. After the State's first witness had testified and the State received defendant's summary disclosure, it learned of other new information, including that G.B. was either sitting by Lidia or in the kitchen with Nancy while watching T.V. at the Gonzalez home. The State represented that the aforementioned information related to alibi, which it had repeatedly requested pretrial, but was not disclosed until after trial started. Further, the State asserted, the information "is not coming from just one witness. It is coming from two witnesses. This is going to force the State to scramble now during trial to try and further investigate all of this information. This is not a small amount." The State argued that a recess or continuance would not cure the problem because "it really puts the State under

the gun, so to speak, to try to rush through this to follow up on all of this information that the defense has provided." Further, the State argued that excluding the evidence would not be preferred because it did not further the goal of truth seeking.

¶ 49 The court told the State that it was willing to give it the entire remainder of the day and evening to investigate, and it asked the State to explain why that option would not be acceptable. The State explained that there was "too much information;" the information involved not just G.B., but the State would also have to "look into the movie situation" and "learn more about the entry into the home and when she got there." It reiterated that the information went "directly to this defense of alibi" and that it was not "just information of an insignificant importance."

¶ 50 Defendant objected, noting that a mistrial should be granted only where something has happened that is so improper and the resulting prejudice is so high that mistrial is of manifest necessity. Counsel argued that the information provided was not really new, but also that it was certainly not akin to a new witness or document; rather, it simply filled in some additional detail about things that both sides already knew, much of which came from the State originally: both sides knew that G.B. was at defendant's house all of the time, regardless of whether she sat on the couch or stood; both sides knew that G.B. cleaned the house; both sides knew that the family went to the movies and went into separate theaters, regardless of whether the girls went to one and the boys went to another; both sides knew that G.B. wrote letters that showed a progression, and "All I am doing is identifying what the letters say that the State tendered to me. I am saying how we are going to use them in our case. I am sorry it doesn't meet with how the State wants the case to turn out. But this is how I am going to use it – information the State provided." Counsel argued that the State had recently tendered new information from G.B. that concerned the movies, and counsel asked witnesses about it. "[W]hen the State says unfair surprise, these

are the State's witnesses. All I am doing is being specific as to the information that the State is providing ***to me."

¶ 51 Further, counsel argued that the information did not concern alibi. The information did not suggest that defendant was somewhere else entirely or did not even go to the movies with the family, it was simply that witnesses would testify that he was not in a position to be under a blanket with G.B. and that they went into separate theatres. Defendant finally objected to the State's representation that a continuance would not cure the situation. "I am not sure what they are looking into. The witnesses are outside. What the heck are they looking into? All they have to do is go ask the girl: what movie did you see when you went to the movies? And when you went to the movies, which one did you go in and which one did the defendant go in? When you came over in the morning, where did you sit? What investigation needs to be done? And when the movie came out, when did it come out. The State can look into that. It is not difficult."

¶ 52 After the State acknowledged that it already provided discovery that an incident occurred at the movies, the court asked the State to explain how the contested information concerned alibi, what was new that could not be cured by interviewing the witness, and further, what work would the State be asking to do that would take more than an afternoon. The State replied that the information from Lidia about the movies was new and "we would be interested in speaking with [Lidia]. I don't know if she would talk to us. But we would want to do that. And then we would want to speak with the other people [who] went to the movies with them."

¶ 53 The court then noted that, as to G.B. coming over in the morning and her cleaning, it had heard no objection from the State during defense counsel's opening statement that would infer to the court that it was new information. As such, the court asked, outside of it just being disclosed, why did the State believe it was so prejudicial. The State responded that it painted a completely

different picture of G.B. and "so we are being sandbagged in the middle of trial with this information." The State later agreed with the *court's* suggestion that its argument was actually that the information changed the way it would proceed or changed its theory of its case. Specifically, the State responded, "yes. And these are all –*albeit details*—that we would want to take the time to speak with our witnesses about because it does drastically change things." (Emphasis added.)

¶ 54 The court announced it would consider the arguments and cases and return to the bench at noon. "I am going to rule on this this morning. We are not going to break." Upon its return, the court first found that the new information constituted a discovery violation under Rule 413(d)(i), and that defendant had a constitutional obligation and, pursuant to Supreme Court Rules, a legal obligation to summarize the conversation counsel had with witnesses the previous night, to put that summary into writing, and to disclose it. The court noted that it considered the motion in the context of the case and that, pre-trial, there had been a number of motions filed by the State to compel discovery "and also motions complying with that by the defense." The current situation, the court noted, concerned information that was obtained only about 14 hours prior, and, therefore, it noted that this was not a case of defendant possessing information for a long period and choosing not to disclose it.

¶ 55 The court granted the State's motion for mistrial. It noted first the standards, per caselaw, that, because granting a mistrial without a defendant's consent deprives the defendant of his or her valued right to have a particular jury decide his or her fate, it must find, in an exercise of "scrupulous discretion," that manifest necessity, *i.e.*, a high degree of necessity, exists for the mistrial because the "ends of public justice would not be served by continuing the proceedings."

¶ 56 The court then applied 12 factors that were referenced in *People v. Edwards*, 388 Ill. App. 3d 615, 623-24 (2009). The factors, and the court's corresponding findings thereon, follow:

1. The source of the difficulty that led to the mistrial: "In this case, I find that this difficulty was caused by the defense, unintentionally."

2. Whether the difficulty could have been manipulated for the purpose of giving the State an opportunity to strengthen its case: The State did not create this, only one witness had been presented, and this was not a situation where there was an opportunity for it to strengthen its case by asking for a mistrial.

3. Whether the possible prejudice could be cured by some alternative action that would preserve the fairness of the trial: Barring the evidence was not appropriate because the case is serious, defendant could be sentenced to prison for a lengthy period, and he had disclosed alibi witnesses and an alibi defense. Further, continuing the case for the afternoon was not appropriate based upon: (a) the record in the case; (b) the witnesses at issue had been disclosed and known to the defense for a substantial period; (c) the information is new; and (d) the State did not believe the prejudice could be cured with additional time.

4. Whether the record indicated that the trial judge considered the alternatives: The jury came in at 8:30 a.m., and a witness testified until 10 a.m. "If I was to consider giving [the State] additional time based upon the Court's docket and what I have for the rest of the week, if I was to continue the case to give the State an opportunity to do this, I could only give them until tomorrow morning which, now what it is almost 12:30 would

be – if they worked until midnight would be only 12 hours to try to accomplish talking to the witnesses, following up on the information that they have requested to follow up."

5. Whether any conviction resulting from the trial would inevitably be subject to reversal on appeal: Not relevant.

6. Whether the trial court acted in the heat of the trial confrontation: This issue was first addressed at 10 a.m., and the jury would return at 1 p.m. if the motion were denied. The court stated that it did not believe it was acting in the heat of the confrontation, it gave parties an opportunity to research cases and did its own research, and it did not immediately grant the mistrial upon request. "I am not angry. I am not mad. I am not upset. I am just looking and applying the factors that I have to apply."

7. Whether the court's determination rests on an evaluation of the demeanor of the participants, trial atmosphere, or any other factors that similarly are not amenable to strict appellate review: There was no atmosphere to be elicited for the record. Both sides acted and argued professionally and "everybody had done their jobs."

8. Whether the trial court granted the mistrial solely for the purpose of protecting the defendant against possible prejudice: "I don't think this applies" because the State asked for the mistrial. Further, the court needed to consider defendant's right to have the verdict rendered by the jury that was selected, unless manifest necessity and the ends of public justice would not be served by continuing trial.

9. Whether the evidence presented by the State prior to mistrial suggested a weakness in the State's case: No, as only one witness had testified. There "is no idea at this point in time whether the case is strong or weak" for the State, and the court did not

find the State to be asking for mistrial to get a second bite at the apple and change its trial strategy.

10. Whether the jurors had heard enough of the case to formulate some tentative opinions: See numbers 9 (above) and 11 (below).

11. Whether the case had proceeded so far as to give the State a substantial preview of the defense tactics and evidence: "We have an opening statement that has been made. But based upon all the discovery that I have gone through and issued and made a comment on, *this is not a surprise*. There is no information that the State learned on today's date that they would not have learned, *other than* the new information based upon the interview that was conducted at 10:00 o'clock last night." (Emphasis added.)

12. Whether the composition of the jury was unusual: One full day was spent picking the jury, but there is nothing about the composition of the jury that was unusual.

¶ 57 The court concluded by stating that it was also to look at the facts of the case and, in its discretion, decide whether to grant the mistrial. It had considered alternatives, including, "mainly," continuing the case until the next day to see what the State could accomplish overnight and whether it would, then, wish to renew the motion. Further, it considered that, if it was wrong in granting the motion, "double jeopardy attaches. And the defendant's case would be dismissed. *** I have considered the possible ramifications if the trial court is wrong." The court started to ask the State again if it was sure that a continuance until the next day would not be sufficient, but then decided that it would not do so, as the State had requested mistrial. As such, over defendant's objection, the court granted the motion.

¶ 58 C. Motion to Dismiss

¶ 59 On June 5, 2015, defendant filed his motion to dismiss the indictment on double-jeopardy grounds. Defendant asserted first that he had picked a jury that he liked. Further, he argued that the mistrial was improperly granted because: (1) the allegedly-new information had nothing to do with alibi; (2) the State had not established how it was so surprised or prejudiced that its ability to prosecute its case was impacted, particularly given that, at the time of the motion, G.B., her mother and sister, as well as Nancy and Lidia, were all outside the courtroom and available to be interviewed, but the State chose not to speak with any of them; and (3) the information was not critical to defendant's defense, which was that he did not commit the alleged acts. Instead, the information consisted only of details inconsequential to the 24 counts charged in the indictment.

¶ 60 In its response, the State agreed that the discovery it previously provided included the fact that G.B. received rides to and from school from the Gonzalez family and that she spent time in the Gonzalez home. However, defendant's disclosures did not provide other information, including "regarding how Mrs. Gonzalez came to give G.B. rides to school, how G.B. entered the home, or what she did inside the home. The State was extremely surprised by this new information."

¶ 61 On July 7, 2015, the court heard oral argument on the motion to dismiss. At the hearing, the State agreed that, since the mistrial was declared, it had not interviewed Nancy or Lidia. The investigation it had conducted resulted in only an additional page and a half of discovery based upon information it received from G.B. and her mother.

¶ 62 Defense counsel reiterated that the witnesses were at the courthouse when the State moved for mistrial, and, despite numerous offers by the court to allow the State to speak with those witnesses, the State declined without providing a good reason. Defense counsel argued

that, other than saying the information was prejudicial, the State had yet to explain *how* it was so prejudicial that mistrial was warranted, particularly where the information had only been mentioned in defendant's opening statement, which was not evidence. As to the State's suggestion that the information would impact its theory of the case, defense counsel argued, "I don't know any authority that states that the State's theory of the case is ground for mistrial, but their theory of the case is that my client did the crime, and there's nothing that we disclosed that even goes towards the actual crimes themselves." Defense counsel argued that the court did not need the State's permission and that it could have ordered it to investigate and come back the next morning; counsel argued that the court should have done so, because there was one week set for trial and the jurors knew it would be a one-week trial.

¶ 63 The State replied that the "defense does not get to dictate" how the State should go about investigating the new information it received and, when it moved for mistrial, it did not know how long it would take to investigate. The State asserted again that "the fact that they gave us this information at the last minute prejudices the State significantly." It argued that the "details" disclosed "go directly to the State's witness' credibility and caused the State to have to re-work our theories and our strategies." Further, it argued that the information did touch on the alibi issue because it addressed whether defendant and G.B. went to two different movies and whether G.B. went into the kitchen with Nancy while the others watched television.[3] "The defense has tendered information to us from witnesses that we did already know about, but these witnesses

[3] Defense counsel noted that photographic exhibits of the house would show that the family room with the television and the kitchen were one, large open space with no walls between them.

were going to say things that the State has never heard before, and that is an unfair surprise and advantage."

¶ 64 The court denied defendant's motion to dismiss the indictment. Defendant appeals.

¶ 65 II. ANALYSIS

¶ 66 Defendant argues on appeal that there was no manifest necessity requiring the court to declare a mistrial where defense counsel unintentionally failed to disclose to the State witness statements on collateral matters that were made to counsel on the eve of trial while he was preparing opening statements. As no manifest necessity existed for a mistrial, defendant reasons, the State is barred from retrying him. For the following reasons, we agree.

¶ 67 The fifth amendment to the United States Constitution states, in relevant part: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const., amend. V. The same principles are embodied in the Illinois Constitution. See Ill. Const. 1970, art. I, § 10. Further, these principles have been codified: "A prosecution is barred if the defendant was formerly prosecuted for the same offense, based upon the same facts, if such former prosecution *** [w]as terminated improperly after the jury was impaneled and sworn ***." 720 ILCS 5/3-4(a)(3) (West 2012). Accordingly, as the constitutional protection against double jeopardy attaches after the jury is selected and sworn, there is no debate here that jeopardy had already attached when the State moved for a mistrial.

¶ 68 The above provisions are based on the notion that, with all of its resources and power, the State should not be allowed multiple attempts to convict a person of an alleged offense. *People v. Bagley*, 338 Ill. App. 3d 978, 980-81 (2003). The protection against double jeopardy extends to the defendant's right to have his or her trial completed before a particular tribunal because, inevitably, a second trial before a different tribunal "increases the financial and emotional burden

on the accused, prolongs the period in which [the accused] is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted." *Arizona v. Washington*, 434 U.S. 497, 503-04 (1978). Accordingly, where a court acting without the defendant's consent declares a mistrial, the court necessarily deprives the defendant of his valued right to have a particular jury decide his fate. *Bagley*, 338 Ill. App. 3d at 981.

¶ 69 This does not necessarily preclude a second trial, because a defendant's right to have his trial completed by a particular jury is, in some instances, subordinate to the public's interest in fair trials designed to end in just judgments. *People v. Sanders*, 342 Ill. App. 3d 374, 378 (2003). However, when the court declares a mistrial without the defendant's consent, the State is allowed to retry the defendant *only* if there was a manifest necessity for declaring the mistrial. *Bagley*, 338 Ill. App. 3d at 981; see also *People v. Dahlberg*, 355 Ill. App. 3d 308, 312 (2005). "[T]he State shoulders the 'heavy' burden of justifying the mistrial and must demonstrate a manifest necessity for any mistrial that has been declared over the objection of the accused." *People v. Burtron*, 376 Ill. App. 3d 856, 862 (2007) (quoting *Arizona*, 434 U.S. at 505). Manifest necessity means a "high degree" of necessity. *Arizona*, 434 U.S. at 505. Indeed, declaring a mistrial is a "drastic course of action." *People v. Segoviano*, 189 Ill. 2d 228, 241 (2000). The circumstances must be " 'very extraordinary and striking' " and the necessity "imperious." *People v. Largent*, 337 Ill. App. 3d 835, 840 (2003) (quoting *Dowman v. United States*, 372 U.S. 734, 736 (1963)).

¶ 70 The manifest-necessity standard is a command to the trial court not to foreclose the defendant's right to have a particular tribunal decide his fate until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by

continuing the proceedings. *Bagley*, 338 Ill. App. 3d at 982. The trial court must carefully consider all of the circumstances and any reasonable alternatives to declaring a mistrial. *Id*. "Essentially, in determining whether manifest necessity exists, the trial court must balance the defendant's interest in having the trial completed in a single proceeding, reserving the possibility of obtaining an acquittal before that 'particular tribunal,' against the *strength of the justification* for declaring a mistrial rather than attempting to continue the trial to a verdict." (Emphasis added.) *People v. Street*, 316 Ill. App. 3d 205, 211 (2000) (citing 5 J. Israel, N. King & W. LaFave, Criminal Procedure § 25.2(c), at 654 (2d ed.1999)). Although a number of factors may be considered when making a manifest-necessity determination, including the 12 factors considered by the trial court in its deliberation here, the manifest-necessity standard "abjures the application of any mechanical formula by which to judge the propriety of declaring a mistrial in the varying and often unique situations arising during the course of a criminal trial." *Illinois v. Somerville*, 410 U.S. 458, 462 (1973). Thus, the question concerning whether manifest necessity warranted a mistrial is determined by the facts of each case. *People v. LaFond*, 343 Ill. App. 3d 981, 985 (2003).

¶ 71 A reviewing court must satisfy itself that the trial judge exercised "sound discretion" in declaring a mistrial. *Arizona*, 434 U.S. at 514. An abuse of discretion occurs when the court's decision was arbitrary, fanciful, or unreasonable. See, *e.g.*, *People v. Rivera*, 2013 IL 112467, ¶ 37; *People v. Gregory*, 2016 IL App (2d) 140294, ¶ 24. We also review the trial court's denial of defendant's motion to dismiss the charges against him on double jeopardy grounds under an abuse-of-discretion standard. *People v. Hill*, 353 Ill. App. 3d 961, 965 (2004).

¶ 72 Here, we start by assuming that defendant's late disclosure constituted a discovery violation. Indeed, defendant argues that it was not and that the trial court's order directing that

the parties reduce to writing and disclose any and all conversations they had with potential witnesses was overbroad and beyond the reach of Rule 413. He notes that, in *People v. Williams*, 262 Ill. App. 3d 808, 823-24 (1994), the court noted that the State's obligation to disclose to a defendant under Illinois Supreme Court Rule 412 (Ill. Sup. Ct. R. 412 (eff. Mar. 1, 2001) (the corollary to a defendant's obligation under Rule 413)) required it to "disclose a witness's oral statements only if they are reduced to writing and are in the witness's own words or substantially verbatim[;] *** [i]f a statement is never memorialized, it need never be disclosed to defense counsel, absent bad faith on the State's part." See also, *People v. Abbott*, 55 Ill. App. 3d 21, 24 (1977) ("As a general rule, a witness will not be disqualified from testifying simply because the State in good faith did not draft memoranda of that witness' pre-trial, oral statements"); *People v. Manley*, 19 Ill. App. 3d 365, 370 (1974) ("in the absence of the known presence of discoverable statements, neither the State nor the defense should bear the unreasonable burden of reducing all of its investigative information to writing.").

¶ 73 However, as previously noted, Rule 413(e) provides that "[u]pon a showing of materiality, and if the request is reasonable, *the court in its discretion may require disclosure to the State of relevant material and information not covered by this rule*." (Emphasis added.) Ill. Sup. Ct. R. 413(e) (eff. July 1, 1982). Further, in *People v. Mullen*, 313 Ill. App. 3d 718 (2000), the court rejected the argument that defense counsel's oral conversation with a witness did not need to be disclosed to the State because Rule 413 only required disclosure of relevant written documents and, further, because the witness was a prosecution witness. The court cited Rule 413(e) and further noted that, "[u]nder this rationale, no oral statement would ever have to be tendered in discovery if the attorney decides not to reduce it to writing[,]" even where material

and relevant, and, further, the statement does not become less relevant or material simply because it was the State's witness who made it to defense counsel. *Id.* at 737.

¶ 74 Here, it is clear that there was emphasis during the pretrial proceedings on very broad disclosure. The State repeatedly pressed defendant for detailed information, and there was a strong hope by both the State and the court to avoid any element of surprise at trial. The court acknowledged the limitations defendant faced in that regard, particularly given the State's own alleged inability to provide detailed information as to dates of events, or even general time parameters, but it ordered that additional information given in any statement by any witness be reduced to writing and disclosed. While we are not prepared to say that we would, if sitting in the court's position, have made that same ruling, we need not decide whether the scope of the disclosure ordered under Rule 413(e) was proper because, as described below, even assuming that the order was proper and that the failure to tender a written memorandum of the additional details violated that order, the resulting grant of a mistrial was an abuse of discretion. Thus, for purposes of the following analysis, we will assume that the court properly found a discovery violation, however minor. That is not to say, as will be seen below, that the atmosphere of heightened disclosure and goal of avoiding surprise is not relevant to the mistrial ruling.

¶ 75 Next, we conclude that the court abused its discretion in declaring a mistrial here. Again, we acknowledge that deference in these matters is generally afforded to the court's decision and the trial judge here clearly considered numerous factors and alternatives before declaring a mistrial. However, we conclude that the court abused its discretion because its ruling was arbitrary and unreasonable when it is viewed in the context of what generally constitutes "high necessity," the collateral or non-substantive nature of the information disclosed, and the absence of any showing of prejudice by the State.

¶ 76 A review of caselaw provides guidance concerning what can constitute manifest or high necessity. For example, mistrials have been upheld, *i.e.*, manifest necessity shown, where the defense counsel committed a series of "blatant indiscretions," was argumentative with the trial court and abused the rules of trial procedure, made improper commentary before the jury regarding conduct of the State, received repeated warnings by the trial court, and then, before the jury, announced that the defendant would willingly submit to a polygraph examination. *People v. Burtron*, 376 Ill. App. 3d 856, 864-66 (2007). In *People v. Edwards*, 388 Ill. App. 3d 615, 628-33 (2009), the mistrial was upheld where the defendant's failed disclosure consisted of information relied upon by his expert witness and, ultimately, rendered defense counsel a witness. The State did not receive the information until *after* it had rested its case. The trial court properly determined that barring the expert from testifying was not a viable option because the witness was critical to the defendant's case, striking him would not have furthered the truth-seeking process, and exclusion would have almost certainly resulted in the defendant being found guilty and reversible error. In *People v. Bagley*, 338 Ill. App. 3d 978 (2003), the defendant was charged with driving under the influence of alcohol. After the jury was sworn, but before the first witness was called, the State located a videotape of the defendant's arrest that was believed to have been lost. The court held that a mistrial was not an abuse of discretion, where barring the evidence would have greatly impeded truth-seeking and the defendant's defense might have been dramatically altered depending on what the tape showed. The court noted that the preferred sanction is generally a continuance, if it would protect the defendant from surprise and prejudice, but defense counsel had even noted that the late production "throws a total wrench in the works" for the defense. *Id*. at 982-83.

¶ 77 In contrast, courts have held that inflammatory, undisclosed statements made on the witness stand before juries did not warrant mistrials, *i.e.*, did not constitute manifest necessity. See, *e.g.*, *People v. Morgan*, 112 Ill. 2d 111, 134-36 (1986) (the defendant was charged with murder, and a witness testified before the jury that the defendant placed a pillow over a shotgun muzzle and said "this is what Jews and Italians do when they want to snuff somebody out"; motion for mistrial denied and later affirmed, with the court noting that the undisclosed statement did not have a bearing on the defendant's guilt, and the court can usually correct any error by sustaining an objection and instructing the jury to disregard the improper remark); *People v. Sosa*, 195 Ill. App. 3d 828, 831, 833-35 (1990) (arresting officer testified that, when he handcuffed the defendant, "he told me [he] would have shot me if he had his chance"; the trial court denied the request for mistrial, instead striking the testimony and instructing the jury to disregard it; the appellate court affirmed, noting, in part, that the statement did not, by itself, relate to the defendant's guilt and that, for a discovery violation, "declaring a mistrial is a drastic sanction, and the court can, by sustaining an objection and instructing the jury to disregard an improper remark, usually correct any error"); *People v. Loggins*, 134 Ill. App. 3d 684, 691 (1985) (State's police officer witness testified that the defendant saw the officers and said "Come in and get me, fuckers"; the State never disclosed the statement, and defendant's motion for mistrial was denied; the appellate court affirmed because the requested sanction, mistrial, was disproportionate to the violation and because the defendant "made no showing as to how he was surprised or prejudiced by the statement"). Further, it has been held that a mistrial was properly denied where it was questionable that the failure to disclose notes was a discovery violation, the failure to disclose was not willful, and a mistrial would be disproportionate to the alleged violation. *People v. Peters*, 144 Ill. App. 3d 310, 317-18 (1986) (State failed to disclose FBI

agent's handwritten notes from a witness interview; appellate court held that the trial court imposed an appropriate sanction where it ordered the notes disclosed and ordered the FBI agent who took the notes talk to defense counsel and, therefore, the defendant could not show prejudice). In *People v. Stewart*, 227 Ill. App. 3d 26, 29-30 (1992), the court's denial of a mistrial was affirmed where the defendant failed to demonstrate prejudice from the discovery violation. The court noted that the witness was named on the State's potential witness list, so, defense counsel had the opportunity to interview him prior to trial. *Id.* at 29. "Defendant does not explain how his trial strategy would have been significantly different had he known of [the witness's] proposed testimony prior to trial." *Id.* Further, the court noted that the undisclosed statement was revealed in the State's case-in-chief, so the defendant still had an opportunity to respond to it during his portion of the case. *Id.* at 30.

¶ 78 We also find instructive *People v. Pondexter*, 214 Ill. App. 3d 79 (1991). There, the *pro se* defendant failed to disclose prior to trial the existence of an eyewitness to the charged crime, instead producing at trial an affidavit that was dated more than one year prior. The court *sua sponte* declared a mistrial, stating that it failed to see another way that the defendant could call the witness, when the State had not been informed of the witness, but that precluding the witness from testifying would be prejudicial to the defendant.

¶ 79 On appeal, the court reversed. *Id.* at 86, 89. Rejecting the State's argument that mistrial was appropriate because the trial court had faced a dilemma that was of the own defendant's making and that the mistrial benefited the defendant because he could then produce the witness, the court held that the mistrial was not manifestly necessary. *Id.* at 82. The court noted that " 'the power [to declare mistrial] ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes ***.' " *Id.* at 83 (quoting *United States v.*

Perez, 22 U.S. 579, 580 (1824)). The court further noted that the trial court must temper its decision by considering the "importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate." *Id*. at 84. The court explained that classic examples of manifest necessity include a hung jury or juror bias. *Id.* The court noted that, although the correct sanction for a discovery violation is a matter for the trial court's discretion, the preferred sanction where the violation is not blatant is a recess or continuance, if that would effectively protect the other party from surprise or prejudice, and that other courts have held that ordering a mistrial for a discovery violation is *not* an appropriate sanction. *Id*. at 85 (citing cases). The court noted that, in the case before it, the State objected to the witness testifying on grounds of surprise, but it did not request a continuance to allow it to speak with the witness. *Id.* at 86. Essentially, the court determined, the State did not want the witness to corroborate the defendant's self-defense theory, but it was already *aware* of the defendant's claim of self defense. *Id.* Thus, it was unlikely that the State would have conducted its prosecution differently, had it known of the witness prior to trial. *Id*. Finally, the court noted that the history of the case reflected that, by the time this issue arose, the trial court was likely frustrated by the "recalcitrant defendant," which might have contributed to the court's decision to declare the mistrial. *Id.* at 88. Nevertheless, the appellate court stated that "a continuance rather than a mistrial was the proper action to be taken to correct the discovery violation" and, with "great reluctance," it reversed the trial court's denial of the defendant's motion to bar re-prosecution. *Id.* at 89.

¶ 80 Without question, there are factual differences between this case and those summarized above, and whether a mistrial is warranted depends on the unique facts of each case. *LaFond*, 343 Ill. App. 3d at 985. We also acknowledge that some of the cases above constituted

affirmances of the trial court's exercise of its discretion on the mistrial question. However, the aforementioned cases nevertheless shed light on whether declaring a mistrial here, under these circumstances, was a *reasonable* exercise of discretion.

¶ 81 In light of the above caselaw, it is apparent here that the discovery violation concerned matters that were non-substantive or only *collateral* to the charges. Indeed, the State has conceded that it knew all of the overarching information, but that the "new" information, "albeit details," would require further inquiry. It provided the trial court with broad expressions of surprise, disadvantage, and statements that it was being "sandbagged," but it never explained *how* its ability to try the case was so prejudiced that a mistrial was required, nor was prejudice clearly apparent from the record. See, *e.g.*, *People v. Houser*, 305 Ill. App. 3d 384, 392-93 (1999) (without sufficient explanation as to how the State was prejudiced, trial court abused its discretion in disallowing the defendant's necessity defense as a sanction for her failure to disclose it until trial). It is not clear that a trial court can possibly exercise sound discretion on this question when it had not even been presented with all relevant facts. Even on appeal, the State fails to convincingly explain *how* it was so prejudiced that it could not have proceeded absent a mistrial, essentially just repeating that the information "drastically changed things," which is a conclusion without factual support. We disagree that the information was "drastically" new. The State knew that G.B. wrote numerous letters of increasing affection to defendant and his family: it produced them. The State knew that the family went to the movies and split up into separate theaters: G.B. disclosed that information. The State knew that G.B. cleaned the house and watched T.V. and slept over: again, it produced that information. The State also admitted that it knew that Nancy gave G.B. rides to school. We understand that, in light of the disclosed information, some additional inquiry might have been desired, but even if

the *details* learned the night before trial should have been disclosed, the State never established how follow-up investigation (such as asking G.B. whether a blanket was involved, whether G.B. ever sat in the kitchen while the others watched television, what movies did they see and was defendant in a separate theatre, whether G.B.'s mother ask Nancy to drive her to school, and whether she sat on the couch in the morning, etc.) would be anything other than a relatively brief task. The State speaks broadly of wishing to speak with other people and checking the movie schedule. However, it does not specify what other people, why this could not have been accomplished with a continuance, and how this information was even critical to the pending charges.

¶ 82 Although the State accepted the trial court's suggestion that it would have to change trial strategy in light of the new information, as in *Stewart* or *Pondexter*, it is not clear *how* that strategy would have changed. The State suggested that the new information painted a new picture of G.B. and her credibility, which was important because the case hinged on G.B.'s credibility versus defendant's credibility. But the State already knew that defendant planned to attack G.B.'s credibility and reputation for truthfulness and that he would do so through the very same witnesses that were involved in the new disclosure. As in *Stewart*, the witnesses were on defendant's potential witness list (indeed, they were also on the State's witness list), but it is not clear that the State interviewed them before the trial. Indeed, even when they were at the courthouse, the State simply refused the court's offers to recess so that they could be interviewed because it was too much information. However, it appears that the State did not even try to interview them after the mistrial was granted, nor in anticipation of a second trial. The State was quick to argue that the information concerned alibi, a situation it had feared would occur, but that argument is weakened by the fact that the information did not in any way suggest that defendant

was not present in the house or at the movies; it simply rebutted the manner in which G.B. had stated things occurred. And, even if it did arguably concern alibi for two events, where G.B. and defendant kissed at the movies (which was not even the subject of any of the charges) and that she touched him while watching television, the charges concerned about *24 allegations* of criminal conduct, including sexual intercourse and other acts of penetration over an 11-month period. We hardly think the details in the disclosure greatly impeded the State's overall ability to pursue its charges against defendant.

¶ 83 Quite frankly, while we certainly value the purpose of the discovery rules, good faith disclosure, and parties' rights to certain information, at some point, the art of lawyering, particularly at a trial, can require thinking on one's feet. To expect every single detail to be virtually scripted so as to completely eliminate any chance of surprise, even on details collateral to the charges, is untenable. To flip on its head a statement made in another case, the rules of discovery do not require that the defendant prepare the State's case. See *Abbott*, 55 Ill. App. 3d at 24 ("the rules of discovery are not intended to impose an unreasonable burden on the State. The rules do not require that the State prepare the defendant's case."). Again, *Abbott* may be factually distinguishable, and we do not cite it to suggest that, under the trial court's order here, the information at issue was not required to be *disclosed*, but it was simply unreasonable to consider the disclosed information of a nature rendering *mistrial* a manifest necessity. This is especially true given that the information had been mentioned only in defendant's opening argument, which (in accord with caselaw preference that the improper remarks be stricken and the jury ordered to disregard), the court reminded the jury was not evidence, and *not* for example, from a witness on the stand or after the State had rested its case, as in *Edwards*. The information was *collateral* to the charges, not akin to a videotape or eyewitness to the charged

crimes, as in *Bagley* or in *Pondexter* (which, in fact, *still* did not justify a mistrial). The information did not involve new evidentiary materials or exhibits, which, in fact, was insufficient to justify mistrial in *Peters*. The trial court expressly found the violation was not intentional, which is in contrast to the type of egregious behavior warranting mistrial in *Burtron*.

¶ 84 We further note that a court properly exercises its discretion when imposing discovery sanctions when the sanction is proportionate to the violation. See, *e.g.*, *Loggins*, 134 Ill. App. 3d at 691; *Peters*, 144 Ill. App. 3d at 318; see also, *People v. Johns*, 336 Ill. App. 3d 682, 687 (2002) (" '[A] trial court may properly fashion a sanction for a discovery violation when it is proportionate to the magnitude of the violation.' ") (quoting *People v. Koutsakis*, 255 Ill. App. 3d 306, 314 (1993)); see also *Mullen*, 313 Ill. App. 3d at 735-36 (noting that Supreme Court Rule 415(g)(i) (eff. Oct. 1, 1971) gives the court discretion to impose a variety of sanctions for discovery violations, but courts have expressed a preference for recess or continuance). Here, the trial court expressly found that the violation was unintentional, and we have determined that the violation concerned collateral information with no showing by the State of prejudice to the State. Again, without any obvious prejudice or a *showing* of true prejudice by the party seeking the mistrial, the trial court cannot possibly exercise sound discretion on this question. Instead, similar to *Pondexter*, we think that the background of the case, with its heightened focus on the potential of an alibi defense, its emphasis on disclosure, and avoidance of any surprise, combined with the court's noted concern that its docket might not allow for a continuance beyond one afternoon, influenced the court's decision to accept the State's representations here without any real showing of prejudice. In our view, the court should have *ordered* the State to interview the witnesses and return the next day for trial, an option it presented, but did not order, when the

State did not accept it. The result, however, was a discovery sanction that was disproportionate to the violation.

¶ 85 In sum, the defendant's valued right to have a particular jury decide his or her fate must not be violated absent manifest necessity. The State here failed to shoulder its "heavy burden" of justifying the mistrial. *Arizona*, 434 U.S. at 505. The circumstances were simply not so "extraordinary and striking" and the need so "imperious" that it was reasonable for the trial court to conclude that the "drastic course of action" of mistrial was justified. See *Segoviano*, 189 Ill. 2d at 241; *Largent*, 337 Ill. App. 3d at 840. Accordingly, as granting the mistrial was improper, the trial court's denial of defendant's motion to bar re-prosecution is reversed.

¶ 86 III. CONCLUSION

¶ 87 For the reasons stated, we reverse the judgment of the circuit court of Kane County.

¶ 88 Reversed.