2017 IL App (1st) 142021-U

FOURTH DIVISION
March 2, 2017

No. 1-14-2021

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 CR 12803
	)	
LARRY JONES,	)	Honorable
	)	Matthew E. Coghlan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices McBride and Howse concurred in the judgment.

O R D E R

Held: Defendant's conviction is affirmed where no discovery violation occurred and, even if it did, the trial court did not abuse its discretion by refusing to grant a remedy for the alleged violation. Defendant's fines and fees order is corrected to vacate the electronic citation fee and to reflect the offset of his state police operations fee by presentence custody credit.

¶ 1 Following trial, a jury found defendant guilty of aggravated vehicular hijacking and the trial court sentenced him to seven years in prison. Defendant appeals, arguing the State committed a discovery violation for which the trial court erroneously refused to grant any remedy. He also challenges two of the assessments that were imposed in this case.

¶ 2 For the following reasons, we affirm the trial court's judgment and modify the fines and fees order.

¶ 3 I. BACKGROUND

¶ 4 A grand jury indicted defendant with, *inter alia*, two counts of aggravated vehicular hijacking based on defendant knowingly taking a 2007 Chevrolet Impala from the person or presence of Isaac Thomas. One count was premised on defendant being armed with a firearm, and one count was premised on defendant being armed with a knife.

¶ 5 Prior to trial, defendant filed a motion to quash arrest and suppress evidence.[1] At a hearing on defendant's motion, Chicago police officer Anna Piatkowski testified that she was on patrol when Isaac Thomas flagged her down near 47th Street and Drexel Avenue at around 1 or 2 p.m. on June 3, 2012.[2] Collins told Piatkowski that he had been car-jacked at around 3 a.m. During cross-examination, the following exchange took place.

> "[THE STATE]: Did [Thomas] tell you whether or not he tried to make a report to the police earlier than three o'clock in the afternoon since [the incident] happened to him in the early morning hours at 1:50 a.m. that day?
>
> [PIATKOWSKI]: Yes.
>
> [THE STATE]: What did he say?
>
> [PIATKOWSKI]: He said that he was unable to make the report due to him not having the information of this vehicle.
>
> [THE STATE]: Like his license plate number or [vehicle identification number] VIN number at that time?

[1] Two versions of the motion appear in the record; based on representations defense counsel made at a pretrial hearing, it appears the second motion is an updated version.
[2] The State asked Piatrkowski about Isaac "Collins," not "Thomas"; this was evidently inadvertent.

[PIATKOWSKI]: Correct."

The trial court ultimately denied defendant's motion to quash arrest and suppress evidence.

¶ 6 The matter proceeded to trial. During opening statements, defense counsel told the jury that it was "going to hear that Mr. Thomas didn't make a police report until well over 10 hours after his car had been allegedly taken from him." Counsel also told the jury the following.

> "What you are also going to hear is that Mr. Thomas never made an official police report, even though he—there is no allegation that his phone was taken from him. He still had his phone when all this happened. He never took the time to call his insurance company, get the VIN number and go down to the police station and make sure they knew that his car had been taken.
>
> But what he did do was flag down some officers at 1:51 p.m. later on that day and tell them, hey, be on the lookout for my blue car, but I only want to be notified if you find my car, otherwise, don't bother me."

¶ 7 Isaac Thomas testified that he left his home in Hammond, Indiana, to go to a club located on 47th and Drexel on June 3, 2012. After driving for about 30 or 40 minutes, Thomas arrived at the club around midnight. While at the club, Thomas consumed "three drinks at the most" which he described as "[j]ust regular drinks." He denied being intoxicated.

¶ 8 Thomas left the club by himself at approximately 3 a.m. and started walking toward his 2007 blue Chevrolet Impala, parked about a block and a half away. After getting into the car and starting it, Thomas waited to drive home so that he could charge his dead phone battery. Thomas could not recall on which side of the car he was sitting while he waited. When asked why he did not immediately leave, Thomas stated, "Because I didn't leave. I just didn't leave yet. Let my car warm up let me phone [*sic*]." Defense counsel asked Thomas, "[y]ou were letting your car warm

up?" to which Thomas responded, "Yes." Counsel confirmed that the incident took place in June and that "[i]t's not cold in June." Thomas responded, "Let my phone charge, charging my phone and it was dead and let me [*sic*] car warm up." Thomas left the door of his car open with one foot outside of the vehicle. He did not close the door because "[l]ike [defense counsel] said, it was the summertime."

¶ 9 About three to four minutes passed when approximately four or five black men approached Thomas' car. Thomas could not recall what the men were wearing. One of the men had a switch blade or "hand knife." Thomas could not recall if that man was standing at the passenger side or driver's side of the car. Another one of the men was holding a gun and standing on the driver's side of the car. The prosecutor asked Thomas whether he saw that man in court. Thomas initially denied seeing that person. However, he then identified defendant as the person who held the gun, stating, "I'm sorry. I see. He is right there. I'm thinking he be over there. I didn't know. I'm sorry." The State asked Thomas if he was having a hard time seeing parts of the courtroom, and Thomas responded that he was. The State asked if it would "assist" Thomas if he "came into the middle of the courtroom" and Thomas responded, "Kinda sorta. I'm sorry. I didn't know what I was looking at. That is him right there."

¶ 10 Thomas testified that the man with the knife pointed it to toward his neck and instructed him to get out of the car. Thomas got out and defendant "was standing there," pointing the gun at Thomas and instructing him not to move. Defendant and the man with the knife got into the car and "pulled off." The other men ran toward a group of row houses on 47th Street before also getting into Thomas' car.

¶ 11 Thomas started walking back toward the club. He did not call the police because his phone was in car. As he walked, Thomas saw his friend Shawn driving by. Thomas flagged Shawn down and got into his car. The following colloquy ensued.

> "[THE STATE]: Once you got into Shawn's car did you call 911?
>
> [THOMAS]: Yes, I attempted to call.
>
> [THE STATE]: What phone did you use to call 911?
>
> [THOMAS]: I used Shawn's phone.
>
> [THE STATE]: Now, without getting into exactly what was said, were you able to make a report over 911?
>
> [THOMAS]: No, I was not.
>
> [THE STATE]: Why were you not able to do that?
>
> [THOMAS]: Because I didn't have my VIN information, my license plate information, none of my information from the car on me."

Defendant did not object to Thomas' testimony regarding the 911 call. On cross-examination, defense counsel asked Thomas, "[a]nd when you called 911 they stated that you couldn't report your car being stolen, is that correct?" Thomas responded, "That's correct." Defense counsel asked, "[a]nd they told you the reason why is because you needed [a] VIN number?" Thomas responded, "I needed vehicle information."

¶ 12 Thomas testified that Shawn offered to drive him to the police station, but Thomas declined because he did not have his vehicle information. Instead, Shawn drove Thomas home. Thomas looked for his vehicle information at his house. He had a copy of his vehicle insurance bill but his insurance card was in his car's glove compartment.

¶ 13 Thomas went to sleep for a few hours until his girlfriend arrived home. At around 11 a.m., he drove his girlfriend's car to Chicago to a police station to file a police report. However, he was still unable to make a report because he did not have his car's license plate number or VIN number. He testified as follows: "[A]ll my information was in the car. I still didn't have the proper information and the DMV wasn't open to get the information and so—that is it." Defense counsel asked Thomas whether he had his car insurance information at home, and Thomas responded that he did not. Counsel then asked if Thomas had a copy of his insurance bill at home, and Thomas responded that he did. Counsel stated, "You do know on your insurance card there is information for a VIN number and a license plate number?" and Thomas responded, "Yes, but it was in my glove compartment." Defense counsel then asked, "Did you attempt to call your insurance company after you woke up the next morning?" Thomas stated, "I couldn't call them. They weren't open. It was a Sunday."

¶ 14 Thomas testified that he returned to the scene of the incident to see whether his car had been abandoned nearby. He observed some officers in a car, so he flagged them down, provided them with a description of his car, and asked them to "be on the lookout." He did not provide the officers with a description of defendant or the other men.

¶ 15 Thomas filed a police report on June 4, 2012. Later in the day, at around 3:30 p.m., the Chicago police department called Thomas to inform him that they had recovered his car and wanted him to identify it. Thomas did not have transportation, so he waited until the next day to go to the police station. At approximately 5 p.m. on June 5, 2012, Thomas identified defendant in a lineup as the person who pointed a gun at him during the hijacking.

¶ 16 After Thomas testified, the trial court took a recess. Following the recess, and outside the presence of the jury, defense counsel made a motion for mistrial based on Rule 412 (eff. March

1, 2001), on the basis that the State never disclosed any information regarding the 911 call that Thomas placed on June 3, 2012.[3] Counsel argued that defendant was prejudiced because the defense theory was that Thomas did not make any reports until almost 10 1/2 hours after the incident took place.

¶ 17 The State responded that it had not intentionally elicited testimony from Thomas regarding the contents of the 911 call. The State also argued that it had tendered any and all discovery in its possession prior to trial. The State pointed out that defense counsel did not object during Thomas's testimony and, in fact, counsel continued to elicit information about the particulars of the call from Thomas during cross-examination. Accordingly, the State did not believe a mistrial should be granted. The State then suggested that if the court found Thomas' testimony inappropriate, the court could issue a limiting instruction or ask the jury to disregard the fact that the 911 call was made.

¶ 18 Defense counsel responded that she did not know the contents of the 911 call and the defense had the right to know that information. Counsel also argued that the State presumably prepped Thomas before trial and knew about the 911 call. Defense counsel indicated that a 911 call was never mentioned in any of the documentation it received. The trial court denied defendant's motion for mistrial, and the presentation of evidence resumed.

¶ 19 Officer Anna Piatkowski testified that she was in a car with Officers Frangella and Perilla at around 1:50 p.m. on June 3, 2012. Thomas approached in a car, and Piatkowski learned that Thomas' car had been taken. Thomas gave a description of his car, and Frangella created a contact card memorializing the encounter with Thomas. Piatkowski did not recall Thomas saying that he was robbed at gunpoint or that his cell phone was stolen.

[3] Counsel also filed a written motion for mistrial.

¶ 20 The next day at around 3:15 p.m., Piatkowski and her partner, Officer Roz Cain, were driving on 52nd Street toward Lake Park when Piatkowski observed a blue Chevrolet Impala. As the Impala passed the officers' car, Piatkowski observed that defendant was driving and was not wearing a seatbelt. Piatkowski and Cain turned into a McDonald's parking lot at the same time that defendant pulled into the parking lot from a different entrance.

¶ 21 The officers "came nose to nose" with the Impala and activated their car's lights and sirens. After exiting their car, the officers approached the Impala and instructed defendant and his passenger to show their hands. Defendant opened the door and fled. Officer Cain testified that he chased defendant. Cain did not observe anything in defendant's hands when defendant got out of the car, nor did Cain see defendant throw anything as he chased him. Cain eventually performed an emergency takedown and placed defendant into custody at 51st and Blackstone. He did not find a gun, knife, or anything else on defendant. Piatkowski, who remained with the vehicles while Officer Cain chased defendant, also denied seeing a gun or knife in defendant's hand and said she did not recover a gun, knife, or cellular phone from the vehicle. A fingerprint was taken from the Impala's gearshift that matched defendant's fingerprint.

¶ 22 Detective Everett testified that after Thomas identified defendant in the lineup, Everett spoke to defendant in the presence of an assistant State's Attorney (ASA). Defendant gave a statement in which he initially said he purchased the Impala from "some guy on 47th Street" for $3,000. However, defendant could not tell Everett where on 47th Street he purchased the car, and the sole description he gave of the seller was that he "was kind of short."

¶ 23 Everett did not believe defendant was telling the truth because his answers were vague. Everett told defendant his responses did not make logical sense and continued questioning defendant. Defendant "started to disengage and tear up." As Everett persisted in his questioning,

defendant gave a different story, this time saying he met a person named “Kev-o” on 47th Street. He later said he met Kev-o a couple weeks earlier on Facebook. According to defendant, he and Kev-o saw Thomas in the vehicle and discussed how to steal the car from him. They went over to Thomas' car and kicked his legs from outside of the car. Defendant and Kev-o then walked away from the car, discussing how to steal it. Kev-o had a knife, and defendant offered to be the lookout. Kev-o got into the car beside Thomas and held the knife to him. Defendant said Thomas did not “get a good look” at Kev-o. Thomas got out of the car and Kev-o drove off, leaving defendant at 47th and Drexel. Defendant said he then walked to the train at 55th, rode it to 95th, and walked to 103rd and Halsted. Everett pointed out that the distance defendant claimed he walked was far. Defendant could not provide Everett with Kevo’s real name or his girlfriend’s name.

¶ 24 Defendant further stated that Kev-o gave him the car the day before defendant was arrested. Defendant used it to pick up his little brother from school and, upon spotting a police car, told his little brother that the car might be stolen and they would have to run if they got stopped. Everett said that in defendant’s third statement, defendant said he had a bottle wrapped in a t-shirt and held it at Thomas during the hijacking.

¶ 25 ASA Colleen Rodgers testified that she took defendant's written statement at approximately 9 p.m. on June 5, 2012. Defendant's statement was admitted into evidence and published to the jury. In the statement, defendant indicated he, “Kevo,” and two other men were drinking Ciroc vodka and Patron and smoking marijuana on June 3, 2012. The four men were walking around 47th and Drexel between midnight and 3 a.m. when they saw Thomas lying in a blue Chevy Impala with his feet hanging out of the passenger side of the vehicle. Defendant stated that he kicked Thomas’ feet into the car and closed the car door. As they walked away

from the car, Kevo told defendant they should go back and take the car, and defendant volunteered to act as a lookout. Defendant stated that Kevo pulled out a large folding knife from his pocket. Kevo opened the passenger side door and held the knife to Thomas' neck. Another man was carrying a Ciroc vodka bottle wrapped in a black shirt to appear like a gun. The man hit Thomas with the Ciroc bottle, waking him up, and the man held the bottle against his stomach and pointed it outward to make it appear like a gun. Thomas grabbed the knife from Kevo, and the two people with defendant and Kevo ran away. Thomas got out of the car, and Kevo got in and drove away while the man chased after him.

¶ 26 Defendant stated that he then went to his girlfriend's house on 110th and Racine by walking and taking the train. His girlfriend's name was "Amy" although she went by "Pinky." He did not know her last name. The next day, Kevo gave defendant the car and defendant used it to pick up his brother at school. Defendant and his brother were driving to McDonalds when they saw an unmarked squad car drive past and then turn around. Defendant told his brother to get out of the car because it was stolen. After his brother did so, defendant continued driving into the McDonalds parking lot. Defendant stated the police car "cut him off," and he got out of the Impala. As he was about to be handcuffed, defendant "took off running" because he knew he was in a stolen car.

¶ 27 Following the presentation of evidence, defense counsel renewed her motion for a mistrial, which the trial court denied. The next day, after the attorneys discussed jury instructions, defense counsel asked the judge to allow her to argue the motion for a mistrial again. Counsel asserted that she had filed a motion for mistrial "or even a continuance at this point." Counsel argued that the defense theory of the case was that Thomas never called the police when the incident allegedly occurred, and that the defense should have been allowed to

subpoena the 911 records, talk to the 911 operator, and subpoena the phone records for the phone number that was used to call 911. Counsel argued that defendant was unfairly surprised by the State's failure to disclose the 911 call because defense counsel's opening statement to the jury and its defense theory that Thomas waited to report the hijacking no longer worked.

¶ 28 The State responded that it did not try to elicit any of the substance of the 911 call, that defense counsel did not object at the time the information regarding the 911 call came out, and that defense counsel asked about the 911 call on cross-examination. The State further argued it had tendered everything it had in its file to defense counsel. The State suggested that "maybe an appropriate sanction would be some sort of instruction to disregard that particular testimony from the victim."

¶ 29 In response, defense counsel argued it did not matter that she did not object because she promptly brought the matter to the court's attention. Counsel reiterated that the statement regarding the 911 call killed its whole theory that Thomas waited to report the crime.

¶ 30 The trial court stated that it did not believe the State had willfully violated the discovery rules if it had even violated the discovery rules at all. The court also found persuasive the State's point that defense counsel failed to object and also questioned Thomas about the 911 call. The court found that if any error had occurred, it was harmless. Defense counsel then argued that if the court believed any error was harmless, the court should exclude the evidence regarding the 911 call from the jury. Counsel also stated that a discovery violation did not have to be willful for sanctions to be warranted. The court denied defense counsel's motion for mistrial.

¶ 31 The matter proceeded to closing arguments. During defense counsel's closing, she argued that Thomas was "wasted" when he left the club and was sitting in his car "trying to sober up so he could drive home that night" and did not remember exactly what happened. Counsel also

argued as follows: “He said he made a 911 call. He said he flagged down his friends. Where is his friend to prove that? Where is this 911 call? Where is the 911 report? Why wasn't that 911 operator called to testify in this case? Because that call never existed.” Later, defense counsel argued, “Where are the contact cards from the 911 call? Where are the contact cards from his stop earlier that day to the Fifth District police station? It didn't happen. He did not make a report until ten and-a-half hours later 'til he flagged [the officers] down.”

¶ 32 Following deliberations, the jury found defendant guilty of aggravated vehicular hijacking with a knife and not guilty of aggravated vehicular hijacking with a firearm.

¶ 33 In June 2014, defendant filed a motion for judgment notwithstanding the verdict or, in the alternative, a new trial.[4] Defendant argued in his motion that the trial court should have granted a mistrial or continuance or should have told the jury to disregard the statement regarding the 911 call.

¶ 34 At a hearing on the motion, the State argued as follows: “[t]here are no police reports that indicate a 911 call was made. We did not subpoena 911 records. I don't believe either party requested 911 records. There are—none of the reports or anything that we had indicated that 911 had been called.” Defense counsel responded that she was not suggesting the State's violation was willful; however, counsel reiterated that the defense theory of the case was based on the fact that there was no 911 call so once that information became available, the defense should have been able to investigate that information further. The trial court found the State had not committed a discovery violation and that defendant received a fair trial; accordingly, the court denied the motion for new trial.

[4] Defendant had previously filed a motion for new trial in April 2014.

¶ 35 Thereafter, the trial court sentenced defendant to nine years in prison, crediting him for 733 days spent in pretrial custody. On defendant's motion to reconsider, the court subsequently reduced defendant's prison sentence to seven years. A fines and fees order reflects that defendant was ordered to pay, *inter alia*, a $15 state police operations fee and a $5 electronic citation fee.

¶ 36 This appeal followed.

¶ 37 II. ANALYSIS

¶ 38 On appeal, defendant argues the State committed a discovery violation for which the trial court erroneously refused to grant any remedy. He also challenges two of the assessments that were imposed in this case. We address each argument in turn.

¶ 39 A. Discovery Violation

¶ 40 Defendant first argues that the State committed a discovery violation by failing to tender information about Thomas' 911 call, and that the trial court erred by refusing to grant any remedy for the State's violation. Defendant observes that Thomas was the sole eyewitness to the offense and that the defense theory at trial focused on attacking Thomas' credibility, including the fact that he did not report the crime until 10 1/2 hours after it occurred. Defendant contends the defense was thus unfairly surprised by the fact that Thomas allegedly called 911 and that Thomas' testimony crippled its defense theory. The State responds that no discovery violation occurred because defendant was aware of the 911 call based on the evidence presented at the pretrial hearing on his motion to suppress. In addition, the State claims, it never possessed any evidence regarding the 911 call, nor could it have discovered such evidence through due diligence. The State further argues that even if a discovery violation occurred, the trial court did not abuse its discretion by declining to grant any remedy.

¶ 41 Illinois Supreme Court Rule 412(a)(i) (eff. March 1, 2001) requires the State to disclose to defense counsel "the names and last known addresses of persons whom the State intends to call as witnesses, together with their relevant written or recorded statements, memoranda containing substantially verbatim reports of their oral statements, and a list of memoranda reporting or summarizing their oral statements." The State's duty to disclose such information is mandatory and ongoing throughout the trial proceedings. Ill. S. Ct. R. 415(b) (eff. Oct. 1, 1971); *People v. Hendricks*, 325 Ill. App. 3d 1097, 1103 (2001). A prosecutor is excused from complying with the discovery provisions "only where the prosecutor was unaware of the existence of the statement or discoverable evidence and could not have become aware of it in the exercise of due diligence." *People v. Cunningham*, 332 Ill. App. 3d 233, 249 (2002).

¶ 42 The purpose of the discovery rules is to protect a defendant against surprise, unfairness, and inadequate preparation. *People v. Heard*, 187 Ill. 2d 36, 63 (1999). Although compliance with the rules is mandatory, the failure to comply does not require reversal absent a showing of prejudice. *Id.* The defendant carries the burden of showing surprise or prejudice. *Id*. When the State fails to comply with discovery rules, a trial court can impose a variety of sanctions including discovery of the previously undisclosed statement, a continuance, the exclusion of the evidence, or another remedy the court sees fit. *People v. Bobo*, 375 Ill. App. 3d 966, 974 (2007). A trial court's determination as to the appropriate sanction for a discovery violation is reviewed for an abuse of discretion. *People v. Ramsey*, 239 Ill. 2d 342, 439 (2010). A court abuses its discretion where its decision is "arbitrary, fanciful, or unreasonable, such that no reasonable person would take the view adopted by the trial court." *Id.*

¶ 43 At the outset, we note the parties dispute whether defendant properly preserved the issue of the State's alleged discovery violation. The State notes that defendant did not object to

Thomas' testimony or ask for a sidebar following Thomas' testimony and, in fact, defense counsel cross-examined Thomas about the 911 call. Defendant, however, contends he did not forfeit review of his claim because defense counsel made a motion for mistrial during trial and renewed that motion before closing arguments, and counsel also included the issue in a posttrial motion.

¶ 44 The State's argument that defendant failed to preserve his claim is well-taken. We find it particularly notable that defense counsel not only failed to object when Thomas testified that he made a 911 call, but then affirmatively solicited *additional* testimony from Thomas regarding the 911 call during cross-examination. Pursuant to the doctrine of invited error, "an accused may not request to proceed in one manner and then later contend on appeal that the course of action was in error." *People v. Harvey*, 211 Ill. 2d 368, 385 (2004). Invited errors are not subject to plain-error review. *People v. Ramirez*, 2013 IL App (4th) 121153, ¶ 78. Here, by soliciting additional testimony from Thomas about the 911 call during cross-examination, defense counsel emphasized to the jury the very testimony that defense counsel argues caused him prejudice. Arguably, the invited-error doctrine precludes defendant from now challenging Thomas' testimony appeal. See *id.* (finding the invited-error doctrine barred the defendant's claim that the trial court erred by permitting a police officer's testimony where the defendant cross-examined the officer and thus actively used the testimony he was challenging on appeal).

¶ 45 In any event, even considering the merits of defendant's claim, we conclude the trial court did not abuse its discretion by declining to order a new trial, grant a continuance, or provide an instruction to the jury to disregard Thomas' testimony. First, we disagree with defendant that a discovery violation occurred. Rule 412(a)(i) requires the State to disclose the names of its intended witnesses along with "their relevant written or recorded statements, memoranda

containing substantially verbatim reports of their oral statements, and a list of memoranda reporting or summarizing their oral statements." Ill. S. Ct. R. 412(a)(1) (eff. March 1, 2001). Here, there is nothing in the record to suggest that a recording existed of Thomas' 911 call—which resulted in no action—or that the State possessed such a recording or memoranda summarizing that recording. In fact, the record does not even definitively establish the State was aware that Thomas called 911. The State claimed throughout the proceedings that it had tendered all discovery to the defense and that none of the discovery documents contained information regarding Thomas' 911 call. Specifically, when defense counsel initially moved for a mistrial, the State told the trial court, "[t]he fact that there was a 911 call made in this particular case, obviously any and all discovery that we had or we had possession of, we did tender it prior to trial." When defense counsel subsequently renewed its motion for a mistrial, the State told the court, "Obviously we had no information or evidence or any 911 subpoenas or anything of that nature in our file that we didn't tender to Defense. We have tendered everything that we have to them so we don't believe this is some sort of radical violation or anything of that nature which would require a new trial." Later, at the hearing on defendant's posttrial motion, the State indicated, "There are no police reports that indicate a 911 call was made. We did not subpoena 911 records. I don't believe either party requested 911 records. There are—none of the reports or anything that we had indicated that 911 had been called."

¶ 46 Defendant argues the record rebuts any claim that the State did not know Thomas called 911 because the State specifically asked Thomas, "did you call 911?" and then asked a series of questions to elicit Thomas' testimony that he could not make a report because he did not have his VIN or license plate information. According to defendant, during this exchange, the State expressed "no surprise" when Thomas said he called 911, and the State's follow-up questions

show it was clearly trying to establish that the 911 operator told Thomas he could not report the incident without his vehicle information.

¶ 47 We are not persuaded by defendant's argument. In light of defense counsel's opening statement regarding Thomas' failure to report the crime sooner, the State presumably could have anticipated that defense counsel would cross-examine Thomas about his delay in reporting the crime. Thus, the State may only have been asking Thomas if he called 911 on direct examination so that it could then ask Thomas his reason for *not* calling 911 sooner. Indeed, the State also asked Thomas during direct examination why he did not try to call the police before getting into Shawn's car. Further, while defendant contends "there was no surprise on the State's part when Thomas said he called 911," we are simply unable to determine, based on the record before us, whether the State was surprised by Thomas' testimony. The record does not indicate, for example, whether the prosecutor paused after Thomas said he attempted to call 911 or whether the prosecutor made a surprised expression.

¶ 48 In any event, assuming *arguendo* that the State committed a discovery violation, the trial court did not abuse its discretion by denying defendant's motion for a mistrial and declining defendant's request for a continuance or the issuance of jury instructions. See *Bobo*, 375 Ill. App. 3d at 974 (the trial court's choice of sanctions will not be disturbed absent an abuse of discretion).

¶ 49 First, as to defendant's motion for a mistrial, "[a] new trial should only be granted if defendant, who bears the burden of proof, demonstrates that he was prejudiced by the discovery violation and the trial court failed to eliminate the prejudice." *People v. Lovejoy,* 235 Ill. 2d 91, 121 (2009). The factors to be considered in determining whether a new trial is warranted include the closeness of the evidence, the strength of the undisclosed evidence, and the likelihood that

prior notice could have helped the defense discredit the evidence. *Id.* An additional factor is the willfulness of the State in failing to disclose the evidence. *People v. Weaver*, 92 Ill. 2d 545, 560 (1982). In addition, we "consider the remedies sought by defendant, such as whether defendant requested a continuance, when determining if actual surprise or prejudice existed." *Lovejoy*, 235 Ill. 2d at 120.

¶ 50 First, the evidence in this case was not close. Officers Piatkowski and Cain found defendant in Thomas' car and, as they started to handcuff defendant, defendant fled the scene. Flight is evidence of consciousness of guilt. *People v. Hart*, 214 Ill. 2d 490, 519 (2005). Thomas also positively identified defendant in a lineup and at trial. While defendant provided an explanation for how he came to be in Thomas' car, his statements varied, as he first told Everett that he purchased the car and then offered a different story in which he said he was the "lookout" while "Kev-o" took the car. In his first statement, defendant could not provide the exact street location where he purchased the car or a physical description of the person who sold it to him. He also claimed in his statements that he walked to his girlfriend's house, a distance Everett observed to be far. Defendant stated that he did not know the last name of his girlfriend or Kev-o. In light of the evidence against defendant and the discrepancies in his statements, we cannot deem the evidence in this case "close."

¶ 51 The second and third factors, the strength of the undisclosed evidence and the likelihood that prior notice would have helped the defense discredit the evidence, also do not warrant the determination that the trial court should have granted a new trial. First, we disagree with defendant's suggestion that the State was able to significantly undercut the defense theory and bolster Thomas's credibility with the 911 call. During opening statements, defense counsel told the jury it would hear that Thomas failed to report the crime for over ten hours. Defense counsel

also told the jury that Thomas "never took the time to call his insurance company, get the VIN number and go down to the police station and make sure they knew that his car had been taken," instead "flag[ging] down some officers at 1:51 p.m. later on that day and tell[ing] them, hey, be on the lookout for my blue car." Counsel's opening statement was not refuted by Thomas's 911 call because even though Thomas called 911, he was apparently unable to make a report at that time. Thus, Thomas did not actually make a report about his vehicle until he flagged down Piatkowski over ten hours after the hijacking, just as defense counsel had indicated during opening statements.

¶ 52 Nonetheless, defendant argues he was prejudiced because the defense theory was that Thomas had not even *tried* to report the crime for ten and a half hours. However, we are compelled to note that at the pretrial hearing on defendant's motion to suppress, the State asked Officer Piatkowksi if Thomas told her whether or not he tried to report the incident to the police earlier in the day, and Piatkowski responded that defendant did. Piatkowski then indicated that Thomas "said that he was unable to make the report due to him not having the information of this vehicle."

¶ 53 On this point, we find persuasive the reasoning in *People v. Harper*, 392 Ill. App. 3d 809, 821 (2009). There, the appellate court found that the State did not violate Rule 412 when it failed to tender the defendant's alleged oral admission that he drove a car involved in a collision. *Harper*, 392 Ill. App. 3d at 821, 824. Prior to trial, the State disclosed that the defendant had conversations with the officers involved in the case. *Harper* at 822. The State also disclosed that the defendant was approached at the scene regarding his involvement in a traffic accident, and the defendant stated he did not have insurance. *Id.* The *Harper* court found that "there was no inherent surprise or prejudice resulting from" the officer's testimony that the defendant admitted

he was driving. *Id.* at 823. To the contrary, the court agreed with the trial court's conclusion that the defendant's admission "was inherent in the statements the State disclosed to" the defendant before trial. *Id.* The *Harper* court found the defendant's statement about insurance was in reference to the officer's inquiries made to the defendant at the scene "about how he was involved—*i.e.*, that pursuant to his own admission, he had been driving." *Id.* The *Harper* court found the facts that the admission was made at the scene, that the defendant was talking to the officer specifically about his involvement in the accident, and that the State disclosed the defendant's statement that he had no insurance "all combined to give enough notice to [the] defendant that his admission that he was driving would be introduced at trial." *Id.*

¶ 54 We acknowledge that in this case, Piatkowski's pretrial testimony did not specifically indicate that Thomas called 911, nor did it reveal the substance of Thomas' 911 call. However, her testimony *did* alert defense counsel to the fact that Thomas said he was unable to make a report because he did not have his vehicle information, suggesting Thomas had already tried to report the hijacking by the time he talked to Piatwoski. Accordingly, defendant cannot claim he was surprised by Thomas' testimony that he attempted to report the crime before he flagged down Piatkowski. See *Heard*, 187 Ill. 2d at 63 (the purpose of the discovery rules is to protect a defendant against surprise, unfairness, and inadequate preparation). We must also note that Thomas not only testified that he called 911, but he also testified that he tried to report the hijacking at a police station before he flagged down Piatkowski. Thus, even if Thomas' 911 testimony had been excluded, the jury would still have heard evidence that Thomas attempted to report the crime before talking to Piatkowski.

¶ 55 We also disagree with defendant that Thomas' 911 call significantly bolstered his credibility. The State presented no proof of Thomas' call, other than Thomas' own testimony.

Thus, defense counsel was still able to argue that Thomas did not actually call 911, since no evidence was presented of that call. Counsel was also able to attack Thomas on the basis that he did not call his insurance company to obtain his vehicle information number and more quickly make a police report. While defendant argues that the contents of Thomas' 911 call would have provided counsel with numerous opportunities to further impeach Thomas, such an argument is purely speculative. It is just as likely that if the State had tried to subpoena Thomas' 911 call, there would have either been no recording or the call would have revealed that Thomas was simply told he needed more information.

¶ 56 The fourth factor, the willfulness of the State in failing to disclose the evidence, also does not weigh in favor of a new trial. Defendant characterizes the State as having "made multiple misleading statements to the court that cast doubt on its veracity regarding this violation." At the outset, we note defense counsel herself told the trial court she was "not claiming that it was willful on the State's behalf." Further, the trial court, who had the opportunity to observe the State when the State gave its explanations regarding the 911 call, expressly found this "certainly" was not a willful violation of discovery rules.

¶ 57 Further, after reviewing the record, we disagree with defendant's suggestion that the State made "multiple misleading statements to the court" that cast doubt on its veracity regarding the violation. Most significantly, we reject defendant's contention that the State first claimed it had tendered the fact that a 911 call was made to the defense and then later claimed that none of the reports it had indicated that 911 had been called. In its initial response to defendant's motion for a new trial, the State told the judge "[t]he fact that there was a 911 call made in this particular case, obviously any and all discovery that we had or we had possession of, we did tender it prior to trial." The State's comment does not indicate it was expressing that it tendered discovery that a

911 call was made, only that it tendered all discovery that it had. We have reviewed the other comments cited by defendant and they do not convince us that the State engaged in a willful discovery violation, particularly in light of the fact that neither defense counsel nor the trial court thought the State had engaged in willful behavior.

¶ 58 Finally, consideration of defense counsel's response in this case to the State's purported discovery violation also supports the trial court's determination that a new trial was not warranted. See *Lovejoy*, 235 Ill. 2d at 120 ("[w]e also consider the remedies sought by defendant, such as whether defendant requested a continuance, when determining if actual surprise or prejudice existed"). As previously detailed, defendant initially failed to object to Thomas' testimony about the 911 call and then proceeded to ask Thomas about the 911 call during cross-examination. Only after Thomas finished testifying and the court took a recess did defense counsel argue the State had violated Rule 412. Further, at that point, counsel asked only for a mistrial, not a continuance. It was not until after the next day that defense counsel mentioned a continuance. All of the foregoing suggests that defense counsel was not as surprised or prejudiced by Thomas' testimony as defendant claims.

¶ 59 Defendant contends that defense counsel's "minor delay in objecting" may have been due to the fact that earlier in the trial, counsel had to request a sidebar multiple times before the trial court granted her one and during that sidebar, counsel ultimately realized she had a copy of a report she originally thought the State had failed to disclose. According to defendant, this suggests the trial court "would not have looked favorably upon another request for a sidebar." We are not persuaded by defendant's argument. Instead, we find the fact that counsel was able and elected to cross-examine Thomas before later seeking a mistrial belies defendant's claim of surprise or prejudice.

¶ 60 In sum, based on all of the foregoing, the trial court did not abuse its discretion by denying defendant's motion for a mistrial.

¶ 61 The trial court also did not abuse its discretion by failing to grant a continuance or provide a jury instruction as defendant requested. We will find an abuse of discretion when a defendant is prejudiced by the State's discovery violation and the trial court fails to eliminate the prejudice. *Weaver*, 92 Ill. 2d at 560. Plainly, defendant in this case was not prejudiced by the alleged discovery violation. Regardless of the fact that Thomas called 911, defense counsel was still able to argue that Thomas did not file a police report until approximately ten hours after the crime was committed. Counsel was also able to call into question the plausibility of Thomas' assertion that he called 911 and his overall credibility by pointing out that Thomas failed to immediately obtain his license plate number and VIN so that he could make a report sooner and that the State failed to present evidence of the 911 call. In light of the foregoing, we cannot say the court's determination in this case that sanctions were unwarranted constituted an abuse of discretion.

¶ 62 B. Fines and Fees

¶ 63 Defendant next contends, and the State agrees, that the $5 electronic citation fee must be vacated and that defendant should receive *per diem* credit against the $15 state police operations fee.

¶ 64 The parties are correct that the electronic citation fee must be vacated, as that assessment does not apply to felonies. 705 ILCS 105/27.3e (West 2014); *People v. Moore*, 2014 IL App (1st) 112592-B, ¶ 46. We also agree that defendant is entitled to apply presentence credit toward the $15 state police operations fee because that assessment is a fine, and a defendant is entitled to a $5 credit for each day he spends in presentence custody toward the fines assessed against him.

725 ILCS 5/110-14(a) (West 2014); *People v. Maxey*, 2016 IL App (1st) 130698, ¶140.

Accordingly, pursuant to Illinois Supreme Court Rule 615(b)(1) (eff. Jan. 1, 1967), and our authority to correct a mittimus without remand (*People v. McGee*, 2015 IL App (1st) 130367, ¶ 82), we order the clerk of the circuit court to correct the fines and fees order to reflect the vacation of the $5 electronic citation fee and the offset of the $15 state police operations fee. We affirm the trial court's judgment in all other respects.

¶ 65 III. CONCLUSION

¶ 66 Affirmed; fines and fees order corrected.