FOURTH DIVISION
April 23, 2015

No. 1-13-3301

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 11 CR 17450
	)	
CHARLES DAHMS,	)	Honorable
	)	Jorge Luis Alonso
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Justices Howse and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for aggravated battery on a public way affirmed. Trial court properly denied defendant's motion to dismiss where State did not commit discovery violation or violate due process. Although trial court should not have given jury instruction on citizen's arrest, error was harmless. Where jury considered mental state as part of charged offense, trial court did not err in refusing defendant's tendered jury instruction on negligence. Trial court did not err in failing to instruct jury, *sua sponte*, on lesser-included offenses. Trial court's response to jury note telling jurors to continue deliberating was not an abuse of discretion, nor was trial court's decision to later give *Prim* instruction. Trial court did not abuse its discretion in denying defendant's request for continuance where defendant withdrew witness, where that was the reason for request, and trial court gave defense counsel additional several-hours continuance to prepare defendant. Aggravated battery statute is not unconstitutional.

¶ 2 Following a jury trial, in which the evidence showed that defendant Charles D. Dahms had struck a taxi cab driver in the face with his briefcase, knocking him unconscious, defendant was found guilty of aggravated battery on a public way in violation of section 12-3.05(c) of the Criminal Code of 2012 (the Criminal Code) (720 ILCS 5/12-305(c) (West 2012)). He was acquitted of two other counts of aggravated battery: section 12-3.05(d)(8) of the Criminal Code (a battery to a taxi driver on duty) and 12-3.05(a)(1) of the Criminal Code (a battery causing great bodily harm). Defendant was sentenced to 18 months' probation and 14 days of incarceration as a condition of probation, with time considered served. He now appeals his conviction. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 After an incident that occurred between defendant and cab driver Terry Enadeghe, defendant was charged with three counts of aggravated battery. Defendant filed a motion to dismiss the charges based on a claimed discovery violation, namely the State's failure to provide him with a video from a Chicago Transit Authority (CTA) bus that may have captured the incident. The trial court denied the motion. The parties proceeded to trial, where the following evidence was presented.

¶ 5 On October 10, 2011, at 8:00 a.m., Enadeghe was driving his taxi cab east on Jackson Street in downtown Chicago. At the intersection of Jackson and Clinton Street, defendant was standing with other pedestrians waiting to cross. Defendant was carrying his briefcase. According to Enadeghe, as his cab was travelling through the crosswalk and the traffic light was yellow, he saw several passengers waiting to cross. He also noticed defendant, who was the only one of the passengers walking through the crosswalk. Enadeghe testified that defendant was "literally on the street" but not directly in front of the taxi. Defendant was on the driver's side of

the taxi a couple of feet ahead of it. Enadeghe stopped the taxi. He acknowledged that he was unintentionally blocking the path of the pedestrians, including defendant, who were waiting to cross Jackson.

¶ 6 As defendant approached the vehicle, he lifted both hands up over his shoulders and, with the briefcase he was holding, smashed the taxi cab's windshield which shattered right in front of Enadeghe's face. Defendant then walked behind the cab and walked south on Clinton Street. Enadeghe parked his taxi cab, got out, and approached defendant. He said, "You just smashed my windshield. You should come take a look at what you just did." Defendant responded, "Get out of my face. Get the hell out of my face. I didn't do nothing, just get out of my face." Enadeghe again told defendant: "Your briefcase, you used it and smashed my windshield, so why not stop and take a look at what you just did," but defendant just kept walking. Enadeghe tried to block defendant and tried to grab the briefcase to try to tell him "[t]his is what you used to smash my windshield." Defendant pulled the briefcase away and Enadeghe let go.

¶ 7 Enadeghe continued following defendant down Clinton Street, telling him to stop and take a look at the car. After they had continued another twenty feet, Enadeghe felt a "bang" on his face as defendant hit him in the face with the briefcase. Defendant hit Enadeghe in the nose, knocking him unconscious and causing him to fall to the ground.

¶ 8 Defendant testified on his own behalf and gave a different version of the incident. He stated that he was waiting at the intersection of Jackson and Clinton and was "one or two people back from the front." After the walk light changed to "the white little man" and the cars were stopped, defendant stepped off the curb and started walking across the intersection when he heard a horn sound off to the west. According to defendant, "everybody started scrambling to get back out of the crosswalk and back toward the curb." Defendant was unable to step back up on

the curb because there were people in the way. As Enadeghe's vehicle passed, defendant was leaning away, trying not to get hit. He was holding his briefcase in his left hand and his arm was up in an effort to balance and he felt a slight tap on Enadeghe's vehicle as it went by. The vehicle passed by and defendant, along with the other pedestrians, walked behind the vehicle. Defendant crossed the street and kept walking south down Clinton Street.

¶ 9 Defendant testified that, after Enadeghe confronted him on foot and told him he had hit his vehicle, defendant told Enadeghe that he should call the police. Enadeghe told defendant he needed to come back with him. Defendant repeatedly told Enadeghe to leave him alone, that he was not going anywhere with him. Enadeghe continuously and repeatedly grabbed defendant's briefcase and defendant pulled it away.

¶ 10 Defendant testified that Enadeghe also grabbed him and his shirt. According to defendant, Enadeghe reached down or "made another lunge" for the briefcase as defendant was turning and pulling his briefcase out of Enadeghe's grasp when the briefcase struck Enadeghe's face. Enadeghe "kind of slowly crumpled down." Defendant testified that he did not intend to strike or injure Enadeghe.

¶ 11 Enadeghe was taken to John Stroger Hospital by ambulance. He received 11 stitches from the bridge of his nose to underneath his eye. He had to return to the hospital a week later for further treatment. Enadeghe then had surgery on his nose under general anesthesia. The day after the incident, Enadeghe identified defendant from a line-up at the Chicago Police Headquarters at Belmont and Western.

¶ 12 Much of this encounter was captured on a surveillance video from the Metro headquarters. The surveillance video was played in court, and both defendant and Enadeghe testified as to what it showed. This video captured some of the preliminary events about which

the parties testified, but both defendant and the cab driver had moved beyond the camera's vision by the time the confrontation that led to the cab driver's injury occurred.

¶ 13 The State presented three other witnesses at trial. Aisha White, a CTA bus driver, testified that she saw defendant take his briefcase and hit the windshield of the taxi cab, right near the cab driver's face. She saw defendant walk around the back of the cab and continue south on Clinton Street. She saw the cab driver park his car, get out, and catch up with defendant. The cabdriver was trying to get defendant's attention and was pointing to his cab. Defendant was walking and the cabdriver was making gestures. White saw the men standing and facing each other. Then she saw defendant hit the cab driver in the face with his briefcase and the cab driver fall to the ground. White stopped her bus, called her supervisor and told him what happened. At the end of the bus line, White called 9-1-1.

¶ 14 Shelton Smith was a pedestrian walking northbound at the time of the encounter between defendant and Enadeghe. Smith testified that it appeared that the cab driver was trying, by his gestures, to get defendant to stop and listen to him. Smith saw Enadeghe grab defendant's briefcase. Smith continued to walk towards the two men. He saw them stop and face each other, and then saw defendant strike Enadeghe in the face with his briefcase. Only defendant's hands were on his briefcase when he struck Enadeghe in the face with it. Smith viewed the Metra surveillance tape and testified that defendant hit Enadeghe after the men were off camera.

¶ 15 Officer Victoria Barber testified that she received a radio call of a battery at Jackson and Clinton Streets. After speaking to persons at the scene, she arrested defendant. She described the windshield as completely shattered, so that the driver would not be able to see out of it.

¶ 16 At the close of the evidence, the jury found defendant guilty of aggravated battery on a public way in violation of section 12-3.05(c) of the Criminal Code. Defendant filed a motion for

a new trial and a supplemental motion, both of which were denied. The trial court granted defendant's motion for reinstatement of bond. Defendant was later sentenced to 18 months' probation and 14 days of incarceration as a condition of probation, with time considered served. Defendant filed a timely notice of appeal.

¶ 17 II. ANALYSIS

¶ 18 Defendant argues that his charges should be dismissed or, in the alternative, the case should be reversed and remanded for a new trial. The alleged trial court errors can be summarized as follows: (1) denying defendant's motion to dismiss; (2) giving an unsolicited jury instruction on citizen's arrest; (3) refusing to give defendant's requested jury instruction on negligence; (4) denying defendant's motion to declare a mistrial based on the jury being deadlocked; (5) not instructing the jury on the lesser-included offenses, including simple battery and reckless conduct; and (6) denying defendant's motion for a continuance of the trial. Defendant also raises a constitutional issue; he contends that section 12-3.05(c) of the Criminal Code is unconstitutional as applied to him.

¶ 19 A. Motion To Dismiss

¶ 20 We first address defendant's argument that the trial court erred in denying his motion to dismiss. On December 5, 2011, defense counsel informed the court that, according to some Chicago police reports he had received, there appeared to be three videos that the police had reviewed, including a Chicago Transit Authority (CTA) video that he had not received. The State represented that it did not intend to use the video and it had not been inventoried because it had not captured any part of the argument between defendant and Enadeghe. The State indicated that the video could be subpoenaed, presuming CTA had retained them. The next day, defendant

issued a subpoena to the CTA but received a letter in response, stating that "due to the time in which it was requested," the videotape was no longer available.

¶ 21 On May 14, 2012, defendant filed a motion to dismiss the charges against him pursuant to *People v Kladis*, 2011 IL 110920. Defendant argued that, because the video was not preserved, the State had committed a discovery violation. The State, in its response, acknowledged that the police reports indicated that a CTA bus may have captured all or parts of the offense on video. The State also noted that Detective Lopeztello had written in his report that he "submitted a request to Jim Higgins of the CTA that any video surveillance from bus #1469 be secured and sent to the attention of the undersigned." However, the State contended that "no officers or detectives involved in this case ever viewed any such CTA video, received any such video from the CTA, or even conclusively determined that any such video ever existed."

¶ 22 The trial court held an evidentiary hearing on defendant's motion to dismiss. Defendant called Detective George Lopeztello. This officer testified that, during his investigation of the incident, he spoke to Officer Barber, the arresting officer, who gave him a summary of what had occurred. Both Detective Lopeztello and Officer Barber spoke to Aisha White, the CTA bus driver. White told them that she had activated a video camera on her bus after the incident. She did not say the incident was captured on video, but that she had activated the camera "in hopes of capturing the defendant before he left the scene." According to Detective Lopeztello, White told him she was operating bus #1469. Detective Lopeztello stated that, to his knowledge, the Chicago Police Department has no control over the CTA security or video recordings. He contacted the security officer at the CTA, Jim Higgins and relayed the information to him regarding a video on bus #1469. Higgins told Detective Lopeztello he would check to see if a video existed and would get back to him with any results. After this contact, Detective

Lopeztello testified that he made no further effort to view any video or see if it was preserved. Detective Lopeztello admitted that several months later, sometime in July 2012, he reviewed a printed version of the 9-1-1 inquiry which listed the bus number as #1569, not #1469. Detective Lopeztello did not take any steps to get a video from bus #1569. He also testified that he never saw any tapes nor did he ever have possession of any tapes. Detective Lopeztello also testified regarding Officer Barber's report and the statement contained in it that indicated that the incident was "captured" on CTA bus #1469. Lopeztello explained that Officer Barber, who had also requested the video from the CTA, did not have a video recording from that bus and had never viewed a video recording. The trial court denied defendant's motion to dismiss, noting that dismissal of the charges would be "a very extreme remedy" that was not warranted by the facts of this case.

¶ 23 The State's failure to produce evidence to a defendant may be a discovery violation under Illinois Supreme Court Rule 415(g)(i) (eff. Oct. 1, 1971), or it may constitute a due process violation, or both. *People v. Borys*, 2013 IL App (1st) 111629, ¶ 17. In the trial court, defendant only argued a discovery violation. Before this court, defendant principally relies on *People v. Kladis*, 2011 IL 110920, a case involving a discovery sanction, not a claimed due process violation. Defendant does, however, discuss due process in his brief and cites to due process jurisprudence. Defendant, in fact, merges the two issues, jumping back and forth between discovery-sanction case law and due-process decisions. Arguably, defendant has forfeited his due process argument, but we will consider it for two reasons. First, the State has not argued forfeiture, thereby, so to speak, forfeiting its forfeiture argument. See *People v. McKown*, 236 Ill. 2d 278, 308 (2010); *People v. Williams*, 193 Ill. 2d 306, 347-48 (2000). Second, the arguments raised below, and the court's findings of fact and conclusions of law

regarding the government's handling of the alleged evidence in this case, provide all the information we require to analyze this issue under the Due Process Clause.

¶ 24 1. Due Process Violation

¶ 25 Under the Due Process Clause, in determining the sanction that should result from the prosecution's failure to produce evidence for the defendant's examination and use at trial, the case law distinguishes between evidence which is "material" exculpatory evidence from that which is merely "potentially useful" to the defendant. *People v. Sutherland*, 223 Ill. 2d 187, 235-36 (2006). Under the seminal case of *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the State's failure to produce exculpatory evidence that is "material" to the defendant's guilt or punishment is reversible error, regardless of the motivation of the government officials in failing to produce the evidence. *Sutherland*, 223 Ill. 2d at 236-36. On the other hand, under *Arizona v. Youngblood*, 488 U.S. 51 (1988), the State's failure to produce evidence that is merely " 'potentially useful' " to the defendant does not deny due process " 'unless a criminal defendant can show bad faith on the part of the police.' " *Sutherland*, 223 Ill. 2d at 236 (quoting *Youngblood*, 488 U.S. at 58); accord *Illinois v. Fisher*, 540 U.S. 544, 547-49 (2004) (reversing our appellate court and finding that state's destruction of substance purporting to be cocaine did not require reversal of defendant's cocaine possession conviction, given lack of bad faith by government officials).

¶ 26 The reasoning behind the *Youngblood* line of cases has particular force where the State not only fails to produce evidence to the defendant, but *cannot* produce it because it has been lost or destroyed. In such a circumstance, *Brady* would be " 'ill-suited' " to the analysis (*Sutherland*, 223 Ill. 2d at 235 (quoting *In re C.J.*, 166 Ill. 2d 264, 272 (1995)) for two reasons. First, evidence does not fall under *Brady* unless it is first determined that the evidence is materially favorable to the accused, an analysis that cannot possibly be undertaken if the evidence is missing. Second, a

remand for a new trial—the typical remedy for a *Brady* violation—would not solve anything, because that evidence would be missing from the second trial, too. See *People v. Hobley*, 159 Ill. 2d 272, 307 (1994). Thus, in cases where evidence is lost or destroyed, the U.S. Supreme Court has made it clear that the only question for the court is the good or bad faith of the government in losing or destroying the evidence. *Youngblood*, 488 U.S. at 58; *Fisher*, 540 U.S. at 547-49.

¶ 27 Arguably, the Illinois Supreme Court has carved an exception to *Youngblood* for cases where the inadvertently lost or destroyed evidence would have been decisive to the outcome of the case. *People v. Newberry*, 166 Ill. 2d 310, 315 (1995). In *Newberry*, a police field test yielded no indication of cocaine present in the substance, while a lab test found the presence of cocaine. The substance was destroyed before the defendant could test it. There was no credible indication of bad faith on the government's part. The supreme court found *Youngblood* distinguishable because the defendant's ability to test the substance was "essential to and determinative of the outcome of the case," and defendant did not "have any realistic hope of exonerating himself absent the opportunity to have [the substance] examined by his own experts." *Id*. at 315.

¶ 28 In *People v. Fisher*, our appellate court relied on *Newberry* in reversing a conviction for cocaine possession and ordering the indictment dismissed, despite any bad faith of the government in destroying the alleged cocaine, because the defendant's ability to test the substance was his " 'only hope for exoneration.' " *Fisher*, 540 U.S. at 547 (quoting appellate court's unpublished order). The U.S. Supreme Court reversed our decision, emphatically reiterating that, in a case involving lost or destroyed evidence, the only question is whether the government acted in bad faith; the importance of the evidence to the outcome of the trial was irrelevant. *Id*. at 547-48. The Supreme Court borrowed language directly from *Newberry* and rejected it: "We … disagree that *Youngblood* does not apply whenever the contested evidence

provides a defendant's 'only hope for exoneration' and is 'essential to and determinative of the outcome of the case.' " *Id*. at 548 (quoting *Newberry*, 166 Ill. 2d at 315).

¶ 29 Our appellate court has since held that *Newberry*'s distinction of *Youngblood* is no longer good law under a federal due process analysis, in light of the Supreme Court's rejection of it in *Fisher*. *People v. Kizer*, 365 Ill. App. 3d 949, 960 (2006); *People v. Kladis*, 403 Ill. App. 3d 99, 106-07 (2010), *aff'd*, 2011 IL 110920. In *Sutherland*, 223 Ill. 2d at 215, our supreme court raised that same question but did not find it necessary to answer whether *Newberry* "still ha[d] vitality," because it found *Newberry* inapplicable. In that case, the evidence the State was unable to produce—the vehicle seized at the time of the defendant's arrest—did not form the basis of the kidnapping, sexual assault and murder charges, nor was it "central or critical" to the State's case. *Id*. at 240. Thus, the only question for the court was whether the government acted in bad faith, which the court had already answered in the negative. *Id*. at 238.

¶ 30 We likewise find it unnecessary to decide whether *Newberry* remains good law, because we would not find a due process violation here in any event. First, although the record reflects some initial confusion on the part of the parties, it is undisputed that the Chicago police never obtained possession of any CTA videotape. The case law cited above, also relied upon by defendant, concerns the failure of the government to *preserve* and disclose evidence to the defendant. See, *e.g.*, *Youngblood*, 488 U.S. at 58; *Sutherland*, 223 Ill. 3d at 213-14. The State cannot preserve evidence that it never had. Defendant is not arguing here that the police should have done a better job of locating that video; his argument, or at least the case law on which he relies, is premised on the fact that the government, at some point in time, possessed the evidence in question. Here, the police never obtained possession of the CTA video.

¶ 31 In addition, unlike in *Newberry*, we cannot say that the missing videotape would have been crucial to or dispositive of the outcome of the case. It is by no means clear that the videotape at issue in this case, assuming it existed, contained relevant information. A Chicago police officer, having been told by Ms. White that she activated the video camera on her bus to capture the identity of defendant, tried to obtain the tape but was unsuccessful. The police never had such a video in their possession or even saw the video. And by the time defendant subpoenaed the CTA for any such video, it had been destroyed. The trial court also noted that certain testimony at the evidentiary hearing called into question whether the video camera was even facing in the right direction to capture the incident between defendant and the victim. Moreover, at trial, two independent, uninterested witnesses testified that defendant struck the cab driver in the face with the briefcase. Based on this evidence, we cannot say that this missing videotape was crucial to the outcome of this case, as was the evidence in *Newberry*. Defendant's argument to the contrary is based on speculation piled atop speculation.

¶ 32 Finally, even if we were to find the *Youngblood* line of cases applicable, despite the fact that the police never actually possessed the evidence, we still would find no due process violation because there was no evidence of bad faith on the part of the police department. *Youngblood*, 488 U.S. at 58; *Fisher*, 540 U.S. at 547-49. The evidence showed that the Chicago police tried to obtain the video, that there was some confusion about the number of the bus that Ms. White was driving that day, and that ultimately, the CTA official never called back the detective. Defendant established no evidence of malice or a deliberate failure to pursue this evidence, nor did the trial court find any. At most, the court found that "the [Chicago police],

perhaps, should have done more in terms of follow-up." For all of these reasons, we find no due process violation in this case.[1]

¶ 33 2. Discovery Violation

¶ 34 For many of the same reasons, we find that no discovery violation occurred here. To establish a discovery violation under Illinois Supreme Court Rule 415(g)(i), the movant must show that "a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto." *Borys*, 2013 IL App (1st) 111629, ¶ 17. There has been no such showing here. As we have noted above, the trial court found that the State never had possession of this videotape. Disclosure requirements governing criminal proceedings deal "with material or information that is within the possession or control of the State." *Hobley*, 159 Ill. 2d at 308; Ill. S. Ct. R. 412(a) (eff. March 1, 2001).

¶ 35 Defendant relies on *People v. Kladis*, 2011 IL 110920. In *Kladis*, the defendant was charged with driving under the influence of alcohol (DUI). She made a discovery request for the videotape of her traffic stop. State law required that videotapes of traffic stops be retained for 90 days and required continued retention where the videotape was deemed to be "evidence in a criminal case." Although the defendant made her request 25 days before her tape was scheduled to be destroyed, the State nonetheless destroyed it. As a sanction for the discovery violation, the trial court excluded any testimony from the police officer as to the events that would have been shown on the videotape, such as defendant's behavior in exiting the vehicle.

¶ 36 In affirming this discovery sanction, the Illinois Supreme Court explained that "upon receiving the written Rule 237 notice to produce the video recording five days after defendant

[1] Defendant nowhere delineates whether his due process argument is brought under the State or federal constitution. But our analysis would be the same in any event. *Sutherland*, 223 Ill. 2d at 241 (holding that this issue treated the same under both State and federal constitution).

was arrested—and 25 days before it was destroyed—the State was placed on notice and should have taken appropriate steps to ensure that it was preserved." *Kladis*, 2011 IL 110920, ¶ 38. The court held that the trial court did not abuse its discretion in finding that the video recording of defendant's stop and arrest was subject to discovery, and that the State committed a discovery violation by allowing the destruction of the recording. *Id*., ¶ 39.

¶ 37 *Kladis* holds that where the State, even without bad faith, destroys relevant evidence *after* being put on notice of defendant's request for the evidence, a non-due-process discovery violation may be found. See *People v. Strobel*, 2014 IL App (1st) 130300, ¶ 11; *People v. Schroeder*, 2012 IL App (3d) 110240, ¶ 32. But "*Kladis* does not stand as authority for imposing a sanction against the prosecution where the requested discovery material never existed in the first instance." *Strobel*, 2014 IL App (1st) 130300, ¶ 11. Nor, as we have noted, does it apply where, as here, the State never took possession of the evidence at any time, either or before or after the discovery request. See *Hobley*, 159 Ill. 2d at 308.

¶ 38 More importantly, unlike in *Kladis*, where the State created and then destroyed the evidence, in this case the Chicago police did neither. There is no evidence that the State destroyed any evidence in the first place, much less that it did so after being put on notice of defendant's request for the evidence. Nor is there any evidence that the Chicago police even saw the video, much less possessed it. At most, the evidence showed that any video that may have existed was unavailable by the time defendant requested it.

¶ 39 Finally, even *Kladis* does not support the remedy requested here, a dismissal of the charges against defendant. In *Kladis*, the trial court did not dismiss the charges against defendant but ruled that the State could not introduce testimony from the police officer as to events that would have been captured by the videotape, a far cry from the remedy defendant seeks here. We

agree with the trial court that defendant sought "a very extreme remedy here" that would be "a massive expansion of [*Kladis*]" unwarranted by the facts.

¶ 40 During oral argument, defendant contended that the trial court necessarily found a discovery violation in this case because, otherwise, it would have had no occasion to discuss a "remedy." We think defendant reads too much into the judge's comments. First of all, the trial court never explicitly stated that it had found a discovery violation. Second, the substance of the ruling does not automatically suggest that it was a sanction. The trial court ruled that, given the absence of this videotape, the CTA bus driver would not be allowed to testify that her identification of defendant as the perpetrator of the crime "would have been corroborated by a video that [she] activated." That ruling could just as easily be viewed as an evidentiary ruling by the trial court to ensure a fair trial for defendant, by not allowing the State to profit from the absence of the videotape. See *People v. Kaiser*, 239 Ill. App. 3d 295, 303 (1992) (even if not imposed as sanction, exclusion of evidence proper "to ensure that the defendant has a fair trial"); *People v. Walley*, 215 Ill. App. 3d 971, 974 (1991) ("A trial court has inherent authority to insure the defendant a fair trial"). It could also be viewed as a pre-trial ruling on admissibility, as the bus driver surely would have lacked foundation to testify as to the contents of a videotape she never saw.

¶ 41 More importantly, if, in fact, the trial court found a discovery violation, we would find that ruling to be error because, as we have noted above, the State never possessed that videotape. See *Hobley*, 159 Ill. 2d at 308; Ill. S. Ct. R. 412(a). Nor could defendant possibly claim that this error was prejudicial to him; it actually favored him, just not as much as he would have preferred.

¶ 42 Because the State did not create the videotape and never possessed the videotape, and because the remedy requested by defendant here is not dictated in any way by *Kladis*, we find that the trial court correctly refused to dismiss the indictment.

¶ 43 B. Jury Instructions

¶ 44 Defendant next argues that the trial court erred in its decisions regarding instructions to the jury. He raises three separate errors: (1) giving the jury, *sua sponte*, I.P.I. 24-25.15, the instruction on a private person's use of force in making an arrest; (2) refusing to give defendant's requested negligence instruction; and (3) not instructing the jury on lesser-included offenses including simple battery and reckless conduct.

¶ 45 This court will reverse a trial court's decision on what instructions to give only if the trial court abused its discretion. *People v. Cook*, 2014 IL App (1st) 113079, ¶ 27. We review *de novo*, however, whether the jury instructions that are given to the jury accurately convey the applicable law. *Id.* ¶ 27; *People v. Velez*, 2012 IL App (1st) 101325, ¶ 26.

¶ 46 1. Citizen's Arrest Instruction

¶ 47 We first address defendant's argument that the trial court erred in giving the jury, *sua sponte*, an instruction on a "citizen's arrest" as contained in I.P.I. 24-25.16 (Private Person's Use of Force in Making Arrest – Not Summoned by Peace Officer). The instruction provided to the jury stated:

> "A private person who makes a lawful arrest need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. He is justified in the use of any force which he reasonable believes to be necessary to effect the arrest and of any force which he reasonably believes to be necessary to defend himself from bodily harm while making the arrest."

¶ 48 The instruction at issue is from chapters 24 and 25 of the Illinois Pattern Jury Instructions, Criminal (IPI), the "Defenses" section. The introduction to Chapter 24 states as follows:

> The Committee believes that elements or issues of an affirmative defense should be treated in two ways: *first,* by definition following the definition of the crime with which the defendant is charged; *second,* in the same instruction with the issues or elements of the crime and the State's burden of proof. See Chapters 6 through 23, *supra.* The appropriate issues and burden of proof defenses instruction should be superimposed upon the appropriate issues and burden of proof crimes instruction so that the jury receives a single instruction covering all of the issues in the case.

¶ 49 There is no question that the instruction at issue concerns an affirmative defense to a criminal charge, the instruction for which must come in two places—after the definition of the offenses charged, and along with the elements of the crime charged. There is also no question that defendant did not plead this affirmative defense, nor any other affirmative defense.

¶ 50 The trial court did not submit this instruction to describe defendant's conduct, but rather the *victim's* actions. The court believed that this jury instruction was appropriate in light of the victim's conduct in trying to stop defendant from leaving the scene of the broken windshield—a confrontation that ultimately led to the battery at issue. The trial court stated that it did not believe "any magic words are required to make this an attempt at an arrest" and noted that two witnesses testified that defendant was involved in criminal damage to the victim's taxi. The court thus determined that "in effect what is happening is that a private person [the cab driver], is

trying to get [defendant] to stop, he is trying to detain [defendant], and the evidence so far is that [defendant] is trying to get away."

¶ 51 But whether the evidence supported the giving of this instruction is not the issue. Nor does it matter, as the State argues, that this instruction accurately stated the law in the abstract. This jury instruction had no place in *this case*. It described no affirmative defense at issue. Defendant was not charged with any crime regarding that broken windshield. Whether defendant or the cab driver was to blame for the broken windshield was irrelevant. That initial incident was part of the narrative as to how the offense in question occurred. There was no reason for the jury to be instructed on it.

¶ 52 What the jury instruction did, instead, was inject the trial court's opinion as to what happened before the battery in question took place, and to some extent what happened afterward. The jury heard evidence that defendant smashed the cab's windshield, and it heard evidence that the briefcase accidentally made contact with the windshield after the cab stopped too close to defendant in the street. The jury instruction effectively picked one version over the other. It made the cab driver's accosting of defendant the equivalent of a "lawful arrest," suggesting that defendant had engaged in criminal conduct with respect to the shattering of the windshield.

¶ 53 Worse still, the instruction inserted commentary as to the events forming the offense in question. In describing the alleged battery at issue, defendant testified that the cab driver grabbed his briefcase and would not let go, and during the process of forcefully removing it from the driver's grasp, the briefcase accidentally contacted the driver in the face. The jury was told by this instruction, however, that the cab driver was making a lawful arrest and was "justified in the use of any force which he reasonably believe[d] to be necessary to effect the arrest." Defendant's testimony painted the cab driver's refusal to let go of his briefcase as unreasonable, but the jury

instruction told the jury that the cab driver "need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance." Simply put, the jury instruction effectively placed the fault for the broken windshield on defendant, and more significantly, it placed the cab driver in a very favorable light during his confrontation on the street with defendant. The giving of this instruction was clearly error.

¶ 54 The next question, then, is whether this error requires a new trial. "It is well settled that a defendant's claim of improper jury instructions is reviewed under a harmless-error analysis." *People v. Amaya*, 321 Ill. App. 3d 923, 929 (2001) (quoting *People v. Dennis*, 181 Ill. 2d 87, 95 (1998)). "Error arising from the tendering of jury instructions is deemed harmless only if the submission of proper instructions to the jury would not have yielded a different result." *People v. Shaw*, 186 Ill. 2d 301 (1999). We do not consider a jury instruction in isolation but instead review whether the instructions, as a whole, fully and fairly announce the law applicable to the theories of the defendant and the State. *People v. Velez*, 2012 IL App (1st) 101325, ¶ 26.

¶ 55 As clearly inappropriate as the jury instruction was, we do not believe it warrants reversal. It is undisputed that the jury was properly instructed as to the State’s burden of proof and defendant’s presumption of innocence. Defendant does not contend that the jury was not instructed on the elements of the State's case. Moreover, there was considerable evidence to support a guilty verdict based on the eyewitness testimony. The pedestrian, Smith, testified that he saw defendant strike the cab driver in the face with his briefcase. The CTA bus driver, White, corroborated Smith's testimony; she testified that she saw defendant hit the cab driver in the face with his briefcase, knocking the cab driver to the ground. Two independent witnesses thus corroborated the State's case.

¶ 56 Ultimately, we do not believe the inclusion of this faulty jury instruction impacted the verdict. The jury was not charged with deciding whether defendant or the cab driver was the more reasonable person in the confrontation on the sidewalk. The jury was asked to decide whether defendant intentionally or knowingly struck the cab driver in the face with his briefcase. Even if the jury was led to believe that the cab driver was acting reasonably in the altercation, if the jury believed that defendant's striking of the cab driver was accidental, as defendant claimed, then the jury instructions would have directed jurors to acquit because the State would have failed to prove the element of an intentional or knowing battery. Thus, although the trial court should not have given the instruction on citizen's arrest, in light of the strength of the evidence against defendant and the curative effect of the other jury instructions we have outlined above, the error was not so prejudicial as to warrant a new trial.

¶ 57 2. Negligence Instruction

¶ 58 Defendant also argues that the trial court erred in refusing to give his requested instruction on negligence. He cites *People v. Simms*, 192 Ill. 2d 348, 412 (2000), in which the court noted that a defendant is entitled to the "submission of appropriate jury instructions on the law that applies to his theory of the case if there is evidence in the record to support that theory." Defendant notes that his theory was that he moved his briefcase to keep it out of the persistent efforts of the cab driver to seize it from his grasp, and he contends that the jury could have concluded that his actions were accidental or negligent.

¶ 59 Defendant was charged with aggravated battery. Intent is an essential element of the offense of battery, and the State is required to prove defendant's conduct was knowing or intentional, not just accidental or negligent. See *People v. Phillips*, 392 Ill App. 3d 243, 258 (2009). The instructions the jury received on the charged offense included this element. The

charged conduct put defendant's mental state at issue. We agree with the State that, if the jury found that defendant did not act intentionally or knowingly, but merely negligently, then the State would have failed to prove a requisite element of the offense of aggravated battery beyond a reasonable doubt. The trial court did not abuse its discretion in declining to give defendant's requested instruction on negligence.

¶ 60 3. Lesser-Included Offenses Instruction

¶ 61 Defendant next asserts that the trial court erred by not instructing the jury on lesser-included offenses including simple battery and reckless conduct. But defendant did not tender lesser-included instructions to the trial court. "Generally, it is the burden of the party who desires a specific instruction to present it to the court and request that it be given to the jury." *People v. Palmer*, 188 Ill. App. 3d 414, 427 (1989). "Error cannot be assigned in a reviewing court with respect to a matter upon which the trial court was not called upon to rule." *People v. Taylor*, 36 Ill. 2d 483, 489 (1967) (failure to give lesser-offense instruction where none was tendered by defendant was not error); accord *People v. Carter*, 208 Ill. 2d 309, 315 (2003); see also *Palmer*, 188 Ill. App. 3d at 427 (where defendant did not offer instruction on lesser-included offense, trial court did not have duty to raise issue *sua sponte*). Defendant has failed to respond to the State's arguments.

¶ 62 Defendant notes that a trial court *may* instruct the jury, *sua sponte*, on a lesser-included offense. See *People v. Garcia*, 188 Ill. 2d 265 (1999). We have also noted that there are circumstances where a trial court may be *required* to *sua sponte* offer an instruction, which include " 'seeing that the jury is instructed in the elements of the crime charged, the presumption of innocence and on the question of burden of proof.' " *People v. Palmer*, 188 Ill. App. 3d 414, 427 (1989) (quoting *People v. Parks*, 65 Ill.2d 132, 137 (1976)). That is not the case here. We

conclude defendant has failed to show the trial court committed any error related to lesser-included offense instructions.

¶ 63 C. Mistrial

¶ 64 Defendant next argues that the trial court abused its discretion in denying defendant's motion for a mistrial when the jury was deadlocked. The State counters that defendant did not make a motion for a mistrial and, in any event, the jury was not hopelessly deadlocked.

¶ 65 The jury began deliberating at 1:55 p.m. At 3:40 p.m., the jury requested the transcript of Shelton Smith's testimony. At approximately 6 p.m., about four hours after the start of deliberations, the jury sent the trial judge a note stating "Jury Deadlocked What now?" The trial court discussed the note with counsel. The State's position was that the court should instruct the jurors to continue their deliberations. Defense counsel noted that the amount of time that the jury had been deliberating was almost as long as the time it took to present the testimony. Defense counsel's stated position was, "if they're deadlocked at this time, they would remain deadlocked, so I would ask the Court to send them home." The court decided to tell the jury to continue to deliberate. The court also told counsel that the court would consider a *Prim*[2] instruction if the jury sent a subsequent note stating it was deadlocked but declined to give it at that point.

¶ 66 At approximately 7:23 p.m., the jury sent a note indicating a juror was "claustrophobic" and needed "some air." The trial court brought the jury out, then instructed the jurors to stop deliberating and go outside for 15 minutes for some fresh air. The court also informed the jury that pizza had been ordered for them and was on its way. After the break, the jury resumed deliberations.

[2] *People v. Prim*, 53 Ill. 2d 62 (1972).

¶ 67 At 9:00 p.m., although there had been no further communication from the jury, the trial court noted that the jury had been deliberating for seven hours and decided to give the *Prim* instruction. At 9:35 p.m., the jury reached its verdict.

¶ 68 A "trial court has broad discretion when responding to a jury that claims to be deadlocked, although any response should be clear, simple, and not coercive." *People v. McLaurin*, 235 Ill. 2d 478, 491 (2009) (trial court's instruction to "keep on deliberating with an open mind" and "keep on deliberating" were proper). The length of jury deliberations is a matter which rests within the sound discretion of the trial court, and its judgment will not be disturbed "unless this discretion has been clearly abused." *People v. Daily*, 41 Ill. 2d 116, 121 (1968); accord *People v. Harris*, 294 Ill. App. 3d 561, 568 (1998) ("The determinations of what length of time is reasonable to permit a jury to deliberate, whether a jury should continue to deliberate after it has indicated that it is hopelessly deadlocked, and whether to sequester a jury that has more than once indicated that it cannot reach a verdict are matters within the discretion of the trial court."). Whether a trial court has abused its discretion depends on the circumstances of a given case. *Daily*, 41 Ill. 2d at 121. Abuse of discretion is the most deferential standard of review. *People v. Radojcic*, 2013 IL 114197, ¶ 33; see also *People v. Coleman*, 183 Ill. 2d 366, 387(1998) (noting that the abuse of discretion standard has been " 'recognized the most deferential standard of review available with the exception of no review at all.' [Citation.]")." "An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *People v. Patrick*, 233 Ill. 2d 62, 685 (2009) (citing *People v. Hall*, 195 Ill. 2d 1, 20 (2000).

¶ 69 The trial court's response to the jury's note was to "continue to deliberate." We agree with the State that the response was simple, neutral and not coercive. The trial court did not abuse its discretion.

¶ 70 Defendant also argues that there was a significant risk that the verdict was coerced or hastened by the trial court's conduct because the jury deliberated less than thirty minutes after the *Prim* instruction, but we disagree.[3] As the State notes, "[t]he length of the jury's deliberations subsequent to the court's instruction, standing alone, is not conclusive as to whether the verdict was the result of the pressure exerted by the court's instruction." See *People v. Gregory*, 184 Ill. App. 3d 676, 682 (1989). We find no error here.

¶ 71 D. Continuance

¶ 72 Defendant next argues that the trial erred in not granting him a continuance. We review a trial court's decision to grant or deny a continuance for an abuse of discretion. *People v. Walker*, 232 Ill. 2d 113, 125 (2009). The Illinois Supreme Court has discussed the factors to be considered by a trial court when deciding whether to allow a request for a continuance, including the movant's diligence, the defendant's right to a speedy, fair and impartial trial, the interests of justice, the history of the case, the complexity of the matter, the seriousness of the charges, docket management, judicial economy, and inconvenience to the parties and witnesses. See *People v. Lovejoy*, 235 Ill. 2d 97, 123 (2009) (citing *People v. Walker*, 232 Ill. 2d 113, 125-26 (2009)). "There is no mechanical test, statutory or other, for determining the point at which the denial of a continuance in order to accelerate the judicial proceedings violates the substantive right of the accused to properly defend." *People v. Lott*, 66 Ill. 2d 290, 297 (1977). "The

[3] Defendant concedes that the trial court's *Prim* instruction, I.P.I 26.07, was correct.

circumstances of each case must be weighed, particularly the reasons presented to the trial judge at the time the request is denied." *Id*.

¶ 73 On March 18, 2013, the day of trial, the State was ready. Defense counsel, however, said that he had told the State a week earlier that he was not going to be ready for trial because he was "having trouble locating a witness," Serge Purnyn. Defendant had not subpoenaed Purnyn because, apparently, the witness had been out of the country. Defense counsel told the court that, if he was "unable to locate [the witness] within the next week and a half," he would withdraw him. The State argued that defense counsel had known about the witness since he had filed his answer to discovery in December 2014, and that defendant had had four months to locate the witness and present him. The State also noted that the trial date had been set for well over a month. The State additionally noted that it had easily procured an address for Purnyn and could not understand why defense counsel had not had an opportunity to speak with him or effect service on him in the last four months. The State also informed the court that it had no personal information about Purnyn other than what it had been "able to dig up from his name." Defense counsel withdrew the witness.

¶ 74 Defense counsel then told the court that he had informed the State as a courtesy that he was not going to be ready and, had he known the State would have been objecting to his request for a continuance, he would have acted differently. When the court commented that the basis for the continuance had "just gone away" because defense counsel was not seeking to call Purnyn, defense counsel agreed. Nonetheless, he contended that he had indicated he was not going to be ready for trial and had not had an opportunity to prepare his client. The following colloquy occurred:

THE COURT: "Let's pass the case. We will make it clear so you have time to prepare that we will start picking [a jury] at 1:00 o'clock. For the record it's 10:30 now.

[DEFENSE COUNSEL]: Thank you.

¶ 75 When the case was later recalled, the following exchange occurred:

[THE COURT]: [Defense counsel] is here. The case is set for trial. [Defense counsel], earlier we called the case. You had made a motion for a continuance that was denied, sir. Did you want to be heard on that again?

[DEFENSE COUNSEL]: Yes, your Honor. Obviously, I was not prepared for trial today due to the fact that when I spoke to the State last week, I told them I wasn't going to be prepared, and I spoke to them both in this courtroom and on the telephone. *** No one indicated to me they were going to object to that or call any witnesses. I left both the courtroom and the telephone conversation with the impression that I would not be held for trial today.

* * *

[DEFENSE COUNSEL]: So I would renew my motion for the Court to enforce the subpoena for his file and again renew my motion for a continuance."

[THE COURT]: Your renewed motion is going to be denied. *** Motion for continuance will be likewise denied."

¶ 76 Defendant raised two grounds for a continuance. The first was that he was having trouble locating a witness, Serge Purnyn, whom he had not subpoenaed. Defendant did not make an offer of proof as to what Purnyn may have testified to on defendant's behalf and we cannot determine whether the witness would have offered any testimony beneficial to defendant. There has been no showing that the lack of his testimony affected the outcome of the trial. Moreover, defendant

withdrew the witness and further agreed on the record that the basis for the continuance had "just gone away." Defendant has not shown that the trial court abused its discretion.

¶ 77 Defense counsel, however, also stated that he was unprepared for trial because he had not had time to prepare his client. But the trial court granted a short continuance. The trial court passed the case at 10:30 a.m. and delayed picking the jury until 1:00 p.m. to give counsel time to prepare. The trial court's decision was not "arbitrary, fanciful, or unreasonable," and we cannot say that no reasonable person would take the view adopted by the trial court. The trial court did not abuse its discretion.

¶ 78 E. Constitutionality of Section 5/12-3.05(c)

¶ 79 We now address defendant's final argument, that section 5/12-3.05(c) is unconstitutional as applied to him. He raises an equal protection argument. Defendant was convicted of aggravated battery under section 12-3.05(c).[4] Defendant's argument that the statute is unconstitutional as applied to him is that there is no rational basis for elevating the misdemeanor of simple battery to a felony of aggravated battery simply because it takes place on a public way.

¶ 80 As the State notes, equal protection challenges to the aggravated battery statute have been rejected by Illinois courts. In *People v. Watson*, 118 Ill. 2d 62 (1987), the Illinois Supreme Court held that the enhancement to aggravated battery for a battery committed on a state or county public aid worker, but not on a *local* public aid employee, did not violate equal protection, in light of the more extensive powers and duties of state and county public aid employees and their correspondingly greater risk and responsibility than local public aid employees. The court thus held that the classification was reasonably related to a legitimate governmental objective of

[4] The statute provides as follows: "(c) Offense based on location of conduct. A person commits aggravated battery when, in committing a battery, other than by the discharge of a firearm, he or she is or the person battered is on or about a public way, public property, a public place of accommodation or amusement, a sports venue, or a domestic violence shelter."

protecting safety of state and county workers. This court has also rejected equal protection challenges to the aggravated battery statute. See *People v. Buie*, 217 Ill. App. 3d 786 (1991); *People v. Lowe*, 202 Ill. App. 3d 648 (1990); *People v. Cole*, 47 Ill. App. 3d 775 (1977).

¶ 81 *People v. Buie* involved an equal protection challenge to the section of the statute at issue in the instant case.[5] We held that "the legislative intent of the statute is clear: it is intended to protect the public safety by making more serious a battery done in a public place, because it 'constitutes a more serious threat to the community than simple battery.' [Citation.]" *Buie*, 217 Ill. App. 3d at 789.

¶ 82 Defendant contends, among other things, that "s*tare decisis* does not compel inaction by this court." He further argues that, in none of the cases relied upon by the State, did the defendant provide "evidentiary support" of the constitutional challenge. Here, in the trial court, defendant attached evidence to his motion from the clerk of the circuit court, specifically statistical data from the clerk's office. Defendant argues that he has presented "ample direct evidence of identical alleged conduct (battery occurring on a public way) where defendants did not have resulting felony convictions."

¶ 83 The exhibits attached to defendant's motion for a new trial show that other defendants in Cook County were charged only with a misdemeanor battery for the same conduct on a public way. Thus, according to defendant, because he was charged with a felony, he was treated differently for the same conduct than were similarly-situated individuals, "based only upon the charging decision of the executive branch."

¶ 84 But that claim comes nowhere close to establishing an equal protection violation, *stare decisis* or not. An equal protection claim requires a showing that the government's selective

[5] The statute, section 12-4(b)(8) of the Criminal Code of 1961, was subsequently renumbered as section 12-3.05 by Public Act 96-1551, Art. 1, § 5, eff. July 1, 2011.

prosecution was motivated by a discriminatory purpose, and that the action had a discriminatory effect on an identified class of individuals sharing a particular trait, *because of* that particular trait. *United States v. Armstrong*, 517 U.S. 456, 465 (1996). Defendant argues none of that. Defendant does not claim that the State's Attorney intentionally singles out people with a particular defining characteristic for felony, as opposed to misdemeanor, prosecution. Defendant is not claiming that he *shares* any particular common characteristic with other people who were charged with felony, rather than misdemeanor, battery. He is not claiming, for example, that he is of a particular race, and everyone sharing his skin color gets charged with the felony, while other racial groups consistently get the misdemeanor charge. He does not claim that he is being singled out for felony prosecution because of age, sexual orientation, religious affiliation, or any other particular attribute. Nor does he identify those charged with misdemeanor offenses by a particular trait that is different than the one he possesses. He is simply saying that some people got charged with felonies, some got charged with misdemeanors, and he was one of the unlucky ones.

¶ 85 Where a defendant's conduct violates more than one statute, he is not denied equal protection of the laws if he is prosecuted under the statute that provides the more severe penalty, so long as the government does not discriminate against any class of defendants based on some identifiable trait. *Jamison*, 197 Ill. 2d at 162 (citing *United States v. Batchelder*, 442 U.S. 114, 123-24 (1979)); accord *People v. Perry*, 224 Ill. 2d 312, 339 (2007). This principle includes the situation where, as here, "the conduct for which a defendant is prosecuted constitutes a misdemeanor under one statute and a felony under another." *People v. McCollough*, 57 Ill. 2d 440, 445 (1974).

¶ 86 It is well established that the State's Attorney has exclusive discretion in the initiation and management of a criminal prosecution, which includes deciding which of several charges shall be brought, or whether to prosecute at all. *People v. White*, 2011 IL 109616, ¶ 25; *People v. Jamison*, 197 Ill. 2d 135, 161-62 (2001); *People ex rel. Daley v. Moran*, 94 Ill. 2d 41, 45-46 (1983). The State's Attorney has the responsibility of evaluating the evidence, as well as other pertinent factors, and determining what offense *can* and *should* properly be charged. See, *e.g.*, *People v. Blackorby*, 146 Ill. 2d 307, 316 (1992). A prosecutor's charging decision is presumptively lawful. *Armstrong*, 517 U.S. at 464; *People v. Kun Lee*, 2011 IL App (2d) 100205, ¶ 15. We have no idea why, in any particular instance, the State's Attorney chose to charge a misdemeanor, rather than a felony battery. Nor has defendant given us one. Absent a showing that he was treated differently than other, similarly-situated individuals based on an identifiable characteristic, defendant has no free-standing constitutional right to compel his prosecution for the lesser, instead of greater, offense. *McCollough*, 57 Ill. 2d at 445. Defendant has failed to show that the aggravated battery statute is unconstitutional in its application to him.

¶ 87 III. CONCLUSION

¶ 88 For the foregoing reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 89 Affirmed.