

No. 1-11-2015

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 10312
	)	
DENNIS HICKS,	)	Honorable
	)	Matthew E. Coghlan,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE REYES delivered the judgment of the court.  
Justices Hall and Lampkin concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Defendant's conviction for retail theft is affirmed where the evidence was sufficient to prove him guilty beyond a reasonable doubt and his claim of improper comments by the State during its rebuttal argument is forfeited; the order which set fines and fees is amended as defendant was erroneously assessed the \$200 DNA fee and is entitled to credit which offsets his \$30 fine.
- ¶ 2 Following a jury trial, defendant Dennis Hicks was convicted of retail theft for stealing toiletry items from a Treasure Island Foods store. The trial court sentenced defendant to three years' imprisonment and assessed him \$610 in fines and fees. On appeal, defendant contends the State failed to prove him guilty beyond a reasonable doubt because it did not present any

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evidence that the toiletry items were from the Treasure Island Foods store. Defendant also contends he was denied his right to a fair and impartial trial because the prosecutor misstated the evidence during her rebuttal argument. In addition, defendant contends, and the State agrees, that he was erroneously assessed a \$200 DNA ID System fee, and is entitled to monetary credit which offsets his \$30 fine for the Children's Advocacy Center. We vacate the DNA fee, modify the fines and fee order to reflect the monetary credit, and affirm defendant's conviction and sentence in all other respects.

### ¶ 3 BACKGROUND

¶ 4 At trial, Miguel Rosa, assistant manager of the Treasure Island in Hyde Park, testified that at approximately 11:15 a.m. on May 22, 2010, he was standing near the exit doors at the front of the store when he saw defendant exiting the store through the entrance doors. Defendant was carrying a large, bulky duffel bag, approximately three feet wide, by a strap over his shoulder. Rosa exited the store, approached defendant in the parking lot, and requested to check his duffel bag. As defendant started to walk away, Rosa grabbed him. Defendant tried to pull away, but Rosa detained him. Rosa then brought defendant inside the store and escorted him to the security room in the basement. Rosa opened defendant's duffel bag and removed four bottles of Gain laundry detergent, five tubes of Crest toothpaste and five packages of Dove soap. All of these items were offered for sale in the Treasure Island store. Rosa questioned defendant whether he had a receipt for the items in the duffel bag, but defendant was not able to produce a receipt. Rosa then inquired what defendant was going to do with the items, and defendant replied that he was going to sell them so he could turn on his cell phone service.

¶ 5 Rosa photographed the items and brought them to the service desk where the bar code on each item was scanned with a cash register to determine its value. The total value of the 14 items was \$77.68. When the police arrived to arrest defendant, Rosa gave them the photograph of the

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items and the cash register receipt showing the value of the items. The items themselves were maintained by Treasure Island to be purchased. Rosa testified that he has detained individuals for attempting to steal merchandise from the store on hundreds of occasions.

¶ 6 Rosa acknowledged that he first observed defendant when defendant was exiting the store. Prior to that moment, Rosa did not know defendant was in the store, and Rosa did not know how long defendant had been in the store. Rosa further acknowledged that he did not observe defendant remove any items while inside the store. The store has approximately 26 security cameras which provide live images to six monitors that are scrutinized by store personnel; the cameras do not record video. The bar codes that were scanned are placed on the products by the manufacturers, and the same codes are used by every store that sells the product. When Rosa scanned the items, he was not certain if they were part of the store's inventory.

¶ 7 Following 12 minutes of deliberations, the jury found defendant guilty of retail theft. The trial court subsequently sentenced defendant, a repeat offender, to a term of three years' imprisonment and assessed him \$610 in court costs, fines and fees.

#### ¶ 8 ANALYSIS

¶ 9 On appeal, defendant first contends the State failed to prove him guilty beyond a reasonable doubt because there was no evidence that the items in his bag were removed from the Treasure Island store. Defendant argues there were no markings on the items to indicate that they belonged to Treasure Island, no one testified that they observed him remove the items from the shelves, there was no evidence that items were missing from Treasure Island's inventory, and he could have purchased the items at another store.

¶ 10 When defendant argues the evidence is insufficient to sustain his conviction, this court must determine whether any rational trier of fact, after viewing the evidence in the light most favorable to the State, could have found the elements of the offense proven beyond a reasonable

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doubt. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011). "Under this standard, all reasonable inferences from the evidence must be allowed in favor of the State." *People v. Baskerville*, 2012 IL 111056, ¶ 31. This standard applies whether the evidence is direct or circumstantial, and circumstantial evidence is sufficient to sustain a conviction. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009). A criminal conviction will not be reversed based upon insufficient evidence unless the evidence is so improbable or unsatisfactory that there is reasonable doubt as to defendant's guilt. *People v. Givens*, 237 Ill. 2d 311, 334 (2010). As the trier of fact, the jury is responsible for determining the credibility of the witnesses, weighing the evidence, resolving conflicts in the evidence, and drawing reasonable inferences therefrom. *Jackson*, 232 Ill. 2d at 281.

¶ 11 The jury need not be satisfied beyond a reasonable doubt regarding each link in the chain of circumstances; it is sufficient if all of the evidence considered together convinces the jury that the defendant is guilty beyond a reasonable doubt. *Jackson*, 232 Ill. 2d at 281. In weighing the evidence, the jury is not required to disregard the inferences that naturally flow from that evidence, nor must it search for any possible explanation consistent with innocence and raise it to the level of reasonable doubt. *Jackson*, 232 Ill. 2d at 281. This court is prohibited from substituting its judgment for that of the fact finder on issues involving witness credibility and the weight of the evidence. *Jackson*, 232 Ill. 2d at 280-81.

¶ 12 A person commits retail theft when he knowingly takes possession of or carries away merchandise displayed or offered for sale in a retail mercantile establishment with the intention of retaining such merchandise or of permanently depriving the merchant of the possession, use or benefit of such merchandise without paying its full retail value. 720 ILCS 5/16A-3(a) (West 2010); *People v. DePaolo*, 317 Ill. App. 3d 301, 306-07 (2000). The elements of retail theft can be inferred from circumstantial evidence. *DePaolo*, 317 Ill. App. 3d at 307; *People v. Rucker*, 294 Ill. App. 3d 218, 226 (1998).

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¶ 13 Defendant relies on *People v. Liner*, 221 Ill. App. 3d 578 (1991), where the defendant's conviction for retail theft was reversed. In *Liner*, the defendant admitted that he and his accomplice entered a store with the intent to create a diversion and steal a bottle of Seagrams liquor. The men did, in fact, create a diversion, and a police officer observed the accomplice hurry out of the store carrying what appeared to be a liquor bottle under his jacket. As the officer pursued him, the accomplice threw a bottle away. A search of the area revealed a broken bottle of Seagrams whiskey. *Liner*, 221 Ill. App. 3d at 578-79.

¶ 14 The appellate court reversed the conviction, over a strong dissent, holding that the State failed to prove that the liquor bottle thrown by the accomplice was the property of the store. In doing so, the majority reasoned that the store clerk did not testify that any liquor was missing from the store, and the State did not introduce any evidence to connect that particular bottle to the store. The majority concluded that additional evidence was required to demonstrate that the bottle was from the store and was not already in the accomplice's possession when he entered the store. *Liner*, 221 Ill. App. 3d at 580.

¶ 15 The dissenting justice found that the circumstantial evidence, along with the defendant's admission, provided ample evidence that the liquor bottle was stolen from that store. The dissent maintained that the majority's analysis would require either that someone see the actual theft or that the store personnel be able to testify that a specific item was missing. The dissent concluded that the State was not required to meet such a high burden and that the circumstantial evidence was sufficient to prove that a theft occurred. *Liner*, 221 Ill. App. 3d at 580-82.

¶ 16 First, we find this case distinguishable from *Liner*, where there was no evidence to connect the liquor bottle to the store. Here, Rosa, the store's assistant manager, testified that all of the items in defendant's duffel bag were items offered for sale at Treasure Island. Second, we agree with the dissent in *Liner* that the circumstantial evidence in that case, together with the

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defendant's admission, was more than sufficient to allow the trier of fact to infer that the bottle thrown by the accomplice was stolen from the store. *Liner*, 221 Ill. App. 3d at 581-82.

¶ 17 In this case, we find that the State presented sufficient evidence to allow the jury to find that defendant removed the 14 items found inside his duffel bag from the Treasure Island store. Miguel Rosa testified that he observed defendant exiting the store through the entrance doors while carrying a large, bulky duffel bag. When Rosa approached defendant in the parking lot and requested to check his bag, defendant tried to walk away. When Rosa detained him, defendant tried to break free from Rosa's grasp. Rosa recovered 14 items from defendant's duffel bag, and testified that all of these items were offered for sale at Treasure Island. Defendant did not have a receipt for these items, and defendant told Rosa that he planned to sell the items so he could turn on his cell phone service. Rosa further testified that Treasure Island kept the items recovered from defendant to sell in the store. We find that by considering all of this evidence as a whole, the jury was able to reasonably infer that defendant took the 14 items while they were displayed for sale inside the Treasure Island store. Sitting as the trier of fact, it was the jury's responsibility to draw reasonable inferences from the circumstantial evidence, and we find no reason to disturb the jury's finding that the State proved defendant guilty of retail theft beyond a reasonable doubt.

¶ 18 Defendant next contends that he was denied his right to a fair and impartial trial because the prosecutor misstated the evidence during her rebuttal argument. Defendant specifically challenges three instances where the prosecutor argued that defendant admitted to Rosa that he "stole" the items to pay his cell phone bill. Defendant argues that there was no evidence that he ever admitted or confessed to stealing the items. Defendant also challenges the prosecutor's argument that the items recovered from defendant would not have scanned through the cash register at Treasure Island if they had come from another store. The prosecutor argued:

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"You would think if he had those items from another store, that some of those items wouldn't have scanned through the cash register. They wouldn't have scanned. Mr. Rosa told you, only the items that scanned through their cash registers are the items that are offered for sale at Treasure Island. No other merchandise – all of the merchandise, all 14 items that were found in the defendant's bag, were scanned, and they all came from Treasure Island. They were all offered for sale, the exact same store Mr. Rosa saw the defendant inside of it."

Defendant asserts that there was no evidence that items from another store would not scan through Treasure Island's cash register, but instead, the evidence established that the bar codes are placed on the products by the manufacturer and are the same at every store where the products are sold. Defendant maintains that the State failed to prove that the items in his duffel bag were from Treasure Island, and therefore, he was prejudiced by the prosecutor's misstatements because the remarks connected the items to the store.

¶ 19 Defendant acknowledges that he failed to properly preserve this issue for appeal, but argues that it should be considered as plain error. Alternatively, defendant argues that trial counsel rendered ineffective assistance when she failed to object to the remarks during trial and failed to raise the issue in a posttrial motion.

¶ 20 The State argues that defendant forfeited this issue because he failed to object to the comments at trial and failed to raise the issue in his posttrial motion. Alternatively, the State argues that the plain error doctrine does not apply in this case because the evidence was not closely balanced, and the comments did not amount to structural error. The State argues that the prosecutor properly characterized defendant's response to Rosa as an admission, and that it was

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logical for the prosecutor to infer from the circumstantial evidence that the items were stolen from Treasure Island. The State further argues that the prosecutor immediately qualified her scanning comment when she noted that Rosa testified that only items offered for sale at Treasure Island would scan through the store's register. The State also notes that the trial court instructed the jury that closing arguments are not evidence. In addition, the State asserts that defense counsel did not render ineffective assistance because defendant was not prejudiced by counsel's failure to object and failure to raise the issue in the posttrial motion.

¶ 21 As a threshold matter, we note that defendant asserts that the proper standard of review for this issue is *de novo*. The State points out that there is currently a conflict as to whether the appropriate standard of review for issues of prosecutorial error in closing arguments is *de novo* or abuse of discretion. See *People v. Cosmano*, 2011 IL App (1st) 101196, ¶¶ 52-53. The State asserts that the abuse of discretion standard should be applied here, but acknowledges that, regardless of which standard is applied, the result will be the same.

¶ 22 In *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007), our supreme court held that the determination of whether a prosecutor's remarks were so egregious that a new trial is required is a question of law subject to *de novo* review. This court noted that the *Wheeler* court also cited with approval *People v. Blue*, 189 Ill. 2d 99 (2000), where the prosecutor's closing remarks were reviewed under the abuse of discretion standard. *Cosmano*, 2011 IL App (1st) 101196, ¶ 52. This court has repeatedly declined to determine the appropriate standard of review where the result would be the same regardless of which standard was applied. See *Cosmano*, 2011 IL App (1st) 101196, ¶ 53; *People v. Anderson*, 407 Ill. App. 3d 662, 675-76 (2011); *People v. Maldonado*, 402 Ill. App. 3d 411, 421-22 (2010). In this case, we would reach the same result under either standard of review. We, therefore, continue to adhere to our decision to refrain from

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discussing the applicable standard of review until the conflict is resolved by our supreme court.

*Cosmano*, 2011 IL App (1st) 101196, ¶ 53.

¶ 23 Initially, we agree with the State that defendant forfeited this issue on appeal because his trial counsel failed to object to the comments during the State's argument and failed to raise this issue in his posttrial motion. *People v. Ceja*, 204 Ill. 2d 332, 356 (2003).

¶ 24 Defendant, however, requests this court to review the State's argument as plain error under Supreme Court Rule 615(a) (eff. Aug. 27, 1999). The plain error doctrine is a limited and narrow exception to the forfeiture rule that applies only where the evidence is so closely balanced that the jury's guilty verdict may have resulted from the error, or the error is so substantial that it deprived defendant of a fair trial. *People v. Caffey*, 205 Ill. 2d 52, 103 (2001).

¶ 25 A prosecutor is given considerable latitude in making a closing argument and is allowed to comment on the evidence and any fair, reasonable inferences that can be drawn therefrom. *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). Comments made during closing argument must be reviewed in context and in consideration of the entire closing argument of both the State and defendant. *Glasper*, 234 Ill. 2d at 204. Comments that are invited or provoked by defense counsel's argument are not improper. *Glasper*, 234 Ill. 2d at 204. Defendant's conviction will not be disturbed unless he demonstrates that the challenged remarks were so prejudicial that he was denied real justice or that the verdict would have been different absent the remarks. *People v. Runge*, 234 Ill. 2d 68, 142 (2009).

¶ 26 Here, we find that the plain error doctrine cannot be applied in defendant's case. Our review of the record shows that the evidence against defendant was not closely balanced. It is undisputed that defendant exited the Treasure Island store carrying a large duffel bag containing 14 items that were available for sale inside the store. It is further undisputed that, when confronted by Rosa in the parking lot, defendant attempted to break free from Rosa's grasp and

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flee. Defendant did not have a receipt for the items, and told Rosa that he planned to sell the items to turn on his cell phone. As stated above, this evidence allowed the jury to infer that defendant stole the items while he was inside the Treasure Island store, and thus, the jury was easily able to conclude that defendant committed retail theft.

¶ 27 Based on this same reasoning, we further find that the plain error doctrine cannot be applied here because the prosecutor's remarks during her rebuttal argument were not so prejudicial that they would have influenced the jury's verdict. Although defendant did not expressly state that he "stole" the items, the jury was able to infer that he did so from the evidence, including his admission to Rosa that he planned to sell the items to turn on his cell phone. Consequently, we cannot find that the prosecutor's comments that defendant admitted that "he stole those items" had any effect on the jury's guilty finding.

¶ 28 In addition, we find that the prosecutor's argument that "those items wouldn't have scanned through the cash register" if they were from another store was not improper. When considering this argument in context and in light of the entire arguments of the State and defense, we find that it was made in response to defense counsel's closing argument that there was no evidence that the items in defendant's bag were from the Treasure Island store. Immediately after making the challenged comment, the prosecutor argued "Mr. Rosa told you, only the items that scanned through their cash registers are the items that are offered for sale at Treasure Island." The State further argued "They were all offered for sale, the exact same store Mr. Rosa saw the defendant inside of it." Accordingly, the State was arguing that the fact that all of the items found in defendant's bag scanned in the cash register was evidence that they were from Treasure Island, and if they were not offered for sale at Treasure Island, they would not have scanned. Moreover, in light of the overwhelming evidence against defendant, we find no indication that the prosecutor's comment had any effect on the jury's verdict. The comment was not the only

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link that allowed the jury to connect the items to the store. Even without the comment, the jury could have inferred from all the evidence that the items were from Treasure Island.

¶ 29 We further note that the trial court expressly instructed the jurors before closing arguments that "[w]hat the lawyers say during arguments is not evidence and should not be considered by you as evidence." Both before and after the arguments, the court instructed the jurors that the arguments "should be confined to the evidence and to the reasonable inference to be drawn from the evidence," and that any arguments or statements made by the attorneys that was not based on the evidence "should be disregarded." Based on this record, we find that the plain error doctrine cannot be applied in this case, and therefore, defendant's procedural default of this issue cannot be excused. *Ceja*, 204 Ill. 2d at 358.

¶ 30 We also reject defendant's alternative argument that trial counsel rendered ineffective assistance when she failed to object to the prosecutor's remarks during trial and failed to raise the issue in a posttrial motion. Claims of ineffective assistance of counsel are evaluated under the two-prong test handed down by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Givens*, 237 Ill. 2d 311, 330-31 (2010). To support a claim of ineffective assistance of trial counsel, defendant must demonstrate that counsel's representation was deficient, and as a result, he suffered prejudice that deprived him of a fair trial. *Strickland*, 466 U.S. at 687; *Givens*, 237 Ill. 2d at 331. If defendant cannot prove he suffered prejudice, this court need not determine whether counsel's performance was deficient. *Givens*, 237 Ill. 2d at 331.

¶ 31 As explained above, in light of the strong evidence of defendant's guilt, we find that defendant was not prejudiced by the comments made by the prosecutor in her rebuttal argument. Consequently, defendant cannot satisfy the prejudice prong of the *Strickland* test. It therefore

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follows that counsel's failure to object to the comments and failure to raise the issue in defendant's posttrial motion did not constitute ineffective assistance.

¶ 32 Defendant next contends, and the State agrees, that the \$200 DNA ID System fee under section 5-4-3(j) of the Unified Code of Corrections (730 ILCS 5/5-4-3(j) (West 2010)) was erroneously assessed to him because he was previously assessed the fee and submitted a DNA sample in October 2004 as the result of a prior conviction. See *People v. Marshall*, 242 Ill. 2d 285 (2001). We therefore vacate the \$200 DNA fee from the Fines, Fees and Costs order.

¶ 33 Finally, the parties agree that defendant is entitled to the \$5 per day presentence incarceration credit pursuant to section 110-14 of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14 (West 2010)) to be applied to his \$30 fine for the Children's Advocacy Center (55 ILCS 5/5-1101(f-5) (West 2010)). Defendant spent 60 days in presentence custody. He is therefore entitled to a credit of \$300, which offsets his \$30 fine in full. Pursuant to our authority (Ill. S. Ct. R. 615(b)(1) (eff. Aug. 27, 1999)), we direct the clerk of the circuit court to amend the Fines, Fees and Costs order to reflect a full credit against the \$30 fine. Defendant's adjusted total assessment should be \$380.

¶ 34 For these reasons, we vacate the \$200 DNA ID System fee from the Fines, Fees and Costs order and direct the clerk of the circuit court to further amend that order to reflect a full credit against defendant's \$30 fine for the Children's Advocacy Center. We affirm defendant's conviction and sentence in all other respects.

¶ 35 Affirmed as modified.