2016 IL App (1st) 141200-U

THIRD DIVISION
September 28, 2016

No. 1-14-1200

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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. 10 CR 5938
	)	
MARIO RAMIREZ,	)	The Honorable
	)	William G. Lacy,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.

Justices Lavin and Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: Witness' testimony, upon review of reliability factors, was not so deficient that no rational juror could accept her identification of defendant as the third robber involved in the crimes at issue and, thus, the State sufficiently proved defendant guilty beyond a reasonable doubt. Additionally, the State's rebuttal closing argument was not so prejudicial as to merit reversal and remand of defendant's convictions where comments complained of were responsive to his own arguments, comprised proper inferences from the evidence presented, and were not otherwise inappropriate.

¶ 2 Following a jury trial, defendant Mario Ramirez (defendant) was convicted of robbery and aggravated battery of a pregnant woman, and sentenced to five years' and four years' imprisonment, respectively, to run concurrently. He appeals, contending that the State failed to prove him guilty of these crimes beyond a reasonable doubt and that he was substantially prejudiced by the State's improper closing argument. He asks that we reverse his convictions outright or, alternatively, that we reverse his cause and remand for a new trial. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 Defendant's convictions stem from the June 29, 2009 early afternoon robbery of a video and cell phone store known as CR Video, located at 3643 West 55th Street in Chicago, and the aggravated battery of the store's owner, who was two months' pregnant at the time.

¶ 5 The victim, Carla Rios, testified that she owned the store and was working there on the day in question with her five-year-old daughter, Bella. At approximately 12:20 p.m., a woman whom Rios did not know entered the store and asked Rios about store memberships; the woman left soon after without obtaining one. Several minutes later, three men entered the store. One of them asked Rios if she had a particular cell phone charger and then walked toward her and behind the counter. When Rios told him he could not come behind the counter, the man pushed her forward. The second of the three men grabbed Bella and held her by the shoulders. Rios began struggling with the first man behind the counter and told him to let her go so she could get her daughter. This man responded by saying, "[s]hut up, b*tch," whereupon Rios started fighting with him. He then began to beat Rios, hitting her in the face and stomach and on her arms and

legs. They fell to the ground and the man pinned Rios down onto her back and got on top of her. Rios screamed that she was pregnant, but he did not stop hitting her and they continued to fight.

¶ 6 Rios testified that, at this time, Bella was crying and screaming. The third man that had entered the store remained by the door, continuously looking out the store window and back at the group. Rios described that, once she was pinned on the ground, she saw this third man, whose face she "took a good look at," bend down to the ground next to her at a store display to reach a second, lower, counter and grab several cell phones. She recounted that this third robber was four to six feet from her when he did so, and she identified him in court as defendant. She stated that she watched defendant as he took the phones from the display and put them in a bag. At this point, she could not see whether the other two robbers were taking anything from the store because she "was limited to just the person taking the phones," and she was not able to "get a good view of what was happening with [her] daughter" and the other robbers. Rios averred that the robbery "happened so fast," and that all three men left the store within five minutes. Rios grabbed her daughter, ran out of the store and called 911. She felt "really sick to [her] stomach" and was worried about her pregnancy; she was taken to the hospital.

¶ 7 Rios further testified that the robbers took approximately $500 from the store. With respect to the cell phones, Rios kept an inventory of them and their serial numbers. On August 17, 2009, she contacted the cell phone providers to see if any of the stolen phones had been activated. Two of them had been activated under a Jane Doe name; however, she discovered that a third had been registered with a legitimate name, Susana Garcia, and address. Rios gave this information to Detective Alfredo Vivas. On August 21, 2009, detective Vivas asked Rios to

come to the police station and look at a series of photo arrays. Rios identified the woman who entered the store and the first and second robbers from these arrays; also on this day, she identified these same people from physical lineups. Rios identified these people at defendant's trial via their photos. In addition, on August 21, 2009, Rios was shown an array containing defendant's photo. However, she did not pick anyone out of this array.

¶ 8 Rios recounted that in March 2010, she returned to the police station to view another lineup. At this lineup, she identified defendant as the third robber. Rios was presented at trial with all the photos she had identified for police and reaffirmed her identifications of the woman, the first robber who beat her, the second robber who held Bella, and defendant, whom she again identified as the third robber who initially stood by the door and then took the cell phones.

¶ 9 On cross-examination, Rios noted that she had provided a description of the robbers to the 911 dispatcher when asked, telling the dispatcher that the robbers were three male white Hispanics. She did not remember giving, or being asked to give, the dispatcher an age range for the robbers. Rios stated that a few minutes after the robbery was over, a police officer arrived at the store; however, she could not remember with specificity what questions that officer asked her. She did remember speaking to a female officer at the hospital. When asked if she gave the female officer a description of the robbers, Rios responded "[m]ore than likely if that is what the report says." She then recalled that she had done so, and that she told the female officer the robbers were three male white Hispanics, but she did not recall providing a specific age range for them. Rios further averred on cross-examination that during the robbery, her concern was for Bella, who was on the other side of the counter being held by the second robber while she (Rios)

was pinned down behind the counter by the first robber.

¶ 10 Rios was also cross-examined regarding her identifications. When presented with the array she viewed in August 2009 that contained defendant's photo, Rios responded that she did not remember viewing the array, but averred that "[i]f [police] say I did," then she must have. However, upon further questioning, she reaffirmed that she did remember his "specific picture." She further stated that she remembered telling a detective during the lineup that she noted on the day of the incident defendant's hair "looked lighter, not as dark," "[l]ike brownish, not red." But, she admitted that defendant's hair at trial was black. On redirect examination, Rios testified that there was no "doubt in [her] mind" that defendant was the third robber who stole the cell phones.

¶ 11 Susan Garcia testified that in August 2009, she was at her friend Priscilla's house when she noted that Priscilla had two extra cell phones. Garcia was having trouble with her cell phone, so she asked Priscilla if she could borrow one. Priscilla loaned her a phone, and Garcia activated it to her account with her name and address. Shortly thereafter, on August 21, 2009, police arrived at Garcia's home and questioned her about the phone. Garcia explained to police that she obtained the phone from Priscilla and took them to Priscilla's house. Garcia averred that Priscilla lived there with her sister Crystal, their brother Xavier, and defendant, their stepfather; she confirmed that Priscilla's boyfriend Jorge, and Xavier's girlfriend Elisenda also lived there. At this point in her testimony, Garcia was presented with the same photos as Rios had been during her testimony; Garcia identified Elisenda as the same woman Rios had identified as having come into the store before the incident, and Xavier and Jorge as the same men Rios identified as the first and second robbers. Garcia also identified a photo of defendant and

identified him in court as well.

¶ 12 Defendant's brother, Victor Tello, testified briefly on his behalf. Tello stated that he and defendant worked five days a week at a tax preparation site. He averred that defendant has always maintained the same black hair color he had on the day of trial, even in June 2009, and he has never known defendant to have ever changed his hair color.

¶ 13 At the close of testimony, the parties presented certain stipulations to the jury. The first was from officer Yvonne Delia, who stated she arrived at the scene of the robbery minutes after it occurred and prepared a report. In her report, she noted that she interviewed Rios, who described the first robber as a male Hispanic, 18 to19 years old, 5'6" to 5'8", heavy build, bald, and wearing a black and yellow striped shirt and black shorts; the second robber as a male Hispanic, 18 to 19 years old, 5'6" to 5'8", heavy build, black hair, and wearing a dark shirt and dark blue jeans; and the third robber as a male Hispanic, 18 to 19 years old, 5'6" to 5'8", heavy build, black hair, and also wearing a black and yellow striped shirt. The second stipulation was from detective Vivas, who confirmed that he received the missing cell phone information from Rios in August 2009, that he interviewed Garcia who brought him to defendant's house, and that he spoke to defendant at that time. Detective Vivas also stated that on August 21, 2009, he prepared several photo arrays and lineups for Rios, and that Rios identified a woman and two men as part of the robbery from three of these, but that Rios did not identify anyone from a fourth array that contained a photo of defendant. Detective Vivas further averred that before Rios viewed these arrays and lineups, he reviewed with her the descriptions of the robbers she had given to officer Delia, and Rios confirmed that those descriptions were correct. Finally, detective Vivas stated that nowhere

in any of the reports he wrote did he note that Rios told him the third robber had reddish brown hair nor that one robber appeared older than the others.

¶ 14 The parties then rested their cases. During its closing argument, the State recounted the details of the robbery and referred to defendant "and his robbery crew," arguing that the evidence proved beyond a reasonable doubt that they robbed Rios' store. It then discussed the concept of legal responsibility and argued that all the participants in the instant robbery, including defendant, were equally accountable for the crimes. The State repeatedly reminded the jury that they had brought with them their "life experience and *** common sense" to decide this cause, and that legal principles, complicated as they may seem, are really simply "predicated often on our own experiences." Defendant began his closing argument by insisting that the State had used "props and theatrics" because the evidence did not support its case. He noted several inconsistencies in Rios' testimony and attacked the quality of her memory of the incident and her identification of him. Defendant also disputed the concept of a "robbery crew" or that he was the leader of it. Finally, he told the jury they had "a duty here to separate sympathy and emotion and theatrics" from the evidence; he urged them to "remove your passion and your emotion and all of our empathy and sympathy for Miss Rios and look at the evidence *** in a calm and *** impassionate [*sic*] manner," asking them to use their "common sense" to find him not guilty.

¶ 15 In its rebuttal closing argument, the State addressed defendant's comments at the outset by apologizing for "being a little too passionate about the case," but that "[l]ife is passionate." It then again referred to a robbery crew, with defendant as its senior member, arguing that, "with age comes experience" and, thus, defendant was able to take a lesser role in the crimes while the

crew's younger members took more active roles. When discussing Rios' testimony, the State apologized "if she got a little passionate and she cried a little bit," but again noted that "that's life" and her testimony comprised "common sense" and "experiences collectively," explaining "why she said the things that she said." When discussing the various participants in the robbery and their relationships, the State referred to defendant as "apparently the stepfather, the grandfather, whatever, the godfather, the leader" and stated that "what bolsters *** [Rios'] identification" of him was that "[h]e's got the goods[; h]e's got the stolen property." Defendant objected, citing that no evidence had been presented in this regard, but the trial court overruled his objection. The State then reminded the jury that the burden of proof in this cause lay with it and that defendant was not required to prove anything, and ended its rebuttal closing argument by stating, "[s]orry, folks, for the passion but some cases require that and if and if and if I got to be criticized for that, well, then sorry. I'll deal with it."

¶ 16 At the close of trial, the court presented the jury with its instructions. The jury returned a verdict of guilty with respect to both crimes, and defendant was sentence to five years' imprisonment for robbery and four years' imprisonment for aggravated battery, to run concurrently.

¶ 17 ANALYSIS

¶ 18 I. Sufficiency of the Evidence and Identification Testimony

¶ 19 Defendant's first contention on appeal is that the State failed to prove him guilty beyond a reasonable doubt of being one of the three men who robbed and battered Rios. His main argument in support of this contention is that Rios' identification was not sufficiently reliable

since she had little opportunity to observe the third robber, initially provided a description of a man less than half his age, failed to identify him in a photo array and changed her description of his hair color after identifying him in a lineup. He also asserts that Rios' "unreliable identification" was not sufficiently corroborated by other evidence to properly support his conviction. We disagree.

¶ 20 When a criminal defendant challenges the sufficiency of the evidence used to convict him, the standard of review is whether, when viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See *People v. Smith*, 185 Ill. 2d 532, 542 (1999); *People v. Hunley*, 313 Ill. App. 3d 16, 20 (2000). Courts of appeal will not retry the defendant. See *People v. Digirolamo*, 179 Ill. 2d 24, 43 (1997). Instead, the jury, as the trier of fact in a jury trial, hears and sees the witnesses and, thus, has the responsibility to adjudge their credibility, resolve any inconsistencies, determine the weight to afford their testimony and draw reasonable inferences from all the evidence presented. See *People v. Steidl*, 142 Ill. 2d 204, 226 (1991); *Hunley*, 313 Ill. App. 3d at 21. Ultimately, a conviction will not be overturned unless the evidence is so improbable or unsatisfactory as to create a reasonable doubt of guilt. See *People v. Brown*, 185 Ill. 2d 229, 247 (1998).

¶ 21 The State must prove beyond a reasonable doubt the identity of the person who committed the offense. See *People v. Lewis*, 165 Ill. 2d 305, 356 (1995). While a vague or doubtful identification will not support a conviction, a single witness' identification of the defendant is sufficient to sustain his conviction as long as that witness viewed the offender under

circumstances permitting a positive identification. See *Lewis*, 165 Ill. 2d at 356; accord *People v. Piatkowski*, 225 Ill. 2d 551, 566 (2007) ("positive identification by a single witness who had ample opportunity to observe is sufficient to support a conviction"). The factors to consider in evaluating the reliability of identification testimony include: the witness' opportunity to view the offender, the witness' degree of attention, the accuracy of the witness' description, the witness' level of certainty, and the length of time between the crime and the identification. See *People v. Slim*, 127 Ill. 2d 302, 307-08 (1989); see also *People v. Lewis*, 165 Ill. 2d 305, 356 (1995), and *People v. Brooks*, 187 Ill. 2d 91, 130 (1999) (a single witness' identification of the defendant is sufficient to sustain his conviction as long as that witness viewed the offender under circumstances permitting a positive identification, including the witness' opportunity to view the offender, degree of attention, accuracy of description, level of certainty, and length of time between crime and identification). These factors are to be viewed in the light most favorable to the State. See *Piatkowski*, 225 Ill. 2d at 567.

¶ 22 In addition, no single factor is dispositive, and a jury is called to consider all of them together in determining the reliability of the identification testimony. See *People v. Smith*, 2012 IL App (4th) 100901, ¶ 87. For example, discrepancies or omissions with respect to facial features and other physical characteristics "are not fatal, but merely affect the weight to be given the identity testimony." See *Lewis*, 165 Ill. 2d at 357. In other words, they do not, in and of themselves, create reasonable doubt, as long as the witness has made a positive identification. See *Lewis*, 165 Ill. 2d at 357. Again, we may not substitute our own judgment for that of the jury regarding its assessment of identification testimony and the credibility of the identification

witness (see *People v. Negron*, 297 Ill. App. 3d 519, 530 (1998)), and we will not overturn a conviction unless the identification or evidence presented is so improbable or unsatisfactory as to create a reasonable doubt of guilt (see *Brown*, 185 Ill. 2d at 247; *People v. Killingsworth*, 314 Ill. App. 3d 506, 510 (2000)).

¶ 23 Based on the record before us, we find that the State proved defendant guilty of the charged crimes beyond a reasonable doubt.

¶ 24 Turning to the first identification factor of opportunity to observe, Rios repeatedly testified that she was positive defendant was the third robber who initially stood by the door and later took cell phones from the display. The robbery occurred in the early afternoon of June 29, 2009. None of the three men who entered the store wore masks or otherwise concealed their faces in any manner, nor was Rios' view of them obstructed upon their entry. Rios specifically testified that, as she and the first robber fought, he pinned her to the ground. It was at this point that she was able to "take a good look at" the face of the third robber, who she clearly identified as defendant in court. This was because, as she consistently recounted, he bent down to the ground next to where the first robber had pinned her to reach a store display of cell phones that was on a lower counter. Rios stated that defendant's face came to within four to six feet of hers when he bent down toward her, and she watched as he grabbed several phones from the display and put them in a bag.

¶ 25 Defendant attacks Rios' identification with respect to this first factor by insisting that the robbery happened very quickly, that Rios was focused on her child, and that Rios did not have a good view of the third robber who spent the majority of the time keeping lookout by the door and

who she saw only briefly while "she was supine behind the glass counter with the first man on top of her, a position from which she testified she 'couldn't get a good view of' Bella, her chief concern." However, these attacks are baseless in light of the evidence presented. Rios did state that she felt the robbery "happened so fast." Yet, she also testified that it lasted some five minutes ample time to have, as she recounted, conversed with the robbers, fought with them, and observed them from various positions as they closely approached her and wadded through her store inventory before leaving. Additionally, Rios did testify that her main concern was for her daughter, whom the second robber was holding by the shoulders. But, she also made clear during her testimony that, once she was pinned to the ground during the time she got a good look at defendant whose face was only four feet away from hers, and while she watched him as he took the phones she was not watching Bella at all. In fact, she admitted she was not able to "get a good view of what was happening with [her] daughter," as she was on the floor on one side of the counter and the second robber had Bella standing on the other side of it. Rios also noted that she could not see what the first or second robber were doing at this point, either. However, what Rios testified she *could* see was defendant. In fact, Rios stated that, in her pinned position, she "was limited to [seeing] just the person taking the phones," whom she identified as defendant. At this point during the robbery, then, even though Rios' concern was still surely for her daughter, her immediate and sole focus was on defendant, who had moved away from the door and bent down right next to her face. Our courts have made clear that a positive identification need not require perfect conditions or prolonged observation. See *People v. Benson*, 266 Ill. App. 3d 994, 1005 (1994); see *People v. Petermon*, 2014 IL App (1st) 113536, ¶ 32, citing

People v. Parks, 50 Ill. App. 3d 929, 932-33 (incident lasting five to ten seconds was sufficient to support conviction). Based on this evidence, Rios had a clear, unobstructed view of defendant, particularly while pinned on the ground when his face came within four feet of hers as he stole the cell phones. Thus, as Rios had more than a sufficient opportunity to view defendant, we find this first factor favors the State.

¶ 26 The second factor, the degree of the witness' attention, is, in this case, related to the first. Again, Rios testified that she was able to "take a good look at" defendant during the robbery, particularly when he bent down toward her, within only four feet of her face. As soon as the robbery was over, Rios called 911 and informed the dispatcher that three male Hispanics robbed her. Although she at first testified she could not remember, she later recalled during her testimony that she also provide a detailed description of the robbers to responding officer Delia, which was confirmed by the parties' stipulations at trial. These descriptions contained the race, gender, ethnicity, age, height, build, clothing and hair color of each of the three robbers. Defendant insists that Rios' attention was wholly diverted by her being beaten by the first robber while the second robber held her daughter. However, according to her testimony, Rios was not beaten the entire time during the robbery; rather, she was initially beaten when the first robber came behind the counter, but this stopped once he pinned her down in a position where she could clearly see defendant. See, *e.g.*, *People v. Brown*, 110 Ill. App. 3d 1125, 1128 (1982) (even though witness was struck on head and told not to look at assailants, his identification of the defendant was reliable where he looked into his face during robbery and remembered it and his clothing). Moreover, of course, Rios' concern, naturally, lay with her daughter. However,

while she may have been watching her and the second robber at the outset of the robbery, once she was pinned down, she could not see her daughter and, again, was instead "limited" to seeing "just the person taking the phones" who she identified as defendant. Clearly, Rios' attention was focused on him and, thus, the second factor, as well, favors the reliability of her identification of defendant as the third robber.

¶ 27 As to the next factor, the accuracy of the witness' description, defendant insists that a reasonable jury could not have believed Rios because of the considerable age discrepancy between her initial description to police and defendant's actual age. The parties stipulated that Rios provided a description of each of the robbers to officer Delia. With respect to the third robber, who Rios later identified as defendant, her description was a male white Hispanic, 18 to 19 years old, 5'6" to 5'8" in height, heavy build, black hair and wearing a black and yellow striped shirt. The record reveals that defendant is a male white Hispanic, 46 years old, 5'6", 210 pounds, with black hair. From our view, Rios' description of defendant matches him in several respects: gender, ethnicity, height, weight and hair color. The only real discrepancy is age.[1] However, as we noted at the outset, the presence of discrepancies in a witness' description of the accused do

[1]Defendant also makes much of an alleged discrepancy in Rios' description of his hair color. That is, upon cross examination, Rios stated she remembered telling a detective at the time of the lineup that defendant's hair "looked lighter, not as dark," on the day of the robbery, "[l]ike brownish, not red." The parties stipulated that detective Vivas stated that nowhere in any report did he write that Rios told him this; additionally, defendant's brother testified that his hair had always been black and Rios admitted at trial that his hair was black. However, based on this, any discrepancy regarding his hair is minor. This is because, other than her comment on cross examination, Rios consistently maintained, and accurately so, that the third robber's hair was black. There is not evidence that Rios ever stated, as defendant insists, that it was "reddish brown."

not, in and of themselves, generate reasonable doubt; they go only to the weight to be afforded her testimony. See *Slim*, 127 Ill. 2d at 309; see also *People v. Thomas*, 121 Ill. App. 3d 883, 888 (1984) (key concern is overall ability of witness to positively identify offender after having had adequate opportunity to view him at time of crime); accord *People v. Robinson*, 206 Ill. App. 3d 1046, 1051 (1991) (credibility of identification does not rest on type of physical features witness is able to relate but, rather, on her opportunity to observe assailant). In the instant cause, we do not find the discrepancy in age to be fatal to Rios' identification of defendant, which was otherwise credible, detailed and accurate in many different aspects of his physical characteristics. See, *e.g.*, *People v. Rodgers*, 53 Ill. 2d 207, 211, 213-14 (1972) (age discrepancy of 13 to 18 years did not render identification unreliable); *People v. Chatman*, 32 Ill. App. 3d 506, 510-11 (1975) (age discrepancy of 5 to 15 years did not render identification unreliable). This is particularly true where Rios clearly, repeatedly, and with no "doubt in [her] mind" identified defendant as the third robber in court. See also *People v. Austin*, 328 Ill. App. 3d 798, 805 (2002) ("[a] witness' positive identification is sufficient even though the witness gave only a general description based on the total impression the accused's appearance made").

¶ 28 The fourth factor with respect to the reliability of identifications is the witness' level of certainty. As we have just mentioned, Rios stated in court that there was no doubt in her mind that defendant was the third robber who bent down within four feet of her face and stole cell phones from her store. When she gave her identifications of the robbers to the 911 dispatcher and to officer Delia, she did not hesitate and provided details of all three assailant's gender, ethnicity, height, build, hair, and clothing. Defendant insists that Rios' failure to pick defendant

out of the photo array, which included his picture, shown to her on August 21, 2009, is a "severe warning sign" that her later identifications were uncertain, particularly since "she was repeatedly shown [defendant's] face." Indeed, Rios was shown four photo arrays that day; she was able to pick out Elisenda (the woman who entered the store) from one, Xavier (a robber) from another, and Jorge (a robber) from another. But, when shown an array containing defendant's photo, she did not identify him at that time. However, although she did not identify defendant, she did not identify anyone from that array. That is, she did not misidentify defendant, nor did she point to someone else's photo as that of the third robber. For whatever reason, she looked at those photos and simply did not identify anyone from that array. What she did do, though, was identify defendant later from a physical lineup; when presented with him physically in front of her, Rios was able to, and did, positively identify him as the third robber. Given Rios' decisive identification of defendant at the physical lineup and again in court at trial, we find that this factor favors the State, as well. See, *e.g.*, *People v. Daniel*, 2014 IL App (1st) 121171, ¶ 17 (rejecting argument that identifications are automatically inadequate where a defendant is the only individual repeatedly shown to a witness during identification procedures).

¶ 29 The fifth and final factor is the length of time between the crime and the identification. " 'The lapse of time goes only to the weight of the [identification] testimony, a question for the jury, and does not destroy the witness' credibility.' " *Austin*, 328 Ill. App. 3d at 805, quoting *Rodgers*, 53 Ill. 2d at 214. In the instant cause, the robbery took place on June 29, 2009. Rios viewed the physical lineup during which she identified defendant as the third robber in early

March 2010.[2] The lapse of time at issue, then, is approximately eight months. Although this is more than, say, a couple of weeks, this amount of time is hardly enough to undercut the sufficiency of Rios' identification of defendant as evidence in support of his conviction. Considerably longer amounts of time than this have been found not to preclude a conviction. See *Slim*, 127 Ill. 2d at 313-14 (citing cases with lapses of between one month and two-and-a-half years between the crime and the identification); *Austin*, 328 Ill. App. 3d at 805 (upholding conviction after 3-year-and-eight-month lapse). Thus, this final factor also favors the State.

¶ 30 Defendant relies heavily on *People v. Hernandez*, 312 Ill. App. 3d 1032 (2000), for the proposition that Rios' identification of him rested solely on her "subjective certainty," which was bolstered by "her deference to the police and her repeated exposure to [defendant's] face in identification confrontations." As defendant notes, in *Hernandez*, a witness to a crime twice viewed photo arrays including the defendant; the first time, he made no identification and the second time, two months later, he identified defendant by his "jaw and cheek." See *Hernandez*, 312 Ill. App. 3d at 1037. The witness later identified the defendant in a lineup and in court. See *Hernandez*, 312 Ill. App. 3d at 1037. Upon review of the witness' identification, the *Hernandez* court found it to be unreliable, noting that the photo array procedure "inexorably led to a lineup identification three months" after the crime. *Hernandez*, 312 Ill. App. 3d at 1037.

¶ 31 While defendant's characterization of *Hernandez* at first blush would seem to support his cause, he does not provide all the facts of that case, nor does he discuss the full and detailed

[2]There was some discrepancy in the testimony as to whether the lineup took place on March 1 or March 3, 2010.

analysis of that court. Rather, he conveniently leaves out several critical points that provided the basis for the court's reversal of that defendant's conviction. For example, and just as we have, the *Hernandez* court conducted a review of each of the five reliability factors as applied to the witness' identification in relation to the crime an altercation that led to a shooting and murder. See *Hernandez*, 312 Ill. App. 3d at 1036. First, it noted that while the witness watched the altercation for almost 10 minutes, he testified that his attention "was riveted on the back of" the offender's head, until the shooter "momentarily exposed his profile" to the witness, who was sitting in a school bus some 90 feet away. *Hernandez*, 312 Ill. App. 3d at 1036. Additionally, the witness' description of the offender to police conflicted with his description at trial by 8 inches in height and 20 pounds; though potentially minor, the court found these discrepancies to be "no endorsement of [the witness'] powers of observation." *Hernandez*, 312 Ill. App. 3d at 1036. Moreover, the witness admitted to police when he gave his description that he was " 'unsure' " whether he could identify anyone involved because " 'he was looking at the back of their heads most of the time.' " *Hernandez*, 312 Ill. App. 3d at 1036-37. As the *Hernandez* court explained, it was all of these factors combined with the photo array procedure, and not simply that procedure alone, that rendered the witness' identification of the defendant "fatally weak." *Hernandez*, 312 Ill. App. 3d at 1036-37 (examining all the identification factors together).

¶ 32 After reading the *Hernandez* decision in its entirety, it quickly becomes very clear that it is wholly distinguishable from the instant cause. Rios viewed defendant throughout the duration of the five minute robbery, coming within four feet of his face. In fact, her view of the situation was actually limited precisely to him during the time she was pinned to the ground; he was all

she could see, as he bent down next to her to steal the cell phones from the lower counter. Her description of him, given just minutes after the robbery, was accurate and consistent with respect to many features, including his gender, ethnicity, height, build and hair color. She never once hesitated in her description nor told police she was "unsure;" she simply did not identify anyone from the fourth photo array but later positively identified defendant in the physical lineup and again in court. Rios' identification here was completely unlike the unreliable identification provided by the witness in *Hernandez*.[3]

¶ 33 Before we leave this issue of identification, defendant makes one last assertion, namely, that Rios' "otherwise unreliable identification is not sufficiently corroborated by other evidence to prove beyond a reasonable doubt" that defendant was the third robber. We will not reiterate every fact related to this cause. Suffice it to restate, however, that a single witness' identification of the defendant is sufficient to sustain his conviction as long as that witness viewed the offender under circumstances permitting a positive identification. See *Lewis*, 165 Ill. 2d at 356; accord *Piatkowski*, 225 Ill. 2d at 566. We have already concluded, via a thorough and reasoned analysis, that the jury could have rationally found Rios' identification of defendant as the third robber was, indeed, reliable and, thus, sufficient to support his conviction. Were this not enough, which it is,

[3]Defendant also cites to *People v. White*, 56 Ill. App. 3d 757 (1978), which, similar to *Hernandez*, found unreliable identification testimony following the failure to identify the defendant in a photo array but his subsequent identification in a lineup merited the reversal of his conviction. However, and again like *Hernandez*, *White* provides no support for defendant here. Not only is the analysis in that case relatively scant, but the facts there indicate that the witness in that cause, unlike Rios, admitted he had no reason to look at the would-be robbers carefully, repeatedly could not recall their likeness to police, and clarified at trial that he had "doubt" as to whether the defendant was one of them. See *White*, 56 Ill. App. 3d at 758-59 (additionally, the defendant provided solid alibi testimony at trial).

there is the additional testimony of Garcia. She stated that in August 2009, she asked her friend Priscilla if she could borrow one of the two extra cell phones she saw in Priscilla's house. Only days after she activate it, police showed up at Garcia's home and questioned her about that very phone. In explaining where she obtained it, Garcia revealed that Priscilla lived in the same house as Xavier, Elisenda, Jorge, and defendant all four of the individuals involved in the robbery of Rios' cell phone store. Significantly, Garcia was presented at trial with the same photos of the robbers as Rios had been during her testimony, and Garcia, just as Rios, identified each of them, including defendant, whom Rios had identified to police and in court. She also identified defendant in court. Clearly, even if the law required additional evidence in this situation (which it does not), it was more than appropriate for the jury to consider Garcia's testimony as sufficiently corroborative of Rios' identification of defendant.

¶ 34 Accordingly, after reviewing all the reliability factors, we cannot say that Rios' testimony was so deficient that no rational juror could accept her identification of defendant as the third robber. All of defendant's attacks in this respect are directed only to the weight that Rios' testimony should be afforded by the jury and, as we have already discussed, it is not the place of this court to substitute our judgment for that of the jury on this point so long as the evidence is not completely unreasonable, improbable or unsatisfactory. See, *e.g.*, *Smith*, 185 Ill. 2d at 542. Based on the record before us, we find that the evidence was not unreasonable, improbable or unsatisfactory and, thus, we hold that Rios' identification testimony was, in light of all the factors, sufficient to prove defendant's guilt beyond a reasonable doubt.

¶ 35 II. Rebuttal Closing Argument

¶ 36 Defendant's second, and final, contention on appeal is that he was "substantially prejudiced" by several of the State's comments made during its rebuttal closing argument. He characterizes these comments as "relentlessly and *** *explicitly*" (emphasis in original) encouraging the jury to be unreasonable in evaluating Rios' testimony by considering sympathy and passion on her behalf. He then concludes that this amounted to argument "well beyond the bounds of acceptable" commentary, meriting reversal and remand of his convictions. We disagree.

¶ 37 As a threshold matter, the State points out, and defendant concedes, that he did not object at trial to any of the comments he now cites as error and, thus, he has forfeited his claim for our review.[4] See *People v. Ramsey*, 239 Ill. 2d 342, 440 (2010); *People v. Wheeler*, 226 Ill. 2d 92, 122 (2007). Defendant urges us, however, to review his claim pursuant to both prongs of plain error, as he asserts the evidence against him was closely balanced and the State's improper comments seriously affected the integrity of his trial. Yet, to do so, we must first find that error occurred, and the burden of proving that falls upon defendant. See *Piatkowski*, 225 Ill. 2d at 565 ("the first step is to determine whether error occurred"); *People v. McGee*, 398 Ill. App. 3d 789, 794 (2010), citing *People v. Herron*, 215 Ill. 2d 167, 187 (2005) (the burden in this context belongs to the defendant, who must demonstrate that error occurred, for, absent error, there can be no plain error). We have already concluded, via a thorough review of the record and

[4]We note for the record that defendant did object to one particular comment wherein the State remarked to the jury that he had been found in possession of the stolen cell phones, which defendant noted was not reflected in the evidence presented. The trial court overruled this objection.

discussion, that the evidence against defendant here was not closely balanced; rather, Rios' reliable identification testimony, as well as the other evidence presented, was amply sufficient for the jury to have found that the State proved him guilty beyond a reasonable doubt. Moreover, errors under the second prong have been equated with structural errors, and there are only a limited class of these. See *People v. Cosmano*, 2011 IL App (1st) 101196, ¶ 78. Specifically, we have held that "[e]rror in closing argument does not fall into the type of error recognized as structural." *Cosmano*, 2011 IL App (1st) 101196, ¶ 78. Thus, even if error could be said to have occurred, defendant could not demonstrate plain error under either prong here.

¶ 38 However, we need not even reach that point for, as we discuss below, there was no error in the State's rebuttal closing argument. See *Piatkowski*, 225 Ill. 2d at 565, and *McGee*, 398 Ill. App. 3d at 794 (without error, there can be no plain error).

¶ 39 The State is allowed a great deal of latitude in closing argument. See *People v. Nieves*, 193 Ill. 2d 513, 532 (2000); see also *Wheeler*, 226 Ill. 2d at 123; *People v. Caffey*, 205 Ill. 2d 52, 131 (2001). It " 'may comment on the evidence and any fair, reasonable inferences it yields.' " *People v. Phillips*, 392 Ill. App. 3d 243, 275 (2009), quoting *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005). The test for determining whether there was reversible error because a remark resulted in substantial prejudice to a defendant is whether the remark was a material factor in his conviction, or whether the jury would have reached a different verdict had the State not made the remark. See *People v. Flax*, 255 Ill. App. 3d 103, 109 (1993); accord *Nieves*, 193 Ill. 2d at 533; see also *Wheeler*, 226 Ill. 2d at 123; *People v. Perry*, 224 Ill. 2d 312, 347 (2007); *People v. Linscott*, 142 Ill. 2d 22, 28 (1991). We review the allegedly improper remark in light of all the

evidence presented against the defendant (see *Flax*, 255 Ill. App. 3d at 109), as well as within the full context of the entire closing argument itself (see *People v. Cisewski*, 118 Ill. 2d 163, 176 (1987)). See also *Wheeler*, 226 Ill. 2d at 122; *Caffey*, 205 Ill. 2d at 131. Ultimately, unless deliberate misconduct by the State during closing argument can be demonstrated, comments will be considered incidental and uncalculated and will not form the basis for reversal. See *People v. Cloutier*, 156 Ill. 2d 483, 507 (1993).

¶ 40 We further note that "[s]tatements will not be held improper if they were provoked or invited by the defense counsel's argument." *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). Thus, when a defendant's own closing argument attacks the State's case and its witnesses, the State is entitled to respond thereto in its rebuttal closing argument, particularly when that response is invited; in such an instance, the defendant cannot then claim prejudice. See *Nieves*, 193 Ill. 2d at 534 (defendant cannot rely upon invited response by State during rebuttal closing argument as error on appeal); accord *People v. Reed*, 243 Ill. App. 3d 598, 606-07 (1993).

¶ 41 Based on the record before us, we do not find that the State's comments were erroneous or that they merit the reversal and remand of defendant's convictions. To the contrary, when viewed within their context and within the entirety of this trial, it is clear that the State was only replying to his theory on the case and drawing its own inferences from the evidence presented to refute those asserted by defendant.

¶ 42 Defendant claims two types of error in the State’s rebuttal closing argument here. First, he asserts that the State attempted to garner sympathy for Rios, the victim and the State’s key witness. Defendant points to multiple instances where the State apologized for being

"passionate" or using "passion" in presenting its case, stated that "[l]ife is passionate" and "all about experience," and referred to Rios' testimony where "she got a little passionate and cried a little bit." Defendant complains that, not only did the State inappropriately invoke sympathy for Rios "generically, but specifically *tied* that sympathy to the weaknesses in her testimony, suggesting that to scrutinize them would be cruel." (Emphasis in original.) He also cites a passage from the conclusion of the State's argument, wherein it again apologized "for the passion," but stated that "some cases require that and if and if and if I got to be criticized for that, well, then sorry. I'll deal with it," insisting that it urged the jury to disregard their instructions against deliberating according to sympathy.

¶ 43 When viewed within the entire context of closing argument, none of these comments rose to the level of impropriety characterized by defendant. While we acknowledged that the State obviously may not appeal to the emotions of the jury in an attempt to shift the focus away from the evidence (see *People v. Johnson*, 208 Ill. 2d 53, 83-84 (2004)), that is not at all what occurred here. We note that both parties' closing arguments focused on two broad themes: "common sense"/"life experience," and "sympathy"/ "passion." The first of these was mentioned initially by the State during its opening closing argument, when speaking to the jury about understanding and applying complicated legal principles introduced at trial, such as "legal responsibility," to their deliberations. That is, the State simply told the jury that they had brought their "life experience and *** common sense" to help decide this cause. Defendant then began his closing argument by insinuating that the State had used "props and theatrics" to hide that the evidence did not support its case, and spent the majority of his time attacking Rios' testimony the quality

of her memory, the inconsistencies in her recount of the incident and, particularly, her identification of defendant as the third robber. Significantly, it was actually defendant who, at this point, was the first to invoke the terms "sympathy" and "passion," telling the jury it had a "duty" to separate and removed these from the evidence and, in a play on the State's use of "common sense" to describe the application of legal principles to the evidence, urged the jury to instead use common sense to find him not guilty.

¶ 44 From this exchange, it is clear that the State's comments in its rebuttal closing argument, of which defendant complains, were invited by his own argument. The State never urged the jury to be passionate. Rather, in the first criticized comment, the State was responding to defendant's insinuations about "props and theatrics" when it apologized for being "too passionate" about the case, and referred not even to evidence or argument but, rather, only to a television monitor it had used to show the jury instructions to the jury. Again, the State apologized for *its* fervor with respect to the case in this respect, and did not refer to any passion on the part of the jury or the use of emotion in rendering a verdict. Next, with respect to the second criticized comment regarding passion, this time, the State was referring to Rios but, again, not to the jury. In responding directly to defendant's lengthy and detailed attack of her testimony, the State attempted to explain why Rios testified as she had, (minor) inconsistencies and all. It simply reminded the jury of the facts of the case: that a pregnant Rios was being beaten and robbed by three men while alone in her store and while her young daughter was being made to watch. In alluding to the trauma she naturally must have felt, the State apologized for *her* passion during her testimony, which led her to cry on the stand, but the State did not ask the jury to consider

that. Instead, the State was commenting on Rios' demeanor while on the stand, which was wholly appropriate. It also picked up on the concept of "common sense" which at this point had now been referred to by both parties, to argue that Rios' testimony comprised common sense and what she had gone through formed the basis of her life experience which led her to testify as she had. In response to defendant's argument, it asked the jury to put itself in Rios' shoes when it determined her credibility and evaluated the reliability of her identification testimony, which was the linchpin of this cause. The final comment regarding passion, as criticized by defendant here, came at the very end of the State's rebuttal closing argument, when it again apologized for its passion in arguing this cause, but noted that "some cases require that and if and if and if I got to be criticized for that, well, then sorry. I'll deal with it." Again, here, contrary to defendant's insistence, the State was not asking the jury to use passion in its deliberations or to find defendant guilty. Additionally, defendant had just argued to the jury that they had "a duty here to separate sympathy and emotion and theatrics" from the evidence and to "remove [their] passion and [their] emotion and all of [their] empathy and sympathy for Miss Rios and look at the evidence *** in a calm and *** impassionate [*sic*] manner." In light of this comment, it could easily be concluded that the State was merely providing a response. Moreover, even if it could be said that the State's comment were directed to the jury and/or skirted the line of emotional propriety, they were not improper, particularly when considered within the entire context of closing arguments, where the concept of passion was batted around by both sides and the comment was, at most, made in passing.

¶ 45 The second type of error in the State's rebuttal closing argument cited by defendant is that

the State made prejudicial comments that lacked any basis in the evidence presented at trial. First, he cites the State's remark that "the link" that "bolsters *** [Rios'] identification in court" was that defendant's "got the goods[, ***] the stolen property."[5] He also cites the State's references to the group who robbed Rios as a "robbery crew" and to defendant as its "leader" or "godfather" who had "experience," which defendant complains insinuates past criminal activity on his part that was never demonstrated at trial.

¶ 46 However, we fail to find that either of these cited comments, when viewed in context of the entirety of closing argument, mandates reversal and remand of defendant's cause. With respect to the former, again, the State was responding directly to defendant's repeated attacks on Rios' credibility and identification testimony. In an effort to contradict defendant's insistence that this was so flawed that it must be disregarded, the State referred to the corroborating evidence presented at trial, namely, Garcia's unrebutted testimony, which included the fact that she obtained what turned out to be a cell phone stolen from Rios' store from the same house where defendant lived along with the three other participants identified in the robbery and aggravated battery. While perhaps the State could have used a better choice of words in this respect, the context is clear the State was referring to evidence presented at trial that corroborated the key witness in this cause and was drawing inferences therefrom to contradict defendant's theory on the case, *i.e.*, misidentification. This was not improper.

¶ 47 With respect to the latter cited comments, defendant insists that they prejudicially imply

[5]As noted, it was to this comment that defendant made his only relevant objection, which the trial court overruled.

he had a history of, and experience in, committing robberies like that in the instant cause. However, the State made references to a "crew" while discussing the robbery and its participants, and the fact that each had their own role Elisenda went in first to scope out the store, the first robber (Xavier) was in charge of controlling (and beating) Rios, the second robber (Jorge) was in charge of restraining her daughter, and defendant was initially the lookout and, while the others subdued the victims, he was the one in charge of stealing the cell phones. The State never mention any past criminal activity on defendant's part. Rather, as the evidence showed that all the robbery's participants worked together, that the State referred to them as a "crew" was hardly inappropriate. Likewise, the State's comments that "with age comes experience," were also based on the evidence. Here, the State was attempting to reconcile why defendant would be with the group when they committed the crime. After all, defendant himself had consistently pointed out that he was considerably older than the other robbers, in an effort to distance himself from them and show he could not have been there in contradiction to Rios' account of the robbery. In response, the State argued that defendant was "hands off" in the robbery because he was the group's senior member which was, indeed, true, as the evidence showed he was older and he never touched Rios or her daughter but only stood as lookout and grabbed merchandise from the display. The State's comment was clearly based on the evidence related to the crime and made to rebut defendant's theory on the case and, thus, was not improper.

¶ 48 Even were we to consider any of the State's comments cited by defendant to have been improper, which we do not, they do not, even when considered cumulatively, rise to the level of substantial prejudice requiring reversal and remand of his convictions. As we have discussed,

the State may properly reflect in closing argument upon the evidence and witness credibility, challenge the theory of defense, and tell jurors that they must ultimately have to believe one side over the other. See *People v. Robinson*, 254 Ill. App. 3d 906, 919-20 (1993); *Reed*, 243 Ill. App. 3d at 606-07. Reading all the cited comments in the context of closing arguments as a whole, we believe this is exactly what occurred here, nothing more. Moreover, not only did the State itself remind the jury that the burden of proof in this cause lay with it and that defendant was not required to prove anything, but the trial court also presented the jury with specific instructions that closing arguments were "not evidence" but only a discussion of what the both sides "believe[d] the evidence has shown," that they should not consider any comment that was not based on the evidence, and that they should "disregard that argument" they "fe[lt] is not supported by the evidence." According to the record, the trial court actually gave these instructions repeatedly at various points throughout the proceedings against defendant: at the outset after the jury was sworn, before closing arguments began, during the State's rebuttal closing argument upon defendant's objections, and at the end before it sent the jury to deliberate. See *People v. Garcia*, 231 Ill. App. 3d 460, 469 (1992) (such a jury instruction cures prejudice from improper remark in closing); accord *People v. Macri*, 185 Ill. 2d 1, 52 (1998). This, in conjunction with the preeminent presumption that jurors follow the trial court's instructions (see *People v. Biggs*, 294 Ill. App. 3d 1046, 1051 (1998)), and the fact that we have already determined that the evidence supported defendant's convictions and was not closely balanced, further underscores our determination that no reversible error occurred in defendant's cause. See, *e.g.*, *People v. Williams*, 192 Ill. 2d at 548, 575 (2000); *People v. Sims*, 285 Ill. App. 3d 598, 607

(1996).

¶ 49 In light of all the evidence presented and, particularly, in light of closing arguments as a whole, we do not find that the cited comments made by the State during its rebuttal closing argument were a material factor in defendant's convictions nor that the jury would have reached a different result had the State not made them. See, *e.g.*, *Wheeler*, 226 Ill. 2d at 123. Thus, we hold that they did not substantially prejudice defendant and do not form the basis for the reversal and remand of his convictions.

¶ 50 CONCLUSION

¶ 51 Accordingly, for all the foregoing reasons, we affirm the judgment of the trial court.

¶ 52 Affirmed.