2017 IL App (4th) 150650-U

NO. 4-15-0650

FILED
November 15, 2017
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
CHRISTINA M. ATKINS,	)	No. 15CM356
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Steigmann and DeArmond concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The State's evidence was sufficient to prove defendant guilty of retail theft beyond a reasonable doubt.

(2) No reversible error occurred in the manner in which the trial court instructed the jury.

(3) The admission of other-crimes evidence at defendant's trial was harmless error.

(4) Comments made by the prosecutor during his closing argument and closing rebuttal argument did not deprive defendant of a fair trial.

¶ 2 Following a jury trial, defendant, Christina M. Atkins, was convicted of retail theft (720 ILCS 5/16-25(a)(1) (West 2014)) and sentenced to 12 months' probation. She appeals, arguing (1) the State failed to prove her guilty of the charged offense beyond a reasonable doubt, (2) the jury was improperly instructed, (3) the trial court erred in overruling her objection to oth-

er-crimes evidence, and (4) comments by the prosecutor during closing argument deprived her of a fair trial. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In April 2015, the State charged defendant with retail theft (720 ILCS 5/16-25(a)(1) (West 2014)). The charge stemmed from allegations that defendant visited a Walmart in Urbana, Illinois, with her young daughter, and was observed by an asset-protection associate for Walmart concealing digital video discs (DVDs) and infant clothing, merchandise totaling less than $300, in a diaper bag and moving past the store's last point of sale.

¶ 5 In June 2015, defendant's jury trial was conducted. Immediately prior to the start of trial, defendant's counsel made an oral motion to exclude testimony concerning an investigation by the Illinois Department of Children and Family Services (DCFS) based on circumstances underlying the charged offense. Counsel noted the possibility that witness David Roesch, a police detective testifying for the State, might testify that he was notified by DCFS of the investigation. The trial court granted the motion and asked the State to "instruct [its] witnesses not to discuss that."

¶ 6 During defendant's trial, Hector Melchor-Hernandez testified he was an asset-protection associate for a Walmart store in Urbana, Illinois. He had held that position for one year and was trained in surveillance; approaching, apprehending, and prosecuting shoplifters; report writing; and photographing merchandise. Melchor-Hernandez testified that, if he confronted a shoplifter who attempted to flee, Walmart policy required him to "call law enforcement after [the shoplifter] broke from apprehension." He asserted he was not supposed to physically intervene due to "liability issue[s]."

¶ 7 Just before 8 p.m. on April 4, 2015, Melchor-Hernandez observed defendant in the Walmart's electronics department. He noticed she had a baby with her and that her shopping cart contained a diaper bag that appeared empty. Melchor-Hernandez watched as defendant selected various DVDs and placed them in her shopping cart. He then observed defendant go to the infant department and select two infant apparel items, which she also placed in her cart. According to Melchor-Hernandez, defendant next proceeded to "a secluded aisle in the hardware department" located in a corner of the store. He stated he observed defendant conceal five or six DVDs and the two items of infant apparel inside the diaper bag. No merchandise was left in defendant's cart.

¶ 8 Melchor-Hernandez asserted he observed defendant "the whole time" and was located "a couple of feet" behind her. He stated he did not lose sight of defendant at any time and did not see her put any items back on the merchandise shelf.

¶ 9 Melchor-Hernandez stated he further watched as defendant made her way toward the store's exit. After she passed the last point of sale, he approached and identified himself as a Walmart employee. According to Melchor-Hernandez, the following then occurred:

> "[Defendant] then grabbed the infant, the baby that she was with and then grabbed the diaper bag and then I demanded her—or I didn't—I then demanded her to come into the office with me. She refused. I then physically tried to redirect her by standing in front of her. After she broke free and was able to get out the door, I immediately notified [the police]."

Melchor-Hernandez denied ever physically touching defendant. Rather, he stated he followed her outside while on the phone with 9-1-1. He observed defendant's vehicle and license plate num-

ber, which he relayed to the 9-1-1 operator. After he called 9-1-1, the police responded to the scene.

¶ 10 Melchor-Hernandez testified Walmart had an in-store camera surveillance system but cameras did not cover every inch of the store. He identified a disc containing surveillance footage of defendant's visit to the store and stated he provided the disc to police following the incident. The disc, containing nine video clips, was admitted into evidence at trial and played for the jury. It contains footage of defendant entering the store with her young child, who was sitting in a shopping cart, and shopping for DVDs and apparel. A dark colored bag was also in defendant's shopping cart. The disc further contained footage of defendant being approached by Melchor-Hernandez as she was leaving the store. The footage showed defendant remove both the child and the diaper bag from the shopping cart as Melchor-Hernandez confronted her. She then stepped around Melchor-Hernandez and exited the store as he followed closely behind.

¶ 11 On cross-examination, Melchor-Hernandez agreed that he was "a couple of feet behind defendant while she was in the store. However, he also acknowledged that he did not appear in any of the video clips that depicted defendant shopping. More specifically, he agreed that the surveillance disc contained clips from four different cameras in the store's electronics department and that he did not appear in any of the video clips. Melchor-Hernandez also testified that there was no video footage of defendant while she was in the hardware department between 8:05 p.m. and 8:28 p.m. Additionally, although there were also cameras outside Walmart which captured the parking lot, he did not include footage from those cameras in the disc because it was really dark and he did not think anything could be seen on them.

¶ 12 Melchor-Hernandez denied that he shoved defendant, stating he never physically

touched her. When he asserted that she "broke away" from him, he meant that she was able to exit the store as he stood in front of her.

¶ 13 The State next presented Roesch's testimony. Roesch stated he had been with the Urbana police department for 9 1/2 years and was currently a detective. He testified on April 9, 2015, that he traveled to Paxton, Illinois, in reference to a police report. The following colloquy then occurred:

> "Q. What did that report involve?
>
> A. Retail theft and endangering the life and health of a child.
>
> Q. Was there a license—
>
> MS. THOMAS (defendant's attorney): Objection.
>
> THE COURT: I beg your pardon?
>
> MS. THOMAS: Objection.
>
> THE COURT: The objection is overruled."

¶ 14 Roesch further testified that a license plate number was associated with the report. The license plate was registered to an individual named Randall Atkins of 1040 East Summer Street in Paxton, Illinois. On April 9, 2015, Roesch went to that address and observed a truck with the reported license plate number in the driveway. Roesch then met with defendant. He stated he introduced himself and asked if defendant knew why he was there. According to Roesch, defendant responded "[']yeah. It's the [Walmart] thing.[']" He then placed her under arrest for retail theft. On cross-examination, Roesch acknowledged that police officers from Paxton were already on the scene when he arrived.

¶ 15 At the conclusion of the State's case, defendant made a motion for a directed ver-

dict, which the trial court denied. Defendant then testified on her own behalf. She asserted that, on April 4, 2015, she went to Walmart with her husband, son, and daughter to shop for Easter. However, her son fell asleep in the family's vehicle so only defendant and defendant's daughter entered the store.

¶ 16 Defendant testified that, initially, she and her daughter went toward the electronics department and by the restrooms. She stated she "picked up some DVD[s] and some baby clothes." At some point, defendant also entered a restroom to change her daughter's diaper. After leaving the restroom, she went "back to look at the DVD[s]." Defendant next went to the clearance aisle. She testified she was only in a secluded hardware aisle for about five minutes. While in the clearance aisle, defendant decided to exit the store because her daughter was getting cranky and her son and husband were "taking too long to come in." She placed the merchandise she had selected on a shelf in the clearance aisle. Defendant denied placing any items in the diaper bag and estimated that she had been inside Walmart for approximately one hour.

¶ 17 Defendant further testified that, as she was leaving the store, a man came running up to her. He stated he was with loss prevention and directed defendant "to come with him." Defendant stated she refused, explaining that she was leaving and did not take anything. She asserted she "tried to go around [the man] and he shoved [her] in [her] chest four times." She then picked up her daughter and began to run to her vehicle. Defendant testified the shoving occurred "in the middle of the doorway" and could not be seen on the surveillance footage. She denied that she stole any items from Walmart.

¶ 18 On cross-examination, defendant testified she was in the hardware aisle because it also contained clearance items. Further, she reiterated that, while exiting the store, she was

shoved four times prior to picking up her daughter and running to her truck. Defendant asserted she was shoved in her chest with open hands. She stated she attempted to file a police report regarding the incident "[a] few days ago" after being arrested for retail theft, but was "rejected." Defendant testified she "[k]ind of" knew what loss prevention was but did not believe that a loss prevention employee had a right to stop her. Further, she did not report the incident to a manager at Walmart because she believed the manager would have "favored" the loss prevention employee.

¶ 19 Following defendant's testimony, the State called both of its witnesses in rebuttal. Roesch testified defendant did not report being shoved at Walmart while he was with her on April 9, 2015. Additionally Melchor-Hernandez denied receiving any complaints "about having shoved a customer."

¶ 20 At the close of the evidence defendant's counsel renewed defendant's motion for a directed verdict, which the trial court denied. During the jury instruction conference, the State submitted a jury instruction patterned after section 16-26(a) of the Criminal Code of 2012 (Code) (720 ILCS 5/16-26(a) (West 2014)), which provided as follows:

> "Any merchant who has reasonable grounds to believe that a person has committed retail theft may detain the person, on or off the premises of a retail mercantile establishment, in a reasonable manner and for a reasonable length of time for all or any of the following purposes:
>
> (1) To request identification;
>
> (2) To verify such identification;
>
> (3) To make reasonable inquiry as to whether such person has in his pos-

session unpurchased merchandise and to make reasonable investigation of the ownership of such merchandise;

(4) To inform a peace officer of the detention of the person and surrender that person to the custody of a peace officer."

Defendant objected to the proposed instruction, but the court overruled her objection, finding as follows: "Well, it's not an [Illinois Pattern Instruction (IPI)], although it correctly states the law. There has been a suggestion that somehow the defendant was accosted by the [Walmart] security officer. I'll note your objection. I believe this is something—an instruction that the jury should have."

¶ 21 Ultimately, the jury found defendant guilty of the charged offense. In July 2015, defendant filed a motion for a new trial. Relevant to this appeal, she argued the State failed to prove her guilty of retail theft beyond a reasonable doubt and the trial court erred by denying her objection to Roesch's testimony about "uncharged conduct," *i.e.*, a child endangerment investigation. In August 2015, the court denied defendant's posttrial motion and sentenced her to 12 months' probation.

¶ 22 This appeal followed.

¶ 23 II. ANALYSIS

¶ 24 A. Sufficiency of the Evidence

¶ 25 On appeal, defendant first argues the State failed to prove her guilty of retail theft beyond a reasonable doubt. She maintains the evidence against her was largely based on Melchor-Hernandez's testimony, which she contends was not credible because it was contradicted by the video surveillance footage. Defendant also argues the State's evidence was insufficient

because it failed to show that any merchandise was missing from Walmart.

¶ 26 When reviewing a challenge to the sufficiency of the evidence in a criminal case, this court must view all of the evidence in the light most favorable to the prosecution and "determine whether any rational trier of fact could have found beyond a reasonable doubt the essential elements of the crime." *People v. Brown*, 2013 IL 114196, ¶ 48, 1 N.E.3d 888. We note "[t]he trier of fact is best equipped to judge the credibility of witnesses, and due consideration must be given to the fact that it was the [trier of fact] that saw and heard the witnesses." *In re Jonathon C.B.*, 2011 IL 107750, ¶ 59, 958 N.E.2d 227. "It also is for the trier of fact to resolve conflicts or inconsistencies in the evidence." *Id*. "[I]t is not the function of this court to retry the defendant." *People v. Givens*, 237 Ill. 2d 311, 334, 934 N.E.2d 470, 484 (2010).

¶ 27 Additionally, "the testimony of a single witness, if positive and credible, is sufficient to convict, even though it is contradicted by the defendant." *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228, 920 N.E.2d 233, 242 (2009). "A reviewing court will not reverse a conviction simply because the evidence is contradictory [citation] or because the defendant claims that a witness was not credible [citation]." *Id*. at 228, 920 N.E.2d at 243. Rather, we will reverse a criminal conviction only "where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt." *Brown*, 2013 IL 114196, ¶ 48, 1 N.E.3d 888.

¶ 28 A person commits retail theft when he or she knowingly takes possession of or carries away merchandise that is displayed or offered for sale in a retail mercantile establishment with the intention of retaining the merchandise or depriving the merchant permanently of the possession, use, or benefit of the merchandise without paying its full retail value. 720 ILCS 5/16-

25(a) (West 2014). The elements of the offense of retail theft can be established by circumstantial evidence. *People v. DePaolo*, 317 Ill. App. 3d 301, 307, 739 N.E.2d 1027, 1032 (2000). Additionally, a trier of fact may infer that a defendant possessed or carried away merchandise with the intention of retaining it or depriving the merchant of its possession, use, or benefit if he or she conceals unpurchased merchandise among his or her belongings and removes that merchandise beyond the last known payment station. 720 ILCS 5/16-25(c) (West 2014).

¶ 29 Here, after viewing the evidence presented at defendant's trial in the light most favorable to the State, we find it was sufficient to prove her guilty of retail theft beyond a reasonable doubt. Melchor-Hernandez testified he observed defendant while she shopped at Walmart. He stated he watched her select items of merchandise from the store's shelves, travel to a secluded location in the store, conceal the merchandise in a diaper bag, and move past the store's last point of sale. His testimony also demonstrated that, when he confronted defendant, she evaded him and fled the scene. The surveillance video presented by the State was generally consistent with Melchor-Hernandez's description of defendant and her activities while shopping at Walmart.

¶ 30 As stated, defendant asserts Melchor-Hernandez was not credible because his testimony regarding his proximity to her while she shopped was contradicted by other evidence. In particular, defendant accurately points out that Melchor-Hernandez did not appear on the surveillance video that depicted her shopping even though he claimed to be only "a couple of feet" behind her as she moved through the store. However, we find the jury could have reasonably concluded that Melchor-Hernandez simply overestimated his proximity to defendant. The jury could have inferred that Melchor-Hernandez ventured close enough to defendant to observe her activi-

ties but also remained far enough away to avoid detection and, thus, he was not visible on the surveillance video. In any event, the disparity between Melchor-Hernandez's testimony and the surveillance video does not render his testimony so flawed as to be wholly unworthy of belief. We note his description of events was otherwise consistent with what could be seen on the surveillance footage.

¶ 31 Defendant further contends Melchor-Hernandez's testimony that he observed her go to a secluded hardware aisle where she concealed store merchandise in a diaper bag lacked credibility. Defendant asserts that, to be credible, this testimony required assumptions that defendant knew the hardware aisle would be secluded and that it was not covered by surveillance cameras. We disagree. The record reflects Melchor-Hernandez testified as to defendant's movements through the store and her activities, which included traveling to a "secluded" hardware aisle located in a corner of the store. When viewed in the light most favorable to the State, a reasonable inference from his testimony is that defendant moved to an area of the store with fewer customers so that she might conceal merchandise in her bag without detection. We find nothing in Melchor-Hernandez's testimony or the State's evidence which would require assumptions that defendant already knew the aisle was empty or that it was not covered by surveillance cameras.

¶ 32 Ultimately, it was for the jury to judge the credibility of the witnesses, weigh the evidence, and resolve any conflicts or inconsistencies in the evidence presented. On review, defendant essentially asks this court to reweigh the evidence on the basis that her testimony was more convincing than that provided by Melchor-Hernandez. As discussed that is not the function of a reviewing court when considering a challenge to the sufficiency of the evidence. Moreover, defendant's own testimony was inconsistent with the surveillance video. Significantly, defendant

testified at trial that, as she was leaving Walmart, Melchor-Hernandez shoved her in the chest four times before she picked up her child and ran to her vehicle. The surveillance video, however, showed that defendant picked up her child and diaper bag immediately upon being confronted by Melchor-Hernandez. She then stepped around Melchor-Hernandez and exited the store as he followed closely behind. The video did not depict any shoving prior to defendant picking up her child.

¶ 33 Here, the State presented evidence to support each element of the charged offense. Although defendant presented contradictory evidence and asserts Melchor-Hernandez was not credible, nothing she has cited to this court renders his testimony, or the State's evidence, "so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt."

¶ 34 With respect to her challenge to the sufficiency of the evidence, defendant further argues that the State failed to establish that Walmart was deprived of any merchandise because nothing was recovered from her "personally at Walmart[] or from her home." To support her claim, defendant cites *People v. Liner*, 221 Ill. App. 3d 578, 578-79, 582 N.E.2d 271, 271-72 (1991), wherein the defendant was found guilty of retail theft based on allegations that he and an accomplice stole a bottle of whiskey from a Walgreens store. Evidence presented at the defendant's trial showed his accomplice was chased from the store by a police officer who saw him throw a bottle. *Id*. at 579, 582 N.E.2d 272. Later, the police discovered a broken bottle of whiskey in the area and obtained a statement from defendant in which he admitted that he and his accomplice had intended to steal whiskey from Walgreens. *Id.*

¶ 35 On review, the defendant challenged the sufficiency of the evidence against him

and the Third District reversed. *Id*. at 579-80, 582 N.E.2d at 272-73. It held the State failed to prove beyond a reasonable doubt an element of the charged offense, *i.e.*, that the merchandise the defendant was alleged to have taken "was displayed, held, stored, or offered for sale in a retail mercantile establishment." *Id*. at 580, 582 N.E.2d at 272. The court pointed out that a store clerk who observed the men in the store did not testify that anything was missing from the store and affirmatively stated that he did not see either the defendant or his accomplice take anything. *Id*. Additionally, it found the State failed to offer any evidence connecting the broken whiskey bottle observed by the police to the Walgreens. *Id*. at 580, 582 N.E.2d at 272-73.

¶ 36 The facts in *Liner* are clearly distinguishable from the facts presented here. In particular, Melchor-Hernandez testified he saw defendant conceal merchandise taken from Walmart's store shelves in a diaper bag and move past the store's last point of sale. Additionally, he asserted that, when confronted, defendant fled the scene. Also, defendant here left the scene and was not confronted about the theft until five days later at her residence. Thus, the jury could have reasonably concluded she had more than enough time to dispose of the items taken. A rational trier of fact could have found defendant guilty based on these facts and *Liner* does not provide a basis for reversing defendant's conviction.

¶ 37 B. Jury Instructions

¶ 38 On appeal, defendant next argues the trial court erred by allowing the jury to be given an instruction patterned after section 16-26(a) of the Code (720 ILCS 5/16-26(a) (West 2014)), which concerns the right of a merchant to detain suspected shoplifters. She maintains the instruction was not relevant to her case "as it is based on a statute used in criminal cases [involving battery-related offenses]." Further, defendant argues the State overemphasized the issue of a

merchant's right to detain a suspected shoplifter during the course of her trial and the use of the jury instruction resulted in ambiguity or confusion regarding the applicable standard of proof.

¶ 39 Initially, defendant acknowledges that, although she objected to the instruction at trial, she failed to preserve the issue for appellate review by not raising it in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1130 (1988) (holding that to preserve an issue for appeal, a defendant must object to the alleged error at trial and include it within a written posttrial motion). However, she argues her forfeiture may be excused under the plain-error doctrine.

> "The plain error doctrine permits a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. McDonald*, 2016 IL 118882, ¶ 48, 77 N.E.3d 26.

"The first step in a plain error analysis is to determine whether error occurred." *Id.* "Absent reversible error, there can be no plain error." *Id.* Further, "[t]he defendant has the burden of persuasion on both the threshold question of plain error and the question [of] whether the defendant is entitled to relief as a result of the error." *Id.*

¶ 40 As stated, we must first determine whether error occurred with respect to the challenged jury instruction. "[T]he purpose of jury instructions is to provide the jury with correct legal principles that apply to the evidence, thus enabling the jury to reach a proper conclusion

based on the applicable law and the evidence presented." *People v. Parker*, 223 Ill. 2d 494, 500, 861 N.E.2d 936, 939 (2006). "Jury instructions should not be misleading or confusing." *People v. Bannister*, 232 Ill. 2d 52, 81, 902 N.E.2d 571, 589 (2008). "[I]f a commonsense interpretation of [a] challenged instruction would not be misleading or confusing, it may be said that the jury was fairly and comprehensibly informed on that issue." *People v. Tucker*, 193 Ill. App. 3d 849, 854, 550 N.E.2d 581, 584 (1990).

¶ 41 The correctness of jury instructions "depends not on whether defense counsel can imagine a problematic meaning, but whether ordinary persons acting as jurors would fail to understand them." *Bannister*, 232 Ill. 2d at 81, 902 N.E.2d at 589. Further, when reviewing a claim that an instruction was ambiguous and therefore subject to erroneous interpretation a court should consider whether there was a reasonable likelihood that the jury "applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *People v. Banks*, 237 Ill. 2d 154, 209, 934 N.E.2d 435, 465 (2010).

¶ 42 "[W]hether the jury instructions accurately conveyed to the jury the applicable law is reviewed *de novo*." *Parker*, 223 Ill. 2d at 501, 861 N.E.2d at 939. A reviewing court "must determine whether the instructions, taken as a whole, fairly, fully, and comprehensively apprised the jury of the relevant legal principles." *Id*. "Jury instructions should be construed as a whole, rather than read in isolation." *Id*.

¶ 43 Additionally, "[w]here there is no IPI jury instruction on a subject on which the court determines the jury should be instructed, the court has the discretion to give a non-IPI instruction." *People v. Hudson*, 222 Ill. 2d 392, 400, 856 N.E.2d 1078, 1082 (2006). A trial court's decision to instruct a jury using a non-IPI instruction will not be disturbed absent an abuse of that

discretion. *Id*. Whether there is an abuse of discretion "depend[s] on whether the nonpattern instruction is an accurate, simple, brief, impartial, and nonargumentative statement of the law." *Bannister*, 232 Ill. 2d at 81, 902 N.E.2d at 590; See also Ill. S. Ct. R. 451(a) (eff. Apr. 8, 2013) (A non-IPI instruction "should be simple, brief, impartial, and free from argument"). Ultimately, "[t]his court reviews *de novo* whether the jury instructions, as a whole, accurately conveyed the law" but "we review for an abuse of discretion the trial court's decision to give a particular jury instruction." *People v. Dorn*, 378 Ill. App. 3d 693, 698, 883 N.E.2d 584, 587 (2008).

¶ 44 Here, we find no reversible error occurred in the underlying proceedings relative to jury instructions. Initially, we disagree with defendant's assertions that the State overemphasized the reasonableness of Melchor-Hernandez's actions when he attempted to stop her from leaving Walmart. She claims the State spent an "inordinate" amount of time addressing the issue, conducting a "trial within a trial." Defendant's arguments mischaracterize what occurred during the underlying proceedings. Instead, the record shows defendant raised issues regarding the manner in which Melchor-Hernandez confronted her, as well as his authority to detain her, challenging both Melchor-Hernandez's credibility and the inference from the State's evidence that she fled the scene due to her alleged theft. Specifically, defendant testified Melchor-Hernandez shoved her four times in the chest as she attempted to leave the store. Defendant also asserted that she attempted to file a police report against Melchor-Hernandez based on his conduct and that she did not believe a loss prevention employee had a right to stop her. The State's questions and arguments regarding Melchor-Hernandez's conduct were in direct response to defendant's evidence. Moreover, contrary to defendant's suggestion on appeal, our review of the record fails to reflect any undue focus by the State on the propriety of Melchor-Hernandez's actions.

¶ 45 As stated, defendant also argues the challenged instruction was not relevant to her case and created ambiguity or was misleading to the jury because it contained language presenting a degree of proof that was different from the degree of proof the State was required to meet, *i.e.*, proof beyond a reasonable doubt. In particular, she notes the challenged instruction contained "reasonable grounds" language, providing that "[a]ny merchant who has reasonable grounds to believe that a person has committed retail theft may detain the person *** in a reasonable manner and for a reasonable length of time for" various specified purposes. Defendant contends the wording of the challenged instruction makes it "reasonably likely that the jury may have concluded that finding that *** Melchor-Hernandez had reasonable grounds to believe [defendant] had committed retail theft equated [with] a finding that the State had proved [elements of the offense of retail theft] beyond a reasonable doubt."

¶ 46 Here, evidence of Melchor-Hernandez's alleged battery of defendant was relevant to issues of credibility and defendant's flight from the store. Evidence of defendant's state of mind—specifically, a belief that Melchor-Hernandez lacked authority to detain her—was also relevant to explain why defendant left Walmart when confronted. However, evidence of Melchor-Hernandez's *actual* authority to detain defendant was not relevant to the issues presented. Even so, we disagree that the challenged instruction created ambiguity or was misleading to the jury such that defendant's due process rights were violated. As defendant acknowledges, the instruction at issue provided a correct statement of the law. A commonsense interpretation of the instruction is that a merchant may detain a suspected shoplifter. Such an interpretation is neither misleading nor confusing. Further, the record shows the jury was correctly instructed regarding the elements of retail theft and that it had to find the State proved each of those elements beyond

a reasonable doubt. In its brief, the State notes the numerous occasions on which the jury was instructed either orally or in writing regarding the applicable standard of proof. Contrary to defendant's assertions on appeal, the jury was not asked to make a separate finding as to whether Melchor-Hernandez had reasonable grounds to detain her. Rather, the challenged instruction simply explained the circumstances under which a merchant could detain an individual.

¶ 47 Additionally, this court has held that "[t]he presence of the extraneous instruction was not a substantial defect that would render [a] trial fundamentally unfair or excuse [a] defendant's [forfeiture]." *People v. Palmer*, 352 Ill. App. 3d 891, 894, 817 N.E.2d 137, 140 (2004). In that case, we considered all of the jury instructions together and noted that they provided "accurate statements of the law" and that the jury was not misled. *Id*. We find similar circumstances are presented by this case.

¶ 48 Although defendant suggests that it was reasonably likely the challenged instruction resulted in a guilty verdict based on a standard of proof that was less than proof beyond a reasonable doubt, we can find no support for that contention in the record. The trial court did not abuse its discretion in giving the challenged jury instruction. No reversible error occurred with respect to the instruction and, thus, there was no plain error.

¶ 49 C. Other-Crimes Evidence

¶ 50 On appeal, defendant further argues the trial court erred in overruling her objection to Roesch's testimony that he was investigating a report of retail theft and "endangering the life and health of a child" when he sought out defendant at the Paxton address. She points out that, prior to trial, the court granted her motion to exclude such evidence. Defendant contends the testimony, which concerned "uncharged conduct," was more prejudicial than probative and

should not have been allowed into evidence.

¶ 51 "While the erroneous admission of other-crimes evidence carries a high risk of prejudice and ordinarily calls for reversal [citation], the evidence must be so prejudicial as to deny the defendant a fair trial, *i.e.*, it must have been a material factor in his conviction such that without the evidence the verdict likely would have been different." *People v. Cortes*, 181 Ill. 2d 249, 285, 692 N.E.2d 1129, 1145 (1998); see also *People v. Nieves*, 193 Ill. 2d 513, 530, 739 N.E.2d 1277, 1285 (2000) (stating the supreme court "repeatedly has held that the improper introduction of other-crimes evidence is harmless error when a defendant is neither prejudiced nor denied a fair trial based upon its admission"). "If the error is unlikely to have influenced the jury, admission will not warrant reversal." *Cortes*, 181 Ill. 2d at 285, 692 N.E.2d at 1145.

¶ 52 Here, the challenged testimony from Roesch was not so prejudicial as to deny defendant a fair trial. We note that evidence related to the child endangerment investigation stemmed from the same underlying facts as defendant's retail theft charge. Thus, the jury was already aware that defendant had been shopping with her young child when she was alleged to have committed the charged offense. Moreover, Roesch's testimony regarding a report of child endangerment was brief, isolated, and not given any undue emphasis by either of the parties or the trial court. Under the circumstances, the challenged testimony was unlikely to have influenced the jury and any error in its admission was harmless.

¶ 53 D. The State's Closing Argument

¶ 54 Finally, defendant argues she was denied a fair trial because of comments the prosecutor made during closing argument. Specifically, she contends the prosecutor misstated the evidence presented at trial, made statements attempting to improperly bolster Melchor-

Hernandez's credibility as a witness and the State's case in general, and improperly suggested defendant could have taken steps to prove her innocence. Again, defendant acknowledges that she failed to properly preserve this issue for appellate review but maintains her forfeiture may be excused under the plain-error doctrine.

¶ 55 Generally, a prosecutor has wide latitude in the content of his or her closing argument and may comment on the evidence presented, as well as any fair and reasonable inference the evidence may yield. *People v. Perry*, 224 Ill. 2d 312, 347, 864 N.E.2d 196, 217-18 (2007). A prosecutor "may not argue assumptions or facts not contained in the record." *People v. Glasper*, 234 Ill. 2d 173, 204, 917 N.E.2d 401, 419-20 (2009). On review, we "must evaluate the comments in the context in which they were made" (*People v. Ramsey*, 239 Ill. 2d 342, 441, 942 N.E.2d 1168, 1222 (2010)) and "consider the closing argument as a whole, rather than focusing on selected phrases or remarks" (*Perry*, 224 Ill. 2d at 347, 864 N.E.2d at 218). "Statements will not be held improper if they were provoked or invited by the defense counsel's argument." *Glasper*, 234 Ill. 2d at 204, 917 N.E.2d at 420.

¶ 56 Reversible error occurs "only if the defendant demonstrates that the improper remarks were so prejudicial that real justice was denied or that the verdict resulted from the error." *Perry*, 224 Ill. 2d at 347, 864 N.E.2d at 218. "Whether statements made by a prosecutor at closing argument were so egregious that they warrant a new trial is a legal issue this court reviews *de novo*." *People v. Wheeler*, 226 Ill. 2d 92, 121, 871 N.E.2d 728, 744 (2007). Additionally, "a prosecutor's statements during closing argument will constitute plain error only if they were so inflammatory that defendant could not have received a fair trial or so flagrant as to threaten deterioration of the judicial process." (Internal quotations omitted.) *People v. Boling*, 2014 IL App

(4th) 120634, ¶ 126, 8 N.E.3d 65. Again, if no reversible error occurs there is also no plain error. *McDonald*, 2016 IL 118882, ¶ 48, 77 N.E.3d 26.

¶ 57 Defendant first argues that, during his rebuttal closing argument, the prosecutor misstated the evidence presented with respect to the video surveillance footage. During her closing, defendant's counsel questioned the lack of surveillance footage depicting defendant inside Walmart between 8:05 p.m. and 8:28 p.m. She called in to question Melchor-Hernandez's credibility by arguing that, according to him, defendant could not "be spotted anywhere" inside Walmart during that critical time frame. In response, the State argued as follows:

> "Ladies and gentlemen, nobody is saying that there's no footage of the defendant wandering around the store from 8:05 to 8:28. That's not what the [S]tate's evidence was. And I bet some of you are glad that you didn't have to watch half an hour of [defendant] wandering around the store after she put the items in her diaper bag."

Defendant argues this statement was incorrect because Melchor-Hernandez actually testified that there was no video footage of defendant during that time frame.

¶ 58 Initially, our review of the evidence does not clearly demonstrate that the prosecutor misstated the evidence. At trial, Melchor-Hernandez testified on direct examination that Walmart had in-store surveillance cameras but they did not cover every inch of the store and only covered two aisles in the hardware department. The State also submitted a disc containing video surveillance footage of defendant inside Walmart from approximately 7:47 p.m. to approximately 8:28 p.m. There were no clips on the disc depicting defendant or her location in Walmart between approximately 8:05 p.m. and 8:28 p.m. On cross-examination, the following colloquy

occurred between defendant's counsel and Melchor-Hernandez:

"Q. So the last time we have on the video before she is leaving the store is at 8:05 p.m.?

A. It's 8:0—I [*sic*] believe so. I would have to look at the time again.

Q. Okay.

A. You mean when she's about to leave the store? Is that what you just said?

Q. No. I'm talking about the last documented video footage that we have for her is 8:05 [p.m.] prior to her leaving the store?

A. Well, there's a clip in there where she's coming in the store. The other clip of her exiting the store is at 8:28 [p.m.]

Q. Correct.

There's no video footage of her between 8:05 [p.m.] and 8:28 [p.m.]; correct?

A. Yeah. That's correct. That's when she was in the hardware department."

¶ 59 From this testimony, it is unclear whether Melchor-Hernandez was testifying that no video surveillance footage of defendant existed at all from 8:05 p.m. to 8:28 p.m., or that no video footage of her existed during the time frame at issue *on the disc he provided to law enforcement*. We note defense counsel's questions appear to have been directed at the State's video surveillance exhibit rather than more broadly to any footage of defendant while inside Walmart. Further, if Melchor-Hernandez's response was directed only to the video surveillance footage

submitted into evidence, then it was not a misstatement of the evidence for the prosecutor to argue that other, non-relevant video surveillance footage existed. Moreover, contrary to defendant's argument on appeal, the prosecutor's comments did not "create an illusion that there was more surveillance video footage that may have been indicative of [defendant's] guilt." Rather the challenged comments indicate any additional footage of defendant "wandering" in the store was irrelevant to the underlying issues. Under these circumstances, we can find no clear and obvious error.

¶ 60 Defendant also challenges comments by the prosecutor regarding the fact that no merchandise was recovered from defendant, arguing such comments also misstated the evidence. During rebuttal the prosecutor commented as follows: "And, yes, police went to her house several days later and there was no mention of that merchandise. That doesn't mean that she didn't take the merchandise. That means that [Walmart's] never getting it back. Who knows where it is now? It could be at a resale shop."

¶ 61 As discussed, "[s]tatements will not be held improper if they were provoked or invited by the defense counsel's argument." *Glasper*, 234 Ill. 2d at 204, 917 N.E.2d at 420. We find the prosecutor's challenged comments were in direct response to arguments defendant's counsel made during her closing argument. Specifically, counsel argued as follows: "The police went to [defendant's] house and she was arrested based on [Melchor-Hernandez's] statement. *** Where is the stuff? The police were at her house. Did they come out of the house with bags of DVD[s] and infant clothing? Did they come out with one DVD? No. Where's the stuff?" Defense counsel's comments clearly invited a response and, thus, the prosecutor's statements were not improper.

¶ 62 Defendant next argues statements the prosecutor made regarding the testimony of Melchor-Hernandez both misstated the evidence and improperly bolstered Melchor-Hernandez's testimony. She first challenges the prosecutor's comments regarding the disparity between Melchor-Hernandez's testimony that he was located "a couple of feet" behind defendant and the surveillance video which did not depict him in any of the clips with defendant. The prosecutor specifically commented as follows: "Melchor-Hernandez says that he was a couple of feet behind [defendant]. Obviously, he means a little more than a couple of feet because [defendant's counsel] is right. She—he wasn't in the video with [defendant] in those clips. Obviously, he wouldn't be just a couple of feet behind her or she would be aware that he was watching her."

¶ 63 As stated, a prosecutor may comment on the evidence and reasonable inferences to be drawn from that evidence. Here, a reasonable inference was that Melchor-Hernandez overestimated his proximity to defendant because, if his testimony was taken literally, his presence would have been obvious to defendant. We find no misstatement of the evidence or improper bolstering of witness testimony and, thus, no reversible error.

¶ 64 Defendant also contends the prosecutor erred in commenting on Melchor-Hernandez job as an asset-protection associate. Specifically, during his rebuttal closing argument, the prosecutor stated as follows:

> "[Melchor-Hernandez] catches an average of 14 people a month. There's no testimony that he gets incentive for any [*sic*] catching any particular shoplifter beyond just his regular paycheck. And, folks, do you think that's every shoplifter in [Walmart] or do you think that's probably a small fraction of people actually stealing things? He's just trying to keep up."

¶ 65 Again, we find these comments were in direct response to portions of defense counsel's closing argument, in which she challenged Melchor-Hernandez's credibility and suggested he was overly ambitious in catching shoplifters for Walmart. Specifically, counsel argued as follows: "[Melchor-Hernandez] also testified that he has stopped 170 people in 12 months. That's 14 a month. And I'm guessing he doesn't work every day of the month, so 14 a month. He didn't say they were convicted, he said that's how many people he stops in [Walmart]. He's ambitious. That's his job." Accordingly, defendant's counsel invited the State to comment on Melchor-Hernandez's activities as an asset-protection agent for Walmart and we find no error.

¶ 66 As a final matter, defendant argues the prosecutor improperly shifted the burden of proof to her by suggesting she should have proved her innocence by opening the diaper bag and showing Melchor-Hernandez that no merchandise was inside. In particular, during his closing argument, the prosecutor addressed defendant's version of events, arguing as follows:

> "[Defendant] claims that she grabbed all of that merchandise and put it in her cart and then she put it back in the general merchandise aisle. Does that make sense? Does it make sense that, if she did that, she then wouldn't just briefly open her bag and say, ['']look, there's nothing in there.['] No. No. Her story doesn't make any sense."

¶ 67 Once again, we find no error. Evidence presented by the defendant is not "beyond the reach of appropriate comment by the prosecution." *People v. Phillips*, 127 Ill. 2d 499, 527, 538 N.E.2d 500, 511 (1989). Further, "[t]here is a great deal of difference between an allegation by the prosecution that defendant did not prove himself innocent and statements questioning the relevance or credibility of a defendant's case." *Id.* "Not every prosecutorial statement question-

ing relevance or credibility rises to an impermissible shifting of the burden." *Id*. Here, the prosecutor's comment questioned defendant's credibility when recounting her version of events and did not impermissibly shift the burden of proof.

¶ 68 Under the circumstances presented, we find no reversible error with respect to the prosecutor's comments during closing argument. Because there is not reversible error there is also no plain error.

¶ 69 III. CONCLUSION

¶ 70 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $75 statutory assessment against defendant as costs of this appeal.

¶ 71 Affirmed.