2012 IL App (2d) 100376-U
No. 2-10-0376
Rule 23 Order filed July 12, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DWAYNE A. CUMMINGS, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of De Kalb County. No. 08-CF-603 Honorable Robbin J. Stuckert, Judge, Presiding.

JUSTICE BOWMAN delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Hutchinson concurred in the judgment.

RULE 23 ORDER

¶ 1 After a jury trial, defendant, Dwayne A. Cummings, was convicted of aggravated robbery (720 ILCS 5/18-5(a) (West 2006)). The trial court sentenced defendant to nine years in prison and ordered him to pay $30 restitution to the victim, Robert Kerschke. After the court denied his motion to reconsider sentence, defendant timely appealed. On appeal, through counsel, he asks us to modify the judgment by reducing the amount of restitution. The State confesses error on that issue. While the appeal was pending, defendant moved to dismiss the appellate defender and proceed *pro se* because the appellate defender was not raising the issues that defendant wanted raised on appeal.

We granted defendant's motion and allowed him to file a *pro se* brief and allowed the State to file a response. Defendant raises various issues in a less-than-articulate brief, including: (1) the trial court erred in denying his motion to suppress; (2) *Brady* violations (*Brady v. Maryland*, 373 U.S.83 (1963)); (3) prosecutorial misconduct during closing arguments; and (4) ineffective assistance of trial counsel. We agree with the parties regarding the reduction of restitution and modify the judgment accordingly. On all other contentions of error, we affirm.

¶ 2 At trial, Kerschke testified that he was a delivery driver for a DeKalb restaurant and defendant robbed him of his cell phone (which was later recovered) and a roll of $1 and $5 bills with a total value of "less than $30." A police detective who arrested defendant testified that he recovered $19 in bills from defendant. This currency was placed into an envelope and introduced into evidence at trial. At sentencing, the trial judge stated that defendant would pay $30 total restitution but that the $19 would "be turned over to Mr. Kerschke."

¶ 3 As the parties agree, the evidence does not support the award of $30 restitution. Therefore, based on the foregoing, we exercise our power under Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994) and modify the judgment by (1) reducing the total restitution to $29; and (2) granting defendant a credit of $19 for the money that was returned to Kerschke. Thus, the total restitution due is $10.

¶ 4 Moving on to defendant's *pro se* contentions of error, defendant first argues that the trial court erred in denying his motion to suppress evidence that was obtained during a search that defendant claims was illegal. In reviewing a trial court's ruling on a motion to suppress evidence, we apply a two-part standard of review. *People v. Geier*, 407 Ill. App. 3d 553, 555 (2011). First, a trial court's ruling on historical facts is reviewed only for clear error, and we give great deference

to any inferences the court draws from those facts. *Id.* We reverse the trial court's findings of facts only if its findings are against the manifest weight of the evidence. *Id.* We review *de novo* the trial court's ultimate legal ruling as to whether the suppression of evidence was warranted. *Id.* at 555-56. Here, defendant argues that the trial court erred in finding that the search was performed with consent.

¶ 5 At the hearing on defendant's motion to suppress, defendant testified that around 5 a.m. on October 10, 2008, he was lying in Dianatha Hardesty's bed at 1015½ Market Street in DeKalb, wearing boxers and a tank top. He was awakened by a police officer hitting the bottom of his foot. When he awoke, he saw four or five officers in the room, requesting that he stand up. He recognized Detective Steve Lekkas, who asked him to come to the station for an investigation. Lekkas asked if he could search the room, and defendant testified that he could not respond. The police officers were talking to Hardesty. Defendant started to put on some shorts, and Lekkas asked if he could search the shorts. Defendant testified that Lekkas snatched the shorts before he could answer. Lekkas pulled a phone out of the pocket and asked who the phone belonged to. Defendant told him it was his phone. Lekkas also pulled out some money. Defendant testified that he had been staying at Hardesty's apartment for about five days preceding his arrest. The officers told him that Hardesty did not want him there anymore. Defendant testified that he did not give the police permission to take his keys or to search his car. Defendant stated he was not told he was under arrest or read his *Miranda* rights until he was at the police station.

¶ 6 On cross-examination, defendant admitted the phone in his pocket was not his phone; he denied knowledge of whose phone it was. He admitted that there were bags of food in the apartment when police came. He testified that he purchased the food from Tom and Jerry's earlier that day.

He admitted that Detective Lekkas called Kerschke's cell phone number while standing in the bedroom and that the phone in defendant's shorts pocket rang.

¶ 7 Kelly Sullivan, another detective, testified that she searched defendant's car and understood the search to be associated with defendant's arrest. The vehicle was unlocked. She recovered a black nylon bag.

¶ 8 Officer Jason Watson testified that Kerschke described the incident. Kerschke told him that he was a delivery driver for Lukulos restaurant and that he went to deliver food to an Amber Manor apartment around 4 a.m. No one was answering, so Kerschke called the cell phone number that placed the order. The person told Kerschke he was at a friend's nearby and would come right away. Kerschke showed Watson the food order ticket. The person came up to Kerschke's car with his hand in a black nylon bag, telling Kerschke he had a .38 special. The person asked him to set the food on the car and asked him for anything in his pockets. Kerschke gave the man his phone and some cash. Officer Watson was able to have the cell phone provider track the phone using GPS technology, which led police to 1015½ Market Street. The cell phone number was also linked to defendant. Kerschke's description matched defendant as well.

¶ 9 Detective Steve Lekkas testified that he and other officers arrived at the Market Street location, knocked on the door, and Hardesty answered. She was the tenant in the apartment. Hardesty allowed the officers inside. Lekkas asked about defendant, and Hardesty stated that he was inside her bedroom, pretending to be asleep. She told Lekkas that he arrived at her home around 5 a.m. Hardesty told Lekkas he could go in the bedroom and that she wanted defendant "out of her hair." Lekkas went inside the bedroom. In the room, Lekkas saw a bag of food that matched the order placed to Lukulos. He asked defendant to get up and speak to him. Defendant said he would

talk to Lekkas. Lekkas told him he could put on some clothes, and defendant picked up shorts. Lekkas asked if he could search the shorts, and defendant said yes and handed him the shorts. Lekkas patted the shorts and felt something like a cell phone and money, but he did not remove anything. He asked defendant whose phone it was, and defendant said it was his sister's phone. Defendant removed the phone from his pocket. Another officer with Lekkas then called Kerschke's phone number, and the phone rang. Lekkas asked if defendant would come to the station, reminding him that Hardesty did not want him there anymore. Defendant agreed. At the station, Lekkas started asking him questions, and defendant asked if he was under arrest. Lekkas stated no, and defendant answered some questions. Defendant then became agitated and asked if he could leave. At that point, Lekkas stated defendant was under arrest and gave him his *Miranda* warnings. Defendant refused to sign the *Miranda* waiver form.

¶ 10 The trial court determined that the initial search of defendant's shorts was justified as a *Terry* search for the officer's protection because at that time, police had Kerschke's description of defendant, who claimed to have a .38 special. Lekkas testified that he patted down defendant's shorts but that defendant removed the cell phone. Therefore, the court determined that Lekkas did not exceed the boundaries of a *Terry* search. The court went further and determined that Lekkas's testimony was credible in that defendant consented to the search of the pants. Therefore, the court determined the cell phone and money were not discovered due to an illegal search.

¶ 11 Regarding the black nylon bag, which was taken during the search of defendant's car, the trial court indicated that two officers observed the black nylon bag in plain view on the car's backseat. The officers already had Kerschke's description of the nylon bag, connecting it with the crime, and they knew that defendant had Kerschke's cell phone in his possession. Regarding the food items that

were found in the room, the court suppressed the food items because the State failed to present when the food items were seized.

¶ 12 Based on the evidence presented, we cannot say the trial court's factual finding that defendant consented to the search of his shorts was against the manifest weight of the evidence. The trial court found Lekkas's testimony credible, and it is not this court's function to determine credibility. *People v. Holman*, 402 Ill. App. 3d 645, 648 (2010). We therefore reject defendant's contention that the trial court should have accepted his testimony that he did not consent to a search of the shorts. To the extent defendant argues that the nylon bag should have been suppressed, we again have no reason to disturb the factual findings of the trial court that two officers saw the bag in plain view and knew that it matched Kerschke's description. Therefore, we reject defendant's contention that the nylon bag should have been suppressed.

¶ 13 Next, defendant argues that the State presented a false food receipt as evidence of his food order. Defendant labels this as a *Brady* violation and also argues that the trial court erred in allowing the receipt into evidence without proper foundation. First, defendant's claim regarding the food receipt evidence does not implicate *Brady* as there is no evidence, or even a claim, that the State failed to tender exculpatory evidence to the defense. Therefore, we ignore defendant's references to *Brady*.

¶ 14 Defendant argues that Lekkas conspired against him and falsified the food receipt because Lekkas's sister and brother-in-law owned Lukulos. Defendant seems to argue that the State never established whether it was a copy or an original. The record does not support defendant's allegations. Kerschke identified the food receipt as the ticket that was placed on the food bag that he delivered to defendant. The ticket contained the food order, the address for the delivery, and the

phone number of the person who placed the order. Kerschke testified the ticket was in substantially the same condition as on the date of the incident. He identified the phone number on the ticket as the one that he called when he arrived at the location, and he stated that the person answered and arrived shortly thereafter. Kerschke identified defendant as the person who arrived shortly after he called the number. The foundation for the admission of physical evidence may be made through its identification by witnesses or through a chain of possession. *People v. Wiley*, 174 Ill. App. 3d 444, 450-51 (1988). Chain of custody foundation is required when the offered evidence is not readily identifiable or is susceptible to alteration by tampering or contamination. *Id.* Here, Kerschke identified the receipt at trial as being in substantially the same condition as on the night of the incident and containing the information that he followed to make the delivery (ie the address and phone number of the customer). See *People v. Vade*, 111 Ill. App. 3d 551, 566 (1982) (finding proper foundation set where arresting police officer identified receipt). We therefore reject defendant's contention that the food receipt was improperly admitted.

¶ 15 Next, defendant argues that the State made improper remarks during closing arguments. Specifically, defendant claims that the State argued the police-witnesses were more credible when it stated that "[t]o suggest that a detective from the City of DeKalb would come in here and lie to you is insulting to you and you should be insulted." We first note that no objection was lodged against the comment but we may review under plain error if the issue warrants.

¶ 16 Courts allow prosecutors wide latitude in making closing arguments. *People v. Rebecca*, 2012 IL App (2d) 091259, ¶ 82. In closing arguments, the State may comment on the evidence and all inferences reasonably drawn from the evidence. *Id.* We review the closing argument in its entirety, and we review an allegedly improper remark in context of the entire argument. *Id.* The trial

court has discretion to determine the proper character and substance of closing arguments, and its rulings will not be disturbed absent an abuse of that discretion. *Id.* at ¶ 82, 86. Prosecutors may respond to comments by defense counsel that clearly invite a response. *Id.* at ¶ 86. Where the challenged remark was invited, the defendant cannot claim them as error on appeal. *Id.* Here, defense counsel argued at great length that the police tampered with the photo lineup and the food receipt. Defense counsel also extensively attacked Kerschke as a witness and Lekkas's family connection to the restaurant. Therefore, the State merely was responding to these direct attacks, and defendant cannot now claim the comment as error where it invited such a response.

¶ 17 Finally, defendant argues that trial counsel was ineffective for failing to obtain security camera footage from businesses in the area of the crime that he argues would have proven he was not in the area at the time of the crime. He also argues that counsel was ineffective for failing to have the seizure of his cell phone suppressed and for failing to produce his cell phone records, which were exculpatory. We review ineffective-assistance-of-counsel claims under the two-prong standard set forth in *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). *Rebecca*, 2012 IL App (2d), ¶ 107. That test requires the defendant to show both that: (1) as determined by prevailing professional norms, counsel's performance fell below an objective standard of reasonableness; and (2) defendant was prejudiced by counsel's deficient performance. *Id.* We may analyze the facts under either prong first, and if we deem that prong was not satisfied, we need not address the other prong. *Id.* To satisfy the deficient-performance prong, the defendant must show that counsel made errors so serious that he or she was not functioning as the "counsel" guaranteed by the sixth amendment. *Id.* To prove prejudice, the defendant must show a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different. *Id.*

¶ 18 Here, defendant has failed to address the prejudice prong other than in a conclusory statement. Defendant failed to establish whether there was any actual exculpatory video surveillance tapes but rather just states that counsel failed to obtain tapes from businesses. We do not even know whether any businesses possessed any video surveillance tapes. As to the cell phone seizure, counsel did file a motion to suppress, and it was properly denied. Regarding the cell phone records, there are no cell phone records in the record or any evidence that any other cell phone records existed to support defendant's contention that the records should have been used to "impeach" Kerschke. Accordingly, we reject defendant's claims of ineffective assistance of counsel.

¶ 19 To the extent defendant alludes to other claims of error in his brief, those claims are forfeited for failure to develop them into reasonable arguments. See Ill. Sup. Ct. R. 341(h)(7) (eff. July 1, 2008); *People v. Evans*, 405 Ill. App. 3d 1005, 1016 (2010) (points not argued are forfeited).

¶ 20 The judgment of the circuit court of De Kalb County is affirmed as modified.

¶ 21 Affirmed as modified.