2022 IL App (3d) 190455-U

Order filed January 10, 2022
Modified upon denial of rehearing filed December 2, 2022

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2022

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ANDREW E. JACKSON, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois, Appeal No. 3-19-0455 Circuit No. 17-CF-727 Honorable Paul P. Gilfillan, Judge, Presiding.

PRESIDING JUSTICE O'BRIEN delivered the judgment of the court.
Justice Peterson concurred in the judgment[1]
Justice McDade dissented.

ORDER

¶ 1 *Held*: (1) The State proved defendant guilty beyond a reasonable doubt of armed robbery. (2) The court's definition of a firearm did not deprive defendant of his right to a fair trial. (3) The State's comments during its closing argument were not reversible plain error. (4) The State did not commit reversible plain error when it improperly impeached a defense witness with extrinsic evidence.

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[1]Following Justice Schmidt's passing and the filing of defendant's petition for rehearing, Justice Peterson was appointed to this court and assumed a position as panel member of this modified disposition.

¶ 2 Defendant, Andrew E. Jackson, argues that (1) the State failed to prove him guilty beyond a reasonable doubt of armed robbery; (2) the Peoria County circuit court denied defendant a fair trial where it failed to provide a complete definition of a firearm; (3) the State committed prosecutorial misconduct during its closing argument; and (4) the State erroneously used extrinsic evidence to impeach John Born's testimony on a collateral matter. We affirm.

¶ 3 I. BACKGROUND

¶ 4 The State charged defendant with armed robbery (720 ILCS 5/18-2(a)(2), (b) (West 2016)), and aggravated robbery (*id.* § 18-1(b)(1), (c)). Defendant waived his right to counsel and proceeded as a self-represented litigant during the pretrial proceedings and jury trial.

¶ 5 Adukeama Ball, a cashier at Dollar General, testified that on August 26, 2017, at approximately 2:45 p.m. defendant asked Ball to open the register several times. While making the demands, defendant's hand was on the left side of his waistband, holding the handle of a black firearm. Ball feared that defendant would use the firearm to shoot her. Ball informed defendant that he would need to purchase an item to open the register. Defendant handed Ball an item that she scanned. When the register opened, defendant reached over the counter and removed money. Ball testified that she had seen photographs of firearms and confirmed that the object defendant held at his waist was the handle of a firearm.

¶ 6 The State entered a surveillance video into evidence that showed Ball behind the counter at a register while defendant stood on the other side of the counter. Defendant held the left side of his waistband with his left hand. Defendant reached over the counter and removed money from the register.

¶ 7 On cross-examination, defendant asked Ball if the firearm she observed had a hammer. Ball indicated that she did know "what a hammer is." Ball observed "the handle of a black gun

that [defendant] continuously held in [his] waistband." Defendant then asked, "You're 100 percent sure you seen [*sic*] a firearm, but you're not sure what the hammer of a firearm is?" Ball responded, "I'm a hundred percent sure I [saw] a fire—a handle of a gun." Ball said the object could not have been a cell phone because she observed a "black gun handle." Defendant asked what markings indicated that it was a firearm. Ball responded, "[t]he handle itself. The handle of a gun is distinctive. How a person holds the handle of a gun is just—it was a gun." When questioned on her familiarity with firearms, Ball stated, "I'm familiar enough to know if I [saw] one, I know a gun is a gun." Ball admitted that before the robbery she had never owned a firearm or held a firearm. The following colloquy occurred between defendant and Ball regarding whether the object defendant carried was a working firearm:

> "Q. Did the gun shoot—was it a firearm, as in one that shot bullets? Can you tell me that?
>
> A. It was a gun. How would I know if it was working? It was a gun.
>
> Q. So it could have been a bb gun?
>
> A. You had a gun.
>
> * * *
>
> Q. Could it have been a bb gun?
>
> * * *
>
> [A.] I can't answer that question."

¶ 8 Mykisha Randall testified that she witnessed the robbery in Dollar General. When Randall approached the register to pay for her items, she saw defendant reaching over the counter into the register. Randall saw a black firearm that she subsequently identified as a pistol on the left side of defendant's waistband. Defendant removed the money from the register and left the store. Randall

did not own firearms but had seen firearms before. Randall saw the "butt" of the firearm hanging out of defendant's waistband. Randall said there was "[z]ero" chance that the object was a cell phone.

¶ 9 On cross-examination, Randall acknowledged that a woman stood between her and defendant, but the woman did not obstruct Randall's view. Randall was "positive[ ]" that she saw defendant gripping the black handle of a pistol. Randall said the object could not have been a cell phone, "[u]nless it was like a toy cell phone/gun combo, it wasn't a cell phone."

¶ 10 Peoria Police Officer Ryan Isonhart reported to the Dollar General on August 26, 2017, at approximately 4:45 p.m. to investigate an armed robbery. Isonhart spoke to Ball and Randall and received a description of the suspect. On cross-examination, defendant asked how Ball described the firearm. Isonhart explained that when he interviews civilians he asks if the observed firearm was a "cowboy-style gun" or similar to Isonhart's black semiautomatic handgun. Ball likened defendant's firearm to Isonhart's handgun. Isonhart's firearm was in a holster where only the handle was visible.

¶ 11 Peoria Police Sergeant David Smith testified that while investigating the robbery, he observed the surveillance video from Dollar General of the incident. Smith identified defendant in the video as the individual removing money from the register.

¶ 12 Defendant called John Born, his uncle and former landlord, to testify. A few days after August 26, 2017, John moved defendant's items out of the house that defendant rented. John did not locate a firearm in defendant's items. John did not know if defendant owned or possessed a firearm. John said defendant kept his cell phone in a waistband clip.

¶ 13 On cross-examination, John denied that defendant was three months behind on rent but said that defendant was approximately one month behind on rent. John communicated to

defendant's mother that John wanted defendant to vacate his rental property. John identified a photograph of defendant, which showed that defendant had an object in his shirt pocket that could have been a cell phone.

¶ 14 Diana Born, defendant's aunt, testified that defendant always wore his cell phone in a belt clip. Diana identified defendant in a photograph that showed defendant carrying a cell phone in his shirt pocket. Diana did not know why defendant carried his cell phone in his shirt pocket or if defendant had a belt clip for his phone on that day.

¶ 15 Defendant testified that on August 26, 2017, he entered Dollar General to purchase something to eat when he decided to steal money from the register. Defendant thought, "[i]f I just ask for the money, I'll be able to go get high and go to rehab and get some help. *** I didn't think nothing of grabbing my phone during the incident." Defendant denied that the object he held during the robbery was a firearm. Defendant believed that he did not need a firearm to rob the store.

¶ 16 On cross-examination, defendant testified that he robbed the store as a cry for help because defendant knew he needed drug rehabilitation treatment. Defendant planned to "go get high for free, and then go to rehab." Defendant turned himself in to police five days after the robbery. At the time of the robbery, defendant was one month behind on rent.

¶ 17 In rebuttal, the State called Smith, who testified that when he interviewed John, John stated that defendant was three months behind on rent.

¶ 18 The State entered into evidence a certified copy of defendant's prior conviction for attempted home invasion.

¶ 19 During its closing argument, the State argued defendant's version of events was incredible. The State contended that defendant wanted the jury to think

"[defendant] did [the robbery] on purpose, *** it was a cry for help because he's got a drug problem and this might set him on the right path. That, first of all, [defendant] is trying to get you to believe the Hollywood version of what a drug addict is. A person with a drug problem is not a person who automatically thinks to victimize a person while they're working at a register.

I think other people with a drug problem who heard that would be mightily offended to be compared to *** that suggestion, that that's how the average person with a drug difficulty was. If he had a working phone in his pocket and knew he needed help, he could have called somebody. He could have not gone in the store. He could not have robbed the place."

The State continued,

"This was no small, little cry for help, because he could have cried for help any other number of ways.

And if it were a cry for help, his behavior would have been consistent with someone doing that just to get arrested. I suppose that does happen, people who get arrested on purpose. But then they're there when the police show up."

¶ 20 The State also commented on defendant's cross-examination of the State's witnesses. The State said, "I was a little confused when the defendant tried to ridicule [Randall's] description of [the suspect]." The State characterized defendant's cross-examination of Smith as "very disingenuous[ ]." Regarding defendant's questioning of Ball, the State said,

"I know [defendant] testified he was sorry, but he didn't seem too sorry when he was questioning [Ball] and giving her a hard time about what she saw. But his whole attitude in questioning her was that this—and even his testimony is that this

is so obviously a phone sticking out. *** [Ball] would not be that upset if it was so obviously a phone sticking out."

¶ 21 The State argued that defendant's witnesses were incredible.

"[Defendant's] defense apparently is that ***, 'Don't worry everybody. That's just a phone in my waistband.' By the way, that he's only holding when he goes up to the register, holding it the whole time he leans over the register and starts digging the money out of the register. That's his defense. So again, apply what you know about the world and the people you met and how it turns, and ask yourself this: Does that make any sense to you at all?

And first of all, please notice the inconsistencies in that whole fiction he's spinning you. He always carries his phone in his waistband, was his defense. *** [John] kind of goes along with the story. 'Sure, it's always in his waistband.'

And then what do you see? A picture of him at a party some weeks before with a phone in his shirt pocket, and somewhat go against his routine habit of always carrying in his waistband. But does that make any sense at all? Why not his pocket? Back pocket, front pocket, whatever. Why his waistband?

***

He then called his aunt and modified it a bit ***.

The aunt had no idea what he was talking about. *** What an awful position he put his aunt and uncle in. I mean, they should have known better than to do it. But clearly, when his aunt was sitting here and he starts asking about side clips and the phone, she had no idea what [defendant] was talking about. It's because it

wasn't part of the script. [Defendant] changed it up on her. It's hard to keep a story straight when the story's fiction and it's involving three different people.

* * *

[Defendant] had a lot of options to him. Apparently, he's got, at the very least, an aunt and uncle who will do anything for him, including coming to court with a nonsensical story."

¶ 22 The State argued that Ball was not required to know the components of a firearm to be able to identify a firearm. The State said,

"The defendant tried to ask [Ball], 'Well, do you even know what a hammer of a gun is?' [Ball] didn't know, probably because she doesn't know as much about guns as the defendant does. But everybody, I submit to you, knows what a gun looks like. They're not—sadly, they're not all that uncommon. Even from the movies or TV shows, everyone knows what the handle of a gun looks like. And she was right up on it and saw it."

The State further argued that Ball and Randall were

"[t]wo people that don't even know each other and could describe [the firearm]. They could describe it to the extent that when the first officer showed up, he said he always has to ask people, 'Was it a cowboy gun,' like *** if you're familiar with a revolver, 'or a gun like the police had?' And he had a gun and they pointed to his gun and were like, 'No. It's like the one the police have.' "

¶ 23 Later, the State addressed the inconsistent testimony regarding defendant's delinquent rent payments, and stated,

"I appreciate his uncle says that he was behind for a month, and I proved he had said before it was three months. *** [T]he uncle had told this defendant's mother that [defendant] needed to be out. He's way behind. He's getting out of his house. The guy needed money."

¶ 24 Following the conclusion of evidence, the court held a conference to discuss jury instructions. Relevant to this appeal, defendant objected to a portion of the Illinois Pattern Jury Instructions, Criminal, No. 18.07A (approved July 18, 2014) (hereinafter IPI Criminal No. 18.07A) defining firearm, which stated "[w]hether a firearm is operable does not affect its status as a weapon." Defendant argued that this language should be removed where the evidence showed that the object defendant held was either a firearm or a cell phone and his defense was that the witnesses believed his cell phone was a gun. Defendant reasoned that it "wasn't [his] intention, really, to interject that it was a fake gun or that the gun wasn't operable," and stated that there was no testimony that the object he had was a "fake gun." The court allowed the instruction over defendant's objection. Defendant did not request to include the bracketed information "[t]he term does not include _____," (*id.*) or request to "[i]nsert *** the name or description of any gun or device excluded from this definition of the word 'firearm' " as defined under the Firearm Owners Identification Card Act (FOID Act) (430 ILCS 65/1.1(1), (1.1) (West 2016)). IPI Criminal No. 18.07A, Committee Note. Defendant also did not request the court to instruct the jury as to the definition of a firearm and its exceptions under the FOID Act. 430 ILCS 65/1.1(1), (1.1) (West 2016).

¶ 25 After closing arguments, the court provided the following instructions to the jury: (1) "[t]he word 'firearm' means any device, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosion, expansion of gas, or escape of gas. Whether a firearm

is operable does not affect its status as a weapon"; (2) counsel's arguments were not evidence and "any statement or argument by the attorney or the defendant which is not based on the evidence should be disregarded"; and (3) the jurors were the "judges of the believability of the witnesses and of the weight to be given to the testimony of each of them."

¶ 26 The jury found defendant guilty of armed robbery and aggravated robbery. The court appointed counsel to represent defendant during the posttrial and sentencing proceedings. Counsel filed a motion for a new trial arguing, *inter alia*, that the court misled the jury by using the word "weapon" rather than "firearm" in its instruction and giving the jury the impression that defendant could be found guilty of armed robbery by using a dangerous weapon, rather than a firearm as defined in the FOID Act. The court denied defendant's motion. The court sentenced defendant to 22 years' imprisonment. Defendant appeals.

¶ 27 II. ANALYSIS

¶ 28 A. Sufficiency of the Evidence

¶ 29 Defendant argues the State failed to prove him guilty beyond a reasonable doubt of armed robbery because it failed to establish that defendant had a firearm during the robbery.

¶ 30 When a defendant makes a challenge to the sufficiency of the evidence, " 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *People v. Collins*, 106 Ill. 2d 237, 261 (1985) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "When presented with a challenge to the sufficiency of the evidence, it is not the function of this court to retry the defendant." *Id.* "A conviction will be reversed only where the evidence is so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt of the defendant's guilt." *People v. Belknap*, 2014 IL 117094, ¶ 67.

¶ 31 To prove defendant guilty of armed robbery, the State needed to establish that defendant knowingly took property by the use or threat of force while armed with a firearm. 720 ILCS 5/18-1, 18-2(a)(2) (West 2016). For purposes of armed robbery, "Firearm" is defined under the FOID Act as "any device, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosion, expansion of gas or escape of gas." 430 ILCS 65/1.1 (West 2016); *People v. Wright*, 2017 IL 119561, ¶ 71. Pneumatic, spring, paint ball, "B-B" and signaling guns are excluded from the definition of a firearm. 430 ILCS 65/1.1 (West 2016). The testimony of a single witness is sufficient to establish that an object is a firearm. *Wright*, 2017 IL 119561, ¶ 76. "The trier of fact determines the credibility of the witnesses, decides what weight to give their testimony, resolves conflicts in the evidence, and draws reasonable inferences from that evidence." *People v. Swenson*, 2020 IL 124688, ¶ 36. When presented with unequivocal testimony and circumstances that a witness viewed a firearm, a jury may reasonably infer that defendant possessed a firearm as defined under the FOID Act. See *People v. Washington*, 2012 IL 107993, ¶ 36.

¶ 32 Defendant does not contest that he robbed Dollar General but argues that the State failed to show that he carried a firearm while committing the robbery. Specifically, the witnesses who testified that defendant held a firearm had no experience handling firearms.

¶ 33 Here, Ball and Randall repeatedly identified the object that defendant held in his waistband during the robbery as the handle of a black firearm. Ball saw the handle of a black firearm when defendant asked her to open the register. Ball said that she was "a hundred percent sure" that she saw defendant holding the handle of a black firearm. Ball further identified defendant's firearm as similar to Isonhart's handgun. Randall's testimony confirmed Ball's observation, as Randall also saw defendant holding what she believed to be the handle of a black firearm. Both Randall and

Ball testified that they had previously observed firearms and expressed that the object in defendant's waistband was not a cell phone. See, *e.g.*, *Wright*, 2017 IL 119561, ¶¶ 4, 76-77 (the court found the testimony of three witnesses who visually observed only the handle of a firearm sticking out of the codefendant's waistband was sufficient to uphold defendant's conviction where no weapon was recovered and the descriptions of what type of firearm the codefendant possessed were inconsistent). Further, defendant conceded that he did not present evidence, nor did he try to present any evidence, or theory that he possessed a "fake gun." Instead, the issue was whether he possessed a cell phone or a firearm. *Supra* ¶ 24; see *Washington*, 2012 IL 107993, ¶¶ 35-36 (the court found that a single witness's unobstructed view of a firearm was sufficient to uphold defendant's conviction where defense counsel argued that it could not be known for sure whether the gun was real or a toy because no firearm was ever recovered).

¶ 34 Moreover, Ball and Randall's version of events are bolstered by the surveillance video. While the nature of the object defendant held is unclear, the video corroborates the witnesses' testimony in all other respects. In contrast, defendant's witnesses' testimony that he customarily kept his cell phone in a clip at his waistband was impeached by the photograph showing defendant's cell phone in his shirt pocket. Defendant's two witnesses, Diana and John, identified defendant in the photograph. Diana acknowledged that the photograph showed defendant carrying his cell phone in his shirt pocket. John stated that the object in defendant's shirt pocket could have been a cell phone. The consistency of the eyewitness testimony and corroboration by the surveillance video enhanced the credibility of Ball and Randall's testimony, while the impeachment of defendant's version detracts from his credibility. We rely on this distinction to find that the facts in this case do not present us with a credibility contest between two equally

likely versions. Viewed in the light most favorable to the State, the testimony of Ball and Randall proved beyond a reasonable doubt that the object in defendant's waistband was a firearm.

¶ 35 B. Jury Instruction Error

¶ 36 Defendant contends that the circuit court erroneously gave the jury an incomplete definition of a firearm. Specifically, defendant argues that the court misled the jury by using the word "weapon" in its instruction defining a firearm and instead should have included the bracketed portion adding language to instruct the jury that a " 'firearm' does not include any gun or device excluded from the definition of a firearm by statute," which would comply with the definition of a firearm provided in the FOID Act.

¶ 37 The determination of which instruction shall be given to a jury lies within the circuit court's discretion and will not be overturned absent an abuse of that discretion. *People v. Banks*, 287 Ill. App. 3d 273, 279 (1997). Whether the jury instructions accurately conveyed the applicable law to the jury is reviewed *de novo*. *People v. Fonder*, 2013 IL App (3d) 120178, ¶ 19. "When words used in a jury instruction have a commonly understood meaning, the court need not define them with the use of additional instructions; this is particularly true where the pattern jury instructions do not provide that an additional definition is necessary." *People v. Manning*, 334 Ill. App. 3d 882, 890 (2002).

¶ 38 We note that defendant, as a self-represented litigant, objected generally to the language "[w]hether a firearm is operable does not affect its status as a weapon." Defendant asked the court to remove this portion of the instruction where his defense was that he held a cell phone and not a firearm. In his posttrial motion, defendant formed a more nuanced objection by arguing that the jury was misled to believe defendant could be convicted of armed robbery with a dangerous weapon, instead of armed robbery with a firearm. In addition to this argument, counsel on appeal

raised a new argument that the court should have *sua sponte* included in the instruction the bracketed information allowing for the insertion of specific devices that the definition of a firearm under the FOID Act excludes.

¶ 39 Although defendant's objection was not the same as posttrial counsel's arguments, or counsel's argument on appeal, we find that they are close enough to avoid the procedural bar of forfeiture. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (to preserve an issue for appellate review, a defendant must object to it at trial and raise it in a posttrial motion).

¶ 40 In the present case, the circuit court determined, over defendant's objection, that the definition instruction should be given with the bracketed language "[w]hether a firearm is operable does not affect its status as a weapon." Given that the court is not required to instruct the jury on the operational definition of a firearm under the FOID Act for an armed robbery offense, the choice to instruct the jury that the State did not need to prove operability is not an abuse of discretion. See *People v. Clark*, 2015 IL App (3d) 140036, ¶¶ 34-35. The court's partial instruction that "[t]he word 'firearm' means any device, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosion, expansion of gas, escape of gas. Whether a firearm is operable does not affect its status as a weapon" did not confuse or mislead the jury. Here, the jury was asked to determine whether the object defendant held was a firearm or a cell phone, not whether the object was a firearm, a "fake gun," or an object explicitly excluded under the FOID Act. Therefore, the court did not err in giving the jury instruction.

¶ 41 Moreover, defendant did not request the bracketed language describing what gun or device the term "firearm" excludes. See IPI Criminal No. 18.07A. We note that the instruction is at odds with defendant's theory of the case—that the object he held was a cell phone. With few exceptions, the circuit court is under no obligation to give jury instructions *sua sponte*. *People v. Mullen*, 80

Ill. App. 3d 369, 376 (1980). Given defendant's theory of the case, the evidence presented, and his failure to request a definition of a firearm or request that certain objects be excluded from that definition, it is unreasonable to expect the court to *sua sponte* instruct the jury. See *id*.

¶ 42 C. Forfeited Issues

¶ 43 Defendant argues the State committed several prosecutorial misconduct errors during closing argument and improperly impeached a defense witness. These alleged errors are forfeited, and defendant asks for plain error review. See *Enoch*, 122 Ill. 2d at 186.

¶ 44 The plain error doctrine allows a reviewing court to consider an otherwise forfeited error when " '(1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence.' " *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) (quoting *People v. Herron*, 215 Ill. 2d 167, 186 (2005). Under the first prong, to determine whether the evidence is close, "a reviewing court must evaluate the totality of the evidence and conduct a qualitative, commonsense assessment of it within the context of the case." *People v. Sebby*, 2017 IL 119445, ¶ 53. This analysis considers the elements of the charged offenses, along with any evidence regarding witness credibility. *Id.* The determination is not one of the sufficiency of the evidence, but "the closeness of sufficient evidence." *Id.* ¶ 60. Under the second prong, "[p]rejudice to the defendant is presumed because of the importance of the right involved." *Herron*, 215 Ill. 2d at 187. The supreme court has equated the second prong of plain error review with structural error such that "automatic reversal is only required where an error is deemed 'structural,' *i.e.*, a systemic error which serves to 'erode the integrity of the judicial process and undermine the fairness of the defendant's trial.' " *People v. Glasper*, 234 Ill. 2d 173, 197-98 (2009) (quoting *Herron*, 215 Ill. 2d at 186). The defendant bears the burden of persuasion under both prongs.

Herron, 215 Ill. 2d at 187. The first step of the plain error analysis is to determine whether an error occurred. *People v. Eppinger*, 2013 IL 114121, ¶ 19.

¶ 45 1. Prosecutorial Misconduct

¶ 46 Defendant argues the State committed the following acts of prosecutorial misconduct during its closing argument: (a) misstated the evidence and the law; (b) accused defendant of inducing perjury; (c) disparaged defendant for exercising his right to cross-examine witnesses; and (d) improperly bolstered the credibility of its witnesses.

¶ 47 "Closing arguments must be viewed in their entirety and the allegedly erroneous argument must be viewed contextually." *People v. Blue*, 189 Ill. 2d 99, 128 (2000). "Generally, improper closing arguments by the State will constitute reversible error only if there is doubt as to whether the jury would have rendered a guilty verdict in the absence of the comments." *People v. Libberton*, 346 Ill. App. 3d 912, 924 (2003).

¶ 48 a. Misstating the Evidence and Law

¶ 49 Defendant argues the State misstated evidence where it asserted defendant wanted the jury to "believe the Hollywood version of what a drug addict is" and that if the robbery "were a cry for help, his behavior would have been consistent with someone doing that just to get arrested."

¶ 50 Here, defendant testified that he robbed Dollar General so that he could "get high and go to rehab and get some help." The State's comments were made in response to this testimony and sought to have the jury consider the credibility of defendant's testimony. Therefore, viewing the argument in context, the statements were not improper. See, *e.g.*, *Glasper*, 234 Ill. 2d at 204, 208 (finding the State's closing argument comment was not error because they were invited by defense counsel's comments); see also *People v. Jackson*, 2020 IL 124112, ¶ 82 (prosecutors "may comment on the evidence and on any fair and reasonable inference the evidence may yield, even

if the suggested inference reflects negatively on the defendant"); see also *People v. Cosmano*, 2011 IL App (1st) 101196, ¶ 57 ("During closing argument, the prosecutor may properly comment on the evidence presented or reasonable inferences drawn from that evidence, respond to comments made by defense counsel which clearly invite response, and comment on the credibility of witnesses.").

¶ 51 b. Accused Defendant of Inducing Perjury

¶ 52 Defendant argues that the State improperly suggested that defendant induced two witnesses, John and Diana, to perjure themselves on defendant's behalf. Generally, a closing argument that suggests that the defense suborned perjury is improper. *People v. Emerson*, 97 Ill. 2d 487, 497 (1983).

¶ 53 Even if we were to assume that the State erred by suggesting defendant induced witnesses to lie, the error would not rise to the level of reversible plain error. First, the evidence of defendant's commission of armed robbery is not close. Ball testified that she was certain the object that defendant held while robbing the Dollar General was a firearm like Isonhart's handgun. Randall similarly testified that the object that defendant carried was a pistol. Randall indicated that the pistol could not have been a cell phone, stating, "[u]nless it was like a toy cell phone/gun combo, it wasn't a cell phone." Moreover, we previously concluded that there is no credibility contest between defendant and the State's witnesses where defendant's testimony that the object was a cell phone did not outweigh Ball and Randall's consistent and conclusive testimony that identified the object as a firearm. *Supra* ¶¶ 33-34; see *Sebby*, 2017 IL 119445, ¶ 60. Therefore, the evidence is not closely balanced, and the omitted instruction is not a reversible error under the first prong of plain error. Second, this error is not reversible under the second prong because it is not so prejudicial that it eroded the integrity of the judicial process. Moreover, any prejudice that

flowed from this error is greatly reduced by the court's jury instruction that arguments were not evidence and that "any statement or argument made by the attorney or the defendant which is not based on the evidence should be disregarded." See *People v. Ramsey*, 239 Ill. 2d 342, 438 (2010) (the act of properly sustaining an objection to an improper comment and instructing the jury to disregard it is usually sufficient to eliminate any prejudice). Although defendant did not object to the improper comment, the court's instruction greatly reduced the amount of prejudice flowing from it such that the improper comment did not erode the integrity of the proceeding.

¶ 54 c. Defendant's Right to Cross-Examine Witnesses

¶ 55 Defendant argues "[i]t was reversible error for the prosecutor to use [defendant's] decision to exercise his right to cross-examine witnesses against him." Specifically, defendant points to the State's comments regarding defendant's cross-examination of Ball, Randall, and Smith.

¶ 56 The sixth amendment of the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right *** to be confronted with the witnesses against him ***." U.S. Const., amend. VI. The Supreme Court described this requirement as "confrontation plus cross-examination of witnesses." *Perry v. New Hampshire*, 565 U.S. 228, 237 (2012). Generally, "[n]egative comments about a defendant's exercise of his or her constitutional rights are improper because they penalize the defendant for the exercise of those rights." *Libberton*, 346 Ill. App. 3d at 923.

¶ 57 Here, viewed in the context of the entire closing argument, the State did not criticize defendant's right to cross-examine witnesses. The State also did not contend that defendant merely exercising his right to cross-examine witnesses showed that he lacked remorse. Instead, the State commented on the manner that defendant cross-examined the witnesses. *Cf. id.* (finding error where the State's argument suggested that a decent person in defendant's position would have

waived his right to a trial and pled guilty); *cf. People v. Mulero*, 176 Ill. 2d 444, 463 (1997) (the court found that "the prosecutor used defendant's mere filing of the motion to suppress against her in an effort to demonstrate defendant's lack of remorse.") Therefore, the State's comment on defendant's cross-examination is not error.

¶ 58 We note that defendant does not argue in his appeal that the State made an inappropriate personal attack on defendant and his manner of cross-examination. See *Glasper*, 234 Ill. 2d at 206-07 (holding the State's comments in closing regarding defense counsel "mocking" or "making fun of" the witnesses in cross-examination were not an inappropriate personal attack amounting to error).

¶ 59 d. Bolstering the Credibility of its Witnesses

¶ 60 Defendant argues that the State misstated the evidence and improperly bolstered the credibility of its witnesses. First, the State informed the jury that it had proved defendant carried a firearm because "everybody *** knows what a gun looks like." Second, the State misstated the facts to suggest that the witnesses observed Isonhart's firearm immediately following the robbery. Third, the State suggested that both witnesses observed Isonhart's firearm.

¶ 61 Assuming for the sake of argument that the State's comments were error, this error is not a reversible plain error as the evidence is not closely balanced and the error is not of such magnitude that it eroded the integrity of the judicial process and infringed on defendant's right to a fair trial. *Supra* ¶ 53. Any prejudice caused by the error was limited by the court's instruction to the jury that arguments were not evidence, that "any statement or argument made by the attorney or the defendant which is not based on the evidence should be disregarded," and that the jurors "are the judges of the believability of the witnesses." See *Ramsey*, 239 Ill. 2d at 438. Accordingly, this misstatement of evidence is not a reversible plain error.

¶ 62 2. Improper Impeachment

¶ 63 Defendant contends that the State improperly impeached John with extrinsic evidence of the number of defendant's delinquent rent payments.

¶ 64 "Generally, any permissible kind of impeaching matter may be developed on cross-examination ***." *Collins*, 106 Ill. 2d at 269. However, extrinsic evidence may not be introduced to impeach a witness's testimony about a collateral issue, and the examiner must accept the witness's answer. *People v. Terrell*, 185 Ill. 2d 467, 509 (1998). An issue is considered collateral if the subject matter is not relevant for any purpose other than to contradict the testimony of the witness. *People v. Santos*, 211 Ill. 2d 395, 405 (2004). A matter is not collateral if the subject matter is relevant in the litigation to establish a fact of consequence. *People v. Hayes*, 353 Ill. App. 3d 578, 583 (2004). The court has the discretion to determine the latitude on cross-examination, rebuttal, and when determining whether an issue is collateral. *Collins*, 106 Ill. 2d at 269-70. A reviewing court should not interfere unless there is a clear abuse of discretion. *Id.*

¶ 65 In the present case, the issue of whether defendant was behind one or three months of rent was not a fact of consequence regarding the armed robbery and was an improper collateral issue. However, this is not a reversible plain error, as the evidence is not closely balanced, and the error did not erode the integrity of the judicial process and deprive defendant of a fair trial. *Supra* ¶ 53.

¶ 66 III. CONCLUSION

¶ 67 The judgment of the circuit court of Peoria County is affirmed.

¶ 68 Affirmed.

¶ 69 JUSTICE McDade, dissenting:

¶ 70 There are, in my opinion, two significant flaws in the majority decision. The first is that it has allowed the State to successfully shift its burden of proving defendant was in possession of a

"firearm" on the apparent theory that if defendant cannot prove the object was his cellphone, it must, by default, be a firearm. I say "by default" because the State has produced exactly *no* evidence that defendant possessed a weapon "designed to expel a projectile or projectiles by the action of an explosion, expansion of gas or escape of gas" *and* that it was not a pneumatic, spring, paint ball, "B-B" or signaling gun. (430 ILCS 65/1.1 (West 2016); 720 ILCS 5/2-7.5 (West 2016)).

¶ 71 The second flaw flows from the first. The majority declines to reach some of defendant's issues in this appeal based on its conclusion that the evidence is not closely balanced. I believe that conclusion is wrong. Defendant claims he had a cellphone; the State has alleged it was a "firearm." Neither defendant (who bears no burden), nor the State (which solely does) has produced any relevant evidence to support the essence of its claim, leaving us with a "he said/it said" situation without a factual basis for resolving the issue. This is a classic example of closely balanced evidence.

¶ 72 The majority finds that the evidence in this case is sufficient to prove *beyond a reasonable doubt* that this defendant was guilty of robbing a Dollar General store in Peoria using a firearm, as that weapon is defined in the FOIA Act. The majority makes this finding despite the following incontrovertible facts about the evidence:

> The State did not produce a firearm at trial.[2]
>
> Neither witness ever saw a firearm; they only saw something they believed to be a gun handle.

[2]The police went to defendant's residence the day following the robbery, searched the exterior of the house, and found no gun. They could not search for a weapon inside the residence because they had not gotten a search warrant.

No firearm, or even the alleged gun handle, is shown on the store's surveillance video.

No witness described anything seen at the scene that looked like an actual gun that might be a firearm.

Defendant did not claim to have a firearm, did not brandish a firearm, and did not threaten the use of a firearm.

Both witnesses, in response to a direct question from the investigating officer, opined that the gun they believed the handle they had seen was part of was more like the officer's service pistol than a "cowboy-style gun." The State offered no evidence of what distinguished this purported handle from that of a "cowboy-style gun." Indeed, there is nothing in the record that shows either witness had ever seen a "cowboy-style gun" or, if they had, what kind it was (handgun or rifle) or that there was any type of "cowboy" gun or "cowboy gun" handle on scene for them to compare with the officer's weapon.

The State presented no evidence that either witness possessed a level of expertise that enabled her to look at a "gun handle" and determine how any gun to which it may have been attached expelled projectiles or whether any such gun was one of the statutorily excluded weapons or whether any such gun was real or a toy.

In fact, the State presented no evidence at all that the alleged handle was part of a "firearm." When the prosecutor elected to charge defendant under the section of the statute alleging the use of a "firearm," as defined in the FOID statute, the State voluntarily assumed an affirmative burden to prove, as an

essential element of the offense, that the putative gun was "designed to expel a projectile or projectiles by the action of an explosion, expansion of gas or escape of gas" *and* that it was not a pneumatic, spring, paint ball, "B-B" or signaling gun. (430 ILCS 65/1.1 (West 2016); 720 ILCS 5/2-7.5 (West 2016)). And, of course, to also prove that it was neither a toy nor a cellphone. In short, the State was required to prove defendant was in possession of a "firearm". The State presented no such evidence in this case, and, indeed, such a showing would be impossible since no one ever saw an actual gun and the prosecution never had the claimed gun in its possession to be assessed or tested. It is ironic that, in its closing argument, the State ridiculed defendant for his attempts to refute what the State was required, but made no effort, to prove.

Ball conceded, in response to questioning by defendant, that she could not say the handle she saw was not that of a BB gun, a type of "gun" that is expressly *excluded* by the statute as a firearm.

Randall stated, "[u]nless it was like a toy cellphone/gun combo, it wasn't a cellphone," leaving open the real and equal possibilities that the object may have been a toy or a cellphone and not a firearm at all.

¶ 73 The State knew, or should have known, it could not prove the essential elements of robbery with a "firearm" and still prosecuted defendant on that charge; the circuit court knew, or certainly should have known, that the State had not proven the essential elements of robbery while in possession of a "firearm" and still entered the judgment. We should know, based on the plain language of the controlling statutes, that the elements of robbery while possessed of a "firearm" have not been proven in this case, but we are nonetheless authorized, and arguably

required, by *Wright* to find not only that defendant has been proven guilty of that offense but that the proof of his guilt is beyond any reasonable doubt.

¶ 74 I am compelled to suggest, with the utmost respect and no little trepidation, that *Wright* simply cannot be right. In considering Wright's challenge to the sufficiency of the evidence against him, the supreme court discussed its earlier decisions in *People v Washington*, 2012 IL 107993, and *People v Ross*, 229 Ill. 2d 255 (2008), both of which, like *Wright*, were cases in which the defendant had been charged with use of a weapon, but no weapon had ever been recovered. In setting up the issue for analysis in *Wright*, the court said:

> "Here, we are asked to assess the sufficiency of the evidence to prove that codefendant possessed a firearm, as defined in the FOID Act, during the robbery. In finding that the evidence proved that the defendant in *Washington* possessed 'a dangerous weapon,' we relied on the testimony of a single eyewitness and concluded that a rational trier of fact could infer from the testimony that the defendant possessed a 'real gun.' Our disposition is controlled by the same rationale here." *Wright*, 2017 IL 119561, ¶ 76.

But *Washington* and *Wright* are not alike in either fact or law.

¶ 75 Washington had been charged with robbery using a "dangerous weapon" under an earlier version of the statute. That statute was subsequently amended to add a new possible charge of committing a robbery while "carr[ying] on or about his or her person or is otherwise armed with a firearm." 720 ILCS 5/18-2(a)(2). (West 2016). The State elected to charge Wright under that section even though it was still possible to charge him with "being armed with a dangerous weapon other than a firearm". The chosen charge allowed the addition of 15 years to Wright's

sentence upon conviction, but the cost of that enhancement was *proving* he had a "firearm" as defined in the FOID Act, and not merely "a dangerous weapon other than a firearm.".

¶ 76 The two cases, *Washington* and *Wright,* are also starkly different factually. In describing the evidence in *Washington*, the *Wright* court said:

> "[W]e relied on the victim's testimony that the defendant had pointed a gun at him, forced him into a truck, and then held a gun to his head while he sat between the defendant and his accomplice in the front seat of a truck. [Citation.] The victim also testified that the defendant pointed the gun at him when he was later forced into the cargo area of the truck. [Citation.] We found this evidence established that the victim, for several minutes, had an unobstructed view of the weapon used during the commission of the crime and that he testified that it was a gun. [Citation.] We held that, given the victim's 'unequivocal testimony and the circumstances under which he was able to view the gun, the jury could have reasonably inferred that defendant possessed a real gun.' " *Wright*, 2017 IL 119561, ¶ 73.

By contrast, in *Wright* not one of the three witnesses ever saw anything other than what they believed was the handle of a gun and even that was never on or about the person of the defendant, only of the codefendant. Again, to quote the *Wright* court: "Perez testified that *he only saw the handle of the gun* but that he was '100% sure' that the weapon codefendant displayed was an 'actual firearm.' " (Emphasis added.) *Wright*, 2017 IL 119561, ¶ 29. Perez's testimony also included the following: "Codefendant turned around and lifted his hoodie to reveal what 'looked like a black automatic, black gun' tucked into the waistband of his pants. Codefendant informed him, 't]his is a robbery; take me to the office.' Perez testified that he was sure the gun

was an actual firearm. He thought it was a semiautomatic pistol and related that he had experience firing such guns." *Id.* ¶ 9. "Perez walked to the office with codefendant behind him. While he was walking, Perez 'felt something sharp in [his] back,' which he thought was a gun." *Id.* ¶ 10. The waitress, Tsegaye, testified that "when she asked codefendant why he wanted her to throw her cellphone into the garbage, he told her she was being robbed and lifted his shirt up to reveal *the handle of a gun* in his waistband." (Emphasis added.) *Id.* ¶ 12. Morina, the third witness, testified "that he also observed *the handle of codefendant's gun.* (Emphasis added.) He had seen guns before and believed it to be a '9 millimeter pistol.' " *Id.* Interestingly, with regard to the possibility that the codefendant had possessed a BB gun, the trial court gave it sufficient credence to give a jury instruction on simple robbery, over defendant's objection, but did not credit it enough to require the State to prove that the codefendant was, in fact, armed with a "firearm" and not a BB gun, which is expressly excluded as a "firearm" under the statute.

¶ 77 Even if the evidence in *Wright* is actually sufficient to satisfy the statute's more recently added requirement that the State prove defendant was armed with a "firearm", as defined by the legislature, the evidence in the instant case is clearly not. The due process clause protects an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged. U.S. Const., amends. V, XIV; Ill. Const. 1970, art I, § 2; *In re Winship*, 397 U.S. 358, 363 (1970). Apart from the fact that no one ever saw an actual "gun" or, more particularly, an identified "firearm", the only two witnesses who saw the alleged gun handle conceded, in the face of defendant's cross-examination, that (1) it might have been a BB gun or (2) it might have been a cellphone that looked like a gun, or a toy.[3] By contrast, there is

[3] Of some interest and enlightenment here is a study undertaken by the United States Bureau of Justice Statistics pursuant to an order of Congress on the use of replica, toy, or pneumatic guns in the commission of various crimes nationwide. Using only officially reported data, the report of the study commission documents that in 1985-89 15% of *robberies* nationally were committed by perpetrators

no indication that Perez or Morina ever wavered from their certainty that Wright's codefendant possessed an actual gun, arguably a firearm. There is neither credible evidence nor proof beyond a reasonable doubt in this case that defendant was armed with a "firearm" when he robbed the store.

¶ 78 There are two other issues that cause me concern in this case. First, the State attempted to prejudice the jury against defendant by mischaracterizing his legitimate efforts to present a defense by aggressively challenging the factual bases for the witnesses' conclusion that he possessed a gun as evidence he was lying about being remorseful. The State did not and could not produce any evidence that defendant possessed a "firearm" and then denigrated him before the jury for his own efforts to prove that he did not.

¶ 79 Second, the State attacked defendant's claim that he routinely wore his cellphone in his waistband by submitting a single photograph of defendant—taken not during everyday routine activities but at a party—showing the phone in his shirt pocket. The photograph did not impeach his testimony as he did not testify that he always kept his cellphone at his waist.

¶ 80 In this case, the State relied on pure speculation, on an assortment of rhetorically beefed-up red herrings, and on that mysterious and miraculous alchemy that allows the *Collins* standard to convert supposition, innuendo, and a dearth of any material and concrete evidence into criminal justice gold—fact-free "proof" of the commission of a crime beyond a reasonable doubt. However, even *Collins* cannot convert imagination without facts into evidence or proof. The State secured a

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armed with imitation guns. Tragically, in a couple of instances, the offenders were killed by law enforcement officers who were unable to distinguish the fake gun from a real one. This study has not been updated and the 1990 data is the most recent available. David L. Carter, Ph.D., Allen D. Sapp, Ph.D., & Darrel W. Stephens, Toy Guns: Involvement in Crime and Encounters with Police, Bureau of Justice Statistics Website (June 1990), available at https://bjs.ojp.gov/library/publications/toy-guns-involvement-crime-and-encounters-police-0 (last visited Nov. 18, 2022).

conviction of armed robbery, without *any* proof at all, and certainly not proof beyond a reasonable doubt, that defendant had a statutorily defined firearm (or any kind of gun) and sent him off to prison for 22 years with the approval and blessing of both the trial court and this appellate panel.