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SIXTH DIVISION
September 19, 2014

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 11 CR 18507
)	
KAMAL MUHAMMAD,)	The Honorable
)	Stanley Sacks,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Hall and Rochford concurred in the judgment.

ORDER

¶1 *HELD:* Defendant was proven guilty of felony theft beyond a reasonable doubt, and the admission of hearsay evidence concerning a serial number was harmless error. The trial court did not improperly limit defense counsel's cross-examination or fail to consider relevant evidence. Defendant was not denied a fair trial because the trial judge's comments did not show any prejudgment of the case or bias against defendant or his counsel and did not prevent defense counsel from making a full closing argument.

¶2 Following a bench trial, defendant Kamal Muhammad was convicted of theft and sentenced to two years of probation. On appeal, defendant contends he was denied a fair trial where the trial court allowed and relied on inadmissible hearsay evidence to find him guilty of theft, limited defense counsel's cross-examination, failed to consider relevant evidence, and interrupted defense counsel throughout the trial and closing argument. Defendant also challenges the sufficiency of the evidence to prove his guilt of felony theft. Based on the following, we affirm the judgment of the trial court.

¶3 I. BACKGROUND

¶4 The State charged defendant with felony theft, alleging that on or about October 25, 2011, he knowingly obtained or exerted unauthorized control over a parking meter pay box, which exceeded \$500 but not \$10,000 in value, and intended to deprive the owner permanently of the use or benefit of its property.

¶5 At the bench trial, Kevin O'Hara testified that he was employed by Laz Parking Inc. since February 2009. Laz Parking Inc. is the operator of the City of Chicago's parking meter system, which is a pay box system. There is approximately one pay box for every 15 parking spaces, and the pay boxes accept quarters or credit cards. The pay boxes are bolted into the concrete sidewalk and are approximately 5 feet tall and 18 inches wide and deep. The pay boxes weigh close to 400 pounds. In October 2011, O'Hara worked as a contract liaison, and his duties included interacting with all city agencies, communicating with the public, filing insurance claims for missing or damaged pay boxes, working with the police department to retrieve pay boxes, and contract compliance. As part of contract compliance, O'Hara ensured that the pay boxes were working correctly. O'Hara did not specifically monitor the pay boxes or oversee the

team of employees who monitored the pay boxes. O'Hara had testified in court regarding the pay boxes before.

¶6 O'Hara explained that Laz Parking Inc.'s monitoring system was web-based, and each morning each pay box should send a signal or "communicate back" to Laz Parking Inc.'s office. The pay boxes were checked on a regular basis. If there was no communication, then something was wrong, and the monitoring team sent meter technicians to check the particular pay box. On October 25, 2011, Laz Parking Inc. received a notification from its monitoring system that "there was a communication down" concerning the pay box at 110th and State Streets, so a technician was sent to that location. O'Hara never went to that location himself. He learned at about 7:30 a.m. on October 25th that something was wrong with that pay box. Consequently, a new pay box had to be installed at 110th and State Streets, and that task was accomplished about 24 hours after this incident. At about 11:30 a.m. on October 25th, O'Hara received a telephone call from the Chicago Police Department. O'Hara then went to the police station and learned that the police had recovered the pay box. O'Hara saw the pay box in the police storage area. The pay box was "severely beaten" and it was obvious that someone had tried to pry the box open to reach the money in the safe inside the cabinet of the pay box. Laz Parking Inc. took the pay box back to its offices.

¶7 O'Hara testified that the pay boxes cost \$6,100 plus \$2,500 to install, and the insurance company usually paid Laz Parking Inc. 90% of the value of the box on loss or damage claims. Each pay box has a serial number, which is located both on the visual display of the pay box and inside the pay box, and all the pay box serial numbers and addresses are recorded in Laz Parking Inc.'s database. O'Hara saw the serial number on the pay box at the police station, and he was

aware of the serial number of the pay box taken from 110th and State Streets. He testified that the serial number of the pay box he viewed at the police station was the same serial number listed in the database for the pay box that went offline at 110th and State Streets.

¶8 Chicago police officer Timothy Conlan testified that, on the date in question, he and Officer Balesteri were on duty. They were in plain clothes and driving an unmarked vehicle. Around 11:30 a.m., they were in the area of 108th and State Streets. Officer Conlan noticed three people in an alley who were bent over something. The officers drove up to investigate. Officer Conlan saw a juvenile and two adults standing around a parking meter pay box that was lying on the ground adjacent to the alleyway in a yard between two garages. While one adult was holding open a door on the pay box, the other adult, identified as defendant Muhammad, was trying to access the safe inside the machine by wedging a pry bar between the edges of the door and beating the pry bar with a hammer. The pay box was all beaten up.

¶9 Officer Conlan testified that the officers exited their vehicle and asked the men where they got the machine from and what they were doing. According to Officer Conlan, defendant responded that "some Mexicans had dropped the machine. His friends asked him if he had a hammer, so naturally he wanted to try to get in[to the box]." Defendant did not attempt to flee. The Officers detained the three people, contacted Laz Parking Inc. regarding the stolen pay box, and arrested defendant and the other adult. The officers placed the pay box in the back of a squad car. Thereafter, the pay box was inventoried and returned to the rightful owner, Laz Parking Inc. The officers also inventoried the pry bar and hammer.

¶10 After the trial court denied the defense's motion for a judgment of acquittal, defendant testified that, on the date in question, he left his home at 107th Street and Wabash Avenue to go

to the currency exchange and get a bus card so he could go to a job interview later that day.

Pierre Bradford and a male juvenile approached defendant and asked if he had a crowbar. They already had a hammer and said they had found a safe in the alley that was dropped there by some Hispanics. Although defendant had seen Bradford and the juvenile around the area, he did not know them. Defendant told them he had a crowbar at home and would get it after he went to the currency exchange. Defendant, however, changed his mind and went with Bradford and the juvenile to the alley.

¶11 Defendant testified that the object was a black box with a safe inside it. The box lay on the ground, was "all beat up," and the door was already off it. Defendant did not see any writing on the box to indicate that it was a Chicago parking meter pay box. Defendant thought someone had cleaned out their home and threw away an old safe that had some coins in it. Defendant retrieved a crowbar from his home. While defendant used both his hands to hold the crowbar on the machine, Bradford hit the crowbar with a hammer.

¶12 The trial court found defendant guilty of theft of a pay box valued at more than \$500. The trial court stated that defendant's testimony was "absurd" and "his version of events [made no] sense whatsoever." Moreover, the trial court stated the evidence established that: the pay box was worth more than \$500; within 24 hours after the pay box went offline, the police recovered it in an alley about two blocks away from its installed location; and when the police recovered the pay box, defendant had control over it and was trying to pry open the safe inside the pay box and take the money contained inside.

¶13 Defendant timely appealed.

¶14 II. ANALYSIS

¶15 A. Hearsay Evidence

¶16 Defendant contends he was denied a fair trial because the trial court erroneously admitted and relied on hearsay evidence to convict him. Specifically, defendant contends the trial court erroneously allowed O'Hara to testify: (1) about the actions and observations of the Laz Parking Inc.'s technician who was sent to investigate the offline pay box at 110th and State Streets; and (2) about the pay box serial number without producing any original writings or records of the serial number for the missing pay box or notification system.

¶17 A trial court's decision concerning whether evidence is relevant and admissible will not be reversed absent a clear abuse of discretion. *People v. Hayes*, 139 Ill. 2d 89, 130 (1990). An abuse of discretion will be found only where the trial court's decision is arbitrary, fanciful or unreasonable or where no reasonable person would take the trial court's view. *People v. Illgen*, 145 Ill. 2d 353, 364 (1991). Evidence is considered relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of an action either more or less probable than it would be without the evidence. *Id.* at 365-66. A trial court may reject evidence on the grounds of relevance if it is remote, uncertain or speculative. *People v. Cloutier*, 156 Ill. 2d 483, 501 (1993).

¶18 Hearsay is "testimony of an out-of-court statement offered to establish the truth of the matter asserted therein, and resting for its value upon the credibility of the out-of-court asserter." *People v. Rogers*, 81 Ill. 2d 571, 577 (1980). Statements offered for their effect on the listener or to explain the subsequent course of conduct of another are not hearsay. *People v. Carroll*, 322 Ill. App. 3d 221, 223 (2001).

¶19 The record refutes defendant's assertion that the trial court allowed O'Hara to testify to the observations of a Laz Parking Inc.'s technician as if they were O'Hara's own observations. According to the record, the trial court sustained defendant's hearsay objection when O'Hara testified that the technician sent to investigate the offline pay box at 110th and State Streets reported that the pay box was missing from that location. The trial court admitted only O'Hara's testimony that he learned something had occurred, which was relevant because O'Hara had testified that his job duties included ensuring that the pay boxes were operational, working with the police to retrieve pay boxes, and filing insurance claims for missing or damaged pay boxes. Moreover, O'Hara testified that, as a result of being notified of the problem with the pay box at 110th and State Streets, a new pay box was installed at that location within 24 hours. Accordingly, there was no erroneous admission of hearsay evidence because the trial court admitted that limited testimony for the accepted, non-hearsay purpose of showing the effect on the listener.

¶20 Defendant also argues that, over defendant's hearsay objection, the trial court allowed O'Hara "to discuss the exact procedures of Laz's notification system in order to prove the box in [defendant's] possession had been stolen from Laz, even though the unnamed technician never contacted O'Hara directly and O'Hara never went to the actual scene of the pay box."

¶21 According to the record, the trial court sustained defendant's hearsay objection to O'Hara's testimony that he was notified about a problem with the pay box at 110th and State Streets by a device in the pay box. The trial court then told the State to lay a foundation for "how [O'Hara] found out from his own device as he puts it." The State asked O'Hara how the pay box monitoring system worked, and O'Hara explained the workings of the web-based

monitoring system and how a properly functioning pay box sends a signal to Laz Parking Inc. every day between 1 a.m. and 2 a.m. O'Hara then testified regarding how he was notified about the particular pay box at 110th and State Streets. In *People v. Caffey*, 205 Ill. 2d 52, 95 (2002) (internal quotation marks omitted), our supreme court held that "the information displayed on a caller ID device is not hearsay because there is no out-of-court asserter [citation]; the caller ID display is based on computer generated information and not simply the repetition of prior recorded human input or observation." Consistent with the holding in *Caffey*, the notification here that a pay box had gone offline was not hearsay because it was based on computer generated information and there was no out-of-court asserter.

¶22 Although defendant argues on appeal that the State failed to lay a proper foundation to admit this testimony, defendant fails to state in his initial brief to this court why the foundation laid by the State was inadequate. In his reply brief, defendant asserts the State failed to show that the computer notification system was reliable because Laz Parking Inc. sends technicians out to the site to verify that a problem has occurred with a particular pay box.

¶23 Defendant's argument lacks merit. Contrary to defendant's assertion, Laz Parking Inc.'s procedure to send technicians to the site of an offline pay box is not some kind of admission that its notification system is unreliable. The notification system informs Laz Parking Inc. only that a pay box has gone offline; it does not tell Laz Parking Inc. why. Furthermore, the trial court excluded as hearsay any testimony that the notification system or the technician informed O'Hara that the pay box was *missing* or *stolen*. As discussed above, the trial court properly admitted O'Hara's testimony just to show that he learned something had occurred; not that the pay box was, in fact, missing.

¶24 Next, defendant argues that O'Hara was allowed to testify that the serial number on the pay box recovered by the police matched the serial number of the pay box that went offline at 110th and State Streets without the State producing any documents or writings to establish the serial number match. Defendant argues the State failed to provide the court with the best evidence available and failed to establish any exception to the hearsay rule that would allow O'Hara to testify about the matching serial numbers.

¶25 According to the record, O'Hara was allowed to testify, over defendant's objection, that he knew based, in part, on his access to Laz Parking Inc.'s computerized business records, that the serial number of the pay box that went offline at 110th and State Streets matched the serial number of the pay box he saw at the police station after the police had recovered it from defendant. Although O'Hara did not testify about the specific serial number, his testimony necessarily incorporated information from the computerized business records which were not admitted during trial. Moreover, the record establishes that the State failed to meet the minimum foundation requirements to admit this evidence under the hearsay exception for business records even though it seems O'Hara would have qualified as an appropriate witness to establish a proper foundation.

¶26 Although the trial court erred by overruling defendant's hearsay objection, it was harmless error. Evidentiary error may be considered harmless if the properly admitted evidence in the case was so overwhelming that no fair-minded fact finder could reasonably have found the defendant not guilty. *People v. Miller*, 173 Ill. 2d 167, 195 (1996). Here, the properly admitted and credible evidence overwhelmingly established defendant's guilt of theft because he was observed exercising control over the property of Laz Parking Inc. See *People v. Price*, 221 Ill.

2d 182, 193 (2006) (holding that a defendant can be found guilty of theft solely on the basis of knowingly exerting unauthorized control over the property of another at the time of arrest, because the crime of theft is not limited to the original taking of the property). Laz Parking Inc. learned by 7:30 a.m. on October 25, 2011, that its pay box at 110th and State Streets was offline, and, at approximately 11:30 a.m. that same day, Officer Conlan observed defendant near 108th and State Streets attempting to access the internal safe of a pay box with a pry bar and a hammer. O'Hara's testimony established that Laz Parking Inc. was the exclusive operator of the Chicago parking meter system, and the distinctive size and weight of its pay boxes, which were bolted into the sidewalks, made it obvious that the pay boxes were Laz Parking's Inc.'s property. Although defendant testified that he thought the five foot tall, 400 pound pay box was merely someone's discarded home safe, the police officers readily recognized the pay box as the property of Laz Parking Inc., as evidenced by the fact that the police immediately contacted Laz Parking Inc. about the pay box recovered from defendant. When O'Hara went to the police station, he identified the recovered pay box, which was damaged and "severely beaten up," as Laz Parking Inc.'s property. In addition, defendant even admitted at the scene to Officer Conlan and again in his trial testimony that he was trying to take the money from the safe inside the pay box. Finally, defendant's testimony—that two people, whom he barely knew, found the discarded safe in the alley, walked up to him and asked him to help them open the safe—was absurd and incredible.

¶27 Defendant asserts, however, that the best evidence rule required the State to produce either the original records of Laz Parking Inc.'s notification system or the serial numbers of its pay boxes in order to prove that the pay box that went offline was the same pay box the police

found in defendant's possession. We disagree. "The best evidence rule states a preference for the production of original documentary evidence when the contents of the documentary evidence are sought to be proved." *People v. Vasser*, 331 Ill. App. 3d 675, 685 (2002); Illinois Rules of Evidence, Rule 1002 (eff. Jan. 1, 2011) ("[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in the rules or by statute."). The best evidence rule does not apply when a party seeks to prove a fact that has an existence independent of documentary evidence. *Vasser*, 331 Ill. App. 3d at 685-86 (best evidence rule was not applicable to the gas station owner's testimony that, when he left work, there was approximately \$5,000 in the safe defendant stole; the owner's testimony was based on his personal knowledge and did not depend on anyone else's knowledge or written documentation for support). The best evidence rule is not applicable here because Laz Parking Inc. was the exclusive operator of the city's parking meter system, its pay boxes were distinctive in appearance, and the police and O'Hara identified the property as belonging to Laz Parking Inc. based on personal knowledge that did not depend on any written documentation for support.

¶28 Defendant cites *People v. Poindexter*, 18 Ill. App. 3d 436 (1973), to support his assertion that the State's proof of ownership failed to comply with the best evidence rule, but that case is factually distinguishable from the instant case. In *Poindexter*, the police responded to a burglar alarm at a building and detained the defendants when they emerged from the shrubbery alongside the building. A window of the building was broken, and numerous pieces of office equipment were inside and just below the window. The police noticed an unattended parked car across the street with its engine running and the keys in the ignition. The police found an electric

typewriter in the locked trunk of the car and arrested the defendants. At trial, the only testimony as to the ownership of the typewriter was by a manager of the corporation that allegedly owned the typewriter. The manager testified that the serial number of the recovered typewriter matched the serial number on a bill of sale he had seen at the corporation's office. *Id.* at 440.

¶29 The appellate court reversed defendant Poindexter's conviction of theft of a typewriter and remanded, finding that the best evidence rule was applicable to prove ownership of the typewriter. *Id.* at 438-40. The court concluded that ownership of the typewriter had not been proved by competent evidence because the original bill of sale had never been produced, the failure to produce it had not been explained, and the manager had no independent knowledge of the ownership or prior possession or use of the typewriter. *Id.* at 440. The court added that the ownership of the typewriter could easily have been proved without reference to the bill of sale by the testimony of a secretary who had used it or by an inventory showing it to have been on hand before the theft. *Id.* Here, in contrast, O'Hara had independent knowledge of Laz Parking Inc.'s ownership of the pay box. O'Hara was employed by Laz Parking Inc. since 2009, and his duties included ensuring that the pay boxes were working correctly, filing insurance claims for missing or damaged pay boxes, and working with the police department to retrieve recovered pay boxes. Moreover, the stolen property in this case was not a piece of office equipment or mass produced merchandise available for sale to the general public from a retail store. As the exclusive operator of the city's parking meter system, only Laz Parking Inc. could have been the owner of the distinctive and readily recognizable pay box in question.

¶30 In *People v. Prince*, 1 Ill. App. 3d 853, 857 (1971), the defendant was charged with robbery and objected on best evidence grounds to the testimony of the victim and a police officer

that described the identification cards taken from the victim's wallet. The court found that the best evidence rule was not applicable because "it is not necessary to prove the particular identity of the property taken, further than to show it was the property of the victim." *Id.* Consistent with *Prince* and *Poindexter*, written documentation was not necessary to prove ownership in the instant case because O'Hara had independent, personal knowledge of Laz Parking Inc.'s ownership and prior possession of the pay box, and Officer Conlan and defendant established that, at the time of defendant's arrest, he was exerting unauthorized control over the readily recognizable pay box that obviously belonged to the parking meter company.

¶31 B. Limitation of Cross-examination

¶32 Defendant contends the trial court violated his right to present a defense by limiting his cross-examination of O'Hara and not allowing defense counsel to present evidence regarding the defense's theory of the case. Specifically, defendant complains counsel was not allowed to explore the issue and introduce evidence that the pay box defendant discovered in the alley on October 25, 2011 might have been one of the several unrecovered pay boxes stolen by Jeffrey Kaput, who was arrested in October 2010 for knocking over about 20 pay boxes with his vehicle. Defendant asserts that the evidence relating to Kaput would have supported the defense theory that Kaput stole the pay box and left it in the alleyway and defendant simply came across a piece of junk on the day of his arrest.

¶33 The Confrontation Clause guarantees the defendant the opportunity for effective cross-examination (*People v. Kirchner*, 194 Ill. 2d 502, 536 (2000)), but does not prevent the trial court from imposing limitations on defense counsel's cross-examination (*People v. Andrews*, 146 Ill. 2d 413, 421 (1992)). The trial court retains wide latitude to impose reasonable limits on

cross-examination in order to, among other things, assure compliance with established rules of trial procedure and evidence. *People v. Jones*, 156 Ill. 2d 225, 243-44 (1993). The scope of cross-examination rests within the sound discretion of the trial court, and the trial court's judgment will not be disturbed unless there was an abuse of discretion. *People v. Harris*, 182 Ill. 2d 114, 138 (1998). The defendant bears the burden of demonstrating that he was prejudiced by the limitations imposed by the trial court. *People v. Martinez*, 335 Ill. App. 3d 844, 856 (2002).

¶34 Testimony is admissible if it is relevant to an issue in dispute (*People v. Patterson*, 192 Ill. 2d 93, 114-15 (2000)), and evidence is relevant when it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence (*People v. Harvey*, 211 Ill. 2d 368, 392 (2004)). A defendant can be found guilty of theft solely on the basis of knowingly exerting unauthorized control over the property of another at the time of arrest because the crime of theft is not limited to the original taking of the property. *Price*, 221 Ill. 2d at 193; *People v. Alexander*, 93 Ill. 2d 73, 78 (1982). Consequently, the issue of who stole the pay box or when it was stolen was not a fact of consequence where the State was arguing that defendant was guilty because he knowingly exerted unauthorized control over the pay box at the time of his arrest with the intent to permanently deprive the owner of the pay box of the use or benefit of that property.

Accordingly, the trial court did not abuse its discretion in limiting defendant's cross-examination of O'Hara regarding Kaput's alleged actions in October 2010.

¶35 "Evidence should be excluded if it is too remote in time or too speculative to shed light on a fact to be found." *People v. Limon*, 405 Ill. App. 3d 770, 772 (2010) (citing *People v. Wheeler*, 226 Ill. 2d 92, 132 (2007)). The alleged information about Kaput was too speculative

and remote in time to have significant probative value because there was no nexus between this crime in October 2011 and the alleged crime committed by Kaput in October 2010 where O'Hara testified that the pay box had been online and working the day before defendant's arrest.

¶36 C. Denial of a Fair and Impartial Trial

¶37 Defendant contends he was denied a fair trial because certain remarks by the trial court were "odd, hostile, and inappropriate," and established that the trial court had prejudged the merits of the case before the trial had ended. Defendant also contends he was denied a fair trial because the trial court did not allow defense counsel to make a full closing argument.

¶38 We agree with the State that defendant has forfeited review of these issues by failing to object both at trial and in his posttrial motion. See *People v. Herron*, 215 Ill. 167, 175 (2005). Application of the forfeiture rule is less rigid where the basis for the objection is the trial court's conduct. *People v. McLaurin*, 235 Ill. 2d 478, 485 (2009). Nevertheless, our supreme court has clarified that forfeiture would only be excused under extraordinary circumstances such as when the trial judge makes inappropriate comments to the jury or relies on social commentary instead of evidence in sentencing a defendant to death. *McLaurin*, 235 Ill. 2d at 488. Our review of the record establishes that extraordinary circumstances are not present in this case. Moreover, because defendant has not presented any extraordinary or compelling reason to relax the forfeiture rule where he was represented by counsel and had the opportunity to raise contemporaneous objections but did not, we decline to relax the forfeiture rule.

¶39 In his reply brief, defendant argues these issues should be considered as plain error. The plain error doctrine is a narrow and limited exception. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). Under the plain error rule, "[a]ny error, defect, irregularity, or variance which does not

affect substantial rights shall be disregarded" unless the appellant demonstrates plain error. Ill. S. Ct. R. 615. A reviewing court will find plain error and grant relief only when a clear or obvious error occurred and either (1) 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) 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. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Defendant has the burden of persuasion of establishing plain error. *People v. Naylor*, 229 Ill. 2d 584, 593 (2008). The first step in plain error review is to "determine whether a 'clear or obvious' error occurred at all." *McLaurin*, 235 Ill. 2d at 489.

¶40 We first note that defendant would not be able to establish plain error under the first prong of the plain error analysis because the evidence was not closely balanced. As discussed above, the properly admitted evidence established that the pay box was the property of Laz Parking Inc., the pay box was distinctive in appearance and readily recognizable as the property of the city's parking meter company, defendant was found exercising control over the pay box, and defendant admitted to the arresting police officer and during his trial testimony that he was trying to take the money from the safe inside the pay box. Needless to say, this was not a close case.

¶41 With respect to the second prong of plain error, we must first consider whether defendant established that a clear or obvious error occurred.

"A trial judge is presumed to be impartial, and the burden of overcoming this presumption rests on the party making the charge of prejudice. [Citation.]

Allegations of judicial bias or prejudice must be viewed in context and should be evaluated in terms of the trial judge's specific reaction to the events taking place.

[Citation.] A judge's display of displeasure or irritation with an attorney's behavior is not necessarily evidence of judicial bias against the defendant or his counsel." *People v. Faria*, 402 Ill. App. 3d 475, 482 (2010).

Prejudice is shown during a bench trial when the tenor of the court's questioning indicates the court has prejudged the outcome before hearing all of the evidence. *People v. Taylor*, 357 Ill. App. 3d 642, 649 (2005). The line of judicial propriety is crossed when the trial judge departs from his role as judge and assumes the role of prosecutor. *Id.* at 648. Our review of this legal question, where neither the facts nor witness credibility are at issue, is *de novo*. *People v. Stevens*, 338 Ill. App. 3d 806, 810 (2003).

¶42 Defendant lists 12 instances to support his assertion that the trial judge was biased against him and prejudged his case. First, when defendant, during his waiver of his right to a jury trial, gave inconsistent answers and indicated he did not understand why he could not elect to have a bench trial and then ask for a jury trial after the bench trial had concluded, the trial court said, "These are not hard comments." Then, the trial court explained that defendant could not have a jury trial after the bench trial concluded and confirmed that defendant understood the implication of waiving a jury trial.

¶43 Second, when defense counsel—after answering ready for a bench trial and delivering an opening statement—objected to the State calling O'Hara as the first witness because the State did not tender to the defense any written statements by O'Hara or business records about the history of the parking meter pay box, the trial court said: "why did you wait until now to ask for it, were

you waiting for the Messiah or something to bring it up?" Thereafter, the trial court stated that counsel should make the appropriate objection during O'Hara's testimony, and the court would rule on the issue at that time.

¶44 Third, O'Hara testified that he did not bring to court any records about the offline pay box, and defense counsel said, "you have no records whatsoever about this box, correct?" Then, the trial court clarified O'Hara's testimony and counsel's question so that it was clear O'Hara meant he did not bring the records with him that day.

¶45 Fourth, defense counsel asked Officer Conlan, "[Defendant] never said that he was working with the Mexicans, correct?" Then, the trial court stated:

"[Defendant] said what he said. Let's move on, please. He did not say he shot Kennedy either."

¶46 Fifth, when defense counsel moved for a directed finding, the trial court stated that, in the context of a bench trial, the proper terminology would be to ask the court to find defendant not guilty. Sixth, during argument on the motion for acquittal, defense counsel argued the court had to determine that the value of the pay box was more than \$500, and the trial court responded, "It's well over \$500." Seventh, when defense counsel argued that it sounded like Laz Parking Inc. did not know about the missing pay box until it got the telephone call from the police, the trial court stated, "When you say that sounds like that happened, where is the evidence to that effect?"

¶47 Eighth, after defense counsel finished his closing argument, the trial court said:

"State, you have the next to last word. Make it brief. I've listened to the evidence."

Ninth, after finding defendant guilty, the trial court asked defense counsel: "what does your client do besides try to break into parking meter boxes?"

¶48 Tenth, during defendant's posttrial motion, counsel argued that the issue of Jeffrey Kaput's theft of pay boxes a year before defendant's arrest was relevant. The trial court commented on the irony of the man's surname and said that defense counsel's argument also was "kaput," but told counsel to "[g]o ahead" with his argument. Eleventh, the trial court stated that defendant's posttrial argument about the discovery issue was like the Peggy Lee song *Is That All There Is?* Twelfth, concerning the issue of defendant's exercise of control over the pay box, the trial court said that it was like being a little bit pregnant—either you are or you are not.

¶49 After reviewing the judge's remarks in context, they do not show a bias against defendant or counsel or indicate that the trial judge prejudged this case. If anything, the remarks show: the trial court's impatience with defense counsel's failure to raise any discovery issues prior to the commencement of the testimony of the State's first witness; the trial court's attempt to correct defense counsel's misstatements of O'Hara's testimony and the nature of the State's uncontradicted and unimpeached evidence to meet its burden of proof concerning the value of the pay box; the court's attempt to move the proceedings along when counsel asked unclear or irrelevant questions; and the trial court's instruction to defense counsel on the court's preference for the use of different terminology.

¶50 Many of the comments in question were merely the trial court's attempt at humor. We do, however, find that the trial judge made an inappropriate comment when he asked defense counsel, "[W]hat does your client do besides try to break into parking meter boxes?"

Nevertheless, that comment was made after defendant was found guilty and no longer cloaked in

the presumption of innocence. Moreover, the comment was part of a proper inquiry into defendant's employment history where the State had asked the court to revoke defendant's bond. That inappropriate remark, with nothing more, does not lead this court to conclude that the trial court was biased against defense counsel or defendant. The trial judge could have tempered his penchant for sarcasm when dealing with defense counsel; however, a defendant is entitled to a fair trial and not a perfect trial. Defendant's trial may not have been perfect, but it was fair. Therefore, we find that defendant has not overcome his burden of challenging the court's presumption of impartiality.

¶51 Next, defendant contends he was denied the right to a fair trial because the trial court's interruptions, questions and arguments with defense counsel prevented counsel from making a full closing argument. Defendant cites three instances during his closing argument to support his assertion that the trial court's constant interruptions prevented defense counsel from making a proper and full closing argument. Specifically, when defense counsel argued that the State failed to present proof, like a photograph, to show that the recovered property was a 400 pound, five foot tall parking meter pay box, the trial court responded:

"They could have taken a picture. Your client admits it was a safe, and the testimony was that's what it looked like."

Counsel then argued that defendant described the pay box differently, the State fell short of its burden to prove the pay box defendant found in the alley came from the street, and the testimony concerning the serial number was hearsay. Then, the trial court stated:

"I told you this before. It's not hearsay. The witness testified that the records reflect it was the same box based on the serial number. Could they have

brought in the records? Perhaps they could have brought it in. It goes to the weight. He still testified it was the same box based on the serial number."

Counsel then argued that the serial number testimony was hearsay because the State failed to lay a proper foundation to establish an exception for business records.

¶52 Next, counsel argued that the best evidence rule required the State to bring in the actual pay box or at least a photograph. The trial court said:

"Would a picture prove it's the same box? I'm just curious. You're making much to do about a picture. Would it prove it was the same box found in the alley, just itself, just a picture?"

Defense counsel initially tried to avoid the court's question, but then conceded a photograph would not have proven the pay box the police recovered from defendant was the same pay box that went offline earlier that day. Defense counsel asserted, however, that a photograph would have corroborated the testimony that the recovered object was a Chicago parking meter pay box. Defense counsel asserted defendant's testimony—that he was curious about the object in the alley, had no idea what it was aside from hearing coins rattling inside, and tried to break into it—was very realistic and credible. Finally, defense counsel concluded the State, at most, had proven defendant guilty of only the misdemeanor offense of theft of lost or mislaid property because there was no proof defendant knew what the object was or had taken the pay box from its bolted installation on the sidewalk to the alley.

¶53 A criminal defendant's right to make a closing summation before the fact finder is a fundamental right derived from the sixth amendment guarantee of assistance of counsel.

Stevens, 338 Ill. App. 3d at 810. The trial court has no discretion to deny a defendant his right to

make a proper argument at closing on the evidence and applicable law in his favor, and the denial of this right is grounds for reversal regardless of whether the defendant was prejudiced.

Id.

¶54 Our review of the record establishes that defense counsel presented a full closing argument to the court. Although the court challenged counsel's remarks about the admission of hearsay evidence and the applicability of the best evidence rule, counsel was permitted to argue his theory of the case to the court. He was neither given a time limit nor pressured by the court to finish prematurely.

¶55 We are not persuaded by defendant's reliance on *Stevens*, 338 Ill. App. 3d 810, where the trial court repeatedly interrupted defense counsel, exhibited impatience by telling counsel he had two minutes left to argue and then immediately told counsel he had overrun his time, and showed a prejudgment of the case by remarking before counsel concluded that the court was convinced the State had proven the defendant guilty. Unlike in *Stevens*, the trial court here did not cut short defense counsel's argument with a time limitation and did not show a prejudgment of the case before counsel concluded his argument.

¶56 For the foregoing reasons, we find that no clear or obvious error occurred. Therefore, defendant has failed to meet his burden of establishing plain error. Defendant's claims are forfeited.

¶57 D. Theft of Lost or Mislaid Property

¶58 Next, defendant argues this court should reduce his felony theft conviction to the lesser-included offense of theft of lost or mislaid property because the State failed to prove defendant knowingly exerted unauthorized control over Laz Parking Inc.'s pay box. Specifically, defendant

asserts the State failed to prove that the pay box the police recovered from defendant was the same pay box missing from 110th and State Streets or that defendant knew the pay box belonged to Laz Parking Inc. Defendant argues that no serial number for the pay box was ever specified at trial, and without establishing the pay box's unique serial number, there was no evidence that the pay box in defendant's possession was the same pay box stolen from 110th and State Streets that day. Defendant contends the State, which failed to present a photograph of the pay box, failed to prove that the pay box belonged to Laz Parking Inc. Defendant also argues that a reasonable trier of fact could have determined that Jeffrey Kaput stole the pay box over a year ago and defendant simply came across the battered object lying in an alleyway and believed it was a discarded safe.

¶59 When the sufficiency of the evidence is challenged, a criminal conviction will not be set aside unless the evidence, when viewed in the light most favorable to the prosecution, is so improbable or unsatisfactory that a rational trier of fact could not have found the essential elements of the crime beyond a reasonable doubt. *People v. Gilliam*, 172 Ill. 2d 484, 515 (1996). The reviewing court may not retry the defendant. *People v. Rivera*, 166 Ill. 2d 279, 287 (1995). The trier of fact determines the credibility of the witnesses, the weight given to their testimony, and the reasonable inferences drawn from the evidence. *People v. Enis*, 163 Ill. 2d 367, 393 (1994). A reviewing court "will reverse a conviction where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt." *People v. Smith*, 185 Ill. 2d 532, 542 (1999).

¶60 In a prosecution for theft, ownership or some sort of superior possessory interest in one other than the defendant is an essential element of the offense. *People v. Drake*, 20 Ill. App. 3d

762, 765-66 (1974). A person commits a Class 3 felony theft when he knowingly obtains or exerts unauthorized control over property of the owner exceeding \$500 and not exceeding \$10,000 in value and intends to deprive the owner permanently of the use or benefit of the property. 720 ILCS 5/16-1(a)(1)(A), (b)(4) (West 2010). A person commits a theft petty offense when he obtains control over lost or mislaid property and (1) knows or learns the identity of the owner or knows, or is aware of, or learns of a reasonable method of identifying the owner, and (2) fails to take reasonable measures to restore the property to the owner, and (3) intends to deprive the owner permanently of the use or benefit of the property. 720 ILCS 5/16-2 (West 2010).

¶61 The trial court was in the best position to assess the credibility of the witnesses, weigh the evidence and draw reasonable inferences therefrom, and resolve any conflicts in the evidence. The evidence was sufficient to prove beyond a reasonable doubt that defendant was guilty. Viewing the evidence in the light most favorable to the State, it is clear that the fact finder's judgment was not so unreasonable that any rational trier of fact would find a reasonable doubt of defendant's guilt. Because the crime of theft is not limited to the original taking of the property, a defendant can be found guilty of theft solely on the basis of knowingly exerting unauthorized control over the property of another at the time of arrest. *Price*, 221 Ill. 2d at 193.

¶62 The question of whether a defendant knows his control was unauthorized is for the trier of fact and can be established by inference from the surrounding circumstances, including a defendant's recent, exclusive and unexplained possession of stolen property. *People v. Sherman*, 110 Ill. App. 3d 854, 859 (1982). Although defendant contends he simply came across an object he thought was someone's discarded home safe, the trial court did not accept defendant's version

of events and found that his story was "absurd." It is the trial court's prerogative to believe or disbelieve the defendant's testimony in determining whether the defendant had the requisite felonious intent. *People v. Martin-Trigona*, 111 Ill. App 3d 718, 722 (1982).

¶63 As discussed above, the evidence at trial established that defendant committed the charged felony theft. On October 25, 2011, at about 7:30 a.m., Laz Parking Inc.'s employee O'Hara had learned from the company's web-based notification system that something was wrong with the pay box at 110th and State Streets because the pay box had gone offline. O'Hara's job duties included ensuring that all the pay boxes were functioning properly, and a new pay box was installed at that location within 24 hours. At 11:30 a.m. on October 25th, Officer Conlan observed defendant and two other people in the area of 108th and State Streets attempting to pry open the cabinet that housed the safe of a parking meter pay box, which was lying in a yard adjacent to the alleyway and between two garages. O'Hara's testimony established that Laz Parking Inc. was the exclusive owner of all the pay boxes in Chicago because Laz Parking Inc. was the operator of the city's parking meter system. Furthermore, O'Hara described the distinctive characteristics of Laz Parking Inc's pay boxes, which cost \$6,100 each and could not be confused with a homeowner's safe. When the police recovered the pay box from defendant, they immediately contacted Laz Parking Inc. about its recovered property, and O'Hara went to the police station and retrieved Laz Parking Inc.'s property. The credible, uncontradicted evidence at trial established that defendant was caught exerting unauthorized control over the pay box that belonged to Laz Parking Inc and was valued at over \$500 but less than \$10,000.

¶64 III. CONCLUSION

¶65 We affirm the judgment of the trial court.

¶66 Affirmed.

