2017 IL App (1st) 142317-U

No. 1-14-2317

Third Division
October 18, 2017

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DAVID STEELE, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Cook County. No. 12 CR 22027 Honorable Luciano Panici, Judge, presiding.

PRESIDING JUSTICE COBBS delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's conviction for armed robbery with a firearm is affirmed where surveillance video and accompanying testimony were properly admitted into evidence, his right to cross-examination was not infringed, the prosecutor's statements did not constitute misconduct, defendant failed to show evidence of judicial bias, the trial court properly questioned jurors during *voir dire*, and defense counsel was not ineffective.

¶ 2 Following a jury trial, defendant David Steele was found guilty of armed robbery with a firearm and sentenced to 21 years' incarceration. On appeal, defendant contends that he should be granted a new trial because of numerous instances of error, including (1) the

admission of surveillance video without proper foundation, (2) improper lay opinion and speculative testimony by the investigating officer, (3) unconstitutional restriction of his right to cross-examination, (4) pervasive prosecutorial misconduct, (5) improper bias and misconduct by the trial court, (6) insufficient questioning of the jury during *voir dire*, and (7) ineffective assistance of counsel. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant and Marvin Smith were charged with one count of armed robbery while armed with a firearm and two counts of aggravated kidnapping, regarding a robbery at a McDonald's restaurant in a tollway oasis. Prior to defendant's trial, Smith pled guilty to armed robbery with a dangerous weapon.

¶ 5 At trial, Brenda Macias, a manager at the McDonald's restaurant testified that she was working late at night on June 7, 2012. Although her shift was scheduled to end at 11:30 p.m., she planned to stay at the 24-hour restaurant until 3:00 a.m. after a coworker, Jason Morris, became ill and left. Defendant, who was also a manager, was working and offered that she could leave, but Macias stayed so that he would not have to work alone. She began to prepare for breakfast and saw defendant texting on his cell phone. After finishing the preparation, she went to the office. There, she saw Smith pointing a gun at defendant. Smith wore a hooded sweatshirt and a mask obscuring his face below his nose. He pointed the gun at Macias, pulled her shirt, and said "Shut the f*** up." She dropped to her knees and tried to move underneath a counter. At that time, defendant was removing money from the office safe and Smith told him to "Hurry up." A female voice said something from the front counter of the

restaurant and Smith responded.[1] Defendant continued to empty the safe and Smith subsequently left. Macias called the police. Sometime later, she noticed that her tote bag had also been taken. When police officers arrived, she was scared, but defendant acted "normal" as if "nothing happened." She later identified Smith in a police lineup.

¶ 6 Smith, who pled guilty to a lesser charge in exchange for his testimony, testified that he was a friend of Morris, the employee who left the restaurant early on the night of the robbery. Morris told Smith that he and defendant had planned to rob the McDonald's, and invited Smith to join them in the plan. About a week before the robbery, the three men met at the restaurant and defendant drove them to Morris's house. During the drive, defendant and Morris explained their plan. Defendant "broke down what would go on during the robbery" and told Smith what he "should and shouldn't do." He indicated that the robbery would be easy and that another coworker had previously gotten away with robbing the restaurant. He explained how to enter the oasis, what to do once inside, and how to disable the security cameras. Following the meeting, Smith used his mother's cell phone to call and text defendant. On June 7, 2012, Smith obtained a shotgun from a friend and then had multiple conversations with Morris and defendant, informing them that he had a weapon and was ready for the robbery. They agreed that the robbery should take place in the early morning hours of the next day because the McDonald's planned to end its 24-hour schedule.

¶ 7 Planning to begin the robbery at 2 a.m., Smith left his home at 1 a.m., walked to the oasis in about 15 minutes, and then waited in the nearby woods for half an hour "for the okay to come in." During that time, he called and texted back and forth with defendant and Morris. Defendant informed Smith that Morris would not be participating in the robbery because he

[1] This conversation was corroborated by the testimony of another oasis employee, Brittany Collins, who was attempting to order food but was told that the restaurant's computers were down.

had gone home sick and a female coworker had taken his shift. He told Smith that Morris was "b****ing up" because he was scared, but they should still go through with the robbery. He also told Smith that he would collect all the money from the cash registers in one place so that the robbery "would be fast." He warned Smith to make sure "to close the safe so that the alarm wouldn't go off," and to wait for a text that the "coast was clear."

¶ 8 After defendant texted that it was time to begin the robbery, Smith entered the oasis through a side entrance, as they had discussed previously, and waited for a signal from defendant. He walked down the hallway and looked out into the main area of the oasis. Defendant stood behind the McDonald's counter and gave him a "head nod." Smith approached the counter and jumped over it. He pulled out the shotgun, grabbed defendant, and led him back to the office and the restaurant's safe. In the office, Smith immediately went to the computer and attempted to turn off the surveillance system as defendant had instructed him. As Smith got down on his hands and knees to press the button, defendant assisted by "kind of kicking" at the button and mouthing for him to press the button. After Smith disabled the system, defendant asked if he had brought a bag as they agreed. When Smith said he had forgotten it, defendant left the office and retrieved plastic store bags. As defendant started filling the bags with money, a woman walked in and Smith pushed her, telling her to get down. She went under a desk. Shortly thereafter, a different woman asked for service from the front counter. Smith yelled back that the computers were down, as defendant instructed him. Defendant placed the plastic bags of money into a large tote bag and Smith ran out of the oasis with the bag. Several days after the robbery, defendant and Morris came to Smith's house and he gave them a portion of the stolen money.

¶ 9 Master Sergeant Matt Swanson, the lead investigating officer, testified that he supervised a team of Illinois State Troopers responsible for a district that included the oasis, and that he had worked in the district for almost 18 years. During the investigation, he began to believe the robbery was "an inside job." Specifically, he thought it was suspicious that Smith used a non-public entrance to enter the Oasis, bypassed the cash registers to go to the office where all the cash drawers had been gathered, knew the location of the manager's office even though it was not in the line of sight from the front counter, and knew how to disable the surveillance cameras.

¶ 10 As part of the investigation, Swanson viewed surveillance footage from the separate surveillance systems of the oasis and the McDonald's. The surveillance footage was later compiled into an 8 minutes and 14 seconds video without audio. The two systems' internal clocks were not synchronized, resulting in a 15 minute time difference between them. However, that did not affect the investigators' ability to chronologically compile the footage into one video. The State played the video without any objection from defendant.

¶ 11 The video began with a clip showing an employee leaving from the restaurant's employee door at 12:19 a.m. It then shifted to a camera within the McDonald's manager's office, where defendant stood stacking cash register drawers on a counter above the safe. The next clip showed Smith walking through the oasis parking lot at 2:04 a.m. Shortly thereafter, a camera inside the oasis recorded two police officers entering the oasis. The next clip, with a 1:49 a.m. timestamp on the McDonald's system, showed defendant opening the office safe, stacking money drawers above it, and then leaving the office. The video then switched to the oasis entrance camera, showing the police officers leaving at 2:13 a.m. The next clip, taken from the oasis lobby, showed defendant interacting with a customer who leaves at 2:15 a.m.

Defendant then continued to stand near the front counter, looking towards the opposite side of the oasis until 2:18 a.m. The video changed to an oasis corridor at 2:19 a.m., when Smith entered the corridor, walked down it, and covered his face as he approached and passed the camera. After a few moments, Smith walked back down the corridor and hid around a corner. Shortly thereafter, he again walked down the corridor past the camera. The video next showed the oasis lobby, where defendant still stood looking towards the opposite side of the oasis. A second lobby camera showed Smith exit from a door in the direction defendant was looking, walk across the oasis, and jump across the front counter. A second camera, pointed down at the McDonald's counter, also showed Smith sliding over it. A third camera then showed Smith approach defendant and raise his arm. Cameras inside the McDonald's showed Smith and defendant walking back towards the office with Smith behind defendant with his hand near defendant's head and neck. They enter the office and defendant began to collect the money. Smith then pulled a long gun out of his pocket and placed it on defendant's back momentarily, before crouching down beneath the counter while defendant leaned down towards him. Defendant then returned to collecting the money shortly before the McDonald's video surveillance cut out at 2:10 a.m. The next clip, from a lobby camera and time-stamped 2:25 a.m., showed a woman standing at the counter of the restaurant and then leaving. At 2:27 a.m. Smith left the restaurant through the employee door and crossed the oasis back in the direction he had entered. The video switched to the corridor with Smith running away from the camera. The final clip showed Smith running across the oasis parking lot.

¶ 12 As the video played in court, Sergeant Swanson provided running narration, which we will discuss in more detail in our analysis. After the video was played, he testified that cell

phone activity and the attempted use of Macias's debit card led to his discovery of defendant's and Smith's involvement in the robbery. He later interviewed defendant and asked to see his cell phone, noting that Macias had indicated he was texting around the time of the robbery. After making "several entries and manipulations," defendant gave the officer his phone. Checking the phone's log, Swanson found there was no record of calls or messages prior to two days after the robbery. Swanson later interviewed defendant again, and defendant agreed to make a video-recorded statement, which was published to the jury.

¶ 13 In the video-taped interview, defendant admitted that he was involved in the robbery, stating that he, Morris, and Smith discussed the plans during a car ride two weeks before the crime. They had chosen June 8 because that was the last night that the restaurant would be open for 24 hours. Defendant described the McDonald's surveillance system for Smith and how to disable it. He maintained communication with Smith after the car ride, and texted with him immediately prior to the robbery to let him know "what was going on in the oasis." He let Smith know when the last customer left, and that he could come at that time. He called Smith several times in the days following the robbery to make sure that he was not "dead or caught." He admitted that he deleted all the texts he had made and received from Smith. He maintained that he never thought that Smith and Morris were "serious about doing it".

¶ 14 The parties entered a stipulation regarding cell phone activity between phones associated with defendant and Smith. The parties stipulated that the phone associated with Smith, and paid for by his mother, was used to call defendant's phone on June 8, 2012 at approximately 12:18 a.m. for approximately six to seven minutes. On that same date, defendant's phone was used to send seven text messages to the phone associated with Smith beginning at 12:02 a.m. and ending at 12:54 a.m., and an eighth text at 5:12 a.m. The phone

associated with Smith was used to send eight text messages to defendant's phone between 12:00 a.m. and 12:57 a.m. on June 8, 2012. Lastly, defendant's phone was used to make six calls to the phone associated with Smith: two phone calls on June 7, 2012 at 2:55 p.m. and 6:10 p.m., three phone calls on June 8, 2012 at 5:58 p.m., 9:34 p.m., and 9:35 p.m., and a phone call on June 9, 2012 at 12:32 p.m.

¶ 15 Defendant testified that he had met Smith two weeks before the robbery when he had given Smith and Morris a ride from the oasis to Morris's home. The two men discussed robbing the restaurant, but defendant did not take them seriously. At trial, defendant initially denied that he had informed Smith how to disable the restaurant's security system, but admitted on cross-examination that he had. He did not communicate with Smith over the next two weeks, but Morris used his phone to call Smith on the night of the robbery. Smith texted defendant prior to the robbery, but defendant told him not to go through with it. Defendant also testified that he stacked all of the cash drawers in the manager's office so that he could count them with Macias before the start of the next shift. After the robbery, he did not tell the police about his communications with Smith because he did not want to be implicated. He texted Smith a few hours after the robbery because he was "outraged," but also to see if he was "O.K."

¶ 16 The jury found defendant guilty of armed robbery with a firearm and the trial court sentenced him to 21 years' imprisonment.

¶ 17 II. ANALYSIS

¶ 18 A. Defendant's Brief

¶ 19 Initially, we note that throughout his appellate brief defendant briefly alludes to numerous perceived errors by the trial court during pretrial litigation and the trial. Many of

these assertions are brief and conclusory in nature and contain little relevant citation to legal authority. As a reviewing court, we are entitled to have the issues clearly defined, pertinent authority cited, and a cohesive legal argument presented. *Walters v. Rodriguez*, 2011 IL App (1st) 103488, ¶ 5. Defendant's failure to provide organized, supported, and developed arguments on these digressive issues results in their waiver. See *Campbell v. Wagner*, 303 Ill. App. 3d 609, 613 (1999) (Appellate court "is not a depository into which the burden of research may be dumped.") We therefore confine our review solely to the clearly identified and legally supported issues set forth in defendant's brief.

¶ 20 We also note that throughout defendant's argument he makes several factual assertions that do not accurately reflect the record. Illinois Supreme Court Rule 341(h)(6) (eff. Feb. 6, 2013) requires an appellant's brief to state the relevant facts of the case "accurately and fairly." We discuss the more egregious of defendant's exaggerations where relevant in our analysis below and confine our review to the facts fully supported by the record on appeal.

¶ 21 B. Plain Error

¶ 22 Defendant acknowledges that he did not properly preserve any issues for appeal by including them in his post-trial motion. He asks, however, that we review his contentions under the plain error doctrine. Generally, a defendant waives errors that were not preserved through both a contemporaneous objection and a written post-trial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). The plain error doctrine allows a reviewing court to consider a clear or obvious unpreserved error where (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant 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. Nowells*, 2013 IL App (1st) 113209, ¶ 18.

¶ 23 The first step in a plain error analysis is to determine whether an error occurred as, absent an error, there can be no plain error. *People v. McGee*, 398 Ill. App. 3d 789, 794 (2010). Thus, we first address each of defendant's claims to determine whether any error occurred before considering whether the plain error doctrine is applicable.

¶ 24 C. The Surveillance Video

¶ 25 1. Foundation for the Surveillance Video

¶ 26 Defendant first contends that the trial court erroneously admitted the edited video compiling multiple surveillance recordings from the McDonald's and the oasis because Sergeant Swanson's testimony did not establish a proper foundation. He asserts that the State failed to present adequate testimony demonstrating that the recording was an accurate portrayal of the events at the oasis, particularly where Swanson did not articulate why most of the tape's edits were made including jumps in time of more than a minute, sped up portions of the video, and the inclusion of still frames.

¶ 27 The admission of evidence is within the sound discretion of the trial court, and will not be reversed absence an abuse of discretion. *People v. Tenney*, 205 Ill. 2d 411, 436 (2002). Much like photographs, video recordings are admissible forms of substantive evidence if proper foundation regarding the recording's accuracy is provided. See *People v. Taylor*, 2011 IL 110067, ¶¶ 32-33. In considering what elements are necessary to establish such a foundation, our supreme court has explained that each case must be evaluated upon its own facts, and there are no set, dispositive factors that apply in every circumstance. See *id.* ¶¶ 34-36. The dispositive question "is the accuracy and reliability of the process that produced the

recording." *Id.* ¶ 35. Moreover, the court has made clear that alterations to a recording do not automatically render it inadmissible; in fact, "[g]iven the particular circumstances of any case, alterations, deletions, or editing may be necessary." *Id.* ¶ 44. Typically, any editing to a video recording only affects the weight of the evidence and not its admissibility so long as the edits do not "affect the reliability or trustworthiness of the recording." See *id.*

¶ 28 Sergeant Swanson testified that he and a crime scene investigator viewed surveillance footage from the restaurant and the oasis and those videos were burned onto nine separate disks. Swanson and his team then took "certain clips" from the nine disks that they believed were relevant and placed them onto a single disk. Swanson testified that the single disk "truly and accurately reflect[ed]" the original footage taken from the surveillance systems. Having reviewed the edited tape and the officer's testimony, we cannot find that the trial court abused its discretion in finding that the State had sufficiently established the accuracy of the edited video, particularly where defendant voiced no concern with the recording's accuracy at the time.

¶ 29 Defendant primarily cites *People v. Flores*, 406 Ill. App. 3d 566, 576. (2010), a case where the reviewing court held that the "use of [an edited] recording is inconsistent with the rules for the admission of substantive evidence," and such a recording is more properly considered merely as demonstrative evidence. We note that *Flores* was decided before our supreme court considered the use of a video recording as substantive evidence in *Taylor*. Additionally, *Flores* heavily based its reasoning on the logic of *People v. Taylor*, 398 Ill. App. 3d 74 (2010), the case that our supreme court overturned with its opinion in *Taylor*, 2011 IL 110067. Accordingly, we find *Flores* unpersuasive. We are concerned with edits to a video recording where they raise questions of the "reliability or trustworthiness of the

recording." *Taylor*, 2011 IL 110067, ¶ 44. Here, although defendant has pointed to numerous edits made to the surveillance video, he fails to assert how any of those edits support an inference that the recording was tampered with in a fashion that undercuts it trustworthiness, as opposed to merely edited to show only relevant portions as testified to by Sergeant Swanson.

¶ 30 2. Swanson's Narration of the Video

¶ 31 Defendant next contends that Sergeant Swanson's narration of the video was improper, particularly where he gave lay opinions or lacked personal knowledge of certain facts. He asserts that Swanson's testimony that defendant had gathered money "without any prompting," that he was in an "empowering position" relative to Smith when Smith ducked under the counter, and that certain things were "suspicious" or "odd" were speculative and inadmissible opinions.

¶ 32 Defendant briefly asserts that narration of a video recording is inadmissible except where it regards the identification of a person, citing *People v. Sykes*, 2012 IL App (4th) 111110, ¶¶ 33-42. However, defendant misconstrues *Sykes*. The appellate court in that case did not create a categorical rule regarding narration, but instead analyzed the issue as an instance of improper lay opinion testimony. See *id.* Accordingly, we address the issue as a matter of lay opinion testimony and our review remains under the abuse of discretion standard. *People v. Thompson*, 2016 IL 118667, ¶ 49.

¶ 33 Illinois Rule of Evidence 701 (eff. Jan. 1, 2011) governs the admission of opinion testimony by lay witnesses. Under the rule, lay witnesses may offer opinions or inferences only when the testimony is "(a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in

issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702 [governing expert testimony.]" *Id.* An admissible opinion need not be based on the direct perception of an event by the witness; it is sufficient that an opinion be rationally based on the witness's perception of a video recording. See *People v. Mister*, 2016 IL App (4th) 130180-B, ¶ 76; see also *Thompson*, 2016 IL 118667, ¶ 60. In determining whether a witness's lay opinion is helpful to the jury, we consider the totality of the circumstances. See *People v. Gharrett*, 2016 IL App (4th) 140315, ¶ 77. Generally, the weight to be given to a lay opinion is best left for the fact-finder to assess. *Mister*, 2016 IL App 130180-B, ¶ 77.

¶ 34 In *Mister*, a casino patron was robbed at gunpoint after returning to his residence. *Id.* ¶ 8. Surveillance footage showed that the defendant and a friend had followed the patron as he was escorted from the casino to his vehicle. *Id.* ¶ 21. At trial, the casino's surveillance shift supervisor, who had reviewed the footage and compiled it, narrated the recording as it was published to the jury. *Id.* ¶¶ 21-22. The supervisor was not present at the time of the robbery. *Id.* ¶ 76. During his testimony, the supervisor explained the layout of the casino and described and interpreted the defendant's actions. *Id.* ¶¶ 22-23. The reviewing court held that the narration of a surveillance video was admissible because the testimony was helpful to the jury as it determined whether the defendant had been at the casino and followed the victim home. *Id.* ¶ 77. Additionally, the witness's opinions provided a clearer understanding about what took place, particularly where the video recording included a lot of footage, fluid scenes and numerous individuals. *Id.* It explained that requiring the jury to spend the same exhaustive amount of time and effort investigating the video as the witness "would be an extremely inefficient use of the jury's and the court's time." *Id.*

¶ 35 We find *Mister* instructive. Swanson's testimony was rationally based on his perception of the video. It did not involve technical considerations that are the subject of expert testimony. It was also helpful for the jury to understand the connections and actions between the various video clips. It also helped explain the course of Swanson's investigation. His noting that he found certain circumstances "odd" or "suspicious" helped the jury understand how the investigator began to target one of the apparent victims as a suspect, and thus helped it assess the officer's credibility.

¶ 36 Defendant also asserts that Swanson's testimony violated Illinois Rule of Evidence 602 (eff. Jan. 1, 2011), which prohibits testimony that is not based upon a witness's personal knowledge of a matter. He cites numerous statements by Swanson that he alleges were made without personal knowledge, including testimony that portions of the oasis "were not known to the public," that certain doors were typically open or closed, and how the surveillance cameras worked. Sergeant Swanson testified that he had been to the oasis during the investigation and had patrolled the oasis's district for several years. Any visitor to an oasis would readily observe that some areas were not open to the public and that certain doors were typically closed. Moreover, defendant fails to assert how the inclusion of these mundane details prejudiced him in anyway, and thus their admission cannot be plain error. See *People v. Leach*, 2012 IL 111534, ¶ 141.

¶ 37 3. Cross-Examination of Swanson

¶ 38 Defendant also contends that the trial court improperly restricted his cross-examination of Sergeant Swanson by directing defense counsel to rewind the video recording in one instance and later directing counsel that he could no longer use the video equipment.

¶ 39 During cross-examination, defense counsel attempted, with apparent difficulty, to use the State's DVD player to play the surveillance video. With the State's assistance, he was able to do so. After questioning Swanson about other matters on the surveillance video, defense counsel questioned the officer about the clip on the video that showed Smith jumping over the McDonald's front counter. He asked Swanson if defendant was "nowhere in sight" during that portion of the video. Swanson responded that defendant was immediately to Smith's left. Defense counsel then asked, "So if David Steele was there, that is where he would have been?" The State objected to the use of the word "if," and the court noted that the video had shown that defendant was standing in the location described. Defense counsel asked if Swanson saw defendant on the video and Swanson answered that he saw defendant in the location in question, then he saw Smith crossing the counter, and he knew the two locations shown were within six feet of each other. Defense counsel eventually asked Swanson to show on the video where defendant was depicted. The State objected, noting that the video was paused and the court stated, "You have to back it up." Defense counsel stated that he would attempt to do so, but inadvertently reset the video to its initial point before advancing the video to the clip of Smith jumping the counter.

¶ 40 Pausing the video, defense counsel asked where defendant was in the "photograph." The State objected and the court stated:

> "This is a video, sir. It is not a still photograph, and it is an ongoing motion picture. So it would show at some point while he is jumping over that – in fact, the Defendant was behind the counter about six feet away from him, to be exact."

Defense counsel then played another portion of the video before having more difficulty with its operation. The court instructed him:

"We are done with the video. Let's move on. I'm not standing here for the next five hours trying to wait for you to figure out what is going on, and you haven't been able to do it. Let's go."

Defense counsel then proceeded to ask Swanson more questions about what had occurred on the video without playing the recording.

¶ 41 The right to confront witnesses and the related right to cross-examination are protected by both the Illinois and United States Constitutions. See U.S. Const., amends. VI, XIV, Ill. Const. 1970, art. 1, § 8; *Crawford v. Washington*, 541 U.S. 36, 54 (2004). The right to confront a witness is limited, however, and the right to cross-examination is satisfied when the court allows the defendant to seek facts relevant to the credibility and reliability of the witnesses. *People v. Quinn*, 332 Ill. App. 3d 40, 43 (2002). The trial court has broad discretion to limit the scope of cross-examination, and a restriction of cross-examination will not be reversed without an abuse of discretion resulting in manifest prejudice. *People v. Price*, 404 Ill. App. 3d 324, 330 (2010); *People v. Criss*, 294 Ill. App. 3d 276, 279-80 (1998).

¶ 42 It is within the court's discretion to impose reasonable limits on cross-examination to assuage concerns about harassment, prejudice, jury confusion, witness safety, or repetitive and irrelevant questioning. *People v. Averhart*, 311 Ill. App. 3d 492, 497 (1999). An appellate court must determine whether a limitation on the cross-examination denied defendant his right to test the truth of the witness's testimony. *People v. Harris*, 123 Ill.2d 113, 145 (1988). To determine the constitutional sufficiency of cross-examination, we consider what defendant was allowed to do, not what he was prohibited from doing. *People v. Truly*, 318 Ill. App. 3d 217, 227-28 (2000).

¶ 43 Having reviewed the video recording and the transcript of Swanson's cross-examination, we find defendant's argument to be unpersuasive. Initially, we note that defendant's assertion that the court "demanded" that defense counsel rewind the video is not a fair characterization of the court's statement. In context, the court's statement is more naturally understood as indicating which portion of the recording showed defendant rather than an imperative command. However, even if such a command were issued, it would appear to be within the trial court's discretion under principles of completeness, as defense counsel's attempts to discredit Swanson with a single paused frame of the video neglected the context of the rest of the recording. See *People v. Patterson*, 154 Ill. 2d 414, 453 (1992) (An opposing party is permitted "to introduce the remainder of an utterance or writing" so that the evidence is not presented out of context.)

¶ 44 We similarly find no error in the court's requiring defense counsel to cease use of the video equipment. He was allowed to use the recording for some time, despite numerous delays and mistakes in its use, until he began asking repetitive questions which were prolonged by his inability to use the device despite the State's assistance. Importantly, defense counsel was only prohibited from further use of the recording, not from asking further questions about it. In fact, counsel did continue to ask questions about what was shown in the video. Thus, it is clear defendant was not denied the right to test the truth of the officer's testimony regarding the video, even though he was unable to replay the video itself. Accordingly, the trial court did not abuse its discretion.

¶ 45 D. Relevance

¶ 46 Defendant also briefly contends that the trial court erroneously sustained objections to several of defense counsel's questions to witnesses as irrelevant. These include: (1) a

question to another McDonald's employee about if she had been instructed on what to do in a robbery, (2) a question to Sergeant Swanson if he had knowledge of McDonald's policies, (3) a similar question to defendant, and (4) a question to Smith about the functionality of the firearm he carried.

¶ 47 The trial court has the discretion to decide whether evidence is relevant and admissible, and that decision will not be reversed absent a clear abuse of discretion resulting in manifest prejudice to the defendant. *People v. Amaya*, 255 Ill. App. 3d 967, 971-72 (1994). Evidence is admissible if it is relevant to an issue in dispute and its probative value is not substantially outweighed by its prejudicial effect. *Id.* The questions to Swanson and the other McDonald's employee regarded their own personal knowledge and provided no evidence of defendant's own understanding of any policies. Although the similar question to defendant may have been relevant, the record reveals that the question was actually excluded on hearsay grounds, not relevance. As defendant has made no legally supported hearsay argument regarding that statement on appeal, he has waived the argument. See *Campbell*, 303 Ill. App. 3d at 613. Finally, regarding the question of the shotgun's functionality, a firearm need not be operable to sustain a conviction for armed robbery as charged. *People v. Hill*, 346 Ill. App. 3d 545, 549 (2004). Although a showing that a firearm was irreparable and "totally harmless" could foreclose a finding that a defendant had used a firearm (*People v. Williams*, 394 Ill. App. 3d 286, 291 (2009)), there was absolutely no indication provided in the evidence or an offer of proof that the shotgun was in such a deteriorated state. Accordingly, we cannot say that the trial court abused its discretion in finding the challenged questions irrelevant.

¶ 48 E. Prosecutorial Misconduct

¶ 49 1. Demeaning Comments by the State

¶ 50 Defendant contends that the State improperly disparaged both defense counsel and defendant with inappropriate comments and argumentative questions throughout the trial. He lists numerous comments the assistant State's Attorney made that he asserts denigrated defense counsel, including stating "I am trying to expedite this so that the jury isn't here until 8:00 tonight," when defense counsel objected to leading questions, making objections that defense counsel stop making "dumb comments" and "ridiculous commentary," and imploring defense counsel to "keep it professional." Defendant also asserts that that assistant State's Attorney disparaged him directly through argumentative and sarcastic questions including, as an example, "Please tell us what you meant ***. Go ahead, we're all waiting?" and "But you were a victim? Right? Right? That's okay. You don't have to answer the question."

¶ 51 The federal and state constitutions guarantee every defendant "a fair, orderly, and impartial trial" conducted in accordance with the law. *People v. Blue*, 189 Ill. 2d 99, 138 (2000); see also U.S. Const., amend. XIV, § 1; Ill. Const. 1970, art. I, § 2. That right is infringed when prosecutors depart from proper questioning or argument in an attempt to prejudice the jury by disparaging the integrity of defense counsel (see *People v. Thompson*, 313 Ill. App. 3d 510, 514 (2000)) or defendant (see *People v. Lucas*, 132 Ill. 2d 399, 437 (1989)). However, when considering whether a prosecutor's comments are improper, we must consider them in their entirety and within full context. See *People v. Wheeler*, 226 Ill. 2d 92, 122 (2007). A prosecutor is entitled to some latitude when comments advanced by defense counsel clearly invite a response. See *People v. Johnson*, 208 Ill. 2d 53, 113 (2003). What is more, although we do not condone the State's comments, prosecutors are afforded

"some degree of both sarcasm and invective to express their points." See *People v. Banks*, 237 Ill. 2d 154, 183 (2010).

¶ 52 In arguing that the assistant State's Attorney attempted to bias the jury against defense counsel and himself, defendant cites *People v. Thompson*, 313 Ill. App. 3d 510 (2000) and *People v. Davis*, 287 Ill. App. 3d 46 (1997). In *Thompson*¸ the appellate court reversed the defendant's conviction where the prosecution made comments insinuating that the defendant and defense counsel had a "nefarious" scheme to obtain witness recantations and to "fix" the defendant's case. *Thompson*, 313 Ill. App. 3d at 514. The court reasoned that accusations of deception and trickery by defense counsel serve no purpose except to prejudice the jury. *Id.* In *Davis*, after reversing the defendant's conviction on separate grounds, the appellate court found that the prosecutor had made improper statements when he told the jury that the defense's witnesses were the "worst liars he had ever seen testify". *Davis*, 287 Ill. App. 3d at 57.

¶ 53 Here, in the full context of the trial, we cannot find that any comment by the assistant State's attorney cited by defendant was of such an egregious nature as to be prosecutorial misconduct. Even though the attorney expressed some sarcasm, nothing in the record indicates the type of direct, acerbic attack on the integrity of defense counsel or defendant that was present in *Thompson* and *Davis*. Additionally, we must note that the State's comments and tone were equally matched by similar commentary and arguments made by defense counsel throughout trial. While the zealousness of each attorney clearly produced less than praiseworthy rhetoric and behavior, we cannot find that it rose to such a level that it deprived defendant of a fair trial.

¶ 54 2. Misstatement of the Evidence

¶ 55 Defendant argues that his conviction should be reversed because the State misstated evidence during both the questioning of witnesses and its closing arguments. He asserts that in four specific instances the assistant State's Attorney misstated the substance of the stipulation regarding phone calls between cell phones associated with himself and Smith. In the first instance, the assistant State's Attorney asked Sergeant Swanson about "cell records of Marvin Smith, Jr." and, following an objection by defense counsel, argued that the stipulation stated the phone belonging to Smith's mother was "associated with" Smith and that Smith testified he had used the phone. During the cross-examination of defendant, the assistant State's Attorney stated that that there was a stipulation that defendant had made two calls to Smith and defendant agreed he had made the calls. Shortly thereafter, the assistant State's Attorney again said that there was a stipulation that defendant had made the two calls and defense counsel objected. The assistant State's Attorney corrected herself noting that the stipulation was that the calls were made from defendant's phone and defendant again admitted he made the calls. Finally, during closing, the assistant State's Attorney stated that the evidence showed defendant had called Smith and that the stipulation showed that one of the calls was at 12:18 a.m. and was six to seven minutes long.

¶ 56 The State may not misstate the law or facts of a case or comment on factual matters not based on evidence. *People v. Buckley,* 282 Ill. App. 3d 81, 89 (1996). Material misstatements of evidence can provide grounds for reversal if the misstatements substantially prejudice the defendant. *Id.* at 90.

¶ 57 Here, two of the instances cited by defendant were clearly not misstatements of the stipulation. The statement that the phone was "associated with" Smith is included in the stipulation. The statements made in closing argument indicated more directly that defendant

had called Smith, but these statements were based on all of the evidence and the stipulations were only tied to the time and length of the call in question, both which were included in the stipulation. During the questioning of defendant, the assistant State's Attorney did erroneously state that the stipulations were that defendant, and not just his phone, had made calls to Smith. However, defendant cannot show the substantial prejudice required for reversal where the assistant State's attorney promptly corrected herself after the objection and defendant himself admitted making the calls. Any misstatement about the wording of the stipulation was immaterial where defendant openly admitted the truth of the underlying fact.

¶ 58 Defendant also argues that the State "clearly implied" that Smith had lied when he testified that he had learned Smith's real name from police, by asking him "Well, isn't it in fact true that the police asked you what his name is?" Defendant does not assert that the State made any misstatement, but instead argues that an underlying "insinuation" was incorrect. As defendant has identified no actual misstatement by the assistant State's Attorney and any incorrect implication was singular and not egregious, we cannot find that error occurred.

¶ 59 3. Sidebar Argument

¶ 60 We separately address an occurrence during a sidebar due to the seriousness of the allegation raised by defendant. He asserts that during a discussion with the trial court outside the presence of the jury, the assistant State's attorney threatened an "imminent physical attack" against defense counsel. This sensational accusation is not supported by the record. The transcript of the discussion reveals the following:

"[DEFENSE COUNSEL]: Please don't interrupt.

[ASSISTANT STATE'S ATTORNEY]: Again, get your finger out of my face.

THE COURT: Hey, hey, hey. Come on.

[ASSISTANT STATE'S ATTORNEY]: Don't you ever put your finger in my face.

[DEFENSE COUNSEL]: Don't hit me.

THE COURT: All right. Enough. Now, I don't want any more arguing."

¶ 61 The disturbing interchange shows a distinct lack of decorum on the part of both attorneys, yet it does not demonstrate the particularly abhorrent behavior alleged by defendant. Had such a threat actually been made, the trial court certainly would have responded with something more than an admonishment to stop arguing. Given the lack of any other indication that a threat of violence occurred, we consider defendant's allegation no further.

¶ 62 F. Judicial Misconduct

¶ 63 1. Judicial Bias

¶ 64 Defendant also contends that his conviction must be reversed because the trial judge showed consistent bias against him. His argument is based largely upon a perceived unfairness in the trial court sustaining the State's objections while overruling the majority of his own. He asserts that many of these rulings were "meritless." As further support of his bias claims, defendant points to numerous issues he has raised here on appeal and to a number of other evidentiary errors that he asserts occurred all without providing substantial legal argument. We have already determined that those issues explicitly raised on appeal are without merit and that defendant has waived the other conclusory assertions put forth without adequate legal argument. As such, we discuss in detail only three specific instances defendant puts forth as evidence of the trial court's bias.

¶ 65 A fair trial is a fundamental right in all criminal prosecutions and a denial of that right is a denial of the procedural due process guaranteed under both the United States (U.S. Const, amend. XIV) and Illinois (Ill. Const. 1970, art. I, § 2) Constitutions. *People v. Taylor*, 357 Ill.

App. 3d 642, 647 (2005). A defendant is fundamentally entitled "to an unbiased, open-minded trier of fact." *People v. Eckert*, 194 Ill. App. 3d 667, 673 (1990). As such, a judge should refrain from injecting commentary into proceedings reflecting a bias for or against either party. *People v. Sims*, 192 Ill. 2d 592, 636 (2000). However, 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." *Id.*

¶ 66 We view any claim of judicial bias in context of the entire record and evaluate the trial court's reactions in regards to the circumstances presented by the individual case before it. *People v. Urdiales*, 225 Ill. 2d 354, 426 (2007). We presume that a trial judge was impartial, and it is defendant's burden to prove otherwise. *People v. Faria*, 402 Ill. App. 3d 475, 482 (2010). Even where comments are improper, reversal is only required where the comments were "a material factor in the conviction or were such that an effect on the jury's verdict was the probable result." *People v. Burrows*, 148 Ill. 2d 196, 250 (1992).

¶ 67 Defendant asserts that a bias against defense counsel was first evident during pre-trial litigation, where the court "indicat[ed] a preference for public defenders." This is a distortion of the record. At defendant's initial bond hearing, he was represented by a public defender. Later, he retained private counsel who filed a motion for reduced bond. During a hearing on that motion, defense counsel argued that there had been a change of circumstances because "defendant now has counsel," despite the fact that defendant had been represented in the previous hearing. The trial court responded:

> "He had counsel. Believe it or not, the Public Defenders, when they represented him at the preliminary hearing, are known as counsels in the state. They are licensed to

> practice law. And as a matter of fact a lot of the times or 90 percent of the time, they are better than private counsel, because that's all they do is criminal law."

In context, the trial court's statement was not a disparagement of defendant or private counsel, but rather a defense of public defenders after defense counsel's dismissive argument. Thus, this comment provides no evidence of judicial bias.

¶ 68 Defendant also argues that the court showed bias during Sergeant Swanson's testimony. While the surveillance video clip showed defendant standing near the front counter before Smith approached, Swanson testified that defendant nodded his head as if to signal Smith. Defense counsel objected, arguing that no nod was visible on the video. The trial court then asked Swanson if he could see nodding. Swanson replied that he could not see it, but had assumed it from Smith's statements. The court stated, "But in all fairness, Smith testified that he did the nodding." Counsel responded, "And in all fairness, the video shows no such thing." A sidebar was then held where the court admonished defense counsel not to argue his objections in front of the jury.

¶ 69 It appears that defendant's argument is that the trial court was too harsh in admonishing defense counsel following this exchange, and as he argues generally throughout his brief, that the State should have been subject to similar admonishments. The trial court's reprimanding of inappropriate behavior, even where it may show signs of "irritation," is not necessarily sufficient to prove judicial bias. *Sims*, 192 Ill. 2d at 636. Our review of the entirety of the trial indicates numerous testimonial objections made by trial counsel, as well as equally common commentary and invective statements. Viewed in context, we cannot find that any of the trial court's comments or admonishments went beyond the bounds of propriety or reflected an improper bias.

¶ 70 Defendant next asserts that the trial court demonstrated evident bias by misstating the evidence during the cross-examination of Smith, where the following colloquy occurred:

> "Q. Now about a week before you met with [defendant] and [Morris] at McDonald's and drove home in the car, you made arrangements to get the shotgun?
>
> A. Yes.
>
> Q. So before ever meeting [defendant], and before discussing this with [Morris], you had already made arrangements to get the shotgun?
>
> A. No. Actually, it was after the meeting, meeting [defendant], and coming up with the plan to rob McDonald's."

Defense counsel then asked again if Smith had made plans to get the gun before meeting defendant and Smith replied, "No." The State objected and the court stated, "Counsel, that was not the testimony," and sustained the objection. When defense counsel protested, the court stated, "He stated specifically that he went to look for the gun after [defendant] told him that he needed a gun. Move on."

¶ 71 It appears that there was some confusion on the part of Smith, the State, and the trial court regarding defense counsel's lengthy question. However, even though the trial court failed to acknowledge the inconsistency between Smith's initial answer of "Yes" to defendant's question and his subsequent answers that mirrored his testimony on direct examination, this at worst shows confusion not clear bias. Moreover, this singular, minor occurrence is not enough to establish a prevalent bias against defendant.

¶ 72 2. Intimidation of a Juror

¶ 73 Defendant also accuses the trial court of "severely intimidat[ing]" a juror such that "she could have felt pressured" to adopt the court's alleged bias against defendant and "might well

have talked with other jurors about what happened" and thus tainted those jurors as well. Once more defendant has exaggerated the record.

¶ 74 On the first day of trial, a juror failed to arrive at the courthouse and the trial court instructed police officers to bring her into court. The court then admonished the juror asking, "Do you understand the severity of what you did today?" It instructed the juror to arrive in court on time the following day and stated:

> "I don't care if you have to walk here. You have to be here on time. If you are not here on time, the next time the Lansing police will pick you up, it will not be to drive you here, it will be to take you into custody. And then we are going to do a hearing. And if I find that your actions were contemptuous, I can give you prison time, not jail time, prison time. That means years in the Illinois Department of Corrections. I do not want to do that, okay?
>
> Once you are chosen to be a juror, it is your responsibility to be here for that service. Do you understand that?"

The juror began to cry and was brought back to the jury room.

¶ 75 Defendant does not argue that a trial court may not admonish a juror who fails to report for service, nor does he argue that such a juror could be found guilty of contempt and sentenced to incarceration. It is within a court's "inherent power" to maintain order in its courtroom through the use the punishment of contempt, and there are no explicit sentencing restrictions for a conviction of contempt. See *People v. Geiger*, 2012 IL 113181, ¶ 24. Therefore, the trial court was well within its discretion to admonish the juror of potential ramifications for repeatedly failing to complete her duty. As for defendant's contention that the trial court's actions "could" have prejudiced the juror, it is a defendant's burden to show

that a juror was prejudiced against him or her. *People v. Mehlberg*, 249 Ill. App. 3d 499, 549 (1993). His mere speculation that such bias might have occurred is insufficient to meet that burden.

¶ 76 G. *Voir Dire*

¶ 77 Defendant next contends that the trial court failed to adequately comply with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012) during *voir dire*. He argues that one panel of jurors was properly instructed on defendant's right not to present evidence, but was not explicitly asked if they understood or accepted the principle. He also argues that another panel was properly instructed on the State's burden, but was not asked if they accepted that principle.

¶ 78 We review whether the trial court complied with Rule 431(b) *de novo*. *People v. Belknap*, 2014 IL 117094, ¶ 41. The rule requires that the trial court ask if potential jurors "understand[] and accept[]" four separate principles of law, including the State's burden to prove defendant guilty beyond a reasonable doubt and defendant's right not to present evidence. Ill. S. Ct. R. 431(b).

¶ 79 Defendant's arguments have no support in the record. With both panels, the trial court first instructed, "The next four questions I want a resounding yes or no from each [of you] in the jury box. Do each of you understand and accept the following principles." The court then listed each of the principles required Rule 431(b), but did not repeat the words "understand and accept" when listing the right not to present evidence for the first panel and did not repeat the word "accept" when explaining the State's burden to the second panel. However, the trial court had already clearly informed both panels that it was asking whether they

accepted and understood each of the principles that it listed. Thus, the court fully complied with Rule 431(b).

¶ 80 H. Prejudice

¶ 81 Before addressing defendant's final claims of ineffective assistance of counsel, we note that as we have found no merit in any of defendant's other claims of error, there can be no plain error. *McGee*, 398 Ill. App. 3d at 794. We briefly note that even had we found error, defendant's arguments under the first prong of plain error would still fail because the evidence in his case was not closely balanced. The detailed testimony of defendant's criminal partner, the stipulated phone communications between defendant and Smith's phones, and defendant's own video-taped confession provided overwhelming evidence of his guilt. Furthermore, the circumstantial evidence presented by the surveillance recordings and Macias's testimony corroborated and bolstered that evidence.

¶ 82 I. Ineffective Assistance of Counsel

¶ 83 Finally, defendant contends that his conviction should be reversed because his trial counsel provided ineffective assistance. He argues that his attorneys failed to preserve issues through proper objections and a post-trial motion, failed to impeach the testimony of Smith and Sergeant Swanson, and failed to propose certain jury instructions.

¶ 84 Every criminal defendant has a constitutional right to receive effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I § 8. Yet the right to effective assistance of counsel entails "reasonable, not perfect, representation." *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 79. To succeed with a claim of ineffective assistance of trial counsel, the defendant must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and establish that: (1) counsel's performance fell below an objective

standard of reasonableness, and (2) counsel's deficient performance prejudiced defendant. *People v. Baines*, 399 Ill. App. 3d 881, 887 (2010). In order to show objectively unreasonable performance, the defendant must overcome a "strong presumption" that counsel's action or inaction was the result of sound trial strategy. *People v. Jackson*, 205 Ill. 2d 257, 259 (2001). Due to the large number of factors that influence trial strategy, " 'claims of ineffective assistance of counsel must be judged on a circumstance-specific basis, viewed not in hindsight, but from the time of counsel's conduct, and with great deference accorded counsel's decisions on review.' " *Wilborn*, 2011 IL App (1st) 092802, ¶ 79 (quoting *People v. Fuller*, 205 Ill. 2d 308, 330–31 (2002)). To satisfy the second prong, the defendant must establish that but for counsel's unprofessional errors, there is a reasonable probability that the verdict would have been different. *People v. Peeples*, 205 Ill. 2d 480, 513 (2002). A defendant must satisfy both the performance and prejudice prongs to prevail on an ineffective assistance of counsel claim. *People v. McCarter*, 385 Ill. App. 3d 919, 935 (2008).

¶ 85 As to defendant's contention that trial counsel failed to properly raise objections and preserve issues for appeal, we have already found that no errors occurred, and thus any objections would not have been meritorious. An attorney's decision not raise an unmeritorious objection does not constitute unreasonable performance and does not prejudice defendant because such an objection would have been overruled. *People v. McCarthy*, 213 Ill. App. 3d 873, 887 (1991).

¶ 86 Defendant also asserts that trial counsel provided deficient performance for failing to impeach Smith and Sergeant Swanson with the stipulated cell phone records. Smith testified that he received a text message from defendant telling him to begin the robbery right before he entered the oasis. During defendant's recorded statement, which was published during

Swanson's testimony, defendant indicated that he texted Smith to come when the last customer left the oasis. The surveillance recording showed that the last customer left the oasis at about 2:15 a.m. and Smith entered shortly thereafter. Yet, the stipulated phone records indicate that the last text messages between Smith and defendant's phones that night were at about 1 a.m. Thus, defendant argues defense counsel should have used the stipulation to undermine Smith's testimony and his own recorded statement.

¶ 87 Generally, the decision whether to impeach a witness is a matter of trial strategy that will not support a claim of ineffective assistance. *People v. Clay*, 379 Ill. App. 3d 470, 481 (2008). However, we need not determine whether defense counsel's decision was deficient because defendant has not made a requisite showing of prejudice. See *McCarter*, 385 Ill. App. 3d at 935. The jury heard the stipulations stating that the last text message came at 1 a.m. and heard evidence that the robbery began after 2 a.m. Defense counsel fully cross-examined both Smith and Sergeant Swanson in an attempt to undermine their credibility. He also called into question the accuracy of defendant's recorded statement in closing argument, arguing that the officers "had put words into" defendant's mouth. Yet, despite this effort, the jury still returned a verdict of guilty. We have already determined that the evidence against defendant was overwhelming; any failure to point out the time discrepancy between the stipulation and other evidence does not raise a reasonable probability that the verdict would have been different.

¶ 88 Defendant makes a cursory argument that trial counsel was also ineffective for failing to propose jury instructions regarding mistakes of fact (I. P. I Crim. 24-25.24) and criminal intent (I. P. I. Crim. 5.01A). He asserts that, because he testified that he had not believed the other men were serious in planning the robbery and that he did not intend to help them, the

instructions would have been relevant to the jury's consideration of guilt. He provides no legal citation relevant to the issue of ineffectiveness in the context of jury instructions. Regardless, his claim of ineffective assistance must fail where he has again shown no prejudice. Given the overwhelming evidence, the requested instructions would not have changed the jury's ultimate verdict; particularly where defendant's testimony that he did not believe the robbery plans were "serious" was contradicted by his own recorded statement to the police. Therefore, defendant has failed to meet his burden and we cannot find that defense counsel was constitutionally ineffective.

¶ 89 III. CONCLUSION

¶ 90 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 91 Affirmed.