2018 IL App (1st) 151313-U

No. 1-15-1313

Order filed May 24, 2018

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 12 CR 18945
	)	
RAYSHAWN HUNT,	)	Honorable
	)	Brian K. Flaherty,
Defendant-Appellant.	)	Judge presiding.

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justice McBride concurred in the judgment.
Justice Gordon specially concurred.

ORDER

¶ 1 *Held*: We affirm defendant's convictions for armed robbery and aggravated kidnaping where the trial court did not err in denying his pretrial motion *in limine* to bar the use of certain photographs at trial, his constitutional rights to confrontation and due process were not violated by a police officer's testimony and the State did not assert facts not in evidence during closing argument.

¶ 2 Following a jury trial, defendant Rayshawn Hunt was found guilty of armed robbery and aggravated kidnaping, and the trial court sentenced him to concurrent terms of 26 years' and 21

years' imprisonment, respectively. On appeal, defendant contends that: (1) the trial court erred in denying his pretrial motion *in limine* to bar the State's use of photographs found on his cell phone purporting to show some of the merchandise taken during the robbery; (2) his constitutional rights to confrontation and due process were violated when the State elicited testimony that, after a police officer interviewed a non-testifying co-offender, he became a suspect in the crimes; and (3) he was denied his right to a fair trial when, during closing argument, the State asserted facts not in the evidence. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 A. Pretrial

¶ 5 A grand jury indicted defendant on four counts of armed robbery, four counts of aggravated kidnaping and three counts of aggravated unlawful restraint based on him allegedly taking merchandise from a clothing store at gunpoint and forcing the store's owner and a customer into the back of the store.

¶ 6 Prior to trial, defendant filed a motion *in limine*, in part, seeking to bar the State from introducing into evidence "[a]ny and all reference to photos from a cell phone SD card," which purported to show jeans taken during the robbery. Defendant argued that the State would not be able to lay a proper foundation for any of the photographs because it was unknown who took them, when they were taken, and if they had been altered in any way. He posited that there was no way to know if the photographs "accurately represent[ed]" what they purported to show, *i.e.*, some of the stolen merchandise. The State responded that defendant's argument concerned the "weight" to be afforded to the photographic evidence rather than their admissibility, and it would be able to sufficiently lay a foundation for the evidence.

¶ 7 The trial court denied the motion as it related to barring the admission of the photographs, finding that the State would be able to lay a foundation for them and the issues raised in the motion went to the weight afforded to the photographic evidence, and not their admissibility. Moreover, the court asserted that defendant would be able to cast doubt upon the photographs on cross-examination. The State proceeded to trial on three counts: one count of armed robbery and two counts of aggravated kidnaping.

¶ 8 B. The State's Case

¶ 9 The State's evidence consisted primarily of the testimony of Michael Culbreath, one of the victims, and Detectives Kristopher Vallow and Paul Morache of the Park Forest Police Department. The evidence revealed that, in July 2012, Culbreath owned a clothing and apparel store called M&S Swag located in Park Forest where among the items he sold were designer jeans from the brand True Religion.

¶ 10 In the early evening of July 28, 2012, a man named Billy Johnson, who had previously visited the store two or three times, entered the store. A short time later while Culbreath was showing Johnson some merchandise, another man, identified at trial as defendant, entered the store wearing a black ski mask and armed with .38-caliber black firearm with a short muzzle. Culbreath knew the weapon was a .38-caliber as he had worked as a security guard and carried that type of firearm. Defendant stood approximately five-foot six- or seven-inches tall with a slender build and had a black baseball hat on that came down to about his hairline. The mask he wore covered his face from his nose to his chin, though Culbreath could see parts of his face depending on the angle.

¶ 11 After entering the store, defendant pointed the firearm at Culbreath, said "you know what this is" and instructed Culbreath to empty the cash register, which had approximately $200. As

Culbreath emptied the cash register, Johnson took the battery out of the cordless store phone based on defendant's command. After Culbreath gave defendant the money, defendant ordered Culbreath to empty his pockets. Culbreath took out his cell phone, but left money, and gave the phone to defendant. Defendant subsequently patted Culbreath down, located $200 or $300 in his pocket, took the money and told Culbreath that he "should shoot" Culbreath for lying.

¶ 12 Next, defendant pointed to the wall which contained jeans and hats, and instructed Johnson and Culbreath to put the merchandise in the store's black retail bags. They filled up four or five bags of merchandise, which included some True Religion jeans. Defendant then instructed both Culbreath and Johnson to walk to the back of the store and then to a nearby bathroom, where defendant instructed Johnson to tie Culbreath up with a shoestring that defendant had on him. After being tied "loosely" to a rail in the bathroom, Culbreath saw defendant make a phone call. Defendant returned to Johnson and Culbreath, and directed Johnson to tie himself up with another shoestring. Defendant proceeded to the main area of the store, and although Culbreath could no longer see him, he could hear the store's door open and close multiple times. Three minutes after the door closed for the final time, Culbreath untied himself, left the bathroom and pushed a silent alarm to alert the police.

¶ 13 While waiting for the police to arrive, Culbreath did not perform any type of inventory check. A few minutes later, Officer Mitchell Greer of the Park Forest Police Department arrived and spoke to Culbreath and Johnson. Culbreath told Greer what happened, showed him where the items were taken from and described defendant, but never told Greer that he recognized defendant. According to Greer, Culbreath was confident about what had been taken based on the merchandise remaining at the store.

¶ 14 Shortly after Greer spoke to Culbreath, Detective Vallow arrived. Greer summarized the incident to Vallow, who then questioned Culbreath and Johnson. Vallow obtained contact information for both men and also searched the store for evidence. Vallow observed two retail bags on the floor and located latent fingerprints on the countertop near the cash register and on the glass window of the store's entrance door, but did not find any fingerprints on the store's phone, in the bathroom or on the handle of the store's entrance door. Vallow also noticed a "couple smudges" on the store's outside window, so he took a cotton swab sample of them. In the back of the store, Vallow found two shoeprints and two shoestrings. Vallow collected the evidence so he could submit them for analysis. After the robbery, Culbreath closed his store.

¶ 15 Vallow next attempted to find Culbreath's cell phone using various investigative methods, but none of them were successful. Vallow also attempted to contact Culbreath and Johnson, but had difficulties. When Vallow went back to M&S Swag, he learned it had closed, and when he went to the address where Johnson said he lived, "it was not a valid address." Over the next month, Culbreath thought about the crime and realized that defendant had been inside his store three times prior to July 28, 2012, and in fact, Culbreath had spoken to him, though Culbreath did not know defendant's name. One time, defendant attempted to negotiate the price of Culbreath's merchandise. And on two of the occasions, Johnson had accompanied defendant.

¶ 16 On August 27, 2012, at the police's direction, Culbreath went to the police station and told them that he had seen both defendant and Johnson previously at his store. Based on what Culbreath said at the station, Vallow believed that Johnson was a person of interest. Four days later, Vallow responded to an armed robbery in the vicinity of the 100 block of Indianwood Boulevard in Park Forest, which resulted in Johnson being arrested as well as another person, Devon Oliver. In a garbage can near the scene of the crime, Vallow recovered a black or blue

steel .38-caliber revolver with a wooden handle, which at trial, he identified as People's Exhibit No. 33. Later, Vallow spoke to Johnson at the police station, and based on their conversation, Vallow determined that defendant was a suspect in the armed robbery of M&S Swag. Vallow subsequently searched social media websites for a connection between Johnson and defendant, and located a Facebook page containing a photograph of defendant inside M&S Swag, which at trial, he identified as People's Exhibit No. 27. Because Vallow had scheduled days off, Detective Morache contacted Culbreath in order to conduct a photo array with him.

¶ 17 On September 2, 2012, Culbreath went to the police station, viewed a photo array and immediately identified defendant as the offender. At trial, Culbreath stated that he was "[o]ne-hundred percent" sure defendant was the culprit. Morache did not use a photograph of Oliver because he did not match the physical characteristics, including height and weight, of defendant. The police also showed Culbreath a photograph of the .38-caliber revolver that was found in the garbage bin, and he responded that it was the firearm he "got robbed with." At trial, Culbreath identified the firearm as People's Exhibit No. 33. Based on Culbreath's identification during the photo array, when Vallow returned to work, he attempted to locate defendant.

¶ 18 On September 14, 2012, Culbreath ran into defendant at a Chase bank. Defendant said "hey" or "what's up" to Culbreath, but he looked at defendant and continued walking into a banker's office. Culbreath did not call the police following the encounter because he "thought [defendant] was arrested already" based on the photo array identification and had simply been released from custody. Three days later, Vallow located defendant and arrested him. Vallow also recovered a cell phone from defendant. During processing, defendant told Vallow that he lived on the 100 block of Indianwood Boulevard in Park Forest. According to Morache, after being arrested, defendant stated he was five-foot seven-inches tall and weighed 135 pounds.

¶ 19 The following day, again at the direction of the police, Culbreath went to the police station. There, he told the police that he had ran into defendant at the bank. Additionally, Culbreath viewed a lineup in which each participant said "you know what this is," and recognized defendant's voice as the offender's. Culbreath subsequently identified defendant as the offender. According to Vallow, Culbreath stated that he was "one-hundred percent" sure that defendant was the offender.

¶ 20 In May 2013, Vallow obtained a search warrant for defendant's cell phone, which allowed Vallow to insert the phone's SD card, or memory card, into a reader and view the photographs stored on the card. Three photographs caught Vallow's eye. One was the same photograph he observed on Facebook of defendant in the M&S Swag store, which had a digital time stamp of August 5, 2012, a date after the store had already closed. At trial, Vallow identified this photograph as People's Exhibit No. 27. The other two photographs showed several pairs of jeans, which had digital time stamps of July 30, 2012 and August 9, 2012. At trial, Vallow identified these photographs as People's Exhibit Nos. 28 and 29, respectively. People's Exhibit No. 28 consisted of seven pairs of folded jeans arranged in two columns of three pairs and one column of one pair, all on top of what appears to be a plaid comforter. People's Exhibit No. 29 consisted of eight pairs of folded jeans arranged in two rows of three pairs and one row of two pairs, all on top of what appears to be a wood floor.

¶ 21 The following month, because Culbreath had moved out of state, Vallow e-mailed him the three photographs. At trial, Culbreath also identified People's Exhibit No. 27 as defendant taking a photograph of himself at M&S Swag as well as People's Exhibit Nos. 28 and 29 as several pairs of True Religion jeans, a brand of high-end designer jeans, all of which he sold in his store on the day of the robbery and all of which were taken during the robbery. He explained

that, although the jeans were not custom made and were available at other stores, two of them, which appeared in both photographs, had rare designs. He highlighted that one pair of jeans spelled "True Religion" in a horseshoe pattern which was "very rare" and another pair of jeans had a faded look, which was also rare. Culbreath testified that he sold both designs in his store on the day of the robbery, and they were among the designs of jeans taken from his store that day. This led Culbreath to believe that the jeans depicted in the photographs were the actual ones taken from his store, though he acknowledged his belief was based only on the designs, his recollection of what he bought and his recollection of what was taken, not serial numbers or any other descriptor.

¶ 22 Lastly, the State presented forensic evidence that showed defendant's fingerprints did not match any of those found in the store or found on any other evidence collected from the store. His DNA also did not appear on any of the evidence.

¶ 23 C. Defendant's Case

¶ 24 Defendant testified that, in July 2012, he had graduated from high school and was working fulltime as a truck loader at a factory. Defendant acknowledged previously visiting M&S Swag with Johnson, his cousin, and speaking to Culbreath. Defendant also acknowledged taking a photograph of himself at the store, which he identified as People's Exhibit No. 27, though he could not recall when he took it. Defendant, however, denied being at, or robbing, M&S Swag on July 28, 2012, but could not remember where he was that night.

¶ 25 At some point prior to being arrested for the instant offenses, defendant obtained a new cell phone and transferred his SD card from the old phone to his new phone, but he could not recall when. When shown People's Exhibit Nos. 28 and 29 at trial, defendant denied knowing anything about the photographs, including who took them. He explained that they ended up on

his cell phone "[f]rom a forwarding text, like an advertisement," a text message that went to several people, not just him. But defendant could not remember who sent him the text because he received it "so long" ago.

¶ 26 D. Verdict and Sentencing

¶ 27 Following closing argument, the jury found defendant guilty of one count of armed robbery and two counts of aggravated kidnaping. Defendant moved for a new trial, arguing, in part, that there was insufficient evidence to convict him of the offenses, the trial court erred in denying his pretrial motion *in limine* to bar the use of the photographs found on his SD card and the State argued facts not in evidence during closing argument. The trial court denied his motion. It subsequently merged the aggravated kidnaping counts together and sentenced defendant to concurrent terms of 26 years' imprisonment for armed robbery and 21 years' imprisonment for aggravated kidnaping. This appeal followed.

¶ 28 II. ANALYSIS

¶ 29 A. The Admissibility of the Photographs

¶ 30 Defendant first contends that the trial court erred in denying his pretrial motion *in limine*, which allowed the State to admit the photographs of the True Religion jeans, People's Exhibit Nos. 28 and 29, into evidence, because the foundation for their admission was inadequate. Specifically, defendant argues that the State did not establish that the jeans in the photographs were what it purported the jeans to be, *i.e.*, some of the stolen merchandise from M&S Swag.

¶ 31 "Photographs, like any evidence, may be admitted into evidence when authenticated and relevant either to illustrate or corroborate the testimony of a witness, or to act as probative or real evidence of what the photograph depicts." *People v. Smith*, 152 Ill. 2d 229, 263 (1992). Both authentication and relevancy are conditions precedent to the admissibility of photographic

evidence. See Ill. Rs. Evid. 402, 901(a) (eff. Jan. 1, 2011). While both are condition precedents, defendant focuses his argument on the authentication component. In order for photographs to be authenticated, the proponent of the evidence must lay a proper foundation, which requires evidence that the photographs are what they claim to be. *People v. Ziemba*, 2018 IL App (2d) 170048, ¶ 51; Ill. R. Evid. 901(a) (eff. Jan. 1, 2011).

¶ 32 Although there are many ways to authenticate evidence, including photographs, one such method is "[t]estimony that a matter is what it is claim[s] to be" by a witness with knowledge. Ill. R. Evid. 901(b)(1) (eff. Jan. 1, 2011). The proponent of the evidence only needs to prove a rational basis upon which the fact finder can conclude that the photographs accurately portray what they purport to show. *Ziemba*, 2018 IL App (2d) 170048, ¶ 51; *People v. Johnson*, 2016 IL App (4th) 150004, ¶ 63. The proponent can meet this burden using either direct or circumstantial evidence. *Ziemba*, 2018 IL App (2d) 170048, ¶ 52. "Circumstantial evidence of authenticity includes such factors as appearance, contents, substance, and distinctive characteristics, which are to be considered with the surrounding circumstances." *Id.*

¶ 33 Even if the proponent meets its burden, a "finding of authentication is merely a finding that there is sufficient evidence to justify presentation of the offered evidence to the trier of fact and does not preclude the opponent from contesting the genuineness of the [evidence] after the basic authentication requirements are satisfied." *People v. Downin*, 357 Ill. App. 3d 193, 202-03 (2005). As the trial court merely acts as a screener, the issue of the evidence's authenticity ultimately becomes one for the jury to determine. *Ziemba*, 2018 IL App (2d) 170048, ¶ 51; *Downin*, 357 Ill. App. 3d at 203. The court's ruling to allow such evidence to be admitted at trial will not be reversed absent an abuse of discretion (*Smith*, 152 Ill. 2d at 263), which occurs only

when its decision is "arbitrary, fanciful, or unreasonable or where no reasonable person would take the court's view." *Ziemba*, 2018 IL App (2d) 170048, ¶ 50.

¶ 34 In this case, in denying defendant's pretrial motion *in limine*, the trial court determined that the State would be able to lay a foundation for the admission of the photographs into evidence. The State attempted to lay that foundation through the testimony of Michael Culbreath, the owner of M&S Swag, who testified that the jeans depicted in the photographs were True Religion jeans, a brand of high-end designer jeans that he sold in his store on the day of the robbery. Culbreath noted that, in the photographs, one pair of jeans spelled "True Religion" in a horseshoe pattern which he commented was "very rare" and another pair of jeans had a faded look, which was also rare, though he acknowledged other stores sold both designs. Culbreath testified that he sold both designs in his store on the day of the robbery, and those designs were among the jeans stolen that day. Culbreath also conceded that the other designs of jeans in the photographs were not rare, but asserted he carried all of those designs at his store, and they, too, were among the designs of jeans stolen from the store. Based on this, Culbreath believed that the jeans in the photographs appeared to be the same ones taken from his store.

¶ 35 This testimony from Culbreath, who had knowledge concerning the jeans, provided circumstantial evidence that the jeans depicted in the photographs were what the State claimed them to be, *i.e.*, some of the stolen jeans from M&S Swag. Notably, Culbreath asserted that two of the jeans had rare designs, and this fact coupled with his testimony that he sold them at his store and they were taken in the robbery was circumstantial evidence that the jeans were the stolen merchandise. See *id.* ¶ 52 (stating that circumstantial evidence of authenticity includes such factors as appearance, contents, substance, and distinctive characteristics, which are to be considered with the surrounding circumstances). This circumstantial evidence provided a rational

basis upon which the jury could conclude that the photographs accurately portrayed the stolen jeans. See *id.* ¶ 51; *Johnson,* 2016 IL App (4th) 150004, ¶ 63). Given this, the trial court's ruling that the State would be able to lay a foundation for the photographs to be admitted into evidence was not arbitrary, fanciful, or unreasonable.

¶ 36 Nevertheless, defendant argues that Culbreath only identified the jeans by design and could not identify the jeans by an inventory label, a serial number, store tags or even by an accounting of what precisely was taken from his store. However, this goes to the weight afforded to the evidence, not its admissibility. See *Downin,* 357 Ill. App. 3d at 202-03 (providing that, even if photographic evidence is allowed to be admitted into evidence, a "finding of authentication is merely a finding that there is sufficient evidence to justify presentation of the offered evidence to the trier of fact and does not preclude the opponent from contesting the genuineness of the [photographs] after the basic authentication requirements are satisfied"). And during cross-examination of Culbreath and Detective Vallow at trial, defense counsel brought out various issues with the photographs, including that they did not actually know who took the photographs, when they were taken or where they were taken. Consequently, the trial court did not abuse its discretion when it denied defendant's pretrial motion *in limine* and allowed the photographs to be admitted into evidence.

¶ 37 B. Confrontation and Due Process Rights

¶ 38 Defendant next contends that his constitutional rights to confrontation and due process were violated when Detective Vallow testified that, after speaking with Billy Johnson, defendant became a suspect in the armed robbery of M&S Swag. At trial, the State elicited the following testimony from Vallow:

> "Q. All right. Now, after this conversation with Mr. Culbreath on the 27th, did you then meet with Mr. Billy Johnson again on August 31?
> A. Yes.
> Q. Where was that at?
> A. At the Park Forest Police Department.
> Q. Did you have a conversation with Billy Johnson?
> A. Yes.
> Q. After having a conversation with Billy Johnson, did you have a suspect in this case?
> A. Yes. One was developed.
> Q. Who was that?
> A. Mr. Rayshawn Hunt."

Defendant highlights that, during closing argument, the State posited that the armed robbery was an inside job where Johnson pretended to be a customer at the store during the robbery, but was actually an accomplice. Defendant therefore argues that, based on Vallow's testimony, the jury became aware that Johnson, a non-testifying co-offender, inculpated him in the crimes in violation of the line of cases following *Bruton v. United States*, 391 U.S. 123 (1968).

¶ 39 Initially, defendant acknowledges that he did not preserve this claim of error for review by objecting at trial to the testimony at issue (see *People v. Smith*, 2016 IL 119659, ¶ 38), but argues we may review the claim under the plain-error doctrine. Under the doctrine, we may review an unpreserved claim of error if the error is clear or obvious, 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. McDonald*, 2016 IL 118882, ¶ 48. The first step in any plain-error analysis is to determine whether an error actually occurred because absent an error, there can be no plain error. *Smith*, 2016 IL 119659, ¶ 39. We accordingly turn to defendant's confrontation and due process claims.

¶ 40 The sixth amendment of the United States Constitution and article I, section 8, of the Illinois Constitution guarantee a defendant the right to confront the witnesses against him. U.S. Const., amend. VI; Ill. Const. 1970, art. I, § 8. The crux of this right is the ability of a defendant to cross-examine adversarial witnesses (*Michigan v. Bryant*, 562 U.S. 344, 358 (2011)), and it protects the defendant from testimonial hearsay. *Davis v. Washington*, 547 U.S. 813, 823-24 (2006). Hearsay is a statement, other than one made by the declarant while testifying at trial, offered into evidence to prove the truth of the matter asserted. *People v. Leach*, 2012 IL 111534, ¶ 66. Testimonial statements are those made to law enforcement where the circumstances reveal there is no ongoing emergency and the "primary purpose" of the police questioning "is to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 547 U.S. at 822. The defendant's due process rights are also potentially implicated because depriving him of the opportunity to cross-examine the witnesses against him is a denial of the guarantee of due process as provided by the fourteen amendment. *Pointer v. Texas*, 380 U.S. 400, 405 (1965).

¶ 41 With this backdrop, we turn to *Bruton*, 391 U.S. at 124, where a defendant and his co-defendant were tried jointly for armed postal robbery. The co-defendant did not testify at the trial, but a postal inspector did and stated that the co-defendant confessed to him and implicated defendant in the crime. *Id.* at 124, 136. The United States Supreme Court observed that when a co-defendant inculpates another person, the credibility of the co-defendant "is inevitably suspect" given the clear "motivation to shift blame onto others." *Id.* at 135-36. The Court remarked that "[t]he unreliability of such evidence is intolerably compounded when the alleged accomplice *** does not testify and cannot be tested by cross-examination" and "[i]t was against such threats to a fair trial that the Confrontation Clause was directed." *Id.* at 136. Based on this,

the Court found that the postal inspector's hearsay testimony about the confession violated the defendant's rights to confront and cross-examine the witnesses against him. *Id.* at 137.

¶ 42 Although *Bruton* involved inculpatory out-of-court statements from a co-defendant, "Illinois courts responded to *Bruton* by finding that testimony by witnesses recounting the inculpatory substance of conversations with non-testifying persons (often, but not always, co-defendants) could be reversible error." *People v. Sample*, 326 Ill. App. 3d 914, 920 (2001) (citing cases). Despite this development from *Bruton*, our supreme court has cautioned that not all testimony in which the defendant is implicated is hearsay.

¶ 43 In *People v. Gacho*, 122 Ill. 2d 221, 247-48 (1988), a police officer testified that he spoke to the victim of a shooting at the hospital and based on that conversation, he began searching for the defendant. Our supreme court stated "[h]ad the substance of the conversation that [the officer] had with [the victim] been testified to, it would have been objectionable as hearsay." *Id.* at 248. But the court concluded the officer's testimony "was not of the conversation with [the victim] but to what he did and to investigatory procedure." *Id.* The court according found nothing improper about the officer's testimony because " '[s]uch testimony is not hearsay because it is based on the officers' own personal knowledge, and is admissible although the inference logically to be drawn therefrom is that the information received motivated the officers' subsequent conduct.' " *Id.* (quoting *People v. Hunter*, 124 Ill. App. 3d 516, 529 (1984)).

¶ 44 What *Gacho* makes clear is that the police can testify about statements made by others when that testimony is not offered to prove the truth of the matter asserted, but rather to show the steps taken by police that ultimately led to the defendant's arrest. *People v. Pulliam*, 176 Ill. 2d 261, 274 (1997); *People v. Risper*, 2015 IL App (1st) 130993, ¶ 39. When testimony is admitted into evidence on this basis, it is not admissible as an exception to the hearsay rule, but instead is

simply not hearsay. *Risper*, 2015 IL App (1st) 130993, ¶ 39. "The relevance of the testimony lies in explaining to the jury how a law enforcement investigation led to the defendant. Without such testimony, a jury might not understand how an officer got from point A to point C; it might appear to the jury that the officer had less than a valid basis for considering the defendant to be a suspect." *Id.* However, the potential misuse of testimony to detail the progress of a police investigation is great. *People v. Rush*, 401 Ill. App. 3d 1, 15 (2010). As such, "an officer's testimony that he acted upon information received, or words to that effect, should be sufficient." *Id.* Where testimony is admitted at trial "for the limited purpose of explaining why the police acted as they did in their investigation, the court must specifically instruct the jury that the statement is introduced for a limited purpose and that the jury is not to accept the statement for the truth of its contents." *People v. Armstead*, 322 Ill. App. 3d 1, 12 (2001).

¶ 45 In this case, Vallow's testimony was nearly identical to that in *Gacho*. He testified that, after he met with Billy Johnson at the police station on August 31, 2012, defendant became a suspect in the armed robbery of M&S Swag. This led Vallow to search social media for a connection between Johnson and defendant, which ultimately resulted in Vallow finding the Facebook photograph of defendant inside M&S Swag. With this information in hand, Detective Morache created the photo array in which Culbreath identified defendant as the offender and eventually, based on that identification, Vallow arrested defendant. Thus, Vallow's testimony that, after his conversation with Johnson, defendant became a suspect was merely to show an intermediate investigative step that ultimately led to defendant's arrest, not to actually prove that defendant was the offender. See *Risper*, 2015 IL App (1st) 130993, ¶ 39.

¶ 46 The evidence used to prove that defendant was, in fact, the armed robber came from Culbreath's identification of him in the photo array, lineup and at trial as well as the

photographic evidence corroborating the identifications. Vallow's fleeting testimony regarding his conversation with Johnson merely bridged the investigative gaps to the identification evidence. Because Vallow's testimony recounted the steps taken during the investigation, the admission of the testimony did not violate defendant's sixth amendment right to confrontation or his due process rights. See *id.* ¶ 40. We do note that, while the trial court did not give the jury a limiting instruction to consider the testimony only for a limited purpose and not accept the statement for the truth of its contents, defense counsel did not request such an instruction and, therefore, the matter is forfeited. See *Rush*, 401 Ill. App. 3d at 16.

¶ 47 Although defendant likens the testimony at his trial to that of *People v. Sample*, 326 Ill. App. 3d 914 (2001), we disagree. There, two police officers testified that, after they spoke with two co-defendants, they searched for the defendant. *Id.* at 921-23. However, the references to the defendant were not fleeting, but rather "serial questions" intended "to build the inference that defendant was named by his criminal cohorts." *Id.* at 922. Because of "the repetition of strong inferences that his co-defendants implicated [the] defendant in the crimes," the court held that the boundaries set for testimony on an investigative process were exceeded. *Id.* at 924.

¶ 48 In finding this way, the court in *Sample* remarked that the State "did not simply conduct a *Gacho*-style exchange concerning the process of investigation" but rather went much further and more detailed. *Id.* at 922. In *Gacho*, 122 Ill. 2d at 247-48, as discussed, a police officer testified that he spoke to the victim at the hospital and based on that conversation, he began searching for the defendant. The circumstances in the present case were nearly identical to those of *Gacho* and ostensibly much more resemble a *Gacho*-style exchange than the serial questioning in *Sample*. Critically, Vallow's testimony on his conversation with Johnson was brief, as he merely testified that, after speaking with Johnson, defendant became a suspect. When Vallow testified this way,

he did so properly to recount the investigative steps he took which ultimately led to defendant's arrest. Because Vallow testified properly, there was no error in allowing his testimony and consequently, there is no plain error. See *Smith*, 2016 IL 119659, ¶ 39.

¶ 49 C. Closing Argument

¶ 50 Defendant lastly contends that he was deprived of a fair trial when, during closing argument, the State asserted facts not in the evidence. Specifically, defendant argues that the State used Detective Vallow's testimony that the photographs depicted in People's Exhibit Nos. 28 and 29 were saved in a subfolder of his phone titled "camera" to posit that he took the photographs of the jeans himself rather than downloading them from an external source.

¶ 51 At trial, Vallow testified that, after he obtained the search warrant for defendant's cell phone, he entered the SD card into a card reader and located a folder called DCIM, or digital camera imaging, in which he observed the photographs depicting the several pairs of jeans. In addition to this folder, Vallow also observed the same photographs in two "sub-file folders," one titled "thumbnails" and one titled "camera."

¶ 52 Faced with this evidence, during defendant's closing argument, defense counsel attempted to mitigate the impact of the photographic evidence, primarily by casting doubt upon the accuracy of their digital time stamps. Counsel highlighted that, in People's Exhibit No. 27, the photograph of defendant at M&S Swag, the digital time stamp bore the date August 5, 2012, which was *after* the store had already closed. Counsel therefore argued that the time stamps of the photographs of the jeans, People's Exhibit Nos. 28 and 29, of July 30, 2012 and August 9, 2012, were also inaccurate. Following this argument, counsel also reiterated defendant's claim that he received the photographs of the jeans after someone sent him a text message with the photographs attached.

¶ 53 In refuting defense counsel's contentions, during its rebuttal closing argument, the State argued that, although defendant claimed the photographs ended up on his cell phone because of a forwarding text, the photographs "weren't in the download [folder]" but rather "in the camera folder." The State posited that the location of the photographs "tells you it wasn't part of a text or a forward." Defense counsel objected to this argument based on a lack of testimony "in that regard." In response, the trial court reminded the jury that "what the lawyers say is not evidence" and to use its "collective memory during deliberations as to what the evidence" was.

¶ 54 Defendant posits that, based on the State's rebuttal closing argument compared to the evidence elicited at trial, it asserted facts that were never introduced into evidence and were of questionable accuracy, *i.e.*, that the specific subfolders in which digital photographs were saved can demonstrate whether the photographs were taken using the cell phone itself rather than downloaded from another source such as an e-mail or text message.

¶ 55 During closing argument, the State has wide latitude in its remarks. *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007). The State may comment on the evidence presented and draw reasonable or fair inferences from that evidence, even if they reflect poorly on the defendant. *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005). The State may also respond to arguments from defense counsel that clearly provoke a response. *People v. Hudson*, 157 Ill. 2d 401, 441 (1993). However, the State may not argue assumptions or facts that are not supported by the record. *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). When viewing challenged comments, we must consider them in their full context and view the closing arguments in their totality. *Nicholas*, 218 Ill. 2d at 122. If the State makes improper comments during argument, reversal is not automatic, as we must ask whether the comments "engender[ed] substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilt resulted from them." *Wheeler*,

226 Ill. 2d at 123. "Misconduct in closing argument is substantial and warrants reversal and a new trial if the improper remarks constituted a material factor in a defendant's conviction." *Id.*

¶ 56 The appropriate standard of review is uncertain. In *Wheeler*, our supreme court applied a *de novo* standard of review (*id.* at 121) while in *People v. Blue*, 189 Ill. 2d 99, 128 (2000), our supreme court applied an abuse of discretion standard. See *People v. Irwin*, 2017 IL App (1st) 150054, ¶ 55 (acknowledging the uncertainty regarding the standard of review). However, we need not resolve this conflict, as our holding would be the same under either standard.

¶ 57 In this case, the State's argument was provoked by defense counsel's argument and a reasonable inference based on the evidence elicited at trial. In an attempt to rebut defense counsel's position that the photographs of the jeans found on defendant's cell phone were innocuous, the State argued that the location of the photographs in a folder titled "camera" on defendant's SD card showed that he took the photographs with his own cell phone rather than being obtained from a forwarding text like he claimed at trial. In this manner, the State's argument that the photographs were not innocuous, but rather critical evidence that defendant was the individual who stole the jeans from M&S Swag was directly responsive to defense counsel's argument. See *Hudson*, 157 Ill. 2d at 441 (the State may respond to an argument that clearly provokes a response). Nevertheless, even if provoked, the State's response must still be based on the evidence or a reasonable inference therefrom. *Glasper*, 234 Ill. 2d at 204; *Nicholas*, 218 Ill. 2d at 121. And the State's argument that defendant must have taken the photographs himself rather than receiving them from another source based on their location in a "camera" folder instead of another folder, such as a download folder, was a fair and reasonable deduction based on Vallow's testimony. Accordingly, the State's argument was proper.

¶ 58 III. CONCLUSION

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

¶ 60 Affirmed.

¶ 61 JUSTICE GORDON, specially concurring:

¶ 62 I agree with the majority on all of the issues in this case except the majority's analysis of the rebuttal closing argument of the State. As a result, I must write separately.

¶ 63 It is true that defense counsel in his closing argument attempted to mitigate the impact of the photographic evidence by showing the inaccuracy of a digital time stamp on one of the photos when the time stamp bearing the date of August 5, 2012, was after the store had already closed. Defense counsel's argument was based on the evidence and the reasonable inference that, if the stamp of August 5, 2012, was inaccurate, all the time stamps may have been inaccurate. The State in its rebuttal did not base its argument on the evidence or any reasonable inference from the evidence. The State argued that, although defendant claimed the photographs ended up on his cell phone because of a forwarding text, the photographs "weren't in the download [folder]" but rather "in the camera folder." The State argued that the location of the photograph "tells you it wasn't part of a text or a forward."

¶ 64 The State's argument was not based on any evidence or any reasonable inference from any evidence elicited in this case. Criminal juries are made up of 12 people and not all of them are computer or iPhone oriented. They may be inclined to believe scientific information that is given to them by a lawyer when the court fails to sustain an objection to the testimony. When defense counsel objected, the trial court did not rule on the objection but instead reminded the jury that "what the lawyers say is not evidence" and to use its "collective memory during deliberations as to what the evidence is." If this is a true scientific fact, then the State had the obligation to ask the trial court to take judicial notice of the information given to the jury. By not

ruling on the objection, the trial court gave credence to the State's rebuttal argument. The State's argument went too far because it asserted facts that were never introduced into evidence claiming that the specific subfolders in which digital photographs were saved demonstrates that the photographs were taken by using a cell phone rather than downloading from another source such as an email or text message.

¶ 65 For the majority to find that "the State's argument was proper" (*supra*, ¶ 57) is wrong. To find that the State had provocation to argue facts not in evidence is wrong because the defense's argument was based on the evidence and a reasonable inference from that evidence and the State's argument was not. *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). The majority is telling the legal community and the community at large that it is appropriate for the State to make a rebuttal argument that has no basis in the evidence under the facts in this case. I disagree.

¶ 66 However, in this case the evidence against defendant was overwhelming and the misconduct of the State in its rebuttal closing argument was harmless error because the improper remarks were not a material factor in defendant's conviction. *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007). The eyewitness identification testimony of the victim was strong and the photographic evidence supported the convictions.