2020 IL App (5th) 160355-U

NO. 5-16-0355

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Clay County.
	)	
v.	)	No. 14-CM-66
	)	
RONALD D. COLLINS,	)	Honorable
	)	Wm. Robin Todd,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE WHARTON delivered the judgment of the court.
Presiding Justice Welch and Justice Overstreet concurred in the judgment.

ORDER

¶ 1 *Held*: Where the defendant, Ronald D. Collins, alleged prosecutorial misconduct but did not preserve the issue for appellate review and was not able to meet the standards of plain error review, we affirm. Where the trial court allowed the State to ask a foundational question about a surveillance video, the trial court did not commit reversible error. Where a lay opinion witness provided testimony about perceived movement seen on a surveillance video and the witness was more likely to correctly identify the movement than the jury, the trial court did not abuse its discretion in allowing the testimony. Where the defendant's attorney did not provide ineffective assistance of counsel by not seeking redaction of the defendant's interview video, we affirm.

¶ 2 The defendant, Ronald D. Collins, was found guilty of misdemeanor sexual exploitation of a child. He was sentenced to 24 months of probation. The defendant appeals arguing that prosecutorial misconduct denied him a fair trial, that the trial court committed reversible error by allowing a police officer to provide testimony about a surveillance video, and that trial counsel

was ineffective for not asking the court to redact his interview video. For the reasons stated in this order, we affirm.

¶ 3 I. BACKGROUND

¶ 4 On July 16, 2014, the State charged the defendant with one count of sexual exploitation of a child in violation of section 11-9.1(a)(2) of the Criminal Code of 2012 (a misdemeanor) for allegedly exposing his sex organ in the presence of two minor girls for his own sexual gratification. 720 ILCS 5/11-9.1(a)(2) (West 2012).

¶ 5 The events at issue in this case all occurred on a Walmart store parking lot in Flora on June 20, 2014. According to the defendant, he went to Walmart to shop. After he finished shopping, he returned to his truck on the parking lot. He noticed a van parked in a row opposite his row. There were two girls in the van that the defendant believed were 16 or 17 years of age. The two girls in the van, M.P. and E.P., were slightly younger than the defendant believed. On that date, M.P. was 13 years of age, and E.P. was 10 years of age. The defendant claimed that the two girls exposed their breasts to him. The defendant then moved his truck to a different parking spot, allegedly to contact his wife to ensure that he had purchased the correct item. Then the defendant moved his truck again and parked next to the van for the purpose of seeing if the two girls would flash him again. When they did not flash him, the defendant claims that he left the parking lot.

¶ 6 The two young girls told a different version of the events that took place on June 20, 2014, at the Flora Walmart parking lot. The two victims were with their mother who had gone into Walmart to shop. The victims decided to stay in their van. A man, parked in a truck across from their van, was staring at them. Both victims denied that they exposed their breasts to this man. They thought that the man left, but then he pulled into the empty parking spot next to them. After parking next to their van, M.P. stated that the man used his mobile phone to access photos of naked

women and held the phone at an angle so the two victims could see the photos. E.P. told police that she was not able to see any photos on the man's mobile phone. At trial, E.P. testified that she did see photos on the man's phone. M.P. said that the man then exited his truck, pulled out his penis, and began "touching it." When their mother came out of Walmart, the man got back into his truck and drove away. M.P. then exited the van and ran to tell her mother what had happened.

¶ 7 The case went to trial before a jury on April 11, 2016. M.P., E.P., and their mother, Elizabeth P., testified for the State about the events of June 20, 2014. Although Elizabeth P. was inside Walmart when the events occurred, she testified about what M.P. told her and about M.P.'s emotional demeanor. Chelsea Williams, a Walmart employee, testified about the video surveillance system in place at the Flora Walmart, and about her work with the Flora Police Department to locate the footage of the alleged parking lot events of June 20, 2014. Officer Jeremy Ruger of the Flora Police Department testified about the evening of June 20, 2014, when Elizabeth P. came to the department to report this man's actions and testified about his resulting investigation. Officer Ruger provided limited commentary to the surveillance video provided by Walmart, including some of the events that took place on June 20, 2014. He also introduced the videotaped interview of the defendant that was played for the jury. In this video, the defendant claimed that the victims flashed him, he acknowledged moving his truck and parking next to their van, he could not remember whether he exited his truck after parking next to their van, and he adamantly and repeatedly denied masturbatory activity.

¶ 8 After closing arguments and the court's instructions to the jury on April 12, 2016, the jury deliberated for 40 minutes before returning a guilty verdict. On June 13, 2016, the defendant was sentenced to 24 months of probation.

¶ 9 On July 12, 2016,—91 days after the guilty verdict—defense counsel filed a motion to arrest judgment, for a new trial, for a judgment notwithstanding the verdict, and for a new sentencing hearing or a reduced sentence. In this motion, the defendant raised the following issues: (1) that the State prejudiced him by naming E.P. as an additional crime victim solely because of her youthful appearance even though she witnessed nothing and could not therefore be a "victim"; (2) that during *voir dire*, the State mischaracterized the burden of proof, and although defense counsel's objection was sustained, the State's comments served to minimize the burden of proof in the minds of the prospective jurors; (3) that the trial court improperly denied his motion *in limine* to restrict the scope of the Walmart parking lot surveillance video, and that this error was compounded by Officer Ruger's testimony highlighting that portion of the video in which he believed there was movement between the two vehicles; (4) that the State improperly argued in closing that the defendant obscured a clear view from the Walmart surveillance camera by the manner in which he parked; (5) that the State improperly referred to the defendant's behavior on the parking lot as "stalking," and because the defendant was not charged with a stalking crime, the argument was impermissibly prejudicial; (6) that the State improperly referred to the defendant's behavior on the parking lot as "predatory," and this characterization was impermissibly prejudicial; (7) that the cumulative effect of all of the State's improper arguments and theories rendered the jury's verdict a nullity; and (8) that the defendant should not have had to register as a sex offender, and should have been sentenced to supervision.

¶ 10 The State filed a motion to strike those portions of the defendant's posttrial motion seeking a new trial, arrest of judgment, and/or judgment notwithstanding the verdict (seven of the eight arguments) on the basis that the motion was untimely because the defendant failed to file it within 30 days of the guilty verdict. The State also argued that the sentencing argument was meritless

because the trial court reviewed the relevant sentencing statutes and found that supervision was not statutorily allowed for a conviction of sexual exploitation of a child.

¶ 11 On August 15, 2016, the trial court granted the State's motion to strike the defendant's posttrial motion in its entirety. The defendant filed his notice of appeal the same day.

¶ 12 II. ANALYSIS

¶ 13 On appeal, the defendant raises three issues. First, he asks this court to reverse his conviction because the State committed prosecutorial misconduct that denied him the right to a fair trial. Second, he contends that the trial court abused its discretion by allowing a law enforcement witness to narrate and render opinions about a surveillance video. Finally, the defendant claims that his trial attorney was ineffective because he failed to seek redaction of his interview video that contained repetitive statements.

¶ 14 A. Jurisdiction

¶ 15 Before turning to the issues raised by the defendant on appeal, we briefly examine a jurisdictional issue. The trial court did not address any of the issues the defendant raises on appeal because it concluded that the posttrial motion was untimely. The defendant was convicted on April 12, 2016, and was sentenced on June 13, 2016. On July 12, 2016, the defendant filed his motion alleging trial-based issues as well as sentencing—91 days after he was found guilty and 29 days after he was sentenced.

¶ 16 The Illinois Code of Civil Procedure has various sections setting time limits by which a defendant must file a motion attacking aspects of a trial or the resulting judgment. "A written motion for a new trial shall be filed by the defendant within 30 days following *** the return of a verdict." 725 ILCS 5/116-1(b) (West 2014); see also 725 ILCS 5/116-2(a) (West 2014) ("A written

motion in arrest of judgment shall be filed by the defendant within 30 days following the entry of a verdict or finding of guilty.").

¶ 17 The trial court dismissed defendant's posttrial motion, including his sentencing-related issue, as untimely even though the motion was filed on the twenty-ninth day after he was sentenced. The final judgment in a criminal case is the entry of the sentence. *People v. Salem*, 2016 IL 118693, ¶ 12 (citing *People v. Baldwin*, 199 Ill. 2d 1, 5 (2002)). Because the case is not final until the defendant is sentenced, the trial court retains jurisdiction over the case. *People v. Talach*, 114 Ill. App. 3d 813, 818 (1983). Thus, the trial court may consider an untimely-filed posttrial motion, so long as the pleading was filed less than 30 days after sentencing. *Id.* The trial court has the discretion to either consider the merits of the motion or to dismiss the motion as untimely. *Id.* at 818-19. We find that although the defendant did not timely file his posttrial motion with respect to trial-based issues because the statutory 30 days had expired, the trial court utilized its discretion to refuse to hear the trial-related issues.

¶ 18 Although the defendant's posttrial motion was untimely with respect to trial-based issues, the defendant's motion also sought relief from his sentence. The defendant's sentencing posttrial motion appears to have been timely filed because he filed the motion 29 days after he was sentenced. We therefore have appellate jurisdiction in this case to address the defendant's appeal pursuant to Illinois Supreme Court Rule 606(b) (eff. Dec. 11, 2014). Rule 606(b) requires a defendant to file a notice of appeal within 30 days of the date of sentencing unless the defendant filed a timely posttrial motion which extends the deadline until 30 days after the trial court rules on the posttrial motion. Ill. S. Ct. R. 606(b) (eff. Dec. 11, 2014).

¶ 19 B. Prosecutorial Misconduct

¶ 20 The defendant raises several issues of prosecutorial misconduct. He contends that the prosecutor inappropriately referred to him during trial as a "predator," and accused him of "stalking" and "hunting" the two young victims. In addition, the defendant argues that the prosecutor used the defendant's statements to argue that he engaged in premeditated acts and deliberately avoided the surveillance cameras Walmart positioned to record the parking lot aisles. Finally, the defendant argues that the prosecutor improperly asked Officer Ruger to corroborate one of the victim's statements with the Walmart surveillance video.

¶ 21 In this case, trial counsel failed to object to the prosecutorial statements made in opening statements and closing arguments he challenges on appeal. In addition, counsel inconsistently objected to the testimony about what could be seen on the Walmart surveillance video. Furthermore, his trial counsel did not include any of these claims in his posttrial motion. To preserve an issue for review, defendant must object both at trial and in a written posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Failure to object at trial and in a posttrial motion operates as a forfeiture of those issues on appeal. *People v. Ward*, 154 Ill. 2d 272, 293 (1992). As such, the defendant has forfeited review of these claims unless we consider them under the plain error rule.

¶ 22 Supreme Court Rule 615(a) provides that "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). "The first step in a plain error analysis is to determine whether error occurred." *People v. McDonald*, 2016 IL 118882, ¶ 48 (citing *People v. Cosby*, 231 Ill. 2d 262, 273 (2008)). Under the plain error rule, a reviewing court may consider unpreserved

claims of error when there was a clear or obvious error and either: (1) the evidence was so closely balanced that the error alone may have tipped the scales of justice against the defendant; or (2) the error was so serious that it affected the fairness of the trial. *People v. Sargent*, 239 Ill. 2d 166, 189 (2010); *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) (citing *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005)).

¶ 23 A reviewing court may order a new trial, even when the error is unpreserved, if it cannot conclude that the prosecutor's improper comments did not contribute to the conviction. *People v. Linscott*, 142 Ill. 2d 22, 28 (1991). However, the plain error rule is not intended as a general savings clause to preserve all efforts that affect substantial rights. *Herron*, 215 Ill. 2d at 177 (quoting *People v. Precup*, 73 Ill. 2d 7, 16 (1978)). Instead, the plain error rule is a very limited exception to the general forfeiture rule. *Id.*

¶ 24 The defendant acknowledges that his trial counsel failed to preserve these issues for appeal and asks this court to consider his claims as plain error. The defendant bears the burden of persuasion under both prongs of the plain error rule. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009).

¶ 25 1. *Predatory Behavior*

¶ 26 The defendant claims that he has established both prongs required for a plain error analysis because of the prosecutor's use of predatory type terms in both opening statements and closing arguments. He argues that the prosecutor's comments referring to him as a predator and stating that he had been hunting and stalking his victims is not relevant to his guilt or innocence and has the sole effect of inflaming jurors' passions. *People v. Hope*, 116 Ill. 2d 265, 277-78 (1986); *People v. Blue*, 189 Ill. 2d 99, 128 (2000). The defendant also claims that the State improperly referenced the victims' emotions which he argues is a suggestion to the jury to empathize with the victims' fear.

¶ 27 We will briefly examine the purposes and law governing both opening statements and closing arguments. Where there is no dispute as to what the prosecutor said in opening statements and closing arguments, the reviewing court considers the issue on a *de novo* basis. *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007).

¶ 28 An opening statement is intended "to apprise the jury of what each party expects the evidence to prove." *People v. Kliner*, 185 Ill. 2d 81, 127 (1998). "An opening statement may include a discussion of the expected evidence and reasonable inferences from the evidence." *Id.* The prosecutor is not allowed to make any statement in opening that he or she cannot or does not intend to prove. *Id.* If a prosecutor's comments are the result of deliberate misconduct or result in substantial prejudice to the defendant, the error is reversible. *Id.*

¶ 29 "A defendant arguing that reversal of his conviction is warranted on the basis of improper closing argument faces a difficult burden." *People v. Holmon*, 2019 IL App (5th) 160207, ¶ 48 (citing *People v. Gutierrez*, 402 Ill. App. 3d 866, 895 (2010)). "[R]eversal is only warranted if the improper remarks were a material factor in the jury's verdict." *Id.* Although it is difficult to reverse a conviction based on improper closing argument, it is possible if the "improper arguments are prejudicial enough to undermine a defendant's substantial rights." *Id.* (citing *People v. Brooks*, 345 Ill. App. 3d 945, 953 (2004)). In closing argument, prosecutors are allowed wide latitude and "may argue facts and reasonable inferences drawn from the evidence." *People v. Branch*, 2017 IL App (5th) 130220, ¶ 16 (citing *People v. Williams*, 192 Ill. 2d 548, 573 (2000)). Prosecutors are not allowed to "engage in argument that serves no purpose other [than] to inflame the passions of the jury." *Holmon*, 2019 IL App (5th) 160207, ¶ 51 (citing *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005)). On appeal, "we must consider the challenged remarks in the context of closing arguments as a whole." *Id.* (citing *Blue*, 189 Ill. 2d at 128).

¶ 30 In support of the defendant's arguments regarding the prejudicial nature of the State's remarks, he urges this court to follow *People v. Mpulamasaka*, 2016 IL App (2d) 130703. In *Mpulamasaka*, the defendant was charged with aggravated criminal sexual assault after a sexual encounter with a female who had a learning disability. *Id.* ¶¶ 3, 7. The sexual encounter occurred in a car on a restaurant parking lot after a group outing that included karaoke followed by a meal at the restaurant. *Id.* ¶¶ 10, 11, 13. At issue was whether the victim consented to the encounter. *Id.* ¶ 4. In closing and rebuttal arguments, the prosecutor made four references to the defendant as a predator, including a statement that the defendant "took a piece of meat" home with him. *Id.* ¶ 109. In concluding that the prosecutor engaged in misconduct by using the predatory language, the court stated that: "Each [reference to the defendant as a predator] *** was clearly improper and was an attempt to cultivate anger toward defendant." *Id.*

¶ 31 In *Mpulamasaka*, the appellate court also found that the victim's cross-examination testimony "indicated a freely given agreement, expressed in her actions" and stated that evidence that the defendant forced the victim to engage in sexual intercourse was "so improbable and unsatisfactory as to create a reasonable doubt of defendant's guilt." *Id.* ¶ 120. The reviewing court also found that the State committed prosecutorial misconduct in its closing and rebuttal arguments that severely prejudiced the defendant's case. *Id.* ¶ 122. The court reversed the conviction. *Id.* ¶ 120.

¶ 32 The State argues that this case is different than *Mpulamasaka* in part due to the nature of the crimes charged. Because consent to an alleged criminal act was at issue, the State argues that the jurors in *Mpulamasaka* could have been confused by use of the term predator because the victim's lack of consent to a sexual encounter was an element of the crime. If the victim had consented to the sexual encounter, then references to the defendant as a predator could have caused

confusion about whether the victim could have exercised consent. We do not entirely agree with the State's theory because the charge that required a finding that the defendant knew that the victim was unable to consent was no longer before the jury for consideration. Thus, the improper remarks would not have caused confusion on this question. However, we do agree that the prosecution appeared to have been using the predatorial language in conjunction with the frequent references to the victim's disability to turn the jury against the defendant even though consent was no longer at issue at the time of closing arguments. While the appellate court in *Mpulamasaka* found that the predatorial language amounted to prosecutorial misconduct, and that the totality of prosecutorial misconduct in that case served to severely prejudice the defendant's case, we do not find that *Mpulamasaka* stands for the proposition that use of predatorial language in isolation automatically results in severe prejudice to a defendant. Each criminal case is factually distinct, and the context of the improper language is also at issue.

¶ 33 In this case, the defendant was not charged with an offense containing an element requiring the defendant to know that the victim was unable to provide consent. The jurors would not have been similarly confused. The State contends that the circumstances by which the defendant's crime became possible are solely derived by the defendant's own actions in engaging with children with whom he was unfamiliar and maneuvering his truck on the Walmart parking lot in order to further this exchange—his claim that the two victims "flashed" him. In short, the State argues that the "predator" terminology was in keeping with the defendant's behavior on the Walmart parking lot with respect to the impact his actions had upon the victims.

¶ 34 We agree with the State's argument that the prosecutor's references to the impact that the defendant's actions may have had upon the victims were connected to a review of the facts and circumstances of the crime as perceived by the victims. See *People v. Terrell*, 185 Ill. 2d 467, 512-

13 (1998). Whether the two victims felt frightened or uncomfortable was part of the factual narrative in that M.P. fled the van and ran to her mother and excitedly told her what had happened. The fear experienced by the victims was directly connected to the defendant's actions and presence. The victims' fear served as circumstantial evidence in support of the defendant's alleged exposure.

¶ 35 However, in a larger sense we find that the prosecutor's references to the defendant as a predator, including her usage of terms like "stalking" and "hunting," were improper. Such references were an effort to dehumanize him to the jury and were designed to evoke juror anger towards the defendant. "Arguments that serve only to inflame the jury constitute error." *Mpulamasaka*, 2016 IL App (2d) 130703, ¶ 106. Although these references were erroneous, we must determine whether they were sufficiently egregious and prejudicial to warrant a new trial. We will discuss that question later in this order in the plain error analysis section beginning at paragraph 47.

¶ 36 2. *Intention to Avoid Surveillance Video*

¶ 37 The defendant next contends that the prosecutor improperly argued, with no basis in fact or evidence, that he intentionally changed parking spots to prevent the Walmart surveillance cameras from capturing video of him. A prosecutor must confine his or her closing arguments to the evidence and reasonable inferences that can be drawn from that evidence. *People v. Hubner*, 2013 IL App (4th) 120137, ¶ 27. In addition, a prosecutor may not misstate the law or the evidence; and cannot argue assumptions or facts not in the record. *People v. Carbajal*, 2013 IL App (2d) 111018, ¶ 29; *People v. Glasper*, 234 Ill. 2d 173, 204 (2009).

¶ 38 In closing argument, the prosecutor argued that the defendant knew that the Walmart parking lot surveillance cameras could be filming him. The prosecutor further argued that the

defendant deliberately pulled into an available parking spot directly to the right of the victims' van because the van would obscure the camera's view of his actions in between the two vehicles. As stated earlier, the defendant claims that the prosecutor's argument was not based on any facts or evidence introduced at trial. More specifically, he argues that there was no evidence that he moved his truck to shield his face from the view of the cameras.

¶ 39 From our review of the record on appeal, two witnesses for the State provided testimony during the trial that involved the surveillance camera system used by Walmart and about the surveillance video of the defendant in the parking lot. First, Chelsea Williams, a Walmart employee, testified that the store's surveillance cameras cover "multiple angle[s] *** in the parking lot" with "two shots" for each row of the parking lot. Second, Officer Ruger testified that at the entrance of the Walmart store, there was a sign indicating that cameras were in use. He also testified that the cameras could be seen affixed to the building as you approached the store from the parking lot. Officer Ruger provided limited testimony about the surveillance video admitted into evidence at trial. In that video, the defendant can be seen exiting the Walmart store and walking back to his truck. Initially, the defendant's truck was parked with the driver's side door facing the surveillance cameras. After the defendant moved his truck to the parking spot adjacent to the victims' van, however, the surveillance camera could not capture video of the driver's side of the defendant's truck because the van blocked that view.

¶ 40 The evidence at trial established that the Walmart store utilized parking lot surveillance cameras, established where the cameras were aimed, and included the defendant's admission that he moved his truck to get closer to the victims' van. The defendant does not deny that the new parking spot obstructed the view of the doors of his truck. Instead, he argues that the State's theory—that he changed parking spots to obscure any video of his face—was not established by

this evidence. Further, he argues that he would not have benefitted from or had a motive to obscure his face from the surveillance camera because Walmart had video showing his face both when he entered the store and when he exited the store and entered his truck with the door facing the camera. However, we note that when the defendant moved his truck to the new parking spot next to the victims' van, the obstructed view made it impossible to see what the defendant did, if anything, between his truck and the victims' van. The defendant repeatedly stated in his interview with Officer Ruger that he does not remember if he exited his truck while parked next to the van. Ultimately, the defendant stated: "I'm not saying I didn't because you're saying you got me on video, I'm just saying I truly don't remember it."

¶ 41 In addition to the testimony about the Walmart surveillance system and the defendant's interview, the jury heard testimony of both M.P. and E.P. M.P. and E.P. testified that they saw the defendant looking at photos of naked women on his mobile phone and that he exited his vehicle. After exiting the vehicle, M.P. stated that the defendant pulled out his penis and began "touching it."

¶ 42 We find that the prosecutor's argument that the defendant moved his truck to avoid being seen on the Walmart surveillance video did not necessarily involve a need to obscure his face. Rather the argument was that the defendant moved his vehicle to avoid being captured on video exposing himself to these two young victims. While the jury was not required to believe the prosecutor's argument that the defendant moved his truck to obscure his allegedly lewd acts, we find that the argument was a reasonable inference from the evidence presented at trial, including the testimony of M.P. and E.P. We conclude that this claim does not constitute error. Therefore, we cannot consider this issue as plain error. *Sargent*, 239 Ill. 2d at 189.

¶ 43 3. *Mischaracterization of Statements in Police Interview*

¶ 44 The defendant next argues that the prosecutor mischaracterized statements he made during his police interview. He further argues that this error was then compounded by Officer Ruger's testimony about the Walmart surveillance video. The defendant claims that the prosecutor argued that he did not deny that he exited his truck after he parked next to the victims' van, an argument he claims the evidence did not support. We agree. The record shows that the defendant repeatedly stated that he did not know or could not remember whether he exited his truck. He finally agreed that he may have exited the truck if that is what the surveillance video showed. We agree with the defendant that the prosecutor's argument that he was not emphatic in denial was somewhat specious. However, even if this issue had been properly preserved for appellate review, we would find that the error here was harmless. See *People v. Johnson*, 238 Ill. 2d 478, 488 (2010). An error is harmless if the error did not contribute to the verdict. *People v. Spicer*, 379 Ill. App. 3d 441, 458 (2007). On appeal, the reviewing court may conclude that an error is harmless if the remaining evidence is overwhelming or if the evidence at issue duplicates other properly admitted evidence. *People v. Becker*, 239 Ill. 2d 215, 240 (2010). In this case, the jury viewed the video of the defendant's interview and would therefore have heard him repeatedly state that he could not remember whether he exited the truck. Thus, the "error" alleged was disproved by the defendant's repeated statements in his videotaped interview. *Id.*

¶ 45 Finally, the defendant argues that the prosecution's mischaracterization of his statements during his interview was compounded when the prosecutor improperly asked Officer Ruger to comment about the surveillance video. The prosecutor asked Officer Ruger to testify about what he believed the video showed to corroborate the out-of-court statements made by the two victims.

The defendant argues that the prosecutor improperly elicited opinion testimony about the contents of the video and that this testimony invaded the province of the jury.

¶ 46 We find that to the extent that eliciting Officer Ruger's testimony constituted prosecutorial error, any error was harmless because the jury had the ability to watch the surveillance video. *Johnson*, 238 Ill. 2d at 488; *Becker*, 239 Ill. 2d at 240. If the video was of poor quality, the jury had the ability to make its own determinations regardless of what Officer Ruger stated in his testimony. Officer Ruger made a single statement that the video captured images consistent with M.P.'s out-of-court statement. The defense attorney objected to all other questions the State asked Officer Ruger designed to emphasize the consistency between the video and the girls' statements. The trial court sustained all these objections. We find that Officer Ruger's one response was merely duplicative of what the jurors saw when they watched the surveillance video. *Becker*, 239 Ill. 2d at 240. We conclude that this claim does not constitute error subject to plain error analysis. *Sargent*, 239 Ill. 2d at 189.

¶ 47 4. *Plain Error*

¶ 48 As stated earlier, with plain error review, we may consider unpreserved claims of error when there was a clear or obvious error and either: (1) the evidence was so closely balanced that the error alone may have tipped the scales of justice against the defendant or (2) the error was so serious that it affected the fairness of the trial. *Sargent*, 239 Ill. 2d at 189. The defendant has the burden of persuasion with both prongs. *Lewis*, 234 Ill. 2d at 43. "Absent reversible error, there can be no plain error." *McDonald*, 2016 IL 118882, ¶ 48 (citing *Williams*, 193 Ill. 2d at 349).

¶ 49 The defendant raised several issues of alleged prosecutorial misconduct he claims deprived him of a fair trial. Although we concluded that most of the claims were unfounded, we agree with the defendant on one issue—the prosecutor's references to the defendant and his behavior as

predatorial in nature. Having determined that error occurred in this case, we must next determine if the defendant can establish either that the evidence is closely balanced or that the error was so significant that the fairness of the trial was affected. *Sargent*, 239 Ill. 2d at 189.

¶ 50 We start our plain error examination of the evidence in this case to determine if the evidence was so closely balanced that the prosecutorial misconduct could have tipped the scales of justice against the defendant. *Id.* To begin our analysis, we turn to the elements of the charged offense that the State needed to prove for a conviction on the charged offense. The State charged the defendant with a misdemeanor charge of sexual exploitation of a child. To prove its case, the State was required to establish that the defendant, while in the presence of M.P. and/or E.P. and with knowledge that one or both of the children would view his acts, exposed his sex organs for the purpose of his own sexual arousal or gratification or that of the child. 720 ILCS 5/11-9.1(a)(2).

¶ 51 The State presented the following evidence to the jury in support of the elements it had to prove to obtain a conviction. Chelsea Williams testified that her employer, Walmart, utilized a parking lot surveillance system. She worked with Officer Jeremy Ruger of the Flora Police Department to locate video depicting the defendant at the store and his movements in the parking lot. Officer Ruger interviewed the defendant, and that interview was videotaped. During that interview, the defendant did not deny that he moved his vehicle to get closer to the victims. Both the Walmart surveillance video and the video of the defendant's interview with police were played for the jury. The surveillance video showed that the defendant moved his vehicle closer to the victims. The victims testified about the defendant's actions in moving his truck from his original parking spot to the spot adjacent to their van. The defendant moved his truck because he claims that both victims flashed him, and he was hoping that they would do so again. Both victims denied that they had done so. Both victims stated that the defendant exited his truck. Although the

defendant did not recall exiting his truck after he had parked next to the van, he acknowledged that he may have done so if the video reflected that activity. M.P. and E.P. testified that the defendant used his mobile phone to access photos of naked women and held the phone in a manner to ensure that they would be able to see the images. M.P. also testified that the defendant pulled out his penis and began touching it. The defendant denied that he committed an act of masturbation. The victims' mother testified about the emotional fear that M.P. expressed contemporaneous with the events in question.

¶ 52 Although the prosecutor should not have referred to the defendant using predatory terminology, we find that the evidence presented to the jury was overwhelmingly supported the jury's guilty verdict. We find that the defendant cannot establish that the evidence is closely balanced. *People v. Wilmington*, 2013 IL 112938, ¶ 31; *People v. Walker*, 232 Ill. 2d 113, 124 (2009).

¶ 53 We continue our plain error review with an examination of whether the predatorial comments made by the prosecutor were so significant that the error affected the fairness of the trial. *Sargent*, 239 Ill. 2d at 189. The Walmart employee provided the foundational framework for establishing that the defendant moved his truck to be closer to the victims' van. The defendant does not deny doing this, and he stated in his recorded interview that he moved his truck to get closer to the girls. He also stated that he believed that the girls were younger than 18. He claims that they flashed him, and he wanted to see if they would do so again. Although the victims deny that they flashed the defendant, whether they did do so was a question of credibility for the jury. The defendant repeatedly stated in his interview that he did not remember whether he exited his truck but concluded that he may have done so. The victims testified that the defendant did exit his truck. M.P. testified that the defendant pulled out his penis. The defendant denied that he

masturbated in front of the victims. The victims testified that they became afraid of the defendant. Upon seeing her mother exit Walmart, M.P. exited the van and ran to her. This fear was confirmed by her mother's testimony. The jury was able to view the defendant's truck and related movements on the video and made its determination from all evidence. After considering the evidence, the jury convicted the defendant after discounting his denial that he exposed his penis to the victims.

¶ 54 We do not condone the prosecutor's use of predatory terminology to describe the defendant and his actions. But we are not able to conclude that use of this predatory language impacted the outcome of the trial. The evidence overwhelmingly established that the defendant's actions on the parking lot that day were motivated by his stated desire to see the breasts of two young girls. We conclude that the defendant is not able to satisfy the burden necessary to establish plain error review—that the predatory language had an impact on the jury's conviction. *Wilmington*, 2013 IL 112938, ¶ 31; *Walker*, 232 Ill. 2d at 124.

¶ 55 C. Officer Ruger's Testimony During Walmart Video

¶ 56 The defendant next argues that the trial court committed reversible error by allowing Officer Ruger to render an opinion about one section of the Walmart surveillance video. The section of the video involved potential movement between the defendant's truck and the victims' van. The defendant argues that Officer Ruger's testimony about the video was an improper lay witness opinion.

¶ 57 "Whether evidence is relevant and admissible at trial is within the trial court's discretion." *People v. Whitfield*, 2018 IL App (4th) 150948, ¶ 46 (citing *People v. Hanson*, 238 Ill. 2d 74, 101 (2010)). On appeal, the reviewing court will not reverse a trial court's decision to admit evidence unless the court's decision is "arbitrary, fanciful or unreasonable." (Internal quotation marks omitted.) *Id.*

¶ 58 A lay witness is typically confined to testimony regarding facts of which the witness has firsthand knowledge. *People v. Donegan*, 2012 IL App (1st) 102325, ¶ 41. A witness cannot provide testimony on his or her opinion that a witness was truthful or credible because that opinion invades the province of the jury. *Id.* Rule 701 of the Illinois Rules of Evidence provides guidelines for a lay witness testifying in the form of an opinion or inference as follows:

> "testimony *** is limited to those opinions or inferences which are (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 ***." Ill. R. Evid. 701 (eff. Jan. 1, 2011).

¶ 59 In this case, the defendant objected to many aspects of the testimony of Officer Ruger during the State's presentation of the surveillance video. The trial court overruled defense counsel's objection to the prosecutor's question to Officer Ruger about whether the footage matched M.P.'s prior statement. At a side bar, the trial court stated that the original question was allowed so that the prosecution could lay a foundation to seek admission of the video as accurate and reliable evidence. Officer Ruger answered that question, stating that the footage matched "[v]ery well." The prosecutor attempted to ask for elaboration, but the trial court sustained all of defense counsel's subsequent objections. We find that the trial court did not abuse its discretion in allowing this initial question to set the foundation for admission of the surveillance video.

¶ 60 Next, the defendant challenges Officer Ruger's identification of the moments on the video where he believed there was movement between the defendant's truck and the victims' van. We find that the Illinois Supreme Court's opinion in *People v. Thompson*, 2016 IL 118667, is relevant and helpful to the lay opinion issue the defendant raises.

¶ 61 In *People v. Thompson*, the supreme court noted that because Rule 701 of the Illinois Rules of Evidence is based upon the federal evidentiary rules, consideration of federal cases for guidance is appropriate. *Id.* ¶ 40. Lay opinion identification testimony may be allowed "where 'there is some

basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury.' " *Id.* ¶ 41 (quoting *United States v. White*, 639 F.3d 331, 336 (7th Cir. 2011)). The court identified five relevant factors to be used in determining if a lay witness is more likely to be able to identify the defendant than the jury. *Id.* ¶ 43. Those factors are: the witness's general level of familiarity with the defendant's appearance; the witness's familiarity with the defendant's appearance at the time of the surveillance photo or video; whether the defendant disguised his appearance at the time of the charged offense; whether the defendant altered his appearance at trial; and the degree of clarity of the surveillance recording and the quality of the defendant's depiction. *Id.* ¶¶ 44, 46, 47, 48. The supreme court noted that if one or more of these factors existed, then there is some basis to find that the witness is more likely to identify the defendant than the jury. *Id*. ¶ 49 (quoting *State v. Barnes*, 212 P.3d 1017, 1024 (Idaho Ct. App. 2009)). The extent that the witness has had the ability to observe the defendant goes to the weight of the evidence and not to its admissibility. *Id.* The supreme court held that: "opinion identification testimony is admissible under Rule of Evidence 701 if (a) the testimony is rationally based on the perception of the witness and (b) the testimony is helpful to a clear understanding of the witness's testimony or a determination of a fact in issue." *Id.* ¶ 50.

¶ 62 Although the holding of the *Thompson* case is helpful, that case involved identification of the defendant which is not at issue in this case. We find that the holding in *People v. Gharrett*, 2016 IL App (4th) 140315, ¶ 76, is also instructive because the court adapted the *Thompson* holding to include identification of an object. In *Gharrett*, the court concluded that the thorough analysis in *Thompson* could be extended to lay witness opinion testimony on other matters. The court adapted the helpfulness definition of *Thompson* from people to objects. *Id.* The court stated that "lay-opinion identification testimony is helpful when some basis exists to conclude that the

witness is more likely to correctly identify the object from the surveillance recording than the jury." *Id.*; see also *People v. Mister*, 2016 IL App (4th) 130180-B, ¶ 76 (holding that the lay witness opinion testimony locating and identifying the defendant and tracking his movement through a casino was "rationally based on his perception of the video," noting that the witness was not present and did not observe the defendant and his movement at the time of the events).

¶ 63 We agree with the holdings in *People v. Gharrett* and *People v. Mister* adapting the helpfulness definition of *People v. Thompson* used in lay witness opinion testimony from identity to other categories. We apply the helpfulness definition in this case to the movement depicted on the surveillance video, finding that this type of opinion testimony is helpful when a basis exists to conclude that the witness is more likely to be able to correctly identify the movement from the surveillance video than the jury. *Gharrett*, 2016 IL App (4th) 140315, ¶ 76.

¶ 64 In determining whether Officer Ruger's opinion about the defendant's movement is helpful to the jury, we apply a totality of the circumstances approach. *Gharrett*, 2016 IL App (4th) 140315, ¶ 77. Reviewing the five factors from *People v. Thompson*, we find that the following factor is relevant to this case: the degree of clarity of the surveillance recording and the quality of the depiction of the defendant's movement. *Thompson*, 2016 IL 118667, ¶ 48.

¶ 65 Officer Ruger testified that he met with Chelsea Williams at Walmart to review the surveillance video and determined that the video appeared to show movement between the two vehicles. Defense counsel objected to his characterization of what occurred. The trial court overruled the objection, stating that the jury would have its opportunity to see the surveillance video.

¶ 66 We find that Officer Ruger's testimony was rationally based on his perception and was helpful to the jury to understand the facts at issue. He was familiar with use of the Walmart

surveillance videos through his experience as a Flora police officer. He was also familiar with this video as he spent time reviewing the video as part of the investigation in this case. The quality of the video was not perfect, and therefore Officer Ruger's testimony was helpful because he was more likely to correctly identify the location of the two vehicles on the parking lot as well as the timing of possible movement. Although Officer Ruger testified that he believed he saw movement between the two vehicles, we note that he did not specifically testify that the defendant exited his truck or engaged in masturbatory activity. We conclude that the trial court did not abuse its discretion in allowing this testimony. *Whitfield*, 2018 IL App (4th) 150948, ¶ 46 (citing *Hanon*, 238 Ill. 2d at 101).

¶ 67 Furthermore, the prosecutor did not reference Officer Ruger's testimony about the perceived movement between the vehicles in the State's closing argument. Instead, the prosecutor referred the jury to the testimony of both victims and to the surveillance video itself.

¶ 68 The defendant also contends that he was prejudiced by Officer Ruger's testimony because the jury was not allowed to take the surveillance video back to the jury room during its deliberation. However, the State counters that the defendant cites no authority for the proposition that a single viewing of a video constitutes prejudice. We note that the trial court prefaced the single viewing of the video by instructing the jury as follows:

> "I'll ask you to watch this video as it's presented and watch it carefully, and this is going to be kind of a one[-]time thing. We're not going to come back and take it into the jury room later and view it a second time. We're going to view what occurs here now just as a witness would testify and you would have your recollection of what the witness testified to, your recollection will be what you view here on the video now as well."

We conclude that the defendant was not prejudiced because the jury was only allowed to view the surveillance video one time. The trial court made certain that the jurors were aware that they would only see the video once and informed them of the need to pay careful attention.

¶ 69 Before continuing, we recognize that the facts of the *Thompson* case involved identification of the defendant by a law enforcement officer. *Thompson*, 2016 IL 118667, ¶ 55. An additional issue presented in that case was the valid constitutional concern that identification of a defendant by a law enforcement officer could preclude a defendant's cross-examination of the officer. *Id.* The defendant could be fearful of cross-examining the officer regarding his bias without revealing how the officer could identify the defendant. *Id.* The defendant could also risk exposing his or her prior criminal history by cross-examining the officer. *Id.* The court noted that the majority of courts had concluded that "the right of confrontation is not denied by allowing law enforcement officers to give lay identification testimony because the inability to cross-examine is not imposed by the court but, rather, is a tactical decision made by defense counsel." *Id.* ¶ 56. The supreme court concluded that there was no *per se* rule barring admission of a law enforcement officer's identification testimony. *Id.* However, the court acknowledged that in many of the cases, the identity of the witness as a law enforcement officer was not known to the jury. *Id.* ¶ 57. The supreme court noted that in one case a defendant was allowed to object to the officer's testimony and the trial court allowed the defendant to establish the foundation for the officer's testimony outside of the presence of the jury. *Id.* ¶¶ 57-58. In concluding that similar safeguards were necessary in Illinois, the supreme court held "that when the State seeks to introduce lay opinion identification testimony from a law enforcement officer, the circuit court should afford the defendant an opportunity to examine the officer outside the presence of the jury." *Id.* ¶ 59.

¶ 70 We find that this case is factually different than *Thompson.* The lay opinion testimony offered by Officer Ruger in this case did not involve the defendant's identity. The defendant admitted that he was at the Walmart, that he saw two young girls flash him, and that he moved his truck to get closer to the two girls. At issue was whether the defendant exited his truck as the two

victims say that he did prior to exposing his penis to them. While the defendant repeatedly denied any memory that he had exited his truck, he eventually admitted that he could have done so. The lay opinion testimony offered by Officer Ruger involved setting the point on the surveillance video at which possible movement between the two vehicles could be seen. While the holding in *Thompson* requires trial courts to hold an out-of-court examination of the officer in order to establish the extent of any potential bias, we do not find that the supreme court's holding extends to opinion testimony about movement.

¶ 71 We do not find that the trial court committed reversible error by allowing Officer Ruger's brief testimony about the Walmart surveillance video. The first question about the video was designed to provide the foundation necessary for the State to be able to enter the surveillance video into evidence. The second question or questions answered by Officer Ruger involved narration to pinpoint the time on the surveillance video when there may have been movement between the vehicles. In a general sense, Officer Ruger's lay opinion testimony was appropriate here because he was familiar with the video and the quality of the video was not ideal. Therefore, his testimony was rationally based on his perceptions and served to assist the jury. Furthermore, we find no basis in law to conclude that the defendant was prejudiced because the jury only saw the surveillance video one time. Just before the video was played, the trial court informed the jury that they would not be able to see the video again.

¶ 72 D. Ineffective Assistance of Counsel

¶ 73 Finally, the defendant alleges that he received ineffective assistance of counsel. The defendant claims that his attorney was ineffective because he did not ask the court to redact his interview video. The interview video contained repetition of M.P.'s prior statement, misstatements and overstatements of the evidence, along with repeated accusations that he was lying.

¶ 74 The State counters that defense counsel's decision to allow the jury to see and hear the full interview video was a tactical decision designed to build his credibility because he remained consistent throughout the entirety of the interview. Defense counsel cross-examined Officer Ruger about the allegedly deceptive tactics he employed. The State contends that this cross-examination served to impugn the credibility and motives of Officer Ruger.

¶ 75 To prevail on an ineffective-assistance-of-counsel claim, the defendant must prove, first, that counsel was ineffective and, second, that he suffered prejudice. *People v. Lefler*, 294 Ill. App. 3d 305, 311 (1998) (citing *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). The defendant must prove "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* The term "reasonable probability" has been defined to mean "a probability sufficient to undermine confidence in trial's outcome." *Id.* at 311-12 (citing *Strickland*, 466 U.S. at 687). The fact that professional errors have been committed does not define the question. We always examine the issue from the perspective of whether the defendant received a fair trial, despite an attorney's shortcomings. *Id.* at 312. In that context, a fair trial means "a trial resulting in a verdict worthy of confidence." *Id.* (citing *People v. Moore*, 279 Ill. App. 3d 152, 161-62 (1996)).

¶ 76 We have reviewed the record and briefs on appeal and conclude that we agree with the State. Had defense counsel redacted the video, the jury would not necessarily have heard the repeated and consistent denials that the defendant exited his truck and/or masturbated in front of the victims. We agree that the consistency of the defendant's denials could have served to help with the issue of the defendant's credibility.

¶ 77 However, even if we had concluded that defense counsel's decision constituted deficient assistance, we do not find that the defendant has satisfied the second prong of *Strickland*—that is

he had not shown that he was prejudiced by his attorney's ineffective representation. *Lefler*, 294 Ill. App. 3d at 311 (citing *Strickland*, 466 U.S. at 694). This was not a case where the evidence was closely balanced.

¶ 78 In this case, the primary fact in dispute was whether the defendant showed his penis to the victims. M.P. testified that he did, while the defendant told Officer Ruger that he did not. The jury had the ability to see the victims testify and to watch the defendant in the courtroom. Further, the jurors watched the defendant's interview video. This was ultimately a credibility issue, and the jury members were entitled to make that determination based upon the evidence presented. "The reviewing court will not retry the defendant or substitute its judgment for that of the trier of fact on questions involving the weight of the evidence, conflicts in the testimony, or the credibility of witnesses." *People v. Corral*, 2019 IL App (1st) 171501, ¶ 71 (citing *People v. Jackson*, 232 Ill. 2d 246, 280-81 (2009)).

¶ 79 We find that the defendant has not established that his defense counsel failed to provide reasonably effective assistance. The defendant also did not establish that he was prejudiced by any alleged legal shortcomings.

¶ 80 III. CONCLUSION

¶ 81 For the foregoing reasons, we affirm the conviction and sentence of the Clay County circuit court.

¶ 82 Affirmed.