2025 IL App (4th) 240884-U

NO. 4-24-0884

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
June 3, 2025
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Peoria County
ROBERT ELY,	)	No. 21CF331
Defendant-Appellant.	)	
	)	Honorable
	)	Katherine S. Gorman,
	)	Judge Presiding.

JUSTICE GRISCHOW delivered the judgment of the court.
Justices Doherty and Vancil concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, holding (1) any improper comments made by the State during closing arguments were not substantially prejudicial and did not warrant a new trial, (2) the trial court did not err by admitting other crimes evidence under a *modus operandi* exception, and (3) the trial court did not commit plain error in permitting an in-court identification of defendant by a person who was only familiar with defendant through a security video recording in a separate, unrelated incident.

¶ 2 Following a jury trial, defendant, Robert Ely, was found guilty of first degree murder (720 ILCS 5/9-1(a)(2) (West 2020)), residential burglary (*id.* § 19-3(a)), and theft of paintings having a value in excess of $100,000 (*id.* § 16-1(a)(1)). After the trial court's denial of his posttrial motions, defendant now appeals, requesting a new trial.

¶ 3 I. BACKGROUND

¶ 4 A. The Underlying Facts and Charges

¶ 5 Below, we summarize only the facts pertinent to this appeal.

¶ 6 In January 2021, Dr. William Marshall, age 92, and his wife, Nancy Marshall, lived in Peoria, Illinois. Dr. Marshall was an avid art collector. His wife suffered from severe Parkinson's disease, dementia, was immobile and nonverbal but had some level of cognition, including the ability to hear and respond to some stimuli. During the day, Nancy was cared for by in-home caregivers, while Dr. Marshall would care for her in the evenings.

¶ 7 On January 6, 2021, Dr. Marshall was found by a caregiver, having been stabbed to death, and seven different pieces of art were missing from his collection.

¶ 8 Kelissa Scott, one of the caregivers, reported a man in a white Ford pickup truck had been in the driveway of the Marshalls' home the day before the death. The man rang the doorbell and spoke with Dr. Marshall, though Scott could not hear the conversation. When Scott left at the end of her shift, she noticed the man was inside the Marshall home, with the permission of Dr. Marshall. Extensive investigation, including collaboration with the Federal Bureau of Investigation (FBI) and witness testimony, connected Dr. Marshall's death to defendant.

¶ 9 On June 9, 2021, defendant was charged by information with first degree murder (*id*. § 9-1(a)(2)). He was later charged by indictment with three counts of first degree murder (*id*. § 9-1(a)(1)-(3)), residential burglary (*id*. § 19-3(a)), and theft of property having a value of over $100,000 (*id*. § 16-1(a)(1)). The case was set for trial on February 21, 2024.

¶ 10 B. The State's Motion *in Limine*

¶ 11 Prior to trial, the State filed a motion *in limine* seeking to introduce evidence of other thefts and burglaries committed by defendant, arguing they fell under the "identity and *modus operandi*" exceptions to Illinois Rule of Evidence 404(b) (eff. Jan. 1, 2011).

¶ 12 The trial court granted the State's motion *in limine*, allowing the State to introduce one prior burglary by defendant, which would be referred to as the "Glen Carbon incident." The

court noted it would issue a limiting instruction when the incident would be introduced at trial, instructing the jury the incident was only for "identification, intent, [or] *modus operandi*."

¶ 13 C. The Trial

¶ 14 1. *The State's Case*

¶ 15 The State called over 17 different witnesses. Since defendant concedes the fact that Dr. Marshall was murdered and challenges only his connection to the murder, only testimony linking him to the crime is summarized.

¶ 16 a. Testimony of Alaina Cochran and Rosie Bohannon

¶ 17 Alaina Cochran, a certified nursing assistant who worked for Aging Care Management, testified she had been caring for Nancy for over three years. She provided care on certain days of the month, from 8:30 a.m. to 12 p.m. (other caregivers provided care on other days). On January 6, 2024, Cochran arrived for her shift around 8:30 a.m. and noticed unusual things. Dr. Marshall normally communicated with staff every morning, but they had not heard from him that day, she found the front door open, and Dr. Marshall did not greet her upon entry. She saw food in the kitchen and found Nancy slumped over, sitting in the sunroom, soaked in urine and covered in drool, as opposed to lying in her bed. Generally, Dr. Marshall would take over his wife's care in the afternoons after the caregivers left. Nancy could hear, but she was not very verbal and was immobile and required a Hoyer lift to move her, which Dr. Marshall would assist the caregivers with.

¶ 18 Rosie Bohannon, another caregiver, arrived to assist. She saw footprints in the snow outside the garage, so she checked to see if Dr. Marshall had possibly fallen. The neighbor was outside and confirmed Dr. Marshall had not been seen. Bohannon checked the living room and dining room and found Dr. Marshall in the basement, lying on his side. Cochran checked for a

pulse, recalling Dr. Marshall was "ice cold and purple." Bohannon called 911.

¶ 19 After calling the police, Bohannon, the longest serving caregiver for the Marshalls, went to retrieve the Hoyer lift to attend to Nancy, as it was apparent that she had been in the chair since the previous day. She noticed two paintings missing from the room. When Bohannon subsequently went to the kitchen to retrieve milk for Nancy, she saw a bucket filled with water in the sink. She remarked she had never used the bucket, as it was typically downstairs.

¶ 20 b. Testimony of Kelissa Scott

¶ 21 On the morning of January 5, 2021, Scott was caring for Nancy. Near the end of her shift, an older Caucasian man with a scruffy, graying beard, wearing a hat and coat, rang the doorbell, and she observed his white work truck in the driveway. Scott distinctly remembered the man's teeth because they were crooked and appeared to need a cleaning, something she recognized from her time in the dental field as "meth mouth." The man had a what she described as a Southern accent, but not quite an accent from "Alabama or Mississippi." Scott identified defendant as the man she saw at the door that day.

¶ 22 Scott recalled defendant asked for Dr. Marshall, more specifically, asking for "Bill" while handing her the mail. When Scott went to notify Dr. Marshall he had a visitor, the man stepped inside the house. Dr. Marshall came upstairs, greeted defendant, and directed him outside to talk. The pair spoke for a few minutes, but she did not overhear the conversation. Dr. Marshall told Scott that she could leave for the day. When Scott was leaving, she observed defendant in the piano room and noticed a power washer in his truck in the driveway.

¶ 23 Scott was questioned as part of the police investigation and shown photo arrays on three consecutive dates to identify the suspect. Scott had difficulty identifying the man in the first two arrays, explaining that the people in the photographs were not showing their teeth, something

that was very prominent and identifiable in the man who came to the door. The third photo array contained pictures of men whose teeth were visible. Scott identified defendant in the third photo array and again in open court during the trial.

¶ 24 c. Testimony of Dr. John Marshall

¶ 25 Dr. Marshall's son, John Marshall, is also a doctor and was called to testify. John testified his father was an art collector, with a vast collection worth approximately $230,000. Many pieces were displayed in museums or traveling art exhibits. During the investigation, John was able to confirm several specific art pieces missing from his father's collection. John confirmed no jewelry, money, or other valuable items were stolen. When shown a picture of a white Ford F-250 truck from a surveillance video, he recognized a painting from his parents' bedroom in the front seat.

¶ 26 d. Testimony of Roberto Vasquez

¶ 27 Detective Roberto Vasquez, an 18-year veteran of the Peoria Police Department, oversaw the investigation into the murder of Dr. Marshall and ultimately arrested defendant. Detective Vasquez testified Dr. Marshall's son confirmed the ball cap found at the scene did not belong to his father. He also provided a booklet listing Dr. Marshall's artwork, which showed seven pieces were missing from the home.

¶ 28 Detective Vasquez had officers review surveillance video of the subdivision. One video showed the white Ford F-250 truck entering the subdivision at 11:09 a.m. and leaving the subdivision at 12:30 p.m., with the driver as the sole occupant. Zooming in on the video showed the driver had a gray goatee and mustache. Artwork reported missing from Dr. Marshall's home could be seen in the front seat.

¶ 29 Detective Vasquez had officers canvas for video footage throughout the city.

Various videos showing the white Ford F-250 truck were found, with the last video being obtained south of Peoria near Troy, Illinois, on Interstate 70.

¶ 30 Detective Vasquez sent information about the white Ford F-250 to other law enforcement agencies in the state. As a result, the name of defendant and his son were exposed and they were considered persons of interest. His department was also contacted about the Glen Carbon incident. The Glen Carbon police provided a video from the scene of a prior burglary showing the same white Ford F-250 truck and a bucket of water in the kitchen sink of the home of that victim.

¶ 31 In February 2021, the white Ford F-250 truck was located in Caseyville, Illinois, at the house of Pedro Gonzalez. Officers obtained a search warrant, transported the truck back to Peoria, and conducted a search. An LG cell phone was found. A search of the cell phone revealed a Gmail account connected to defendant, three images of the white Ford F-250 truck in the parking lot of Michael Riggio Auto Sales, and a message regarding a trip to Las Vegas, Nevada, connected to defendant. The police also found a business card from a U-Haul facility in Overland, Missouri, and a U-Haul padlock. Detective Vasquez contacted U-Haul and retrieved records connecting defendant's phone number to a storage unit under the name Staneka Ziko. Phone records from T-Mobile revealed communications between defendant's cell phone and Ziko's phone number 96 times between January 6, 2021, and January 12, 2021 (Ziko was never located). In addition, on January 12, 2021, the records revealed communication between defendant's cell phone and Ziko's numbers 18 minutes before the U-Haul storage rental was made, and then 3 minutes after. A search of the U-Haul storage unit uncovered seven paintings, all of which were missing from Dr. Marshall's home. Utilizing a fracture match, the FBI connected a piece of broken frame located in the white Ford F-250 truck to one of the stolen paintings.

¶ 32 Detective Vasquez and officers searched the home of Tilley Frank in St. Louis, Missouri, where defendant also resided. Detective Vasquez spoke with defendant and noted his accent, describing it as Southern or Creole, and noted defendant's bad teeth. Medication, a set of U-Haul keys, a Ford truck owner's manual, and an orange traffic cone were found in the home. Later, it was determined the keys opened the U-Haul padlock from the storage unit in Overland, Missouri.

¶ 33 At this point, Dr. Marshall's cell phone still had not been located. Detective Vasquez obtained a search warrant for Dr. Marshall's Gmail account, which was also the same as his iCloud identifier. The warrant was sent to Google, and with the information obtained, the police were able to track Dr. Marshall's cell phone traveling out of town in the same direction as the white Ford F-250 truck. The data showed the cell phone stopped at mile marker 99, leaving East Peoria, Illinois. Detective Vasquez located the cracked cell phone on the shoulder of the road in that area.

¶ 34 e. Testimony of Clay Blum

¶ 35 Clay Blum, a crime scene technician with the Peoria Police Department, was in charge of processing the crime scene. He did not find evidence of forced entry. Officer Blum testified to the photographs he took, one of which showed a chair cushion, a magazine, a family photo, and papers on the floor in the basement, indicating a struggle. The magazine, cushion, and family photo had a red substance on them identified as blood. A small table in the same area and the chair with the missing cushion also had red, blood-like stains on them. Officer Blum collected samples of the blood-like stains. He also photographed the walls, revealing several spaces where paintings had once hung. After the coroner took custody of the body, he was able to see what he believed were lacerations to Dr. Marshall's abdomen and lower back.

¶ 36 f. Testimony of Scott Bowers and Paul Tuttle

¶ 37 Officers Scott Bowers and Paul Tuttle are crime scene technicians with the Peoria Police Department. Officer Bowers was assigned to process the main and second floor areas of the residence. He photographed the bedroom walls where paintings were missing. He also examined the bed frame and dressers for latent fingerprints using fingerprint powder. He photographed the kitchen, including a bucket in the kitchen sink.

¶ 38 On February 2, 2021, Officers Bowers and Tuttle searched a white Ford F-250 truck suspected of being part of the crime. Officer Bowers found no latent prints or blood stains on the truck, inside or out. Upon searching the bed of the truck, Officer Bowers found a black-handled Farberware chef's knife, which was "approximately 13-inches long with an approximately 8-inch blade," with a dark substance that tested positive for blood. DNA evidence testing later confirmed the blood on the knife belonged to Dr. Marshall. Officer Tuttle found a cell phone with no detectable fingerprints, along with a U-Haul padlock, keys, a tape measure, a pair of gloves, and a bank receipt.

¶ 39 The next day, Officer Bowers responded to Eastbound Interstate 74, just east of exit 99, and met Detective Vasquez. They had located a cell phone on the side of road, which he photographed and collected for evidence.

¶ 40 g. Testimony of Sergeant Michael Johnston

¶ 41 Michael Johnston, a sergeant in the detective bureau of the Peoria Police Department, assisted Detective Vasquez with the investigation. He also assisted in creating the screenshot image from video surveillance that showed the white Ford F-250 truck transporting art pieces from the subdivision. Sergeant Johnston testified it was suspicious, as the truck did not have a rear license plate and only a vanity plate on the front. He noted the side of the truck had an

advertisement for services, but no contact information. It was also odd to have a pressure washer in the truck during winter, with temperatures around 20 to 30 degrees Fahrenheit.

¶ 42 After magnifying the screenshot of the truck, Sergeant Johnston was able to determine the front vanity plate was an advertisement for a St. Louis area auto dealership, Michael Riggio Auto Sales. A lone male driver and fine art were observed in the truck's cab. Sergeant Johnston drafted a statewide intelligence message to disseminate to partnering law enforcement. He also contacted the auto dealership and obtained the vehicle identification number (VIN) of the Ford F-250 truck and a bill of sale listing Tilley Frank as the owner.

¶ 43 h. Testimony of Pedro Gonzalez

¶ 44 On February 1, 2021, Caseyville police officers and Peoria detectives came to Gonzalez's home in Caseyville to discuss a white Ford F-250 truck parked in his driveway. Gonzalez knew defendant as Robert and his girlfriend Tilley from their work together in construction. Approximately three weeks prior, defendant offered Gonzalez $150 to take the truck and store it in his garage for two months, along with $200 to give to his landlord. Defendant claimed his job had slowed down and he wanted to store the truck until the weather improved and more work was available. Gonzalez agreed and parked the truck in his driveway, covering it partially due to limited garage space. Gonzalez moved a power washer, blower, and weed eater into his garage so they would not be stolen. Defendant asked him to rent a storage unit in Overland, Missouri, and Tilley offered money for this, but he declined. Gonzalez identified defendant in court.

¶ 45 Gonzalez agreed to work with the FBI and St. Louis authorities and wear a body wire to record conversations with defendant and Tilley. On one recording, Tilley admitted she owned the truck and said if Gonzalez got arrested, she would bail him out. Gonzalez gave the

police a phone number he linked to defendant, and during cross-examination, he acknowledged that Tilley often answered the phone.

¶ 46 i. Testimony of Sue Neutzling

¶ 47 Sue Neutzling was called to testify regarding the Glen Carbon incident, a prior burglary that occurred at her mother's home. Neutzling identified defendant as one of the perpetrators of that burglary. Before Neutzling testified, the trial court read the following instruction:

> "Evidence has been received that defendant has been involved in conduct other than that charged in the indictment. The evidence has been received on the issue of the defendant's identification and *modus operandi* and may be considered by you only for that limited purpose.
>
> It is for you to determine whether the defendant was involved in that conduct, and, if so, what weight to be given to this evidence on the issues of identification and *modus operandi*."

¶ 48 On March 23, 2020, Sue's mother, Wilma Jean Mayfield, now deceased, lived alone in Glen Carbon, Illinois. At the time, Mayfield was around 80 years old and had Ring security cameras with audio and video surveillance around her property. Neutzling could remotely access and view live and recorded footage from her mother's Ring security cameras.

¶ 49 On March 23, 2020, Neutzling received a Ring doorbell alert that someone was at her mother's door. Neutzling watched in real time as a man pretending to know her mother tried to gain access to the home. Neutzling observed a white Ford pickup truck in the driveway. This observation raised her concern, as she was responsible for coordinating any work at the property,

and no such work had been scheduled. Furthermore, she had noticed this particular truck in the driveway on previous occasions.

¶ 50 After spotting the truck and seeing the man enter her mother's home, Neutzling immediately called the police and drove to her mother's home. Neutzling noticed her mother's rings were missing and a green bucket of water was left in the garage. She did not recognize the bucket and noted it was out of place in the home.

¶ 51 Neutzling saved the Ring video footage and turned it over to police. The video was played for the jury, showing the interaction with defendant and the white Ford truck. In open court, Neutzling identified defendant as the individual shown in the video from the Ring camera. On cross-examination, defendant's counsel clarified Neutzling saw two men on the video from the Ring camera on March 23, 2020. Neutzling was not asked by police to identify that second man.

¶ 52 2. *The Remainder of Trial and Posttrial Proceedings*

¶ 53 Defendant chose not to testify. Following closing arguments, the jury came back with a guilty verdict. Defendant was sentenced to 99 years in the Illinois Department of Corrections for first degree murder and 15 years for theft. A sentence was not imposed for the residential burglary. A motion to reconsider the sentence was filed, alleging the sentence was excessive, disproportionate, and unconstitutional. The motion was denied.

¶ 54 This appeal followed.

¶ 55 II. ANALYSIS

¶ 56 On appeal defendant argues the trial court erred, claiming: (1) improper and inflammatory comments made by the State during closing argument warranted a new trial, (2) the admission of other crimes evidence was more prejudicial than probative, and (3) allowing the identification of defendant on a Ring camera video was improper. We disagree and affirm.

¶ 57 A. The State's Comments During Closing Argument

¶ 58 Defendant contends a new trial is warranted because the trial court permitted improper and inflammatory comments by the State during closing argument.

¶ 59 "An error in closing argument is not a typical trial error in that it does not involve the admission of inculpatory evidence or the rejection of exculpatory evidence but rather commentary on the evidence that has been presented." *People v. Williams*, 2022 IL 126918, ¶ 40. An objected-to, improper comment in closing argument will result in reversible error only when the comment engenders substantial prejudice against the defendant to the extent that it is impossible to determine whether the verdict of the jury was caused by the comments or the evidence. In determining whether a trial court's decision to overrule a defendant's objection to a prosecutor's comment during closing argument is reversible error, there is a two-step process. *Id.* ¶ 41. First, a court must determine if a comment was improper. *Id.* Second, the court must determine if the improper comment was so prejudicial that justice was denied or the verdict itself resulted from the error. *Id.* In making this determination, the trial is viewed in its entirety. *LID Associates v. Dolan*, 324 Ill. App. 3d 1047, 1065 (2001). Absent an abuse of discretion, a trial court's decision to overrule an objection to a prosecutor's comment in closing argument will not be overturned. *Williams*, 2022 IL 126918, ¶ 41.

¶ 60 When viewing the totality of the evidence and arguments presented, we find defendant was not substantially prejudiced by the State's comments during closing argument, even if some comments may have been improper.

¶ 61 1. *Reference to Neutzling's In-Court Identification*

¶ 62 Defendant argues the State's comment regarding the strength of Neutzling's identification of defendant was inappropriate. Specifically, when the State said, "She picks the

person we all agree is the defendant," in reference to Neutzling's in-court identification, defendant argues this was the insertion of a personal opinion by the prosecutor. We disagree. While it may sound as if the comment veers on the line of personal opinion, precedent says otherwise. For example, in *People v. Emerson*, 122 Ill. 2d 411, 434 (1987), the defendant appealed on similar grounds, arguing the statement, " 'And we know Robert Ray was telling you the truth. We could tell.' " (emphasis omitted) was the insertion of a personal opinion by the State. However, our supreme court rejected the defendant's argument that the comment was the insertion of a personal opinion and instead noted it was a fair comment on the evidence. *Id.* In addition, the court in *People v. Pope*, 284 Ill. App. 3d 695, 707 (1996), noted that if a jury must infer the prosecutor is inserting his personal opinion, it is not the same as explicitly stating his or her opinion. We reach the same conclusion in this case and have determined this comment was not improper. The state's attorney commented on the evidence without explicitly stating his personal opinion.

¶ 63 2. *The State's Reference to Nancy Marshall*

¶ 64 Next defendant claims a second comment made by the State, referring to Nancy, the victim's spouse, was improper. Specifically, the State commented, "Also, the fact that—and this is a chilling part of the case, Nancy Marshall was disabled. She was in that chair. She could not talk, but she could hear. Imagine that." Defendant raised an objection to this comment during the trial, asserting that these remarks were emotional appeals to the jury based on unsubstantiated evidence.

¶ 65 It is generally error for counsel to appeal to the passions of the jury, and instead, counsel must confine closing argument to the facts that are in evidence and to reasonable inferences from the evidence. *People v. Clark*, 335 Ill. App. 3d 758, 764 (2002). However, attorneys are given broad latitude in making closing arguments, and the trial court has discretion

in the scope of closing argument. *Weisman v. Schiller, DuCanto & Fleck, Ltd.*, 368 Ill. App. 3d 41, 62 (2006). Defendant argues these remarks by the prosecutor were unsupported by evidence introduced at trial and thus improper. The crime occurred in the basement, while Nancy was upstairs in the den, and there was nothing in the record to suggest any altercation had taken place in her presence. However, reviewing courts are to consider the whole closing argument, rather than focusing on selected phrases or remarks, in determining whether there was prejudicial error. *People v. Lewis*, 2017 IL App (4th) 150124, ¶ 67. The State's comments here were irrelevant and improper. We discourage the use of similar remarks in closing arguments and caution trial counsel to tread carefully when commenting on unsubstantiated evidence that may only serve to enflame the passions of the jury. However, these remarks alone did not amount to substantial prejudice in this case. Instead, the comments were comprised of three lines within closing arguments that extended over 100 pages in the trial transcript. Any potential prejudice produced by the comments was reduced when the trial judge instructed the jury not to let sympathy or prejudice influence its decision.

¶ 66 3. *The State's References to "Knowing" Defendant Was the Killer*

¶ 67 The final comment defendant alleges warrants a new trial occurred when the state's attorney said, "I know that's the killer." After the State's comment during closing argument, defendant objected, and the judge called both attorneys for a sidebar conference. Defendant's objection was sustained, and the jury was admonished to disregard any personal opinion made by the State.

¶ 68 Despite the wide latitude prosecutors are granted in closing argument, it is improper for a prosecutor to express personal beliefs. *Id.* However, "the act of sustaining an objection and properly admonishing a jury is generally sufficient to cure prejudice engendered by improper

closing argument." *People v. Wheeler*, 226 Ill. 2d 92, 128 (2007). The prosecutor's comment was improper, but the trial court sustained defendant's objection, admonished the jury to disregard it, and cured any resulting prejudice.

¶ 69 4. *The Cumulative Effect of the State's Comments*

¶ 70 A reviewing court must entertain every reasonable presumption that the trial court properly exercised its discretion in determining the propriety of the remarks. *People v. Beler*, 327 Ill. App. 3d 829, 835 (2002). We find substantial prejudice has not been established. Defendant's guilt did not rely solely on these comments, and the record was not closely balanced. The closing arguments spanned over 100 pages in a 1,300 page transcript of the trial alone, and there were dozens of witnesses and various exhibits (including photo and video evidence). The record contains substantial evidence related to the elements the State needed to prove. It was not impossible to determine whether the jury's ultimate determination in this case was based on the improper comments versus the evidence presented.

¶ 71 In short, any improper comments made by the State during closing argument, in the aggregate, did not cause substantial prejudice to defendant, nor did they threaten to tip the scales of justice against defendant. A fair trial is not necessarily an error free trial, and the mere existence of a few improper comments will not require reversal. *McHale v. Kiswani Trucking, Inc.*, 2015 IL App (1st) 132625, ¶ 45; *Bajgrowicz v. DEV Medical Associates*, S.C., 2024 IL App (1st) 230196-U, ¶ 152. Ultimately, we cannot say the trial court's decision was an abuse of discretion. Thus, we reject defendant's request for a new trial on this basis.

¶ 72 B. Admissibility of Other Crimes Evidence

¶ 73 Defendant further argues the trial court erred in granting the State's motion *in limine* regarding other crimes evidence by permitting evidence of the Glen Carbon incident.

Defendant claims it lacked a " 'high degree of similarity' " to the present case, making it substantially more prejudicial than probative.

¶ 74 "Courts generally prohibit the admission of [other crimes] evidence to protect against the jury convicting a defendant because he or she is a bad person deserving punishment." *People v. Donoho*, 204 Ill. 2d 159, 170 (2003). Even though a defendant is entitled to have his or her guilt or innocence evaluated only based on the charged crime, "[o]ther-crimes evidence is admissible *** to prove intent, *modus operandi*, identity, motive, absence of mistake, and any material fact other than propensity that is relevant to the case." *Id.* Even if other crimes evidence falls under one of the exceptions to allow for its admissibility, the court can still exclude it if the prejudicial effect of the evidence substantially outweighs its probative value. *Id.* To be admissible, other crimes evidence must have some similarity to the crime charged. *Id.* at 184. A reviewing court will not reverse the trial court's decision to admit other crimes evidence unless it finds the court abused its discretion. *Id.* at 182. An abuse of discretion pertains to a decision that is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view adopted by the trial court. *Id.* A reviewing court, in determining whether the trial court abused its discretion in admitting other crimes evidence, owes some deference to the trial court's ability to evaluate the impact of the evidence on the jury. *Id.* at 186.

¶ 75 Here, the trial court granted the State's motion *in limine*, allowing the State to present evidence of an incident where defendant was identified as the perpetrator where an elderly woman's home was robbed in Glen Carbon. This incident was captured on video and played for the jury. The similarities between the Glen Carbon incident and the case at hand include the manner in which defendant approached the homeowners (repeated visits to the homes, friendly demeanor, and pretending to know the elderly owners), the use of the white Ford F-250 truck, and filling up

a bucket of water while in the home (identified as a tactic used where burglars ask homeowners to fill up a bucket of water to create noise and distract them). Reasonable minds can differ about whether other crimes evidence is "admissible without requiring reversal under the abuse of discretion standard." *Id.* There were some factual differences between the crime in this case and the Glen Carbon incident, including the type of items stolen. However, no two crimes are the same, and some differences between a prior offense and the crime currently charged do not make the prior offense inadmissible. See *id.* at 185.

¶ 76 Moreover, we are not persuaded the admission of the other crimes evidence was substantially more prejudicial than probative. During trial, the court issued a limiting instruction to the jury, noting the evidence was not to be used for propensity, but rather for "defendant's identification and *modus operandi*." As the factual similarities increase between a previous incident and the current crime, so does the probative value in determining whether it falls under the *modus operandi* exception to other crimes evidence. *People v. Bartall*, 98 Ill. 2d 294, 310 (1983). We also recognize that as the factual similarities increase, so can the prejudicial effect. In this case, the limiting instruction diminished the prejudicial value. Consequently, the properly admitted evidence of other crimes was not excessively prejudicial compared to its probative value. We cannot conclude the trial court's decision was arbitrary or unreasonable. Therefore, admitting the other crimes evidence was not an abuse of discretion.

¶ 77 C. Identification of Defendant Through Video Recording

¶ 78 Defendant's final argument is that the trial court erred by allowing a witness to make an in-court identification of defendant when that witness had only ever seen defendant through a video camera in real time.

¶ 79 Here, we clarify our understanding of the sequence of events in the record to determine the proper standard of review. The State called Neutzling to testify. During her testimony, defense counsel objected to Neutzling's statement that she had "seen a man being very nice to my mother trying to gain access to the house and acted like he knew her." Defense counsel objected on the basis of hearsay. The State disagreed. The trial court had counsel approach for an unrecorded sidebar conference. When the sidebar ended, Neutzling was permitted to continue testifying and later made an in-court identification of defendant. The record reveals, after other witnesses testified and after a lunch break, the court allowed defense counsel to make his record on his previous objection regarding what Neutzling saw on the Ring video.

¶ 80 Generally, a court reviews a trial court's decision to admit lay opinion identification testimony under an abuse of discretion standard. *People v. Thompson*, 2016 IL 118667, ¶ 49. However, to preserve a purported error for review, a defendant must contemporaneously object to the error at trial and raise the error in a posttrial motion. *People v. Sebby*, 2017 IL 119445, ¶ 48; *People v. Denson*, 2014 IL 116231, ¶ 11. Failure to take either of these steps results in forfeiture. *Sebby*, 2017 IL 119445, ¶ 48. A reviewing court may consider an otherwise forfeited issue under the plain error doctrine. *Id.*

¶ 81 In making his record, defense counsel noted, during the unrecorded sidebar, he objected to Neutzling's in-court identification of defendant due to lack of personal knowledge and abandoned the hearsay objection. Even though defense counsel was not allowed to make his record until later in the trial, the original objection and sidebar were contemporaneous, preserving the issue for appeal. Hence, counsel's argument will be reviewed under an abuse of discretion standard.

¶ 82 Our supreme court has clarified the admission of lay opinion identification testimony under Illinois Rule of Evidence 701 (eff. Jan 1, 2011) in *Thompson*. In that case, the supreme court held, "[O]pinion identification testimony is admissible under Rule of Evidence 701 [(eff. Jan. 1, 2011)] 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." *Thompson*, 2016 IL 118667, ¶ 50. In addition, "[l]ay opinion identification testimony is helpful where there is some basis for concluding the witness is more likely to correctly identify the defendant from the surveillance recording than the jury." *Id.* Special knowledge of the defendant is not required; rather, "the witness must only have had contact with the defendant, that the jury would not possess, to achieve a level of familiarity that renders the opinion helpful." *Id.* There are a variety of factors to consider in determining whether lay opinion identification testimony was proper, including: the witness's general familiarity with the defendant; the witness's familiarity with the defendant at the time the recording was made or where the witness observed the defendant dressed in a manner similar to the individual depicted in the recording; whether the defendant was disguised in the recording or changed his or her appearance between the time of the recording and trial; and the clarity of the recording and extent to which the individual is depicted. *Id.* ¶ 51. These factors are considered in their totality. *Id.*

¶ 83 The State argues, although Neutzling only observed defendant on video through a Ring camera, she had the opportunity to observe him in real time; thus, her in-court identification of defendant was proper lay opinion testimony. At the very least, Neutzling's testimony provided a foundation for the admission of the Glen Carbon Ring video. However, we find the State's distinction regarding Neutzling's real time viewing of the video irrelevant. Neutzling's only familiarity with defendant was what she observed on the Ring video, which was then shown to the

jury. She had no more familiarity with defendant than any juror who watched the recording. Consequently, Neutzling's in-court identification of defendant was improper. However, the error in admitting her in-court identification of defendant was harmless. "An evidentiary issue is harmless when no reasonable probability exists that the jury would have acquitted the defendant absent the error." *People v. Pelo*, 404 Ill. App. 3d 839, 865 (2010). No reasonable probability exists that the jury would have acquitted defendant absent Neutzling's in-court identification. The jury understood Neutzling's in-court identification of defendant was based solely on seeing him previously on the Ring camera video. The jury viewed the same recording as Neutzling and could judge for themselves. Furthermore, the accuracy of Neutzling's identification was challenged during cross-examination and scrutinized during closing argument.

¶ 84 Under these circumstances, we find defendant's argument that Neutzling's identification alone could have compromised the trial unpersuasive. Consequently, any error from her in-court identification was harmless, and we thus deny defendant a new trial on this basis.

¶ 85 III. CONCLUSION

¶ 86 For the reasons stated, we affirm the trial court's judgment.

¶ 87 Affirmed.