

FOURTH DIVISION
November 23, 2016

No. 1-14-0413

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
)	Cook County.
Plaintiff-Appellee,)	
)	
v.)	No. 12 CR 14277
)	
ANTOINE ARGUE,)	Honorable
)	Anna Helen Demacopoulos,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Ellis and Justice Burke concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's conviction for UUWF is affirmed. The State proved defendant's felon status by way of stipulation; there was sufficient evidence that defendant was in possession of the firearm because a witness testified she saw defendant handle the weapon and the police officers saw defendant laying back in the passenger seat so that his head was in the location where the firearm was found; defendant failed to make an offer of proof relating to sustained objections he now complains of; the prior consistent statement of a witness was properly admitted to

rebut recent fabrication that was elicited by defense counsel during cross-examination; and counsel's remarks during closing argument were not objected to in the trial court and, even if they were, did not impact the outcome of the trial.

¶ 2 Defendant, Antoine Argue, was charged by indictment with armed habitual criminal, two counts of unlawful use of a weapon by a felon (UUWF), and six counts of aggravated unlawful use of a weapon. The predicate felony in one of defendant's UUWF charges was based on a vehicular hijacking and the felony predicate in the other UUWF charge was based on defendant's conviction for possessing a firearm without a FOID card. Prior to trial, the State dismissed the UUWF count regarding the vehicular hijacking and dismissed the six counts of aggravated unlawful use of a weapon. The State then proceeded to trial on one count of armed habitual criminal and the count of UUWF that was based on his possession of a weapon without an FOID card. After a jury trial, defendant was found guilty on both counts. Prior to sentencing, the State moved to dismiss the armed habitual criminal conviction because the felony it was premised upon, possessing a firearm without an FOID card, had been declared unconstitutional. Defendant now appeals his conviction for UUWF. For the following reasons, we affirm the conviction and sentence.

¶ 3 Background

¶ 4 Defendant, Antoine Argue, was charged by indictment with armed habitual criminal, two counts of UUWF, and six counts of aggravated unlawful use of a weapon. The indictments generally alleged that on June 19, 2012, defendant unlawfully possessed a firearm without a FOID card and with two prior criminal convictions, one for unlawful use of a weapon in Case Number 01 C6 60381 (Count 2), and one for vehicular hijacking in Case Number 99 C6 0605 (Count 3). Prior to trial, the State moved to dismiss Count 3. Following a jury trial, defendant was found guilty of armed habitual criminal and UUWF. The aggravated unlawful use of a weapon statute was subsequently found unconstitutional, and on the State's request, the trial

court vacated the finding of guilt for armed habitual criminal. The court allowed defendant's conviction for UUWF to stand, noting that the parties had stipulated to both of defendant's prior felony convictions at trial. The trial court judge then sentenced defendant to five years imprisonment.

¶ 5 Prior to trial, the parties filed motions regarding the qualifying felonies for the charges of armed habitual criminal and UUWF. The trial court allowed the parties to stipulate to the two qualifying felonies, defendant's convictions for unlawful use of a weapon and vehicular hijacking, but stated that it would not give the jury the titles of defendant's previous convictions. The State then indicated it would only proceed to trial on the charges of armed habitual criminal and the first count of UUWF, which was the UUWF count based on defendant's prior conviction for unlawful use of a weapon, and dismissed the remaining charges. The following evidence was presented at the trial.

¶ 6 Officer Woodson of the Chicago Heights Police Department testified that on June 19, 2012, at 12:40 a.m., he was on patrol in his marked squad car with his partner, Officer Nick Guidotti, at 1814 Chicago Road. As he traveled southbound, he observed a car traveling northbound with a headlight out and a defective windshield. He activated his lights and executed a traffic stop, illuminating the stopped car with his spotlight. As he and his partner approached the car, they saw two occupants in the car. The person in the passenger seat was reclined all the way back, laying down with his head in the back seat area. Officer Woodson identified defendant in court as the person he saw in the passenger seat. Officer Woodson testified that he then asked the female driver, Drejuana Bulloch, for her license and proof of insurance, and she complied.

¶ 7 As Officer Woodson walked back to his car to verify Bulloch's information, Officer Guidotti signaled him to look in the back seat. Using his flashlight, Officer Woodson looked in the back seat, and saw a 9-mm pistol on the floorboard behind the driver's seat. Officer Woodson yelled "gun," and everyone got out of the car. He secured Bulloch and defendant, and the weapon. The gun had one round in the chamber and a loaded magazine. Officer Woodson stored the weapon in an evidence bag, and inventoried it and the magazine at the Chicago Heights Police Station.

¶ 8 Officer Guidotti testified that on June 19, 2012, at 12:40 a.m., he was on duty with Officer Woodson at 1814 Chicago Road in Chicago Heights, where they performed a traffic stop on a vehicle with a cracked windshield and missing headlight. Once the car was stopped in the parking lot of the Gyro Express, he approached the passenger side. He saw that the passenger, identified in court as defendant, was laying back in the seat with his head in the back seat area of the car. As Officer Guidotti looked in the car, he saw a silver handgun laying on the floorboard in the backseat, behind the driver's side. He nodded to Officer Woodson to look in the backseat, and Officer Woodson yelled and announced the gun. The barrel of the gun was pointed toward the rear passenger door. Both individuals were then removed from the car and handcuffed.

¶ 9 Drejuana Bulloch identified defendant in open court as a friend of her former boyfriend, Justice Hampton. Bulloch testified that on June 19, 2012, she had been in Chicago with Hampton and his friends in her car. Bulloch knew that her windshield was cracked and that the right headlight was out. Bulloch testified that she and Hampton arrived in Chicago Heights shortly before 1:00 a.m., and met up with defendant and other friends in the area of 24th Place. Hampton got out of the car and asked Bulloch to drive defendant to Gyro Express. She agreed. Defendant sat in the passenger seat of her car, laying back. As Bulloch drove towards Gyro

Express, she noticed that the police were behind them with their lights activated, so she pulled into the parking lot. Defendant then started acting nervous and told her, "don't tell." Defendant tried to hide the gun by throwing it behind the seat. Bulloch testified that she did not know that defendant had a gun when he got into her car. Bulloch was taken out of the car and went to the police station.

¶ 10 Bulloch later talked to Hampton about what happened, and he told her to write a statement and give it to defense counsel. Bulloch stated that she wrote what Hampton told her to write, but that the note was not the truth. On cross-examination, defense counsel entered Bulloch's note as an exhibit. The note stated that the gun actually belonged to Hampton. Bulloch testified that she read the note to defense counsel in her office on January 15, 2013, and that she told defense counsel that no one had threatened her or forced her to write it. Bulloch further testified that she signed another statement in defense counsel's office, and in that statement she stated that she wrote the note, that everything in it was true, and that no one forced or threatened her to write the note.

¶ 11 During a sidebar, the State objected to reading the entirety of Bulloch's statement. The State informed the trial court, "so we are clear at this point in time, she gave a written statement to the detective which is inconsistent with her testimony today." The trial court judge responded, "Then you'll be allowed to do – use a prior consistent statement to rebut recent fabrication." Bulloch's statement to defense counsel was then read into the record. In the January 15, 2013 statement, Bulloch said that the Chicago Heights Police Department forced her to say things she did not want to say about defendant after she got pulled over. Bulloch stated that she told them she did not know who the gun belonged to because she did not want to get anyone in trouble, but that the police told her to tell them that it was defendant's gun so she could go home. Bulloch

stated that the police told her that, if she did not say that the gun was defendant's, they were going to charge her with it. Bulloch further stated that the gun really belonged to Justin Hampton, and the last time she saw the gun in her car was in Hampton's hands. Bulloch testified that on the night of the arrest, the police prepared a statement for her that she signed, and she was then released.

¶ 12 On re-direct, Bulloch testified that she never saw Hampton with a gun, and that the gun did not belong to her or Hampton. Bulloch testified that the statement she signed at the police station on the night of the arrest was the truth, and that she saw defendant with that gun. Bulloch again stated that what she told the police was the truth, and that she saw defendant trying to hide the gun from the police.

¶ 13 Outside the presence of the jury, the State entered certified copies of defendant's prior convictions into evidence: a conviction under Case Number 01 C6 60381 for unlawful use of a weapon, and a conviction under Case Number 99 C6 60605 for vehicular hijacking. The State also asked to admit Bulloch's statement to the police into evidence, and defense counsel objected, arguing that it was a prior consistent statement. The State responded that it was being offered to rebut the indications of recent fabrication based on the additional statement given to defense counsel. The trial court stated that there was not a sufficient foundation for the entirety of the statement, and only the portion of the statement used to rehabilitate Bulloch would be admitted.

¶ 14 The State then presented the testimony of Holly Heitzman, a forensic scientist in the Latent Print Section of the Illinois State Police. Heitzman testified that she received the recovered weapon, magazine, and cartridge in this case, and examined them for fingerprints, but there were no impressions suitable for comparison.

¶ 15 The parties then stipulated to the jury that defendant had previously been convicted of felony offenses under Case Numbers 01 C6 60381 and 99 C6 60605, both of which were qualifying offenses under the armed habitual criminal statute. Outside the presence of the jury, defense counsel moved for a directed finding, which was denied.

¶ 16 Justin Hampton testified on defendant's behalf. Hampton testified that he previously dated Drejuana Bulloch, but that they stopped dating in October 2012. On June 18, 2012, Hampton testified that he and Bulloch visited his friends in Chicago, and that he got a chrome nickel-plated 9-mm gun at one of his friend's houses. He and Bulloch drove back to Chicago Heights to another friend's house at 24th Street. Defendant called Hampton, and Hampton asked Bulloch to pick defendant up and take him to get something to eat. Hampton testified that he forgot that the gun was still in the car, and that he had been drinking. Hampton eventually received a phone call from Bulloch the next morning, telling him what had happened. Hampton testified that he went to the Chicago Heights Police Department and tried to speak to the detective at the station, but no one spoke to him. Hampton stated that he did not threaten or encourage Bulloch to write a statement for defense counsel.

¶ 17 On cross-examination, Hampton testified that he never saw defendant on the night in question, and did not know where defendant was when he called. Hampton testified that he did not know if defendant had a gun on him when he got into the car, but insisted that the gun recovered by the police was his. Hampton further testified that he is good friends with defendant, and he has seen defendant and spoken to him since his arrest.

¶ 18 On re-direct, defense counsel asked several questions that were sustained. Defense counsel asked, "You never told him there was a gun in the car? Correct?" The trial court responded, "Sustained." Defense counsel then asked, "You did try to inform the detective that

the gun was yours? Correct?" The State objected, and the trial court judge sustained the objection. Defense counsel asked Hampton, "And, why did you go to the Chicago Heights Police Station?" The trial court judge responded, "Sustained."

¶ 19 The parties then rested. Bulloch's handwritten note that she gave to defense counsel was admitted into evidence over the State's objection. Bulloch's additional statement to defense counsel, indicating that she wrote the letter and that no one forced her to do so, was also admitted, but not to be sent back to the jury.

¶ 20 Several statements made by the State during closing arguments are at issue in this appeal. The State argued that the issue in this case was not one of ownership, but of possession, actual or constructive possession. The State argued that defendant had actual possession when he moved the gun to the floorboard of the car, and constructive possession when the gun was recovered from the floorboard. The State acknowledged Bulloch's statement to defense counsel and stated, "But, she told you that her boyfriend made her. This girl was courageous to come in here and tell you exactly what happened." The State also argued that Bulloch had a nervous demeanor when testifying on the stand and stated, "She was nervous for a reason. She was the only one courageous enough to come in here and break the code of silence. And that's why she was scared." The State emphasized that Bulloch's trial testimony was the same information she gave to the police, "And, that's why she was scared, cause she has the guts to come in here and tell the truth about this two-time convicted felon."

¶ 21 In response, defense counsel argued that Bulloch only told the truth when she was not afraid of being charged with the gun. Defense counsel further argued that there was no actual possession, because it was not defendant's gun, and no constructive possession because "You can't have constructive possession of something that you don't know it was there."

¶ 22 The State responded in rebuttal that the gun was found within defendant's arm's length, and that while it was possible Hampton also had a gun, defendant had the gun in the car. The State further argued that "defendant was the one that had the gun. Defense Attorney is trying to fool you. They are trying to bring in this witness and somehow say it is his gun to try and pull the wool over your eyes and fool you. Don't believe it." Defense counsel objected, and the objection was immediately sustained. The State then argued that Hampton, "the defendant's friend, came into here and tried to fool you to say it is his gun. Not believable." Finally, the State asked the jury to "[c]onsider your life experiences and you [*sic*] common sense. You will see how the defendant is guilty. Don't be fooled."

¶ 23 The court instructed the jury: to disregard questions and exhibits that were withdrawn or to which objections were sustained; for evidence received for a limited purpose, to not consider it for any other purpose; that closing arguments are not evidence, and any argument not based on evidence should be disregarded; and on the definitions of actual and constructive possession. Specifically, "A person has actual possession when he has immediate and exclusive control over something. A person has constructive possession when he lacks actual possession of a thing but he has both the power and the intention to exercise control over a thing."

¶ 24 The jury convicted defendant on both counts, UUWF and armed habitual criminal.

¶ 25 After trial, the State informed the trial court that the aggravated unlawful use of a weapon statute had been ruled unconstitutional in certain circumstances. Since defendant's conviction for armed habitual criminal was predicated in part on a prior conviction for aggravated unlawful use of a weapon, the State asked the trial court to vacate defendant's conviction on that charge. As to the charge of UUWF, the State argued that "We had to prove that he was a convicted felon. The case number is surplusage, therefore, we're not asking to vacate that." The trial court noted that

there was a stipulation at trial as to the two prior felony convictions, and that the jury did not receive the specific felonies of which defendant had been convicted, and "so that Count still stands."

¶ 26 Defense counsel subsequently filed motions for a new trial and to vacate the verdict. The defense argued that defendant's conviction for UUWF was predicated on his prior conviction for aggravated unlawful use of a weapon, which was void under *People v. Aguilar*, 2013 IL 112116, and that the count that was based on a prior vehicular hijacking conviction had been *nolle prossed* prior to trial. The State responded that the nature of the prior conviction was surplusage without any evidentiary significance, and that the State only had to prove defendant's status as a convicted felon. The trial court stated that the trier of fact "only had to decide whether or not he was a convicted felon, not whether or not he was—there is no specific finding by the fact finder that it was this specific felony. It was any felony." The trial court ultimately determined that "it is just the felony status that the State must prove, as an element of the offense," that the parties stipulated to both convictions at trial, and "the State can amend the charging document at any time, even after the evidence has been presented, and therefore they could amend Count 2, and add the additional felony that was alleged in the subsequent count." Defendant's motion to vacate the verdict was denied. Defendant's motion for a new trial was also denied, with the trial court finding that the State proved defendant guilty beyond a reasonable doubt at trial. The trial court then sentenced defendant to a term of five years' imprisonment. Defendant's motion to reconsider his sentence was denied. Defendant now appeals his conviction. For the reasons that follow, we affirm defendant's conviction.

¶ 27

Analysis

¶ 28

I. Effect of *Aguilar* on Defendant's UUWF Conviction

¶ 29 Defendant argues that his UUWF conviction must be reversed where that charge was premised on his prior aggravated unlawful use of a weapon felony conviction, which our supreme court has since found to be unconstitutional in *People v. Aguilar*, 2013 IL 112116 (and later *People v. Burns*, 2015 IL 117387). As such, defendant argues that the State failed to prove him guilty of UUWF based on a prior aggravated unlawful use of a weapon conviction and, further, never tried him for UUWF based on his prior felony conviction of vehicular hijacking because that count was dismissed by the State prior to trial. Therefore, defendant argues that he cannot be convicted of a crime he was never tried for. The State in turn argues that defendant's UUWF conviction must be upheld where the UUWF statute only requires that the State prove defendant was a convicted felon at the time he committed the UUWF and does not require the State to prove the specific crime for which defendant's felon status is premised upon. Because the parties stipulated to defendant's felon status, the State argues it has proven defendant's UUWF conviction. Further, the State notes that at the time of this offense, defendant had another qualifying felony on his record, vehicular hijacking, and the parties stipulated to that felony conviction as well.

¶ 30 The UUWF statute at issue here states:

"(a) It is unlawful for a person to knowingly possess on or about his person or on his land or in his own abode or fixed place of business any weapon prohibited under Section 24-1 of this Act or any firearm or any firearm ammunition if the person has been convicted of a felony under the laws of this State or any other jurisdiction. This Section shall not apply if the person has been granted relief by the Director of the Department of State Police

under Section 10 of the Firearm Owners Identification Card Act."

720 ILCS 5/24-1.1(a) (West 2012).

¶ 31 In *People v. McFadden*, 2016 IL 117424, our supreme court explained what happens when the prior felony conviction for which the UUWF conviction is based upon is later found to be void:

"The [UUWF] statute prohibits the possession of a firearm by any person 'if the person has been convicted of a felony under the laws of this State or any other jurisdiction.' 720 ILCS 5/24-1.1(a) (West 2008). As previously explained, that language of the statute requires the State to prove only 'the defendant's felon status.' *Walker*, 211 Ill. 2d at 337. Contrary to the appellate court's finding, the statute does not require the State to prove the predicate offense at trial. Additionally, the proscription under section 24-1.1(a) is expressed in the past tense, thus applying to any person who 'has been convicted' of a felony (720 ILCS 5/24-1.1(a) (West 2008)). Nothing on the face of the statute suggests any intent to limit the language to only those persons whose prior felony convictions are not later subject to vacatur." *People v. McFadden*, 2016 IL 117424, ¶ 27.

The *McFadden* court went on to explain,

"under section 24-1.1(a), it is immaterial whether the predicate conviction 'ultimately might turn out to be invalid for any reason.' *Lewis*, 445 U.S. at 62. Moreover, as with the federal statute, the UUW by a felon statute is not concerned with prosecuting or

enforcing the prior conviction. Rather, the legislation is concerned with 'the role of that conviction as a disqualifying condition for the purpose of obtaining firearms.' *Mayfield*, 810 F.2d at 946.

Accordingly, based on the plain wording of this particular statutory scheme, the [UUWF] offense is a status offense, and the General Assembly intended that a defendant must clear his felon status before obtaining a firearm.

Moreover, the policy and purpose of the [UUWF] statute are served by requiring an individual to clear his felony record before possessing a firearm, 'no matter what infirmity infects his conviction.' *Padilla*, 387 F.3d at 1091. As one jurisdiction aptly pointed out, a defendant 'may not resort to self help by first obtaining and possessing [a] firearm, and thereafter try[ing] to assert the invalidity of the prior conviction as a defense to a [UUWF] prosecution.' *People v. Harty*, 173 Cal. App. 3d 493 (1985)." *McFadden*, 2016 IL 117424, ¶¶ 29-30.

Thus, based on the reasoning our supreme court laid out in *McFadden*, defendant's UUWF conviction here, although based on a prior aggravated unlawful use of a weapon conviction, would still stand because at the time he was charged with and convicted of UUWF, the parties stipulated to defendant's status as a felon. Although the prior aggravated unlawful use of a weapon conviction may be subject to possible attack, it had not yet been cleared from his record and his status remained as a convicted felon. Therefore, pursuant to *McFadden*, the State has proven defendant's felon status, by way of stipulation, and his UUWF conviction must be

affirmed. *People v. Walker*, 211 Ill. 2d 317, 333 (2004) ("[T]he [United States Supreme Court has] found that when felon status is all that the government needs to prove, evidence of the name and nature of the prior conviction is needless surplusage which has no probative value, yet presents a high risk of unfair prejudice."); *People v. McGee*, 2016 IL App (1st) 141013, ¶ 26 ("An essential element of proof was that the defendant's status as a felon be established beyond a reasonable doubt, not that a particular or specific felony be proved or that the felony was charged under a specific or identified case number."). Although defendant cautions against us following our supreme court's reasoning in *McFadden*, it is well-settled that we must follow the law as declared by our supreme court. *Ausman v. Arthur Andersen, LLP*, 348 Ill. App. 3d 781, 787-88 (2004); *Illinois Labor Relations Board v. Chicago Transit Authority*, 341 Ill. App. 3d 751, 758 (2003) ("After the supreme court has declared the law with respect to an issue, [the appellate] court must follow that law because only the supreme court has authority to overrule or modify its decisions.").

¶ 32

II. Sufficiency of the Evidence—UUWF

¶ 33 Next, defendant argues that there was insufficient evidence to convict him of UUWF. Specifically, defendant argues that the State failed to prove he had constructive or actual possession of the firearm where: (1) another person, Justin Hampton, claimed that he owned the firearm at issue; (2) defendant did not own the vehicle where the firearm was found and he had not been in the vehicle long before the firearm was found; and (3) the only person who saw defendant in possession of the firearm was Bulloch, who was arrested at the same time as defendant, released after implicating defendant, and who offered conflicting testimony during the proceedings. The State in turn argues that the trier of fact could have reasonably inferred from the evidence that defendant had actual possession of the firearm where Bulloch testified at trial that she saw defendant move the firearm to the backseat after being pulled over by the police and

constructive possession where there was evidence that the firearm was found in the car where defendant was a passenger and within defendant's reach and sight.

¶ 34 “When a court reviews a challenge to the sufficiency of the evidence, the relevant question is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *People v. Lee*, 376 Ill. App. 3d 951, 954 (2007); see also *People v. Campbell*, 146 Ill. 2d 363, 374-75 (1992). “A criminal conviction will not be set aside on appeal unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to the defendant's guilt.” *Lee*, 376 Ill. App. 3d at 955. In reviewing the evidence, the court will not substitute its judgment for that of the trier of fact. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). Decisions regarding the credibility of witnesses and the weight given to their testimony are exclusively within the province of the jury. *People v. Collins*, 106 Ill. 2d 237, 261-62 (1985). “Circumstantial evidence alone is sufficient to sustain a conviction where it satisfies proof beyond a reasonable doubt of the elements of the crime charged.” *People v. Nesbit*, 398 Ill. App. 3d 200, 209 (2010).

¶ 35 A person commits the offense of UUWF where he “knowingly possess on or about his person or on his land or in his own abode or fixed place of business any weapon prohibited under Section 24-1 of this Act or any firearm or any firearm ammunition if the person has been convicted of a felony under the laws of this State or any other jurisdiction.” 720 ILCS 5/24-1.1(a) (West 2012). At trial, defendant stipulated to being a felon based on two prior felony convictions, so the issue here is whether the evidence sufficiently established that defendant possessed the firearm.

¶ 36 Criminal possession may be actual or constructive. “Actual possession is proved by testimony which shows [that the] defendant exercised some form of dominion over the unlawful

substance, such as trying to conceal it or throwing it away.” *People v. Love*, 404 Ill. App. 3d 784, 788 (2010) (citing *People v. Scott*, 152 Ill. App. 3d 868, 871 (1987)). On the other hand, “constructive possession” arises when the defendant has the intent and capability to maintain control and dominion over the contraband. *Love*, 404 Ill. App. 3d at 788. Where the possession is constructive, the State must prove that “defendant (1) had knowledge of the presence of the weapon, and (2) had immediate and exclusive control over the area where the weapon was found.” *People v. Ingram*, 389 Ill. App. 3d 897, 899-900 (2009) (citing *People v. Hampton*, 358 Ill. App. 3d 1029, 1031 (2005)). Knowledge may be “inferred from several factors, including: (1) the visibility of the weapon from defendant's location in the vehicle, (2) the amount of time in which defendant had an opportunity to observe the weapon, (3) gestures or movements made by defendant that would suggest an effort to retrieve or conceal the weapon, and (4) the size of the weapon.” *Ingram*, 389 Ill. App. 3d at 900 (citing *People v. Hampton*, 358 Ill. App. 3d at 1033).

¶ 37 Here, Bulloch testified at trial that she saw defendant handle the gun and attempt to hide it in the back seat of the car when the police pulled them over. This testimony from Bulloch is sufficient evidence from which the jury could find that defendant had actual possession of the firearm. Although defendant argues that Bulloch offered conflicting evidence on this issue,¹ the jury is entitled to choose which evidence to believe (*People v. Ortiz*, 196 Ill. 2d 236, 267 (2001) (“a fact finder need not accept the defendant's version of events as among competing versions”)), and it is not our province to second-guess the verdict or to retry defendant on appeal. *People v. Hall*, 194 Ill. 2d 305, 329-30 (2000).

¶ 38 Further, the arresting officers testified that they saw the firearm in plain view in the backseat of the vehicle behind the driver's seat when they pulled the car over, and that as they

¹ Defendant frequently points out that Bulloch gave a statement that the firearm belonged to Hampton, and that Hampton testified the firearm belonged to him. However, ownership is not dispositive on the issue of possession, and one can be found to be in possession of a weapon that he or she does not own.

approached the car defendant's seat was fully reclined and his head was in the backseat area of the car. Such facts, especially along with Bulloch's testimony, would also be sufficient to show constructive possession. See *Ingram*, 389 Ill. App. 3d at 897 (Evidence was sufficient to establish that defendant knowingly possessed weapon so as to support conviction for unlawful possession of a weapon by a felon where photograph showed gun was found on the floor, with nothing else around it; where the defendant's front passenger seat was broken and therefore resting in the backseat, right next to where gun was found; where the size of gun made it easily identifiable as such; where the defendant had not just entered car but had been in car for a sufficient period of time to imply knowledge; where gun was in a position where the defendant easily could have reached over and placed it there; and where the defendant's flight from car following traffic stop supported the inference that the defendant possessed the gun.).

¶ 39 While we recognize defendant's arguments that he did not own the car where the firearm was found, that he was not in the car long before it was pulled over, that someone else came forward and claimed to own the gun, and that Bulloch had an interest in saying the firearm belonged to defendant, none of these elements are dispositive factors when considering constructive possession. See *Love*, 404 Ill. App. 3d at 790. As stated earlier, the factors that are to be considered are: "(1) the visibility of the weapon from defendant's location in the vehicle, (2) the amount of time in which defendant had an opportunity to observe the weapon, (3) gestures or movements made by defendant that would suggest an effort to retrieve or conceal the weapon, and (4) the size of the weapon." *Ingram*, 389 Ill. App. 3d at 900. Based on our review of the evidence in this case, we cannot say that the evidence was so improbable or unsatisfactory that no rational finder of fact could have found the crime to have been proved beyond a reasonable doubt. See *People v. Villarreal*, 198 Ill. 2d 209 (2001).

¶ 40 III. Sustained Objections to Hampton's Testimony

¶ 41 Defendant next argues that he was denied his right to present a complete defense due to several objections that were sustained during the defense's questioning of Hampton.

Specifically, defendant claims that the trial court improperly sustained objections to: (1) the question of whether he told defendant there was a gun in the car, and (2) the question of whether he tried to inform the Chicago Heights detectives that the gun in question belonged to him.²

Although defendant concedes that no offer of proof was made with respect to these sustained objections, he argues that the answers to the questions were obvious such that no offer of proof was necessary, or, in the alternative, the errors in sustaining the objections amounted to plain error. For the reasons that follow, we find defendant forfeited his objections to the court's rulings. Moreover, if the alleged errors had been preserved we would affirm the trial court's rulings sustaining the objections.

¶ 42 First, in the absence of an offer of proof and, consequently, with no way of knowing what Hampton's testimony would have been if the objections had not been sustained, defendant has waived his right to challenge those rulings. On appeal, defendant “ ‘must provide [the] reviewing court with an adequate offer of proof as to what the excluded evidence would have been.’ ” *People v. Pelo*, 404 Ill. App. 3d 839, 875 (2010) (quoting *In re Estate of Romanowski*, 329 Ill. App. 3d 769, 773 (2002)). The purpose of an offer of proof is: (1) to disclose to the trial court and opposing counsel the nature of the proposed evidence so that the trial court may take appropriate action; and (2) to provide the reviewing court with an adequate record to determine whether the trial court's action was in error. *People v. Boston*, 2016 IL App (1st) 133497, ¶ 63.

² Specifically, defense counsel asked the following questions, which were sustained: "You never told defendant there was a gun in the car? Correct?" "You did try to inform the detective that the gun was yours? Correct?" "You did go to the Chicago Heights Police station?" "And, you did try to talk to someone there?" "And, why did you go to the Chicago Heights Police station?"

In other words, when a trial court bars evidence, no appealable issue exists unless the denied party makes an offer of proof. *People v. Peeples*, 155 Ill. 2d 422, 457 (1993). If a criminal defendant claims on appeal that he was not able to prove his case because the trial court improperly barred him from presenting evidence but he failed to make an adequate offer of proof, he forfeits review of the issue on appeal. *Id.* Defendant concedes that he did not make an offer of proof with respect to the objections that were sustained. Absent any offer of proof regarding what the content of Hampton's answers would have been had the objections not been sustained, we cannot determine whether exclusion of that evidence was proper. See *People v. Andrews*, 146 Ill. 2d 413, 421 (1992). Therefore, defendant has forfeited the issue on appeal. See *People v. Burgess*, 2015 IL App (1st) 130657, ¶¶ 147-48.

¶ 43 While defendant argues that Hampton's answers to the questions that were sustained were obvious, we disagree. Absent an offer of proof as to what Hampton's answers would have been, we have no way of knowing what those answers would have been. Defendant concedes as much: "The prosecutor provided no basis for objecting to this evidence and the court gave no reasons for excluding it. [Citation.] It is thus impossible to know why the court believed the evidence was inadmissible." We cannot merely guess or accept defendant's suggestions as to what those answers would have been. Moreover, "an appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis. Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984).

¶ 44 Second, defendant argues that the court's decision to sustain the two objections during the defense counsel's questioning of Hampton amounted to plain error, which would not require that he preserve the errors for an appeal. "[T]he plain-error doctrine allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. [Citation.]" *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). However, if we find there was no error, there can be no plain error.

¶ 45 Here, we find that, even if we assume *arguendo* that the trial court erred in sustaining the objections, and further assume *arguendo* that Hampton would have given the answers defendant suggests on appeal he would have given—that Hampton never told defendant about the gun in the car and Hampton went to the Chicago Heights police to tell them he owned the gun at issue—the rulings were not relevant and did not form the basis of a defense to the charges facing defendant because: (1) defendant could still have possession of the firearm at issue even if it belonged to Hampton; (2) Bulloch testified that upon being pulled over, defendant handled the firearm and tried to hide it in the backseat, thereby making it irrelevant whether Hampton said anything to defendant about the firearm; and (3) the arresting officers testified that when they pulled the car over, defendant's seat was back and he was laying with his head in the back seat where the firearm was found in plain view. Thus, because defendant failed to make offers of proof and because any alleged errors cannot rise to the level of plain error, we cannot find that the trial court's rulings sustaining the objections at issue here were an abuse of discretion. *People v. Becker*, 239 Ill. 2d 215, 234 (2010) (“The admission of evidence is within the sound

discretion of a trial court, and a reviewing court will not reverse the trial court absent a showing of an abuse of that discretion.”). Since there is no error there can be no plain error, and we affirm the rulings of the trial court.

¶ 46

IV. Prior Consistent Statement

¶ 47 Defendant next argues that the trial court erred when it allowed the State to introduce the statement that Bulloch gave to the Chicago Heights police on the night of defendant's arrest during the re-direct portion of her testimony. Defendant argues that this was a prior consistent statement that was (1) offered to bolster Bulloch's testimony at trial, (2) did not fall into any exception that would allow a prior consistent statement in at trial, and (3) was highly prejudicial to defendant's case where Bulloch's testimony was the most important factor in establishing his guilt at trial. However, the State argues, and defendant concedes, this error was not properly preserved on appeal. “[T]he failure to raise an issue in a written motion for a new trial results in a waiver of that issue on appeal. *Both* a trial objection *and* a written post-trial motion raising the issue are required for alleged errors that could have been raised during trial.” (Emphases in original.) *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). As such, defendant has waived this issue on appeal.

¶ 48 However, we may review an otherwise waived issue “when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.” *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Defendant argues that this issue—allowing Bulloch's prior consistent statement—falls within the first prong of the plain-error doctrine. Under this first prong, defendant must show that an error occurred and the evidence

was so close that the error alone threatened to tip the scales of justice against the defendant. See *id.* ("the first step is to determine whether error occurred").

¶ 49 Generally, evidentiary rulings are within the sound discretion of the trial court and will not be reversed unless the trial court has abused that discretion. *People v. Purcell*, 364 Ill. App. 3d 283, 293 (2006); see, e.g., *People v. Caffey*, 205 Ill. 2d 52, 89 (2001). A trial court abuses its discretion only where the ruling is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view adopted by the trial court. *Caffey*, 205 Ill. 2d at 89. Here, Bulloch testified on direct examination that she saw defendant handle the firearm and try to hide it in the backseat when the police pulled them over. On cross-examination, defense counsel confronted Bulloch with a statement that she made indicating that the firearm actually belonged to Hampton. On re-direct, Bulloch testified that, after being arrested, she made a statement to the police indicating that she saw defendant try to hide the gun upon being pulled over by the police.

¶ 50 A witness may not be corroborated on direct examination by proof of prior statements consistent with his testimony. *People v. Williams*, 147 Ill. 2d 173, 227 (1991). Moreover, when a witness is impeached by means of a prior inconsistent statement, if a consistent statement does not disprove or explain the making of the inconsistent statement, it is not admissible. *Id.*

"However, prior consistent statements are admissible to rebut a charge or an inference that the witness is motivated to testify falsely or *that his testimony is of recent fabrication*, and such evidence is admissible to show that he told the same story before the motive came into existence or *before the time of the alleged fabrication*." (Emphases added.) *Id.*; see also *People v. Clark*, 52 Ill. 2d 374, 389 (1972). We find that the trial court did not abuse its discretion when it allowed Bulloch to testify about a prior consistent statement because the testimony was used to rebut an implication by the defense that her trial testimony was fabricated. On cross-

examination defense counsel brought out the fact that Bulloch made statements to defense counsel in his office that are inconsistent with her trial testimony. The trial court properly allowed the state to present her prior consistent statement made on the date of the arrest to rebut the implication by defense counsel that Bulloch fabricated her trial testimony. “It is well established that where a witness has been impeached by proof that he has made prior inconsistent statements, he may bring out all of the prior statements to qualify or explain the inconsistency and rehabilitate the witness.” *People v. Harris*, 123 Ill. 2d 113, 142 (1988) (citing *People v. Hicks*, 28 Ill. 2d 457, 463 (1963)); see also *People v. Wetzel*, 308 Ill. App. 3d 886, 895 (1999) (listing “a case where the consistent statement could be used to qualify or explain the inconsistency” as an example of one of the “occasions when prior consistent statements may be admissible to corroborate a witness's trial testimony”). As such, the trial court did not err when it allowed Bulloch to testify on re-direct about the statement she made to the police at the time of the arrest to rebut the charge brought out on cross-examination by defendant that she fabricated her testimony.

¶ 51 Moreover, beyond an error, defendant must also show that the evidence was so closely balanced that the error alone threatened to tip the scales of justice against the defendant. We cannot say that allowing Bulloch's statement to the police at the time of the arrest tipped the scales of justice in this case where there was evidence in the record that Bulloch saw defendant handle the firearm and try to hide it in the back seat after being pulled over by the police, and the police officers testified that upon pulling over the car they observed defendant laying back in his seat with his head in the backseat where the firearm was located in plain view in the back seat driver's side of the car. Further, although Bulloch was confronted with her statement that the firearm actually belonged to Hampton, whether the firearm belonged to Hampton was irrelevant

to whether defendant had possession of the firearm at the time of the offense. As such, we find no plain error.

¶ 52 V. Comments During Closing Arguments

¶ 53 Finally, defendant argues that his conviction should be reversed due to misconduct during the State's closing arguments. Specifically, he argues that the following comments made during closing arguments amount to misconduct: (1) improper suggestion that defendant was responsible for a "code of silence" to keep Bulloch from testifying; (2) suggestions that defense counsel presented false testimony to try and trick the jury into acquitting defendant, and (3) dwelling on defendant's prior felony convictions. The State in turn argues that any objections to the State's closing remarks were waived and, alternatively, do not fall within the purview of the plain error doctrine where no error occurred. Defendant concedes that he failed to preserve many of the objections to closing remarks that he now takes issue with and raises on appeal. *People v. Wheeler*, 226 Ill. 2d 92, 122 (2007) ("To preserve claimed improper statements during closing argument for review, a defendant must object to the offending statements both at trial and in a written posttrial motion."). Nonetheless, waiver aside, we find that the trial court did not abuse its discretion, and therefore did not commit error in allowing the comments made during closing arguments. *Piatkowski*, 225 Ill. 2d at 565 (under the plain-error test, even where an otherwise waived issue may be reviewed, the defendant still must show that an error occurred in the first place); see also *People v. Bannister*, 232 Ill. 2d 52, 65 (2008)

("When a defendant fails to establish plain error, the result is that the procedural default must be honored.") (Internal quotation marks omitted.).

¶ 54 Defendant faces a substantial burden to achieve reversal of his conviction based upon improper remarks during closing argument. *People v. Williams*, 332 Ill. App. 3d 254, 266 (2002). The regulation of the substance and style of closing argument lies within the trial court's

discretion. *People v. Meeks*, 382 Ill. App. 3d 81, 84 (2008); *Caffey*, 205 Ill. 2d at 128. However, “there appears to be a conflict among Illinois Supreme Court cases regarding the correct standard for reviewing remarks during argument.” *People v. Daniel*, 2014 IL App (1st) 121171, ¶ 32. As a result, appellate courts have been divided as to whether the appropriate standard of review is abuse of discretion or *de novo*. *People v. Kelley*, 2015 IL App (1st) 132782, ¶ 76. “However, we do not need to resolve the issue of the appropriate standard of review at this time, because our holding in this case would be the same under either standard.” *Id.*

¶ 55 While a prosecutor may not make arguments or assumptions that have no basis in evidence, improper comments or remarks are not reversible error unless they are a material factor in the conviction or cause substantial prejudice to the accused. *People v. Tipton*, 207 Ill. App. 3d 688, 699-700 (1990). They may comment on the evidence and draw reasonable inferences therefrom, as well as dwelling on the “ ‘evil results of crime’ ” and urging the “ ‘fearless administration of the law.’ ” *People v. Liner*, 356 Ill. App. 3d 284, 295-96 (2005) (quoting *People v. Harris*, 129 Ill. 2d 123, 159 (1989)). However, a prosecutor may not make an argument that serves no purpose but to inflame the jury. *People v. Thompson*, 2013 IL App (1st) 113105, ¶ 80. Where there are allegations of prosecutorial misconduct, arguments of both the prosecutor and defense counsel must be reviewed in their entirety, and allegations of improper comment must be placed in their proper context. *Tipton*, 207 Ill. App. 3d at 701. A reviewing court will find reversible error based upon improper closing argument only if a defendant can identify remarks of the prosecutor that are both improper and so substantial that a reasonable jury could have reached a different verdict if the improper comments had not been made and thus were a material factor in defendant's conviction. *Wheeler*, 226 Ill. 2d at 123; see also *Thompson*, 2013 IL App (1st) 113105, ¶¶ 79-80.

¶ 56 We find that the State's comments during closing arguments were reasonable inferences from the evidence elicited at trial. With respect to defendant's first challenge regarding the "code of silence[,]" the prosecutor stated the following to the jury: "Miss. Bulloch, you could tell by her demeanor on the stand that she was nervous. She was nervous for a reason. She was the only one courageous enough to come in here and break that code of silence. And, that's why she's scared. She had to deal with whatever it was going on with her and Mr. Hampton to come in here and have the guts to take the stand." There was evidence in the record, by way of Bulloch's testimony, that Hampton pressured Bulloch to write the statement to defense counsel, which was different than her testimony in court and that was given to the police after the arrest. As such, we believe that the prosecutor's comments about Bulloch being scared and testifying regardless of what was going on with her and Hampton and breaking the "code of silence" were reasonable inferences made from the evidence. See *Linear*, 356 Ill. App. 3d at 295-96.

¶ 57 With respect to defendant's second argument relating to defense counsel trying to trick the jury with false testimony, we find that any such comments were either sustained and addressed in jury instructions or were not improper and did not have a material effect on the outcome of the case. With respect to the first comment, where the prosecutor stated "Defense Attorney is trying to fool you," this was immediately objected to and sustained by the trial court. The jury was also given the following jury instruction after closing arguments: "What the lawyers say during the argument is not evidence and you should not consider it and should not be considered by you as evidence." As such, given that the comment was quickly sustained and a proper jury instruction was given, the prosecutor's comment did not warrant reversal. *People v. Johnson*, 208 Ill. 2d 53, 116 (2003) ("As this court has frequently stated, the prompt sustaining

of an objection combined with a proper jury instruction usually is sufficient to cure any prejudice arising from an improper closing argument.").

¶ 58 The remaining comments that defendant took issue with pertaining to fabrication and trying to fool the jury were all proper comments regarding the believability of the witnesses: "[Bulloch] testified truthfully and credibly what happened. [Hampton], the defendant's friend, came into here and tried to fool you and say it is his gun. Not believable." and "Consider your life experiences and you [*sic*] common sense. You will see how defendant is guilty. Don't be fooled." Again, we do not find that these comments attack defense counsel, but rather go to the credibility of the witnesses, which witnesses the jury should believe, and common sense about which witnesses the jury should believe. There is nothing improper about commenting on the witnesses' credibility and, as such, we find these comments could reasonably be inferred from the evidence that was presented at trial through the witnesses who offered conflicting testimony. See *People v. Kirchner*, 194 Ill. 2d 502, 549 (2000) ("The State may challenge a defendant's credibility and the credibility of his theory of defense in closing argument when there is evidence to support such a challenge.").

¶ 59 With respect to the last argument relating to the prosecutor's repeated reference to the fact that defendant had previously been convicted of two felonies, we find these comments were not only reasonably inferred from the evidence, but were facts that the State needed to elicit to the jury in order to satisfy the elements of the crime for which defendant had been charged. In the prosecutor's closing arguments, he remarked: "he can't possession [*sic*] a gun because he is convicted of two felonies." He also remarked: "There is no fact in dispute that the defendant is a twice convicted felon. It is [*sic*] been stipulated to not only by us but by the defense. That under two separate occasions he has been convicted as a felon. And, that's important because when we

look at the actual charges, the UUW by a felon. That the defendant knowingly possessed a firearm. And, that he was a convicted felon. The armed habitual criminal. The defendant has twice been convicted of a felony. They qualify. They agreed to that." The prosecutor remarked that the following items were pieces of information that the jury could use in coming to a verdict: "One, the law the Judge can give you. The other is evidence. The evidence that was presented on the stand. The evidence of the stipulation that this guy is a two-time convicted felon. And, use your common sense." And, last, the prosecutor referred to Hampton as "this two-time convicted felon's friend." The parties stipulated to the fact that defendant had two prior felony convictions and a prior felony conviction was a necessary element to the crimes defendant was charged with. As such, because the prosecutor was commenting on stipulated evidence, we do not find that his comments were improper in any way. See *Linear*, 356 Ill. App. 3d at 295-96.

¶ 60 While we recognize that defendant argues that the cumulative effect of the prosecutor's misconduct denied defendant a fair trial, because we have found that none of the alleged misconduct was in fact improper or substantially prejudiced defendant, it follows that we cannot find any cumulative misconduct. *People v. Howell*, 358 Ill. App. 3d 512, 526 (2005) ("If the alleged errors do not amount to reversible error on any individual issue, generally there is no cumulative error.").

¶ 61 Last, even if we were to assume *arguendo* that the State's remarks during closing arguments were improper, we cannot say the remarks were "a material factor in the conviction" or caused "substantial prejudice to the accused" where there was evidence in the record that Bulloch saw defendant handle the firearm and try to hide it in the back seat after being pulled over by the police, and the police officers testified that upon pulling over the car they observed

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defendant laying back in his seat with his head in the backseat where the firearm was located in plain view in the back seat driver's side of the car. As such, we affirm defendant's conviction.

¶ 62

Conclusion

¶ 63 For all the reasons stated above, the judgment of the circuit court of Cook County is affirmed.

¶ 64 Affirmed.