THIRD DIVISION
September 28, 2018

No. 1-15-2715

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 CR 15702
	)	
JOE FEAZELL,	)	Honorable
	)	Vincent Michael Gaughan,
Defendant-Appellant.	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: The judgment of the circuit court of Cook County is affirmed; the trial court's error in questioning the jury on whether they understood and accepted that defendant did not have to produce any evidence was not plain error; the State did not engage in improper conduct that denied defendant a fair trial; the trial court did not abuse its discretion in sentencing defendant to a greater term of imprisonment than offered to defendant during plea bargaining; the trial court was not required to state its reasons for its sentence on the record; and the armed habitual criminal statute is not facially unconstitutional.

¶ 2 Following a jury trial, the circuit court of Cook County convicted defendant of armed habitual criminal and sentenced him to 10 years' imprisonment. Defendant appeals his conviction and sentence alleging errors by the court in impaneling the jury, misconduct by the

State during trial and closing argument, improper sentencing, and the unconstitutionality of the statute defining the offense. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 The State charged defendant, Joe Feazell, with armed habitual criminal. On January 15, 2015, the trial court entered a pretrial conference pursuant to Illinois Supreme Court Rule 402 (eff. July 1, 2012). Defendant was offered a sentence of six years' imprisonment in exchange for pleading guilty. Defendant rejected the offer. The parties stipulated that defendant was charged with armed habitual criminal based on two prior convictions for unlawful use of a weapon by a felon.

¶ 5 The trial court examined the venire pursuant to Illinois Supreme Court Rule 431(b) (eff. July 1, 2012) in pertinent part as follows:

> "THE COURT: The first off is the presumption of innocence. Anybody placed on trial in a criminal case is presumed to be innocent of the charges against him. What does that mean? That means if you were selected as jurors and I told you to go back to the jury room and come back with a verdict, the only verdict you could come back with is not guilty because the State would not have been allowed to present any evidence at that time and Mr. Feazell would have had the presumption of innocence. Does anybody have any difficulties understanding the constitutional principle of presumption of innocence please raise their hand?
>
> Let the record indicate that nobody in the outer or inner part of the courtroom has raised their hand. Does anybody have any problems or qualms about applying the constitutional principle of presumption of innocence? Please raise your hand.

Again, nobody has raised their hand in the courtroom.

The next constitutional principle I want to talk to you about is the burden of proof. Some of you may have been jurors in civil cases, and in a civil case the best way to demonstrate the burden of proof is if this was a scale, all you have to do is tilt it. We call that the preponderance of the evidence. And the legal definition there is that it's more likely than not that the event occurred. In a criminal case, the highest burden of proof is the proof beyond a reasonable doubt, and that's the highest burden of proof in law. Does anybody have any problems understanding that the burden of proof in a criminal case is the proof beyond a reasonable doubt? Please raise their hand.

And, again, nobody has raised their hand. Does anybody have any problems applying that principle, that the burden of proof is proof beyond a reasonable doubt or qualms with that principle, please raise your hand.

Again, nobody in the inner or outer part of the courtroom has raised their hand.

The next constitutional principle that I want to talk to you about is the State has the burden of proof beyond a reasonable doubt, and this burden lasts with the State throughout the entire case. Does anybody have any problems understanding that the State has the burden of proof, which is proof beyond a reasonable doubt and that stays with the State throughout the entire case? Please raise their hand.

Again, nobody in the outer or inner part of the courtroom has raised their hand.

Does anybody have problems applying that principle or qualms about applying that principle of proof beyond a reasonable doubt, and that's the burden of proof that stays with the State throughout the case, please raise your hand?

Again, nobody in the inner or outer part of the courtroom has raised their hand.

The next thing I want to talk to you about is anybody placed on trial in a criminal case has a constitutional right to take the witness stand, and after they swear or affirm to tell the truth, you judge that person's credibility like you would any other witness. Does anybody have any problems understanding that principle, please raise your hand?

Again, nobody has raised their hand.

Does anybody have any problem about applying or qualms with that principle, please raise your hand?

And on the other side, if you looked at if [*sic*] as a constitutional claim and turn it over, if Mr. Feazell decides not to testify, no inference whatsoever can be drawn from the silence. Does anybody have any problems understanding that principle, please raise their hand?

Does anybody have any problems applying or any qualms about applying that principle please raise their hand?

Again, nobody has raised their hand."

¶ 6 At trial, Officer Matthew Gallagher testified he was on patrol on the afternoon of August 19, 2014, with three other officers. Officer Gallagher was a passenger in the car at around 3:50 p.m. when he saw defendant. Officer Gallagher was about 60-75 feet away when he saw

defendant. Officer Gallagher testified that defendant "was wearing the thick black glasses, navy blue denim overalls with no shirt underneath. He had shorts underneath the overalls as well as red gym shoes." Defendant looked toward the police, and Officer Gallagher saw that defendant "had a physical impairment to his left eye." Officer Gallagher thought defendant may have been carrying a weapon based on the way defendant was holding the waistband of his pants. Defendant ran up the stairs of the house he was in front of and Officer Gallagher got out of the car yelling "Police. Stop." Defendant ran to the front porch of the house and began pounding on the front door shouting "Police out here. Let me in." Officer Gallagher was about 15-20 feet from defendant when he "observed the handle of a blue steel handgun protruding from [defendant's] right side through—outside of the shorts that were underneath the denim overalls." Defendant jumped off the porch and ran away, hopping over a fence to the neighboring yard. Officer Gallagher followed. He saw "defendant reach into his right-side waistband area and throw a black handgun and a white card into a flower pot" in the backyard. Defendant hopped over another fence and ran away. Rather than continuing to give chase, Officer Gallagher went to the flower pot and "recovered the handgun and found it to be one blue steel Bersa semiautomatic .380 caliber Model No. 380 with one live round in the chamber and four live rounds in the magazine." He also recovered a white Illinois identification card with defendant's name, picture, birth date, and address. Defendant was 44 years old at the time. Officer Gallagher recognized defendant's picture on the identification card as the same person who ran from him and hid the gun. Officer Gallagher did not go to the address on the identification card.

¶ 7 Officer Gallagher testified that three days later he was on patrol and he saw defendant "wearing the same thick black glasses, red gym shoes, he had a dark T-shirt as well." He saw defendant had the same physical impairment to his left eye. He arrested defendant and took him

into custody. Once at the police station, Officer Gallagher informed defendant of his right to an attorney, that a lawyer would be provided for him if he could not afford one, and that police would not question him until the attorney was appointed. He further informed defendant that if defendant chose to answer questions then or without an attorney present, that defendant could stop the questioning at any time to consult with an attorney and that defendant had a right to remain silent. Defendant verbally affirmed that he understood his rights and that he wished to answer questions.

¶ 8 Officer Gallagher then questioned defendant. He saw defendant had crusted scabs on his forearms and asked how defendant injured himself. Defendant replied, "I got these when I was jumping the fences hopping away from you guys—running away from you guys." Officer Gallagher asked how defendant acquired the gun and defendant replied that he bought it from a man "named Red for $150 who lives at Pulaski and Wilcox." Officer Gallagher did not ask defendant any further questions about "Red" or the sale of the gun to defendant.

¶ 9 Officer Kevin Clarke testified that he was on patrol on August 19, 2014, with Officer Gallagher and two other officers. At around 3:50 p.m. Officer Clarke was a passenger in the unmarked car when he saw a person wearing "blue overalls, denim jeans, *** red gym shoes, and he had glasses on, black glasses." Officer Clarke then made an in-court identification of defendant as the same person he observed on August 19, 2014. Officer Clarke testified he saw defendant turn and run up the front steps of a house. Officer Clarke testified that the area is "high crime, heavy gang violence, shootings weekly, monthly, in that area also." Defendant's trial counsel objected, and the court sustained the objection and instructed the jury to "disregard that" comment. Officer Clarke then described the area as a "residential area."

¶ 10 Officer Clarke got out of the car with Officer Gallagher and he saw defendant banging on the front door yelling "Police out here. Let me in. Let me in." Defendant then climbed up the front porch ledge. When defendant turned to jump off the ledge, Officer Clarke saw the butt of a gun on defendant's person. Officer Clarke saw Officer Gallagher jump, and then Officer Clarke lost sight of him and defendant. Officer Clarke did not see defendant jump over or climb any fences. Officer Clarke then heard over the radio that Officer Gallagher recovered a gun. Officer Clarke was shown the identification card recovered and he recognized defendant from the picture.

¶ 11 Following Officer Clarke's testimony, the parties stipulated that defendant "has two prior qualifying felony offenses under Case Nos. 01 CR 24503 and 97 CR 1838. The state completed their case in chief, and defendant did not present any evidence.

¶ 12 In closing argument defendant's trial counsel argued the State's theory of the case was implausible and that defendant was not guilty. Counsel argued defendant could not have jumped or climbed over fences because defendant has asthma and was 44 years old at the time. Counsel also claimed it was simply unbelievable that defendant would abandon a gun along with the very means to identify defendant.

¶ 13 The jury found defendant guilty. Following a sentencing hearing, the trial court sentenced defendant to 10 years' imprisonment.

¶ 14 This appeal followed.

¶ 15 ANALYSIS

¶ 16 Defendant raises several arguments on appeal seeking reversal of his conviction and/or a reduction of his sentence. Defendant argues (1) the trial court committed plain error when it failed to properly instruct the jury under Illinois Supreme Court Rule 431(b) (eff. Jul 1, 2012);

(2) the State denied him a fair trial when it elicited improper evidence, bolstered the credibility of its witnesses, and argued facts not in evidence; (3) the trial court abused its discretion in sentencing defendant to 10 years' imprisonment and in failing to articulate its reasons for its sentence; and (4) the armed habitual criminal statute is facially unconstitutional. We address each argument in turn.

¶ 17 (1) Illinois Supreme Court Rule 431(b)

¶ 18 Illinois Supreme Court Rule 431(b) (eff. July 1, 2012) reads as follows:

> "(b) The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that if a defendant does not testify it cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's decision not to testify when the defendant objects.
>
> The court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section." Ill. S. Ct. R. 431(b) (eff. July 1, 2012).

Rule 431(b) lists what are commonly known as the "*Zehr* principles." *People v. Daniel*, 2018 IL App (2d) 160018, ¶ 20 (citing *People v. Zehr*, 103 Ill. 2d 472, 477 (1984)). A trial court has committed error if it failed "to ask prospective jurors whether they both understood and accepted the principles set forth in Rule 431(b). [Citation.]" (Internal quotation marks and emphasis omitted.) *Id*. ¶ 24 (quoting *People v. Belknap*, 2014 IL 117094, ¶ 46). "Whether the trial court

complied with Rule 431(b) presents a question of law that we review *de novo*. [Citation.]" *People v. Space*, 2018 IL App (1st) 150922, ¶ 62. In this case, the parties agree the trial court committed error because it did not ask the prospective jurors whether they both understood and accepted the principle that defendant was not required to offer any evidence on his own behalf. Defendant, however, admits he failed to preserve this error for review. *Id*. ¶ 19 ("To preserve a claim for review, a defendant must both object at trial and include the alleged error in a written posttrial motion.") Defendant argues the trial court's error is cognizable under the plain error doctrine.

> "The plain-error doctrine allows a reviewing court to consider unpreserved error where either (1) a clear or obvious error occurs and the evidence is so closely balanced that such error threatens to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurs and is so serious that it affects the fairness of the defendant's trial and challenges the integrity of the judicial process, regardless of the closeness of the evidence. [Citation.] In both instances, the burden of persuasion remains on the defendant. [Citations.]" *Id*.

¶ 19 Defendant does not dispute our supreme court's holding that a Rule 431(b) violation "is not cognizable under the second prong of the plain-error doctrine absent evidence that the violation produced a biased jury." *Id*. ¶ 26 (citing *People v. Sebby*, 2017 IL 119445, ¶ 52). Defendant does not argue his jury was biased; defendant argues only that the evidence against him was closely balanced and thus the trial court's error is cognizable under the first prong of the plain-error doctrine. "In determining whether the evidence adduced at trial was close, a reviewing court must evaluate the totality of the evidence and conduct a qualitative,

commonsense assessment of it within the context of the case. [Citations.] That standard seems quite simple, but the opposite is true. A reviewing court's inquiry involves an assessment of the evidence on the elements of the charged offense or offenses, along with any evidence regarding the witnesses' credibility." *Sebby*, 2017 IL 119445, ¶ 53. "The only question in a first-prong case, once clear error has been established, is whether the evidence is closely balanced." *Sebby*, 2017 IL 119445, ¶ 69. "The burden is on defendant to show the evidence was so closely balanced *** that it affected the fairness of his trial ***. [Citation.]" *People v. Thompson*, 2017 IL App (5th) 120079-B, ¶ 24 (citing *People v. Herron*, 215 Ill. 2d 167, 182 (2005)).

¶ 20 In *Sebby*, after reviewing the evidence on the elements of the offense charged, the court noted that the issue "does not involve the sufficiency of close evidence but rather the closeness of sufficient evidence." *Sebby*, 2017 IL 119445, ¶ 60. Our supreme court held that a "commonsense assessment of the evidence reveals that it was closely balanced." *Id.* ¶ 61. The court found that neither the prosecution nor the defense accounts were fanciful, neither account was any less plausible than the other, and neither version of events was supported by corroborating evidence. *Id.* ¶¶ 61-62. Therefore, the outcome of the case "turned on how the finder of fact resolved a 'contest of credibility.' [Citation.]" *Id.* ¶ 63 (citing *People v. Naylor*, 229 Ill. 2d 584, 606-07 (2008)). "[B]ecause both versions were credible, the evidence was closely balanced. [Citation.]" *Id.*

¶ 21 In this case, given the parties' stipulation to defendant's qualifying prior offenses, defendant argues the evidence was closely balanced only as to the possession of a gun element of the offense of armed habitual criminal. See 720 ILCS 5/24-1.7 (West 2014). Defendant argues the evidence is closely balanced because the State's proof he possessed a gun "hinged entirely on the credibility of the officers and the reliability of their identifications." Defendant argues the

officers' credibility was questionable because their testimony was "too good to be true," unreasonable, and contrary to common sense. Defendant also argues a close question of the reliability of the officers' identification of him as the person they saw in possession of a gun existed because (1) "since close questions existed on the officers' credibility, their claimed ability to recognize [defendant] as someone they had seen three days earlier was also necessarily close;" and (2) the clothing the officers' partially relied upon to recognize defendant after the person with the gun fled was not distinctive and the circumstances under which the officers viewed the person with the gun were not favorable to an identification. The State responds there "exists no 'contest of credibility' " in this case because "only the People presented credible evidence and there were no competing accounts." The State asserts defendant's attacks on the officers' credibility and the reliability of their identifications are an attempt to get this court to retry him or to substitute its judgment for that of the factfinder's. The State claims there is nothing in the record to suggest the officers' testimony was "inherently incredible," and defendant's claim the identifications were unreliable is an attempt "to attack the sufficiency of the evidence, not the closeness of the sufficient evidence." In reply, defendant argues that whether the evidence is closely balanced does not depend on whether he presented any evidence at trial.

¶ 22 The issue thus presented is whether the evidence is closely balanced in a case that hinges largely on the credibility of the witnesses and the defense can plausibly attack their credibility. Defendant cites several cases he argues stand for the proposition that this court has found the evidence closely balanced where "the State's proof hinged entirely on the credibility of the officers and the reliability of their identifications." Defendant's characterization of those authorities as finding the evidence closely balanced where the conviction rests on the credibility

of a witness and the reliability of an identification is an understatement of the holding in each case. In each case, the evidence was also fundamentally contradictory on a substantive element of the offense. In *People v. Williams*, 332 Ill. App. 3d 693 (2002), the court found the evidence closely balanced for purposes of determining whether the erroneous admission of expert testimony was harmless error. *Williams*, 332 Ill. App. 3d at 698-99. In that case, the defendant was convicted of aggravated battery based on the victim's prior inconsistent statements. *Id*. at 697. The expert testimony at issue "was essentially an opinion as to the credibility of the various statements" by the victim which tended to bolster her incriminating initial statements and discredit her trial testimony. *Id*. at 698. The victim's trial testimony directly and substantively contradicted her prior statements. See *id*. at 695-96. The court found the evidence closely balanced for purposes of its harmless error analysis where the case turned on the credibility of the out-of-court statements as opposed to the believability of the trial testimony. *Id*. at 699. In *People v. Ridley*, 199 Ill. App. 3d 487 (1990), the court applied a plain error analysis to remarks by the prosecutor to the jury that it must find that the State's witnesses were lying in order to believe the defendant's alibi witnesses. *Ridley*, 199 Ill. App. 3d at 493. The court concluded the evidence in the case was closely balanced. *Id*. In *Ridley*, two eyewitnesses identified the defendant as the perpetrator, and the defendant called four witnesses who testified the defendant was somewhere else when the offense occurred. *Id*. at 490. The court then determined that the State's comment was error. See *id*. at 493-94. The court found it was error to tell the jury it could not believe the defense alibi witnesses unless it found the State witnesses were lying because the defense witnesses did not directly contradict the testimony of the State's witnesses, who simply may have been mistaken in their identification. *Id*. Finally, in *People v. Roberts*, 133 Ill. App. 3d 731 (1985), the court held "the evidence is closely balanced since it essentially

amounts to the testimony of a single eyewitness against that of a defendant and numerous alibi witnesses." *Roberts,* 133 Ill. App. 3d at 738-39.

¶ 23 However, the evidence at issue in *People v. Herron*, 215 Ill. 2d 167 (2005), also cited by defendant, was not directly contradictory on an element of the offense; instead, the defendant's conviction rested on a single eyewitness identification. See *Herron*, 215 Ill. 2d at 171-73. There, one eyewitness to the offense described one offender as "around six feet tall" and a second offender as "shorter, 'probably around five-five.' " *Herron*, 215 Ill. 2d at 170. The taller man had a missing tooth and the shorter man had a darker complexion and an unshaven face. *Id*. A second eyewitness described the shorter man "as 5 foot 10 or 11 inches tall with spotty facial hair." *Id*. at 171. The second eyewitness identified the defendant as the shorter offender. *Id*. at 172. The first eyewitness did not identify the defendant in a lineup as one of the perpetrators. *Id*. The error in *Herron* was an erroneous jury instruction on how the jury was to weigh the identification testimony of the witnesses. *Id*. at 187-88 (citing Illinois Pattern Instruction, Criminal, No. 3.15 (4th ed. 2000)). Our supreme court held the evidence was closely balanced where the case "turned on the credibility of [the second eyewitness's] identification testimony, *and* the erroneous jury instruction involved how the jury should weigh such identification testimony." (Emphasis added.) *Id*. at 193-94.

¶ 24 In *People v. Piatkowski*, 225 Ill. 2d 551 (2007), the jury was given the same erroneous instruction involved in *Herron*. *Piatkowski*, 225 Ill. 2d at 554, 561. The court found:

> "The only evidence linking defendant to the crime was the testimony of the two eyewitnesses. The erroneous instruction in this case related to how the jury would assess the reliability of that eyewitness testimony.

> Thus, we must consider whether the evidence presented on the reliability of the eyewitness testimony rendered this case one that is closely balanced." *Id*. at 567.

The court held that a new trial was required due to the jury-instruction error. *Id*. at 572. However, the court pointed out that it did "not mean to imply that a new trial is required in every case where this particular erroneous-identification instruction is given and the only evidence against defendant is identification testimony." *Id*. at 570. Rather, a new trial was required in that case "under the totality of the circumstances, particularly where the witnesses were only able to view the suspect for as little as a few seconds, did not previously know the suspect, some discrepancies existed in their prior descriptions and a lapse of more than six months occurred from the crime to the identification." *Id*. at 570.

¶ 25 The finding that the evidence was closely balanced in *Herron* depended upon (a) the fact the credibility of a single eyewitness determined the outcome of the case and (b) the jury was misinformed as to how it should assess the reliability of that identification. See *Herron*, 215 Ill. 2d at 193-94. In *Piatkowski*, our supreme court similarly found the evidence closely balanced where the "case turned on the credibility of the witnesses' identification testimony and the erroneous instruction involved how the jury would weigh and evaluate such identification testimony." *Piatkowski*, 225 Ill. 2d at 570. Neither case supports defendant's position that the State's version of events in this case was so inherently implausible or the officers' actions so contradictory that the evidence of defendant's guilt was necessarily closely balanced for purposes of a plain error analysis.

¶ 26 Defendant argues the State failed to adduce evidence to corroborate the officers' testimony they recovered defendant's identification card with evidence the officers inventoried

the identification card. The presence or absence of corroborating evidence is not the issue because, as defendant points out, the question is not the sufficiency of close evidence, but the closeness of the sufficient evidence. Here, there is no contention the evidence was not sufficient to convict. Defendant's assertion the evidence is closely balanced because the jury requested the officers' inventory report is based on nothing more than speculation and conjecture. The court's decision in *People v. Gonzalez*, 2011 IL App (2d) 100380, does not aid defendant. There, the court found the jury's request for a police report indicated that the jury had "difficulty deciding the case" because "it had questions about the detectives' testimony." *Gonzalez*, 2011 IL App (1st) 100380, ¶ 26. However, in that case the defense also presented the testimony of an eyewitness who directly contradicted the detective's testimony. *Id*. ¶ 10. In rebuttal, the State elicited additional testimony to contradict the defense witness. *Id*. ¶ 13. Unlike this case, *Gonzalez* involved contradictory testimony which required the jury to decide which witness was more credible; therefore, the court could reasonably find the jury's request for the police report significant. Here, defendant speculates as to the motive for the jury's request for the officers' report based on the absence of one piece of corroborating evidence. Defendant also complains police failed to document defendant's incriminatory statements. However, as stated above, the question is not whether the evidence is close because the State could have, but did not, present additional evidence; the question is whether there is a close question on the evidence the State did present, which was sufficient to convict defendant. See *Sebby*, 2017 IL 119445, ¶ 60; *Piatkowski*, 225 Ill. 2d at 568.

¶ 27 Therefore, we find defendant's argument concerning the alleged failure to inventory defendant's identification card unpersuasive. Similarly, defendant's arguments about what the police did not do upon recovering defendant's identification card or learning the identity of the

person who allegedly sold defendant the gun are also immaterial to the plain error analysis in this case. "[W]e must consider whether the evidence presented *** rendered this case one that is closely balanced." *Piatkowski*, 225 Ill. 2d at 567. See also *People v. Naylor*, 229 Ill. 2d 584, 609 (2008) ("It is axiomatic that whether the evidence in a criminal trial is closely balanced depends solely on the evidence adduced in that particular case."). In *Piatkowski*, our supreme court examined the defendant's arguments in relation to the facts in the record and found the evidence presented on the five factors listed in the instruction for assessing the reliability of identification testimony did not overwhelmingly favor the State and that the defendant had met his burden to show "that the evidence was sufficiently closely balanced so as to require a remand for a new trial." *Piatkowski*, 225 Ill. 2d at 568. We again note that "[i]n determining whether the closely balanced prong has been met, we must make a 'commonsense assessment' of the evidence ([citation]) within the context of the individual case." *People v. Adams*, 2012 IL 111168, ¶ 22.

¶ 28 As to the evidence presented in this case—the officers' testimony—defendant argues it is "unreasonable" to believe defendant would discard his identification card with a gun after going to great effort to evade police, then confess that he was the person police chased when arrested later and ask whether he would recover his identification card. Defendant argues the State's version of events is so unworthy of belief as to make the evidence closely balanced. In support of his argument, defendant relies primarily on cases addressing the sufficiency of the evidence which, of course, raises a "separate question." *Piatkowski*, 225 Ill. 2d at 566. Regardless, in this case two witnesses testified to seeing defendant with a gun and positively identified defendant. Here, defendant does not challenge the instructions to the jury as how to weigh the credibility of the witnesses or assess the reliability of their identifications. The only error was in the trial

court's failure to ask the jury if they understood and accepted the principle that defendant was not required to present any evidence. In the context of the circumstances of this case we cannot conclude that error alone severely threatened to tip the scales of justice against defendant. See *Adams*, 2012 IL 111168, ¶ 21.

¶ 29 Defendant argues that due to the failure to ensure defendant's jury understood and accepted that defendant had the right not to present evidence the jury could have resolved the flaws in the State's case against defendant. However, defendant does not argue that the trial court did not properly instruct the jury as to the presumption of innocence and the State's burden of proof. Our supreme court has found:

> "The trial court's questions about [the *Zehr*] principles, particularly the defendant's presumption of innocence and the State's burden of proof, constitute preliminary instructions to potential jurors on how they must evaluate the evidence, so a Rule 431(b) violation may affect the verdict. If jurors do not understand and accept that the defendant is presumed innocent, then credibility contests could lean in the State's favor, which could tip the scales of justice against the defendant in a close case. Or if jurors do not understand and accept that the State bears the burden of proof beyond a reasonable doubt, then, again, credibility contests could lean in the State's favor, which also could tip the scales of justice against the defendant in a close case. A jury that does not understand and accept those principles may weigh the evidence in favor of the State or render a guilty verdict on insufficient proof, again tipping the scales against the defendant in a close case." *Sebby*, 2017 IL 119445, ¶ 67.

Here, there is no indication the jury did not understand and accept the principles that the defendant was presumed innocent and the State had the burden to prove defendant guilty beyond a reasonable doubt. There is no indication the jury improperly weighed the officers' testimony or assessed the reliability of their identification of defendant based on incorrect factors. In light of the foregoing, we hold the "quantum of evidence presented by the State against [defendant]" is such that the erroneous Rule 431(b) instruction in this case did not contribute to the result. *Id*. at 694 (quoting *Herron*, 215 Ill. 2d at 193). Accordingly, defendant's request that we review the trial court's failure to properly question the jury pursuant to Rule 431(b) fails.

¶ 30 Defendant also argues the evidence was closely balanced because the officers' identification of defendant was unreliable. "Thus, we must consider whether the evidence presented on the reliability of the eyewitness testimony rendered this case one that is closely balanced." *Piatkowski*, 225 Ill. 2d at 567.

> "The five factors listed in the instruction are the same factors noted by the United States Supreme Court in *Neil v. Biggers*, 409 U.S. 188, 199 (1972), for assessing the reliability of identification testimony. Those factors include (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. [Citation.]" *Id*. (citing *Biggers*, 409 U.S. at 199-200).

¶ 31 Defendant challenges the reliability of the identification based on the officers' distance from the person with the gun, the duration of the officers' observation, and because of the presence of a weapon. "Discrepancies and omissions as to facial and other physical features are

not fatal but affect the weight to be given the identification testimony. [Citations.] A witness' positive identification is sufficient even though the witness gives only a general description based on the total impression the accused's appearance made. [Citations.]" *People v. Austin*, 328 Ill. App. 3d 798, 805 (2002). The circumstances of the observation do not need to be perfect provided the witness's in-court identification is positive and credible. *People v. Goodloe*, 263 Ill. App. 3d 1060, 1069 (1994).

¶ 32 When asked how far away he was when he first saw defendant, Officer Gallaher testified he was "60 to 75 feet and closing." When defendant looked in Officer Gallaher's direction, the officer observed that defendant had a physical impairment to his left eye. Officer Gallagher was 15 to 20 feet from defendant when he saw the gun in defendant's waistband and he testified he had a clear view of defendant. He clarified he was at the base of the steps of the porch defendant ran onto and defendant was at the top of the steps. On cross-examination Officer Gallagher testified there were seven or eight steps to the top of the porch. Officer Clarke testified it was a clear and sunny day when he observed defendant. Officer Clarke also described defendant's appearance. Officer Clarke testified his distance was "60 feet and closing" when he first saw defendant. The police vehicle stopped directly in front of the residence where defendant ran up the porch, Officer Clarke exited the vehicle and approached the residence, and defendant was banging on the door. Officer Clarke testified defendant then turned to his right whereupon Officer Clarke was able to see defendant's right profile and the handle of a gun. On cross-examination he testified he was approximately 30 feet from defendant at that time. At trial, Officer Clarke identified the identification card that was recovered from the scene of the original incident with defendant.

¶ 33 "[W]hen assessing whether a witness had an opportunity to view the offender at the time of the offense, a reviewing court considers whether the witness was close enough to the accused for a sufficient period of time under conditions adequate for observation." (Internal quotation marks omitted.) *People v. Green*, 2017 IL App (1st) 152513, ¶ 109. In this case, the officers testified they observed defendant at a distance of 15 to 30 feet on a clear day while defendant stood at the top of 7 or 8 stairs and the officers were on the ground. The circumstances of the observation do not call its reliability into question. The officers described defendant consistently and in sufficient detail to demonstrate they were paying attention to defendant. There is no dispute the officers accurately described the impairment to defendant's eye, and the officers were confident of their identification of defendant both after the initial confrontation when defendant was arrested and at trial. Finally, the length of time between the initial confrontation and the subsequent identification when the officers arrested defendant was brief, and defendant does not call this factor into question. Based on the totality of the evidence, we conclude the evidence presented on the *Biggers* factors weigh in favor of the State's witnesses' identifications and, therefore, defendant has not met his burden to show that the evidence was sufficiently closely balanced so as to require a new trial. *Piatkowski*, 225 Ill. 2d at 568. For this reason as well, defendant's request for review of the trial court's error under Rule 431(b) fails.

¶ 34 (2) Fair Trial

¶ 35 Next, defendant argues the State engaged in misconduct and denied him a fair trial when it elicited improper evidence, attempted to improperly bolster the credibility of its witnesses, and argued facts not in evidence. First, defendant states the State elicited evidence of unrelated gun violence in the neighborhood where the initial confrontation with police and subsequent arrest occurred. Defendant argues this evidence was irrelevant and highly prejudicial.

> "Every defendant has the right to a trial free of improper prejudicial comments or arguments by the prosecutor. [Citation.] This right is of constitutional magnitude. Therefore, we review *de novo* the question of whether a prosecutor's statements denied the defendant a fair trial. [Citation.] Although a defendant is entitled to a trial free of improper comments, not every improper question or comment requires reversal. Instead, the act of promptly sustaining the objection and instructing the jury to disregard such argument has usually been viewed as sufficient to cure any prejudice. [Citations.]" (Internal quotation marks omitted.) *People v. Ramsey*, 239 Ill. 2d 342, 438 (2010).

¶ 36 During the examination of Officer Clarke, the following exchange occurred:

> "Q. Have you ever made arrests in that neighborhood before?
>
> A. Yes.
>
> Q. Would you characterize that neighborhood as a high crime or low crime area or something else?
>
> A. Yes, high crime, heavy gang violence, shootings weekly, monthly, in that area also.
>
> [Assistant Public Defender]: Objection, Judge.
>
> THE COURT: Sustained. The jury will disregard that.
>
> BY [Assistant State's Attorney]:
>
> Q. Can you describe the area, is it residential or commercial?
>
> A. It's a residential area."

¶ 37 Despite the trial court sustaining the objection to the testimony and striking it from the record, defendant argues the court "could not undo the harm that had already occurred."

Defendant cites examples of circumstances in which the court has held that sustaining an objection and striking evidence from the record are insufficient to remove the taint of prejudice, none of which bear any similarity to this case. See *People v. Rivera*, 277 Ill. App. 3d 811, 818-20 (1996) (hearsay testimony identifying the defendant as the perpetrator of the crime). Notably, the *Rivera* court found that the trial court's sustaining the objection to the original improper hearsay testimony and instruction to the jury to disregard it "may have worked had the subject been dropped for the duration of the trial. It was not dropped." *Id*. at 817. In *People v. Williams*, 333 Ill. App. 3d 204 (2002), the prosecutor made an improper argument during its closing argument. *Williams*, 333 Ill. App. 3d at 213. The trial court "sustained defense counsel's objection" but the prosecutor "chose to continue the same line of improper argument." *Id*. The court held "the prosecution's *continued improper argument* after the trial court had sustained [the] defendant's objection served to magnify the prejudice to [the] defendant." (Emphasis added.) *Id*. The court further found as follows:

> "We find similarly unpersuasive the State's argument that any prejudice to defendant was cured by a jury instruction advising the jury that closing arguments are not evidence and any statement made by one of the attorneys not based on the evidence should be ignored. 'Instructing the jury that arguments are not evidence will not, in every instance, cure the defect caused by introduction of such evidence. Whether the remarks and/or evidence constitute error depends, in each case, on the nature and extent of the statements and whether they are probative of defendant's guilt.' [Citation.] In light of the analysis above, we find that the jury instruction did little to cure the damage already inflicted by the State. [Citation.]" *Id*. at 214.

In this case, the prosecutor never returned to the subject of the rate or nature of crime in the area where defendant was seen with a gun and arrested, and such testimony is not probative of defendant's guilt. See also *People v. Hernandez*, 121 Ill. 2d 293, 309 (1988) (improper admission of incriminating statements by nontestifying codefendant). In finding the trial court's limiting instruction insufficient, the *Hernandez* court wrote "[i]t would be difficult to imagine any evidence that would be more prejudicial than inculpation of the defendant by a nontestifying codefendant. [Citation.]" (Internal quotation marks omitted.) *Id*. at 317-18. In *People v. Lewis*, 269 Ill. App. 3d 523 (1995), a police officer witness made a reference to a polygraph examination in his testimony. *Lewis*, 269 Ill. App. 3d at 527. The court held the "trial court did its best to 'unring the bell,' but in this case, we conclude that the polygraph reference denied defendant his right to a fair trial." The court explained that "[i]n so holding, we emphasize the extensive conflict at trial between the testimony of T.S., the woman who 'agreed to take a polygraph exam,' and the statements of defendant regarding T.S. that the State introduced at trial. This improper polygraph reference could have substantially enhanced the credibility of T.S. in the eyes of the jury." *Id*. at 527. In this case, defendant has not pointed this court to other evidence at trial that combined with the brief and solitary reference to gun violence in the neighborhood in which this crime occurred could have had an effect on the outcome of this case. We find the trial court's act of promptly sustaining the objection and instructing the jury to disregard the testimony was sufficient to cure any prejudice. *Ramsey*, 239 Ill. 2d at 438.

¶ 38 Next, defendant argues the State improperly argued its witnesses were credible because they were experienced police officers. Defendant argues the improper argument prejudiced him because the primary issue in the case was the officers' credibility, and the State had already "planted seeds in the jurors' minds that the neighborhood where these events occurred was very

dangerous," so the comments invited the jurors to find the officers knew defendant needed to be off the street to curb the violence. Defendant failed to object to the State's rebuttal closing argument at trial but asks this court to review the allegedly improper remarks as plain error. "The court reviews *de novo* the legal issue of whether a prosecutor's misconduct, like improper statements at closing argument, was so egregious that it warrants a new trial. [Citation.]" *People v. Cook*, 2018 IL App (1st) 142134, ¶ 62.

> "In making a closing argument, a prosecutor is given a great deal of latitude. [Citation.] The prosecutor 'has [the] right to comment on the evidence and draw all legitimate inferences deducible therefrom, even if they are unfavorable to the defendant.' [Citation.] We must look at the entire argument and view any alleged erroneous comments within the context that they were made. [Citation.] *** It is also improper for a prosecutor to argue that a police officer's testimony is more credible based on the status of being a police officer. [Citation.] *** Further, '[a]lthough the prosecutor's remarks may sometimes exceed the bounds of proper comment, the verdict must not be disturbed unless it can be said that the remarks resulted in substantial prejudice to the accused, such that absent those remarks the verdict would have been different.' [Citation.] Improper comments by the prosecutor themselves will not warrant reversal unless those comments were a material factor in convicting the defendant. [Citation.] Additionally, a significant factor in reviewing the impact of a prosecutor's allegedly improper comments on a jury verdict is whether the comments were isolated and brief within the context of a lengthy closing argument. [Citation.]" *People v. Woods*, 2011 IL App (1st) 091959, ¶ 42.

¶ 39 Defendant complains about the following statements by the prosecutor during rebuttal argument (with some of the surrounding argument added to provide the appropriate context):

> "[Assistant State's Attorney]: And he didn't run when he got arrested because he didn't have a gun on his person anymore. He didn't need to run. The story doesn't make sense, what the police says doesn't make sense, so in essence the defendant is implying that these police officers got up here and lied to you, ladies and gentlemen, and that's not the case at all.
>
> They're attacking these police officers for doing their job. They have been working on the streets for eight and a half years trying to keep the streets safe, and that's exactly what they did. No, they didn't go and try to find the person from Pulaski and Wilcox because they already took a gun off the streets. They took this guy's gun off of the street, his illegal gun off the streets.
>
> * * *
>
> Defense wants you to focus on what you don't have before you, what evidence you haven't heard because they know that the evidence that you have heard is more than enough to convict this defendant of armed habitual criminal. Two veteran police officers who testified credibly that they saw the gun in this defendant's waistband. And what did he do when he looked in their direction in the unmarked car, he ran up to the house, bang bang, open up, police out here. Why would he do that, ladies and gentlemen?
>
> * * *
>
> And by the way, you're going to get an instruction that neither sympathy nor prejudice should influence you. Ladies and gentlemen, I submit to you he

> didn't look like this, he wasn't dressed like this on the day that he had that gun. He was the big man with the gun. He didn't have his inhaler out for you to look at, he didn't have his eyeglasses all crooked, he wasn't looking at you all pathetic. No, he was the big man with the gun in his waistband running from the police, so you can't find him not guilty of this offense because you feel sorry for him. If you find yourself doing that, you have to stop. Just like you can't find him guilty because you feel sorry for the officers for doing their job.
>
> You can only use the evidence, the law, and your common sense. *** You use it every day of your lives. You use it when you listen to the testimony up there and what makes sense and what doesn't make sense. This story is—this is not a story, ladies and gentlemen. This happened. The officers are trained, the officers did their job. The defendant is the one who did these things."

¶ 40 The State argues "the prosecutor was responding to the defense counsel's attempt to discredit the police officers, namely that [the officers] fabricated the entire event including defendant's confession." In reply to the State defendant argues that his trial counsel's challenge to the officers' credibility "was grounded on the facts of this case," whereas the prosecutor asked the jury to find the State's witnesses credible "not because of their testimony, but because of their status and years of service to the community." Defendant asserts that type of argument "has repeatedly been found improper."

¶ 41 In *People v. Davis*, 228 Ill. App. 3d 835 (1992), the defendant argued "it was improper for the prosecution to suggest that the police officers' testimony was more credible because of their official position in the community and, more specifically, that it was improper for the prosecution to comment that the police officers would not risk their careers, reputations, and

pensions in order to frame [the] defendant." *Davis*, 228 Ill. App. 3d at 840-41. The court acknowledged "that courts have generally held that these types of comments concerning police officers' testimony are improper. [Citation.]" *Id.* at 841 (citing *People v. Clark*, 186 Ill. App. 3d 109 (1989)). However, the *Davis* court found that "the question is not whether the argument was proper, but whether it reached the level of impropriety which deprived defendant of a fair trial." *Id*. The court found that the record showed "it was precisely defendant's strategy to make the credibility of the officers the dispositive issue; defendant expressly attacked the credibility of the officers throughout the trial." *Id*. Therefore, the court held, the "prosecution's comments, in response to defendant's trial strategy, focused the jury's attention on the dispositive issue; the comments did not unfairly play upon the jury's sympathies and did not deny defendant a fair trial." *Id*. See also *People v. Myers*, 246 Ill. App. 3d 542, 547 (1993) (finding "nothing improper about the prosecutor's reference to the officers' experience or their lack of reason to lie" where prosecutor commented: "I submit to you they were not lying. They told you the truth. *** These were officers with two to three years' experience on the force."). In *People v. Gorosteata*, 374 Ill. App. 3d 203 (2007) (overruled on other grounds, *People v. Chambers*, 2016 IL 117911, ¶ 63), the court found "overreaching errors in [the prosecutor's] arguments" but recognized that it still had to "determine whether those arguments would have amounted to 'plain error.' [Citation.]" *Gorosteata*, 374 Ill. App. 3d at 225. There, the State commented, in part, that the issued had "been resolved by the credible testimony of officers with years of experience." *Id*. at 220. The court found "the bulk of the prosecution's argument analyzed and persuasively addressed the evidence." *Id*. at 226. The court also found that "since the State's arguments were focused upon credibility they did not distract the jurors from confronting the appropriate question of credibility." *Id*. at 226-27. The court held it could not find that the

errors, individually or in combination, denied the defendant a fair trial or undermined the integrity of the judicial process. *Id*. at 227. See also *People v. Young*, 2013 IL App (2d) 120167, ¶¶ 40-42 (where prosecutor, "[b]y emphasizing their credentials, *** indicated that the police officers were more credible simply because they were police officers," court nonetheless found that "[w]hen the context of the entire case is considered, we do not believe that the errors became so serious that they affected the fairness of defendant's trial and the integrity of the judicial process").

¶ 42 Here, as in *Young*, we have found the evidence is not closely balanced for purposes of the plain-error test. *Id*. ¶ 41. Further, here the complained of comments were focused on the officer's credibility, and therefore "did not distract the jurors from confronting the appropriate question of credibility" (*Gorosteata*, 374 Ill. App. 3d at 226-27), where "it was precisely defendant's strategy to make the credibility of the officers the dispositive issue" (*Davis*, 228 Ill. App. 3d at 841). We find no error in the prosecutor's comments. First, the prosecutor responded to the defense's attack on the witnesses' credibility by asserting the officers did not lie. The next comment, that the officers were "doing their job" was a response to the defense strategy to discredit the officers for not attempting to locate the person defendant claimed sold him the gun, as evidenced by the very next statement that the officers did not seek that person "because they already took a gun off the streets." Next, the prosecutor stated, "Two veteran police officers *** testified credibly *** they saw the gun in this defendant's waistband." This comment is based on the evidence and, therefore, proper, where both officers testified they observed the gun in defendant's waistband and that they were experienced with firearms and the concealment of firearms from their police training. *Gorosteata*, 374 Ill. App. 3d at 223 ("The credibility of a witness is a proper subject for closing argument if it is based on the evidence or inferences drawn

from it."). Further, the defense strategy during its closing argument was to claim the officers fabricated the entire incident with defendant, and this comment is a direct refutation of that assertion. The prosecutor's final comment about which defendant complains, that the officers "are trained, the officers did their job," is a summation of the foregoing, proper, arguments. Regardless, even were we to find some error in the prosecutor's comments in this case, we would not find those comments denied defendant a fair trial or undermined the integrity of the judicial process. See *id*. at 226-27. Accordingly, defendant's argument fails.

¶ 43 Next, defendant argues the prosecutor made an argument that was not based on evidence presented at trial when she stated as follows:

> "Ladies and gentlemen, I submit to you he didn't look like this, he wasn't dressed like this on the day that he had that gun. He was the big man with the gun. He didn't have his inhaler out for you to look at, he didn't have his eyeglasses all crooked, he wasn't looking at you all pathetic. No, he was the big man with the gun in his waistband running from the police, so you can't find him not guilty of this offense because you feel sorry for him."

¶ 44 Defendant states "no evidence had been presented at trial that [defendant] was not carrying an inhaler on the date of the offense, or that his glasses were not crooked." Defendant argues he was prejudiced because the comments undercut his defense that his physical condition prevented him from engaging in the type of flight the police officers described and implied to the jury that defendant was attempting to deceive them. The State responds "the fact that defendant altered his appearance for trial was fair game for comment." Alternatively, the State argues that even if the comments were error, defendant cannot show "that the claimed error was so serious that it affected the fairness of [his] trial [or] challenged the integrity of the judicial process."

¶ 45 "It is improper for the prosecutor to argue assumptions or facts not based on the evidence, or to present to the jury what amounts to his own testimony." *People v. Rivera*, 277 Ill. App. 3d 811, 821 (1996). "[I]t is entirely proper for a prosecutor to denounce a defendant's wickedness, engage in some degree of invective, and draw inferences unfavorable to the defendant if such inferences are based upon the evidence. [Citation.]" (Internal quotation marks omitted.) *People v. Burton*, 338 Ill. App. 3d 406, 418 (2003). In *People v. Goins*, 2013 IL App (1st) 113201, ¶ 83, the defendant argued the prosecutor made improper comments during closing argument by "referring to evidence of [the] defendant's cognitive delays as 'a pile of baloney,' and a 'story,' and telling the jury 'don't buy it.' " *Goins*, 2013 IL App (1st) 113201, ¶ 83.

> "A 'prosecutor's comments in closing argument will result in reversible error only when they engender "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.' [Citation.] In reviewing allegations of prosecutorial misconduct during closing argument, the remarks must be considered in light of the entire arguments of both the prosecution and the defense. [Citation.] And, a prosecutor may respond to comments made by defense counsel which invite a response. [Citation.]" *Id.* ¶ 85.

In *Goins*, the State charged the defendant with attempt first degree murder and aggravated battery of a child "stemming from injuries sustained by his two-year-old son." *Id.* ¶ 8. "Throughout trial, the defense maintained that due to [the defendant's] limited cognitive abilities, he was unable to waive his *Miranda* rights, provide [a] statement, [or] seek help for [his son] after his injuries." *Id.* ¶ 95. During closing argument, the prosecutor stated: "So if you don't' believe that, didn't believe that there is a learning disability and the IQ in the 60's means that I'm

just not smart enough to know how to call for help, I'm just not smart enough to call 911, I'm just not smart enough to know how to lie, I'm just not smart enough to know and talk about what really happened, what a pile of baloney." (Internal quotation marks omitted.) *Id.* ¶ 94. The court found "the prosecutor's argument was not improper where these remarks were in response to [the defendant's] theory of defense and based on the evidence and reasonable inferences drawn therefrom. [Citation.] Further, the prosecutor was permitted to comment on the illogical nature of defense counsel's argument." *Id.* ¶ 95. The defendant in *Goins* also complained that the prosecutor improperly suggested that he was a liar. *Id.* ¶ 96. Part of Goins' defense was to assert he could not have provided a statement to an assistant state's attorney because he could not have read or understood it. *Id.* That line of defense was inconsistent with the testimony of the ASA and a police detective. *Id.* "Therefore, there was a basis in the record for the State to point out inconsistencies." *Id.*

¶ 46 In this case, the prosecutor's remarks were in response to the defense argument that defendant's clothing and physical condition would have made it "impossible" for him to engage in the type of conduct described by police and a plea for the jury not to decide the case based on sympathy for defendant. Defendant's line of defense was inconsistent with the officers' testimony, therefore, "there was a basis in the record for the State to point out inconsistencies." The State pointed out that defendant "was the big man with the gun *** running from the police" to highlight the inconsistency between the defense theory and the officers' testimony. The defense appealed to the jury to disbelieve the officers because defendant could not have done the things they said he did. The defense argued: "You heard Officer Gallagher tell you that [defendant] suffers from asthma, you heard Officer Gallagher tell you that he had a physical impairment in his left eye, and you heard that he's 45 years old. Does this sound like the kind of

individual that could run and do all of these things that the officers is [*sic*] saying they saw him do ***." The State put defendant's asthma at issue with its argument. The State pointed out defendant's inhaler and what it described (without objection) as a disheveled appearance to counter that line of defense. The prosecutor's statements were based on the evidence and arguments in the case (see *Burton*, 338 Ill. App. 3d at 418) and were invited by the defense (see *Goins*, 2013 IL App (1st) 113201, ¶ 85). We find no impropriety in the State's argument.

¶ 47 Having found no prejudicial error from the stricken statement about gun violence in the neighborhood where the crime occurred, the prosecutor's comments about the officers' training or length of service, or the prosecutor's remarks about defendant, the argument that "the pervasive prosecutorial misconduct here also warrants reversal" necessarily fails, as does defendant's argument trial counsel was ineffective in failing to object "to all of the State's misconduct." As we have found, all of the complained of conduct was proper. *People v. Jackson*, 2018 IL App (1st) 150487, ¶ 42 ('trial counsel was not ineffective for failing to object to these statements. An objection would have been futile because all of the challenged remarks were fair comments on the evidence.").

¶ 48 (3) Defendant's Sentence

¶ 49 Next, defendant argues the trial court abused its discretion in sentencing him to 10 years' imprisonment given the nature of the offense, his history, mitigating evidence, and the fact he was offered a six-year sentence in exchange for his guilty plea prior to trial. Defendant asserts the State presented no argument that would warrant a sentence over the minimum, and the evidence in aggravation consisting solely of defendant's mostly non-violent criminal history does not justify the 10-year sentence. Additionally, defendant argues the 10-year sentence "fails to account for the compelling mitigation within [defendant's] pre-sentence investigation report."

Defendant also argues the sentence places a financial burden on Illinois taxpayers that is disproportionate to the offense. Finally, defendant argues the fact he was offered a six-year sentence in exchange for his guilty plea provided compelling evidence his 10-year sentence is excessive and "appears to have improperly taxed [defendant] for his choice of a jury trial." Separately, defendant argues the trial court abused its discretion in sentencing him by failing to explain the reasons for the sentence.

¶ 50 Illinois Supreme Court Rule 615(b)(4) grants this court the power to reduce a sentence, but our supreme court has cautioned that it is a power that "should be exercised cautiously and sparingly. [Citations.]" (Internal quotation marks omitted.) *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). "A reviewing court may not alter a defendant's sentence absent an abuse of discretion by the trial court. [Citation.] A sentence will be deemed an abuse of discretion where the sentence is 'greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense.' [Citations.]" *Id*. We give great deference to the trial court's discretionary powers in imposing sentence because the trial judge, having observed the defendant and the proceedings "has a far better opportunity to consider these factors than the reviewing court. [Citation.]" *Id*. at 212-13. "The trial judge has the opportunity to weigh such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. [Citations.] Consequently, the reviewing court must not substitute its judgment for that of the trial court merely because it would have weighed these factors differently. [Citation.] [Citation.]" (Internal quotation marks omitted.) *Id*. at 213. Prior to sentencing defendant, the trial court in this case stated, in pertinent part, as follows:

> "THE COURT: I looked at the totality of the circumstances. I reviewed the presentence investigation and listened to the arguments of the attorneys and reviewed the evidence at trial.
>
> The sentence range is any place from 6 years to 30 years in the state penitentiary with 3 years mandatory supervised release. I will sentence Mr. Feazell to 10 years Illinois Department of Corrections, 3 years mandatory supervised release, credit for 357 days."

¶ 51 We cannot say the trial court failed to consider the nature of the offense, defendant's history, or the mitigating evidence. The record shows the trial judge considered the evidence adduced at trial, the presentence investigation report, and the arguments of counsel. See *id*. at 213. Defendant declined to make a statement. *Id*. On appeal, defendant only argues the sentence fails to consider the mitigation evidence in his presentence investigation report. As for defendant's argument the cost of a 10-year incarceration is disproportionate to his offense, "[i]t is sufficient to note that nothing in the record points to the trial court's refusal to consider this factor, and that absent such affirmative evidence, the trial court is presumed to consider the incarceration cost." *People v. Decatur*, 2015 IL App (1st) 130231, ¶ 17. We also note that "[i]f a sentence is within the statutory range, we presume it is not excessive." *People v. Busse*, 2016 IL App (1st) 142941, ¶ 27. Defendant's sentence of 10 years is *less than twice* the statutory minimum of six years. In this case we do not find defendant's sentence to be "greatly at variance with the spirit and purpose of the law" or "manifestly disproportionate to the nature of the offense." See *id*. "[T]he purpose of the armed habitual criminal statute is to help protect the public from the threat of violence that arises when repeat offenders possess firearms ([citation]). [A] twice-convicted felon's possession of a firearm is not 'wholly innocent' and is, in fact,

exactly what the legislature was seeking to prevent in passing the armed habitual criminal statute." (Emphasis omitted.) *People v. Fulton*, 2016 IL App (1st) 141765, ¶ 31. We believe defendant is attempting to convince this court to reweigh the factors involved in his sentencing decision. To do so would be "an improper exercise of the powers of a reviewing court" (*Alexander*, 239 Ill. 2d at 215) and we decline to do so. We also find defendant's argument that his sentence "appears to have improperly taxed [him] for his choice of a jury trial" to be without merit. "[T]rial courts have the right to impose a greater sentence after trial than at the time of a guilty plea." *People v. Peterson*, 311 Ill. App. 3d 38, 53 (1999) (citing *People v. Jackson*, 299 Ill. App. 3d 104, 115 (1998), relying on *Alabama v. Smith*, 490 U.S. 794 (1989)). One of the reasons for this rule is that "guilty pleas may justify leniency." *Id*.

¶ 52 Turning to defendant's argument the trial court abused its discretion in sentencing him and failing to explain the reasons for the sentence, "[t]here is no requirement that the trial court must set forth every reason or specify the weight it gave to each factor when determining the sentence. [Citation.]" *Busse*, 2016 IL App (1st) 142941, ¶ 24 (citing *People v. Burgess*, 2015 IL App (1st) 130657, ¶ 227). In *People v. Davis*, 93 Ill. 2d 155 (1982), our supreme court held that a statute requiring the trial court to state its reasons for imposing a particular sentence would be unconstitutional if it were construed to be a mandatory requirement but a construction that would render such a statute solely directory would not be unconstitutional. *Davis*, 93 Ill. 2d at 162. Section 5-4.5-50(c) of the Code of Corrections states that "[t]he sentencing judge in each felony conviction shall set forth his or her reasons for imposing the particular sentence entered in the case ***." 730 ILCS 5/5-4.5-50(c) (West 2014). "[T]o hold that the term 'shall' denominates a mandatory requirement imposed upon the judiciary at sentencing would be to find the statute to be constitutionally invalid. As we presume that the legislature intended to enact a valid statute,

we read 'shall' in this context as permissive rather than mandatory." *Davis*, 93 Ill. 2d at 162. Defendant "recognizes *Davis* is controlling, [but] maintains it was wrongly decided and wishes to preserve this issue for further review." *Davis* is still controlling on this court's decision. "As an intermediate appellate court, we are bound to honor our supreme court's conclusion on this issue unless and until that conclusion is revisited by our supreme court or overruled by the United States Supreme Court. [Citation.]" (Internal quotation marks omitted.) *People v. Morris*, 2017 IL App (1st) 141117, ¶ 42. Accordingly, we must reject defendant's argument and find the trial court did not abuse its discretion in not stating its reasons for imposing sentence on defendant.

¶ 53 (4) Constitutionality of the Armed Habitual Criminal Statute

¶ 54 Finally, we briefly address defendant's argument the armed habitual criminal statute is facially unconstitutional because it "potentially criminalizes innocent conduct." Defendant argues that under Illinois law, "even those who have twice been convicted of qualifying offenses may be authorized to possess a firearm" under the FOID Card Act. Thus, argues defendant, possession of a firearm by a person twice convicted of offenses listed in the armed habitual criminal statute is not, by itself, a crime; rather, it only becomes a crime if that person does not have a FOID card. But, since the armed habitual criminal statute "does not require that additional showing, it potentially criminalizes innocent conduct." Defendant cites our supreme court's decision in *Coram v. State*, 2013 IL 113867, in support of his position, as well as several cases wherein our supreme court has purportedly "invalidated statutes where they potentially subject innocent conduct to criminal penalty." Defendant also argues the armed habitual criminal statute does not require a culpable mental state. This court rejected a facial challenge to the armed habitual criminal statute in *People v. Johnson*, 2015 IL App (1st) 133663, ¶ 27. We

also addressed the argument that the armed habitual criminal statute potentially subjects wholly innocent conduct to criminal penalties in *People v. Fulton*, 2016 IL App (1st) 141765, ¶ 31. Both cases found *Coram* inapplicable to the question presented. See *Johnson*, 2015 IL App (1st) 133663, ¶ 29; *Fulton*, 2016 IL App (1st) 141765, ¶ 24. Defendant argues we should depart from *Johnson* and *Fulton* because "*Johnson* relied on the special concurrence and dissent in *Coram*," and "*Fulton* *** is inconsistent with *Coram*." We decline. The *Johnson* court relied on the findings of "a majority of the justices" in *Coram*. *Johnson*, 2015 IL App (1st) 133663, ¶ 29. The *Fulton* court found "*Johnson*, not *Coram*" provided the proper guidance on the issue. *Fulton*, 2016 IL 141765, ¶ 24. For the reasons stated in *Johnson* and *Fulton*, we reject defendant's challenge to the constitutionality of the armed habitual criminal statute.

¶ 55 CONCLUSION

¶ 56 For the foregoing reasons the judgment of the circuit court of Cook County is affirmed.

¶ 57 Affirmed.