2018 IL App (1st) 160637-U
No. 1-16-0637
Order filed September 28, 2018

FOURTH DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. GEORGE SANDERS, Defendants-Appellant.	)))))))))))	Appeal from the Circuit Court of Cook County. No. 14 CR 11098 The Honorable James B. Linn, Judge, presiding.

JUSTICE GORDON delivered the judgment of the court.
Presiding Justice McBride and Justice Burke concurred in the judgment.

ORDER

¶ 1 *Held:* Where a shooting occurred from defendant's vehicle which immediately crashed into a tree, with defendant as the sole occupant and an empty shell casing on his shirt, we cannot find that the evidence was insufficient to show that he possessed the gun found next to the crashed vehicle.

¶ 2 Defendant George Sanders was convicted under the armed habitual criminal statute after a jury trial and sentenced to 10 years with the Illinois Department of Corrections (IDOC).

¶ 3 On this appeal, defendant claims: (1) that the State failed to prove beyond a reasonable doubt that defendant had actual or constructive possession of the gun that was the subject of his conviction; (2) that the trial court erred by giving a pattern jury instruction on possession where the instruction included constructive possession and where the State failed to present any evidence on constructive possession; and (3) that the trial court committed first-prong plain error when it failed to ask potential jurors whether they understood and accepted the *Zehr* principles and when the case was closely balanced.

¶ 4 For the following reasons, we affirm defendant's conviction and sentence.

¶ 5 BACKGROUND

¶ 6 Defendant was charged with attempted murder, with aggravated battery with a firearm, and under the armed habitual criminal statute. After a jury trial, the jury acquitted him of attempted murder and aggravated battery with a

firearm but convicted him of one count under the armed habitual criminal statute.

¶ 7 The case at bar concerned a shooting from a vehicle containing two men: defendant and Cheves Dembry. During opening statements, the State argued that the evidence would show that defendant was the shooter, while the defense argued that the evidence would show that the victim said Dembry's name immediately before the shots were fired.

¶ 8 The State's evidence established that, immediately after a shooting from a vehicle, the vehicle crashed into a tree with defendant as its only occupant. The police found defendant in the driver's seat, with the airbags deployed, a gun on the ground in front of the vehicle, and a shell casing falling off the front of his shirt.

¶ 9 Sheena Johnson, the victim's girlfriend, testified that she was walking down Keystone Avenue with her boyfriend, Greg Stewart, shortly after 10 a.m. on June 7, 2014, when she observed defendant and Dembry drive by in a black sport utility vehicle (SUV). Johnson knew them both from the neighborhood. Dembry was driving, and defendant was in the passenger seat. Five to eight minutes later, as she and Stewart were standing outside of a firehouse at the corner of West End and Keystone Avenues, a black SUV drove past them again and then stopped. This time, defendant was driving and Dembry was in the

passenger's seat. Defendant called to Stewart to come over, and Stewart walked over to the driver's side window, which was down. A conversation ensued between defendant and Stewart which Johnson could not hear. At the end of the conversation, she heard Stewart state "no something" and then heard a gunshot (the first shot). Defendant reached through the window and fired two more shots from a silver gun at Stewart, before the vehicle sped off. The second shot "hit him in the leg," and the third shot was fired when Stewart was already on the ground. Johnson testified that all the shots came from the driver's side window and that defendant was the only shooter. Johnson was not asked on direct where the first shot landed. On cross, when asked whether "the shot in the back of the leg was the first shot," Johnson responded no. Johnson testified on cross that she did not observe the first shot, that the second shot was the shot to the leg, and that the third shot was to Stewart's "side." (Johnson also testified that it was his "stomach.")

¶ 10 Johnson testified that, although she lost sight of the shooter's vehicle after it turned off West End Avenue onto Pulaski Avenue, she heard a big crash. A fire chief and some firemen exited a nearby fire station to aid the victim. Johnson testified that, when the fire chief realized that Stewart was shot "in the stomach," he sought additional help. Dembry, who had been in the black SUV, returned to the fire station on foot after the police arrived. Johnson

accompanied Stewart to the hospital, and later that day, she identified defendant from a lineup. Stewart died a year later, on June 2, 2015. On cross, Johnson testified that Stewart's death was unrelated to the injuries in this case.

¶ 11 On cross, Johnson testified that, when Stewart approached the vehicle, defendant was not driving, which contradicted her testimony on direct. Johnson was asked whether, on July 8, 2014, the day after the shooting, she gave a statement to the police in which she stated that the black SUV passed her and Stewart a second time 30 to 40 minutes later, with defendant driving. At trial, she answered: "I guess that's what I said." She agreed that 30 to 40 minutes was longer than the 5 minutes she had testified to on direct.

¶ 12 On cross, Johnson testified that, on the evening of July 7, 2014, the day of the shooting, a police detective came to her home but she did not recall telling the detective that one of the last statements she heard defendant make was "man, Cheves," which is Dembry's first name. She also denied telling the detective that, for the third shot, defendant reached over to the passenger's side and shot through the passenger's side window.

¶ 13 On cross, Johnson testified that the second shot went through Stewart's leg and the third shot went through the side of his stomach. Johnson testified that, in addition to herself and Stewart, there were two other people outside at

the time of the shooting, who Johnson knew from the neighborhood, but she did not know their names.

¶ 14 Johnson did not testify that Dembry exited the vehicle but she did testify that, as Dembry walked toward the fire station, the police pulled up. When asked whether she told the police in her statement that Dembry walked past her at the fire station, Johnson denied it. Johnson testified that she turned to the fire chief and let him know that Dembry had been in the vehicle and so, when the police pulled up, they immediately placed Dembry in custody. As a result, Dembry "never walked past" her at the fire station.

¶ 15 On cross, Johnson testified that she was with Stewart in the hospital, when the police interviewed him, and she signed a "victim's refusal to prosecute form." At the time that she signed the form, Stewart had just come out of surgery but he was alert. He stated that "he didn't want to talk," but he was unable to sign the form, so she signed it for him. She did not testify that she signed it at his direction.

¶ 16 On redirect, Johnson testified that neither she nor Stewart had "any beef" with Dembry.

¶ 17 Next, the State called Cheves Dembry, who Johnson testified had been in the SUV with defendant. Dembry testified that he had two drug convictions. On June 7, 2014, Dembry called defendant to ask defendant to drive Dembry to

Dembry's cousin's house, so Dembry could pick up some money. At trial, Dembry testified that he did not recall whether he had a conversation with defendant about Stewart while they were in defendant's black truck, because Dembry was under the influence of PCP. Dembry did recall that, on June 8, 2014, he spoke with police detectives and assistant State's attorneys (ASAs) and signed a handwritten statement. Dembry also recalled that he and defendant spoke "about a couple things" while they were driving around but he could not recall what they discussed. When he told the police and ASAs that defendant told him that defendant wanted to "pop" somebody, Dembry "was just really going along" and "really trying to get away from the police." When asked whether he tried to talk defendant out of it, Dembry testified at trial that he did not remember but that is what he told the police and ASAs. When asked whether defendant pulled out a nine-millimeter gun from his pants pocket at Dembry's cousin's house, Dembry denied having observed defendant pull out a gun and testified "[t]hat's just something I told the police officers." However, Dembry acknowledged that this information was included in the handwritten statement.

¶ 18 On direct, Dembry acknowledged that, in the handwritten statement, he identified a photograph of the gun that defendant had pulled out and stated that, after his cousin observed defendant with the gun, she asked them to leave.

Dembry agreed that, in the statement, he had stated that he and defendant left the cousin's house in defendant's black SUV and returned to Dembry's house; that Dembry's cousin agreed to drop the money off at Dembry's house which the cousin subsequently did; and that is when Dembry observed Stewart. However, at trial, Dembry testified that he had "never seen[]" Stewart, although this is what he had told the police. Dembry acknowledged that, in the statement, he also identified a photograph of Stewart.

¶ 19 On direct, Dembry acknowledged that he told the police that, after observing Stewart, Dembry tried to walk up to Stewart; that defendant made a statement about Stewart saying "there he goes"; and that Dembry then told defendant to "drop it." Dembry acknowledged telling the police that, after he talked with Stewart, Dembry walked back to his house and defendant was sitting on the front porch and defendant was angry at Dembry for having spoken with Stewart. Dembry acknowledged telling the police that his cousin dropped off $1000 in cash while they were on Dembry's front porch; and that Dembry had decided to purchase some clothes. At this point in the trial, Dembry testified again, saying: "I really don't remember, because I was under the influence."

¶ 20 Dembry acknowledged that he was initially driving the black SUV and then defendant was driving it with Dembry in the front passenger seat.

However, when asked if Stewart was standing on West End Avenue as defendant drove down the avenue, Dembry testified "that's just something I told the officer" and "I really don't remember what happened." Dembry acknowledged telling the officers that Stewart walked up to their vehicle, but he "never" remembered Stewart walking up to their vehicle. Dembry denied telling the police that, when Stewart approached, defendant pulled out a gun and placed it under his shirt. Dembry testified that he told the police that he had "never seen the gun." Dembry recalled telling the police that defendant stated: "that's how y'all do me." However, he testified "I never—actually heard—seent [*sic*] or heard nothing, because, like I say, spaced out, man, you know. PCP is a strong drug."

¶ 21 Dembry acknowledged telling the police that Stewart told defendant that Stewart had nothing to do with defendant's "being jumped on"; that, after this, Dembry heard seven to eight gunshots; that Dembry looked over at defendant and observed defendant firing the gun at Stewart through the driver's side window; that Dembry observed Stewart lying on the ground; that defendant fired two more times at Stewart while Stewart was on the ground; that Stewart was less than five feet away and did not have a gun; that defendant sped away and made a right turn onto Pulaski Avenue with Dembry still in the vehicle; that defendant was driving the wrong way down West End Avenue; that another

vehicle was traveling down West End Avenue; that defendant swerved to avoid hitting the other vehicle and crashed into a tree; and that Dembry exited the vehicle but he did not actually recall doing it. During this litany, Dembry admitted telling this information to the police but denied actually remembering it because he was high.

¶ 22 Dembry admitted that the vehicle crashed into a tree. However, he denied recalling that he climbed out of the crashed vehicle, although he admitted telling this to the police. Dembry admitted that he told the police that the gun landed on his lap; that he threw it out the window; that his money scattered all over the vehicle; that he exited the vehicle; and that he walked back on West End Avenue to where Stewart was in order to check on Stewart. However, he claimed he did not remember these facts. Dembry testified that he was then arrested.

¶ 23 When asked "[y]ou were never charged in this case, correct?", Dembry replied "[n]o." When asked "[a]nd no promises were ever made to you," Dembry replied "[y]es" and then explained: "I signed a statement because I didn't want to be charged with attempt murder so that's why I asked them, by signing the statement. *** I was told I could be a witness or a Defendant, so that's really why I signed the statement. I was scared." Dembry repeated that "[t]hey told me, if I—either I could be a witness or a Defendant" and explained:

"I was just trying to do anything, maybe, that I could to get away from the police station."

¶ 24 Dembry testified that, when he was first brought into the police station, he was handcuffed to the bench, but that he was not handcuffed when he gave the statement. He denied reading the whole statement, but he acknowledged receiving food and drink and being allowed to go to the bathroom. Although he admitted telling the police that he was not under the influence of drugs or alcohol when making the statement, he was "real high." Dembry then identified both the statement and his signature at the bottom of each of the eight pages, as well as on the photographs of defendant, Stewart and the gun.

¶ 25 Dembry acknowledged telling the police that, when defendant arrived at Dembry's house on the day of the offense, defendant told Dembry that Stewart and two other men had jumped defendant at 4:30 a.m. that day. However, at trial, Dembry did not remember this. Dembry testified that he and Stewart had been friends "at one point in time," but "at that point, we were no longer friends." However, Dembry did not have any problems with Stewart on the day of the offense.

¶ 26 On cross, Dembry admitted to having a physical fight with Stewart not long before the shooting over money. Dembry testified that the fight began with Stewart's uncle, and then Stewart became involved in the fistfight. As a

result, Dembry did not like Stewart on the day of the shooting, and Dembry was not on friendly speaking terms with Stewart. On the day of the shooting, Dembry called defendant to come to Dembry's house, and defendant did not live in the neighborhood. Defendant drove over in order to drive Dembry to Dembry's cousin's house in order to pick up some money that she owed Dembry.

¶ 27 Dembry testified that he last observed the statement when the ASA showed it to him in August 2015, approximately three months before trial. However, since it was getting late at the time, he did not read it, and the ASA said she would go over it with him the next time they met. Dembry did not recall the day when the statement was made because he was high on PCP at the time; and he had also smoked PCP moments before the shooting, and he had been out the night before the shooting, smoking and drinking. As a result, he has no independent memory of what happened on the day of the shooting and no actual memory of making the statement.

¶ 28 On cross, the defense counsel observed that Dembry held his head to one side to look at a piece of paper and asked him if he had any vision problems. Dembry testified that, when he was little, he had a hanger stuck in his right eye and that his vision in that eye is blurry and he has to squint. When he signed a photograph of the victim, Dembry signed that it was "Craig Stewart," not "Greg

Stewart." When Dembry signed the statement, he was in police custody because he had been arrested with defendant in connection with this shooting. Dembry signed the statement because the police officers told him that, if he did not, he would be charged; so he signed the statement and he was not charged. Dembry testified that, at the time he signed the statement, it was not true. No one took any samples from his hands or clothing. The statement was not in his handwriting.

¶ 29 On redirect, Dembry testified that the fistfight he had with Stewart was in April 2014, two months before the shooting.

¶ 30 Officer John Powers testified that on June 7, 2014, at 10:30 a.m., he was on routine patrol with his partners when he observed Stewart lying on the ground in front of a fire station and subsequently observed a black SUV crashed into a tree. The SUV was facing the wrong way on a one-way street. There was one person in the SUV, in the driver's seat, with the airbags deployed and money scattered inside the vehicle. Powers identified defendant as the driver, who was slumped over the wheel, disoriented, with his hands still on the wheel. As the officers helped defendant exit the vehicle, a shell casing fell off the front of defendant's shirt and onto the ground. Powers also observed a silver, semi-automatic handgun on the ground in front of the vehicle. At the firehouse,

Powers observed Dembry walking past the victim and ordered Dembry to place his hands in the air and go down on his knees, and Dembry complied.

¶ 31 On cross, Powers explained that he returned to the firehouse specifically to detain Dembry because an unidentified individual had indicated that Dembry had been in the vehicle and then walked away from it. Powers immediately handcuffed Dembry and placed him into a squad vehicle. Powers was asked if the shell casing was mentioned in the arrest report, and he could not recall. On redirect, the State showed Powers the arrest report concerning defendant, and Powers confirmed that the report mentioned the shell casing falling from defendant's person when detained.

¶ 32 Michael Kuryle, a paramedic with the Chicago fire department, testified that the fire company at the location had already bandaged Stewart and established an "IV" before Kuryle arrived at the scene. Kuryle and his partner then drove Stewart to the emergency room.

¶ 33 Hiram Gutierrez, an evidence technician with the Chicago police department, testified that he administered a gunshot residue test to defendant's hands while defendant was in the emergency room, at noon on the day of the shooting. Gutierrez then sent the kit to the Illinois State Laboratory for processing. Gutierrez was not asked to collect samples from Dembry.

¶ 34 Mary Wong, a forensic scientist with the Illinois State Police, testified that she received the gunshot residue kit, processed it and concluded that defendant "may not have discharged a firearm with either hand. If he did, then the particles were either removed by activity, not deposited on or not detected by the procedure." Wong explained that removal activity could include "[a]ny type of movement of the hands, whether you're touching another surface, or wiping the—your hands in—on clothing, or getting your hands in the pockets or washing the hands." When asked whether a negative result meant that a person had not fired a gun, Wong answered "no," explaining that a person's hands could have been covered and that the passage of time may have an effect on the results. She observed that the kit should be administered in "a six-hour window between [the] time of [the] incident and [the] time of collection." In addition, Wong testified that the instrument is designed and set to look for particles of a certain diameter and that, if the particles are smaller, they will not be detected.

¶ 35 On cross, Wong testified that her report indicated that the incident occurred at 10:46 a.m. and that the kit was administered at 12:10 p.m., creating a time lapse of only an hour and 24 minutes, which is well within the recommended six-hour window. Wong did not process a kit for Dembry.

¶ 36 Officer Thomas Ellerbeck, an evidence technician in the latent print unit of the Chicago police department, testified that he received the gun recovered in

this case, for the purpose of examining it for latent fingerprints. There were 8 rounds in the 13-round magazine received with the gun. Ellerbeck found latent ridge impressions on the 13-round magazine, which he photographed for examination by a latent print examiner.

¶ 37 Joseph Calvo, a latent print examiner with the Chicago police department, testified that the prints he received in this case were not suitable for comparison. The prints were not suitable because they did not contain enough characteristics to be used for a comparison.

¶ 38 Officer Plovanich, a police officer with the Chicago police department, did not testify to his first name.[1] Plovanich was one of the partners of Officer Powers, who had previously testified. Plovanich, Powers and their third partner, Bjorn Millan, were traveling southbound in a police vehicle on Pulaski Avenue at 10:30 a.m. on June 7, 2014, when they observed a black SUV that had crashed into a tree. Defendant was the only occupant, and he was in the driver's seat, with his hands still grasping the steering wheel with the airbags deployed. As Plovanich helped defendant exit the vehicle, a shell casing fell off his clothing and landed on the street. Plovanich rode with defendant in the ambulance to the hospital. Before Plovanich and defendant departed in the

[1] Plovanich did not testify to his first name.

ambulance, his two partners went to the firehouse because an unidentified individual had identified another person who had been in the vehicle.

¶ 39 Assistant State's attorney Becky Walters testified that she took a handwritten statement from Charles Dembry on June 8, 2014. Dembry was not handcuffed, and she read him his rights. Dembry told her what happened on June 7, 2014, and she handwrote his statement. Outside the presence of the police officers, she asked him how he had been treated by the officers and Dembry informed her that he had been treated well. Dembry received a sandwich and a soda, and was allowed to use the bathroom. Walters asked Dembry to read the first paragraph of the statement out loud, so she could confirm that he could read. Then Walters read the entire statement out loud to him. Dembry had an opportunity to make any changes, and he made several, which he, Walters and Detective Salemme[2] all initialed. Dembry subsequently signed the bottom of each page, as did Walters and Detective Salemme. After the signatures were executed, a photo was taken of Dembry which Dembry also signed and dated. Defendant objected to the introduction of the statement, and the trial court noted that the objection was timely, since the objection had also

[2] Detective Salemme was the lead detective in the case and he testified later in the trial. *Supra* ¶ 41.

been made prior to the witness' testimony.[3] The trial court overruled the objection, and the statement was admitted into evidence and published to the jury.

¶ 40 The parties then stipulated that an evidence technician recovered a nine-millimeter shell casing from the street near the shooting, a nine-millimeter shell casing from the ground near the crashed SUV, and a nine-millimeter semiautomatic gun from the grass in front of the crashed SUV. The parties also stipulated that Brian Sokniewicz, a firearms examiner, if called to testify, would testify that the shell casing recovered from the ground near the crashed SUV was "not suitable" for comparison. He would further testify that he test fired cartridges from the recovered gun and that the test-fired cartridges did not match the shell casing recovered from the street near the shooting.

¶ 41 The parties also stipulated that defendant had "two prior qualifying felony convictions under the armed habitual criminal statute."

¶ 42 Detective John Salemme testified that, on June 7, 2014, he was assigned to investigate the shooting. He was the lead detective on the case and, after speaking with Stewart, defendant and Dembry, he made the decision to charge defendant. On cross, he testified that he made the decision to have a gunshot residue test performed on defendant but not Dembry because "[n]one of the

[3] Prior to the witness' testimony, the defense had requested a sidebar, which was held off the record.

evidence pointed to [Dembry] shooting the gun." Salemme had the black SUV searched for additional weapons, as well as the surrounding area, and none were found. When Salemme interviewed Stewart in the hospital, Salemme produced a victim's refusal to prosecute form. Stewart was unable to sign it, so his girlfriend, who was also present, signed on his behalf.

¶ 43 The State rested, and the trial court denied defendant's motion for a directed verdict. The trial court then stated on the record that it was "going to do jury instructions with the lawyers," and the trial court recessed for lunch. Although there is no transcript of the jury instruction conference, which was held off the record, the record does contain a copy of the State's proposed jury instructions. These proposed instructions state "People's Instruction No." at the bottom of each instruction, and they do not contain any instruction on possession of a firearm. After the lunch recess, the trial court stated on the record:

> "We had a jury instruction conference which is spread of record now. All the instructions that are given are given by agreement of the parties. They are all IPI instructions with the exception of a couple [of] non-IPI instructions to give the jury instructions about the armed habitual criminal statute and the additional element.

> The Defense is objecting to one instruction, and that is the accountability instruction, IPI 5.03, and to the issues instructions with the accountability language in those instructions also."

After hearing argument from the defense, the trial court ruled that the accountability instructions would be given. When the court asked "[a]nything else?" defense counsel responded no.

¶ 44 When the case was back in front of the jury, the defense introduced a stipulation between the parties that Detective Andres, if called to testify, would testify that on June 7, 2014, he interviewed Sheena Johnson, that Johnson heard Stewart say to the front passenger, "Man, Cheves," that Johnson stated that she observed defendant "reach over, point the gun towards Stewart and sho[o]t through the open passenger side window, striking Stewart on the left wrist." The defense rested.

¶ 45 After closing arguments, the trial court read the jury instructions to the jury. The court instructed the jury, among other things, that: "A person commits the offense of being an armed habitual criminal when he knowingly possesses a firearm after having been convicted of two prior qualifying felony offenses." The court reporter's transcript of the trial court's reading of the jury instructions shows that the trial court did not read aloud any definition of possession. However, before the jurors retired to deliberate, the trial court told

them that they would have in their possession "the instructions that I just related to you."

¶ 46 The written copy of the instructions, that appear in the appellate record, contain the following definition of possession:

> "Possession may be actual or constructive. A person has actual possession when he has immediate and exclusive control over a thing. 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 either directly or through another person.
>
> If two or more persons share the immediate and exclusive control or share the intention and the power to exercise control over a thing, then each person has possession."[4]

These instructions appear to be the copy that the jury had because three of the verdict forms, included with these instructions, were signed by the jurors and stamped filed by the trial court. Also, on the instruction for aggravated battery appears a note written in ballpoint pen that states: "We need more clarification on the *First*." (Emphasis in original.) This note was the subject of a question later sent out by the jury, as we describe below. In addition, the written

[4] The above instruction is, word for word, Illinois Pattern Instruction, Criminal, No. 4.16 (posted online Dec. 8, 2011) (hereinafter IPI Criminal No. 4.16).

instructions appear in the same order that the trial court read them, except that, in the written instructions, an instruction for possession appears after the instruction for armed habitual criminal.

¶ 47 During jury deliberations, the jury sent two notes to the trial court. The first note asked: "Can we have more clarification on the First definition of aggravated battery with a firearm [?]" With the agreement of the parties, the trial court responded in a written note that stated: "You have received the law that applies to the case. You are to apply all of the law collectively. Please continue your deliberations."

¶ 48 The second note asked: "If any firearm was in the car[,] does it count as 'possession' for [defendant] even if it wasn't on his person?" Over defendant's objection, the trial court responded with a note that stated: "I am giving you an additional instruction of law. Please read and apply this with all the other instructions you have received. Please continue your deliberations." The trial court informed the attorneys that it was "giving them a clean copy of IPI 4.16 directly from the book." The written instruction for possession that appears in the appellate record, included in the other written instructions, may be this "clean copy."

¶ 49 After continuing to deliberate, the jury reached a verdict, acquitting defendant of attempted murder of Stewart and of aggravated battery of a

firearm, and finding him guilty under the armed habitual criminal statute. Defendant filed a posttrial motion for judgment notwithstanding the verdict or a new trial, claiming that the trial court erred by responding to the jury's note by providing IPI Criminal No. 4.16 because the instruction included constructive possession and the State had not argued constructive possession.

¶ 50 At the hearing on the posttrial motion, the trial court asked if IPI Criminal No. 4.16 was given to the jurors originally, and defense counsel responded that it was not and that it was provided only in response to the jurors' question. After listening to argument, the trial court denied the motion and proceeded to sentencing.

¶ 51 At sentencing, the State asked for a sentence close to the maximum of 30 years. After considering factors in aggravation and mitigation, the trial court sentenced defendant to 10 years with IDOC. This appeal followed.

¶ 52 On appeal, the parties supplemented the record with a stipulation. The stipulation is entitled: "Jury Instructions, obtained from Public Defender's Office." The stipulation reads:

> "It is hereby stipulated between the Office of the State Appellate Defender and the Cook County State's Attorney's Office that the attached supplemental document/transcript may be certified and bound as a supplemental volume by the Clerk of the Circuit Court of Cook County.

> The Cook County State's Attorney's Office and the Office of the State Appellate Defender reserve the right to object to submission of this document/transcript to the Appellate Court if circumstances warrant."

Attached to this stipulation are the State's proposed jury instructions.

¶ 53 ANALYSIS

¶ 54 On this appeal, defendant claims: (1) that the State failed to prove beyond a reasonable doubt that defendant had actual or constructive possession of the gun that was the subject of his conviction; (2) that the trial court erred by giving a pattern jury instruction on possession where the instruction included constructive possession and the State failed to present evidence on constructive possession; and (3) that the trial court committed first-prong plain error where it failed to ask potential jurors whether they understood and accepted the *Zehr* principles and the case was closely balanced.

¶ 55 For the following reasons, we affirm.

¶ 56 I. Rule 431(b) Claim

¶ 57 In his third claim, defendant argues that the trial court erred by failing to ask potential jurors whether they understood and accepted the four principles listed in Illinois Supreme Court Rule 431(b) (eff. July 1, 2012). In the case at bar, the trial court asked potential jurors if they had "a disagreement or problem" with any of the Rule 431(b) principles. Similarly, in *People v. Sebby*,

2017 IL 119445, the trial court asked potential jurors if they "[h]ad any problems" with or "believe[d] in" the Rule 431(b) principles (*Sebby*, 2017 IL 119445, ¶ 8), and our supreme court found this was "clear error" (*Sebby*, 2017 IL 119445, ¶ 49). As a result, the State in the case at bar admits error, as it must, since the supreme court opinion on this matter could not be more clear.

¶ 58 However, defendant concedes that he forfeited his Rule 431(b) claim for our review by failing to object in the court below, and he asks this court to review the error under the plain error doctrine. *People v. Piatkowski*, 225 Ill. 2d 551, 564-65 (2007). In *Sebby*, our supreme court found 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." *Sebby*, 2017 IL 119445, ¶ 52. Defendant does not claim an actually biased jury and seeks review only under the first prong of the plain error doctrine which requires that he show that the evidence at his trial was closely balanced. *Piatkowski*, 225 Ill. 2d at 564-65.

¶ 59 Since there is no dispute that error occurred, and defendant does not argue that his jury was actually biased, his Rule 431(b) claim rests solely on the question of whether the evidence at his trial was closely balanced.

¶ 60 Thus, when we review the evidence below to determine his first claim, whether the evidence at trial was sufficient, we will also consider whether the

evidence was closely balanced, so that we do not repeat our discussion of the evidence twice.

¶ 61 II. Sufficiency of the Evidence

¶ 62 Defendant claims that the evidence was insufficient to establish his guilt beyond a reasonable doubt. When reviewing a challenge to the sufficiency of the evidence, we will not retry the defendant. *People v. Nere*, 2018 IL 122566, ¶ 69. Instead, a reviewing court considers whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Nere*, 2018 IL 122566, ¶ 69; *People v. Hardman*, 2017 IL 121453, ¶ 37. "All reasonable inferences from the evidence must be drawn in favor of the prosecution." *Hardman*, 2017 IL 121453, ¶ 37. " '[T]he trier of fact is not required to disregard inferences which flow normally from the evidence before it, nor need it search out all possible explanations consistent with innocence and raise them to a level of reasonable doubt.' " *Hardman*, 2017 IL 121453, ¶ 37 (quoting *People v. Jackson*, 232 Ill. 2d 246, 281 (2009)). A reviewing court will not reverse a criminal conviction unless the evidence is so unreasonable, improbable or unsatisfactory as to raise a reasonable doubt of the defendant's guilt. *Hardman*, 2017 IL 121453, ¶ 37.

¶ 63 "A person commits the offense of being an armed habitual criminal if he or she receives, sells, possesses, or transfers any firearm after having been convicted" of two or more prior qualifying felony offenses. 720 ILCS 5/24-1.7 (West 2012). In the case at bar, the parties stipulated that defendant had been convicted of two prior qualifying felony offenses, and the jury was instructed only on possession and not receipt, sale or transfer.[5] Thus, the issue, with respect to sufficiency, is whether any rational trier of fact could have found, beyond a reasonable doubt, that defendant possessed the firearm found on the ground next to his crashed vehicle.

¶ 64 Possession may be actual or constructive. *People v. Givens*, 237 Ill. 2d 311, 335 (2010). A person has actual possession when he has immediate and exclusive dominion or control over an item, but actual possession "does not require present personal touching" of the item. *Givens*, 237 Ill. 2d at 335. A person has constructive possession when he lacks actual possession, but has both the intent and capability to exercise control and dominion over the item. *People v. Spencer*, 2016 IL App (1st) 151254, ¶ 25. In addition, possession may be joint, if "two or more persons share the intention and power to exercise control" over the item. *Givens*, 237 Ill. 2d at 335. "Proof that a defendant had

[5] The trial court instructed the jury, among other things, that: "A person commits the offense of being an armed habitual criminal when he knowingly *possesses* a firearm after having been convicted of two prior qualifying felony offenses." (Emphasis added.)

control over the premises" where the item was located "gives rise to an inference of knowledge and possession." *Givens*, 237 Ill. 2d at 335.

¶ 65 On appeal, defendant argues, in essence, that evidence that he was the shooter cannot be considered because the jury acquitted him of being the shooter. Even if we were to find this argument persuasive—and we do not—there was sufficient evidence for a reasonable jury to find him guilty of possession even without considering the evidence that he was the shooter. In the case at bar, the State's evidence established that there was a drive-by shooting from defendant's vehicle; that moments after the shooting, defendant's vehicle crashed into a tree with defendant as its only occupant; that the police found defendant in the driver's seat, with the airbags deployed, a gun on the ground in front of the vehicle, and a shell casing falling off the front of his shirt. From these facts, and the reasonable inferences that could be drawn from these facts, and viewing the facts in a light most favorable to the State, a rational factfinder could have found that defendant had actual or constructive possession of the gun. *Hardman*, 2017 IL 121453, ¶ 37 ("All reasonable inferences from the evidence must be drawn in favor of the prosecution.").

¶ 66 Defendant argues that the State failed to prove that defendant, and not Dembry, possessed the gun. However, the State did not have to prove this. As we observed, if the jury found that defendant and Dembry exercised joint

dominion and control over the gun when it was in defendant's vehicle, that was sufficient for a jury to find possession by defendant beyond a reasonable doubt. *Givens*, 237 Ill. 2d at 335 (possession may be joint, if "two or more persons share the intention and power to exercise control" over the item).

¶ 67 Defendant argues that his fingerprints were not found on the gun, and no gunshot residue was found on his hands. However, the State's experts explained that no suitable prints for comparison were recovered from the gun; and a rational factfinder could have found that defendant exercised joint control and dominion over the gun while it was in *his* vehicle before, during and after the shooting, whether or not defendant was the actual shooter. *Givens*, 237 Ill. 2d at 335 ("Proof that a defendant had control over the premises" where the item was located "gives rise to an inference of knowledge and possession.").

¶ 68 Defendant argues that he did not have control over the gun after it crashed, and defendant was slumped over the steering wheel with the airbag deployed, and Dembry admitted to throwing the gun out of the vehicle. However, whether defendant lacked control over the gun at that moment in time is not dispositive over whether he exercised joint control over the gun earlier.

¶ 69 Defendant cites in support *People v. Bailey*, 333 Ill. App. 3d 888, 891 (2002), which found: "A defendant's mere presence in a car, without more, is not evidence that he knows a weapon is in the car." The appellate court

reversed the weapons charge in *Bailey* because "the State failed to produce any affirmative evidence, either circumstantial or direct, to establish that [the defendant] had knowledge of the presence of the weapon under his seat." *Bailey*. 333 Ill. App. 3d at 892. By contrast, the case at bar is not a case of mere presence. A rational factfinder could reasonably infer from the shooting from defendant's vehicle—which first drove by the victim and then returned to drive by the victim a second time—that he had knowledge of the weapon in his vehicle.

¶ 70 Defendant seems to assume that, since the jurors could not find that he was the shooter beyond a reasonable doubt, they must have concluded that Dembry was the shooter and, thus, in possession of the gun. However, it may be that the jury could not find beyond a reasonable doubt which one of the two men was the actual shooter. Even if the jury could not find beyond a reasonable doubt which one of the two men in the black SUV was the actual shooter, the jury could still conclude that they both had actual joint possession over the gun. *Givens*, 237 Ill. 2d at 335 (possession may be joint, if "two or more persons share the intention and power to exercise control" over the item).

¶ 71 For all these reasons, we are not persuaded by defendant's insufficiency claim. We are also not persuaded that the evidence was closely balanced. In support of his argument that the evidence was closely balanced, defendant

makes many of the same arguments, such as there were no fingerprints found on the gun or gunshot residue found on defendant's hands, and the jury acquitted defendant of being the shooter. With respect to the gunshot residue and the acquittal, the jury did not have to find defendant to be the shooter in order to find that he exercised joint control with Dembry over the gun.

¶ 72 Defendant claims that, before finding him guilty, the jury had to resolve a credibility question, and the resolution of a credibility question renders the evidence closely balanced.[6] However, defendant does not specify what the credibility question is. Sheena Johnson's and Cheves Dembry's testimony that a drive-by shooting occurred from defendant's vehicle is amply supported by the other physical evidence, such as the victim's injuries and defendant's immediate crash of his vehicle into a nearby tree, with him still inside. At trial, the defense did not challenge the credibility of the police officers who testified that a shell casing fell off the front of defendant's shirt and that they recovered a gun immediately outside of his crashed vehicle.

¶ 73 For all these reasons, we do not find the evidence closely balanced and, thus, we are not persuaded that his Rule 431(b) claim requires reversal.

[6] For this point, defendant cites in support *People v. Schaffer*, 2014 IL App (1st) 113493, ¶ 49. However, in *Schaffer*, the prosecutor asked the defendant to comment on the veracity of other witnesses. *Schaffer*, 2014 IL App (1st) 113493, ¶ 49. The appellate court held, when such an action occurs, "reversal is warranted when the evidence is closely balanced and the credibility of the witnesses is a crucial factor." *Schaffer*, 2014 IL App (1st) 113493, ¶ 49.

¶ 74 III. Jury Instruction

¶ 75 Defendant claims that it was reversible error for the trial court to give an instruction that included constructive possession because his conviction was based only on the State's theory that he was the shooter and, thus, had actual possession of the gun. Thus, the defense's claim is based solely on its perception of the State's theory. In the case at bar, neither party spent much time in their closing remarks on the possession element of the armed habitual criminal charge. Both parties directed the majority of their closing remarks toward the attempted murder charge. The defense did not specifically address the possession element of the armed habitual criminal charge. With respect to the possession element, the State argued in closing only that:

> "The first proposition, that the defendant possessed a firearm. There are multiple points throughout this story that the defendant is committing this second element and he's committing that crime. When he has the gun at any point in the car, he's committing that crime. When he is shooting the victim, he is also committing that crime. During the getaway, he is still committing the crime. Up until even the crash, that whole time he's committing armed habitual criminal."

¶ 76 We cannot find from these few sentences that the State intended to argue for actual possession to the exclusion of constructive possession. In the above

quote, the State argued that, when defendant had the gun in his vehicle at any time, he was committing the crime. This brief argument could reasonably be interpreted as an argument for constructive possession, since Dembry was also admittedly in defendant's vehicle during the same time period. Since we do not find persuasive defendant's argument about the State's theory, we cannot find this claim persuasive.

¶ 77 For the purpose of our analysis of this claim, we presume, since the State has not argued otherwise, that defendant is correct when he argues that the possession instruction was not originally provided to the jury in their initial written instructions. If that is true, then the jurors were provided initially with absolutely no definition of possession, actual or constructive. Defendant argues that the trial court erred by later providing it in response to a jury note.

¶ 78 Generally, a trial court has a duty to provide instruction when the jury has posed an explicit question or asked for clarification on a point of law. *People v. Averett*, 237 Ill. 2d 1, 24 (2010). "A trial court may, nevertheless, exercise its discretion to decline answering a question from the jury under appropriate circumstances." *Averett*, 237 Ill. 2d at 24. An abuse of discretion occurs only when the trial court's decision is arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it. *People v. Lerma*, 2016 IL 118496, ¶ 23. "Appropriate circumstances include [(1)] when the jury

instructions are readily understandable and sufficiently explain the relevant law, [(2)] when additional instructions serve no useful purpose or may potentially mislead the jury, [(3)] when the jury's request involves a question of fact, [(4)] or when giving an answer would cause the trial court to express an opinion likely directing a verdict one way or the other." *Averett*, 237 Ill. 2d at 24.

¶ 79 Applying the directive in *Averett* to the facts at bar, we can find no abuse of discretion here. First, the instructions in the case at bar did not "sufficiently explain the relevant law," as the jury itself noted, because they provided no definition of possession, an element of one of the crimes charged. See *Averett*, 237 Ill. 2d at 24. Second, the jury was already at risk of being misled by the absence of an instruction on possession and, thus, the jury instruction provided by the trial court served the "useful purpose" of informing them of the legal definition of that word. *Averett*, 237 Ill. 2d at 24. Third, the jury's question involved a point of law rather than a point of fact. *Averett*, 237 Ill. 2d at 24. Fourth, the trial court did not express an opinion but merely provided "a clean copy of IPI 4.16 directly from the book." Thus, we cannot find that the trial court abused its discretion by answering the jury's question and providing the

pattern instruction on possession.

¶ 80 CONCLUSION

¶ 81 For the foregoing reasons, we affirm defendant's conviction and sentence.

¶ 82 Affirmed.