2018 IL App (1st) 163178-U

No. 1-16-3178

Order filed October 5, 2018

Fifth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 CR 10928
	)	
KEITH MCCULLUM,	)	Honorable
	)	Michael B. McHale,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Rochford and Justice Hoffman concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for the offense of armed habitual criminal is affirmed over his contentions that (1) the trial court erred in denying his motion to quash arrest and suppress evidence, (2) the State failed to prove him guilty beyond a reasonable doubt, (3) the trial court should not have sustained an objection made by the State during defense counsel's closing arguments, and (4) the trial court erred in giving a specific jury instruction.

¶ 2 Following a jury trial, defendant Keith McCullum was convicted of the crime of armed habitual criminal and, based on his criminal history, sentenced as a Class X offender to an

extended term of seven years in prison. On appeal, defendant (1) contends that the trial court erred in denying his motion to quash arrest and suppress evidence; (2) challenges the sufficiency of the evidence, arguing that the arresting officer's testimony was not credible, that the vehicle in which the handgun was found was not his, and that no physical evidence connected him to the recovered handgun; (3) contends that he was denied a fair trial where the trial court sustained the State's objection to defense counsel's closing argument regarding the concepts of actual and constructive possession; and (4) contends that the trial court erred in giving the jury an instruction regarding proof of prior convictions because he did not specifically request the instruction be given.

¶ 3 For the reasons that follow, we affirm.

¶ 4 BACKGROUND

¶ 5 Defendant's conviction arose from the events of May 9, 2013. Following his arrest that day, defendant was charged by information with one count of being an armed habitual criminal, two counts of unlawful use of a weapon by a felon, and six counts of aggravated unlawful use of a weapon. Prior to trial, the State nol-prossed all counts but the one charging the crime of armed habitual criminal.

¶ 6 Defendant filed a motion to quash arrest and suppress evidence, alleging that at the time of his warrantless arrest, the police lacked reasonable suspicion that criminal activity was occurring and that he was armed and dangerous, and lacked probable cause to believe he had committed or was about to commit a crime.

¶ 7 At the hearing on the motion, defendant called Ebony Finley as a witness. Finley testified that she grew up with defendant, that they were friends, and that he dated a good friend of hers.

Around 9 p.m. on the day in question, she saw defendant on her block, near the corner of West Kamerling Avenue and Pine Avenue. Defendant had pulled up in a truck and parked across the street from her house. According to Finley, defendant was not double parked. Defendant got out of the truck and talked with Finley for about 15 minutes. Then he got back in the truck and drove off.

¶ 8 At this point, a friend of Finley's named Kimberly walked up. As Finley and Kimberly were talking, they noticed police lights down the street. Since "nothing happens on Kamerling because there is a lot of police over there," the women were curious and decided to go down the street and "be nosy." As they approached, Finley recognized defendant's truck, which had been pulled over by the police. Finley could not hear what was being said by the police or defendant, but saw two officers get out of a car and saw defendant hand them papers out of the truck's window. The police said something, defendant got out of the truck, and the police handcuffed him. After the police put defendant in their car, they searched the truck.

¶ 9 Almost a year later, Finley talked with an investigator from the State's Attorney's office. After the investigator left her home, she called the investigator to "clarify some things."

¶ 10 On cross-examination by the State, Finley clarified that defendant had been pulled over on Long Avenue, which intersected with her street. She also stated that the truck he was driving did not belong to defendant, but rather, it was her friend's truck. Finley further added that after speaking with the investigator in person, she called him back twice and gave him additional information and details, "because my boyfriend scared me, and he told me don't talk to the police."

¶ 11 Defendant, who testified on his own behalf, acknowledged that in the last 10 years, he had been convicted of a weapons offense and a DUI that was a felony because he did not have a driver's license. He stated that on the day in question, he drove a Ford Explorer to Finley's house. According to defendant, the Explorer's back passenger and bed windows were tinted, but the windshield, the driver's window, and the front passenger's window were not tinted. Defendant parked "lawfully," stood outside the Explorer to talk with Finley, and then drove off "in a safe and proper manner, obeying all traffic laws." Shortly thereafter, he was pulled over by two police officers. At the officers' request, he provided his driver's license and insurance papers. The officers had defendant get out of the Explorer, handcuffed him, and searched the Explorer. During the search, they found a gun under the driver's seat.

¶ 12 On cross-examination by the State, defendant testified that when he was parked on Kamerling Avenue, he was in a parking space and was not blocking traffic in any way, and that when he drove off and turned left onto Long Avenue, he used his turn signal. Defendant stated that when the police approached him, they were not using flashlights. Rather, they only used flashlights when they were searching the Explorer. Defendant admitted that at the time he was pulled over, he knew he had a gun in the Explorer. However, he denied having a handgun in his hand when the officers approached, denied moving his hands toward the base of his seat as they approached, and denied that he was putting the gun on the floor at that time.

¶ 13 The State called Chicago police officer Richard Yi, who testified that he and his partner, Officer P. Theodorides, were on routine patrol on the night in question. At about 9 p.m., as Yi drove along the 5400 block of West Kamerling Avenue, he noticed an SUV double parked in the middle of the street ahead of them. When Yi was about two car lengths from the back of the

SUV, the SUV sped off and made an abrupt left turn onto Long Avenue without using a turn signal. Yi gave chase and activated his car's emergency lights.

¶ 14 When the SUV stopped, Yi and Theodorides got out of their car and approached the SUV on foot: Yi on the driver's side, and Theodorides on the passenger's side. According to Yi, the SUV's windows were not tinted. The SUV's sole occupant was defendant, whom Yi identified in court. Yi testified, "When I approached the driver's side, I had my flashlight directed into the vehicle, which was illuminated inside. I observed the driver, which is now the defendant, placing a handgun underneath the seat of his car." Yi described the handgun as silver and shiny, and explained that before defendant placed it underneath the seat, he was holding it in his right hand over his lap.

¶ 15 Yi opened the SUV's door and attempted to place defendant in custody. Defendant did not comply with Yi's verbal directions, moved away, and would not show his hands. Eventually, Theodorides and other police officers who had arrived on the scene came to the driver's door, and together, the officers removed defendant from the SUV and placed him in custody. Yi then recovered the handgun from the SUV and determined it was loaded.

¶ 16 On cross-examination, Yi testified that he did not "recall any tints" on any of the SUV's windows. When pressed on the point, he stated, "I remember that it did not have tints." Yi testified that although Kamerling Avenue is a two-way street, it is very narrow, and that defendant's SUV was parked in the middle of the street in such a way that Yi would not have been able to drive around it had he tried. Yi acknowledged that he did not include in the arrest report he prepared that defendant made an abrupt turn onto Long Avenue. He further stated that

he activated his emergency lights after defendant made the turn without signaling, as that was a traffic violation.

¶ 17 The trial court denied the motion to quash arrest and suppress evidence. In the course of doing so, the court made the following comments:

> "I found Miss Finley's testimony to be somewhat suspicious, at the very least, biased. She is a friend of the defendant's. But the fact that she met with an investigator and then called back twice to give additional info, as she said because he [sic] boyfriend scared her and told her she shouldn't talk to the police, makes me question the testimony. It is directly at odds with the officer as well.
>
> She says that there is a nice and easy going curbing of the vehicle, and he is handing out documents. The officers then have him come out. That was the -- diametrically opposed to Officer Yi's version.
>
> Officer Yi said that he was in an unmarked Crown Vic in civilian dress. I found his testimony to be unimpeached, very detailed.
>
> I will note -- and I think it is proper for me to note -- that there are two tickets in the arrest -- attached to the arrest report that's in the court file, and they are for double parking and failing to signal. There is also a reference to the narrative that he was double parked and that he did turn onto Long Avenue without using a turn signal.
>
> I will note that the word abrupt is not in the arrest report, but I don't find that to be impeaching.

> The defendant has two prior felony convictions, and he has a lot to lose. I am allowed to take that into consideration when I am considering his credibility. Basically, I believe the officer, and I don't believe the defense witnesses. Motion to quash arrest and suppress is denied."

¶ 18 Defense counsel informed the court he would be filing a motion to reconsider and, after several continuances, indicated on November 23, 2015, that he had received email from Hertz confirming that the SUV at issue "had lightly-tinted windows." Counsel thereafter filed a motion to reconsider, alleging that according to Hertz, who "provided the rental car," the windows of the SUV defendant was driving were tinted. Counsel argued in the motion that between the tinted windows and the fact that it was dark outside, Officer Yi would not have been able to see a gun being hidden, and that the trial court should reconsider its ruling because Yi's testimony was "plainly incorrect." Defense counsel did not attach any email from Hertz or other documentation to the motion.

¶ 19 Proceedings were held on the motion to reconsider on March 30, 2016, almost two years after the motion to quash arrest and suppress evidence had been denied on May 13, 2014. Defense counsel argued that contrary to Yi's testimony that there was no tint on the SUV's windows, he had received "materials" from Hertz indicating there was in fact a tint. The trial court commented that it did not have any materials from Hertz and asked counsel if he had attached the materials to his motion. Counsel answered that he had not. When the court remarked that it did not remember any testimony about materials from Hertz, defense counsel responded that he believed the parties had stipulated that the Hertz records said there was a "light tint" on

the windows. The State and the court replied that they did not recall a stipulation. The following exchange ensued:

> "THE COURT: Why wouldn't you attach that to the motion. That's newly discovered evidence. Regardless, we're not taking any continuances. Any other argument that you have, [defense counsel]? I'm not hearing anything. State, you wish to argue?
>
> [ASSISTANT STATE'S ATTORNEY]: No.
>
> THE COURT: Motion for reconsideration is denied, [defense counsel]. I had it with this case. We're done. Denied. Anything else you want, you can do it in writing."

¶ 20 At trial, following opening statements, the parties presented a stipulation that defendant "has two qualifying felony offenses."

¶ 21 Chicago police officer Richard Yi testified that around 9 p.m. on May 9, 2013, while he was on patrol with his partner, he noticed a Ford Explorer SUV double parked in the middle of the street near 5445 West Kamerling Avenue, obstructing traffic. Yi drove up toward the back of the SUV. When he was about two car lengths away, the SUV sped off eastbound on Kamerling and made a fast left turn onto Long Avenue going northbound, without using a turn signal. Yi stated that the SUV was traveling at a high rate of speed, which he estimated to be about 45 miles per hour.

¶ 22 Yi activated his car's lights, pursued the SUV, and caught up to it on Long Avenue. Once the SUV stopped, Yi got out of his car and approached the driver's side on foot. Using his flashlight, Yi looked into the front driver's side window of the SUV and saw defendant, whom

he identified in court. Defendant, the SUV's lone occupant, had a shiny silver revolver in his right hand, which was above his waist. Defendant then quickly placed the gun underneath the driver's seat. Yi opened the driver's door and ordered defendant to step out of the SUV and show his hands. Defendant did not comply, but rather, moved his hands around in "furtive movements." Soon thereafter, assisting officers who had arrived on the scene came to the driver's door to assist Yi. Yi testified that when he again told defendant to step out of the SUV, defendant complied. Yi handcuffed defendant and placed him into custody. He then recovered a loaded revolver from underneath the driver's seat of the SUV. He did not see any other shiny objects under the seat.

¶ 23 On cross-examination, defense counsel asked Yi if the SUV had tinted windows. Yi responded, "I don't remember the back of the rear windows, but I know for sure that the passenger -- the driver's side window did not have tint." Yi acknowledged that he had previously testified there was no tint on any of the SUV's windows, and agreed that he was now saying he did not remember with regard to the rear windows. Yi identified two traffic tickets he issued to defendant after his arrest. One was for double parking, and the other was for not using a turn signal. He admitted that the second ticket did not say "no signal," and explained this was due to a clerical error. Yi testified that he did not ask defendant for his license and proof of insurance at the scene. He also did not issue defendant a ticket for speeding, did not include in the police report that defendant drove 45 miles per hour on Kamerling Avenue, and admitted he did not mention that particular speed in his prior testimony. Yi stated that he activated his emergency lights while he was still on Kamerling Avenue, but after defendant had turned onto Long Avenue. He stated that he did not run the SUV's plates on the computer in his car until after

defendant was placed in custody, and did not know whether his partner checked the computer during the chase. Similarly, he did not use his radio to call in the location of the stop before he got out of the car, and did not remember whether his partner did so. Yi agreed that at some point, he determined defendant did not own the SUV. Yi also agreed that after he arrived at the driver's window and saw defendant holding a gun, he did not draw his own weapon, yell out "gun," or radio a message that there was a gun. He explained that he did not feel threatened, because defendant did not have the gun pointed at him or his partner. Finally, Yi acknowledged that he did not submit the gun for fingerprint or DNA analysis.

¶ 24 On redirect, Yi testified that his arrest report included a notation that defendant had committed the ticket violation of failure to signal. He also stated that on the night in question, he did not have a radar gun in his car, so he did not know for sure how fast defendant was driving.

¶ 25 During re-cross, defense counsel attempted to ask Yi about actual possession and constructive possession as follows:

> "Q. And you know -- when you are trained as a police officer do you learn things about actual possession and constructive possession?
>
> [ASSISTANT STATE'S ATTORNEY]: Objection.
>
> THE COURT: Sustained.
>
> [DEFENSE COUNSEL]: Judge --
>
> THE COURT: No, sustained.
>
> Q. Officer, you know what you need to say in order to put a gun on someone that doesn't own the car, right?

A. Sir, I never put anything on anybody. I don't place any type of evidence.

Q. Right. I have got nothing else, Judge."

¶ 26 Ebony Finley testified that she was long-time friends with defendant. On the night in question, defendant drove to her block in a Ford Explorer. He pulled over, and they had a conversation outside. After about 15 minutes, defendant drove off. Shortly thereafter, Finley, who was at a friend's house near the corner of West Kamerling Avenue and Long Avenue, saw that "the police pulled behind him and pulled him over or whatever." She saw a police officer approach the driver's side of the SUV and, although she could not hear what was happening, the officer appeared to have a conversation with defendant. Defendant handed the officer "license and insurance papers or whatever." Then, defendant got out of the SUV and the police searched it.

¶ 27 On cross-examination, Finley testified that she first saw the police car when she and defendant were talking outside the SUV, and the police were circling the block. Then, after defendant started driving away, the police car came up behind him and activated its emergency lights. Defendant turned left onto Long Avenue before he pulled over. According to Finley, the police told defendant to get out of the SUV. When asked whether she actually heard this order, Finley answered, "Body language. I could see everything going on because nothing happens on the block. So I was being nosy." Finley specified that she saw two police officers approach the SUV, and denied seeing any more officers arrive at the scene. She further stated that after the officers searched the SUV, she and her friend, Kim Friend, walked off. In response to questions regarding whether she saw the police recover anything from the SUV, Finley stated, "I really

couldn't see because of all the trees and whatever and it was hot, summer, you know. So we were talking, lights flashing. It hurt my eyes."

¶ 28 Finley further testified on cross-examination that almost a year after the night in question, she talked with an investigator from the State's Attorney's office who came to her house. She did not initially tell the investigator that she saw defendant hand papers to the police or that she saw them search the SUV because she "was a little bit nervous or whatever." Instead, she thought about it and called the investigator later to tell him she saw the police ask defendant questions. Finley denied calling the investigator back another time.

¶ 29 After the parties rested, the attorneys and the court discussed the jury instructions. As relevant here, when the trial court asked whether both sides had their packets, defense counsel answered, "Yes, Judge. The jury instructions are fine." The court followed counsel's statement by asking, "You already looked at them. No objection to any of them?" Defense counsel responded, "None." Then, as the court went through the instructions one by one, it stated, "3.13X no longer applies -- I'm sorry, it does apply actually. 3.13X will be People's 10." Defense counsel did not object.

¶ 30 Following closing arguments, the jury was instructed. Among the instructions was Illinois Pattern Jury Instruction, Criminal, No. 3.13X (approved October 17, 2014) (hereinafter IPI 3.13X), which the court gave as follows:

> "Ordinarily, evidence of a defendant's prior conviction of an offense may not be considered by you as evidence of his guilt of the offense with which he is charged.

> However, in this case, because the State must prove beyond a reasonable doubt the proposition that the defendant has previously been convicted of two qualifying felony offenses, you may consider evidence of defendant's prior convictions of qualifying felony offenses only for the purpose of determining whether the State has proved that proposition."

The judge gave an instruction defining armed habitual criminal as follows:

> "A person commits the offense of Armed Habitual Criminal when he, having been previously convicted of two qualifying felony offenses possesses a firearm."

The issues instruction for armed habitual criminal was given as follows:

> "To sustain the charge of armed habitual criminal, the State must prove the following propositions:
>
> First: That the defendant knowingly possessed a firearm; and
>
> Second: That the defendant has previously been convicted of two qualifying felony offenses.
>
> If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.
>
> If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty."

The jury was also instructed on the concepts of actual and constructive possession as follows:

> "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."

¶ 31 After almost two hours of deliberating, the jury sent out a note asking, "What happens if we are not able to come to a unanimous decision?" The court answered, "You have all of the evidence. Please continue your deliberations." About half an hour later, the jury sent a second note, asking, "Can you please provide more clarification on the charge armed habitual criminal? Is it due to the past two felonies? We understand first and second as described." The court answered this question by writing, "The parties and I spoke off the record. Everyone is agreeing that we should respond by stating you have all of the law. Please reread your jury instructions." After about five more minutes, the jury sent a third note. This one asked, "Can we see the transcript of what Officer Yi testified to?" The trial court answered the question, but the record does not reflect the contents of the answer. Approximately half an hour later, the jury reached a verdict finding defendant guilty of the crime of armed habitual criminal.

¶ 32 The trial court entered judgment on the verdict. Defendant thereafter filed a posttrial motion, arguing that he was not proved guilty beyond a reasonable doubt. The trial court denied the motion. Based on defendant's criminal history, the trial court sentenced him as a Class X offender to an extended term of seven years in prison.

¶ 33 ANALYSIS

¶ 34 On appeal, defendant first contends that the trial court erred in denying his motion to quash arrest and suppress evidence, as well as his motion to reconsider that denial. An appeal from a trial court's ruling on a motion to quash and suppress presents mixed questions of fact and law. *People v. McDonough*, 239 Ill. 2d 260, 265-66 (2010). We accord great deference to the trial court's factual determinations, and will disturb them only if they are against the manifest weight of the evidence. *Id*. at 266. This deferential standard recognizes that the trial court is in a superior position to determine and weigh the credibility of the witnesses, observe their demeanor, and resolve conflicts in their testimony. *Id*. However, we review *de novo* the trial court's ultimate determination regarding whether evidence should be suppressed. *Id*. A reviewing court may consider trial evidence in affirming a trial court's denial of a motion to suppress, but may not do so when a defendant asks the court to overturn that ruling. *People v. Brooks*, 187 Ill. 2d 91, 127-28 (1999).

¶ 35 Defendant's challenge to the trial court's denial of his motion to quash and suppress focuses on the trial court's findings that Yi was credible and Finley and defendant were not. Defendant argues that several portions of Yi's testimony at the hearing on the motion to quash and suppress were unreasonable, especially when compared to defendant's own testimony and the testimony provided by Finley. Specifically, defendant asserts Yi's testimony that the SUV was double-parked in the middle of the street with no pedestrians around it makes "little sense" when compared to his own and Finley's testimonies that he had pulled the SUV over to talk with Finley and had not double parked. Defendant further urges this court to compare Yi's narrative regarding the SUV speeding off just after Yi began to approach it with Finley's account that the police circled the block several times before stopping defendant. Finally, defendant notes that Yi

contradicted himself by testifying at the hearing that defendant was removed from the SUV by several officers, but at trial that defendant voluntarily exited the SUV. With regard to the denial of the motion to reconsider, defendant argues that the information from Hertz that the SUV had "lightly tinted" windows directly contradicted Yi's testimony at the hearing that none of the SUV's windows were tinted, and supported his theory that Yi could not have seen the gun through the window. He asserts that it was error for the trial court to "los[e] its patience" and not consider and evaluate the information from Hertz before denying the motion to reconsider.

¶ 36 Defendant's arguments involve the trial court's credibility findings. As noted above, when reviewing a trial court's decision on motion to suppress, we defer to the factual determinations of the trial court in judging witness credibility. *People v. Hunley*, 313 Ill. App. 3d 16, 28 (2000). Here, at the hearing on the motion to quash arrest and suppress evidence, defendant testified that the back windows of the SUV he was driving on the night in question were tinted, but the front windows were not. He stated that he was lawfully parked in a parking space while talked with Finley, that he drove away from that space in a safe and proper manner, that he was thereafter pulled over by the police, that he did not have a gun in his hands or put a gun underneath his seat when the police approached him on foot, and that he provided the police with his license and proof of insurance. Similarly, Finley testified at both the hearing and at trial that defendant was not double parked when he was talking with her, and that she saw defendant hand the police some paperwork through the SUV's window. At trial, Finley also specified that the police had been circling the block before pulling defendant over. In contrast, at both the hearing and at trial, Yi testified that he noticed a double-parked SUV while on routine patrol. He stated that as he approached the SUV in his car, it sped off and, without signaling, made an

abrupt turn before coming to a stop. Then, as Yi approached on foot, he saw defendant holding a handgun and placing it under the seat.

¶ 37 At the close of the hearing, the trial court explicitly announced that it was making a credibility finding: the court stated, "I believe the officer, and I don't believe the defense witnesses." The court further noted that defendant had "a lot to lose" and stated that it found Finley's testimony to be biased and somewhat suspicious. Given the degree of deference that must be accorded to the trial court's credibility determinations, we cannot agree with defendant that Yi's account, despite the small inconsistencies in his testimony, was generally implausible, and we cannot find that the trial court's credibility determinations were against the manifest weight of the evidence. With regard to the issue of window tinting, we note that defendant himself testified that the front windows of the SUV -- which would include the window through which Yi testified he saw the gun -- were not tinted. As such, we cannot find error in the trial court's refusal, when deciding the motion to reconsider, to take into account "materials" from Hertz that allegedly indicated the SUV's windows were "lightly tinted." This is especially so where defendant never produced these "materials" in a physical form, even though counsel had apparently received at least an email from Hertz regarding the tinting four months before the hearing on the motion to reconsider. Defendant's arguments fail. We affirm the denial of defendant's motion to quash and suppress.

¶ 38 Defendant next challenges the sufficiency of the evidence to sustain his conviction. When reviewing the sufficiency of the evidence, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S.

307, 318-19 (1979). The credibility of the witnesses, the weight to be given their testimony, and the resolution of any conflicts in the evidence are within the province of the trier of fact, and a reviewing court will not substitute its judgment for that of the trier of fact on these matters. *Brooks*, 187 Ill. 2d at 131. The testimony of a single witness, if positive and credible, is sufficient to convict. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). A reviewing court will not reverse a conviction simply because the defendant claims that a witness was not credible. *Id*. Rather, reversal is justified only where the evidence is "so unsatisfactory, improbable or implausible" that it raises a reasonable doubt as to the defendant's guilt. *People v. Slim*, 127 Ill. 2d 302, 307 (1989). Where a guilty finding depends on eyewitness testimony, a reviewing court, keeping in mind that it was the fact finder who saw and heard the witnesses, must decide whether any fact finder could reasonably accept the witnesses' testimony as true beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 279-80 (2004). It is for the finder of fact to judge how flaws in a witness's testimony affect the credibility of the whole. *Cunningham*, 212 Ill. 2d at 283.

¶ 39 In challenging the sufficiency of the evidence, defendant first argues that Officer Yi's testimony was "far from credible in significant respects" and "belied commonsense." He argues it is "astonishing" that Yi did not issue him a speeding ticket, even though Yi testified defendant sped off at 45 miles per hour and Yi acknowledged that he had his traffic ticket book with him. Defendant asserts it is incredible that Yi did not indicate in his police report that defendant was driving at 45 miles per hour, and observes that Yi did not mention a specific speed when testifying at the hearing on the motion to quash arrest and suppress evidence. Defendant further argues it is inconceivable that after stopping the SUV, Yi and his partner would not request

defendant's license, registration, and insurance. Based on the fact he was not ticketed for failing to produce these documents, defendant maintains that Ebony Finley's testimony about seeing defendant hand papers to the police was credible and reliable, and Yi's testimony that he did not ask for defendant's license and proof of insurance at the scene was not. Defendant argues it is "instructive" that Yi did not call in his location when he stopped the SUV, did not radio that there was a gun involved, did not draw his own gun, and did not look up information about the SUV on the squad car's computer until after defendant was placed into custody. Defendant asserts that "some of the most incredible and objectively unreasonable aspects of the officer's testimony had to do with whether or not the Ford Explorer had tinted windows," as tinting would affect Yi's ability to observe the gun. Finally, defendant maintains it "strains credulity" that following a high-speed chase, after which he voluntarily stopped the SUV, he would have waited until Yi was within inches of his window, holding a flashlight, to move a handgun from his lap to an area underneath his seat.

¶ 40 Defendant's arguments involve matters of credibility that were for the jury to resolve in its role as trier of fact. *People v. Tenney*, 205 Ill. 2d 411, 428 (2002). As noted above, it is the trier of fact who assesses the credibility of witnesses, the weight to be given their testimony, and the inferences to be drawn from the evidence, and who resolves conflicts or inconsistencies in the evidence. *Id.*; *Brooks*, 187 Ill. 2d at 131.

¶ 41 Here, the jury heard Yi's testimony and was well aware of defendant's position that it was untruthful. Defense counsel's arguments in closing mirrored the concerns defendant is now raising on appeal. Nevertheless, based on defendant's conviction, it is apparent that the jury found Yi's testimony credible. This was its prerogative in its role as the trier of fact. *People v.*

Moody, 2016 IL App (1st) 130071, ¶ 52. We will not substitute our judgment for that of the jury on this question of credibility. *Brooks*, 187 Ill. 2d at 131.

¶ 42 In addition to challenging Yi's credibility, defendant also argues that the evidence was insufficient to convict because he did not own the SUV in which the gun was found, and because there was no physical evidence connecting him to the gun, such as fingerprints or DNA. We construe these arguments as concerning corroboration. However, the State was not obligated to corroborate Yi's testimony by presenting fingerprint or DNA evidence; such a requirement would run contrary to settled law that the credible testimony of a single eyewitness is sufficient to establish guilt beyond a reasonable doubt. *Siguenza-Brito*, 235 Ill. 2d at 228; see also *People v. Daheya*, 2013 IL App (1st) 122333, ¶¶ 75-76 (the State was not required to present physical evidence, such as a gun, gunshot residue, or fingerprints, that linked the defendant to a shooting in order to prove him guilty beyond a reasonable doubt of aggravated discharge of a firearm); *People v. Bennett*, 154 Ill. App. 3d 469, 475 (1987) ("[T]he lack of fingerprint evidence does not necessarily raise a reasonable doubt as to guilt," rather, "it is unnecessary and cumulative where there is eyewitness testimony."); *People v. Allen*, 377 Ill. App. 3d 938, 944 (2007) (the absence of DNA evidence on a handgun would not exonerate the defendant). Moreover, where Yi testified he saw defendant holding and then hiding the gun, ownership of the SUV is irrelevant.

¶ 43 We find that the evidence supporting defendant's conviction could reasonably be accepted by the jury, which saw and heard Yi testify. In our view, this is not a case in which the witness's description of the crime was incredible on its face. See *Cunningham*, 212 Ill. 2d at 284. Having heard the evidence, the jury was convinced of defendant's guilt beyond a reasonable doubt. After reviewing the evidence in the light most favorable to the prosecution, which we

must, we conclude that the evidence was not "so unsatisfactory, improbable or implausible" to raise a reasonable doubt as to defendant's guilt. *Slim*, 127 Ill. 2d at 307. Accordingly, defendant's challenge to the sufficiency of the evidence fails.

¶ 44 Defendant's third contention on appeal is that he was denied a fair trial where the trial court sustained the State's objection to closing arguments by defense counsel "regarding the respective concepts of 'actual' and 'constructive' possession." He asserts that by sustaining the objection, the court deprived him the opportunity to argue the core theory of his defense to the jury. Specifically, defendant argues he was precluded from arguing in closing that Yi's claim of seeing the gun in his hand was false and "conveniently aimed at establishing 'actual' possession by the defendant because the vehicle was not the defendant's and the notion of 'constructive' possession would require both knowledge on the part of the defendant (in the absence of the false testimony by the officer) that the gun was underneath the driver's seat of a vehicle that was not his and the exercise of immediate and exclusive control over the area where the gun was found." Defendant maintains that defense counsel's closing arguments were proper, based on reasonable inferences from the evidence, and consistent with the law, and therefore, should have been allowed.

¶ 45 Defendant acknowledges that he has forfeited this issue for review because he did not raise it in his posttrial motion. Nevertheless, he argues that this court may reach the issue as first-prong plain error. The plain error doctrine bypasses forfeiture principles and allows a reviewing court to consider unpreserved error when: (1) the evidence is close, regardless of the seriousness of the error; or (2) the error is serious, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). A defendant alleging first prong plain error must show

that he was prejudiced; that is, that the evidence is so closely balanced that the alleged error alone would tip the scales of justice against him, or that the guilty finding may have resulted from the error and not the evidence properly adduced at trial. *People v. White*, 2011 IL 109689, ¶ 133. Before we consider application of the plain error doctrine, however, we must determine whether any error occurred, because "without error, there can be no plain error." *People v. Smith*, 372 Ill. App. 3d 179, 181 (2007).

¶ 46 Here, the closing arguments by defense counsel, objections by the State, and rulings by the trial court about which defendant is complaining are as follows:

> "[DEFENSE COUNSEL]: And when they have to prove that he possessed a gun there are two ways you can prove possession. I tried to get into it with the officer. Don't think that the officer doesn't know these things. He has been around for more than a decade.
>
> There is actual possession and constructive possession. Actual possession is you're holding something. So I take this key out. This key -- I actually possess this key. If this key were in my briefcase, my briefcase I may be proven to constructively possess it because I control my briefcase. So there are two ways.
>
> And of course, it's easier to prove someone guilty if you can say I saw the item in his hand, especially where it's not his Ford Explorer.
>
> [ASSISTANT STATE'S ATTORNEY]: Objection.
>
> THE COURT: Sustained. The jury will disregard that.
>
> [DEFENSE COUNSEL]: Judge, that was the testimony.
>
> THE COURT: Is there any evidence of that?

[DEFENSE COUNSEL]: The evidence said that.

[ASSISTANT STATE'S ATTORNEY]: Objection, Judge.

THE COURT: I will sustain the objection. The jury will not consider that.

[DEFENSE COUNSEL]: Well, there is no evidence that it is his Ford Explorer, folks.

[ASSISTANT STATE'S ATTORNEY]: Objection.

THE COURT: Well, there is no evidence. So overruled.

[ASSISTANT STATE'S ATTORNEY]: Judge, rebuttal.

THE COURT: All right. Overruled. Let's go."

¶ 47 In general, counsel is afforded wide latitude in closing argument. *People v. Crawford*, 343 Ill. App. 3d 1050, 1058 (2003). Arguments and statements that are based upon the facts in evidence, or upon reasonable inferences drawn therefrom, are within the scope of proper closing argument. *Id.* at 1058-59. In a criminal case, the trial court must allow defense counsel an opportunity to argue the defendant's cause. *Id.* at 1059. A defendant's attorney may comment on the evidence and draw any reasonable inferences that the evidence will support. *People v. Maldonado*, 402 Ill. App. 3d 411, 428 (2010). However, counsel does not have the right to go beyond the evidence presented and the inferences therefrom or to misstate the law. *People v. Wooley*, 178 Ill. 2d 175, 209 (1997). Regulation of the substance and style of closing argument lies within the trial court's discretion, and the court's determination of the propriety of the remarks will not be disturbed absent a clear abuse of discretion. *People v. Caffey*, 205 Ill. 2d 52, 128 (2001).

¶ 48 Here, no facts in evidence supported defense counsel's statement that "it's easier to prove someone guilty if you can say I saw the item in his hand," and defendant has identified no law to support counsel's inference that actual possession is easier to prove than constructive possession. As such, the trial court properly sustained the State's objection. Having found no clear abuse of discretion, and thus no error, the plain error doctrine does not apply and defendant's contention remains procedurally defaulted.

¶ 49 Moreover, even if we were to find error, we would not find that such error deprived defendant the opportunity to argue the core theory of his defense to the jury, *i.e.*, that Yi lied in his testimony so as to establish that defendant had actual possession of the gun. Rather, the record reveals that defense counsel was able to put forth this theory of Yi's untruthfulness during both opening statements and closing arguments. In opening, counsel made the following remarks:

> "[Yi] is just going to get here and say I am a Chicago police officer and you should believe me because this is what I say, and fortunately that's not what the law necessarily says. You're going to get a chance to see him. You're going to get a chance to hear him, and you're going to get a chance to decide if this is believable or not, and at the end you're going to find [defendant] not guilty."

Then, during closing arguments, counsel again addressed Yi's truthfulness, even arguing that Yi made up a story so as to place the gun in defendant's hands:

> "He comes into court now and tells you guy -- tells you guys things that he never said before. He comes in here and he makes up all of these additional facts."

***

So the officer wants you to believe that he walked up to a car in today's day and age -- this was a couple years ago but still -- in Chicago and sees a guy holding this gun, this gun on his lap, not even on his lap, in the air holding this gun, and you're going to get the gun, holding this gun. It's him and his partner. And what does he do? He waits, watches, doesn't yell, doesn't say gun, doesn't call for backup, doesn't yell out to his partner, doesn't do anything and waits for [defendant] to supposedly put it under the seat.

Why does he tell you that story? He tells you that story because he wants to put the gun in [defendant's] hand because he has got no evidence that [defendant] controlled that vehicle, that it was his vehicle. So he can't prove it any other way other than to claim that he saw it in [defendant's] hand, and that's why they don't send it for fingerprints, folks. That's why they don't test it for DNA.

***

You got to see the officer testify. You got to judge his credibility. You're going to get to look at the pictures. You're going to get to look at the weapon. You're going to get to decide does that story just makes sense to me, and at the end you're going to come to the only verdict that's appropriate, which is a not guilty."

In light of these opening and closing arguments, defendant's contention that he was deprived the opportunity to argue the core theory of his defense to the jury, even if not waived, would fail.

¶ 50 Defendant's fourth contention on appeal is that where he did not testify at trial and did not request that the jury be given IPI 3.13X, the trial court abused its discretion in giving the instruction as follows:

> "Ordinarily, evidence of a defendant's prior conviction of an offense may not be considered by you as evidence of his guilt of the offense with which he is charged.
>
> However, in this case, because the State must prove beyond a reasonable doubt the proposition that the defendant has previously been convicted of two qualifying felony offenses, you may consider evidence of defendant's prior convictions of qualifying felony offenses only for the purpose of determining whether the State has proved that proposition."

A committee note accompanying IPI 3.13X provides that "[i]f the defendant does not testify at his trial, this instruction should be given *only* at the defendant's request; otherwise, this instruction should *not* be given." (Emphasis in original.) IPI 3.13X Committee Note (approved October 17, 2014). Defendant argues that pursuant to the Committee Note, this instruction should not have been given absent his express request. He asserts that giving the instruction was an error that had a profound effect on the jury and the outcome of the case, as evidenced by the jury's note asking, "Can you please provide more clarification on the charge armed habitual criminal? Is it due to the past two felonies? We understand first and second as described."

¶ 51 Defendant acknowledges that he did not object to the giving of IPI 3.13X or raise the issue in his posttrial motion, but urges this court to reach the issue via both prongs of the plain error doctrine. Under Illinois Supreme Court Rule 451(c) (eff. April 8, 2013), "substantial

defects" in jury instructions in criminal cases "are not waived by failure to make timely objections thereto if the interests of justice require." This exception applies when there is a grave error or when the case is so factually close that fundamental fairness requires the jury be properly instructed (*People v. Hopp*, 209 Ill. 2d 1, 7 (2004)), and analysis of the exception is identical to the plain error doctrine (*People v. Durr*, 215 Ill. 2d 283, 296 (2005)). See *People v. Lewis*, 2014 IL App (1st) 122126, ¶ 47. An error in giving an instruction rises to the level of plain error only when it creates a serious risk that the defendant was incorrectly convicted because the jury did not understand the applicable law. *Id.* ¶ 48. In order for there to be plain error, the instruction must have clearly misled the jury and resulted in prejudice to the defendant. *People v. Anderson*, 2012 IL App (1st) 103288, ¶ 45.

¶ 52 The purpose of jury instructions is to convey to the jury the correct principles of law applicable to the evidence submitted so that the jury can arrive at a correct conclusion according to the law and the evidence. *Id.* Here, the instruction, as given, clearly and accurately conveyed the applicable law to the jury. See *id.* In addition, we note that IPI 3.13X, as given, was a limiting instruction. That is, it advised the jurors that they could not consider defendant's prior convictions as evidence of anything other than the fact that he had prior convictions. As such, the giving of the instruction worked in defendant's favor, not to his detriment. In these circumstances, we cannot find either that the instruction misled the jury or that the instruction resulted in prejudice to defendant. See *id.* Accordingly, there is no plain error. Defendant's contention remains procedurally defaulted.

¶ 53 We are mindful of defendant's argument that by giving the jury IPI 3.13X, the trial court caused juror confusion, as evidenced by the jury's note asking for clarification on the charge of

armed habitual criminal and referencing "the past two felonies." We disagree with defendant's interpretation of the jury's note. In our view, the note shows, if anything, that the jury simply was not clear on the definition of the offense of armed habitual criminal. The note does not demonstrate that the jurors were misled or confused by the concept that they could consider evidence of defendant's prior convictions only for the purpose of determining whether the State proved he had been previously been convicted of two qualifying felony offenses. The note also does not indicate the jury was misled into arriving at an incorrect conclusion. We decline defendant's request that we overturn the jury's guilty verdict when the jury was unquestionably provided with the correct law in the jury instructions.

¶ 54 CONCLUSION

¶ 55 For the reasons explained above, we affirm the judgment of the circuit court.

¶ 56 Affirmed.