

prove the object used in the offense met the applicable statutory definition of a firearm.

Defendant also argues his trial counsel was ineffective for arguing a theory in opening statement that was unsupported by the evidence at trial. We affirm.

¶ 3 At trial, Anthony Nettles testified that on the afternoon of June 29, 2009, he and Malon Dorsey were walking near 157th Street and Hoyne in Harvey to meet Kiara Johnson and another female friend at a store and walk with them back to Nettles' house. During their walk, defendant and another person approached Nettles, who was 18 years old, and defendant asked if they wanted to buy "some weed." After Nettles declined that offer, defendant asked if Nettles wanted to buy a pistol or if defendant could give Nettles a pistol, and Nettles again declined. Nettles was asked if he knew defendant or had "share[d] a girlfriend" with defendant, and Nettles responded he did not know defendant; however, Nettles later testified he had seen defendant's companion previously.

¶ 4 Nettles and Dorsey continued walking and met their friends at the store. Nettles testified that in returning home, they took a different route to "avoid running into the guys again" because "there was going to be a problem." Nettles and his group saw defendant and his companion approach from across a field. Defendant started arguing with them, saying Dorsey was acting as if he were afraid and asking again if they wanted the pistol. Dorsey told defendant they did not need it. According to Nettles, defendant was acting aggressively and said he wanted to fight, and Nettles told defendant they did not want to fight. Defendant and his friend walked away, but Nettles saw the two men a short time later as his group continued walking.

¶ 5 Nettles testified he saw defendant hand a pistol to his companion. Nettles viewed that exchange from a distance of "two or three houses down," and he said the weapon was black and defendant handed it off "backwards." Nettles said the weapon was a handgun as opposed to a rifle. Defendant walked up to Nettles and asked if he was going to fight. Dorsey stepped between Nettles and defendant, but defendant knocked Nettles to the ground.

¶ 6 Nettles testified he heard defendant tell his companion to shoot him. Defendant straddled Nettles as he lay on the ground and defendant's companion removed Nettles' phone and wallet from his pocket. Nettles said his wallet contained \$20 and his driver's license and state identification card. After defendant and his friend ran away, Nettles and Dorsey continued home, where Nettles called his uncle, a police officer. Nettles, Dorsey and Johnson later identified defendant to police. On cross-examination, Nettles said defendant did not display the weapon that he offered to sell or give them.

¶ 7 Dorsey testified that he saw defendant pass the gun to his friend. Dorsey said it looked like a pistol, and defendant's friend put it in his waistband. When defendant had Nettles pinned to the ground, defendant told his friend to shoot, and the friend responded he would and reached for his waist. On cross-examination, Dorsey said neither defendant nor his friend displayed a gun when they asked Dorsey and Nettles if they were interested in buying one. Dorsey said when he saw defendant and his companion pass the gun between them, he could see the weapon's barrel.

¶ 8 Johnson testified that when defendant approached their group, he was acting aggressively. When the men started fighting, defendant threatened that if anyone moved, they would get shot. She said she did not see anyone display a gun.

¶ 9 After the State rested its case-in-chief, defense counsel stated she would call defendant to testify. After hearing and denying the defense's motion for a directed finding, the court took a short recess, after which defendant stated he would not testify. The defense presented no witnesses.

¶ 10 During deliberations, the jury sent two questions simultaneously to the court, asking if defendant could "be convicted of armed robbery even if we are not sure he had a gun" and "does armed robbery require the showing of a firearm or is the threat of the presence of the firearm the same thing." After consulting with counsel for both sides, the court responded to the jury that it

had been instructed on the applicable law. The jury found defendant guilty of the armed robbery of Nettles. In addition, the jury found that defendant was armed with a firearm during the commission of that offense, thus requiring a 15-year statutory enhancement to defendant's sentence pursuant to section 18-2(b) of the Criminal Code of 1961 (the Code) (720 ILCS 5/18-2(b) (West 2008)).

¶ 11 On appeal, defendant contends his conviction should be reduced to simple robbery because the State failed to establish he used or was armed with a firearm during the offense and therefore did not provide sufficient evidence to support the 15-year statutory sentencing enhancement.

¶ 12 A person commits armed robbery when he commits the act of robbery while carrying or being armed with a firearm. 720 ILCS 5/18-2(b) (West 2008). Section 2-7.5 of the Code (720 ILCS 5/2-7.5 (West 2008)) provides that the term "firearm" has the meaning ascribed to it in section 1.1 of the Firearm Owners Identification Card Act (430 ILCS 65/1.1 (West 2008)), which describes a "firearm" as any device "designed to expel a projectile or projectiles by the action of an explosion" but excludes paint ball guns, BB guns, devices used for signaling or safety and other enumerated items.

¶ 13 Defendant argues that Nettles and Dorsey only saw the object briefly from a distance of several houses away and that the item could have been a replica or toy gun. He points out that no firearm was recovered and entered into evidence by the State, and no expert testimony (such as that of a police officer) was offered to establish the item in question was a firearm.

¶ 14 When considering a challenge to the sufficiency of the evidence, it is not the function of the reviewing court to retry the defendant. *People v. Evans*, 209 Ill. 2d 194, 209 (2004). Instead, 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, 319 (1979). Under this standard, the trier

of fact, which in this case was the jury, is responsible for assessing the credibility of the witnesses, the weight to be given their testimony, and the reasonable inferences to be drawn from the evidence. *People v. Ross*, 229 Ill. 2d 255, 272 (2008).

¶ 15 In arguing that the testimony of Nettles and Dorsey was insufficient to establish the presence of a weapon, defendant cites *Ross*, 229 Ill. 2d at 274, in which the police investigating an armed robbery retrieved the victim's wallet and a pellet gun, which was described as such on a police inventory sheet and was also apparently not loaded. The facts here more closely resemble those in *People v. Washington*, 2012 IL 107993, and also of *People v. Malone*, 2012 IL App (1st) 110517, which we have allowed the State to cite as additional authority.

¶ 16 In *Washington*, the victim of an armed robbery, aggravated kidnapping and aggravated vehicular hijacking testified that the defendant held a gun to his head. *Washington*, 2012 IL 107993, ¶ 10. The supreme court reversed the appellate court's holding that such testimony was insufficient to uphold the convictions, noting that, in contrast to *Ross*, "there was no evidence in the case before it that the weapon displayed by defendant was anything other than a 'real gun.'" *Id.* at ¶¶ 35-36. Similarly, in *Malone*, the victim, a Walgreen's employee, testified the defendant held a gun in his right hand and rested it on the counter as he reached into the cash register and took money. The victim stated: "I seen a whole gun. It was rested on the [counter], his hand was on it, it was black." She further testified:

"Q. Had you ever seen the gun before?

A. That was the first one.

Q. But to you it looked like a gun?

A. Uh-huh.

Q. Is that a yes?

A. Yes."

Malone, 2012 IL App (1st) 110517, ¶ 51. This court concluded in *Malone* that because no

contrary evidence was presented that the gun was a toy or fake weapon, the victim's testimony and the circumstances in which she viewed the gun, along with a videotape and photograph of the offense, supported a finding that the defendant was armed with a gun. *Id.* In response to that authority, defendant argues the opportunity of the victim in *Malone* to view the gun was much greater than the ability of Nettles and Dorsey.

¶ 17 Viewing the evidence in the light most favorable to the prosecution, we conclude any rational trier of fact could have found beyond a reasonable doubt that defendant the item was a gun. Upon their first meeting, defendant told Nettles and Dorsey that he and his friend were in possession of a weapon and asked if Nettles and Dorsey were interested in buying it. Both Nettles and Dorsey testified that, from a distance of several houses away, they saw defendant pass a weapon to his companion. Nettles identified the weapon as a handgun, and Dorsey described it as a pistol. Dorsey testified that he observed defendant's friend secure the gun in his waistband, to which the friend motioned when prompted by defendant to shoot Nettles as he was pinned to the ground. Defendant fails to offer support for his suggestions that, to establish the existence of a firearm for purposes of section 18-2(b), a weapon must be introduced into evidence, a law enforcement officer must testify to the presence of a firearm, or Nettles or Dorsey were required to hold the weapon or observe its discharge.

¶ 18 Defendant's remaining contention is that his trial counsel was ineffective because even though counsel mentioned in opening statement that the incident between defendant and the victims stemmed from a fight over a girl and was not motivated by robbery, counsel presented no evidence to support that theory.

¶ 19 The record establishes that defense counsel began her opening statement by telling the jury that the encounter was not an armed robbery but instead arose when Nettles and his friends approached defendant and insulted defendant's girlfriend, whom Nettles used to date. Defendant argues that his counsel's failure to offer witnesses to support that theory rendered the result of his

trial unreliable, noting the State remarked on the omission in its rebuttal closing argument.

¶ 20 To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient in that it fell below an objective standard of reasonableness and also that the deficient performance prejudiced him in that the result of his trial would have been different absent the error. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Counsel's error must create a reasonable probability that the trial result would have been different, which is a probability sufficient to undermine confidence in the trial's outcome. *People v. Enis*, 194 Ill. App. 3d 361, 376 (2000).

¶ 21 The effective assistance of counsel refers to representation that is competent, not perfect (*People v. Palmer*, 162 Ill. 2d 465, 476 (1994)), and a defendant has the burden of overcoming the presumption that the attorney's decision was based on sound trial tactics. *People v. Gacy*, 125 Ill. 2d 117, 126 (1988). "[T]he test is not whether defense counsel fulfilled all the promises he made during his opening remarks but, rather, whether defense counsel's errors were so serious that, absent those errors, the result of the proceeding would likely have been different." *People v. Schlager*, 247 Ill. App. 3d 921, 932 (1993).

¶ 22 Counsel's failure to provide promised evidence or testimony is not ineffective assistance *per se*; such a circumstance can be warranted by unforeseen events, and counsel's decision to abandon a trial strategy during trial may be reasonable under the circumstances. *People v. Everhart*, 405 Ill. App. 3d 687, 696 (2010); *People v. Ligon*, 365 Ill. App. 3d 109, 119-20 (2006). In the case at bar, it is clear from the record that defense counsel presented an opening statement with the intention of presenting testimony about a fight. Counsel did not promise that defendant or any particular witness would testify but asserted that when all the evidence was heard, a theory of armed robbery would not "make sense." Counsel's opening remarks are not error if there is no indication counsel knew at the time she made the remarks that the promised witness would not testify. See *People v. Faber*, 2012 IL App (1st) 093273, ¶ 42. At the close of the State's case,

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counsel informed the court that defendant would take the stand, clearly indicating that counsel expected defendant to support her argument about a fight. When defendant decided not to testify, counsel rested the defense case without offering witnesses. We do not find counsel's performance fell below an objective standard of reasonableness or that counsel's remarks prejudiced defendant's case.

¶ 23 Accordingly, defendant's conviction and sentence is affirmed.

¶ 24 Affirmed.