



the result of defendant's trial, defendant received effective assistance of trial counsel.

¶ 2 After a jury trial, defendant Sean Dennis was convicted of unlawful use of a weapon by a felon and sentenced to eight years in prison. On appeal, defendant contends that: (1) the State failed to prove him guilty of unlawful use of a weapon by a felon beyond a reasonable doubt; (2) the prosecutor misstated the law in both opening statement and closing argument; (3) the State improperly objected and used its charging power to interfere with defense counsel's closing argument demonstration and the court erred by sustaining the State's objection; (4) the trial court erred by reading the name and nature of defendant's prior felony conviction to the jury; and (5) he received ineffective assistance of counsel when counsel failed to provide the testimony he promised in opening statement. We affirm.

¶ 3 The evidence at trial essentially showed that on January 21, 2010, defendant was pulled over while driving his mother's car and placed in custody by Officer John Murray. During a search incident to the arrest, Murray recovered a nine-millimeter handgun from the car. Defendant was charged by information with several counts of aggravated unlawful use of a weapon and one count of unlawful use of a weapon by a felon, however the State ultimately proceeded to trial on only the unlawful use of a weapon by a felon charge, and nolle prossed the remaining charges.

¶ 4 The information shows that the unlawful use of a weapon by a felon charge was based on defendant's prior felony conviction for aggravated vehicular hijacking. Prior to trial, defendant filed a motion *in limine*, requesting that the specific prior felony not be read to the jury because it would be inflammatory and prejudicial. Defense counsel offered to stipulate to defendant having

a prior qualifying felony instead. The court denied defendant's motion *in limine*.

¶ 5 Before jury selection began, the circuit court informed the prospective jurors that:

"[T]he defendant is charged with the offense of unlawful use of a weapon by a felon in that on or about January 21st of 2010, \*\*\* he knowingly carried on or about his person a firearm, to wit: A handgun, after having been convicted of the felony offense of aggravated vehicular hijacking under Case Number 02-C6-60115."

Shortly thereafter, the court advised the prospective jurors:

"The charges in this case are contained in what is called an Information.

You must remember that an information is not to be considered as any evidence against the defendant simply because of the word, "Information."

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The Information is merely the formal method of bringing a case [to] the court."

¶ 6 After the jury was selected, the circuit court read the full text of the information to the jury, including that the charge for unlawful use of a weapon by a felon was based on defendant's prior conviction for aggravated vehicular hijacking in case no. 02 C6 60115 . The court then reminded the jury again that the information was not to be considered as evidence against defendant. The court also told the jury that the opening statements were not evidence and that they "are merely statements by the lawyers as to what fact they expect the evidence to prove."

¶ 7 During opening statement, the prosecutor said defendant "can't be in a position to where he can even exercise control of that, much less touch it or use it, can't be in a position to exercise control --" Defendant's objection to the statement was overruled. The prosecutor went on to state there were "[n]o circumstances under which the defendant can exercise immediate control over a weapon of any kind. He forfeited that right when he became a felon."

¶ 8 During defendant's opening statement, defense counsel began by saying "the Defense feels you're going to hear the officers lie." Counsel told the jury again that the information could not be used as evidence. He then stated that the State would probably only call as witnesses "two officers out of the scores of officers that were there." Counsel argued that the gun was not in plain view and was found "hidden in an area not capable of being seen" after the car "was taken apart" and "disassembled." Counsel also said:

"[I]n stopping that vehicle, you're going to learn facts that this vehicle was cut off on all sides, in front, in back, alongside; and that Sean Dennis was yanked out of the vehicle at gunpoint and put up against the car where all of his belongings were thrown on the car."

¶ 9 The State called Officer John Murray, who testified that while on patrol at approximately 2:40 a.m. on January 21, 2010, he saw a silver Buick fail to signal while coming out of a Citgo gas station located at Vermont Street and Ashland Avenue in Blue Island, Illinois. Murray passed the Buick but was unable to see inside because the car had tinted windows. Murray made a u-turn, pulled up behind the Buick, and then conducted a traffic stop in the well-lit parking lot of a Shell gas station located at 127th Street and Marshfield Avenue in Calumet Park, Illinois.

Murray approached the driver's side of the vehicle and, once the window was rolled down, he was able to see defendant in the driver's seat. Murray did not see anyone else in the car.

Defendant was unable to produce a driver's license, so Murray returned to his squad car and ran a check with the Secretary of State. Murray learned that the vehicle was registered to Darlene Dennis and that defendant's driver's license was suspended. Murray placed defendant in custody for driving on a suspended license. After defendant exited his car, Murray conducted an inventory search of it. The driver's door was open and before entering the vehicle, Murray noticed the handle of a gun "resting on a carpeted mound by the acceleration pedal." Murray eventually recovered the gun, a Silver Sky .9 millimeter. The gun was loaded with one round in the chamber and six rounds in the magazine, and the serial number had been obliterated. The gun's barrel had been underneath an opening in the center console of the car, one foot away from where defendant had been sitting in the driver's seat.

¶ 10 On cross-examination, Murray denied having his weapon drawn as he approached the vehicle. Eventually, Murray learned that defendant's car was registered to Darlene Dennis. While he was standing next to defendant's car, Murray never saw defendant touch anything in the car, or engage in any furtive, suspicious, or secretive movements. Murray questioned defendant the following night, after reading defendant his *Miranda* rights.

¶ 11 The parties then stipulated that "defendant was previously convicted of a felony offense under Case Number 02 C6 60115. The felony offense as listed above will satisfy the felony offense requirement of unlawful possession of a weapon by a felon." The gun and the ammunition were also entered into evidence.

¶ 12 The State rested and the circuit court denied defendant's motion for a directed verdict.

¶ 13 For the defense, Brandy Brackens testified she had been friends with defendant and his family for many years, but had never been romantically involved with defendant. In January 2010, defendant lived with his mother, Darlene, in an apartment on 144th Street in Riverdale, Illinois. On January 20, 2010, Brackens was cleaning defendant's apartment with defendant's mother because Brackens was having her birthday party at the apartment later that night. When Brackens went under the bathroom sink to retrieve cleaning supplies, she saw a small, grey gun. At trial, Brackens said the gun that was recovered from defendant's car looked like the gun she saw under the sink. Brackens asked defendant's uncle what to do with the gun, because her children would soon be at the apartment. Brackens took the gun out of the house and put it in Darlene's car, on the floor "underneath where the radio is on the carpet," pushing the gun so that it was not visible. She then went back upstairs. Defendant was at Brackens's birthday party and, although she did not see him leave, she also did not see defendant after 11 p.m. The next day, Brackens learned that defendant had been arrested. On December 23, 2010, a State investigator visited Brackens, but Brackens told the investigator she did not want to talk about the case and that she was not with defendant when he was arrested. Brackens never contacted the police to tell them about the gun she had found.

¶ 14 On cross-examination, Brackens admitted she did not want anything bad to happen to defendant, but was testifying because she wanted the truth to be known. Brackens spoke with defendant "[m]aybe once" before trial about her testimony and spoke with defendant's attorney once the day before she testified. Defense counsel told Brackens to "Tell the truth."

¶ 15 Defendant testified that on January 20, 2010, he was at Brackens's birthday party until a friend who was stranded on the expressway called defendant for a ride. Defendant used his

mother's car, a silver Buick LaCrosse, registered in her name. The car had tinted windows and defendant acknowledged that "these are tints where you can really not see into the vehicle." Defendant stopped at a Citgo gas station on his way and signaled as he turned out of the station. Before defendant reached the expressway, he was pulled over by Officer Murray. Defendant waited in the car for Murray to approach. Defendant never saw a gun on the floor of the car and did not attempt to hide anything. Murray did not have his weapon drawn as he approached defendant's car. Murray said he had pulled defendant over because the tint on the car windows was too dark, then asked defendant for his insurance and license. Defendant told Murray his license was suspended but handed Murray his insurance card. While Murray went back to his car after asking for defendant's license and insurance, another police car pulled up and blocked defendant's path. Another car then pulled up on the right side of defendant's car. The officer that pulled in front of defendant asked defendant to exit his vehicle. Then an officer escorted defendant to stand near the back of his car while Murray searched defendant's vehicle. The search lasted about 15 or 20 minutes. Defendant said he saw the officers "reaching all, you know, they was reaching under the seats, under the steering column, all over the car, going through the trunk, and they came back, and they didn't have anything." Then Murray reached under the center console and came out with the gun.

¶ 16 Before closing arguments, the trial court informed the jury that closing arguments were not to be considered as evidence. The State argued in its closing that there was "no way that the defendant did not know the weapon was there." The prosecutor later told the jury:

"I am just going to address two particular instructions because really they are to the heart of the matter in this particular case. And

the first is the instruction for what we need to sustain, the State.

To sustain the charge of unlawful possession of a weapon by a felon. We must prove the following propositions: First proposition: That the defendant knowingly possessed a firearm. There you go.

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But to insure that nobody is confused about what possession actually is in this particular case, I am going to read you that instruction.

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 the thing but he has both the power and the intention to exercise control over the thing.

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Similarly, in this case, when that weapon is at the foot of the defendant in his car, he is in possession of that weapon."

In rebuttal, the State again argued there was "no way the defendant didn't know this gun was in that location."

¶ 17 According to defendant's brief, at the beginning of his closing argument, defense counsel had defendant sit in a chair in front of the jury and placed the gun at defendant's feet. The record then shows that the State objected and requested a sidebar. The following exchange was then

had outside the presence of the jury:

"THE COURT: What's your objection?

STATE: Judge, pardon the interruption, but I either want this particular activity totally prohibited or want the defendant advised of his rights because he's now technically in violation of unlawful use of a weapon by a felon if Counsel persists in this.

DEFENSE COUNSEL: He's not in possession, Judge. I am using it as closing argument.

THE COURT: Constructive possession, and also if you're close by and you can possibly reach it.

DEFENSE COUNSEL: It's a secured weapon that is not loaded.

THE COURT: I am telling you, they can charge him with unlawful possession of a weapon, so –

STATE: I just don't want to go down that road, your Honor.

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THE COURT: Why don't you have him sit in the back.

You can make the argument. You can leave the chair there. Okay.

You can put the gun where it was, but sit in the regular seat."

¶ 18 Outside the presence of the jury, the State said it wanted "this particular activity totally prohibited or want the defendant advised of his rights because he's now technically in violation of unlawful use of a weapon by a felon if Counsel persists in this." Defense counsel responded that

the gun was secured and unloaded. The court concluded that defendant had to remain in his regular seat at the back, but allowed the other chair to remain in front of the jury and said the gun could be placed where it had been near the chair.

¶ 19 After closing arguments, the court instructed the jury as to the law, and informed them that opening statements and closing arguments are not evidence and that "any statements or argument made by the attorneys which is not based on the evidence should be disregarded." The jury found defendant guilty of unlawful use of a weapon by a felon. Defendant filed a motion for new trial, arguing that the evidence was insufficient to convict him and that the trial court improperly informed the jury of the nature of defendant's prior conviction. The circuit court denied defendant's motion and sentenced him to eight years in prison.

¶ 20 On appeal, defendant first contends that the State's evidence was insufficient to prove him guilty beyond a reasonable doubt of unlawful use of a weapon by a felon. Specifically, defendant argues that the State failed to show that defendant knew about the gun found in his mother's car and therefore failed to show defendant possessed the gun.

¶ 21 The standard of review on a challenge to the sufficiency of the evidence 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. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224 (2009). When considering a challenge to the sufficiency of the evidence, it is not the function of the reviewing court to retry the defendant; it is for the trier of fact to determine the credibility of witnesses, weigh the evidence, draw reasonable inferences, and resolve any conflicts in the evidence. *Siguenza-Brito*, 235 Ill. 2d at 228. A reviewing court will not reverse a conviction unless the evidence is so unreasonable, improbable, or

unsatisfactory as to justify a reasonable doubt of the defendant's guilt. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009).

¶ 22 To sustain a conviction for unlawful use of a weapon by a felon, the State must prove that the defendant knowingly possessed a firearm on or about his person after having been convicted of a felony. 720 ILCS 5/24-1.1(a) (West 2010). "Knowing possession" may be actual or constructive. *People v. Hannah*, 2013 IL App (1st) 111660, ¶ 28. Where, as here, the defendant is not found to be in actual possession of the firearm, the State must prove he constructively possessed the weapon. *Id.* (citing *People v. McCarter*, 339 Ill. App. 3d 876, 879 (2003)). To establish constructive possession, the State must show that the defendant had knowledge of the weapon's presence and that the defendant "exercised immediate and exclusive control over the area where the weapon was found." *Hannah*, 2013 IL App (1st) 111660, ¶ 28.

¶ 23 "Knowledge of the existence of a firearm within the defendant's possession may be proved through circumstantial evidence." *People v. Bailey*, 333 Ill. App. 3d 888, 891 (2002). The mere presence of the defendant in the car, without more, is not evidence sufficient to prove he has knowledge of a weapon in the car. *Id.* A court may infer knowledge from other factors, including: (1) the visibility of the weapon from the defendant's position in the car; (2) the period of time in which the defendant had the opportunity to observe the weapon; (3) any gestures by the defendant indicating an effort to retrieve or hide the weapon; and (4) the weapon's size. *Id.* at 891-92. In addition, the court should consider any other relevant circumstantial evidence, such as whether the defendant had an ownership interest in either the weapon or in the car where the weapon was found. *Id.* at 892.

¶ 24 Here, we find the evidence presented at trial was sufficient to find defendant had

knowledge of the gun that was found in the car. Officer Murray testified that he saw defendant seated in the driver's seat of the Buick as Murray approached the vehicle. Defendant was the only person in the car. Once defendant exited the car, Murray saw the gun's handle from outside of the car laying on a carpeted mound next to the gas pedal. Murray recovered the gun from underneath the center console and testified the gun was about one foot from where defendant had been sitting. Murray never saw defendant making any gestures indicating an attempt to hide the gun, however Murray was unable to see into the car while he was running a check with the Secretary of State due to the car's tinted windows. There is no evidence that defendant had any ownership interest in the gun and the car was not registered to defendant's. However, it is unnecessary to prove a defendant's ownership of the place where the contraband is found in order to establish constructive possession. *People v. O'Neal*, 35 Ill. App. 3d 89, 91 (1975); see also *People v. Ingram*, 389 Ill. App. 3d 897, 898, 901 (2009) (the jury's finding of guilty was affirmed even though the car was registered to a woman who was not in the vehicle at the time of the traffic stop). Moreover, although Brackens's testimony that she placed the gun under the center console so that it was not visible was not contradicted, Murray's testimony that the handle of the gun was visible once defendant exited the car was similarly uncontradicted. A trier of fact is not "required to accept any possible explanation compatible with the defendant's innocence and elevate it to the status of reasonable doubt." *Siguenza-Brito*, 235 Ill. 2d at 229. Viewed in a light most favorable to the State, the evidence showed defendant was sitting one foot away from a gun while he drove from his apartment to the Citgo, from the Citgo to the Shell, while he was pulled over, and up until an officer asked him to exit the car. At that time, the gun's handle was exposed. From this evidence, a rational trier of fact could reasonably infer that defendant could

have seen the handle of the gun during his time in the car and that the gun was within his reach, giving defendant exclusive and immediate control over where the gun was found. Under these circumstances, we cannot find that the evidence was so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt.

¶ 25 Defendant next contends that he was denied a fair trial due to improper comments made by the State during opening statement and closing argument. Specifically, defendant argues that the State "repeatedly defined possession as requiring neither knowledge nor intent."

¶ 26 Initially, the parties disagree on the proper standard of review. Defendant argues that the proper standard of review is *de novo*. The State acknowledges an apparent conflict between two Illinois Supreme Court cases as to the proper standard of review, citing *People v. Wheeler*, 226 Ill. 2d 92 (2007), and *People v. Blue*, 189 Ill. 2d 99 (2000). The First District recognized this conflict in *People v. Hayes*, 409 Ill. App. 3d 612 (2011), explaining that the court in *Wheeler* used a *de novo* standard while in *Blue* and other cases, the court used an abuse of discretion standard. *Hayes*, 409 Ill. App. 3d at 624. However, based on the supreme court's more recent pronouncement in *Wheeler*, we will review this issue *de novo*.

¶ 27 In addition, defendant concedes that the issue was not fully preserved for review because he did not object to all of the contested statements and did not include the issue in a posttrial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (a defendant forfeits review of an issue if he fails to object at trial and raise the issue in a posttrial motion). Defendant nonetheless argues that the issue may properly be reviewed as plain error. The plain error doctrine allows a reviewing court to consider a forfeited error where the evidence was so closely balanced that the error threatened to tip the scales of justice against the defendant or where the error was so serious

that the defendant was deprived of a substantial right and therefore a fair trial. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). Defendant argues that the evidence in this case was closely balanced, while the State claims the evidence of defendant's guilt was overwhelming.

¶ 28 We conclude the evidence presented at defendant's trial was closely balanced. Officer Murray testified for the State that defendant was driving a Buick registered to defendant's mother Darlene, that Murray pulled over defendant, and that after defendant exited the vehicle, Murray saw the handle of a gun sticking out from under the car's center console. Murray did not see defendant make any suspicious or furtive movements nor did Murray ever see defendant actually possessing the gun.

¶ 29 In contrast, defendant denied having any knowledge of the gun and testified he never saw the gun in the car. Defendant explained that while he was at Brackens's birthday party, he received a call from a friend who was stranded on the expressway. He left the party and took his mother's car because his own car would not start. He never saw the gun and was not aware the gun was in the car. Brackens testified that earlier the same day, while cleaning defendant's apartment, she found a gun which she then put in defendant's mother's car. The gun she found looked like the gun that Murray eventually recovered from the car. Brackens said she placed the gun underneath where the car radio was so it was not visible. Brackens did not tell defendant putting the gun in the car. There is no evidence to suggest that the testimony from defendant or Brackens was especially unbelievable and no extrinsic evidence was presented to contradict defendant's testimony that he did not know the gun was in the car or Brackens's testimony that she put the gun in the car. Taking all of the trial evidence into consideration, we find the evidence was closely balanced and therefore will consider whether the trial court committed

plain error.

¶ 30 Having concluded the evidence was closely balanced, we must now determine whether any error occurred, because if there is no error, there can be no plain error. *People v. Blair*, 379 Ill. App. 3d 51, 60 (2008). The State has wide latitude to comment on and draw reasonable inferences from the evidence in both opening statement and closing arguments. *People v. Lane*, 256 Ill. App. 3d 38, 56 (1993). In addition to commenting on the evidence, a prosecutor may make any reasonable and fair inferences based on the evidence. *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). Comments made during rebuttal argument are not improper if they were invited by the defense and comments made during closing arguments must be viewed in the context of the entire arguments of both parties. *People v. Giraud*, 2011 IL App (1st) 091261, ¶ 43. A reviewing court will not reverse a jury's verdict based on improper closing arguments unless the comments were of such magnitude that they resulted in substantial prejudice to the defendant and constituted a material factor in his conviction. *People v. Gonzalez*, 388 Ill. App. 3d 566, 587 (2008).

¶ 31 Here, defendant claims the State misstated the definition of "knowledge" by "suggesting that Dennis's mere proximity to the gun was sufficient to establish possession." However, when viewing the State's comments in their full context, it becomes apparent that the State did not misstate the law. During closing argument, the State informed the jury that in order to sustain a conviction for unlawful use of a weapon by a felon, it had to prove that defendant "knowingly possessed a firearm." The State went on to explain that possession could be actual or constructive and defined constructive possession as having "both the power and the intention to exercise control" over the weapon. The State's comments during closing argument about what it

needed to prove to sustain a conviction and the definition of possession closely mirror the language provided by the Illinois pattern jury instructions covering the same topics. See Illinois Pattern Jury Instructions (IPI), Criminal, Nos. 4.16 (4th ed.2000) ("A person has constructive possession when he \*\*\* has both the power and the intention to exercise control over a thing"); IPI, Criminal, 18.08 (4th ed.2000) ("To sustain the charge of Unlawful Possession of a Weapon by a Felon, the State must prove the following propositions: First Proposition: That the defendant knowingly possessed a firearm \*\*\*). Throughout closing and rebuttal, the State argued the evidence showed that defendant knew about the gun in the car. The record shows the State did not misstate the law. Following closing arguments, the trial court read IPI Criminal Nos. 4.16 and 18.08 to the jury, once again noting the State had to prove defendant "knowingly possessed a firearm" and defining constructive possession as having "both the power and the intention to exercise control over a thing." Accordingly, the State gave the correct definition of possession in closing argument and the jury received proper instruction on the law, so there is no plain error and the issue has been forfeited.

¶ 32 Next, defendant asserts that the prosecutor committed misconduct by using the State's charging power to interfere with the defense's closing argument demonstration and that the trial court erred by sustaining the State's objection to the demonstration.

¶ 33 First, we note that defendant has forfeited this issue by failing to raise it in a posttrial motion. See *Enoch*, 122 Ill. 2d at 186. However, defendant argues the issue may be reviewed under the plain error doctrine. See *Herron*, 215 Ill. 2d at 178-79. As we discussed above, the evidence presented at trial in the present case was closely balanced, so we must now determine whether an error occurred.

¶ 34 Defendant argues that when the State objected to defense counsel's demonstration based on defendant being "technically in violation of unlawful use of a weapon by a felon," the objection was actually a threat to bring criminal charges not justified by the evidence in order to interfere with defendant's ability to present his case. The State responds that it properly objected to the demonstration "that placed defendant, a convicted felon, charged with a weapons offense in the immediate proximity of a gun as well as the jury" and the objection prevented "a manifestly untenable situation from ensuing."

¶ 35 Although defendant claims the State's objection interfered with his ability to present his defense, the only case defendant provides in support of his argument, *People v. Mancilla*, 250 Ill. App. 3d 353 (1993), is distinguishable. In *Mancilla*, the court granted the defendant a new trial after finding the prosecutor prevented a potential alibi witness from testifying by improperly threatening her with perjury and obstruction of justice. *Mancilla*, 250 Ill. App. 3d at 359-60. The court noted that although the State might have been able to charge the witness, it was "highly unlikely" they would be brought or that they could be successfully prosecuted if they were brought because there was little evidence to support the charge. *Id.* at 360. Here, the State did not prevent a defense witness from testifying, the State objected to a demonstration during closing argument. Defendant provides no evidence or further case law to support his argument that the State's objection interfered with his ability to present his defense.. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) (the argument section of appellant's brief "shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and pages of the record relied on.") Moreover, we need not consider whether the argument made by the State in objecting to the demonstration was erroneous because the entire colloquy took place outside

the presence of the jury. Even if the State's objection was unreasonable, the real question is whether the trial court properly limited defense counsel's demonstration.

¶ 36 A trial court has a wide degree of discretion in determining whether a courtroom demonstration will be allowed and the trial court's decision will not be reversed absent an abuse of discretion. *People v. Hayes*, 353 Ill. App. 3d 355, 357 (2004). A trial court abuses its discretion when its decision is arbitrary, fanciful, or unreasonable. *People v. Morgan*, 197 Ill. 2d 404, 455 (2001). Specifically, in determining whether a trial court abused its discretion in allowing or limiting a demonstration, a reviewing court primarily considers whether the demonstration is " 'probative of facts in issue and whether it is conducted under substantially similar conditions and circumstances as those which surrounded the original occurrence.' " *People v. Harp*, 193 Ill. App. 3d 838, 843 (1990) (quoting *People v. Carbona*, 27 Ill. App. 3d 988, 1003-04 (1975)). A demonstration should be used to aid the jury in understanding testimony, not for dramatic effect. *Harp*, 193 Ill. App. 3d at 843.

¶ 37 Here, the trial court properly limited defense counsel's demonstration during closing argument. First, the demonstration would not have been conducted under substantially similar conditions and circumstances as the original occurrence, because defendant was originally sitting in a car at night, with a gun at least partially hidden underneath the center console at his feet. In contrast, the demonstration would have had defendant sit in a chair in front the jury with a gun at his feet in the courtroom. Additionally, although the trial court limited the demonstration by having defendant sit in his regular seat, the court allowed the demonstration chair to remain in front of the jury and the gun to be placed at the foot of the chair. Defendant maintains he was prejudiced by the court's limitation of the demonstration because the demonstration was a direct

response to the State's closing argument and because defense counsel's argument "that if a person knew they had a gun directly at their feet when they were stopped by police they would not leave it there directly addressed the key question of whether [defendant] was aware that the gun was in the car." However, defense counsel was still able to verbalize this argument for the jury in closing even without defendant sitting in the demonstration chair, and in fact did so. We cannot conclude under these facts that the trial court's limitation of defendant's unusual demonstration was arbitrary, fanciful, or unreasonable and therefore find no abuse of discretion and no error. To the extent defendant suggests that this issue can be reviewed under the second prong of the plain error doctrine, because we have found no error occurred we need not reach this point. See *Blair*, 379 Ill. App. 3d at 60. Defendant has failed to show plain error and has therefore forfeited this issue.

¶ 38 Defendant next contends that the trial court erred by allowing the jury to learn the name and nature of defendant's prior felony conviction despite defendant's offer to stipulate to having a qualifying prior conviction.

¶ 39 In *People v. Walker*, 211 Ill. 2d 317 (2004), our supreme court held:

"[W]here the prosecution's sole purpose for introducing evidence of a defendant's prior felony conviction is to prove his status as a convicted felon and the defendant offers to stipulate to this element, the probative value of the name and nature of the prior conviction is outweighed by the risk of unfair prejudice and, thus, should be excluded." *Walker*, 211 Ill. 2d at 341.

¶ 40 The record shows that in the present case the State never introduced the name or nature of

defendant's prior felony conviction into evidence, instead stipulating that defendant had a prior conviction that satisfied the prior felony conviction requirement for the unlawful use of a weapon by a felon charge. A certified copy of the prior conviction was never entered into evidence. The only time the jury heard the name of defendant's prior conviction was from the trial court before the trial began. The trial court read the text of the information to the jury, including the name of defendant's prior conviction, once during *voir dire* and once after the jury was selected.

However, both times after reading the information to the jury, the trial court instructed the jury that the information was not to be considered as evidence and they could not infer any presumption of defendant's guilt based on the information. Absent evidence to the contrary, we will presume the jury followed the court's instructions. See *People v. Taylor*, 166 Ill. 2d 414, 438 (1995) (a jury is presumed to follow the instructions given by the court).

¶ 41 Defendant nonetheless argues that "[t]he holding in *Walker* leaves no question that error occurred in this case." However, the facts in the present case are distinguishable from *Walker*. In *Walker*, the defendant made an oral motion *in limine* asking to stipulate to his prior felony conviction but the State rejected the offer to stipulate. *Id.* at 320. After presenting its evidence at the jury trial, the State placed into evidence a certified copy of the defendant's prior felony conviction for unlawful possession of a controlled substance with intent to deliver, over the defendant's renewed objection. *Id.* at 323. The appellate court found that the trial court abused its discretion by allowing the State to introduce the name and nature of the defendant's prior felony conviction into evidence when the defendant had offered to stipulate to the conviction. *Id.* at 327. In affirming the appellate court's decision, the supreme court found that, under the particular facts of the defendant's case, the error of allowing the State to introduce the name of

defendant's prior conviction was not harmless. *Id.* at 341. The supreme court observed that introducing the name and nature of defendant's prior felony charge made the State's theory of the case more plausible, questions from the jury during deliberation suggested the jury did not find the State witnesses entirely credible, and the State made repeated references to the name and nature of the prior conviction in closing argument. *Id.* at 342.

¶ 42 Here, unlike in *Walker*, the name of defendant's prior felony conviction was never entered into evidence by the State in any capacity and the State never mentioned the name of the offense in opening statement or closing argument, instead presenting the stipulation. Defendant claims that the name of his prior conviction was, in fact, entered into evidence because the trial court read the case number from defendant's prior conviction for aggravated vehicular hijacking while reading the charging instrument to the jury, and the State referenced the same case number in its stipulation to defendant having a prior felony conviction. This argument is, at best, tenuous and this was not the prejudice contemplated by the supreme court in *Walker*. See *Id.* at 341-42.

Under these circumstances, we find the trial court did not err by reading the name of defendant's prior felony conviction to the jury.

¶ 43 Finally, defendant argues that his trial counsel was ineffective for making promises in opening statement that the testimony would show that "scores" of officers were present and had their guns drawn when they "yanked" defendant from the car and that the police "disassembled" the car defendant had been driving.

¶ 44 To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient and he was prejudiced by the deficient performance.

*Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel's performance is considered

deficient if " 'counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.' " *People v. Cooper*, 2013 IL App (1st) 113030, ¶ 53 (quoting *Strickland*, 466 U.S. at 687). To show prejudice, a defendant must show that but for counsel's actions there is a reasonable probability that the trial outcome would have been different. *Cooper*, 2013 IL App (1st), ¶ 12. If the defendant fails to show both prongs of the *Strickland* test, his claim will fail. *People v. Manning*, 334 Ill. App. 3d 882, 892 (2002).

¶ 45 Counsel's failure to provide promised testimony is not ineffective assistance *per se*. *Id.* The defendant must show that counsel's actions were unreasonable and there was a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Id.* Moreover, the defendant must overcome a strong presumption that counsel's decisions were the result of sound trial strategy. *People v. Coleman*, 183 Ill. 2d 366, 397 (1998). The presumption can be overcome if defendant demonstrates counsel's decision "appears so irrational and unreasonable that no reasonably effective defense attorney, facing similar circumstances, would pursue such a strategy." *People v. King*, 316 Ill. App. 3d 901, 916 (2000). "Only if counsel's trial strategy is so unsound that he entirely fails to conduct meaningful adversarial testing of the State's case will ineffective assistance of counsel be found." *People v. Perry*, 224 Ill. 2d 312, 355 (2007).

¶ 46 Based on the record, we find defense counsel's comments during opening statement were a fair representation of the evidence presented at trial. Defense counsel's theory at trial was that defendant did not know about the gun, the police acted overzealously, and the police were not testifying truthfully. In opening statement, defense counsel said that the State would probably only call two officers out of the "scores of officers that were there." In fact, the State only called

one police officer out of at least three police officers that were present. The trial testimony also showed that there were three squad cars present by the end of the traffic stop. In opening statement, counsel said that the gun was not in plain view in defendant's car and was only found after the car was "taken apart" and "disassembled." At trial, Brackens testified that she put the gun under the car's center console so it was not visible and defendant testified he did not see the gun, both supporting defense counsel's opening statement. Defendant also testified that the police searched his car for 15 to 20 minutes, and that he saw the officers "reaching under the seats, under the steering column, all over the car, going through the trunk" and did not recover the gun until the end of the search. This testimony supports the contention that the police had to search extensively to find the gun, in further supporting the theory that the gun was hidden from plain view and that the search was just simply cursory. In opening statement defense counsel also stated that the vehicle was cut off "in front, in back, alongside" and the evidence at trial showed that the three squad cars present at the scene were parked in front of, behind, and alongside defendant's car. At worst, counsel's various descriptions were colorful exaggerations of what the evidence at trial showed. However, we believe these statements were supported by the evidence.

¶ 47 The only statement defense counsel made in opening statement that was not supported by the trial testimony was his contention that defendant was yanked out of his car by the police at gunpoint. Both Officer Murray and defendant testified at trial that Murray did not have his gun drawn when he approached defendant's car and that another officer asked defendant to get out of his car before it was searched. It is unclear from the record why in opening statement defense counsel suggested that defendant was taken from his car at gunpoint. However, the record shows

defense counsel aggressively challenged the State's case throughout trial. He zealously cross-examined Officer Murray, presented the testimony of Brackens and defendant, and in closing focused on arguing that Murray's testimony was not credible and the State did not sustain their burden. Although not perfect, defense counsel subjected the State's case to meaningful adversarial testing and we cannot say that counsel's performance was so deficient that he was not functioning as defense counsel. See *Perry*, 224 Ill. 2d at 355.

¶ 48 Even assuming defense counsel was deficient due to his comments during opening statement that the police yanked defendant from his car at gunpoint, defendant cannot show he suffered prejudice as a result. The central issue at defendant's trial was whether defendant knew the gun was in the car, not how he was approached or treated by the police during the traffic stop. In addition, the circuit court instructed the jury before trial and before deliberation that opening statements are not evidence. Finally, in closing, defense counsel argued that the State did not sustain its burden because it only called one officer to testify and argued that the officer's testimony lacked credibility, and did not reference whether the gun was drawn.

¶ 49 Although defendant argues that the prejudice in his case was exacerbated by the State "repeatedly referring" to defense counsel's unfulfilled promises, a review of the record shows a passing reference. The State asked whether the evidence showed that Officer Murray came out with his gun drawn or "anything like that, like Mr. Goldberg tried time and time and time again to say? No, he doesn't come out. \*\*\* And, in fact, the defendant told you himself, no, he didn't have his gun drawn." However, we conclude this reference to defense counsel's comment does not prejudice defendant. Accordingly, defendant is unable to show there was a reasonable probability that but for defense counsel's comments during opening statement, the result of his

trial would have been different.

¶ 50 The case defendant relies on to support his claim of ineffective assistance of counsel, *People v. Lewis*, 240 Ill. App. 3d 463 (1992), is distinguishable. In *Lewis*, the defendant was convicted of the murder of two people, Venus and Nimrod. *Lewis*, 240 Ill. App. 3d at 465-66. During opening statement, defense counsel told the jury that defendant gave an exonerating pretrial statement in which he denied stabbing Venus. *Id.* at 467-68. When defense counsel attempted to introduce the statement into evidence, the circuit court ruled the statement inadmissible hearsay. *Id.* at 468. Defense counsel referred to the statement again in closing argument, and the court sustained the State's objection. *Id.* The appellate court found that the defendant was prejudiced by defense counsel's deficient performance because "the promise to produce such significant exonerating evidence, and the failure to fulfill such a promise is highly prejudicial." *Id.*

¶ 51 Defense counsel in *Lewis* promised to introduce an exonerating pretrial statement from the defendant, a statement that went directly to the central question in the defendant's trial: whether the defendant was guilty of murder. Here, in contrast, the evidence that defense counsel promised to introduce was evidence of how defendant was approached and treated by the police, which had no direct bearing on the central question in defendant's trial: whether defendant knew about the gun. In addition, defense counsel in *Lewis* referred to the defendant's pretrial statement in closing argument, even though the statement had not been entered as evidence. Here, defense counsel did not argue about Murray having his gun drawn in closing argument. Defendant has failed to show he received ineffective assistance of counsel.

¶ 52 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 53 Affirmed.