

recorded interview wherein police questioned defendant on an unrelated charge; and (3) defense counsel provided ineffective assistance of counsel by failing to tender certain jury instructions.

We reverse.

¶ 4

I. BACKGROUND

¶ 5 In May 2013, the State filed a bill of indictment against defendant, charging him with the following offenses allegedly occurring on October 7, 2012: (1) unlawful possession of a firearm without a valid FOID card (430 ILCS 65/2(a)(1) (West 2010)) and (2) unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2010)).

¶ 6 In June 2013, defendant filed a motion *in limine*, seeking to exclude from evidence parts of his recorded interview with police, asserting those portions that referenced an unrelated shooting were more prejudicial than probative. Later that month, the trial court granted defendant's motion in large part. In July 2013, the State filed a motion to reconsider, asserting some of the recording the court excluded was more probative than prejudicial. The court agreed and granted the motion to reconsider as to that portion of the recording.

¶ 7 Immediately thereafter, defendant's case proceeded to jury trial. The facts presented at trial are undisputed for purposes of this appeal. Detective Steven Fanelli testified, on October 14, 2012, he questioned defendant regarding a shooting that occurred earlier that day. The interview was audio and video recorded, and the jury viewed a redacted portion of the video, consistent with the trial court's earlier orders regarding defendant's motion *in limine*. The jury also received a transcript of the interview. During the interview, numerous officers from the Bloomington police department questioned defendant, including Detective Fanelli, Detective William Lynn, and Detective Rick Barkes. Prior to questioning, Detective Fanelli read defendant his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). Detective Fanelli then

asked defendant for any information defendant had about the October 14, 2012, shooting.

Defendant denied any knowledge of or involvement in the shooting. To that end, he consented to a search of his cell phone.

¶ 8 During the search of defendant's phone, Detective Lynn discovered several pictures depicting defendant holding a gun. For clarity, we refer to the item depicted in defendant's possession as a "gun," as the parties do not dispute the object depicted in the various photographs is indeed a gun. We will use the term "firearm" in discussing whether the gun depicted in the photographs meets the legal definition of a firearm. According to Detective Lynn's forensic investigation, the photographs depicting defendant with a gun were taken on October 7, 2012, between midnight and 1 a.m.

¶ 9 After retrieving the photographs from defendant's phone, the following conversation ensued:

"DETECTIVE FANELLI: You touched a gun. Fair statement?

DEFENDANT: Yeah. I never touched a gun today[,] sir. Or yesterday. I never did[,] sir.

DETECTIVE BARKES: But you have touched a gun before?

DEFENDANT: Like[,] yeah[,] in my lifetime[,] but—

DETECTIVE BARKES: Alright. You a hunter? A deer hunter or somethin'?

DEFENDANT: No[,] no[,] sir.

DETECTIVE BARKES: Okay. Do you have a FOID card?

DEFENDANT: No[,] sir.

DETECTIVE BARKES: So you shouldn't be touchin' a gun anytime, right?

DEFENDANT: I know."

¶ 10 Defendant continued to deny possessing a gun that day or the evening before. After defendant admitted the photographs recovered from his cell phone indeed depicted him, Detective Fanelli asked if the gun from the photographs was the same gun used in the shooting the night before. Defendant responded, "no."

"DETECTIVE FANELLI: That's not the gun that was used?

DEFENDANT: No.

DETECTIVE FANELLI: So then there's a whole bunch of guns that these guys got.

DEFENDANT: Yeah, I told you."

Detective Fanelli then noted the photographs showed defendant had his "hands on it," referring to the purported gun in the photograph. Defendant responded, "Oh, I mean, I was just holding it." He also agreed the pictures were probably taken on October 7, 2012.

¶ 11 Following the presentation of the recorded interview, Detective Fanelli described the gun defendant was holding in the photographs as a semiautomatic gun with an extended magazine that would provide space for additional bullets. However, when questioned for further detail as to the make or model of the gun depicted in the photographs, he stated, "I don't know. It's just a semiautomatic gun is all I know." When the prosecutor asked Detective Fanelli if he was familiar with guns and firearms, particularly handguns, he responded, "Yes, I'm familiar. I'm not an expert by any means, but I am definitely familiar." When the prosecutor asked if the presence of an extended magazine meant anything to him, Detective Fanelli stated:

"Well, to me, I mean if I were to look at this, I've never seen a BB gun, a pellet gun, an air soft gun that has an extended magazine.

I'm also not an expert on those types of guns either, the BB guns and that, but as far as I know, the magazine doesn't serve a function for those, but for a real gun it does. That's where the rounds are contained."

¶ 12 On cross-examination, Detective Fanelli acknowledged he was also not an expert on BB guns, since he did not play with them while growing up, but indicated he had never seen one with an extended magazine. He also acknowledged it was possible that a BB gun could have an extended magazine. Notwithstanding his lack of expertise, Detective Fanelli stated, "I feel very confident that it is a gun based on the photos and the conversation I had with [defendant], but I can't say 100 percent. No I can't." The gun was never recovered for police to determine whether it fell under the legal definition of a firearm. Additionally, Detective Fanelli acknowledged, during the interview, he never asked defendant whether the gun in the photographs was a firearm. However, Detective Fanelli stated defendant referenced the item as a "gun" during the interview and never mentioned it was a BB gun, an airsoft gun, a pellet gun, or a squirt gun. We note the record contains no instance in which defendant used the word "gun" in reference to the item depicted in the photographs.

¶ 13 The parties stipulated defendant had a prior felony conviction and, accordingly, was ineligible to receive a FOID card. Following the State's presentation of evidence, defendant moved for a directed verdict, asserting the jury could not determine beyond a reasonable doubt that the photographs depicted defendant wielding a firearm. The trial court denied the motion,

finding defendant referred to the object as a "gun" during his interview, so it would be left to the jury to determine whether the gun in the photographs constituted a firearm. Defendant rested without presenting evidence. Thereafter, the jury found defendant guilty on both counts alleged in the indictment.

¶ 14 In August 2013, defendant filed a motion for a new trial or for judgment notwithstanding the verdict. Defendant asserted, in part, the evidence was insufficient to prove him guilty beyond a reasonable doubt. In October 2013, the trial court denied defendant's motion. Subsequently, the court sentenced defendant to 10 years' imprisonment.

¶ 15 This appeal followed.

¶ 16 II. ANALYSIS

¶ 17 On appeal, defendant argues (1) the State presented insufficient evidence to prove him guilty beyond a reasonable doubt; (2) the trial court erred in admitting into evidence portions of the recorded interview wherein police questioned defendant on an unrelated charge; and (3) defense counsel provided ineffective assistance of counsel by failing to tender certain jury instructions. We begin by addressing the sufficiency of the evidence.

¶ 18 A. Sufficiency of the Evidence

¶ 19 Defendant first asserts the State presented insufficient evidence for the jury to find him guilty of either count beyond a reasonable doubt.

¶ 20 In a jury trial, the State bears the burden of proving the defendant guilty of every element of the offense beyond a reasonable doubt. *People v. Maggette*, 195 Ill. 2d 336, 353, 747 N.E.2d 339, 349 (2001). "A reviewing court will not set aside a criminal conviction on grounds of insufficient evidence unless the proof is so improbable or unsatisfactory that there exists a reasonable doubt of the defendant's guilt." *Id.* In other words, where a jury finds a defendant

guilty, our inquiry is whether, in viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found all of the essential elements of the crime beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 278, 818 N.E.2d 304, 307 (2004).

¶ 21 To convict defendant of unlawful possession of a firearm based on the lack of a FOID card, the State must prove defendant (1) knowingly possessed a firearm, (2) did not have a FOID card in his possession at the time he possessed the firearm, and (3) was ineligible to acquire a FOID card at the time he possessed the firearm. Illinois Pattern Jury Instructions, Criminal, No. 18.26 (4th ed. 2000) (hereinafter, IPI Criminal 4th); 430 ILCS 65/2(a)(1) (West 2012). To convict defendant of unlawful possession of a weapon by a felon, the State was required to prove defendant (1) knowingly possessed a firearm, and (2) had a prior felony conviction. IPI Criminal 4th No.18.08; 720 ILCS 5/24-1.1(a) (West 2012). Defendant concedes the evidence was sufficient to prove he has a prior felony conviction, and he failed to possess and was ineligible to possess a FOID card. Rather, the dispute in this case centers on whether the State proved, beyond a reasonable doubt, defendant knowingly possessed a firearm. Accordingly, the jury received an instruction stating, "[t]he word 'firearm' means any device, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosion, expansion of gas, or escape of gas. Whether a firearm is operable does not affect its status as a weapon." IPI Criminal 4th No. 18.07A; see 430 ILCS 65/1.1 (West 2012) Though the instruction provides a bracketed area in which the parties may list the types of guns excluded under this definition, the parties did not discuss adding that material. See IPI Criminal 4th No. 18.07A. However, the legal definition of a firearm specifically excludes types of BB guns, pneumatic guns, spring guns, and paintball guns. 430 ILCS 65/1.1 (West 2012)).

¶ 22 Defendant asserts the photographs alone are insufficient to prove him guilty of knowingly possessing a firearm where no evidence was presented to prove the gun fell within the legal definition of a firearm. Defendant notes the gun was never recovered and the detectives never asked defendant for details about the gun depicted in the photographs to determine whether it constituted a firearm. By contrast, the State argues sufficient evidence existed to convict defendant. The State contends (1) defendant's reference to the object in his hand as a "gun," (2) the fact he never mentioned to the detectives the gun was a BB or other type of "legal" gun, and (3) the photographs provided sufficient evidence upon which the jury could infer the gun constituted a firearm.

¶ 23 We first note, contrary to the State's contention, defendant never uses the word "gun" when discussing the photographs. Rather, it is the detectives who use the word "gun" repeatedly throughout the interview. Thus, the State's reliance on this nonexistent fact is unpersuasive.

¶ 24 Second, the State argues defendant's failure to disclose to police that the gun in the photographs was a BB or other "legal" gun creates a credibility issue from which the jury could find he possessed a firearm. We disagree. Initially, requiring defendant to disprove an element of the offense constitutes improper burden-shifting. See *People v. Hernandez*, 2012 IL App (1st) 092841, ¶ 64, 967 N.E.2d 910 ("Constitutional due process rights require that a person may not be convicted in state court unless the State meets its burden of proving all of the elements of the offense beyond a reasonable doubt."). Moreover, the focus of the interview was whether defendant had been involved in a shooting on October 14, 2012. It did not focus on whether he possessed a firearm on October 7, 2012; thus, defendant would have no reason to believe those photographs or that gun was a subject of the investigation. At no point did

Detective Fanelli ask the pertinent question: whether the item in defendant's hand was, in fact, a firearm.

¶ 25 The State next asserts the photographs provided sufficient evidence upon which to convict defendant. In support, the State relies on *People v. Malone*, 2012 IL App (1st) 110517, 978 N.E.2d 387. In *Malone*, the defendant was convicted of armed robbery with a firearm, which subjected him to a sentencing enhancement. *Id.* ¶ 1, 978 N.E.2d 387. On appeal, the defendant challenged the sufficiency of the evidence, arguing, in part, the State failed to prove the defendant used a real firearm during the commission of the offense. *Id.* ¶ 40, 978 N.E.2d 387. The appellate court rejected this argument, concluding the victim's testimony that she saw the defendant holding a black gun along with consistent surveillance footage was sufficient to prove defendant possessed a firearm. *Id.* ¶ 51, 978 N.E.2d 387.

¶ 26 The critical difference between the present case and *Malone* is, in *Malone*, a witness provided unequivocal testimony that she saw the defendant with a firearm, which made a loud "clinking" sound when it hit the counter. *Id.* Thus, rather than providing the sole evidence of the defendant's guilt, the video surveillance served to corroborate the witness's testimony. *Id.* ¶ 52, 978 N.E.2d 387.

¶ 27 The dissent asserts *Malone* and other cases demonstrate expert testimony is unnecessary to establish an object constitutes a firearm; rather, lay witness testimony will suffice. See also *People v. Fields*, 2014 IL App (1st) 110311, ¶ 36, 6 N.E.3d 180 (upholding the defendant's conviction for armed robbery where the evidence he possessed a firearm came from unequivocal testimony from a single eyewitness), and *People v. Washington*, 2012 IL 107993, ¶ 36, 969 N.E.2d 349 (finding sufficient evidence of a firearm based on the lay witness's unequivocal testimony and the circumstances under which he viewed the gun). We agree expert

testimony is not critical in determining whether an object constitutes a firearm and do not intend to suggest otherwise. However, given the circumstances in the present case, in which no witnesses actually observed defendant holding the alleged firearm, something more than a photograph was necessary for the State to meet its burden.

¶ 28 It is well settled "unequivocal testimony of a witness that the defendant held a gun" provides sufficient evidence upon which a jury may find a defendant guilty. *Fields*, 2014 IL App (1st) 110311, ¶ 36, 6 N.E.3d 180; see also *Washington*, 2012 IL 107993, ¶ 36, 969 N.E.2d 349; *People v. Lee*, 376 Ill. App. 3d 951, 955, 876 N.E.2d 671, 676 (2007). We have no such witness here. In fact, the jury heard from no witness who unequivocally testified the gun in the photographs constituted a firearm. The sole source of information derives from Detective Fanelli, who (1) admitted he was neither an expert in firearms nor in BB guns, (2) could not identify the maker of the alleged firearm depicted in the photographs, and (3) could not unequivocally testify the gun constituted a firearm. This speculative evidence is insufficient.

¶ 29 During the recorded interview, Detective Fanelli failed to ask defendant any specific questions regarding the gun depicted in the photographs that would allow him to later verify the gun constituted a firearm. That proves fatal to this particular case. "It makes no more sense to say that everything that looks like a gun is a gun than to say that everything that looks like cocaine is cocaine." *People v. Crowder*, 323 Ill. App. 3d 710, 712, 753 N.E.2d 1165, 1166 (2001). Consistent with defendant's trial strategy, "an object that looks like a gun may actually be a toy or a realistic replica." *Id.* Though we recognize the investigation on that evening centered on the October 14 shooting, that in no way diminishes the State's burden of proving defendant possessed a firearm on October 7. The reasonable doubt cast over defendant's

conviction could have been easily avoided had Detective Fanelli asked defendant to verify the item in the picture was a firearm.

¶ 30 Thus, when viewing the noticeably blurry photographs lifted from defendant's cell phone, upon which Detective Fanelli could not positively identify the make and model of the gun or provide any information upon which the jury could find the gun constituted a firearm, we conclude the State failed to prove defendant guilty beyond a reasonable doubt.

¶ 31 B. Remaining Claims

¶ 32 Because we have determined the State presented insufficient evidence to prove defendant guilty beyond a reasonable doubt, we do not reach defendant's claims regarding (1) the admission of the recorded interview and (2) ineffective assistance of counsel.

¶ 33 III. CONCLUSION

¶ 34 For the foregoing reasons, we reverse the trial court's judgment.

¶ 35 Reversed.

¶ 36 JUSTICE HARRIS, dissenting.

¶ 37 I respectfully dissent. In my opinion, the evidence, when viewed in the light most favorable to the prosecution, supports the jury's conclusion defendant possessed a firearm. The majority suggests the evidence was insufficient because Detective Fanelli was not an expert on firearms or BB guns and he could not identify the manufacturer of the gun. The majority also states Fanelli "could not unequivocally testify the gun constituted a firearm." *Supra* ¶ 28. However, I do not find the two limitations in Detective Fanelli's testimony identified by the majority are fatal to the State's case in light of *Malone*, *Fields*, and *Washington*, nor do I consider his testimony that defendant possessed a firearm was equivocal.

¶ 38 In *Malone*, the defendant was convicted of armed robbery of a Walgreens store. *Malone*, 2012 IL App (1st) 110517, ¶ 2, 978 N.E.2d 387. A cashier in *Malone* testified she was walking away from the cash register when she heard a noise "like something heavy hit the counter." *Id.* ¶ 4, 978 N.E.2d 387. The cashier looked and saw the defendant holding a gun. *Id.* The jury was shown a video from the store's security surveillance system showing the "defendant displaying an object that look[ed] like a gun." *Id.* ¶ 9, 978 N.E.2d 387. Noting that the cashier's testimony was unequivocal and that no contrary evidence was presented establishing the gun was anything other than a real gun, the First District determined the evidence was sufficient to support the conclusion the defendant was armed with a firearm. *Id.* ¶ 52, 978 N.E.2d 387.

¶ 39 In *Fields*, a customer at a convenience store testified she was confronted inside the store by a man holding a gun at his side. *Fields*, 2014 IL App (1st) 110311, ¶ 7, 6 N.E.3d 180. After giving the man her money, the customer "continued to look at [him] in the face." *Id.* ¶¶ 7-8, 6 N.E.3d 180. After finding the customer's identification testimony was sufficient, the court in *Fields* found the witness's testimony about seeing the gun to be sufficient proof the

defendant was armed with a firearm. The First District noted that "unequivocal testimony of a witness that the defendant held a gun is circumstantial evidence sufficient to establish that a defendant is armed during a robbery." *Id.* ¶ 36, 6 N.E.3d 180. The court further noted the lack of evidence suggesting the gun fell within any of the statutory exceptions to the definition of a firearm in the FOID Act. *Id.* ¶ 37, 6 N.E.3d 180.

¶ 40 In *Washington*, a delivery truck driver was confronted by two men, one of whom was holding a gun. *Washington*, 2012 IL 107993, ¶ 10, 969 N.E.2d 349. The two men forced the delivery driver to sit between them as they drove away in the truck. *Id.* The gunman was later convicted of kidnapping, aggravated vehicular hijacking, and armed robbery. *Id.* ¶ 21, 969 N.E.2d 349. The supreme court upheld the convictions, finding the defendant was armed with a dangerous weapon when he committed the offenses. *Id.* ¶ 37, 969 N.E.2d 349. The supreme court noted the delivery driver had an unobstructed view of the weapon and testified it was a gun. *Id.* ¶ 35, 969 N.E.2d 349. "[D]uring closing argument defense counsel did not argue defendant did not possess a gun, only that it could not be known for sure whether the gun was real or a toy because no gun was ever recovered. However, given [the delivery driver's] unequivocal testimony and the circumstances under which he was able to view the gun, the jury could have reasonably inferred that defendant possessed a real gun." *Id.* ¶ 36, 969 N.E.2d 349.

¶ 41 In none of the above cases did the prosecution present expert testimony about firearms or BB guns or witness testimony establishing the manufacturer of the subject gun. Instead, each case involved testimony based simply on a lay witness's observations, which was deemed sufficient to establish the defendant's possession of a gun. Interestingly, in a recent First District case, witness testimony was deemed sufficient to establish an object was a firearm where the witnesses saw only the handle of a gun protruding from the waistband of a codefendant's

pants. *People v. Wright*, 2015 IL App (1st) 123496, ¶ 76, 33 N.E.3d 781 ("While there is no surveillance video of the crime as in *Malone*, the three eyewitnesses had ample opportunity to view the weapon at a close distance during the robbery, and although it was the handle of the gun, we find this identification sufficient.").

¶ 42 In the present case, the jury viewed five photographs clearly showing defendant posing for the camera while holding a gun. Detective Fanelli, a law enforcement officer with 15 years of experience and who was familiar with firearms, testified unequivocally that the gun in the photographs was a real gun. Detective Fanelli identified the gun in the photographs as a semiautomatic with an extended magazine designed to increase ammunition capacity. Detective Fanelli testified at one point he was "very confident" the gun in the photos was a real gun, and later he agreed he had "a high degree of certainty" that the gun was an "actual firearm." There was no contrary evidence suggesting the gun was a type excepted from the definition of a firearm in the FOID Act. Further, Detective Fanelli testified he questioned defendant about the photographs. Detective Fanelli asked defendant if the gun in the photographs was the same gun used in a shooting the night before, to which defendant responded, "no." Defendant did not correct Fanelli by saying it was a BB gun or a toy gun. In fact, at no point during Detective Fanelli's questioning of defendant about the photographs did defendant indicate it was not a real gun.

¶ 43 In my view, the evidence was sufficient to establish defendant possessed a firearm in violation of the law.