2016 IL App (1st) 140648-U

FIFTH DIVISION
September 23, 2016

No. 1-14-0648

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	No. 07 CR 4117
v.	)	
	)	
JOSHUA HOSKINS,	)	
	)	The Honorable
Defendant-Appellant.	)	Steven J. Gobel,
	)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Justices Lampkin and Reyes concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant's armed habitual criminal and unlawful use of a weapon by a felon convictions were affirmed. The defendant was proven guilty beyond a reasonable doubt. The defendant failed to establish his claims of error. Defense counsel was not ineffective. The defendant's convictions were not void.

¶ 2 Following a jury trial, the defendant, Joshua Hoskins, was convicted of violating the armed habitual criminal statute (720 ILCS 5/24-1.7 (West 2006)) and unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2006)). He was sentenced to 25 years in the Illinois Department of Corrections. On appeal, the defendant contends that: (1) the evidence was insufficient to prove him guilty beyond a reasonable doubt; (2) the prosecutor's examination of the witnesses and closing argument denied him a fair trial, or, in the alternative, defense counsel's failure to preserve the alleged errors denied him effective assistance of counsel; and (3) his convictions were void. For the reasons stated below, we affirm the defendant's convictions and sentence.

¶ 3 BACKGROUND

¶ 4 I. Charges

¶ 5 The State filed an information charging the defendant with a violation of the armed habitual criminal statute in that "he, knowingly or intentionally possessed a firearm after having been convicted of unlawful use of a weapon by a felon *** and aggravated unlawful use of a weapon." (Emphasis omitted.) The defendant was also charged with unlawful use of a weapon by a felon in that "he, knowingly possessed on or about his person *** a handgun, after having been previously convicted of the felony offense of unlawful use of a weapon by a felon." (Emphasis omitted.) Both underlying felony convictions were entered in 2006.

¶ 6 II. JURY TRIAL

¶ 7 A summary of the pertinent testimony and evidence presented at trial follows below.

¶ 8 A. For the State

¶ 9 1. *Chicago Police Officer Sean O'Brien*

¶ 10 On February 2, 2007, Officer O'Brien and his partner, Chicago Police Officer Christopher Doherty, were on routine patrol in an unmarked squad car driven by Officer Doherty.[1] At approximately 5:10 p.m., as they proceeded eastbound on 71st Street, just west of Eberhardt Avenue, they observed a group of people running. Officer O'Brien saw an individual, whom he identified in court as the defendant, running with a gun. The defendant was wearing a dark puffy sleeveless vest over a shirt. The defendant was holding the gun in his right hand, just below his waistline.

¶ 11 As the defendant ran northbound on Eberhardt Avenue, he looked behind him in the general direction of the squad car. The defendant dropped the gun at Eberhardt Avenue and 71st Street and continued running. Officer Doherty stopped the squad car and retrieved the gun dropped by the defendant while Officer O'Brien pursued the defendant into an alley between Vernon and Eberhardt Avenues. At one point in the pursuit, the defendant jumped over a fence into a yard at 7131 South Eberhardt Avenue. As he attempted to jump the fence back into the alley, he came face to face with Officer O'Brien. Officer O'Brien observed two other individuals at the scene. One of them, later identified as Shaun Loyde, pointed at the defendant shouting, " 'It's him. It's him.' " The other individual ran into a stairwell.

¶ 12 After placing the defendant in custody, Officer O'Brien turned him over to Officer Doherty. Officer O'Brien then spoke to the individual in the stairwell. The individual, later identified as Jonathan Hoskins (Jonathan), the defendant's identical twin brother, was wearing a long-sleeved three-quarter length pea or trench style coat. Officer O'Brien brought

[1]Officer O'Brien explained that an unmarked squad car had lights, sirens and police municipal license plates on it.

Jonathan to the front of 7131 South Eberhardt Avenue where he was placed in the custody of Chicago police officers Lule and Partida, who had arrived on the scene.

¶ 13 After speaking with Mr. Loyde, Officer O'Brien went to 7050 South Eberhardt Avenue, where he observed Mr. Loyde's damaged vehicle and another damaged vehicle. Officers O'Brien and Doherty then returned to the police station where they processed the defendant's arrest.

¶ 14 On cross-examination by the defendant, Officer O'Brien testified that he did not witness the accident involving Mr. Loyde's vehicle. The defendant was 20 to 30 feet away when the officer first observed him running southbound with the gun. The defendant dropped the gun at the northeast corner of 71st Street and Eberhardt Avenue. Officer O'Brien was about 10 to 15 feet away from the defendant when he witnessed the defendant drop the gun.

¶ 15 Officer O'Brien called in a foot chase to the police dispatcher. The officer explained that it would be the dispatcher who requests that other units go to the scene. Officer O'Brien did not tell the dispatcher how many individuals he was chasing. The officer believed he was the only officer pursuing the defendant; he did not know if anyone was pursuing Jonathan. As the defendant attempted to jump over the fence, the officer heard Mr. Loyde yelling from the front of the house. Mr. Loyde told Officer O'Brien that Jonathan was driving a vehicle which struck Mr. Loyde's vehicle and that Mr. Loyde had observed the defendant carrying a gun.

¶ 16 2. *Chicago Police Officer Christopher Doherty*

¶ 17 At approximately 5:10 p.m. on February 2, 2007, Officer Doherty and his partner, Officer O'Brien, were traveling east on 71st Street in an unmarked squad car. As their squad car approached the intersection of Eberhardt Avenue and 71st Street, Officer Doherty observed a black male wearing a black winter vest running southbound with a gun in his hand. The

officer identified the defendant as the black male with the gun, which was a black revolver. When Officer Doherty first observed him, the defendant was approximately 10 to 15 feet away on the east side of the sidewalk at 7059 Eberhardt Avenue. The defendant looked toward the squad car and dropped the gun. Officer Doherty parked the vehicle and recovered the gun from where the defendant had dropped it. The gun was a Smith and Wesson .38 caliber revolver with a six-inch barrel. The gun contained six fired rounds.

¶ 18 Officer Doherty maintained radio contact with Officer O'Brien who was pursing the defendant. The officer drove to the alley at 7131 South Eberhardt Avenue where he located Officer O'Brien and the defendant. Officer Doherty took custody of the defendant and placed him in the squad car. The officer returned to the police station to process the defendant and inventory the gun.

¶ 19 On cross-examination by the defendant, Officer Doherty was questioned as follows. After he recovered the gun from where the defendant dropped it, the officer placed it in his waistband where it remained until it was inventoried at the police station. Officer Doherty explained that while the defendant was initially placed in his police vehicle, a marked police car arrived on the scene and transported the defendant to the police station.

¶ 20 Officer Doherty explained that Officer O'Brien and he advised the police dispatchers that they were pursuing an offender, but he did not recall if he personally informed other officers as to what was taking place. The officer denied that they reported they were pursuing two offenders. Officer Doherty learned that there had been a car accident in the vicinity where the gun was recovered and that Officer O'Brien was approached by an individual whose vehicle had been involved in the accident. Officer O'Brien investigated the accident with Chicago police officers, Partida and Lule, who had arrived at the scene.

¶ 21 3. *Angela Horn*

¶ 22 Ms. Horn was employed by the Illinois State Police as a forensic scientist specializing in the area of firearms and tool mark identifications. Qualified as an expert witness, Ms. Horn testified that after testing the gun recovered by Officer Doherty, she determined that the gun was functional and that the six cartridge cases taken from the weapon had been fired from that weapon.

¶ 23 4. *Stipulations*

¶ 24 The State and the defendant entered into the following stipulation which provided in pertinent part as follows:

> "[I]t is hereby stipulated by and through the parties, number one: The defendant, Joshua Hoskins, has been convicted of two qualifying felony offenses referenced in 720 ILCS 5/24-1.7(a) armed habitual criminal.
>
> Number two: The defendant has a qualifying felony conviction as referenced in 720 ILCS 5/24.1.1(a) unlawful use of a weapon by a fellow [*sic*].
>
> Number three: The judgment of the first felony conviction was entered on February 23, 2006, and judgment on the second felony conviction was entered on April 7, 2006."

¶ 25 After its exhibits were admitted into the evidence, the State rested its case in chief.

¶ 26 B. For the Defendant

¶ 27 1. *Shaun Loyde*

¶ 28 Mr. Loyde acknowledged that he had previous convictions for possession of a controlled substance and robbery. Around 5 p.m. on February 2, 2007, Mr. Loyde was in a house at 71st Street and Eberhardt Avenue when he heard gunfire and witnessed what appeared to be a tan

Corolla hit his Chevrolet Malibu parked across the street on Eberhardt Avenue, along with several other cars. When Mr. Loyde and other individuals from the house approached the scene, he observed one man laying on the trunk of the Corolla, another man standing and a woman standing by the cars. One of the men was wearing a vest-like garment, and the other was wearing a hoodie. None of the three individuals had a gun in their possession. Mr. Loyde told the man on the trunk that he was going to have to pay for the damage to the Malibu and demanded information from him. The man had begun walking backward toward 71st Street when Mr. Loyde heard a second round of gunfire. As everyone took cover, the man ran, and Mr. Loyde lost track of him for about 10 minutes.

¶ 29 As Mr. Loyde and other individuals stood on the corner of 71st Street and Eberhardt Avenue, he noticed a man named Terrell standing there with them holding a gun. He described Terrell as heavyset with a dark complexion and the gun as a .357 pistol. After five or ten minutes, an unmarked police car pulled up, and an officer exited the car. Terrell threw the gun down and walked toward King Drive. The police then left.

¶ 30 One of Mr. Loyde's friends pointed out that the man who hit his Malibu was across the street. As Mr. Loyde approached him, the man began walking away. Mr. Loyde heard another round of gunfire, and the man jumped over the fence into a yard. The man was talking through the fence telling Mr. Loyde that he would pay for the damage to the Malibu when a maroon police squad car drove down the street. Mr. Loyde flagged down the squad car and pointed out the man to the officers as the one who hit his Malibu. One officer exited the car and ordered the man to get on the ground. Mr. Loyde identified the man to the police officers as the individual who was driving the car that struck his Malibu. He denied that he told police that the individual he had just identified was the man with the gun.

¶ 31 According to Mr. Loyde, more police officers began to arrive on the scene in response to gunshots from the alley where the man was apprehended. According to Mr. Loyde, there were four separate shooting incidents, and eight people were arrested.

¶ 32 Mr. Loyde discussed the accident with the police. He had never met the defendant until the defendant's trial, though he had possibly seen a picture of him. Mr. Loyde did not see the defendant on February 2, 2007.

¶ 33 On cross-examination, Mr. Loyde testified that Terrell was not a friend, just someone Mr. Loyde knew from the neighborhood because he robbed people. One of the officers recovered the gun which Terrell dropped.

¶ 34 Mr. Loyde had never seen the three people who were standing by his Malibu before. He described the two men as having lighter complexions than the woman. He did not see either of the men in the courtroom.

¶ 35 Mr. Loyde left the corner of 71st Street and Eberhardt Avenue to catch up with the man who hit his car. As he approached, he heard shots in the alley, and the man ran into a backyard on Eberhardt Avenue and jumped over the gate into a yard. As Mr. Loyde prepared to follow the man, he saw a police car and flagged it down, pointing to the man and telling the officers that he had hit his car. There were four officers in the backyard of South Eberhardt Avenue. A Hispanic-looking officer pointed a gun at the man and told him to get on the ground. The officer then asked Mr. Loyde to identify an individual seated in the police car as the man with the gun. When Mr. Loyde explained that the officer had seen Terrell with the gun, the officer offered to pay for the damage to Mr. Loyde's Malibu if he would identify the individual in the police car as the man with the gun. He did not see the individual's face

because he was slumped down in the seat. All he could see was that he had a light complexion. Mr. Loyde did not see that person in court.

¶ 36 In February 2007, Mr. Loyde received a notice telling him to report to the courthouse at 26th Street and California Avenue. He told a female assistant State's Attorney that he had seen someone with a gun. Mr. Loyde then spoke to the defendant's female assistant Public Defender and told her that the police were trying to get him to identify the wrong man. He also told the assistant State's Attorney that the Hispanic officer tried to bribe him. Mr. Loyde denied seeing two offenders run into the yard at 7131 South Eberhardt Avenue and denied telling Officer O'Brien that the defendant had the gun and that Jonathan was the driver who hit the Malibu. He further denied telling Officers O'Brien and Doherty that the defendant fired the gun five times when he confronted Jonathan about hitting his car. While he thought it was a serious offense, Mr. Loyde did not file a written report of the attempted bribery by the Hispanic officer.

¶ 37 On redirect examination by the defendant, Mr. Loyde acknowledged that it was in 2010 that he was subpoenaed by the State. It was then that he had the conversations with the assistant State's Attorney and the defendant's Public Defender.

¶ 38 2. *Philip Anderson*

¶ 39 Mr. Anderson acknowledged that he was serving a sentence for attempted first degree murder at the Department of Corrections facility at Pontiac, Illinois.

¶ 40 At 5 p.m. on February 2, 2007, Mr. Anderson and a friend were on the corner of 71st Street and Eberhardt Avenue on their way to a bus stop when he heard gunshots and saw a collision on 71st Street between Eberhardt Avenue and Vernon Avenue. Mr. Anderson saw Jonathan, whom he knew as "Johnnie Boy" exit a car at the scene of the collision. He knew

both Jonathan and the defendant from growing up in the same neighborhood. There was another individual, tall, and with a light complexion and braids in his hair at the site of the collision. He did not see anyone else exit the car. Another man walked up to Jonathan and began talking to Jonathan who then ran down Eberhardt Avenue toward 72nd Street. Mr. Anderson did not see anything in Jonathan's hands.

¶ 41 Mr. Anderson then noticed a man standing on the opposite corner of 71st Street and Eberhardt Avenue. The man dropped a gun. Mr. Anderson did not recognize the man, but it was not the defendant. Mr. Anderson decided to leave the area and started to walk toward St. Lawrence Avenue two blocks east of Eberhardt Avenue.

¶ 42 Mr. Anderson was still on the scene when two plain-clothes officers arrived. Both officers were white males. The officer with blonde hair pursued Jonathan south down Eberhardt Avenue.

¶ 43 On cross-examination, Mr. Anderson acknowledged that he had a pending charge of murder. Despite witnessing the collision, Mr. Anderson saw only one car - the Ford Taurus that Jonathan exited. He was about 20 feet away, but he could tell Jonathan and the defendant apart. Mr. Anderson maintained that Jonathan and the defendant were just acquaintances rather than friends.

¶ 44 According to Mr. Anderson, there was a man standing on the northwest corner of 71st Street and Eberhardt Avenue. The man had been standing there prior to the gunshots and the car collision. Mr. Anderson did not see the gun until the man began to run down Eberhardt Avenue toward 70th Street. He did not see the gun in the man's hand; he only saw it on the ground. There had been no gun on the ground prior to the man running from the area.

¶ 45 Mr. Anderson did not tell the police officers at the scene that he had seen a man standing on the corner drop a gun. Mr. Anderson did not see the defendant in the area. He did not see anyone else standing on the corner with the man. He saw a white police officer with dark hair retrieve the gun. The gun appeared to be a revolver.

¶ 46 3. *Joshua Hoskins*

¶ 47 The defendant acknowledged that in 2009, he had been convicted of attempted murder and armed robbery. He had an identical twin brother, Jonathan now deceased.

¶ 48 At 5 p.m. on February 2, 2007, the defendant was at 72nd Street and Langley Avenue on his way to the scene of an automobile collision involving Jonathan and a younger sister. As he was crossing 71st Street at Langley, the defendant saw a blue and white Chicago police squad car. Officer Doherty exited the driver side of the squad car, and Officer O'Brien exited the passenger side. Officer O'Brien put the defendant on the hood of the squad car while Officer Doherty handcuffed him and placed him in the squad car. When the defendant asked what he was being arrested for, the officers told him they would talk to him at the police station. The defendant did not see Jonathan or Mr. Anderson in the area where he was taken into custody.

¶ 49 When the defendant was brought into the holding area of the police station, he saw Jonathan, who was under arrest. The defendant denied having a gun in his possession, and the police did not recover a gun from him. The defendant could not state whether Jonathan had a gun.

¶ 50 On cross-examination, the defendant did not know the exact time he was informed of the car accident involving Jonathan and his sister, but he knew it was after 4 p.m. He was

stopped by the officers on 71st Street between Langley and Champlain Avenues. Langley Avenue was four blocks from Eberhardt Avenue.

¶ 51 The defendant did not know what car Jonathan was driving because neither Jonathan nor their sister owned a car. At the police station, Jonathan was telling him what the police were doing when the police officers separated them.

¶ 52 3. *Chicago Police Officer Jose Lule*

¶ 53 On February 2, 2007, Officer Lule was on routine patrol with his partner, Chicago Police Officer Art Partida. They received a radio message of a foot chase involving Officers O'Brien and Doherty. The officer did not remember whether the message specified the names of the offenders. Officer Lule acknowledged that the report he prepared of Jonathan's arrest stated that two offenders exited a vehicle, one of which was Jonathan who was the driver.

¶ 54 On cross-examination by the State, Officer Lule testified as follows. Officer Lule was not present during the foot chase. His report was a summary, not a verbatim account of what he was told by Officers O'Brien and Doherty on February 2, 2007.

¶ 55 C. Rebuttal

¶ 56 Officer O'Brien and Officer Doherty were recalled as rebuttal witnesses. According to Officer O'Brien, Mr. Loyde used articles of clothing to describe the individuals. He described the individual with the gun as wearing a puffy jacket or vest. Both officers testified that Officers Lule and Partida were the only Hispanic officers on the scene. Neither Officer O'Brien nor Officer Doherty offered to have Mr. Loyde's car fixed if he would identify the defendant as the individual with the gun, and neither of them heard any of the other officers on the scene make such an offer to Mr. Loyde. According to both Officer O'Brien and

Officer Doherty, Officer Doherty was never on 71st Street between Champlain and Langley Avenues, and neither officer placed the defendant under arrest on 71st Street between Champlain and Langley Avenues. Neither officer saw Mr. Loyde in the area of 71st Street and Eberhardt Avenue where the gun was recovered.

¶ 57 Also called as rebuttal witnesses, Officers Lule and Partida also testified that they were the only Hispanic officers on the scene of this incident. Both officers had a conversation with Mr. Loyde, but neither of them offered to pay for the repairs to Mr. Loyde's car if he would identify the defendant as the individual with the gun. Officer Lule did not hear Officer O'Brien make that offer to Mr. Loyde, and Officer Partida did not hear Officer Doherty or Officer O'Brien make that offer to Mr. Loyde.

¶ 58 Called as a rebuttal witness, Assistant State's Attorney Mikki Miller (ASA Miller) testified that she was working in the felony trial division and was assigned to the defendant's case. On April 21, 2010, ASA Miller spoke with Mr. Loyde in the jury room of the courthouse. In the conversation, Mr. Loyde made no mention of a police officer's attempt to bribe him.

¶ 59 III. Verdict and Posttrial Proceedings

¶ 60 Following deliberations, the jury returned a verdict finding the defendant guilty of armed habitual criminal and of unlawful possession of a weapon by a felon.

¶ 61 The defendant's motion for a new trial was denied. The trial court merged the unlawful use of a weapon by a felon conviction with the armed habitual criminal conviction and sentenced the defendant to 25 years imprisonment to be served concurrently with his sentences on two other convictions he had received. The defendant's motion for reconsideration of his sentence was denied.

¶ 62 The defendant filed a timely notice of appeal.

¶ 63 ANALYSIS

¶ 64 I. Sufficiency of the Evidence

¶ 65 The defendant contends that the evidence was insufficient to find the defendant guilty beyond a reasonable doubt of the offenses charged in this case. He maintains that the content of the arresting officers' radio report of the foot chase completely contradicted their in-court testimony and, therefore, their testimony lacked credibility.

¶ 66 A. Standard of Review

¶ 67 When considering a defendant's challenge to the sufficiency of the evidence, a reviewing court applies a reasonable doubt standard. *In re Jonathan C.B.*, 2011 IL 107750, ¶ 47. "The reasonable doubt standard asks whether, 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." *In re Jonathan C.B.*, 2011 IL 107750, ¶ 47. The standard applies whether the evidence is direct or circumstantial. *In re Jonathan C.B.*, 2011 IL 107750, ¶ 47.

¶ 68 B. Discussion

¶ 69 The defendant argues that the testimony of Officers O'Brien and Doherty is not credible since the radio message they sent failed to mention a gun and contradicted their testimony as to the number of offenders they were pursuing; neither officer would acknowledge sending the radio dispatch; and Officer O'Brien arrested both the defendant and his brother, though he claimed to be pursuing only one offender.

¶ 70 The defendant's argument centers around the content of the radio dispatch sent by Officers O'Brien and Doherty reporting the foot chase of the suspect whom they witnessed dropping the gun at the corner of 71st Street and Eberhardt Avenue. The defendant argues

that according to the dispatch, the officers were in pursuit of two offenders who had been in a car but fled when they saw the officers. At trial, Officers O'Brien and Doherty contradicted the radio message maintaining that only one suspect was being pursued after witnessing him dropping a gun on the corner of 71st Street and Eberhardt Avenue.

¶ 71 The defendant relies on the arrest report authored by Officer Jose Lule. According to Officer Lule's arrest report for Jonathan, the radio message referred to a foot chase with two offenders who had run from a vehicle and that the driver of the vehicle was Jonathan.

¶ 72 When considering a sufficiency of the evidence challenge, this court will not retry the defendant. *In re Jonathan C.B.*, 2011 IL 107750, ¶ 59. As the trier of fact, the jury was best equipped to judge the credibility of the witnesses, and due consideration must be given to the fact that the jury saw and heard the witnesses. *In re Jonathan C.B.*, 2011 IL 107750, ¶ 59. It was also for the jury to resolve any conflicts or inconsistencies in the evidence. *In re Jonathan C.B.*, 2011 IL 107750, ¶ 59. As a reviewing court, we will not substitute our judgment for that of the fact finder on questions involving the weight of the evidence and the credibility of the witnesses. *People v. Moore*, 375 Ill. App. 3d 234, 238 (2007). While the trier of fact's decision to accept testimony is neither binding nor conclusive, it is sufficient if all the evidence taken together satisfies the trier of fact beyond a reasonable doubt of the defendant's guilt. *In re Jonathan C.B.*, 2011 IL 107750, ¶ 60.

¶ 73 There was no evidence of the exact contents of the radio message reporting the foot chase. Officer O'Brien testified that the report of the foot chase was made to the police dispatcher, who would then dispatch officers to the scene. While Officer Lule received a radio report of the foot chase involving Officers O'Brien and Doherty and two offenders, he did not testify as to whether he received the message from the officers or the police

dispatcher. Moreover, Officer Lule's arrest report was a summary of what he was later told by Officers O'Brien and Doherty. Finally, the fact that Officer O'Brien arrested Jonathan as well as the defendant does not confirm that the officers were pursuing two suspects. Officer O'Brien testified that he did not see Jonathan until he was in the alley trying to apprehend the defendant.

¶ 74 The defendant's challenge to the testimony of Officers O'Brien's and Doherty's credibility addresses the functions of the jury and not those of the reviewing court. *People v. Tenney*, 205 Ill. 2d 411, 428 (2002). The jury heard the testimony of the witnesses and resolved the credibility issue in favor of Officer O'Brien and Officer Doherty. A court will not reverse a conviction because the defendant maintains that the witness is not credible. *Tenney*, 205 Ill. 2d at 428.

¶ 75 The defendant presented a different version of the events of February 2, 2007, claiming he was arrested by Officers O'Brien and Doherty several blocks away from 71st Street and Eberhardt Avenue. A jury is " 'not required to accept any possible explanation compatible with the defendant's innocence and elevate it to the status of reasonable doubt.' " *Tenney*, 205 Ill. 2d at 429 (quoting *People v. Herrett*, 137 Ill. 2d 195, 206 (1990)). While the defendant's absence from the area where the gun was dropped was supported by the testimony of his witnesses, Mr. Anderson, a convicted felon, and Mr. Loyde, whose testimony was contradicted by Officer O'Brien's testimony, it was the jury's function, not this court's, to determine which witnesses to believe.

¶ 76 Viewing the evidence in the light most favorable to the State, we conclude that a rational trier of fact could have found the defendant guilty beyond a reasonable doubt of armed habitual criminal and unlawful possession of a firearm by a convicted felon.

¶ 77 II. Denial of the Defendant's Right to a Fair Trial

¶ 78 The defendant contends that multiple errors, either singularly or cumulatively, denied him a fair trial. He acknowledges that some of the errors he complains of were not preserved and requests that we review the unpreserved errors for plain error. The defendant further contends that the actions of defense counsel in failing to preserve error and introducing prejudicial evidence denied him effective assistance of counsel.

¶ 79 A. Standards of Review

¶ 80 Evidentiary errors are reviewed for an abuse of discretion. *People v. Torruella*, 2015 IL App (2d) 141001, ¶ 32. The appellate courts remain divided on whether the standard of review for closing argument is *de novo* or abuse of discretion. *People v. Kelley*, 2015 IL App (1st) 132782, ¶ 76. We need not resolve the issue of the appropriate standard of review where, as in the present case, under either standard, our ruling would be the same. *Kelley*, 2015 IL App (1st) 132782, ¶ 76. Where the facts relevant to an ineffectiveness of counsel claim are undisputed, our review is *de novo*. *People v. Bew*, 228 Ill. 2d 122, 127 (2008).

¶ 81 B. Discussion

¶ 82 1. *Errors Preserved for Review*

¶ 83 a. Failure to Perfect Impeachment

¶ 84 The defendant argues that the State failed to perfect the impeachment of Mr. Loyde after he denied that he told an officer that he saw the defendant fire his gun five times. The State responds that because the attempted impeachment was on a collateral matter, it was prevented from perfecting the impeachment.

¶ 85 "It is improper for the prosecutor to ask a witness questions for purposes of impeachment unless the prosecutor is prepared to offer proof of the impeaching information." *People v.*

Olinger, 112 Ill. 2d 324, 341 (1986). The danger from failing to perfect the impeachment is that the jury will ignore any denial by the witness, presume that the insinuation or innuendo is accurate and substitute that presumption for proof. *People v. Montgomery*, 254 Ill. App. 3d 782, 797 (1993). However, on cross-examination, a witness may not be impeached on a collateral matter, and the questioner must accept the witness' answer. *Montgomery*, 254 Ill. App. 3d at 796-97. "The test for determining if a matter is collateral is whether the matter could be introduced for any purpose other than to contradict; the determination is usually left to the discretion of the trial court and not reversed unless it results in substantial prejudice to defendant." *Montgomery*, 254 Ill. App. 3d at 797.

¶ 86 We agree with the State that whether Mr. Loyde told the police he saw the defendant fire five shots is a collateral matter. The charges against the defendant required proof that he possessed a gun, not that he fired shots from the gun. As the defendant himself argues in a related claim of error, the ballistics evidence was completely irrelevant in this case. Therefore, no error occurred.

¶ 87 b. Improper Rebuttal Argument

¶ 88 Prosecutors have wide latitude in closing argument. *Anderson*, 407 Ill. App. 3d at 677. "A prosecutor has the right to comment upon the evidence presented and upon reasonable inferences arising from that evidence, even if the inferences are unfavorable to the defendant and may respond to comments made by defense counsel which clearly invite a response." *Anderson*, 407 Ill. App. 3d at 677. The court reviews the defendant's complaints of improper argument by the prosecutor in light of the entire record, in particular the arguments of both the prosecutor and defense counsel in their entirety, and on a case-by-case basis. *People v. Williams*, 313 Ill. App. 3d 849, 863 (2000).

¶ 89 i. Misrepresentation of Identification Evidence in Rebuttal Argument

¶ 90 The defendant maintains that in her rebuttal argument, the prosecutor misrepresented Mr. Loyde's identification testimony to the jury.

¶ 91 On direct examination, defense counsel asked Mr. Loyde to describe what the three people he saw standing at the accident site were wearing. Mr. Loyde testified as follows:

> "One have on like a vest. The other one had on a hoodie, and the girl had on like a pink and white leather jacket."

In his testimony on rebuttal, Officer O'Brien testified that Mr. Loyde described the individual with the gun as wearing a puffy jacket or vest.

¶ 92 In rebuttal, the prosecutor argued as follows:

> "It is at that point the officers see all [*sic*] the defendant's brother Jonathan Hoskins dressed completely different. Looks similar but completely different. Black jacket. And that's the individual that Shaun Loyde identifies as the one that was driving the vehicle and then identifies this defendant as the one who was holding the gun out there that night."

¶ 93 The defendant argues that the prosecutor's argument misled the jury into believing that Mr. Loyde's testimony corroborated the officers' testimony since Mr. Loyde neither identified anyone with a black jacket nor specified the clothing of either the driver or the passenger.

¶ 94 On direct examination, Officer O'Brien identified the defendant as the man he pursued after seeing him drop a gun and that the defendant was wearing a dark, puffy sleeveless vest over a shirt. Officer Doherty also described the man with the gun as a black male wearing a black winter vest. In contrast, when Officer O'Brien arrested Jonathan, he was wearing a

long-sleeved three-quarter length pea or trench style coat. On rebuttal, Officer O'Brien testified that Mr. Loyde used articles of clothing to describe the individuals and described the man with the gun as wearing a puffy vest.

¶ 95 The prosecutor's comment did not mislead the jury since her argument was based on reasonable inferences from the record. The officers consistently described the man with the gun as wearing a puffy dark or black vest. According to Officer O'Brien, Mr. Loyde also described the man with the gun as wearing a puffy vest. Officer O'Brien described Jonathan as wearing a three-quarter length coat but did not specify the color. The prosecutor's argument that when the officers saw the identical twins together, the fact that they were dressed differently, *i.e.*, a vest versus a jacket or coat, countered the defendant's argument that the police could have arrested the wrong twin. The fact that the prosecutor referred to a "black jacket," rather than a hoodie or pea coat, was a minor discrepancy which would not have misled the jury who heard the testimony of the witnesses.

¶ 96 The prosecutor's argument was not improper, and no error occurred.

¶ 97 ii. Improper Suggestion of Bias

¶ 98 The defendant contends that the prosecutor misstated Mr. Loyde's testimony to suggest that he was biased in favor of the defendant, when on rebuttal, she argued:

> "Well, I guess that's how they explain how the defendant gets into custody, into custody by the police officers because his friend or person Shaun Loyde didn't see him out there and his buddy Phillip [*sic*] Anderson didn't see him out there."

The defendant points out that Mr. Loyde testified that he had never met the defendant and became aware of his existence only when he was subpoenaed to testify.

¶ 99 The reference to Mr. Loyde as a "friend" of the defendant was a misstatement of his testimony. However, the prosecutor stated "friend or person," which, while awkwardly phrased, did not require the jury to disregard Mr. Loyde's testimony that he did not know the defendant at the time of the incident. Therefore, we reject the defendant's argument that the prosecutor's argument was a deliberate attempt to suggest to the jury that Mr. Loyde was biased in favor of the defendant and had tailored his testimony accordingly.

¶ 100 We find no prejudice to the defendant. When the defendant objected, the trial court stated that the jury had heard the evidence. The jury was instructed that closing arguments were not evidence and to disregard any statement made by the attorneys during closing argument which was not based on the evidence. See *People v. Cosmano*, 2011 IL App (1st) 101196, ¶ 91 (potential prejudice from the prosecutor's improper comment was cured by the trial court's prompt and repetitive admonishments to the jury and the instructions to the jury that closing arguments were not evidence and that any statement or argument by the attorneys not based on the evidence should be disregarded).

¶ 101 Therefore, we conclude the State was not required to perfect impeachment on a collateral matter, and the trial court did not err in sustaining the defendant's objections to the prosecutor's rebuttal argument.

¶ 102 2. *Unpreserved Claims of Error*

¶ 103 The defendant acknowledges that certain of his claims of error were not preserved for review. Failure to preserve an alleged error for appellate review forfeits the alleged error. *People v. Span*, 2011 IL App (1st) 083037, ¶ 72. The defendant seeks to avoid the consequences of forfeiture by requesting that we review his forfeited claims of error for plain error or, in the alternative, ineffective assistance of counsel.

¶ 104 The plain error doctrine allows a court to consider forfeited errors where (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. *Span*, 2011 IL App (1st) 083037, ¶ 73. The defendant's argument raises only the closeness of the evidence prong of the plain-error analysis. In the first step of the analysis, we determine whether error occurred. *Span*, 2011 IL App (1st) 083037, ¶ 73.

¶ 105 a. Irrelevant Ballistics Evidence

¶ 106 In order to prove the defendant guilty of the offenses in this case, the State was required to prove beyond a reasonable doubt that the defendant possessed a firearm. See 720 ILCS 5/24-1.7(a)(2) (West 2006); 720 ILCS 5/24-1.1(a) (West 2006). The ballistics evidence established that the gun recovered by Officer Doherty was a firearm. See 430 ILCS 65/1.1 (West 2006) (providing with certain exceptions not relevant here that " '[f]irearm' 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"). Therefore, the ballistics evidence was relevant to proving the elements of the offenses.

¶ 107 The defendant's reliance on *People v. Almond*, 2015 IL 113817, and *People v. Johnson*, 208 Ill. 2d 53 (2003), is misplaced. In *Almond*, the supreme court addressed whether the unlawful possession of a weapon by a felon statute was ambiguous because it did not distinguish between a loaded or unloaded firearm, not the relevancy or the prejudicial effect of ballistics evidence on the jury. See *Almond*, 2015 IL 113817, ¶ 42. In *Johnson*, the supreme court dealt with misconduct by prosecutors in closing argument, not the admission of relevant evidence.

¶ 108 b. Hearsay

¶ 109 The defendant claims that Officer O'Brien's testimony as the defendant was jumping over the back yard fence that, from the front yard, Mr. Loyde pointed to the defendant and yelled "that's him that's him" was improper hearsay and not subject to any of the exceptions allowing such testimony. The State responds that the statement is not hearsay, where as in this case, Mr. Loyde testified, was subject to cross-examination and the statement was one of identification. See 725 ILCS 5/115-12 (West 2008) (statement not rendered inadmissible if declarant testifies and is subject to cross-examination, and the statement is one identifying the person made after perceiving him); Ill. R. Evid. 801(d)(1) (B) (eff. Jan 1, 2011) (codifying section 115-12).[2]

¶ 110 In *People v. Newbill*, 374 Ill. App. 3d 847 (2007), the reviewing court held that a police officer's testimony concerning the victim's description of the defendant was hearsay under section 115-12, since the victim testified at trial and was subject to cross-examination regarding her statement to the officer. After discussing relevant authority and observing that the supreme court had indicated that what constituted statements of identification had been too narrowly construed, the court in *Newbill* held that the officer's testimony recounting the victim's description of the defendant "was the first step in the 'entire identification process' " and was therefore properly admitted. *Newbill*, 374 Ill. App. 3d at 852-53 (quoting *People v. Tisdel*, 201 Ill. 2d 210, 219 (2002)). The decision in *Newbill* was cited with approval in this court's decision in *People v. Thompson*, 2016 IL App (1st) 133648, ¶ 41 (Rule 801(d)(1)(B) has been interpreted to include any identification evidence).

¶ 111 We conclude that the Officer O'Brien's testimony was properly admitted.

¶ 112 c. Accusation of Perjury

[2] The October 15, 2015 amendment to Rule 801 did not change the rule as it applied in this case.

¶ 113 The defendant claims that in her rebuttal argument, the prosecutor accused Mr. Loyde and the other witnesses for the defendant of committing perjury. The prosecutor argued that the defense witnesses "are the ones trying to make it about a car crash, they are the ones trying to make it oh, the police were trying to bribe us. Not us, them. They are trying to confuse you, creating a red herring as to what happened." Later in the argument, the prosecutor told the jury, "[y]ou know why [Mr. Loyde] didn't report [the attempt to bribe him]? Because it didn't happen. That's the red herring in this case. That's what they want you to believe. They want to change the story, they want you to be confused as to what happened, not the State."

¶ 114 The prosecutor may properly comment on the credibility of the witnesses. *Cosmano*, 2011 IL App (1st) 101196, ¶ 57. Viewed in the context of the entire closing argument and the trial evidence and the reasonable inferences from the evidence, the prosecutor's comments did not amount to error let alone perjury.

¶ 115 d. Misstatement of the Law

¶ 116 The defendant claims that the prosecutor misstated the law as to the offense of bribery when, on cross-examination and in her argument to the jury, the prosecutor accused Mr. Loyde of committing a serious felony by failing to report the officer's attempt to bribe him in order to secure his identification of the defendant as the individual with the gun. The defendant argues that since Mr. Loyde was not a public officer the bribery statute did not apply to the officer's offer to exchange the car repair for his testimony. See 720 ILCS 5/33-1 (West 2006). However, the bribery statute also provides that a person commits bribery when: "[w]ith intent to cause any person to influence the performance of any act related to the ***

function of any *** witness, he promises or tenders to that person any property or personal advantage which he is not authorized by law to accept." 720 ILCS 5/33-1(c) (West 2006).

¶ 117 The jury heard Mr. Loyde describe the "Hispanic" officer's offer to pay for the repairs to his car if he identified the defendant as the man with the gun, which Mr. Loyde testified was not the truth. If true, the officer violated section 33-1(c) of the bribery statute. Bribery is a Class 2 felony. 720 ILCS 5/33-1(f) (West 2006). Mr. Loyde agreed it was a serious offense, but he never reported his conversation with the officer or mentioned it until 2010 when he told an un-named assistant State's Attorney and an un-named attorney representing the defendant.

¶ 118 We conclude that the prosecutor did not misstate the bribery statute and that her argument was based on Mr. Loyde's testimony and was a proper comment on Mr. Loyde's credibility. No error occurred.

¶ 119 e. Prior Consistent Statement

¶ 120 The defendant claims that the State improperly bolstered Officer Doherty's credibility with a prior consistent statement. On direct examination, Officer Doherty testified that he saw the defendant with a gun and that he wrote the defendant's name on the evidence envelope containing the gun. The defendant maintains that Officer Doherty's testimony was not in support of the chain of custody, as the State argues, since Ms. Horn identified the gun evidence envelope by only the inventory number.

¶ 121 Prior consistent statements of a witness are inadmissible for the purpose of corroborating the trial testimony of the witness because they serve to unfairly enhance the credibility of witness. *People v. Johnson*, 2012 IL App (1st) 091730, ¶ 60. Its danger lies in the fact that since people tend to believe what is repeated most often, the likelihood exists that a jury may

attach disproportionate significance to a prior statement of a witness consistent with the witness's testimony. *Johnson*, 2012 IL App (1st) 091730, ¶ 60.

¶ 122 We agree with the State that Officer Doherty's testimony was proper in that it established the chain of custody of the gun and the six empty shell casings. The State must lay an adequate foundation for an object it seeks to enter into evidence. *People v. Woods*, 214 Ill. 2d 455, 466 (2005). Where the object is readily identifiable and its composition is not subject to change, testimony that the object to be admitted is the same object recovered and in the same condition is sufficient to lay an adequate foundation. *Woods*, 214 Ill. 2d at 466. Unlike a gun, bullets and cartridge cases are not unique, and require the State to establish a chain of custody. *People v. Smith*, 2014 IL App (1st) 103436, ¶ 46.

¶ 123 "To establish an adequate chain of custody, the State must show that the police took 'reasonable protective measures' to ensure that the piece of evidence is the same item that the police recovered." *Smith*, 2014 IL App (1st) 103436, ¶ 47 (quoting *Woods*, 214 Ill. 2d at 467). The State must show " 'that it was unlikely that the evidence has been altered.' " *Smith*, 2014 IL App (1st) 103436, ¶ 47 (quoting *Woods*, 214 Ill. 2d at 467).

¶ 124 In this case, Officer Doherty testified to his recovery of the gun from where the defendant dropped it and how the gun and the six empty shell casings were inventoried. The officer identified the envelope containing the gun and the envelope containing the shell casings by the inventory and the case report numbers, the address of the recovery area and the defendant's name, all written on the envelopes in the officer's handwriting. This testimony was necessary to the chain of custody as it established the .38 caliber revolver's connection to the six empty shell casings.

¶ 125 We conclude that Officer Doherty's testimony was necessary as part of the chain of custody and was not a prior consistent statement introduced to bolster the identification of the defendant as the individual the officer saw drop the gun. Therefore, no error occurred in the admission of Officer Doherty's testimony.

¶ 126 None of the defendant's unpreserved claims of error were in fact error. In the absence of error there can be no plain error. *People v. Brant*, 394 Ill. App. 3d 663, 677 (2009).

¶ 127 C. Cumulative Error

¶ 128 In the absence of any error claimed by the defendant, we need not address his argument that cumulative error requires that he receive a new trial.

¶ 129 D. Ineffective Assistance of Counsel

¶ 130 Our determination that no error occurred also resolves the defendant's claims of ineffective assistance of counsel based on counsel's failure to preserve those claims of error for review. The defendant's remaining claim of ineffective assistance of counsel stems from defense counsel's cross-examination of Officer O'Brien. The defendant contends that on cross-examination, defense counsel elicited damaging testimony from Officer O'Brien and failed to move to strike the testimony as hearsay and unresponsive to the question she posed to the officer.

¶ 131 Under cross-examination, Officer O'Brien testified that while the defendant was attempting to jump the backyard fence, Mr. Loyde was in the front yard, looking into the back yard. Officer O'Brien testified that when he went to the front yard, he had a conversation with Mr. Loyde. Defense counsel questioned Officer O'Brien further as follows:

"Q. And who did Mr. Loyde - - what was Mr. Loyde's concern at that point?

A. What was his concern?

Q. His concern, why was he there?

A. Because he explained to me later - - after I - - after Joshua and Jonathan relocated back to the crash, he stated that Jonathan was in a vehicle. He was driving and he just hit his car and then observed Joshua carrying a gun at that location."

¶ 132 The defendant argues that Officer O'Brien's testimony that Mr. Loyde told him that he saw the defendant with a gun was inadmissible hearsay and nonresponsive to the question. He maintains that defense counsel's failure to object and move to strike the testimony constituted ineffective assistance of counsel.

¶ 133 In order to establish ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient, and (2) that the deficient performance prejudiced the defendant. *People v. McGhee*, 2012 IL App (1st) 093404, ¶ 11; *Strickland v. Washington*, 466 U.S. 668 (1984). In order to satisfy the deficiency prong, the defendant must demonstrate that his " 'counsel's representation fell below an objective standard of reasonableness.' " *People v. Cunningham*, 376 Ill. App. 3d 298, 301 (2007) (quoting *Strickland*, 466 U.S. at 688). In order to satisfy the prejudice-prong, the defendant must establish that there was a reasonable probability that the outcome of the trial would have been different, or the result of the proceeding was unreliable or fundamentally unfair. *People v. Bailey*, 374 Ill. App. 3d 608, 614 (2007). The defendant must establish both the deficiency of the performance and the resulting prejudice to him, or the claim fails. *People v. Simms*, 192 Ill. 2d 348, 362 (2000).

¶ 134 Under the deficiency prong, counsel is afforded wide latitude when making tactical decisions. *Cunningham*, 376 Ill. App. 3d at 301. Matters of trial strategy include how to

conduct cross-examination. *People v. Johnson*, 372 Ill. App. 3d 772, 778 (2007). There is a strong presumption that counsel's performance fell within the wide range of reasonable professional assistance. *People v. Berrier*, 362 Ill. App. 3d 1153, 1166 (2006). The presumption will give way if no reasonably effective criminal defense attorney would engage in similar conduct under those circumstances. *People v. Fletcher*, 335 Ill. App. 3d 447, 453 (2002).

¶ 135 The State argues that the testimony elicited by defense counsel from Officer O'Brien was a statement of identification and therefore not hearsay. Ill. R. Evid. 801(d)(1)(B) (eff. Jan 1, 2011). It further argues that counsel's decision not to move to strike the testimony as nonresponsive was a tactical one, designed to avoid drawing the jury's attention to the identification testimony.

¶ 136 In *People v. Evans*, 209 Ill. 2d 194 (2004), the defendant alleged that defense counsel was ineffective where he failed to object to a police officer's testimony that at the jail the defendant told him " 'I come up here a lot, and I'll be here for a long time,' and 'I stabbed that guy.' " E*vans*, 209 Ill. 2d at 204. At trial, the defendant argued that the officer was mistaken and that defendant never made the alleged statement to the officer. In finding that the defendant failed to establish that defense counsel's performance was deficient, the court found it highly possible that defense counsel allowed the statement to pass without objecting to diffuse its importance, rather than object and draw further attention to the statement, particularly since the defendant maintained at trial that the officer's statement was fabricated. *Evans*, 209 Ill. 2d at 221; see *People v. White*, 2011 IL App (1st) 092852, ¶ 75.

¶ 137 The present case is similar to *White*. Under cross-examination by defense counsel, a prosecution witness testified to a remark by a police officer at the lineup he was viewing that

the defendant had " 'beat so many murders.' " The reviewing court noted that defense counsel did not " 'elicit' " the damaging statement. Rather, the witness had given an unexpected response to a general question calling for a " 'a little bit more' " information, and counsel discontinued questioning the witness and did not later highlight the testimony at trial or in closing argument. *White*, 2011 IL App (1st) 092852, ¶ 74. The court in *White*, distinguished *Bailey*, where the reviewing court found no valid trial strategy in defense counsel's line of questioning where counsel "elicited 'inculpatory evidence on cross-examination' and continued questioning, 'digging the hole deeper, eliciting damaging testimony not presented as part of the State's case.' " *White*, 2011 IL App (1st) 092852, ¶ 74 (quoting *Bailey*, 374 Ill. App. 3d at 609, 614).

¶ 138 Similar to *White*, defense counsel questioning did not "elicit" Officer O'Brien's testimony that Mr. Loyde told him that the defendant had a gun. In contrast to defense counsel in *Bailey*, defense counsel did not continue to question Officer O'Brien about Mr. Loyde's statement that the defendant had a gun. Defense counsel's determination to allow the remark to pass without drawing attention to it by objecting was a tactical decision, particularly since Mr. Loyde denied seeing the defendant the night of the incident. See *Evans*, 209 Ill. 2d at 221; *White*, 2011 IL App (1st) 092852, ¶ 75 (defense counsel could have chosen not to move to strike the reference to detective's statement since it supported the defense's position that the detective was biased).

¶ 139 Since the defendant failed to establish that defense counsel's performance was deficient, his claim of ineffective assistance of counsel fails.

¶ 140 III. Whether the Defendant's Convictions Are Void

¶ 141 In his opening brief, the defendant contended that his armed habitual criminal and unlawful possession of a firearm by a felon convictions were void since they were based on his conviction for unlawful possession of a weapon, which was later held unconstitutional. After the State filed its brief, and before the defendant filed his reply brief, the supreme court issued its decision in *People v. McFadden*, 2016 IL 117424.[3]

¶ 142 In *McFadden*, the supreme court held that the defendant was properly convicted of unlawful use of a weapon by a felon even though his felony status arose from his conviction under a statute that had been found unconstitutional. The court explained that the defendant's conviction was subject to being vacated as void *ab initio*. However, the defendant was required to clear his felon status prior to possessing a gun. *McFadden*, 2016 IL 117424, ¶ 37.

¶ 143 In his reply brief, the defendant concedes that in light of *McFadden*, this issue must be resolved against him. We agree. Pursuant to *McFadden*, the defendant's convictions are not subject to vacation as void *ab initio*.[4]

¶ 144 Finally, the defendant contends that defense counsel was ineffective for stipulating to the defendant's underlying convictions. However, under *McFadden*, it was defendant's possession of a weapon prior to clearing his record of the unconstitutional violations that resulted in his conviction. Therefore, defense counsel's stipulation to the existence of the underlying felony convictions was neither a deficient performance nor prejudicial to the defendant. As such, the defendant's claim of ineffective assistance for stipulating to his prior convictions fails.

¶ 145 CONCLUSION

[3] *McFadden* is pending on the supreme court's re-hearing docket.

[4] The defendant's argument directed toward this issue is made solely for the purposes of preserving the issue for future review. Defendant's Reply Brief at 20.

¶ 146 The defendant's convictions and sentence are affirmed.

¶ 147 Affirmed.