2018 IL App (1st) 160178-U

FOURTH DIVISION
December 6, 2018

No. 1-16-0178

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 155
	)	
DWAYNE BURKE,	)	Honorable
	)	Anna Helen Demacopoulos,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Gordon and Reyes concurred in the judgment.

ORDER

Held: We find that the evidence established defendant's guilt beyond a reasonable doubt, the State's closing argument did not deny defendant a fair trial, his mandatory natural life sentences were not unconstitutional as applied to defendant, and his two armed robbery convictions do not violate the one-act, one-crime rule.

¶ 1 Following a jury trial, defendant Dwayne Burke was convicted of two counts of armed robbery with a firearm and sentenced as a habitual criminal to natural life imprisonment. On appeal, defendant contends that: (1) the State failed to prove his guilt beyond a reasonable doubt where only one unreliable eyewitness identified him; (2) the State failed to prove beyond a

reasonable doubt that he was armed with a firearm where both occurrence witnesses testified only that they observed what appeared to be the handle of a gun; (3) he was denied a fair trial by the State's closing argument which commented on his failure to testify; (4) the Habitual Criminal Act (730 ILCS 5/5-4.5-95(a) (West 2008)) violates his constitutional rights; and (5) one of his convictions should be vacated under the one-act, one-crime rule. For the reasons stated below, we affirm defendant's armed robbery convictions and sentences.

¶ 2 I. BACKGROUND

¶ 3 Defendant was charged by indictment as a habitual criminal with two counts of armed robbery with a firearm. The State alleged that on September 10, 2009, defendant robbed a Shell gas station in Dolton, Illinois.[1]

¶ 4 Theresa Watt testified at trial that she was 65 years old and previously worked as a cashier at the Shell gas station in Dolton for approximately nine years. On September 10, 2009, she was working the 3 p.m. to 11 p.m. shift with her co-worker, Ruthie Love. Watt described the layout of the premises. Upon entering through the main door, there was shelving to one side and coolers for beverages at the back of the store. To the left, there was an enclosed booth which housed the two cash register stations. The cashiers accessed the booth through a door located on the side of the booth opposite the entrance of the store.

¶ 5 Watt testified that at approximately 3:42 p.m., she and Love were both working inside the cashier booth when "a young man came in and we made eye contact as he was walking." Watt testified that the man approached the cashier counter and opened the door to the booth, which was an employee-only area but was unlocked at the time. She had never seen the man before,

[1] As defendant notes, he was also charged with four additional separate cases of armed robbery with a firearm; he was acquitted in two cases following a jury trial, he was convicted of armed robbery and sentenced to natural life in *People v. Burke*, 2016 IL App (1st) 132489-U, and he pleaded guilty to aggravated robbery in another case.

whom she described as "black, about 5 foot 7, 5, 8 [*sic*]. He had on a cap so I don't know how his hair was." She did not recall whether he wore any glasses. Watt testified that the man had a backpack and was "carrying it. Like had it down" and not on his back. Watt testified that the man "branished [*sic]* a gun and I saw the handle" and he stated, "Give me your money and you won't get hurt." Watt explained that he pulled "[j]ust the handle" of the gun out of the bag. Watt testified that she opened her register with a key and then stepped back and put her hands up. Defendant went into the register and took what money was there.

¶ 6 Watt testified that defendant next went to Love's register and instructed Love to open it. Love opened her register and also stepped back and defendant took the money from Love's register. Defendant also took a carton of cigarettes from a shelf behind the clerks. He placed everything in his bag and then went out the cashier booth door and exited the store.

¶ 7 Watt testified that the entire encounter lasted no more than 10 minutes. Love called the police, who arrived approximately 20 minutes later.

¶ 8 Love testified that she had worked as a cashier at the gas station for approximately 14 years. She similarly described that there were products, food, and coolers to the right upon entering the gas station, and the enclosed cash register booth was to the left, with the entry to the booth toward the back of the store.

¶ 9 She testified that she was working the 3 p.m. to 11 p.m. shift on September 10, 2009. At approximately 3:42 p.m., she was serving a customer when a man walked into the gas station and entered the cash register booth. Love identified defendant at trial as the man who entered the cashier booth. The door to the booth was unlocked at the time because Love had just left the booth to make coffee and returned to the cash register when a customer came to the window.

¶ 10 Love testified that defendant had a black backpack in his hand. He stated that he "didn't want to hurt us. He just want [*sic*] the money." Love testified that as he said this, he "showed the gun in the bag" and Love was able to see the butt of the gun for "a split second" and "[e]nough for me to just cooperate." The whole gun was never pulled out of the bag and she did not observe a barrel or trigger of the gun. Love testified that she had never seen defendant before. He was wearing a cap and she believed he was also wearing sunglasses.

¶ 11 Love testified that defendant first went to Watt's cash register, which had no cash, so defendant took the money that was in the lottery drawer underneath the register. Love testified that defendant next came over to her register and she opened the drawer and backed up and let him take the money. Defendant then took cartons of cigarettes that were on the shelf behind her. She did not know how many he took, but it was more than one carton. He put the money and cigarettes into his backpack and left the store. Love testified that the entire encounter was "very brief" and a "few minutes." Love called the police.

¶ 12 Love testified that on November 18, 2009, she went to Homewood Police Station to view a lineup and identified defendant. She had never seen him before the robbery.

¶ 13 Dolton police detective Steve Biddle was assigned to investigate the robbery and he conducted the November 18 lineup in which Love identified defendant. Before viewing the lineup, Biddle reviewed with Love an advisory form regarding what the lineup would entail. Biddle testified that defendant was 5 feet, 11 inches tall and weighed 175 pounds.

¶ 14 In the defense case-in-chief, Dolton police officer Bryan Caridine testified that he was working as a detective at the time and received a radio call advising of an armed robbery at the Shell gas station. The radio call did not provide a description of the suspect. According to his police report, he arrived at the gas station at 3:44 p.m. He did not meet anyone outside the gas

station. He interviewed Watt and Love, who both described the suspect as wearing a tan hat, dark sunglasses, tan shirt, and black jeans.

¶ 15 The defense made a motion for a directed verdict, which the trial court denied. Defense counsel also made a motion for a mistrial after the jury retired for deliberations. Defense counsel asserted that the State improperly commented on defendant's failure to testify at trial during closing arguments. The trial court denied the motion.

¶ 16 The jury convicted defendant of two counts of armed robbery. Defendant filed a motion for a new trial asserting, *inter alia*, that his guilt was not proven beyond a reasonable doubt, the trial court erred in denying his motion for a directed verdict based on the lack of firearm evidence, and the trial court erred in denying his motion for a mistrial regarding the State's closing argument. The trial court denied the motion.

¶ 17 At sentencing, the State presented evidence of another armed robbery case against defendant from August 2009, in addition to a certified copy of defendant's guilty-plea armed robbery conviction in 1988 and a certified copy of defendant's guilty-plea conviction to armed robbery in 2001. The trial court noted defendant's extensive criminal record and found it was compelled to sentence defendant as a habitual criminal offender to mandatory natural life imprisonment. His sentences were to run concurrently to each other.

¶ 18 II. ANALYSIS

¶ 19 A. Sufficiency of the Evidence

¶ 20 On appeal, defendant argues there was insufficient evidence to establish (1) his identity as the perpetrator, and (2) that a firearm was involved. We address each argument in turn.

¶ 21 "[T]he State carries the burden of proving beyond a reasonable doubt each element of an offense." *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224-25 (2009) (citing *Jackson v. Virginia*,

443 U.S. 307, 315-16 (1979)). When reviewing the sufficiency of the evidence supporting a conviction, we must view all of the evidence in the light most favorable to the prosecution to determine "whether any rational trier of fact could have found beyond a reasonable doubt the essential elements of the crime." *Id.* (citing *Jackson*, 443 U.S. 318-19). "A criminal conviction will not be set aside unless the evidence is so improbable or unsatisfactory as to create a reasonable doubt of the defendant's guilt." *Id.* at 225. On review, we will not "retry the defendant or substitute [our] judgment for that of the trier of fact." *People v. Gabriel*, 398 Ill. App. 3d 332, 341 (2010). Rather, we defer to the jury's assessment of the credibility of the witnesses, weight of their testimony, and resolution of conflicting evidence or inconsistencies in their testimony. *Id*.

¶ 22 The State bears the burden of proving the identity of the perpetrator. *People v. Slim*, 127 Ill. 2d 302, 307 (1989); 720 ILCS 5/3-1 (West 2008). "Where the finding of the defendant's guilt depends on eyewitness testimony, we decide whether the fact finder could reasonably accept the testimony as true beyond a reasonable doubt." *People v. Williams*, 2015 IL App (1st) 131103, ¶ 69 (citing *People v. Cunningham*, 212 Ill. 2d 274, 279 (2004)).

¶ 23 Here, Love was the only eyewitness to identify defendant. "A single witness' identification of the accused is sufficient to sustain a conviction if the witness viewed the accused under circumstances permitting a positive identification." *Slim*, 127 Ill. 2d at 307. As set forth by the United States Supreme Court in *Neil v. Biggers*, 409 U.S. 188 (1972), and adopted by our supreme court in *Slim*, we consider the following factors in evaluating the reliability of identification testimony:

> "(1) the opportunity the witness had to view the offender at the time of the crime; (2) the degree of attention given by the witness; (3) the accuracy of the

> witness' prior description of the offender; (4) the level of certainty the witness demonstrated when identifying the perpetrator in person; and (5) the amount of time that lapsed between the crime and the in-person identification." *Williams*, 2015 IL App (1st) 131103, ¶ 70 (citing *Slim*, 127 Ill. 2d at 307-08).

¶ 24 Viewing the evidence in the light most favorable to the State, we conclude that Love's identification of defendant was sufficient to establish his identity beyond a reasonable doubt as the armed robber. First, regarding Love's opportunity to view the offender, Love testified that the encounter with defendant lasted "a few minutes." She had a close-up view of defendant during the robbery considering that he entered the cashier booth where she and Watt were. She was able to observe the defendant at close range. She recalled that defendant was wearing a cap and probably sunglasses. She observed him first take money from the other cashier and then come over to her register, where she opened the register drawer and stepped back and let him take the money. She also observed him take cigarettes from the shelf behind her. Under these circumstances, the brevity of the robbery did not impair Love's account as she had sufficient opportunity to view defendant. See *Williams*, 2015 IL App (1st) 131103, ¶ 74 ("Although the entire tragedy took place in a matter of minutes, the witnesses' opportunity to observe what happened goes to the weight and credibility of their testimony.")

¶ 25 With regard to the second factor, the evidence demonstrates that Love gave defendant a significant degree of attention. She first noticed him enter the store at a specific time: 3:42 p.m. She recounted his actions from the moment he entered until the moment he left the store. She observed the butt of a firearm that defendant displayed in his backpack. She followed his instructions regarding the register during the robbery. She provided a physical description to police and she was later able to identify him in a lineup. Contrary to defendant's argument, the

evidence did not show that Love was so overcome with emotion that her attention was diminished.

¶ 26 Concerning the third factor, defendant has not pointed out any inaccuracy in Love's description. Despite never having seen defendant before, she provided a description of him following the robbery to the police which was similar to her description of him in her trial testimony. She was able to identify defendant in a lineup after the robbery. Further, Love's and Watt's descriptions of defendant were similar; they described defendant wearing a cap and carrying a black backpack. That Watt's description of defendant's height (5'7" or 5'8") differed from defendant's actual height (5'11") does not serve to substantially diminish *Love's* identification evidence. Likewise, the fact that *Watt* was unsure whether the perpetrator wore sunglasses does not render *Love's* description inaccurate.

¶ 27 As to the fourth factor, the record does not indicate that Love demonstrated any uncertainty in identifying defendant in person, during the lineup, and at trial. Biddle's testimony also supports this, as he gave no indication that Love hesitated in identifying defendant in the lineup.

¶ 28 Finally, with respect to the fifth factor, a little over two months passed between the time of the armed robbery and the lineup identification. Although the lineup did not occur immediately after the offense, the amount of time between the offense and the in-person identification was not so great as to overrule the jury's determination that Love provided a reliable identification of defendant. "Where two-year lapses of time between the crime and the identification have been upheld ([citations]), the passage of two months between the date of the crime and the date of the lineup does not adversely affect the identification." *People v. Cox*, 377 Ill. App. 3d 690, 699 (2007).

¶ 29 Thus, all five of the *Biggers* factors weigh in favor of the reliability of Love's identification of defendant. Watt's description of the perpetrator is consistent with Love's. Accordingly, we find that when viewed in the light most favorable to the prosecution, the evidence established beyond a reasonable doubt defendant's identity as the perpetrator.

¶ 30 We next address defendant's challenge to the sufficiency of the evidence related to his possession of a firearm during the robbery.

¶ 31 The State had the burden of establishing beyond a reasonable doubt that the defendant "[took] property *** from the person or presence of another by the use of force or by threatening imminent use of force" (720 ILCS 5/18-1(a) (West 2008)) and that he "carrie[d] on or about his *** person or [was] otherwise armed with a firearm" (720 ILCS 5/18-2(a)(2) (West 2008)). See *People v. Wright*, 2017 IL 119561, ¶ 71. Under the FOID Act statute, "a firearm is defined *** as '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' but specifically excluding, among other items, any pneumatic gun, spring gun, paint ball gun, or BB gun." *Id.* (quoting 430 ILCS 65/1.1 (West 2010); 720 ILCS 5/2-7.5 (West 2010)).

¶ 32 Defendant argues that Love and Watt never observed the entire weapon; they viewed only the butt or handle of what they believed was a gun. He contends that Illinois courts have held that a witness's testimony that an object looked like a firearm is insufficient to establish beyond a reasonable doubt that the object possessed by a defendant was a firearm.

¶ 33 We conclude that, viewed in the light most favorable to the State, the witnesses' testimony regarding their observations and defendant's actions and words sufficiently established that he possessed a firearm. While Watt and Love did not testify that they viewed the entire gun or that defendant removed it completely from the bag and pointed it at them, they both testified

that defendant warned them to, "Give me your money and you won't get hurt," as he showed the butt of the gun, and these words and actions were sufficiently threatening to compel Watt and Love to comply with his demands. As our court has stated, "it should be noted that the language of the armed robbery statute merely requires the prosecution to show that the accused carried or possessed a dangerous weapon while committing a robbery. The statute does not require the State to prove that the weapon was displayed or used." *People v. Thomas*, 189 Ill. App. 3d 365, 370 (1989). See *People v. Addison*, 236 Ill. App. 3d 650, 655 (1992) (same) (armed robbery conviction affirmed where the defendant had a gun in her pocket while she participated in taking items from the victim's home and beat the victim.) Accordingly, it is "within the province of the jury to determine the credibility of [the victim's] testimony that defendant was holding a gun in his right hand." *Thomas*, 189 Ill. App. 3d at 370. See also *People v. Fields*, 2014 IL App (1st) 110311, ¶ 37 (sufficient evidence that the defendant possessed a firearm under FOID Act where a witness testified that the defendant held a gun during the robbery and there was no evidence suggesting that the gun fell within the statutory exceptions to the general definition); *People v. Toy*, 407 Ill. App. 3d 272, 288-89 (2011) (sufficient evidence to find the defendant was armed within section 1.1 of the FOID Act where the victim and another witness testified that the defendant had a gun and the victim testified the defendant threatened to kill her and she felt something pressed against her head during the sexual assault); *People v. Lee*, 376 Ill. App. 3d 951, 955 (2007) (sufficient evidence to establish that the defendant was armed with a firearm during a robbery where one witness unequivocally testified that the defendant was holding a gun and threatened to shoot the victim and two other witnesses testified that the defendant had a silver object in his hand).

¶ 34 Defendant argues that our courts have recognized that witnesses regularly mistake objects that look like firearms for actual firearms and have reduced armed robbery convictions to simple robbery on that basis. However, in contrast to the present case, the cases defendant relies on all involve circumstances where there was actual evidence that the object in question was, in fact, not a firearm. See *People v. Dixon*, 2015 IL App (1st) 133303 (the object that the defendant was holding was a BB gun that broke when he dropped it), *People v. Thorne*, 352 Ill. App. 3d 1062 (2004) (objected pointed at the witness's head during the incident which witness believed to be a pistol was a black BB gun), and *People v. Skelton*, 83 Ill. 2d 58 (1980) (witness believed a toy gun was a revolver). We reject defendant's reliance on these cases because in the present case, there was no evidence that the handle of the gun observed by Watt and Love was actually some other object, toy gun, or BB gun. In fact, no BB gun or other toy gun was recovered or placed in evidence. "[I]n weighing evidence, the trier of fact is not required to disregard inferences which flow normally from evidence before it [citation], nor need it search out all possible explanations consistent with innocence and raise them to a level of reasonable doubt [citation]." *People v. Campbell*, 146 Ill. 2d 363, 380 (1992). See also *People v. Clark*, 2015 IL App (3d) 140036, ¶ 24 (rejecting assertion that witnesses' testimony that the defendant was carrying a rifle was insufficient evidence to establish that the object was a "firearm" instead of an air gun or BB gun because "these things were not offered as evidence at trial and were never considered by the jury").

¶ 35 Defendant also contrasts the present case to cases wherein the court found sufficient evidence to establish the firearm element, citing *Clark*, 2015 IL App (3d) 140036, ¶¶ 22-23 (sufficient evidence to establish that the defendant was carrying a rifle based on witness testimony that he possessed a black rifle with a red laser pointer and both witnesses could see the

victim, defendant, and the rifle); *People v. Wright*, 2015 IL App (1st) 123496, ¶ 76, *aff'd in part, rev'd in part*, 2015 IL 119561 (sufficient evidence to establish codefendant possessed a firearm during robbery where codefendant stated "this is a robbery" and lifted hoodie to reveal what witness believed to be a black automatic or semiautomatic gun and witness felt something sharp pressed into his back, another witness testified that the codefendant told her she was being robbed and she observed the handle of a gun in his waistband, and another witness believed the gun was a "9 millimeter pistol").

¶ 36 Insofar as defendant attempts to distinguish *Clark* and *Wright* on their facts, including the witnesses' opportunities to view or touch the guns, we reiterate that the evidence presented at trial here, when viewed in the light most favorable to the prosecution, was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant was armed with a firearm during the commission of the robbery. "[T]he question of whether eyewitness testimony is sufficient to establish that an object is a 'firearm' is a question of fact properly determined by the jury." *Clark*, 2015 IL App (3d) 140036, ¶ 24. "The State does not have to prove the gun is a firearm [within the meaning of the statutory definition] by direct or physical evidence; unequivocal testimony of a witness that the defendant held a gun is circumstantial evidence sufficient to establish that a defendant was armed during a robbery." *Wright*, 2015 IL App (1st) 123496, ¶ 74.

¶ 37 Defendant also relies on *People v. Crowder*, 323 Ill. App. 3d 710, 711-12 (2001), but we find this case inapposite because the issue in *Crowder* was whether the trial court properly dismissed the indictment for weapons-related charges where the State destroyed the gun upon which the charges were based. The appellate court upheld the dismissal because the defendant's ability to prepare for trial was forever prejudiced by the destruction of the firearm; while the

State could still prove its case by presenting officers' testimony that the gun seized was in fact an operable firearm, defendant would not be able to refute this assertion. *Id.* at 712. Additionally, unlike *Crowder*, the present case does not involve destruction of evidence or a discovery violation.

¶ 38 B. Closing Arguments

¶ 39 Defendant next contends that the State improperly commented on his failure to testify during closing arguments. Defendant asserts that this comment denied him a fair trial. The State contends that defendant forfeited this issue because he failed to object to the statement during closing arguments.

¶ 40 Although defendant moved for a mistrial regarding the challenged remark after the jury retired for deliberations and included it in his posttrial motion for a new trial, he concedes he did not raise an objection at the time the comment was made. "To preserve a claim for review, a defendant must both object at trial and include the alleged error in a written posttrial motion." *People v. Thompson*, 238 Ill. 2d 598, 611 (2010). Defendant argues, however, that we may review his claim under either prong of the plain error doctrine, under which a reviewing court may consider unpreserved error if the defendant shows that a clear or obvious error occurred and (1) the evidence was so closely balanced that it threatened to tip the weight of the evidence against defendant or (2) the error was so egregious that it affected the fairness of the trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Nowells*, 2013 IL App (1st) 113209, ¶ 18 (citing *People v. Sargent*, 239 Ill. 2d 166, 189 (2010)). Given that "[w]ithout reversible error, there can be no plain error[,]" *People v. McGee*, 398 Ill. App. 3d 789, 794 (2010), we first determine whether an error occurred.

¶ 41 We note that it is unclear whether the proper standard of review to be applied to claims of prosecutorial misconduct in closing arguments is *de novo* or an abuse of discretion. See *People v. Phillips*, 392 Ill. App. 3d 243, 274-75 (2009) (comparing *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007) (reviewing claim of prosecutorial misconduct *de novo*), with *People v. Blue*, 189 Ill. 2d 99, 132 (2000) (applying abuse of discretion standard to prosecutorial misconduct claim)). But see *People v. Cook*, 2018 IL App (1st) 142134, ¶¶ 63-64 (finding no conflict exists regarding the proper standard of review and holding that the abuse of discretion standard applies "to determinations about the propriety of a prosecutor's remarks during argument," while the *de novo* standard applies to "the legal issue of whether a prosecutor's misconduct, like improper remarks during argument, was so egregious that it warrants a new trial [citation].") Regardless, we need not resolve this issue because the outcome here will be the same under either standard. *Phillips*, 392 Ill. App. 3d at 275.

¶ 42 "Every defendant is entitled to fair trial free from prejudicial comments by the prosecution." *People v. Young*, 347 Ill. App. 3d 909, 924 (2004). Generally, "prosecutors are afforded wide latitude in closing argument, and usually a trial court's determination as to the propriety of such arguments will not be disturbed on review." *People v. Derr*, 316 Ill. App. 3d 272, 275 (2000). We must view a prosecutor's closing argument as a whole, considering any challenged remarks in context. *People v. Thompson*, 2016 IL App (1st) 133648, ¶ 47. Improper remarks require reversal only if they " 'engender substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilt resulted from them.' " *People v. James*, 2017 IL App (1st) 143036, ¶ 46 (quoting *Wheeler*, 226 Ill. 2d at 123).

¶ 43 In the present case, defendant objects to the following remark during the prosecutor's closing argument:

> "That's the event that brings you here today, ladies and gentlemen. And the evidence you heard in this case came from this witness stand. *There were three people present on the day of September 10th of 2009. And you have heard from two of them.*
>
> They told you what happened that day. It is not complicated. It is not complex. It comes down to what probably occurred in a matter of seconds." (Emphasis added.)

¶ 44 "A defendant has the constitutional right not to testify, and therefore a prosecutor cannot comment on the exercise of that right." *People v. Jackson*, 2017 IL App (1st) 142879, ¶ 60. That said, a prosecutor may comment on the evidence and make reasonable inferences therefrom, "including a defendant's credibility or the credibility of the defense's theory of the case." *People v. Williams*, 2015 IL App (1st) 122745, ¶ 12. A prosecutor may also respond to comments or arguments by the defense which invite a response. *People v. Willis*, 2013 IL App (1st) 110233, ¶ 102. Even more, "it is generally permissible for the State to point out that evidence is uncontradicted even if the defendant is the only person who could have provided contrary proof. [Citations.] Such comments are not permitted, however, if they are intended or calculated to direct the attention of the jury to the defendant's failure to testify." *Derr*, 316 Ill. App. 3d at 275.

¶ 45 Here, defendant's trial counsel argued that the remark implied defendant should have testified or that there was a third victim or witness who could have testified in support of the State. The trial court denied the motion, finding that counsel's failure to contemporaneously object deprived the court of an opportunity to give a limiting instruction to the jury. The trial court also held that the State's argument followed the evidence, as Love testified that there was a customer in the store at the time, which would have meant there were three people in the store. In

finding no error, the trial court further observed that (1) it instructed the jury several times that the lawyers' arguments were not evidence and the jury was to rely on its collective memory of the evidence, and (2) it instructed the jury multiple times that it was not to consider the fact that defendant did not testify.

¶ 46 We find no error in the trial court's decision. Considering the State's closing arguments in their entirety, as we must (*Thompson*, 2016 IL App (1st) 133648, ¶ 47), the challenged remark was not "intended or calculated" to direct the jury's attention to defendant's failure to testify. Indeed, the prosecution did not mention defendant or his failure to testify in the challenged remark. Rather, the State argued that the testimonial evidence established that defendant committed the armed robbery. The State reviewed Love's and Watt's testimony in detail regarding their opportunity to view the handle of the gun and their accounts of defendant's actions and statements during the incident. The State then discussed how the witnesses' testimony established each element of armed robbery. The State further argued that "the evidence that you heard came from this witness stand" and the jury would be the only judge "of the believability of the witnesses and the weight to be given to their testimony ***." The State reviewed the factors the jury would consider in weighing eyewitness testimony and argued that Watt's and Love's identification testimony was believable based on those factors. Moreover, as the trial court found, one witness testified that she was servicing a customer at the time defendant entered the store, which could have been the third person referred to in the prosecution's comment.

¶ 47 Additionally, we must view the remark in light of the defenses advanced by defendant. *Willis*, 2013 IL App (1st) 110233, ¶ 102. The challenged argument was in response to the defense's assertion, from the outset of the case, and especially in closing arguments, that there

was "no evidence" that defendant committed the armed robberies. Defense counsel asserted that there was no physical evidence such as fingerprints, DNA, photographs, video, a hat, sunglasses, or a weapon linking defendant to the crimes. In closing, the defense argued that the evidence did not establish that there was a firearm in the backpack or defendant's identity as the perpetrator. Defense counsel reiterated the argument that there was no physical evidence linking defendant to the crime. Defense counsel specifically attacked the identification evidence, criticizing the witnesses' opportunity to view the robber, Watt's failure to identify defendant, and pointing out discrepancies in the witnesses' accounts.

¶ 48 Considering this record, we find the prosecutor's comments were intended to show that the elements of armed robbery were established by the testimony of the two eyewitnesses and to contradict the defense's assertion that there was "no evidence" in the case, rather than to call attention to the fact that defendant did not testify. On the whole, we cannot say that the prosecutor's comment engendered such "substantial prejudice" against defendant "such that it is impossible to say whether or not a verdict of guilt resulted from them." (Internal quotation marks omitted.) *James*, 2017 IL App (1st) 143036, ¶ 46.

¶ 49 Moreover, as the trial court noted, it could have issued a limiting instruction at that moment had defendant timely objected. Even more, the trial court's instructions, as given, cured any potential error, as it instructed the jury several times that the lawyers' arguments were not evidence and that it was not to consider the fact that defendant did not testify. "A trial court may usually cure any prejudice arising from improper argument by promptly sustaining an objection to the challenged comment and giving a proper jury instruction." *People v. Campbell*, 2012 IL App (1st) 101249, ¶ 42. Also, a prompt objection and cautionary instruction are often sufficient to cure any prejudice resulting from the particular error alleged here, *i.e.*, improper prosecutorial

comments regarding a defendant's failure to testify. *People v. Whitehead*, 116 Ill. 2d 425, 446-47 (1987), *People v. Sawyer*, 42 Ill. 2d 294, 300-01 (1969)). As we have concluded that no error occurred, there can also be no plain error. *McGee*, 398 Ill. App. 3d at 794.

¶ 50 C. Proportionate Penalties

¶ 51 Defendant argues that, as applied to him, the Habitual Criminal Act, 730 ILCS 5/5-4.5-95(a) (West 2008), under which he received a mandatory natural life sentence, is disproportionate to the severity of the offense such that it violates the State and federal constitutional guarantees of proportionality in sentencing. Ill. Const., art. I, § 11; U.S. Const., amends. VIII, XIV. Defendant argues that the sentence here was so disproportionate to the offense as to shock the moral sense of the community.

¶ 52 The State responds that our courts have repeatedly found the statute does not violate the proportionate penalties clause and it does not violate defendant's rights as applied to him because he has now been convicted of four armed robberies. The State asserts that armed robbery is not a "minor inconsequential offense" and defendant has an extensive criminal history.

¶ 53 "We review the constitutionality of a statute *de novo.*" *People v. Collins*, 2015 IL App (1st) 131145, ¶ 32. There is a strong presumption that a statute is constitutional; the challenging party bears the burden of "clearly establish[ing]" that the statute violates constitutional protections. *People v. Sharpe*, 216 Ill.2d 481, 487 (2005). "[A]n as-applied challenge requires a showing that the statute is unconstitutional as it applies to the specific facts and circumstances of the challenging party." *People v. Harris*, 2018 IL 121932, ¶ 38.

¶ 54 Under the Illinois State Constitution, "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. The eighth amendment, in turn, prohibits the

imposition of "cruel and unusual punishments." U.S. Const. amend. VIII. The proportionate penalties clause is "coextensive with" the eighth amendment's cruel and unusual punishment clause. *People v. Patterson,* 2014 IL 115102, ¶ 106. "To succeed on a proportionate penalties claim, a defendant must show either that the penalty imposed is cruel, degrading, or [that it is] so wholly disproportionate to the offense that it shocks the moral sense of the community***." *People v. Klepper,* 234 Ill. 2d 337, 348-49 (2009). The legislature generally enjoys broad discretion in setting criminal penalties, which courts typically decline to overrule. *Sharpe*, 216 Ill. 2d at 487. Ultimately, the relevant inquiry is "whether the legislature has set the sentence in accord with the seriousness of the offense." (Internal quotation marks omitted.) *People v. Ligon*, 2016 IL 118023, ¶ 10.

¶ 55 The challenged statute provides:

> " 'Every person who has been twice convicted in any state or federal court of an offense that contains the same elements as an offense now *** classified in Illinois as a Class X felony, *** and who is thereafter convicted of a Class X felony, *** committed after the 2 prior convictions, shall be adjudged an habitual criminal.' 730 ILCS 5/5-4.5-95(a)(1) (West 2010). In addition, 'anyone adjudged an habitual criminal shall be sentenced to a term of natural life imprisonment.' 730 ILCS 5/5–4.5–95(a)(5) (West 2010)." *Collins*, 2015 IL App (1st) 131145, ¶ 33.

¶ 56 Defendant acknowledges that Illinois courts have repeatedly upheld the constitutionality of the statute. See, *e.g.*, *People v. Dunigan,* 165 Ill. 2d 235, 244-48 (1995); *People v. Huddleston*, 212 Ill. 2d 107, 148 (2004); *People v. Fernandez*, 2014 IL App (1st) 120508, ¶ 64; *People v. Collins*, 2015 IL App (1st) 131145, ¶¶ 34-35. He contends, however, that this court

should that find application of the statute in his case resulted in a constitutionally disproportionate sentence because he falls outside the class of offenders the statute is meant to punish, considering that no one was physically injured and the witnesses' brief glimpse of what appeared to be the handle of a gun resulted in the harshest penalty possible.

¶ 57 We disagree. This was defendant's third Class X felony conviction within 20 years. Armed robbery is not a minor, inconsequential offense. Our legislature and courts have concluded that crimes committed with a firearm enhance the offender's ability to kill the intended victim or inflict harm or death on bystanders. See *Sharpe*, 216 Ill. 2d at 524. In fact, this court has recently upheld the habitual criminal offender statute against similar challenges where both defendants were convicted of non-violent offenses. *Fernandez*, 2014 IL App (1st) 120508, ¶¶ 38, 43 (controlled substance offense); *Collins*, 2015 IL App (1st) 131145, ¶ 34 (controlled substance offenses). Here, although the victims were not physically injured, defendant's statement, "Give me your money and you won't get hurt," while brandishing the handle of a gun was sufficiently threatening to cause both Love and Watt to comply with his orders. As such, forcibly taking their property while brandishing the handle of a fireman was inherently violent.

¶ 58 Defendant also argues that the recent decisions of the United States Supreme Court demonstrate an evolving standard of decency which disfavors mandatory life sentences. However, the cases relied on by defendant involved the imposition of life sentences on *juveniles*. See *Graham v. Florida*, 560 U.S. 48 (2010); *Miller v. Alabama*, 567 U.S. 460 (2012); *People v. Miller*, 202 Ill. 2d 328 (2002). These cases presented a wholly distinct analysis and consideration from defendant's circumstances—an individual with an extensive criminal background, he was approximately 41 years of age when he committed the instant offenses, he was the sole and principal offender, and he had committed other armed robberies around the same time.

¶ 59 Accordingly, we are unable to conclude that the mandatory natural life sentences imposed under the Habitual Criminal Act constituted cruel and unusual punishment or violated the Illinois proportionate penalties clause as applied to defendant. In light of the facts involved in the instant offenses and defendant's criminal history, defendant has demonstrated that he poses a significant risk to the community and is likely incapable of rehabilitation. We therefore affirm defendant's sentence.

¶ 60 D. One-Act, One-Crime Rule

¶ 61 In his final contention on appeal, defendant argues that his two convictions for armed robbery violate the one-act, one-crime rule, because the evidence showed that he only took money from one establishment—the gas station—and not any money or items belonging to Watt or Love personally. He contends that one of his armed robbery convictions should be vacated.

¶ 62 Defendant recognizes that he raises this issue for the first time on appeal, arguing that it is reviewable under the second prong of the plain error doctrine. *People v. Scott*, 2015 IL App (1st) 133180, ¶ 12.

¶ 63 According to the one-act, one-crime doctrine, multiple convictions cannot stem from the same physical act. *Scott*, 2015 IL App (1st) 133180, ¶ 14; *People v. Miller*, 238 Ill. 2d 161, 165 (2010); *People v. King*, 66 Ill. 2d 551, 566 (1977). As stated, a defendant "commits armed robbery when he or she knowingly takes property from the person or presence of another by the use of force or by threatening the imminent use of force while carrying a firearm, or during the commission of the offense, personally discharges a firearm." *Scott*, 2015 IL App (1st) 133180, ¶ 15 (citing 720 ILCS 5/18-1, 18-2(a)(2), (a)(3) (West 2010)).

¶ 64 "Under well-settled Illinois law, multiple armed robbery convictions cannot lie when there is a single taking of property, even when multiple individuals are present and threatened."

Scott, 2015 IL App (1st) 133180, ¶ 16 (only a single taking of property occurred and only one conviction of armed robbery could stand where passenger accompanied pizza delivery driver and the defendant took the pizzas from the passenger at gunpoint). See also *People v. Mack*, 105 Ill. 2d 103, 134-36 (1984) (holding defendant could not be convicted of two counts of armed robbery where there was but one taking of money at a bank; defendant shot security guard and threatened bank official with imminent use of force while accomplices jumped over partitions and removed money from teller's cages), *vacated on other grounds, Mack v. Illinois*, 479 U.S. 1074 (1987); *People v. Hunter*, 42 Ill. App. 3d 947, 951-52 (1976) (only one of two convictions for armed robbery could stand where the defendant threatened the only two people in a restaurant and one opened the restaurant's cash register; although two victims were present and both were threatened and both had custody of the property, there was "only a single act" and the property was stolen from the cash register, "not from the person of either woman.")

¶ 65 As our courts have explained, "[t]he ownership of the property taken is unimportant; its possession by the victim is adequate for the purpose of establishing the crime." *People v. Scott*, 23 Ill. App. 3d 956, 967 (1974). "[T]he property taken must have been in the presence or control of the victim." *Mack*, 105 Ill. 2d at 136. In *Scott*, the property taken was money removed from the cash register in a restaurant while the bartender and owner were both present and threatened with force and with a gun. *Id.* at 968. As such, the restaurant owner had ownership of the money while the bartender had custody and control over it. *Id.* The court found that the two convictions for armed robbery were based on a single act or transaction and thus vacated one conviction. *Id.*

¶ 66 We do not agree with defendant that one of his two convictions of armed robbery must be vacated under the one-act, one-crime rule. The present case differs from the circumstances present in *Mack*, *Hunter*, and *Scott.* Here, defendant engaged in two separate actions when he

twice took different property (*i.e.*, money) from the presence or control of two different individuals. While both Watt and Love were present and both were threatened with force and with a gun, defendant approached each cashier individually and took money from their respective cash registers. This is distinct from *Hunter* or *Scott* where only one cash register was robbed while two individuals were present. We thus agree with the State that two separate acts of taking occurred here. See *People v. Butler*, 64 Ill. 2d 485, 489 (1976) (upholding two armed robbery convictions where two victims standing within arm's reach of each other were simultaneously robbed of their money by defendant and codefendant); *People v. Thomas*, 67 Ill. 2d 388, 389-90 (1977) (five armed robbery convictions upheld where the defendant took money and personal property from each of the five victims during robbery outside and inside of a house).

¶ 67 III. CONCLUSION

¶ 68 For the reasons stated, we affirm defendant's armed robbery convictions and sentences.

¶ 69 Affirmed.