2015 IL App (1st) 130051-U

No. 1-13-0051

June 12, 2015

FIFTH DIVISION



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IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>MICHAEL ORIA,<br><br>Defendant-Appellant. | ) | Appeal from the Circuit Court of Cook County.<br><br>No. 11 CR 7922<br><br>The Honorable Thomas V. Gainer, Judge, presiding. |

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

**O R D E R**

¶ 1 *Held*: Defendant's AUUW conviction for carrying an uncased, loaded, and immediately accessible firearm is reversed pursuant to *People v. Aguilar*, 2013 IL 112116. His AUUW conviction for carrying a firearm without a valid firearm owner's identification (FOID) card is affirmed as (1) the FOID-card provision of the AUUW statute is constitutional, (2) the trial court did not err by refusing to provide certain jury instructions, (3) the court properly responded to the jury's note, and (4) the State's closing argument was not improper.

¶ 2 Following trial, a jury found defendant, Michael Oria, guilty of two counts of aggravated unlawful use of a weapon (AUUW). The trial court subsequently sentenced him to one year in prison. Defendant appeals, arguing (1) his AUUW conviction for carrying an uncased, loaded, and immediately accessible weapon must be reversed pursuant to *People v. Aguilar*, 2013 IL 112116, and (2) his AUUW conviction for lacking a firearm owner's identification (FOID) card must be reversed because the FOID subsection of the AUUW statute is not severable from the portion of the statute invalidated in *Aguilar* or the unlawful use of a weapon (UUW) statute found unconstitutional in *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), and the FOID provision unconstitutionally infringes on the second amendment rights of those under the age of 21. In the alternative, defendant contends his AUUW conviction for lacking a FOID card must be reversed and remanded for a new trial because (1) the trial court failed to instruct the jury on essential elements of the offense when it refused to provide instructions on knowledge and possession as a voluntary act, (2) the court improperly refused to answer the jury's question about those elements, and (3) the State misstated the law during its closing argument. For the reasons that follow, we affirm in part, reverse in part, and remand with directions.

¶ 3 I. BACKGROUND

¶ 4 The State charged defendant with, *inter alia*, one count of AUUW for carrying on or about his person an uncased, loaded, and immediately accessible firearm outside his home (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2010)). It also charged him with one count of AUUW based on carrying a firearm on or about his person a without a valid FOID card (720 ILCS 5/24-1.6(a)(1), (a) (3)(C) (West 2010)).

¶ 5 At trial, Chicago police officer William Murphy and his partner, Vladan Milenkovic[1], testified that they were driving north on Ewing Avenue in an unmarked police car at approximately 1:15 p.m. on May 5, 2011. As they were driving, the officers observed a white vehicle turn onto 103rd Street without stopping at the stop sign. The vehicle was directly in front of the officers' car when it turned. Milenkovic activated the police car's emergency lights and turned behind the vehicle. Murphy and Milenkovic then observed an arm extend from the front passenger window of the car and throw a dark object. According to Murphy, the person throwing the object appeared to be wearing a sweatshirt with gray sleeves. Milenkovic likewise described the person who threw the object as wearing gray clothing, testifying he could see "just below the elbow down to" the person's fingertips. Milenkovic estimated that the officers were about 20 feet away when they saw the object being tossed, while Murphy testified they were about 30 feet away.

¶ 6 As the officers drove by the object, which had been thrown to the sidewalk, Murphy observed that it was a black handgun. The driver of the white car pulled over a few seconds later, and Murphy and Milenkovic exited their squad car and approached the vehicle. They observed five people inside the car. Defendant was sitting in the front passenger seat, wearing a gray sweatshirt. According to Murphy, none of the car's other occupants were wearing gray sweatshirts, although he could not recall, and the police report did not disclose, what the other occupants were wearing. The officers ordered the occupants out of the car and patted them down.

¶ 7 Approximately three additional officers arrived to the scene shortly thereafter, and Murphy returned to the sidewalk where the gun had been tossed. He described the gun as a black or blue steel finish .25 caliber Baretta. After retrieving the gun, Murphy brought it back to

[1] As he did not provide it during trial, we have gleaned Milenkovic's first name from the *voir dire* proceedings.

Milenkovic, who unloaded the magazine with the assistance of another officer. The gun contained eight live rounds. At the station, Milenkovic inventoried the gun, eight live rounds, and the magazine. Murphy testified that the gun was sent to a lab to determine that it was a working firearm. However, Murphy did not send the gun to be fingerprinted or for DNA testing, nor did he check defendant's fingers or hands for gunshot residue. He explained that gunshot residue testing was not performed because the officers had no evidence that defendant fired the weapon.

¶ 8 Defendant and the driver of the car, Eddie Contreras, were transported to the police station. Contreras was issued two traffic citations. Milenkovic denied telling defendant's mother that "I know this was not your son's gun, but I didn't see who threw it, because I was driving." He also denied pointing to Contreras and saying to defendant's mom, "ask this punk why your son is being arrested."

¶ 9 The State entered into evidence a certified document from the Illinois State Police which stated that defendant was never issued a FOID card as of November 11, 2011.

¶ 10 Tiffany Flood testified for the defense. She and four others were going to a park to play basketball on May 5. Contreras was driving, defendant was in the front passenger seat, Sergio Rosa was in the back passenger seat, Flood was in the middle seat, and Mota was in the left rear seat. As they were traveling on Ewing Avenue, Flood noticed two men that she knew, Michael Anaya and "Frizz," who were "pulled over" next to two police officers. Anaya and "Frizz" were on bicycles. Contreras' car "jolted" or "jerked" before turning right onto 103rd Street. Flood was surprised when the car turned because the park was straight ahead, not to the right. After Contreras made the right turn, Flood felt him reach under his seat and adjust it. He then pulled a gun out, leaned his right arm over, and threw the gun out the passenger side window. Afterward,

"[e]veryone was screaming." Flood did not know that a gun was in the car. Flood was surprised when defendant was arrested, and she told a police officer after the incident that defendant was not the person who threw the gun. She also spoke to a State's Attorney investigator over the phone and told him that Contreras had the gun, not defendant.

¶ 11 Eric Mota testified that as the white car passed 106th Street on Ewing Avenue, he noticed police cars had pulled over a car with three or four people inside, including a friend named Michael Anaya. Mota saw Anaya point to Contreras' white car as they drove by. The police then got back into their car and started to pursue Contreras' vehicle. When Contreras saw the police, he accelerated and "blew a stop sign" as he made a right turn onto 103rd Street. Mota then felt Contreras' seat "jolt back" as Contreras reached under it and pulled something out. Contreras extended his hand out the right passenger window and tossed the object out. Mota did not know the object was a gun until Contreras threw it. Afterward, the car's occupants started screaming and shouting. According to Mota, both defendant and Rosa were wearing gray sweatshirts, and Contreras was wearing a white sweatshirt. Mota was confused as to why defendant was the one being taken into custody, and he told Murphy and Milenkovic that they had the wrong person. He also told a sheriff on the scene, who was in a long-sleeve white shirt, that the wrong person had been arrested.

¶ 12 Yolanda Avila testified that after learning her son was arrested, she went to the police station. After speaking to somebody at the front desk, Avila observed Milenkovic "coming out of the back" area of the station with Contreras. Milenkovic informed her that her son was being arrested for a gun that was tossed out of the window. She denied that her son had a gun, and Milenkovic said he did not believe it was her son's gun, either, and she should ask "this punk,"

meaning Contreras, about it. Milenkovic also told her that he was driving, so he did not see who could have tossed the gun out of the window.

¶ 13 In rebuttal, Sergeant Daniel Knezvic testified that he was the sole sergeant on the scene on May 5, 2011. He was wearing his uniform, which consisted of a white shirt. The other uniformed officers on the scene would have been wearing blue shirts, although he was not sure whether Milenkovic and Murphy were in plainclothes or uniform. None of the individuals in the car told Knezvic that the wrong person had been arrested.

¶ 14 Cook County State's Attorney investigator Robert Hursht also testified in rebuttal that he spoke to Flood on the phone on May 1, 2012. She said she did not want to be interviewed, and she did not tell Hursht that the wrong person had been arrested or that the gun belonged to Contreras. About 115 investigators worked at the State's Attorney's office.

¶ 15 During the jury instruction conference, defense counsel tendered Illinois Pattern Jury Instructions, Criminal No. 4.15 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 4.15). That instruction provides as follows: "Possession is a voluntary act if the person knowingly procured or received the thing possessed, or was aware of his control of the thing for a sufficient time to have been able to terminate his possession." Counsel expressed concern that the jury could find defendant possessed the gun just because he was sitting in the car. The trial court indicated it might agree with defense counsel if the gun had been found under defendant's seat, but that was not the case and defendant's case did not involve constructive possession. Rather, the case consisted of two conflicting stories about who actually possessed the gun.

¶ 16 Defense counsel also tendered proposed jury instructions regarding the mental state of knowledge. Those instructions included Illinois Pattern Jury Instructions, Criminal, No. 5.01B (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 5.01B), relating to "knowledge—willfulness,"

and Illinois Pattern Jury Instructions, Criminal, No. 5.01C (4th ed. Supp. 2011) (hereinafter, IPI Criminal 4th No. 5.01C (Supp. 2011), relating to "actual knowledge." Counsel explained that she was concerned the jury would be confused regarding the requisite intent and could find the State established that defendant knowingly possessed the gun because he was in the car and near a gun. The trial court rejected the knowledge instructions, explaining that it "might be a whole different situation" if defendant testified that the gun was thrown into his lap and he flipped it out the window because Contreras tricked him. The court noted, however, that the evidence consisted of witnesses' testimony that Contreras threw the gun out the window, not defendant, and counsel would be able to argue defendant never possessed the gun.

¶ 17 Following the presentation of evidence, the case proceeded to closing arguments. During its closing, the State argued that "[t]his defendant is here for one reason and one reason only because on May 5, 2011, he and no one else held this gun in his hands. At the time he held this gun in his hands it was loaded." The State explained that to prove defendant guilty of AUUW, it had to show he knowingly carried or possessed a firearm on or about his person. Later, the State asserted, "Common sense tells you that it was this defendant who tossed that gun. The gun was in this defendant's hand when he tossed it and that is possession plain and simple period. We have met that proposition." In defense counsel's closing, she argued the State was required to show the defendant "knowingly possessed or carried a firearm on or about his person" and "what the prosecutor just argued about if he touched it, that's possession is not correct." The State objected, and the trial court sustained the State's objection, advising the jury that it would instruct them on the law at the close of the case.

¶ 18 Following the parties' arguments, the trial court instructed the jury, *inter alia*, that to sustain defendant's AUUW charges, the State was required to prove he knowingly carried a

firearm on or about his person. It further instructed the jury that if it did not find the State proved the proposition beyond a reasonable doubt, it should find defendant not guilty.

¶ 19 After receiving instructions, the jury retired to deliberate. During deliberations, the jury sent the trial court a note asking, "If the defendant was handed the gun by the driver or another occupant and the defendant then passed it out the window, is that considered possession?" The trial court consulted the attorneys for suggestions on how to respond. Defense counsel speculated that the jury was confused based on the State's closing argument that defendant possessed the gun because "the gun was in his hand." Counsel proposed the jury be instructed that the State had to prove certain factors to establish actual possession. The trial court responded that it felt the State's argument was proper on the facts of the case. Defense counsel then proposed the jury be instructed further on "knowledge" and the standard of "knowingly." The State, however, proposed that the jury simply be instructed that it had the law and it should continue deliberating. The court responded as follows.

> "Here's the problem that I have with this question. What this jury is asking us to do is to give them information about a theory that nobody has argued, and as such I think it would be improper to in any way activated [*sic*] knowledge that their theory is correct because if we acknowledge that their theory is correct, then we have to take it a step further and say he had it in his hand.
>
> If you decide that he had it in his hand, then he possessed it, and I'm not willing to do that so what I think should be said is that you have all of the instructions. Continue to deliberate. Because

> the only way to do anything but that is to acknowledge their theory of the case, and I'm not going to do that.
>
> Nobody argued that. Nobody said anything like that. This is something they came up with on their own so I think that they just have to thrash it out and come up with a theory on their own."

¶ 20 Defense counsel stated that she and co-counsel had anticipated "this was going to be an issue" and had proposed an instruction in that regard. The trial court asked whether she was referring to IPI Criminal 4th No. 4.15 and she responded she was "actually going to refer to" IPI Criminal 4th No. 5.01C (Supp. 2011), the instruction on actual knowledge, because the jury was not "really" asking about "possession," but rather, about "the definition of knowledge as it is presented in the definition of the crime in the jury instruction." Defense counsel argued the jury's question showed it was unsure whether defendant committed a crime if he did not know about the gun until the moment the police turned on their sirens and another person threw him the gun and told him to throw it out the window, which was what the jury appeared to believe happened. The court responded that the instructions it had given to the jury made clear the State had to prove defendant "knowingly carried a firearm on or about his person." The court stated that "[t]his theory that the jury has come up [with,] it is an issue of fact for the jury, and apparently they were at least considering this issue. Once they have resolved [the] issue, it's very clear what the State has to prove that he knowingly carried on or about his person a firearm. They've got adequate instructions." The court further stated that it had considered the instructions defense counsel had proposed and it had "really focused" on IPI Criminal 4th No. 4.15, but it did not think that instruction fit. Defense counsel stated that she was not asking the court to reconsider

IPI Criminal 4th No. 4.15. Thereafter, the court responded to the jury's note as follows. "You have all the instructions. Continue to deliberate."

¶ 21 The jury found defendant guilty of both counts of AUUW. At a later hearing, the trial court denied defendant's motion for a judgment of acquittal or a new trial. It then sentenced him to one year in prison on the AUUW count premised on possessing an uncased, loaded, and immediately accessible firearm, merging the AUUW count for lacking a FOID card into the first AUUW count. This appeal followed.

¶ 22 II. ANALYSIS

¶ 23 On appeal, defendant first argues, and the State concedes, that defendant's conviction for carrying an uncased, loaded, and immediately accessible weapon must be vacated pursuant to the decision in *People v. Aguilar*, 2013 IL 112116. In *Aguilar*, the supreme court held that the Class 4 form of the AUUW statute contained in section 24-1.6(a)(1), (a)(3)(A), (d), (720 ILCS 5/24-1.6(a)(1), (a)(3)(A), (d) (West 2008)), violated the second amendment right to keep and bear arms because it amounted to a categorical ban against the possession and use of a firearm for self-defense outside the home. *Aguilar*, 2013 IL 112116, ¶¶ 21-22. Here, defendant was convicted of one count of AUUW for possessing an uncased, loaded, and immediately accessible weapon under the same portion of the AUUW section found unconstitutional in *Aguilar*. Accordingly, we reverse that conviction.

¶ 24 Defendant also asserts that we must reverse his other AUUW conviction, which was based on carrying a firearm outside his home without a valid FOID card (720 ILCS 5/24-1.6(a)(1), (a)(3)(C) (West 2010)). He sets forth two arguments in support of his claim. First, he contends the FOID-related portion of the AUUW statute cannot be severed from the portion of the AUUW statute invalidated in *Aguilar* and the subsections of the UUW statute struck down in

*Moore*. He concedes that our court rejected such an assertion in *People v. Henderson*, 2013 IL App (1st) 113294. Nonetheless, he contends that *Henderson* was wrongly decided. In the alternative, defendant posits that Illinois's FOID card requirement amounts to an unconstitutional infringement on the second amendment right to self-defense for applicants under 21 years old.

¶ 25 Both of defendant's arguments fail in light of the supreme court's recent decision in *People v. Mosley*, 2015 IL 115872, as well as our court's decision in *Henderson*. In *Mosley*, our supreme court rejected the defendant's argument that subsection (a)(3)(C) was not severable from the section of the AUUW statute invalidated by *Aguilar* (section (a)(1), (a)(3)(A)). *Mosley*, 2015 IL 115872, ¶¶ 27, 31. In doing so, the *Mosley* court relied on the reasoning set forth in *Henderson*. *Id.* ¶ 31. In *Henderson*, this court concluded that subsection (a)(3)(A) was only one of several factors that operated in conjunction with subsections (a)(1) and (a)(2) to create substantive offenses, and subsections (a)(1), (a)(2), and the remaining factors in (a)(3) could stand independently of subsection (a)(3)(A). *Henderson*, 2013 IL App (1st) 113294, ¶ 22. Because removing subsection (a)(3)(A) did not undermine the "completeness" or "executability of the remaining subsections" of the AUUW statute, it was not "so intertwined with the rest of the statute that the legislature intended the statute to stand or fall as a whole." (Internal quotation marks omitted.) *Id.* The *Henderson* court further noted the balance of the AUUW statute demonstrated a continued reflection of the statute's purpose, to protect the police and public from dangerous weapons. *Id.* ¶ 26. Given the supreme court's recognition in *Aguilar* and the Seventh Circuit's recognition in *Moore* that the second amendment was subject to reasonable restrictions, the *Henderson* court concluded subsection (a)(3)(C) was severable from subsection (a)(3)(A). *Id.* ¶¶ 24-26. Finding the reasoning in *Henderson* to be "sound," the *Mosley* court likewise concluded that subsection (a)(3)(C) could stand independently from subsection (a)(3)(A).

*Mosley*, 2015 IL 115872, ¶ 31; see also *In re Jordan G.*, 2015 IL 116834, ¶ 19 (continuing to hold that subsection (a)(3)(A) was severable).

¶ 26 Based on *Mosley*, we reject defendant's claim that subsection (a)(3)(C) was not severable from subsection (a)(3)(A). We note that *Mosley* did not specifically address defendant's argument relating to *Moore—i.e.*, that the language in subsections (a)(1) and (a)(2) of the AUUW statute is nearly identical to the language in the UUW statute struck down in *Moore* and that an enhanced version of an unconstitutional statute is essentially and inseparably connected in substance and cannot be severed. However, our court in *Henderson* rejected these claims, reasoning that *Moore*, like *Aguilar*, did not expressly rule on whether subsection (a)(3)(A) was severable. *Henderson*, 2013 IL App (1st) 113294, ¶ 23. Thus, defendant's claim that subsection (a)(3)(C) was not severable fails.

¶ 27 Equally meritless in light of *Mosley* is defendant's contention that the "FOID card" subsection of the AUUW statute violates the second amendment rights of applicants under 21 years old. The *Mosley* court concluded that possession of handguns by minors was conduct falling outside of the second amendment's protection. *Mosley*, 2015 IL 115872, ¶ 36. Our supreme court further reasoned that the FOID card requirement of subsection (a)(3)(C) was consistent with the *Aguilar* court's recognition that the second amendment right to possess firearms is "subject to meaningful regulation." *Mosley*, 2014 IL 115872, ¶ 36 (quoting *Aguilar*, 2013 IL 112116, ¶ 21). Thus, the supreme court concluded that subsection (a)(3)(C) did not violate "the second amendment rights of *** 18- to 20-year-old-persons." *Id.* ¶ 38; see also *Jordan G.*, 2015 IL 116834, ¶ 25 (citing the decision in *Mosley* and likewise rejecting a defendant's second amendment challenge to subsection (a)(3)(C) of the AUUW statute). Based

on the foregoing, we reject defendant's claim that the FOID-card provision of the AUUW statute is unconstitutional.

¶ 28 Defendant next contends his AUUW conviction must be reversed and remanded for a new trial because the trial court refused to give the jury the instructions he proposed regarding possession as a voluntary act and knowledge. He argues the court should have provided IPI Criminal 4th No. 4.15, which states that "[p]ossession is a voluntary act if the person knowingly procured or received the thing possessed, or was aware of his control of the thing for a sufficient time to have been able to terminate his possession." He also contends the court should have given the jury IPI Criminal 4th No. 5.01B, which provides that "[c]onduct performed knowingly or with knowledge is performed willfully," and IPI Criminal 4th No. 5.01C (Supp. 2011), which states that "[a]ctual knowledge is direct and clear knowledge, that is, knowledge of such information as would lead a reasonable person to inquire further." Defendant argues that the jury needed the proposed possession and knowledge instructions because it could legitimately have found, based on all the evidence presented at trial, that defendant held and threw the gun but that he did not hold it long enough to constitute "possession" or to acquire the requisite knowledge of the nature or attendant circumstances of his possession of it.

¶ 29 "The purpose of jury instructions is to provide the jury with the correct legal rules that can be applied to the evidence to guide the jury toward a proper verdict." *People v. Lovejoy*, 235 Ill. 2d 97, 150 (2009). Some evidence must exist in the record to justify an instruction, and instructions unsupported by the law or evidence should not be given. *People v. Mohr*, 228 Ill. 2d 53, 65 (2008). It is within the trial court's discretion to determine whether the evidence raises a particular issue and whether an instruction should be given. *Id.* As a reviewing court, our task "is to determine whether the instructions, considered together, fully and fairly announce the law

applicable to the theories of the State and the defense." *Id.* A trial court abuses its discretion when its instructions "are not clear enough to avoid misleading the jury." (Internal quotation marks omitted.) *Id.* at 66.

¶ 30 The trial court did not abuse its discretion by refusing to tender defendant's proposed instructions on possession as a voluntary act and knowledge because the evidence did not support those instructions. At trial, Murphy and Milenkovic testified that they saw an arm, covered in a gray sweatshirt, throw a gun out of the front passenger window. They later observed defendant in the front passenger seat of the vehicle wearing a gray sweatshirt. The defense witnesses, on the other hand, testified that Contreras pulled a gun out from under his seat and threw it out the passenger side window. Thus, the evidence centered on whether defendant or Contreras carried or possessed the gun, not whether defendant's possession was voluntary. Providing IPI Criminal 4th No. 4.15 would have been inappropriate and would only have confused the jury. See IPI Criminal 4th No. 4.15, Committee Comments, at 130 (stating the instruction "should be given only if voluntariness is an issue"); see also *People v. Bui*, 381 Ill. App. 3d 397, 426 (2008) (given the lack of evidence indicating the defendant's possession of narcotics was involuntary and the fact that the disputed issue at trial was knowledge, the trial court would have confused the jury by providing IPI Criminal 4th No. 4.15).

¶ 31 Providing the proposed instructions on knowledge would likewise have been improper because no evidence was presented to suggest defendant possessed the gun but somehow did so unknowingly. See *Mohr*, 228 Ill. 2d at 65 (instructions unsupported by the evidence should not be given). Furthermore, jury instructions on the term "knowingly" are generally unnecessary "because that term has a plain meaning within the jury's common knowledge." *People v. Sanders*, 368 Ill. App. 3d 533, 537 (2006). In addition, IPI Criminal 4th No. 5.01B, relating to

"knowledge—willfulness," is only to be provided in conjunction with offenses describing the state of "willfulness." See IPI Criminal 4th No. 5.01B, Committee Comments, at 143. The State was not required to show defendant willfully carried a firearm, but that he knowingly did so. See 720 ILCS 5/24-1.6(a)(1), (a)(3)(C) (West 2010).

¶ 32 We reject defendant's argument that in denying IPI Criminal 4th No. 4.15, the trial court focused solely on the parties' theories instead of the evidence. Defendant overlooks that the parties' theories were based on the evidence presented. At trial, defendant did not argue, nor could he argue, that Contreras passed him the gun and he held it only momentarily before throwing it out the window because none of the witnesses testified to that effect. Even viewing the State's and defense witnesses' testimony in combination, the record is devoid of evidence to support such a scenario. Flood and Mota said that they felt Contreras backing up his seat and reaching down for a gun, but they both affirmatively stated that Contreras then threw the gun out the window. In fact, both Flood and Mota were surprised when defendant was arrested. Defendant points out that Contreras ran through the stop sign and sped up when the police started following him, and everybody in the car started screaming when Contreras pulled out the gun. According to defendant, such actions established it was Contreras, and not defendant, who knew about the gun. Nonetheless, while Contreras' actions may have shown he knew or became aware that a gun was in the car, they offer no evidence that Contreras then handed defendant the gun for defendant to dispose of it. None of the witnesses provided testimony to support such a theory.

¶ 33 Because it is distinguishable, we find unpersuasive defendant's reliance on *People v. Larry*, 218 Ill. App. 3d 658 (1991). There, an officer pulled the defendant over and observed the handle of a gun protruding from a mat in the car that the defendant was driving. *Larry*, 218 Ill. App. 3d at 660. The defendant denied knowing the gun was in the car, which belonged to his

friend. *Id.* at 660-61. The *Larry* court held the jury should have been instructed regarding possession as a voluntary act because it might legitimately have inferred, based on the position of the gun under the car mat, that the defendant was aware of the gun but not for enough time to enable him to terminate possession. *Id.* at 665-66. In so holding, the court recognized that "[a] defendant is entitled to have the jury instructed not only as to the law applicable to the state of facts testified to but applicable to any state of facts which the jury may legitimately find from the evidence to have been proved." *Id.* at 665.

¶ 34 Unlike in *Larry*, in this case, defendant's AUUW charge was not premised on his constructive possession of the gun, but on his actual possession, and for the reasons we have previously detailed, the jury could not have legitimately found that defendant possessed the gun unknowingly or involuntarily because no evidence was presented to that effect. To the contrary, the evidence consisted of two conflicting versions of events, pursuant to which defendant either did or did not actually possess the gun. The trial court instructed the jury that to convict defendant of AUUW, the State had to establish he knowingly carried a firearm on or about his person. It further instructed the jury that if it did not find the State proved the aforementioned proposition, it should find defendant not guilty. Thus, the court properly advised the jury as to the law relevant to the evidence presented at trial, and we find no error in the trial court's instructions.

¶ 35 Defendant next argues that the trial court improperly responded to the note the jury sent during deliberations, which posed the following question: "If the defendant was handed the gun by the driver or another occupant and the defendant then passed it out the window, is that considered possession?" The court responded by stating, "You have all the instructions. Continue to deliberate." However, defendant argues the court should have provided the jurors with the

instructions he proposed on possession as a voluntary act and knowledge or, at the very least, the statutory definition of knowledge. See 720 ILCS 5/4-5(a) (West 2010) (a person acts with knowledge of "[t]he nature or attendant circumstances of his or her conduct, described by the statue defining the offense, when he or she is consciously aware that his or her conduct is of that nature of that those circumstances exist"). Defendant contends the jury's note shows it was confused. He further argues the note presented a legal question that the court had a duty to answer, and its stated reason for refusing to the instruct the jury—because the jury was asking a question on a theory that nobody had argued—was an unacceptable justification for refusing to provide the proposed instructions.

¶ 36 Generally, the trial court has a duty to provide instructions to the jury when the jury poses an explicit question or requests clarification on a point of law arising from facts causing doubt or confusion. *People v. Averett*, 237 Ill. 2d 1, 24 (2010). However, the court may exercise its discretion and refrain from answering a jury question in certain appropriate circumstances, including when the instructions are readily understandable and sufficiently explain the relevant law, where further instructions would serve no useful purpose or could potentially mislead the jury, where the jury's inquiry involves a question of fact, or where the giving of an answer would cause the court to express an opinion that would likely direct a verdict either way. *Id.* In addition, the court should not submit new charges or theories to the jury after it has commenced deliberations. *People v. Millsap*, 189 Ill. 2d 155, 161 (2000).

¶ 37 Initially, the State argues that defendant did not ask the trial court to instruct the jury on possession as a voluntary act after the court received the jury's note. The State points out that defense counsel proposed the jury be instructed further on knowledge and the standard of knowingly, clarifying that she was *not* asking the court to reconsider IPI Criminal 4th No. 4.15.

In general, " 'a defendant forfeits review of any putative jury instruction error if the defendant does not object to the instruction or offer an alternative instruction at trial and does not raise the issue in a posttrial motion.' " *People v. Mohr*, 228 Ill. 2d 53, 64-65 (2008) (quoting *People v. Herron*, 215 Ill. 2d 167, 175 (2005)). However, we note that when the trial court initially alerted the parties to the jury's note, defense counsel proposed the jury be instructed that the State had to prove certain factors to establish actual possession. Counsel also expressed concern over the State's comment in closing argument that defendant possessed the gun because it "was in his hand." Moreover, to the extent the State fails to argue forfeiture in its brief, we will review defendant's claim on the merits. See *People v. McKown*, 236 Ill. 2d 278, 308 (2010) (noting the State "in effect" forfeited its ability to argue defendant's forfeiture by failing to raise the issue in the appellate court).

¶ 38 The trial court properly responded to the jury when it told them it had the instructions and it should continue deliberating. We are guided by the decision in *People v. Smith*, 321 Ill. App. 3d 523 (2001). There, the jury was given instructions on first degree murder with respect to one victim and attempted first degree murder with respect to another victim. *Id.* at 525. During deliberations, the jury sent a note asking "can the [defendant] be charged or found with a lesser charge (2nd degree/involuntary)." *Id.* at 525. By agreement of the parties, the court sent the following response: "The law applicable to the case is contained in the instructions you have been given. You are to follow those instructions." *Id.* at 525. On appeal, our court rejected the defendant's challenge to the propriety of the trial court's response. *Id.* at 531. We reasoned that if the trial court had answered the jury's question any other way, it would have introduced new theories of second degree murder and involuntary manslaughter. *Id.* at 532. Because no evidence was heard on second degree murder or involuntary manslaughter, the court's answer concerning a

new charge could have potentially misled the jury. *Id.* at 532. We further concluded that a response other than the one given by the trial court "would have served no useful purpose, could have misled the jury, and could have caused the court to express an opinion which would have likely directed a verdict one way or another." *Id.*

¶ 39 Like the second degree murder and involuntary manslaughter charges in *Smith*, no evidence was presented in this case on the issues of knowledge and possession as a voluntary act. Accordingly, the parties did not present theories on these issues at trial, focusing instead on the element of possession and whether defendant or Contreras threw the weapon. Providing instructions on knowledge and possession as a voluntary act in response to the jury's note would thus have served no useful purpose and could, in fact, have misled the jury. See *Smith*, 321 Ill. App. 3d at 532. The proposed instructions on knowledge would have been particularly misleading given that the jury's note asked whether a certain set of facts constituted possession, not whether it constituted *knowing* possession. See *Averett*, 237 Ill. 2d at 24 (further instructions need not be given where they would serve no useful purpose or could potentially mislead the jury). In addition, as previously detailed, providing the instruction on willfulness would have been erroneous because defendant's AUUW charge was premised on defendant acting "knowingly," not "willfully." See IPI Criminal 4th No. 5.01B, Committee Comments, at 143 (instruction should be given only in conjunction with offenses including a mental state of 'willfulness'). Furthermore, it would have been unfair to the State to inject the idea to the jurors that they could find defendant not guilty if they found he possessed the gun but that he did so unknowingly or involuntarily. Introducing such a theory after deliberations had already commenced would have deprived the State of the opportunity to argue as to those issues. See *Millsap*, 189 Ill. 2d at 159, 163-64 (where the State did not pursue an accountability theory at

trial and the trial court responded to a jury's note by instructing them on accountability after deliberations had commenced, the defendant was deprived of the opportunity to argue against that theory in closing argument).

¶ 40 Moreover, even assuming any error occurred when the trial court either initially refused defense counsel's proposed instructions or later refused to further instruct the jury, such error was harmless in light of the strong evidence against defendant. See *People v. Washington*, 2012 IL 110283, ¶ 60 (instructional errors are harmless if the result of the trial would not have been different had the jury been properly instructed). Murphy and Milenkovic observed an arm, covered in a gray sweatshirt, extend out of the front passenger window of a car and throw an object that Murphy later determined to be a gun. When the officers stopped the car, they observed defendant wearing a gray sweatshirt and sitting in the front passenger seat. Murphy testified that defendant was the only person in the car wearing a gray sweatshirt. Although Mota testified that Rosa was also wearing a gray sweatshirt, Rosa was sitting in the back passenger seat, and the officers both observed the gun being tossed from the front passenger window. Furthermore, none of the witnesses testified that Rosa threw the gun. Instead, Flood and Mota both testified Contreras threw the gun out of the window. Yet, according to Mota, Contreras was wearing a white shirt.

¶ 41 Based on this evidence, we conclude the result of the trial would not have been different even if the proposed instructions had been given. Defendant's contention that the jury's note shows it might have acquitted him if it were instructed on knowledge and possession as a voluntary act is meritless. The hypothetical scenario posed in the jury's note—*i.e.* whether it would be considered possession if an occupant of the car handed defendant the gun and he passed it out the window—was not argued at trial by either party, nor was it supported by any

evidence. Thus, any claim that the jury in fact convicted defendant based on such a theory is purely speculative, especially where the evidence establishing that defendant possessed the gun was strong. As the State points out, the jury's note may have merely reflected that it was weighing the evidence and resolving any inconsistencies therein. In sum, any error in the jury instructions was harmless.

¶ 42 Finally, defendant asserts that the State deprived him of a fair trial by twice implying during closing argument that the jury could find he possessed the gun if he simply held it. The State responds that defendant either knowingly waived his objection to the allegedly improper argument or forfeited review of his claim by failing to object at trial. Furthermore, the State argues the challenged comments did not misstate the law.

¶ 43 To preserve review of allegedly improper closing arguments, a defendant must object both at trial and in a written posttrial motion. *People v. Wheeler*, 226 Ill. 2d 92, 122 (2007) (citing *People v. Enoch*, 122 Ill. 2d 176, 186 (1988)). We may review unpreserved claims of error pursuant to the plain-error doctrine. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). However, our supreme court has declined to apply the plain-error doctrine where a defendant has requested to proceed in one manner and has then argued on appeal that the course of action was erroneous. See *People v. Patrick*, 233 Ill. 2d 62, 77 (2009). Here, the State argues defendant affirmatively waived review of the improper argument, relying on defendant's statement in his brief that defense counsel "knew the prosecutor misstated the law on possession, but did not object because she would correct the prosecutor's misrepresentations in her own closing argument." However, nothing in the record indicates defendant encouraged the State to make the comments he now challenges. Applying the doctrine of invited error to encompass defendant's

failure to object would be inappropriate. Accordingly, and as defendant failed to object to the argument at trial, we will review the State's closing argument for plain error.

¶ 44 Pursuant to the plain-error doctrine, we may consider an unpreserved claim of error where a clear or obvious error occurred and either (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against defendant, regardless of the seriousness of the error, or (2) the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Belknap*, 2014 IL 117094, ¶ 48. Our first step in plain-error review is determining whether error occurred. *Thompson*, 238 Ill. 2d at 613. We note that the appropriate standard of review for closing arguments is currently unclear. See *People v. Thompson*, 2013 IL App (1st) 113105, ¶¶ 75-77 (noting it is unsettled whether a *de novo* or abuse of discretion standard applies). However, we need not resolve the issue because whether considering the State's argument *de novo* or for an abuse of discretion, we find no error. *Id.* ¶ 78.

¶ 45 Prosecutors have wide latitude in closing arguments and may "comment on the evidence and any fair, reasonable inferences it yields." *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). However, a prosecutor may not misstate the law. *People v. Armstrong*, 183 Ill. 2d 130, 157 (1998). A closing argument must be viewed in its entirety and any challenged remarks must be viewed in context. *Glasper*, 234 Ill. 2d at 204. Prosecutorial misconduct in closing arguments warrants reversal if the improper remarks constituted a material factor in the defendant's conviction. *Wheeler*, 226 Ill. 2d at 123. In other words, if the jury could have reached a contrary verdict had the improper remarks not been made, or we cannot say the improper remarks did not contribute to the conviction, we should grant a new trial. *Id.*

¶ 46 During closing, the State made the following comment. "This defendant is here for one reason and one reason only because on May 5, 2011, he and no one else held this gun in his hands. At the time he held this gun in his hands it was loaded. He is here because when he saw the police he held this gun in his hand and he tossed it out the window of the car that he was riding in with four other individuals." The State then explained that to sustain defendant's AUUW charge, it had to show he knowingly carried or possessed a firearm on or about his person. It asked, "how do we know that this defendant and no one else carried that gun on or about his person? You know from the testimony you heard from the stand." It then reviewed the officers' testimony and explained how portions of the defense witnesses' testimony were consistent with the officers' testimony. The State then went on to assert that, "there is no question that this defendant, in fact, was the person that threw the gun outside of the car, and why is there no question, ladies and gentlemen, this is where we ask that you use your common sense." The State argued the officers saw the defendant reach outside of the car and throw the gun. It then stated as follows: "Common sense tells you that it was this defendant who tossed that gun. The gun was in this defendant's hand when he tossed it and that is possession plain and simple period. We have met that proposition."

¶ 47 The State's comments were proper and did not misstate the law. To sustain defendant's AUUW charge, the State was required to show defendant knowingly carried on or about his person a firearm and that he possessed the firearm without a valid FOID card. 720 ILCS 5/24-1.6(a)(1), (a)(3)(C) (West 2010). The AUUW statute does not define "carry" or "possess." Where a statutory term is undefined, we assume the legislature intended it to have its ordinary and popularly understood meaning. *People v. Diggins*, 235 Ill. 2d 48, 55 (2009). " 'Possession' " has been defined as " 'the act or condition of having in or taking into one's control or holding at one's

disposal.' " *People v. Ward*, 215 Ill. 2d 317, 325 (2005) (quoting Webster's Third New International Dictionary 1770 (1986)); see also *People v. Scolaro*, 391 Ill. App. 3d 671, 679 (2009) (" '[p]ossession' has been defined in Illinois as '[t]he fact of having or holding property in one's power; the exercise of dominion [or control] over property.' " (quoting Black's Law Dictionary 1201 (8th ed. 2004)).

¶ 48 Based on the common definition of "possession," the State's argument that defendant possessed the firearm when he held it was entirely proper. See *Ward*, 215 Ill. 2d at 325 (possession is " 'the act or condition of having in or taking into one's control or holding at one's disposal.' " (quoting Webster's Third New International Dictionary 1770 (1986))). The disputed issue at trial was whether defendant or Contreras possessed the gun, and the State made its comments relating to defendant's holding of the gun in the context of arguing that it was defendant who threw the gun. The State may comment on the evidence and any fair, reasonable inferences it yields. *Glasper*, 234 Ill. 2d at 204. Notably, the State never argued defendant only had to possess the gun. Rather, it clearly acknowledged it had to show defendant *knowingly* possessed the gun.

¶ 49 Nonetheless, defendant argues the State grossly oversimplified what the law requires to prove "knowing possession." He posits the State had to establish he "knowingly procured or received" the gun or "was aware of his control of [the gun] for a sufficient time to have been able to terminate his possession." Defendant's argument fails because in support of his claim, he has cited IPI Criminal 4th No. 4.15. Yet, the trial court never tendered those instructions to the jury, and the voluntariness of defendant's possession was not in dispute. The State was not required to argue, and the jury was not required to find, that defendant "possessed" the gun according to the definition of voluntary possession contained in IPI Criminal 4th No. 4.15. Defendant cites *City of*

*Carbondale v. Nelson*, 137 Ill. App. 3d 123, 125 (1985), for the proposition that "possessing" an object is different from picking up an object for the purpose of moving it. *City of Carbondale* concerned the sufficiency of the evidence to convict a defendant of unlawful possession of alcohol by a minor. *Id.* at 125. We decline to interpret that case as suggesting that the State could not argue defendant's holding of the gun constituted "possession" here, where no evidence was presented suggesting defendant only momentarily held the gun. Defendant further contends the State was required to show he had "direct and clear knowledge" of the gun, *i.e.*, "that he was consciously aware of the nature and attendant circumstances of his possession." Again, however, defendant cites to proposed jury instructions the trial court never gave, as well as the statutory definition of "knowledge," which the court did not provide. See 720 ILCS 5/4-5(a) (West 2010). The State was not required to frame its argument on "possession" around the IPI instructions regarding "knowledge" or the statutory definition of "knowledge," which were never given to the jury and which related to an element that was not in dispute at trial.

¶ 50 Finally, even assuming any error occurred, defendant has failed to establish reversal is warranted under either prong of the plain-error doctrine. As previously detailed, the evidence in this case was not closely balanced such that the outcome of defendant's trial would have been different absent the State's comments. We note that defendant has cited *People v. Burnside*, 212 Ill. App. 3d 605 (1991), for the proposition that the jury's question in this case served as "objective evidence that jury would have reached a contradictory verdict." However, *Burnside* is distinguishable. There, the defendant was charged with unlawful use of weapons by a felon, pursuant to which the State had to show he knowingly possessed a weapon. *Id.* at 606-07. During closing, the State argued that all it was required to prove was that he had guns or bullets in his house. *Id.* at 606-07. During deliberations, the jury sent a note asking for additional information

on "possession" and "knowledge." *Id.* at 607. The appellate court agreed with the defendant that the prosecutor's comments were misstatements of the law. *Id.* Further, it found the comments constituted prejudicial error because the jury could have reached a different result if the comments had not been made, as shown by the questions the jury had regarding "knowledge" and "possession." *Id.*

¶ 51 Unlike the jury's question in *Burnside*, the jury's note in defendant's case does not establish it could have reached a contradictory verdict absent the State's remarks in closing. In *Burnside*, the State argued it had established defendant's guilt because of the presence of the gun, and the jury later asked about the issues of "knowledge" and "possession." Here, however, the State never argued that defendant possessed the gun because he momentarily held it before throwing it out the window. Furthermore, no evidence was presented to suggest defendant only momentarily held the gun before throwing it out the window. The jury's question in this case thus does not convince us that the jury convicted defendant under such a scenario or that it would not have convicted him absent the State's comments.

¶ 52 Defendant has likewise failed to persuade that reversal is warranted under the second prong of the plain-error doctrine. See *Thompson*, 238 Ill. 2d at 613 (the burden of persuasion in plain-error review lies with the defendant). Defendant's conclusory allegation that the State's misrepresentation caused him "substantial prejudice and denied him a fair trial" is insufficient to invoke plain-error review under the second prong. See *People v. Polk*, 2014 IL App (1st) 122017, ¶ 48 (a defendant's argument that plain error occurred must "be sufficiently developed, or it is forfeited."). Furthermore, even if we were to undertake a plain-error review of defendant's claim, we would find no basis for reversal. Our supreme court has equated the second plain-error prong with structural error. See *People v. Eppinger*, 2013 IL 114121, ¶ 19. A structural error is a

"systemic error which serves to erode the integrity of the judicial process and undermine the fairness of the defendant's trial." (Internal quotation marks omitted.) *Thompson*, 238 Ill. 2d at 613-14. Here, the fairness of defendant's trial was not undermined by the brief statements made by the State during closing. We reject defendant's assertion that he was possibly convicted based on "insufficient factual findings." The State acknowledged during closing that it had to show defendant knowingly carried or possessed the weapon. The trial court also clearly instructed the jury that the State had to prove beyond a reasonable doubt that defendant knowingly carried the firearm, and if it did not, it should find defendant not guilty. In sum, any error in the State's argument did not erode the integrity of the judicial process.

¶ 53 III. CONCLUSION

¶ 54 For the reasons stated, we reverse defendant's AUUW conviction for carrying an uncased, loaded, and immediately accessible firearm. We affirm his AUUW conviction for carrying a firearm without a valid FOID card and remand for sentencing on that count.

¶ 55 Affirmed in part, reversed in part; cause remanded with directions.