2014 IL App (2d) 121303-U
No. 2-12-1303
Order filed December 24, 2014

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. AARON A. McGEE, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 11-CF-1358 Honorable Timothy Q. Sheldon, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Burke and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: Because defense counsel stipulated to the foundational basis for the admissibility of an audio recording of a telephone conversation that defendant had while in jail, the trial court did not err in admitting that tape into evidence. Further, the trial court did not err when, in response to a question from the jury, it responded that it was for the jury to collectively determining the meaning of "reasonable doubt," and thus, there was no plain error. Finally, the State proved beyond a reasonable doubt that defendant possessed a firearm and defendant was not denied the effective assistance of counsel because defendant's trial counsel failed to submit an Illinois Pattern Jury Instruction defining a "firearm." Therefore, we affirmed.

¶ 2 Following trial, a jury found defendant, Aaron A. McGee, guilty of armed robbery with a dangerous weapon in violation of section 18-2(a)(1) of the Criminal Code of 1961 (the Criminal

Code) (720 ILCS 5/18-2(a)(1) (West 2010)) and armed robbery with a firearm in violation of section 18-2(a)(2) of the Criminal Code (720 ILCS 5/18-2(a)(2) (West 2010)). Thereafter, the trial court sentenced defendant to a term of 29 years' imprisonment. Defendant now appeals, contending that (1) the trial court committed reversible error when, in response to a question from the jury regarding the meaning of "reasonable doubt," it answered that it was up to them to determine the meaning; (2) the trial court abused its discretion when it admitted into evidence a recording of a phone call defendant made from jail because substantial portions of that recording were inaudible, and further, the State interpreted the inaudible recording during rebuttal closing arguments; (3) the State failed to prove him guilty beyond a reasonable doubt; and (4) trial counsel was ineffective for failing to tender an Illinois Pattern Instruction defining the term "firearm." We affirm.

¶ 3 I. BACKGROUND

¶ 4 The record reflects that the State charged defendant with two counts of armed robbery, two counts of aggravated robbery, and one count of robbery. All counts, except for the armed robbery counts, were *nolle prossed* before trial.

¶ 5 At trial, the victim, a cab driver, testified on the State's behalf. The victim testified that on May 8, 2011, at approximately 11 p.m., he was dispatched to pick up two passengers at 335 Watch Court in Elgin. Upon picking up the passengers, who sat in the back seat, he asked for a destination. Instead of giving him a specific address, the passengers directed him to an area in southwest Elgin. At the destination, one of the passengers exited the taxi, approached a home, and knocked on the door. The other passenger remained in the taxi. After knocking on the door, the passenger returned to the taxi and conversed with the other passenger through the back seat window. Several minutes later, the victim told the passengers that they had to pay their fare.

¶ 6 The victim testified that, thereafter, while he was facing forward in the cab, he felt something wet on the back of his head and smelled pepper spray. The victim grabbed his keys from the ignition and "bolted out" of the cab. Once outside the cab, one of the passengers came up behind the victim and told him "I want all your money." The victim testified that the passenger said "I am going to shoot you with this gun in my hand" and that he felt "a round something pushing" on the back of his neck. The victim heard the gun cock, "freaked out" and "wrestled and got the gun away [from defendant]." The victim eventually ran 20-25 feet away from defendant. When he turned around, he witnessed defendant going through his cab and taking a bag which contained his insulin, wallet, mobile phone, and identification cards.

¶ 7 On cross-examination, the victim acknowledged that he was practically blind in one eye and clarified that he "never saw a gun." The victim clarified that he wrestled with defendant and "[i]f [defendant] had a gun in his hand, it got knocked away."

¶ 8 Frank Rosas testified that, on May 8, 2011, he and defendant made plans to take a taxi "by force" and to take the driver's money and other belongings. Rosas and defendant met on Watch Court. Rosas testified that defendant used his cell phone to call the cab. Once the cab picked them up, defendant told the driver to take them to Belmont Street, but he did not give an exact address. The taxi ultimately stopped in the area of Belmont and Princeton, and the passengers told the victim that they would split the fare. According to Rosas, defendant got out of the cab and walked toward the back of a house while Rosas waited in the back seat.

¶ 9 Rosas testified that, when defendant got out of the cab to retrieve money, "there was a brief second *** that he lifted up his shirt a bit to show the butt of a gun." During cross-examination, Rosas acknowledged that he described the gun display as follows:

> "What happened—the taxi stops, you know, he stops and right, um, [the defendant] got out like he was [sic] kind of nudge me like, hey, showing me the gun. I was like, 'Whoa.' And then he got out, you know, and the whole plan just kind of—it just occurred to me like, damn, this dude had a gun. I didn't know if it was real or fake or what."

¶ 10 Defendant returned to the cab and appeared "nervous, fidgety." Defendant was pacing back and forth on the passenger's side of the vehicle. The victim turned around and shined a flashlight in Rosas's face, and Rosas put his hands in front of his face to cover it. At that point, Rosas pepper sprayed the side of the victim's face as well as the back of his neck and head. Rosas then exited the cab and ran toward defendant, who was still "walking back and forth nervously." Rosas told defendant that the plan "was a fail" and ran down the street. Rosas did not look back to see what defendant was doing.

¶ 11 Elgin police detective Brian Gorcowski obtained phone records and determined that the call that dispatched the victim's cab to Watch Court came from number 414-326-6785. That number belonged to Kayla Hale, who lived in Milwaukee. Hale had dated defendant for approximately one month. She bought the phone in March 2011 and gave it to defendant before May 8, 2011.

¶ 12 Gorcowski testified that he, along with another law enforcement officer, went to Milwaukee and met with a detective from the Milwaukee police department. The officers drove to an address in Milwaukee and spoke with defendant. Gorcowski testified that defendant said that he knew the officers wanted to talk to him about his phone having "been used in some type of robbery." Defendant told the officers that he no longer had the phone because it "must have been lost or stolen," and went with the officers to the police station. At the station, the officers

issued defendant his Miranda warnings. After initially denying any involvement, defendant admitted that he was in Elgin, that he and Rosas planned the robbery, that Rosas had used pepper spray, and that he had taken the bag. Defendant denied having a firearm. Defendant agreed to record his statement, and the recording and a transcript were admitted into evidence. Law enforcements did not recover any firearm connected to the crime.

¶ 13 The State and defendant stipulated that there was a proper foundation basis for a recording of a telephone conversation that defendant had while in jail. The stipulation provided:

> "[T]he parties hereby stipulate that [p]eople's [e]xhhibit No. 26 is a CD containing recordings from a telephone call made on [January 26, 2012] made from defendant to [phone number] 224-238-3009. *** The contents of that CD are held in the ordinary course of business, that the foundation for the admissibility of this telephone call on this CD is complete, [and] that the telephone call on this CD are true and accurate recordings of the conversation."

After the recording was played, the trial court queried "[w]as everyone able to hear that? I couldn't hear a word that was said." A transcript of the recording was not prepared. At the end of its case in chief, the State claimed to have "fixed" the recording and played it again.

¶ 14 The trial court denied defendant's motion for a directed verdict. Thereafter, the bailiff informed the trial court that some of the jurors were not aware of who was talking on the tape. The trial court commented "obviously one participant is *** defendant and then he makes a statement mom [sic] and then a male voice comes on, and I think he refers to the male voice, but I could not understand a word that they said." The State responded that "[i]t's a male voice, and he says 'Antoine,' and I believe the stipulation [indicated] that it's a telephone call made by defendant." Defense counsel commented that there will be a jury instruction and that addressing

the issue before the proofs have been closed was not necessary. The trial court agreed and noted that, if the jury asks a question during deliberations, "we will gather together and prepare an answer for them." The trial court advised the jury that all questions should be addressed to the court in writing.

¶ 15 During the jury-instruction conference, the trial court noted that the jury had submitted the following questions in writing: "Who was on the tape? Who called who? Could you reintroduce it? Can we hear it again?" The trial court concluded:

> "Well, it was very, very hard to understand what they are saying. I could understand several words, but you didn't go with a transcript. So I would answer this question by sending it back to them with a recording and they can listen over and over and over and answer their own questions. It's in evidence. They have a right to consider it."

The trial court advised the parties that it would give the jury its answer after the jury had retired to deliberate. Thereafter, both parties rested.

¶ 16 Before the parties proceeded to closing arguments, the trial court advised the jury: "Keep in mind what the attorneys will say to you is not evidence. This is their summary of the evidence." During closing argument, the State argued:

> "I want you to hear what [defendant] thinks of [Rosas's] testimony. The stipulation that was entered into evidence said that this phone call that was difficult to hear made by [defendant]; and at the beginning of the phone call, he says 'Mom,' and then there is a little garble and then he talks to his brother Antoine. At the end of the phone call, they talk about [Rosas] being out of custody. What does he say? He says, 'Beat [Rosas's] ass. Tell him not to come to court. Tell him not to testify.' That's what he thinks of

> [Rosas's] evidence. He is so afraid of [Rosas's] evidence because he knows it's the evidence that is going to convict him of armed robbery."

The State played the recording again for the jury. Thereafter, the State argued:

> " '[Rosas's] out. He made a lockout statement. Beat his ass. Fuck him. Tell him don't come to court.' That's consciousness of guilt."

During defendant's closing argument, defense counsel argued:

> "The jail tape, if you can understand it, is a call from [defendant] to his brother. Actually, to his mother. *** The purpose of that call was not to threaten [Rosas]. That's not why he was calling home. If you listen to that[,] you will get it. It will come back with you. If you listen to it, listen to the intonation in [defendant's] voice when his brother tells him [Rosas] is out of jail. He is surprised. He is surprised. And then he is mad because what he told [Gorcowski] is what he is thinking then. [Rosas] maced this guy, and he is out of jail? Listen. He is surprised. So what comes after that? I submit to you *** you just hear that somebody is out of jail, and you are still stuck, and he is the one who did it? It is anger. He didn't call to make a threat. It's a reaction. His statement is a reaction to hearing that [Rosas] got out, nothing more, no threat."

During rebuttal argument, the State argued:

> "What did you hear on the jail tape? The other voice, Antoine McGee, said 'I don't know where he lives.' After this defendant said beat his ass, tell him not to come to court, Antoine McGee, I don't know where he lives. It's evidence. It is there for all of you to consider."

¶ 17 During deliberations, the jury made the following request: "Define reasonable doubt." Without objection, the trial court responded "[t]hat is for you, as the jury, to decide." The jury

returned a guilty verdict on both armed robbery counts. The armed robbery with a dangerous weapon conviction merged with the armed robbery with a firearm conviction. Following a sentencing hearing, the trial court sentenced defendant to a term of 29 years' imprisonment.

¶ 18 II. ANALYSIS

¶ 19 A. Phone Call Recording

¶ 20 The first issue we will address on appeal is whether the trial court erred in admitting a recording of the phone call that defendant made while he was in jail. Defendant contends that the trial court erred in admitting the recording into evidence because most of it was inaudible. Defendant maintains that this error was compounded when the trial court permitted the State to give its version of what was being said on the recording during closing and rebuttal arguments.

¶ 21 We review evidentiary rulings for an abuse of discretion. *People v. Garcia-Cordova*, 2011 IL App (2d) 070550, ¶ 82. A trial court abuses its discretion where its decision is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the trial court's view. *Id.*

¶ 22 As the State notes, defendant did not object to the recording being admitted into evidence, but instead, stipulated that the recording had a proper foundational basis. To preserve an issue for appellate review, defendant needed to object at trial and raise the issue in a posttrial motion. See *People v. Herron*, 215 Ill. 2d 167, 175 (2005). Nonetheless, the plain-error doctrine allows a reviewing court to reach a forfeited error affecting substantial rights in two circumstances: (1) where the evidence in a case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence, the reviewing court may consider the forfeited error to preclude an argument that an innocent person was wrongly convicted; and (2) where the error is so serious that the defendant was denied a substantial right and thus a fair trial, the reviewing court may consider the forfeited error in order to preserve the integrity of the

judicial process. *People v. Cosby*, 231 Ill. 2d 262, 272 (2008) (citing *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005)). However, the first step in plain-error review is to determine whether an error occurred because "[a]bsent reversible error, there can be no plain error." *Cosby*, 231 Ill. 2d at 273.

¶ 23 In this case, we need not consider defendant's contention under the plain error doctrine because the trial court did not err in admitting the recording. The record reflects that, before the trial court admitted the recording, defendant stipulated that the CD was a true and accurate recording of a telephone conversation that defendant had on January 26, 2012, to phone number 224-238-3009. The trial court admitted the recording without objection. Under the invited error doctrine, a party who agrees to the admission of evidence through a stipulation is estopped from later complaining about that evidence being stipulated into the record. *People v. Kane*, 2013 IL App (2d) 110594, ¶ 19 (citing *People v. Calvert*, 326 Ill. App. 3d 414, 419 (2001)). Thus, because defendant stipulated to the admission of the recording, he is now estopped from complaining about that evidence being stipulated into the record.

¶ 24 Citing *People v. One 1999 LEXUS, VIN JT8BH68X2X0018305*, 367 Ill. App. 3d 687 (2006), defendant argues that the scope of a stipulation must be interpreted like a contract; and here, he stipulated to the recording's foundational basis, not that the recording was admissible. We disagree. In *One 1999 LEXUS*, we held that, based on a colloquy between the State and defense counsel, the defendant stipulated to the admission of documents regarding a vehicle's forfeiture. *Id.* at 692-93. The defendant's counsel in *One 1999 LEXUS* did not expressly stipulate to the *admission* of the documents. Rather, after the State advised the trial court that it had shown defense counsel supporting documentation regarding the vehicle forfeiture, defense counsel responded "[w]e stipulate to proof of service, and receipt of the same ***." The State

further advised the trial court that it had included copies of the indictment, complaint, and sentencing order of the underlying action, which was the basis of the forfeiture. Defense counsel responded "Correct. So stipulated." We concluded that "the most reasonable interpretation is that [the defendant's] counsel was stipulating that the documents be admitted into evidence." *Id.* at 693.

¶ 25 Likewise, based on our review of the record, we believe that the most reasonable interpretation was that defendant stipulated to the CD recording being admitted into evidence. Defendant's stipulation here expressly provided that "the foundation for the *admissibility* of this telephone call on this CD is complete *** ." (Emphasis added.) Further, that defendant did not object when the trial court admitted the recording further supports our conclusion that defendant's counsel believed that she had stipulated to the CD's admission. See *id.*

¶ 26 We also reject defendant's argument that the "error was exacerbated when the trial court overruled defense counsel's objection to the [State's] interpretation of the inaudible recording during *** closing and rebuttal arguments." As this Court has noted, "[i]t is well settled that prosecutors are afforded wide latitude in closing argument, and even improper remarks do not merit reversal unless they result in substantial prejudice to the defendant." *People v. Burman*, 2013 IL App (2d) 110807, ¶ 25 (citing *People v. Kitchen*, 159 Ill. 2d 1, 38 (1998)). A prosecutor may comment on the evidence presented, comment on reasonable inferences drawn from that evidence, respond to comments made by defense counsel, and comment on the credibility of witnesses; and in reviewing whether comments were improper, we must review closing argument in its entirety while placing the remarks in context. *People v. Burman*, 2013 IL App (2d) 110807, ¶ 25. Thus, a reviewing court will reverse a judgment due to improper closing arguments only when the comments were (1) improper; and (2) "so prejudicial that real justice

was denied or the jury may have reached its verdict because of the error." *People v. Sykes*, 2012 IL App (4th) 111110, ¶ 45.

¶ 27 In this case, even if we were to conclude that the State's comments during closing argument were improper, the comments, when placed in context, did not substantially prejudice defendant. We note that, before closing argument commenced, the trial court admonished the jury that the attorneys would summarize "what they believe the evidence has been" and that "what the attorneys will say to you is not evidence." Further, defendant's counsel argued her interpretation of the tape during rebuttal argument, which was that the purpose of the call was not to threaten Rosas. Instead, according to defense counsel, defendant was surprised when his brother told him that Rosas was out of jail, and while defendant was angry, his statement was a reaction as opposed to a threat. Defense counsel also suggested to the jury that it should listen to the tape during deliberations. Finally, we note that the State did not extensively rely on the tape. Rather, the State also referenced during closing arguments the physical evidence adduced at trial as well as the testimony from other witnesses. Therefore, because defendant has not demonstrated prejudice from the State's allegedly improper comments during closing argument, we will not address defendant's argument under the plain-error doctrine. See *People v. Sharp*, 391 Ill. App. 3d 947, 958 (2009) (refusing to consider allegedly improper comments during closing argument under the plain-error doctrine because, even if the State's remarks were improper, the comments did not result in substantial prejudice to the defendant, or compromise the fairness or integrity of the trial process).

¶ 28 B. Definition of Reasonable Doubt

¶ 29 The next issue we will consider is whether the trial court committed reversible error when, in response to a question, it advised the jury that the definition of reasonable doubt was

"for you, as the jury, to decide." The State responds that defendant is estopped from raising this issue pursuant to the invited error doctrine because defense counsel agreed to the trial court's answer. The State further argues that defendant's argument is based on recent precedent, including precedent from this Court, that "represent[s] an illogical misunderstanding and application of well-established Illinois Supreme Court precedent."

¶ 30 Defendant acknowledges that he did not preserve this issue for appellate review, but asks that we consider his claim pursuant to the plain-error doctrine. As noted above, a reviewing court can bypass forfeiture (1) where the evidence in a case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence, the reviewing court may consider the forfeited error to preclude an argument that an innocent person was wrongly convicted; and (2) where the error is so serious that the defendant was denied a substantial right and thus a fair trial, the reviewing court may consider the forfeited error in order to preserve the integrity of the judicial process. *Cosby*, 231 Ill. 2d at 272. However, the first step in a plain-error analysis is to determine whether error occurred. *Id.* at 273. The State concedes that if the trial court's answer constituted error, then it was plain error. However, it maintains that no error occurred. "Although the giving of jury instructions is generally reviewed for an abuse of discretion, when the question is whether the jury instructions accurately conveyed to the jury the law applicable to the case, our review is *de novo*." *People v. Pierce*, 226 Ill. 2d 470, 475 (2007).

¶ 31 This Court recently addressed whether the trial court committed plain error by erroneously defining "reasonable doubt" in response to a question from the jury. In *People v. Downs*, 2014 IL App (2d) 121156 (leave to appeal allowed, 117934, Sept. 24, 2014), the jury, during deliberations, sent a question to the trial court asking "[w]hat is your definition of reasonable doubt[:] 80%[,] 70%[, or] 60%?" *Id.* ¶ 17. After consulting with the State and

defense counsel, the trial court sent a written response "[w]e cannot give you a definition[,] it is your duty to define." *Id.*

¶ 32 On review, we began our analysis by noting that it is "well established in Illinois that the term 'reasonable doubt' is self-defining and does not need any further defining in court instructions." *Id.* ¶ 22 (citing *People v. Speight*, 153 Ill. 2d 365, 374 (1992)). We further noted that the Illinois Pattern Jury Instructions recommend that that no instruction is given defining the term "reasonable doubt." *Downs*, 2014 IL App (2d) 121156, ¶ 22.

¶ 33 Thereafter, our analysis turned to two prior cases from other Appellate Court districts that had addressed similar circumstances. In *People v. Turman*, 2011 IL App (1st) 091019, the jury asked the trial court for " 'a more explicit, expansive definition of reasonable doubt.' " *Id.* ¶ 19. The trial court answered that "[i]t is for the jury to collectively determine what reasonable doubt is," which the reviewing court in *Turman* held constituted error. *Id.* ¶¶ 19, 25. Similarly, in *People v. Franklin*, 2012 IL App (3d) 100618, the trial court, during *voir dire*, defined "reasonable doubt" as " 'what each of you individually and collectively, as 12 of you, believe is beyond a reasonable doubt.' " *Id.* ¶ 4. Under a plain-error analysis, the reviewing court held that the trial court's answer violated the prohibition in Illinois against defining "reasonable doubt," and therefore, error had occurred. See *id.* ¶ 27. We summarized *Turman* and *Franklin* as focusing on:

> "(1) the improper instruction that the jury is to collectively determine the meaning of reasonable doubt; and (2) the danger that the jury will convict a defendant on proof that did not meet the reasonable-doubt standard." *Downs*, 2014 IL App (2d) 121156, ¶ 27.

We construed the trial court's instruction as meaning that the jury was to collectively define reasonable doubt. *Id.* We further concluded that the risk that the jury might have used a

standard less than reasonable doubt was "manifest." *Id.* ¶ 28. Specifically, we noted that "there [was] no plausible interpretation of the trial court's written instruction other than as a command to define the term according to the jury's collective decision." *Id.* That the jury sought to quantify "reasonable doubt" in terms of percentages, which percentages we deemed to be "disturbingly low," confirmed the likelihood that the jury used a lesser standard. *Id.* Thus, we concluded that error had occurred and also held that defendant satisfied the second prong of a plain-error analysis. *Id.* ¶ 39.

¶ 34 Following *Downs*, this Court in *People v. Thomas*, 2014 IL App (2d) 121203, addressed whether plain error occurred when, in response to a question from the jury regarding the legal definition of "reasonable doubt," the trial court responded that the definition was for the jurors to determine. *Id.* ¶¶ 46-47. The Court in *Thomas* considered *Turman*, *Franklin*, and *Downs*, noting that, based on the "peculiar facts" relating to the content of the jury's note in *Downs*, we would reverse in that case even if *Turman's per se* error approach was incorrect. *Id.* ¶ 44. We held that the trial court's response that it was for the juror's to determine the definition of reasonable doubt was "unquestionably correct," and in doing so, emphasized that the refusal to supply a definition required jurors "to wrestle with the term's meaning themselves" which was "no bad thing." *Id.* ¶ 47. We concluded:

> "[T]he American legal system is premised on the belief that jurors represent the conscience of the community and will act diligently and thoughtfully in applying the law. Thus, absent any concrete demonstration of error or confusion, jurors should be trusted to apply the beyond a reasonable doubt standard appropriately. [Citation.] A trial court's instruction that the meaning of 'reasonable doubt' is for jurors to determine is a correct statement of Illinois law." *Id.*

As a result, to the extent that *Turman* and *Franklin* held that simply instructing jurors that they must determine the meaning of reasonable doubt violated our supreme court's proscription against providing a definition, or constituted reversible *per se* error, we declined to follow those decisions. *Id.*

¶ 35 We elect to follow the holding in *Thomas* that, absent any concrete demonstration of error or confusion by the jurors, they should be trusted to apply the correct standard of beyond a reasonable doubt. Here, in response to a question from the jury, the trial court told the jurors that it was from them decide. Because the record is devoid of any indication that the jurors were confused or applied the wrong standard, which distinguishes this matter *Downs*, the trial court's answer was correct. See *id.* Thus, because there was no error, there can be no plain error. See *id.* ¶ 49.

¶ 36 C. Sufficiency of Evidence

¶ 37 Defendant's next contention on appeal is that the State failed to prove beyond a reasonable doubt that he committed the robbery while armed with a firearm, as defined in the Criminal Code. In support of this contention, defendant argues that the only evidence presented by the State regarding whether a gun was used to rob the victim was the victim's and Rosas's testimony. Citing section 18-2(a)(2) of the Criminal Code, defendant argues that "[n]either witness claimed to have made any observation that could support a finding that *** defendant committed the offense while armed with a device that was a 'firearm' for the purposes of the add-on provision of the armed robbery statute."

¶ 38 When presented with a challenge to the sufficiency of the evidence, it is not the function of the reviewing court to retry the defendant. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). Rather, " 'the relevant question is whether, after viewing the evidence in the light most favorable

to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The reviewing court should not substitute its judgment for that of the trier of fact, who is responsible for weighing the evidence, assessing the credibility of witnesses, resolving conflicts in the evidence, and drawing reasonable inferences and conclusions from the evidence. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). However, a reviewing court must set aside a defendant's conviction if a careful review of the evidence reveals that it was so unreasonable, improbable, or unsatisfactory as to create a reasonable doubt of the defendant's guilt. *People v. Evans*, 209 Ill. 2d 194, 209 (2004).

¶ 39 In *People v. Lee*, 376 Ill. App. 3d 951 (2007), the reviewing court rejected the defendant's challenge to the sufficiency of the evidence with respect to an armed robbery conviction. The defendant contended that, although there was sufficient evidence to establish the elements of robbery, the State failed to prove beyond a reasonable doubt that he committed the robbery while carrying a firearm. *Id.* at 954-55. The reviewing court noted that a witness had "unequivocally testified" that the defendant was holding a gun while he robbed her husband, and that the trier of fact found the witness credible. *Id.* at 955. Two other witnesses testified that they witnessed the defendant carrying a silver object in his hand and the defendant had threatened to shoot one of the witnesses, which the reviewing court noted "was circumstantial evidence that he was carrying a firearm during the robbery." *Id.* The reviewing court rejected the defendant's testimony that one witness was not credible due to a history of drug use and because other witnesses contradicted her testimony, emphasizing that assessing the credibility of witnesses was the trier of fact's responsibility. The trier of fact was aware of the witness's drug use but chose to believe her testimony over the testimony from other witnesses. *Id.* Further, the

reviewing court rejected the defendant's argument that the evidence was insufficient because the victim did not know if the defendant had a gun and was unable to describe the object in the defendant's hand. The court concluded that an armed robbery conviction may be sustained even if the weapon was neither seen nor accurately described by the victim. *Id.* at 956.

¶ 40 Similarly, in this case, the State produced sufficient evidence to prove defendant guilty of armed robbery beyond a reasonable doubt. While the victim testified on cross-examination that he was blind in one eye and acknowledged that he never saw the gun, he testified that defendant said "I am going to shoot you with this gun in my hand." The victim also testified that he felt "a round something" pushing on the back of his neck and that he heard a gun cock. Because the victim testified that defendant told him that he was going to shoot him and that he also heard a gun cock, defendant's conviction may be sustained even if the victim was unable to see the gun or accurately describe it. See *id.* Further, while defendant notes that Rosas did not inform law enforcement officials that defendant was carrying a gun until Rosas was negotiating a plea agreement, the jury was aware of Rosas' testimony regarding the nature of his plea agreement and when he informed law enforcement officers that defendant had a gun during the robbery. As the court in *Lee* noted, it was the fact finder's responsibility to assess the credibility of the witnesses and jury here could have chosen to believe Rosas' testimony. See *id.* at 955.

¶ 41 We find further support for our determination in *People v. Toy*, 407 Ill. App. 3d 272 (2011). In *Toy*, two victims testified that the defendant sexually assaulted one victim while armed with a firearm. *Id.* at 289. Both victims testified that the defendant threatened to kill them. *Id.* One victim's testimony indicated that he had no doubt that the defendant possessed a gun. The other victim testified that she felt something pressed against her head as the defendant sexually assaulted her, and she believed that the object was a gun because the defendant

threatened to kill them. *Id.* After reviewing this evidence in the light most favorable to the State, the reviewing court found that the jury could have concluded that defendant was armed with a firearm. *Id.*

¶ 42 We find the reasoning in *Toy* applicable here. Defendant attempts to distinguish *Toy* by arguing that the testimony in that case "was more persuasive than [the victim's] guess that *** defendant used a real firearm and the self-serving testimony of [Rosas]." However, as the court in *Toy* noted, a guilty finding based on eyewitness testimony will be set aside only where the evidence is so improbable or unsatisfactory as to create a reasonable doubt of a defendant's guilt. *Id.* at 287. In this case, based on the victim's testimony that defendant threatened to shoot him and that he heard a gun cock, combined with Rosas' testimony that he saw defendant with a gun, a jury could have concluded that defendant was armed with a gun when he committed the robbery. See *Id.* at 289.

¶ 43 D. Ineffective Assistance of Counsel

¶ 44 Defendant's final contention on appeal is that he was denied the effective assistance of counsel because trial counsel failed to tender Illinois Pattern Jury Instruction No. 18.35G, which defines "firearm." Defendant notes that, during deliberations, the jury asked the trial court "if a defendant used any item to hold a victim, and implied that the item was a gun, are we to infer that it should be treated as a gun, even without actually verifying it?" The trial court responded "you must find that the defendant or one for whose conduct he is legally responsible carried on or about his person or was otherwise armed with a firearm at the time of the taking." Defendant concedes that the trial court's response "was accurate," but maintains that "the question revealed that the jurors did not understand that the State bore the burden to prove that a real firearm actually was involved in the offense." We disagree.

¶ 45 Under the sixth and fourteenth amendments to the United States Constitution and article I, section 8 of the Illinois Constitution, the defendant in any criminal case has a right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685 (1984); *People v. Jackson*, 205 Ill. 2d 247, 258-59 (2001). " 'The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' " *People v. Albanese*, 104 Ill. 2d 504, 525 (1984) (quoting *Strickland*, 466 U.S. at 686). Under *Strickland*, the defendant must demonstrate (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that this deficiency in counsel's performance was prejudicial to the defense. *Strickland*, 466 U.S. at 687, 692; *Albanese*, 104 Ill. 2d at 525 (citing *Strickland*). To establish the ineffective assistance of counsel, a defendant must satisfy both the performance and prejudice prongs of *Strickland*. *People v. Houston*, 226 Ill. 2d 135, 144-45 (2007); see also *People v. Clendenin*, 238 Ill. 2d 302, 317-18 (2010) (because a defendant must satisfy both prongs of this test, the failure to establish either prong is fatal to the claim).

¶ 46 In *People v. Sanders*, 368 Ill. App. 3d 533 (2006), a jury convicted the defendant of first-degree murder. *Id.* at 538. On appeal, the defendant argued that his trial counsel was ineffective for failing to offer the pattern jury instruction defining "knowledge" in response to a question from the jury and in acquiescing to the trial court's answer. *Id.* During deliberations, the jury asked:

> "Question on the second proposition that when the defendant did so, is the basis for our decision whether he knew he could or did he have the intent to create a strong probability of death or great bodily harm? *** Is Intent required?" *Id.* at 536.

The trial court answered that intent was not required and instructed the jury to "please follow all jury instructions." *Id.*

¶ 47 The reviewing court rejected the defendant's ineffective-assistance-of-counsel claim after concluding that defense counsel's performance was not deficient. The court reasoned that the jury did not ask for the definition of "knowing," but rather, wanted to know whether intent was required. *Id.* at 539. According to the reviewing court, the trial court's response "was equally clear." *Id.*

¶ 48 We find the reasoning in *Sanders* applicable here. In this case, the jury did not request further instruction on the term "firearm," or more specifically, what constituted a firearm. On the contrary, the jury's question was clear and focused on whether, if defendant had used "any item" and "implied that the item was a gun," were they to infer that the item "should be treated as a gun, even without actually verifying it." The jury expressed no confusion over the meaning of the term "firearm," but instead, queried whether defendant had to actually possess a firearm to be convicted. Defendant concedes that the trial court's response was accurate. Thus, as in *Sanders*, defendant failed to establish that trial counsel's performance was deficient, and therefore, his ineffective-assistance-of-counsel claim fails. See *id.*

¶ 49

¶ 50 III. CONCLUSION

¶ 51 For the reasons stated, we affirm the judgment of the circuit court of Kane County.

¶ 52 Affirmed.