

NOTICE

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IL App (4th) 150574-U

NO. 4-15-0574

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

April 27, 2016

Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
MATTHEW SINCLAIR,)	No. 13CF1952
Defendant-Appellant.)	
)	Honorable
)	Heidi N. Ladd,
)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Harris and Pope concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed, concluding (1) the trial court did not abuse its discretion in refusing defendant's proffered jury instruction; (2) the evidence was sufficient for a reasonable jury to conclude the State had proved the elements of the offense beyond a reasonable doubt; and (3) the phrase "immediately accessible," as used in the aggravated-unlawful-use-of-a-weapon statute, was not unconstitutionally vague.

¶ 2 In April 2015, a jury convicted defendant, Matthew Sinclair, of one count of aggravated unlawful use of a weapon. Defendant appeals his conviction, arguing his possession of an unloaded handgun with the ammunition clip in a separate location was not culpable conduct under section 24-1.6(a)(1), (a)(3)(B-5) of the Criminal Code of 2012 (Criminal Code) (720 ILCS 5/24-1.6(a)(1), (a)(3)(B-5) (West 2014)). In particular, defendant contends (1) the trial court erred by denying defendant's tendered non-Illinois Pattern Jury Instruction (non-IPI), which defined "immediately accessible"; (2) the court erred by denying defendant's motion to

vacate the jury's verdict because there was reasonable doubt the ammunition clip was "immediately accessible" to defendant; and (3) the aggravated-unlawful-use-of-a-weapon statute is unconstitutionally vague as applied to defendant because the phrase "immediately accessible" did not provide defendant sufficient guidance to identify prohibited conduct. We affirm.

¶ 3

I. BACKGROUND

¶ 4

In April 2015, the State brought defendant to trial on three charges: (1) aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1), (a)(3)(B-5) (West 2014)) for knowingly carrying in his vehicle an uncased and unloaded firearm with the ammunition clip immediately accessible (count II); (2) aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1), (a)(3)(H) (West 2014)) for knowingly carrying in his vehicle a firearm while engaged in the commission or attempted commission of a misdemeanor involving the use or threat of violence against another person, namely disorderly conduct and aggravated assault (count III); and (3) unlawful use of weapons (720 ILCS 5/24-1(a)(1) (West 2014)) for knowingly possessing a set of metal knuckles (count IV). Prior to trial, the State dismissed count I, which had charged defendant with another count of aggravated unlawful use of a weapon.

¶ 5

The evidence presented at the jury trial included the following. On November 23, 2013, at approximately 3:45 p.m., three women in a vehicle travelling westbound on Interstate 74 from Lafayette, Indiana, saw a brown Ford pickup truck with three men inside. The women believed the men in the truck and the passengers in a blue sports utility vehicle (SUV), also travelling westbound, were acting "odd" toward each other. The women believed it was "almost like a road rage thing." Eventually, the truck and the SUV travelled side by side with the truck in the right lane. The driver of the truck (defendant) pointed a gun out the driver's side window with his left hand at the SUV. The women called 9-1-1.

¶ 6 Sergeant Andrew Hewkin, an Urbana police officer, conducted a traffic stop of defendant's truck in the parking lot of Hendrick House, a University of Illinois dormitory. Defendant complied with the officer's command to exit the vehicle with his hands up. Other officers secured defendant in handcuffs. The two passengers in defendant's truck, Michael Bellamy and Nubis Padhye, exited the vehicle and were also placed in handcuffs but were later released. Officers Hewkin and Zachery Mikalik conducted a search of defendant's truck and found an unloaded handgun and ammunition. Specifically, in the center console, the officers found a closed black nylon handgun case, secured with a Velcro strap, with an unloaded Springfield XD .40-caliber pistol inside. The corresponding ammunition for the pistol was found in the driver's side door pocket. Officer Mikalik testified the ammunition clip was in plain view and was not covered by anything in the door pocket. Also found in the truck were metal knuckles and a BB gun. Also in the center console, Sergeant Hewkin found defendant's wallet, which contained a firearm owner's identification (FOID) card. The parties stipulated defendant had a valid FOID card, but he did not have a license under the Firearm Concealed Carry Act (Pub. Act 98-63 §§ 1 to 95 (eff. July 9, 2013)).

¶ 7 As defendant sat in the backseat of a squad car, Officer Doug Pipkins interviewed him. The interview was audio and video recorded and published to the jury. According to that interview, defendant explained he had put his gun in the center console to take with him on the road to Lafayette, Indiana, because the day before, his rear window broke and he had a flat tire. Because he would be driving on his only spare tire and would be travelling through questionable cellular telephone service areas, he brought his gun for protection. He put his unloaded gun in the center console and his ammunition clip in the door pocket. He admitted taking the gun out of the center console and pointing it out his window.

¶ 8 Defendant and his witnesses explained at trial that the University of Illinois football team had a game against Purdue University in Lafayette, Indiana, on Saturday, November 23, 2013. Defendant was on the administrative staff of the football team. He had driven to the game on his own, rather than taking the team bus. After the game, two other staff members, Mike Bellamy and Nubis Padhye, asked to ride home with defendant.

¶ 9 Defendant explained he had put the gun in his truck "for emergency purposes," thinking it may be necessary, given the condition of his truck, to get the gun out, load it, and discharge it. If he was stranded, he wanted to be able to defend himself. He testified he put the ammunition clip "in the side pocket because [he] knew it couldn't be stored with the gun." The prosecutor asked: "But it was still close at hand, correct?" Defendant said: "I threw it in the side door pocket as I got in my truck, yes." In his side door pocket were other miscellaneous items, such as greeting cards, chewing tobacco cans, compact disc cases, and water bottles. Defendant believed the pocket was approximately 10 inches deep.

¶ 10 As the three were travelling back to the Champaign area, Bellamy pointed out to defendant that they had just passed Marcus Berry and Justin Hood in a university owned blue SUV. Defendant slowed down and got in the right lane to wait for Hood to catch up. In the meantime, Bellamy asked defendant if he had a phone charger. Defendant testified:

"And so what happened was, you know, I am driving. I open up the center console. And the last thing that I had put in the center console was the gun inside the case. So I took that out, put that on my lap. You know, I am digging around, find [the phone charger], give it to Bellamy, and kind of concurrently as this goes on—

* * *

Right. And concurrently, as this was going on, you know, and I took the gun out and put it in my lap, the comment was made, you know, how funny would it be if you stuck that out the window for Marcus and them to see.

And I am in no way blaming anybody else for it. And I mean, in kind of our relationship with each other and kind of the atmosphere, I stupidly was like, of course, it would be funny, you know, just not even thinking about it.

And so I kind of looked in the mirror and saw them pulling up in the next lane and I switch hands and roll down the window, grab the weapon.

And, you know, they kept saying that I stuck it out really slow, and I did because we were going fast and I was holding onto it. And I literally, you know, just stick it out for a couple seconds just to show them.

And when I looked back and, you know, saw that they had, you know, saw their reaction, pulled it back in, put it in the case, transferred it back into the center console and, you know, didn't even—that was that."

¶ 11 Defendant explained when he is in the driver's seat, his legs are "flush up against the door handle on the left side and flush up against the center console on the right side." On cross-examination, defendant said, if he wanted to get the ammunition, he "would have to shift [himself] completely in [his] seat over this way to make room to get down in there, and then [he] would have to fish around for it because [he didn't] remember exactly where [he] put it."

¶ 12 The jury found defendant guilty of aggravated unlawful use of a weapon (count II) and not guilty of the remaining counts. Defendant filed a posttrial motion requesting, *inter alia*, the trial court enter a judgment notwithstanding the verdict due to (1) the State's failure to

prove defendant guilty beyond a reasonable doubt, (2) the unconstitutionality of the statute based on vagueness of the statutory phrase "immediately accessible," (3) the court's failure to grant defendant's pretrial motion to dismiss, and (4) the court's decision not to instruct the jury on the definition of "immediately accessible." The court denied defendant's motion and sentenced him to 18 months' probation.

¶ 13 This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 Defendant raises three issues on appeal, all challenging the statutory phrase "immediately accessible" as it appears in section 24-1.6(a)(1), (a)(3)(B-5) of the Criminal Code (720 ILCS 5/24-1.6(a)(1), (a)(3)(B-5) (West 2014)). First, defendant claims the trial court erred in denying his tendered non-IPI jury instruction on the definition of "immediately accessible." Second, defendant insists the court erred in denying his posttrial motion for a judgment notwithstanding the verdict (JNOV) when there was reasonable doubt the ammunition clip in the pocket of the driver's door was "immediately accessible." Finally, defendant argues the statute is unconstitutionally vague as applied to him because he was unable to ascertain what conduct was prohibited, as the statute provides no guidance on what "immediately accessible" means. We address each of defendant's contentions in turn.

¶ 16 A. Non-IPI Jury Instruction

¶ 17 During the jury instruction conference, defendant tendered the following jury instruction: "Accessibility refers to the proximity of the ammunition to the defendant and the capability of the defendant to reach the ammunition." This non-IPI instruction derived from the First District's language in *People v. Shields*, 337 Ill. App. 3d 1063, 1064 (2003). In *Shields*, the appellate court considered whether the weapon police found during a search of the defendant's

vehicle was "immediately accessible." The weapon was found inside a woman's glove under the hood of the car the defendant was driving. *Shields*, 337 Ill. App. 3d at 1064. The propriety of the jury instructions was not an issue. When considering whether the evidence was sufficient to find the defendant guilty of aggravated unlawful use of a weapon based upon whether the weapon was "immediately accessible," the court, citing *People v. Martinez*, 285 Ill. App. 3d 881, 884 (1996), stated:

"Accessibility refers to the proximity of the weapon to the defendant and the capability of the defendant to reach the weapon. In other words, a weapon is 'immediately accessible' if it is within 'easy reach' of the defendant." *Shields*, 337 Ill. App. 3d at 1064.

Relying on this language from *Shields*, defendant proffered a jury instruction defining "immediately accessible." The pattern instructions did not include this definition.

¶ 18 Illinois Supreme Court Rule 451(a) (eff. Apr. 8, 2013) provides that applicable criminal IPI instructions shall be given. Rule 451(a) also provides that an impartial non-IPI instruction may be given if the IPI instruction does not accurately state the law or does not cover a subject in which the jury should be instructed. Ill. S. Ct. R. 451(a) (eff. Apr. 8, 2013). It is within the discretion of the trial court to give a non-IPI instruction. *People v. Gilliam*, 172 Ill. 2d 484, 519 (1996). The court's decision on whether to use a non-IPI instruction should not be disturbed absent an abuse of that discretion. *People v. Hudson*, 222 Ill. 2d 392, 400 (2006).

¶ 19 The trial court did not err in refusing defendant's tendered instruction. The phrase "immediately accessible," which defendant sought to have the trial court define, is a phrase of common usage and understanding and did not require further definition. See *People v. Clark*, 71 Ill. App. 3d 381, 415 (1979); *People v. Watson*, 19 Ill. App. 3d 854, 855 (1974). Each word in

the phrase is commonly used and understood by laymen. "[T]here was nothing in the case that might have obscured the meaning of the word. The meaning of words used in their conventional sense need not be defined or explained in giving instructions to a jury." *Clark*, 71 Ill. App. 3d at 415. "Where the terms in question are of general use, and are not technical terms or words of art, they need not be defined, in the absence of anything in the charge to obscure their meaning." *People v. Monroe*, 32 Ill. App. 3d 482, 488 (1975). "[W]here a word or phrase is self-defining or commonly understood, the trial court's failure to define the term during jury instructions is not reversible error." *People v. Delgado*, 376 Ill. App. 3d 307, 314 (2007).

¶ 20 Although the proffered instruction may have contained an accurate definition, the trial court determined the jurors could rely on their common sense and individual experiences to determine whether the ammunition clip was "immediately accessible" to defendant. The court noted non-IPI instructions are disfavored and should only be used if the IPI instructions do not accurately state the law. The court further noted that extracting a quote from an appellate decision and converting the same into a jury instruction was also disfavored. The court stated:

"With respect to whether or not extracting that phrase was appropriate, I think the State makes a cogent argument here that when you rely on just extracting one phrase and taking it out of context of others, then you are going down a slippery slope, and the danger is that the exception is going to swallow the rule if you just handpick phrases from appellate decisions and insert them into an IPI instruction.

The phrase that was discussed in the *Shields* case is followed by a reference to easy reach of the defendant when discussing the terms of accessibility, and that's a good example why the court shouldn't highlight one or

two sentences from an appellate case and automatically convert it into an instruction even if it's appropriate to support that appellate decision.

* * *

The term immediately accessible is understandable to a person of ordinary intelligence and experience giving it its common meaning and common sense and interpretation. It's not technical. It's not confusing.

Taken in the context of the totality of the jury instructions that were given to the jury, it's very understandable, and this is reinforced by the fact that the jury never sent out any questions seeking clarification of the term. There is no basis to argue that the instruction was needed or that somehow the jury was confused when they were applying all of the instructions to the facts.

So I do not agree with the argument here that the instruction should have been given. I stand on my previous analysis. It simply wasn't helpful, it wasn't well phrased, and it wasn't necessary."

¶ 21 The issue is not whether we would have given the instruction to the jury or whether the evidence was sufficient for the jury to determine whether the ammunition clip was "immediately accessible" to defendant. Rather, the issue presented here is whether the trial court abused its discretion in deciding not to give the non-IPI instruction. It is apparent the court gave the decision careful consideration before rejecting defendant's proffered instruction. Because the proffered instruction (1) included a phrase that is commonly understood, and (2) was not necessary to accurately state the law for the jury, the trial court did not abuse its discretion in refusing defendant's non-IPI instruction on the definition of "immediately accessible." See *Delgado*, 376 Ill. App. 3d at 314 (citing *People v. Edwards*, 343 Ill. App. 3d 1168, 1180 (2003))

(instruction was not necessary to define "robbery"), *People v. Manning*, 334 Ill. App. 3d 882, 890 (2002) (no error where trial court did not define "conceal"), and *People v. Bradley*, 192 Ill. App. 3d 387, 393-94 (1989) (term "stolen motor vehicle" was readily understood and not in need of further definition via instruction)). We affirm.

¶ 22 B. Sufficiency of the Evidence

¶ 23 Defendant next contends reasonable doubt existed as to the issue of whether the ammunition clip was immediately accessible to him. He contends the trial court erred in failing to vacate the jury's verdict for this reason. He claims the "evidence was overwhelming that the ammunition clip was NOT immediately accessible" to defendant. We disagree.

¶ 24 Defendant argues his testimony at trial suggested it was impossible for him to reach the ammunition clip in the driver's door pocket while driving down the interstate. He testified he was holding the gun with one hand on his lap while he steered the vehicle with his other hand. When asked if he could reach the ammunition clip, defendant testified:

"I mean I would have to shift myself completely in my seat over this way to make room to get down in there, and then I would have to fish around for it because I don't remember exactly where I put it. I just knew I threw it in the side door pocket. I literally wasn't really looking when I threw it in there because I was jumping in my truck at the same time."

Defendant claims this evidence demonstrated the ammunition clip was not "immediately accessible" to him; therefore, he claims, a reasonable jury could not have found him guilty beyond a reasonable doubt.

¶ 25 Viewing all the evidence in a light most favorable to the prosecution, as we are required to do on review, we find a rational trier of fact could have found the essential elements

of the crime beyond a reasonable doubt. See *People v. Davison*, 233 Ill. 2d 30, 43 (2009). The jury is responsible for making credibility determinations, determining the weight to be given to the witness's testimony, and drawing reasonable inferences from the evidence. *People v. Washington*, 2012 IL 107993, ¶ 33.

¶ 26 Officer Mikalik testified he found the ammunition clip in the driver's door pocket in plain view. He said the clip was not covered by anything. Defendant testified he did not realize how many items were in the door pocket until after the search. However, according to Officer Mikalik's testimony, the ammunition clip was not buried in the door pocket, as it was immediately visible in the opened door. Defendant also testified he reached into the center console while he was driving and dug around until he found a phone charger. He said it took him approximately 10 seconds to find the charger and give it to Bellamy.

¶ 27 Defendant also testified how his large frame fit into the driver's seat in relation to the proximity of the center console and the driver's door pocket. Defendant said his "legs sit flush up against the door handle on the left side and flush up against the center console on the right side." His testimony suggests the door pocket was as close to his body as the center console. Because he retrieved the phone charger within seconds from his center console, it was reasonable for the jury to believe defendant could have just as easily retrieved the ammunition clip within seconds from the door pocket. Defendant also testified, on cross-examination, he put the ammunition clip in the door pocket because he knew "it couldn't be stored with the gun" but, he agreed, it was still close at hand.

¶ 28 Viewing the evidence in the light most favorable to the prosecution, we conclude a reasonable trier of fact could have found from all the evidence that the ammunition clip located in the driver's door pocket was "immediately accessible." The jury could reasonably conclude

the ammunition clip was no more difficult to reach or retrieve than items placed in the center console since defendant sat an equal distance from each. Because (1) the clip was in plain view during the search of the vehicle; (2) defendant admitted he kept the clip in a different location from the weapon, yet still close at hand; and (3) defendant was able to keep a hand on the steering wheel, remove the weapon, and retrieve the phone charger from the center console within 10 seconds, the jury could have reasonably inferred from the evidence that defendant could have just as easily retrieved the ammunition clip from the driver's door pocket. Given our standard of review, we conclude a rational trier of fact could have found the essential element that the ammunition clip was "immediately accessible" to defendant was proved beyond a reasonable doubt. See, e.g., *People v. McKnight*, 39 Ill. 2d 577, 579, 581 (1968) (a weapon in such proximity to the defendant as to lie within easy reach is "immediately accessible"); *People v. Strompolis*, 2 Ill. App. 3d 289, 292 (1971) (a weapon hidden inside a panel on the driver's door within inches of the defendant's hand, where the screws had been removed, was "immediately accessible"); *People v. Tilden*, 26 Ill. App. 3d 447, 449, 453 (1974) (a weapon located under the driver's seat was "immediately accessible"); *People v. Cannon*, 18 Ill. App. 3d 781, 790 (1974) (weapon found under the defendant's seat was "immediately accessible"). Therefore, the trial court did not err in denying defendant's motion for JNOV.

¶ 29

C. Vagueness

¶ 30

Finally, defendant contends section 24-1.6(a)(1), as provided in subsection (a)(3)(B-5) of the Criminal Code (720 ILCS 5/24-1.6(a)(1), (a)(3)(B-5) (West 2014)) is unconstitutionally vague as applied to him. He claims the phrase "immediately accessible" did not provide him sufficient guidance to know specifically what conduct was prohibited.

¶ 31 We review *de novo* constitutional challenges to a statute. *People v. Masterson*, 2011 IL 110072, ¶ 23. "[A] statute enjoys a strong presumption of constitutionality." *People v. Nakajima*, 294 Ill. App. 3d 809, 817 (1998). In determining the constitutionality of a statute, the reviewing court's role is to ascertain and give effect to the legislature's intent. *Nakajima*, 294 Ill. App. 3d at 817. A statute must be construed "so as to sustain its constitutionality and presume any interpretation that renders the law valid was intended by the legislature." *Nakajima*, 294 Ill. App. 3d at 817.

¶ 32 To demonstrate a statute is vague, a defendant must show "(1) a person of ordinary intelligence would not have a reasonable opportunity to understand what conduct the statute prohibits; or (2) the statute authorizes or encourages arbitrary enforcement." *People v. Sucic*, 401 Ill. App. 3d 492, 504 (2010). Defendant cannot satisfy his burden.

¶ 33 The statutory provision at issue, aggravated unlawful use of a weapon, provides, in pertinent part:

"(a) A person commits the offense of aggravated unlawful use of a weapon when he or she knowingly:

(1) Carries on or about his or her person or in any vehicle or concealed on or about his or her person except when on his or her land or in his or her abode or fixed place of business any pistol, revolver, stun gun or taser or other firearm; [and]

(3) One of the following factors is present:

* * *

(B-5) the pistol, revolver, or handgun possessed was uncased, unloaded, and the ammunition for the weapon was immediately accessible at the time of the offense and the person possessing the pistol, revolver, or handgun has not been issued a currently valid license under the Firearm Concealed Carry Act[.]" 720 ILCS 5/24-1.6 (West 2014).

¶ 34 The legislature did not define the phrase "immediately accessible" as used in section 24-1.6(a)(3)(B-5) and this appeal turns on the constitutionality of that phrase. Due process requires that a particular statute give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may adjust his conduct accordingly. *People v. Einoder*, 209 Ill. 2d 443, 450 (2004). " '[A] statute is considered unconstitutionally vague only if its terms are so ill-defined that the ultimate decision as to its meaning rests on the opinions and whims of the trier of fact, rather than any objective criteria or facts.' " *People v. Winningham*, 391 Ill. App. 3d 476, 481 (2009) (quoting *General Motors Corp. v. Illinois Motor Vehicle Review Board*, 224 Ill. 2d 1, 24 (2007)).

¶ 35 The phrase "immediately accessible" is readily understandable and commonly understood. We find the statute at issue defines the criminal offense with sufficient certainty such that ordinary people are able to understand what conduct is prohibited and in a way that does not encourage arbitrary or discriminatory enforcement. *People v. Taylor*, 138 Ill. 2d 204, 212-13 (1990). If the legislature does not define the terms, courts will assume and apply the terms' ordinary and commonly understood meanings. *People v. Blair*, 52 Ill. 2d 371, 373 (1972). A dictionary is a good place in which to find the ordinary meaning of words. *People v. Cardamone*, 232 Ill. 2d 504, 513 (2009). The dictionary definition of "immediately" is "without

interval of time" (Merriam-Webster's Collegiate Dictionary 578 (10th ed. 2000)) or "without delay, or without any delay or lapse of time" (Black's Law Dictionary 750 (6th ed. 1990). "Accessible" is defined as "being within reach" (Merriam-Webster's Collegiate Dictionary 6 (10th ed. 2000)) or "able to be reached or entered" (New Oxford American Dictionary 9 (1st ed. 2001)).

¶ 36 Combining the dictionary definitions of each word, the phrase "immediately accessible" refers to an item that is able to be reached without delay. Accordingly, a person of ordinary intelligence would be put on notice that it is unlawful to possess ammunition for an unloaded weapon in an area that is able to be reached without delay. We find this phrase is not unconstitutionally vague or ambiguous, or " 'so ill-defined that the ultimate decision as to its meaning rests on the opinions and whims of the trier of fact, rather than any objective criteria or facts.' " *Winningham*, 391 Ill. App. 3d at 481 (quoting *General Motors Corp.*, 224 Ill. 2d at 24). The individual terms, and the combined phrase, are not so indefinite that a person of common intelligence would have to guess at their meaning. See *People v. Maness*, 191 Ill. 2d 478, 484 (2000). We conclude defendant has failed to overcome his burden of rebutting the presumption that section 24-1.6(a)(1), (a)(3)(B-5) of the Criminal Code (720 ILCS 5/24-1.6(a)(1), (a)(3)(B-5) (West 2014)) is constitutional. We reject his argument that the statute is unconstitutionally vague.

¶ 37 III. CONCLUSION

¶ 38 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$75 statutory assessment against defendant as costs of this appeal.

¶ 39 Affirmed.