2025 IL App (5th) 230344-U

NO. 5-23-0344

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Macon County.
	)	
v.	)	No. 21-CF-1309
	)	
VINCENT R. ARRINGTON,	)	Honorable
	)	Jeffrey S. Geisler,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Justices Barberis and Sholar concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant's constitutional challenge under the second amendment is without merit. The State's improper remarks during closing argument amounted to plain error where the evidence was closely balanced.

¶ 2 Following a jury trial, the defendant, Vincent R. Arrington, was convicted of unlawful possession of weapons by a felon (720 ILCS 5/24-1.1(a) (West 2022)) and sentenced to six years in the Illinois Department of Corrections followed by one year of mandatory supervised release (MSR). On appeal, the defendant claims that section 24-1.1(a) of the Criminal Code of 2012 (720 ILCS 5/24-1.1(a) (West 2022)) is facially unconstitutional; the defendant was denied a fair trial where the State misstated the law, introduced new theories, and misrepresented facts during closing arguments; and that the defendant's trial counsel was ineffective for failing to stipulate to the defendant's felon status. For the following reasons, we reverse and remand for a new trial.

¶ 3 I. BACKGROUND

¶ 4 On September 15, 2020, the defendant and Casey Brown were passengers in a 2018 Chevrolet Cruze driven by Vance Brewer. The car fled from a stop for a minor traffic offense. Two handguns were recovered from the flight path of the vehicle as it tried to evade the police. On October 25, 2021, the defendant was charged by information with one count of unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2022)) where the defendant "knowingly possessed on or about his person, a firearm, a handgun."

¶ 5 The jury trial began on March 7, 2023. After jury selection, the parties presented opening statements. In its opening statement, the State explained that on September 15, 2020, the Decatur Police Department was alerted regarding a car with individuals carrying firearms. The defendant was a backseat passenger in that car. The car was asked to pull over after failing to use a turn signal properly. After initially stopping, the car pulled away when the police officers started to exit their vehicle. As the car was attempting to flee, two firearms were discarded from the moving car. The defendant's DNA was found on one of the firearms; and he had a prior felony conviction.

¶ 6 The defense, in its opening statement, focused on the fact that there were three men in the vehicle and only two possessed firearms. The defense presented its theory that the State would not be able to prove possession solely through the DNA evidence.

¶ 7 After opening statements, Jonathan Jones, a detective with the City of Decatur Police Department, testified first and indicated that on September 15, 2020, he was alerted that individuals inside a black 2018 Chevrolet Cruze were carrying firearms. Jones saw the vehicle at approximately 11:30 p.m. and observed that the vehicle failed to signal before turning westbound. Jones informed patrol officers in the area to perform a traffic stop of the Chevy Cruze. The vehicle initially stopped but then began to flee from the officer performing the traffic stop. Jones pursued

the Chevy Cruze and deployed "stop sticks." The vehicle eventually stopped after it crashed into an auto body shop building.

¶ 8 Brent Morey, a detective for the Decatur Police Department, testified that he was assigned to the Community Action Team (CAT). Morey explained that the CAT team was developed to combat gun violence and target firearms in the community. Morey was involved in the traffic stop that occurred on September 15, 2020, and he was able to identify the defendant in the courtroom as the backseat passenger during that traffic stop.

¶ 9 Morey also testified that he was involved in the collection of evidence. Two semi-automatic handguns were recovered from the roadside in two different locations along the path where the vehicle had travelled. One of the handguns had a magazine and the magazine had not been properly secured in the handgun when recovered. Morey testified that throwing the handgun from the vehicle may have caused the magazine to become loose.

¶ 10 Morey identified People's Exhibit 1 as a semi-automatic Sig Sauer handgun found at the intersection of Illinois and William Street. Morey additionally identified People's Exhibit 2 as a magazine and 45-caliber pistol ammunition.

¶ 11 Justin Closen testified that he was the patrolman on September 15, 2020, who had initiated a traffic stop near the intersection of Wood and Illinois streets involving the Chevrolet Cruze. Closen testified that a camera was mounted to face forward on the front windshield of his patrol car, which recorded the incident. The video was published to the jury and entered into evidence as People's Exhibit 3. Closen testified that the backseat passenger depicted on the video was the defendant, and he identified the defendant in the courtroom. Closen additionally testified that he collected two buccal swabs from the defendant. These were entered into evidence as People's Exhibit 4.

¶ 12 After Closen's testimony concluded, the State submitted People's Exhibit 5, a certified copy of the defendant's prior felony offense. The defendant had been found guilty of attempt armed violence in *People v. Arrington*, No. 17-CF-445 (Cir. Ct. Macon County, Sept. 19, 2017). The circuit court admitted People's Exhibits 1 through 5 into evidence and concluded the first day of the trial.

¶ 13 The trial continued on March 8, 2023. Sangeetha Srinivasan testified for the State as an expert in the area of forensic science and biological deoxyribonucleic acid (DNA). Srinivasan testified that she swabbed and collected samples from the handgun marked as People's Exhibit 1 and the magazine marked as People's Exhibit 2. These samples were given to another analyst. Srinivasan additionally testified that DNA could be transferred by touching or holding a firearm. She further explained that DNA could also transfer from any form of bodily fluids, "like saliva or blood or semen or any kind of vaginal material."

¶ 14 Heather Wright, a forensic scientist with the Illinois State Police and a DNA analyst, testified as an expert witness in forensic biology and DNA identification. Wright testified that she analyzed the DNA samples recovered from Exhibits 1 and 2. Wright had identified a mixture of at least three individuals from the swab from "the pistol" and the defendant could not be excluded from the major male profile. Wright explained that "major" means that it was the "most prevalent profile out of this mixture." Wright testified that "the statistical rarity for that inclusion is one in 4.6 quadrillion unrelated individuals could not be excluded from that particular profile."

¶ 15 Wright additionally testified that she performed a DNA analysis on the "magazine" and the analysis resulted in a single source profile. Only one individual was identified, and the defendant could not be excluded. Wright testified that "for that profile, approximately one in eight octillion individuals cannot be excluded."

¶ 16 On cross-examination, Wright testified that she was unable to determine how the DNA transferred to the firearm. Wright explained that skin cells constantly fall off and there was a chance that a person's DNA could transfer to another person and onto an object. Wright additionally testified that it was hard to design scientific studies to determine how often DNA could be transferred to another person and then onto an object. Wright further testified that "there's a lot of factors which kind of created this—this gray area" and she was unable to provide specific details on transfer DNA. The State rested after Wright's testimony concluded.

¶ 17 For the defense, Casey Brown, the defendant's cousin and the front seat passenger in the Cruze vehicle on September 15, 2020, testified as a witness. Brown testified that during the high-speed chase, "I was panicking and I had a gun on me and I threw it." He described the gun as a black and silver Smith and Wesson gun and stated that he threw the firearm from the passenger side window of the vehicle. Brown additionally testified that he was on probation for "aggravated UUW," a gun offense.

¶ 18 During the State's cross-examination, Brown testified that he was quiet when they were initially pulled over. Brown also testified that he never told the police prior to trial that he had a gun or that he had thrown his gun. Brown clarified that he had told his lawyer that he had a gun and had pled guilty to the offense.

¶ 19 Vance Brewer, the defendant's brother, testified that he was the driver of the vehicle on September 15, 2020, during the police chase. Brewer pled guilty to the offense of possession of a firearm by a felon for this incident. Brewer testified that he owned a black 45-caliber Sig Sauer, and he had thrown the firearm from the driver side window during the police chase. Brewer additionally testified that the defendant was a backseat passenger during the police chase, and the defendant did not have a firearm.

¶ 20 On cross-examination, Brewer acknowledged that he had pled guilty to a 2014 burglary charge and had a retail theft conviction in 2015. He was asked if he was able to throw his firearm out of the window while driving during the high-speed chase. Brewer testified that he was able to discard his firearm, and that the defendant never handled the gun. Brewer testified that he had pled guilty to the firearm charge because his DNA was on the gun.

¶ 21 Brewer was also questioned about whether he had told anyone that the defendant did not have a gun. Brewer testified, "I didn't tell any police officer. I was talking about—I was telling—that's what I was saying to people that I was locked up with. I didn't never tell no police officer that." Brewer additionally testified that during the police chase, the defendant had told him to slow down and to stop the vehicle. The defense rested after Brewer's testimony concluded.

¶ 22 The circuit court held a jury instruction conference and defense counsel objected to the use of the language "attempted armed violence" in Illinois Pattern Jury Instructions (IPI), Criminal, No. 3.13X (approved Oct. 17, 2014) (Proof Of Prior Convictions—Defendant—Admissibility). Defense counsel argued that the language was prejudicial and requested that the language be replaced with the word "felony." The State responded that the defense argument was moot because no objection had been made regarding the statement made during the initial explanation to the jury regarding the nature of the case. The circuit court agreed with the State and overruled the objection because the jury had already heard the language, and found that the language was not overly prejudicial. Defense counsel objected to additional jury instructions that referenced "attempt armed violence." The circuit court overruled the objections and allowed the instructions.

¶ 23 During closing arguments, the State emphasized that statements made during closing arguments were not evidence and that reasonable inferences from evidence, including witness

testimony and admitted exhibits, were allowed. The State additionally informed the jury that it was able to consider circumstantial evidence.

¶ 24 The State argued that the defendant had a prior felony conviction and that he had possessed a firearm after becoming a felon. The defendant's DNA found on a firearm was circumstantial evidence that the defendant had possessed the firearm. The defendant's DNA was a major profile on the firearm and only the defendant's DNA was found on the magazine. The State commented,

> "I don't care if one person—if there was just one gun. If all three people's DNA is on it, then all three of them has possessed it."

The State also commented,

> "You heard from the experts that it was the major profile, that on the gun, yes, there were three individuals on the gun. And that's, you know, more than one person can posses [*sic*] something, can have it in their possession at different times. Or even in constructive possession, there are some cases under the law if there is a can of beer in a car and it's sitting between the driver and the passenger and they both have the ability to control that thing, that's constructive possession. They can both be accountable for that."

¶ 25 The State additionally argued that the date of possession was not relevant and stated, "And you know, frankly, I don't even care if he didn't have it during the car chase. The condition is, as a felon, he's not supposed to have a gun." The defense objected to this statement and argued that the defendant was charged with possessing a firearm on September 15, 2020. The circuit court sustained the objection. Then the State commented, "Okay. Well, in any case, I don't care if it was during the car chase or not, but evidence clearly shows he possessed that gun" and then the State requested a sidebar.[1] When the closing arguments resumed, the State read IPI, Criminal, No. 3.01 (approved Oct. 17, 2014) (hereinafter IPI Criminal No. 3.01) (Date of Offense Charged) to the jury and explained that the information stated "on or about" and that the State was not required to prove

[1]The details of the sidebar discussion were not included in the record.

that the defendant possessed the firearm on the specific date. The defense did not object to this further argument.

¶ 26 The State then argued that the jury, as the trier of fact, had to "determine the believability of a witness." The defense witnesses already had pled guilty to charges and the State claimed they were protecting the defendant. The State argued,

> "Did they at any time before this tell anyone that that was the case, that [the defendant] didn't posses [*sic*] it or didn't touch it? No. They waited until they came in to here to tell you that when it was most convenient."

¶ 27 The State then focused on the Sig Sauer which the defendant's brother, Brewer, had claimed to possess. The State argued that Brewer's testimony was not credible, and that the DNA evidence demonstrated, beyond a reasonable doubt, that the defendant had held the firearm.

¶ 28 The defense presented its closing argument and conceded that the defendant was involved in the high-speed chase as a backseat passenger in the vehicle. The defense then argued that there were three people in the vehicle and two firearms were recovered. The other two passengers had already claimed that they were the owners of the firearms and pled guilty for charges associated with those firearms. The defense argued that the defendant never possessed a firearm, and no testimony was presented that the defendant possessed a firearm, except for the DNA evidence. The jury should not solely rely on the DNA evidence because no evidence was presented regarding how the defendant's DNA was transferred onto the firearm. The defense further argued that the exact day that the defendant's DNA transferred onto the firearm was not relevant because the DNA evidence was insufficient to demonstrate possession.

¶ 29 The State on rebuttal argued,

> "And let's talk about this idea of two guns and three people in the car, and so it just must be the two of them that had guns. Let's think about other[ ] things.

> So let's say three guys go into rob one bank. One bank gets robbed. They come out. You know, they've all held the same gun. They pass the gun around. They come out of there and they get charged with robbing a bank and we say, oh, you know, only one of them can be convicted of robbing a bank 'cause only one bank was robbed. That is also ludicrous."

¶ 30 The State argued that it was unreasonable to conclude that the DNA evidence recovered from the firearm had been transferred by accident. The State referred to the high-speed chase video and inferred that the driver would not have been able to throw the firearm from the car window during the chase. The State further argued,

> "Plus, Mr. Brown says there was no conversation. But now today, I would submit, to make [the defendant] look like the hero in this in some perverted way, Mr. Brewer comes in and says, oh, yeah, he was telling me to stop. Yeah, yeah. He was a good guy. He was telling me to stop. Bull, ladies and gentlemen. That's what I say to that."

¶ 31 At the conclusion of the State's argument, the circuit court instructed the jury. Among the instructions, the circuit court explained that neither opening statements or closing arguments were evidence, and any statement not based upon the evidence should be disregarded. The circuit court additionally instructed the jury that the defendant's prior conviction may not be considered as evidence of his guilt. In this case, the State was required to prove beyond a reasonable doubt the proposition that the defendant "has previously been convicted of attempt armed violence," and the jury was allowed to consider evidence of the defendant's prior conviction for the purpose of determining whether the State proved that proposition.

¶ 32 The jury found the defendant guilty of unlawful possession of weapons by a felon. On March 31, 2023, the defendant filed a *pro se* document that only had the title, "Motion for Retrial," with no written argument. Defense counsel did not argue a posttrial motion. The defendant was subsequently sentenced to six years in the IDOC and one-year MSR. This appeal followed.

¶ 33 II. ANALYSIS

¶ 34 On appeal, the defendant argues that his conviction should be vacated because section 24-1.1(a) of the Criminal Code of 2012 (Code) (720 ILCS 5/24-1.1(a) (West 2022)) is facially unconstitutional; the defendant was denied a fair trial where the State misstated the law on possession, introduced new theories of guilty-accountability and constructive possession during closing arguments, and misrepresented defense witnesses' testimony; and that defense counsel was ineffective for failing to stipulate to the defendant's felon status.

¶ 35 A. Constitutional Challenge

¶ 36 The defendant raises a facial challenge to the constitutionality of the unlawful possession of weapons by felons statute (720 ILCS 5/24-1.1(a) (West 2022)) for the first time on appeal, pursuant to the Supreme Court case *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022). A constitutional challenge to a criminal statute may be raised at any time. *People v. Wright*, 194 Ill. 2d 1, 23 (2000). All statutes carry a strong presumption of constitutionality and the party making the challenge must clearly establish its invalidity to overcome this presumption. *People v. Mosley*, 2015 IL 115872, ¶ 22. The question of whether a statute is constitutional is reviewed *de novo*. *People v. Aguilar*, 2013 IL 112116, ¶ 15.

¶ 37 Under section 24-1.1(a) of the Code,

> "[i]t is unlawful for a person to knowingly possess on or about his person or on his land or in his own abode or fixed place of business any weapon prohibited under Section 24-1 of this Act or any firearm or any firearm ammunition if the person has been convicted of a felony under the laws of this State or any other jurisdiction." 720 ILCS 5/24-1.1(a) (West 2022).

¶ 38 The second amendment states, "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const., amend. II. The United States Supreme Court in *Bruen* announced a two-part analysis for review

of laws affecting the right to bear arms, and the standard for applying the second amendment is as follows:

> "When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.' " *Bruen*, 597 U.S. at 24.

Simply, "the two-part process requires us to determine (1) whether defendant's conduct falls within the plain text of the second amendment and, if so, (2) whether there is a justification for the regulation rooted in history and tradition." *People v. Travis*, 2024 IL App (3d) 230113, ¶ 24.

¶ 39 *Bruen* referenced the United States Supreme Court decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. Chicago*, 561 U.S. 742 (2010), which recognized that "the Second and Fourteenth Amendments protect the right of an ordinary, law-abiding citizen to possess a handgun in the home for self-defense." *Bruen*, 597 U.S. at 8-9. *Bruen* agreed that "the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home." *Bruen*, 597 U.S. at 10.

¶ 40 The defendant noted that courts have relied on *dicta* in *Heller* and in *Bruen* and found that the second amendment right belongs to "law-abiding" citizens, as evidence that people with felony convictions may be categorically excluded from the second amendment's protections. See *People v. Baker*, 2023 IL App (1st) 220328, ¶ 37 (finding that *Bruen* made it clear that its test applied only to laws that attempted to regulate the gun possession of "law-abiding citizens" where the phrase was repeated 18 times in the majority opinion and concurrence). The Third District found that the "plain text" of the second amendment did not contain language to exempt felons. *Travis*, 2024 IL App (3d) 230113, ¶ 25. The defendant argues, however, that the "law-abiding citizens" distinction

defies the plain language of the second amendment, which affords rights to "the people." See U.S. Const., amend. II.

¶ 41 *People v. Kelley*, 2024 IL App (1st) 230569, ¶ 17, considered that "the Supreme Court explicitly sanctioned the prohibition on the possession of firearms by felons." The defendant in *Kelley* made a similar argument as the defendant in this case, that this reasoning constitutes *dictum* and should therefore be given little or no weight. *Kelley*, 2024 IL App (1st) 230569, ¶ 17. *Kelley* found that "there is no reason to discount the weight of the Supreme Court's dictum from the *Heller* decision" and that "*Bruen* is clear that second amendment rights apply to law-abiding citizens for self-defense." *Kelley*, 2024 IL App (1st) 230569, ¶¶ 18, 22. Felons are not a law-abiding citizens. *People v. Burns*, 2024 IL App (4th) 230428, ¶ 21.

¶ 42 The Supreme Court has also observed that the prohibition on felons possessing firearms is both "longstanding" and consistent with historical tradition. *Heller*, 554 U.S. at 626-27. The government has historically promoted public safety and "[o]ur tradition of firearm regulation allows the Government to disarm individuals who present a credible threat to the physical safety of others." *United States v. Rahimi*, 602 U.S. 680, 700 (2024). A further detailed and extensive historical analysis was set forth in the case of *United States v. Collette*, 630 F. Supp. 3d 841, 851 (2022). *Collette* considered that there is a historical tradition of excluding felons from "the people" and stated,

> "[T]his Nation has a historical tradition of excluding felons and those who abuse their rights to commit violence from the rights and powers of 'the people.' Consistent with *Heller*'s definition, if groups have been categorically excluded under other constitutional provisions bestowing rights to 'the people,' logic demands that society could also exclude those groups from under the Second Amendment." *Collette*, 630 F. Supp. 3d at 850.

¶ 43 Section 24-1.1 is consistent with the nation's historical tradition of regulating firearms. The defendant, a felon, is not a "law-abiding citizen" and cannot show that his conduct was

presumptively protected by the second amendment. See *Burns*, 2024 IL App (4th) 230428, ¶ 21. The defendant has not demonstrated that the statute violates the second amendment on its face under the *Bruen* analysis.

¶ 44 B. Closing Arguments

¶ 45 We turn next to whether the defendant was denied a fair trial due to comments made by the State during closing arguments. The defendant raises multiple issues with the State's closing argument, including that the State broadened the definition of possession; the State improperly expanded the time frame of the charge; the State used inaccurate examples which confused the jury and improperly presented theories for the first time at closing argument; and the State misrepresented the defense witness testimony.

¶ 46 A defendant is required to object to the statements at trial and in a written posttrial motion to preserve a challenge to improper statements made during closing argument. *People v. Wheeler*, 226 Ill. 2d 92, 122 (2007). The defendant did not preserve his claims and seeks plain error review. "[T]he plain-error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence. *People v. Fort*, 2017 IL 118966, ¶ 18 (citing *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005)). The first step in plain error review is to determine whether error occurred at all. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 47 Generally, prosecutors are afforded wide latitude during closing argument. *People v. Holmon*, 2019 IL App (5th) 160207, ¶ 49. They may properly comment on the evidence presented and reasonable inferences drawn therefrom, respond to comments made by defense counsel that invite a response, and comment on the credibility of witnesses. *People v. Marzonie*, 2018 IL App

(4th) 160107, ¶ 47. It is improper for a prosecutor to misstate the evidence or argue facts not in evidence. *Marzonie*, 2018 IL App (4th) 160107, ¶ 47. "When reviewing challenges to a prosecutor's remarks made during closing argument, the challenged remarks must be viewed in the context of closing argument as a whole." *People v. Johnson*, 2023 IL App (5th) 190426-B, ¶ 35.

¶ 48 Reversal is only required if the comments "engendered such substantial prejudice against the defendant that it is impossible to tell whether the verdict of guilt resulted from them," even if the State's comments were considered inappropriate. *People v. Cross*, 2019 IL App (1st) 162108, ¶ 99. "If the reviewing court cannot say whether the prosecutor's improper remarks contributed to the defendant's conviction, then it must grant a new trial." *Cross*, 2019 IL App (1st) 162108, ¶ 74. We apply *de novo* review when considering whether the statements made during closing arguments were so egregious that they warrant a new trial. *Wheeler*, 226 Ill. 2d at 121.

¶ 49 The defendant argues that the sole question for the jury for the allegation of unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2022)) was whether the defendant possessed the Sig Sauer or magazine recovered from the flight path of the car as it fled from police. The defendant claims that the State broadened the definition of possession by arguing that DNA was *per se* proof of possession.

¶ 50 Under section 24-1.1(a) of the Code, the defendant must "knowingly possess" a firearm or any firearm ammunition. "Knowing possession may be actual or constructive." *People v. Donald*, 2023 IL App (1st) 211557, ¶ 24. Knowledge can be established by circumstantial evidence. *People v. Cook*, 2021 IL App (3d) 190243, ¶ 25. "Actual possession may be proven by testimony of some form of dominion over the object." *People v. Alexander*, 2019 IL App (3d) 160709, ¶ 18. A defendant has constructive possession of a firearm where he "knew a firearm was present" and

"exercised immediate and exclusive control over the area where the firearm was found." *People v. Wise*, 2021 IL 125392, ¶ 28.

¶ 51 Multiple people are able to be in possession of one firearm. *People v. Maldonado*, 2015 IL App (1st) 131874, ¶ 43. "If two or more persons share the intention and power to exercise control, then each has possession." *People v. Givens*, 237 Ill. 2d 311, 335 (2010). Constructive possession can be established where possession is joint or where others have access to the area where the firearm is recovered. *Maldonado*, 2015 IL App (1st) 131874, ¶ 43.

¶ 52 The defendant's proximity to a firearm is a relevant factor to consider when determining whether the defendant had constructively possessed a firearm. *Wise*, 2021 IL 125392, ¶ 29. However, " '[a] defendant's mere presence in a car, without more, is not evidence that he knows a weapon is in the car.' " *Cook*, 2021 IL App (3d) 190243, ¶ 25 (quoting *People v. Bailey*, 333 Ill. App. 3d 888, 891 (2002)).

¶ 53 The defendant argues that the State, in its closing argument, distorted the law on possession and relied heavily on the presence of the defendant's DNA to prove possession. The defendant specifically took issue with the following statement made by the State during closing argument, "I don't care if one person—if there was just one gun. If all three people's DNA is on it, then all three of them has possessed it." The defendant argues that the statement indicated that DNA is *per se* proof of possession.

¶ 54 The State, however, did not solely rely on DNA evidence as proof of possession and specifically asserted that the DNA evidence was circumstantial evidence. The State had argued that the driver of the vehicle would have had a difficult time discarding the weapon during the high-speed chase; during the chase, the defendant was sitting on the driver's side of the vehicle from which the weapons were discarded, thus allowing for the defendant to discard the weapon

from the driver's side; the defense witnesses were not credible; and that the weapon had the defendant's DNA on it.

¶ 55 The defendant further argues that the State improperly expanded the time frame in which the defendant possessed the firearm and specifically argues that presenting the instruction for the date of the offense charged, IPI Criminal No. 3.01, to the jury during the closing argument was improper. IPI Criminal No. 3.01 provides:

> "The [(indictment) (information) (complaint)] states that the offense charged was committed [(on or about)] ____. If you find the offense charged was committed, the State is not required to prove that it was committed on the particular date charged." IPI, Criminal, No. 3.01.

According to the committee notes for IPI Criminal No. 3.01, the instruction should only be given "when there is a variance between the date alleged and the evidence, and all dates are within the period of limitations." IPI Criminal No. 3.01.

¶ 56 Generally, " 'the date alleged in the indictment is not material, and that it is sufficient if the prosecution proves that the offense charged was committed at any time within the period of the statute of limitations ***.' " *People v. Neumann*, 76 Ill. App. 3d 112, 118 (1979) (quoting *People v. Olroyd*, 335 Ill. 61, 68 (1929)). Giving IPI Criminal No. 3.01 prevents a defendant from asserting that he should be acquitted because of a variance between the charging instrument and the proof presented at his trial. *People v. Thrasher*, 383 Ill. App. 3d 363, 368 (2008). If there is no variance, then there is no need for this instruction. *People v. Suter*, 292 Ill. App. 3d 358, 363 (1997).

¶ 57 Use of IPI Criminal No. 3.01 results in reversible error where (1) " 'inconsistencies between the date charged in the indictment and the evidence presented at trial are so great that the defendant is misled in presenting his defense' "; or (2) the defendant " 'presents an alibi for the time alleged in the indictment and is thereby prejudiced because he failed to gather evidence and

witnesses for the time actually proved by the State.' " *Thrasher*, 383 Ill. App. 3d at 368 (quoting *Suter*, 292 Ill. App. 3d at 364).

¶ 58 A variance did not exist between the date alleged in the information and the evidence presented in this case. The State was required to prove, beyond a reasonable doubt, that the defendant, a felon, knowingly possessed the firearm or magazine. See 720 ILCS 5/24-1.1(a) (West 2022). The defendant prepared a defense that he did not knowingly possess the firearm or ammunition during the car chase on September 15, 2020. DNA evidence is not time-stamped. Giving IPI Criminal No. 3.01 allowed the jury to consider that the defendant had possession at any time prior to the car chase solely based on DNA evidence without proving knowing possession. Since there was no evidence that the charged incident occurred on any date other than September 15, 2020, the instruction should not have been introduced by the State during closing arguments.

¶ 59 The defendant additionally claims that the State's hypothetical examples of possession during closing arguments improperly injected additional theories of constructive possession and accountability that were not presented prior to closing arguments. The defendant claims that he was unable to prepare a closing argument that included a meaningful response to these theories which were not addressed during the jury instruction conference.

¶ 60 "The Constitution guarantees defendants the right to make a closing argument, no matter how 'simple, clear, unimpeached, and conclusive the evidence may seem.' " *People v. Millsap*, 189 Ill. 2d 155, 166 (2000) (quoting *Herring v. New York*, 422 U.S. 853, 860 (1975)). "The court shall hold a conference with counsel to settle the instructions and shall inform counsel of the court's proposed action thereon prior to the arguments to the jury." 735 ILCS 5/2-1107(c) (West 2022). The purpose of this section is to allow the attorneys to tailor their closing arguments to the law on which the jury will be instructed. *Millsap*, 189 Ill. 2d at 163.

¶ 61 The defendant argues that the following statements made by the State during closing argument were improper:

> (1) "You heard from the experts that it was the major profile, that on the gun, yes, there were three individuals on the gun. And that's, you know, more than one person can posses [*sic*] something, can have it in their possession at different times. Or even in constructive possession, there are some cases under the law if there is a can of beer in a car and it's sitting between the driver and the passenger and they both have the ability to control that thing, that's constructive possession. They can both be accountable for that."
>
> (2) "And let's talk about this idea of two guns and three people in the car, and so it just must be the two of them that had guns. Let's think about other[ ] things.
>
> So let's say three guys go in to rob one bank. One bank gets robbed. They come out. You know, they've all held the same gun. They pass the gun around. They come out of there and they get charged with robbing a bank and we say, oh, you know, only one of them can be convicted of robbing a bank 'cause only one bank was robbed. That is also ludicrous."

¶ 62 The State's examples are misleading and unclear. The first example does not indicate whether the driver and the passenger both had knowledge that the can was a beer can. The example improperly inferred that the defendant could possess the firearm based on its vicinity without conveying that constructive possession requires: (1) knowledge, and (2) immediate and exclusive control. See *Wise*, 2021 IL 125392, ¶ 28. A defendant's mere presence in a vehicle is not sufficient to establish knowledge of the items recovered from the vehicle. *Cook*, 2021 IL App (3d) 190243 ¶ 25. The example was unclear as to whether the driver and passenger shared the intention and power to exercise control to demonstrate joint possession. See *Givens*, 237 Ill. 2d at 335. The second example, regarding the bank robbery, was simply confusing.

¶ 63 The State's examples did not clarify that an individual's mere presence is insufficient to prove accountability. See 720 ILCS 5/5-2 (West 2022). This theory of accountability was not mentioned prior to closing arguments and the jury was not provided with an instruction regarding accountability.

¶ 64 The State argues that the examples illustrate joint possession, and the State did not intend to argue the theory of accountability. The State claims that the examples provided could be considered "inartful," but they were not inaccurate and not improper. See *People v. Garcia*, 2019 IL App (2d) 161112, ¶ 45. Notably, the jury is presumed to follow the instructions provided by the trial court, and potential prejudice caused by improper remarks during closing arguments is greatly diminished when the circuit court instructs the jury that closing arguments are not evidence. *People v. Sims*, 2019 IL App (3d) 170417, ¶ 49. The jury instructions provided in this case included that statements made by the attorneys during closing arguments not based on evidence should be disregarded. We also consider that a new trial must be granted if the reviewing court cannot say whether the State's improper remarks contributed to the defendant's conviction. *Cross*, 2019 IL App (1st) 162108, ¶ 74.

¶ 65 When considering the entirety of the State's closing argument, we find error. The jury should not have received IPI Criminal No. 3.01, which essentially instructed the jury that the defendant could be found guilty even if they did not find that the defendant had possession of the firearm on the date charged based solely on DNA evidence. The State was required to prove knowledge and immediate and exclusive control for constructive possession. See *Wise*, 2021 IL 125392, ¶ 28. The examples provided to the jury did not clearly convey the element of knowing possession of a firearm required for the unlawful possession of weapons by felons statute (720 ILCS 5/24-1.1(a) (West 2022)).

¶ 66 Having determined that error occurred, we must next consider whether the evidence was closely balanced. During the September 15, 2020, car chase, two firearms were discarded and recovered by law enforcement. Three people were in the car and the defendant was a backseat passenger. Two other individuals claimed possession of the two firearms recovered. While the

defendant's DNA was on the firearm, no witness saw the defendant with the firearm during the car chase. Rather, the witnesses testified that the defendant did not have a firearm. Therefore, we find that the evidence was closely balanced. Consequently, we conclude that the defendant was deprived of a fair trial due to the improper remarks by the State during closing argument. We, therefore, reverse the defendant's conviction and remand the cause for a new trial.

¶ 67 As an alternative to plain error, the defendant argues that defense counsel was ineffective for failing to preserve the defendant's claims regarding the State's closing argument. The defendant also claims that the defense counsel was ineffective for failing to stipulate to the defendant's criminal history. As we are reversing and remanding for a new trial, we do not need to address the remainder of the defendant's arguments.

¶ 68 Double jeopardy bars retrial after reversal where the evidence at the first trial was not sufficient to support the conviction. See *People v. Olivera*, 164 Ill. 2d 382, 393 (1995); *People v. Jackson*, 348 Ill. App. 3d 719, 738 (2004). Although we are reversing the defendant's conviction, we find that the evidence was sufficient to prove the defendant guilty, beyond a reasonable doubt, of unlawful possession of a firearm by a felon. Our ruling does not constitute a determination of the defendant's guilt that would be binding on retrial, and no double-jeopardy violation will occur in the event of a new trial. See *People v. Hale*, 2012 IL App (4th) 100949, ¶ 26.

¶ 69 III. CONCLUSION

¶ 70 For the reasons stated, we reverse defendant's conviction and remand for a new trial.

¶ 71 Reversed and remanded.