Illinois Official Reports

Appellate Court



**_People v. Boss_, 2025 IL App (1st) 221855**

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| Appellate Court Caption | THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RANDY BOSS, Defendant-Appellant. |
| District & No. | First District, Fifth Division<br>No. 1-22-1855 |
| Filed | February 28, 2025 |
| Decision Under Review | Appeal from the Circuit Court of Cook County, No. 19-CR-16831; the Hon. Kenneth J. Wadas, Judge, presiding. |
| Judgment | Affirmed. |
| Counsel on Appeal | James E. Chadd, Douglas R. Hoff, and Kieran M. Wiberg, of State Appellate Defender's Office, of Chicago, for appellant.<br><br>Kimberly M. Foxx, State's Attorney, of Chicago (Enrique Abraham, Brian K. Hodes, and Susan Wobbekind, Assistant State's Attorneys, of counsel), for the People. |
| Panel | JUSTICE ODEN JOHNSON delivered the judgment of the court, with opinion.<br>Justice Mitchell concurred in the judgment and opinion.<br>Presiding Justice Mikva specially concurred, with opinion. |

## OPINION

¶ 1 Following a jury trial, defendant Randy Boss was convicted of unlawful use of a weapon by a felon (UUWF) and was sentenced to an eight-year extended term of imprisonment because the gun had a laser sight attached. On appeal, defendant contends that (1) section 24-1.1(a) of the UUWF statute (720 ILCS 5/24-1.1(a) (West 2018)) violates the second amendment (U.S. Const., amend. II) under the test articulated by the United States Supreme Court in *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), both on its face and as-applied to him, where there is no founding-era evidence of permanent status-based revocation of the right to keep and bear arms and (2) the trial court committed plain error during jury selection when it misstated one of the four principles required under Illinois Supreme Court Rule 431(b) (eff. July 1, 2012). Oral argument was held for this appeal on January 28, 2025. For the following reasons, we affirm.

¶ 2 ### I. BACKGROUND

¶ 3 #### A. *Voir Dire*

¶ 4 Prior to trial, at the start of *voir dire* on June 28, 2022, the trial court advised the prospective jurors of the Rule 431(b) principles. The court stated, among other things, that

> "[d]efendant has no obligation to testify on his own behalf or to call witnesses in his defense. He may simply sit here and rely upon what he and his lawyer perceive to be the inability of the State to present sufficient evidence to meet their burden of proof. *** The bottom line *** is that there's no burden on the defendant to prove his innocence."

The trial court further explained that "[t]he defense will have the opportunity to present such evidence as they may elect to do bearing in mind what I've previously stated, that they have no burden under our system of law to present any evidence."

¶ 5 The trial court later admonished smaller groups of potential jurors and told all but one of the individual potential jurors, among other things, that the People had the burden of proving defendant guilty beyond a reasonable doubt, that the defense had no burden, and that defendant did not have to testify or call any witnesses on his behalf. The trial court additionally told one potential juror that defendant "[didn't] have to prove anything."

¶ 6 #### B. The Trial Evidence

¶ 7 Defendant's arrest and subsequent conviction stemmed from events that occurred on November 15, 2019. Briefly stated, the evidence presented at trial revealed that Chicago police officers Edward Zeman and Francis Johnson were patrolling near Jackson Boulevard and Cicero Avenue in their unmarked car where they were assigned due to an increase of shootings in the area. Zeman noticed defendant and another person walking west on the sidewalk, as he drove east on Jackson Boulevard at approximately 11 p.m. Defendant caught his attention because, when defendant saw the police vehicle, he changed direction and began walking into a vacant lot towards Cicero Avenue. Zeman noticed that defendant's right jacket pocket appeared to be weighed down by a heavy object, as it hung lower than his left pocket. Zeman pulled over and Johnson exited the vehicle to interview defendant. Defendant immediately fled, running towards Cicero Avenue. Johnson pursued defendant on foot, while Zeman

followed in the vehicle approximately 15 to 20 feet behind defendant. Zeman saw defendant remove what appeared to be a black firearm from his right jacket pocket and hold it in his right hand as he ran. Defendant dropped the object on Cicero Avenue in front of a Chicago police command van. However, Zeman did not stop to pick up the object at that time out of concern for Johnson's safety because, based on his experience, defendant could have had an additional weapon. Zeman stated that the area around the command unit was very well lit. When defendant eventually stopped running, Johnon placed him in custody. Defendant did not have a Firearm Owners Identification (FOID) card or a concealed carry license (CCL). Johnson testified that he saw defendant remove an L-shaped object from his right pocket, which he believed was a firearm, and he heard a metal object hit the ground near the command unit van. After defendant's arrest, Johnson returned to the area near the command unit and recovered a black handgun in front of the command unit. The handgun was a Ruger firearm with a laser sight on it.

¶ 8 During cross-examination, Johnson testified that he inventoried the gun and requested fingerprint and DNA testing done. However, there was no evidence presented at trial about the results of any DNA or fingerprint testing. During closing argument, the State noted that both sides had access to the evidence and could have requested testing. The trial court overruled defense counsel's objection to that argument.

¶ 9 The State also presented the video recording from Johnson's body camera, which showed Johnson chasing defendant, taking him into custody, patting him down, then retracing defendant's flight path. When Johnson returned to the area near the command van, he was shown on video picking up a firearm from the street, removing the magazine, and dejecting a round from the gun's chamber.

¶ 10 During jury deliberations, the jury sent notes requesting transcripts of the officers' testimony, asking for a definition of reasonable doubt, and inquiring whether the gun was ever tested for fingerprints. The trial court responded that the transcripts were not ready, there was no definition of reasonable doubt, and the jury had received all of the evidence. The jury subsequently sent a second request for transcripts, and the court replied that they would not be ready until the next day and instructed the jury to continue deliberations. The jury later sent a note indicating that it could not reach a verdict. The jury was dismissed until the next morning and subsequently reached a guilty verdict.

¶ 11 Defendant filed a motion for new trial, arguing, among other things, that the State improperly shifted the burden of proof in its closing by stating that the defense had the ability to request testing of the evidence. The trial court denied defendant's posttrial motion, and defendant was sentenced to eight years' imprisonment on October 25, 2022. Defendant's timely notice of appeal was filed on November 23, 2022.

¶ 12 II. ANALYSIS

¶ 13 As noted above, on appeal, defendant contends that (1) section 24-1.1(a) of the UUWF statute (720 ILCS 5/24-1.1(a) (West 2018)) violates the second amendment (U.S. Const., amend. II) under the test articulated by the United States Supreme Court in *Bruen*, 597 U.S. 1, both on its face and as-applied to him, where there is no founding-era evidence of permanent status-based revocation of the right to keep and bear arms, and (2) the trial court committed plain error during jury selection when it misstated one of the four principles required under

Illinois Supreme Court Rule 431(b) (eff. July 1, 2012). We shall examine each issue below.

¶ 14 A. Constitutional Challenges to the UUWF Statute

¶ 15 We begin by examining defendant's facial challenge to the constitutionality of section 24-1.1(a) of the UUWF statute.

¶ 16 1. *Facial Challenge*

¶ 17 Defendant contends for the first time on appeal that section 24-1.1(a) (720 ILCS 5/24-1.1(a) (West 2018)) of the UUWF statute is unconstitutional under the second amendment, both on its face and as applied to him. He argues that *Bruen* altered the burden of persuasion and the substantive standard for second amendment challenges to gun regulations. Defendant also argues that history does not support permanent government bans of firearm possession for those with felony convictions. In making this argument, defendant asserts that felons are part of "the people" contemplated by the second amendment and that historical firearm regulations did not prohibit possession in the same way or for the same reasons as modern laws that criminalize the possession of firearms by felons. Defendant concludes that section 24-1.1(a) is therefore facially unconstitutional based on the historical test announced in *Bruen*.

¶ 18 Although defendant raises this issue for the first time on appeal, our supreme court has previously held that a party may raise a facial challenge to the constitutionality of a statute at any time. *People v. Villareal*, 2023 IL 127318, ¶ 13, (citing *In re J.W.*, 204 Ill. 2d 50, 61 (2003)).

¶ 19 We begin with the familiar rules controlling the review of a facial constitutional challenge to a statutory provision. A party bringing a facial challenge to a statute faces a particularly heavy burden. *Id.* ¶ 14. The party must prove that there is no set of circumstances under which the statute would be valid. *Id.* Statutes are presumed constitutional, and the party challenging the constitutionality of a statute has the burden of clearly establishing its invalidity. *Id.*; *People v. Stephens*, 2024 IL App (5th) 220828, ¶ 22. Additionally, it is the duty of the court to construe a statute so as to affirm its constitutionality if it can be reasonably done. *Villareal*, 2023 IL 127318, ¶ 14; *People v. Spencer*, 2012 IL App (1st) 102094, ¶ 27.

¶ 20 The version of section 24-1.1(a) of the UUWF statute that was in effect at the time of defendant's arrest provides in relevant part:

> "(a) It 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. This Section shall not apply if the person has been granted relief by the Director of the Department of State Police under Section 10 of the Firearm Owners Identification Card Act." 720 ILCS 5/24-1.1(a) (West 2018).[1]

[1] The UUWF statute has been amended twice since the time of defendant's arrest; the first amendment was effective from August 20, 2021, to December 31, 2024, and the second became effective on January 1, 2025. Neither amendment altered the language in subsection (a) that is at issue in this appeal.

¶ 21 The second amendment provides: "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.

¶ 22 We begin with a review of the relevant United States Supreme Court decisions. In *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008), the Supreme Court declared for the first time that the second amendment right to keep and bear arms was an individual right, rather than a collective right. In *Heller*, the Court struck down a series of District of Columbia laws that banned handgun possession in the home and required other types of firearms to be kept unloaded and disassembled or bound by a trigger lock or similar device. *Id.* at 575, 635. The Court held that the laws violated the second amendment's protection of the right of law-abiding citizens to use arms in defense of hearth and home. *Id.* at 635. The Court also noted that the right secured by the second amendment was not unlimited and admonished that "nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill." *Id.* at 626.

¶ 23 Two years later, in *McDonald v. City of Chicago*, 561 U.S. 742, 789-91 (2010), the Supreme Court held that the second amendment's right to keep and bear arms for the purpose of self-defense applied to the States through the fourteenth amendment (U.S. Const., amend. XIV). Further, it struck down laws enacted by the City of Chicago and a Chicago suburb similar to those in *Heller*. *McDonald*, 561 U.S. at 750. While so holding, the Court stated: "We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill ***.' [Citation.] We repeat those assurances here." *Id.* at 786.

¶ 24 In 2022, the Supreme Court decided *Bruen*, which forms the basis of defendant's contentions on appeal. The issue in *Bruen* was whether "ordinary, law-abiding citizens have a *** right to carry handguns publicly for their self-defense." *Bruen*, 597 U.S. at 9-10. The Court held, consistent with *Heller* and *McDonald*, that the second and fourteenth amendments protect such a right. *Id.* at 10. Thus, it struck down New York's licensing laws that conditioned the issuance of public-carry licenses on a showing of a special need. *Id.* at 11.

¶ 25 In deciding the issue, the *Bruen* Court recognized that, following *Heller*, the United States Courts of Appeals were utilizing a two-step framework for analyzing second amendment challenges that combined history with means-end scrutiny. *Id.* at 17. At the first step, the government could justify the firearm restriction by demonstrating that the impacted activity fell outside the scope of the second amendment as originally understood. *Id.* at 18. If the government proved that the regulated activity fell beyond the amendment's original scope, the court would uphold the regulation without further analysis. *Id.* If, however, it was unclear that the activity was unprotected, the court would proceed to the second step, in which the court would weigh the severity of the firearm regulation—the means—against the ends the government sought to achieve. *Id.* The level of scrutiny would depend on how close the regulation came to the core of the second amendment. *Id.*

¶ 26 The *Bruen* Court declined to adopt that framework, noting that *Heller* and *McDonald* did not support applying a means-end scrutiny in the second amendment context. *Id.* at 19. Instead, the *Bruen* Court set forth the following test for assessing the validity of statutes under the second amendment:

> "[W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the

> government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.' " *Id.* at 17 (quoting *Konigsberg v. State Bar of California*, 366 U.S. 36, 49 n.10 (1961)).

¶ 27 Thus, under *Bruen*, the court must first ask whether the second amendment's "plain text" covers an individual's conduct. *Id.* If it does, the question becomes whether the challenged statute is "consistent with this Nation's historical tradition of firearm regulation." *Id.*

¶ 28 After briefing in this case was complete, the Supreme Court decided *United States v. Rahimi*, 602 U.S. 680, 699 (2024), which reaffirmed the *Bruen* test and emphasized that "*Heller* never established a categorical rule that the Constitution prohibits regulations that forbid firearm possession in the home." Rather, the Court noted, *Heller* "stated that many such prohibitions, like those on the possession of firearms by 'felons and the mentally ill,' are 'presumptively lawful.' " *Id.* (quoting *Heller*, 554 U.S. at 626, 627 n.26). The *Rahimi* Court rejected a facial challenge to a federal statute (see 18 U.S.C. § 922(g)(8) (2018)) that prohibited firearm possession by a person subject to a domestic violence restraining order that protected an intimate partner or the partner's child. *Rahimi*, 602 U.S. at 699. The Court held that the statute was not facially invalid, given that one of the bases for prohibiting firearm possession by the subject of the order was that he or she presented a credible threat to the physical safety of the intimate partner or the partner's child. *Id.* at 700. It should be noted that the Court did not apply the first part of the *Bruen* test but considered only whether the statute was consistent with the Nation's history of firearms regulation. See *id.* at 690. After reviewing the historical context of the statute, the Court found that "[o]ur tradition of firearm regulation allows the Government to disarm individuals who present a credible threat to the physical safety of others." *Id.* at 700. The Court concluded that "[a]n individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment." *Id.* at 702.

¶ 29 We next discuss how Illinois courts have analyzed this issue. The issues of facial and as-applied constitutional challenges to section 24-1.1(a) under the second amendment have been considered by every district of this court since *Bruen* was decided, and there is a split between the districts as to how the first prong of the *Bruen* test is applied. Specifically, there is a split in the decisions surrounding whether felons are included in "the people" to whom the second amendment refers.

¶ 30 The Sixth Division of the First District of this court was the first to tackle the issue in *People v. Baker*, 2023 IL App (1st) 220328. While *Baker* considered only an as-applied challenge, the court concluded that the defendant's second amendment challenge failed under the first part of the *Bruen* test because felons were not included in "the people" contemplated by the second amendment because he was not a law-abiding citizen but, rather, a felon. *Id.* ¶ 37. The court therefore found that defendant was "outside the box drawn by *Bruen*." *Id.*

¶ 31 *Baker*'s analysis was adopted by other districts in several published and unpublished decisions of this court. See, *e.g.*, *People v. Boyce*, 2023 IL App (4th) 221113-U; *People v. Burns*, 2024 IL App (4th) 230428; *People v. Gardner*, 2024 IL App (4th) 230443; *People v. Martinez*, 2024 IL App (2d) 230305-U; *Stephens*, 2024 IL App (5th) 220828; *People v. Atkins*, 2024 IL App (1st) 221138-U; *People v. Mallery*, 2024 IL App (4th) 231397-U.

¶ 32 However, the First Division of the First District found that the second amendment applied to the defendant as part of the people who had the right to keep and bear arms in his home, despite being a felon. See *People v. Brooks*, 2023 IL App (1st) 200435, ¶¶ 84-87; see also *People v. Travis*, 2024 IL App (3d) 230113, ¶ 26.

¶ 33 Here, while we find the analysis in *Brooks* on the first step of the *Bruen* analysis to be well reasoned, we are not persuaded by its conclusion. Instead, we join with the majority of panels who have examined the holdings in *Baker* and *Brooks* and have elected to follow *Baker* and agree that the second amendment does not apply to a felon's firearm possession. Accordingly, we find that defendant's facial constitutional challenge fails because the second amendment does not apply to him as he is not a law-abiding citizen but, rather, a felon.

¶ 34 After this appeal was fully briefed, we granted defendant's motion to cite four cases as additional authority: *People v. Noble*, 2024 IL App (3d) 230089-U; *People v. Montgomery*, 2024 IL App (3d) 220326-U; *Rahimi*, 602 U.S. 680; and *Range v. Attorney General of the United States*, 124 F.4th 218 (3d Cir. 2024). We have already discussed *Rahimi* above. We have reviewed the additional cases proffered by defendant and find that they do not cause us to reconsider our decision. Both *Noble* and *Montgomery*, cases from the Third District of this court, followed the analysis in *Brooks* in conducting the *Bruen* test. We note, and defendant's appellate counsel conceded at oral argument, that even when Illinois courts have determined that the first prong of the *Bruen* test applied to felons, the courts have nevertheless found that the UUWF statute is constitutional under the second prong of the *Bruen* test. We further decline to follow the *Range* decision, which also found that felons were included in the second amendment as "the people." We are only obliged to follow the decisions of the Supreme Court of Illinois and of the United States Supreme Court, as both tribunals exercise appellate jurisdiction of the Appellate Court of Illinois. *People v. Leavitt*, 2014 IL App (1st) 121323, ¶ 48. Therefore, we are not bound to follow decisions by federal courts other than the United States Supreme Court, though such decisions may be considered persuasive authority. *Id.*

¶ 35 In conclusion, we find that defendant's facial challenge to section 24-1.1(a) of the UUWF statute on second amendment grounds as his status as a felon takes him outside the box of law-abiding citizens contemplated under the second amendment.

¶ 36 Even if we were to conclude that the first prong of the *Bruen* test applies to defendant, we would still find, like every other Illinois court that has considered the issue thus far, that the UUWF statute is constitutional on its face, based on the United States Supreme Court's statements in *Heller*, *McDonald*, *Bruen*, and *Rahimi*. Additionally, we note that, contrary to defendant's appellate counsel's argument at oral argument, the UUWF statute references exceptions to the felony ban that are available under the Firearm Owners Identification Card Act. See 430 ILCS 65/10(c) (West 2022)).

¶ 37 2. *As-Applied Challenge*

¶ 38 Defendant also argues that section 24-1.1(a) is unconstitutional as applied to him because (1) there are no historical regulations that would have applied, (2) he was not serving a felony sentence or mandatory supervised release term when he possessed the firearm, and (3) the State introduced no facts showing that he was dangerous or that he was engaged in any criminal conduct when he was arrested. Rather, defendant contends that his possession of a firearm in a dangerous area was "unquestionably constitutionally protected conduct under *Bruen*."

Defendant did not raise this issue in his posttrial motion in the trial court and raises it for the first time on appeal.

¶ 39 While a facial challenge alleges that the statute is unconstitutional under any set of facts, an as-applied challenge alleges only that the statute violates the constitution as applied to the particular facts and circumstances in the present case. *Baker*, 2023 IL App (1st) 220328, ¶ 34. Accordingly, when we are presented with an as-applied challenge, it is imperative that the record be sufficiently developed in terms of those facts and circumstances for purposes of appellate review. See *People v. Figueroa*, 2020 IL App (2d) 160650, ¶¶ 85-89 (citing *People v. Harris*, 2018 IL 121932). A court is not capable of making an as-applied determination of constitutionality when there has been no evidentiary hearing and no findings of fact; without an evidentiary record, any finding that a statute is unconstitutional as applied is premature. *Id.* ¶ 86 (citing *Harris*, 2018 IL 121932, ¶¶ 38-39). Moreover, the court in *Harris* specifically rejected the notion that the basic personal information about the defendant that was discernible from the presentence investigation report provided a basis for evaluating the defendant's as-applied constitutional challenge. *Harris*, 2018 IL 121932, ¶ 46. The court further declined to remand the matter for an evidentiary hearing but noted that the defendant could pursue his claim either in a postconviction petition or in a proceeding pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2016)). *Harris*, 2018 IL 121932, ¶ 48.

¶ 40 Here, defendant did not raise his as-applied challenge in the trial court, and the trial record contains no information about the facts and circumstances surrounding his predicate felony conviction other than the name of the offense (armed robbery). Defense counsel stated at the sentencing hearing that defendant had some prior drug use, but it was not clear whether he was using drugs at the time of his arrest. Counsel also stated that defendant had some mental health issues but there was no evidence presented to support those contentions. A letter provided by defendant's mother as mitigation during the sentencing hearing indicated that defendant's father was incarcerated for most of his life and that defendant had attempted to turn his life around since his prior imprisonment.

¶ 41 However, because this issue was not raised in the trial court, no evidentiary hearing was held on defendant's as-applied constitutional challenge. Thus, the trial court did not have the opportunity to hear evidence concerning the facts and circumstances surrounding defendant's prior conviction, the matters raised during the sentencing hearing, and what impact, if any, those things had on defendant's as-applied challenge. Nor was the court able to make any findings concerning defendant's particular circumstances and how they related to his second amendment challenge.

¶ 42 Accordingly, we find defendant's as-applied challenge is premature, and we do not address it. See *Burns*, 2024 IL App (4th) 230428, ¶ 17 (holding that the defendant's as-applied challenge to the constitutionality of the UUWF statute was premature where it was not raised in the trial court and, accordingly, no factual findings were made concerning his prior conviction or how it pertained to his second amendment challenge).

¶ 43 B. Trial Court Errors During Jury Selection

¶ 44 Next, defendant contends that the trial court committed plain error during jury selection when it omitted key portions of questioning required by Illinois Supreme Court Rule 431(b) (eff. July 1, 2012). Specifically, defendant contends that the court failed to ask the prospective jurors if they understood and accepted that defendant was not required to present any evidence,

but rather, the court simply asked jurors to affirm that he did not have to testify or call witnesses in his own behalf. Defendant's appellate counsel argued at oral arguments that the failure of the court to properly admonish the jury narrowed the definition of "evidence," which was highlighted when the State commented during closing arguments that both sides had the ability to order tests on the gun. Defendant contends that because this was clear and obvious error and the evidence was closely balanced, we should find that plain error occurred and reverse and remand for a new trial. Defendant did not object during *voir dire*, nor was this issue raised in his posttrial motion.

¶ 45 It is well settled that, under the plain-error doctrine, a reviewing court may consider an unpreserved error if (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Birge*, 2021 IL 125644, ¶ 24. Under either prong, the defendant bears the burden of persuasion. *Id.* However, a violation of Rule 431(b) is not a second-prong, structural error that requires automatic reversal under a plain-error analysis (*id.*), and neither party makes that argument. The first step under either prong of the plain-error doctrine in a case involving an alleged Rule 431(b) violation is to assess if a clear or obvious error occurred, and our review of the matter is *de novo*. *Id.*

¶ 46 Determining whether the trial court erred in how it presented the four Rule 431(b) principles to the prospective groups of jurors requires this court to construe the rule. *Id.* ¶ 25. Rule 431(b) states as follows:

> "The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her behalf; and (4) that if a defendant does not testify it cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's decision not to testify when the defendant objects.
>
> The court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section." Ill. S. Ct. R. 431(b) (eff. July 1, 2012).

¶ 47 Here, the record reveals that the trial court failed to read the specific principles verbatim to the prospective jurors, questioned them in various sized groups, and varied some of its language when admonishing them. The record also indicates that, in addition to the group admonishments, each prospective juror was individually questioned and affirmed the Rule 431(b) principles. Defendant, however, maintains that the trial court failed to properly inform the potential jurors that he was not required to present any evidence when questioning them; rather, the court repeatedly informed the potential jurors that defendant was not required to testify or present witnesses. He asserts that those two statements are meaningfully different from the principles contained in Rule 431(b). Assuming without deciding that the trial court erred by not fully complying with Rule 431(b), we disagree that plain error analysis of defendant's claim is appropriate because the evidence is not closely balanced.

¶ 48 Under the first prong of the plain error test, the question is whether the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice. *People v. Bailey*, 2020 IL App (5th) 160458, ¶ 74. As noted above, defendant has the burden of persuading this court that the evidence was close enough to meet this standard. *Id.*

¶ 49 In support of his assertion that the evidence in this case was close enough to meet this standard, defendant argues that the evidence against him consisted primarily of the officers' testimony and the video footage from Johnson's body camera. He contends that Johnson testified that he did not see the gun drop; instead, he saw something in defendant's hand that looked like a gun and heard the sound of something metal hitting the ground as they ran. Zeman was the only witness to testify that he saw defendant drop a gun, but Zeman's body camera was not activated.[2] Defendant further contends that Johnson's camera footage did not show a gun in defendant's hand, nor did it show him drop a gun, and that it is "hardly unthinkable in such a location that the firearm found could have appeared from some source other than [defendant]." At oral argument, defendant's appellate counsel argued that the weakness in the State's case was highlighted by the jury's request for transcripts, fingerprint evidence, and the length of the jury's deliberations, which showed that the case could have gone either way. Thus, defendant concludes that the evidence was weak enough to be considered closely balanced. We disagree.

¶ 50 In determining whether the evidence presented at trial was close, a reviewing court must evaluate the totality of the evidence and conduct a qualitative, commonsense assessment of it within the context of the case. *People v. Montgomery*, 2018 IL App (2d) 160541, ¶ 28. A reviewing court's inquiry involves an assessment of the evidence on the elements of the charged offense, along with any evidence regarding the witnesses' credibility. *Id.* However, courts have found no "credibility contest" when one party's version of the events was either unrefuted, implausible, or corroborated by other evidence. *Id.* ¶ 31; see *People v. Effinger*, 2016 IL App (3d) 140203, ¶ 12 (circumstantial evidence supported victim's version of the events and defense presented no evidence).

¶ 51 In this case, the evidence was not closely balanced. Defendant was charged with UUWF in that he knowingly possessed on his person a firearm and was previously convicted of a felony. 720 ILCS 24-1.1(a) (West 2018).

¶ 52 Here, the State presented ample evidence at trial to support the conclusion that defendant possessed a firearm on his person without a FOID card or CCL and that he was a felon. Through the officers' testimonies, it was established at trial that defendant was observed walking down the street with a heavy object in his right jacket pocket that both officers, who were on patrol in the area, suspected was a gun. When defendant saw the police in their unmarked vehicle, he turned in a different direction and began running away from them. One officer chased defendant on foot, while the other officer followed in the vehicle. Neither officer lost sight of defendant. Zeman testified that he saw defendant remove an object from his right pocket and hold it in his hand before dropping it on the street near a police command van. When the object was in defendant's hand, Zeman saw that it was a gun. Johnson, who was chasing defendant on foot, also saw him remove an object from his right pocket and drop it to

[2]At trial, when asked why he did not activate his body camera, Zeman stated that because he was in the vehicle and driving, the camera would only have captured the dashboard during the pursuit of defendant.

the ground near the command van. Johnson also heard a metal sound when the object was dropped. He could not see what the object was, but after defendant was arrested, Johnson retraced their steps and retrieved a gun lying on the ground near the police command van. There was no testimony or evidence presented that anyone else was in the area during the chase or when the officers saw defendant drop the object. There was also no evidence that anyone else was near the police command van before or after the gun was retrieved. While the video footage was "jumpy," due to Johnson running after defendant, it showed Johnson retrieving the gun from near the command van. There was evidence presented that defendant did not have a FOID card or CCL and that he was previously convicted of a felony. The State's evidence was unrefuted, consistent, and corroborated by the video footage.

¶ 53 While defendant points to perceived weaknesses in the State's case, the evidence need not be perfect to avoid application of the plain-error doctrine. *Montgomery*, 2018 IL App (2d) 160541, ¶ 32. Instead, we apply a commonsense approach, based on the context of the case. *Id.* Under the first prong of plain error, the defendant must prove prejudicial error. *People v. Piatkowski*, 225 Ill. 2d 551, 564-65 (2007) (citing *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005)). That is, the defendant must show both that there was plain error and that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him, to which the State could respond that the evidence was strongly weighted against defendant. *Id.*

¶ 54 We also note that, while defendant assigns error to the State's comment during cross-examination regarding the availability of testing by both parties, it was not an improper shifting of the burden to defendant. However, it is well accepted that a defendant cannot ordinarily claim error where the State's remarks are in reply to, and may be said to have been invited by, defense counsel's argument. *People v. Kelley*, 2015 IL App (1st) 132782, ¶ 63. A review of the record reveals that this comment was in direct response to defense counsel's cross-examination of Johnson regarding the lack of fingerprint testing and, thus, opened the door to the State's response. We conclude that defendant's argument falls short of proving prejudicial error.

¶ 55 Given that the State's evidence was strong and unrefuted, we cannot say that the evidence as a whole was closely balanced. Accordingly, we decline to apply plain error to consider defendant's contention.

¶ 56 III. CONCLUSION

¶ 57 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 58 Affirmed.

¶ 59 PRESIDING JUSTICE MIKVA, specially concurring:

¶ 60 I concur fully with the result in this case and with the vast majority of the analysis. However, I would resolve Mr. Boss's as-applied challenge, rather than find it premature, because I do not think any further development of the record is necessary or relevant. Rather, I would find that an as-applied second amendment challenge to a gun restriction based on felony convictions fails under the first part of the test set out in *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022): felons are simply not included in "the people" contemplated

by the second amendment, which protects gun rights of law abiding citizens. *People v. Baker*, 2023 IL App (1st) 220328, ¶ 37, *pet. for leave to appeal pending*, No. 130174 (filed Nov. 3, 2023). As we said in *Baker*, these challenges are simply "outside the box drawn by *Bruen*." *Id.*

¶ 61 Moreover, even under this court's analysis in *People v. Brooks*, 2023 IL App (1st) 200435, *pet. for leave to appeal pending*, No. 130153 (filed Oct. 30, 2023), a more robust record as to Mr. Boss's facts and circumstances would be unnecessary. The court in *Brooks* viewed persons with felony backgrounds as covered by the second amendment and looked to historical precedent to evaluate the constitutionality of the armed habitual criminal statute, which barred gun possession for persons having two qualifying felony convictions. *Id.* ¶ 89. Through its historical analysis, the court found that the second amendment did not bar our legislature from imposing status-based restrictions disqualifying certain categories of people from possessing firearms, including persons whose background included nonviolent felonies. *Id.* ¶ 100.

¶ 62 For the reasons set out in both decisions, I reject the court's suggestion in this case that in order to consider Mr. Boss's as-applied challenge, we would need to know more about the facts and circumstances surrounding his predicate felony conviction, his drug use, or his mental health issues. *Supra* ¶ 40. Rather, I would reject that challenge for the reasons we rejected his facial challenge, rejected the as-applied challenge in *Baker*, or rejected the as-applied challenge in *Brooks*. In my view, these challenges to the application of a categorical ban on the possession of firearms by a convicted felon simply do not require an individualized showing by the State or an individualized determination by the court that the person challenging the law is a danger to society.