NOTICE
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2026 IL App (5th) 230968-U

NO. 5-23-0968

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Champaign County.
	)	
v.	)	No. 22-CF-980
	)	
NATHAN D. COBBS,	)	Honorable
	)	Ramona Sullivan,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE BARBERIS delivered the judgment of the court.
Justice Vaughan concurred in the judgment.*

ORDER

¶ 1 *Held*: We affirm defendant's armed habitual criminal conviction where the evidence was sufficient to prove defendant's guilt, there was no plain or reversible error in the jury instructions or the State's closing argument, and defendant failed to show that he received ineffective assistance of counsel.

¶ 2 Following a jury trial in the circuit court of Champaign County, defendant, Nathan D. Cobbs, was convicted of being an armed habitual criminal (AHC) (720 ILCS 5/24-1.7(a) (West 2022))[1] and sentenced to 14 years in prison. Defendant appeals, arguing that (1) the State's

*Justice Moore fully participated in the decision prior to his retirement. See *Cirro Wrecking Co. v. Roppolo*, 153 Ill. 2d 6 (1992).

[1]We acknowledge that the Illinois legislature modified the language of this statute from "Armed habitual criminal" to "Unlawful possession of a firearm by a repeat felony offender." 720 ILCS 5/24-1.7(a) (modified by Pub. Act 103-822, § 20 (eff. Jan. 1, 2025)). For the purposes of consistency and clarity in this decision, we will use the "armed habitual criminal" terminology in use at the time the record was created.

evidence was insufficient to sustain his conviction; (2) his right to a fair trial was violated when the trial court failed to instruct the jury that the AHC offense required the jury to determine whether defendant knowingly possessed the firearm and defense counsel was ineffective for failing to obtain that instruction; (3) the court erred when it instructed the jury that it could find defendant guilty of AHC on a date other than the date specified in the charging instrument; (4) the State's closing argument relating to the DNA evidence and defendant's status as a "habitual criminal" was improper and prejudicial and defense counsel was ineffective for failing to object; and (5) defense counsel was ineffective when counsel failed to adequately respond to the State's DNA evidence. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 On September 13, 2022, a grand jury returned a bill of indictment charging defendant with the offense of being an AHC. The charge was based on the allegation that on July 31, 2022, defendant possessed a firearm, specifically a Sig Sauer P226 .40-caliber handgun, after having been previously convicted of two felonies. Defendant retained private counsel.

¶ 5 On July 26, 2023, defendant's jury trial commenced. The parties stipulated that defendant had two qualifying felony offenses. During opening statements, the State asserted that the evidence would show defendant was a backseat passenger in a vehicle that was stopped for a minor traffic violation. The State asserted that police searched the vehicle and found a gun underneath the passenger seat directly in front of where defendant was sitting. The State asserted that the evidence would show that DNA consistent with defendant's DNA was found on the gun. The State further asserted that defendant "conceded that he is a habitual criminal, [and] cannot have a gun."

¶ 6 Defense counsel asserted during opening statements that there was no "good evidence" demonstrating how defendant's DNA "got on the gun." Defense counsel noted that defendant was

charged with possessing the gun on July 31, 2022, but that the "forensic scientist testimony I believe will not indicate when the DNA was on the gun or when it first got on the gun to begin with." Defense counsel also noted that defendant's DNA could have gotten on the gun without defendant touching the gun and that there were two other individuals in the vehicle where the gun was found.

¶ 7 Kyle Reilly, a police officer with the City of Champaign Police Department, testified for the State. Officer Reilly conducted a traffic stop on a vehicle with a missing license plate on July 31, 2022. Officer Reilly identified Marcus Johnson as the driver of the vehicle, Jaton McCurry as the front seat passenger, and defendant as the backseat passenger seated behind McCurry. Officer Reilly decided to search the vehicle after observing an open alcohol container and learning that the driver, Johnson, had a revoked driver's license. Another officer, Kristina Trock, arrived on the scene shortly after Officer Reilly initiated the traffic stop. Officer Trock assisted in searching the vehicle and notified Officer Reilly that she located a gun inside of a black and red bag under a seat in the vehicle. Officer Reilly placed the gun and bag in the intake locker at the police department. Officer Reilly identified the gun he placed into the intake locker as the same gun the State presented as evidence at the trial. Officer Reilly specifically identified "a Sig Sauer P226 .40 caliber firearm with magazine, as well as some ammunition." On cross-examination, Officer Reilly could not recall who the registered owner of the vehicle was at the time of the traffic stop.

¶ 8 Officer Trock, a police officer with the City of Champaign Police Department, also testified for the State. Officer Trock assisted in the traffic stop and search of the vehicle on July 31, 2022. While searching the vehicle, Officer Trock "moved the front [passenger] seat forward so [she] could see underneath the whole seat" and "located a red and black zipper pouch bag on [the] ground." Officer Trock could not see the bag until she moved the seat. Officer Trock believed that

"a front seat passenger could not have shoved anything that far back" due to the amount of wiring under the seat. Inside of the bag, Officer Trock found a gun and magazine. Officer Trock confirmed that the "magazine was in the firearm, and it also was loaded with bullets." Officer Trock swabbed the slide, trigger, and butt of the gun for DNA.

¶ 9 Karri Broaddus, a forensic scientist employed by the Illinois State Police, next testified for the State. Broaddus testified that DNA could be left on an object through blood, saliva, or skin cells. Broaddus explained that DNA could be found by "swabbing the inside of a hat band for the wearer or the collar of a shirt or a crowbar left at a burglary scene we could swab to see who was holding the item." Broaddus testified that it is not always possible to find DNA on an object because there are "lots of variables." Broaddus noted that some people "leave behind DNA very readily" while others "don't shed as many skin cells, and so they don't leave as much DNA behind." Broaddus explained that DNA could be transferred to an item without touching the item, specifically noting that a person's saliva could transfer to an object simply by speaking near the object. When asked if she was able to ascertain how long DNA was present on an object, Broaddus responded, "No." When asked if she was able to determine how DNA was transferred to an object, Broaddus responded, "No, really we're not." Broaddus explained that DNA typically remains on a stored item for a longer time period.

¶ 10 When asked if a person was more likely to deposit DNA from handling an item versus handling something near an item, Broaddus responded, "Um, actually touching an item and handling it is the best way really to get DNA on the item." Broaddus noted, however, that "merely touching an item doesn't leave a lot of DNA behind either." She noted that if she were to just touch an object once and move on, there would be a chance that she would not leave "a ton of DNA

behind." Broaddus reiterated that "some people shed more DNA, so they may leave a lot just by a simple touch."

¶ 11 Broaddus tested the DNA swabs Trock collected from the gun. Broaddus identified four DNA contributors on the swab from the butt of the gun, including defendant and three unknown individuals. According to Broaddus, "[t]he contribution was 57 percent for one contributor, 24 percent, 12 percent, and 7 percent." Broaddus determined that defendant was "the 57 percent contributor ***." Broaddus identified three contributors from the DNA swab taken from the slide of the gun and noted that "the proportion of contributors on [that] sample was 59, 27, and 14." Broaddus identified defendant as the "59 percent contributor." Broaddus did not test the swab taken from the trigger of the gun.

¶ 12 On cross-examination, Broaddus admitted that she did not know what type of biological material was on the swabs she analyzed from the butt and slide of the gun. Specifically, Broaddus did not know if the material was saliva or skin cells. Broaddus agreed that she could not determine how the DNA profile was transferred to the gun. Broaddus confirmed that a person's DNA could be found on an object even if that person did not physically touch the object.

¶ 13 Following Broaddus's testimony, the State rested. Defense counsel moved for a directed verdict, which the trial court denied. The defense presented no evidence.

¶ 14 During the jury instruction conference, the State requested that Illinois Pattern Jury Instructions, Criminal, No. 3.01 (approved Oct. 17, 2014) (hereinafter IPI Criminal No. 3.01) be given to the jury. Defense counsel objected. IPI Criminal No. 3.01 provided that, although defendant was charged with committing the offense on July 31, 2022, the State was not required to prove that the offense was committed on the particular date charged. The court overruled defense counsel's objection, finding that "the instruction accurately states the law." Without objection from

defense counsel, the jury was given Illinois Pattern Jury Instructions, Criminal No. 18.07B (approved Oct. 27, 2023) (hereinafter IPI Criminal No. 18.07B), which provided as follows: "A person commits the offense of being an armed habitual criminal when he possesses a firearm after having been convicted of two qualifying offenses."[2] Also without objection from defense counsel, the jury was given Illinois Pattern Jury Instructions, Criminal No. 18.08B (approved Oct. 27, 2023) (hereinafter IPI Criminal No. 18.08B), which provided that the State was required to prove two propositions to sustain the charge of AHC: (1) "that the defendant possessed any firearm," and (2) "that the defendant had previously been convicted of two qualifying offenses."[3] The jury was also instructed as follows: "Possession may be actual or constructive[.] A person has actual possession when he has immediate and exclusive control over a thing[.] A person has constructive possession when he lacks actual possession of thing, but he has both the power and the intention to exercise control over a thing." The trial court read the instructions to the jury prior to closing arguments.

¶ 15 During closing arguments, the State acknowledged that the gun was found in a vehicle that did not belong to defendant and that defendant wanted the jury to believe that the firearm was "just in the car." The State noted, however, that defendant's DNA was found on the gun. The State posited that if the gun belonged to the vehicle owner, the gun likely would have been stored in the glove box or center console, not under the passenger seat of the vehicle. The State argued that defendant brought the gun with him in the vehicle and placed it underneath the seat in front of him. Returning to the DNA evidence, the State noted that "defendant was the major contributor" with

[2]IPI Criminal No. 18.07B has since been amended and now states that a person commits the offense of being an AHC when he "knowingly" possesses a firearm. Illinois Pattern Jury Instructions, Criminal No. 18.07B (approved July 26, 2024).

[3]IPI Criminal No. 18.08B has since been amended and now states that the State must prove that a defendant "knowingly" possessed any firearm. Illinois Pattern Jury Instructions, Criminal No. 18.08B (approved July 26, 2024).

"[m]ore than 50 percent in both of the samples tested." The State asserted: "You heard with numbers like that, that is generally because somebody is touching something, not because somebody's standing over here and the gun is on the table and maybe my DNA is getting on it." The State noted that it had to prove that defendant was a habitual criminal but claimed that defendant was "conceding that he [was] a habitual criminal, that he ha[d] the two offenses that make him such."

¶ 16 In addressing the defense's claim that it was unclear how or when defendant's DNA "got placed" on the gun, the State asserted as follows:

> "So let's assume—let's assume, for example, that the defendant placed the gun in the bag three weeks before, doesn't touch it again, just carries it around in that bag. First, I would submit to you that carrying it around in the bag is possessing it. But if you don't believe that, if you believe that it's only possessing it when you're actually touching it without the bag in between, the date doesn't matter. The Judge read to you and you will have to take back to you that it doesn't matter. It could have happened three weeks before. It could have happened on that date. All you have to believe and what I have proven to you, ladies and gentlemen, is that the defendant possessed a firearm. And he did. His DNA, it's on both swabs. And the defendant again is not permitted to possess a firearm."

¶ 17 In response, defense counsel highlighted to the jury Broaddus's testimony that DNA could be innocently transferred, either directly or indirectly, by being in close proximity to an object or by a "touch transfer." In addressing the State's argument that defendant was a "major contributor," defense counsel noted that Broaddus testified that some people were "greater shedders of DNA than others." Defense counsel noted that there was no evidence demonstrating how or when defendant's DNA was transferred to the gun. Defense counsel specifically noted that "[t]here was

no evidence at all as to when the DNA got on the gun and when that time coincided with him being a—having two qualifying offenses for purposes of the statute." Defense counsel further noted that there were two other individuals in the vehicle and that defendant did not own the vehicle.

¶ 18 In rebuttal, the State asserted that the person who placed the firearm in the bag was the "major contributor." The State concluded by stating that the jury had to "base it on the evidence, on the scientific evidence that places [defendant's] DNA on the gun that was found at his feet." Following less than an hour of deliberations, the jury found defendant guilty of being an AHC.

¶ 19 On August 25, 2023, defendant filed a motion for acquittal or, alternatively, a motion for new trial, which the trial court denied. On September 8, 2023, following a hearing, the court sentenced defendant to 14 years in prison, to be followed by 3 years of mandatory supervised release. Defendant filed a motion to reconsider his sentence, which the court denied. This appeal followed.

¶ 20 II. ANALYSIS

¶ 21 On appeal, defendant argues that (1) the State's evidence was insufficient to sustain his conviction; (2) his right to a fair trial was violated when the trial court failed to instruct the jury that the AHC offense required the jury to determine whether defendant knowingly possessed the firearm and defense counsel was ineffective for failing to obtain that instruction; (3) the court erred when it instructed the jury that it could find defendant guilty of AHC on a date other than the date specified in the charging instrument; (4) the State's closing argument relating to the DNA evidence and defendant's status as a "habitual criminal" was improper and prejudicial and defense counsel was ineffective for failing to object; and (5) defense counsel was ineffective when counsel failed to adequately respond to the State's DNA evidence. We address defendant's arguments in turn.

¶ 22 1. Sufficiency of the Evidence

¶ 23 Defendant first argues that the State's evidence was insufficient to prove him guilty of the offense of being an AHC. Specifically, defendant argues that the State's evidence failed to establish, beyond a reasonable doubt, that he had knowledge of the gun found in the vehicle. In support, defendant asserts that he did not own the vehicle, two other individuals were in the vehicle, he made no movements towards the firearm, and other unidentified individuals' DNA was found on the gun. The State responds that the evidence against defendant was overwhelming and, thus, sufficient to prove him guilty of the offense of being an AHC. Specifically, the State notes that the evidence demonstrated that the gun was found under the seat directly in front of where defendant was sitting in the vehicle, and defendant's DNA was found on the gun.

¶ 24 "When reviewing a challenge to the sufficiency of the evidence, the appropriate standard of review is whether viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offense were proven beyond a reasonable doubt." *People v. Nesbit*, 398 Ill. App. 3d 200, 208 (2010) (citing *People v. Pollock*, 202 Ill. 2d 189, 217 (2002); *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *People v. Collins*, 106 Ill. 2d 237, 261 (1985)). "The same standard of review applies when reviewing the sufficiency of evidence in all criminal cases, regardless of whether the evidence is direct or circumstantial." *Pollock*, 202 Ill. 2d at 217. Circumstantial evidence alone may be sufficient to sustain a conviction where such evidence satisfies proof, beyond a reasonable doubt, of the elements of the crime charged. *Id.* "Decisions regarding the credibility of witnesses and the weight given to their testimony are exclusively within the province of the jury." *Nesbit*, 398 Ill. App. 3d at 209 (citing *Collins*, 106 Ill. 2d at 261-62). "A reviewing court should not retry a defendant when considering a sufficiency of the evidence challenge." *Id.* (citing *People v. Wheeler*, 226 Ill. 2d 92, 114 (2007)).

¶ 25 A person commits the offense of being an armed habitual criminal when that person "receives, sells, possesses, or transfers any firearm" after previously having been convicted of two qualifying offenses. 720 ILCS 5/24-1.7(a) (West 2022). Here, defendant stipulated at trial that he had been convicted of two qualifying offenses. At issue is whether the State proved, beyond a reasonable doubt, that defendant knowingly possessed the gun found in the vehicle.

¶ 26 "Criminal possession may be actual or constructive." *Nesbit*, 398 Ill. App. 3d at 209. "Where the possession is constructive, the State must prove that [the] 'defendant (1) had knowledge of the presence of the weapon, and (2) had immediate and exclusive control over the area where the weapon was found.' " *Id.* (quoting *People v. Ingram*, 389 Ill. App. 3d 897, 899-900 (2009)). "The element of knowledge may, and most often must, be proved by circumstantial evidence," and while a person's "mere presence in the vicinity of the contraband is insufficient to establish constructive possession, control over its location gives rise to such an inference which is not undermined by the presence of others in the vicinity." *People v. Rangel*, 163 Ill. App. 3d 730, 739 (1987). "[T]he State cannot rely on an inference of knowledge from [a] defendant's presence in a motor vehicle where a weapon is found." *Nesbit*, 398 Ill. App. 3d at 209. "The State must present other evidence establishing [the] defendant's knowledge of the weapon." *Id.* (citing *Ingram*, 389 Ill. App. 3d at 900). Knowledge can be "inferred from several factors, including: (1) the visibility of the weapon from [the] defendant's location in the vehicle, (2) the amount of time in which [the] defendant had an opportunity to observe the weapon, (3) gestures or movements made by [the] defendant that would suggest an effort to retrieve or conceal the weapon, and (4) the size of the weapon." *Ingram*, 389 Ill. App. 3d at 900 (citing *People v. Hampton*, 358 Ill. App. 3d 1029, 1033 (2005); *People v. Bailey*, 333 Ill. App. 3d 888, 891-92 (2002)).

¶ 27 In the present case, the State presented sufficient evidence to establish, beyond a reasonable doubt, that defendant had knowledge of the presence of the gun found in the vehicle. While defendant did not own the vehicle and two other individuals were inside of the vehicle at the time of the traffic stop, the gun was found under the front passenger seat of the vehicle—directly in front of where defendant was seated. Officer Trock testified that she did not believe the person sitting in the front passenger seat could have placed the gun under the seat due to the seat's wiring, indicating that defendant had immediate and exclusive control over the area where the gun was found. We acknowledge that neither Officer Reilly nor Officer Trock testified that they observed defendant make any movements towards the gun and that Officer Trock testified that the gun was not visible until she moved the seat. However, we note that DNA consistent with defendant's DNA was found in two places on the gun, indicating that defendant had knowledge of the gun. Although other DNA profiles were found on the gun, Broaddus testified that defendant was the highest contributor of DNA found on the gun. Specifically, Broaddus testified that the profile consistent with defendant's DNA contributed over 50% of the DNA found on both samples from the gun. Broaddus also testified that "touching an item and handling it is the best way really to get DNA on the item." This evidence, when viewed in a light most favorable to the State, was sufficient for a reasonable jury to conclude that defendant knowingly possessed the gun. Thus, we reject defendant's argument that the evidence was insufficient to sustain his conviction for being an AHC.

¶ 28 We acknowledge that defendant cites *Bailey* in support of his contention that the State's evidence was insufficient; however, we find the facts of *Bailey* distinguishable. The defendant in *Bailey* was riding in the front passenger seat of a vehicle and police discovered a gun under the defendant's seat. *Bailey*, 333 Ill. App. 3d at 889-90. The Third District concluded that the State's

evidence was insufficient to establish that the defendant had knowledge of the gun where the evidence demonstrated that the gun was not visible to the defendant; the vehicle and gun were owned by other individuals; and police did not observe the defendant reach for the gun. *Id.* at 892. In addition, the Third District noted that there was no forensic evidence, specifically fingerprints, connecting the defendant to the gun. *Id.* Unlike *Bailey*, here, DNA consistent with defendant's DNA was found on the gun and, thus, there was forensic evidence connecting defendant to the gun. In addition, in *Bailey*, the evidence demonstrated that the gun was owned by another person, whereas here, there was no evidence indicating who owned the gun. For these reasons, we do not find *Bailey* controlling.

¶ 29 2. AHC Jury Instructions

¶ 30 Defendant next argues that the trial court violated his right to a fair trial when it failed to properly instruct the jury regarding the offense of being an AHC. Specifically, defendant argues that the court erred by failing to include the knowledge element in the jury instructions. Defendant alternatively argues that defense counsel was ineffective for failing to obtain instructions with the knowledge element. The State responds that there was no error or ineffective assistance of counsel where the court instructed the jury with the existing Illinois Pattern Jury Instructions for the offense of being an AHC.

¶ 31 Defendant acknowledges that he failed to preserve this issue for review by objecting to the jury instructions at his trial and by including the issue in a posttrial motion. See *People v. Herron*, 215 Ill. 2d 167, 175 (2005) ("Generally, a defendant forfeits review of any putative jury instruction error if the defendant does not object to the instruction or offer an alternative instruction at trial and does not raise the instruction issue in a posttrial motion."). Nevertheless, defendant argues that this court should review the issue under either prong of the plain-error doctrine. The plain-error

doctrine allows a reviewing court to reach a forfeited issue affecting substantial rights where (1) "the evidence in a case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence," or (2) "the error is so serious that the defendant was denied a substantial right, and thus a fair trial." *Id.* at 178-79. Under both prongs of the plain-error doctrine, the defendant has the burden of persuasion. *Id.* at 187. Generally, the first step in plain-error review is to determine whether error occurred at all. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). With this in mind, we consider defendant's argument regarding the AHC jury instructions.

¶ 32 "The function of jury instructions is to convey to the jury the law that applies to the evidence presented." *Herron*, 215 Ill. 2d at 187. The jury instructions should not be misleading or confusing and their correctness depends on whether ordinary persons acting as jurors would fail to understand them. *Id.* at 187-88. "[A] jury instruction error rises to the level of plain error only when it 'creates a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law, so as to severely threaten the fairness of the trial.' " *Id.* at 193 (quoting *People v. Hopp*, 209 Ill. 2d 1, 8 (2004)).

¶ 33 Generally, when "Illinois Pattern Jury Instructions, Criminal contains an instruction applicable in a criminal case *** and the court determines that the jury should be instructed on the subject, the IPI Criminal instruction *shall* be used, unless the court determines that it does not accurately state the law." (Emphasis added.) Ill. S. Ct. R. 451(a) (eff. Apr. 8, 2013). Defendant maintains that the trial court erred by instructing the jury with the Illinois Pattern Jury Instructions that were in effect at the time of his trial. Specifically, defendant asserts that the trial court erred by giving IPI Criminal No. 18.07B, which provided as follows: "A person commits the offense of being an armed habitual criminal when he possesses a firearm after having been convicted of two

qualifying offenses." Defendant also asserts that the court erred by giving IPI Criminal No. 18.08B, which provided that the State was required to prove two propositions to sustain the charge of AHC: (1) "that the defendant possessed any firearm," and (2) "that the defendant had previously been convicted of two qualifying offenses." Defendant maintains that these instructions did not accurately state the law because the instructions failed to include the requisite element of knowledge.

¶ 34 As stated *supra*, a person commits the offense of being an AHC when that person, *inter alia*, "possesses *** any firearm" after previously having been convicted of two qualifying offenses. 720 ILCS 5/24-1.7(a) (West 2022). Where an offense is possessory in nature and the statute does not include a specific mental state, "knowledge is the appropriate mental state." *People v. Ramirez*, 2023 IL 128123, ¶ 22. Also, as stated *supra*, "[c]riminal possession may be actual or constructive." *Nesbit*, 398 Ill. App. 3d at 209. "Where the possession is constructive, the State must prove that [the] 'defendant (1) had knowledge of the presence of the weapon, and (2) had immediate and exclusive control over the area where the weapon was found.' " *Id.* (quoting *Ingram*, 389 Ill. App. 3d at 899-900). Accordingly, we agree with defendant that the State was required to prove defendant knowingly possessed the firearm. We also agree that the AHC jury instructions given in the present case did not specifically apprise the jury of the element of knowledge. See *People v. Hampton*, 2024 IL App (1st) 230171, ¶ 32. We note that the AHC jury instructions have since been amended to include the element of knowledge.

¶ 35 In support of his assertion that the trial court committed plain error by giving IPI Criminal No. 18.07B and IPI Criminal No. 18.08B, defendant cites *People v. Hampton*, 2024 IL App (1st) 230171. In *Hampton*, the defendant was charged with AHC and other related offenses after police discovered a firearm underneath a seat in the vehicle the defendant was driving. *Id.* ¶¶ 3-4. The

First District considered the propriety of the jury instruction "that a person commits AHC 'when he possesses any firearm after previously being convicted of two qualifying felony offenses.' " *Id.* ¶ 32. Because the instruction did not specify that a person must " 'knowingly' " possess the firearm or "otherwise indicate that knowledge was an element of AHC," the First District concluded that the jury instructions "failed to apprise the jury of an essential element of the charged offense." *Id.* ¶ 36 The First District concluded that giving the jury instruction constituted plain error under the " 'closely balanced' " prong, where the State and defendant "presented two competing versions of events, relative to whether [the defendant] knew the firearm was under his seat in the vehicle." *Id.* ¶¶ 36-37. Specifically, the First District noted that the State presented evidence demonstrating that the arresting officer had observed the defendant reach toward the floor, the defendant appeared nervous, and the officer found the firearm underneath the driver's seat where he had seen the defendant reach. *Id.* ¶ 37. The First District noted that other evidence demonstrated that the defendant told the arresting officer there were no firearms in the car, the vehicle belonged to the defendant's girlfriend, and the firearm was not visible. *Id.* ¶ 38. In addition, the defendant's girlfriend testified that both the vehicle and gun belonged to her; she placed the gun under the seat to remove it from a party with children; she did not tell defendant the gun was under the seat; and the defendant borrowed her vehicle to drop off a friend. *Id.* The First District additionally noted that there was no forensic evidence connecting the defendant to the firearm. *Id.* The First District also observed that the jury deliberated for several hours and the "jurors' notes indicate[d] that they were struggling to reach a consensus on whether the State had proven its case." *Id.* ¶ 40. The First District could not conclude that "the trial court's refusal to instruct the jury on the principal contested issue of [the defendant's] knowledge, when the evidence was closely balanced and the jury indicated that it was struggling to reach a verdict and was told to review the jury instructions,

was harmless." *Id.* ¶ 42. The First District "express[ed] no opinion on whether, in future cases, the failure to give an instruction that includes the knowledge requirement will require reversal based on the facts of the case." *Id.* ¶ 47.

¶ 37 Here, unlike *Hampton*, the evidence against defendant was not closely balanced. We acknowledge that, similar to *Hampton*, the vehicle did not belong to defendant in this case. Unlike *Hampton*, however, there was no evidence demonstrating that another person owned the gun and placed it in the car without defendant's knowledge. The evidence in this case demonstrated that the gun was found under the front passenger's seat—directly in front of where defendant was sitting in the vehicle. Officer Trock testified that the front seat passenger would not have been able to access the gun due to the seat's wiring. In addition, DNA consistent with defendant's DNA was found on the gun. Although DNA from unidentified individuals was also found on the gun, Broaddus determined that defendant was the highest contributor of the DNA on the gun. Thus, unlike *Hampton*, there was forensic evidence connecting defendant to the gun in this case. Moreover, unlike *Hampton*, the jury in the present case deliberated for less than an hour before finding defendant guilty, indicating that there was no struggle to reach a verdict. Based on our review of the record, we do not find the evidence in this case closely balanced and, thus, defendant has failed to establish first-prong plain error.

¶ 38 We also reject defendant's assertion that the jury instructions constituted second-prong plain error. We reiterate that "an omitted jury instruction constitutes plain error only when the omission creates a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law, so as to severely threaten the fairness of the trial." *Hopp*, 209 Ill. 2d at 12. "[E]ven an incorrect instruction on an element of the offense is not necessarily reversible error." *Id.* at 10 (citing *People v. Jones*, 81 Ill. 2d 1, 10 (1979)). Here, although IPI

Criminal No. 18.07B and IPI Criminal No. 18.08B did not specifically reference knowledge, the jury was instructed as follows: "Possession may be actual or constructive[.] A person has actual possession when he has immediate and exclusive control over a thing[.] A person has constructive possession when he lacks actual possession of a thing, but he has both the power and the intention to exercise control over a thing." From this instruction, the jurors would have understood that the State had to prove defendant knowingly possessed the firearm. See *People v. Woods*, 2023 IL 127794, ¶ 47 ("[S]ome errors in jury instructions can be considered harmless, such as when an inaccurate instruction, standing alone, may be misleading but other instructions clear up the confusion."); see also *People v. Terry*, 99 Ill. 2d 508, 516 (1984) ("When considered and read as a whole, the instructions in this case fully and adequately informed the jury of the applicable law."). We also reiterate that the evidence in this case demonstrated that the gun was found under the seat directly in front of where defendant was sitting and that defendant was the highest contributor of the DNA found on the gun. Under these circumstances, we conclude that the jury instructions did not severely threaten the fairness of defendant's trial.

¶ 39 For similar reasons, we reject defendant's argument that defense counsel was ineffective for failing to request a non-pattern jury instruction on AHC's knowledge element. In light of our analysis set forth above, defendant has failed to show that but for defense counsel's failure to request a non-pattern jury instruction, the outcome of the proceeding would have been different—meaning defendant would have been acquitted. See *People v. Young*, 341 Ill. App. 3d 379, 383 (2003) (In order to establish a claim of ineffective assistance of counsel, a defendant must prove: "(1) his lawyer's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for the defense lawyer's errors, the outcome of the proceeding would have been different." (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984))).

¶ 40 3. Date of Offense Charged Jury Instruction

¶ 41 Defendant next argues that the trial court erred by giving IPI Criminal No. 3.01, which provided that the jury could find defendant guilty of being an AHC on a date other than the date charged. Defendant maintains that the State's evidence related solely to the alleged offense on the charged date and the instruction invited the jury to speculate as to whether the offense was committed at some other specified time. The State responds that the court did not err in giving IPI Criminal No. 3.01 where defendant injected the issue of when defendant's DNA was deposited on the gun at trial.

¶ 42 We note that, unlike defendant's previous claims of error, this issue has been preserved for review. Where the defendant has made a timely objection and included the issue in a posttrial motion, we employ a harmless-error analysis. *People v. Thurow*, 203 Ill. 2d 352, 365 (2003). In a harmless-error analysis, the State bears the burden of persuasion with respect to prejudice in that "the State must prove beyond a reasonable doubt that the jury verdict would have been the same absent the error." *Id.* at 363. " 'An error in a jury instruction is harmless if it is demonstrated that the result of the trial would not have been different had the jury been properly instructed.' " *People v. Mohr*, 228 Ill. 2d 53, 69 (2008) (quoting *People v. Pomykala*, 203 Ill. 2d 198, 210 (2003)). "Where the evidence of guilt is clear and convincing, an instructional error may be deemed harmless." *People v. Dennis*, 181 Ill. 2d 87, 95 (1998).

¶ 43 "Generally, the decision to give certain jury instructions rests with the trial court, and that decision will not be reversed on appeal absent an abuse of that discretion." *People v. Hale*, 2012 IL App (4th) 100949, ¶ 19. The jury instruction at issue, IPI Criminal No. 3.01, provided as follows: "The information states that the offense charged was committed July 31, 2022[.] If you find the offense charged was committed, the State is not required to prove that it was committed

on the particular date charged." The committee notes for IPI Criminal No. 3.01 indicate that 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, Committee Comments.

¶ 44 Ordinarily, " 'the date alleged in the indictment is not material, and *** 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). The 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).

¶ 45 Here, even assuming *arguendo* that the use of IPI Criminal No. 3.01 was error, defendant asserted no alibi to the allegations and acknowledged that he was present in the car when the gun was found by police. Accordingly, for any error regarding use of IPI Criminal No. 3.01 to be reversible, the inconsistencies between the date charged in the indictment and the evidence presented at trial must be so great that defendant was misled in presenting his defense. Defendant asserts in his reply brief to this court that the defense's theory was "not that [defendant] possessed

the gun on a different date, but that the State's evidence was insufficient to show that he ever possessed the gun, since his DNA could have been innocently transferred at some unknown prior time." In other words, according to defendant, regardless of the date, he never possessed the gun. Thus, we conclude that defendant was not misled in preparing and presenting his defense. See *People v. Sims*, 2019 IL App (3d) 170417, ¶ 42. ("Because defendant denied ever knowingly possessing a firearm, he was not misled in preparing and presenting his defense."). Accordingly, any error in the use of IPI Criminal No. 3.01 was not reversible error.

¶ 46 We find defendant's reliance on *People v. Arrington*, 2025 IL App (5th) 230344-U, misplaced. In *Arrington*, this court considered whether the defendant was denied a fair trial due to various comments made by the State during closing arguments, 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 presented theories for the first time at closing argument; and the State misrepresented the defense witness testimony. *Id.* ¶ 45. With regard to the specific argument that the State improperly expanded the time frame of the charge, the defendant argued that the State improperly presented IPI Criminal No. 3.01 to the jury during closing arguments. *Id.* ¶ 55. This court concluded that "[s]ince there was no evidence that the charged incident occurred on any date other than [the date charged in the information], the instruction should not have been introduced by the State during closing arguments." *Id.* ¶ 58. This court additionally determined that the State utilized "misleading and unclear" examples in closing arguments. *Id.* ¶ 62. This court found error "[w]hen considering the entirety of the State's closing argument." *Id.* ¶ 65. This court reversed the defendant's conviction and remanded the cause for a new trial, concluding that the evidence in the defendant's case was closely balanced. *Id.* ¶ 66.

¶ 47 We find the present case distinguishable from *Arrington* in several respects. First, defendant, here, asserts that the trial court erred by giving IPI Criminal No. 3.01, whereas the defendant in *Arrington* argued that the State improperly used IPI Criminal No. 3.01 during closing arguments. The defendant in *Arrington* additionally asserted that the State made multiple improper comments during closing arguments and this court concluded that the State's reference to IPI Criminal No. 3.01, coupled with the State's use of improper examples, during closing arguments constituted plain error. *Id.* ¶ 65. In addition, this court concluded that the error was reversible in *Arrington* because the evidence was closely balanced. *Id.* ¶ 66. As discussed *supra*, the evidence in the present case was not closely balanced. Moreover, in *Arrington*, this court did not consider whether the inconsistencies between the date charged in the indictment and the evidence presented at trial were so great that the defendant was misled in presenting his defense. Accordingly, we do not find *Arrington* controlling in the present case.

¶ 48 4. State's Closing Argument

¶ 49 Defendant next argues that his constitutional right to a fair trial was violated by the State's closing argument, which mischaracterized the DNA evidence and included improper prejudicial statements. Specifically, defendant argues that the State misrepresented the DNA evidence when it stated that the gun belonged to defendant because he was the "major contributor" of the DNA found on the gun and the State improperly commented that defendant conceded he was a "habitual criminal." Defendant further argues that defense counsel was ineffective for failing to object to the State's closing argument. The State responds that there was no plain error in the closing argument and counsel was not ineffective for failing to object.

¶ 50 Defendant acknowledges that he failed to preserve this issue for review. See *Wheeler*, 226 Ill. 2d at 122 (a defendant is generally required to object to the statements made by the State at

trial and include that issue in a written posttrial motion to preserve a challenge to improper statements made during closing argument). Nevertheless, defendant maintains that this court should review his claim under the first prong of the plain-error doctrine. As stated *supra*, " '[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 (quoting *Herron*, 215 Ill. 2d at 186-87). Generally, the first step in plain-error review is to determine whether error occurred at all. *Piatkowski*, 225 Ill. 2d at 565.

¶ 51 The State is generally afforded wide latitude during closing argument. *People v. Holmon*, 2019 IL App (5th) 160207, ¶ 49. The State "may properly comment on the evidence presented and reasonable inferences drawn from that evidence, respond to comments made by defense counsel that invite a response, and comment on the credibility of a witness." *People v. Marzonie*, 2018 IL App (4th) 160107, ¶ 47. However, the State may not personally vouch for the credibility of a witness, bolster a witness's testimony, misstate the evidence, or argue facts not in evidence. *Id.* "To determine whether [the State's] comment in closing argument was improper, a reviewing court must view such comment in its proper context." *Id.*

¶ 52 Here, defendant has failed to demonstrate that the State's comments during closing argument were improper. The State was permitted to argue the evidence presented at trial and any reasonable inference that could be drawn from that evidence. The State's assertion that defendant possessed the gun because he was the highest contributor of the DNA found on the gun was a reasonable inference that could be drawn from the evidence. Broaddus testified that "touching an item and handling it is the best way really to get DNA on the item." Broaddus's testimony, when viewed as a whole, indicated that generally the more a person handles an item the more DNA is

likely to be left on the item. Thus, the State's assertion that defendant possessed the gun because he was the highest contributor of DNA found on the gun did not misstate the evidence and was, instead, a reasonable inference that could be drawn from the evidence.

¶ 53 The State's assertion that defendant was a "habitual criminal" was also based on the evidence. The State was required to prove that defendant had two qualifying offenses, and defendant stipulated that he had two qualifying offenses. Accordingly, there was no error in the State referring to defendant as a habitual criminal during closing argument. See *People v. Rios*, 2022 IL App (1st) 171509, ¶¶ 95-96 (concluding that there was no error in the State's reference to the defendant as a "a gun-toting, face-tattooed, multi-time convicted felon" during closing argument where the parties stipulated that the defendant had two qualifying felony convictions); see also *People v. Avalos*, 2025 IL App (1st) 230874-U, ¶ 54 (concluding that there was no error in the State's reference to the defendant as a "convicted felon" in its opening statement and closing argument where the parties stipulated that the defendant was a convicted felon). Because the State's closing argument was not improper, there can be no plain error.

¶ 54 Moreover, even assuming *arguendo* that the State's remarks were improper, defendant cannot demonstrate that the State's remarks constituted plain error because the evidence in this case was not closely balanced. As stated *supra*, the State's evidence against defendant was strong. The evidence demonstrated that the gun was found under the seat directly in front of where defendant was sitting in the vehicle. In addition, defendant was found to be the highest contributor of DNA found on the gun. Accordingly, defendant cannot demonstrate that the State's closing argument constituted plain error for this additional reason.

¶ 55 For similar reasons, we reject defendant's argument that defense counsel was ineffective for failing to object to the State's closing argument. In light of our analysis set forth above,

defendant has failed to show that defense counsel's performance was deficient for failing to object to proper arguments made by the State and that but for defense counsel's failure to object, the outcome of the proceeding would have been different—meaning defendant would have been acquitted. See *Young*, 341 Ill. App. 3d at 383 (In order to establish a claim of ineffective assistance of counsel, a defendant must prove: "(1) his lawyer's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for the defense lawyer's errors, the outcome of the proceeding would have been different." (citing *Strickland*, 466 U.S. at 687)).

¶ 56 5. Defense Counsel's Effectiveness Regarding DNA Evidence

¶ 57 Lastly, defendant argues that defense counsel was ineffective when counsel failed to clarify Broaddus's testimony that defendant was the highest contributor of DNA to the firearm by presenting available scientific evidence showing that being a "major contributor" of DNA in a multiple-contributor sample does not mean that a person last touched or possessed the item. The State responds that defense counsel was not required to call a DNA expert or present additional evidence to support the defense's theory of the case when the defense's theory of the case was supported through cross-examination of Broaddus.

¶ 58 As noted, in order to establish a claim of ineffective assistance of counsel, a defendant must prove: "(1) his lawyer's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for the defense lawyer's errors, the outcome of the proceeding would have been different." *Id.* (citing *Strickland*, 466 U.S. at 687). In considering whether counsel's performance was deficient, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action

'might be considered sound trial strategy.' " *Strickland*, 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). "Generally, matters of trial strategy will not support a claim of ineffective assistance of counsel unless counsel failed to conduct any meaningful adversarial testing." *People v. Patterson*, 217 Ill. 2d 407, 441 (2005). "The decision whether to call particular witnesses is a matter of trial strategy and thus will not ordinarily support an ineffective-assistance-of-counsel claim." *Id.* at 442.

¶ 59 Here, the defense's theory was that defendant's DNA could have been deposited on the gun without defendant touching the gun. Defense counsel elicited testimony from Broaddus on cross-examination in support of the defense's theory. Notably, on cross-examination, Broaddus admitted that she could not determine the type of biological material, being either skin cells or saliva, that was found on the gun. Broaddus also admitted that she could not determine how or when defendant's DNA was transferred to the gun. Broaddus also testified that some individuals shed DNA more readily than others, which could explain the presence or absence of DNA on a particular object. Broaddus also testified that a person's DNA could be transferred to an object without a person touching the object, noting that speaking near an object could transfer a person's DNA to that object. Broaddus's testimony also revealed that other individuals' DNA was found on the gun. Under these circumstances, it was not unreasonable for defense counsel to rely on his own cross-examination of Broaddus in lieu of calling his own forensic expert or presenting additional DNA evidence, which could have further highlighted the presence of defendant's DNA on the gun to the jury.

¶ 60 Accordingly, defendant has failed to show that defense counsel's performance in challenging the State's DNA evidence fell below an objective standard of reasonableness. Thus, he has failed to establish a claim of ineffective assistance of counsel.

¶ 61 III. CONCLUSION

¶ 62 For the foregoing reasons, we affirm the judgment of the circuit court of Champaign County.

¶ 63 Affirmed.