2021 IL App (2d) 180514-U
Nos. 2-18-0514 & 2-18-0515 cons.
Order filed February 2, 2021

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	Nos. 15-CF-1690 16-CF-913
JUAN ARELLANO-BERBER,	)	Honorable Donald Tegeler,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Hutchinson and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm defendant's residential-burglary conviction. Although the trial court erred when admonishing the jury of the *Zehr* principles, defendant did not object and there was no plain error. The court's decision to admit evidence that defendant possessed the stolen gun did not amount to improper other-crimes evidence. The evidence was sufficient to convict.

¶ 2 A jury convicted defendant, Juan Arellano-Berber, of residential burglary (720 ILCS 5/19-3(a) (West 2016)) in case No. 16-CF-913. Defendant's residential-burglary conviction caused the court to revoke his probation in case No. 15-CF-1690, wherein defendant had pleaded guilty to aggravated domestic battery. The court sentenced defendant to seven years' imprisonment for the

residential burglary and resentenced him to four years' imprisonment for the aggravated domestic battery, to run concurrently.

¶ 3 Defendant's arguments on appeal concern only the residential burglary. However, defendant's aggravated-domestic-battery conviction and sentence are included in this appeal, because his prison term in the battery case was premised on his residential-burglary conviction.

¶ 4 Specifically, defendant argues that the trial court did not comply with Illinois Supreme Court Rule 431(b), which sets forth four principles of law commonly known as the *Zehr* principles. See Ill. S. Ct. Rule 431(b) (eff. July 1, 2012) (codifying *People v. Zehr*, 103 Ill. 2d 472 (1984)). Defendant did not object to the error below, and now he argues that the court's non-compliance constituted prong-one plain error, because the evidence was closely balanced. He also argues that the evidence was insufficient to convict. We agree that the court failed to comply with Rule 431(b). See *People v. Dismuke*, 2017 IL App (2d) 141203. We disagree, however, that the evidence was closely balanced, particularly where the trial court properly admitted evidence that defendant possessed the gun stolen in the residential burglary. The evidence was also sufficient to convict. We affirm.

¶ 5 I. BACKGROUND

¶ 6 This case concerns a residential burglary occurring on May 26, 2016, at 200 Butte Lane in Carpentersville (200 Butte). Maria Ibarra and her adult son, Abel Rodriguez, resided at 200 Butte. According to the State's theory of the case, Ibarra's niece, Crystal Villegas, defendant (Villegas's then-boyfriend), and Daniel Aguirre committed the offense. Villegas, defendant, and Aguirre lived together at 25 Pine Street in Carpentersville (25 Pine), along with two other people. On June 2, 2016, police responded to Villegas's 911 call, and the three were apprehended. (Defendant later pleaded guilty to a *second* battery, case No. 16-CF-914, in conjunction with the June 2, 2016,

incident, which is not at issue here.) The June 2, 2016, incident involved the gun stolen in the residential burglary, and the court allowed into evidence limited testimony about defendant's possession of the stolen gun.

¶ 7 According to defendant's theory of the case, however, Villegas committed the May 26, 2016, residential burglary alone. She called police on June 2, 2016, to frame defendant, because she knew the police suspected her in the residential burglary. She hoped that, by implicating defendant, she would receive immunity.

¶ 8 The State charged defendant with residential burglary (720 ILCS 5/19-3(a) (West 2016) ("A person commits residential burglary when he or she knowingly and without authority enters or knowingly and without authority remains within the dwelling place of another, or any part thereof, with the intent therein to commit a felony or a theft")), and the prosecution commenced. Due to the nature of the issues on appeal, we find it helpful to quote large portions of the trial transcript.

¶ 9 A. Rule 431(b)

¶ 10 During *voir dire*, the trial court admonished the jury pursuant to Rule 431(b). The court instructed:

> "Earlier, I touched upon some principles of law that apply to all criminal cases. I am going to explain to you certain principles. And if you *understand* the principles, *agree* with those principles, and *accept* those principles, please do not raise your hand. That will signify that you *understand*, *agree* and *accept* these principles.
>
> If you do not *understand or accept* these principles or you do not agree with them, I would ask that you raise your hand in response to my questions.

First principle: The defendant is presumed to be innocent of the charges against him. This presumption remains with the defendant throughout the trial and is not overcome unless, by your verdict, you find that the State has proven the defendant guilty beyond a reasonable doubt.

Is there anybody here who has any *difficulty or disagreement* with this proposition of law, the presumption of innocence? If so, please raise your hand.

There are no hands raised.

Second proposition and order of the court: The State has the burden of proving the guilt of the defendant beyond a reasonable doubt. This burden remains upon the State throughout the trial.

Does anybody have a *difficulty or disagreement* with that proposition of law, the burden of proof? If so, please raise your hand.

There are no hands raised.

The third proposition: The defendant is not required to offer any evidence on his own behalf.

Does anyone have any *difficulty or disagreement* with this principle of law? If so, please raise your hand.

There are no hands raised.

Fourth proposition: If the defendant does not testify, it cannot be held against him. Does anybody have any *difficulty or disagreement* with this proposition of law, the right to remain silent?

If so, please raise your hands.

There are no hands raised." (Emphases added.)

¶ 11 The attorneys went on to question the prospective jurors. This exchange occurred between defendant's attorney and prospective juror No. 49:

"[THE DEFENSE]: Okay. Ma'am, what were your first thoughts?

[JUROR NO. 49]: Anger. Just frustrated by, you know, how did we get to this point that he's accused of that, we ended up here in the jury, there has to be something to that. And then, you know what else—

[THE DEFENSE]: Do you think that [defendant] must have done something to get himself in the chair here today?

[JUROR NO. 49]: I can't help—as much as I try to open up my mind, I can't help continuing to hold to that point. And then, when you say there is a possibility that you wouldn't speak, then that heightens my thought that there is a reason why you wouldn't want to talk.

THE COURT: Let me hop in here. Previously instructed everybody, and I will do that again, in this case, that State has the burden of proof beyond a reasonable doubt. [The court continued to review the *Zehr* principles in an uninterrupted and unscripted manner.]

Does anybody in the courtroom have any *problem* with those orders of the court? All right. You do?

I know you're 49. Tell me what's your *problem*? And I appreciate—that's why I said, raise your hand. Let's go through this.

[JUROR NO. 49]: I am trying really hard to listen and I've listened to all of these people say how open minded you would be. And I try to be really open minded, but I keep swaying towards even though in theory, I am supposed to follow those issues, it is hard to not think differently.

THE COURT: Okay.

[JUROR NO. 49]: And I am trying not to, but it is hard.

THE COURT: *** Are you saying that under no circumstances would you be able to listen to my instructions and cloak this person with the presumption of innocence?

[JUROR NO. 49]: If I were being completely honest, possibly. That's where my mind keeps going." (Emphases added.)

The defense moved to strike juror No. 49 based on her answers. The court granted the motion.

¶ 12 B. Motions *In Limine*

¶ 13 The court conducted hearings on the parties' motions *in limine*. At issue was the June 2, 2016, incident. Specifically, 25 Pine was a known gang house. Rival gang members drove by the house and shouted a provocative message. Defendant wanted to respond to them, and he told Villegas that he and Aguirre needed a driver. Villegas drove defendant and Aguirre to a rival gang house. Defendant shot at the house with the gun stolen in the instant residential burglary. That same night, defendant also held Villegas against her will, and she complied, because she knew he possessed the gun. Eventually, Villegas was able to escape and call 911. The police arrived and took defendant into custody. He was charged with battery (for his June 2, 2016, actions) and residential burglary (for his May 26, 2016, actions).

¶ 14 Defendant moved to bar Villegas from testifying that defendant shot the gun on June 2, 2016. Defendant argued that the act of discharging the gun had limited probative value as to the residential burglary. It occurred one week after the residential burglary. Further, defendant urged, Villegas could testify to other, less incendiary incidents when she saw defendant holding the stolen gun. The State argued that defendant's use of the stolen gun was relevant to whether he stole it.

¶ 15 The court granted defendant's motion in part, and denied it in part:

"It's close enough in time and the incident concerns a weapon, and I am told that the witness can *probably* identify it. I am going to allow the State to elicit evidence that the defendant possessed the weapon.

I am not going to allow you to get into the fact that there was a discharge of the weapon, and I am not going to allow the State to argue based upon defendant's record that he was not allowed to possess the weapon.

So[,] I don't want any uncharged events coming out. I understand possession alone might be, but I don't think the jury understands that. They would understand a discharge. So you could have her testify that she saw him with a weapon—I am assuming it's in the car from what I understand? She was supposedly the driver?

[THE STATE]: Yes. But he is outside. I understand your limit.

THE COURT: That she saw him with a weapon. I will allow that, but I am not going to allow in the fact that he discharged it or anything of that nature." (Emphasis added.)

¶ 16 The State moved to admit the tape of Villegas's 911 call under the excited-utterance exception to the rule against hearsay. The court denied the motion. The court agreed that the tape had some probative value, in that Villegas reported that defendant possessed what was likely the stolen gun. However, the prejudicial impact would be too great, as Villegas relayed in an excited voice the bad acts defendant had committed that night.

¶ 17 The court also barred Villegas from testifying to the domestic incident that caused her to call 911. (However, Villegas would be able to testify in limited fashion to the bare fact that she called 911.)

¶ 18 Before the start of trial, the court sought to review its evidentiary rulings. The following exchange occurred:

"THE COURT: We have already done the pretrial motions. Everyone remember the rulings?

[THE STATE]: Yes.

[THE DEFENSE]: Yes.

[THE STATE]: And regarding that, just to make you aware, I did talk to [defense counsel] about that I had asked for, in order to make sure, I can, as we all know, I can tell the witnesses what not or not to go into, but sometimes—

THE COURT: Oh, I would advise them what the court's order is.

[THE STATE]: Yes. And I have. And I will talk to them again, but I did talk to [defense counsel] about when there are situations where it would—there is a high risk that or a high possibility that maybe information would come in that isn't, I'm going to ask leading questions.

I understand if she objects, if it doesn't—for some reason, she isn't aware that this is the way I am going, she did seem amenable to that, *just asking one or two leading questions when there are issues as to why 911 would be called*.

THE COURT: I will leave that up to—if there is an objection that you think you have to make, just ask to approach.

[THE DEFENSE]: *I would agree that we had a conversation and I do believe that probably [is] the safest avenue for some parts of this trial*." (Emphases added.)

¶ 19 C. Trial

¶ 20 1. The State's Case

¶ 21 i. Villegas

¶ 22 The State called Villegas as its first witness. It began by asking her when she saw defendant possess the gun:

"Q. *** [T]aking you back to June 2, 2016, were you—did you sleep in the bedroom that you shared with [defendant] that night?

A. Yes.

Q. And in the morning, in that morning, were you in the bedroom with [defendant]?

A. Yes.

Q. At some point, did you put your hand on his waistband?

A. Yes.

Q. When you did that, did you feel anything underneath his shirt?

A. It was what I thought I felt, yes.

Q. What did you think you felt?

[THE DEFENSE]: Judge, at that point, I am going to object based on the motion *in limine* previously filed. I understand the court made a ruling with respect to that.

[THE STATE]: Judge, this shows the effect on the listener.

THE COURT: As far as speculative, I will sustain it.

Q. Did you feel anything hard underneath his shirt?

A. What I believed it was a gun.

[THE DEFENSE]: Objection to speculation.

[THE STATE]: Judge, it shows the effect on the listener, what she does after this.

THE COURT: What she believes is not appropriate and I will sustain the answer as to what she believed. She can answer the question if she felt anything hard with a yes or a no, I believe.

Q. Did you feel anything hard underneath the shirt?

A. Yes.

Q. And prior to that date, had you seen [defendant] with a gun?

A. Yes.

[THE DEFENSE]: Judge, again, for the record, I am going to object knowing the pretrial ruling and motion.

THE COURT: That will be overruled.

Q. After feeling something hard underneath his shirt, did you call the police?

A. Yes.

Q. Did you leave the house?

A. I left the house.

Q. And did you use a stranger's phone to call the police?

A. I did.

Q. Did you call the police and report that [defendant] had a gun?

A. Yes.

* * *

A. [Then, I went back toward the house to speak with a police officer.]

Q. And did you tell [the officer] that [defendant] had a gun?

[Hearsay objection overruled.]

A. Yes.

Q. Why did you report that [defendant] had a gun?

A. Just because I know what he's capable of.

[THE DEFENSE]: Objection, your honor.

THE COURT: *Sustained. The jury will disregard that*.

Q. Were you scared of [defendant]?

A. I was.

[THE DEFENSE]: Objection, leading.

THE COURT: *Sustained*.

Q. What were your concerns with [defendant] having a gun?

A. After I left the house, I just felt that he would either—

[THE DEFENSE]: Objection to speculation as to what she felt.

[THE STATE]: Judge, may we approach?" (Emphases added.)

¶ 23 The following sidebar occurred:

"[THE STATE]: Judge, the reason why I am asking this as a direct exam question is because she reported that [defendant] had a gun, but she also reported that [defendant] shot the house the night before[.] *** I'm trying not to have her go into the fact that what you sustained that she was aware what he was capable of. So that's why I am leading so that she doesn't go into it.

THE COURT: She reported he had a gun, what is the relevance of all this to the residential burglary?

[THE STATE]: She was scared.

THE COURT: That's not relevant to a residential burglary.

[THE STATE]: It would show—again, I am showing the effects on the listener as to why.

THE COURT: So she—I don't see the relevance to a residential burglary[;] *** it is not relevant as to whether he committed the [burglary] offense."

The court sustained the objection.

¶ 24 Villegas then testified that, after speaking with the officer outside the house, she went to the Carpentersville police station for an interview. It was there that she told them about the residential burglary.

¶ 25 Villegas described the *first* time she saw the stolen gun. It was May 26, 2016, and she, defendant, and Aguirre had just left 200 Butte and returned to 25 Pine. Aguirre worked to open the stolen lock box. Villegas watched, and she was surprised to see that the lock box contained a gun. "We saw there was a gun[,] and I went to get [defendant's] attention as quickly as I could to notify him of the gun." Villegas handed the gun to defendant. Defendant took out the clip, and he determined that the gun was loaded. Defendant kept the gun. Villegas saw Aguirre with the gun a few times, but, more often, defendant kept the gun. Defendant stored the gun in the bedroom that he shared with Villegas. Villegas observed that defendant cleaned the gun each time he handled it. The State asked Villegas to identify the actual gun, Exhibit No. 20:

"Q. I am showing you what I previously marked as Exhibit No. 20. Is this the gun that you saw?

A No."

Next, the State asked Villegas to identify a photograph of the actual gun, Exhibit No. 21:

"Q. *** I am showing you what is People's Exhibit No. 21. Can you tell me what that is? What is this a picture of?

A. The gun.

Q. Is this the gun you saw [defendant] with?

A. *It is not what I remember it looking like*.

Q. How often did you hold the gun yourself?

A. Never did hold the gun.

Q. When you spoke with—you were interviewed at the Carpentersville Police Station, correct?

A. Correct.

Q. What color—and you were asked what color the gun was that you saw?

A. Black.

Q. And did the gun you saw have a magazine?

A. Yeah, where the bullets come out from.

Q. And what type of gun did you see?

A. I don't know what type of gun it was.

Q. Was it a pistol, was it a large gun or a small gun?

A. Was like a handgun." (Emphasis added.)

¶ 26 Villegas also testified to the residential burglary. On May 26, 2016, Villegas and defendant drove past 200 Butte. Villegas was familiar with 200 Butte, because it had been her childhood home. However, she had not been in the home in years, because she did not get along with Ibarra. Villegas's grandmother also lived in the home up until a few months prior, but, when Villegas came to visit, she waited outside in the car.

¶ 27 Villegas was motivated by "revenge" to target Ibarra's house. Ibarra had previously called the police on defendant, then her boyfriend. Villegas and defendant saw that there were no cars in

the driveway and inferred that no one was home. After scoping out the scene, they returned to 25 Pine to convince Aguirre to come back with them to 200 Butte. On the trip back to 200 Butte, Villegas, defendant, and Aguirre discussed stealing from Ibarra. "[W]e all knew what we were going to do."

¶ 28 Once at 200 Butte, defendant and Aguirre "popped open" the front door by using a license plate. Villegas stood lookout in the living room, defendant went into Rodriguez's bedroom, and Aguirre went into Ibarra's bedroom. Villegas saw defendant take "a bunch" of Nike Air Jordan shoes. She also saw the men put the stolen items in the back seat of her car. In addition to the shoes, she also noticed a purse and a lock box. They were at 200 Butte for approximately 15 minutes before they returned to 25 Pine.

¶ 29 Upon returning to 25 Pine, they discovered the gun in the lock box, as set forth above. Also, defendant and Aguirre divided the shoes. Each kept several pairs.

¶ 30 During cross-examination, Villegas testified to her understanding of her agreement with the State. She understood that, if she testified, the State would not charge her with residential burglary. She understood that the possible punishment for residential burglary was 4 to 15 years' imprisonment. Villegas admitted that she did not want to go to prison. She had two young children, both under age 10. Villegas had also been concerned that her car would be impounded as a result of the investigation.

¶ 31 The defense asked Villegas if she received immunity for DUI. The State interjected that it had not discussed a DUI with Villegas. The defense explained that, on June 2, 2016, Villegas drove her own car to the police station. She had also told an investigator that she had used heroin. The court allowed the defense to continue. Villegas clarified that she told an investigator that she

had used heroin on June 1, not June 2. Villegas was not motivated to commit the crime to obtain money for heroin. She did not pay for her own heroin.

¶ 32 Villegas knew that Ibarra owned jewelry, because she had seen Ibarra wear it. However, prior to the burglary, she did not know where Ibarra kept it. She did not know that Ibarra owned a gun. The defense asked if she had ever shot Ibarra's gun at a shooting range. She answered, "no," but conceded that she once shot *a* gun at a shooting range. She did not believe it was Ibarra's gun. She did not know that Rodriguez owned a Louis Vuitton purse.

¶ 33 Villegas agreed that Rodriguez called her cell phone shortly after the burglary to accuse her of committing it. However, she disagreed that she admitted to the burglary at that time. She did not say, "Yeah, I got your shit. Come find me." Villegas also disagreed that she ever taunted Rodriguez upon seeing him across the street at their grandmother's restaurant.

¶ 34 Villegas did not believe that the police asked her how defendant and Aguirre entered 200 Butte. If they had asked, she would have told them that defendant and Aguirre used a license plate. She did not remember stating, "I didn't see anything in their hands at all, but they got in."

¶ 35 When Villegas called 911 on June 2, 2016, she already knew that she was a suspect in the May 26, 2016, residential burglary. Ibarra had called Villegas's mother. Ibarra told Villegas's mother that she had called the police and the burglary was being investigated. Villegas's mother passed on this information to Villegas.

¶ 36 Villegas also testified to various Facebook and text messages. Villegas did not remember whether, on June 4, 2016, she sent a message to defendant's mother, telling her that she was happy with a new boyfriend, "Christian." Villegas sent various messages to Ibarra. At first, she did not remember whether, on July 11, 2016, she sent Ibarra a photo of a pile of money. Underneath the photo, the message read, "This money came in handy," and was followed by a crying-, laughing-

face emoji. When shown an image of that message, however, she agreed that she sent it. She also sent a message that said, "Keep the bracelet, laugh out loud. You lost a couple stacks worth of your jewelry, so hope that makes you content." In other messages, Villegas referred to Rodriguez as a "faggot ass son," and attached a purse emoji. She accused Ibarra of being "petty" for "leaving grandma's clothes outside."

¶ 37 On redirect, Villegas testified that, when she called 911 on June 2, 2016, she did not know whether she was going to be charged with a crime. "I mean, I went in knowing that I could possibly get charged with what I was about to—going to say."

¶ 38 ii. Interceding Oral Motions

¶ 39 After Villegas testified, the State moved the court to reconsider its decision to bar Villegas from testifying to the June 2, 2016, occurrences, including the shooting and the domestic incident. The State explained as follows. The defense implied, through the elicited testimony, that Villegas went to the police one week after the burglary to frame defendant, because she knew the police suspected her. The State wished to counter that Villegas went to the police *despite* the possibility that she would have to implicate herself. "[T]he State believes [the] entire truth of the situation *** greatly goes to the credibility of [Villegas] and to why she went to the police on June 2." The court denied the State's motion.

¶ 40 The defense then moved for the court to strike "any of Villegas[']s] testimony pertaining to [defendant] possessing any gun whatsoever," to tell the jury to disregard it, to remind the jury in the jury instructions to disregard it, and/or to grant a mistrial. The defense explained as follows. The State had argued during the hearing on the motions *in limine* that it could place the gun recovered at 25 Pine in the hands of defendant, through Villegas's testimony. The court found defendant's possession of the gun to be relevant, "because the State represented [that Villegas]

would be able to put that gun in [defendant's] possession." "It is the defense's position that this court denied in part and granted in part my motion *in limine* based on the statement that [Villegas] can probably ID [the gun]—the gun recovered from the residential burglary and put it in my client's possession." Yet, Villegas did not unequivocally identify the gun. Because Villegas did not identify the gun:

> "[T]hat severely prejudices [defendant]. The jury could infer that the defendant was just someone in possession of a firearm. The jury could infer that there were two firearms in this case. *Essentially, what the State has done is introduced another bad act of [defendant] being in possession of some other firearm,* because this witness could not connect this gun to that residential burglary ***. A weapon or item not recovered from a residential burglary would not be relevant in any other case. The reason this gun is relevant to this case is because it was allegedly recovered from the residential burglary.
>
> [Villegas] not being able to tie up those two things makes her testimony regarding my client being in possession of a weapon not only [ir]relevant, but also highly prejudicial." (Emphasis added.)

Defense counsel reviewed the complained-of testimony:

> "[T]he State asked [Villegas] all sorts of questions about my client cleaning a gun, how often he kept it. There was also a statement elicited that was sustained and the jury was asked to disregard it about what he was capable o[f], based on her believing that he had a gun. How he took it apart. How he kept the gun usually."

¶ 41 The State responded that it never told the court that Villegas "absolutely" would be able to identify the gun. Defendant's motion was premature, because the State had not yet put on all of its witnesses. It was confident that the gun in evidence would be identified as Ibarra's stolen gun.

Also, the State had no intention of eliciting testimony that the gun in defendant's possession was a different gun, "so there is going to be no testimony that it is another bad act." Rather, evidence that defendant possessed the stolen gun was relevant to whether defendant participated in the burglary.

¶ 42 The court denied defendant's motion. It explained:

> "First, as to the issue of bad acts, *** the jury is not going to be instructed that the possession of a weapon is a crime.
>
> *In fact, under the laws of Illinois, many times the possession of a gun and ammunition is a perfectly legal* *** and I will not allow anyone to argue that that is a bad act. Nor do I think the State was intending to do that.
>
> There's no question that [Villegas] is a little, well, all over the board it seems like when it comes to whether or not the actual gun, Exhibit No. 20, is the one. The picture, No. 21, is the one. She says it is the gun. Then, she says she doesn't remember what it looked like. And this goes to the weight of her testimony in this case. I don't think that alone goes to striking the testimony or granting a mistrial.
>
> In addition, there have been arguments made about the possession of a gun. [Defendant] is not charged with possession of the gun under any circumstances nor will I allow anyone to argue that. He's charged with residential burglary where the State has to prove [that] without authority he entered a dwelling place, in this case, of Maria Ibarra, with the intent to commit a theft. They don't even have to prove a theft occurred. They have to prove that he entered with the intent to do so.
>
> And the way they are attempting *** to do it is through some circumstantial evidence, obviously, about what may or may not have been taken.

***

I will let the jury decide what credibility, if any, [Villegas] has. I will allow both sides to argue her credibility, obviously, and there is no basis in my mind for a mistrial ***."

¶ 43 iii. May 26, 2016, Witnesses: Abel Rodriguez, Maria Ibarra, and Daniel Vera

¶ 44 Rodriguez and Ibarra testified to the post-burglary scene and the stolen items. Rodriguez testified that, on the morning of the burglary, he went to the gym with a friend, Luis Nunez. He and Nunez returned to 200 Butte at approximately noon. The front door was locked, and Rodriguez initially noticed nothing unusual. The front portion of the house was undisturbed. He and Nunez ate lunch in the kitchen. Then, about one hour later, he went into his bedroom. The room was "destroyed." "The mattress [wa]s flipped over and just everything, it was just rummaged through." The following items were missing from his room: a Louis Vuitton backpack (valued at over $2000), a Play Station and games, an iPad, and many pairs of size 11 shoes.

¶ 45 After seeing his room, Rodriguez called Ibarra. She told him to check her room. There, Rodriguez saw that her gun, which she typically kept in a lock box on the dresser, was missing. Rodriguez called the police.

¶ 46 Rodriguez also called Villegas. Rodriguez wanted to confront Villegas, because he believed she had taken his things. She told him, "Yeah, I got your shit. Come find me." She hung up. Rodriguez called her back, and a man answered. The police took the phone from Rodriguez and attempted to speak with the man.

¶ 47 Sometime after the burglary, Rodriguez was inside his grandmother's restaurant, and Villegas stood outside the restaurant and "laughed at" him.

¶ 48 Rodriguez believed that Villegas knew about his Louis Vuitton backpack and Nike shoe collection, because he posted pictures of them on social media. Also, "the whole family kn[ew] that [Ibarra] ha[d] gold [jewelry]." Rodriguez believed that the grandmother in particular knew where the jewelry—and gun—were kept, because the grandmother and Ibarra shared a bedroom. The grandmother had a house key, but she lost it at some point.

¶ 49 Rodriguez identified shoes photographed in the State's exhibits as those stolen from his bedroom. These were size 11, Nike Air Max, Air Jordan Legend Blues, Air Jordan Reds, and Nike Black and Golds. Similarly, he identified the stolen Play Station and games, including FIFA 15, NBA 2K13, Duty Ghost, UFC Undisputed 2010, and Duty Black Ops II. Defendant raised a continuing objection, which the court overruled, that the shoes and games were mass produced and could not be identified as belonging to Rodriguez, specifically.

¶ 50 Rodriguez clarified that two of the shoes and several of the Play Station games recovered at 25 Pine did not belong to him. Specifically, Exhibit No. 6, a pair of size 11 black Nike shoes, were not his shoes. Additionally, some of the jewelry recovered at 25 Pine did not belong to Ibarra. The Louis Vuitton backpack was not recovered.

¶ 51 Ibarra testified that she received a call from Rodriguez regarding the burglary. She left work and met the police at 200 Butte. She "immediately" told them that she believed Villegas was the perpetrator. She never gave Villegas, defendant, or Aguirre permission to enter her home.

¶ 52 When Ibarra's mother lived at 200 Butte, they shared a bedroom. Her mother, Villegas's grandmother, knew where Ibarra kept her gun and jewelry. Ibarra and the grandmother went to the shooting range together. The grandmother and Villegas were close. Therefore, Ibarra reasoned, Villegas would have known that her grandmother went to the shooting range.

¶ 53 The grandmother moved out of 200 Butte six months before the burglary. She moved to Florida to live with her other daughter while recovering from heart surgery. The grandmother had a house key to 200 Butte, but, at some point, she lost it.

¶ 54 Ibarra testified that some of the recovered jewelry belonged to her, but some did not. She testified that the recovered gun was her gun. It was a Crown Point handgun. She had a FOID card for the gun. (The gun had a serial number, but the perpetrators had scratched it off.) She also identified the recovered case as her case.

¶ 55 Daniel Vera, a patrol officer for the Carpentersville Police Department, testified that he investigated the May 26, 2016, residential burglary. When Vera arrived at 200 Butte, he spoke with Rodriguez and Nunez. Rodriguez implicated Villegas and provided Villegas's car make and model. He and Rodriguez walked around the perimeter of the property to examine doors and windows for signs of forced entry. He found no sign of forced entry. He did not find a license plate. However, he did not complete his search of the back portion of the property.

¶ 56 While Vera was at 200 Butte, Rodriguez called Villegas. At some point, Vera took the phone from Rodriguez. Vera identified himself. He recalled: "[I] [b]asically spoke to a male subject who did not provide his information. He was very belligerent. Was cussing me over the telephone. The conversation lasted probably no more than 20 or 30 seconds. And then, I ended—I actually ended the conversation by telling him that it was going nowhere and I basically hung up."

¶ 57 In his police report, Vera named Villegas as the only suspect. Vera obtained an address for Villegas (not 25 Pine) through a State driver's image retrieval system, but he did not go to that address. Vera obtained a phone number for Villegas, but Vera did not document this in his police

report, nor did he recall whether he ever called the number. Vera did not document the 20- to 30-second phone conversation that he had with the male subject.

¶ 58 iv. June 2, 2016, Witnesses: John Spencer, Juan Cisneros, and John Steinhable

¶ 59 John Spencer, also a patrol officer for the Carpentersville Police Department, testified that, on June 2, 2016, he received a 911 dispatch. The dispatch alerted him to an incident at 25 Pine involving a gun. Spencer parked his squad car just south of 25 Pine. He exited the vehicle and was on foot when Villegas drove up beside him and stopped her vehicle. She introduced herself and stated that she was the person who had called 911. Her eyes were red and swollen and her makeup was running down her face. She was visibly upset. Villegas provided "information" about two individuals. Spencer relayed this information to officers already at the house. The two individuals—defendant and Aguirre—were placed in squad cars and taken to the police station. Spencer asked Villegas if she was capable of driving, or if she would like a ride to the police station. Villegas said that she could drive herself.

¶ 60 Spencer and a detective, Juan Cisneros, interviewed Villegas. The interview was recorded, and it lasted approximately 30 minutes. During the interview, Villegas discussed the events of May 26, 2016. At this time, Spencer had no outside knowledge of which stolen items had been recovered from 25 Pine.

¶ 61 Spencer and Cisneros then interviewed defendant. Spencer testified that, during the interview, defendant was wearing size 11 Air Jordan's. These were taken into evidence as Exhibit No. 6. The substance of defendant's statement was not admitted into evidence, because Spencer misplaced the *Miranda* waiver. (In any case, defendant's statement pertained not to the residential burglary, but to whether he was in a romantic relationship with Villegas.)

¶ 62 Cisneros testified that he obtained a search warrant for 25 Pine. In the living room, he found a Samsung tablet, a Play Station 3, a gun safe box, and a jewelry box with miscellaneous jewelry. In the middle bedroom, Cisneros found five pairs of size 11 Nike Air Jordan shoes.

¶ 63 John Steinhable, a sergeant with the Carpentersville Police Department, testified that he supervised the execution of the search warrant at 25 Pine and found the gun. He arrived toward the end of the search. He heard some of the officers discussing whether the suspects hid anything in the crawlspace. The crawlspace covered the entire bottom of the house. Steinhable removed a plywood lid in the kitchen and entered the three-foot-deep crawlspace, which he described as "disgusting," damp, smelling of sewage, and littered with garbage bags. Steinhable found the gun lying on the ground under the bathroom. It was not in any sort of container. Wearing gloves, he picked up the gun. Then, he handed the gun to another officer for processing.

¶ 64 v. Forensic Evidence: Two Stipulations and Testimony by Heather May

¶ 65 The State read two stipulations into the record. First, if called, evidence technician Johnson (first name not stated) would testify that she processed the crime scene at 200 Butte. She took fingerprints from Ibarra's dresser, but found none suitable for comparison. She took fingerprints from the television and found two prints suitable for comparison. The first matched Ibarra's other son, Eduardo. The second was not matched to defendant, Aguirre, or Ibarra. (Villegas did not submit her fingerprints for evaluation.) The gun and one magazine containing eight cartridges were tested for fingerprints. None were suitable for comparison.

¶ 66 Second, if called, forensic scientist, Patrick Powers, would testify that not all attempts to recover latent fingerprints are successful. Even when utilizing proper techniques, a number of factors may render a print unsuitable for comparison. These factors include a person's age, sex,

occupation, or medical condition. Environmental factors, such as temperature, humidity, and surface texture, may also impact the quality of the prints.

¶ 67 Next, Heather May, a forensic scientist employed by the Illinois State Police, testified that she tested DNA samples found on the gun and compared them to samples obtained from defendant, Aguirre, and Ibarra. The gun contained the DNA of two individuals. However, the DNA sample was not suitable to establish a positive match to any individual. Rather, the DNA sample was suitable only for exclusions. The DNA sample could not exclude the defendant, Aguirre, or Ibarra. May was able to obtain "very little" information from the DNA sample. A sample may be weak, because time has elapsed or because the object has been wiped down.

¶ 68 During cross-examination, May explained the concept of sample exclusion:

> "A. Oh, [defendant, Aguirre, and Ibarra] weren't excluded from that, but it shouldn't be implied as a positive association just because they weren't excluded.
>
> Q. How much of the population could not be excluded from that sample?
>
> A. The information that I had was that a hundred percent of people wouldn't be excluded. It's a little misleading to say that because, obviously, the sample is suitable for exclusions. But the way that the math and statistics worked out came out that essentially no people statistically would be excluded as being contributors to the mixture."

¶ 69 2. Motion for a Directed Verdict

¶ 70 The State's case concluded, and defendant moved for a directed verdict. He argued that the evidence came down to one witness, Villegas, who lacked credibility. Villegas testified that defendant possessed a gun, but she could not identify the gun as the one stolen on May 26, 2016. The Nike shoes that defendant wore to the police station, Exhibit No. 6, were *not* identified by

Rodriguez as his. No independent witness put defendant at the scene. There was no physical evidence. The court denied the motion.

¶ 71 3. Defendant's Case: Maria Berber and John Spencer

¶ 72 Maria Berber, defendant's mother, testified that defendant had dated Villegas. According to Berber, on June 4, 2016, Villegas sent Berber a Facebook message that said: "May God bless your son because things are going to go very badly for him because he's an asshole and tell him that I'm going to be really fine with Christian." (Translated from Spanish by an interpreter.) The State submitted a printout of the Facebook message.

¶ 73 Defendant recalled Spencer, who testified that, during the June 2, 2016, interview, he asked Villegas how defendant and Aguirre entered 200 Butte. Villegas answered, "I don't know how they got in, but they were like getting without—I didn't see anything in their hands at all, but they got in." She did not say that they used a license plate. Also, Villegas told Spencer that her mother called her one hour after the burglary to tell her "that the cops are gonna impound my car if they find my car because my aunt reported a [burglary] and her gun is missing."

¶ 74 The jury convicted defendant of residential burglary.

¶ 75 D. Posttrial Motion

¶ 76 Defendant moved for a new trial. In his written motion, he argued in part:

> "The court erred in denying defendant's first motion *in limine*, in part. The court erred in allowing evidence that defendant possessed a weapon on June 2, 2016, seven days after the alleged residential burglary. *** [Villegas] testified that on June 2, 2016, she told a police officer that [defendant] had a gun. Defense's objection on hearsay grounds was overruled. *** [Officer Spencer] testified that he responded to [25 Pine] for the report of a person with a gun."

¶ 77 Defendant also argued:

"The court erred in failing to strike testimony and instruct the jury to disregard [Villegas's] statement that she knew what defendant was capable of.[1] This statement was elicited by the State in violation of defendant's first motion *in limine* that was granted with regards to the State introducing evidence of the defendant's prior bad acts."

¶ 78 And:

"The court erred in denying defendant's oral motion for a mistrial and/or request that the court strike testimony and order the jury to disregard *any and all* testimony by [Villegas] pertaining to defendant being in possession of a firearm.

The State asked [Villegas] if she recognized [Exhibit No. 20], the gun purportedly stolen during the residential burglary. [Villegas] unequivocally answered no.

The State then asked [Villegas] if she recognized [Exhibit No. 21], a photograph of the gun purportedly stolen during the residential burglary. [Villegas] initially answered yes. However, [Villegas] was then asked to clarify. She stated she was not certain it was the gun in the photo.

During the pretrial conference for defendant's first motion *in limine*, the State represented to the court that [Villegas] would identify the gun in this case. [Villegas] did not subsequently identify the gun during trial.

The court erred in finding that possession of a gun is not a bad act when the State used said evidence for that purpose.

[1] The court *did* strike this comment and instruct the jury to disregard it.

> This placed defendant in a poor light before the jury based on evidence of an otherwise inadmissible prior bad act." (Emphasis added).

¶ 79 At the hearing, defendant argued:

> "[T]he *crux of the error* in this case arose out of the testimony by the one and only witness who placed my client at the scene who, in a pretrial motion, the State claimed to be able to tie the gun located in the residence to my client.
>
> It is our position that that is not what came of that trial and that it was error to allow the prior bad act being the possession of the gun into evidence, as well as to not bar her testimony with regards to the gun at that time ***." (Emphasis added.)

¶ 80 The court denied the motion without comment. This appeal followed.

¶ 81 II. ANALYSIS

¶ 82 Defendant argues that: (1) the trial court failed to comply with Rule 431(b) when admonishing the jury as to the *Zehr* principles, and the Rule 431(b) violation amounts to prong-one plain error, because the evidence was closely balanced; (2) the trial court abused its discretion when it refused to strike Villegas's testimony that defendant possessed a gun on June 2, 2016; and (3) the evidence was insufficient to convict. We agree that the trial court failed to comply with Rule 431(b). However, we disagree that the evidence was so closely balanced that the court's non-compliance with Rule 431(b) alone threatened to tip the scales of justice against defendant, particularly where the gun evidence was properly admitted. Additionally, the evidence was sufficient to convict.

¶ 83 A. Rule 431(b) and the *Zehr* Principles

¶ 84 We first address whether the trial court failed to comply with Rule 431(b) when admonishing the jury as to the *Zehr* principles. Because defendant did not object at trial or in a

posttrial motion, we will conduct a plain-error review. See *Dismuke*, 2017 IL App (2d) 141203, ¶ 57. Under the plain-error doctrine, the court may consider an unpreserved error when a clear or obvious error occurred and: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) the error was so serious that it affected the integrity of the judicial process. *Id*. Non-compliance with Rule 431(b) does not necessarily result in a biased jury, and, thus, establishing plain error under prong two presents difficulties. See *People v. Thompson*, 238 Ill. 2d 598, 614-15 (2010). Defendant appears to recognize this and pursues relief under prong one only. Thus, we first consider whether a clear or obvious error occurred, and we then consider whether the evidence was closely balanced.

¶ 85 Rule 431(b) provides:

> "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 own 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." (Emphasis added.) Ill. S. Ct. Rule 431(b).

¶ 86 Although the rule allows for the court to question the jurors in a group, the court must give each juror an opportunity to respond to the specific questions. *Thompson*, 238 Ill. 2d at 607. The court "shall ask" the jurors if they "understand and accept" the enumerated principles. *Id*. The

court may not "simply give a 'broad statement of the applicable law followed by a general question concerning the juror's willingness to follow the law.'" *Id*. (quoting 177 Ill. 2d R. 431, Committee Comments).

¶ 87 In *Dismuke*, this court explored exactly how closely a trial court must adhere to the exact, "understand and accept" language set forth in Rule 431(b). We set forth the *Dismuke* admonishments in full, because they so closely mirror those used in the instant case:

> "Okay, Ladies and Gentlemen, earlier I touched upon some principles of law that apply to all criminal cases. I am going to explain to you certain principles, and if you *understand* the principles, *agree* with those principles and *accept* those principles, please do not raise your hand and that will signify that you *understand*, you *agree* and you *accept* these principles. If you don't *understand* or *accept* these principles or don't agree with them, I would ask that you raise your hand in response to my question.
>
> The defendant is presumed to be innocent of the charge against him. This presumption remains with the defendant throughout the trial and is not overcome unless, by your verdict, you find that the State has proven the defendant guilty beyond a reasonable doubt. Is there anyone who has any *difficulty or disagreement* with this proposition of law, the presumption of innocence?
>
> If so, raise your hand.
>
> The record reflects none.
>
> The State has the burden of proving the guilt of the defendant beyond a reasonable doubt. This burden remains upon the State throughout the trial. Does anyone have any *difficulty or disagreement* with this proposition of law, the burden of proof? If so, raise your hand.

The record reflects none.

The defendant is not required to offer any evidence on his own behalf. Does anyone have any *difficulty or disagreement* with this principle of law. If so, please raise your hand.

The record reflects none.

If the defendant does not testify, it cannot be held against him. Does anyone have any *difficulty or disagreement* with this proposition of law, the right to remain silent? If so, please raise your hand.

The record reflects none." (Emphasis added.) *Id.* ¶ 78.

¶ 88 The *Dismuke* majority deemed the trial court non-compliant. *Id.* ¶¶ 53-55. The trial court began, correctly, by instructing the jury to evaluate whether they "understood and accepted" the four principles. However, after the court recited each principle, it changed the question from whether they "understood and accepted" to whether they had any "difficulty or disagreement." The majority recognized that asking for disagreement, and getting none, *arguably* establishes juror acceptance of the principles. *Id.* ¶ 53 (citing *People v. Wilmington*, 2013 IL 112983, ¶ 32). The majority also recognized, however, that the failure to ask jurors if they *understand* the principles is error in itself. *Id.* Thus, the majority focused on whether the asking jurors if they have any difficulty or disagreement with the principles was equivalent to asking if they understood the principles. *Id.*

¶ 89 The majority determined that asking the jurors if they had any difficulty or disagreement with the principles was *not* equivalent to asking if they understood the principles. *Id.* It explained, "someone might not disagree with a statement simply because he or she does not understand it." *Id.* Further, the court explained:

> " 'Difficulty' is defined as 'the quality or state of being difficult, or hard to do or to overcome,' or a 'disagreement' or 'controversy.' [Citation.] 'Difficulty' is not, therefore, synonymous with 'understanding.' The court never repeated, or even alluded to, the word 'understand' in its questioning after the recitation of each principle." *Id.* ¶ 55.

¶ 90 The majority also believed that the trial court's hand-raising instructions were confusing, and it concluded: "Rather than make the procedure so convoluted, it was necessary only to recite the principles and ask the potential jurors one question: whether they understood and accepted the principles. Accordingly, we hold that the court violated Rule 431(b)." *Id.*

¶ 91 In a special concurrence, Justice Burke disagreed that the court violated Rule 431(b). *Id.* ¶ 79 (Burke, J., specially concurring). He stated that, in context, the court's use of the word "difficulty" referred to whether a potential juror had difficulty understanding or accepting the principle. *Id.*

¶ 92 Turning to the instant case, we observe that the language used by the trial court here closely mirrors that used by the trial court in *Dismuke*. There is nearly a word-for-word overlap in the recitations of each respective trial judge. See *supra* ¶¶ 10, 87. Indeed, the instant case arises out of the same county (Kane), and the instant admonishments were given just months before the release of our appellate opinion in *Dismuke*. We will not depart from another panel of our court on an identical issue.

¶ 93 The only question that remains, therefore, is whether, as the State urges, the subsequent colloquy with juror No. 49 brings this case outside the realm of *Dismuke*. We determine that it does not. Again, juror No. 49 expressed anger toward defendant and was frustrated by the possibility that defendant might not testify. The court interjected and provided an informal, non-technical recitation of the *Zehr* principles. It then asked:

"Does anybody in the courtroom have any *problem* with those orders of the court?

All right. You do?

I know you're 49. Tell me what's your *problem*? And I appreciate—that's why I said, raise your hand. Let's go through this." (Emphases added.)

¶ 94 This exchange does not remedy the court's non-compliance. The court again failed to use the word understand. Just as the word "difficulty" cannot substitute for word "understand," neither can the word "problem." Moreover, although the court asked whether "anybody" had a problem, the court focused its attention on juror No. 49. That juror was ultimately dismissed. The court did not give each member of the jury an opportunity to answer whether he or she understood each principle.

¶ 95 Having determined that, as in *Dismuke*, a clear and obvious error occurred, we must now determine whether defendant is entitled to relief under prong one of the plain error doctrine. The question, again, is whether the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant. Defendant cannot persuade us that standard has been met, particularly where, as we first address, evidence that defendant possessed the stolen gun was properly admitted.

¶ 96 B. The Gun

¶ 97 Defendant argues that the trial court abused its discretion when it refused to strike Villegas's testimony that defendant possessed a gun on June 2, 2016. Defendant argues that Villegas's testimony that defendant possessed a gun on June 2, 2016, constitutes improper other-crimes evidence. He notes that "Villegas's testimony made it readily apparent that she believed [defendant's] gun possession on June 2 somehow constituted improper conduct when she called the police to report him," and "[Villegas's] testimony about the June 2 incident, particularly when

combined with Officer Spencer's, served only to suggest that [defendant] threatened Villegas with the gun." More specifically, defendant argues that: (1) the trial court misunderstood the scope of other-crimes evidence to include only actual crimes as opposed to bad acts; and (2) the probative value of Villegas's testimony was outweighed by its prejudicial effect. The problem with defendant's argument is that he fails to acknowledge the procedural history of the case, the rulings on the motions *in limine*, the statements made at the status hearings, the objections sustained below, the basis he provided for his motion to strike, and the context of the trial court's ruling. He also fails to acknowledge that the testimony had probative value, and the trial court did exercise its discretion to limit its prejudicial impact.

¶ 98 Evidence of other crimes, wrongs, or bad acts committed by the defendant is not admissible if it is offered merely to establish the defendant's propensity to commit crime. Ill. R. Evid. 404(b) (eff. Jan. 1, 2011); *People v. Pikes*, 2013 IL 115171, ¶ 16. The concern is that such evidence might persuade the jury to convict the defendant only because it feels that the defendant is a bad person deserving punishment. *Id*.

¶ 99 Evidence of other crimes is admissible if it is relevant for any purpose other than to show the defendant's propensity to commit crime. *Id*. ¶ 11. Accepted bases for admitting evidence of other crimes include to show *modus operandi*, intent, motive, identity, or absence of mistake with respect to the crime with which the defendant has been charged. *Pikes*, 2013 IL 115171, ¶ 11. Other bases include proof of opportunity, preparation, plan, and knowledge. Ill. R. Evid. 404(b). Related to opportunity, the evidence may be used to place the defendant in proximity to the time and place of the presently charged offense or rebut an alibi defense. *People v. Diaz*, 78 Ill. App. 3d 279-80 (1979). It may also be used to demonstrate consciousness of guilt or to prove a fact in issue. *Id*. at 80. However, as with any relevant evidence, the court must consider whether the

probative value of the evidence is outweighed by its prejudicial effect. *Pikes*, 2013 IL 115171, ¶ 11.

¶ 100 Typically, for the other-crimes evidence to be admissible, the other crime must bear sufficient similarity to the charged offense. *People v. Cruz*, 162 Ill. App. 3d 314, 349 (1994). This similarity requirement serves to ensure the relevance of the other-crimes evidence and to guard against its use to show propensity. *Id*. However, the degree of similarity required depends on the reason the other-crimes evidence was admitted. *Id*. For example, when using other-crimes evidence to show *modus operandi*, a high degree of similarity is required. *Id*. When used to show intent, general similarity has sufficed. *Id*. at 350. When used to show the accuracy of confession or consciousness of guilt, courts have admitted the evidence without performing an analysis as to the degree of similarity at all. *Id*.

¶ 101 The admissibility of other-crimes evidence is within the trial court's discretion, and we will not disturb its decision absent an abuse of that discretion. *Id*. ¶ 12. A trial court abuses its discretion when its ruling is arbitrary, fanciful, or unreasonable, such that no reasonable man would take the view adopted by the court. *People v. Young*, 381 Ill. App. 3d 595, 600 (2008). Also, the trial court will be found to have abused its discretion where it misapplies the law. See, *e.g.*, *Carlson v. Jerousek*, 2016 IL App (2d) 151248, ¶ 69.

¶ 102 1. The Trial Court Understood the Law

¶ 103 Defendant's primary argument is that the trial court misunderstood the law concerning what constitutes other-crimes evidence and, in so doing, abused its discretion. Defendant points to the trial court's statement that mere gun possession is not a crime under Illinois law. Again, the trial court stated, in part: "[U]nder the laws of Illinois, many times the possession of a gun and ammunition is a perfectly legal ***." Defendant asserts that this comment shows that the trial

court believed that what constitutes other-crimes evidence hinges on whether the jury can surmise that defendant's actions constituted a statutory or common-law criminal offense, when, in fact, other-crimes evidence can include acts that do not constitute a criminal offense but otherwise imply that defendant engaged in improper conduct.

¶ 104 Defendant is correct that other-crimes evidence can include acts that do not constitute a criminal offense but otherwise imply that defendant engaged in improper conduct. *People v. Mendez*, 2013 IL App (4th) 110107, ¶ 28. Rule 404(b) itself describes a prohibition against "other crimes, wrongs, *or acts*." (Emphasis added.) Ill. R. Evid. 404(b). However, we disagree that the trial court misunderstood the law.

¶ 105 We must consider the context of the trial court's comment. That is, after Villegas testified, the defense moved to strike "any of Villegas's testimony pertaining to [defendant] possessing any gun whatsoever." The defense reasoned that, because Villegas was not able to unequivocally identify the gun, the jury could infer that there were two guns in the case. It stated: "Essentially, what the State has done is introduced another bad act of [defendant] being in possession of some other firearm." The defense listed the testimony that it considered to be problematic: "the State asked [Villegas] all sorts of questions about my client cleaning a gun, how often he kept it. There was also a statement elicited that was sustained and the jury was asked to disregard it about what he was capable o[f], based on her believing that he had a gun. How he took it apart. How he kept the gun usually."

¶ 106 It was following this argument by defendant that the trial court made its now complained-of remark. The record shows that the defense invited this remark. The defense itself argued that mere possession of a second gun "introduce[s] another bad act of [defendant]." The defense wanted to strike any gun testimony "whatsoever," and it focused on defendant's general possession

of the gun following the May 26, 2016, burglary, how he "clean[ed] a gun," "how often he kept it," "how he took it apart," and "how he kept the gun usually." The defense complained of testimony concerning the June 2, 2016, events only briefly, referencing Villegas's statement that she knew what defendant was "capable of," *but the defense acknowledged that the court had already stricken this statement and told the jury to disregard it*. The question that the defense placed before the trial court was whether, based on Villegas's failure to unequivocally identify the gun, her testimony concerning defendant's possession of a gun implied to the jury that defendant committed the "bad act" of possessing a gun. The trial court's response to this question was wholly appropriate.

¶ 107 To underscore the incongruity between the basis for exclusion offered at trial and the basis offered here on appeal, we quote defendant's posttrial argument:

> "*[T]he crux of the error* in this case arose out of the testimony by the one and only witness who placed my client at the scene who, in a pretrial motion, the State claimed to be able to tie the gun located in the residence to my client.
>
> It is our position that that is not what came of that trial and that it was error to allow the prior bad act being the possession of the gun into evidence, as well as to not bar her testimony with regards to the gun at that time ***." (Emphasis added.)

It is clear that, at trial, defendant lamented Villegas's inability to unequivocally identify the gun, and he believed that her failure to do so implied that he committed the bad act of possessing "some other" gun.

¶ 108 2. Probative Value versus Prejudicial Effect

¶ 109 Defendant secondarily argues that the trial court abused its discretion, because the probative value of the challenged testimony was outweighed by the prejudicial effect.[2] We disagree.

¶ 110 Although not cited by the parties, we find *Diaz*, 78 Ill. App. 3d 277, instructive. In *Diaz*, the defendant was charged with an armed robbery. The defendant and an accomplice were alleged to have robbed a tavern at gunpoint and stolen $300 and the tavern owner's gun. At trial, the State introduced evidence of a subsequent bad act involving the defendant's use of the stolen gun. That is, one day after the charged offense, defendant and two accomplices approached a pregnant woman as she exited her vehicle. The woman's friend and the friend's baby remained in the vehicle. One of the accomplices put a gun to the woman's stomach and told her that, if she did not "give it up" and "go along," the baby would be "born with a hole in its head." *Id*. at 279. The friend screamed, and the accomplice pointed the gun at her baby. The friend called out that the police were coming, and the perpetrators walked away. They were soon apprehended, based on information given by the female victims. The police found the stolen gun in one of the accomplices' purse.

¶ 111 On appeal, the defendant argued that the probative value of the other-crimes evidence was outweighed by its prejudicial impact. The appellate court agreed and ordered a new trial. *Id*. at 280. It acknowledged that the other-crimes evidence was relevant in that it established the

[2] Defendant also devotes a significant portion of his brief to *People v. Jacobs*, 2016 IL App (1st) 133881, in anticipation that the State would raise the continuing-narrative exception to the rule against other-crimes evidence. However, the State did not.

circumstances of the defendant's arrest[3] and showed that the weapon used was the one stolen during the commission of the crime at issue. *Id.* It reasoned, "[h]ad the trial court limited the testimony concerning the subsequent armed robbery attempt to that evidence, the prejudice resulting to defendant would not have clearly outweighed its probative value." *Id.* However, the trial court's decision to allow the female victims to testify at length to the acts against them, to the condition of pregnancy, and to the threat of harm to an unborn child and to a baby, none of which made it any more or less likely that the defendant committed the charged offense, was so "obvious[ly]" prejudicial as to deny the defendant a fair trial. *Id.*

¶ 112 Per *Diaz*, evidence that a defendant later possessed a gun stolen during the commission of the charged offense is relevant to whether he participated in the charged offense. *Id.* This purpose does not depend on a high degree of similarity between the alleged bad act and the charged offense. Villegas's testimony that she saw defendant possess the gun on June 2, 2016, just before the police arrived has high probative value. The police found only one gun, Ibarra's gun. Thus, Villegas's testimony that defendant possessed *a* gun on June 2, 2016, just before the police arrived, allowed the jury to reasonably infer that defendant possessed the *stolen* gun on June 2, 2016. This inference was not dependent on Villegas's identification of the gun.

¶ 113 Unlike in *Diaz*, however, the trial court excluded prejudicial details. The court excluded evidence that defendant lived in a gang house and that he used the stolen gun to participate in a

[3] We recognize that courts must exercise caution when admitting the circumstances of arrest and may not do so merely to satisfy the jury's curiosity as to how the investigation unfolded. *People v. McCray*, 273 Ill. App. 3d 396, 402 (1995). Here, we are focused on defendant's possession of the gun.

shooting and hold Villegas against her will. The court barred the 911 tape. Extracting evidence of defendant's mere possession from the morass of other bad acts was so delicate that the State and the defense agreed that the State could ask leading questions to do so. To the extent that Villegas strayed into topics that the court had barred at the hearing on the motion *in limine*, the court *did* strike that testimony and tell the jury to disregard it. Also, the court denied the State's oral motion to expand the boundaries of Villegas's testimony in light of defendant's questioning of Villegas and the implication that Villegas called the police on June 2, 2016, only to frame defendant. Under these circumstances, we cannot hold that the trial court abused its discretion in admitting portions of Villegas's testimony that defendant possessed the gun on June 2, 2016.

¶ 114 C. The Evidence was not so Closely Balanced

¶ 115 Having established that the trial court did not abuse its discretion in admitting Villegas's testimony that defendant possessed the stolen gun on June 2, 2016, we proceed to consider whether the evidence was so closely balanced that the court's non-compliance with Rule 431(b) alone threatened to tip the scales of justice against the defendant. For the reasons that follow, we find that it was not.

¶ 116 When considering whether the evidence was closely balanced, we view the evidence in a commonsense manner, mindful of the totality of the circumstances. *Dismuke*, 2017 IL App (2d) 141203, ¶ 58. Here, we are aware that accomplice testimony is to be viewed with skepticism, particularly when the accomplice has been given immunity in exchange for her testimony. See *People v. White*, 134 Ill. App. 3d 262, 273 (1985). However, in this case, Villegas did not know that she would be given immunity when she initiated contact with police on June 2, 2016. She stated, "I mean, I went in knowing that I could possibly get charged with what I was about to—going to say." Villegas went to the police *despite* the possibility of being charged, not to avoid

getting charged. The bare fact that Villegas called 911 was allowed into evidence, as was Spencer's testimony that he came upon Villegas a short distance from 25 Pine, visibly upset and seeking help. Considering these facts in a commonsense manner, defendant's theory that Villegas called the police in a calculated move to frame him for a residential burglary does not seem likely.

¶ 117 The State secured Villegas's testimony that defendant participated in the residential burglary. Villegas's testimony that she stood lookout in the living room while defendant and Aguirre robbed the bedrooms is consistent with the crime scene. The living room was undisturbed, to the point that Rodriguez was in the home nearly one hour before he realized anything was amiss. Yet, Rodriguez's bedroom was "destroyed." The mattress was flipped over. Also, the number of goods stolen in a short amount of time, including many shoes, purses, video games, jewelry, and lock box with a gun is consistent with multiple perpetrators.

¶ 118 Additionally, the State produced circumstantial evidence of defendant's participation in the burglary. Through the testimony of Rodriguez and Vera, it showed that Villegas was in the company of a male subject immediately following the burglary. This male answered Villegas's phone and interacted with Vera in a "belligerent" manner. The State further established that the stolen goods were found at 25 Pine, where Villegas, defendant, and Aguirre lived. Defendant complained at trial that the stolen goods were mass produced and, therefore, may not have belonged to Rodriguez and Ibarra. However, the likelihood that the recovery of the same constellation of goods as those stolen could be otherwise explained is extraordinarily slight. Villegas's testimony that defendant, as opposed to other persons in the household, possessed at least some of the stolen goods was corroborated when she told police that defendant possessed a gun and, upon searching the house, the police found but one gun, the stolen gun, the gun identified by Ibarra.

¶ 119 Complained-of inconsistencies in Villegas's testimony do not persuade us. These are: whether Villegas taunted Rodriguez and Ibarra, whether defendant and Aguirre used a license plate to open the door, and Villegas's inability to identify the gun. Defendant also notes the absence of forensic evidence and stresses that he did not wear a pair of stolen shoes to the police interview.

¶ 120 The first inconsistency is insignificant. Rodriguez perceived Villegas, his cousin, to have mocked him from across the street; this has no bearing on whether defendant was a co-participant in the burglary. Moreover, Villegas admitted that she taunted Ibarra with emoji-rich text messages. There is no inconsistency here. Indeed, that Villegas admitted that she behaved in an unflattering manner likely served to enhance her credibility before the jury.

¶ 121 The second inconsistency, whether defendant and Aguirre used a license plate to open the door or, as Rodriguez and Ibarra speculated, the grandmother's lost key, is slightly more significant. If they used a key, then Villegas would have lied to police about the method of entry, minimizing her own role in the scheme. However, whether the trio entered the house with a license plate or a key does not make it any more or less likely that defendant participated in the burglary. Whether the perpetrators used a license plate or a key, they did not have permission to enter the home. As such, that defendant refers to this discrepancy as the "most material contradiction" in Villegas's testimony demonstrates the overriding weakness of his argument.

¶ 122 The third inconsistency, that Villegas was unable to identify the stolen gun, is not as damaging as defendant posits. Villegas insisted that she saw defendant possess the stolen gun from the time she, defendant, and Aguirre discovered it in the lock box on May 26, 2016, to the time of the June 2, 2016, incident (with Aguirre handling it occasionally). Nevertheless, she expressed uncertainty when shown the recovered gun, declining to identify the actual gun (Exhibit No. 20) and wavering when shown a photograph of the gun (Exhibit No. 21). She stated, "It is not

what I remember it looking like." Villegas could have easily answered "yes," but she did not. She demonstrated that she was not testifying only to give the "right answer." This does not hurt her credibility. Moreover, as there was no question that the recovered gun was the stolen gun—it was positively identified by Ibarra, as was the lock box—the damage to the State's case was minimal.

¶ 123 The absence of forensic evidence is a neutral factor. Investigators did not recover fingerprints on Ibarra's television or dresser. However, Villegas testified that defendant stole from Rodriguez's room. Investigators did not recover fingerprints on the gun. However, Villegas testified that defendant repeatedly wiped down the gun. Similarly, the DNA sample from the gun was suitable for exclusions only.

¶ 124 Finally, that the shoes defendant wore to the interview, Exhibit No. 6, were not identified by Rodriguez as stolen is a neutral factor. That defendant wore a pair of non-stolen shoes is not exculpating.

¶ 125 In sum, under a commonsense assessment, we determine that the evidence was not so closely balanced that the court's non-compliance with Rule 431(b) alone threatened to tip the scales of justice against the defendant. Thus, we honor the procedural default.

¶ 126 D. Sufficiency

¶ 127 Likewise, we determine that the evidence was sufficient to convict defendant for residential burglary. Due process requires the State to prove each element of the offense beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004). "A person commits residential burglary when he or she knowingly and without authority enters or knowingly and without authority remains within the dwelling place of another, or any part thereof, with the intent therein to commit a felony or a theft." 720 ILCS 5/19-3(a) (West 2016). Defendant appears to agree that, if he was present at 200 Butte with Villegas and Aguirre, then the elements of residential burglary

have been met. Rather, he urges that the evidence does not establish his presence or participation, and it is just as likely that Villegas committed the offense entirely by herself.

¶ 128 When reviewing the sufficiency of the evidence, we consider whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). We will not substitute our judgement for that of the trier of fact on issues of the weight of the evidence or the credibility of the witnesses. *People v. Phelps*, 211 Ill. 2d 1, 7 (2004). As such, we will not set aside a conviction unless it is so improbable or unsatisfactory that it creates reasonable doubt as to the defendant's guilt. *Collins*, 106 Ill. 2d at 261.

¶ 129 Defendant again stresses the general concept that accomplice testimony must be viewed with skepticism. He points to inconsistencies in Villegas's testimony, as set forth in the previous section of our analysis. He further contends that, here, no circumstantial evidence corroborates Villegas's account.

¶ 130 As we have discussed above, these points are not determinative. It is well settled that it is for the jury to assess witness credibility and resolve discrepancies in the testimony. *Collins*, 106 Ill. 2d at 261. Moreover, even though accomplice testimony is to be viewed with suspicion, it can be sufficient to sustain a conviction should the jury choose to believe it. *Id.* Here, the circumstances surrounding Villegas's decision to call the police and report defendant's involvement in the residential burglary could have convinced a rational juror of her credibility. A rational juror could have resolved any discrepancies in Villegas's favor. And, finally, we disagree that no circumstantial evidence corroborates Villegas's testimony. As discussed, the condition of the crime scene, with the flipped mattress and numerous goods stolen in a short amount of time, as well as defendant's possession of the stolen gun, which was found shortly after the police arrived

at 25 Pine, constitute circumstantial evidence. The evidence was sufficient to convict defendant of residential burglary.

¶ 131 III. CONCLUSION

¶ 132 For the foregoing reasons, we affirm the trial court's judgment.

¶ 133 Affirmed.