

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 09 CR 20030
)	
SHANNON POLK,)	Honorable
)	Jorge Luis Alonso,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE ROBERT E. GORDON delivered the judgment of the court.

Justices Cahill and Lampkin specially concurred in the judgment.

ORDER

¶ 1 *Held:* We hold, first, that defendant's confession was sufficiently corroborated by circumstantial evidence and thus the evidence at trial was sufficient to find him guilty beyond a reasonable doubt; and, second, that the

No. 1-10-1496

unlawful-use-of-a-weapon-by-a-felon statute does not violate on its face the second amendment right to bear arms.

¶ 2 After a bench trial held on March 10, 2010, defendant Shannon Polk was convicted of one count of unlawful use of a weapon by a felon. 720 ILCS 5/24-1.1(a) (West 2008). On May 18, 2010, he was sentenced to 4 years and 6 months in the Illinois Department of Corrections. On this direct appeal, defendant claims, first, that the evidence was insufficient to convict him because his confession was not sufficiently corroborated; and, second, that the statute setting forth the offense is unconstitutional on its face because it violates the second amendment right to bear arms. For the following reasons, we find his claims unpersuasive and we affirm.

¶ 3 BACKGROUND

¶ 4 I. Pretrial Proceedings

¶ 5 On November 12, 2009, defendant was charged by information with two counts: (1) unlawful use of a weapon by a felon; and (2) aggravated unlawful use of a weapon. Specifically, the first count charged that:

"he, knowingly possessed on or about his person, a
firearm, to wit: a handgun, after having been previously

No. 1-10-1496

convicted of the felony offense of delivery of a controlled substance[.]"

The second count charged that:

"he, knowingly carried on or about his person, a firearm, at a time when he was not on his own land or in his own abode or fixed place of business and the firearm possessed was uncased, loaded and immediately accessible at the time of the offense[.]"

¶ 6 On March 9, 2010, the defense filed a written motion *in limine* to preclude the State from impeaching defendant, if he testified, with evidence of his prior convictions. In 2005 and in 2006, defendant had pled guilty to two separate drug charges. Denying the motion, the trial judge observed that he was going to hear about at least one of the two convictions as part of the current charges. On March 10, 2010, defendant signed a jury waiver.

¶ 7 II. The Trial

¶ 8 At trial, the defense argued in its opening statement that the "essence" of the case was the fact that the arresting police officer never observed a weapon in defendant's hands. The State waived its opening statement.

¶ 9 Officer Ugarte, the arresting officer, was the only witness who testified at trial.¹ Officer Ugarte testified that he had been a police officer with the Chicago Police Department for 5 years. On the evening of October 19, 2009, he was patrolling in the vicinity of 93rd Street and LaSalle Street in a marked blue-and-white squad vehicle with his partner Officer Bibanco. Officer Ugarte was the passenger and Officer Bibanco was driving, and they were in plain clothes. At 9:45 p.m., they received a call² concerning gunshots having been fired. They were informed that Officers Akinbusui and Taylor were in pursuit on foot of an offender who was described as a "male black wearing dark clothing in the 9300 block of South Prairie running eastbound through the gangways."

¶ 10 Officer Ugarte testified that, after receiving this information, he and his partner responded to assist the other officers and that they arrived within seconds after receiving the call. As they were driving eastbound on 93rd Street,

¹ The officer did not provide his first name or his partner's first name.

² Defendant objected on hearsay grounds to testimony about the call, and the trial court overruled the objection stating that this information was not being admitted for the truth of the matter asserted but to show the course of the investigation. This hearsay objection is not at issue on this appeal.

No. 1-10-1496

Officer Ugarte testified that he observed a black man wearing dark clothing running northbound through an alley. The man was running toward 93rd Street, so that he was initially running toward Officer Ugarte's vehicle. The alley was the alley running behind Lafayette Street.

¶ 11 Officer Ugarte testified that he observed the man, as he was running in the alley, make "a tossing motion with his right hand onto a gangway of the house." Officer Ugarte testified that the area was well-lit by both artificial lighting in the alley and the headlights from his squad vehicle, and that there was nothing obstructing his view. The officer testified that he was approximately 7 feet away from the man when the man made this tossing motion and that the man was running alone.

¶ 12 Officer Ugarte testified that, after the approach of the police vehicle, the man squatted between two parked vehicles. At first, the officer testified that defendant squatted between two parked vehicles; however, he later testified that defendant was crouching between two garbage cans. This slight discrepancy was not clarified on either direct or cross examination. However, the officer testified that the place where the man was squatting was approximately 5 feet from the location where the officer had observed the man make the tossing motion. Officer

No. 1-10-1496

Ugarte testified that he and his partner then exited their vehicle and Officer Ugarte illuminated the interior of the gangway with his flashlight. The officer observed a nickel-colored steel handgun laying on the gangway at 9304 South Lafayette.

¶ 13 Officer Ugarte testified that he did not observe any other objects or debris in the gangway and that this was the area towards which he had observed defendant make the tossing motion. The officer testified that the handgun was subsequently recovered and inventoried, and that it was a 9 millimeter handgun, loaded with six rounds and a magazine. The officer testified that he then placed defendant in custody, and that this was the same man whom he had observed making the tossing motion.

¶ 14 Officer Ugarte testified that he read defendant his Miranda rights on the scene using the officer's preprinted card, which the officer had also brought with him to court and which he read aloud at trial. Defendant indicated that he understood his rights and that he agreed to speak with the officers. At this point in the trial, Officer Ugarte made an in-court identification of defendant.

¶ 15 Officer Ugarte testified that he asked defendant: "What's up with the gun?" The officer testified that defendant responded:

"It's my gun. I have it for protection. I sell weed

No. 1-10-1496

on 93rd and LaSalle. N*** want to kill me. I been shot before. I bought it from a hype [sic] for \$200 on 95th by the McDonald's."

The officer testified that it was approximately 5 feet between where defendant had been crouching and where the gun was laying.

¶ 16 On cross examination, Officer Ugarte admitted that he observed only defendant's right hand as defendant was making the tossing motion but that he did not observe a gun in defendant's hand. The officer also did not observe a gun leaving defendant's hand during the tossing motion, and he did not observe defendant reach into his pockets prior to making the tossing motion.

¶ 17 On cross examination, the officer also testified that his vehicle window was down when he first observed defendant and there were no other people around or vehicles on the street. His partner picked up the gun with his hands and he was not wearing gloves. The officer also testified that, after transporting defendant back to the police station, he did not arrange for a court reporter, or a taperecorder, or a videocamera to memorialize defendant's statement. The officer also did not seek to memorialize defendant's statement in writing, other than by writing it in his police report.

No. 1-10-1496

¶ 18 The State then introduced a certified copy of defendant's prior conviction, which was admitted, and the State rested. The trial court then denied defendant's motion for a directed finding. Defendant then exercised his right not to testify, and the defense rested. The State then waived its right to an initial closing argument.

¶ 19 In its closing, the defense argued that, although the officer admitted that the lighting was good, the officer conceded that he never observed a weapon either in defendant's hand or leaving defendant's hand. The defense argued that the officer was "honest" when he testified about not observing a weapon leave defendant's hand, but that his testimony about defendant's statement was suspect. The defense argued that there was no court reporter, no audiotape and no videotape of the statement, and that the alleged statement did not "match up" with the evidence that the gun was never in defendant's possession. In its rebuttal closing, the State argued that it was a reasonable inference to make, from the officer's testimony about defendant's tossing motion toward the gangway, that defendant tossed the gun that was immediately found in the gangway. The State argued that this reasonable inference, coupled with defendant's statement, proved defendant's guilt.

No. 1-10-1496

¶ 20 The trial court then issued its ruling. Finding the officer credible, the trial court stated:

"I believe the officer did testify very credibly, and I do not believe that the officer would on the one hand say – admit that he didn't see the weapon or even see the weapon leave his hand, and then make up a statement against Mr. Polk. That doesn't make any sense to me."

After reviewing the evidence on the record, the trial court then found defendant not guilty on count 1 and guilty on count 2. Explaining its not guilty verdict, the trial court stated that he was "going to give him the benefit of the doubt on the issue of his own land or abode." The trial court then reiterated that, in reaching its verdict, it did not consider the hearsay evidence about the offender's description or about the prior firing of gunshots.

¶ 21 III. Posttrial Proceedings

¶ 22 On April 8, 2010, defendant filed a posttrial motion for a new trial alleging several claims, including that the State failed to prove defendant guilty beyond a reasonable doubt. On May 18, 2010, when presenting argument on the posttrial motion, defense counsel argued only the insufficient evidence claim. The

No. 1-10-1496

trial court denied the posttrial motion, finding again that the officer was credible and that defendant's statement, together with the circumstantial evidence, was sufficient to prove defendant guilty beyond a reasonable doubt. The trial court summarized the circumstantial evidence as "the motion, the hiding, the location where the gun was found, the absence of other items around that gun, *** [and] the flight."

¶ 23 On May 18, 2010, a notice of appeal was filed, and this direct appeal followed.

¶ 24 ANALYSIS

¶ 25 On this direct appeal, defendant claims, first, that the evidence was insufficient to convict him because his confession was not sufficiently corroborated; and, second, that the statute setting forth the offense is unconstitutional on its face because it violates the second amendment right to bear arms. For the following reasons, we find these claims unpersuasive.

¶ 26 I. Sufficiency of the Evidence

¶ 27 Defendant claims, first, that the State failed to prove him guilty beyond a reasonable doubt. The due process clause of the fourteenth amendment to the United States constitution "requires that a person may not be convicted in

No. 1-10-1496

state court 'except upon proof beyond a reasonable doubt of every fact necessary to constitute a crime with which he is charged.'" *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004) (quoting *In re Winship*, 397 U.S. 358, 364 (1970)).

¶ 28 A. Standard of Review

¶ 29 When we review a claim that the evidence was insufficient to sustain a conviction, "the question is 'whether, after reviewing 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.'" (Emphasis in original.) *Cunningham*, 212 Ill. 2d at 278-79 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *People v. Hunter*, 331 Ill. App. 3d 1017, 1025 (2002)). "The *Jackson* standard applies in all criminal cases, regardless of the nature of the evidence." *Cunningham*, 212 Ill. 2d at 279. In applying this standard, "a reviewing court must allow all reasonable inferences from the record in favor of the prosecution." *Cunningham*, 212 Ill. 2d at 280. Also, a reviewing court will not substitute its judgment for that of the trier of fact with respect to the credibility of a witness. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009).

¶ 30 B. Corroboration Requirement

¶ 31 "Under the law of Illinois, proof of an offense requires proof of two

No. 1-10-1496

distinct propositions or facts beyond a reasonable doubt: (1) that a crime occurred, *i.e. the corpus delicti*; and (2) that the crime was committed by the person charged." *People v. Sargent*, 239 Ill. 2d 166, 183 (2010). In the case at bar, the occurrence of the crime, namely, unlawful use of a weapon by a convicted felon, is dependent upon a showing that the crime was committed by the person charged, namely, a convicted felon. Therefore, the first proposition, that a crime occurred, is dependent on the second proposition, that defendant committed it.

¶ 32 Although a defendant's confession may be integral to proving the first proposition, that a crime occurred, the proof that a crime occurred may not rest exclusively on defendant's confession. *Sargent*, 239 Ill. 2d at 183. When a defendant's confession is used to prove that a crime occurred, the State must also introduce corroborating evidence independent of the defendant's statement. *Sargent*, 239 Ill. 2d at 183. If the State fails to introduce corroborating evidence that a crime occurred, then the conviction cannot stand. *Sargent*, 239 Ill. 2d at 183.

¶ 33 Although the corroboration requirement means that the State has to introduce "some" independent evidence that a crime occurred, the corroborating evidence does not have to, by itself, prove the existence of a crime beyond a reasonable doubt. *Sargent*, 239 Ill. 2d at 183. "If the defendant's confession is

No. 1-10-1496

corroborated, the corroborating evidence may be considered together with the confession to determine whether the crime, and the fact the defendant committed it have been proven beyond a reasonable doubt." *Sargent*, 239 Ill. 2d at 183.

¶ 34 C. Sufficiency and Corroboration

¶ 35 Defendant argues that the officer was scrupulously honest when he admitted not seeing the gun in defendant's hand but lied when he recounted defendant's statement. As the trial court observed in its ruling, "[t]hat doesn't make any sense." The defense's argument, that defendant did not have a gun in his hand, depends on accepting the officer's credibility. We can come up with no explanation why the officer would be scrupulously truthful one minute -- about the same defendant in the same case -- and then lie to invent a detailed statement by defendant, about his drug selling, its precise location and his reasons for possessing a weapon. We agree with the trial court that this makes no sense.

¶ 36 After reviewing the evidence in the light most favorable to the prosecution, we find that a rational trier of fact could have found defendant guilty beyond a reasonable doubt. First, there was defendant's unequivocal statement: "It's my gun. I have it for protection." Second, we find that defendant's statement was corroborated by circumstantial evidence. The circumstantial evidence

No. 1-10-1496

included: defendant's tossing motion toward the same location where the gun was almost immediately recovered; defendant's flight and attempted self-concealment at the approach of a marked squad vehicle; the absence of any other pedestrians or moving vehicles in the vicinity; and the discovery of the gun without any other objects or debris nearby, creating the reasonable inference that it was the subject of defendant's tossing motion.

¶ 37 In defendant's reply brief to this court, defendant uses reprints from Google maps to argue that, based on the substance of the police call and the officer's testimony about his whereabouts, defendant could not have been the suspect described in the call. First, we observe that, after defendant's hearsay objection, the trial court specifically ruled that the call would not be considered for the truth of the matter asserted. After obtaining this desired result in the trial court, defendant cannot now argue that we should consider the call for the truth of the matters asserted in it. Second, whether or not defendant was the suspect described in the police call has no bearing on the offense for which he was convicted, which required proof that he had possession of a firearm and that he was a convicted felon. 720 ILCS 5/24-1.1 (West 2008) (it is unlawful for a person "to knowingly possess" a firearm, if he "has been convicted of a felony"). He was not charged

No. 1-10-1496

with firing the gunshots reported in the police call. As a result, our evaluation of the State's evidence is not affected by whether defendant was or was not the suspect described in the police call.

¶ 38 Since we find both that the circumstantial evidence corroborated defendant's statement and that a rational trier of fact could have found defendant guilty beyond a reasonable doubt, we do not find persuasive defendant's claim of insufficient evidence.

¶ 39 D. Alleged Error by the Trial Court

¶ 40 Defendant also argues that the trial court mistakenly believed that defendant had to prove his own innocence. Defendant makes this argument based on the trial judge's introductory remark to his ruling in which the judge stated:

"Okay. State presented one witness, so obviously I've got to find him credible. That's especially so because the officer is saying Mr. Polk made a very damaging statement."

When this statement is read in context, it is clear that what the trial judge meant was that, to find defendant guilty, he had to find the officer credible; and that, if he did not find the officer credible, then the State had failed to prove its case. This

No. 1-10-1496

meaning is clear from the trial court's following statements, which defendant does not quote, where the trial court then finds the officer credible and provides a detailed review of how the State's evidence proved defendant guilty beyond a reasonable doubt. If there was any doubt that the trial judge failed to understand this basic principle of criminal law, it was certainly eliminated when the trial court reiterated its review of the State's evidence during the hearing on defendant's posttrial motion. Thus, we find no basis for defendant's argument that the trial court failed to grasp one of the basic tenets of American criminal law.

¶ 41

II. Second Amendment

¶ 42 Defendant's second claim is that the statute setting forth his offense is unconstitutional because it violates the second amendment right to bear arms.

¶ 43 Specifically, defendant argues that recent Illinois appellate cases that reviewed other felon possession laws and affirmed them were wrongly decided, and that statements in recent United States Supreme Court decisions in support of felon possession bans were merely *dicta* and not binding. As we explain more fully below, we see no reason to suddenly abandon our recently decided precedent and thus we decline defendant's invitation to now pursue a completely different course.

¶ 44 For its part, the State also argues that our precedent was wrongly decided, but only to the extent that it requires any scrutiny of these laws at all. The State argues that convicted felons are not "people" for the purpose of the second amendment, that they do not even come within the scope of the second amendment and that, as a result, no level of scrutiny is required. For reasons that we also explain below, we find that convicted felons are people and that some level of scrutiny is required.

¶ 45 A. Standard of Review

¶ 46 Whether a statute is constitutional is a question of law that we review *de novo*. *People v. Cornelius*, 213 Ill. 2d 178, 188 (2004). Statutes are presumed to be constitutional, and the party challenging the constitutionality of a statute has the burden of overcoming this presumption. *Cornelius*, 213 Ill. 2d at 189. After listening to the parties' arguments, a reviewing court should try to construe the statute as constitutional, if that is reasonably possible. *Cornelius*, 213 Ill. 2d at 189. If the reviewing court has any doubts about how to construe the statute, it should resolve those doubts in favor of finding the statute constitutional. *Cornelius*, 213 Ill. 2d at 189. "This is not to mean that statutes are unassailable," but rather that they enjoy a strong presumption of validity. *Cornelius*, 213 Ill. 2d at 189.

No. 1-10-1496

¶ 47 Although defendant did not raise his constitutional claim in the trial court, a constitutional challenge to a criminal statute can generally be raised at any time. *People v. J.W.*, 204 Ill. 2d 50, 61 (2003). Accordingly, defendant has not waived his constitutional challenge to the statute, even though he first raised this challenge in the appellate court. *J.W.*, 204 Ill. 2d at 61-62.

¶ 48 B. Facial Challenge

¶ 49 Defendant challenges the constitutionality of the statute on its face. "The difference between an as-applied and a facial challenge is that if a plaintiff prevails in an as-applied claim, he may enjoin the objectionable enforcement of a statute only against himself, while a successful facial challenge voids enactment in its entirety and in all applications." *Morr-Fitz, Inc. V. Blagojevich*, 231 Ill. 2d 474, 498 (2008).

¶ 50 This difference affects the scope of our review, because the facts of a party's case become relevant only if he or she brings an as-applied challenge. In an as-applied challenge, the challenging party contests only how the statute was applied against him or her within a particular context; and, as a result, the facts of his or her particular case become relevant. *Napleton v. The Village of Hinsdale*, 229 Ill. 2d 296, 306 (2008). By contrast, in the case at bar, where defendant has

No. 1-10-1496

chosen to mount only a facial challenge, the facts of his particular case do not affect our review.

¶ 51 Since a successful facial challenge will void the statute for all parties in all contexts, it is "the most difficult challenge to mount successfully." *Napelton*, 229 Ill. 2d at 305. "Facial invalidation "is, manifestly, strong medicine" that "has been employed by the court sparingly and only as a last resort." " *Poo-bah Enterprises, Inc. v. The County of Cook*, 232 Ill. 2d 463, 473 (2009) (quoting *National Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973))).

¶ 52 C. Second Amendment and Recent Case Law

¶ 53 The second amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed." U.S. Const. amend II.

¶ 54 In the last few years, the United States Supreme Court has issued two significant decisions concerning the second amendment: (1) *District of Columbia v. Heller*, 554 U.S. 570 (2008); and (2) *McDonald v. City of Chicago*, 130 S.Ct. 3020, 3026 (2010).

¶ 55 In sum, the United States Supreme Court found in *Heller* that the

No. 1-10-1496

second amendment permitted an individual to keep a handgun in his or her home for the purpose of self-defense, and it struck down the District of Columbia law that had banned this. Two years later, in *McDonald*, the court held that its holding in *Heller* was not limited to the federal District but also applied with equal force to the States.

¶ 56 Specifically, in *Heller*, a District of Columbia police officer, who was authorized to carry a handgun while on duty, applied to also register a handgun to keep in his home in the District, and the District refused his application. *Heller*, 554 U.S. at 575-76. The police officer then filed suit in federal court seeking to overturn the District's ban against the registration of handguns, but only in so far as it prohibited him from keeping a handgun in his home. *Heller*, 554 U.S. at 575-76. Before the United States Supreme Court, the District argued that the second amendment protected only the right to keep a firearm in connection with militia service. *Heller*, 554 U.S. at 577. In contrast, the police officer argued that the second amendment also protected the right of an individual, such as himself, to keep a firearm in his home for the purpose of self-defense. *Heller*, 554 U.S. at 577. In a close 5-to-4 decision, the United States Supreme Court agreed with the officer. *Heller*, 554 U.S. at 636.

No. 1-10-1496

¶ 57 Two years later in *McDonald*, defendants City of Chicago and the village of Oak Park, which had laws similar to the District law struck down in *Heller*, tried to distinguish their case by arguing that, although the second amendment applied in the federal District, it had no application to the States. *McDonald*, 130 S.Ct. at 3026. The United Supreme Court rejected this argument and held in *McDonald* that its holding in *Heller* was fully applicable to the States. *McDonald*, 130 S.Ct. at 3050. The court ended with: "We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*." *McDonald*, 130 S.Ct. at 3050.

¶ 58 D. Continuing Validity of Felon Possession Laws

¶ 59 We do not find persuasive defendant's argument that, in light of these recent cases, we should now find that felon possession laws violate the second amendment.

¶ 60 In both these recent cases, the United States Supreme court emphasized that its holdings had no effect on the validity of laws, such as the one in the case at bar, that prohibit the possession of guns by convicted felons. In *Heller*, the United States Supreme Court stated unequivocally that: "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the

No. 1-10-1496

possession of firearms by felons." *Heller*, 554 U.S. at 626. See also *Heller*, 554 U.S. at 626 ("the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes). In *Heller*, the police officer asked to be able to register his handgun, " 'assuming he is not otherwise disqualified,' by which they apparently mean if he is not a felon and is not insane." *Heller*, 554 U.S. at 630. In response to his request, the *Heller* court held that the second amendment protects "the rights of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635.

¶ 61 Similarly, in *McDonald*, a plurality of justices stated: "[w]e made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as 'prohibition on the possession of firearms by felons ***. We repeat those assurances here." *McDonald*, 130 S.Ct. at 3047.

¶ 62 In addition, every Illinois appellate panel, which has considered second amendment challenges to felon possession laws after *Heller*, has upheld these laws. See *e.g. People v. Davis*, 408 Ill. App. 3d 747, 750 (1st District, 3rd Division 2011) (unlawful use of a weapon by a felon (UUWF), and armed habitual criminal statute (AHC))³; *People v. Ross*, 407 Ill. App. 3d 931, 942 (1st District,

³A person commits the offense of being an armed habitual criminal if he or

No. 1-10-1496

6th Division 2011) (AHC); *People v. Coleman*, 409 Ill. App. 3d 869, 879 (1st District, 6th Division 2011) (different panel) (AHC).

¶ 63 For these reasons, we reject defendant's argument that felon possession laws were rendered invalid by the recent holdings in *Heller* and *McDonald*.

¶ 64 E. Some Level of Scrutiny Required

¶ 65 We also do not find persuasive the State's argument that convicted felons are not people for the purpose of the second amendment and that no level of scrutiny of these laws is required.

¶ 66 First, we find that felons are people. The second amendment right is a right of the "people" not of "citizens." U.S. Const. amend II. Although felons may lose some rights of citizenship, they still remain persons. In Justice Thomas' concurrence in *McDonald*, he pointed out that the plurality in *McDonald* had applied the second amendment to the states -- not through the privileges-and-

she "receives, sells, possesses, or transfers any firearm" after having been convicted of at least two triggering offenses. *Ross*, 407 Ill. App. 3d at 935 (quoting 720 ILCS 5/24-1.7 (West 2008)). This statute is similar to the statute in the case at bar because both involve possession of a firearm by a convicted felon.

No. 1-10-1496

immunities clause which recognizes the rights of citizens -- but "through the Due Process clause, which covers all 'persons.'" *McDonald*, 130 S.Ct. at 3083 n. 19 (Thomas, J., concurring). It was for this reason that he had written separately. *McDonald*, 130 S.Ct. at 3059 (Thomas, J., concurring). However, he acknowledged that his view was "contrary to this Court's precedents" which have held that the second amendment right is a right which does not belong just to citizens, but which belongs more universally to all persons. *McDonald*, 130 S.Ct. at 3084.

¶ 67 In addition, the majority in *Heller* observed that the federal bill of rights used the phrase "right of the people" only three times: in the first amendment's "Assembly-and-Petition Clause," in the fourth amendment's "Search-and-Seizure Clause," and in the second amendment. *Heller*, 554 U.S. at 579. The State offers us no reason why we should interpret the same phrase, "right of the people," differently in the second amendment than in the first and fourth amendments. *McDonald*, 130 S.Ct. at 3044 (rejecting the argument that the second amendment right is "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees"). If we today interpret "the people" in the second amendment as excluding convicted felons, this interpretation could

No. 1-10-1496

then be used as an opening wedge to chip away at their rights to petition and assembly under the first amendment and their rights against unreasonable search and seizure under the fourth amendment. We are offered no well-reasoned philosophy why we should embark down this slippery slope, and we reject the State's invitation to do so. *Accord. Davis*, 408 Ill. App. 3d at 749 ("Although a felon, [defendant] still counts as one of the people whose rights the Constitution protects.").

¶ 68 Second, we find that some level of scrutiny is required. In *Heller*, the United States Supreme Court observed that the "prohibitions on the possession of firearms by felons" were "presumptively valid" under the second amendment, but only "presumptively" so. *Heller*, 554 U.S. at 626, 627 n. 26. This means that, although we start with the presumption of their second amendment validity, this presumption, like any other presumption, can be rebutted. Thus, there must be some level of scrutiny of these felon laws permitted by the Court's recent cases.

¶ 69 F. Intermediate Level of Scrutiny

¶ 70 We find an intermediate level of scrutiny to be appropriate. In the case before us, defendant argues for strict scrutiny, while the State argues that if any level of scrutiny applies, it should be rational basis. To answer this question, we

No. 1-10-1496

review first the United States Supreme Court's precedent and second the precedent of our own Illinois courts.

¶ 71 1. U.S. Supreme Court

¶ 72 In *Heller*, the United States Supreme Court found that the rational basis test was an insufficient level of scrutiny for evaluating "the extent to which a legislature may regulate" the second amendment right found in *Heller*. *Heller*, 554 U.S. at 629 n. 27.

¶ 73 After observing that the traditional levels of scrutiny were "strict scrutiny, intermediate scrutiny, [and] rational basis," the *Heller* court chose not to specify whether an intermediate or strict level of scrutiny would be appropriate. *Heller*, 554 U.S. at 634. The majority acknowledged that the dissent "criticizes us for declining to establish a level of scrutiny for evaluating Second Amendment restrictions," but stated that "there will be time enough to expound" on these points later. *Heller*, 554 U.S. at 634. In essence, the Supreme Court deliberately left the task to the lower courts in the first instance to determine the appropriate level of scrutiny after *Heller*.

¶ 74 2. Illinois Appellate Courts

¶ 75 Despite the language in *Heller* appearing to reject the rational basis

No. 1-10-1496

test, at least one Illinois appellate panel has applied it post-*Heller*.

¶ 76 For the aggravated unlawful use of a weapon statute, there is a split among Illinois appellate panels about whether intermediate scrutiny or rational basis applies to second amendment challenges post-*Heller*. The First and Third Divisions of the First District have applied intermediate scrutiny (*People v. Mimes*, 2011 Ill. App. Lexis 644, *40 (1st District, 1st Division 2011); *People v. Aguilar*, 408 Ill. App. 3d 136 (1st District, 3rd Division 2011)) while the Fourth Division has applied rational basis (*People v. Williams*, 405 Ill. App. 3d 958 (1st District, 4th Division 2010)).

¶ 77 For the armed habitual criminal statute, the Illinois appellate court has consistently applied intermediate scrutiny. *Davis*, 408 Ill. App. 3d at 749 (1st District, 3rd Division 2011); *Ross*, 407 Ill. App. 3d at 939 (1st District, 6th Division 2011). *C.f.* *Wilson v. Cook County*, 407 Ill. App. 3d 759, 768 (1st District, 3rd Division 2011) (applying intermediate scrutiny to uphold a statute banning assault weapons).

¶ 78 Although the *Heller* decision appeared to reject the rational basis test, the thoughtful decision by the Fourth Division in *Williams* distinguished that language in *Heller* by observing that the statute before it, AUUW, did not

No. 1-10-1496

"implicate the fundamental right announced by *Heller*," namely "the right to possess a loaded handgun in the home for self-protection." *Williams*, 405 Ill. App. 3d at 963. The AUUW statute has a specific exception for a person's abode or land. 720 ILCS 5/24-1.6(a) (West 2008). Because of this exception, the Fourth Division chose to apply the rational basis test instead of intermediate scrutiny. *Williams*, 405 Ill. App. 3d at 963.⁴ *Cf. Marzzarella*, 614 F.3d at 95 (applied intermediate scrutiny where the statute could implicate possession of "firearms in the home").

¶ 79 "[T]he Second Amendment can trigger more than one particular standard of scrutiny," depending on the type of law challenged. *United States v. Marzzarella*, 614 F.3d 85, 97 (3rd Cir. 2010), quoted with approval in *United States v. Reese*, 627 F.3d 792, 801 (10th Cir. 2010) and in *Wilson*, 407 Ill. App. 3d at 767. In the case at bar, the statute before us has no exception for an abode. Thus, the logic of the *Williams* decision would not apply to the statute before us, even if we chose to adopt the reasoning of the *Williams* court.

⁴ It was also this exception that persuaded the trial court in the case at bar not to find defendant guilty of AUUW; the trial court explained that it was "going to give him the benefit of the doubt on the issue of his own land or abode."

No. 1-10-1496

¶ 80 As a result, we choose to apply an intermediate level of scrutiny because, first, the majority in *Heller* rejected rational basis for statutes that could make criminal the possession of handguns kept in the home for self-defense; and, second, because our Illinois precedent has consistently applied an intermediate level of scrutiny for statutes prohibiting weapons possession by felons, such as the statute before us.

¶ 81 G. Application of Intermediate Scrutiny

¶ 82 Applying intermediate scrutiny to the statute before us, we find that it is constitutional.

¶ 83 Under intermediate scrutiny, a regulation can survive only if it serves "important governmental objectives" and employs means that are "substantially related to the achievement of those objectives." *United States v. Virginia*, 518 U.S. 515, 533 (1996) (internal quotation marks omitted); *Marzzarella*, 614 F.3d at 98 (the regulation must serve an important objective and "the fit between the challenged regulation and the asserted objective [must] be reasonable, not perfect"); *Davis*, 408 Ill. App. 3d at 749.

¶ 84 The statute at issue provides:

"It is unlawful for a person to knowingly possess on or

No. 1-10-1496

about his person or on his land or in his own abode or fixed place of business any weapon prohibited under Section 24-1 of this act [720 ILCS 5/24-1 (West 2008)] or any firearm or any firearm ammunition if the person has been convicted of a felony under the laws of this State or any other jurisdiction. This Section shall not apply if the person has been granted relief by the Director of the Department of State Police under Section 10 of the Firearm Owners Identification Act. [430 ILCS 65/10 (West 2008)]." 720 ILCS 5/24-1.1(a) (West 2008).

¶ 85 Section 10 of the Firearm Owners Identification Act, which is incorporated by reference in the statute above, provides, in relevant part:

"Any person prohibited from possessing a firearm under Sections 24-1.1 or 24-3.1 of the Criminal Code of 1961 [720 ILCS 5/24-1.1 or 720 ILCS 5/24-3.1 (West 2008)] *** may apply to the Director of the Department of the State Police or petition the circuit court in the county where the petitioner resides ***, requesting relief

No. 1-10-1496

from such prohibition and the Director or court may grant such relief if it is established by the applicant to the court's or Director's satisfaction that: ***

(1) the applicant has not been convicted of a forcible felony under the laws of this State or any other jurisdiction within 20 years of the applicant's application for a Firearm Owner's Identification Card, or at least 20 years have passed since the end of the period of imprisonment imposed in relation to that conviction,

(2) the circumstances regarding a criminal conviction, where applicable, the applicant's criminal history and his reputation are such that the applicant will not be likely to act in a manner dangerous to public safety; and

(3) granting relief would not be contrary to the public interest." 430 ILCS 65/10(c) (West 2008).

¶ 86 First, we find that the statute at issue serves an important government interest. This court has previously held that the legislative purpose behind the

No. 1-10-1496

UUWF statute is to deter firearm possession by "a class of persons that the [Illinois] legislature has determined presents a higher risk of danger to the public when in possession of a weapon." *People v. Crawford*, 145 Ill. App. 3d 318, 321 (1986). See also *Crawford*, 145 Ill. App. 318 at 322 ("The legislative history clearly demonstrates the intent to promote the public safety"); *Davis*, 408 Ill. App. 3d at 750 (the purpose of the UUWF statute is to protect the public from the danger posed when convicted felons possess firearms"). The UUWF's objective of keeping guns out of the hands of people likely to misuse them is an important government interest. *Marzzarella*, 614 F.3d at 98 (an important government objective is " 'to keep firearms away from the persons Congress classified as potentially irresponsible and dangerous' "); *Reese*, 627 F.3d at 802-03 (an important government objective is to keep firearms away from persons who pose a heightened danger of misusing them).

¶ 87 Second, we find that the means employed are substantially related to the achievement of those objectives. On its face, the statute does not create a lifelong ban on the possession of firearms by felons, and it makes future eligibility for possession easier for non-violent felons, such as defendant. Instead, the statute permits a convicted felon, upon the consideration of certain well-delineated factors,

No. 1-10-1496

to petition for a firearms license. *Cf. Aguilar*, 408 Ill. App. 3d at 157 (Neville, J., dissenting) (objecting to "a complete ban" on certain types of possession). In addition, the statute specifically permits a convicted felon to raise the affirmative defense of necessity to a UUWF charge. 720 ILCS 5/24-1.1(d) (West 2008).

¶ 88 Prior to *Heller*, this court held that the UUWF statute was reasonably tailored to further its objective, in part, because it "provide[d] for [these] exceptions to the exclusion of firearm possession by felons." *Crawford*, 145 Ill. App. 3d at 322. After *Heller*, we still find that the UUWF statute is reasonably tailored to its objective.

¶ 89 Since the statute satisfies the two-part test of intermediate scrutiny, we find that it does not, on its face, violate the second amendment.

¶ 90 CONCLUSION

¶ 91 For the foregoing reasons, we find, first, that defendant's confession was sufficiently corroborated and the evidence was sufficient to convict him; and, second, that the statute on its face does not violate the second amendment right to bear arms.

¶ 92 Affirmed.

No. 1-10-1496

¶ 93 JUSTICE CAHILL, specially concurring.

¶ 94 I concur in the result only.

¶ 95 JUSTICE LAMPKIN, specially concurring:

¶ 96 I concur in the result of the opinion but not the rationale.

¶ 97 I write separately to emphasize that intermediate scrutiny is not applicable to defendant's second amendment challenge to the constitutionality of the statutory prohibition concerning the unlawful use of a weapon by a felon. Although I agree that the challenged law satisfies intermediate scrutiny, the court applies rational basis scrutiny, not intermediate scrutiny, because the challenged law implicates conduct that falls outside the scope of the second amendment's protection of the right to bear arms.

¶ 98 The Court found that the right to bear arms, in addition to providing for the ready formation of a militia and a protection from tyranny, was also popularly understood as an individual right to self-defense, particularly for the defense of one's hearth and home. *Heller*, 554 U.S. at 599-601, 586. Nevertheless, the second amendment, like the first amendment's right of free speech, was not unlimited. *Id.* at 595. The Court stated that the second amendment "elevates above all other interests the right of *law-abiding, responsible citizens* to use arms in defense of hearth of home." (Emphasis added.) *Id.* at 635.

¶ 99 The Court rejected the application of a rational basis review to conduct within the scope of the second amendment's protection. *Id.* at 628-29 n.27. Here, however, the challenged law does not impose a burden on conduct falling within the scope of the second amendment's

No. 1-10-1496

guarantee because the law impacts felons, who are not law-abiding, responsible citizens. See *People v. Mimes*, 2011 IL App (1st) 082747, ¶ 14, *pet. for leave to appeal pending*, No. 112728 (filed July 25, 2011) (discussing a two-part approach to second amendment claims). Because the challenged law does not burden protected conduct, the law is valid, provided that it satisfies the due process mandate of rationality in lawmaking. *Mimes*, at ¶ 14; *Wilson v. Cook County*, 407 Ill. App. 3d 759, 766 (2011), *pet. for leave to appeal allowed*, No. 112026 (Ill. May 25, 2011); *Heller*, 554 U.S. at 629 n.27.