

laws where it does not punish defendant for his prior convictions, but rather for the separate offense of possessing a firearm after having been convicted of at least two of the statute's enumerated offenses. The trial court did not abuse its discretion by sentencing defendant to 18 years' imprisonment where it considered proper aggravating and mitigating factors in making its sentencing determination. The \$200 DNA analysis fee assessed against defendant should be vacated where he had previously submitted a DNA specimen in connection with a prior conviction and that the \$30 Children's Advocacy Center charge assessed against him should be offset by his presentencing custody credit.

¶ 2 Following a bench trial, defendant Duane Ellison was found guilty of being an armed habitual criminal and sentenced to 18 years' imprisonment. On appeal, defendant contends that the State failed to prove him guilty beyond a reasonable doubt, the armed habitual criminal statute violates the second amendment and the constitutional prohibitions against *ex post facto* laws, his sentence is excessive, he was improperly assessed a \$200 DNA analysis fee, and the trial court should have applied his presentencing custody credit to the \$30 Children's Advocacy Center fee assessed against him. For the reasons that follow, we affirm defendant's conviction and sentence, but vacate the \$200 DNA analysis fee and order that the \$30 Children's Advocacy Fee be offset by his presentencing custody credit.

¶ 3 **BACKGROUND**

¶ 4 Defendant was charged with being an armed habitual criminal and with multiple counts of unlawful use of a weapon by a felon and aggravated unlawful use of a weapon in connection with his alleged possession of a firearm. At trial, Chicago police officer James Davis testified that on the evening of August 27, 2009, he was riding in a squad car with Officer Dale Caridine and Officer Lamoine McCants. Officer Davis also testified that they were responding to a call about a silver or gray four-door Pontiac that had been involved in the attempted murder of a police officer and that about 8:16 p.m., he observed a vehicle that matched the description in the

1-10-3060

radio call and saw defendant, who was not wearing his seat belt, in the driver's seat and another man in the front passenger seat.

¶ 5 Officer Davis testified that the officers initiated a traffic stop of defendant's vehicle and that he pointed his flashlight into the backseat of the car while Officer Caridine asked defendant for his driver's license and noticed a large revolver with white tape wrapped around the handle and a silver barrel on the floorboard behind the front passenger seat. Officer Davis instructed Officer Caridine to remove defendant from the vehicle and then entered the car through "the driver's side passenger door" and recovered the revolver, which was loaded with six live rounds, after defendant had been handcuffed and escorted to the police vehicle. On cross-examination, Officer Davis stated that he had testified before the grand jury that he found the gun on the rear passenger seat.

¶ 6 Officer Caridine testified that he arrested defendant on the evening of August 27, 2009, that he spoke with defendant after having advised him of his *Miranda* rights, and that defendant stated that the gun recovered by Officer Davis was his. On cross-examination, Officer Caridine stated that after he had arrested defendant, he observed Officer Davis bend down into the rear passenger side of defendant's vehicle and remove a gun.

¶ 7 The State then entered certified copies of defendant's prior convictions for robbery, aggravated robbery, and criminal sexual assault into evidence and rested its case. Defendant did not testify or present additional evidence, and the trial court found him guilty of all counts. In doing so, the court stated that it considered this to be a close case prior to the introduction of defendant's statement that the gun Officer Davis recovered was his and that although there were

1-10-3060

inconsistencies between the officers' testimony, they were not material enough to outweigh defendant's admission. Defendant subsequently filed a motion for a new trial, and the court granted the motion and entered a finding of not guilty as to three counts of unlawful use of a weapon alleging that he had not been issued a currently valid firearm owner's identification card, and denied the motion as to all other counts.

¶ 8 At the sentencing hearing, the State asked the court for a substantial sentence and asserted that defendant was a violent felon where he had prior felony convictions for residential burglary, criminal sexual assault, aggravated robbery, and robbery and noted that the firearm was loaded with six live rounds when it was discovered by Officer Davis. The defense requested a minimum sentence of six years' imprisonment and asserted that his prior convictions were for crimes he committed when he was younger and in his twenties, that he had an 18 month-old child, that he was gainfully employed at the time of his arrest, and that there was no evidence showing that he used or handled the firearm at issue. The trial court merged all of defendant's convictions into his conviction for being an armed habitual criminal and sentenced him to 18 years' imprisonment. In doing so, the court stated that defendant's substantial criminal history required a sentence greater than the minimum and that "looking at the totality of the circumstances, looking at the defendant's background, reading the entirety of the PSI, the good and the bad and listening to the presentation [of] the lawyers on both side[s], as well as Mr. Ellison, I will sentence the defendant to 18 years."

¶ 9

ANALYSIS

I. Sufficiency of the Evidence

1-10-3060

¶ 10 Defendant first contends that the State failed to prove him guilty of being an armed habitual criminal beyond a reasonable doubt. Where a defendant challenges the sufficiency of the evidence to sustain his conviction, the standard of review is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Hall*, 194 Ill. 2d 304, 330 (2000). This standard recognizes the responsibility of the trier of fact to resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences therefrom. *People v. Campbell*, 146 Ill. 2d 363, 375 (1992). This court will only reverse a conviction where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt. *People v. Ross*, 229 Ill. 2d 255, 272 (2008).

¶ 11 A person commits the offense of being an armed habitual criminal if he possesses a firearm after having been convicted of two or more forcible felonies. 720 ILCS 5/24-1.7(a)(1) (West 2008). The State may satisfy the possession requirement by proving that the defendant had either actual or constructive possession of the firearm. *People v. Nesbit*, 398 Ill. App. 3d 200, 209 (2010). To establish constructive possession, the State must prove that the defendant had knowledge of the presence of the firearm and had immediate and exclusive control over the area where it was found. *People v. Ingram*, 389 Ill. App. 3d 897, 899-900 (2009).

¶ 12 Viewed in the light most favorable to the State, the evidence shows that Officer Davis discovered a revolver on the floorboard behind the front passenger seat of the vehicle defendant was driving and that defendant admitted to Officer Caridine that the gun was his. Defendant asserts that the State did not establish that he had constructive possession of the revolver found

1-10-3060

by Officer Davis where Officer Caridine's testimony regarding his admission was necessary to establish possession and was not believable because it was inherently illogical and contrary to human experience. Defendant also asserts that inconsistencies between the testimony of Officer Davis and Officer Caridine rendered both their testimony unpersuasive.

¶ 13 As stated earlier, it is the responsibility of the trier of fact "to determine the witnesses' credibility and the weight given to their testimony, to resolve conflicts in the evidence, and to draw reasonable inferences from the evidence," and this court will not substitute its judgment for that of the trier of fact on such matters. *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001). In this case, the trial court observed Officer Davis and Officer Caridine testify and was in the best position to determine their credibility and the believability of their testimony. While it is true that defendant had an incentive to disclaim ownership of the revolver after it was discovered by Officer Davis, people oftentimes admit to wrongdoing or make inculpatory statements, and his admission is not so inherently illogical or contrary to human experience as to justify disturbing the credibility determination made by the trial court.

¶ 14 In addition, while the flaws in a witness' testimony may be so severe that no part of it could be accepted, it is for the trier of fact to judge how flaws in part of the testimony affects the credibility of the whole. *People v. Cunningham*, 212 Ill. 2d 274, 283 (2004). Here, the court addressed the inconsistencies between the testimony of Officer Davis and Officer Caridine in finding defendant guilty and determined that those inconsistencies were not material enough to outweigh defendant's admission.

¶ 15 We thus determine that there is sufficient evidence in the record to establish defendant's

1-10-3060

constructive possession of the revolver where the State presented evidence showing that the gun was found on the floorboard behind the front passenger seat of the vehicle he was driving and he admitted the gun was his. As such, we conclude that the State presented sufficient evidence to prove defendant guilty of being an armed habitual criminal beyond a reasonable doubt.

¶ 16

II. Second Amendment

¶ 17 Defendant also contends that the armed habitual criminal statute violates his individual right to bear arms protected by the second amendment. Although defendant did not raise this issue before the trial court, it is not waived because a constitutional challenge to a statute may be raised at any time. *People v. Bryant*, 128 Ill. 2d 448, 453-54 (1989).

¶ 18 The State initially asserts that defendant is contending that the statute is unconstitutional both on its face and as applied to him and that he may not raise an as-applied challenge on appeal where the claim was not raised before the trial court and an evidentiary hearing has not been conducted on the issue. In his reply, defendant maintains that the factual record from his trial is sufficient to allow this court to adjudicate an as-applied challenge to the statute. However, defendant only raised a facial challenge to the statute in his appellant's brief where he contended that "the statute creating the offense of being an armed habitual criminal is unconstitutional on its face and [defendant's armed habitual criminal] conviction and gun-related merged offenses must be vacated." Thus, to the extent defendant has raised an as-applied challenge in his reply, such a claim cannot be considered by this court where it was not raised in his appellant's brief. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) (points not argued in the appellant's brief are waived and shall not be raised in the reply brief); *People v. Brooks*, 377 Ill. App. 3d 836, 841 (2007).

1-10-3060

¶ 19 Statutes are presumed constitutional, and courts have a duty to construe statutes to uphold their constitutionality if there is any reasonable way to do so. *People v. Jones*, 223 Ill. 2d 569, 595-96 (2006). The party challenging a statute's constitutionality bears the burden of rebutting the presumption of its validity. *People v. Cornelius*, 213 Ill. 2d 178, 189 (2004). To succeed on a facial challenge of a statute's constitutionality, the challenging party must show that the statute would be invalid under any imaginable set of circumstances. *In re M.T.*, 221 Ill. 2d 517, 536 (2006).

¶ 20 Defendant asserts that our supreme court has since rejected this standard for reviewing a facial challenge to a statute's constitutionality in *People v. Madrigal*, 241 Ill. 2d 463 (2011). In *Madrigal*, our supreme court held that a court should depart from this standard in the context of facial challenges of penal statutes that lack a culpable mental state and criminalize a significant amount of innocent conduct. *Id.* at 477-78. In this case, however, defendant is not contending that the armed habitual criminal statute lacks a culpable mental state, but that it violates his second amendment right to bear arms, and he must therefore show that the statute would be invalid under any imaginable set of circumstances.

¶ 21 Defendant asserts that the armed habitual criminal statute is unconstitutional in light of the United States Supreme Court's recent decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010). Since the entry of those decisions, this court has held that the armed habitual criminal statute withstands intermediate scrutiny and does not violate the second amendment. *People v. Coleman*, 409 Ill. App. 3d 869, 879 (2011); *People v. Davis*, 408 Ill. App. 3d 747, 750 (2011); *People v. Ross*, 407 Ill. App. 3d

1-10-3060

931, 942 (2011). We see no reason to depart from those holdings.

¶ 22 The armed habitual criminal statute is intended to protect the public from the danger of violence that arises from the possession of firearms by repeat offenders, and the State has a legitimate interest in protecting the public from such a danger. *Davis*, 408 Ill. App. 3d at 750. In addition, the regulation set forth in the statute fits proportionally with the interests it is designed to serve where it only applies to people who have twice committed the specific kinds of felonies peculiarly related to the use of firearms. *Id.* This court's prior holdings are further supported by the Supreme Court's assurances that its holding in *Heller* did not cast doubt on longstanding prohibitions on the possession of firearms by felons (*McDonald*, 130 S. Ct. at 3047; *Heller*, 554 U.S. at 626), and to the extent those assurances may be dicta, they nonetheless carry significant weight (*Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 236 (2010); *Davis*, 408 Ill. App. 3d at 750). As such, we conclude that the armed habitual criminal statute does not violate the second amendment.

¶ 23

III. *Ex Post Facto*

¶ 24 Defendant next contends that his conviction under the armed habitual criminal statute violates the constitutional prohibitions against *ex post facto* laws. Although defendant did not preserve this issue for appeal, it is not waived because a constitutional challenge to a statute may be raised at any time. *Bryant*, 128 Ill. 2d at 453-54. The enactment of an *ex post facto* law is prohibited by both the United States and Illinois constitutions. U.S. Const., § 10; Ill. Const. 1970, art. I, § 16. An *ex post facto* law is one that is both retroactive and disadvantageous to the defendant. *Cornelius*, 213 Ill. 2d at 207. A law is disadvantageous to a defendant if "it

1-10-3060

criminalizes an act that was innocent when done, increases the punishment for a previously committed offense, or alters the rules of evidence by making a conviction easier." *People v. Malchow*, 193 Ill. 2d 413, 418 (2000).

¶ 25 A person commits the offense of being an armed habitual criminal if he possesses a firearm after having been convicted of two or more forcible felonies. 720 ILCS 5/24-1.7(a)(1) (West 2008). In this case, the State presented evidence showing that defendant had been convicted of robbery on July 30, 2001, aggravated robbery on December 8, 1994, and criminal sexual assault on November 17, 1992. Defendant asserts that although he was found to have possessed a firearm after the enactment of the armed habitual criminal statute, his conviction violates the prohibitions against *ex post facto* laws because his prior convictions for forcible felonies all occurred before the armed habitual criminal statute had been enacted.

¶ 26 This court has consistently held that the armed habitual criminal statute does not violate the constitutional prohibitions against *ex post facto* laws because the statute does not punish a defendant for his prior convictions, but rather for the separate offense of possessing a firearm after having been convicted of at least two of the statute's enumerated offenses. *Coleman*, 409 Ill. App. 3d at 880; *Davis*, 408 Ill. App. 3d at 751-52; *Ross*, 407 Ill. App. 3d at 944-45; *People v. Thomas*, 407 Ill. App. 3d 136, 141-42 (2011); *People v. Adams*, 404 Ill. App. 3d 405, 413 (2010); *People v. Bailey*, 396 Ill. App. 3d 459, 463-64 (2009); *People v. Leonard*, 391 Ill. App. 3d 926, 931-32 (2009). Although defendant maintains that those decisions are inconsistent with our supreme court's holdings in *People v. Dunigan*, 165 Ill. 2d 235 (1995), and *People v. Levin*, 157 Ill. 2d 138 (1993), the court did not hold in those cases that habitual criminal legislation could

1-10-3060

not include prior convictions as elements of an offense, but merely indicated that the statute in question in those cases was a sentencing enhancement, and not a substantive offense (*Leonard*, 391 Ill. App. 3d at 932). As such, we conclude that defendant's conviction under the armed habitual criminal statute does not violate the prohibitions against *ex post facto* laws.

¶ 27

IV. Excessive Sentence

¶ 28 Defendant also contends that his sentence of 18 years' imprisonment is excessive and that this court should either reduce his sentence or remand the matter for a new sentencing hearing.

The State first responds that defendant has forfeited his right to challenge his sentence because he did not file a written motion to reconsider. However, such a claim may be reviewed under the plain-error doctrine, and we must therefore first determine whether error occurred at all. *People v. McGee*, 398 Ill. App. 3d 789, 794 (2010).

¶ 29 Defendant does not dispute that the term falls within the permissible statutory range, but asserts that the sentence is excessive in light of the nature of the offense and the evidence presented in mitigation at the sentencing hearing. Defendant maintains that his conviction was based on a finding that he engaged in the minimum amount of criminal conduct necessary to support a conviction where he was merely driving the vehicle in which the firearm was found and was not observed handling or using the gun. Defendant also maintains that the trial court was presented with considerable mitigating evidence where he had obtained an associate's degree in 1999, he had been employed by the Solo Cup Factory for 18 months prior to his arrest, and he lived with his fiancé and young daughter, who needed his financial support.

¶ 30 Where the sentence imposed by the trial court falls within the statutory range permissible

1-10-3060

for the offense of which the defendant is convicted, a reviewing court may disturb that sentence only if the trial court has abused its discretion. *People v. Jones*, 168 Ill. 2d 367, 373-74 (1995). Such a sentence will be deemed excessive and the result of an abuse of discretion where it is greatly at variance with the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense (*People v. Stacey*, 193 Ill. 2d 203, 210 (2000)), and a reviewing court may then reduce the sentence under Supreme Court Rule 615(b)(4) (eff. Aug. 27, 1999) (*People v. Alexander*, 239 Ill. 2d 205, 212 (2010)).

¶ 31 In this case, defendant was found guilty of being an armed habitual criminal on evidence showing that he was in constructive possession of a loaded firearm where it was found on the floorboard behind the front passenger seat of the vehicle he was driving and he admitted the gun was his. At the sentencing hearing, the court was presented with aggravating evidence showing that defendant had been convicted of residential burglary, criminal sexual assault, aggravated robbery, and robbery, and mitigating evidence showing that he was gainfully employed at the time of his arrest, had obtained an associate's degree in 1999, and lived with his fiancé and young daughter. The court then determined that a minimum sentence was not appropriate due to defendant's criminal history and sentenced him to 18 years' imprisonment after "looking at the totality of the circumstances, looking at the defendant's background, reading the entirety of the PSI, the good and the bad and listening to the presentation [of] the lawyers on both side[s], as well as Mr. Ellison."

¶ 32 It is the province of the trial court to balance factors in aggravation and mitigation and make a reasoned decision as to the appropriate punishment (*People v. Streit*, 142 Ill. 2d 13, 21

1-10-3060

(1991)), and it is not our prerogative to reweigh these factors and independently decide that the sentence is excessive (*Alexander*, 239 Ill. 2d at 214). In this case, defendant was found not just to have been in possession of a firearm, but to have been in possession of a fully loaded revolver while driving on a public street. In addition, the record shows that the court considered proper aggravating and mitigating factors in making its sentencing determination where it considered defendant's substantial criminal history in deciding not to impose a minimum sentence and then considered the totality of the circumstances in imposing a term within the permissible statutory range. While defendant is correct that his 18-year sentence substantially exceeds the minimum six-year term for a class X felony and his longest previous term of nine years, he fails to mention that his sentence is also well below the maximum 30-year term for a class X felony. 730 ILCS 5/5-4.5-25(a) (West 2008). Under these circumstances, we conclude that the trial court did not abuse its discretion by sentencing defendant to 18 years' imprisonment.

¶ 33

V. Fees

¶ 34

A. DNA Analysis Fee

¶ 35 Defendant contends, and the State agrees, that the \$200 DNA analysis fee (730 ILCS 5/5-4-3(j) (West 2008)) assessed against him should be vacated. Any person convicted of a felony must submit specimens of blood, saliva, or tissue to the Illinois Department of State Police and pay an analysis fee of \$200. 730 ILCS 5/5-4-3(j) (West 2008). Our supreme court has recently held that a defendant is only required to submit specimens for DNA analysis one time and may therefore be assessed with the corresponding fee only once. *People v. Marshall*, 242 Ill. 2d 285, 297 (2011). In this case, defendant could not have been required to submit a specimen or pay a

1-10-3060

fee because he had previously submitted a DNA specimen in connection with a prior conviction.

As such, we vacate the \$200 DNA analysis fee assessed against defendant.

¶ 36 B. Children's Advocacy Center Fee

¶ 37 Defendant further contends, and the State agrees, that his 404 days of presentencing custody credit should be applied against the \$30 Children's Advocacy Center fee (55 ILCS 5/5-1101(f-5) (West 2008)) assessed against him. A defendant incarcerated on a bailable offense is entitled to a credit of \$5 for each day spent in custody prior to sentencing to be applied against any fines. 720 ILCS 5/110-14 (West 2008); *People v. Clark*, 404 Ill. App. 3d 141, 143 (2010).

The Children's Advocacy Center charge is appropriately characterized as a fine and may therefore be offset by a defendant's presentencing credit. *People v. Jones*, 397 Ill. App. 3d 651, 664 (2009). As such, we order that the \$30 Children's Advocacy Center charge assessed against defendant be offset by his presentencing custody credit.

¶ 38 CONCLUSION

¶ 39 Accordingly, we affirm defendant's conviction and sentence, but vacate the \$200 DNA analysis fee assessed against him and order that the \$30 Children's Advocacy Center charge be offset by defendant's presentencing custody credit.

¶ 40 Affirmed in part and vacated in part; fines and fees order modified.