

UUWF statute and the armed habitual criminal statute violate the second amendment because they criminalize the mere possession of firearms by a felon; and (3) the armed habitual criminal statute violates the *ex post facto* clause of the state and federal constitutions. For the following reasons, we affirm the judgment of the trial court.

¶ 3

BACKGROUND

¶ 4 Defendant was charged by indictment with one count of being an armed habitual criminal, one count of UUWF and four counts of aggravated unlawful use of a weapon by a felon. The State proceeded to trial on only the counts of armed habitual criminal and UUWF.

¶ 5 At trial, Officer Chirillo of the Cook County Sheriff's Police testified that on January 3, 2010, he and his partner Officer Dwyer were in the area of 22nd Street and Union Avenue in Chicago Heights when they conducted a traffic stop of a Chevy Lumina, which was devoid of any registration. Officer Chirillo identified defendant as the driver of the Lumina. After explaining to defendant why he was pulled over, defendant stated his girlfriend was having an asthma attack at their home, approximately two blocks away. Officer Dwyer told defendant to park his car while the officers requested medical attention. Instead, defendant drove away.

¶ 6 The officers pursued defendant to the area of a railroad embankment, at which point defendant got out of his vehicle and fled on foot. Officer Dwyer chased defendant while Officer Chirillo remained with the abandoned vehicle. Officer Dwyer was unable to apprehend defendant. The officers did an inventory search of defendant's car and found documents matching the 213 East 21st Street address that defendant had initially given them during the

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traffic stop. They also found an AK-47 in the trunk of the car.¹

¶ 7 The officers proceeded to 213 East 21st Street in Chicago Heights. Andrea Rockett, the leaseholder, answered the door and gave the officers consent to search the apartment. The officers found defendant hiding in a closet. Defendant was detained. Rockett directed the officers to the master bedroom and informed them that there was a handgun underneath the mattress. Rockett lifted up the mattress and pointed to a blue box with a .22 caliber handgun inside. The gun was recovered and inventoried.

¶ 8 Officer Chirillo spoke with defendant while he sat in the squad car. Defendant volunteered that the .22 caliber gun was his and had been given to him by his father before his father died. Defendant was transported to the Markham police station where he refused to put his statement into writing.

¶ 9 Andrea Rockett testified that she was dating defendant on January 3, 2010, and defendant was living with her in an apartment at 213 East 21st Street in Chicago Heights. She testified that she did not have an asthma attack on that day. At about 4:45 p.m., defendant banged on the back door. When she opened it, defendant brushed past her and told everyone to be quiet. Defendant turned off the lights and the television.

¶ 10 The police knocked on the door shortly thereafter. Rockett let them in and they searched the apartment. Rockett knew that defendant was hiding in the closet but didn't direct the police there. The police found defendant and took him out of the closet. The officer then searched the

¹Defendant was not charged with possession of the AK-47.

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master bedroom, which she shared with defendant. Rockett testified that she did not direct the officers to the mattress in the bedroom, but that she lifted the mattress and exposed the gun after she was asked if there were any weapons in the apartment. The police recovered the blue box from under the mattress and Rockett saw a small gun inside. Rockett informed Officer Chirillo that the gun belonged to defendant.

¶ 11 The State admitted into evidence two certified statements of defendant's convictions in case numbers 02 C6 302380,1 for aggravated unlawful use of a weapon, and 03 CR 1486201 for aggravated discharge of a firearm. Defendant rested without presenting any evidence.

¶ 12 The court found defendant guilty of armed habitual criminal and UUWF and sentenced defendant to 8 years' imprisonment. It is from this judgment that defendant now appeals.

¶ 13 ANALYSIS

¶ 14 Defendant first argues that the State failed to prove him guilty of armed habitual criminal and UUWF beyond a reasonable doubt. Specifically, defendant claims that he was never seen with the gun or in the room where the gun was found, so the State could not prove that he constructively possessed the gun.

¶ 15 The standard of review on a challenge to the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). It is not the function of the reviewing court to retry the defendant or substitute its judgment for that of the trier of fact. *People v. Collins*, 214 Ill. 2d 206, 217 (2005). The trier of fact assesses the credibility of the witnesses, determines the appropriate weight of the

testimony and resolves conflicts or inconsistencies in the evidence. *People v. Naylor*, 229 Ill. 2d 584, 614 (2008). The trier of fact is not required to disregard inferences that flow from the evidence or search out all possible explanations consistent with innocence and raise them to a level of reasonable doubt. *People v. Hall*, 194 Ill. 2d 305, 332 (2000). A criminal conviction will not be set aside unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 225 (2009).

¶ 16 A person commits the offense of being an armed habitual criminal if he "receives, sells, possesses, or transfers any firearm" after having been convicted of at least two triggering offenses. 720 ILCS 5/24-1.7 (West 2008). To sustain a conviction for UUWF, the State must prove that defendant "knowingly possess[ed] on or about his person or on his land or in his own abode or fixed place of business any weapon prohibited under Section 24-1 of this Act or any firearm or any firearm ammunition if the person has been convicted of a felony under the laws of this State or any other jurisdiction." 720 ILCS 5/24-1.1(a) (West 2008). Under both laws, criminal possession may be proven by showing that the defendant had actual or constructive possession of the weapon. *People v. McCarter*, 339 Ill. App. 3d 876, 879 (2003).

¶ 17 "Actual possession is proved by testimony which shows [the] defendant exercised some form of dominion over the unlawful substance, such as trying to conceal it or throwing it away." *People v. Scott*, 152 Ill. App. 3d 868, 870-71 (1987). Based on the facts of this case, there is no evidence to support actual possession, nor do the parties argue actual possession existed. Constructive possession, which defendant claims was lacking here, exists where defendant has no actual personal present dominion over the contraband, but defendant has the intent and a

capability to maintain control and dominion over the contraband. *People v. Morrison*, 178 Ill. App. 3d 76, 90 (1988); *People v. Valentin*, 135 Ill. App. 3d 22, 31 (1985). Operating on a theory of constructive possession, the State must prove that: (1) that defendant had knowledge of the presence of the weapon; and (2) that defendant exercised immediate and exclusive control over the area when the weapon was found. *McCarter*, 339 Ill. App. 3d at 879; *People v. Bailey*, 333 Ill. App. 3d 888, 891 (2002).

¶ 18 Constructive possession can be proven by circumstantial evidence. *People v. McLaurin*, 331 Ill.App.3d 498, 502 (2002). The trier of fact can rely on reasonable inferences to determine knowledge and possession. *People v. Smith*, 191 Ill.2d 408, 413 (2000). For example, control over the location where the weapon is found gives rise to a reasonable inference that defendant possessed the weapons. *People v. Hammer*, 228 Ill.App.3d 318, 323 (1992); *People v. Chico*, 205 Ill. App. 3d 928, 935 (1990).

¶ 19 Defendant relies on *People v. Macias*, 299 Ill. App. 3d 480 (1998), in support of his position that the State failed to prove constructive possession of the gun. In *Macias*, the defendant was convicted of UUWF. Police officers observed defendant, a suspected drug dealer, enter an apartment building and noticed that lights went on in the rear first-floor apartment. The officers obtained a search warrant. *Id.* at 482. The following day, the officers stopped defendant in his parked vehicle, served him the search warrant, and read him his Miranda rights. *Id.* After a pat down search, the officers recovered keys that allowed entry into the front door of the apartment building, the two padlocks on the front door of the apartment unit, and the padlock on the bedroom door inside the unit where the gun and drugs were found. The

officers entered the same apartment that they had observed defendant enter the previous day with the keys. *Id.* Inside the apartment, the officers discovered cocaine and two guns hidden in a bedroom. *Id.* Defendant testified that although he possessed the keys to the apartment, he did not live in the apartment. His friend, who did live in the apartment, had given him the keys so that he could retrieve personal items for the friend while his friend was in the hospital. *Id.*

¶ 20 This court reversed the defendant's conviction for UUWF finding that the evidence was insufficient. *Id.* at 488. In doing so, we noted that the officers testified that they had only "seen defendant enter the building and lights go on in the rear apartment, rather than seeing defendant enter the apartment and the lights go on in the rear bedroom." *Id.* at 487. In addition, defendant's explanation of why he had the keys to the apartment was corroborated. *Id.* at 485.

¶ 21 *Macias* is factually distinguishable from this case. Here, the evidence showed that defendant lived with Rockett at 213 East 21st Street in Chicago Heights and that the two shared the master bedroom. After being asked if there were any weapons in the apartment, Rockett testified that she lifted the mattress of the bed in the master bedroom and revealed a box containing a .22 caliber gun. Rockett testified the gun belonged to defendant. In addition, defendant admitted that he owned the .22 caliber gun found under the mattress in the master bedroom.

¶ 22 We find the facts of this case more similar to those in *McCarter*, 339 Ill. App. 3d 876 (2003). In *McCarter*, the police found weapons and ammunition in a bedroom while executing a search warrant. Although the defendant was not present at the time the warrant was executed and other people lived in the house with the defendant, this court affirmed the defendant's conviction

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of UUWF. We found that the State had proved beyond a reasonable doubt that the defendant had constructively possessed the weapons and ammunition that the police found because the evidence at trial had shown that one of the officers had known that the defendant lived there; that photographs of the defendant and two pieces of mail addressed to him were found in the same drawer where the ammunition was found; and that, earlier that day, the defendant's mother had implied to the police that the defendant lived there. *Id.* at 879. To have constructively possessed the weapons, the defendant need not have been seen with them or even have been on the premises at the time. *Id.* at 879. The fact that other people living at that address had access to the weapons or the area where they were stored did not disprove that the defendant also constructively possessed them. *Id.* at 879-80.

¶ 23 Viewed in the light most favorable to the State, we find that the evidence in this case was sufficient to support defendant's conviction for armed habitual criminal and UUWF. Rockett's testimony that she and defendant were dating and that he was living with her and sharing the master bedroom where the gun was found, coupled with her testimony that it was his gun and his admission that the gun was his does not warrant this court substituting its judgment for that of the trier of fact in finding a reasonable inference that defendant constructively possessed the weapon at the time of its recovery.

¶ 24 Defendant next argues that his armed habitual criminal and UUWF convictions should be vacated because the statutes creating the offenses of armed habitual criminal and UUWF violate the second amendment right to keep and bear arms in one's home for the purpose of self-defense. Defendant relies on the United States Supreme Court's recent rulings in *District of Columbia v.*

Heller, 554 U.S. 570, 594-601 (2008), and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), in support of his argument.

¶ 25 In *Heller*, the Supreme Court struck down a District of Columbia law that banned the possession of handguns in the home when it found that the second amendment protects the right to keep and bear arms in one's home for the purpose of self-defense. *Heller*, 554 U.S. 570. Likewise, in *McDonald*, the plurality of the Court concluded that the right to possess a handgun in the home was a fundamental right and was applicable to the states under the due process clause. *McDonald*, 130 S. Ct. at 3050.

¶ 26 However, what defendant fails to recognize is that in both *Heller* and *McDonald*, the United States Supreme Court emphasized that its holdings had no effect on the validity of laws, such as the ones 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 possession of firearms by felons.” *Id.*, at 626. 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.” *Id.* at 3047.

¶ 27 This court, which has considered second amendment challenges to felon possession laws after *Heller*, has upheld these laws in accordance with *Heller* and *McDonald*. *People v. Davis*, 408 Ill. App. 3d 747, 750 (2011) (1st District) (unlawful use of a weapon by a felon, and armed habitual criminal statute); *People v. Ross*, 407 Ill. App. 3d 931, 939 (2011) (1st District) (armed habitual criminal statute); *People v. Coleman*, 409 Ill. App. 3d 869, 879 (2011) (1st District)

(armed habitual criminal statute). Accordingly, we must reject defendant's second amendment claims because we find no reason to depart from our well established precedent.

¶ 28 Finally, defendant contends his conviction for the offense of armed habitual criminal violates the *ex post facto* clauses of the United States and Illinois Constitutions where the predicate prior convictions each occurred before the effective date of the legislation creating the offense. See Ill. Const. 1970, art. I, § 16; U.S. Const. Art. 1, § 9, cl. #3; 10, cl. 1. Although defendant is raising this issue for the first time on appeal, a constitutional challenge can be raised at any time. *People v. Wright*, 194 Ill. 2d 1, 23 (2000).

¶ 29 All statutes are presumed to be constitutional and the party challenging the statute bears the burden of proving the statute unconstitutional. *People v. Malchow*, 193 Ill. 2d 413, 418 (2000). Whenever reasonably possible, a court must construe a statute to uphold its constitutionality. *People v. Dinelli*, 217 Ill. 2d 387, 397 (2005). Whether a statute is constitutional is a question of law reviewed de novo. *Malchow*, 193 Ill. 2d at 418.

¶ 30 A law is considered to be *ex post facto* if it "(1) makes criminal and punishable an act innocent when done; (2) aggravates a crime, or makes it greater than it was when committed; (3) increases the punishment for a crime and applies the increase to crimes committed before the enactment of the law; or (4) alters the rules of evidence to require less or different evidence than required when the crime was committed." *People v. Leonard*, 391 Ill. App. 3d 926, 931 (2009).

¶ 31 In *Leonard*, 391 Ill. App. 3d at 931, the defendant was convicted of the offense of being an armed habitual criminal for possessing a firearm after having been previously convicted of three qualifying offenses between 1998 and 2004. The defendant argued that the armed habitual

criminal statute violated the prohibition against *ex post facto* laws because his prior convictions were being used as elements of the offense even though they were obtained before the enactment of the armed habitual criminal statute. *Id.* at 930. This court rejected the defendant's argument finding that the armed habitual criminal statute did not punish the defendant for offenses committed before the statute was enacted but punished him for "the new act of possessing a firearm." Therefore the statute did not violate the provision against *ex post facto* laws. *Id.* at 391. The court further stated that the defendant had fair warning at the time he possessed the firearm "that, in combination with his prior convictions, he was committing the offense of armed habitual criminal." *Id.* at 931.

¶ 32 This court has consistently affirmed the constitutionality of the armed habitual criminal statute and dismissed challenges based on *ex post facto* grounds. See *People v. Coleman*, 409 Ill. App. 3d 869 (2011); *People v. Tolentino*, 409 Ill. App. 3d 598 (2011); *People v. Ross*, 407 Ill. App. 3d 931 (2011); *People v. Leonard*, 391 Ill. App. 3d 926 (2009); *People v. Davis*, 405 Ill. App. 3d 585 (2010); *People v. Adams*, 404 Ill. App. 3d 405 (2010); *People v. Thomas*, 407 Ill. App. 3d 136 (2011). We find no reason to depart from these holdings.

¶ 33 We are likewise unpersuaded by defendant's argument that we should reject these decisions because they conflict with *People v. Dunigan*, 165 Ill. 2d 235 (1995). *Dunigan* is inapplicable here where it upheld the constitutionality of the Habitual Criminal Act (Ill. Rev. Stat. 1989, ch. 38, par 33B-1 (repealed by Pub. Act 95-1052 § 93 (eff. July 1, 2009))), which only dealt with sentencing.

¶ 34

CONCLUSION

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¶ 35 For the forgoing reasons, we affirm defendant's conviction.

¶ 36 Affirmed.

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