

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  
SECOND DISTRICT

---

THE PEOPLE OF THE	)	Appeal from the Circuit Court
STATE OF ILLINOIS,	)	of Kane County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 12-CF-1967
	)	
BENJAMIN P. MILLER,	)	Honorable
	)	Susan Clancy Boles,
Defendant-Appellant.	)	Judge, Presiding.

---

JUSTICE JORGENSEN delivered the judgment of the court.  
Justices Burke and Hudson concurred in the judgment.

**ORDER**

¶ 1 *Held:* In convicting defendant of unlawful possession of a firearm and ammunition with no FOID card, the trial court properly considered multiple factors in determining that defendant did not fall under the “nonresident” exception(s) to the Firearm Owners Identification Card Act (FOID Card Act) (430 ILCS 65/0.01 *et seq.* (West 2012)). Trial counsel was not ineffective. Affirmed with directions.

¶ 2 Following a bench trial, the court convicted defendant, Benjamin Miller, of: (1) three counts of unlawful possession of a firearm without the requisite Firearm Owner’s Identification (FOID) card (430 ILCS 65/2(a)(1) (West 2012)); (2) unlawful possession of firearm ammunition without the requisite FOID card (430 ILCS 65/2(a)(2) (West 2012)); and (3) harassment through

electronic communication (720 ILCS 135/1-2(a)(3) (West 2012)). The court sentenced Miller to two years in the Department of Corrections.

¶ 3 Miller appeals, arguing that he was a “nonresident” of Illinois, and, therefore, he did not need a FOID card. 430 ILCS 65/2(b)(9), (10) (West 2012) (“The provisions of this Section regarding the possession of firearms, firearm ammunition, stun guns, and tasers do not apply to: \*\*\* (9) Nonresidents whose firearms are unloaded and enclosed in a case; (10) Nonresidents who are currently licensed to possess a firearm in their resident state”). Miller contends that the FOID Card Act defines Illinois residency as having an active Illinois driver’s license. As such, he argues that, if Illinois residency is defined as having an Illinois driver’s license, then having an active Wisconsin driver’s license makes him a resident of Wisconsin, and, thus, a nonresident of Illinois. Alternatively, Miller argues that, even if residency is determined after a consideration of multiple factors, rather than a simple driver’s license check, his trial counsel was ineffective for failing to call his landlord in Wisconsin as a witness in support of Wisconsin residency.

¶ 4 For the reasons that follow, we reject Miller’s arguments. However, as the State concedes, only one count of unlawful possession of a firearm without a FOID card may stand. See *People v. Sotelo*, 2012 IL App (2d) 101046, ¶ 13 (the simultaneous possession of multiple firearms without a FOID card will support only one conviction). Therefore, we affirm the trial court’s judgment, but we direct that the judgment order be corrected to reflect that the convictions for unlawful possession of firearms without a FOID card merge into one count.

¶ 5

## I. BACKGROUND

¶ 6

### A. State’s Case

¶ 7 The State charged Miller with three counts of possession of a firearm without a FOID card, possession of ammunition without a FOID card, and harassment through electronic communication. At trial, it presented the following evidence.

¶ 8 Miller came to the attention of authorities after interacting with federal forestry officials in what could be perceived as a threatening manner. Because Miller does not appeal his harassment conviction, we do not go into extensive detail. But, essentially, Miller believed that he had inherited property in South Dakota that had been wrongfully sold at a tax sale in the early 1900's, and now, apparently, fell under the jurisdiction of the United States Forest Service. Miller was dissatisfied with the Forest Service's investigation into his claim.

¶ 9 On January 29, 2011, North Aurora patrol sergeant Travis Foltz and his partner received instructions to go to 315 Hill Avenue in North Aurora, which police believed to be Miller's residence, to speak with Miller about the threatening messages. Miller was present, and they spoke with him outside the garage. Miller acknowledged making the alleged statements, and he tried to justify them. Overall, Miller's conversation with the officers was civil.

¶ 10 Miller continued to act in what the forestry officials believed to be a threatening manner, and, so, the Forest Service determined that, in the future, Miller would communicate exclusively with special agent Travis Lunders in regard to his alleged land claim. This communication occurred mainly through e-mail.

¶ 11 On September 19, 2012, Miller sent Lunders an e-mail that threatened the use of force against any state or federal agency that obstructed his land claim. The e-mail further stated that "trespassers will be tracked down in their kitchen[s]" and that "[a]ll threats \*\*\* will be removed[,] starting with their heads." In the e-mail, Miller listed a North Aurora fax number as his contact information.

¶ 12 On September 20, 2012, based on the above-quoted e-mail, North Aurora police officer Steven Van Loan and another officer returned to the North Aurora residence. Miller was again present. While the other officer was speaking with Miller about the e-mail, Van Loan noticed a box in the garage with the word “Winchester” printed on the side. Van Loan asked Miller about it, and Miller told him that he owned a Winchester rifle.

¶ 13 After learning about the rifle, Van Loan performed an information search on Miller. He found that Miller, born in 1977, had a *non*-juvenile 1995 conviction for domestic battery (against his mother). He also found that Miller did *not* have a FOID card. Based on information that Miller possessed a gun but not a FOID card, Van Loan obtained a search warrant for the North Aurora residence.

¶ 14 On September 28, 2012, Van Loan, along with North Aurora patrol sergeant Joseph Gorski and four other officers, executed the search warrant. They knocked on the front door calmly, because they believed that Miller’s wife and young child could be home. Miller answered the door. Van Loan showed Miller the search warrant, and he explained that they were there to search for guns. Miller admitted that he had three guns in the home, one Bushmaster assault weapon and two long rifles. These were located in a closet in Miller’s home office.

¶ 15 The police took the guns and ammunition into evidence, as well as a nearby backpack. The backpack contained several knives, “survivalist” mylar blankets, a hatchet, and matches. Additionally, the police seized a Nicor bill and a Dish Network bill, each addressed to Benjamin Miller at the North Aurora location. After Miller showed the guns and the ammunition to the police, the officers took him into custody. Miller waived his *Miranda* rights.

¶ 16 The State submitted into evidence a DVD of the police interview with Miller, which had been conducted by Gorski. Before the interview officially starts, Miller begins by asking if he

can call his wife because he left his dogs in the backyard of the North Aurora home. Miller explained that his wife, daughter, and two dogs lived in the North Aurora home, and he owned the guns for his family's protection. Miller acknowledged that he owned the North Aurora home, and paid the mortgage and all associated bills. He bought the home approximately 10 years ago, when he was attending school at Northern Illinois University.

¶ 17 Miller acknowledged that he did not have a FOID card, and he denied ever applying for a FOID card (which is contrary to State records). Gorski, seemingly attempting to relate to Miller, told Miller that he was surprised that Miller was able to purchase a gun without a FOID card. Gorski related that, when he bought his gun at a Gander store, the first thing that Gander asked to see was a FOID card. Miller explained that, because he bought his guns at a Gander in Wisconsin (in September 2012), all they asked to see was his Wisconsin driver's license, which he had obtained weeks before. Miller bought the assault rifle in a private transaction with Chad Anderson.

¶ 18 Miller averred that he was *actually* a Wisconsin resident. Miller again told Gorski that he had a Wisconsin driver's license. (Upon further investigation, Gorski was able to confirm that Miller had a Wisconsin driver's license, issued August 30, 2012. However, Miller's Illinois driver's abstract showed that he did not surrender his Illinois license until October 11, 2012.) Miller told the police that, in August 2012, he moved to Wisconsin for work; he was a salesman and his territory included Wisconsin. He was in the process of having a home built, and he currently rented a property from Anderson. (Miller did not provide details about his rental arrangement with Anderson, the same person from whom he bought the assault rifle.)

¶ 19 Finally, Illinois State Police sergeant Matt Weller testified concerning aspects of the FOID card application process. As a supervisor in the firearm transfer inquiry program, he has

access to information concerning all Illinois firearm transactions and FOID histories. The Illinois State Police keeps a record of every individual who applies for a FOID card. It processes as many as 20,000 applications per month. Weller's records showed that Miller applied for a FOID card, and his application was denied due to his conviction for domestic battery. A conviction for domestic battery forever prohibits a person from obtaining a FOID card. Due to an administrative error, Weller was unable to ascertain the exact date that the agency rejected Miller's application, but the rejection occurred prior to Miller's arrest.

¶ 20 Weller noted that Illinois is the only state with the FOID card system. However, at a minimum, individuals who purchase guns in other states must comply with certain "NICS" procedure. NICS is a "federal national index" overseen by the Federal Bureau of Investigation. Under the federal system, a conviction for domestic violence (excluding a crime where the perpetrator is the child) forever prohibits a person from owning a gun. Weller conceded that, because Miller's criminal act of battery involved an (adult) child against a parent, Miller would not be banned under the federal system.<sup>1</sup>

---

<sup>1</sup> The State never challenges Miller's right to own a gun under the federal system. However, we must note that Weller cannot testify to a legal conclusion or question of statutory interpretation. *Maggi v. RAS Development, Inc.*, 2011 IL App (1st) 091955, ¶ 71. The parties have not submitted the federal statute as a reference. Likewise, being able to purchase a gun at Gander does not assure legitimate gun ownership. Even well-regarded dealers may err. As such, by our order, we in no way suggest that Miller has a right to own a gun under the federal regulations. We only answer the issue before us and determine that Miller is not permitted to acquire or possess a gun in Illinois.

¶ 21 Weller explained that, if a person were to move from another state to Illinois, and that person owned a gun, that person would have 60 days to obtain an Illinois driver's license and apply for a FOID card. For the *application* purposes, the driver's license establishes residency in Illinois.

¶ 22 Weller acknowledged that some people "fall through the cracks" and obtain FOID cards when they should not, or clear the federal standards to purchase a gun when they should not. When asked whether a person could lie in order to clear the federal standards, Weller answered that "lying on that [form] is a federal charge and it's above and beyond my area of expertise." Weller stated that, when a person purchases a gun from a licensed gun seller, the gun seller likely runs a criminal history check. Weller knew that the Gander store in Illinois had access to criminal histories, and he assumed that the Gander store in Wisconsin did as well. (It does appear that, in this case, Gander checked with federal authorities in some manner because the Gander sales form stated that the initial response from "NICS or the appropriate state agency" was "Delayed," and the later response was "Proceed.")

¶ 23 At the close of the State's case, Miller moved for a directed finding. He argued that he did not need a FOID card, because he was a Wisconsin resident. The trial court denied the motion.

¶ 24 **B. Miller's Case**

¶ 25 During his case, Miller, through his own testimony, presented evidence to establish that he did not need a FOID card, because he was a "nonresident" of Illinois. Miller testified that he lived in his North Aurora home until August 20, 2012. He kept a home office there for his job, which involved selling machine tools. The company that employs him is located in Wisconsin, and Miller's sales territory includes parts of Wisconsin, Illinois, and Indiana. He decided to

move to Wisconsin, because he had lived there in the past (his presentencing report reflects that he lived there in high school after his parents divorced and before attending Northern Illinois University), and because his job duties frequently brought him to Wisconsin.

¶ 26 On August 30, 2012, Miller obtained a Wisconsin driver's license. The department that issued the license did not require any proof of residence, such as bills, because, due to his prior, high school residency, he was "already in the system." When he obtained the Wisconsin license, the department that issued the license punched a hole in his Illinois license.

¶ 27 Miller owned a plot of land in Cable, Wisconsin, and he was in the process of building a cabin on the land. Once the home was built, his wife and child would join him in Wisconsin. In the meantime, he was living in a home owned by Anderson. He and Anderson never established a rent amount, nor did Miller ever pay any rent, because the State filed the instant charges before any such arrangement could be made.

¶ 28 The State presented Miller with a receipt from the federal firearms form that he filled out when purchasing the two rifles from Gander in Wisconsin. Gander turned this form over to the State, certifying that they were completed in the regular course of business. The form consisted of a three-page questionnaire that had been completed by Miller at the time of purchase. One of the questions on the form asked: "Have you ever been convicted in any court of a misdemeanor crime [of] domestic violence?" Miller checked "no" to that question. The State questioned Miller further as to why he would check "no" to that question. The State asked, "Is it a true statement that you were sentenced prior to that date for a battery involving your mother?" Miller answered: "For domestic battery yes, but that is not the same thing as domestic violence." Miller explained that he performed his own research on the legal question of what would constitute a misdemeanor crime of domestic violence, and he determined that, in order to qualify as such, the



act would have to have been committed by a parent, spouse, or guardian of the victim. Therefore, because he was the (adult) child of the victim, he did not believe that his act qualified.

¶ 29 Miller stated that, when he first obtained the guns, he brought them back to his rental property in Wisconsin. When asked why the guns were found in his Illinois home office, Miller explained that he had just stopped by Illinois to pick up a couple of items for an upcoming camping trip. He transported the weapons from Wisconsin to Illinois in their cases, with the weapons and ammunition separate. There was no gun inside the Winchester box that had prompted Van Loan to obtain a search warrant; rather, Miller had the gun in his vehicle on that occasion.

¶ 30 C. Trial Court's Ruling

¶ 31 The trial court issued a finding of guilt on all of the charges. In its oral ruling, it explained why it did not find Miller to be a nonresident of Illinois. It stated that the *only* evidence in favor of Miller's nonresidency was his Wisconsin driver's license. Other than the Wisconsin driver's license, no evidence supported Miller's assertion that Wisconsin was his primary residence. Miller paid no rent in Wisconsin and had not yet reached a rental agreement with his "supposed landlord." As such, the court essentially made a negative credibility finding against Miller, stating that no evidence corroborated Miller's assertion that he moved to Wisconsin. Further, the court expressly rejected Miller's story that he did not store the guns in Illinois, but, rather, had the guns with him because he was swinging through Illinois on the way to a camping trip.

¶ 32 In contrast, the court found many factors to support Miller's Illinois residency. Miller's Illinois driver's license abstract showed that he maintained an Illinois driver's license at the time of his arrest. The North Aurora home that he had owned (for over 10 years) was fully furnished,

in his name, and not for sale. His wife, young child, and dogs lived in the home. Miller's sales territory covered Illinois, Wisconsin, and Indiana, and that had not changed. His home office remained in Illinois, and Miller continued to list the North Aurora fax number as his business contact number. Finally, Miller was physically present on each of the (three) occasions when police officers arrived unannounced at the North Aurora residence.

¶ 33 Lastly, pending sentencing, the trial court set bond at \$50,000, and it ordered: "And this goes without saying, that the order of the court is that he is to be in no possession of any guns, ammunition, anything. He is ineligible to be in possession of that. He is to have absolutely no weapons whatsoever." The court later sentenced Miller to two years' imprisonment. This appeal followed.

¶ 34

## II. ANALYSIS

¶ 35 On appeal, Miller argues that the provisions of the FOID Card Act under which he was convicted do not apply to him because he is a "nonresident" of Illinois. Miller's argument is not one of evidentiary sufficiency, but one of statutory interpretation. He posits that the FOID Card Act defines Illinois residency as having an active Illinois driver's license. Moreover, he argues that, if Illinois residency is defined as having an active Illinois driver's license, then having an active Wisconsin driver's license makes him a resident of Wisconsin, and, thus, a nonresident of Illinois.

¶ 36 For the reasons that follow, we disagree with Miller's interpretation of the statute. Additionally, to whatever extent Miller *does* challenge the sufficiency of the evidence, we affirm the trial court's residency determination. Finally, we reject Miller's ineffective-assistance claim.

¶ 37

### A. Statutory Interpretation

¶ 38

#### 1. Forfeiture

¶ 39 The State contends that Miller forfeited this statutory-interpretation argument and, because he did not argue plain error in his appellate brief, he also forfeited a plain-error claim. *People v. Nieves*, 192 Ill. 2d 487, 503 (2000). It notes that, for the first time on appeal, Miller argues that the statutory provisions of the FOID Card Act indicate a legislative intent to make the issuance of a driver's license by a particular state to be synonymous with becoming a resident of that state. In contrast, at trial, Miller appeared to concede that possession of a Wisconsin driver's license was but one indicium of Wisconsin residency.

¶ 40 We are not certain that Miller has forfeited the argument. Miller has argued from the beginning that he is a Wisconsin resident and, from the beginning, he relied heavily on the fact that he possessed a Wisconsin driver's license. Now, he seeks further support for his position by pointing to the statute. In any case, if the trial court had misapplied the statute under which it convicted Miller, justice would demand our consideration of the issue. Therefore, mindful that forfeiture is not a limitation on the court, *Jackson v. Board of Election Commissioners of the City of Chicago*, 2012 IL 111928, ¶ 33, we consider Miller's statutory-interpretation argument.

¶ 41 2. Merits

¶ 42 In making his statutory-interpretation argument, Miller relies on the following provisions of the FOID Card Act:

“(a)(1) No person may acquire or possess any firearm, stun gun, or taser within this State without having in his or her possession a Firearm Owner's Identification Card previously issued in his or her name by the Department of State Police under the provisions of this FOID Act.

(2) No person may acquire or possess firearm ammunition within this State without having in his or her possession a Firearm Owner's Identification Card previously

issued in his or her name by the Department of State Police under the provisions of this FOID Act.

(b) The provisions of this Section regarding the possession of firearms, firearm ammunition, stun guns, and tasers do not apply to:

\* \* \*

(9) Nonresidents whose firearms are unloaded and enclosed in a case;

(10) Nonresidents who are currently licensed to possess a firearm in their resident state[.]

\* \* \*

(d) Any person who becomes a resident of this State, who is not otherwise prohibited from obtaining, possessing, or using a firearm or firearm ammunition, shall not be required to have a Firearm Owner's Identification Card to possess firearms or firearm ammunition until 60 calendar days after he or she obtains an Illinois driver's license or Illinois Identification Card." 430 ILCS 65/2(a),(b)(9), (10), (d) (West 2012).

And:

"(a-5) Each applicant for a Firearm Owner's Identification Card who is over the age of 18 shall furnish to the Department of State Police either his or her Illinois driver's license number or Illinois identification card number except as provided by subsection (a-10) [concerning law enforcement officers, military, and armed security]." 430 ILCS 65/4(a-5) (West 2012).

¶ 43 We review *de novo* questions of statutory construction. *People v. Tara*, 367 Ill. App. 3d 479, 484 (2006). The fundamental rule of statutory construction is to ascertain and give effect to the intent of the legislature. *Id.* The best indication of the legislature's intent is the language of

the statute. *Id.* The language is to be given its plain and ordinary meaning, and the statute is to be read as a whole, with all relevant parts read together. *People v. Olsson*, 335 Ill. App. 3d 372, 374 (2002). The FOID Card Act does not define “resident” or “nonresident” so as to give it a specialized meaning outside the English language’s ordinary meaning. The ordinary, dictionary definition of “resident” is “dwelling or having an abode for a continued length of time.” Webster’s Third New International Dictionary, 1931 (1993). Additionally, where a given statute does not define “resident” so as to give it a specialized meaning, courts have used the term “resident” synonymously with “domicile.” *Hatcher v. Anders*, 117 Ill. App. 3d 236, 239 (1983) (concerning different service of process rules under the Motor Vehicle Code for “nonresidents”).

¶ 44 As in *Hatcher*, where residents are governed by a different set of rules than nonresidents, we consider the term domicile. A person can have only one domicile, and, once it is established, it is retained until a new domicile is acquired. *Hatcher*, 117 Ill. App. 3d at 239. Once a residence has been established, it is presumed to continue until the contrary is shown, and the burden of proof is on the person who claims that there has been a change. *Id.* That person must show that the new resident has physically gone to a new home to live there with the intention of making it permanent. *Id.* Moreover, that person must show that affirmative acts have been taken to abandon, not just temporarily vacate, the Illinois residence. *Id.* Abandonment must be proven to establish a loss of Illinois residence. *Id.* A single factor favoring residency in the new state is not enough to meet that burden. *Id.* (the one fact supporting the defendant’s nonresidency was his absence from Illinois during his military service, and this was not enough).

¶ 45 Therefore, under a plain reading of the statute, determining whether Miller was a nonresident would involve a multi-factor consideration as to whether he abandoned the Illinois property and physically resided in Wisconsin for a length of time with an intent to make that

arrangement permanent. This interpretation is consistent with the plain and ordinary meaning of the terms resident and nonresident.

¶ 46 We reject Miller's arguments to the contrary. We reject Miller's position that the statute itself defines Illinois residency as having an Illinois driver's license. Again, Miller points to sections 4(a-5) and 2(d), which state:

“(a-5) Each applicant for a Firearm Owner's Identification Card who is over the age of 18 shall furnish to the Department of State Police either his or her Illinois driver's license number or Illinois identification card number except as provided by subsection (a-10) [concerning law enforcement officers, military, and armed security].” 430 ILCS 65/4(a-5) (West 2012).

And,

“(d) Any person *who becomes a resident* of this State, who is not otherwise prohibited from obtaining, possessing, or using a firearm or firearm ammunition, shall not be required to have a Firearm Owner's Identification Card to possess firearms or firearm ammunition until 60 calendar days after he or she obtains an Illinois driver's license or Illinois Identification Card.” (Emphasis added.) 430 ILCS 65/2(d) (2012).

¶ 47 Section 4(a-5) does not define residency, but merely sets forth an administrative requirement to obtain a FOID card. Likewise, section 2(d) does not define residency, but merely states that any person *who becomes a resident* must obtain a FOID card within 60 days of obtaining a driver's license. In other words, the person is already a resident, and obtaining a driver's license is but one step a person makes in settling in to a new permanent residence or domicile. While we understand that obtaining the driver's license starts the application clock, we will not read section 2(d) to mean that obtaining a driver's license is synonymous with residency.

Nothing in section 2(d) states that a new Illinois resident who chooses not to obtain a driver's license or apply for a FOID card is exempt from the strictures of the FOID Card Act.

¶ 48 Rather, sections 4(a-5) and 2(d) are written for those intending to submit themselves to the strictures of the FOID Card Act by applying for a FOID Card, not for those who are seeking to turn the statute on its head to avoid its reach. That the Illinois State Police would accept an applicant's Illinois driver's license as documentation of residency in the context of applying for a FOID card is reasonable. To *admit* Illinois residency is to submit oneself to the strictures of the FOID Card Act, and, unlike an attempt to except oneself from the strictures of the FOID Card Act, does not warrant a high level of scrutiny. Moreover, given that the office processes as many as 20,000 FOID applications per month, an Illinois driver's license number creates an easy means by which to track a person's identity, including name, date of birth, and address.

¶ 49 Contrary to Miller's position, Weller's testimony does not support the proposition that Illinois residency is defined as owning an Illinois driver's license. Weller testified that, to get a FOID card, one can "establish residency" by getting an Illinois driver's license, and submitting that driver's license number on his or her application. Weller cannot testify to a legal conclusion such as the definition of "residency" under the FOID Card Act or what is or is not sufficient to establish residency. *Maggi*, 2011 IL App (1st) 091955, ¶ 71 (even an expert witness may not give testimony amounting to a statutory interpretation or a legal conclusion). Again, we take Weller's statement simply to mean that possession of an Illinois driver's license or equivalent documentation is necessary to the application process.

¶ 50 We point out two remaining logical and practical errors in Miller's approach. First, and again, Miller argues that, if Illinois residency is defined as owning an Illinois driver's license, *then having an active Wisconsin driver's license makes him a resident of Wisconsin*, and, thus, a

nonresident of Illinois. Wisconsin does *not* have a statutory scheme that would be analogous to the FOID Card Act, and we, as an Illinois court, have no business making a determination that a Wisconsin driver's license would establish residency in Wisconsin for the purposes of applying for a FOID card in Wisconsin, *if* Wisconsin issued FOID cards. Second, Miller apparently maintained driver's licenses in *both* Illinois and Wisconsin between August 30 and October 11, 2012. Granted, Miller stated that "they punched a hole" in his Illinois license, and, as conceded by the State at oral argument, the Illinois Secretary of State's Office did not have a chance to immediately act upon a notification of surrender. However, there is no evidence to suggest that the hole punch would have left Miller unable to apply for a FOID card in Illinois. The statute does not require that applicants must physically mail in an actual Illinois driver's license. To the contrary, it requires each applicant over age 18 to furnish "either his or her Illinois driver's license *number* or Illinois Identification Card *number*." (Emphases added.) 430 ILCS 65/4(a-5) (West 2012). Had Miller submitted his Illinois driver's license number on an application at the time of his arrest, department workers would have seen an "active" status on his Illinois driver's license abstract.

¶ 51 Finally, although Miller's statutory interpretation argument does not call for a review of the evidence, we briefly confirm that the evidence supported the trial court's determination of residency under a multi-factor approach. Where, as here, the exception at issue is not listed as an element in the body of the substantive offense, but merely withdraws certain acts or persons from the operation of the statute, then the defendant has the burden to prove by a preponderance of the evidence that he should be excluded from the statute's operation. *People v. Rodgers*, 322 Ill. App. 3d 199, 202 (2001) (the defendant had the burden to prove that he had a restricted driving permit issued under the law of another state, if he wished to avail himself of the restricted-permit



exception to the offense of driving while license revoked (DWLR)). Naturally, the State may introduce evidence to contradict the defendant's claim.

¶ 52 The trial court did not find Miller to be a credible witness. It expressly stated that it did not believe that Miller only had the guns in North Aurora because he was swinging through the state for a camping trip. This credibility finding is reasonable, given that Miller first told the police that he acquired the guns for the protection of his family (who lived in North Aurora) and given that the police found the guns stored away in the closet of a home office. It also seemed to reject Miller's assertion that, as of a few weeks before his arrest, he physically resided in Wisconsin. After all, the court referred to Anderson, the same man who sold Miller the assault rifle in a private sale, as Miller's "supposed landlord." The only evidence the court accepted in favor of Miller's residency was his possession of a Wisconsin driver's license.

¶ 53 However, given the totality of the evidence, the trial court may reasonably have found even that evidence to be tainted. Evidence suggested that Miller acquired the Wisconsin driver's license in order to obtain a gun, not necessarily in order to abandon the Illinois residence and reside permanently in Wisconsin. Miller first tried to own a gun in Illinois. He applied for a FOID card and was rejected due to his criminal history. By his own testimony, he performed research and learned that, despite his criminal history, he might be able to buy a gun in Wisconsin. The Gander store in Wisconsin required a Wisconsin driver's license in order to buy a gun. Again by his own testimony, Miller did not submit any proof of residence to the issuer of his Wisconsin driver's license. Rather, he testified that the issuer retrieved the data from his prior (high school) residency, which was still in the system.

¶ 54 In contrast, the evidence supported that Miller was a resident of Illinois. Miller was physically present at his North Aurora home each of the three times that the police arrived

unannounced. Miller had lived in the home for years. The home was fully furnished, including Miller's functioning home office. Miller's wife, young child, and dogs also resided in the home. The mortgage and all of the bills for the home were in Miller's name. Having clearly established long term residency in Illinois, the burden was on Miller to show that he changed residency. There is no evidence to show that Miller abandoned his Illinois residence. And, the single fact that he obtained a driver's license in Wisconsin, particularly where the evidence supports that he obtained the driver's license for the purpose of obtaining a gun, does not show an intent to move to, and live in, Wisconsin permanently.

¶ 55 Indeed, Miller appears to concede that, if a determination of residency requires a multi-factor approach, then the evidence supported the trial court's determination of Illinois residency. He makes no argument to the contrary in his opening brief, although he does challenge various indicia of Illinois residency in his reply brief. Rather, Miller argues that, if a determination of residency requires a multi-factor approach, then his trial counsel was ineffective for failing to submit evidence that would have supported Wisconsin residency.

¶ 56 **B. Ineffective Assistance**

¶ 57 Miller argues that his counsel was ineffective for failing to submit evidence that would have supported Wisconsin residency. Apparently bothered by the trial court's reference to Anderson as the "supposed landlord," Miller posits that, if counsel had called Anderson, Anderson would have been able to testify in support of Miller's Wisconsin residency.

¶ 58 In order to prevail on an ineffective-assistance claim, Miller must establish that: (1) counsel's performance was deficient, in that it fell below an objective standard of reasonableness; and (2) counsel's deficient performance resulted in prejudice, meaning that, but for counsel's error, the result of the proceeding likely would have been different. *Strickland v.*

*Washington*, 466 U.S. 668, 687 (1984). Counsel's performance falls under an objective standard of reasonableness where he or she fails to function as the counsel guaranteed by the sixth amendment. *People v. Jackson*, 205 Ill. 2d 247, 259 (2001). The defendant must overcome the strong presumption that the alleged deficiency was nothing but a product of sound trial strategy. *Id.* A failure to establish either prong is fatal to a defendant's ineffective-assistance claim. *People v. Pineda*, 373 Ill. App. 3d 113, 117 (2007). For the reasons that follow, Miller cannot satisfy the performance prong, and, so, we do not address prejudice.

¶ 59 Looking to the existing record, Miller cannot rebut the presumption that trial counsel's decision not to call Anderson was anything other than sound trial strategy. Miller has not demonstrated that counsel failed to contact Anderson. It may very well be that counsel contacted Anderson, but determined that Anderson would not be a helpful witness. Miller's ineffective-assistance claim is better suited for a collateral attack on the conviction. Even then, Miller would likely have an uphill battle, as Miller himself testified that he never paid any rent nor secured a rental agreement with Anderson. In sum, we reject Miller's ineffective-assistance claim.

¶ 60

### III. CONCLUSION

¶ 61 For the aforementioned reasons, we affirm the trial court's judgment, but we direct that the judgment order be corrected to reflect that the convictions for unlawful possession of firearms without a FOID card merge into one count.

¶ 62 Affirmed with directions.