

No. 1-13-1871

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 7917
	)	
JUAN HERNANDEZ,	)	Honorable
	)	William G. Lacy,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE LAMPKIN delivered the judgment of the court.  
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

**O R D E R**

¶ 1 **Held:** (1) Defendant was not denied effective assistance of counsel; (2) defendant’s conviction of armed habitual criminal is vacated where his prior 2005 conviction for aggravated unlawful use of a weapon was void *ab initio* and could not serve as the necessary predicate offense; (3) the State proved defendant guilty of unlawful possession of a firearm by a street gang member where the evidence established the street gang was engaged in a course or pattern of criminal activity; (4) the statutory offense of unlawful possession of a firearm by a street gang

member statute does not violate the constitutional prohibition against cruel and unusual punishment; and (5) defendant's conviction of unlawful possession of a firearm by a street gang member does not violate the one-act one-crime rule.

¶ 2 Following a bench trial, defendant Juan Hernandez was found guilty of being an armed habitual criminal, two counts of unlawful possession of a firearm by a street gang member, two counts of unlawful use of a weapon by a felon (UUWF), and two counts of aggravated unlawful use of a weapon (AUUW). The court sentenced him to eight years' imprisonment on the armed habitual criminal offense and seven years' imprisonment for the unlawful possession of a firearm by a street gang member offense, to be served concurrently. The court merged the UUWF and AUUW convictions with the unlawful possession of a firearm by a street gang member conviction.

¶ 3 On appeal, defendant contends: (1) trial counsel was ineffective by failing to move to suppress evidence based on challenging the police officers' justification to stop the car defendant was driving; (2) his armed habitual criminal and the merged UUWF convictions should be vacated because one of the predicate offenses, his 2005 AUUW conviction, was under a subsection of the statute that has been declared unconstitutional by the Illinois Supreme Court in *People v. Aguilar*, 2013 IL 112116; (3) his merged AUUW convictions should be vacated as void *ab initio* pursuant to *Aguilar*; (4) the State failed to prove his guilt of unlawful possession of a firearm by a street gang member where it presented no evidence to show the Spanish Cobras met the statutory definition of a street gang by engaging in a course or pattern of criminal activity; (5) the offense of unlawful possession of a firearm by a street gang member violates the constitutional prohibition against cruel and unusual punishment; and (6) his convictions of unlawful possession of a firearm by a street gang member and armed habitual criminal violate

the one-act one-crime rule.

¶4 For the reasons that follow, we vacate defendant's armed habitual criminal conviction and affirm his conviction of unlawful possession of a firearm by a street gang member.

¶5 I. BACKGROUND

¶6 This cause arose from defendant's arrest on the evening of May 1, 2011, after Chicago police detective Jason Bala and his partner stopped the car defendant was driving and recovered a firearm. Defendant was charged with the offenses of armed habitual criminal, UUWF, AUUW, and possession of a firearm by a street gang member.

¶7 At the June 2012 bench trial, Detective Bala testified that he had been with the police department for 10 years and had been assigned for 4 years as a gang officer with the department's organized crime bureau. His training included instruction on the different types of street gangs, the number of gangs and approximate number of membership in the city, and gang hierarchy, tattoos, symbols and colors. He had experience and contact with gang members on a daily basis, learned who they were, and made arrests involving gang members. Bala and Officer Ralph Magallom were working together on the date of the incident. They were in plain clothes and an unmarked vehicle.

¶8 At about 11 p.m., they were driving east on Deming Place when they came up behind defendant, who was sitting in the driver's seat of a four-door 1991 Lincoln Town Car that was stopped in front of 4446 West Deming Place. The Lincoln was standing in the middle of that narrow, one-way residential street, obstructing the path of traffic. Defendant was alone in the car. Detective Bala ran the Lincoln's license plate to check whether it was stolen. While the officers waited for a response from the Law Enforcement Agencies Data System (LEADS), defendant drove east on Deming Place, turned north onto Kostner Avenue, and then turned east onto

Schubert Avenue. The officers followed defendant, and after LEADS responded that the Lincoln was not stolen, Officer Magallom, who was driving, activated his vehicle's lights and siren.

Defendant pulled over near 4316 West Schubert Avenue.

¶9 Detective Bala exited his vehicle and walked toward the passenger side of defendant's car while carrying an illuminated flashlight. Street lights also illuminated the scene. When Bala was 10 feet away from defendant's car, he saw defendant place a handgun underneath the bench backseat of the car with his right hand. Bala yelled "gun, gun, gun" to alert Officer Magallom, who was approaching the driver's side of defendant's car. Bala ordered defendant out of the car, and Magallom placed him in custody. Bala recovered the gun, with five live rounds, from underneath the backseat of the car. Defendant did not have a driver's license or any identification on him. While the officers waited 5 or 10 minutes for transport, a woman whom defendant claimed was the mother of his child arrived. Defendant gave her some speakers and an amplifier from the car. Officer Magallom drove defendant to the police station, and Detective Bala drove defendant's car, which still had the keys in the ignition, to the police station's impound. Upon further investigation, the officers issued defendant a citation for driving while his license was suspended.

¶10 After defendant was given his *Miranda* warnings, he told the officers he was carrying the gun for protection because he had been shot at earlier that day, around 3:30 a.m. near 3800 West Fullerton Avenue. Defendant also said he was affiliated with the Spanish Cobras street gang for the last seven years in the vicinity of Haddon and California Avenues. He said he was an enforcer for that gang and was on his way to meet a different faction of the Spanish Cobras when he was arrested. He said the Spanish Cobras and Latin Eagles street gangs were at war because "Pancake" and other members of the Spanish Cobras were "flipping" to the Latin Eagles.

Defendant worked under “Fifty,” who had about 11 soldiers working under him. During processing, Detective Bala noticed that defendant had symbols of the Spanish Cobras street gang tattooed on his chest and arms. The police took photographs of defendant’s tattoos.

¶11 The parties stipulated that defendant did not possess a Firearm Owner’s Identification (FOID) card. The State also introduced into evidence the self-authenticating documents of the registration and title transfer of defendant’s 1991 Lincoln Town Car. Furthermore, the State submitted certified documents of defendant’s prior convictions, and the parties stipulated that defendant was convicted on January 21, 2009 of UUWF in case number 07-CR-23880, and on January 22, 2005 of AUUW in case number 04-CR-27349.

¶12 Defendant testified that he was a member of the Spanish Cobras. Prior to the date of the incident at issue here, he helped Naomi Rivera purchase and sign title to the Lincoln Town Car. At the time of the incident, he pulled the Lincoln over in front of his cousin’s house when he saw the police lights and heard the siren. He gave the officers his identification upon request and exited the Lincoln when the officers asked. The officers did not search him, but they placed him on the front fender of the Lincoln and took the car keys from his pocket. An officer opened the trunk and tore “the inside out.” An officer also used the keys to unlock the passenger-side door and pulled a gun from the car. Defendant asserted that he never possessed the gun and had been driving the Lincoln only for about 40 minutes prior to being pulled over. His friend, Jose Lopez, had been driving the Lincoln before defendant. Defendant testified, however, that when he was driving the Lincoln around 3:30 a.m. on the date at issue, his girlfriend was shot in the leg through the car door, which bore several bullet holes from that shooting.

¶13 The trial court found defendant guilty of armed habitual criminal, two counts of unlawful possession of a firearm by a street gang member, two counts of UUWF, and two counts of

AUUW. The trial court found the testimony of Detective Bala was credible and corroborated in many respects by defendant's testimony, which was somewhat incredible. The trial court denied defendant's posttrial motions. At the sentencing hearing, the court merged the UUWF and AUUW counts into the offense of unlawful possession of a firearm by a street gang member and sentenced defendant to seven years' imprisonment for that offense, to run concurrent to eight years' imprisonment for the offense of armed habitual criminal. Defendant appealed.

¶14

## II. ANALYSIS

¶15 On appeal, defendant contends: (1) trial counsel was ineffective by failing to move to suppress evidence based on challenging the police's justification to stop the car defendant was driving; (2) his armed habitual criminal and the merged UUWF convictions should be vacated because one of the predicate offenses, his 2005 AUUW conviction, was under a subsection of the statute that has been declared unconstitutional by the Illinois Supreme Court in *Aguilar*, 2013 IL 112116; (3) his merged AUUW convictions should be vacated as void *ab initio* pursuant to *Aguilar*; (4) the State failed to prove his guilt of unlawful possession of a firearm by a street gang member where it presented no evidence to show the Spanish Cobras met the statutory definition of a street gang by engaging in a course or pattern of criminal activity; (5) the offense of unlawful possession of a firearm by a street gang member violates the constitutional prohibition against cruel and unusual punishment; and (6) his convictions of unlawful possession of a firearm by a street gang member and armed habitual criminal violate the one-act one-crime rule.

¶16

### A. Ineffective Assistance of Counsel

¶17 Defendant argues he received ineffective assistance of counsel because trial counsel failed to file a motion to suppress evidence challenging the legality of the traffic stop that resulted in the discovery of the gun in the car, defendant's arrest, and his statement to the police

after his arrest. According to defendant, the traffic stop was illegal because there was no evidence he committed any parking or standing infraction that would have justified the stop and the officers could not have had any reasonable suspicion that he had committed a crime.

Defendant argues that even if he had been double-parked, that infraction would not have justified the traffic stop because parking infractions have been decriminalized in the City of Chicago.

Specifically, defendant cites section 9-64-230 of the Municipal Code of Chicago (2011) for the proposition that vehicular standing or parking violations of the traffic code shall be a civil offense punishable by fine and no criminal penalty or civil sanction other than that prescribed in the municipal code shall be imposed. Although defendant acknowledges that it is a violation of the Illinois Vehicle Code to “stop, stand or park a vehicle \*\*\* [o]n the roadway side of any vehicle stopped or parked at the edge or curb of a street” (625 ILCS 5/11-1303(a)(1)(a) (West 2010)), he argues the police could not have discerned during the limited time frame whether his car was temporarily halted to receive or discharge passengers and, thus, the officers could not have developed a reasonable suspicion that his car was unlawfully stopped or standing in the street.

¶18 Defendant also argues his posttrial counsel was ineffective for failing to demonstrate to the trial court that trial counsel’s misunderstanding of the law resulted in his decision not to file a suppression motion. Specifically, trial counsel testified at the hearing on defendant’s posttrial motion alleging ineffective assistance of counsel that counsel did not believe defendant had standing to file a motion to suppress because defendant asserted that he never possessed the gun.

¶19 In determining whether a defendant was denied effective assistance of counsel, we apply the familiar two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504 (1984). To prevail on a

claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. To demonstrate performance deficiency, a defendant must establish that counsel's performance fell below an objective standard of reasonableness. *People v. Edwards*, 195 Ill. 2d 142, 163 (2001). In evaluating sufficient prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. If either prong of the *Strickland* test cannot be shown, then the defendant has not established ineffective assistance of counsel. *Strickland*, 466 U.S. at 697.

¶20 We conclude that defendant's claim of ineffectiveness of counsel fails because counsel was not deficient where any motion to suppress would have been futile because the traffic stop was proper. See *People v. Glisson*, 359 Ill. App.3d 962, 974 (2005) (an attorney's performance will not be deemed ineffective for failing to file a futile motion); accord *People v. Stewart*, 365 Ill. App. 3d 744, 750 (2006). Accordingly, defendant cannot meet his burden of establishing prejudice because he fails to show a reasonable probability that the outcome of the proceeding would have been different if trial counsel filed the motion to suppress.

¶21 The fourth amendment to the United States Constitution guarantees the right of the people to be secure against unreasonable searches and seizures. U.S. Const., amend. IV. "Reasonableness under the fourth amendment generally requires a warrant supported by probable cause" (*People v. Johnson*, 237 Ill. 2d 81, 89 (2010)), but the Supreme Court in *Terry v. Ohio*, 392 U.S. 1 (1968), recognized an exception to the warrant requirement. Pursuant to *Terry*, "an officer may, within the parameters of the fourth amendment, conduct a brief, investigatory



stop of a citizen when the officer has a reasonable, articulable suspicion of criminal activity, and such suspicion amounts to more than a mere ‘hunch.’ ” *People v. Gherna*, 203 Ill. 2d 165, 177 (2003) (citing *Terry*, 392 U.S. at 27). The Illinois legislature has codified the *Terry* standards in section 107-14 of the Code of Criminal Procedure of 1963 (Criminal Code). 725 ILCS 5/107-14 (West 2010) (a peace officer, after identifying himself, may stop any person in a public place for a reasonable period of time when the officer reasonably infers from the circumstances that the person is committing, is about to commit, or has committed an offense). Defendant has the burden of demonstrating an illegal search or seizure. *People v. Buss*, 187 Ill. 2d 144, 204 (1999).

¶22 Not every encounter between the police and a private citizen results in a seizure. *People v. Luedemann*, 222 Ill. 2d 530, 544 (2006). “Courts have divided police-citizen encounters into three tiers: (1) arrests, which must be supported by probable cause; (2) brief investigative detentions, or ‘*Terry* stops,’ which must be supported by a reasonable, articulable suspicion of criminal activity; and (3) [consensual] encounters that involve no coercion or detention and thus do not implicate fourth amendment interests.” *Id.*

¶23 Here, the officers’ stop of defendant was justified under *Terry*. Section 11-1301 of the Illinois Vehicle Code provides, in pertinent part:

“(a) Outside a business or residence district, no person shall stop, park or leave standing any vehicle, whether attended or unattended, upon the roadway when it is practicable to stop, park or leave such vehicle off the roadway, but in every event an unobstructed width of the highway opposite a standing vehicle shall be left for the free passage of other vehicles and a clear view of such stopped vehicle shall be available from a distance of 200 feet in each direction upon such highway.” 625 ILCS 5/11-1301(a) (West 2010).

The fourth amendment does not prohibit a warrantless arrest for minor traffic violations that are punishable only by a fine. *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001). Pursuant to the authority codified in both the Criminal Code and the Illinois Vehicle Code, “police officers have additional authority to place a defendant under custodial arrest for committing a traffic infraction that is punishable only by a fine.” *People v. Taylor*, 388 Ill. App. 3d 169, 178 (2009) (citing 725 ILCS 5/107-2(1)(c) (West 2010)), which provides that a police officer may arrest someone when “[h]e has reasonable grounds to believe that the person is committing or has committed an offense” and 625 ILCS 5/16-102(a) (West 2010), which provides that “[t]he State Police shall patrol the public highways and make arrests for violation of the provisions of this Act”).

¶24 Contrary to defendant’s argument on appeal, the record establishes that the police did not stop defendant for merely violating a municipal parking ordinance. Detective Bala testified that defendant was in his car, which was stopped in the middle of a narrow, residential one-way street with cars parked on both sides of the street so that no other cars could pass around defendant’s car. It was late at night, so the officers requested a LEADS report before stopping the vehicle. However, before they could obtain the LEADS report, defendant drove away, so the officers followed him a short distance and then curbed his vehicle immediately after they obtained the LEADS report. The officers had a legitimate reason for the delayed stop because they were checking with LEADS to determine if the car had been reported as stolen, which was important information for them to obtain for officer safety reasons. Moreover, the plain language of section 11-1301 does not have any minimum time requirement for standing in the roadway before a violation occurs. See *Glisson*, 359 Ill. App. 3d at 973-74 (finding a legal basis to *Terry* stop the defendant for standing on the public highway in violation of section 11-1301 where the police

officer saw the defendant's car at midnight stopped in the roadway near anhydrous ammonia storage tanks, and as the officer approached the car a man closed the trunk and entered the passenger side of the car, which then drove away). In addition, no evidence indicated that defendant was stopped in the roadway to discharge a passenger.

¶25 Viewing the circumstances in their entirety, we conclude that the officers' stop of defendant's car for violating the Illinois Vehicle Code was valid and that a motion to suppress would have been properly denied. Thus, defendant suffered no prejudice as a result of trial counsel's failure to file a motion to suppress, even assuming counsel's performance was objectively unreasonable.

¶26 B. Armed Habitual Criminal Conviction

¶27 Defendant argues the State failed to prove him guilty of armed habitual criminal beyond a reasonable doubt. When considering a challenge to a criminal conviction based on the sufficiency of the evidence, our inquiry is limited to 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. Wright*, 2015 IL App (1st) 123496, ¶ 73.

¶28 To sustain a conviction for armed habitual criminal, the State was required to prove that defendant possessed a firearm after having been convicted of at least two qualifying predicate offenses. See 720 ILCS 5/24-1.7(a) (West 2010). Defendant argues that we should vacate his conviction for armed habitual criminal in light of *Aguilar*, 2013 IL 112116, which found the version of the AUUW offense for carrying an uncased, loaded and immediately accessible firearm while not on the person's land or in his abode to be facially unconstitutional in violation of the second amendment right to bear arms. "When a statute is declared unconstitutional, it is void *ab initio*, or as though the law had never been passed." *People v. Fields*, 2014 IL App (1st)

110311, ¶ 38.

¶29 According to the record, defendant was charged with four counts of AUUW in case 04-CR-27349, but was convicted of only one count based on carrying an uncased, loaded and immediately accessible firearm while not on his land or in his abode (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2004)). Defendant was sentenced to two years' probation. Defendant argues the State cannot rely on his 2005 AUUW conviction as a predicate offense for armed habitual criminal because it is void and, therefore, the State has failed to prove an essential element of armed habitual criminal beyond a reasonable doubt.

¶30 In *Fields*, the defendant was convicted of being an armed habitual criminal after the parties stipulated to the predicate convictions at trial, one of which was an AUUW conviction based on section 24-1.6(a)(1) and (a)(3)(A) of the Criminal Code of 1961 (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2004)). *Fields*, 2014 IL App (1st) 110311, ¶¶ 43-44. The court held that the prior AUUW conviction, which was based on a statute found to be unconstitutional and void *ab initio*, could not stand as a predicate offense for the defendant's armed habitual criminal conviction where the State was required to prove each element of the prior AUUW conviction beyond a reasonable doubt. *Id.* ¶ 44. Accordingly, the court vacated the defendant's armed habitual criminal conviction. *Id.* ¶ 51; accord *People v. McFadden*, 2014 IL App (1st) 102939, ¶ 42, *appeal allowed*, No. 117424, 8 N.E.3d 1051 (Ill. May 28, 2014); *People v. Claxton*, 2014 IL App (1st) 132681, ¶ 15.

¶31 The State argues that: we lack jurisdiction to consider the validity of defendant's predicate 2005 AUUW conviction; the status of the predicate felony conviction at the time defendant possessed the firearm controls for purposes of determining whether he is guilty of armed habitual criminal, regardless of whether the predicate conviction is later found to be

unconstitutional; and this court must affirm defendant's armed habitual criminal conviction because the relevant section of the AUUW statute had not been declared unconstitutional at the time defendant possessed the firearm. These arguments have been addressed and rejected in *Claxton*, 2014 IL App (1st) 132681, ¶¶ 16-19, and we decline to readdress them here. Pursuant to *Aguilar*, we find that defendant's 2005 AUUW conviction is void *ab initio* and, thus, cannot serve as an essential element of his armed habitual criminal conviction so that his armed habitual criminal conviction must be vacated.

¶32 Defendant was also found guilty of two counts of the offense of UUWF, which prohibits the possession of firearms by a person who was previously convicted of a felony. 720 ILCS 5/24-1.1(a) (West 2010). He argues this court should vacate that finding of guilt because the requisite prior felony charged and evidenced at trial was his 2009 UUWF conviction, which was based on his 2005 AUUW conviction under subsection (a)(3)(A) of the AUUW statute.

Defendant argues that because his 2005 AUUW conviction is void *ab initio*, it could not serve as the predicate felony offense for his 2009 UUWF conviction, which, likewise, could not serve as the predicate felony for his UUWF conviction in the present case. In addition, defendant argues this court should vacate the trial court's finding of guilt on two counts of the offense of AUUW under subsection (a)(3)(A) of that statute, which was held unconstitutional in *Aguilar*.

¶33 We, however, need not address defendant's arguments regarding his UUWF and AUUW convictions because no sentences were imposed on those convictions. The record shows that the trial court merged those UUWF and AUUW convictions into, and imposed the sentence only on the conviction of unlawful possession of a firearm by a street gang member. In the absence of a sentence, there is no final judgment, and therefore, the UUWF and AUUW convictions are not before this court. *People v. Caballero*, 102 Ill. 2d 23, 51 (1984). Additionally, we note that we

are not vacating or reversing defendant's 2005 AUUW conviction or 2009 UUWF conviction pursuant to *Aguilar* and we decline to address whether formal proceedings for collateral relief may be available to defendant to do so.

¶34 C. Unlawful Possession of a Firearm by a Street Gang Member

¶35 Defendant argues the State failed to prove his guilt of unlawful possession of a firearm by a street gang member because the State failed to present evidence that the Spanish Cobras committed two or more gang-related offenses in Illinois since 1993 within five years of one another, and that at least one of those offenses was a felony. Defendant argues that although Detective Bala characterized the Spanish Cobras as a gang, he did not give sufficient evidence about its activities to permit a rational trier of fact to conclude that it was a street gang as defined by statute.

¶36 When a defendant attacks his conviction on reasonable doubt grounds, the relevant 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. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). The reviewing court must allow all reasonable inferences from the record in favor of the prosecution. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011). The trier of fact bears the responsibility to assess the credibility of the witnesses, weigh the evidence presented, resolve conflicts in the evidence, and draw reasonable inferences from the evidence. *People v. Williams*, 193, Ill. 2d 306, 338 (2000). We afford the trier of fact great deference (*People v. DePaolo*, 317 Ill. App. 3d 301, 306 (2000)), and will not set aside a conviction unless the evidence is so improbable or insufficient that there remains a reasonable doubt as to the defendant's guilt (*People v. Campbell*, 146 Ill. 2d 363, 374 (1992)).

¶37 To sustain a conviction of unlawful possession of a firearm by a street gang member, the State was required to prove, *inter alia*, that defendant was a member of a street gang as defined by the Illinois Streetgang Terrorism Omnibus Prevention Act (Act). See 720 ILCS 5/24-1.8 (West 2010). The Act defines a *streetgang* as “any combination, alliance, network, conspiracy, understanding, or other similar conjoining, in law or in fact, of 3 or more persons with an established hierarchy that, through its membership or through the agency of any member engages in a course or pattern of criminal activity.” 740 ILCS 147/10 (West 2010).

¶38 According to the Act, a *course or pattern of criminal activity* means:

“2 or more gang-related criminal offenses committed in whole or in part within this State when:

- (1) at least one such offense was committed after the [January 1, 1993] effective date of this Act;
- (2) both offenses were committed within 5 years of each other; and
- (3) at least one offense involved the solicitation to commit, conspiracy to commit, attempt to commit, or commission of any offense defined as a felony or forcible felony under the Criminal Code of 1961.

‘Course or pattern of criminal activity’ also means one or more acts of criminal defacement of property under section 21-1.3 of the Criminal Code of 1961, if the defacement includes a sign or other symbol intended to identify the streetgang.”

*Id.*

¶39 *Streetgang member* or *gang member* “means any person who actually and in fact belongs to a gang, and any person who knowingly acts in the capacity of an agent for or accessory to, or is legally accountable for, or voluntarily associates himself with a course

or pattern of gang-related criminal activity, whether in a preparatory, executory, or cover-up phase of any activity, or who knowingly performs, aids, or abets any such activity.”

*Id.*

¶40 Furthermore, *gang-related* means:

“any criminal activity, enterprise, pursuit, or undertaking directed by, ordered by, authorized by, consented to, agreed to, requested by, acquiesced in, or ratified by any gang leader, officer, or governing or policy-making person or authority, or by any agent, representative, or deputy of any such officer, person, or authority:

- (1) with the intent to increase the gang’s size, membership prestige, dominance, or control in any geographical area; or
- (2) with the intent to provide the gang with any advantage in, or any control or dominance over any criminal market sector, including but not limited to, the manufacture, delivery, or sale of controlled substances or cannabis; arson or arson-for-hire; traffic in stolen property or stolen credit cards; traffic in prostitution, obscenity, or pornography; or that involves robbery, burglary, or theft; or
- (3) with the intent to exact revenge or retribution for the gang or any member of the gang; or
- (4) with the intent to obstruct justice, or intimidate or eliminate any witness against the gang or any member of the gang; or
- (5) with the intent to otherwise directly or indirectly cause any benefit, aggrandizement, gain, profit or other advantage whatsoever to or for the gang, its reputation, influence, or membership.” *Id.*



¶41 “Statutory language must be given its plain and ordinary meaning, and courts are not free to construe a statute in a manner that alters the plain meaning of the language adopted by the legislature.” *Murray v. Chicago Youth Center*, 224 Ill. 2d 213, 235 (2007). The legislature expressly stated that it was not the intent of the Act “to interfere with the constitutionally protected rights of freedom of expression and association.” 740 ILCS 147/5 (West 2010). The State may rely on circumstantial evidence, as long as it provides proof beyond a reasonable doubt of each element of the crime charged. *People v. Laubscher*, 183 Ill. 2d 330, 335-36 (1998). “However, there must be *some* evidence giving rise to a reasonable inference of defendant’s guilt; the State may not leave to conjecture or assumption essential elements of the crime.” (Emphasis in original.) *Id.* Furthermore, a witness, whether expert or lay, may provide an opinion on an ultimate issue in a case. *Richardson v. Chapman*, 175 Ill. 2d 98, 107 (1997); *People v. Jamesson*, 329 Ill. App. 3d 446, 460 (2002).

¶42 In *Jamesson*, 329 Ill. App. 3d at 450, the court found that the State met its burden to prove the defendant guilty of the misdemeanor offense of unlawful contact with a street gang member where the police officer, who was qualified at the trial to testify as a gang evidence expert, testified that he arrested the defendant in an area designated as the territory of the Latin Counts street gang after seeing the defendant loitering with two other individuals the officer knew to be members of the Latin Counts. Moreover, the officer testified the Latin Counts were a violent street gang that had been involved in numerous violent incidents involving narcotics, assaults, batteries, and aggravated batteries for a couple of years. *Id.* The court found the officer’s testimony, which did not specify any incidents or dates of gang-related criminal offenses, sufficient to allow the trial court to conclude that the Latin Counts had engaged in a pattern or course of criminal activity under the definition set forth in the Act. *Id.* at 461.

¶43 Here, defendant admitted that he was a member of the Spanish Cobras, and Detective Bala testified about his training and experience as a gang officer for the past four years. Detective Bala had contact with gang members on a daily basis, knew the identity of gang members, was familiar with gang tattoos and their meaning, made arrests involving gang members, recognized defendant's tattoos as symbols of the Spanish Cobras, and identified the Spanish Cobras as a street gang. Furthermore, Detective Bala's testimony concerning defendant's statement to the police about being an enforcer and working under "Fifty," who had at least 11 soldiers working under him, established the hierarchy of the Spanish Cobra's alliance or network. Moreover, the State's evidence showed that defendant did not possess a FOID card and was in a vehicle on the street holding a loaded firearm that he attempted to conceal from the police, which was a felony offense. In addition, defendant's statement to the police established that the Spanish Cobras were a street gang that partook in violent conduct. Defendant told the police that the Spanish Cobras were at "war" with their rivals, the Latin Eagles, because members of the Spanish Cobras were "flipping" to the Latin Eagles. Defendant also admitted that he had been fired at earlier that morning during a drive-by shooting, his girlfriend had been injured, and his car door sustained bullet holes. In addition, defendant admitted that at the time of his arrest he was carrying the gun for protection while he was en route to a meeting with another faction of the Spanish Cobras concerning the "war" with the Latin Eagles.

¶44 Defendant's statements to the police and trial testimony established that he engaged in criminal activity on behalf of the Spanish Cobras by possessing the gun without a FOID card and was acting as the Spanish Cobra's enforcer during its violent war with the Latin Eagles, which war was intended to increase the Spanish Cobras' size, prestige, dominance, or control of

a geographical area. Moreover, this criminal activity occurred within the requisite 5-year time frame pursuant to the statutory definition of *a course or pattern of criminal activity*.

¶45 After reviewing the record in the light most favorable to the prosecution, we conclude that a rational trier of fact could have determined beyond a reasonable doubt that defendant was guilty of the offense of unlawful possession of a firearm by a street gang member. The testimony of Detective Bala and defendant and reasonable inferences from the evidence support the trial court's finding that the Spanish Cobras were a street gang engaged in a pattern or course of criminal activity. Defendant's own words characterized the Spanish Cobras as a violent street gang that partook in violent conduct, and the trial court was free to accept Officer Bala's lay opinion that the Spanish Cobras were a street gang. See *Jamesson*, 329 Ill. App. 3d at 460 ("Although [the police officer] did not testify as to specific dates or specific incidents, the trial court was free to accept or reject [the officer's] opinions that the Latin Counts were a street gang that engaged in a course or pattern of criminal activity."). Accordingly, we affirm defendant's conviction of unlawful possession of a firearm by a street gang member.

¶46 D. Constitutionality of the Statute

¶47 Defendant argues the unlawful possession of a firearm by a street gang member statute is unconstitutional because it impermissibly criminalizes defendant's mere status as a gang member, in violation of the eighth amendment prohibition of the infliction of cruel and unusual punishments. U.S. Const., amend. VIII.

¶48 Statutes are presumed to be constitutional, and the party challenging the constitutionality of a statute bears the burden of rebutting this presumption and clearly establishing a constitutional violation. *People v. Funches*, 212 Ill. 2d 334, 339-40 (2004). "If reasonably possible, courts must construe a statute so as to affirm the statute's constitutionality and

validity.” *Id.* Defendant’s constitutional challenge involves a facial attack of the statute, which is the most difficult challenge to mount, in that the challenger must establish that no set of circumstances exists under which the statute would be valid. *People v. Greco*, 204 Ill. 2d 400, 407 (2003).

¶49 One cannot constitutionally be punished because of one’s status alone; criminal penalties require an *actus reus*. Compare *Robinson v. California*, 370 U.S. 660, 662-63 (1962) (a statute that made it a misdemeanor punishable by imprisonment for any person to be addicted to the use of narcotics was unconstitutional because it criminalized, not an act but rather, the person’s status or condition of narcotic addiction, for which the offender could be prosecuted at any time before he reformed even though he never used or possessed any narcotics within the State and had not been guilty of any antisocial behavior there), with *Powell v. Texas*, 392 U.S. 514, 541-44 (1968) (a statute that criminalized public drunkenness was constitutional because it did not punish the mere status of chronic alcoholism but instead imposed a criminal sanction for public behavior and thus required the State to prove the defendant actually committed some proscribed act). See also, *People v. Clay*, 361 Ill. App. 3d 310, 327-28 (2005) (rejecting eighth amendment challenge to insanity statute and finding that it did not punish the status of the mentally ill); *People v. Luckey*, 90 Ill. App. 2d 325, 331-32 (1967) (rejecting eighth amendment challenge to mandatory life sentence for sale of narcotics and finding it punished an act, not a status).

¶50 Defendant argues the unlawful possession of a firearm by a gang member statute is unconstitutional under the eighth amendment because he is exposed to an increased penalty solely based on his status as a gang member. Specifically, defendant argues that his conviction under the challenged statute is a Class 2 felony with a sentencing range of 3-to-10 years’ imprisonment whereas the same conduct by a non-gang member under the AUUW statute carries

a substantially lesser penalty as a Class 4 felony with a sentencing range of 1–to-3 years’ imprisonment. *Compare* 720 ILCS 5/24-1.8 (West 2010), *with* 720 ILCS 5/24-1.6(a)(1), (a)(3)(C) (West 2010). Based on this increased penalty under the challenged statute, defendant concludes that it is his status as a gang member, not his conduct of unlawfully possessing a firearm without a valid FOID card, that is criminalized in violation of the eighth amendment.

¶51 We reject defendant’s eighth amendment challenge to the unlawful possession of a firearm by a street gang member statute. In order to sustain the conviction under this statute, the State had to prove that defendant: (1) possessed a firearm while on any street, road, alley, gangway, sidewalk, or any other lands, except when inside his own abode or fixed place of business; (2) did not have a valid FOID card; and (3) was a member of a street gang. 720 ILCS 5/24-1.8(a)(1) (West 2010). The plain language of the statute establishes that it does not merely criminalize a person’s status as a street gang member. Rather, the statute punishes the act of unlawful possession of a firearm and, thus, contains the requisite *actus reus* and thereby passes constitutional scrutiny.

¶52 Furthermore, defendant cites *Chicago v. Youkhana*, 277 Ill. App. 3d 101 (1995), where the appellate court held that a gang loitering ordinance was unconstitutional because it was unconstitutionally overbroad, was unconstitutionally vague, and unconstitutionally criminalized the status of being gang member. However, defendant’s reliance on *Youkhana* to support his eighth amendment challenge here is misplaced. After the State appealed the appellate court’s ruling, both the Illinois and United States Supreme Courts affirmed without addressing the eighth amendment challenge to the ordinance’s constitutionality and the defendant’s contention that the ordinance created a status offense. *City of Chicago v. Morales*, 177 Ill. 2d 440 (1997); *aff’d*, 527 U.S. 41(1999). Both the Illinois and United States Supreme Courts found that the gang loitering

ordinance was unconstitutionally vague because the ordinance’s prohibition of loitering drew no distinction between innocent conduct and conduct calculated to cause harm. *Morales*, 177 Ill. 2d at 451-52; aff’d 527 U.S. at 55-60. Furthermore, the unlawful possession of a firearm by a street gang member statute contains a well-defined and culpable prohibited act—illegal gun possession—and thus has no parallel to the gang loitering ordinance cases, which lacked any illegal act in the elements of the offense.

¶53 E. One-Act One-Crime Rule

¶54 Our supreme court has held that a defendant’s conduct cannot result in multiple convictions if the convictions are based on precisely the same physical act and any of the offenses are included offenses. *People v. King*, 66 Ill. 2d 551, 566 (1977). Because this court has vacated defendant’s conviction of armed habitual criminal, there is no violation of the one-act one-crime rule, and his conviction of unlawful possession of a firearm by a street gang member is affirmed.

¶55 III. CONCLUSION

¶56 For the foregoing reasons, we vacate defendant’s conviction of armed habitual criminal. We affirm defendant’s conviction of unlawful possession of a firearm by a street gang member.

¶57 Vacated in part and affirmed in part.