2014 IL App (1st) 082957-UB

No. 1-08-2957

SIXTH DIVISION
June 30, 2014

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ALEJANDRO ALVARADO, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Cook County No. 07 CR 398 Honorable Mary Margaret Brosnahan, Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Hoffman and Hall concurred in the judgment.

O R D E R

¶ 1 *Held*: Neither subsection (a)(3)(C) nor (a)(3)(I) of the aggravated unlawful use of a weapon statute (720 ILCS 5/24-1.6(a)(1), (a)(3)(C), (a)(3)(I) (West 2006)) was unconstitutional, and we therefore remand this matter to the trial court to determine which of those two convictions should remain. Furthermore, trial counsel did not render ineffective assistance where counsel's questions of witnesses were consistent with the defense strategy to discredit the police officers' testimony and disassociate defendant from the co-arrestee who flashed gang signs at the scene.

¶ 2 Following a jury trial, defendant Alejandro Alvarado was convicted of two counts of aggravated unlawful use of a weapon (AUUW). Specifically, defendant was found guilty of carrying a handgun in the street without a valid Firearm Owner's Identification (FOID) card, pursuant to section 24-1.6(a)(1), (a)(3)(C) of the Criminal Code of 1961 (Code) (720 ILCS 5/24-1.6(a)(1), (a)(3)(C) (West 2006) (hereinafter, the FOID subsection)), and for being under the age of 21 at the time he was in possession of the handgun, pursuant to section 24-1.6(a)(1), (a)(3)(I) of the Code (720 ILCS 5/24-1.6(a)(1), (a)(3)(I) (West 2006) (hereinafter, the under 21 subsection)). He was sentenced to two years of probation.

¶ 3 On appeal, he contends that: (1) his convictions under the FOID and under 21 subsections violate the constitutional guarantees of the right to keep and bear arms and equal protection; (2) his multiple convictions for AUUW violate the one-act, one-crime rule; (3) and he received ineffective assistance from trial counsel, who elicited testimony concerning street gangs.

¶ 4 After this court filed an opinion in this case in December 2011 (*People v. Alvarado*, 2011 IL App (1st) 082957), the Illinois Supreme Court issued a supervisory order instructing us to vacate our judgment and reconsider our prior decision in light of *People v. Aguilar*, 2013 IL 112116. *People v. Alvarado*, No. 113757 (Jan. 29, 2014) (supervisory order). Our prior judgment was vacated, and the parties have filed supplemental briefs in this case.

¶ 5 For the reasons that follow, we hold that: (1) defendant's AUUW convictions under the FOID and under 21 subsections do not violate the constitutional guarantees of the right to keep and bear arms and equal protection; (2) one of defendant's two AUUW convictions must be vacated under the one-act, one-crime rule; and (3) defendant was not denied effective assistance

of counsel where counsel's questions of witnesses were consistent with the defense strategy to discredit the police officers' testimony and disassociate defendant from the co-arrestee who flashed gang signs at the scene. We remand this matter to the trial court to determine which of the two AUUW convictions should remain and affirm the judgment of the circuit court in all other respects.

¶ 6 I. BACKGROUND

¶ 7 On the afternoon of December 12, 2006, defendant was arrested after Chicago police officers, who were conducting surveillance from inside an unmarked squad car, allegedly saw defendant on the street with a gun in his hand. Two police officers approached defendant, chased him into a residence, and recovered the Smith and Wesson .38-special bluesteel revolver he was carrying.

¶ 8 Prior to trial, defendant moved the court to quash his arrest and suppress evidence. He argued the court should suppress the handgun recovered inside his home and his postarrest statement because his home was illegally searched and he was illegally arrested. After a hearing, the trial court denied defendant's motion.

¶ 9 Defendant was tried before a jury on charges that he: (count I) knowingly carried on or about his person a handgun when he was not on his own land, or in his own abode or fixed place of business, and had not been issued a currently valid FOID card (720 ILCS 5/24-1.6(a)(1), (a)(3)(C) (West 2006)); and (count II) knowingly carried on or about his person a handgun when he was not on his own land or in his own abode or fixed place of business and was under 21 years of age and in possession of a handgun (720 ILCS 5/24-1.6(a)(1), (a)(3)(I) (West 2006)).

¶ 10 At trial, Chicago police officer Angel Cahue testified for the State that he was conducting surveillance on the 3000 block of South Homan Avenue. He sat in the backseat of a parked, covert vehicle and relayed information to other surrounding officers via radio. Sergeant Jason Janopolous and Officer Sonia Aponte were also present in that car. Officer Medina was sitting in an unmarked car parked in an alley about one block north of Officer Cahue's location.

¶ 11 Officer Cahue saw a Jeep driven by Raudel Perez pull into a driveway on the east side of Homan Avenue. Defendant, who was in the passenger seat, exited the Jeep and had a brief conversation with Perez. Defendant held a handgun in his right hand. Defendant turned and began to cross the street, tucking the gun into the right side of his waistband so that the gun handle remained visible. Officer Cahue radioed for Officer Medina to approach. Officer Medina drove to the rear of 3040 South Homan Avenue, and ran from the alley, through the backyard and gangway to the front of the residence. Defendant was in the street in front of 3040 South Homan Avenue, and Officer Cahue had exited his car. The revolver was in defendant's waistband and his hand was on the handle of the gun.

¶ 12 Officer Cahue testified that the officers announced their office and told defendant to stop. Defendant looked at them and then ran into the gangway at 3040 South Homan Avenue. Officer Medina chased defendant, followed by Officer Cahue. Defendant ran inside a basement apartment, slamming the door in Officer Medina's face. Officer Medina immediately opened the unlocked door and followed defendant. When Officer Cahue caught up to them inside the apartment, Officer Medina had defendant lying facedown on the floor in protective custody. While Officer Cahue stayed with defendant, Officer Medina recovered the revolver from the

bathroom.

¶ 13 Officer Cahue testified that when the officers entered the basement apartment, it was filthy and in complete disarray. Garbage was spilling over from garbage cans, dishes were piled up in the kitchen sink, and clothes were all over the floor. The officers did not search or ransack defendant's apartment. Defendant was advised of his rights and taken to the police station. Defendant then voluntarily told Officers Cahue and Medina that a male pulled a gun on defendant and shot at him the previous day. Defendant also said that he would not call the police because he was his own protection. Defendant's statement was not videotaped or tape-recorded because this case did not involve a homicide. Officer Cahue took steps to verify whether the prior shooting incident had occurred.

¶ 14 Officer Cahue testified that Raudel Perez was also arrested at the scene for reckless conduct where he attempted to create a diversion by flashing gang signs and yelling gang slogans when the police were chasing defendant. Furthermore, no females were around the area when defendant was out on the street with the gun. In addition, defendant was 20 years old at the time of the arrest and did not have a FOID card.

¶ 15 Officer Medina testified consistently with Officer Cahue. Officer Medina added that when defendant ran into the basement and the door slammed closed, Officer Medina immediately opened the unlocked door and saw defendant in the vestibule area still in possession of the revolver. Defendant ran into a bathroom that was less than 10 feet from the vestibule, pulled the revolver from his waistband, and tossed it into the top of an uncovered, water-filled toilet tank. Defendant then moved away from the toilet, got on the ground, and cooperated with the officers'

orders. Furthermore, at the police station, defendant told the officers that a rival gang member pulled a gun on him the day before. Officer Medina did not ask defendant when or where the incident happened or the name of anyone defendant may have thought was the offender. Officer Medina explained that he did not make a tape or video recording of defendant's postarrest statement because the matter was treated as a gun case, not a homicide case.

¶ 16 Sergeant Janopolous testified that he supervised the surveillance in this matter and was the driver in the covert vehicle with Officer Cahue. Sergeant Janopolous saw the Jeep driven by Perez pull into the driveway. Defendant, who was the passenger, then exited the Jeep and started to walk across the street. Perez exited the Jeep soon thereafter. When Officers Medina and Cahue chased defendant, Perez started flashing Latin King gang signs and yelling gang slogans, and began to cross the street. At that point, Sergeant Janopolous and Officer Aponte exited their car and, in order to provide additional protection for the officers that chased defendant, arrested Perez for reckless conduct. Sergeant Janopolous testified consistently with Officers Cahue and Medina concerning the condition of the basement apartment. Sergeant Janopolous testified that the officers did not break the basement door or search the basement apartment. The officers were only inside the apartment for a couple of minutes before they all returned to the police station.

¶ 17 Amber Huerta testified for the defense. She lived across the street from defendant and knew him as a family friend. She was home at the time of the incident and looked out her window because a green truck playing loud music drove into the driveway next to her home. Two men were in the truck, but defendant was not with them. Furthermore, defendant was not around on the street. Two Hispanic male police officers searched the truck and its two

occupants. Then more officers came and they ran to the house next door to defendant's home and spoke with someone at that residence. Next, the officers went to the second floor of defendant's home, but no one answered the door. The officers then went through the gangway, and Huerta lost sight of them. About 10 minutes later, the officers came outside with defendant, took him to the two men from the truck, and searched them. Huerta knew that defendant was arrested for having a gun, realized her information was important, but never told the police that someone other than defendant was the truck passenger. Moreover, prior to trial, Huerta refused to give a statement to the State's investigator in this case.

¶ 18 Defendant testified that he had been at home all day before the police burst into his apartment. Specifically, he was alone when he heard two loud knocks on the door. Then, the police knocked the door off its hinges and entered. The first officer, a big white man, came in with his gun drawn, and two others came in and began searching the apartment. While defendant lay facedown on the floor for about 15 minutes, the officers pulled cabinets down, flipped and tore couches, and went through drawers. The police took him to the washroom, where they had removed the toilet tank cover and claimed to have found a gun. Defendant testified that he never put a gun in the toilet tank and did not know how the toilet tank cover disappeared. Photographs of defendant's home in disarray were introduced into evidence. Defendant, however, acknowledged that he did not present any photographs from family functions, etc., that would have shown the condition of his home prior to the date of his arrest.

¶ 19 Defendant did not remember being told his *Miranda* rights and never made a statement that someone shot at him the day before his arrest. Defendant acknowledged that his

neighborhood was in Latin King territory but testified that he was not in a street gang, had never been in one, and did not have any gang tattoos. Although defendant had seen Perez around for probably one month, defendant did not know Perez was a Latin King and was not in Perez's Jeep on the date of the incident.

¶ 20 The State recalled Officer Cahue as a rebuttal witness. Officer Cahue testified that after the arrest he asked defendant if he was in a gang, and defendant said he was a Latin King. Officer Cahue documented that statement in his offense report.

¶ 21 The jury found defendant guilty of both counts of AUUW where he did not possess a valid FOID card (count I), and where he was under 21 years of age when he was in possession of the handgun (count II). He was then sentenced to two years of felony probation. Defendant appealed.

¶ 22 II. ANALYSIS

¶ 23 A. Constitutionality of the AUUW Statute

¶ 24 Defendant challenges the constitutionality of the FOID and under 21 subsections of the AUUW statute under which he was convicted. 720 ILCS 5/24-1.6(a)(1), (a)(3)(C), (a)(3)(I) (West 2006)). Defendant argues the FOID and under 21 subsections violate the constitutional guarantees of the right to keep and bear arms and equal protection.

¶ 25 Whether a statute is constitutional is a question of law to be reviewed *de novo*. *People v. Sharpe*, 216 Ill. 2d 481, 487 (2005). Statutes are presumed constitutional, and we have a duty to construe the statute in a manner that upholds its validity and constitutionality if it can be reasonably done. *Aguilar*, 2013 IL 112116, ¶ 15. The party challenging the constitutionality of a

statute carries the burden of proving that the statute is unconstitutional. *Id*.

¶ 26 1. The Right to Keep and Bear Arms

¶ 27 In *Aguilar*, the Illinois Supreme Court found that the Class 4 form of section 24-1.6(a)(1), (a)(3)(A), (d) of the Code (720 ILCS 5/24-1.6(a)(1), (a)(3)(A), (d) (West 2008)), which made it unlawful for a person to possess an uncased, loaded and immediately accessible firearm except when the person was on his land or in his abode or fixed place of business, was a comprehensive ban, rather than a reasonable regulation, of the right to possess and use an operable firearm for self-defense outside the home. *Aguilar*, 2013 IL 112116, ¶ 21. Accordingly, the court concluded that subsection (a)(3)(A) of the AUUW statute was facially unconstitutional because it violated the second amendment. *Id*. ¶ 22.

¶ 28 Although the court reversed the defendant's AUUW conviction under subsection (a)(3)(A) of the AUUW statute, it upheld his separate conviction for unlawful possession of a firearm based on his age–17 years old at the time of the offense–and the longstanding prohibition against the possession of handguns by minors. *Id*. ¶¶ 26-27. In reaching that conclusion, the court followed the reasoning in *District of Columbia v. Heller*, 554 U.S. 570 (2008), which confirmed that the right to keep and bear arms was subject to longstanding prohibitions on the possession of firearms by felons and the mentally ill, and to laws forbidding the carrying of firearms in sensitive places like schools and government buildings, and laws imposing conditions and qualifications on the commercial sale of firearms. *Aguilar*, 2013 IL 112116, ¶¶ 26-27; *Heller*, 554 U.S. at 626-27. In upholding a law-abiding citizen's right to possess an operable handgun "in defense of hearth and home," the Supreme Court stated that the second amendment's

guarantee of an individual right to possess and carry weapons in case of confrontation, like the first amendment's right of free speech, was not unlimited. *Heller*, 554 U.S. at 592, 595, 635. The Supreme Court did "not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation." (Emphasis in original.) *Id*. at 595. The right to keep and bear arms was not "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id*. at 626.

¶ 29 Here, we address defendant's AUUW convictions under different sections of the statute than *Aguilar* addressed. Whereas *Aguilar* struck subsection (a)(1), (a)(3)(A) as unconstitutional, defendant challenges the FOID and under 21 subsections. The relevant sections of the statute provided as follows:

> "(a) A person commits the offense of aggravated unlawful use of a weapon when he or she knowingly:
>
> (1) Carries on or about his or her person or in any vehicle or concealed on or about his or her person except when on his or her land or in his or her abode or fixed place of business any pistol, revolver, stun gun or taser or other firearm; [and]
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> ***
>
> (3) One of the following factors is present:
>
> (A) the firearm possessed was uncased, loaded and immediately accessible at the time of the offense; or
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> ***

> (C) the person possessing the firearm has not been issued a currently valid Firearm Owner's Identification Card; or
>
> * * *
>
> (I) the person possessing the weapon was under 21 years of age and in possession of a handgun as defined in Section 24-3, unless the person under 21 is engaged in lawful activities under the Wildlife Code or described in subsection 24-2(b)(1), (b)(3), or 24-2(f)." 720 ILCS 5/24-1.6(a)(1), (a)(3)(A), (a)(3)(C), (a)(3)(I) (West 2006).

¶ 30 2. Severability

¶ 31 First, defendant argues *Aguilar* implicitly invalidated the AUUW statute, which depends on the unconstitutional premise that the State can categorically ban the possession and use of firearms outside the home. Defendant argues this court must vacate his convictions because the FOID and under 21 subsections cannot be severed from the subsection of the AUUW statute found unconstitutional in *Aguilar*. According to defendant, the FOID and under 21 subsections are merely enhanced versions of the (a)(1), (a)(3)(A) subsection struck by *Aguilar*.

¶ 32 Previously, in *People v. Henderson*, 2013 IL App (1st) 113294, this court considered and rejected the argument that the FOID subsection could not be severed from the unconstitutional subsection struck by *Aguilar*. Specifically, this court conducted the two-part inquiry to determine whether the valid and invalid portions of the statute were essentially and inseparably connected in substance and whether the legislature would have enacted the valid portions without

the invalid portions. *Id.* ¶ 19. This court concluded that the invalidity of subsection (a)(1), (a)(3)(A) did not undermine the completeness or executability of the remaining subsections of the AUUW statute, and particularly the FOID subsection. *Id.* ¶ 22. Noting the court's obligation to uphold legislative enactments whenever reasonably possible, this court concluded that subsections (a)(1) and (a)(2), and the remaining factors in subsection (a)(3) stood independently of subsection (a)(3)(A), which was only one of several factors that operated in conjunction with subsection (a)(1) or (a)(2) to comprise the substantive offense. *Id.* This court also rejected the defendant's assertion that the legislature would not have passed the FOID subsection if it had known that the possession and use of an operable firearm outside the home was constitutionally protected conduct. *Id.* ¶ 26. In support of this conclusion, this court noted that the second amendment right was not unlimited or exempt from meaningful regulation, the purpose of the AUUW statute was to protect the police and the public from dangerous weapons, and the legislature could implement sensible requirements for the public carriage of handguns without running afoul of the second amendment. *Id.* ¶¶ 24-26.

¶ 33 We agree with and follow this reasoning in *Henderson* and, accordingly, reject defendant's argument that the FOID and under 21 subsections cannot be severed from the subsection of the AUUW statute found unconstitutional in *Aguilar*.

¶ 34 3. Young Adults and the Second Amendment

¶ 35 Next, defendant argues the FOID and under 21 subsections unconstitutionally disarm adults who are 18 to 20 years old. Defendant argues these young adults are "indisputably" part of "the People" protected by the second amendment. To support this proposition, defendant cites

Heller, 554 U.S. at 581, which stated the militia was a subset of "the People," who met some criteria for militia service. Defendant also cites *Heller*'s discussion of the First Militia Act, which was enacted by Congress in 1792, created the organized militia, and provided that "every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years *** shall severably and respectively be enrolled in the militia." *Heller*, 554 U.S. at 597 (quoting Act of May 8, 1792, 1 Stat. 271). While defendant recognizes the consensus among historians and jurists that "the People" referenced in the second amendment were limited to the "virtuous citizenry" (see *U.S. v. Yancy*, 621 F.3d 681, 684-85 (7th Cir. 2009)), defendant contends 18, 19 and 20 year-old adults are part of the virtuous citizenry and cannot be categorically disarmed like convicted felons, children, or the mentally ill.

¶ 36 We disagree. The *Aguilar* court emphasized the limitation of its holding, stating that the right to possess and use a firearm for self-defense outside the home was not unlimited or exempt from meaningful regulation. *Aguilar*, 2013 IL 112116 ¶ 21. Unlike the comprehensive ban at issue in *Aguilar*, the FOID and under 21 subsections are not flat bans on possessing and carrying firearms for self-defense outside of the home. *People v. Taylor*, 2013 IL App (1st) 110116, ¶ 28. The Firearm Owners Identification Card Act (FOID Card Act) (430 ILCS 65/1 *et seq*. (West 2006)), does not constitute a blanket prohibition against those under the age of 21 who wish to obtain a FOID card. The department of state police has authority to deny a FOID application to a person "under 21 years of age who does not have the written consent of his parent or guardian to acquire and possess firearms and firearm ammunition, *** or whose parent or guardian does not

qualify to have a [FOID] card." 430 ILCS 65/8(b) (West 2006). However, Illinois' FOID Card Act mandates individualized consideration of a person's FOID card application and circumstances by the department of state police and the judiciary. *Coram v. State*, 2013 IL 113867, ¶ 58 (citing 430 ILCS 65/5, 8, 10 (West 2006)). An individual who is denied a FOID card may first appeal that denial to the director of the state police (430 ILCS 65/10 (West 2006)), and then may obtain judicial review (430 ILCS 65/11 (West 2006)).

¶ 37 In *Henderson*, 2013 IL App (1st) 113295, this court considered the constitutionality of the FOID subsection and the defendant's claim that the FOID card requirement, without any individualized determination of dangerousness, completely barred all persons under 21 years old from firearm ownership without parental permission. This court concluded that the FOID card provision concerning people under 21 years of age was a constitutional restriction on the possession of firearms. *Id.* ¶ 30-33. Specifically, this court noted cases from other jurisdictions involving the prohibition of the purchase and possession of handguns by persons less than 21 years of age and concluded that the under-21-years-of-age prohibition was historically rooted and did not affect conduct at the core of the second amendment right. *Id.* ¶ 30. We agree with the conclusion reached in *Henderson*.

¶ 38 The core protection of the second amendment is the "right of law-abiding, *responsible* citizens to use arms in defense of hearth and home." (Emphasis added.) *Heller*, 554 U.S. at 634-35. Although the second amendment guaranty has *some* application in the very different context of possession of firearms in public, "outside the home, firearm rights have always been more limited because public safety interests often outweigh individual interests in self-defense."

United States v. Masciandaro, 638 F.3d 458, 470 (4th Cir. 2011). "The Second Amendment does not foreclose regulatory measures to a degree that would result in 'handcuffing lawmakers' ability to prevent armed mayhem in public places.' " (Internal quotation marks omitted) *Kachalsky v. County of Westchester*, 701 F.3d 81, 96 (2010) (quoting *United States v. Masciandaro*, 638 F.3d 458, 471 (4th Cir. 2011)).

¶ 39 Neither *Heller* nor *Aguilar* set forth an analytical framework to evaluate the regulation of the public carriage of firearms; however, a two-part approach to second amendment claims has emerged as the prevailing analysis. *Wilson v. Cook County*, 2012 IL 112026, ¶¶ 41-42. First, the court conducts a textual and historical inquiry to determine whether the challenged law imposes a burden on conduct that was understood to be within the scope of the second amendment's protection at the time of ratification. *Id.* at ¶ 41. The regulated activity is categorically unprotected if the challenged law regulates activity falling outside the scope of the second amendment right. *Id.* However, if the historical evidence is inconclusive or suggests that the regulated activity is not categorically unprotected, then the court, applying the appropriate level of means-ends scrutiny, conducts a second inquiry into the strength of the government's justification for restricting or regulating the exercise of second amendment rights. *Id.* ¶ 42; *Ezell v. City of Chicago*, 651 F.3d 684, 701-04 (7th Cir. 2011). *Heller* rejected rational-basis review and requires some form of heightened scrutiny. *Heller*, 554 U.S. at 628 n. 27.

¶ 40 The conduct at issue here–possession in public of a handgun by an 18-to-20-year-old adult who may be a law-abiding citizen carrying the handgun for the purpose of self-defense–is not at the core of the right to bear arms like the defense of hearth and home. Nevertheless, this

conduct is not completely beyond the scope of the second amendment's protection. Because the challenged FOID and under 21 subsections burden conduct within the scope of the second amendment guarantee, we evaluate the prohibition under the appropriate standard of constitutional scrutiny. Defendant argues that strict scrutiny should govern because a fundamental right is at issue. We disagree. Second amendment challenges, like first amendment challenges, can trigger more than one particular standard of scrutiny. The first amendment right to free speech is an enumerated fundamental right, yet it is subject to several standards of scrutiny depending on the type of speech and level of prohibition at issue. See *United States v. Marzzarella*, 614 F.3d 85, 96-98 (3d Cir. 2010) (discussing the application of intermediate scrutiny to content-neutral time, place and manner restrictions, or to regulations on nonmisleading commercial speech). Whereas a regulation that threatens a right at the core of the second amendment triggers strict scrutiny, a less severe regulation requires a less demanding means-end showing. *National Rifle Ass'n of America, Inc. v. Bureau of Alcohol, Tobacco, Firearms, Explosives*, 700 F.3d 185, 195 (5th Cir. 2012). Intermediate scrutiny requires the government to demonstrate that the regulation is reasonably adapted to a substantial governmental interest. *Id.*

¶ 41 Here, neither the challenged FOID nor the under 21 subsection constitutes a total ban on conduct that is at the core of the second amendment right, such as the total ban in *Heller* on having an operable handgun in one's home for the lawful purpose of self-defense. Furthermore, this court has rejected the contention that the public carriage of handguns by those under 21 is conduct at the core of the second amendment right. See *Henderson*, ¶ 8 (citing *National Rifle*

Ass'n of America, Inc., 700 F.3d at 204 (finding restrictions on the ability of persons under 21 to purchase handguns to be firmly historically rooted), *United States v. Rene E.*, 583 F.3d 8, 16 (1st Cir. 2009) (the right to keep arms in the founding period did not extend to juveniles), and *Powell v. Tompkins*, 926 F. Supp. 2d 367, 387-90 (D. Mass. 2013) (a Massachusetts law that proscribed the carrying of firearms by persons under the age of 21 did not violate the second amendment)); see also *Baril v. Baril*, 354 A.2d 392, 396 (Me. 1976) (stating that the "English common law doctrine of majority of twenty-one years [was] recognized and enforced by the colonists"); *National Rifle Ass'n of America, Inc.*, 700 F.3d at 201 (noting that the age of majority at common law was 21, and it was not until the 1970s that states enacted legislation to lower the age of majority to 18); *U.S. v. Skoien*, 614 F.3d 638, 640-41 (2010) (statutory categorical disqualifications on the possession of firearms by some persons are permissible and do not need to "mirror limits that were on the books in 1791"). In addition, the severity of the age disqualification is reduced by its temporary nature; the burdened 18-to-20-year-old adults who will soon grow up and out of its reach. *National Rifle Ass'n of America*, 700 F.3d at 207. Consequently, intermediate scrutiny is the appropriate level of heightened scrutiny to apply here based upon the type of protected conduct that is burdened and the severity of the restriction that is challenged. To survive intermediate scrutiny, the fit between the challenged regulation need only be substantial, "not perfect." *Marzzarella*, 614 F.3d at 97.

¶ 42 First, we consider whether the FOID and under 21 subsections serve a significant, substantial or important government interest. Promoting and ensuring the safety of both the general public and police officers by limiting the accessibility of firearms in public to a less

responsible or less mature group of people constitutes a substantial or important interest. See *People v. Ross*, 407 Ill. App. 3d 931, 942 (2011) (the government had an inherent and lawful power of restraint upon private rights as necessary and appropriate to promote society's health, comfort, safety and welfare even though the prohibitions invade an individual's right of liberty). In *People v. Marin*, 342 Ill. App. 3d 716, 723-24 (2003), this court looked at the history and language of the AUUW statute and determined that its purpose was to protect the public and police officers from the inherent dangers and threats to safety posed by any person carrying in public a loaded and immediately accessible firearm on his person or in his vehicle. In particular, the statute intended to "prevent situations where no criminal intent existed, but criminal conduct resulted despite the lack of intent, *e.g.*, accidents with loaded guns on public streets or the escalation of minor public altercations into gun battles or *** the danger of a police officer stopping a car with a loaded weapon on the passenger seat." *Id*. at 727. Even innocent motivations could be transformed "into culpable conduct because of the accessibility of weapons as an outlet for subsequently kindled aggression." *Id*. Comments made during the legislative debates indicate that the legislature recognized that it was treating adults under 21 years of age differently in order to "recognize the activity of gang members or young kids in certain parts of the state that are active in gangs" and address the concern that gang members should be one of the groups targeted by this legislation. 91st Ill. Gen. Assem., House Proceedings, April 10, 2000, at 54-55 (statements of Representative Cross).

¶ 43 We conclude from that discussion that the legislature sought to deter 18-to-20 year-old adults from carrying handguns, which threaten both the public and police officers, because the

18-to-20-year-old group is heavily at risk for illegal gang-related activity. See *Kachalsky*, 701 F.3d at 97 (citing *Turner Broadcasting System., Inc. v. FCC*, 512 U.S. 622, 665 (1994), to support the proposition that deference is warranted to the predictive judgments of the legislature, which is far better equipped than the judiciary to make sensitive public policy judgments–within constitutional limits–concerning the dangers in carrying firearms and the manner to combat those risks). We also note that the 18-to-20-year-old age group is more likely to be directly interacting with and, thus, endangering juveniles under 18 years of age. We find that the FOID and under 21 subsections serve a substantial and important government interest to reduce in this state the armed violence and illegal activity of street gangs and others by preventing those under 21 years of age from carrying handguns in public, except in certain limited circumstances involving lawful hunting, target shooting, employment or military service. See 520 ILCS 5/1.1 *et seq.* (West 2006); 720 ILCS 5/24-2(b)(1), (f) (West 2006); 720 ILCS 5/24-2(b)(3) (West 2006).

¶ 44 We also find that the fit between the FOID and under 21 subsections and the substantial and important government goal is absolutely reasonable although arguably somewhat imperfect. A reasonable fit "represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served.' " *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 480 (1989) (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982)). Defendant's argument that the 18-to-20-year-old group is not unusually dangerous is not persuasive given the statistics concerning the use of handguns among that group in matters involving illegal street gang activity and other crimes.

¶ 45 As discussed above, the purpose of the challenged provision is to advance public and police officer safety by eliminating the inherent threats posed by young adults carrying handguns in public. Because we find that the fit between the challenged FOID and under 21 subsections of the AUUW statute and the statute's substantial and important goal is absolutely reasonable, the FOID and under 21 subsections do not violate the second amendment and defendant's AUUW conviction must stand.

¶ 46 4. Equal Protection

¶ 47 Next, defendant argues his AUUW conviction violates the equal protection clause of the fourteenth amendment to the United States Constitution because the FOID and under 21 subsections, which restrict or prohibit adults 18, 19 and 20 years old from possessing handguns in public for self-defense, impermissibly burden the fundamental right to bear arms. Defendant contends this legislative classification is subject to strict scrutiny under the equal protection clause because it impinges on the fundamental right to bear arms for self-defense.

¶ 48 Legislative enactments have a strong presumption of constitutionality, and we are required to uphold the constitutionality of a statute whenever reasonably possible. *People v. Alcozer*, 241 Ill. 2d 248, 259 (2011). The party challenging the constitutionality of the statute has the burden to prove its invalidity. *Id.*

¶ 49 The constitutional right to equal protection of the laws requires the government to treat similarly situated persons in a similar manner. *People v. Warren*, 173 Ill. 2d 348, 361 (1996). The guarantee of equal protection "does not preclude the State from enacting legislation that draws distinctions between different categories of people, but it does prohibit the government

from according different treatment to persons who have been placed by a statute into different classes on the basis of criteria wholly unrelated to the purpose of the legislation." *Jacobson v. Department of Public Aid*, 171 Ill. 2d 314, 322 (1996).

¶ 50 To ensure that the State has not exercised its power to classify arbitrarily, courts analyze legislation under equal protection by applying different levels of scrutiny depending on the statutory classification involved. *Id*. at 323.

> "It is the nature of the right affected that dictates the level of scrutiny we employ in determining whether the statute meets constitutional requirements. [Citation.] If the challenged statute implicates a fundamental right or discriminates based on a suspect classification of race or national origin, the court subjects the statute to 'strict scrutiny' analysis and will uphold the statute only if it is narrowly tailored to serve a compelling State interest. [Citations.] Under an equal protection analysis, suspect classifications are based on race or national origin. [Citation.]
>
> If the statute does not affect a fundamental constitutional right or involve a suspect classification, the rational basis test applies, requiring the statute bear a rational relationship to the purpose the legislature intended to achieve by enacting it. [Citation.] Additionally, '[a] third tier of constitutional scrutiny lies between deferential rational basis review and strict scrutiny, and is known as intermediate scrutiny,' and has been applied to review classifications based on gender, illegitimacy, and those classifications that cause 'certain content-neutral, incidental burdens to speech.' [Citation.]" *Alcozer*, 241 Ill. 2d at 262-63.

¶ 51 Defendant acknowledges that courts have applied the rational basis standard for purposes of an equal protection analysis of an age-based classification because courts have routinely held that age is not a suspect class for purposes of equal protection analysis. See *People v. M.A.*, 124 Ill. 2d 135, 140 (1988). Defendant, however, argues that the FOID and under 21 subsections impinge upon a fundamental right and are therefore subject to strict scrutiny. Specifically, defendant asserts that the age classification in the challenged provisions of the AUUW statute burden the fundamental right to keep and bear arms for self-defense.

¶ 52 Fundamental rights "lie at the heart of the relationship between the individual and a republican form of nationally integrated government." *People ex rel. Tucker v. Kotsos*, 68 Ill. 2d 88, 97 (1977). As discussed above, the challenged statutory provisions do not burden a fundamental right because they do not impinge on conduct at the core of the second amendment right, like a law-abiding, responsible individual's possession of an operable handgun for the defense of hearth and home.

¶ 53 We reject, therefore, defendant's argument that the FOID and under 21 subsections are subject to strict scrutiny. Like the first amendment fundamental right to free speech, which is subject to different standards of scrutiny depending on the type of speech involved and the level of prohibition at issue, the second amendment right to bear arms is also subject to different standards of scrutiny. For the reasons discussed above, the challenged provisions warrant, at most, intermediate scrutiny, and we have already concluded that they satisfy intermediate scrutiny. The FOID and under 21 subsections do not violate the equal protection clause.

¶ 54 B. One-Act, One-Crime Rule

¶ 55 When a defendant is convicted of two offenses based upon the same, single physical act, the court must vacate the less-serious offense. *People v. Johnson*, 387 Ill. App. 3d 780, 793 (2009). The State concedes that one of defendant's two convictions for AUUW must be vacated under the one-act, one crime rule because multiple convictions are improper if they arise out of the same physical act. *People v. Crespo*, 203 Ill. 2d 335, 340-41 (2001). Both of defendant's AUUW convictions are based on the same, single act of possession of the same revolver. Moreover, both offenses are Class 4 felonies with a mental state of knowingly (720 ILCS 5/24-1.6(a)(1), (a)(3)(C), (a)(3)(I), (d)(1) (West 2006)), and a sentencing range of one to three years (730 ILCS 5/5-4.5-45(a) (West 2006)).

¶ 56 In the context of the one-act, one-crime rule, the sentence should be imposed on the more serious offense and the less serious offense should be vacated. *People v. Artis*, 232 Ill. 2d 156, 170 (2009). "In determining which offense is the more serious, a reviewing court compares the relative punishments prescribed by the legislature for each offense." *Id*. at 170. If the degree of the offenses and their sentencing classifications are identical, we may consider which of the convictions has the more culpable mental state. *Id*. at 170-71. "[W]hen it cannot be determined which of two or more convictions based on a single physical act is the more serious offense, the cause will be remanded to the trial court for that determination." *Id*. at 177.

¶ 57 Here, defendant's two AUUW convictions share the same mental state, sentencing classification, and punishment. Because we cannot determine which offense is the more serious, we remand this cause to the trial court for that determination.

¶ 58 C. Ineffective Assistance of Trial Counsel

¶ 59 Defendant contends that trial counsel provided ineffective assistance by eliciting irrelevant and inflammatory testimony which suggested that the offense was gang-related. Specifically, defendant complains his trial counsel should not have elicited on cross-examination testimony (1) from Officer Cahue that Perez, defendant's co-arrestee, was arrested for flashing gang signs and shouting gang slogans; and (2) from Officer Medina that defendant told the officers a rival gang member shot at defendant the day before his arrest. According to defendant, that cross-examination opened the door for the State to present evidence that the neighborhood was considered Latin King territory and defendant told the police after his arrest that he was a member of that street gang. We do not agree.

¶ 60 To obtain relief, defendant must show not only that his lawyer's performance fell below an objective standard of reasonableness, but also that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-89 (1984); *People v. Albanese*, 104 Ill. 2d 504, 525-27 (1984). A reviewing court must consider the totality of the evidence before the fact finder in determining whether a defendant has established his attorney's unreasonable errors and the reasonable probability of a different result. *Strickland*, 466 U.S. at 695. The prejudice prong of this *Strickland* test may be satisfied if defendant can show that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. *People v. Evans*, 209 Ill. 2d 194, 220 (2004). The failure to satisfy either the performance or the prejudice prong of the *Strickland* test will preclude a finding of ineffective assistance of counsel. *People v.*

Johnson, 368 Ill. App. 3d 1146, 1161 (2006).

¶ 61 Before we address defendant's ineffective assistance of counsel claim, we must clarify the trial court's ruling on the parties' motions *in limine*. Defendant asserts, without citation to the record, that prior to the start of the trial, "the trial court ruled that the case was not gang-related and that no gang evidence would be introduced." Our review of the record, however, establishes that the trial court made no such ruling. The trial court's ruling was actually much narrower. It addressed whether the State could present evidence that the police were at the scene conducting surveillance as a result of receiving information from an unknown citizen that someone would be carrying a gun in order to retaliate for a prior shooting incident involving street gangs. The trial court did not preclude any mention of street gang activity but, rather, precluded the State from eliciting the hearsay information obtained from the unknown citizen, who was not available for cross-examination.

¶ 62 According to the record, before jury selection on July 14, 2008, the trial court addressed the parties' motions *in limine*. After ruling on several of the State's oral motions *in limine*, the State sought guidance regarding the extent to which the officers could testify about the reason they had set up surveillance at 30th Street and Homan Avenue. The State explained that the police had defendant's name and photo because an unknown citizen told the police that there was going to be a gang retaliation and defendant was going to be the one with the gun. Furthermore, an offense case report indicated that on a previous day defendant was shot at by unknown rival gang members. The State sought leave to present the facts that the officers were familiar with that block based on gang activity and had information that a gang retaliation was going to take

place.

¶ 63 The defense objected, arguing defendant would not be able to cross-examine the source of that information. The defense explained that a telephone call to the police was apparently the source of the information, but the person connected to the relevant telephone number denied making any such call and denied any knowledge of the matter.

¶ 64 Due to concerns involving hearsay and prejudice resulting from the denial of the right to confront witnesses, the trial court precluded the State from mentioning any information supplied by the unknown citizen. The trial court limited the State on direct examination to presenting testimony that the police were at the location "on surveillance pursuant to a continuing investigation."

¶ 65 The trial court then addressed the admissibility of defendant's postarrest statement that a male pulled a gun on him on a previous day, defendant was not going to call the police, and defendant was his own protection. Defense counsel asked the court to preclude any use of defendant's postarrest statement because it was not written or recorded, defendant denied being shot at and denied making the postarrest statement, and the statement was inconsistent with the information supposedly supplied by the unknown citizen.

¶ 66 The trial court ruled that defendant's postarrest statement was relevant and admissible, the defense's cross-examination could challenge whether defendant ever made the postarrest statement, and the jury would decide what weight to give that evidence.

¶ 67 Defense counsel argued that he felt "boxed-in" by the trial court's ruling and the State should not be allowed to use defendant's entire postarrest statement. Defense counsel agreed

with the court's ruling to preclude any reference to the information received from the unknown citizen. However, if defendant's postarrest statement was admissible, defense counsel was concerned that he might have to refer to some of the precluded information. Specifically, in order to challenge the notion that defendant made the alleged postarrest statement, counsel might refer to the precluded information in order to show that the facts supposedly supplied by the unknown citizen were not even consistent with the facts in the postarrest statement the police attributed to defendant.

¶ 68 The State expressed concern that if the police officers were cross-examined about what information they had prior to going to the scene, then some of the precluded information might come out.

¶ 69 The trial court did not alter its ruling, but acknowledged that defendant's cross-examination of the officers about what they knew prior to their surveillance might open some doors to gang activity or shootings that happened earlier. If that happened, the trial court would address the matter in a sidebar before the State's redirect or cross-examination.

¶ 70 Then the trial court asked if there were any further motions *in limine* to address. Defense counsel said he had "a formal one on the gang issue but [the court] already ruled on that [and counsel would file it]." Defense counsel asked "that the State have a clean folder for the jury so that nothing–gang affiliation or pending charges not be open and visible for that." The trial court asked the State to keep any information or exhibits not yet admitted into evidence away from the jury's sight line. Thereafter, jury selection commenced.

¶ 71 The record contains defendant's motion *in limine*, file stamped July 14, 2008, to prohibit the State from introducing evidence of any gang involvement by defendant. The motion alleged that defendant had no gang tattoos, markings or scars, made no motions consistent with gang involvement while the police observed him, and was not in the company of any other individuals that would indicate gang involvement. The motion also alleged that, aside from the arrest information and general offense report, no reports supported the officers' contention that this case was gang-related. The motion argued that the introduction of gang evidence would be more prejudicial than probative in this particular case. There is no indication in the record that a ruling was made on this motion or that the issue raised therein was presented to the trial court.

¶ 72 During the cross-examination of Officer Cahue, defense counsel elicited testimony that at the time of defendant's arrest, the police also arrested Perez for reckless conduct where "he was outside acting up, flashing gang signs and gang slogans, attempting to create a diversion." Later, when defense counsel cross-examined Officer Medina about his failure to follow through on defendant's alleged statement that someone had fired a gun at him, the following exchange occurred:

"Q. So here you have an individual who had just told you that somebody may have shot at him, correct?

A. Right.

Q. Did you ask him who?

A. Yes.

Q. Who did you get?

MS. GOLDFISH [Assistant State's Attorney]: Objection.

THE COURT: Overruled. You may tell us.

A. He said it was a rival gang."

Defense counsel continued to question Officer Medina regarding whether defendant mentioned the time and location of the prior shooting incident and any names of the people involved. Counsel then questioned Officer Medina regarding his failure to make a tape or video recording of defendant's alleged statement or have him write or sign it.

¶ 73 Thereafter, defendant testified on direct that he was never in a gang, did not have any gang tattoos, and never made a postarrest statement to Officer Cahue or Medina. On cross-examination, he testified that he had lived on his block for about 15 years and knew that it was Latin King territory. He was not a Latin King and did not know whether Perez was a Latin King.

¶ 74 After the defense rested, the State sought leave to have rebuttal witness Officer Cahue testify that, after defendant's arrest, Officer Cahue asked him whether he was affiliated with a gang, defendant said he was a member of the Latin Kings, and Officer Cahue documented that statement in his general case report.

¶ 75 Defense counsel responded:

"[W]e have been hearing gangs about this over our objection the entire time from every state witness that has come up there. So I had to rebut their violation of that particular issue by asking [defendant] if he was in a gang or not."

¶ 76 The trial court, however, corrected defense counsel, noting that the State did not introduce any information regarding street gangs during the direct examinations of the police

officers. The trial court stated:

> "So I just resent the implication that you make in your argument that there [have] been numerous violations of a motion *in limine* and people have been trotting out gangs from start to finish. That was not the case. The record does not show that."

The trial court clarified that Officer Cahue's rebuttal testimony was not allowed based on the defense opening any door to evidence about gang membership as a result of the defense's cross-examination of the police officers. Instead, the rebuttal testimony was allowed because it was relevant on the issue of defendant's credibility where he testified on direct examination that he was never a member of a gang.

¶ 77 Based upon the above summary of the course of the trial, we now address defendant's ineffective assistance of counsel claim. Specifically, defendant challenges counsel's cross-examination that elicited (1) Officer Cahue's testimony that Perez was arrested for flashing gang signs and (2) Officer Medina's testimony that defendant told the officers a rival gang previously shot at him. According to defendant, there was no valid tactical reason to have so cross-examined Officers Cahue and Medina under the circumstances, so counsel's challenged actions cannot be attributed to trial strategy.

¶ 78 Defendant fails to meet his burden under the first prong of *Strickland* to show that defense counsel's conduct at trial fell below an objective standard of reasonableness. In reviewing an attorney's actions, we show deference to the attorney's decisions, and the defendant must overcome the presumption that counsel's challenged action was trial strategy. *Strickland*, 466 U.S. at 689. There is a strong presumption that an attorney's actions fall within the wide

range of choices that could be considered adequate counsel. *Id*. Matters of trial strategy include whether to offer certain evidence or call particular witnesses, whether and how to conduct cross-examination, and what motions to make. *People v. Anderson*, 266 Ill. App. 3d 947, 956 (1994).

¶ 79 The defense strategy entailed convincing the jury that defendant was not on the street at the time of the alleged incident and the police unlawfully burst into his apartment, detained him in his living room while they conducted an illegal search, and supposedly recovered a gun in the bathroom. To accomplish this strategy, the defense attempted to convince the jury that the police, in order to justify their warrantless search, lied about conducting the undercover surveillance, falsely connected defendant to someone who was involved in gang activity, fabricated defendant's postarrest statement, and invented the incident about someone pulling a gun on defendant in order to manufacture a motive for defendant to have the gun.

¶ 80 Consistent with this strategy, counsel elicited Officer Cahue's testimony that it was actually the co-arrestee, Perez, who was flashing gang signs and yelling gang slogans at the scene. This line of questioning hardly opened the door to testimony about gang activity where the defense knew that Sergeant Janopolous also would testify during the State's case-in-chief and would likely discuss, *inter alia*, the behavior by Perez that resulted in his arrest. Sergeant Janopolous testified after Officer Cahue, and defendant cites no authority to support any argument that Sergeant Janopolous's testimony regarding Perez's conduct at the scene was not admissible. Accordingly, the defense pursued the strategy of disassociating defendant from Perez by presenting the testimony of eyewitness Huerta and defendant. Huerta knew defendant as a family friend for several years and testified that he was not even on the street, let alone in

Perez's Jeep. Defendant, who had lived in that neighborhood for several years, insisted that he had never been in a street gang and did not have any gang tattoos. Any contrary testimony by the police that defendant was involved in gang activity was, according to the defense, just another lie to invent a motive and justify the warrantless search and arrest of defendant.

¶ 81 Defense counsel's cross-examination of Officer Medina was also consistent with the defense's strategy to show the jury that the police invented both the prior shooting incident and defendant's postarrest statement in order to manufacture a motive for defendant to have a gun on the street on the day of his arrest. Specifically, counsel challenged as irrational the notion that an arrested person would tell the police that he was carrying a gun because someone had shot at him a day ago and the police would respond as casually as Officers Cahue and Medina seemed to have acted in this case. Based upon the trial court's ruling on the motion *in limine*, the State could not present the hearsay evidence about the unknown citizen's report to the police that defendant was going to be part of a gang retaliation. As a result, counsel was able to attack Officer Medina for failing to question defendant and uncover the who, what, when and where of the prior shooting incident, and Officer Medina could not respond that the police, before they conducted the undercover surveillance that resulted in defendant's arrest, had already received a tip that defendant would be involved in a gang retaliation as a result of the prior shooting incident.

¶ 82 Furthermore, Officer Medina's testimony that defendant said a rival gang shot at him did not open the door to irrelevant and inflammatory testimony about street gangs. As the trial court clarified, the State's leave to present Officer Cahue's rebuttal testimony–that defendant said he

was a Latin King–was not based upon any door being opened by defense counsel's cross-examination of the police officers. Rather, the rebuttal testimony was admissible solely because it was relevant to the issue of defendant's credibility where he testified on direct examination that he was never a member of a street gang.

¶ 83 Defense counsel's challenged actions were reasonable and consistent with the strategy to discredit the testimony of the State's witnesses that the officers observed defendant in the street carrying the gun and defendant made an incriminating postarrest statement. Even assuming, *arguendo*, that counsel's strategy was not perfect, "[m]istakes in strategy or tactics do not, alone, amount to ineffective assistance of counsel, nor does the fact that another attorney might have handled things differently; in fact, counsel's strategic choices are 'virtually unchallengeable.' " *People v. Ward*, 371 Ill. App. 3d 382, 434 (2007) (citing *People v. Palmer*, 162 Ill. 2d 465, 479 (1994)).

¶ 84 The record establishes that counsel provided effective and competent representation by challenging prior to trial the warrantless search of defendant's home, his arrest and the admissibility of his postarrest statement. Counsel also delayed the trial until the defense had obtained all relevant information concerning the unknown informant and Perez's arrest and investigated those matters. Furthermore, the defense successfully precluded, on hearsay grounds, the evidence concerning the police officers' course of conduct and reason for conducting the surveillance. In addition, the defense thoroughly cross-examined the State's witnesses, raised numerous objections to the State's evidence, moved for a directed verdict on the sufficiency of the FOID card evidence, and presented witnesses and exhibits on defendant's behalf. See *People*

v. Shatner, 174 Ill. 2d 133, 147-48 (1996) (defense counsel was not ineffective where he offered rigorous cross-examinations and witnesses on the defendant's behalf). Consequently, defendant fails to show that counsel's performance fell below an objective standard of reasonableness.

¶ 85 Defendant also fails to meet his burden under the second prong of *Strickland* to show a reasonable probability that, absent any errors by counsel, the jury would have had a reasonable doubt that defendant had a handgun on the street on the date in question. The complained-of testimony concerning street gangs was not overly prejudicial where Officers Cahue and Medina testified clearly, consistently and credibly that they saw defendant on South Homan Avenue with a revolver in his hand and waistband. In contrast, defense witness Huerta and defendant gave vague or inconsistent physical descriptions of the officers involved in defendant's arrest. Furthermore, defendant did not present any photographic evidence to counter the officers' testimony that his home was in complete disarray before the officers ever entered it. Defendant also could not explain how his toilet tank cover mysteriously disappeared during the alleged illegal search and randsacking of his home.

¶ 86 The fact that defense counsel's cross-examination of Officers Cahue and Medina elicited very brief references to street gangs neither opened the door to a flood of gang evidence nor raised a reasonable probability that the challenged testimony so colored the jury as to force a conviction regardless of the evidence in this case. Defendant has failed to meet his burden under *Strickland*.

¶ 87 III. CONCLUSION

¶ 88 Accordingly, we remand the cause to the trial court to determine which of the two

AUUW convictions should remain and to correct the mittimus accordingly. We affirm the judgment in all other respects.

¶ 89 Affirmed and cause remanded with directions.