2012 IL App (1st) 100323

FIRST DIVISION
March 26, 2012

No. 1-10-0323

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
	)	the Circuit Court
Plaintiff-Appellee,	)	of Cook County
	)	
v.	)	No. 08 CR 22858
	)	
LACY RINEY,	)	
	)	Honorable
Defendant-Appellant.	)	Michael Brown,
	)	Judges Presiding.

JUSTICE KARNEZIS delivered the judgment of the court.
Presiding Justice Hoffman and Justice Hall concurred in the judgment.

O R D E R

¶ 1 ***Held*:** The trial court did not err in denying defendant's motion *in limine*. Trial counsel was not ineffective for failing to file a motion to exclude evidence. The State did not make improper comments during closing argument. The trial court may have considered improper factors during sentencing. *Ex post facto* principles do not preclude a conviction for armed habitual criminal.

¶ 2 Lacy Riney was charged by way of information with unlawful use of a weapon by a felon (UUW) (720 ILCS 5/24-1.1(a) (West 2008)), and being an armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2008)). After a jury trial, defendant was convicted of being an armed habitual criminal and was sentenced to 12 years' imprisonment. Defendant now appeals and argues: (1) trial counsel was ineffective for failing to move to exclude or object to irrelevant and prejudicial testimony; (2) the State made improper statements during rebuttal closing argument; (3) the trial court relied on improper factors in sentencing defendant; and (4) his conviction for the offense of armed habitual criminal violates the prohibition against *ex post facto* laws. For the following reasons, we affirm defendant's conviction but remand for resentencing.

¶ 3 BACKGROUND

¶ 4 Defendant was charged by way of information with UUW and being an armed habitual criminal. Prior to trial, defense counsel filed a motion to quash arrest and suppress physical evidence, as well as two of his three post-arrest statements. After a hearing, the court denied the motion. Subsequently, the State dismissed the UUW charge and proceeded on the remaining charge of being an armed habitual criminal.

¶ 5 At trial, Officer Peete testified that he finished his shift as a patrol officer on November 19, 2008, at approximately 3:30 p.m. He was still dressed in his uniform but was driving his personal car. He stopped at a red light at the intersection of Chicago Avenue and Central Avenue, just after 4 p.m. He heard arguing and saw a "commotion" on the north side of the street. He saw an African-American man, approximately 6 feet tall, wearing a black jacket and a red and black baseball cap standing in front of the Shop and Save store. Officer Peete identified

defendant as the person he saw standing in front of the store. Defendant was yelling profanities and making hand gestures, which Office Peete demonstrated for the jury, at two men on the south side of Chicago Avenue. Officer Peete testified that defendant then lifted his shirt, showing a silver pistol protruding from his left front pocket. Officer Peete had an unobstructed view of defendant when he lifted his shirt revealing the pistol.

¶ 6 When the light changed, Officer Peete drove away and called 911 on his cell phone and reported the incident. He then turned around and parked on the street facing west. Within a few minutes, a squad car passed him going west. Officer Peete was able to get the attention of the officers in the squad car and reported to Officers DeRosa and Fichter what he had seen. Officer Peete followed the squad car to the Shop and Save store. Defendant was still standing in front of the store.

¶ 7 Officers DeRosa and Fichter got out of their squad car with their weapons drawn and announced their office. They told a group of people who were standing within a few feet to stop. Officer DeRosa instructed the people to "show your hands." Defendant matched the description given by Officer Peete so Officer Fichter believed him to be armed.

¶ 8 As the officers approached, defendant began to walk away and ignored the officers' requests for him to stop and show his hands. Defendant then broke into a full sprint and ran west on Chicago Avenue. The officers gave chase while continuing to command defendant to stop. Defendant eventually ran into a gangway at 817 North Parkside. The gangway was not a thoroughfare; it ended with a fence. Officer DeRosa testified that as defendant ran toward the fence, he pulled a silver object out of somewhere on his body and threw the object in the air. The

other officers did not see defendant throw anything. Defendant tried to climb the fence. When he was unable to, he turned to the officers and according to Office Peete, assumed a "fighting stance." When defendant would not drop to the ground as ordered, the officers forced defendant to the ground using an "emergency takedown" to subdue him. The officers testified that defendant had resisted by flailing his arms and kicking his legs.

¶ 9 Officer DeRosa recovered a silver .32 Colt automatic pistol from the ground about six or seven feet from where defendant had tried to climb the fence. The gun had half of the grip missing on the right side so one could look into the handle. The gun was not loaded. Defendant was cuffed and transported to the police station.

¶ 10 During the ride to the 15th District station, defendant cursed at the officers from the backseat of the squad car, saying "[y]ou police bitches better let me go * * * I'll fucking kill you, both." Defendant continued to be uncooperative when they arrived at the station. Officers DeRosa and Fichter took defendant to an interview room, placed him on a bench and handcuffed him to a restraining bar. Defendant was visible to those outside the room through a glass panel. Defendant yelled, "Fuck the police * * *fuck you all, * * * fuck you bitches" and then pulled down his pants and urinated on the floor and walls of the cell. Officer De Rosa then called for a sergeant.

¶ 11 Sergeant Isakson entered the interview room after defendant had urinated on the floor. Sergeant Isakson told defendant that they were going to move him to a holding cell. As he and Officer DeRosa walked defendant to the lock-up, defendant said. "Fuck you all, you have nothing on me, it wasn't my gun, I was just holding it." When asked whose gun it was defendant did not

identify the owner of the gun.

¶ 12 Officer DeRosa maintained possession of the gun until he returned to the station and inventoried it. Officer DeRosa did not request that it be examined for fingerprints. Firearms examiner Leonard Cacioppo examined the gun and determined the gun was still in working order. Despite the absence of a magazine and having a broken grip, Officer Cacioppo was able to fire two test shots from the gun.

¶ 13 The parties stipulated to defendant's two qualifying convictions: a Class 2 felony for possession with intent to deliver a controlled substance and a Class 1 felony for delivery of a controlled substance.

¶ 14 Defendant testified that at approximately 4 p.m. on the day of his arrest he was on his way home from his grandmother's house and wanted to buy cigarettes. He walked to a convenience store near the intersection of Chicago and Central Avenues. A group of five or six young African-American men stood outside the entrance to the store. He recognized the men from his grandmother's neighborhood but only knew them by nickname. Defendant went into the store and bought cigarettes. When he came out, he stood on the sidewalk next to the men. As he lit a cigarette, and while he spoke to some of the men, he noticed that a marked squad car headed eastbound on Chicago Avenue had stopped on the south side of the street. Two officers, DeRosa and Fitcher, whose uniforms were covered by hooded black shirts or zippered jackets, got out of the squad car with their guns drawn and pointed at him.

¶ 15 Defendant was wearing a black, long-sleeve hooded jacket and jeans. He denied he was wearing a hat on the day of his arrest. Defendant testified that he, along with four other men, ran

when the police approached because it was a high crime area and he did not want to go to jail. Defendant ran west to Parkside, then followed the other men north on Parkside.

¶ 16 The officers followed defendant into a gangway on Parkside, where he became trapped by a fence. He turned and put up his hands. Officer DeRosa kicked him in the chest. Defendant was then put on the ground and handcuffed. Defendant had no weapons or drugs on him and denied trying to throw a gun onto an adjacent roof.

¶ 17 Defendant denied telling the police that he was holding a gun for someone. On direct examination, he denied yelling profanities at the officers and denied urinating in the holding cell.

¶ 18 After hearing all of the evidence, a jury convicted defendant of being an armed habitual criminal. Defendant was sentenced to 12 years' imprisonment.

¶ 19 ANALYSIS

¶ 20 Defendant first claims that evidence of his comments to the officers during and following his arrest were improperly admitted. He also claims that his attorney was ineffective for failing to move *in limine* to preclude the admission of evidence that he urinated in the holding cell.

¶ 21 Prior to trial, defense counsel moved *in limine* to exclude two statements defendant allegedly made to police after his arrest. The first statement, "You bitches better let me go, I'll kill you I'll fucking kill you both you bitch police" was made to the officers in the squad car on the way to the station. The second statement, "Fuck the police, fuck you bitches" was allegedly made while defendant was locked in the holding cell at the police station. The trial court denied the motion finding that the statements were admissible as "context" for another statement defendant made wherein he told police that the gun was not his, he was merely holding it for

someone. Defense counsel did not move to exclude the evidence that defendant urinated in the holding cell.

¶ 22 Defendant argues that the trial court erred in admitting the two statements he allegedly made to police after his arrest because the statements are irrelevant and highly prejudicial.

¶ 23 A trial court's decision to deny a motion *in limine* thereby allowing certain evidence to be admitted will not be overturned on review absent an abuse of discretion. *People v. Owen*, 299 Ill. App. 3d 818 (1998). We cannot say that the trial court abused its discretion in denying defendant's motion *in limine* to preclude the introduction of the two statements. As the trial court found, the statements help to explain the context and the circumstances under which the third inculpatory statement was made.

¶ 24 Defendant's reliance on *People v. Maounis*, 309 Ill. App. 3d 155 (1999), *People v. Liapis*, 3 Ill. App. 3d 864 (1972) and *People v. Decaluwe*, 405 Ill.A pp. 3d 256 (2010) is unpersuasive. *Maounis*, *Liapis* and *Decaluwe* deal with the introduction of evidence that had no relation to the crime charged. The two statements in this case were not only relevant because they helped to explain the context in which the inculpatory statement was made, but they were part of the narrative of the events surrounding his arrest. Furthermore, any error is harmless where the evidence against defendant was overwhelming.

¶ 25 Defendant also faults counsel for failing to oppose the State's introduction of evidence showing that defendant urinated in a police holding cell after his arrest.

¶ 26 The law is clear that a defendant in any criminal case is constitutionally guaranteed effective assistance of counsel. U.S. Const., amend. VI, XIV; Ill. Const. 1970, art. I § 8;

Strickland v. Washington, 466 U.S. 668 (1984); adopted by *People v. Albanese*, 104 Ill. 2d 504 (1984). The *Strickland* court set forth the two requirements that a defendant must show to prevail in an ineffective assistance claim; (1) counsel's performance fell below an objective standard of reasonableness and; (2) there is reasonable probability that, but for counsel's errors, the result of the trial would have been different. The burden is on the defendant to overcome the strong presumption that defense counsel rendered adequate assistance using reasonable professional judgment pursuant to sound trial strategy. *Strickland*, 466 U.S. at 689-90.

¶ 27 A defendant must show there was a reasonable probability that defense counsel's errors *affected* the outcome of the proceeding. *Id* at 694 (emphasis added). A reasonable probability is one sufficient to "undermine confidence in the outcome." *Id.* An ineffectiveness claim can be resolved by examining only the prejudice prong, because if a defendant cannot establish that he was prejudiced by counsel's alleged error, counsel's performance is irrelevant. *People v. Coleman*, 183 Ill. 2d 366, 397-98 (1998).

¶ 28 Defendant cannot establish that he suffered prejudice as a result of counsel's failure to make a motion to exclude evidence that defendant urinated in the holding cell. First, there is no evidence to suggest that even if counsel had made such a motion, that it would have been granted. Second, the State was only required to prove that defendant was a twice convicted felon, which was stipulated to in its case in chief, and that defendant possessed a gun (720 ILCS 5/24-1.1(a) (West 2008)), which was proven overwhelmingly by the testimony of the officers. Third, even if the evidence that defendant had urinated in the holding cell was excluded, the result of the trial would have not been any different. We therefore, cannot say that defendant

received ineffective assistance of counsel.

¶ 29 Defendant argues that he was denied a fair trial where the prosecutor improperly argued to the jury that the credibility of testifying witnesses was enhanced because they were police officers and invited speculation about how defendant might have used the gun in order to incite fear in the jurors.

¶ 30 It is well settled that prosecutors are afforded wide latitude in closing argument, and even improper remarks do not merit reversal unless they result in substantial prejudice to the defendant. *People v. Kitchen*, 159 Ill. 2d 1, 38 (1994). During closing argument, the prosecutor may properly comment on the evidence presented or reasonable inferences drawn from that evidence, respond to comments made by defense counsel which clearly invite response, and comment on the credibility of witnesses. *People v. Rader*, 178 Ill. App. 3d 453, 466 (1988). In reviewing whether comments made during closing argument are proper, the closing argument must be viewed in its entirety, and remarks must be viewed in context. *Kitchen*, 159 Ill. 2d at 38

¶ 31 During rebuttal closing argument, the prosecutor remarked, "If what the defendant says is true, then those officers, Officer Peete, DeRosa and Fitcher arrested an innocent man. If what the defendant says is true, that the police all lied under oath here, every single one of them."

¶ 32 The prosecutor further remarked that if defendant was telling the truth, the officers must have gotten together to "coordinate their lies" and the State "must be in on it too, coordinating all these lies." The prosecutor urged the jury to think about why:

> "they would go through all that trouble of coordinating lies, knowing that they are going to be potentially here in a place like this in front of strangers, fellow citizens, being asked question after question by lawyers, not only lawyers for Lacey Riney, but myself.

> And remember what the defense attorney asked, in previous hearings. There were other hearings. There were multiple hearings, knowing that they are going to face perjury."

¶ 33 The prosecutor assured the jury that the officers were not lying but were "police officers doing their job." The prosecutor also remarked that defense counsel called the officers "liars" and "corrupt, lying, coordinating evidence-planting corrupt cops." The prosecutor countered by questioning the allegations against the officers and stated that the officers are "doing their job and being honest and was [sic] honest up there."

¶ 34 The prosecutor commented on the veracity of the officers individually. Officer Peete was "honest and forthcoming" when he "described the stance the defendant took" and "all the information." The prosecutor indicated that Officer Peete was "candid and transparent and precise and forthcoming" and "about doing the right thing." The prosecutor also remarked that Officer De Rosa was being "precise and truthful."

¶ 35 Defendant urges that he was denied a fair trial the prosecutor improperly bolstered the testimony of the officers during closing argument by repeatedly commenting that the officers were honest and truthful.

¶ 36 After reading the closing argument in its entirety, we are confident that the prosecutor's comments that defendant now complains of were invited by the defense. The State may properly respond to comments made by defense counsel that clearly invite a response. *People v. Hudson*, 157 Ill. 2d 401, 444 (1993). In closing argument defense counsel gave three reasons why defendant is innocent: "the lies of Officer DeRosa. And second, the contradictions between all of theses officers' testimony; and third, the complete lack of evidence, lack of investigation in this

case." Throughout his closing argument defense counsel made numerous references to Officer DeRosa being a liar and went so far as to say "[o]bviously, lying under oath is not a problem for Officer DeRosa." Defense counsel also called Officer Peete's veracity into question when he was questioning the location of the gun on defendant's person. Defense counsel said, "[b]ut the lies doesn't just stop with those two." Defense counsel also classified Officer Peete's testimony as "mistaken." Based on defense counsel's references to the officers's veracity in closing argument, it was an appropriate subject for discussion in the State's rebuttal closing argument. In addition, any error is harmless where the jury was properly instructed that closing arguments are not to be considered evidence.

¶ 37 Defendant argues that it was particularly egregious for the prosecutor to remark about the officers risking perjury charges if they lied under oath. Defendant contends that this argument was improper where it was not based on any evidence presented at trial.

¶ 38 Recently, in *People v. Adams*, 2012 WL 169702 (Ill. S.Ct. January 20, 2012) our supreme court was called upon to determine whether a prosecutor may properly argue to a jury that a police officer's testimony should be believed because he would not risk "his credibility, his job, and his freedom" by lying when no evidence that those consequences would occur was introduced at trial. During closing argument, the prosecutor remarked:

> "What doesn't make sense is that [Sergeant] Boers would plant these drugs on the defendant. We are talking about 0.8 grams of cocaine. If you believe what the defendant is saying, then you also have to believe that [Sergeant] Boers is risking his credibility, his job, and his freedom over 0.8 grams of cocaine.
>
> And not only is [Sergeant] Boers going that, but [Deputy] Schumacher is doing

that as well. He's also risking his life-his job and his freedom and his reputation over 0.8 grams of cocaine." *Id* at 3.

During rebuttal, the prosecutor argued that believing defendant required the jury to believe that "these officers are risking their jobs for this, over 0.8 grams of cocaine." *Id* at 4.

¶ 39 Our supreme court ruled that the prosecutor's comments were improper as the comments constituted "impermissible speculation, as no evidence was introduced at trial from which it could be inferred that the testifying officers would risk their careers if they testified falsely." In so holding, the *Adams* court reasoned that by highlighting any assumed punitive consequences or sanctions an officer might face if he testifies falsely, a prosecutor implies that a police officer has a greater reason to testify truthfully than another witness with a different type of job. *Id* at 5.

¶ 40 The complained of argument here is distinguishable from the argument made by the prosecutor in *Adams*. In this case, the prosecutor merely argued that the officers faced perjury charges, not that the officers risked their jobs, reputation, credibility or freedom. Furthermore, a charge of perjury for lying under oath is not specific to a police officer. Anyone who lies under oath would face a perjury charge so the reasoning employed by the court in *Adams* is inapplicable here. Furthermore, any error is harmless. The jury was properly instructed that counsel's arguments were not evidence.

¶ 41 Defendant also contends that the prosecutor made improper comments during closing argument when he suggested to the jury that defendant planned to commit an armed robbery with the gun, or to harm others with it.

¶ 42 During closing argument, defense counsel commented that the State charged defendant with being an armed habitual criminal: "They have charged him with possessing a gun. The gun

had no bullets, no clip, no magazine. The piece of metal. Lacy never had that piece of metal either." In rebuttal, the prosecutor responded:

"Calling this a piece of steel is kind of like saying a missle is just a giant piece of steel with chemicals inside, trying to use language to minimize the seriousness of this.

You heard what Investigator Cacioppo said. This is a live working gun.

Sure, there may be no grip handle here, but that is not needed for this to function. If one is holding this gun with the right hand, it completely covers it up anyway.

* * *

Ladies and gentlemen, this law exists because this thing, this object, only has one purpose, one purpose only. We all know what that purpose is. We don't want it in the hands of felons.

Just a piece of steel, not that important. Really?

* **

Didn't he have this like this? Well, didn't he have this gun? Wasn't he in front of a store? And didn't he go inside the store? What can a person do with this in a store, or for other people?"

¶ 43 Defendant contends that the above argument improperly suggested that defendant had committed or planned to commit other offenses unrelated to the one for which he was being tried. Reading the closing argument in its entirety and considering the context of the complained of comments, we find that the prosecutor's statement did not amount to an improper suggestion that defendant committed offenses unrelated to being an armed habitual criminal. Even if the prosecutor's comments could be so construed, we find that not only was the prosecutor's

comment proper because it was invited by defense counsel (the State may properly respond to comments made by defense counsel that clearly invite a response. *Hudson*, 157 Ill. 2d at 444), but the comment was a reasonable inference given the testimony of the officers. "To be proper, closing argument comments on evidence must be either proved by direct evidence or be a fair and reasonable inference from the facts and circumstances proven." *People v. Hood*, 229 Ill. App. 3d 202, 218 (1992). Officers saw defendant with a gun standing outside of a store. Accordingly, we find that no error occurred in closing argument.

¶ 44 Defendant argues that the court erred in sentencing him to a 12-year term of imprisonment where the court relied on erroneous information contained in the pre-sentence investigation report. Specifically, defendant claim that the trial court improperly considered four felony convictions that erroneously appeared in his criminal history when it imposed sentence. Defendant acknowledges that he forfeited this issue, but urges us to consider as plain error.

¶ 45 To preserve a claim of sentencing error, a defendant must object to the error at the sentencing hearing and raise the objection in a postsentencing motion. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). If the error is not preserved, as in this case, it is forfeited. *Hillier*, 237 Ill. 2d at 544.

¶ 46 Forfeited issues relating to sentencing may be reviewed for plain error. *Hillier*, 237 Ill. 2d at 545. To establish plain error, a defendant must show either that: "(1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing." *Hillier*, 237 Ill. 2d at 545. Defendant bears the burden of persuasion under either prong of the plain error rule. *Hillier*, 237 Ill. 2d at 545. Before we can determine whether defendant has met his burden under either prong of plain error, we must first

decide whether a clear or obvious error occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 47 At sentencing, the court asked if the parties had any amendments to make to the pre-sentence investigation report. The pre-sentence investigation report showed that defendant had four criminal convictions in Cook County, plus five convictions and an outstanding arrest warrant from Minnesota. Defense counsel indicated that he wished to make several corrections to the report. Defense counsel challenged the out-of-state arrests and conviction, stating that although his client resided in Minnesota for a period of time, those arrests and convictions were not defendant's. Defense counsel also argued that defendant never spent any time in the Minnesota Department of Corrections and that he ever violated probation in Minnesota causing a warrant to be issued for his arrest. In addition, defense counsel explained that defendant's brother lived in Minnesota and had been incarcerated in that state. The State informed the court that it did not have any amendments to the pre-sentence investigation report and that it did not wish to present any evidence. The State argued that defendant had four prior felony convictions in Cook County for narcotics related offenses. Two of those convictions defendant stipulated to in the State's case in chief. The other two conviction were used to impeach defendant in rebuttal. The State did not comment on any of the offenses from Minnesota.

¶ 48 After hearing arguments in aggravation and mitigation, as well as defendant's statement in elocution, the court addressed defendant and stated:

> "Mr. Riney, one of the things that I've learned as a judge over here in this building is that when you do a 402 conference you get a very narrow view of the facts and circumstances of the case. We did a 402 conference in this case and I was told that you

dropped a gun on November 19, 2008. I knew that that was a school day, but that's all I was told.

I was told that you had four felony convictions. They didn't mention any of the felony convictions about you being in North Dakota, just the felony convictions here in Cook County."

¶ 49 Reliance on an improper factor in sentencing does not necessarily require remandment for resentencing. *People v. Bourke*, 96 Ill. 2d 327, 332 (1983). However, when a reviewing court is unable to determine from the record the amount of weight afforded to an improperly considered factor, the cause must be remanded for resentencing. *Bourke*, 96 Ill. 2d at 332. Where it can be determined from the record that the weight placed on the improperly considered aggravating factor was so insignificant that it did not lead to a greater sentence, remandment is not required. *Bourke*, 96 Ill. 2d at 332.

¶ 50 We cannot determine from the record before us whether the judge considered defendant's out-of-state convictions in crafting the sentence imposed. The court mentioned the out of state convictions in the context of discussing the cursory amount of information revealed in a pretrial conference and how a judge who conducts a trial hears all of the evidence and finds "out a lot more about a case." The court remarked that "[s]ometime it works to the benefit of the State, sometimes it works to the benefit of the defendant. It depends on the particular facts and circumstances." The court told defendant that one of the things that was not mentioned in the 402 conference was "any of the felony convictions about you being in North Dakota, just the felony convictions here in Cook County." We likewise cannot determine whether the out-of-state convictions actually belong to defendant or someone else. As defendant points out, the

computerized criminal history attached to the pre-sentence investigation report shows that the name of the offender for the offenses in Minnesota was Dawyon Riney, the State was inexplicably silent regarding defendant's contention that those out-of-state convictions did not belong to him. The State never provided a certified copy of conviction for those offenses, nor did it offer an explanation as to its position on the out-of-state offenses once defendant challenged them. As we cannot determine the weight afforded to the out of state convictions, we must find that error occurred here, and that this error constitutes plain error so that the defendant's sentence must be vacated and the cause remanded for resentencing. See *Hillier*, 237 Ill. 2d at 545 (plain error occurs in sentencing where the evidence at sentencing is closely balanced and the error was so egregious as to deny a defendant a fair sentencing hearing.)

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

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

¶ 53 A law is considered to be *ex post facto* if it "(1) makes criminal and punishable an act

innocent when done; (2) aggravates a crime, or makes it greater than it was when committed; (3) increases the punishment for a crime and applies the increase to crimes committed before the enactment of the law; or (4) alters the rules of evidence to require less or different evidence than required when the crime was committed." *People v. Leonard*, 391 Ill. App. 3d 926, 931 (2009).

¶ 54 In *Leonard*, 391 Ill. App. 3d at 931, the defendant was convicted of the offense of being an armed habitual criminal for possessing a firearm after having been previously convicted of three qualifying offenses between 1998 and 2004. The defendant argued that the armed habitual criminal statute violated the prohibition against *ex post facto* laws because his prior convictions were being used as elements of the offense even though they were obtained before the enactment of the armed habitual criminal statute. *Id* at 930. This court rejected the defendant's argument finding that the armed habitual criminal statute did not punish the defendant for offenses committed before the statute was enacted but punished him for "the new act of possessing a firearm." Therefore the statute did not violate the provision against ex post facto laws. *Id* at 391. The court further stated that the defendant had fair warning at the time he possessed the firearm "that, in combination with is prior convictions, he was committing the offense of armed habitual criminal." *Id* at 931.

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

¶ 56 We are similarly unpersuaded by defendant's argument that we should reject these decisions because they conflict with *People v. Dunigan*, 165 Ill. 2d 235 (1995). *Dunigan* is inapplicable here where it upheld the constitutionality of the Habitual Criminal Act (Ill. Rev. Stat. 1989, ch. 38, par 33B-1 (repealed by Pub. Act 95-1052 § 93 (eff. July 1, 2009)) which only dealt with sentencing. See also *People v. Coleman*, 409 Ill. App. 3d 869 (2011); *People v. Tolentino*, 409 Ill. App. 3d 598 (2011); *People v. Ross*, 407 Ill. App. 3d 931 (2011); *People v. Leonard*, 391 Ill. App. 3d 926 (2009); *People v. Davis*, 405 Ill. App. 3d 585 (2010); *People v. Adams*, 404 Ill. App. 3d 405 (2010); *People v. Thomas*, 407 Ill. App. 3d 136 (2011).

¶ 57 CONCLUSION

¶ 58 For the forgoing reasons, we affirm defendant's conviction, vacate his sentence and remand for resentencing.

¶ 59 Affirmed in part; vacated in part and remanded with directions.