2011 IL App (1st) 101500-U

FIFTH DIVISION
December 2, 2011

No. 1-10-1500

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 09 CR 15343
	)	
JAMIE HUMMONS,	)	Honorable
	)	Michael Brown,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE EPSTEIN delivered the judgment of the court.
Justices Joseph Gordon and McBride concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court properly denied motion to quash arrest and suppress evidence where police searched defendant incident to a lawful arrest supported by probable cause. Police officer's prior consistent statement at trial was properly admitted to qualify his prior inconsistent statement and even assuming admission was error, error was harmless. Armed habitual criminal statute did not violate due process clause of the United States and Illinois constitutions. Defendant's armed habitual criminal conviction did not violate *ex post facto* clause of the United States and Illinois constitutions.

¶ 2 Following a jury trial, defendant Jamie Hummons was convicted under the armed habitual criminal statute (720 ILCS 5/24–1.7 (West 2006)) and was sentenced to seven years in

prison. On appeal, Hummons claims that (1) the trial court erred by denying his motion to suppress the gun police officers found on his person because the officers lacked probable cause for his arrest and there were no other grounds justifying the pat down search; (2) the trial court committed reversible error by admitting a police officer's prior consistent statement; (3) the armed habitual criminal statute is unconstitutional because it deprives defendants of due process by mandating that the trier of fact hears evidence of defendant's prior convictions; and (4) Hummons' armed habitual criminal conviction violated the *ex post facto* clauses of the United States and Illinois constitutions because his qualifying convictions occurred before the effective date of the armed habitual criminal statute. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 At 1:30 a.m. on August 12, 2009, police responded to a call received from Monique Johnson. Officers Alejandro Hernandez and Alton Brown encountered Johnson at 71st and Eberhart in Chicago, and she told them that a man had touched her buttocks without her consent. Johnson provided a description of his clothing, vehicle, and general location. The uniformed officers went to that location and approached a man matching the description, who then ran from the officers. The officers caught up with the man, conducted a pat down search, and found a loaded handgun in his pants pocket. The man, defendant Jamie Hummons, was later charged with misdemeanor battery and a number of crimes related to the possession of the gun.

¶ 5 Defendant moved to quash the arrest and suppress the gun as evidence based on a lack of probable cause. At a hearing on the motion, the trial court heard testimony from Officer Hernandez regarding the details of Hummons' arrest. Hernandez testified that Johnson said that a

man "grabbed or slapped her buttocks without her consent" about fifteen minutes before the officers arrived, while Johnson was nearby on St. Lawrence Avenue. While he did not notice any bruising on Johnson's body and she did not complain about pain at the time, Hernandez testified that Johnson was "very angry." Johnson provided a description of the man's clothing, his vehicle, and his general location (just down the block from where the Johnson and the police stood).

¶ 6 After talking with Johnson, Hernandez and his partner got back in the car and went to "[t]he area where she told [them] the offender would be." A few minutes later, the officers encountered Hummons standing alone "near the vehicle which matched the description the victim gave us," which was about three-fourths of a block from where Hernandez spoke with Johnson. Hummons' clothing also matched the description provided by Johnson. As Hernandez approached, Hummons "slowly started to walk away" and then "attempted to flee." After a "brief foot chase," Hernandez conducted a pat down search and found a loaded revolver in Hummons' pants pocket.

¶ 7 The trial judge denied defendant's motion to quash arrest and suppress evidence, finding that the weapon was recovered during a search incident to a valid arrest. The court found that it was reasonable for the officer to believe that the defendant committed the misdemeanor offense of battery, because there "was a specific description given of both Mr. Hummons' person and his vehicle," "the demeanor of the victim was consistent with her complaint about unwelcome touching," Hummons' attempted flight when approached by the officers, and Hummons' presence at a location that was consistent with the information that the victim provided.

¶ 8 Before trial, the State dismissed charges against the defendant for misdemeanor battery, unlawful use of a weapon by a felon, and aggravated unlawful use of a weapon, leaving only the charge under the armed habitual criminal statute. The trial court granted the State's motion *in limine* to present evidence of the battery for the limited purpose of explaining the circumstances of Hummons' arrest.

¶ 9 At trial, the State presented testimony from Johnson, Officer Hernandez, Officer Brown, and Officer Daniel Gainer, who testified regarding the condition and custody of the gun and ammunition. The jury also heard the parties' stipulation that Hummons had "been convicted two times of felony offenses referenced in 720 ILCS 5/24–1.6(a)(1), armed habitual criminal."

¶ 10 Johnson testified that on the night of the incident she was at a party near 71st Street and South Saint Lawrence Avenue. Johnson stated that while at the party, Hummons "pressed his body up against" her and "humped behind" her, but she denied telling the officers that she was "slapped in the butt." Johnson turned around, saw the defendant, and "cussed him out." After leaving the party, Johnson saw Hummons driving a car. Johnson called the police, and when they arrived, she provided a description of the person who had touched her at the party and the car he was driving. The police left, but later returned with Hummons to where Johnson was standing. Johnson identified Hummons as the person who had touched her at the party.

¶ 11 Officer Hernandez generally repeated his testimony from the suppression hearing. He also stated that when he initially placed defendant in custody, he was arresting him for the battery alleged by Johnson. In his testimony, he described the search he conducted as "a custodial search" and a "protective pat down." He also testified that Johnson described defendant's car as a

"black, two-door Oldsmobile Cutlass."

¶ 12 Officer Brown provided a description of the incident similar to that provided by Officer Hernandez. He made an in-court identification of Hummons, whom he identified as the man standing next to a "black Cutlass, drop top, convertible." He also specifically testified that when he and Officer Hernandez approached Hummons, "[h]e started walking I guess it would be eastbound, and then he broke into a run."

¶ 13 The jury returned a guilty verdict on the armed habitual criminal charge. The court sentenced Hummons to seven years in the Illinois Department of Corrections as a Class X offender.

¶ 14 ANALYSIS

¶ 15 *1. Probable Cause for Arrest*

¶ 16 Hummons first challenges the trial court's denial of his motion to quash his arrest and suppress evidence of the gun police officers found on his person. He argues that the police officers lacked probable cause for his arrest and thus could not conduct a search incident to an arrest, and he contends that there were no other circumstances justifying a pat down search.

¶ 17 The standard of review for evaluating a trial court's decision on a motion to suppress evidence is well-established and uncontested:

> "In reviewing a ruling on a motion to quash arrest and suppress evidence, this court applies a two-part standard of review. [Citations.] 'While we accord great deference to the trial court's factual findings, and will reverse those findings only

> if they are against the manifest weight of the evidence, we review *de novo* the court's ultimate ruling on a motion to suppress involving probable cause.' [Citations.]" *People v. Hopkins*, 235 Ill. 2d 453, 471 (2009); see also *People v. Bennett*, 376 Ill. App. 3d 554, 563 (2007).

"[D]efendant must make a *prima facie* case that the evidence was obtained by an illegal search or seizure," and "[i]f a defendant makes a *prima facie* case, the State has the burden of going forward with evidence to counter the defendant's *prima facie* case." *People v. Gipson*, 203 Ill. 2d 298, 306–07 (2003). "[T]he ultimate burden of proof remains with the defendant." *Id.* at 307. This court may consider the testimony adduced at the suppression hearing, as well as evidence presented at trial, in reviewing the trial court's ruling on the motion to suppress. *People v. Sims*, 167 Ill. 2d 483, 500 (1995); see also *People v. Slate*, 228 Ill. 2d 137, 149 (2008).

¶ 18 Defendant first argues that the police did not have probable cause to arrest Hummons and therefore the search of his person cannot be justified as a search incident to arrest. Police must have probable cause to make a warrantless arrest. *People v. Jackson*, 232 Ill. 2d 246, 274–75 (2009). "Probable cause to arrest exists when the facts known to the officer at the time of the arrest are sufficient to lead a reasonably cautious person to believe that the arrestee has committed a crime." *People v. Hopkins*, 235 Ill. 2d 453, 472 (2009) (quoting *Jackson*, 232 Ill. 2d at 275). "In other words, the existence of probable cause depends upon the totality of the circumstances at the time of the arrest." *Id.*

¶ 19 Hummons' principal attack on the trial court's finding of probable cause is that Johnson's statement left doubt as to whether a crime had been committed at all. As our Supreme Court has

explained, "where the question is whether a crime has been committed, as opposed to whether a particular individual committed a known crime, more evidence will be required to satisfy the probable cause requirement." *In re D.G.*, 144 Ill. 2d 404, 410 (1991); see also *People v. Lee*, 214 Ill. 2d 476, 485 (2005). To support his claim that there was doubt as to whether a crime had been committed, defendant argues that the police should have doubted Johnson's truthfulness, and even assuming she was truthful, there was reason to think that no battery had been committed at all because there was a question as to whether the actions Johnson described were intentional.

¶ 20 As to the officers' view of Johnson's truthfulness, we agree with defendant that our supreme court has rejected the "rigidity embodied in the presumptions" that citizen informants are reliable and paid informants are unreliable. See *People v. Adams*, 131 Ill. 2d 387, 398 (1989); see also *People v. Munson*, 205 Ill. 2d 104, 123 (2002). But "[t]he fact that the information came either from the victim or from an eyewitness to the crime is entitled to particularly great weight in evaluating its reliability." *People v. Aguilar*, 286 Ill. App. 3d 493, 497 (1997). Defendant does not point to any evidence produced at the suppression hearing or trial indicating that the officer had any reason to believe that Johnson was lying. At the suppression hearing, Officer Hernandez testified that when he and his partner encountered Johnson, she was "very angry" because a man had just "grabbed or slapped her buttocks without her consent." After hearing this testimony, the trial court found that "the demeanor of the victim was consistent with her complaint about unwelcome touching" and that based on her description, the police had a duty to investigate. We must uphold these findings of fact unless they demonstrate clear error by the trial court. *People v. Wear*, 229 Ill. 2d 545, 561 (2008); see also

Munson, 205 Ill. 2d at 123 (rejecting defendant's argument that police lacked probable cause where he could not point to any evidence in the record that a citizen informant was unreliable). We conclude that these factual findings were not against the manifest weight of the evidence.

¶ 21 Defendant also contends that the police had reason to doubt a crime had been committed because there was a question if the battery was intentional. See 720 ILCS 5/12–3 (2006) (amended by Pub. Act 96–1551, Art. 1, § 5 (eff. July 1, 2011)) ("A person commits battery if he intentionally or knowingly without legal justification and by any means, (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual."). A probable cause determination depends on "the facts known to the officer at the time of the arrest." *Hopkins*, 235 Ill. 2d at 472. While defendant contends that it is possible that someone accidentally bumped into her at the late night party, this possible scenario is wholly inconsistent with Johnson's description of the incident to the officers: a man grabbed and slapped her without her consent. Where there was a clear statement from the victim describing intentional, non-consensual touching, the officers did not have to discredit this information in favor of possible scenarios. Probable cause "concerns the probability of criminal activity, rather than proof beyond a reasonable doubt. [Citation.] Indeed, probable cause does not even demand a showing that the belief that the suspect has committed a crime be more likely true than false. [Citation.]" *Jackson*, 232 Ill. 2d at 275 (internal quotation marks omitted). Any question as to whether Johnson's description was inaccurate again goes to her reliability, and as noted above, defendant has failed to present any evidence that the officers had reason to question the reliability of Johnson's description of events. The trial court's finding that it was reasonable for the officers

to believe that Johnson had described the offense of battery was not against the manifest weight of the evidence.

¶ 22 Having rejected defendant's challenge to the trial court's conclusion that it was reasonable for the officers to believe a crime had been committed based on Johnson's statement, we must therefore reject his contention that the officers lacked probable cause for an arrest. Hummons concedes that a victim's accurate general description of an offender is a relevant factor supporting probable cause. See *People v. Hopkins*, 235 Ill.2d 453, 475 (2009) (noting that the fact that the "defendant, a black male in his 20s, matched the description of the offenders" supported the probable cause finding); *People v. Follins*, 196 Ill. App. 3d 680, 692 (1990). Hummons also concedes that attempted flight is a relevant factor supporting a finding of probable cause. See, *e.g.*, *People v. Wright*, 286 Ill. App. 3d 456, 460 (1996) (quoting *People v. Jones*, 196 Ill. App. 3d 937 (1990)) ("It is well established that defendant's flight from police can be considered as an additional factor in determining probable cause."); *Sibron v. New York*, 392 U.S. 40, 66–67 (1968) ("[D]eliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of mens rea, and when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are proper factors to be considered in the decision to make an arrest.").

¶ 23 In view of the totality of the circumstances, it was reasonable for the officers to believe that Hummons had committed a crime: Johnson described a recent, nearby incident consistent with misdemeanor battery; she provided an accurate description of the clothes, automobile, and location of the man who touched her; and when the officers approached Hummons, he attempted

to flee. These facts provided the officers with probable cause to arrest Hummons. See *People v. Follins*, 196 Ill. App. 3d at 692 (trial court did not err in finding probable cause where defendant matched a broadcast description that offender was wearing blue jogging suit, robbery had been committed a few minutes earlier and within blocks of where officer observed defendant, and defendant stated his destination was Wrigley Field, even though he was walking in the opposite direction).

¶ 24 The search that revealed the handgun was thus a lawful search incident to an arrest, and the trial court did not err in denying defendant's motion to quash the arrest and suppress evidence. See *People v. Hoskins*, 101 Ill. 2d 209, 216 (1984) (finding that a search incident to a lawful arrest does not violate the fourth amendment and is a reasonable search under the amendment). We therefore need not consider the State's contentions that the search of the defendant was a permissible pat down search subsequent to a lawful stop under *Terry v. Ohio*, 392 U.S. 1 (1968).

¶ 25 *2. Prior Consistent Statement*

¶ 26 Defendant next argues that the trial court committed reversible error by admitting Officer Hernandez's prior consistent statement. At trial, Hernandez testified on direct examination:

"Q: As you and Officer Brown approached the Defendant, what happened?

A: He began to flee on foot.

Q: When you say 'he began to flee,' what did he do?

A: He ran.

Q: As the Defendant started to run, what did you do?

A: I pursued the chase.

Q: So you ran after him?

A: Yes."

On cross-examination, defense counsel attempted to impeach Hernandez with a portion of his testimony from the hearing on defendant's motion to quash:

"Q: You were asked this question: He didn't make any furtive moves? And you replied: As we approached he slowly tried to walk away.

A: Yes, and then he ran."

On redirect examination, the State revisited this line of questioning:

"Q: Now, Counsel asked you about a question and an answer. Following that question and answer, were you asked this question and did you give this answer: —

The Court: What page?

Q: Page 9, Your Honor. Question: You said that there was a brief foot chase? Answer: Yes. Were you asked that question and —

Defense: Objection, your honor."

At a sidebar conference, defense counsel argued that the prosecutor could not elicit a prior consistent statement from Officer Hernandez. The court disagreed, stating that "I do think that when there is, in this instance, impeachment testimony given of a witness, the other side can introduce prior consistent statements to rebut an inference of recent fabrication." The court overruled the objection and allowed the State to repeat the question and answer from the hearing, to which Officer Hernandez responded, "Yes."

¶ 27 The testimony at issue can be neatly summarized. At the prior hearing, Hernandez testified that Hummons walked, then he ran. On direct examination at trial, Hernandez testified that Hummons ran. On cross-examination, Hernandez was impeached with part of his statement from the prior hearing: Hummons walked. On redirect, the prosecutor then brought out the other part of the statement from the hearing: Hummons ran. Defendant contends that the State elicited an inadmissible prior consistent statement on redirect.

¶ 28 "Generally, statements made prior to trial for the purpose of corroborating trial testimony are inadmissible." *People v. Cuadrado*, 214 Ill. 2d 79, 90 (2005). In this case, however, defense counsel impeached Hernandez with an answer to a specific question from the suppression hearing, and on redirect the prosecutor brought out testimony from the prior hearing that clarified and qualified this answer. "It is well established that where a witness has been impeached by proof that he has made prior inconsistent statements, he may bring out all of the prior statements to qualify or explain the inconsistency and rehabilitate the witness." *People v. Harris*, 123 Ill. 2d 113, 142 (1988) (citing *People v. Hicks*, 28 Ill. 2d 457, 463 (1963)); see also *People v. Wetzel*, 308 Ill. App. 3d 886, 895 (1999) (listing "a case where the consistent statement could be used to qualify or explain the inconsistency" as an example of one of the "occasions when prior consistent statements may be admissible to corroborate a witness's trial testimony"). In *People v. Hicks*, for example, after the defendant had been impeached by prior inconsistent statements, "defense counsel attempted to bring out other portion of the defendant's testimony" to "show the testimony that *** the prosecutor *** left out." *Hicks*, 28 Ill. 2d at 463. The Illinois Supreme Court concluded that the trial court committed reversible error when it did not permit the

defendant to bring out the prior statements, and "remanded for a new trial so that the defendant will be afforded every opportunity of explaining or reconciling his inconsistent testimony." *Id.* In the present case, where defense counsel impeached Hernandez with a prior inconsistent statement that, by itself, overstated the inconsistency, on redirect examination the prosecutor was entitled to provide the jury with a complete, accurate view of Hernandez's prior testimony.

¶ 29 Defendant does not quarrel with the rule allowing for introduction of prior statements that qualify or explain an inconsistency, but argues that it does not apply here because "Hernandez acknowledged the prior inconsistent statement and explained it himself on cross-examination" by responding, "Yes, and then he ran." According to defendant, because Hernandez already explained his testimony from the prior hearing, his prior consistent statement had no additional probative value. We disagree. Hernandez was impeached by his prior inconsistent statement; this was an attack on his credibility. Hernandez's response to the defense attorney at trial did nothing to repair his credibility. It was only the qualifying statement from the prior hearing that served to "rehabilitate the witness." See *Harris*, 123 Ill. 2d at 142. We therefore conclude that Hernandez's statement that "there was a brief foot chase" was properly admitted as a statement qualifying his testimony that Hummons tried to walk away when the officers first approached.

¶ 30 Even if the trial court did err in admitting the prior statement, the error was harmless because it did not affect the outcome of the trial. See, *e.g.*, *Harris*, 123 Ill. 2d at 142; *People v. Miller*, 302 Ill. App. 3d 487, 493 (1998). The testimony in question did not go to defendant's guilt or innocence on the charged crime; whether the police were in a brief foot chase is irrelevant to establish that the defendant was in possession of a weapon on the night in question.

Defendant complains that the State impermissibly referred to the prior statement during closing argument, but the State's recitation of the fact that Hummons walked and then ran was proper, as Officer Brown provided unimpeached testimony that Hummons "started walking I guess it would be eastbound, and then he broke into a run." While defendant argues that the admission of the prior consistent statement was harmful because it bolstered the credibility of "the State's main witness" by countering his impeachment, Hernandez's testimony was corroborated by testimony from Officer Brown, who stated that defendant was found in the possession of a loaded handgun. As defendant concedes, the evidence of defendant's guilt was not closely balanced. We therefore find that even if the trial court erred in admitting the prior statement, the error was harmless.

¶ 31 *3. Due Process Challenge to the Armed Habitual Criminal Statute*

¶ 32 Defendant next claims that the armed habitual criminal statute, section 24–1.7(a) of the Criminal Code of 1961 (720 ILCS 5/24–1.7(a) (West 2006)), violates the due process clause of the Illinois and United States constitutions because the statute "builds unnecessary prejudice against a defendant" by requiring his prior convictions to be presented to the trier of fact. This court reviews the constitutionality of a statute *de novo*. *People v. Dabbs*, 239 Ill. 2d 277, 292 (2010). A statute is presumed to be constitutional and the party challenging its constitutionality carries the burden of showing that a violation exists. *Id.* "Where, as here, a statute does not affect a fundamental constitutional right, the test for determining whether it complies with substantive due process is the rational basis test." *Id.* (citing *People v. Williams*, 235 Ill. 2d 178, 205 (2009)). "A statute will be upheld under the rational basis test so long as it bears a rational

relationship to a legitimate legislative purpose, and it is neither arbitrary nor unreasonable." *Id.* Section 24–1.7(a) of the Criminal Code of 1961 provides:

> "A person commits the offense of being an armed habitual criminal if he or she receives, sells, possesses, or transfers any firearm after having been convicted a total of 2 or more times of any combination of the following offenses:
> (1) a forcible felony as defined in Section 2–8 of this Code;
> (2) unlawful use of a weapon by a felon; aggravated unlawful use of a weapon; aggravated discharge of a firearm; vehicular hijacking; aggravated vehicular hijacking; aggravated battery of a child; intimidation; aggravated intimidation; gunrunning; home invasion; or aggravated battery with a firearm; or (3) any violation of the Illinois Controlled Substances Act or the Cannabis Control Act that is punishable as a Class 3 felony or higher." 720 ILCS 5/24–1.7(a) (West 2006).

¶ 33 At the outset, we note that this court has twice rejected a due process challenge to the armed habitual criminal statute. See *People v. Davis*, 405 Ill. App. 3d 585, 591-96 (2010); *People v. Adams*, 404 Ill. App. 3d 405, 411–13 (2010). Defendant acknowledges this court's later opinion in *Davis* and simply states that it was wrongly decided. We disagree.

¶ 34 Defendant concedes that the State has a legitimate interest in deterring recidivist felons from possessing firearms, but argues that making the prior convictions elements of the offense is unduly prejudicial. As *Davis* explained in detail, the courts of this state, as well as the United States Supreme Court, have rejected due process challenges to statutes pursuant to which the jury

is informed of a defendant's prior convictions. See *Davis*, 405 Ill. App. 3d at 592–94 (collecting cases); see also, *e.g.*, *Spencer v. Texas*, 385 U.S. 554 (1967) (finding no due process violation for Texas statute that allowed jury to hear evidence of defendant's prior conviction); *People v. Owens*, 37 Ill. 2d 131 (1967) (relying on *Spencer* and rejecting due process challenge based on defendant's claim that "he was deprived of a fair trial because the trier of fact was informed of his prior conviction"); *People v. Allen*, 382 Ill. App. 3d 594 (2008) (finding that unlawful use of a weapon by a felon statute did not violate procedural due process because the jury heard evidence of defendant's prior conviction as element of the offense).

¶ 35 The defendant argues that the United States Supreme Court's decision in *Old Chief v. United States*, 519 U.S. 172 (1997), casts doubt on these decisions. See *Old Chief*, 519 U.S. at 191–92 (holding that where a federal statute required the prosecution to prove that the defendant had a prior conviction and the defendant offered to stipulate to the prior conviction, the trial court erred when, over the defendant's objection, it admitted the full conviction record); see also *People v. Walker*, 211 Ill. 2d 317, 341 (2004) ("[W]here the prosecution's sole purpose for introducing evidence of a defendant's prior felony conviction is to prove his status as a convicted felon and the defendant offers to stipulate to this element, the probative value of the name and nature of the prior conviction is outweighed by the risk of unfair prejudice and, thus, should be excluded."). We agree with the *Davis* court that *Old Chief* "did not involve a due process challenge and cannot be said to represent a departure from the aforementioned due process case law." *Davis*, 405 Ill. App. 3d at 594; see also *Allen*, 382 Ill. App. 3d at 599 ("*Old Chief* and *Walker* suggested that in cases where a defendant's felon status is an element of the offense, a

stipulation to the prior felony conviction is the least prejudicial means of introducing the evidence.").

¶ 36 We are equally unconvinced with defendant's discussion of what he calls the "federal counterpart" to Illinois' armed habitual criminal statute. *See* Armed Career Criminal Act of 1984 (ACCA) (8 U.S.C. § 924(e)(1) (2000)).[1] Defendant argues that the Illinois General Assembly attempted to model the armed habitual criminal statute after the ACCA, which is a sentencing enhancement, but the General Assembly "failed to replicate the ACCA when it made the prior convictions for section 24–1.7 a substantive element."

¶ 37 Defendant suggests that Congress avoided a constitutional violation by making prior convictions part of a sentencing enhancement, while the General Assembly went one step too far by making the prior convictions a substantive element of the crime. The *Davis* court correctly reasoned that "the Illinois legislature was not required to duplicate a federal statute and our legislature's decision not to do was deliberate." *Davis*, 405 Ill. App. 3d at 595. We additionally note that while defendant attempts to draw a line between sentencing enhancements and substantive offenses based on prior convictions, the federal government enacted a statute that, like Illinois' armed habitual criminal statute, makes a prior conviction an element of the crime.

---

[1] Section 924(e)(1) provides:

> "In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g)." 18 U.S.C. § 924(e)(1) (2000).

Indeed, the sentencing-enhancement provisions of the ACCA apply "in the case of a person who violates [18 U.S.C. §] 922(g)." 18 U.S.C. § 924(e)(1) (2000). Section 922(g)(1), which defendant does not discuss, "prohibits possession of a firearm by anyone with a prior felony conviction." 18 U.S.C. § 922(g) (2000). Thus, in order to prove a violation of section 922(g)(1), the government must "introduc[e] a record of judgment or similar evidence identifying the previous offense" or the defendant must stipulate to the conviction. *Old Chief*, 519 U.S. at 174.

¶ 38 Although defendant relies on a case interpreting the ACCA, *United States v. Jackson*, 824 F.2d 21 (D.C. 1987), to support a claim that the ACCA is only constitutional because it does not use prior convictions as an element of an offense, that case did not even address the constitutionality of the ACCA. While the *Jackson* court identified the potential prejudice of putting prior convictions before a jury and observed a "congressional reluctance to make a prior criminal conviction an element of an offense," the court recognized that an "obvious exception" to this "congressional reluctance" was the triggering offense for the ACCA—now codified at section 922(g)—which itself makes a prior conviction an element of an offense. *Id.* at 25 & n.6. The ACCA may be different from the Illinois legislative scheme, but this does not mean that the federal courts (or the federal legislature) have recognized a constitutional infirmity in using prior convictions as an element of a crime.

¶ 39 We recognize, as did the courts in *Old Chief*, *Walker*, and *United States v. Jackson*, that there is a risk of unfair prejudice when a defendant's prior conviction is before the jury. However, this does not give a reviewing court the liberty to overturn an act of the legislature, in contradiction to a long line of cases rejecting due process challenges to statutes that require the

jury receive evidence of the defendant's prior conviction. See, *e.g.*, *Spencer*, 385 U.S. at 564 (concluding that "possibility of some collateral prejudice" where the jury was informed of defendant's prior conviction did not render state statute unconstitutional); *Allen*, 382 Ill. App. 3d at 691–92 (finding no due process violation where trial court accepted parties' stipulation that "defendant had previously been convicted of a felony for purposes of establishing an element of the offense"). "Even if we believe a wiser or fairer means may exist to achieve the legislature's objective, this does not rise to a determination that the armed habitual criminal statute is not rationally related to a legitimate state purpose." *Davis*, 405 Ill. App. 3d at 596. We therefore conclude that defendant has not met his burden of proving that the armed habitual criminal statute is unconstitutional.

¶ 40 *4. Ex Post Facto Challenge to the Armed Habitual Criminal Statute*

¶ 41 Defendant finally contends that his habitual criminal conviction violated the *ex post facto* clauses of the United States and Illinois constitutions because both of his qualifying convictions occurred before the effective date of the armed habitual criminal statute. The United States Constitution and the Illinois Constitution both prohibit *ex post facto* laws. U.S. Const., art. I, § 9, cl.3, § 10, cl. 1; Ill. Const. 1970 art. 1, § 16. "An *ex post facto* law is one that (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. Tolentino*, 409 Ill. App. 3d 598, 607 (2011) (quoting *People v. Leonard*, 391 Ill. App. 3d 926, 931 (2009)). "The

cornerstone of the constitutional prohibitions against *ex post facto* laws is that persons have a right to fair warning of that conduct which will give rise to criminal penalties." *People v. Coleman*, 111 Ill. 2d 87, 93 (1986).

¶ 42 The effective date of the armed habitual criminal statute is August 2, 2005, and Hummons was convicted of the two qualifying offenses on September 4, 2003. Hummons argues that having two qualifying prior convictions is one of two elements of the statute, and the habitual criminal statute therefore violates *ex post facto* principles by changing the legal consequences of the acts that resulted in his prior convictions.

¶ 43 Defendant acknowledges that this court has uniformly rejected this argument in several prior cases. See *People v. Tolentino*, 409 Ill. App. 3d 598 (2011); *People v. Coleman*, 409 Ill. App. 3d 869 (2011); People v. *Ross*, 407 Ill. App. 3d 931 (2011); *People v. Thomas*, 407 Ill. App. 3d 136 (2011); *People v. Davis*, 405 Ill. App. 3d 585 (2010); *People v. Adams*, 404 Ill. App. 3d 405 (2010); *People v. Bailey*, 396 Ill. App. 3d 459 (2009); *People v. Leonard*, 391 Ill. App. 3d 926 (2009). While defendant contends that these cases were incorrectly decided, he raises no arguments here that were not fully and convincingly addressed in these previous cases.

¶ 44 We see no reason to depart from the sound reasoning of the long line of authority rejecting defendant's argument. The court in *Bailey* explained that the armed habitual criminal statute "did not punish the defendant for offenses he committed before it was enacted but, instead, punished him for the separate offense of possessing a firearm after having been convicted of three of the statute's enumerated offenses." *Bailey*, 396 Ill. App. 3d at 463. The *Bailey* court, along with courts that later addressed the issue, also reasoned that because the

defendant's firearm possession was after the effective date of the statute, "he had ample warning that, in combination with his prior convictions, he was committing the offense of armed habitual criminal." *Id.* Several of these decisions also thoroughly addressed, and rejected, defendant's reliance on the Illinois Supreme Court's decisions in *People v. Dunigan*, 165 Ill. 2d 235 (1995), and *People v Levin*, 157 Ill. 2d 138 (1993). See, *e.g.*, *Tolentino*, 409 Ill. App. 3d at 609 (quoting *Leonard*, 391 Ill. App. 3d at 932) ("*Dunigan* and *Levin* do not expressly prohibit the use of prior convictions as elements of an offense in all habitual criminal legislation. Instead, 'they merely indicated that the statute in question in those cases was a sentencing enhancement, not a substantive offense. [Citations]. In contrast, the armed habitual criminal statute [at issue here] *** creates a substantive offense which punishes a defendant, not for his or her earlier convictions, but for the new offense.'"). We conclude that, as applied in this case, the armed habitual criminal statute does not violate the *ex post facto* clause of the Illinois or United States constitutions.

¶ 45 CONCLUSION

¶ 46 For the foregoing reasons, we affirm defendant's conviction under the armed habitual criminal statute.

¶ 47 Affirmed.