2011 IL App (1st) 093587

SIXTH DIVISION
NOVEMBER 10, 2011

No. 1-09-3587

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. 08 CR 21667
	)	
ANTONIO ALMOND,	)	Honorable
	)	Thomas Joseph Hennelly,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE ROBERT E. GORDON delivered the judgment of the court.
Justice Cahill concurred in the judgment.
Justice Garcia concurred in part and dissented in part.

ORDER

¶ 1 *Held*: We find that, based on the exhibits and testimony introduced at the suppression hearing and at trial, the search and seizure in the case at bar did not violate the fourth amendment; that defendant's multiple convictions, based on the same physical act of possessing one loaded firearm, cannot

> stand and we affirm the conviction on count 1 for being an armed habitual criminal and vacate the remaining convictions; and that the armed habitual criminal statute does not offend the second amendment right to bear arms.

¶ 2 After a bench trial, defendant Antonio Almond was convicted on October 14, 2009, as indicated on the mittimus, for: (1) one count of being an armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2008); (2) two counts of unlawful use of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2008), and (3) two counts of aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1), (3)(A) (West 2008). The mittimus, dated December 1, 2009, states that the trial court sentenced defendant to six years for the armed habitual criminal count, with three-year sentences each for the remaining counts. The mittimus also states that all sentences are to be served concurrently.

¶ 3 It is undisputed by the parties that, on October 30, 2008, a police officer recovered a firearm from defendant's pants waistband while defedant was standing in a store. Defendant claims that he was a customer and that the police lacked probable cause for the search and seizure. The State claims that the officers entered the store after receiving anonymous information about drug selling at the store and asked defendant whether he possessed narcotics or weapons, and he

responded that he had a gun. Defendant filed a Freedom of Information Act (FOIA) request which provided support for his claim that the officers had not received a call. However, no exhibits or testimony about the lack of a call were introduced into evidence by defense counsel at either the suppression hearing or at trial.

¶ 4 On this direct appeal, defendant claims that: (1) the police lacked probable cause for the search and seizure, as required by the fourth amendment, and thus the trial court erred in denying his pretrial motion to quash his arrest and suppress evidence; (2) the statutes creating the offenses of armed habitual criminal, unlawful use of a weapon by a felon, and aggravated unlawful use of a weapon violate the second amendment right to bear arms; and (3) his multiple convictions are based on the same physical act and thus violate the one-act, one-crime rule. No claim of ineffective assistance of counsel is before us.

¶ 5 In response to defendant's "one act, one crime" claim, the State asks this court to let stand two of defendant's convictions and to vacate the rest. In response to defendant's fourth amendment claim, the State argues that defendant forfeited this issue by counsel's failure to raise it in a posttrial motion for a new trial.

¶ 6 For the following reasons, we find that, based on the exhibits and testimony introduced at the suppression hearing and at trial, the search and seizure did not violate the fourth amendment. We also find that defendant's multiple convictions, based on the same physical act of possessing one loaded firearm, cannot stand and we affirm the conviction on count 1 for being an armed habitual criminal and vacate the remaining convictions. We also find that the armed habitual criminal statute does not offend the second amendment right to bear arms.

¶ 7 BACKGROUND

¶ 8 I. The Indictment

¶ 9 On December 1, 2008, based solely on defendant's possession of one loaded firearm, defendant was indicted on seven counts: count 1, for being an armed habitual criminal; count 2, for unlawful use of a weapon by a felon, in that he possessed a firearm; count 3, for unlawful use of a weapon by a felon, in that he possessed firearm ammunition; count 4, for aggravated unlawful use of a weapon, in that he carried an uncased, loaded and immediately accessible firearm when he was not on his own land or in his own abode and while a convicted felon; count 5, for aggravated unlawful use of a weapon, in that he carried a firearm when he was not on his own land or in his own abode, without a valid license and while a

convicted felon; count 6, for aggravated unlawful use of a weapon, in that he carried an uncased, loaded and immediately accessible firearm, when he was on a public street and while a convicted felon; and count 7, for aggravated unlawful use of a weapon, in that he carried a firearm while not on his own land or in his own abode, without a valid license and while a convicted felon.

¶ 10 II. Pretrial Proceedings

¶ 11 On February 4, 2009, defendant filed a pretrial motion seeking to quash his arrest and suppress evidence on the ground that the police lacked probable cause, prior to defendant's arrest, to believe that defendant had or was about to commit a crime.

¶ 12 At the pretrial hearing on March 4, 2009 on defendant's suppression motion, three witnesses testified: (1) defendant; (2) Officer James Davis, the arresting officer; and (3) his partner, Officer Carl Weatherspoon.

¶ 13 Defendant testified that at around 1:00 p.m. he was a customer inside a liquor store when two police officers entered and approached him. The officers were wearing street clothes and had badges hanging around their necks. After the officers approached, they told defendant "to get on the gate," which was a reference to a security gate inside the store which protected store employees.

Defendant immediately complied, placing his hands on the gate, and the police officers started to search him. One officer grabbed defendant's waist and felt a gun, and then stepped back. Defendant testified that he did not tell the officer, prior to the officer's search, that he had a gun. Defendant testified that he would not have admitted to the officer that he had a gun, because he knew "it's wrong to have a gun." The officer then recovered the weapon from defendant and placed defendant under arrest.

¶ 14 On cross examination, defendant testified that, when he entered the liquor store, he was by himself. However, when he was inside the store and the officers approached, there were two men with him. Defendant also testified that when the officers first approached, they asked him his name. However, he denied that the officers asked him what he was doing there or whether he had anything on him. Defendant admitted that he was carrying a Smith and Wesson firearm loaded with six rounds of ammunition.

¶ 15 The trial court found that defendant had met its burden, and the State then offered a stipulation between the parties that defendant has a prior felony conviction. The State then called the arresting officer to the stand.

¶ 16 Police officer James Davis testified that he and his partner, Carl Weatherspoon, were working on October 30, 2008, when they received information from "2nd District desk personnel" at approximately 12:45 p.m. or 1 p.m. that someone had walked into the police station and stated that several men were selling drugs inside a particular store on East Pershing Road.

¶ 17 Officer Davis testified that he and his partner then drove to this store on East Pershing in a marked patrol vehicle. As their vehicle approached the store, Officer Davis observed defendant outside of the store, as well as "five others." The officers then parked and exited their patrol vehicle, and they were wearing plain clothes with a vest, and their badges were not visible. After the officers exited, defendant walked into the store with two of the individuals, while two other men left the location heading in opposite directions.

¶ 18 Officer Davis testified that he and his partner followed the three men into the store, and approached defendant. They asked him "what was he doing inside the store." Officer Davis also asked defendant if he had any narcotics or weapons on him. Defendant responded, “I just got to let you know I got a gun on me.” The officers then recovered a weapon from defendant’s pants waistband. Officer Davis testified that he was the officer primarily speaking with defendant,

while his partner spoke to the two other individuals who had walked into the store with defendant.

¶ 19 On cross examination, Officer Davis admitted that he did not remember from whom he had received his information at the Second District. He also did not know who had provided the information originally to the Second District. Officer Davis acknowledged that this was like an anonymous tip, since they had no information either about the original source or how the source had acquired the information. However, the officer did recall being told that individuals were selling drugs in and out of the store.

¶ 20 On cross examination, although Officer Davis had previously testified that there were "five others" in addition to defendant, he now stated that there were five individuals total outside the store when the patrol vehicle approached. Officer Davis then admitted that he prepared both the arrest report and the case report which both stated that there were only three individuals outside the store, namely, defendant and two others. Officer Davis also admitted that both the arrest and case report did not contain any information that the officer had followed defendant inside the store. Officer Davis also admitted that he did not observe defendant doing anything suspicious prior to the officers' approach.

¶ 21 Officer Davis admitted that he only description provided by the anonymous source was that there were "several male blacks." There was no description of age, clothing, height or hair. No one followed the two men, who were not mentioned in the police reports, and who had walked in opposite directions from the store.

¶ 22 On re-cross examination, Officer Davis admitted that there was nothing in the three pages of police reports that he prepared to indicate that the officers entered a store or questioned defendant inside a store.

¶ 23 In rebuttal, the defense called Officer Weatherspoon, Officer Davis' partner. Officer Weatherspoon testified that he also did not remember the name of the person at the Second District's front desk who told the officers about the alleged drug sales at the store on Pershing Road. He also did not know anything about either the original source of this information or how the source had obtained this informtion. Officer Weatherspoon confirmed that he had not received any description of the suspects' height, weight, clothing or hair style. Although he heard Officer Davis talking to defendant inside the store, he did not know the extent of the questions Officer Davis asked because he (Officer Weatherspoon) was talking to the other two men in the store.

¶ 24 In cloisng, the defense argued that, after receiving only an uncorroborated anonymous tip without any detail describing the suspects, the police did not have the right to make a Terry stop. Second, the defense argued that it made no sense for a convicted felon to volunteer that he had a gun, as the officers claimed. Third, the defense argued that the police were impeached by their own reports.

¶ 25 In response, the State argued that the police officers' approach did not rise to the level of a Terry stop, and that a police officer is more credible than a convicted felon. After arguments, the trial court took the motion under advisement for a later disposition.

¶ 26 On March 16, 2009, the trial court denied defendant's suppression motion finding that it was not a Terry stop and thus no reasonable suspicion was required and that the officers were credible. The trial court stated that "judging from the testimony of the police officers... they searched Mr. Almond because he made an oral statement admitting or indicating that he had a firearm." The trial court explained:

> "I think it is really more a matter of credibility rather than a matter of law," and "to make that decision, I have the testimony of

> two uniformed police officers, veteran police officers, with the testimony of a convicted felon. And I considered his felony conviction only how it affects his credibility, not for any preconceived notion he may have committed the crime *** and I choose to believe the testimony of those police officers. So, I believe Mr. Almond did make this statement, and as a result they were within their rights to conduct a search and recover the firearm."

¶ 27 Accordingly, the trial court rejected defendant's fourth amendment claims of an unreasonable search and seizure and denied defendant's motions to quash arrest and suppress evidence. On March 30, 2009, defense counsel informed the trial court that the parties had discussed a possible resolution and that he expected the case to be disposed of at the next court appearance.

¶ 28 On May 1, 2009, a handwritten letter to the trial court from defendant was filed in the circuit court. In the letter, defendant argues that the police officers' testimony at the pretrial motion had inconsistencies and was inherently incredible at certain points. Defendant asked the trial court to review "the Chicago C.P.D. camera outside of" the store on Pershing Roadd which he stated would reveal only the presence of the two officers, Officer Davis and Officer Weatherspoon.

¶ 29 In a handwritten letter dated June 11, 2009 and stamped filed with the circuit court on August 20, 2009, defendant sought discovery by submitting a Freedom of Information Act ("FOIA") request to the Office of Emergency Management and Communications for "the complete Chicago Police Dept. all calls, radio transmissions, and event query [*sic*]" regarding a man selling drugs at the store on East Pershing Road on October 30, 2008, between the hours of 1:00 p.m. and 3:00 p.m.

¶ 30 In a letter dated June 18, 2009, and stamped filed with the circuit court on August 20, 2009, the office responded stating:

> "You requested information pertaining to persons selling drugs at the above location between 1:00 p.m. and 3:00 p.m.. There are no records located for the time and location requested for drug selling."

¶ 31 On July 13, 2009, in open court, defendant addressed the trial court directly to express dissatisfaction with his attorney, and his attorney asked the trial repeatedly for permission to withdraw, which the trial court denied.

¶ 32 The July 13th hearing began with defense counsel informing the trial court that his client wanted to protect his right to appeal the court's decision denying his suppression motion, and thus counsel had set the case down for a

bench trial. Defendant then spoke to the trial court directly, trying to inform him of the results of his FOIA request. However, the trial court said that it could not really "get involved into [sic] attorney client conversations and the evidence."

¶ 33 With respect to the motion, the trial judge stated that he had "chose[n] to believe what you and your wife presented." However, defendant's wife, if he had one, did not testify at the suppression hearing.

¶ 34 Defendant then stated that he wanted a bench trial but he was dissatisfied with his attorney's representation. Defense counsel agreed that his client had "lost faith" in his representation. Defendant then asked the trial court again to look at the FOIA letter, and the trial court refused, stating that defendant was represented by counsel. Defense counsel then asked the trial court's permission to withdraw, which the trial court denied, stating that it was "too late to bring in new counsel."

¶ 35 The trial court recessed to allow counsel to speak to his client. When they returned, defense counsel stated that he had informed his client that the only purpose of a trial, at this point, would be to protect defendant's right to appeal the trial court's denial of the motion to quash the arrest, and that the best way to protect

his right to appeal this motion was through a bench trial. However, his client did not want him to be his attorney any longer.

¶ 36 The trial court stated that the only condition upon which it would allow defense counsel to withdraw was if defendant could arrange for another attorney who would be able to go to trial in a couple of months. Defendant indicated that, at trial, he wanted to call the desk sergeant whom the officers stated had given a call, because the FOIA request had indicated that it did not happen. The trial court responded that he "would have a right to present that evidence at a bench or at a jury trial." Defendant ultimately agreed to remain with his counsel and to have a bench trial. The trial court then stated that, if defendant wanted "to subpoena the desk sergeant," that may not be relevant "to anything," and the trial judge "may or may not allow him to testify."

¶ 37 On August 20, 2009, in open court, the trial judge informed defendant that he had "received some correspondence from you, sir, which I did not open." The trial judge stated:

> "I showed it to your lawyer. It's really not proper for you to write to the Court while you still have a pending matter, okay? Those are just

rules we have. If you want to present something to me, speak to [defense counsel] and then he'll address me that way."

Defense counsel then formally tendered the letter to the trial court.

¶ 38 On September 30, 2009, defense counsel filed a motion to reconsider with the trial court which was argued and denied on October 14, 2009. On that same day, defendant signed a written waiver of his right to a jury trial and the matter proceeded to a bench trial.

¶ 39 III. The Trial

¶ 40 Since the parties did not stipulate to the testimony and exhibits at the suppression hearing, the State called Officer James Davis, the arresting officer, to testify again. Officer Davis was the sole witness at the bench trial held on October 14, 2009.

¶ 41 Officer Davis testified that, on October 30, 2008, at 1:15 p.m., he was on duty, in civilian clothes, when he received a complaint of narcotics activity at a store on East Pershing and he drove there with his partner, Officer Weatherspoon, in a marked police vehicle. As their vehicle approached, he observed defendant and two other individuals "inside the door entranceway of 330 East Pershing" which is a food and liquor store. When the officers approached defendant,

defendant and the two other individuals entered the store. After defendant and the other two men entered, they sat against a wall. The store is a twenty-foot by twenty-foot cube, with a window where the cashier delivers goods from behind a fenced-in area.

¶ 42 Officer Davis testified that he and his partner approached the defendant and the two other men, who were all sitting together, against the wall. Officer Davis asked defendant what he was doing inside the store and whether he had any weapons or narcotics on him. Defendant replied: "I got to let you know I got a gun on me." The officer then recovered from defendant's pants waistband a Smith and Wesson .38 caliber firearm, which was loaded and uncased

¶ 43 On cross examination, Officer Davis testified that he and his partner received a police radio call about a citizen complaint between 12:30 and 1 p.m. when they were on the street and they were instructed to return to the Second District. The officer acknowledged that radio calls from the Second District to officers on the street are recorded by the Office of Emergency Management and Communications. When the officers returned, someone at the Second District desk, whom Officer Davis could not recall, told Officer Davis that "someone" had entered the station and complained about "a lot of men selling drugs" at 330 East

Pershing Road. He did not receive any information about the "someone" or how this person had acquired his or her information. When Officer Davis and his partner arrived at the store on Pershing Road, they did not set up surveillance to observe if anyone was, in fact, selling drugs. Although they observed defendant and two other men near the store, they admitted that they did not observe defendant engage in any hand-to-hand transactions. Officer Davis admitted that they had no other information about the suspects except that they were black males, and there were other black males in the vicinity. Officer Davis acknowledged that there had been multiple citizen complaints about drug trafficking near that location.

¶ 44 Officer Davis admitted that, when he arrived at the store on East Pershing, he did not observe defendant do anything illegal. After defendant and two men entered the store, the officers followed them inside in order to do "a field interview." Although Officer Davis had testified on direct that the three men were sitting against the wall, he now stated that they were standing against the wall. After the officers approached the three men, Officer Davis asked them what they were doing inside the store and they replied that they were going to purchase some chips. Then Officer Davis asked them "why weren't they at the register [as] opposed to being in the back of the wall just standing there," and they did not

respond. Officer Davis then testified that he asked defendant "did he have any weapons or narcotics on him" and defendant replied: "I got to let you know I got a gun on me."

¶ 45 Officer Davis could not remember whether defendant was wearing a coat. The gun was in defendant's "front right waistband," but the officer did not observe the weapon when the officer first approached defendant. Defendant attempted to give the officer the gun, but the officer told him to stop and the officer would retrieve it, which he did.

¶ 46 Then the State then entered into evidence certified copies of two prior felony convictions of defendant which were received without objection. Both the State and the defense rested, and the State waived its initial closing argument.

¶ 47 In closing, defense counsel's first remarks were: "Well, Judge, now on top of the motion to quash arrest, you got some additional information." Counsel argued that his "client himself subpoenaed OEMC and there is no record whatsoever of this beat that the officer was assigned that day getting any call to come in the station or getting any call whatsoever from anyone."

¶ 48 Defense counsel argued that it was inherently incredible: that the police station would call officers into the station rather than telling them over the

radio; and that defendant would not explain why he was not at the register paying for his chips but would volunteer that he had a gun. Defense counsel also argued based on what defendant had testified to at the suppression hearing and attempted to reargue the suppression motion.

¶ 49 The trial court then found Officer Davis's testimony credible and found defendant guilty "as to all counts."

¶ 50 IV. Posttrial Proceedings

¶ 51 On November 9, 2009, defense counsel filed a posttrial motion for a new trial alleging only the boilerplate claims that the State failed to prove defendant guilty beyond a reasonable doubt and that the verdict was against the manifest weight of the evidence. The motion alleged no specific claims. On December 1, 2009, the trial court asked defense counsel whether he wished to argue or to stand on his motion. Defense counsel replied that "we did argue on the last court date." The trial court replied that "the common law record" did not indicate whether the motion was argued. Defendant counsel then stated that he would stand on the motion. The trial court then ruled: "I've reviewed your motion, counsel, I've considered the claims of error in there. But, I believe I was correct when I decided this case."

¶ 52 In open court on December 1, 2009, after considering factors in aggravation and mitigation, the trial court sentenced defendant on all of the seven counts in the indictment. However, the mittimus, which was also filed on December 1, 2009, indicates that defendant was sentenced on only five counts.

¶ 53 In open court, the trial court stated that defendant was sentenced to the minium of six years on count 1, for being an armed habitual criminal. For each of the remaining six counts, the trial court also sentenced defendant to the minium of three years for each count. In addition, the trial judge ordered that all counts were to run concurrently.

¶ 54 The mittimus filed on December 1, 2009, indicates that defendant was sentenced on five counts. The mittimus states that defendant was sentenced to six years for count 1, being an armed habitual criminal. For the remaining four counts, defendant received a sentence of three years for each count, with all counts to run concurrently. The four counts are: count 2, "felon poss/use firearm prior"; Count 3, "felon poss./use firearm prior"; count 4, "agg uuw/veh/prev conviction"; and count 5, "agg uuw/veh/prev conviction."

¶ 55 On December 16, 2009, a notice of appeal was filed. In an order by the appellate court dated January 31, 2011, we permitted the filing of an amended notice of appeal, stating:

> "That the motion to amend the notice of appeal to reflect the correct offenses of armed habitual criminal, two counts unlawful use of a weapon by a felon and four counts aggravated unlawful use of a weapon, and the correct sentence of one six-year term and six three-year terms, all concurrent, is hereby allowed."

¶ 56 ANALYSIS

¶ 57 I. Fourth Amendment Claim

¶ 58 On appeal, defendant asks us to reverse the trial court's denial of his pretrial motion to quash arrest and suppress evidence based on fourth amendment grounds.

¶ 59 A. State's Forfeiture Argument

¶ 60 First, we must address the State's forfeiture argument. Defendant concedes that his counsel failed to raise this issue in his written posttrial motion for a new trial. Generally, to preserve an issue for appellate review, a defendant must

both object at trial and raise the issue in a written posttrial motion. *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007).

¶ 61 Although defendant concedes that his counsel failed to raise the fourth amendment issue in his posttrial motion, he argues, relying on *People v. Segoviano*, 189 Ill. 2d 228, 243 (2000), and *People v. Burnfield*, 295 Ill. App. 3d 256, 262 (5th Dis. 1998), that this failure should not cause him to forfeit review because: (1) his counsel brought the issue to the trial court's attention in a written pretrial motion to quash arrest and suppress evidence; (2) his counsel litigated the motion at an evidentiary hearing; (3) and, after the trial court denied it, counsel specifically informed the court that defendant would proceed to a bench trial solely in order to "protect his right to appeal that decision"; (4) and, finally, counsel presented and argued a written motion to reconsider the denial of his initial pretrial motion. was sufficient to preserve the issue for appellate review. *Burnfield*, 295 Ill. App. 3d at 262 (citing *People v. Torres*, 283 Ill. App. 3d 281 (1996)). However, we observe that, whether or not we relaxed the waiver rule, the result would be the same, because we find no error at all -- plain or otherwise.

¶ 62 When a defendant has failed to preserve a claim for appellate review, we may still review for plain error. *Piatkowski*, 225 Ill. 2d at 564. The plain error

doctrine allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurs and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurs and that error is so serious that if affects the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *Piatkowski*, 225 Ill. 2d at 565.

¶ 63 However, the first step in a plain error analysis is to determine whether there was any error at all. *Piatkowski*, 225 Ill. 2d at 565. If there is no error, there can be no plain error. On the basis of the evidence admitted at the suppression hearing and at trial, we find no error, as we explain below.

¶ 64 B. Defendant's Fourth Amendment Claim

¶ 65 We find no error because, based on the evidence admitted at the pretrial hearing and at trial, we find that the police had reasonable suspicion for a Terry stop, and that it was reasonable for the police to inquire, out of safety concerns, whether defendant was armed.

¶ 66 Although the facts and evidence at the pretrial hearing were closely balanced, the trial court made a credibility judgment between the police officer and

defendant and resolved the conflicts in their testimony based on the evidence in the record and its personal observation of the witnesses. A trial court's factual findings receive great deference on appeal and will not be disturbed unless they are contrary to the manifest weight of the evidence. *People v. Pitman*, 211 Ill. 2d 502, 512 (2004); *People v. Gherna*, 203 Ill. 2d 165, 175 (2003). "This deferential standard of review is premised upon the reality that the circuit court is in 'a superior position to determine and weigh the credibility of the witnesses, observe the witnesses' demeanor, and resolve conflicts in the witnesses' testimony.' " *Gherna*, 203 Ill. 2d at 175 (quoting *People v. Gonzalez*, 184 Ill. 2d 402, 412 (1998)); *Pitman*, 211 Ill. 2d at 512. In light of the testimony and exhibits admitted at the pretrial hearing and the trial, which did not include any evidence of the lack of a radio call, and the claims made before us on appeal, which did not include a claim of ineffective counsel, defendant cannot establish that the trial court's factual findings were manifestly erroneous. As a result, in reviewing the trial court's ultimate decision on the suppression issue, we accept as credible the officer's version of the facts. Once we have accepted the trial court's findings of fact, we then review *de novo* the trial court's ultimate decision of whether suppression was warranted on those facts. *Gherna*, 203 Ill. 2d at 175. A reviewing court is free to

make its own assessment of the facts, as they relate to the issues, and to draw its own conclusions when deciding what relief should be granted. *Pitman*, 211 Ill. 2d at 512; *Gherna*, 203 Ill. 2d at 175-76.

¶ 67 Accepting the officer's version of events for the reasons stated above, we find, first, that there was a Terry stop. A Terry stop is a brief, investigative detention, and it occurs when a reasonable person in the defendant's shoes would reasonably believe that he was not free to terminate the encounter. *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) ("a brief investigatory stop"), citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968); *Florida v. Bostick*, 501 U.S. 429, 438 (1991) (the key inquiry is whether a reasonable person would have felt free "to terminate the encounter"). In the case at bar, based on the officer's description of events, we find that a reasonable person would not have believed that he was free to terminate the encounter, after the officers had arrived and parked immediately in front of defendant's location, pursued defendant from the street to the inside of a store, chose to pursue defendant instead of other individuals who walked in opposite directions immediately upon the police vehicle's arrival, stood in front of defendant with his back to a wall and thus physically blocked any further movement by defendant, and demanded to know, if defendant was purchasing chips, why he was

not at the register and whether defendant had narcotics or a gun. *Gherna*, 203 Ill. 2d at 180 ("the blocked movement" of defendant's vehicle, with a police officer on a bike on either side of her vehicle, combined with police questions, would have led a reasonable person to believe that she was not free to terminate the encounter). See also *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) ("we have consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry"); *Bostick*, 500 U.S. at 437 (a Terry stop is judged by "taking into account all of the circumstances surrounding the encounter" and what they would have communicated to a reasonable person). Certainly, when the officer asked defendant whether he had narcotics or a gun, any reasonable person in defendant's shoes would not have felt free to terminate the encounter.

¶ 68 However, we find, based on the officer's description of events, that he had reasonable suspicion for the Terry stop, based on the anonymous tip, as well as other citizen complaints, that this was a high drug-trafficking area, and defendant's immediate and otherwise unprovoked flight at the officer's approach, as well as the scattering in three different directions of all the men standing near defendant. Similarly, in *Illinois v. Wardlow*, 528 U.S. 119 (2000), the United States Supreme Court held that a police officer had reasonable suspicion for a Terry stop and an

ensuing protective pat-down search, after defendant's immediate and otherwise unprovoked flight in a drug-trafficking area, as police vehicles were driving past him. *Wardlow*, 528 U.S. at 121, 124. In the case at bar, there is the additional fact that all the men whom defendant was standing with scattered in three completely different directions at the officer's approach. Based on *Wardlow* and the circumstances described by the officer, we find that the officer had reasonable suspicion for a stop.

¶ 69 We find, based on the officer's description of events, that it was reasonable for an officer during a Terry stop and out of safety concerns, to ask the suspect if he was armed and to retrieve the weapon once defendant admitted that he had a gun and started reaching for his gun, particularly in light of the fact that defendant was reaching for his gun in a store and with the officers standing directly in front of him. *Terry*, 392 U.S. at 23 (noting the "immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him").

¶ 70 In sum, based on the exhibits and testimony that were introduced at the pretrial hearing and trial, and which did not include evidence of the absence of

a radio call, we find that the trial court's determination that the officer was credible was not against the manifest weight of the evidence. Based on the officer's description of events, we find that the officer's conduct did not exceed the scope of a valid Terry stop and thus did not violate the fourth amendment Since we do not find any error, the result is the same whether or not we find the error was waived.

¶ 71 II. Defendant's Claim Under the One Act, One Crime Rule

¶ 72 Before addressing defendant's claims that his convictions violate the second amendment, we must determine first which of his convictions should stand and which, if any, must be vacated.

¶ 73 First, we note a discrepancy between the mittimus and the trial court's oral sentencing in open court. The mittimus reflects five convictions, and the oral sentence reflects seven. Both the oral sentencing and the mittimus reflect a conviction on the first five counts, which include one count for being an armed habitual criminal, two counts for unlawful possession of a firearm by a felon, and two counts for aggravated unlawful use of a weapon. The difference between the mttimus and the oral sentence is that the mittiums does not reflect convictions on counts 6 and 7, which were additional counts for aggravated unlawful use of a

weapon. Since the parties ask us to let stand only counts 1 and 3, this discrepancy does not affect our analysis.

¶ 74 Both parties ask us to let stand only one conviction for the possession of the firearm, and another conviction for the possession of the ammunition inside the firearm. This we cannot do.

¶ 75 For the possession of the firearm, the parties ask us to let stand count 1, the conviction for being an armed habitual criminal, and to vacate the other counts which concern the firearm. However, the parties ask us to affirm count 3, for the sole reason that it concerns the ammunition inside the firearm, rather than the firearm itself.

¶ 76 The State asks us to let stand: "his conviction for AHC (Count 1), based on the same act of knowing possession of a single firearm" and "his conviction for unlawful use of a weapon by a felon (Count 3) based on the distinct act of his knowing possession of ammunition." The State states that it "agree[s] that this Court should vacate defendant's *** remaining convictions [which were] predicated on the same act of possession of a firearm as his AHC conviction."

¶ 77 Once both parties have agreed that the one act, one crime rule applies and have asked us to vacate convictions based on it, we are then compelled to

determine the parameters of the rule and which convictions must be vacated. *Cf. People v. Givens*, 237 Ill. 2d 311, 328 (2010) (observing that an appellate court "was compelled in the interest of justice to *sua sponte* address the trial court's 'obvious error' in convicting defendant of four separate counts of first degree murder involving a single murder), citing *People v. Rodruguez,* 336 Ill. App. 3d 1, 12 (2002). The one-act, one-crime doctrine prohibits multiple convictions when the convictions are carved from precisely the same physical act. *People v. Miller,* 238 Ill. 2d 161, 165 (2010); *People v. King*, 66 Ill. 2d 551, 566 (1977). "Where but one person has been murdered, there can be but one conviction of murder." *People v. Cardona*, 158 Ill. 2d 403, 411 (1994). Similarly, when the State presents evidence of defendant"s possession of only one loaded firearm at only one point in time, there can be only one conviction based on it. *People v. Quinones*, 362 Ill. App. 3d 385, 397 (2005) (multiple convictions "based on the same act, specifically, defendant's possession of the firearm *** cannot stand under the one-act, one-crime doctrine"). When a court or jury returns multiple convictions for the same physical act, the mittimus should reflect only the conviction for the most serious charge, and the court must vacate the convictions on the less serious charges. *Cardona*, 158 Ill. 2d at 411 (1994). For the reasons discussed below, we will let

stand the most serious count (count 1), and we will vacate the remaining charges. Ill. S.Ct. R. 615()(1) (eff. Aug. 27, 1999) (providing the appellate court with the power to "reverse, affirm, or modify the judgment or order from which the appeal is taken").

¶ 78 We find that the possession of a single loaded firearm cannot serve as the basis for multiple convictions, and our conclusion is supported by our analysis below of our legislature's amendment concerning firearm ammunition (Pub. Act 94-284 (eff. July 1, 2005) (amending 720 ILCS 5/24-1.1(e) (West 2008)), enacted in response to our supreme court's decision in *People v. Carter*, 203 Ill. 2d 295 (2004).

¶ 79 In *Carter*, during a search of defendant's vehicle, the police recovered weapons and ammunition.[1] *Carter*, 213 Ill. 2d at 298. As a result of this one incident, defendant was charged with four separate counts of unlawful

[1] In *Carter*, there was a drive-by shooting; the shooter's vehicle crashed as it tried to avoid the police; the defendant, who was the driver, fled from the crashed vehicle; and police officers recovered weapons and ammunition from the crashed vehicle. *People v. Carter*, 344 Ill. App. 3d 663, 664-65 (2003), *aff'd in part and rev'd in part* by *Carter*, 213 Ill. 2d 295 (2004).

possession of a weapon by a felon. *Carter*, 213 Ill. 2d at 298. The four counts were for: (1) an unloaded 22-caliber handgun; (2) a 25-caliber handgun; (3) the ammunition clip that was attached to the 25-caliber handgun; and (4) a clip for the 22-caliber handgun, that was found near the 22-caliber handgun, but that was not attached to it. *Carter*, 344 Ill. App. 3d at 664-65.

¶ 80 The *Carter* case thus presented at least three potential issues: (1) whether the simultaneous possession of two firearms constituted one offense or two; (2) whether the possession of a loaded handgun constituted one offense or two; and (3) whether a loaded handgun presented a different issue than an unloaded handgun with a clip nearby.

¶ 81 The *Carter* court found that, under the version of the statute that applied to the facts before it, the simultaneous possession of the two weapons and their respective ammunition constituted one offense. *Carter*, 213 Ill. 2d at 304. Thus, the *Carter* court resolved all three potential issues with one holding. However, the *Carter* court asked our legislature to provide guidance on the issues raised by "the simultaneous possession of multiple firearms" and "the simultaneous possession *** of a firearm and ammunition." *Carter*, 213 Ill. 2d at 304. Our supreme court observed that almost every federal court of appeals that

had considered these issues had found only one crime. *Carter*, 213 Ill. 2d at 304. Our supreme court specifically asked for legislative guidance with respect to a "loaded gun," stating: "[w]hile we agree with the State that a felon who possesses a loaded gun may be more dangerous than a felon who possesses a gun but no ammunition, it is for the legislature to 'define what it desires to make the [allowable] unit of prosecution.' " *Carter*, 213 Ill. 2d at 306 (quoting *Manning*, 71 Ill. 2d at 137, quoting *Bell*, 349 U.S. at 63).[2]

¶ 82 The subsequent amendment states that: "[t]he possession of each firearm or firearm ammunition in violation of this Section constitutes a single and separate violation." 720 ILCS 5/24-1.1(e) (West 2008). Thus, "each firearm"

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[2] In *People v. Lee*, 379 Ill. App. 3d 533 (2008), the law that governed was the old statute, prior to the amendment. *Lee*, 379 Ill. App. 3d at 538. In *Lee*, the defendant argued, and the State conceded, and the trial court agreed that the old statute did not permit multiple convictions for one loaded firearm. *Lee*, 379 Ill. App. 3d at 538. The *Lee* court did observe that the statute had been subsequently amended, and the court reiterated the language of the amendment in a footnote, but the *Lee* court had no reason to consider the 2005 amendment, and it did not. *Lee*, 379 Ill. App. 3d at 538-39, 539 n.2.

leads only to a "single" offense. The amendment refers simply to "each firearm," without making any distinction between a loaded firearm and an unloaded firearm. Thus, to resolve any ambiguity in the defendant's favor as we are required to do, we must hold that "each" loaded firearm creates only a "single" offense. *Carter*, 213 Ill. 2d at 301 ("Criminal or penal statutes must be strictly construed in the defendant's favor").

¶ 83 In other weapons laws, the legislature has carefully drawn distinctions among: (1) a "loaded" firearm; (2) an "unloaded" firearm where "the ammunition for the weapon was immediately accessible; and (3) an unloaded firearm without immediately accessible ammunition. 720 ILCS 5/24-1.6 (West 2008). However, the legislature chose not to draw those distinctions here. Thus, resolving any ambiguity in favor of the defendant, we must find that "each firearm" means a firearm, whether loaded or not. 720 ILCS 5/24-1.1 (West 2008).

¶ 84 The ambiguity inherent in the statute becomes clear when we consider the phrase "each *** ammunition." 720 ILCS 5/24-1.1 (West 2008). "Ammunition" can be either plural or singular;[3] while "each" is singular.[4] The

[3] Although the Criminal Code of 1961 defines "ammunition" as any one self-contained cartridge (720 ILCS 5/2-7.1 (West 2008), incorporating by reference 430

legislature's use of the phrase "each *** ammunition" raises the question of whether "each" round of ammunition can lead to a separate offense or whether an entire collection of ammunition, without regard to the number of clips or rounds present, constitutes only one offense. If we were to accept an interpretation that both the rounds in a firearm and the firearm itself can give rise to separate offenses, we are not sure how many separate offenses could result from one loaded firearm, considering the number of rounds in the firearm itself or in any attached clip. *Carter*, 344 Ill. App. 3d at 675 (McLaren, J., dissenting) (noting "the absurd result" that would be reached if every round of ammunition gave rise to a separate offense).

ILCS 65/1.1 (West 2008)), the word is commonly understood to be a plural noun. A dictionary defines "ammunition" as "[t]he projectiles, along with their fuses and primers, that can be fired from guns or otherwise propelled." The American Heritage Dictionary, Second College Edition 103 (1982). The word "projectiles" is plural.

[4] "Each" is defined as "[b]eing one of two or more, considered individually, every." American Heritage Dictionary, Second College Edition 434 (1982). "Each" thus means "being one."

¶ 85 It has been suggested that, if we hold that a loaded firearm represents only one offense, our holding would have the absurd result of encouraging convicted felons to carry their guns loaded. If a holding that a loaded firearm is a single offense would lead to an absurd result, then there is absurdity no matter which way we interpret this amendment. As already discussed above, one firearm with a clip attached could lead to dozens of offenses. If there is ambiguity in a criminal or penal statute, we are required to interpret it in the defendant's favor. *Carter*, 213 Ill. 2d at 301 ("Criminal or penal statutes must be strictly construed in the defendant's favor").

¶ 86 Since the amendment is ambiguous, we find that only one offense is permitted for a single loaded firearm; we let stand the conviction on the most serious offense, namely, count 1; and we vacate his remaining convictions. We do not remand for sentencing because defendant did not ask us to remand for sentencing, and defendant received the minimum sentence on the one conviction which stands.

¶ 87 III. Second Amendment Claims

¶ 88 Since we vacated defendant's remaining convictions, we review his second amendment claim only with respect to his conviction for count 1, being an

armed habitual criminal. Defendant claims that the statute setting forth his offense is unconstitutional because it violates the second amendment right to bear arms.

¶ 89 Specifically, defendant argues that recent Illinois appellate cases that reviewed other felon possession laws and affirmed them were wrongly decided, and that statements in recent United States Supreme Court decisions in support of felon possession bans were merely *dicta* and not binding. As we explain more fully below, we see no reason to suddenly abandon our recently decided precedent and thus we decline defendant's invitation to now pursue a completely different course.

¶ 90 For its part, the State also argues that our precedent was wrongly decided, but only to the extent that it requires any scrutiny of these laws at all. The State argues that convicted felons are not "people" for the purpose of the second amendment, that they do not even come within the scope of the second amendment and that, as a result, no level of scrutiny is required. For reasons that we also explain below, we find that convicted felons are people and that some level of scrutiny is required.

¶ 91 A. Standard of Review

¶ 92 Whether a statute is constitutional is a question of law that we review *de novo*. *People v. Cornelius*, 213 Ill. 2d 178, 188 (2004). Statutes are presumed to be constitutional, and the party challenging the constitutionality of a statute has the burden of overcoming this presumption. *Cornelius*, 213 Ill. 2d at 189. After listening to the parties' arguments, a reviewing court should try to construe the statute as constitutional, if that is reasonably possible. *Cornelius*, 213 Ill. 2d at 189. If the reviewing court has any doubts about how to construe the statute, it should resolve those doubts in favor of finding the statute constitutional. *Cornelius*, 213 Ill. 2d at 189. "This is not to mean that statutes are unassailable," but rather that they enjoy a strong presumption of validity. *Cornelius*, 213 Ill. 2d at 189.

¶ 93 Although defendant did not raise his constitutional claim in the trial court, a constitutional challenge to a criminal statute can generally be raised at any time. *People v. J.W.*, 204 Ill. 2d 50, 61 (2003). Accordingly, defendant has not waived his constitutional challenge to the statute, even though he first raised this challenge in the appellate court. *J.W.*, 204 Ill. 2d at 61-62.

¶ 94 B. Facial Challenge

¶ 95 Defendant challenges the constitutionality of the statute on its face. "The difference between an as-applied and a facial challenge is that if a plaintiff prevails in an as-applied claim, he may enjoin the objectionable enforcement of a statute only against himself, while a successful facial challenge voids enactment in its entirety and in all applications." *Morr-Fitz, Inc. V. Blagojevich*, 231 Ill. 2d 474, 498 (2008).

¶ 96 This difference affects the scope of our review, because the facts of a party's case become relevant only if he or she brings an as-applied challenge. In an as-applied challenge, the challenging party contests only how the statute was applied against him or her within a particular context; and, as a result, the facts of his or her particular case become relevant. *Napleton v. The Village of Hinsdale*, 229 Ill. 2d 296, 306 (2008). By contrast, in the case at bar, where defendant has chosen to mount only a facial challenge, the facts of his particular case do not affect our review.

¶ 97 Since a successful facial challenge will void the statute for all parties in all contexts, it is "the most difficult challenge to mount successfully." *Napelton*, 229 Ill. 2d at 305. " 'Facial invalidation "is, manifestly, strong medicine" that "has

been employed by the court sparingly and only as a last resort." ' " *Poo-bah Enterprises, Inc. v. The County of Cook*, 232 Ill. 2d 463, 473 (2009) (quoting *National Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973))).

¶ 98 C. Second Amendment and Recent Case Law

¶ 99 The second amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed." U.S. Const. amend II.

¶ 100 In the last few years, the United States Supreme Court has issued two significant decisions concerning the second amendment: *(1) District of Columbia v. Heller*, 554 U.S. 570 (2008); and (2) *McDonald v. City of Chicago*, 130 S.Ct. 3020, 3026 (2010).

¶ 101 In sum, the United States Supreme Court found in *Heller* that the second amendment permitted an individual to keep a handgun in his or her home for the purpose of self-defense, and it struck down the District of Columbia law that had banned this. Two years later, in *McDonald*, the court held that its holding in *Heller* was not limited to the federal District but also applied with equal force to the States.

¶ 102 Specifically, in *Heller*, a District of Columbia police officer, who was authorized to carry a handgun while on duty, applied to also register a handgun to keep in his home in the District, and the District refused his application. *Heller*, 554 U.S. at 575-76. The police officer then filed suit in federal court seeking to overturn the District's ban against the registration of handguns, but only in so far as it prohibited him from keeping a handgun in his home. *Heller*, 554 U.S. at 575-76. Before the United States Supreme Court, the District argued that the second amendment protected only the right to keep a firearm in connection with militia service. *Heller*, 554 U.S. at 577. In contrast, the police officer argued that the second amendment also protected the right of an individual, such as himself, to keep a firearm in his home for the purpose of self-defense. *Heller*, 554 U.S. at 577. In a close 5-to-4 decision, the United States Supreme Court agreed with the officer. *Heller*, 554 U.S. at 636.

¶ 103 Two years later in *McDonald*, defendants City of Chicago and the village of Oak Park, which had laws similar to the District law struck down in *Heller*, tried to distinguish their case by arguing that, although the second amendment applied in the federal District, it had no application to the States. *McDonald*, 130 S.Ct. at 3026. The United Supreme Court rejected this argument

and held in *McDonald* that its holding in *Heller* was fully applicable to the States. *McDonald*, 130 S.Ct. at 3050. The court ended with: "We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*." *McDonald*, 130 S.Ct. at 3050.

¶ 104 D. Continuing Validity of Felon Possession Laws

¶ 105 We do not find persuasive defendant's argument that, in light of these recent cases, we should now find that felon possession laws violate the second amendment.

¶ 106 In both these recent cases, the United States Supreme court emphasized that its holdings had no effect on the validity of laws, such as the one in the case at bar, that prohibit the possession of guns by convicted felons. In *Heller*, the United States Supreme Court stated unequivocally that: "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons." *Heller*, 554 U.S. at 626. See also *Heller*, 554 U.S. at 626 ("the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes). In *Heller*, the police officer asked to be able to register his handgun, " 'assuming he is not otherwise disqualified,' by which they apparently mean if he is not a felon and is not insane."

Heller, 554 U.S. at 630. In response to his request, the *Heller* court held that the second amendment protects "the rights of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635.

¶ 107 Similarly, in *McDonald*, a plurality of justices stated: "[w]e made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as 'probhibition on the possession of firearms by felons ***. We repeat those assurances here." *McDonald*, 130 S.Ct. at 3047.

¶ 108 In addition, every Illinois appellate panel, which has considered second amendment challenges to felon possession laws after *Heller*, has upheld these laws. See *e.g. People v. Davis*, 408 Ill. App. 3d 747, 750 (1st District, 3rd Division 2011) (unlawful use of a weapon by a felon (UUWF), and armed habitual criminal statute (AHC)); *People v. Ross*, 407 Ill. App. 3d 931, 942 (1st District, 6th Division 2011) (AHC); *People v. Coleman*, 409 Ill. App. 3d 869, 879 (1st District, 6th Division 2011) (different panel) (AHC).

¶ 109 For these reasons, we reject defendant's argument that felon possession laws were rendered invalid by the recent holdings in *Heller* and *McDonald*.

¶ 110 E. Some Level of Scrutiny Required

¶ 111 We also do not find persuasive the State's argument that convicted felons are not people for the purpose of the second amendment and that no level of scrutiny of these laws is required.

¶ 112 First, we find that felons are people. The second amendment right is a right of the "people" not of "citizens." U.S. Const. amend II. Although felons may lose some rights of citizenship, they still remain persons. In Justice Thomas' concurrence in *McDonald,* he pointed out that the plurality in *McDonald* had applied the second amendment to the states -- not through the privileges-and-immunities clause which recognizes the rights of citizens -- but "through the Due Process clause, which covers all 'persons.' " *McDonald*, 130 S.Ct. at 3083 n. 19 (Thomas, J., concurring). It was for this reason that he had written separately. *McDonald*, 130 S.Ct. at 3059 (Thomas, J., concurring). However, he acknowledged that his view was "contrary to this Court's precedents" which have held that the second amendment right is a right which does not belong just to citizens, but which belongs more universally to all persons. *McDonald*, 130 S.Ct. at 3084.

¶ 113 In addition, the majority in *Heller* observed that the federal bill of rights used the phrase "right of the people" only three times: in the first amendment's "Assembly-and-Petition Clause," in the fourth amendment's "Search-and-Seizure Clause," and in the second amendment. *Heller*, 554 U.S. at 579. The State offers us no reason why we should interpret the same phrase, "right of the people," differently in the second amendment than in the first and fourth amendments. *McDonald*, 130 S.Ct. at 3044 (rejecting the argument that the second amendment right is "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees"). If we today interpret "the people" in the second amendment as excluding convicted felons, this interpretation could then be used as an opening wedge to chip away at their rights to petition and assembly under the first amendment and their rights against unreasonable search and seizure under the fourth amendment. We are offered no well-reasoned philosophy why we should embark down this slippery slope, and we reject the State's invitation to do so. *Accord. Davis*, 408 Ill. App. 3d at 749 ("Although a felon, [defendant] still counts as one of the people whose rights the Constitution protects.").

¶ 114 Second, we find that some level of scrutiny is required. In *Heller*, the United States Supreme Court observed that the "prohibitions on the possession of firearms by felons" were "presumptively valid" under the second amendment, but only "presumptively" so. *Heller*, 554 U.S. at 626, 627 n. 26. This means that, although we start with the presumption of their second amendment validity, this presumption, like any other presumption, can be rebutted. Thus, there must be some level of scrutiny of these felon laws permitted by the Court's recent cases.

¶ 115 F. Intermediate Level of Scrutiny

¶ 116 We find an intermediate level of scrutiny to be appropriate. In the case before us, defendant argues for strict scrutiny, while the State argues that if any level of scrutiny applies, it should be rational basis. To answer this question, we review, first, the binding precedent of the United States Supreme Court; and second, the precedent of our own Illinois appellate courts.

¶ 117 1. U.S. Supreme Court

¶ 118 In *Heller*, the United States Supreme Court found that the rational basis test was an insufficient level of scrutiny for evaluating "the extent to which a legislature may regulate" the second amendment right found in *Heller*. *Heller*, 554 U.S. at 629 n. 27.

¶ 119 After observing that the traditional levels of scrutiny were "strict scrutiny, intermediate scrutiny, [and] rational basis," the *Heller* court chose not to specify whether an intermediate or strict level of scrutiny would be appropriate. *Heller*, 554 U.S. at 634. The majority acknowledged that the dissent "criticizes us for declining to establish a level of scrutiny for evaluating Second Amendment restrictions," but stated that "there will be time enough to expound" on these points later. *Heller*, 554 U.S. at 634. In essence, the Supreme Court deliberately left the task to the lower courts in the first instance to determine the appropriate level of scrutiny after *Heller*. *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (the issue was "left open" by the United States Supreme Court).

¶ 120 2. Illinois Appellate Courts

¶ 121 For the armed habitual criminal statute, which is the statute at issue here, the Illinois appellate court has consistently applied intermediate scrutiny. *Davis*, 408 Ill. App. 3d at 749 (1st District, 3rd Division 2011); *Ross*, 407 Ill. App. 3d at 939 (1st District, 6th Division 2011). *C.f. Wilson v. Cook County*, 407 Ill. App. 3d 759, 768 (1st District, 3rd Division 2011) (applying intermediate scrutiny to uphold a statute banning assault weapons).

¶ 122 As a result, we choose to apply an intermediate level of scrutiny because, first, the majority in *Heller* rejected rational basis for statutes that could make criminal the possession of handguns kept in the home for self-defense; and, second, because our own Illinois state courts have consistently applied an intermediate level of scrutiny for statutes prohibiting weapons possession by felons, such as the statute before us.

¶ 123 G. Application of Intermediate Scrutiny

¶ 124 Applying intermediate scrutiny to the statute before us, we find that it is constitutional.

¶ 125 Under intermediate scrutiny, a regulation can survive only if it serves "important governmental objectives" and employs means that are "substantially related to the achievement of those objectives." *United States v. Virginia*, 518 U.S. 515, 533 (1996) (internal quotation marks omitted); *United States v. Marzzarella*, 614 F.3d 85, 98 (3rd Cir. 2010) (the regulation must serve an important objective and "the fit between the challenged regulation and the asserted objective [must] be reasonable, not perfect"); *Davis*, 408 Ill. App. 3d at 749.

¶ 126 The statute at issue 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: ***
>
> (3) any violation of the Illinois Controlled Substances Act or the Cannibus Control Act that is punishable as a Class 3 felony or higher.
>
> (b) Sentence. Being an armed habitual criminal is a Class X felony." 720 ILCS 5/24-1.7 (West 2008).

¶ 127 First, we find that the statute at issue serves an important government interest. The legislative purpose behind this statute is to deter firearm possession by "a class of persons that the [Illinois] legislature has determined presents a higher risk of danger to the public when in possession of a weapon." *Cf. People v. Crawford*, 145 Ill. App. 3d 318, 321 (1986) (discussing the unlawful use of a weapon by a felon statute (UUWF)); *Davis*, 408 Ill. App. 3d at 750 (the purpose of the UUWF statute is to protect the public from the danger posed when convicted felons possess firearms"). The objective of keeping guns out of the hands of people

likely to misuse them is an important government interest. *Marzzarella*, 614 F.3d at 98 (an important government objective is " 'to keep firearms away from the persons Congress classified as potentially irresponsible and dangerous' "); *United States v. Reese*, 627 F.3d 792, 802-03 (10th Cir. 2010) (an important government objective is to keep firearms away from persons who pose a heightened danger of misusing them).

¶ 128 Second, we find that the means employed are substantially related to the achievement of those objectives. The Illinois legislature has selected certain limited and particularly serious felonies to serve as the predicate felonies for the statute, such as aggravated battery of a child, home invasion, gun running and drug crimes. 720 ILCS 5/24-1.7(a)(2), (3) (West 2008). For drug crimes, the statute requires a high level of offense; the only convictions that qualify are for class 3 felonies or higher. In addition, the statute requires not simply that defendant be a repeat offender of these particularly crimes, but that he be a multiple or habitual offender. Thus, we find that the means employed by the legislature are substantially related to its objective of keeping weapons out of the hands of those persons most likely to misuse them.

¶ 129 Since the statute satisfies the two-part test of intermediate scrutiny, we find that it does not, on its face, violate the second amendment.

¶ 130 CONCLUSION

¶ 131 For the foregoing reasons, we find that, based on the exhibits and testimony introduced at the suppression hearing and at trial, the officer's conduct was part of a valid Terry stop. We also find that defendant's multiple convictions, based on the same physical act of possessing one loaded firearm, cannot stand and we vacate all but the conviction on count 1 for an armed habitual criminal which had a six-year sentence. We also find that this conviction does not offend the second amendment right to bear arms.

¶ 132 Affirmed in part, reversed in part.

¶ 133 JUSTICE GARCIA, specially concurring in part, dissenting in part:

¶ 134 I concur that the defendant's motion to quash arrest and suppress evidence was correctly denied. I do not join in majority's conclusion "that the police had reasonable suspicion for a *Terry* stop." *Supra,* at 23. Rather, I agree with the State that this was a consensual encounter between police and the defendant that involved a simple question being put to the defendant that he choose to answer. See *People v. Luedemann,* 222 Ill. 2d 530, 544 (2006) (encounters

without "coercion or detention *** do not implicate fourth amendment interests"). The circuit court's finding that the officers' version of the encounter, with no coercion or detention involved, was credible cannot be overturned on appeal unless the finding is contrary to the manifest weight of the evidence. *People v. Gherna*, 203 Ill. 2d 165, 175 (2003). The denial of the defendant's suppression motion is consistent with the evidence adduced at the hearing, upon which the circuit court based its finding that no coercion or detention occurred.

¶ 135 I dissent, however, from the analysis under the "One Act, One Crime" doctrine. *Supra*, at 28. The analysis fails to address this court's decision in *People v. Anthony*, 2011 IL App (1st) 091528 (November 7, 2011), in which I joined Justice McBride's opinion and the author of this decision dissented. Although *Anthony* involved a plain error claim, we held that no error occurred in two convictions arising from the possession of a single loaded firearm. *Id.*, at ¶17 ("Defendant committed simultaneous violations of statute by possessing both a firearm and firearm ammunition, and we find no error in his multiple convictions based upon that simultaneous possession."). I believe the analysis in *Anthony*, that rejected the same argument that persuades the majority here, compels that we affirm. Consequently, I agree with the State that the convictions under Count 1

and Count 3, the former based on the firearm, the latter based on the ammunition, must stand.

¶ 136 I limit my concurrence on the last issue to the rejection of the defendant's second amendment claim.