No. 123289

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court of Illinois, No. 2-15-0599.
Plaintiff-Appellee,	)	There on appeal from the Circuit Court of the Seventeenth Judicial
-vs-	)	Circuit, Boone County, Illinois, No. 13 CF 86.
DEONTAE MURRAY	)	Honorable Robert Tobin,
Defendant-Appellant	)	Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLANT

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POINT AND AUTHORITIES Page

NATURE OF THE CASE

A Boone County jury convicted Deontae Murray of first-degree murder and unlawful possession of a firearm by a streetgang member. On appeal, the Appellate Court, Second District, affirmed Murray's convictions over challenges to the sufficiency of the evidence. *People v. Murray*, 2017 IL App (2d) 150599, ¶1. The court held that, to sustain Murray's conviction for possession of a firearm by a streetgang member, a gang expert's testimony that the Latin Kings engaged in violence and drug sales, and his opinion that the Latin Kings are a streetgang, was sufficient to meet the statutory definition of "streetgang" under the Illinois Streetgang Terrorism Omnibus Prevention Act ("Act"). The Act requires proof that members of the purported gang engaged in a "course or pattern of criminal activity," defined as, "2 or more gang-related criminal offenses committed in whole or in part within this State when: (1) at least one such offense was committed after the effective date of this Act; (2) both offenses were committed within 5 years of each other; and (3) at least one offense involved the solicitation to commit, conspiracy to commit, attempt to commit, or commission of any offense defined as a felony or forcible felony under the Criminal Code of 1961." *Murray*, at ¶83; 740 ILCS 147/10.

No issue is raised challenging the charging instrument or the sufficiency of the pleadings.

ISSUE PRESENTED FOR REVIEW

Whether the State failed to prove Deontae Murray guilty of unlawful possession of a firearm by a streetgang member where it failed to present sufficient evidence the Latin Kings are a "streetgang" as defined by the Illinois Streetgang Terrorism Omnibus Prevention Act, and the appellate court's conclusion to the contrary conflicts with the decisions in *People v. Lozano*, 2017 IL App (1st) 142723, ¶¶42-44, and *People v. Jamesson*, 329 Ill. App. 3d 446 (2d Dist. 2002), as well as the plain language of the statute, 740 ILCS 147/10.

JURISDICTION

Jurisdiction lies with this Court under Supreme Court Rules 315 and 612(b). This Court allowed defendant's timely petition for leave to appeal. *People v. Murray*, No. 123289 (May 30, 2018).

STATUTES AND RULES INVOLVED

720 ILCS 5/24-1.8, Unlawful possession of a firearm by a street gang member:

(a) A person commits unlawful possession of a firearm by a street gang member when he or she knowingly:

(1) possesses, carries, or conceals on or about his or her person a firearm and firearm ammunition while on any street, road, alley, gangway, sidewalk, or any other lands, except when inside his or her own abode or inside his or her fixed place of business, and has not been issued a currently valid Firearm Owner's Identification Card and is a member of a street gang; or

(2) possesses or carries in any vehicle a firearm and firearm ammunition which are both immediately accessible at the time of the offense while on any street, road, alley, or any other lands, except when inside his or her own abode or garage, and has not been issued a currently valid Firearm Owner's Identification Card and is a member of a street gang.

(b) Unlawful possession of a firearm by a street gang member is a Class 2 felony for which the person, if sentenced to a term of imprisonment, shall be sentenced to no less than 3 years and no more than 10 years. A period of probation, a term of periodic imprisonment or conditional discharge shall not be imposed for the offense of unlawful possession of a firearm by a street gang member when the firearm was loaded or contained firearm ammunition and the court shall sentence the offender to not less than the minimum term of imprisonment authorized for the Class 2 felony.

(c) For purposes of this Section:

"Street gang" or "gang" has the meaning ascribed to it in Section 10 of the Illinois Streetgang Terrorism Omnibus Prevention Act.

"Street gang member" or "gang member" has the meaning ascribed to it in Section 10 of the Illinois Streetgang Terrorism Omnibus Prevention Act.

740 ILCS 147/10, Definitions [Illinois Streetgang Terrorism Omnibus Prevention Act]:

"Course or pattern of criminal activity" means 2 or more gang-related criminal offenses committed in whole or in part within this State when:

(1) at least one such offense was committed after the effective date of this Act;

(2) both offenses were committed within 5 years of each other; and

(3) at least one offense involved the solicitation to commit, conspiracy to commit, attempt to commit, or commission of any offense defined as a felony or forcible

felony under the Criminal Code of 1961 or the Criminal Code of 2012.1

"Course or pattern of criminal activity" also means one or more acts of criminal defacement of property under Section 21-1.3 of the Criminal Code of 1961 or the Criminal Code of 2012, if the defacement includes a sign or other symbol intended to identify the streetgang.

* * *

"Streetgang" or "gang" or "organized gang" or "criminal street gang" means any combination, confederation, alliance, network, conspiracy, understanding, or other similar conjoining, in law or in fact, of 3 or more persons with an established hierarchy that, through its membership or through the agency of any member engages in a course or pattern of criminal activity.

For purposes of this Act, it shall not be necessary to show that a particular conspiracy, combination, or conjoining of persons possesses, acknowledges, or is known by any common name, insignia, flag, means of recognition, secret signal or code, creed, belief, structure, leadership or command structure, method of operation or criminal enterprise, concentration or specialty, membership, age, or other qualifications, initiation rites, geographical or territorial situs or boundary or location, or other unifying mark, manner, protocol or method of expressing or indicating membership when the conspiracy's existence, in law or in fact, can be demonstrated by a preponderance of other competent evidence. However, any evidence reasonably tending to show or demonstrate, in law or in fact, the existence of or membership in any conspiracy, confederation, or other association described herein, or probative of the existence of or membership in any such association, shall be admissible in any action or proceeding brought under this Act.

"Streetgang member" or "gang member" means any person who actually and in fact belongs to a gang, and any person who knowingly acts in the capacity of an agent for or accessory to, or is legally accountable for, or voluntarily associates himself with a course or pattern of gang-related criminal activity, whether in a preparatory, executory, or cover-up phase of any activity, or who knowingly performs, aids, or abets any such activity.

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

(1) with the intent to increase the gang's size, membership, prestige, dominance, or control in any geographical area; or

(2) with the intent to provide the gang with any advantage in, or any control or dominance over any criminal market sector, including but not limited to, the manufacture, delivery, or sale of controlled substances or cannabis; arson or

arson-for-hire; traffic in stolen property or stolen credit cards; traffic in prostitution, obscenity, or pornography; or that involves robbery, burglary, or theft; or

(3) with the intent to exact revenge or retribution for the gang or any member of the gang; or

(4) with the intent to obstruct justice, or intimidate or eliminate any witness against the gang or any member of the gang; or

(5) with the intent to otherwise directly or indirectly cause any benefit, aggrandizement, gain, profit or other advantage whatsoever to or for the gang, its reputation, influence, or membership.

STATEMENT OF FACTS

On April 21, 2013, shortly after 6:00 p.m., Richard Herman was shot and killed outside a Shell gas station in Belvidere, Illinois. The single, fatal shot followed an argument with Marco Hernandez. Herman was at the gas station with his friend, Max Cox, to buy beer while Cox got gas. Hernandez was there with Deontae Murray to buy beer to take back to a birthday party they were attending. The State subsequently charged Hernandez[1] and Murray with first-degree murder, aggravated unlawful use of a weapon, and unlawful possession of a firearm by a streetgang member. (C. 66-68, 153-155).

State's case

Belvidere Detective David Dammon testified over defense objection as a gang expert. (R. 1397-98). Dammon testified about the role of hierarchy and loyalty within gangs, and discussed the history of the Latin Kings and the Sureño 13's, including their rivalry in Belvidere. (R. 1398-1402, 1405). He described gang signs and colors tied to each gang. (R. 1406-1407).

Dammon identified tattoos on Hernandez that indicated he was a Latin King. (R. 1442-1442, 1446, 1449). In a photo taken from Murray's phone, Dammon described that Murray wearing a White Sox hat tilted to the left identified him as a member of the People nation, to which the Latin Kings belong. (R. 1447). Based on this and other information, Dammon opined that Hernandez, Murray, and a friend of Murray's, Anthony Perez, were all Latin Kings, while Cox was a Sureño 13. (R. 1449-1450).

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[1]Hernandez was tried separately. *People v. Hernandez*, 2017 IL App (2d) 141104-U, ¶2.

During Dammon's testimony, the State published two videos taken from Murray's cellphone to the jury. (R. 1455-1460). In one, Perez is seen urinating on a building with Sureño 13 gang graffiti on it and calling out to Sureño 13's. (R. 1455-1459). He also added "K" after some of the graffiti, meaning "killer." (R. 1455). In the second video, Perez calls out to Sureño 13's and throws gang signs. (R. 1458-1459). Both videos were recorded on April 21, 2013. (R. 1455, 1458).

Dammon also explained that, because of intra-gang hierarchy, Hernandez, who was new to the area, would have been treated as subordinate by local Kings. (R. 1462-1463). He would have needed permission to go somewhere with a local member. (R. 1463). If a gang member is carrying a gun, it is usually because an order has come from a higher-ranking member. (R. 1464-1465).

On cross-examination, Dammon acknowledged that, although the Sureños and Kings generally do not get along, it is not uncommon for individual members from rival gangs to be on friendly terms. (R. 1473).

Occurrence witnesses described the shooting as follows: Cox and Herman went to the Shell station for gas and beer on April 21, 2013. (R. 839-840). At the time, Cox "claimed to" the Sureño 13 gang, and hung out with other Sureño 13's in Belvidere. (R. 842). Inside the station, Cox and Herman passed Murray and Hernandez. (R. 843). A store surveillance video showed Hernandez and Herman look at each other and possibly bump shoulders as they walked past each other. (St. Ex. 21).

At the counter, Herman said something about Hernandez to Cox. (R. 844). Back outside at the car, Murray and Hernandez approached Cox and Herman. (R. 846-848, 889). Hernandez was yelling. (R. 848). Murray asked Cox, "What's

up" and if he was gangbanging. (R. 848, 888). Cox said no, and Murray accused him of lying, briefly lifting his shirt to show a black, square handgun. (R. 849). According to Cox, Hernandez walked up to Murray, stood in front of him, and then stepped away, putting a pistol behind his back. (R. 850). Hernandez was arguing with Herman, and Cox told Herman to "Shut the fuck up, he has a gun." (R. 850-851, 892). Hernandez pulled out the gun and shot Herman. (R. 851-852). Inside the station, cashier Daniel Arevalo heard the commotion and also saw Hernandez shoot Herman. (R. 909-917). Herman fell to the ground, and Arevalo called 911. (R. 918).

Cox and Arevalo later identified Murray and Hernandez in photo arrays. (R. 854-855, 919-920). Arevalo had seen Hernandez before, during an incident in which his friend chased Hernandez. (R. 856-857). He did not see where Hernandez and Murray went after the shooting. (R. 858). Cox did not see how the gun was exchanged. (R. 852-853, 890).

Gerald Keeney, who was in his truck in the Shell station parking lot, saw two white men at a pump, arguing, and then heard a gunshot. (R. 944-948). He ducked down, but then looked up and saw a man he identified in court as Murray waving a gun around. (R. 948-949). Keeney ducked back down, and when he looked up, he saw Murray and a Hispanic man running. (R. 949).

Heather Swanson, Murray's girlfriend, testified that she talked to Murray after the shooting.(R. 782-783). Murray told her there was an argument, and his friend shot someone. (R. 783-785). She denied that Murray told her anything about where the gun Hernandez used came from. (R. 787-788). Swanson admitted she had given a statement to Belvidere Detectives Dammon and Washburn, in which

she told them that Murray told her he pulled a gun out of his belt and gave it to Hernandez, and then Hernandez shot Herman. (R. 788-789). Swanson said the police scared and threatened her, and that she still felt threatened. (R. 808-809). She also said that some of what she told police was not true. (R. 810).

A.45-caliber shell casing and an unfired .45-caliber round recovered at the scene matched a Glock model 30 handgun found in Murray's friend Anthony Perez's apartment, and was identified as the murder weapon. (R. 1114, 1142-1146, 1155-1161, 1286-1288, 1309-1310, 1431-1434, 1489-1500).

Police arrested Murray in Rockford on May 10, 2013. (R. 1206-1210, 1311-1312).

Defense case

Murray testified on his own behalf. (R. 1525). Before his arrest, he was working with his uncle in Rockford remodeling homes, and was also an aspiring recording artist with his own YouTube channel. (R. 1527, 1539-1540). Murray acknowledged having prior felony convictions for aggravated battery and obstructing justice. (R. 1529).

Murray acknowledged being a Latin King, but said he was not currently an active member. (R. 1529-1531). In his experience, Kings in Belvidere do not carry guns, because it was not smart to do so given police practice of stopping and frisking. (R. 1537-1538).

On April 21, 2013, Murray came to Belvidere to attend a birthday party. (R. 1538). At the party, Murray met Hernandez. (R. 1542-1543). When Murray left the party to buy beer, Hernandez joined him. (R. 1543). They went to a nearby Shell station. (R. 1543-1544).

As they were leaving the station, Murray saw Max Cox, who he knew as a cannabis dealer. (R. 1544-1545). After buying the beer, Murray and Hernandez walked out of the station and started back to the party. (R. 1545). Hernandez said something about Cox that "alarmed" Murray, and then showed him a pistol. (R. 1547). Murray knew Hernandez had had a confrontation with Cox before. (R. 1548). Not wanting something bad to happen, Murray took the gun away from Hernandez, put it in his pocket, and told Hernandez he would "handle it," meaning he would talk to Cox. (R. 1549).

Cox and Herman came out of the store, and Cox started pumping gas. (R. 1549-1550). Murray asked Cox he was gangbanging to try to chase Hernandez. (R. 1550). Cox said no. (R. 1550). Hernandez and Herman began shouting at each other, with Herman getting very loud. (R. 1550-1552). Murray was focused on Cox when he felt Hernandez yank the gun out of his pocket. (R. 1552). He turned to see Hernandez with the gun behind his back. (R. 1552). Within seconds, Hernandez ran up to Herman and shot him. (R. 1552-1553).

Murray panicked and ran. (R. 1553-1554). The gun was not his, and he did not take it with him. (R. 1554). Murray did not immediately turn himself in because he was afraid the Kings would hunt him down. (R. 1555).

State rebuttal

Maria Ledesma testified that she legally purchased the murder weapon in 2012, when she was dating Perez. (R. 1566). She did not know Hernandez. (R. 1566). Detective Washburn identified a photo from Murray's phone, a selfie depicting Murray with a pistol tucked into the left side of his waistband. (R. 1574). He also identified a screenshot from an album entitled "Wreckle$$ Life$tyle" on Murray's

YouTube channel. (R. 1574-1575). Washburn acknowledged that rappers sometimes pose with weapons for album art. (R. 1580). He opined that the guns in the photos were not props, though could not say if any of them were functional. (R. 1578).

The jury found Murray guilty on all counts, and found that Murray was armed with a firearm during the commission of the offense. (R. 1705). The trial judge sentenced Murray to 50 years for murder plus ten years for unlawful possession of a firearm by a streetgang member. (R. 1741-1742).

Murray timely appealed, and made several challenges to his convictions. The appellate court agreed that errors occurred, but found them not reversible. *People v. Murray*, 2017 IL App (1st) 150599, ¶¶58, 63-65, 76-77. Relevant here, the appellate court rejected Murray's argument that the State did not prove that the Latin Kings were a "streetgang" under the Illinois Streetgang Terrorism Omnibus Prevention Act. *Murray*, at ¶¶79-83.

After unsuccessfully petitioning for rehearing, Murray timely petitioned for leave to appeal. This Court granted leave to appeal on May 30, 2018.

ARGUMENT

The State Failed To Prove Deontae Murray Guilty of Unlawful Possession of a Firearm By a Streetgang Member Where It Failed To Present Sufficient Evidence the Latin Kings Are a "Streetgang" as Defined by the Illinois Streetgang Terrorism Omnibus Prevention Act. The Appellate Court's Conclusion to the Contrary Conflicts With the Decisions In *People v. Lozano*, 2017 IL App (1st) 142723, ¶¶42-44, and *People v. Jamesson*, 329 Ill. App. 3d 446 (2d Dist. 2002), As Well As the Plain Language of the Statute, 740 ILCS 147/10.

To sustain Deontae Murray's conviction for unlawful possession of a firearm by a streetgang member, the State was required to prove, *inter alia*, that Murray was a member of a "streetgang" as defined by the Illinois Streetgang Terrorism Omnibus Act ("Act"). 720 ILCS 5/24-1.8(a)(1), (c) (West 2013); 740 ILCS 147/10 (West 2013). Although the State submitted evidence suggesting Murray was a Latin King, the State failed to prove that the Latin Kings are a "streetgang." It presented no concrete evidence that the Latin Kings were involved in a "course or pattern of criminal activity," as defined by the act and as required to find that a particular group of individuals constitutes a "streetgang" under the Act. The legislature provided a very specific definition of "streetgang," requiring the State to prove a "course or pattern of criminal activity" which means that members of the gang engaged in "2 or more gang-related criminal offenses," in Illinois, 1) at least one of which was committed after the effective date of the Act, 2) both offenses were committed "within 5 years of each other," and, 3) at least one offense was solicitation to commit, conspiracy to commit, attempt to commit, or commission of a felony or forcible felony. 740 ILCS 147/10.

On appeal, Murray pointed out that the State never adduced any evidence showing that the Latin Kings committed two or more offenses meeting the strict standards of the Act. Yet, the Appellate Court, Second District, rejected his

sufficiency argument. It held that a "gang expert" detective's opinion that the Latin Kings are a "streetgang" was enough, by itself, to satisfy the strictures of the Act, and further held that the detective's testimony that gang members engage in intimidation and fighting was sufficient for a jury to infer that the Latin Kings "historically and currently commit felonies." *People v. Murray*, 2017 IL App (2d) 150599, ¶¶82-83. The appellate court's published holding conflicts with the plain language of the statute and with the decisions in *People v. Lozano*, 2017 IL App (1st) 142723, ¶¶42-44, and *People v. Jamesson*, 329 Ill. App. 3d 446, 460 (2d Dist. 2002). This Court should resolve that conflict by holding that the State must prove all the statutory elements to establish a "streetgang," including "2 or more gang-related criminal offenses" within five years of each other, reversing the appellate court and Murray's conviction for possession of a firearm by a streetgang member.

Due process requires the State to prove beyond a reasonable doubt every element of the crime of which the defendant is accused. U.S. Const. amend. XIV; Ill. Const. 1970, art. I, §2; *In re Winship*, 397 U.S. 358, 361, 364 (1970); *People v. Carpenter*, 228 Ill. 2d 250, 264 (2008). Where the defendant challenges the sufficiency of the evidence used to convict him, the reviewing court must determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *People v. Smith*, 185 Ill. 2d 532, 541 (1999). The essential elements of proof cannot be inferred, but rather must be established beyond a reasonable doubt through the introduction of evidence. *People v. Mosby*, 25 Ill. 2d 400, 403 (1962). If, after viewing the evidence in the light most favorable to the State, the court determines it is insufficient to establish the defendant's guilt beyond a reasonable doubt, the

conviction must be reversed. *Smith*, 185 Ill. 2d at 541-42.

To establish the offense of unlawful possession of a firearm by a streetgang member, the State had to prove that Murray was a member of a streetgang as defined by the Act. 720 ILCS 5/24-1.8(a)(1), (c). The Act defines a "streetgang" as:

> any combination, confederation, alliance, network, conspiracy, understanding, or other similar conjoining, in law or in fact, of 3 or more persons with an established hierarchy that, through its membership or through the agency of any member engages in **a course or pattern of criminal activity**.

740 ILCS 147/10 (emphasis added).

According to the Act, a "course or pattern of criminal activity":

> means 2 or more gang-related criminal offenses committed in whole or in part within this State when:
>
> (1) at least one such offense was committed after the effective date of this Act;
>
> (2) both offenses were committed within 5 years of each other; and
>
> (3) at least one offense involved the solicitation to commit, conspiracy to commit, attempt to commit, or commission of any offense defined as a felony or forcible felony under the Criminal Code of 1961.

740 ILCS 147/10.

Here, the State relied exclusively on Detective David Dammon's testimony about the Latin Kings to try to establish that the Latin Kings are a "streetgang" and that Murray was a "streetgang member" as defined by the Act. Dammon testified generally about Latin King gang colors and how its members are organized, and identified gang signs and tattoos. (R. 1396-1408). However, the State's evidence failed to prove that the Latin Kings: 1) committed two or more gang-related criminal offense taking place in Illinois since January 1, 1993 (the effective date

of the Act); 2) the two or more offenses took place within five years of each other; and 3) at least one of those offenses was a qualifying offense as listed in the Act. Indeed, Dammon at no point in his testimony described any specific crime the Latin Kings had ever committed. (R. 1383-1473). Dammon's description of the Latin Kings is wholly insufficient to establish it was a "streetgang" as defined by the Act. (R. 1396-1408); 740 ILCS 147/10.

The appellate court, however, held that Dammon's opinion that the Latin Kings are a "streetgang" and his testimony "in the present tense that gangs use guns to protect their drugs, cash, and members from rival gangs, and that members do whatever is needed to benefit the gang, including intimidation of people," was sufficient to establish, beyond a reasonable doubt, that the Latin Kings are a "streetgang" under the Act. *People v. Murray*, 2017 IL App (2d) 150599, ¶83. This holding defied the plain language of the statute, essentially eliminating the specific offense and timeframe requirements demanded by the legislature. *Murray*, at ¶83; 740 ILCS 147/10.

People v. Lozano, 2017 IL App (1st) 142723, abided by the statutory language and held the opposite. There, the State presented evidence from a "gang expert" detective who testified to the history, hierarchy, and rivalries of the Two-Six in an attempt to establish the Two-Six was a "streetgang," to in turn prove that the defendant was guilty of unlawful possession of a firearm by a streetgang member. *Lozano*, at ¶¶41-44. On review, the defendant argued that the State had failed to establish the Two-Six was a streetgang as defined by the Act, where the detective's testimony did not include mention of a "course or pattern of criminal activity." *Id.* at ¶27. The appellate court agreed, finding that, although the detective

mentioned that the Two-Six used violence to control their territory, the detective did not mention a specific time frame for those crimes, instead merely asserting that they had been occurring since the 1970s. *Id.* at ¶42. Because the Act requires that two offenses must have occurred since the Act's effective date of January 1, 1993, and have been committed within five years of each other, the court found that, without testimony of specific offenses, the State had failed to establish that the Two-Six was a "streetgang" under the statutory definition. *Id.* The court thus reversed the defendant's conviction. *Id.* at 44.

In *Jamesson*, a "gang expert" detective testified at the defendant's bench trial that the Latin Counts in Addison had engaged in "numerous violent incidents," including felonies, in the preceding few years. *Jamesson*, 329 Ill. App. 3d at 449. On appeal, the appellate court carefully scrutinized the officer's testimony to determine whether the State met the exacting language of the Act. There, the officer specified that he began having contact with the Latin Counts "a couple of years ago" in Addison, Illinois, and that the Latin Counts were involved with aggravated batteries. *Id.* The court found that the "couple of years ago" language meant the offenses occurred within five years of each other (and took place after the effective date of the Act), and therefore satisfied the elements of the Latin Counts being a "streetgang." *Jamesson*, 329 Ill. App. 3d at 449-51. Thus, the detective's testimony in *Jamesson* provided sufficient evidence, including specific prior offenses within the appropriate time frame, to establish the Latin Counts as a "streetgang" under the Act. *Id.* at 460-61.

In rejecting the majority opinion in *Lozano*, the appellate court here noted that the *Jamesson* court held that an expert may opine on the ultimate issue of

whether a group is a streetgang. *Murray*, at ¶83. The court overstated *Jamesson*, as demonstrated above, as the court there did not hold that the detective's opinion *alone* established streetgang status beyond a reasonable doubt. *Jamesson*, 329 Ill. App. 3d at 460. Rather, the *Jamesson* court parsed the officer's testimony before finding it satisfied the essential elements required by the Act. *Id.* And, the court in this case ignored a key distinction noted by the majority in *Lozano* – that *Jamesson* was a bench trial, not a jury trial like Murray's or like in *Lozano*. *Murray*, at ¶83. That is, the trial judge in *Jamesson*, presumptively knowing and following the law, knew that he was free to accept or reject the expert's testimony as he wished. *People v. Terrell*, 185 Ill. 2d 467, 496-97 (1998) (trier of fact not required to accept expert opinion, so opinion does not usurp province of jury); *People v. McCoy*, 207 Ill. 2d 352, 355 (2003) (trial judge in bench trial presumed to know law). In this case, as in *Lozano*, Murray's jury was not instructed on whether it could reject Dammon's opinion testimony, and the general instruction on believability of witnesses does not address expert (or lay) opinion testimony. (C. 621-654); IPI 1.02; *Lozano*, at ¶43. Thus, because the jury was not provided with the statutory definitions of "streetgang" and "course or pattern of criminal activity," the jury could not properly consider Dammon's opinion that the Latin Kings are a "streetgang" as proof beyond a reasonable doubt. *Lozano*, at ¶43.

Further, to the extent to appellate court's decision in this case expresses the court's belief that there is ambiguity in whether the legislature intended to require the State to prove each element demonstrating "a course or pattern of criminal activity" at trial, the legislative history creating the offense of unlawful possession of a firearm by a streetgang member leaves no ambiguity. *See People*

v. Young, 2011 IL 111886, ¶11 ("To discern the plain meaning of statutory terms, it is appropriate for the reviewing court to consider the statute in its entirety, the subject it addresses, *and the apparent intent of the legislature in enacting it*") (emphasis added). Members of the Illinois Senate made clear their intent to hold the State to establishing each and every element of "a course or pattern of criminal activity." During debate on creating the offense at issue here, lawmakers expressed concern about the possibility of unfairly punishing individuals based on prior or tenuous gang affiliation. Sen. Transcript, 96th Gen. Assem., 70th Legis. Day at pp. 154-155 (discussing H.B. 4124) (comments of Sen. Raoul). Other lawmakers responded that their intent was that the State would be held to a "very, very high" burden of proof on the gang elements of the offense. Sen. Tr., at p. 158 (Sen. Millner). Specifically, Senator Rutherford stated that "there exists an extremely clear definition of a 'gang member.' So it is not up to a discretion." Sen. Tr., at p. 157. Similarly, Senator Millner assured his colleagues that the definition of "streetgang" was lengthy and detailed, explaining, "to comfort the Members of this – this Body, I would say that the – the burden of proof is very high." Sen. Tr., pp. 158-159.

Under the appellate court's holding, however, the State is not held to a "very, very high" burden at all. On the contrary, the appellate court sanctioned the State's failure to establish that the Latin Kings engaged in a "course or pattern of criminal activity," namely committing two or more felonies within five years of each other, as the statutory definition requires. 740 ILCS 147/10; *Murray*, at ¶83. The appellate court's decision is thus contrary to the legislature's unambiguous intent in creating the offense of unlawful possession of a firearm by a streetgang member, and effectively short-circuits the State's burden of proving each and every

element of an offense beyond a reasonable doubt. Sen. Tr., at 154-155, 157-159 (comments of Sens. Raoul, Millner, Rutherford).

Holding the State to the strict statutory requirements of the offense at issue here is consistent with Illinois law in analogous cases involving exacting legislative strictures. For example, to prove that a non-enumerated offense is a qualifying "forcible felony" for proving armed habitual criminal (AHC), the State must prove either that the circumstances of the offense at issue involved actual violence or is inherently a forcible felony under the AHC statute's residual clause. *People v. White*, 2015 IL App (1st) 131111 ¶¶30-33; *see also People v. Carmichael*, 343 Ill. App. 3d 855, 859-61 (1st Dist. 2003). Similarly, to prove delivery of a controlled substance within 1000 feet of a church, the State must prove beyond a reasonable doubt that the church was a "building used primarily for religious worship . . . *on the date of the offense*." *People v. Hardman*, 2017 IL 121453, ¶31; *People v. Ortiz*, 2012 IL App (2d) 101261, ¶11; 720 ILCS 570/407(b)(1). The State must also provide evidence of an exact measurement showing the crime occurred within 1000 feet of the church or school; courts do not allow an inference from general or vague testimony, which is what the appellate court sanctioned in this case. *People v. Davis*, 2016 IL App (1st) 142414, ¶¶9-16. The statutory requirement in this case requiring the State to prove two or more offenses within five years of each other as part of a "course or pattern of criminal activity" to establish Murray was a "streetgang" member is no different than the statutory strictures requiring the State to prove that a building was operating as a church at the time of a narcotics delivery for delivery within 1000 feet of a church, or that an unenumerated felony specifically qualifies as a forcible felony for AHC. *White*, at ¶¶30-33; *Ortiz*, at ¶11.

The appellate court's decision in this case is thus contrary to Illinois law, and should not stand.

Consistent with the plain language of the applicable statutory provisions, as well as the intent behind those statutes, and the appellate court's decisions in *Lozano* and *Jamesson*, this Court should resolve the conflict created by the Appellate Court, Second District's decision in this case, by holding that the State must prove each of the specific statutory requirements defining "streetgang" and "course or pattern of criminal activity" beyond a reasonable doubt. This Court should reverse the appellate court's decision on this issue, and reverse Murray's conviction for unlawful possession of a firearm by a streetgang member outright.

CONCLUSION

For the foregoing reasons, Deontae Murray, Defendant-Appellant, respectfully requests that this Court reverse the decision of the Appellate Court, Second District, and reverse Deontae's conviction for unlawful possession of a weapon by a streetgang member.

Respectfully submitted,

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COUNSEL FOR DEFENDANT-APPELLANT

CERTIFICATE OF COMPLIANCE

I, Jennifer L. Bontrager, certify that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 21 pages.

/s/Jennifer L. Bontrager
JENNIFER L. BONTRAGER
Assistant Appellate Defender

APPENDIX TO THE BRIEF

Deontae Murray No. 123289

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IN THE CIRCUIT COURT OF BOONE COUNTY, ILLINOIS
17TH JUDICIAL CIRCUIT

PEOPLE OF THE STATE OF ILLINOIS
Vs.
DEONTAE X. MURRAY
Defendant

Case No. 13 CF 86

Date of Sentence May 13, 2015
Date of Birth 01/15/92 (Defendant)

FILED
BOONE COUNTY ILLINOIS
MAY 13 2015
CLERK OF THE CIRCUIT COURT

JUDGMENT – SENTENCE TO ILLINOIS DEPARTMENT OF CORRECTIONS

WHEREAS the above-named defendant has been adjudged guilty of the offenses enumerated below; IT IS THEREFORE ORDERED that the defendant be committed to the custody of to confinement in the Illinois Department of Corrections for the term of years and months specified for each offense.

COUNT	OFFENSE	DATE OF OFFENSE	STATUTORY CITATION	CLASS	SENTENCE	MSR
1	First Degree Murder	4-21-13	720 ILCS 5/9-1(a)(2)	M	50 Yrs. ___ Mos.	3 Yrs.
3	Possession of a Firearm by Street Gang Member	4-21-13	720 ILCS 5/24-1.8(a)(1)	2	10 Yrs. ___ Mos.	2 Yrs.

To run (concurrent with) (consecutively to) count(s) 3 and served at 50%, 75%, 85%, (100%) pursuant to 730 ILCS 5/3-6-3

To run (concurrent with) (consecutively to) count(s) 1 and served at (50%) 75%, 85%, 100% pursuant to 730 ILCS 5/3-6-3

To run (concurrent with) (consecutively to) count(s) _____ and served at 50%, 75%, 85%, 100% pursuant to 730 ILCS 5/3-6-3

This Court finds that the defendant is:

_____ Convicted of a class _____ offense but sentenced as a Class X offender pursuant to 730 ILCS 5/5-4.5-95(b).

The Court further finds that the defendant is entitled to receive credit for time actually served in custody (of 731 days as of the date of this order) from (specify dates) 5/12/13 To 5/13/15. The defendant is also entitled to receive credit for the additional time served in custody from the date of this order until defendant is received at the Illinois Department of Corrections.

_____ The Court further finds that the conduct leading to conviction for the offenses enumerated in counts _____ resulted in great bodily harm to the victim. (730 ILCS 5/3-6-3(a)(2)(iii)).

_____ The Court further finds that the defendant meets the eligibility requirements for possible placement in the Impact Incarceration Program. (730 ILCS 5/5-4-1(a)).

_____ The Court further finds that offense was committed as a result of the use of, abuse of, or addiction to alcohol or a controlled substance and recommends the defendant for placement in a substance abuse program. (730 ILCS 5/5-4-1(a)).

_____ The defendant successfully completed a full-time (60-day or longer) Pre-Trial Program ___ Educational/Vocational ___ Substance Abuse ___ Behavior Modification ___ Life Skills ___ Re-Entry Planning – provided by the county jail while held in pre-trial detention prior to this commitment and is eligible for sentence credit in accordance with 730 ILCS 5/3-6-3(a)(4). THEREFORE IT IS ORDERED that the defendant shall be awarded additional sentence credit as follows: total number of days in identified program(s) _____ x 1.50 (1.25 for program participation before August 11, 1993) = _____ days, if not previously awarded.

_____ The defendant passed the high school level test for General Education and Development (GED) on _____ while held in pre-trial detention prior to this commitment and is eligible to receive Pre-Trial GED Program Credit in accordance with 730 ILCS 5/3-6-3(a)(4.1). THEREFORE IT IS ORDERED that the defendant shall be awarded 60 days of additional sentence credit, if not previously awarded.

_____ IT IS FURTHER ORDERED the sentence(s) imposed on count(s) _____ be (concurrent with) (consecutive to) the sentence imposed in case number _____ in the Circuit Court of _____ County.

X IT IS FURTHER ORDERED that Judgment Entered Against Defendant for Court Costs of $402.00

The Clerk of the Court shall deliver a certified copy of this order to the Sheriff. The Sheriff shall take the defendant into custody and deliver defendant to the Department of Corrections which shall confine said defendant until expiration of this sentence or until otherwise released by operation of law.

This order is (X effective immediately) (_____ stayed until _____).

DATE: May 13, 2015 ENTER: C. Robert Tobin III

C. Robert Tobin III
(PLEASE PRINT JUDGE'S NAME HERE)

Approved by Conference of Chief Judges 6/20/14

2-15-0599

IN THE CIRCUIT COURT OF BOONE COUNTY, ILLINOIS

17TH JUDICIAL CIRCUIT

Defendant Deontae X. Murray

Case Number 13 CF 86

JUDGMENT – SENTENCE TO ILLINOIS DEPARTMENT OF CORRECTIONS

___IT IS FURTHER ORDERED that _____

DATE: May 13, 2015

ENTER: C Robert Tobin

C Robert Tobin III
(PLEASE PRINT JUDGE'S NAME HERE)

2017 IL App (2d) 150599
No. 2-15-0599
Opinion filed December 13, 2017
Modified upon denial of rehearing January 31, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Boone County.
Plaintiff-Appellee,	)	
v.	)	No. 13-CF-86
DEONTAE X. MURRAY,	)	Honorable C. Robert Tobin III,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court, with opinion.
Justices Jorgensen and Birkett concurred in the judgment and opinion.

OPINION

¶ 1 Defendant, Deontae X. Murray, appeals his convictions of first-degree murder (720 ILCS 5/9-1(a)(2) (West 2012)) and unlawful possession of a firearm by a street gang member (720 ILCS 5/24-1.8(a)(1) (West 2012)), following a jury trial in the circuit court of Boone County. We affirm as modified.

¶ 2 I. BACKGROUND

¶ 3 On July 19, 2013, a Boone County grand jury returned a three-count amended indictment charging defendant with first-degree murder in connection with the April 21, 2013, shooting death of Richard J. Herman in Belvidere, Illinois (count I), aggravated unlawful use of a weapon

(720 ILCS 5/24-1.6(a)(1), (a)(3)(A), (d) (West 2012)) (count II), and unlawful possession of a firearm by a street gang member (count III). The jury convicted defendant of all three offenses. The jury also found that defendant was armed with a firearm during the commission of the offenses. The court merged count II into count III and sentenced defendant to an aggregate of 60 years' incarceration in the Illinois Department of Corrections. The following evidence relevant to the issues in this appeal was adduced at trial. We will augment our discussion of the evidence where necessary in the analysis portion of the opinion.

¶ 4 A. Defendant's Gang Affiliation

¶ 5 The State introduced defendant's gang affiliation to show the motive for Herman's murder. The State argued that defendant facilitated the shooting when he handed the murder weapon to Marco "Wacko" Hernandez, who shot Herman.[1]

¶ 6 Officer David Dammon of the Belvidere police department testified for the State as an expert on gang activity. He testified that defendant was a member of the Latin Kings street gang. He based his opinion on his personal experience with defendant, information in the police department's gang database, defendant's association with other known Latin Kings, defendant's use of gang signs, and defendant's mode of dress. According to Dammon, Hernandez was also a member of the Latin Kings but was so low in the hierarchy that he would not be permitted by the gang to carry a gun. Dammon detailed the criminal nature of street gangs in general and the Latin Kings in particular. Dammon further testified, without

[1] Hernandez was tried separately. This court reversed his conviction and remanded for a new trial because the State improperly introduced a hearsay statement as substantive evidence and the court improperly instructed the jury that it could consider the statement as substantive evidence. *People v. Hernandez*, 2017 IL App (2d) 141104-U, ¶¶ 14, 23.

objection, that the Latin Kings are an organized street gang as defined by statute. See 740 ILCS 147/10 (West 2012).

¶ 7 B. The Shooting of Richard Herman

¶ 8 On April 21, 2013, defendant attended a birthday party at the home of Mallek Sanchez in Belvidere. Sanchez was a "higher-up" in the Latin Kings. Hernandez was also at the party. Defendant and Hernandez left the party and walked to a nearby Shell gas station to buy beer and a cigar. Max Cox, who was a member of the rival gang the Surenos 13, and Herman, Cox's companion, were at the Shell station. Cox was prepaying for gas, and Herman was at the coolers buying beer. Cox and defendant knew each other, as Cox had previously sold cannabis to defendant. Hernandez had a recent confrontation with Cox.

¶ 9 1. Cox's Testimony

¶ 10 At approximately 6:30 p.m. on April 21, 2013, Cox parked his car next to pump No. 5 at the Shell station, and he and Herman went inside the store. Defendant and Hernandez were in the store. Herman waved Cox to his location by the coolers and told Cox something about Hernandez. Then Cox prepaid for gas, Herman paid for a case of beer, and they left the store. Herman placed the beer in the back passenger seat of Cox's car, taking out a can for himself. Cox was on the driver's side of the car, pumping gas, when he saw defendant and Hernandez walking toward him. Defendant stopped at his front bumper, and Hernandez stopped 10 or 15 feet from the front bumper. Hernandez was yelling.

¶ 11 Defendant asked Cox if he was "gang banging," meaning was Cox "hanging out" with the Surenos 13. Cox said no. Defendant accused Cox of lying. Then defendant lifted his shirt and exposed a gun on his left side. Cox described the gun as "black, square, decent size." Defendant then covered the gun with his shirt again. Hernandez stepped in front of defendant,

stepped away, and put a "pistol" behind his back. Then Hernandez began arguing with Herman. Cox told Herman to shut up, that Hernandez had a gun. Then Hernandez pulled out the pistol, ran up to Herman, and shot him.

¶ 12 On cross-examination, Cox testified that defendant was at least 10 feet away from him during the incident. Cox testified that he did not see the exchange of the gun from defendant to Hernandez. Cox agreed that he did not know whether defendant handed the gun to Hernandez or whether Hernandez grabbed it. According to Cox, the entire incident took approximately a minute and a half.

¶ 13 2. Dan Arevalo's Testimony

¶ 14 Dan Arevalo was the cashier at the Shell station on the evening of April 21, 2013. He looked out the window and saw Cox pumping gas. He also saw Herman and defendant arguing. He did not see Hernandez. Arevalo attended to some customers, and when he looked outside again a few seconds later, he saw Hernandez at the passenger side of Cox's car. Arevalo testified that Hernandez was running toward Herman, reaching for a gun from behind his back. He saw Hernandez point the gun at Herman, at which time Arevalo "backed away." Arevalo heard a shot. He immediately called 911. When Arevalo next looked outside, he saw defendant and Hernandez running away.

¶ 15 3. Gerald Keeney's Testimony

¶ 16 On the evening of April 21, 2013, Keeney stopped at the Shell station to buy lottery tickets. He sat in his pickup, scratching his tickets on the center console, when he heard people arguing. He saw two white men (presumably Cox and Herman) at a gas pump. The next thing Keeney heard was a gunshot. He ducked down. When he looked out again, he saw a black

man waving a gun. Keeney ducked down again. The next time he looked out, he saw the black man and a Hispanic man running toward the back of the station.

¶ 17 C. The Crime Scene and Investigation

¶ 18 A woman flagged down police officer Jeremy Bell and told him that she saw two people running through an alley. Bell searched the area, but he did not locate anyone. Sergeant Shane Woody responded to the scene and saw Herman lying face-up on the pavement near pump No. 5. He noted a bullet hole in Herman's chest. Herman was transported to a Rockford hospital, where he died at approximately 7 p.m.

¶ 19 Illinois State Police investigator Rebecca Hooks processed the scene for evidence. Arevalo turned over a Shell station surveillance video to Dammon. Dammon recognized defendant on the video, but he did not recognize Hernandez. Cox and Arevalo each identified defendant from a photo lineup, and they later identified Hernandez as the shooter, from a second photo lineup.

¶ 20 Dr. Larry Blum, a forensic pathologist, performed an autopsy on Herman. Dr. Blum testified that the bullet caused Herman's left lung to collapse and then exited his back. Herman died of hemorrhagic shock due to a gunshot wound to the chest.

¶ 21 After the murder, defendant moved among various addresses in Harvard, Rockford, and Freeport, and he was considered by the police to be a fugitive. Defendant's wandering was aided by another Latin King, Anthony Perez. In late April 2013, the Belvidere police enlisted the help of the United States Marshals to apprehend defendant. On May 9, 2013, the police and the marshals executed a search warrant at Perez's mother's apartment in Winnebago County. The police recovered a state-issued ID card for defendant, mail belonging to Perez, drug paraphernalia, cannabis, two firearms, and ammunition.

¶ 22 On the top shelf of the bedroom closet, the police found a Glock gun case. Inside the gun case were a black Glock Model 30 pistol, two magazines, and a magazine motor. Later, a forensic test determined that the Glock was used to kill Herman. Perez's fingerprints were found on the gun's slide, but there was no DNA on the gun that was suitable for analysis.

¶ 23 On May 10, 2013, police officers searched a residence at 925 11th Street in Rockford. They observed a woman trying to get into the house. She was placed in custody and identified as Heather Swanson, defendant's girlfriend. While placing Swanson in custody, the officers heard a "crash" in some bushes north of the property. The officers jumped over a chain link fence and arrested defendant, who was lying in the bushes. Defendant stated: "Yeah, I know I'm wanted. I was going to turn myself in."

¶ 24 The police seized defendant's cell phone. Two videos recorded approximately two hours before the shooting showed (1) Perez urinating on a building in Belvidere that bore Surenos 13 gang graffiti and (2) defendant "throwing up" a Latin Kings sign while Perez "threw down" a Surenos 13 sign and said "13 killer."

¶ 25 D. Additional Trial Testimony

¶ 26 1. Swanson's Testimony

¶ 27 The State called Swanson in its case-in-chief. Swanson testified that she was in jail on the evening of the murder. She spoke on the phone with defendant that night, and she later saw him in early May 2013.

¶ 28 The prosecutor asked Swanson what defendant told her about what happened at the Shell station. Swanson testified: "There was an argument and *** his friend shot somebody." Swanson testified that she knew that Cox was also at the Shell station. The prosecutor then asked her the following question: "So what, if anything, did [defendant] tell you about what

[Cox] was doing at the Shell station?" Swanson replied that she did not know "specifically." The prosecutor then asked what defendant told her about "the gun." She answered: "He didn't tell me anything." The prosecutor asked the same question again, and Swanson testified: "[Defendant told me that] [Hernandez] shot the guy that was at the gas station." The prosecutor then asked: "What, if anything, did [defendant] tell you about where that gun came from—about where he got it from?" Swanson testified: "He didn't."

¶ 29 The prosecutor then asked if Swanson recalled telling the police that defendant "said he pulled the gun out of his belt and gave it to [Hernandez]." She admitted that she told that to the police. The prosecutor next asked Swanson whether she told the police that defendant said that Hernandez shot Herman after defendant gave Hernandez the gun. Swanson said, "I think so, yes."

¶ 30 Swanson testified that defendant told her that he was with Hernandez after the shooting. Defendant also told her that Perez was arrested with a "bunch of guns," so she assumed that Perez had the murder weapon. Swanson then agreed that she told the police that defendant told her that the gun was at Perez's apartment.

¶ 31 On cross-examination, Swanson testified that she had felt "threatened" by the police when they questioned her after she and defendant were arrested. She testified that she specifically was "scared" of Dammon and that this caused her to tell the police untruths.

¶ 32 2. Richard Hobson's Testimony

¶ 33 Richard Hobson testified as an expert on armed gunmen's characteristics. A former Washington D.C. police officer, he was professionally trained, and taught courses, on the detection and recovery of firearms. Hobson viewed the surveillance video from the Shell station from the evening of the murder. He had been informed that the gun in question was a

Glock Model 30 .45-caliber semiautomatic pistol. Based upon certain characteristics that defendant displayed inside the store that evening, Hobson opined that defendant was carrying a firearm concealed on his left side.

¶ 34 3. Defendant's Testimony

¶ 35 Following the court's denial of his motion for a directed verdict, defendant testified on his own behalf. Prior to trial, the court had ruled that the State could use defendant's prior conviction of felony obstruction of justice to impeach him if he testified. The court barred the State from using defendant's prior conviction of aggravated battery for impeachment purposes, ruling that it was too prejudicial. Nonetheless, under defense counsel's questioning, defendant testified that he had previously been convicted of obstruction of justice, aggravated battery, and attempted obstruction of justice, a misdemeanor. Defendant testified that he was no longer a member of the Latin Kings. He also testified that members of the Belvidere Latin Kings did not carry firearms.

¶ 36 Defendant testified that Hernandez pointed at Cox's car at the Shell station. Defendant knew that Hernandez and Cox had a recent confrontation. Then, Hernandez showed defendant a pistol. Defendant took the pistol, thinking that he did not want "anything bad" to happen to Cox and that, because there were probably cameras "everywhere," it would be "stupid" to display a gun. Defendant put the gun in his pocket, and he told Hernandez that he would "handle it."

¶ 37 Defendant testified that Cox and Herman came out of the store. Defendant walked toward Cox and "confronted him." Defendant asked Cox if he was "gang banging to try to chase [Hernandez]." Cox said "no." At that time, Hernandez and Herman were arguing and yelling. Thirty seconds into defendant's conversation with Cox, he felt the gun being "yanked"

from his pocket. Then defendant saw Hernandez put the gun behind his back. Hernandez ran toward Herman and shot him. Defendant panicked and fled the scene. He did not go to the police, because he was afraid of reprisals from the Latin Kings.

¶ 38 After defendant testified, he rested.

¶ 39 4. The State's Rebuttal and Closing Argument

¶ 40 In rebuttal, Maria Ledesma testified that she bought a Glock Model 30 .45-caliber pistol in Belvidere in 2012, while she was dating Perez. She did not know Hernandez. The State also introduced photos depicting defendant with various firearms, including a Glock pistol.

¶ 41 In his rebuttal closing argument, the prosecutor argued that Swanson told the truth when she admitted that she told the police that defendant told her that he gave the gun to Hernandez.

¶ 42 E. Sentencing

¶ 43 The trial court denied defendant's posttrial motion and proceeded to sentencing. Herman's mother read a victim impact statement, and the prosecutor read statements from Herman's children. In allocution, defendant remarked only that there were no African Americans on the jury. The court found that defendant displayed "no remorse over what [is] an otherwise senseless act." The court sentenced defendant to 50 years' incarceration for first degree murder, merged the weapons charges, and sentenced defendant to 10 years' incarceration for unlawful possession of a firearm by a gang member. The court denied defendant's motion to reconsider the sentence, and he filed a timely appeal.

¶ 44 II. ANALYSIS

¶ 45 Defendant raises the following eight issues.

¶ 46 A. Reasonable Doubt of Murder

¶ 47 Defendant first argues that the State did not prove that he was accountable for Herman's murder. In assessing whether the evidence was sufficient to prove a defendant's guilt beyond a reasonable doubt, the reviewing court must determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Taylor*, 186 Ill. 2d 439, 445 (1999). A conviction should not be reversed unless the proof is so improbable or unsatisfactory that a reasonable doubt exists about the defendant's guilt. *Taylor*, 186 Ill. 2d at 445. A defendant commits first-degree murder when, in performing the acts that cause the death of an individual, he knows that such acts create a strong probability of death or great bodily harm to that individual or another. 720 ILCS 5/9-1(a)(2) (West 2012). A defendant is legally accountable for the actions of another when, either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he or she "solicits, aids, abets, agrees, or attempts to aid that other person in the planning or commission of the offense." 720 ILCS 5/5-2(c) (West 2012); see *Taylor*, 186 Ill. 2d at 445. To prove intent to promote or facilitate the commission of an offense, the State must establish that the defendant shared the criminal intent of the principal or that there was a common criminal design. *People v. Jaimes*, 2014 IL App (2d) 121368, ¶ 37.

¶ 48 Defendant argues that the only "first-hand" accounts of the shooting were given by Cox and himself. Defendant asserts that their "largely consistent" versions do not establish that he gave Hernandez the gun knowing that Hernandez was going to kill Herman. Defendant also maintains that the accounts do not establish that he and Hernandez shared a common design to kill Herman. By focusing solely on his and Cox's accounts, while ignoring the totality of the State's evidence, defendant distorts the picture.

¶ 49 Defendant and Hernandez, who were Latin Kings, were rivals of Cox, who belonged to the Surenos 13. Approximately two hours before the shooting, defendant and Perez, another Latin King, were recorded displaying gang signs and doing other acts that were disrespectful of the Surenos 13. On the video, Perez intoned "13 killer." Inside the Shell station's store, Hernandez called defendant's attention to Cox's presence. Defendant knew that Hernandez and Cox had a recent confrontation. In Hobson's expert opinion, defendant was armed.

¶ 50 Outside the store, both defendant and Hernandez initiated a gang fight with Cox and Herman. After defendant and Hernandez left the store, defendant approached Cox and demanded to know if Cox was "gang banging." Defendant lifted up his shirt to display a gun. Hernandez and Herman were arguing. Earlier, Arevalo witnessed defendant arguing with Herman. Hernandez obtained the gun from defendant, without a struggle or a word, and shot Herman. Keeney immediately saw a black man waving the gun. The only black man at the scene was defendant. Defendant and Hernandez fled together, and the police recovered the murder weapon from Perez's apartment, where they also discovered defendant's photo ID. Supporting the State's theory that defendant, rather than Hernandez, brought the gun to the scene was Ledesma's rebuttal testimony that she bought a Glock Model 30 .45-caliber handgun while she was dating Perez. Defendant hid out in a series of locations until the police arrested him lying in some bushes.

¶ 51 Mere presence at the scene of a crime does not itself make a person accountable, but it is a factor that can be considered, together with other circumstances, to determine accountability. *Jaimes*, 2014 IL App (2d) 121368, ¶ 38. Active participation in the offense is not a requirement for a finding of guilt under an accountability theory. *Jaimes*, 2014 IL App (2d) 121368, ¶ 38. The trier of fact may consider factors such as the maintenance of a close affiliation with the

companion after the commission of the crime, flight from the scene, and the failure to report the crime. *Jaimes*, 2014 IL App (2d) 121368, ¶ 38. We determine that the jury, viewing the evidence in the light most favorable to the prosecution, could conclude beyond a reasonable doubt that defendant was guilty of Herman's murder by accountability.

¶ 52 B. Introduction of Swanson's Prior Inconsistent Statement

¶ 53 Defendant contends that Swanson's statement to the police—that defendant told her that he pulled the gun out of his belt and gave it to Hernandez—was not admissible either as substantive evidence or for impeachment. Defendant acknowledges that he did not preserve the issue for review, but he argues that it is plain error. Alternatively, defendant contends that his trial counsel rendered ineffective assistance when he failed to object to the introduction of the statement. The State concedes that error occurred, but it contends that it did not rise to the level of plain error. The State also argues that counsel's performance did not result in prejudice.

¶ 54 1. Substantive Evidence

¶ 55 Generally, hearsay—an out-of-court statement offered for the truth of the matter asserted—is inadmissible at trial. *People v. McCarter*, 385 Ill. App. 3d 919, 929-30 (2008). Section 115-10.1(c)(2) of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10.1(c)(2) (West 2012)) provides a hearsay exception for a prior inconsistent statement of a testifying witness. Under section 115-10.1(c)(2), a witness's prior inconsistent statement may be admitted as substantive evidence if it "narrates, describes, or explains an event or condition of which the witness had personal knowledge." 725 ILCS 5/115-10.1(c)(2) (West 2012). "Personal knowledge" requires that the witness actually saw the events that are the subject of the statement. *McCarter*, 385 Ill. App. 3d at 930. Here, it is undisputed that Swanson was in jail when the shooting occurred and could not have witnessed the event. See *People v. Simpson*,

2015 IL 116512, ¶ 31 ("event" is not defendant's admission but the offense described in the admission). Accordingly, her prior inconsistent statement was not admissible as substantive evidence under section 115-10.1(c)(2).

¶ 56 2. Impeachment

¶ 57 Section 115-10.1 provides that a prior inconsistent statement that does not meet the criteria for admission as substantive evidence may, nevertheless, be used as impeachment. To be used as impeachment, a prior inconsistent statement must be truly inconsistent with the witness's trial testimony, and it must deal with a matter that is more than collateral. *People v. Thomas*, 354 Ill. App. 3d 868, 877 (2004). Illinois Supreme Court Rule 238(a) (eff. Apr. 11, 2001) allows a party to impeach its own witness with a prior inconsistent statement when the witness's testimony affirmatively damages that party's case. *People v. French*, 2017 IL App (1st) 141815, ¶ 42. A witness's testimony is affirmatively damaging, rather than merely disappointing, when it gives positive aid to the other side. *French*, 2017 IL App (1st) 141815, ¶ 42. The witness's testimony must be more damaging than his complete failure to testify would have been, before impeachment is permitted. *People v. Weaver*, 92 Ill. 2d 545, 563-64 (1982).

¶ 58 Defendant argues that Swanson's testimony that defendant did not tell her anything about how Hernandez got the gun did not affirmatively damage the State's case, because it did not exculpate defendant. Defendant maintains that Swanson's testimony merely disappointed the State, because it failed to incriminate defendant. The State agrees. Although the reviewing court is not bound by a party's concession (*In re Brandon P.*, 2014 IL 116653, ¶ 44), we accept the State's concession, because the prosecution was no worse off than if Swanson had not testified. The State still had strong evidence that defendant intended to promote or facilitate Herman's murder.

¶ 59 However, we reject defendant's plain-error argument. The plain-error doctrine allows the reviewing court to consider unpreserved error when (1) a clear or obvious error occurred, and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the accused, regardless of the seriousness of the error, or (2) a clear or obvious error occurred that was so serious that it affected the fairness of the trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). For purposes of the plain-error doctrine, we have already determined that the State's introduction of Swanson's prior inconsistent statement was clear or obvious error. Next, under the first prong of the plain-error analysis, defendant must demonstrate that the error was prejudicial by showing that the quantum of evidence presented by the State rendered the evidence closely balanced. See *Piatkowski*, 225 Ill. 2d at 566. Whether the evidence is closely balanced is a question separate from whether the evidence is sufficient to sustain a conviction against a reasonable-doubt challenge. *Piatkowski*, 225 Ill. 2d at 566.

¶ 60 As noted above, to prove that a defendant intended to promote or facilitate the crime, the State must present evidence that (1) the defendant shared the principal's criminal intent, or (2) there was a common criminal design. *People v. Fernandez*, 2014 IL 115527, ¶ 13. Under the common-criminal-design rule, if two or more persons engage in a common criminal design or agreement, any acts committed by one party in the furtherance of that design or agreement are considered the acts of all parties to the design or agreement, and all parties are equally responsible for the consequences of further acts. *Fernandez*, 2014 IL 115527, ¶ 13.

¶ 61 Here, the State, without expressly so articulating, proceeded under the common-criminal-design rule. In essence, the State theorized that when Hernandez shot Herman, defendant was equally responsible, because the shooting was done in furtherance of the

common criminal design to inflict violence. In closing argument, the prosecutor argued the common-criminal-design rule when he highlighted that defendant was "looking to start a gang fight on the day of the murder." The prosecutor stated that defendant went to the Shell station armed with the Glock because he intended "unlawfully to use it." The prosecutor emphasized that defendant was "hanging out" with other members of the Latin Kings that day and that he filmed Perez saying "13 killers." The prosecutor argued that when defendant and Hernandez encountered Cox, a member of the Surenos 13, at the Shell station, defendant "promoted" the gang fight that led to Herman's murder. The prosecutor reminded the jury that Arevalo saw defendant and Herman arguing and that defendant accused Cox of gang banging before he displayed the gun to Cox.

¶ 62 Under this theory, which was overwhelmingly substantiated by the totality of the evidence,[2] it would not matter whether Hernandez grabbed the gun from defendant or defendant gave him the gun. When Hernandez saw Cox's car parked at pump No. 5, he pointed it out to defendant. Defendant knew that Cox and Hernandez had a recent gang-related encounter. Inside the Shell station's store, Herman told Cox "something" about Hernandez. Defendant testified that Hernandez looked a certain way at Herman and Cox while they were all inside the store. Then, outside, defendant engaged Herman and then Cox in a verbal gang quarrel, displaying his gun to Cox, while Hernandez joined by arguing with Herman. At that point, Hernandez and defendant were jointly engaged in provoking gang violence. Defendant displayed his gun to Cox, sending the message that he was prepared to use it. Cox understood

[2] In defendant's petition for rehearing, he focuses solely on Cox's and his own testimony in arguing that the evidence was closely balanced. Defendant ignores the substantial evidence that inculpated him under the common-criminal-design rule.

this, because after Hernandez got the gun, Cox told Herman to shut up. Hernandez stepped next to defendant, and the gun passed between them without a fight or a protest from defendant. Then Hernandez shot Herman.

¶ 63 Where one aids another in the planning or commission of an offense, he is legally accountable for the conduct of the person he aids, and the word "conduct" encompasses any criminal act done in furtherance of the planned and intended act. *People v. Kessler*, 57 Ill. 2d 493, 497 (1974). The evidence shows that defendant was legally accountable for Hernandez's act, even if defendant did not hand Hernandez the gun. Accordingly, the introduction of Swanson's prior inconsistent statement did not prejudice defendant.

¶ 64 Defendant additionally contends that, under the second prong of the plain-error analysis, the introduction of Swanson's prior inconsistent statement requires reversal of his conviction. If a defendant carries the burden of showing that the error was so serious that it affected the fairness of the trial and challenged the integrity of the judicial process, prejudice is presumed. *People v. Sebby*, 2017 IL 119445, ¶ 50. We determine that defendant has not demonstrated second-prong plain error. As discussed above, proof of defendant's culpability under the common-criminal-design rule does not rest on whether defendant handed Hernandez the gun. Consequently, the introduction of Swanson's prior inconsistent statement did not affect the fairness of the trial.

¶ 65 We also reject defendant's claim of ineffective assistance of counsel. Claims of ineffective assistance of counsel are resolved according to the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687-94 (1984). To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance resulted in prejudice to the defendant. *Strickland*, 466 U.S. at 687.

To establish deficient performance, the defendant must show that his attorney's performance fell below an objective standard of reasonableness. *People v. Evans*, 209 Ill. 2d 194, 219 (2004). Prejudice is established when a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Evans*, 209 Ill. 2d at 219-20. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome, in that counsel's deficient performance rendered the trial result unreliable or the proceeding unfair. *People v. Watson*, 2012 IL App (2d) 091328, ¶ 23. The failure to satisfy either *Strickland* prong precludes a finding of ineffective assistance of counsel. *People v. Lofton*, 2015 IL App (2d) 130135, ¶ 24. Where, as here, the claim of ineffective assistance of counsel was not raised in the trial court, our review is *de novo*. *Lofton*, 2015 IL App (2d) 130135, ¶ 24.

¶ 66 Having determined that Swanson's prior inconsistent statement was inadmissible for any purpose, we also determine that counsel's failure to object to its admission fell below an objective standard of reasonableness. However, defendant cannot demonstrate prejudice for the reasons stated above.

¶ 67 C. Ineffective Assistance of Counsel—Introduction of Prior Convictions

¶ 68 The State moved *in limine* to introduce defendant's felony convictions for impeachment purposes if he testified. Defendant was convicted of felony obstruction of justice in 2011 and aggravated battery in 2012. The court allowed the State to use the obstruction-of-justice conviction, ruling that it was less prejudicial than the aggravated-battery conviction. The court also prevented the State from naming the felony (aggravated battery) that was the predicate for the charge of aggravated unlawful use of a weapon

¶ 69 However, during defendant's testimony, defense counsel deliberately introduced both felony convictions plus a misdemeanor conviction for attempted obstruction of justice. Defendant argues that counsel's performance was deficient, depriving him of a fair trial. The State asserts that counsel's trial strategy was to make defendant look as candid as possible in light of his damaging admissions that he possessed the murder weapon and was a gang member. The State also posits that eliciting the aggravated-battery conviction relieved the jury of speculating about the nature of the felony that underlay the charge of aggravated unlawful use of a weapon.

¶ 70 There is a strong presumption that trial counsel's conduct was reasonable and that the challenged action or inaction was the product of trial strategy. *Lofton*, 2015 IL App (2d) 130135, ¶ 24. Decisions concerning which witnesses to call and what evidence to present on a defendant's behalf rest with trial counsel and are matters of trial strategy. *People v. Williams*, 317 Ill. App. 3d 945, 950 (2000). Trial strategy includes the decision whether to use a defendant's prior convictions to suggest to the jury that the defendant is testifying honestly, because he is not concealing his prior convictions. *Williams*, 317 Ill. App. 3d at 950. This issue is raised for the first time on appeal, so our review is *de novo*. *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 25.

¶ 71 Defendant relies on *People v. Fletcher*, 335 Ill. App. 3d 447 (2002). In *Fletcher*, defense counsel had the defendant recite all of his extensive prior criminal history, including inadmissible juvenile arrests from the age of 14, and then allowed the prosecutor on cross-examination to delve into the details of each case's history. *Fletcher*, 335 Ill. App. 3d at 450-52. In finding prejudice, the appellate court noted that the State's evidence consisted of testimony of accomplices who "needed to be viewed with great caution." *Fletcher*, 335 Ill.

App. 3d at 455. Indeed, defense counsel's performance in *Fletcher* was so lacking that the appellate court treated it with unrestrained ridicule.

¶ 72 The present case is a far cry from *Fletcher*. Nevertheless, we need not decide whether counsel's performance was deficient, because defendant cannot demonstrate that he was prejudiced. As noted, the totality of the evidence overwhelmingly proved defendant's guilt. When defendant took the witness stand, the jury already knew that he was a member of the Latin Kings and that the Latin Kings organization financed itself through crime. The jury had already heard from Hobson that defendant came to the Shell station armed. Through Cox's testimony, the jury knew that defendant picked the fight and displayed the gun. Keeney told the jury that defendant was waving the gun immediately after the shooting. The jury also knew that defendant and Hernandez fled the scene in tandem and that defendant hid from the police with the assistance of other members of the Latin Kings. The jury heard defendant's testimony and could reasonably have rejected it. Consequently, we determine that there is no reasonable probability that the result of the trial would have been different had the jury not been exposed to defendant's prior convictions.

¶ 73 D. The State's Reliance on Swanson's Prior Inconsistent Statement in Rebuttal Argument

¶ 74 When Swanson denied that defendant told her anything about how Hernandez got the gun, the State impeached her with her prior inconsistent statement. Then, in rebuttal closing argument, the prosecutor argued that "she told the detectives this defendant told her he took the gun out and gave it to [Hernandez]." The prosecutor argued that "[Swanson] told you the truth about what [defendant] said to her regarding this murder[,] and she told you about what this defendant said happened." Defendant maintains that the prosecutor improperly used the prior inconsistent statement as substantive evidence in his rebuttal argument.

¶ 75 Prosecutors are given wide latitude in closing argument. *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007). However, a prosecutor cannot make arguments that have no basis in the evidence. *People v. Meeks*, 382 Ill. App. 3d 81, 84 (2008). Improper comments are not reversible error unless they are a material factor in the conviction or cause substantial prejudice to the defendant. *Meeks*, 382 Ill. App. 3d at 84.

¶ 76 Here, the State concedes that the State's argument was improper. Indeed, we have already determined that Swanson's prior inconsistent statement was not admissible as substantive evidence, because she had no personal knowledge of the event. Consequently, we agree with defendant that the prosecutor's comments were improper. See *People v. Emerson*, 97 Ill. 2d 487, 501 (1983) (improper for the State to reference a prior consistent statement in closing argument where the statement was not admissible).

¶ 77 Because the issue was not preserved for review, defendant urges that it amounted to plain error. Defendant also asserts that counsel rendered ineffective assistance for failing to object to the comments. We find no plain error. As noted, under the plain-error doctrine, a forfeited error is reviewable when (1) the evidence is closely balanced or (2) the error is so fundamental and of such magnitude that the defendant was deprived of a fair trial. *People v. Williams*, 193 Ill. 2d 306, 348-49 (2000). As discussed above, the evidence was not closely balanced. Further, the prosecutor's improper comments were not repeated, and the jury was instructed to consider prior inconsistent statements only as affecting the weight of the witness's testimony. Consequently, the comments did not render the trial unfair under the second prong of the plain-error analysis. For the same reasons, we also hold that defendant was not prejudiced, so there was no ineffective assistance of counsel.

¶ 78 E. Proof of Guilt of Unlawful Possession of a Firearm by a Street Gang Member

¶ 79 Defendant argues that the State failed to prove that the Latin Kings are a "street gang" as defined by the Illinois Streetgang Terrorism Omnibus Prevention Act (Act) (740 ILCS 147/10 (West 2012)). Defendant was charged with unlawful possession of a firearm by a street gang member in violation of section 24-1.8(a)(1) of the Criminal Code of 1961 (Code) (720 ILCS 5/24-1.8(a)(1) (West 2012)). A person violates that section when he or she: (1) knowingly possesses, carries, or conceals on or about his person a firearm while on any street, road, alley, gangway, sidewalk, or other lands, except when inside his or her own abode or fixed place of business; (2) has not been issued a valid firearms owner's identification (FOID) card; and (3) is a member of a "street gang." "Street gang" is defined as "any combination *** of 3 or more persons with an established hierarchy that, through its membership or through the agency of any member engages in a course or pattern of criminal activity." 740 ILCS 147/10 (West 2012). "Course or pattern of criminal activity" means two or more gang-related criminal offenses committed when (1) at least one such offense was committed after January 1, 1993; (2) both or all offenses were committed within five years of each other; and (3) at least one offense involved the solicitation to commit, conspiracy to commit, attempt to commit, or commission of any felony. 740 ILCS 147/10(1-3) (West 2012).

¶ 80 Relying on *People v. Lozano*, 2017 IL App (1st) 142723, defendant argues that the State failed to prove a "course or pattern of criminal activity" and, therefore, failed to prove that the Latin Kings are a street gang. The State has the obligation to prove every essential element of the crime beyond a reasonable doubt. *Lozano*, 2017 IL App (1st) 142723, ¶ 30. As noted, when the defendant challenges the sufficiency of the evidence, we must determine whether any rational trier of fact, after viewing the evidence in the light most favorable to the State, could have found the essential elements of the crime beyond a reasonable doubt. *Lozano*, 2017 IL

App (1st) 142723, ¶ 28. The reviewing court must draw all reasonable inferences in the State's favor. *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004).

¶ 81 In *Lozano*, the court reversed the defendant's conviction of unlawful possession of a firearm by a street gang member where the State failed to establish a specific time frame during which the gang committed its crimes. *Lozano*, 2017 IL App (1st) 142723, ¶¶ 41-44. Presiding Justice Gordon dissented, in part on the basis that the State's gang expert testified in the present tense that the gang's violence included forcible felonies. *Lozano*, 2017 IL App (1st) 142723, ¶ 55 (Gordon, P.J., dissenting). The dissent concluded that whether the expert's testimony referenced current events or historical facts was for the jury to decide and that it was free to interpret the testimony as applying to the present time. *Lozano*, 2017 IL App (1st) 142723, ¶ 55 (Gordon, P.J., dissenting).

¶ 82 Here, Dammon testified as the State's gang expert. Dammon explained the Latin Kings' and Surenos 13's histories, hierarchies, structures, symbols, signs, dress, and tattoos. Dammon testified that "gang banging" occurs when members are doing actual gang work, such as committing crimes for the prosperity or benefit of the gang, rather than "hanging out." According to Dammon, guns are very important to gangs, as gangs' primary income is from drug sales. He testified that gangs need weapons to protect their drugs, cash, and members from rival gangs. Dammon explained that "gang banging" also means fighting rival gangs, "as well as intimidation of people. Anything to benefit the gang itself." Dammon opined, without objection, that the Latin Kings are a street gang as defined by Illinois law. He identified defendant as a current member of the Latin Kings.

¶ 83 Defendant maintains that, as in *Lozano*, the State's proof fails because Dammon did not testify to a time frame or, indeed, to any specific historical crime committed by the Latin Kings.

The State urges us to adopt Presiding Justice Gordon's dissent. However, in *People v. Jamesson*, 329 Ill. App. 3d 446, 460 (2002), this court held that an expert on gangs may opine on the ultimate issue of whether an organization is a street gang engaged in a course or pattern of criminal activity without testifying to specific dates or incidents. Here, Dammon testified to the organizational structure of street gangs in general, and the Latin Kings in particular, and he opined that the Latin Kings are a street gang within the meaning of Illinois law. That opinion alone was sufficient to establish the element that the Latin Kings are a street gang. Further, Dammon testified in the present tense that gangs use guns to protect their drugs, cash, and members from rival gangs and that members do whatever is needed to benefit the gang, including intimidation of people. We believe that the jury could have reasonably inferred from Dammon's testimony that the Latin Kings historically and currently commit felonies. Accordingly, we hold that the State proved defendant's guilt of unlawful possession of a firearm by a street gang member beyond a reasonable doubt.

¶ 84 F. Whether Section 24-1.8(a)(1) of the Code is Unconstitutional

¶ 85 Defendant contends that section 24-1.8(a)(1) of the Code, which makes it unlawful for a street gang member who does not have a FOID card to possess a firearm, unconstitutionally criminalizes a defendant's status as a street gang member, in violation of the eighth amendment to the United States Constitution (U.S. Const., amend. VIII). The constitutionality of a statute is an issue of law, which we review *de novo*. *People v. Brown*, 2017 IL App (1st) 150146, ¶ 26. The party challenging the constitutionality of a statute has the burden to clearly establish that the statute violates constitutional protections. *Brown*, 2017 IL App (1st) 150146, ¶ 26. Statutes carry a strong presumption of constitutionality, and courts have a duty to uphold a statute's constitutionality whenever it is reasonably possible to do so. *Brown*, 2017 IL App (1st)

150146, ¶ 26. Consequently, all doubts are construed in favor of a statute's constitutionality. *Brown*, 2017 IL App (1st) 150146, ¶ 26.

¶ 86 In *Robinson v. California*, 370 U.S. 660, 666 (1962), the United States Supreme Court struck down a California statute making it a criminal offense for a person to be addicted to narcotics. In so holding, the Court noted that the statute punished a person not for the use, purchase, sale, or possession of narcotics, but for the status of being a narcotics addict. *Robinson*, 370 U.S. at 666. The Court commented that criminalizing a disease inflicted cruel and unusual punishment. *Robinson*, 370 U.S. at 666. In *Powell v. Texas*, 392 U.S. 514, 532 (1968), the Court refused to extend *Robinson* to a claim that the defendant's conviction of public drunkenness violated the eighth amendment, because the defendant was convicted not for being an alcoholic, but for being in public while drunk on a particular occasion. *Powell*, 392 U.S. at 532. Thus, the challenged statute in *Powell* punished an illicit act rather than a person's status. See *Farber v. Rochford*, 407 F. Supp. 529, 534 (N.D. Ill. 1975). In *Farber*, the court struck down a Chicago ordinance declaring it unlawful for a habitual drunkard, narcotics addict, or known prostitute to congregate with other persons of those classes, holding that such laws look "towards the status of the suspect rather than his conduct as the determinative factor of guilt." *Farber*, 407 F. Supp. at 533.

¶ 87 Here, defendant argues that section 24-1.8(a)(1) punishes his status as a gang member. Defendant relies on *City of Chicago v. Youkhana*, 277 Ill. App. 3d 101 (1995). In *Youkhana*, a city ordinance proscribed loitering by persons known to the police to be street gang members. *Youkhana*, 277 Ill. App. 3d at 104. The appellate court held that the ordinance violated the eighth amendment because it prohibited gang members from loitering solely because they were gang members. *Youkhana*, 277 Ill. App. 3d at 113. Defendant argues that, as in *Youkhana*,

section 24-1.8(a)(1) is triggered only by his status as a gang member. Therefore, he concludes, section 24-1.8(a)(1) punishes only his status.

¶ 88 We distinguish *Youkhana* without opining on *Youkhana*'s dubious assumption that street gang membership is a status. *Robinson* and *Powell* were concerned with recognized diseases, not voluntary criminal associations. Be that as it may, as in *Powell*, section 24-1.8(a)(1) punishes an illicit act—the possession of a firearm without a FOID card. Possession is an act, not a status or a condition. *People v. Nettles*, 34 Ill. 2d 52, 56 (1966). In *Nettles*, the defendant was convicted of possession of narcotics. *Nettles*, 34 Ill. 2d at 53. The defendant argued that the statute criminalizing possession of narcotics, when applied to a known narcotics addict, violated the eighth amendment. *Nettles*, 34 Ill. 2d at 56. Our supreme court handily rejected that argument, noting that possession is a voluntary act. *Nettles*, 34 Ill. 2d at 56. Accordingly, we hold that section 24-1.8(a)(1) is constitutional.

¶ 89 G. Propriety of the Aggregate 60-Year Sentence

¶ 90 Defendant contends that his aggregate 60-year sentence of incarceration does not reflect his youth, rehabilitative potential, and marginal culpability. Defendant also contends that the sentence is disproportionate to the 60-year sentence given to the shooter, Hernandez. See *Hernandez*, 2017 IL App (2d) 141104-U, ¶ 16. Defendant urges this court to reduce his aggregate sentence to 38 years' incarceration. The trial court has broad discretion when imposing a sentence, and its sentencing decision is entitled to great deference. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). This court cannot alter a sentence pursuant to Illinois Supreme Court Rule 615(b) (eff. Jan. 1, 1967) unless the trial court abused its discretion. *People v. Vasquez*, 2012 IL App (2d) 101132, ¶ 68. An abuse of discretion occurs when a

sentence is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense. *Vasquez*, 2012 IL App (2d) 101132, ¶ 68.

¶ 91 The sentencing range for first-degree murder is 20 to 60 years' incarceration. 730 ILCS 5/5-4.5-20(a) (West 2012). Because the jury found that defendant was armed with a firearm during the commission of the offense, a mandatory 15-year enhancement applied. 730 ILCS 5/5-8-1(a)(1)(d)(i) (West 2012). A conviction of unlawful possession of a firearm by a street gang member carries a range of incarceration from 3 to 10 years. 720 ILCS 5/24-1.8(b) (West 2012). Here, the court sentenced defendant to 35 years' imprisonment for first-degree murder, and then added the mandatory 15-year enhancement. As noted, the court merged the conviction of aggravated unlawful use of a weapon into the conviction of unlawful possession of a firearm by a street gang member, and sentenced defendant to a consecutive 10 years' incarceration on that charge. Thus, the aggregate sentence was within statutory limits.

¶ 92 Nevertheless, defendant maintains that the sentence was an abuse of discretion because of his youth and rehabilitative potential. Defendant was 21 years old at the time of the murder. He had been adjudicated delinquent for residential burglary and sentenced to the Illinois Department of Corrections, juvenile division. As an adult, defendant had convictions of driving under the influence, felony obstruction of justice (for which he was sentenced to one year of incarceration), misdemeanor attempted obstruction of justice, and aggravated battery. Defendant was unemployed and was a member of a street gang. At sentencing, he expressed no remorse or regret.

¶ 93 Although defendant downplays his participation in Herman's murder, the jury rejected his version of the event. The evidence showed that defendant went to the Shell station armed and then instigated the confrontation with Cox. Defendant intimidated Cox by accusing him of

gang banging and by displaying the gun in his belt. Immediately after the shooting, defendant was waving the gun, and then he and Hernandez fled. For the next three weeks, defendant was a fugitive. Killing Herman was no act of youthful derring-do. It was, as the court noted, a senseless killing. As the videos taken from defendant's phone depict, defendant was a dedicated street gang member. The act, defendant's criminal history, and his lack of remorse show little, if any, rehabilitative potential.

¶ 94 Defendant also argues that his sentence was excessive as compared to Hernandez's sentence, because (1) Hernandez was eligible for a greater sentence than defendant, as he was subject to a mandatory 25-year enhancement for his first-degree murder conviction, and, (2) as a mere accomplice, defendant should receive a lesser sentence than the shooter. Hernandez was sentenced to a 55-year term of incarceration for first-degree murder with a consecutive 5-year term for unlawful possession of a firearm by a street gang member. *Hernandez*, 2017 IL App (2d) 141104-U, ¶ 16. Defendant asserts that Hernandez grabbed the gun from defendant, who was acting as a peacemaker. As noted, the jury reasonably rejected that scenario. The evidence overwhelmingly demonstrated that defendant was the only one who was initially armed and that he was the prime aggressor. Accordingly, for all of the above reasons, we hold that the court did not abuse its discretion in sentencing defendant to an aggregate term of 60 years' incarceration.

¶ 95 H. Additional Credit Against the Sentence

¶ 96 Finally, defendant contends that he is entitled to an additional two days of credit against his sentence. The mittimus reflects a credit of 731 days. According to defendant, that figure was a miscalculation, as he spent 733 days in custody awaiting trial. The State concedes this argument. Accordingly, we correct the mittimus to reflect a credit of 733 days.

¶ 97 III. CONCLUSION

¶ 98 For the foregoing reasons, the judgment of the circuit court of Boone County is affirmed as modified. We grant the State's request for statutory State's Attorney fees pursuant to *People v. Nicholls*, 71 Ill. 2d 166 (1978).

¶ 99 Affirmed as modified.

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
COUNTY OF BOONE

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff,

-v-

DEONATE X. MURRAY,

Defendant.

Case No. 2013 CF 86

NOTICE OF APPEAL

An appeal is taken from the order or judgment described below.

(1) Court to which appeal is taken: Appellate Court Second District.

(2) Name of appellant and address to which notices shall be sent.

Name: Deontae Murray

Address: Boone County Jail
3820 East Main Street
Belvidere, Illinois 61008

(3) Name and address of appellant's attorney on appeal.

Name: Michael Pelletier
State Appellate Defender
P.O. Box 5240
Springfield, Illinois 62705

If appellant is indigent and has no attorney, does he want one appointed? Yes

(4) Date of judgment or order: June 12, 2015

(5) Offense of which convicted: First Degree Murder and Possession of a Firearm by a Street Gang Member.

(6) Sentence: 50 years IDOC for First Degree Murder and 10 years IDOC for Possession of a Firearm by a Street Gang Member to run concurrently.

(7) If appeal is not from a conviction, nature of order appealed from:

N/A

(8) If the appeal is from a judgment of a circuit court holding unconstitutional a statute of the United States or of this state, a copy of the court's findings made in compliance with Rule 18 shall be appended to the notice of appeal. N/A

Charles J. Prorok
Boone County Alternate Public Defender
One Court Place, Suite 301
Rockford, Illinois 61101
815-964-4601 ext 105

No. 123289

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court of Illinois, No. 2-15-0599.
Plaintiff-Appellee,	)	There on appeal from the Circuit Court of the Seventeenth Judicial
-vs-	)	Circuit, Boone County, Illinois, No. 13 CF 86.
DEONTAE MURRAY	)	Honorable Robert Tobin,
Defendant-Appellant	)	Judge Presiding.

NOTICE AND PROOF OF SERVICE

Ms. Lisa Madigan, Attorney General, 100 W. Randolph St., Chicago, IL 60601, eserve.criminalappeals@atg.state.il.us;

Mr. David J. Robinson, Acting Deputy Director, State's Attorney Appellate Prosecutor, 2032 Larkin Avenue, Elgin, IL 60123, 2nddistrict.eserve@ilsaap.org;

Ms. Michelle Courier, Boone County State's Attorney, 601 N. Main St., Suite 302, Belvidere, IL 61008, stateatty@boonecountyil.org;

Mr. Deontae Murray, Register No. M22250, Menard Correctional Center, P.O. Box 1000, Menard, IL 62259

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On August 10, 2018, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

/s/Alicia Corona
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