

No. 123289

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF)	Appeal from the Appellate Court of
ILLINOIS,)	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.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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REPLY BRIEF FOR DEFENDANT-APPELLANT

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.

At Deontae Murray’s trial, the State introduced no specific evidence that the Latin Kings engaged in a “course or pattern of criminal activity” by committing two or more felony offenses within five years, as required to establish the “streetgang” element of Unlawful Possession of a Firearm (UPF) by a streetgang member. 720 ILCS 5/24-1.8; 740 ILCS 147/10 (Illinois Streetgang Terrorism Omnibus Act “Act”). The State therefore failed to establish the offense of UPF by a streetgang member beyond a reasonable doubt. The State responds to the contrary, asking this Court to relieve the State of its burden of proof by allowing a gang expert’s opinion – without mention of specific prior felonies – to alone serve

as proof beyond a reasonable doubt that the Latin Kings are a “streetgang” within the meaning of the statute. This Court should reject the State’s argument, reverse the appellate court, and reverse Murray’s conviction for UPF by a streetgang member.

The State’s response attempts to distract from the issue at hand by re-framing Murray’s argument in multiple ways. First, the State claims that Murray’s argument “recasts” a procedural objection – the lack of a jury instruction on the definition of street gang – as a sufficiency claim. This entirely misstates Murray’s argument. (St. Br. 11-12). In *People v. Lozano*, 2017 IL App (1st) 142723, the court noted that the jury had not been instructed on the definition of “streetgang.” But that point was not determinative in the court’s decision to find the gang expert’s failure to specify a time-frame for the crimes rendered his testimony insufficient to establish the Two-Six as a “streetgang” within the strict statutory definition. *Lozano*, at ¶42. Similarly, Murray clearly argued, both here and in the appellate court, that the State’s evidence was insufficient to sustain his conviction for UPF by a streetgang member beyond a reasonable doubt because the State failed to prove that the Latin Kings are a “streetgang,” by failing to prove a “course or pattern of criminal activity,” namely that members of the gang engaged in “2 or more gang-related criminal offenses,” in Illinois, “within 5 years of each other,” at least one of which was a felony or forcible felony. (Def. Br. 12-20); *People v. Murray*, ¶¶79-83; 740 ILCS 147/10.

The State’s “recasting” argument also attempts to distinguish *People v. Jamesson*, 329 Ill. App. 3d 446 (2d Dist. 2002), it fails. (St. Br. 11-12). Similarly,

the fact that *Jamesson* involved a bench trial changed nothing about the standard of review the appellate court applied, but informed the appellate court's opinion regarding the evidence the trier of fact considered; there, evidence that the Latin Counts had been involved in aggravated batteries "a couple of years ago," and the judge's presumed application of all relevant statutory elements and definitions. *Jamesson*, 329 Ill. App. 3d at 449-51, 460-61. As explained in Murray's opening brief, both *Lozano* and *Jamesson* should inform this Court's decision. (Def. Br. 15-17).

Next, the State repeatedly asserts that the statute does not limit how the State may prove its case. (St. Br. 13-15). But *how* the State proves its case is not at issue. The question is *whether* the State proved its case. Without evidence of two specific crimes committed by Latin Kings members, it did not. 720 ILCS 5/24-1.8; 740 ILCS 147/10. This case is thus no different than analogous cases involving exacting legislative strictures. As Murray demonstrated in his opening brief, this Court has consistently held the State to its burden of proof on strict statutory requirements. (Def. Br. 19-20); *People v. Davis*, 2016 IL App (1st) 142414, ¶¶9-16 (exact measurement required for narcotics delivery within 1000 feet of a school or church); *People v. White*, 2015 IL App (1st) 131111 ¶¶30-33 (for non-enumerated offense to qualify as "forcible felony" for proving armed habitual criminal (AHC), State must prove offense at issue involved actual violence or is inherently forcible felony under residual clause). This Court should require no less in this case.

The State's reliance on *People v. Wright*, 2017 IL 119561, is misplaced. (St. Br. 14-15). In *Wright*, several eyewitnesses described a firearm, and this Court

found that those descriptions were sufficient to sustain the defendant's conviction beyond a reasonable doubt. *Wright*, at ¶76. *Wright* involved a physical object subject to close and easy observation. *Id.* A streetgang, by contrast, is an abstract concept formed by people and ideas, making it not susceptible to simple observation. That is, while certain elements of a streetgang might be easily observed, like the use of colors or symbols, factors like hierarchy, history, and membership status are not. *Murray*, at ¶82. The issue in *Wright* – whether multiple witnesses' description of a weapon was sufficient to prove it was a firearm beyond a reasonable doubt – is thus nothing like the one presented here – whether Detective Dammon's opinion, which failed to mention specific felony offenses committed by Latin Kings in a specific time period, was sufficient to establish that the Latin Kings are a streetgang under the specific strictures of the statute. *Wright* is thus inapplicable to the case at bar.

This Court's recent decision in *People v. Newton*, 2018 IL 122958, mentioned by the State, (St. Br. 15, fn. 6), similarly has no impact on this case. In *Newton*, this Court held that the State need not adduce additional evidence that a church was used primarily for religious worship for purposes of proving the offense of delivery of a controlled substance within 1000 feet of a church, where the building at issue was proven beyond a reasonable doubt to be a church. *Newton*, at ¶¶17-22, 25-26, 29. Relying on a dictionary definition of "church," because the legislature had not defined it, this Court found the clause "used primarily for religious worship" in the delivery of a controlled substance is redundant with "church," and was aimed at cases involving houses of worship that are not traditional churches or

synagogues. *Id.* at ¶¶17, 20. This Court also found that the State introduced extensive evidence establishing that the church was, in fact, a church, including up-to-date signage, lighting, and people entering and leaving the building. *Id.* at ¶25.

Here, unlike in *Newton*, the legislature has provided a specific definition of “streetgang.” 740 ILCS 147/10. And also unlike in *Newton*, the State presented no evidence of specific crimes committed by Latin Kings within five years, as the statute specifically requires. *Id.* The evidence – or lack thereof – in this case is analogous to the evidence found insufficient in *People v. Cadena*, 2013 IL App (2d) 120285, and *People v. Fickes*, 2017 IL App (5th) 140300, which this Court distinguished in *Newton*. *Newton*, at ¶29. In *Cadena*, the only evidence presented was a police officer’s affirmative response to the leading question that the Evangelical Covenant Church was an active church and that the church was 860 feet from the drug transaction; the court held that the testimony lacked any temporal context or indication as to the officer’s personal knowledge that the location was an active church at the time of the offense. *Cadena*, at ¶16; *Newton*, at ¶29. Similarly, in *Fickes*, the only evidence was vague testimony that a transaction took place “just south of the St. James Lutheran Church, behind the church,” finding that the reference to the church, by itself, was insufficient for proof that it was operating as a church beyond a reasonable doubt. *Fickes*, at ¶24; *Newton*, at ¶29. The State’s proof is similarly lacking here, as Dammon’s testimony failed to mention two specific crimes within five years to meet the statutory definition of “streetgang.” (R. 1383-1473). Thus, *Newton* does not alter the outcome of this case.

There is no support for the State's position that Dammon's opinion that the Latin Kings are a streetgang, without Dammon testifying that Latin Kings committed two or more felonies within five years of each other, is sufficient to prove Murray's guilt of UPF by a streetgang member beyond a reasonable doubt. (St. Br. 13). Allowing an expert to opine on an ultimate issue – here, that the Latin Kings are a “streetgang” as defined by the Act – does not allow the State to circumvent its burden of proof. The expert still must provide the basis on which his conclusion rests in order to infer the applicable statutory requirements; here, the statutory elements that establish a “course or pattern of criminal activity.” *Jamesson*, 329 Ill. App. 3d at 449-51, 460-61; 740 ILCS 147/10. Dammon's testimony in this case did not mention specific felonies committed by Latin Kings within five years of each other, and thus cannot support Murray's conviction beyond a reasonable doubt. (R. 1383-1473); *Jamesson*, 329 Ill. App. 3d at 460-61; *Lozano*, at ¶¶42-44.

The only direct response from the State is its assertion that it does not have to present evidence of specific crimes to establish the offense at issue. (St. Br. 12-13). But it does, by the plain language of the statute. 720 ILCS 5/24-1.8; 740 ILCS 147/10; *Lozano*, 2017 IL App (1st) 142723, ¶¶42-44. Again, the State had to prove that Murray is a member of a “streetgang” as defined by 740 ILCS 147/10, which required the State to prove that the Latin Kings engaged in a “course of pattern of criminal activity,” which includes, “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. That the State did not do, through Detective Dammon's testimony or otherwise, as neither Dammon nor any other witness described specific crimes committed by the Latin Kings. (R. 1383-1473).

And despite the State's protestation, the legislative intent behind the offense remains relevant. (St. Br. 15). The State first suggests that the legislative history must be ignored because the statutory language is ambiguous. But the parties plainly disagree on the meaning of this language as it relates to the State's burden of proof at trial; by arguing that it need not establish the statutory elements with specific evidence to obtain a conviction, the State injects ambiguity into the statute. (St. Br. 15); *People v. Young*, 2011 IL 111886, ¶11 (finding review of legislative intent appropriate to determine whether preschool was a "school" for purposes of delivery of a controlled substance enhancing factor). The legislative history defeats the State's reading. Sen. Transcript, 96th Gen. Assem., 70th Legis. Day at pp. 154-159 (discussing H.B. 4124) (Sens. Raoul, Millner, Rutherford); (Def. Br. 17-19).

The State also complains that the legislature's stated intent that the prosecution be held to a "very, very high" burden of proof on the gang elements of the offense was not from the passage of the Illinois Streetgang Terrorism Omnibus Act. (St. Br. 15). That is true. The stated legislative intent that the definition of "streetgang" be lengthy and detailed, that "there exists an extremely clear definition of a 'gang member,'" and that, "the burden of proof is very high," came from the

legislature's creation of the offense of UPF by a streetgang member. Sen. Transcript, 96th Gen. Assem., 70th Legis. Day at pp. 157-159 (discussing H.B. 4124) (Sens. Millner, Rutherford). That is exactly what makes it relevant and defeats the State's argument. The legislators specifically adopted the detailed definition of "streetgang" from the Act in creating the offense of UPF by a streetgang member, and in doing so repeatedly stated their intent that courts hold the prosecution to a "very, very high" burden of proof when prosecuting defendants for UPF by a streetgang member. Sen. Tr., at p. 158 (Sen. Millner). The appellate court's opinion in this case, finding Dammon's testimony sufficient to establish the Latin Kings as a gang beyond a reasonable doubt, without mention of a statutory element, directly conflicts with the legislature's clearly stated intent. *Murray*, at ¶83; Sen. Tr., at 157-159 (comments of Sens. Millner, Rutherford).

Nor is there any "irony" in Murray's argument that holding the State to its burden would require that additional gang evidence be admitted. (St. Br. 15-16). Any jury tasked with weighing a defendant's guilt for UPF by a streetgang member must by definition hear gang evidence. 720 ILCS 5/24-1.8; 740 ILCS 147/10. Under the State's method of allowing a gang expert to go on at length about purported general, vague and abstract criminal behavior, the jury is exposed to a mountain of extraneous, unnecessary, prejudicial and time-consuming evidence. Under the method proposed by Murray and consistent with the statute, the State need only present evidence of two specific, documented crimes in a specific time frame. The result would be more efficient, more relevant, and less prejudicial trial testimony. Indeed, it is ironic that the *State* is not proposing this simpler and cleaner approach.

The State's argument on this point is a red herring.

Finally, the State's argument, made for the first time in this Court, that Murray's own criminal behavior on the day of the shooting established a course or pattern of criminal activity is also misplaced. (St. Br. 17-18). The State's assertion carries the same flaw as the State's argument overall – it does not establish two criminal offenses as required by the statute. Trying to provoke a fight, if that was what Murray was doing, would have been a misdemeanor. 720 ILCS 5/12-3(b) There is no basis for concluding that Murray or Perez created any graffiti, as the State at trial presented nothing more than the video showing Murray and Perez goofing off; the State proffered no evidence as to who created the graffiti, such as on whose property it appeared or when it appeared, and nothing more than Murray's walking past it linked it to him. (R. 1317-1318). And the State did not argue at trial that Murray and Perez actually created the graffiti. (R. 13317, 1627-1628).

The State's evidence in this case failed to include mention of specific felony crimes committed by Latin Kings within five years of each other, and thus failed to prove the Latin Kings are a streetgang under the Act beyond a reasonable doubt. Without that evidence, there is no sufficient basis on which to sustain Deontae Murray's conviction for unlawful possession of a firearm by a streetgang member beyond a reasonable doubt. Consistent with the plain language of the applicable statutes, the intent behind those statutes, and the appellate court's decisions in *Lozano* and *Jamesson*, this Court should hold that the State must prove each of the specific statutory requirements defining "streetgang" and "course or pattern

of criminal activity” beyond a reasonable doubt. Accordingly, 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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CERTIFICATE OF COMPLIANCE

I, Jennifer L. Bontrager, certify that this reply brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this reply brief, excluding pages containing the Rule 341(d) cover and the Rule 341(c) certificate of compliance is 11 pages.

/s/Jennifer L. Bontrager
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NOTICE AND PROOF OF SERVICE

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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 November 9, 2018, the Reply Brief 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 Reply Brief to the Clerk of the above Court.

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