

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)
) No. 46333-2018
 Plaintiff-Respondent,)
) Ada County Case No.
 v.) CR01-17-51270
)
 JOHN ROBERT RODRIGUEZ,)
)
 Defendant-Appellant.)
 _____)

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA**

HONORABLE JONATHAN MEDEMA
District Judge

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STATEMENT OF THE CASE

Nature Of The Case

John Robert Rodriguez appeals from his conviction for providing a firearm to a criminal gang member.

Statement Of The Facts And Course Of The Proceedings

The state charged Rodriguez with two counts of providing firearms to criminal gang members and a sentencing enhancement for gang participation. (Confidential Documents, pp. 1-2.) After a trial, a jury convicted him of one count of providing a firearm to a criminal gang member, but acquitted him of the second count and the enhancement. (R., pp. 86-87.) The district court sentenced Rodriguez to 10 years with four years determinate, suspended the sentence, and ordered probation for 10 years. (R., pp. 91-96.) Rodriguez filed a notice of appeal timely from the entry of judgment. (R., pp. 103-05.)

ISSUES

Rodriguez states the issue on appeal as:

Must this Court vacate Mr. Rodriguez's judgment of conviction because I.C. § 18-8505 violates the First, Second and Fourteenth Amendments to the United States Constitution by criminalizing the otherwise lawful sale or transfer of a firearm without the intent to further criminal gang activity?

(Appellant's brief, p. 4.)

The state rephrases the issues as:

1. Has Rodriguez failed to show that his right of association was implicated, much less violated, by the statute prohibiting the transfer of firearms to criminal gang members and has therefore failed to show fundamental error?
2. Has Rodriguez failed to show that his right to bear arms was infringed, and has therefore failed to show fundamental error?

ARGUMENT

I.

Rodriguez Has Failed To Show That The Statute Prohibiting The Transfer Of Firearms To Criminal Gang Members Is Clearly Overbroad

A. Introduction

For the first time on appeal, Rodriguez argues that the statute prohibiting supplying firearms to criminal gangs is constitutionally overbroad and unenforceable because it interferes with the right of association. (Appellant’s brief, pp. 9-12, 16-18.) However, Rodriguez has failed to show that *his* rights of association are even implicated because whether he is personally a member of a gang is statutorily irrelevant. The only requirement of gang membership is that the recipient of the firearm (not the defendant) be a criminal gang member. Rodriguez has failed to show that transferring a firearm to another person is a constitutionally protected “association.” Because he has the burden of showing a clear violation of *his* constitutional rights, Rodriguez has failed to show fundamental error.

B. Standard Of Review

Where a claim of error unpreserved by a contemporaneous objection is presented on appeal, the Court applies a three step review. State v. Perry, 150 Idaho 209, 226, 245 P.3d 961, 978 (2010). First, the appellant must show that “one or more ... unwaived constitutional rights were violated.” Id. Second, “the error must be clear or obvious.” Id. “This means the record must contain evidence of the error and the record must also contain evidence as to whether or not trial counsel made a tactical decision in failing to object.” State v. Miller, 165 Idaho 115, ___, 443 P.3d 129, 133 (2019). “If the record does not contain evidence regarding whether counsel’s decision was strategic, the claim is factual in nature and thus more appropriately addressed via a petition for post-conviction relief.”

Id. Finally, the appellant “must demonstrate that the error affected [his or her] substantial rights.” Perry, 150 Idaho at 226, 245 P.3d at 978. “Whether the error affected the trial proceedings must be clear from the appellate record.” Miller, 165 Idaho at ____, 443 P.3d at 133.

Where the constitutionality of a statute or ordinance is challenged, the appellate court reviews it *de novo*. State v. Cobb, 132 Idaho 195, 969 P.2d 244 (1998); State v. Richards, 127 Idaho 31, 34, 896 P.2d 357, 360 (Ct. App. 1995). The party challenging the constitutionality of a statute must overcome a strong presumption of constitutionality and clearly show the invalidity of the statute. Olsen v. J.A. Freeman Co., 117 Idaho 706, 791 P.2d 1285 (1990); Richards, 127 Idaho at 34, 896 P.2d at 360. The appellate court is obligated to seek a construction of a statute that upholds its constitutionality. Cobb, 132 Idaho at 197, 969 P.2d at 246; State v. Newman, 108 Idaho 5, 13 n.12, 696 P.2d 856, 864 n.12 (1985).

C. Rodriguez’s Overbreadth Claim Is Incompatible With The Fundamental Error Standard

The first prong of the fundamental error test is that “the defendant must demonstrate that one or more of *the defendant’s* unwaived constitutional rights were violated.” State v. Perry, 150 Idaho 209, 226, 245 P.3d 961, 978 (2010) (emphasis added). However, the overbreadth doctrine invoked by Rodriguez “is aimed at statutes which, though designed to prohibit legitimately regulated conduct, include within their prohibitions constitutionally protected freedoms.” State v. Manzanares, 152 Idaho 410, 423, 272 P.3d 382, 395 (2012). Under an overbreadth challenge there is no requirement “that the person making the attack demonstrate that *his own conduct* could not be regulated by a statute drawn with the

requisite narrow specificity.” Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) (emphasis added, internal quotations omitted). The overbreadth doctrine “operates as an exception to the normal rules of standing” which requires the party invoking it “to demonstrate a realistic danger that the ordinance will significantly compromise recognized First Amendment protections *of parties not before the Court*.” Regan v. Time, Inc., 468 U.S. 641, 652 (1984) (emphasis added, brackets and quotations omitted). Thus, “the issue under the overbreadth doctrine is whether a government restriction of speech that is *arguably valid as applied to the case at hand* should nevertheless be invalidated to avoid the substantial prospect of unconstitutional application elsewhere.” Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 800 n.19 (1984) (emphasis added, quotation omitted). An overbreadth challenge, therefore, as opposed to an as-applied challenge, is not a claim that *the defendant’s* constitutional rights have been violated. Because an overbreadth claim is not a claim that the *defendant’s* constitutional rights have been infringed, it is not a cognizable claim of fundamental error. Rodriguez’s claim necessarily fails under the first prong of the fundamental error test.

Nor is it clear, under the second prong of the fundamental error test, that Rodriguez’s constitutional rights of association were implicated in this case, much less clear that they were violated. The First Amendment provides a right to “assemble for *lawful purposes*.” United States v. Cruikshank, 92 U.S. 542, 552 (1875) (emphasis added). See also Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1 (1964) (First Amendment guarantees right to gather together for the “lawful purpose” of helping assert statutory rights). “[F]reedom of speech and of assembly for *any lawful purpose* are rights of personal liberty secured to all persons, without regard to citizenship, by the due process

clause of the Fourteenth Amendment.” Hague v. Committee for Industrial Organization, 307 U.S. 496, 519 (1939) (Stone, J., plurality opinion) (emphasis added, citations omitted). See also Bates v. City of Little Rock, 361 U.S. 516, 522-23 (1960) (“And it is now beyond dispute that freedom of association for the purpose of advancing ideas and airing grievances is protected by the Due Process Clause of the Fourteenth Amendment from invasion by the States.”). Thus, “*peaceable* assembly for *lawful* discussion cannot be made a crime,” but if defendants have “formed or are engaged in a conspiracy against the public peace and order, [defendants] may be prosecuted for their conspiracy or other violation of valid laws.” De Jonge v. Oregon, 299 U.S. 353, 365 (1937) (emphasis added). “The freedom of association protected by the First Amendment does not extend to joining with others for the purpose of depriving third parties of their lawful rights.” Madsen v. Women’s Health Center, 512 U.S. 753, 776 (1994).

Applying these principles, the Supreme Court of the United States has held that a statute that prohibits providing material support to designated terrorist organizations does not implicate the right of association because it “does not penalize mere association with a foreign terrorist organization.” Holder v. Humanitarian Law Project, 561 U.S. 1, 39 (2010). Likewise, the statute in question here does not penalize any association.

The statute in question provides: “A person commits the offense of supplying firearms to a criminal gang if the person knows an individual is a gang member and supplies, sells or gives possession or control of any firearm to that gang member.” I.C. § 18-8505(1). The statute thus criminalizes the selling or giving of a firearm to a known gang member. The statute does not implicate the right of association because it “does not penalize mere association with” a criminal gang. Humanitarian Law Project, 561 U.S. at

39. Rodriguez could have joined the Nortenos, gone to their meetings and activities, invited them over to his house, and associated with them in any way he wished without violating this statute. The statute penalizes only providing guns to members of the criminal gang, an action that is not a protected “association.”

Rodriguez contends the statute violates the right of association, but does not articulate how. (Appellant’s brief, pp. 9-12.) He does not claim that *he* was exercising *his own* right of association by giving someone a gun. Rather, he claims that the statute “criminalizes the sale of a firearm based on association alone” (Appellant’s brief, p. 12), but does not claim it is *his* association that is relevant. Indeed, the statute requires that the *other participant in the transaction* be the person associated with the gang (and the person providing the firearm knows it). As noted above, Rodriguez cannot meet the fundamental error test by arguing that the statute is overbroad because it interferes with the *gun recipient’s* right to associate with gangs. Having failed to show that handing someone else a gun (whether as part of a sale or not) is a constitutionally protected association right, he has failed to establish that his constitutional rights are in any way implicated by the statute, much less that the statute is clearly unconstitutional. His argument therefore necessarily fails under the first two prongs of the fundamental error test.

II.

Rodriguez Has Failed To Show That His Right To Bear Arms Was Infringed, And Has Therefore Failed To Show Fundamental Error

A. Introduction

For the first time on appeal Rodriguez argues the statute he violated is overbroad under the Second Amendment because it “substantially burdens *the right of anyone identifiable as a gang member’s* right [sic] to bear arms.” (Appellant’s brief, p. 13.) As

with the overbreadth analysis above, because Rodriguez does not contend (much less show) that *his* constitutional rights are implicated or violated, he cannot show fundamental error.

B. Standard Of Review

Where a claim of error unpreserved by a contemporaneous objection is presented on appeal, the Court applies a three step review. State v. Perry, 150 Idaho 209, 226, 245 P.3d 961, 978 (2010). First, the appellant must show that “one or more ... unwaived constitutional rights were violated.” Id. Second, “the error must be clear or obvious.” Id. “This means the record must contain evidence of the error and the record must also contain evidence as to whether or not trial counsel made a tactical decision in failing to object.” State v. Miller, 165 Idaho 115, ___, 443 P.3d 129, 133 (2019). “If the record does not contain evidence regarding whether counsel’s decision was strategic, the claim is factual in nature and thus more appropriately addressed via a petition for post-conviction relief.” Id. Finally, the appellant “must demonstrate that the error affected [his or her] substantial rights.” Perry, 150 Idaho at 226, 245 P.3d at 978. “Whether the error affected the trial proceedings must be clear from the appellate record.” Miller, 165 Idaho at ___, 443 P.3d at 133.

C. Rodriguez’s Overbreadth Claim Is Incompatible With The Fundamental Error Standard

The Second Amendment confers “an individual right to keep and bear arms,” but the right is not “unlimited.” D.C. v. Heller, 554 U.S. 570, 595 (2008). Limitations on that right include “prohibitions on carrying concealed weapons,” “prohibitions on the possession of firearms by felons and the mentally ill,” “laws forbidding the carrying of firearms in sensitive places such as schools and government buildings,” laws imposing

“conditions and qualifications on the commercial sale of arms,” and regulation of arms not in “common use.” Heller, 554 U.S. at 626–27. “[T]he Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right.” McDonald v. City of Chicago, Ill., 561 U.S. 742, 791 (2010). “It is settled that the Second Amendment protects an individual right to keep and bear arms that applies against both the Federal Government and the States.” Caetano v. Massachusetts, ___ U.S. ___, 136 S. Ct. 1027, 1028 (2016).

Rodriguez has not claimed, nor shown, that he had a Second Amendment right to provide a gun to a criminal gang member. To the contrary, he argues that I.C. § 18-8505 “substantially burdens the right of *anyone identifiable as a gang member’s* right [sic] to bear arms.” (Appellant’s brief, p. 13.) As with his first overbreadth argument,¹ Rodriguez does not claim a violation of *his* constitutional rights and therefore does not articulate a cognizable fundamental error claim.

CONCLUSION

The state respectfully requests this Court to affirm the judgment of conviction.

DATED this 23rd day of August, 2019.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

¹ The state notes that Rodriguez has cited to no cases holding that overbreadth analysis (normally limited to the First Amendment) applies to the Second Amendment, and the state is unaware of any cases so applying the overbreadth doctrine. See United States v. Chester, 514 F. App’x 393, 395 (4th Cir. 2013) (“We first note that no circuit has accepted an overbreadth challenge in the Second Amendment context.”).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 23rd day of August, 2019, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

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