FIRST DIVISION
January 29, 2018

No. 1-15-1525

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 13 CR 17275
	)	
TYRESE WARD,	)	The Honorable
	)	Joseph M. Claps,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Harris and Mikva concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in denying defendant's motion to quash arrest and suppress evidence. Defendant's right to confrontation was not violated. Defendant's conviction and sentence under count 4 are vacated. His one-act, one-crime argument is moot.

¶ 2 Following a bench trial, defendant Tyrese Ward was convicted of four counts of aggravated unlawful use of a weapon (AUUW), but was sentenced under count 4, a violation of section 24-1.6(a)(1), (a)(3)(a) (720 ILCS 5/24-1.6(a)(1), (a)(3)(a) (West 2012)) for carrying an uncased, loaded, immediately accessible firearm, and count 5, a violation of section 24-1.6(a)(1), (a)(3)(C) (720 ILCS 5/24-1.6(a)(1), (a)(3)(C) (West 2012)), for carrying a firearm without a firearm owners' identification card (FOID), to concurrent terms of 11 years' imprisonment. On

appeal, defendant argues: (1) the trial court erred in denying his motion to quash arrest and suppress evidence where his mere possession of a gun, without any additional evidence, was insufficient to lead a reasonably cautious person to believe that he had committed a crime and, thus, failed to provide police with probable cause for arrest; (2) his constitutional right to confrontation was violated when the court allowed the admission of a "certification" alleging defendant's lack of a FOID card, which was prepared by a non-testifying witness and amounted to testimonial hearsay where the affiant was not subject to prior cross-examination and the affidavit was admitted for its truth; (3) his conviction for AUUW under count 4, a violation of section 24-1.6(a)(1),(3)(a), should be vacated because that section was found to be unconstitutional in *People v. Burns*, 2015 IL 117387; and (4) one of his convictions for AUUW must be vacated under the one-act, one-crime rule. For the following reasons, we affirm in part and vacate in part.

¶ 3 BACKGROUND

¶ 4 Prior to trial, defendant filed a motion to quash arrest and suppress evidence. At the hearing on the motion, Chicago Police Officer Powers testified that he was on duty on August 28, 2013, and was driving an unmarked vehicle in the area of 3262 West Maple Avenue, which was a section 8 housing building. At about 1:48 a.m., he saw defendant who was part of a group of five to ten people standing around a sign that prohibited loitering and trespassing in the building. Officer Powers stopped his vehicle, exited and announced his office. Defendant then began to walk quickly westbound on Maple Avenue. Officer Powers drove his vehicle in reverse for about 25 to 30 feet and exited the vehicle, approaching defendant on foot.

¶ 5 Although defendant had been walking alone, Officer Powers noticed that there was now a female also walking westbound on Maple Avenue. Officer Powers saw defendant place his arm

around the female. When defendant did that, defendant's shirt rode up and Officer Powers was able to see a shiny object in defendant's waistband. Officer Powers believed the shiny object was a handgun and as he got closer to defendant he was sure that the object was a handgun. The handgun was tucked between defendant's belt and his jeans which allowed Officer Powers to see the handle of the handgun as well as the barrel. Officer Powers testified that the gun was a chrome .380 semiautomatic handgun about 5 inches long. The officers approached defendant for a field interview. Defendant was handcuffed and Officer Powers recovered the handgun from defendant's waistband during a protective pat down. Defendant was transported to the police station.

¶ 6 Following Officer Powers' testimony, defendant argued that the officers had no basis to detain defendant because it is no longer illegal to carry a handgun in the city of Chicago and "at best * * * they would have the authority to conduct a field investigation and ask him if he had a FOID card." Defense counsel argued that because the gun is not illegal, there was no basis for the stop. The State responded that at the time defendant was stopped, the "law that was in effect at the time that the police officers approached defendant was that you could not carry a handgun, a loaded handgun, in the streets of Chicago as well as in the State of Illinois." The State further argued that *People v. Aguilar*, 2013 IL 112116, which found certain sections of the AUUW statute to be unconstitutional, did not apply retroactively in this case. The trial court denied defendant's motion.

¶ 7 At trial, Detective James Cwick of the Chicago police department testified that he was assigned to a case of an armed habitual criminal/AUUW, and met Officer Powers and Roth at the police station. Officers Powers and Roth explained the circumstances surrounding defendant's arrest. Afterwards, Detective Cwick read defendant his Miranda rights and defendant agreed to

speak with Detective Cwick without a lawyer present. Defendant told Detective Cwick that before his arrest, he was "hanging out with a girl" and that he had a gun because "he did not want anyone to hurt him." Detective Cwick did not have defendant prepare a written statement and did not record the conversation. Detective Cwick did not have defendant sign a *Miranda* waiver form.

¶ 8 Officer Powers testified consistently with his testimony at the suppression hearing.

¶ 9 The State entered a certification from Illinois State police Sergeant Matt Weller indicating that defendant had not been issued a FOID card.

¶ 10 The court found defendant guilty of four counts of AUUW, and sentenced him on two counts: count 4, for carrying an uncased, loaded, immediately accessible firearm, and count 5, for carrying a firearm without FOID card, to concurrent 11-year terms of imprisonment.

¶ 11 ANALYSIS

¶ 12 Defendant argues that the trial court erred when it denied his motion to quash arrest and suppress evidence because pursuant to *People v. Aguilar*, 2013 IL 112116, ¶19-21, the mere possession of a firearm outside the home, without more, is not a crime. Therefore, the police lacked probable cause for arrest.

¶ 13 When defendant was arrested in this case, on August 28, 2013, the AUUW statute in Illinois contained a blanket prohibition on the possession of an operable, uncased, loaded, and immediately accessible handgun in public. 720 ILCS 5/24–1.6(a)(1), (a)(3)(A) (West 2010). Shortly thereafter in 2013, our supreme court in *People v. Aguilar*, 2013 IL 112116, ¶ 21, declared portions of the AUUW statute, including the blanket provision on the possession of an operable, uncased, loaded, and immediately accessible handgun in public unconstitutional as violating the second amendment. See also *People v. Burns*, 2015 IL 117387, ¶ 25 (clarifying that

there is no limit on the *Aguilar* holding that the ban is unconstitutional). When a statute is declared facially unconstitutional, the statute is void *ab initio*, meaning it was void from its inception. *People v. McFadden*, 2016 IL 117424, ¶ 17.

¶ 14 Subsequent to defendant filing his brief in this case, our supreme court decided *People v. Holmes*, 2017 IL 120407, wherein the court considered and rejected the exact argument defendant has advanced here. In *Holmes*, the defendant was arrested in 2012 after a Chicago police officer observed a revolver in his waistband. Id. ¶¶ 1, 5. The defendant filed a motion to quash arrest and suppress evidence, arguing that in light of *Aguilar*, which was decided in 2013, well after the defendant's arrest, probable cause was retroactively invalidated. *Id*. The circuit court granted the defendant's motion, we affirmed, and the State appealed. *Id*. ¶ 2.

¶ 15 Our supreme court determined that the unconstitutionality of the AUUW statute recognized in *Aguilar* does not negate the existence of probable cause at the time of a defendant's arrest. Although *Aguilar* held that a portion of the AUUW statute was void *ab initio*, that finding did not retroactively invalidate the probable cause an officer may have had to believe that the defendant was violating the statute that was part of the criminal code at the time of the arrest. *Holmes*, 2017 IL 120407, ¶ 37.

¶ 16 Pursuant to our supreme court's holding in *Holmes*, we must reject defendant's argument here that probable cause did not exist based on the officer's observation of him with a gun in his waistband in public. Therefore, we find that the trial court did not err in denying his motion to quash arrest and suppress evidence.

¶ 17 Defendant next argues that the admission of a certification letter issued by Sergeant Matt Weller of the Firearms Service Bureau of the Illinois State Police, showing that defendant did not possess a FOID card, violated his constitutional right of confrontation because it was testimonial

hearsay, where the affiant was not subject to prior cross-examination, was not shown to be unavailable, and the affidavit was submitted substantively for its truth.

¶ 18 The State argues that defendant forfeited his right to raise this issue here where defendant expressly acquiesced to the admission of the evidence at trial. Defendant admits that he waived this issue for appeal by failing to object at trial, and asks us to consider the issue under the plain error doctrine. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 19 The plain error doctrine allows a court of review to consider an 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 defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Sebby*, 2017 IL 119445, ¶ 48; *Piatkowski*, 225 Ill. 2d at 565. Defendant asks us to consider his claim under both prongs of the plain error doctrine. Before we can determine whether plain error occurred in this case, we must determine whether a clear or obvious error occurred. *Sebby*, 2017 IL 119445, ¶ 49; *Piatkowski*, 225 Ill. 2d at 565.

¶ 20 The sixth amendment guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right *** to be confronted with the witnesses against him." U.S. Const., amend. VI. See also *People v. Whitfield*, 2014 IL App (1st) 123135, ¶ 25 ("a defendant is guaranteed the right to confront witnesses against him by the confrontation clauses of both the United States and Illinois Constitutions"); Ill. Const. 1970, art. I, § 8. This clause guarantees "confrontation plus cross-examination of witnesses." *Perry v. New Hampshire*, 565 U.S. 228, 237 (2012). "[T]he basic objective of the Confrontation Clause *** is to prevent the accused from being deprived of

the opportunity to cross-examine the declarant about statements taken for use at trial." *Michigan v. Bryant*, 562 U.S. 344, 358 (2011).

¶ 21 *Crawford v. Washington*, 541 U.S. 36, 43 (2004), dictates that under the confrontation clause, a witness's out-of-court statement could be admitted only if the witness was available for cross-examination at trial or the defendant had had an opportunity to cross-examine the witness. In *Crawford*, the Supreme Court held that "the principal evil at which the Confrontation Clause was directed" was the "use of ex parte examinations as evidence against the accused. *Id*. at 50. "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Id*. at 51. In the case at bar, there is no dispute that certification prepared by the Illinois State police regarding defendant's lack of a FOID card was testimonial and falls squarely within the class of statements considered in *Crawford*. See *Melendez–Diaz v. Massachusetts*, 557 U.S. 305, 307-10 (2009) (certificates of state laboratory analysts clearly constituted affidavits and were "functionally identical" to the "testimony the analysts would be expected to provide if called at trial.")

¶ 22 Nevertheless, as the State argues in response, defendant acquiesced to the admission of the certification letter that established that defendant had no valid FOID card. To preserve an issue for review, a defendant must raise an objection both at trial and in a written posttrial motion. *People v. Enoch*, 122 Ill. 2d 176 (1988). Defendant did neither in this case. Rather, defendant acquiesced to the admission of the certificate.

¶ 23 The record before us establishes that when asked if he had any objection to the State admitting the certification into evidence, defendant affirmatively waived any objection to the admission of the certification. When the State indicated that it wished to admit "a certification by the Illinois State Police that the Defendant, Tyrese Ward, did not have a FOID card," the

court asked defense counsel if he had any objection to which defense counsel responded, "No objection." Defendant clearly acquiesced to the admission of the certificate. When a defendant procures, invites, or acquiesces in the admission of evidence, even though the evidence is improper, he cannot contest the admission on appeal. *People v. Caffey*, 205 Ill. 2d 52, 114 (2001). By acquiescing, rather than objecting to the admission of allegedly improper evidence, a defendant deprives the State of the opportunity to cure the alleged defect, and that is why he cannot wait until appeal to contest its admission. *People v. Bush*, 214 Ill. 2d 318, 332 (2005); See *People v. Trefonas*, 9 Ill. 2d 92, 98 (1956) ("A party cannot sit by and permit evidence to be introduced without objection and upon appeal urge an objection which might have been obviated if made at the trial"). We therefore cannot find any error by the trial court in allowing the certificate into evidence. *People v. Cox*, 2017 IL App (1st) 151536, ¶76 (finding that, because defense counsel failed to object to the admission of a notarized letter from the Illinois State Police demonstrating that the defendant did not possess a FOID card, the trial court committed no error in allowing the letter to be admitted into evidence). Without error, plain error analysis is unnecessary.

¶ 24 Defendant's reliance on *People v. Diggins*, 2016 IL App (1st) 142088, to support his position is unavailing. Diggins was charged with aggravated unlawful use of a weapon based on his failure to possess a FOID card and the State sought to admit a certificate from an employee of the Firearms Services Bureau of the Illinois State Police, stating that the defendant did not possess a FOID card. *Diggins*, 2016 IL App (1st) 142088, ¶ 6. Defense counsel objected at trial to the admission of the letter into evidence, which was overruled by the trial court. On appeal, this court reversed the defendant's conviction for aggravated unlawful use of a weapon and remanded for a new trial, on the ground that the defendant's sixth amendment right was violated

by the admission, over defendant's objection, of a certified letter documenting the defendant's lack of a FOID card. *Diggins*, 2016 IL App (1st) 142088, ¶ 1.

¶ 25 Unlike the defendant in *Diggins*, in the case at bar, defendant acquiesced to the admission of the certificate by stating affirmatively that he had no objection to admitting the document, even though it was clear that by doing so there would be no cross-examination prior to its admission. *Diggins* is of no help to defendant.

¶ 26 We also reject defendant's claim that trial counsel was ineffective for failing to include the confrontation clause error in defendant's posttrial motion. To prevail on a claim of ineffective assistance of counsel, a defendant must show both (1) that his counsel's performance was objectively unreasonable under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687. There is a "strong presumption that the challenged action or inaction may have been the product of sound trial strategy." *People v. Manning*, 241 Ill. 2d 319, 327 (2011). Both prongs of the *Strickland* test must be met, and we may analyze them in any order. *People v. Kirklin*, 2015 IL App (1st) 131420, ¶ 109.

¶ 27 In the present case, "the only way that defense counsel's decision not to object to the certification could *possibly* be ineffective assistance was if defendant actually had a FOID card and the certification was in error." (Emphasis in original.) *Cox*, 2017 IL App (1st) 151536, ¶ 88. Based on the record here, there is nothing to suggest that defendant possessed a concealed carry license or FOID card and the letter certifying that he did not possess either was in error. See *id*. It is clear then, that counsel's decision to not challenge the admission of the certification letter was a matter of sound trial strategy. After his motion to quash arrest and suppress evidence was denied, defense counsel took steps to minimize the consequences that defendant would face for

being caught on the street in possession of a firearm. We cannot find that counsel's performance was objectively unreasonable under prevailing professional norms. See *Cox*, 2017 IL App (1st) 151536, ¶¶ 88-89 (finding that defense counsel was not objectively unreasonable for failing to object to the admission of a notarized letter establishing that the defendant did not possess a FOID card where counsel's trial strategy was to contest whether the defendant possessed the firearm).

¶ 28 Defendant next argues that the State agrees that his conviction for AUUW under count 4, which alleged that the firearm possessed by defendant was uncased, loaded, and immediately accessible at the time of the offense in violation of section 24-1.6(a)(1),(a)(3)(A) (720 ILCS 5/24-1.6(a)(1),(a)(3)(A) (West 2012), is void because that section of the AUUW statute had been found to be facially unconstitutional under *People v. Burns*, 2015 IL 117387, ¶¶1-2. We agree. Accordingly, we vacate defendant's AUUW conviction under count 4.

¶ 29 We also agree that the AUUW conviction under section 24-1.6(a)(2),(3)(A), alleged in count 6, which the court merged into count 4 at sentencing, is equally unconstitutional. *People v. Mosely*, 2015 IL 115872, ¶ 25. Therefore, defendant cannot be resentenced on count 6, which is void, that was merged into count 4, which we have also found to be void.

¶ 30 Given our finding with respect to count 4, defendant's one-act, one-crime argument is moot. *People v. Blaylock*, 202 Ill. 2d 319, 315 (2002).

¶ 31 CONCLUSION

¶ 32 For the foregoing reasons, we affirm defendant's conviction and 11-year sentence for AUUW on count 5. Defendant's conviction and sentence for AUUW on count 4 are vacated.

¶ 33 Affirmed in part; vacated in part.