2018 IL App (1st) 151634U

No. 1-15-1634

Order filed November 28, 2018

Third Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 19803
	)	
CARLOS FIGUEROA,	)	Honorable
	)	Angela Munari Petrone,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE ELLIS delivered the judgment of the court.
Justices Howse and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: Evidence was sufficient to prove defendant guilty of unlawful use of weapon and aggravated unlawful use of weapon based on his possessing firearm outside his home when he had not been issued valid Firearm Owner's Identification card. Defendant's conviction for aggravated unlawful use of weapon based on his possessing firearm outside home was vacated as unconstitutional. Trial court did not err in admitting into evidence notarized certification showing that defendant did not have valid Firearm Owner's Identification card because defendant acquiesced to its admission. Defendant failed to establish claim for ineffective assistance of counsel for counsel's failure to object to admission of certification.

¶ 2 Following a bench trial, defendant Carlos Figueroa was convicted of two counts of aggravated unlawful use of a weapon (AUUW) and two counts of unlawful use of a weapon by a felon (UUWF). The court sentenced defendant to concurrent terms of six years in prison for the AUUW counts and concurrent terms of four years in prison for the UUWF counts. We affirm in part and vacate in part.

¶ 3 BACKGROUND

¶ 4 At trial, Wilson Melendez, a witness for the State who was arrested along with defendant, recanted his early statement implicating defendant. Specifically, Melendez testified that, at about 3:45 a.m. on October 23, 2010, he was arrested near the 2500 block of North Austin Avenue in Chicago for possessing a firearm. He was about five feet away from defendant when four police officers wearing regular clothes and bullet proof vests approached him in an unmarked car. When the police approached, Melendez threw the gun, which was in the front pocket of his hoodie, over a fence in the yard in front of him. Melendez and defendant took off running in the same direction. Melendez testified that he had the gun on him "since like way before we been outside," it was just left in the neighborhood, and he grabbed it "for security."

¶ 5 Melendez testified that he pleaded guilty to AUUW in exchange for a sentence of 18 months of gang intensive probation. Melendez denied that, as part of the factual basis for his plea agreement, the assistant State's Attorney read into the record that, as the officers were approaching, defendant removed a blue steel handgun from the back of his waistband and tossed it to Melendez, who caught the gun and threw it into the front yard at that location. Melendez denied that the factual basis for his plea deal included that, after he received his *Miranda* rights, Melendez told the officers that defendant had the gun, walked up to Melendez, said, "take this

shit, they coming," and then threw the gun at him. Melendez denied telling the judge at his plea hearing that the facts the assistant State's Attorney read into the record were accurate.

¶ 6 On cross-examination, Melendez testified that defendant did not throw a gun to him on the night Melendez was arrested. When Melendez pleaded guilty, he knew the charges against him were serious and he could receive prison time. He did not "really care" what the assistant State's Attorney told the judge and only cared about getting 18 months' probation. Melendez testified that, after he was arrested, he tried to tell the police that the gun was his and "[the police] were like it doesn't matter, that [the police] don't want me, [the police] want [defendant]."

¶ 7 Assistant State's Attorney Andrew Varga testified that he was the assigned prosecutor in the State's criminal case against Melendez. Varga identified the transcript of Melendez's guilty plea hearing and the transcript was admitted into evidence. Varga then read the factual basis for Melendez's plea agreement into the record. The factual basis provided:

> On October 23, 2010, at about 3:42 a.m., Melendez was standing with defendant and, when police officers approached, at which point defendant removed a blue steel handgun from the back of his waistband and tossed it to Melendez. Melendez caught the gun with both arms and threw it into the nearby front yard. After being advised of his rights, Melendez told the officers that defendant had the gun, walked up to him, and said, "take this shit, they coming."

Varga testified that when Melendez was under oath at the plea hearing, he stated that the facts Varga had read into the record for the factual basis for his plea were accurate.

¶ 8 Chicago police officer Rich Ys testified that around 3:45 a.m. on October 23, 2010, he and his partner, Officer Sal Samartino, were in uniform and driving near the area of 2501 North Austin in a marked police car. As the officers approached the intersection of Altgeld Street and Austin Avenue, Officer Ys saw defendant walking towards them.

¶ 9 According to Officer Ys, defendant looked in the officers' direction and then turned around so "his body was angled toward" Melendez. Defendant reached into his back waistband, took out a blue steel handgun, tossed it to Melendez with his right hand, and walked away towards Altgeld. Nothing obstructed Officer Ys' view of defendant. Melendez caught the gun with both of his arms, held it for a "couple of seconds," and then threw it over the nearby fence. Officer Ys immediately got out of his vehicle and took Melendez into custody; Officer Samartino went after defendant.

¶ 10 After securing Melendez, Officer Ys jumped over the fence and recovered the gun, which had one round in the chamber. Officer Ys described the gun as a "blue steel .380 caliber, Lorcin, model number L380."

¶ 11 Defendant was then taken to the police station. After he was Mirandized, defendant told Officer Ys that he was currently on parole and "didn't want to get caught with it." According to Officer Ys, after Melendez was Mirandized, he said that defendant said to him, "take this shit they're coming," and then threw the gun at Melendez.

¶ 12 Officer Ys identified the handgun he recovered and six live rounds he recovered from that handgun. He testified that the items were in the same or substantially the same condition as when he recovered them on October 23, 2010.

¶ 13 On cross-examination, Officer Ys testified that, when he initially saw defendant, his car was traveling about 25 to 30 miles per hour and he was about 20 or 30 feet or "[m]aybe about half a block" away from defendant. When defendant threw Melendez the handgun, Officer Ys' squad car was a few feet away from defendant. Officer Ys testified that Melendez caught the gun with "his arms and his hands" and had the gun for "a couple seconds," which could have been anywhere from "three to seven seconds." At the police station, defendant never told Officer Ys that the gun was his or that he gave it to Melendez. Officer Ys acknowledged that defendant's arrest report did not state that (1) before defendant pulled the gun out of his waistband, he looked in Officer Ys' direction, (2) Melendez threw the gun over a fence, or (3) Officer Ys jumped over the fence to recover the gun.

¶ 14 Officer Samartino testified that as he and Officer Ys approached the corner of Altgeld and Austin, from a distance of approximately three to five feet, while he was driving he saw defendant approach Melendez, remove an item from the back of his waistband, toss it to Melendez, and then walk "quickly" on Altgeld. After defendant tossed the item, Melendez caught it and, with his right hand, tossed it over a gate. Officer Samartino testified that he was "not sure" if the item was a handgun but it "appeared to be a gun" based on the shape, size, and color.

¶ 15 Officer Samartino left his vehicle and called to defendant. Defendant started running and Officer Samartino gave chase. He eventually caught defendant and placed him in custody. Officer Samartino testified that he did not tell Melendez that it did not matter if the gun belonged to Melendez or that he wanted defendant.

¶ 16 On cross-examination, Officer Samartino testified that he was not able to see for certain that the item defendant tossed was actually a gun. Samartino acknowledged that, in a preliminary hearing for the case, when asked at what point he saw defendant's waistband, he responded he was not able to see defendant's waistband.

¶ 17 A certified copy of defendant's prior conviction in case number 09 CR 1785501 was introduced into evidence, as well as a notarized certification from the Illinois State Police showing that defendant had never been issued a FOID card as of June 4, 2014.

¶ 18 After closing arguments, the court found defendant guilty of two counts of AUUW (counts II and III) and two counts of UUWF (counts VI and VII). The AUUW in count II was based on his possessing an uncased, loaded, and immediately accessible firearm at a time when he was not on his own land, abode, or fixed place of business (720 ILCS 5/24-1.6(a)(1)/(3)(A) (West 2010)). The AUUW in count III was based on his carrying a firearm when he was not on his own land, abode, or fixed place of business and he had not been issued currently valid FOID card (720 ILCS 5/24-1.6(a)(1)/(3)(C) (West 2010)). The UUWF counts were based on his possessing a firearm (count VI) and ammunition (count VII) when he had previously been convicted of a felony (720 ILCS 5/24-1.1(a) (West 2010)).

¶ 19 In announcing its finding, the court explained: "I observed Melendez while he testified before me. I do not believe his recantation of those facts or his explanation for telling [the judge at the guilty plea hearing] that they were true. He would have said anything to get probation, especially so because Melendez told the same facts to police shortly after his arrest." The court subsequently sentenced defendant to six years in prison for each AUUW count, to be served concurrently, and four years in prison for each UUWF count, to be served concurrently.

¶ 20 ANALYSIS

¶ 21 Defendant first maintains that the State did not prove beyond a reasonable doubt that he possessed the handgun because the evidence that defendant tossed it to Melendez when the police arrived was "sparse and conflicting." He argues there was no physical evidence to connect defendant to the gun and his only custodial statement was exculpatory. Defendant asserts that the State's three eyewitnesses "testified to irreconcilably conflicting accounts."

¶ 22 When a defendant challenges the sufficiency of the evidence, we must determine whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319 (1979). It is the responsibility of the fact finder—here, the trial court—to determine the "credibility of the witnesses, to weigh the evidence and draw reasonable inferences from it." *People v. Johnson*, 2014 IL App (1st) 120701, ¶ 21. We will not retry a case (*People v. Nesbit*, 398 Ill. App. 3d 200, 209 (2010)) or substitute our judgment for that of the fact finder on questions regarding the credibility of the witnesses (*People v. Ross*, 407 Ill. App. 3d 931, 935 (2011)). We will only reverse a conviction if the evidence is "so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt." *People v. Collins*, 214 Ill. 2d 206, 217 (2005).

¶ 23 To prove defendant guilty of the AUUW and UUWF counts as charged, the State had to prove that defendant possessed the handgun. See 720 ILCS 5/24-1.6(a)(1) (West 2010); 720 ILCS 5/24-1.1(a) (West 2010). Here, we find that the evidence was sufficient for a rational trier of fact to conclude that defendant possessed the handgun that Melendez threw over the fence. Officer Ys testified that, when he was a few feet away from defendant, he saw defendant take a

blue steel handgun from his back waistband and toss it to Melendez, who threw it over the fence. Officer Ys testified that nothing obstructed his view of defendant, and he later recovered a blue steel handgun from behind the fence. In finding defendant guilty, the court necessarily determined that Officer Ys' testimony with respect to seeing defendant possess the handgun and toss it to Melendez was credible, which was its "prerogative in its role as the trier of fact." See *People v. Moody*, 2016 IL App (1st) 130071, ¶ 52. Thus, Officer Ys' testimony alone was sufficient to support that defendant possessed the recovered handgun. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009) ("the testimony of a single witness, if positive and credible, is sufficient to convict").

¶ 24 Further, Officer Samartino's testimony corroborated Officer Ys' testimony. Like Officer Ys, Officer Samartino also testified that he saw defendant remove an item from his back waistband and toss it to Melendez. And, although he was not able to see "for certain" that the item defendant tossed was a gun, he testified that it "appeared to be a gun" based on the shape, size, and color. Further, defendant ran from Officer Samartino and was eventually found crouching in the backyard of a residence, from which the court could have inferred defendant's consciousness of guilt. See *People v. Assenato*, 224 Ill. App. 3d 96, 102 (1991) ("evidence of flight is admissible as a fact from which the jury may infer consciousness of guilt"). Moreover, the factual basis for Melendez's guilty plea, which the State presented as a non-hearsay prior inconsistent statement, also stated that defendant removed the blue steel gun from his waistband and tossed it to Melendez. Viewing this evidence as a whole and in the light most favorable to the State, the evidence was sufficient for the court to reasonably conclude that defendant possessed the gun that Melendez threw over the fence.

¶ 25 Undeterred, defendant claims that Officer Samartino, Officer Ys, and Melendez "testified to irreconcilably conflicting accounts." Specifically, he asserts that Officer Ys and Officer Samartino provided inconsistent testimony with respect to how far they were from defendant when he tossed the gun to Melendez, whether defendant turned away from the officers before pulling the gun out of his waistband, how Melendez specifically caught the gun (*i.e.* with his arms or hands), and how long Melendez held the gun before he threw it over the fence. Defendant also asserts that Officer Ys and Officer Samartino testified inconsistently because Officer Ys testified that he could see that the item defendant tossed was a gun but Officer Samartino, who was sitting next to Officer Ys, testified that he could not identify the item as a gun.

¶ 26 As the fact finder, it was the trial court's responsibility to resolve inconsistencies and conflicts in the evidence. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). The trial court here found that there were only "slight discrepancies" with the officers' accounts, as it concluded that "each officer testified as to what he observed from this [*sic*] individual vantage point which explained any slight discrepancies." Based on our review of the record, we have no basis to upset the court's credibility determination. *People v. Goodar*, 243 Ill. App. 3d 353, 357 (1993) ("The mere existence of conflicting evidence at trial does not require a reviewing court to reverse a conviction.").

¶ 27 Defendant similarly asserts that Melendez's trial testimony conflicted with Officer Ys' and Officer Samartino's trial testimony. However, the State presented the factual basis for Melendez's guilty plea as a non-hearsay prior inconsistent statement. The factual basis for Melendez's plea agreement, which Melendez recanted at trial, was consistent with Officer Ys'

and Officer Samartino's trial testimony, as it stated that defendant removed a blue steel handgun from his waistband and tossed it to Melendez. The trial court was free to find the prior inconsistent statement more credible than the in-court recantation. *People v. Curtis*, 296 Ill. App. 3d 991, 1000 (1998).

¶ 28 Defendant next contends, and the State concedes, that the section of the AUUW statute under which defendant was convicted in count II is unconstitutional because it violates the second amendment. He argues an unconstitutional statute is void *ab initio* and we should therefore vacate his conviction and sentence for AUUW in count II. We agree.

¶ 29 The section of the AUUW statute under which defendant was charged and convicted in count II was based on his carrying an uncased, loaded, and immediately assessable firearm outside his home when he was not an invitee. 720 ILCS 5/24-1.6(a)(1)/(3)(A) (West 2010). Because defendant had previously been convicted of a felony, defendant's conviction for AUUW in count II was a class 2 felony. 720 ILCS 5/24-1.6(d) (West 2010).

¶ 30 In *People v. Aguilar*, 2013 IL 112116, ¶¶ 19-22, our supreme court found that section 24-1.6(a)(1), (a)(3)(A) of the AUUW statute violated the second amendment because it "categorically prohibits the possession and use of an operable firearm for self-defense outside the home." In *People v. Burns*, 2015 IL 117387, the supreme court extended *Aguilar*'s reasoning and concluded that "section 24–1.6(a)(1), (a)(3)(A) of the [AUUW] statute is facially unconstitutional, without limitation" and "is not enforceable against anyone." *Burns*, 2015 IL 117387, ¶¶ 25, 32 (quoting *Aguilar*, 2013 IL 112116, ¶ 22). Thus, the offense in section 24-1.6(a)(1), (3)(a) of the AUUW statute is unconstitutional even where, as here, the class 2 felony sentence classification applied. See *Burns*, 2015 IL 117387, ¶¶ 22-25, 32.

¶ 31 Pursuant to *Aguilar* and *Burns*, we must vacate defendant's conviction for AUUW in count II, which was based on his possessing an operable firearm outside the home. 720 ILCS 5/24-1.6(a)(1)/(3)(A) (West 2010). Because the section of the AUUW statute under which defendant was convicted in count II is unconstitutional, it is void *ab initio*. *People v. Akins*, 2014 IL App (1st) 093418-B, ¶ 11.

¶ 32 Defendant next contends we should reverse his conviction and sentence for AUUW in count III, which was based on his possessing a firearm outside the home at the time when he had not been issued a currently valid FOID card. Defendant asserts that the certification showing that he did not have a valid FOID card was a testimonial statement, and his rights under the confrontation clause were violated when the court allowed the State to introduce the certification into evidence as the only proof that he did not have a valid FOID card.

¶ 33 A defendant has a constitutional right under the confrontation clauses of the United States and Illinois Constitutions to confront the witnesses against him. *People v. Whitfield*, 2014 IL App (1st) 123135, ¶ 25. In *Crawford v. Washington*, 541 U.S. 36, 59 (2004), the United States Supreme Court held that "testimonial statements" may only be admitted when "the declarant is unavailable" and "the defendant has had a prior opportunity to cross-examine." Affidavits and certificates of state laboratory analysts are considered testimonial statements. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310-11 (2009); *Crawford*, 541 U.S. 36 at 51-52. Likewise, this court has explained that notarized certifications showing that a defendant did not have a valid FOID card are testimonial. *People v. Diggins*, 2016 IL App (1st) 142088, ¶¶ 6-7, 17. Because the parties do not dispute the facts, we apply a *de novo* standard of review. See *People v. Cox*, 2017 IL App (1st) 151536, ¶¶ 55-57.

¶ 34 Defendant concedes that he did not preserve his challenge to the admission of the notarized certification by objecting at trial or raising the issue in a posttrial motion. *People v. Anaya*, 2017 IL App (1st) 150074, ¶ 50. Defendant nevertheless argues that we should review his challenge under the plain error doctrine. The State asserts that the trial court did not err in admitting the certification because defense counsel affirmatively stated that he had no objection to its admission.

¶ 35 We may review unpreserved error under the plain error doctrine if there was a clear and obvious error and (1) the evidence was "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) the "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." *Cox*, 2017 IL App (1st) 151536, ¶ 50. However, when there is no error, there is no plain error. *Id.* ¶ 87. Thus, we must first determine whether the trial court erred at all. *Id.* ¶ 52. We conclude that the trial court did not err when it admitted the notarized certification into evidence.

¶ 36 The record shows that, after the State presented the notarized certification and requested the court admit it into evidence, the court specifically asked defense counsel, "Any objection?" Defense counsel responded, "No." Thus, because defense counsel affirmatively responded that defendant did not object to the admission of the certification, defendant acquiesced to the admission and cannot now claim the trial court erred when it admitted it. See *People v. Caffey*, 205 Ill. 2d 52, 114 (2001) ("When a party procures, invites, or acquiesces in the admission of evidence, even though the evidence is improper, that party cannot contest the admission on appeal."). In addition, as we discussed in *People v. Cox,* 2017 IL App (1st) 151536, ¶ 75, if

defense counsel had objected rather than affirmatively respond that he did not have any objections, "the State could have easily remedied the problem by simply calling the State employee to the stand."

¶ 37 Thus, the trial court did not err when it admitted the notarized certification into evidence because defendant acquiesced in its admission. *Id.*, ¶ 76. Defendant's plain error argument fails.

¶ 38 Last, defendant argues that he received ineffective assistance of counsel due to trial counsel's failure to object to the admission of the notarized certification into evidence. Ineffective assistance of counsel claims are governed by the familiar two-part test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Manning*, 241 Ill. 2d 319, 326 (2011). Under *Strickland*, to establish an ineffective assistance of counsel claim, a defendant must show: (1) "counsel's performance was deficient" and (2) "the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687.

¶ 39 To prove deficient performance, a defendant must show " 'that counsel's performance was objectively unreasonable under prevailing professional norms.' " *In re Edgar C.*, 2014 IL App (1st) 141703, ¶ 78 (quoting *People v. Domagala*, 2013 IL 113688, ¶ 36). Under this prong, a " 'defendant must overcome the strong presumption that the challenged action or inaction may have been the product of sound trial strategy.' " *Manning*, 241 Ill. 2d at 327 (quoting *Strickland*, 466 U.S. at 688). "Whether to object to matters such as foundation for evidence is, by and large, a matter of trial strategy" and the failure to do so "does not necessarily establish substandard performance." *People v. Probst*, 344 Ill. App. 3d 378, 387 (2003).

¶ 40 Defendant has not demonstrated that his trial counsel's performance was deficient. There is nothing in the record to show that defendant had a valid FOID card or that the notarized

certification was incorrect. See *Cox*, 2017 IL App (1st) 151536, ¶ 88 ("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. Otherwise, counsel's decision to waive any objection to its admission was a matter of trial strategy.") (Emphasis in original.) The record indicates that defense counsel's decision to not object to the admission of the certification was a matter of trial strategy. The record is clear that defense counsel's strategy throughout trial was to contest the element of possession. Accordingly, we cannot find that counsel's decision to not object to the admission of the certification was objectively unreasonable under prevailing professional norms. See *id.*, ¶¶ 88-89 (where record showed that defense counsel's "strategy, from start to finish at trial, was to contest whether defendant possessed a gun," we could not find that counsel's decision to not object to admission of certification showing that defendant lacked valid FOID card was "objectively unreasonable under prevailing professional norms"). Thus, defendant has not established that his trial counsel's performance was deficient and, therefore, has not established a claim for ineffective assistance of counsel.

¶ 41 CONCLUSION

¶ 42 We affirm defendant's convictions for UUWF and his conviction for AUUF in count III. We vacate defendant's conviction for AUUW in count II.

¶ 43 Affirmed in part; vacated in part.