2017 IL App (1st) 143652-U
No. 1-14-3652

THIRD DIVISION
June 21, 2017

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 14CR8369
	)	
PIERRE HARRIS,	)	
	)	The Honorable
Defendant-Appellant.	)	Joseph M. Claps,
	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Justice Cobbs concurred in the judgment.
Presiding Justice Fitzgerald Smith specially concurred.

ORDER

¶ 1 *Held:* defendant's aggravated unlawful use of a weapon conviction reversed and the cause remanded for a new trial where the circuit court's admission of a notarized document completed by a non-testifying witness stating that defendant had not been issued a FOID card or a Concealed Carry License violated defendant's constitutional right to confrontation.

¶ 2 Following a bench trial, defendant was convicted of aggravated unlawful use of a weapon and was sentenced to 16 months' imprisonment. Defendant appeals his conviction and the sentence imposed thereon, arguing that his constitutional right to confrontation was violated

when the circuit court admitted into evidence a testimonial document completed by a non-testifying witness to establish an element of the charged offense. For the reasons explained herein, we reverse the judgment of the circuit court and remand for a new trial.

¶ 3 BACKGROUND

¶ 4 On April 30, 2014, defendant was found to be in possession of a firearm and was subsequently charged with multiple counts of aggravated unlawful use of a weapon. The charges were all predicated on defendant's lack of a valid Firearm Owner's Identification (FOID) card or a Concealed Carry License (CCL). Defendant ultimately elected to proceed by way of a bench trial.

¶ 5 At trial, Michael Werner, a graduate student at the University of Chicago, testified that on the evening of April 30, 2014, he and his girlfriend were walking to get dinner. At approximately 8:40 p.m., Werner and his girlfriend cut through a small park and began walking northbound on Drexel Avenue. They observed two men standing by a parked car in the vicinity of 5411 South Drexel. One of the men was wearing a red coat and had dreadlocks in his hair. Werner testified that even though it was dark outside, street lights illuminated the area enabling him to view the two men. When he was approximately 15 feet away from the men, Werner observed the man in the red coat pull a gun out of the waistband of his pants with his right hand. The man then leaned over slightly, dropped the gun to the ground, and then kicked it under a nearby parked car.

¶ 6 Werner testified that he and his girlfriend continued walking and saw a nearby police vehicle. Werner's girlfriend flagged down the officer who had been in the vehicle and Werner relayed what he had just seen to the officer. Specifically, Werner told the officer that a man wearing a red coat and dreadlocks had dropped a gun to the ground and kicked it under the car.

The man was still visible down the street and Werner pointed in his direction. He was the only one in the area wearing a red coat at that time. When shown People's Exhibit 1, a handgun, Werner confirmed that it was the same shiny gun he had observed on the evening of April 30, 2014. He, however, was unable to identify defendant as the man who had dropped the gun.

¶ 7 Chicago Police Officer Nicholas Lipa testified at approximately 8:40 p.m. on the evening of April 30, 2014, he was in the vicinity of 5411 South Drexel responding to a gambling complaint. After arriving in the area, Lipa was approached by Werner and his girlfriend. Werner spoke to him and then described and "pointed to" defendant. In response to the information that Werner relayed, Officer Lipa walked over to defendant, who was standing in the street with another man. There were additional officers near the two men at that time. Officer Lipa confirmed that defendant was wearing a red coat and matched the description provided by Werner. He further confirmed that defendant was the only individual wearing a red coat at that location. Officer Lipa testified that he subsequently looked under a vehicle that was parked "less than 10 feet" from where defendant was standing and recovered a loaded .45 caliber semiautomatic handgun underneath the car. Officer Lipa showed the gun to Werner who confirmed that it was the same weapon he had seen earlier. Following Werner's positive identification, Officer Lipa arrested defendant and transported him to the police station. At the station, defendant provided his name and date of birth.

¶ 8 On cross-examination, Officer Lipa acknowledged that neither fingerprint nor DNA testing was performed on the recovered weapon.

¶ 9 Following Officer Lipa's testimony, the State moved to admit a notarized "certification" issued by the Illinois State Police that showed that defendant had never been issued a FOID card or CCL. Defense counsel objected to the admission of the document and argued that it was

hearsay. The State disputed defense counsel's classification of the document and argued that it was not hearsay; rather, the document was a self-authenticating document, and as a result, was properly admissible. The circuit court agreed with the State and admitted the certification attesting to defendant's lack of a FOID card or CCL into evidence. The document, completed by Debbie Claypool, Administrative Assistant of the Illinois State Police Firearms Services Bureau, specifically provided as follows:

"CERTIFICATION

Based on the following name and date of birth information provided by the Cook County State's Attorney's Office, I, Administrative Assistant Debbie Claypool, Firearms Services Bureau (FSB), Illinois State Police, do hereby certify, after a careful search of the FSB files, the information below to be true and accurate for Pierre Harris whose date of birth is July 3, 1988, has never been issued a FOID or CCL Card as of May 30, 2014."

¶ 10 After admitting the certification into evidence, the State then rested its case.

¶ 11 In his defense, defendant admitted that he was in the area of 54th Street and South Drexel on the evening of April 30, 2014. He explained that he was planning on going out to eat with several friends when police arrived in the area. Defendant also admitted that he was wearing dreadlocks and a red coat that evening. He denied, however, that he was in possession of a weapon that day. He further denied that the weapon that Officer Lipa recovered from underneath a nearby parked vehicle belonged to him. Defendant did not know the person to whom the gun belonged and he had never seen that weapon before.

¶ 12 Following defendant's testimony, defense counsel rested and the parties subsequently delivered closing arguments. After considering the evidence and the arguments of the parties, the court found defendant guilty of aggravated unlawful use of a weapon. At the sentencing

hearing that followed, the court heard arguments advanced in aggravation and mitigation and sentenced defendant to 16 months' imprisonment.

¶ 13 This appeal followed.

¶ 14 ANALYSIS

¶ 15 On appeal, defendant raises no challenge to the sufficiency of the evidence. Rather, he argues that the "admission of a 'certification' alleging [his] lack of a Firearm Owner's Identification Card of Concealed Carry License, prepared by a non-testifying witness, violated [his] right to confrontation because the affidavit was testimonial hearsay, the affiant was not subject to prior cross-examination and not shown to be unavailable, and the affidavit was admitted substantively for its truth."

¶ 16 The State initially responds that defendant failed to preserve this issue for appellate review because he did not include this issue in his posttrial motion. On the merits, the State argues that the circuit "court properly admitted the certified, signed and notarized document bearing the seal of the Illinois State Police to establish that defendant did not possess a valid FOID card."

¶ 17 As a threshold matter, defendant acknowledges that he failed to raise the court's admission of the disputed document in his posttrial motion; however, he submits that the issue is not forfeited because it involves a constitutional issue that was raised at trial and could later be raised in a postconviction petition. Alternatively, he argues that the issue should be reviewed for plain error or ineffective assistance of counsel.

¶ 18 As a general rule, in order to properly preserve an issue for appeal, a defendant must object to the purported error at trial and specify the error in a posttrial motion and his failure to satisfy both requirements results in forfeiture of appellate review of his claim. See *People v.*

Enoch, 122 Ill. 2d 176, 186 (1988). Several types of claims, however, are not subject to forfeiture for failure to include the issue in a posttrial motion. *People v. Cregan*, 2014 IL 113600, ¶ 16. One such exception involves constitutional issues that are raised at trial that could subsequently be raised in a petition for postconviction relief in accordance with the Postconviction Hearing Act (725 ILCS 5/122-1(a) (West 2014)). *Cregan*, 2014 IL 113600, ¶ 16 (citing *Enoch*, 122 Ill. 2d at 190); see also *People v. Diggins*, 2016 IL App (1st) 142088, ¶ 12. The "constitutional-issue exception" exists as a matter of judicial economy. *Cregan*, 2014 IL 113600, ¶ 18; *People v. Brown*, 2017 IL App (1st) 142877, ¶ 49. As our supreme court has explained: "If a defendant were precluded from raising a constitutional issue previously raised at trial on direct appeal, merely because he failed to raise it in a posttrial motion, the defendant could simply allege the issue in a later postconviction petition. Accordingly, the interests in judicial economy favor addressing the issue on direct appeal rather than requiring defendant to raise it in a separate postconviction petition." *Cregan*, 2014 IL 113600, ¶ 18. Here, despite defendant's failure to object to the admission of Debbie Claypool's certification in his posttrial motion, he did object to its admission at trial. Given that the matter involves a constitutional issue that could be raised in a later postconviction proceeding, we find that the constitutional-issue exception applies and that the issue has not been forfeited. See, *e.g.*, *Diggins*, 2016 IL App (1st) 142088, ¶ 12 (finding that the defendant's argument that the admission of a certified letter violated his constitutional right to confrontation was not forfeited even though the issue was not included in his posttrial motion because it was subject to the constitutional-issue exception). We therefore address the merit of defendant's claim.

¶ 19 Every criminal defendant has a constitutional right to present a defense and confront the witnesses against him (U.S. Const., amend. VI; Ill. Const. 1970, art. I, §8; *People v. Stetchly*, 225

Ill. 2d 246, 263-64 (2007)). A defendant's right to confrontation applies to "testimonial" statements. See *People v. Chmura*, 401 Ill. App. 3d 721, 723 (2010) (citing *Davis v. Washington*, 547 U.S. 813, 821, 126 S. Ct. 2266, 2273, 165 L. Ed. 2d 224, 237 (2006) ("Only statements that are 'testimonial' make the speaker a 'witness' within the meaning of the confrontation clause"). As a general rule, "[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Crawford v. Washington*, 541 U.S. 36, 59, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Although the term has not been specifically defined (*Stechly*, 225 Ill. 2d at 280), testimonial statements have been recognized to include a variety of evidence including: "*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially, [citation] extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions, [citation] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." (Internal quotation marks omitted.) *Crawford*, 541 U.S. at 51-52, 124 S. Ct. 1354, 158 L. Ed. 2d 177.

¶ 20 In support of his argument that the admission of Claypool's certification attesting to his lack of a FOID card or a CCL violated his constitutional right to confrontation, defendant relies on this court's prior decision in *People v. Diggins*, 2016 IL App (1st) 142088. We agree with defendant that *Diggins* is directly on point and that the circuit court erred in admitting the document.

¶ 21 In *Diggins*, the defendant was charged with aggravated unlawful use of a weapon. The defendant's lack of a FOID card formed the basis for the charge. At trial, the circuit court admitted into evidence a notarized document, signed by a sergeant employed by the Firearm Services Bureau of the Illinois State Police. In the document, the sergeant stated that he had searched the Bureau's "FOID files" and that the defendant had never been issued a FOID card. Based on the evidence presented, including the notarized document attesting to the defendant's lack of a FOID card, the defendant was convicted of aggravated unlawful use of a weapon. On appeal, the defendant argued that the admission of the document violated his constitutional right to confrontation. We agreed, finding that the document was testimonial evidence of a non-testifying witness that was improperly admitted absent a showing that the sergeant was unavailable to testify and that the defendant had prior opportunity to cross-examine him. Specifically, we reasoned:

> "[T]he certified letter was an affidavit, as it was a declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths. [Citation.] Moreover, the affidavit was 'made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use later at trial.' (Internal quotation marks admitted). *Crawford*, 541 U.S. at 52. ***Additionally, whether defendant owned a FOID card constituted an element of AUUW, which the State had the burden to prove. Accordingly, absent a showing that the witness was unavailable to testify at trial and that defendant had a prior opportunity to cross-examine him, defendant was entitled to be confronted with the witness at trial." *Diggins*, 2016 IL App (1st) 142088, ¶ 16.

¶ 22 The facts in this case are analogous to those present in *Diggins*. Like *Diggens*, the document at issue was prepared following defendant's arrest and the timing of the completion of Claypool's certification indicates that its preparation was intended for use at defendant's trial. Defendant was not afforded a prior opportunity to cross-examine Claypool and the State did not argue or present any evidence to establish that she was unavailable. Moreover, the contents of the certification were utilized by the State to prove the truth of the matter asserted—that defendant was not in possession of a FOID card or a CCL—and establish an element of the charged offense of aggravated unlawful use of a weapon. In light of the reasoning employed in *Diggins*, we find that the admission of the document violated defendant's constitutional right to confrontation.

¶ 23 We further find that the court's error in admitting the certification was not harmless. See *Stechly*, 225 Ill. 2d at 304 (recognizing that confrontation clause violations are subject to harmless-error analysis); *Diggins*, 2016 IL App (1st) 142088, ¶¶ 17-18 (evaluating a confrontation clause error for harmless error). When engaging in harmless-error review, the error at issue will only be deemed harmless if it appears beyond a reasonable doubt that it did not contribute to the verdict. *Stechly*, 225 Ill. 2d at 304; *Diggins*, 2016 IL App (1st) 142088, ¶ 17. In this case, we cannot conclude that the admission of the certification was harmless. Defendant was charged with the offense of aggravated unlawful use of a weapon and the aggravating factor was defendant's lack of a CCL or FOID card at the time he was found to be in possession of an uncased, loaded, and immediately accessible firearm. 720 ILCS 5/24.1.6(a)(1), (3) (A-5); (3) (C) (West 2012). Accordingly, it was incumbent upon the State to prove that defendant had not been issued a CCL or FOID card beyond a reasonable doubt. Given that the only evidence that the State presented regarding this element was the certification completed by Claypool, we are

unable to conclude beyond a reasonable doubt that the erroneous admission of the affidavit had no bearing on the verdict. See, *e.g.*, *Diggins*, 2016 IL App (1st) 142088, ¶ 18 (finding that the erroneous admission of a certified letter attesting that the defendant had not been issued a FOID card was not harmless where the letter was the only evidence the State presented to prove that element of the aggravated unlawful use of a weapon charge against the defendant).

¶ 24 Although we find the admission of the certification was not harmless, we nonetheless conclude that double jeopardy concerns do not prohibit a retrial in this matter. It is well established that double jeopardy principles prohibit the retrial of a defendant whose conviction is reversed due to insufficient evidence; however, double jeopardy does not prohibit retrial where a conviction is set aside due to the erroneous admission of evidence. *Diggins*, 2016 IL App (1st) 142088, ¶ 19 (citing *People Olivera*, 164 Ill. 2d 382, 393 (1995)). More specifically, "retrial is permitted even though evidence is insufficient to sustain a verdict once erroneously admitted evidence has been discounted, and for purposes of double jeopardy all evidence submitted at the original trial may be considered when determining the sufficiency of the evidence," (*Oliviera*, 164 Ill. 2d at 393) including the improperly admitted evidence (*Diggins*, 2016 IL App (1st) 142088, ¶ 19; *People v. Thompson*, 349 Ill. App. 3d 587, 595 (2004)). Here, without determining defendant's guilt or innocence, we find that the evidence presented at trial, including the improperly admitted certification, was sufficient to support a conviction for aggravated unlawful use of a weapon and that retrial is not barred on double jeopardy grounds. See *Diggins*, 2016 IL App (1st) 142088, ¶ 19.

¶ 25 CONCLUSION

¶ 26 For the reasons set forth above, the judgment of the circuit court is reversed and the cause is remanded for a new trial.

¶ 27 Reversed and remanded.

¶ 28 PRESIDING JUSTICE FITZGERALD SMITH, specially concurring.

¶ 29 I concur in the result here, but write separately to express my concern that, under *Diggins*, the prosecution is required to prove the negative. See *People v. Grant*, 2014 IL App (1st) 100174-B, ¶¶ 29-30 (citing *People v. Henderson*, 2013 IL App (1st) 113294, ¶ 36) (Responding to the defendant's contention that, to prove aggravated unlawful use of a weapon, the State was "required to introduce affirmative evidence that no valid FOID card had been issued" despite police officer testimony to the contrary, the court noted that the "law in Illinois does not require the State to prove a negative[.]") I think requiring the State to prove the negative here subtly shifts the burden so that defendants are provided more opportunity to game the system. Instead, once notified that the State intends to prove the lack of a FOID card by certified affidavit, defendants should be required to provide evidence that counters the affidavit.

¶ 30 Going forward, I would encourage arresting officers to specifically ask offenders if they have a FOID card, and the prosecution to specifically ask the officers to testify as to this interaction. Additionally, in the event a defendant testifies, the State should ask the defendant both whether he was issued a FOID card and whether he had it on his person at the time of arrest. See *People v. Elders*, 63 Ill.App.3d 554, 559 (1978) ("The mere ownership of a card by a person in possession of a firearm or firearm ammunition is not sufficient [compliance with the statute;] he must then also have the card on his person"). While not a perfect solution, these practices may decrease the incidence of defendants taking advantage of the system.