2018 IL App (1st) 150653-U

No. 1-15-0653

Order filed February 2, 2018

Fifth 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. 12 CR 7300
	)	
JOSEPH PERRY,	)	Honorable
	)	Rosemary Grant-Higgins,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Reyes and Justice Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defendant was proved guilty beyond a reasonable doubt of being an armed habitual criminal.
(2) The State's closing argument did not shift the burden of proof or attempt to inflame the passions of the jury.
(3) The trial court did not admit irrelevant and unduly prejudicial evidence about loaded guns.
(4) Defendant's prior conviction of unlawful use of a weapon by a felon was properly used as a qualifying predicate offense to support his conviction of being an armed habitual criminal.

¶ 2 Following a jury trial, defendant Joseph Perry was found guilty of being an armed habitual criminal (AHC) and was sentenced to 15 years' imprisonment.

¶ 3 On appeal, defendant argues that (1) the State failed to prove his guilt beyond a reasonable doubt because an arresting police officer's version of events was implausible and contrary to human experience, (2) the State's closing argument improperly shifted the burden of proof and was designed to inflame the passions of the jury, (3) irrelevant and unduly prejudicial evidence about loaded guns was admitted into evidence, and (4) defendant's AHC conviction should be reversed because one of the predicate offenses, his 2005 unlawful use of a weapon by a felon (UUWF) conviction, was based on a 2004 aggravated unlawful use of a weapon (AUUW) conviction, which was under a subsection of the relevant statute that was found facially unconstitutional in *People v. Burns*, 2015 IL 117387, and thus was void *ab initio*.

¶ 4 For the reasons that follow, we affirm the judgment of the trial court.

¶ 5 I. BACKGROUND

¶ 6 Defendant Perry was charged with AHC, UUWF, and AUUW, along with co-offenders Steven Suber and Everett Robinson. Before trial, the State dismissed the UUWF and AUUW counts against defendant, leaving the AHC offense as the sole charge against him. The State alleged that defendant committed this offense on March 22, 2012, by knowingly possessing a firearm after having been convicted of two qualifying felony offenses, *i.e.*, vehicular hijacking in case No. 07-CR-19879 and UUWF in case No. 05-CR-10155.

¶ 7 At the August 2014 jury trial, the State's evidence showed that Chicago Police Officers Eric Ruhnke and Victor Ramirez responded to a vice complaint, *i.e.*, a complaint involving matters related to narcotics, prostitution, or gambling, at an apartment building. When the

officers entered the building, they saw a group of men near the top of the building's front stairs. The men fled into the second floor hallway and both officers ran up the stairs. Officer Ruhnke turned onto the second floor hallway while Officer Ramirez continued up to the third floor in case any of the men ran up there. When Officer Ramirez did not see anyone on the third floor, he ran to the end of the hall and went down the rear staircase to the second floor.

¶ 8 Meanwhile, on the second floor, Officer Ruhnke saw four men down the hallway, crowded around the door of apartment 207 and pressing up against each other, trying to get inside. The hallway was about 60 feet long with about five apartment units on each side of the hall. The building's rear stairwell was at the end of the hall. Officer Ruhnke had a view of the men's right profiles and saw defendant, who was at the end of the line of men, armed with a large black revolver in his right hand. Officer Ruhnke was about 30 to 45 feet away from defendant. Officer Ruhnke ran toward defendant, drew his weapon, and yelled "drop the gun" to warn Officer Ramirez. The apartment door closed just before Officer Ruhnke arrived at it. The door was locked, so Officer Ruhnke, with his weapon drawn, kicked the door in. He immediately saw all four men. Defendant, who still had the same revolver in his hand, was directly in front of Ruhnke. Defendant dropped the gun and moved back with his hands raised. Meanwhile, co-offender Robinson opened a window, threw a silver firearm out the window, and then attempted to dive out the window head-first. Robinson then screamed and braced his legs inside the window to stop his fall. One of the other men, Christopher Miller, grabbed Robinson's leg and held onto him.

¶ 9 Officer Ruhnke yelled at everyone to show their hands and stop moving but told Miller to hold onto Robinson. While Ruhnke held his gun in his left hand and pointed it at defendant,

Ruhnke moved defendant away from the door and the black revolver on the floor. Co-offender Suber fled out the door, refusing to comply with Officer Ruhnke's order to come toward him. Then Officer Ruhnke used his right hand to pat Miller down while Ruhnke held his gun in his left hand, pointed at defendant. Officer Ruhnke felt no weapon on Miller and told him to leave, which Miller did. Officer Ramirez entered the apartment and saw defendant in the middle of the room with his hands up, the gun on the floor, and Officer Ruhnke standing with this gun pointed at defendant while holding onto Robinson, who was hanging out the window. The officers pulled Robinson back inside through the window.

¶ 10 Officer Ruhnke estimated that he entered the apartment within five seconds of seeing the men crowded outside the apartment door and that Officer Ramirez entered the apartment about one minute later. The officers placed handcuffs on defendant and Robinson. Officer Ruhnke recovered defendant's revolver from the floor and rendered it safe by removing "four live rounds" from its cylinder. After speaking with Ruhnke, Ramirez went outside and recovered the silver handgun on the ground directly below the window of apartment 207. Ramirez found "six live bullets" in the silver handgun.

¶ 11 Officer Ruhnke acknowledged that the case report initially correctly described defendant as a black male with black hair but later erroneously described him as an albino-complexioned male with a Mohawk hairstyle. Ruhnke testified that none of the four men who fled into the apartment had an albino complexion or Mohawk hairstyle. Ruhnke testified that he did not author that report.

¶ 12 The State entered certified copies of defendant's prior convictions of vehicular hijacking and UUWF. However, the parties agreed to omit the nature of the underlying charges and stipulated before the jury to the convictions as "two prior qualifying felony offenses."

¶ 13 The trial court denied defendant's motion for a directed verdict and defendant did not testify or present any evidence. The jury found defendant guilty of AHC. The trial court denied defendant's posttrial motion and sentenced him to a prison term of 15 years.

¶ 14 II. ANALYSIS

¶ 15 On appeal, defendant argues that (1) the State failed to prove his guilt beyond a reasonable doubt because Officer Ruhnke's version of events was implausible and contrary to human experience, (2) the State's closing argument improperly shifted the burden of proof and was designed to inflame the passions of the jury, (3) irrelevant and unduly prejudicial evidence, *i.e.*, that the gun defendant allegedly possessed was loaded and that the police recovered another loaded gun connected to co-offender Robinson, was admitted into evidence, and (4) defendant's AHC conviction should be reversed because one of the predicate offenses, his 2005 UUWF conviction, was based on a 2004 AUUW conviction, which was under a subsection of the relevant statute that was found facially unconstitutional in *Burns*, 2015 IL 117387, and thus was void *ab initio*.

¶ 16 A. Sufficiency of the Evidence

¶ 17 Defendant argues that Officer Ruhnke's version of events defied human experience and was contrary to the laws of nature. Specifically, the one minute timeline defied human experience where Ruhnke claimed that he pursued the suspects on the second floor, kicked in the apartment door, and frisked Miller and told him to leave before Officer Ramirez rejoined Ruhnke

in the apartment. Moreover, it was contrary to human experience to believe that Ruhnke would kick in a door to pursue four suspects, one of whom had held a gun in plain view, without waiting for Officer Ramirez or backup. Also, defendant, who was a convicted felon, logically would not have exposed the gun for Ruhnke to see while outside the apartment or retained the gun once inside the apartment. In addition, Ruhnke's testimony was further discredited by the police report, which incorrectly listed defendant as albino complected with a Mohawk hairstyle.

¶ 18 When a defendant attacks his conviction on reasonable doubt grounds, the relevant question is whether, after reviewing 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. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). The reviewing court must allow all reasonable inferences from the record in favor of the prosecution. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011). The trier of fact bears the responsibility to assess the credibility of the witnesses, weigh the evidence presented, resolve conflicts in the evidence, and draw reasonable inferences from the evidence. *People v. Williams*, 193 Ill. 2d 306, 338 (2000). We afford the trier of fact great deference (*People v. DePaolo*, 317 Ill. App. 3d 301, 306 (2000)), and will not set aside a conviction unless the evidence is so improbable or insufficient that there remains a reasonable doubt as to the defendant's guilt (*People v. Campbell*, 146 Ill. 2d 363, 374 (1992)).

¶ 19 To sustain the charge of AHC, the State had to prove that defendant possessed a firearm after having been convicted a total of two or more times of qualifying felony offenses. 720 ILCS 5/24-1.7(a) (West 2012).

¶ 20 Defendant's challenges to the officers' credibility were already presented to and rejected by the jury. The defense did not cross-examine Ruhnke, a trained officer, about his ability to run

the short distance to apartment 207 and kick in the door in five seconds. He testified that the incident was intense and unfolded rapidly, and nothing in the record indicates that his testimony was improbable. Although defendant implies that Ruhnke's conduct in entering the apartment without backup was implausible because it was reckless, the jury was entitled to view his actions as determined, calculated and brave. Moreover, Ramirez closely corroborated Ruhnke's testimony regarding their entry into the building, the initial chase, the time it took Ramirez to enter the apartment, and the location and recovery of the black revolver from the floor and the silver revolver from the ground below apartment 207, which was precisely where Ruhnke saw co-offender Robinson throw it. In addition, defendant suggests that a "person with any sense" would have hidden the gun and disposed of it before the officer entered the apartment. We find nothing implausible about Ruhnke's testimony that he saw the large revolver in defendant's right hand as he pressed against the other suspects and tried to get inside the apartment. Moreover, neither defendant nor Robinson had time to hide or dispose of their guns because Ruhnke entered the apartment within five seconds. Finally, Ruhnke did not author the case report that mistakenly described defendant as albino complected with a Mohawk hairstyle, and this challenge to Ruhnke's credibility was already presented to and rejected by the jury. It was the jury's exclusive function to resolve Ruhnke's credibility in light of all the evidence, and its finding is entitled to great deference. *Collins*, 106 Ill. 2d at 261-62.

¶ 21 After reviewing the record in the light most favorable to the prosecution, we conclude that a rational trier of fact could have determined beyond a reasonable doubt that defendant was guilty of the offense of AHC based on the testimony of the officers and reasonable inferences from the evidence. Accordingly, we reject defendant's reasonable doubt argument.

¶ 22 B. Closing Argument

¶ 23 Defendant argues that the State's improper closing argument demeaned the defense, shifted the burden of proof, remarked that the defense failed to present proof of innocence, and attempted to inflame the passions of the jury. Defendant concedes that he has forfeited appellate review of these claims by failing to both timely object and include these issues in his motion for a new trial. However, he asks us to review this issue under the plain error doctrine, arguing that the evidence was so closely balanced that this misconduct severely threatened to tip the scales of justice against him and that the cumulative effect of this misconduct was so serious that he was denied a fair trial.

¶ 24 In general, a defendant preserves an issue for review by timely objecting to it and including it in a posttrial motion. *People v. Denson*, 2014 IL 116231, ¶ 11. However, we may review claims of error under the plain error rule (Ill. S. Ct. R. 615(a)), which is a narrow and limited exception to forfeiture (*People v. Hillier*, 237 Ill. 2d 539, 545 (2010)). To obtain relief under this rule, defendant must show that a clear or obvious error occurred. *Id.* Defendant bears the burden of persuading the court that either (1) the evidence at the hearing was so closely balanced (regardless of the seriousness of the error) as to severely threaten to tip the scales of justice against the defendant, or (2) the error was so serious (regardless of the closeness of the evidence) as to deny the defendant a fair trial and challenge the integrity of the judicial process. *People v. Herron*, 215 Ill. 2d 167, 187 (2005). In order to determine whether the plain error doctrine should be applied, we must first determine whether any error occurred. *Id.*

¶ 25 "The regulation of the substance and style of closing argument lies within the trial court's discretion; the court's determination of the propriety of the remarks will not be disturbed absent

a clear abuse of discretion." *Caffey,* 205 Ill. 2d at 128. A prosecutor is allowed wide latitude during closing arguments. *People v. Nieves,* 193 Ill. 2d 513, 532-33 (2000). A prosecutor may comment on the evidence presented at trial, as well as any fair, reasonable inferences therefrom, even if such inferences reflect negatively on the defendant. *People v. Nicholas,* 218 Ill. 2d 104, 121 (2005). Remarks made during closing arguments must be examined in the context of those made by both the defense and the prosecution, and must always be based upon the evidence presented or reasonable inferences drawn therefrom. *People v. Coleman,* 201 Ill. App. 3d 803, 807 (1990).

¶ 26 The court reviews *de novo* the legal issue of whether a prosecutor's misconduct, like improper statements at closing argument, was so egregious that it warrants a new trial. *People v. Wheeler,* 226 Ill. 2d 92, 121 (2007). The reviewing court asks whether the misconduct "engender[ed] substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilt resulted from them." *Id*. at 123. "Misconduct in closing argument is substantial and warrants reversal and a new trial if the improper remarks constituted a material factor in a defendant's conviction." *Id*.

¶ 27 This court has remarked multiple times that a conflict exists concerning whether a reviewing court should apply an abuse of discretion analysis or *de novo* review to allegations challenging a prosecutor's remarks during closing argument. See, *e.g.*, *People v. Deramus*, 2014 IL App (1st) 130995, ¶ 35; *People v. Hayes*, 409 Ill. App. 3d 612, 624 (2011); *People v. Raymond*, 404 Ill. App. 3d 1028, 1059-60 (2010). However, a careful review of Illinois Supreme Court precedent establishes that no such conflict exists. Specifically, our supreme court's

decisions have applied the two standards of review separately to the appropriate issue addressed on appeal.

¶ 28 In *People v. Blue*, 189 Ill. 2d 99, 128-34 (2000), the court held that the trial court abused its discretion by permitting the jury to hear the prosecutor's arguments that the jury needed to tell the police it supported them and tell the victim's family that he did not die in vain and would receive justice. In *People v. Hudson*, 157 Ill. 2d 401, 441-46 (1993), the court found under the abuse of discretion standard that the prosecutor's closing argument remarks about the defendant's concocted insanity defense and his expert's lack of credibility did not exceed the scope of the latitude extended to a prosecutor. In contrast, in *Wheeler*, 226 Ill. 2d at 121-31, the court reviewed *de novo* whether a new trial was warranted based on the prosecutor's repeated and intentional misconduct during closing argument, which involved vouching for police credibility, attacking defense counsel's tactics and integrity, disparaging former defense counsel, and persistently stating that the prosecution was representing the victims. Whereas a reviewing court applies an abuse of discretion analysis to determinations about the propriety of a prosecutor's remarks during argument (*Blue*, 189 Ill. 2d at 128; *Hudson*, 157 Ill. 2d at 441), a court reviews *de novo* the legal issue of whether a prosecutor's misconduct, like improper remarks during argument, was so egregious that it warrants a new trial (*Wheeler*, 226 Ill. 2d at 121). Our supreme court's decisions have not created any conflict about the appropriate standard of review to be applied to these two different issues.

¶ 29 First, defendant argues that the prosecutor improperly demeaned the defense as "ludicrous," shifted the burden of proof, and essentially told the jury to disregard defendant's

theory of the case because the defense did not put on proof that the police were liars. The specific remarks defendant challenges on appeal are set forth below in italics.

¶ 30 According to the record, during the State's initial closing argument, the prosecutor referred to defense counsel's cross-examination of Officer Ruhnke and paraphrased defense counsel's repeated questions that had asked Ruhnke, "[D]o you mean to tell us that we're to take your word about what happened; that we're to rely solely on your word and no scientific evidence of what [defendant] did that day." The prosecutor argued that the idea that a juror cannot rely on the word of one individual would set a dangerous precedent. The prosecutor argued that criminals, not victims and witnesses, set the crime scene, and to "*[s]ay that Officer Ruhnke's word is not enough is ludicrous.* Because the testimony of one reliable credible witness is sufficient evidence."

¶ 31 The prosecutor stated that the jurors must judge the officers' reliability and credibility and determine the weight to give their testimony. The prosecutor continued:

> "[I]n doing that think about what they both said, their descriptions of the events, the sequence, the timeline, is consistent. The testimony in light of the evidence is reasonable that that is in fact how things occurred on March 22; *and when you do that, ask yourselves what evidence there is that that's not how it occurred.* That they were lying, that Officer Ruhnke and Officer Ramirez came in here and they lied because to say that they weren't credible, that they weren't reliable is to say that they are liars plain and simple."

Thereafter, the prosecutor discussed the elements of the AHC offense and argued that the evidence presented at trial established that the State had met its burden of proof. Concerning

whether defendant knowingly and intentionally possessed the gun, the prosecutor held the gun in front of the jury and argued that the gun was too large and too heavy to be shoved into a pocket and forgotten about. The prosecutor stated that now it was safe and not loaded, "[b]ut remember that's not the condition it was in when the defendant had it so when he had it, *it was loaded and ready to go*."

¶ 32 Viewing the challenged remarks in context, we find no error here. The prosecutor properly argued that the defense's theory of the case—that Ruhnke's version of events was not accurate and was not supported by any scientific evidence, like DNA—was not a reasonable inference based on the evidence presented and did not shift the burden of proof by implying that defendant had a duty or burden to present exculpatory evidence. *People v. Phillips*, 127 Ill. 2d 499, 523-26 (1989) (the prosecutor may comment upon and challenge defense characterizations of the evidence and attack its theory of defense). The prosecutor simply pointed out that there was only one version of the offense in evidence: the version supported by the officers' testimony. *People v. Moore*, 171 Ill. 2d 74, 105-07 (1996) (prosecutors may argue that evidence is uncontroverted or not contradicted as long as the argument is not directed at the defendant's decision not to testify). The prosecutor properly urged the jury to credit the officers' testimony and reject defendant's claim that it was insufficient to support a conviction. Moreover, the prosecutor's remarks were an attack, not on defense counsel personally, but on the substance of the defense's theory. *People v. Zoph*, 381 Ill. App. 3d 435, 454 (2008).

¶ 33 Next, defendant argues that the prosecutor made inflammatory appeals to the fears and passions of the jury by arguing that the gun defendant allegedly possessed "was loaded and ready to go." Defendant complains that this statement essentially told the jury that defendant was

prepared to use the gun. According to defendant, the challenged statement served no legitimate purpose because the State was not required to prove that the gun was loaded as an element of the AHC offense.

¶ 34 Viewing the challenged remark in context, we find no error here. A prosecutor has the right to comment upon the evidence presented and reasonable inferences arising from the evidence even if such inferences are unfavorable to the defendant (*Hudson*, 157 Ill. 2d at 441), and evidence that the gun was loaded was already introduced evidence. Absent an *in limine* ruling limiting discussion of a particular piece of evidence during closing argument, a defendant is not entitled to a sanitized or watered-down version of the events during closing argument simply because the evidence may reflect unfavorably on him. *Id*.

¶ 35 Because we find no error in the State's complained-of remarks, we hold defendant to his forfeiture of these claims challenging the State's closing argument.

¶ 36 In the alternative, defendant argues that trial counsel's failure to object to the prosecutor's challenged statements constituted a deficient performance and prejudiced defendant because this failure and the closely balanced evidence affected how the jury viewed the evidence and defendant.

¶ 37 In determining whether a defendant was denied effective assistance of counsel, we apply the familiar two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504 (1984). To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. To demonstrate performance deficiency, a defendant must establish

that counsel's performance fell below an objective standard of reasonableness. *People v. Edwards*, 195 Ill. 2d 142, 163 (2001). In evaluating sufficient prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694. If either prong of the *Strickland* test cannot be shown, then the defendant has not established ineffective assistance of counsel. *Id.* at 697.

¶ 38 We conclude that defendant's claim of ineffectiveness of counsel fails because counsel was not deficient where any objection to the challenged remarks would have been futile because, as discussed above, those remarks did not shift the burden of proof, demean the defense, or inflame the passions of the jury. Accordingly, defendant cannot meet his burden of establishing prejudice; there is no reasonable probability that the outcome of the proceeding would have been different if counsel had made futile objections to the prosecutor's challenged closing argument remarks.

¶ 39 C. Irrelevant and Unduly Prejudicial Evidence

¶ 40 Defendant argues that the trial court erroneously admitted irrelevant and unduly prejudicial evidence—*i.e.*, the facts that defendant's gun was loaded with live bullets and co-offender Robinson also had a loaded gun—because those facts were not necessary to prove an element of the AHC offense and were not pertinent to any fact of consequence in the case. Defendant claims that this evidence was improper because it portrayed him as "armed and dangerous." Defendant concedes that he forfeited review of this claim, but urges us to consider it

under the closely-balanced evidence prong of the plain error rule or, in the alternative, as an ineffective counsel claim.

¶ 41 Under the plain error rule, we must first determine whether any error occurred. We review evidentiary rulings for an abuse of discretion and will not reverse a ruling even if an abuse of discretion occurred "unless the record indicates the existence of substantial prejudice affecting the outcome of the trial." *People v. Jackson*, 232 Ill. 2d 246, 265 (2009).

¶ 42 All relevant evidence is admissible unless otherwise provided by law. *People v. Monroe*, 66 Ill. 2d 317, 321 (1977). " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ill. R. Evid. 401 (eff. Jan. 1, 2011). "The consequential steps in the investigation of a crime and the events leading up to an arrest are relevant when necessary and important to a full explanation of the State's case to the trier of fact." (Internal quotation marks omitted.) *Jackson*, 232 Ill. 2d at 267. A trial court "is not required to exclude relevant evidence *** just because it may be prejudicial or arouse feelings of horror or indignation in the jury." (Internal quotation marks omitted.) *People v. Buss*, 187 Ill. 2d 144, 219 (1999).

¶ 43 Furthermore, this court has distinguished intrinsic evidence, which encompasses a continuing course of conduct and can be part of the episode being tried or consist of necessary preliminaries to the matter being tried, from extrinsic evidence, which is not contained in or part of the episode. *People v. Manuel*, 294 Ill. App. 3d 113, 123-24 (1997). Where evidence is intrinsic to or inextricably intertwined with the matter being tried, it is admissible "simply

because such evidence formed an integral and natural part of the witness's account of the circumstances surrounding the offenses for which the defendant was indicted." *Id*.

¶ 44 We find no error in the admission of Officer Ruhnke's testimony about (1) Robinson throwing his silver gun out the window and attempting to dive head-first after it to escape but then changing his mind upon realizing the danger of a fall from that height, and (2) recovering defendant's gun on the floor and rendering it safe by unloading its live ammunition before Ruhnke placed the gun in his waistband. Moreover, there was no error in Officer Ramirez's testimony that he (1) recovered Robinson's gun precisely where Ruhnke saw Robinson throw it, and (2) rendered the weapon safe by unloading the live ammunition.

¶ 45 The narrative of the officers' testimony establishes that the evidence regarding the ammunition and Robinson's gun was inextricably intertwined with the matter being tried and was an integral and natural part of the officers' accounts of the circumstances surrounding the offenses for which defendant was indicted. Prohibiting any of this testimony would have presented a highly abridged and inaccurate version of the evidence and deprived the jury of the actual circumstances of the incident even though those circumstances were relevant to a full explanation of the State's case. The evidence showed that the officers faced a chaotic situation where a lot of action was happening at once. Excluding any of the challenged testimony would have left the jurors wondering why Robinson was hanging out the window and why Officer Ruhnke did not prevent Suber from fleeing and dismissed Miller after quickly searching him with one hand and finding no weapon, all while Ruhnke held his gun in his other hand to "cover" defendant. Moreover, the testimony was relevant to the jurors' assessment of the officers' ability to observe the facts and circumstances surrounding the arrest.

¶ 46 Defendant's argument that the challenged testimony was unduly prejudicial implies that this evidence involved "other crimes" evidence. However, evidence of other offenses that are inextricably intertwined with the matter being charged are not equated with "other crimes" evidence and are admissible as part of the continuing narrative of the charged offense. *People v. Pikes*, 2013 IL 115171, ¶ 20; *People v. Hensley*, 2014 IL App (1st) 120802, ¶ 51; *Manuel*, 294 Ill. App. 3d at 123-24; see also *People v. Adkins*, 239 Ill. 2d 1, 31-33 (2010) (chronicling cases cited therein). In addition, the trial court gave the jury a limiting instruction regarding Robinson's gun, explaining that the silver gun was not attributed to defendant and someone other than defendant was involved in that offense, and that the silver gun was received as evidence on the issue of the officers' ability to observe the facts and circumstances surrounding the arrest.

¶ 47 We conclude that the trial court properly allowed the challenged firearm and ammunition evidence because it was inextricably intertwined with and important to a full explanation of the facts of this case, including the events leading up to defendant's arrest. The exclusion of this evidence would have forced the officers to present an artificial and inaccurate version of those events. Accordingly, we hold defendant to his forfeiture of this issue. For all the same reasons, defendant's alternative argument that trial counsel was ineffective for failing to object and preserve this meritless claim also fails. *People v. Lawton*, 212 Ill. 2d 285, 304 (2004) (failure to make a futile objection does not constitute deficient performance).

¶ 48 D. The Predicate Felony Supporting the AHC Conviction

¶ 49 Finally, we address defendant's argument that his AHC conviction should be vacated because it was based on a predicate 2005 conviction for UUWF, which, itself, was based on a 2004 conviction for AUUW, which was based on a subsection of the relevant statute that was

found unconstitutional in *People v. Aguilar*, 2013 IL 112116, and *Burns*, 2015 IL 117387. Although defendant acknowledges that the Illinois Supreme Court rejected a similar claim in *People v. McFadden*, 2016 IL 117424, he urges this court not to follow *McFadden*, contending that (1) *McFadden* and the UUWF statute are distinguishable from the AHC statute at issue in this case, and (2) *McFadden* contravenes several United States Supreme Court decisions. Defendant also argues that trial counsel was ineffective for failing to vacate defendant's 2004 AUUW conviction before his sentencing hearing in the instant case, which allegedly prejudiced him because the trial court mentioned that AUUW conviction in discussing his criminal history.

¶ 50 This court is bound by *McFadden*'s holding that a void prior AUUW conviction can be used to prove a defendant's felon status under the statute defining the UUWF offense. Specifically, *McFadden* reaffirmed the principle that the void *ab initio* doctrine renders a facially unconstitutional statute unenforceable and renders a conviction under that facially unconstitutional statute subject to vacatur. *Id.* ¶ 20. The court, however, ruled that defendant McFadden's status as a felon was not affected by *Aguilar* because his prior 2002 AUUW conviction was treated as valid until a court with reviewing authority declared that it was vacated. *Id.* ¶ 31. Thus, the 2002 AUUW conviction, which was treated as a valid felony conviction, made it unlawful for McFadden to possess firearms in 2008 when he committed the three armed robberies in his current case. *Id.* Because McFadden had not cleared his felon status before obtaining a firearm in 2008, his 2002 AUUW conviction properly served as proof of the predicate felony conviction for UUWF in his current case. *Id.* ¶¶ 21, 37.

¶ 51 To sustain a conviction for AHC, the State was required to prove that defendant possessed a firearm after having been convicted of at least two qualifying predicate offenses. See

720 ILCS 5/24-1.7(a) (West 2012). At the trial, the State submitted certified documents of defendant's prior convictions, and the parties stipulated that he was convicted of the statutory qualifying predicate offenses of vehicular hijacking in 2009 and UUWF in 2005.

¶ 52 Applying *McFadden*, we find that defendant's 2005 UUWF conviction is not void because his 2004 AUUW conviction was properly used to prove his felon status in that 2005 case. The 2004 AUUW conviction, which is treated as a valid felony conviction until it is declared void by a court with reviewing authority, made it unlawful for defendant to possess a firearm in April 2005 when he committed the UUWF offense. Because defendant's felon status was not cleared before he possessed a firearm and committed the conduct in his 2005 case, his 2004 AUUW conviction properly served as the predicate felony conviction for his UUWF conviction in the 2005 case. Accordingly, defendant's 2005 UUWF conviction served as a valid qualifying predicate offense for his AHC conviction in the instant case.

¶ 53 Finally, defendant's alternative argument that trial counsel was ineffective for failing to move to vacate defendant's 2004 AUUW conviction before his sentencing hearing in the instant case lacks merit. Even if trial counsel had moved to vacate defendant's 2004 AUUW conviction as void before his sentencing hearing in the instant case, his 2005 UUWF conviction would not have been rendered void because, as discussed above, defendant's status as a felon in April 2005 when he committed the conduct that resulted in his 2005 UUWF conviction was not affected by the 2013 *Aguilar* decision. Accordingly, defendant cannot establish either deficient performance by counsel or prejudice resulting to defendant.

¶ 54 III. CONCLUSION

¶ 55 For the foregoing reasons, we affirm defendant's conviction of being an armed habitual criminal and his 15-year prison term.

¶ 56 Affirmed.