2018 IL App (1st) 151958-U

FOURTH DIVISION
March 22, 2018

No. 1-15-1958

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 13 C6 61030
	)	
JAMIL FLEMING,	)	Honorable
	)	Brian Flaherty,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Justices McBride and Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: Affirmed. Defendant invited error in admission of FOID-card certification by State Police and thus could not complain of confrontation error. Defendant could not establish either plain error or ineffective assistance of counsel.

¶ 2 Following a jury trial, defendant Jamil Fleming was convicted of aggravated unlawful use of a weapon by a person without a Firearm Owners Identification card (AUUW-FOID count) and unlawful possession of a weapon by a felon. He was sentenced to nine years in prison on the AUUW-FOID count. On appeal, he argues that he was denied the right to confront the witness that signed the certification from the Illinois State Police regarding defendant's lack of a Firearm Owners Identification card (FOID card), as the certification was a testimonial affidavit from a

non-testifying witness that he did not have a prior opportunity to cross-examine. He seeks relief under the plain-error doctrine or, in the alternative, for ineffective assistance of counsel, given that his trial counsel stated that he had "no objection" to the admission of the certification.

¶ 3 We affirm. Although the FOID-card certification was indeed a testimonial document, defense counsel invited the error by stating that there was no objection to admitting the document into evidence. We find no plain error. We also reject defendant's ineffectiveness claim, because counsel's decision not to object was reasonable trial strategy.

¶ 4 I. BACKGROUND

¶ 5 In August 2013, defendant was riding in the backseat of a car pulled over for a license plate violation. As the detectives approached, and for their safety, they asked defendant to put his hands on the headrest in front of him. While speaking with the front passenger, Detective Malone observed that defendant had taken his hands off the headrest and that she no longer could see them. She instructed defendant to reposition his hands on the headrest and to keep them there, and he complied.

¶ 6 But as Malone asked the front passenger to get out of the car and walk to the rear of the car, she noticed defendant's hands once again were off the headrest. This time, however, they were shoving something in the pouch behind the front passenger seat, but she could not see what it was. After all occupants got out of the vehicle, Malone looked at the pouch and saw parts of a "shiny silver handgun," namely the handle and the back of the slide.

¶ 7 When Malone went to put handcuffs on him, defendant attempted to strike her with his elbow, broke free, and fled. He was later apprehended by another officer. After he was detained, Malone recovered the "shiny silver handgun" from the pouch. Both the gun and magazine were

sent to the Illinois State Crime Lab for DNA testing, where it was determined that defendant's DNA buccal sample matched the major male profile on the gun.

¶ 8 Defendant was charged with AUUW-FOID and unlawful possession of a weapon by a felon. At the conclusion of his jury trial, the State introduced a number of exhibits, including State's Exhibit 5, which the State referred to as a "certification," a signed and notarized document indicating that defendant had not been issued a FOID card as of November 30, 2013. It read:

> "Based on the following name and date of birth information provided by the Cook County State's Attorney's Office, I, Sergeant Matt Weller, Firearms Services Bureau, Illinois State Police, do hereby certify after a careful search of the FOID files, the information below to be true and accurate for [defendant] whose date of birth is July 2, 1992, has never been issued FOID card as of November 30th, 2013. Signed by Sergeant Matt Weller, Firearms Services Bureau, Illinois State Police, State of Illinois, Sangamon County."

When prompted by the trial judge, defendant stated that he had "no objection" to the introduction of this exhibit. Nor was the issue raised in a written posttrial motion.

¶ 9 The jury found defendant guilty on both counts. Finding him eligible for extended sentencing, the trial judge sentenced defendant to nine years on the AUUW charge. Defendant's motions for a new trial and to reconsider sentencing were denied. This appeal followed.

¶ 10 II. ANALYSIS

¶ 11 On appeal, defendant argues that the admission of the certification violated his confrontation rights under the sixth amendment. He acknowledges that he forfeited appellate review of this issue, as defendant's trial counsel stated there was "no objection" to the

introduction of the State's certification, nor was an objection raised in a written posttrial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (defendant must contemporaneously object and raise issue in posttrial motion to preserve error). Defendant argues that the confrontation violation constituted plain error. He also argues, in the alternative, that his trial counsel was ineffective for stating that he had no objection to the admission of the certification.

¶ 12 Our review is *de novo*, because the facts are undisputed, and the question whether his right to confront witnesses was violated is a question of law. *People v. Leach*, 2012 IL 111534, ¶ 64; *People v. Martin*, 408 Ill. App. 3d 891, 895 (2011).

¶ 13 A. Testimonial Evidence

¶ 14 The right of confrontation ensures that, under both federal and state constitutions, an accused has the right to confront witnesses against her. U.S. Const. 1970, amend. VI; Ill. Const., art. I, § 8. More specifically, a witness's out-of-court testimonial statement is admissible only if the witness is unavailable and the defendant had a prior opportunity to cross examine her. *Crawford v. Washington*, 541 U.S. 36, 59 (2004). Although declining to offer a comprehensive list, the United States Supreme Court provided examples of "testimonial" statements implicating the sixth amendment, including "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." *Id.* at 51-52.

¶ 15 We can easily dispose of the question of whether a FOID-card certification such as this one is testimonial. We have recently held, twice, that a signed and notarized certification from an agent of the firearm services bureau of the Illinois State Police, attesting that a defendant has not been issued a FOID card as of a date certain, was testimonial in nature and thus implicated the

sixth amendment's confrontation right. See *People v. Cox*, 2017 IL App (1st) 151536, ¶ 63; *People v. Diggins*, 2016 IL App (1st) 142088, ¶ 16.

¶ 16 Likewise, here, there is no question that the certification was made in anticipation of its use at trial against defendant, as the certifying individual indicated that he received defendant's name from the State's Attorney's Office, and the statement spoke directly to an element of the charge against defendant—that he lacked a FOID card at the time he was arrested for possession of the firearm. See *Diggins*, 2016 IL App (1st) 142088, ¶ 16; *Crawford*, 541 U.S. at 52; see also *Melendez–Diaz v. Massachusetts*, 557 U.S. 305, 310 (2009) (in cocaine-trafficking case, signed and notarized "certificate" from state health department, attesting that contraband tested positive for cocaine of a certain amount, was testimonial; Court had "little doubt that the documents at issue in this case fall within the 'core class of testimonial statements' thus described" in *Crawford*).

¶ 17 Having determined that the certification was testimonial in nature, the question becomes whether defendant's confrontation rights were violated in this case. It is undisputed that defendant not only failed to object to the admission of the certification, but that his counsel affirmatively stated that he had "no objection" to its admission. Defendant thus seeks review of this alleged error as plain error or, in the alternative, as ineffective assistance of counsel for failing to object.

¶ 18 This court recently considered these precise legal issues, in this precise context, in *Cox*, 2017 IL App (1st) 151536, which will figure heavily in our analysis below of plain error and ineffectiveness.

¶ 19 B. Plain Error

¶ 20 The plain-error doctrine allows a court to review unpreserved claims of error under one of two separate prongs: 1) when the evidence was so closely balanced that the error alone tipped the scales in favor of the State; or 2) that a clear or obvious error was so serious that it affected the integrity of the defendant's trial. *People v. Thompson*, 238 Ill.2d 598, 613 (2010). Defendant seeks relief under both prongs. But before determining whether an alleged error qualifies under either prong, we must first decide whether any error occurred at all. *People v. Sargent*, 239 Ill. 2d 166, 189 (2010). We may affirm a conviction on any basis appearing in the record. *People v. Wright*, 194 Ill.2d 1, 16 (2000); *People v. Burnette*, 325 Ill. App. 3d 792, 805 (2001).

¶ 21 Under the doctrine of invited error, an accused may not proceed in one manner, then on appeal argue that this course of action was in error. *People v. Patrick*, 233 Ill.2d 62, 77 (2009); *People v. Carter*, 208 Ill.2d 309, 319 (2003); *People v. Villarreal*, 198 Ill.2d 2092, 228 (2001). When a defendant "procures, invites, or acquiesces in the admission of evidence, even though the evidence is improper, she cannot contest the admission on appeal." *People v. Bush*, 214 Ill. 2d 318, 332 (2005).

¶ 22 In *Cox*, 2017 IL App (1st) 151536, ¶¶ 72-75, we recently held that a statement of "no objection" to the admission of a FOID-card certification triggered the invited-error doctrine. We reasoned that, had defendant objected to the admission of the FOID-card certification, the State easily could have remedied any objection by calling the affiant as a live witness. *Id*. ¶ 76. Because the defense "invited" the trial court to admit the certificate by its statement that it did not object, the trial court committed no error, much less plain error. *Id*. ¶¶ 76, 87. We further found that in inviting this error, the defendant forfeited plain-error review. *Id*. ¶ 87; see also *People v. Patrick*, 233 Ill. 2d 62, 77, 908 N.E.2d 1, 10 (2009) (plain-error review forfeited, as defendant invited error under review); *People v. Boston*, 2017 IL App (1st) 140369, ¶ 91 (same).

¶ 23 We follow the holding in *Cox*. We likewise hold that defendant invited any error by the trial court in admitting the certification here, based on defendant's statement that it had no objection to its admissibility. If counsel had objected to the admission of the certification, the State easily could have remedied the problem, by calling to the stand the representative from the State Police who signed the document or otherwise. Counsel's affirmative decision not to do so, and to state that the defense had "no objection," invited the State to proceed as it did. We find no error and thus no plain error. We also hold that defendant forfeited plain-error review, in any event, by inviting the error.

¶ 24 C. Ineffective Assistance of Counsel

¶ 25 Defendant's final argument is that his trial counsel was ineffective. To demonstrate that his counsel was ineffective, defendant has the burden to prove that counsel's performance was deficient, and that the deficient performance prejudiced the defendant. *People v. Domagala*, 2013 IL 113688, ¶ 36. The failure to establish either prong warrants a rejection of the ineffectiveness claim. *People v. Simpson*, 2015 IL 116512, ¶ 35. With respect to the first prong, deficient performance, the defendant must overcome the "strong presumption" that counsel's action or inaction was the result of sound trial strategy, rather than incompetence. *People v. Clendenin*, 238 Ill. 2d 302, 317 (2010).

¶ 26 In *Cox*, 2017 IL App (1st) 151536, ¶ 88, we rejected the defendant's ineffectiveness argument, based on his counsel's statement of non-objection to the admission of the FOID-card certification, reasoning that:

> "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. [Citations.] In the record before us, there is nothing to suggest that defendant had a FOID card and everything to suggest that the decision was a matter of trial strategy." (Emphasis in original.)

¶ 27 We likewise find no basis to find deficient performance by counsel on the record before us. Defendant did not, at any time, attempt to claim that he actually possessed a FOID card, nor did he ever cast doubt on the State's claim that he did not. Instead, defendant directed his defense of the case toward claiming that the weapon was not his—that the gun "miraculously" appeared after defendant fled from the officers, that there was no independent evidence that the gun belonged to him, and that his DNA was inadvertently transferred onto a police officer during the encounter, which was then transferred to the gun. As in *Cox*, there is nothing in the record to indicate that, in fact, defendant had a FOID card—which of course would have been a complete defense—and everything to suggest otherwise.

¶ 28 Absent any such evidence in the record, we find nothing to overcome the "strong presumption" (*Clendenin*, 238 Ill. 2d at 317) that defense counsel's decision not to object to the admission of the certification was anything other than a decision not to force the State to bring in a witness from downstate Sangamon County to establish a fact that defense counsel already knew he could not successfully contest, resulting in needless delay of the trial and an inefficient use of judicial resources. On this record, we find defense counsel's statement of "no objection" to the admission of the certification to be an exercise of reasonable trial strategy, not an example of incompetence. Defendant's ineffectiveness argument thus fails. *Clendenin*, 238 Ill. 2d at 317.

¶ 29 III. CONCLUSION

¶ 30 For these reasons, defendant's conviction is affirmed.

¶ 31 Affirmed.