2018 IL App (1st) 160520-U

No. 1-16-0520

SIXTH DIVISION
MAY 4, 2018

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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. 15 CR 7417
	)	
CLARENCE JANUARY,	)	Honorable
	)	James Michael Obbish,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: Where defense counsel acquiesced to the admission of a certification letter showing that defendant did not have a valid concealed carry license or Firearm Owner's Identification card, the trial court did not err in admitting the certification and plain error review was inapplicable. Defense counsel's failure to object to the admission of the certification did not establish a claim for ineffective assistance of counsel.

¶ 2 Following a bench trial, defendant Clarence January was convicted of aggravated unlawful use of a weapon (AUUW) (720 ILCS 5/24-1.6(a)(2)/(3)(A-5), (C) (West 2014)) based

on his carrying or possessing a firearm on a public street without a valid concealed carry license (CCL) under the Firearm Concealed Carry Act or a valid Firearm Owner's Identification (FOID) card. The court sentenced the defendant to two years of intensive probation. On appeal, the defendant contends that the certification letter offered by the State to demonstrate that he did not have a valid CCL or FOID card was testimonial hearsay, and that its admission violated his constitutional right to confront witnesses against him. Although his trial counsel did not object to the admission of that evidence, the defendant argues that it is reviewable as plain error. The defendant otherwise contends that his trial counsel provided ineffective assistance by failing to object to the admission of the certification. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 At trial, the State proceeded on six counts of AUUW. Chicago police officer William Murphy testified that he was riding in a squad car on the afternoon of April 10, 2015, when he saw three men, including the defendant, standing in front of the residence at 7223 South Green Street. As the squad car approached, the defendant moved away from the group and went "rapidly up" the porch stairs of the residence. When Officer Murphy got out of the squad car, the defendant jumped from the porch into a vacant lot and ran towards an alley, holding his side. Officer Murphy chased the defendant.

¶ 5 In the alley, Officer Murphy saw the defendant reach to his side, remove a handgun, and toss it over a fence. Officer Murphy heard "a loud clank of the metal hitting the concrete." The defendant continued to run with Officer Murphy in pursuit. At one point, the defendant stopped,

took off his shirt, and tried to give it to "his friend." Officer Murphy eventually apprehended the defendant, placed him into custody, and waited for a squad car to come.

¶ 6 After the defendant was taken into custody, Officer Murphy returned to the alley and recovered the handgun from the area where he had observed the defendant throw it. After being advised of his rights, the defendant told Officer Murphy that he "was carrying the weapon because he was working security on the block."

¶ 7 On cross-examination, Officer Murphy acknowledged that he lost sight of the defendant for a "couple seconds" while chasing him and that he did not see the defendant remove his shirt. Officer Murphy also acknowledged that, after he placed the defendant in handcuffs, a "couple minutes" passed before Officer Murphy returned to the scene where the gun was recovered.

¶ 8 In addition to Officer Murphy's testimony, the State also presented a notarized "certification" letter signed by Tracey Schultz from the Firearms Service Bureau of the Illinois State Police. The certification stated:

> "Based on the following name and date of birth information provided by the Cook County State's Attorney's Office, I, Executive I Tracey Schultz, 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 Clarence January whose date of birth is November 26, 1992, has never been issued a FOID or CCL Card as of May 27, 2015."

When the State sought to admit the certification into evidence, the court asked defense counsel, "[a]ny objection, counsel, to that certified copy?" Defense counsel responded, "[n]o, judge." The court admitted the certification into evidence, and the State rested.

¶ 9 The defendant called Diavonna Davis. She testified that on the afternoon of April 10, 2015, she and her boyfriend were sitting on the porch at her residence at 7224 South Green Street. She observed the defendant sitting on the porch across the street. Davis' boyfriend saw a car approach, and he told Davis that it resembled a car that was involved in a previous shooting incident. Davis and her boyfriend ran inside her house. Looking out a window, Davis saw the defendant running through a field, followed by "three men with hoodies *** running after him." Davis also saw police officers chasing the three men. Later, Davis saw police searching the area near her residence for about 40 minutes. The defendant rested after Davis' testimony.

¶ 10 Following closing arguments, the trial court found the defendant guilty of all AUUW counts and merged the counts into count four, which was based on his carrying or possessing an uncased, loaded, and immediately accessible firearm on a public street when he had not been issued a currently valid CCL or FOID card. The court subsequently denied the defendant's motion for a new trial and sentenced him to two years of intensive probation.

¶ 11 ANALYSIS

¶ 12 On appeal, the defendant contends that the certification letter offered to show that he did not have a valid CCL or FOID card was testimonial hearsay, and that its admission violated his constitutional right to be confronted by witnesses against him. The defendant argues that the State did not prove that Schultz, the person who signed the certification letter, was unavailable to

testify or that the defendant had a prior opportunity to cross-examine Schultz. The defendant thus requests that we reverse his conviction and remand the case for a new trial.

¶ 13 To prove the AUUW offense at issue, the State had to prove that the defendant carried or possessed a handgun when he had not been issued a currently valid CCL or FOID card. See 720 ILCS 5/24-1.6(a)(2)/(3)(A-5), (C) (West 2014). The certification letter was the only evidence offered to show that defendant did not have a valid CCL or FOID card.

¶ 14 Under the confrontation clauses of the United States and Illinois constitutions, a defendant has a right to confront witnesses against him. *People v. Whitfield*, 2014 IL App (1st) 123135, ¶ 25. Under *Crawford v. Washington*, 541 U.S. 36, 59 (2004), "testimonial statements" may only be admitted when "the declarant is unavailable" and "the defendant has had a prior opportunity to cross-examine." This court has held that a notarized "certified letter" showing that the defendant did not have a valid FOID card is "testimonial in nature." *People v. Diggins*, 2016 IL App (1st) 142088, ¶¶ 6-7, 17. The State does not dispute that the certification letter here is testimonial and subject to the confrontation clause. Because the facts are not in dispute, we apply a *de novo* standard of review. See *People v. Cox*, 2017 IL App (1st) 151536, ¶¶ 55-57.

¶ 15 Before we may reach the merits, however, we address the State's claim that the defendant forfeited the alleged error. To preserve a claim for appeal, a defendant must object at trial and raise the issue in a posttrial motion. *People v. Greenwood*, 2012 IL App (1st) 100566, ¶ 27. The defendant concedes that he did not preserve his challenge to the admission of the certification by objecting at trial. Nevertheless, he argues that we should review the issue under the plain error doctrine. The State responds that plain error review does not apply, because the defendant's trial counsel "affirmatively acquiesced" to the admission of the certification letter.

¶ 16 Under the plain error doctrine, we may review unpreserved error 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. The "initial analytical step" under the plain error doctrine "is to determine whether a clear or obvious error occurred. [Citations.]" *Id.* ¶¶ 52-53.

¶ 17 The State argues that there can be no plain error where the defendant at trial acquiesced to the admission of the certification. The State cites the principle that "when a defendant procures, invites, or acquiesces in the admission of evidence, even though the evidence is improper, [he] cannot contest the admission on appeal." *People v. Bush*, 214 Ill. 2d 318, 332-33 (2005).

¶ 18 As the State points out, we recently addressed a very similar situation in *People v. Cox*, 2017 IL App (1st) 151536. As in this appeal, the defendant in *Cox* claimed that his sixth amendment confrontation right was violated by the admission of a certification stating that a search of the State's records revealed that the defendant did not possess a FOID card. *Id.* ¶ 2. Similar to this case, the defendant's trial counsel in *Cox* did not raise any objection, even when specifically asked by the trial court whether it objected to the admission of the document. *Id.* ¶¶ 2, 24-25. We concluded there was no error, reasoning:

> "When the defense invited the trial court to admit the certificate by affirmatively responding to the trial court's question that it had no objection to its admission, we cannot find any error by the trial

> court. Thus, we cannot find that the admission of the certification violated defendant's right to confront the State employee who authored the certification. [Citation.]" *Id.* ¶ 76.

We subsequently concluded that "since there was no error by the trial court, there can be no plain error. [Citation.]" *Id.* ¶ 87. We further noted that " 'plain-error review is forfeited *** when the defendant invites the error.'" *Id.* (quoting *People v. Boston*, 2017 IL App (1st) 140369, ¶ 91).

¶ 19 The same result is warranted here. The record is clear that the trial court specifically asked the defense if it had "[a]ny objection" to the admission of the certification into evidence, and defense counsel responded that it did not. Thus, the defendant acquiesced to the admission and cannot now contend that the trial court erred in admitting it. Accordingly, "we cannot find error by the trial court" in the admission of the certification. *Id. ¶* 76. In turn, the plain error doctrine does not apply. See *id.* ¶ 87.

¶ 20 Apart from the plain error doctrine, the defendant otherwise contends that his "forfeiture can be excused" because his trial counsel's failure to object to the admission of the certification letter constituted ineffective assistance of counsel. We review ineffective assistance of counsel claims under the standard provided in *Strickland v. Washington,* 466 U.S. 668 (1984). *People v. Manning*, 241 Ill. 2d 319, 326 (2011). Under this standard, to establish a claim for ineffective assistance of counsel, a defendant must show that (1) "counsel's performance was deficient" and (2) "the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687. "Since a defendant must satisfy both prongs of the *Strickland* test in order to prevail, a trial court may dismiss the claim if either prong is missing." *In re Edgar C.*, 2014 IL App (1st) 141703, ¶ 79.

¶ 21 Under the deficient performance prong, a defendant must show " 'that counsel's performance was objectively unreasonable under prevailing professional norms.' " *Id.* ¶ 78 (quoting *People v. Domagala*, 2013 IL 113688, ¶ 36). To establish deficient performance, " 'the 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 *People v. Smith,* 195 Ill. 2d 179, 188 (2000)). "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).

¶ 22 Defendant has not established a claim for ineffective assistance of counsel because he has not demonstrated that his trial counsel's performance was objectionably unreasonable. Significantly, defendant never asserted, and there is nothing in the record to suggest, that defendant actually had a valid FOID card or CCL. As this court stated in *Cox*, "the only way that defense counsel's decision not to object to the certification could *possibly* be ineffective assistance was if defendant actually had a FOID card and the certification was in error." (Emphasis in original.) *Cox*, 2017 IL App (1st) 151536, ¶ 88. Instead, the record shows that defense counsel's trial strategy was focused on disputing that the defendant possessed the handgun described by Officer Murphy. See *id.* ¶ 88 (finding that it was not unreasonable for defense counsel to not object to the admission of a certification where there was nothing in the record to suggest that the defendant had a FOID card but "everything to suggest that the decision was a matter of trial strategy"). That strategy is apparent from defense counsel's cross-examination of Officer Murphy, as well as defense counsel's decision to elicit testimony from Davis conflicting with Officer Murphy's recollection of events.

¶ 23 Given that defense counsel's trial strategy was to contest the element of possession, we cannot find that the failure to object to the admission of the certification was "objectively unreasonable under prevailing professional norms." See *id.* ¶¶ 88-89. Thus, the defendant has not demonstrated deficient performance by his trial counsel, and so his ineffective assistance claim fails.

¶ 24 For the foregoing reasons, we affirm the defendant's conviction.

¶ 25 Affirmed.