

No. 1-09-1734

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THIRD DIVISION
March 31, 2011

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. 08 CR 16251
)	
RALPH CHATMAN,)	Honorable
)	John T. Doody,
Defendant-Appellant.)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Justices Murphy and Steele concurred in the judgment.

O R D E R

Held: The trial court's judgment was affirmed (1) because defendant waived his argument that the State failed to prove the tested substance was heroin, and (2) because the trial court did not abuse its discretion when it invoked the State's privilege regarding the disclosure of a secret surveillance location.

Following a jury trial, Ralph Chatman, the defendant, was convicted of possession of a controlled substance with intent to deliver and sentenced as a Class X offender to seven and one-half

years' imprisonment. On appeal, defendant contends that the State failed to prove that the tested substance was heroin. He also contends that the trial court impermissibly restricted his sixth amendment right to cross-examine the witness against him when it denied his motion to disclose the surveillance location of a police officer. We affirm.

Prior to trial, defendant filed a motion for disclosure of the surveillance location, contending that the State's case against him rested exclusively on the ability of Officer Olsen to observe purported transactions between him and unknown individuals. To effectively exercise his right to confrontation, defendant maintained that defense counsel must investigate the ability of police officers to observe the alleged transactions. The State filed a motion *in limine* arguing that defendant should be precluded from eliciting testimony regarding Olsen's exact point of surveillance due to police safety and the public's interest in protecting the surveillance location for future use. After an *in camera* hearing with Olsen, the court found that, for purposes of officer safety, the surveillance location would not be disclosed at trial.

On the day of trial, defendant renewed his motion to disclose the surveillance location. The trial court conducted a second *in camera* review and spoke with Officer Olsen off the record. The court held, as it did earlier, that the exact surveillance location

will be withheld at trial due to officer safety. However, the court added that defendant will have the opportunity to cross-examine the State's witnesses regarding weather, distance, lighting, and any obstructions.

Officer Olsen testified that on August 6, 2008, at about 1:20 p.m., he was on a tactical team and set up surveillance in the vicinity of 3824 West Roosevelt Road in Chicago. Olsen acted as the surveillance officer and was observing a vacant lot where about 15 people were located. Olsen was about 250 feet south of the vacant lot, and was elevated about 20 feet. It was daylight during the surveillance, and Olsen was using binoculars to aid his vision. Olsen saw four women approach defendant on separate occasions in the lot, and, each time, they gave him money. Defendant then walked to the edge of a nearby building, bent down, removed a small item from a green box, walked back to the women, and gave them the item. After observing the fourth transaction, Olsen radioed the enforcement officers, told them defendant's location, and described defendant. Olsen never lost sight of defendant during his observations, and saw the enforcement officers detain defendant. Olsen remained in constant radio contact with the enforcement officers, and was able to verify that they detained the same person he saw engage in the purported narcotics transactions. Olsen directed one of the enforcement officers, Officer Wrigley, to where the green box was located, and saw him recover it.

Officer Thomas Beyna testified that he and his partner, Officer John Wrigley, were part of Officer Olsen's team. After a radio communication with Olsen, Beyna and Wrigley drove to the vacant lot. Beyna was given a description of defendant by Olsen, and when he arrived at the vacant lot, he detained defendant and found \$50 in his pockets. Beyna did not recall at the time of trial what defendant was wearing when he arrived at the scene, nor did he remember obtaining a clothing description of defendant. Wrigley walked away from where Beyna was detaining defendant, and when he returned, he showed Beyna suspect narcotics. Beyna never observed defendant commit any crimes.

Officer Wrigley testified similarly to Officer Beyna. Wrigley also testified that Officer Olsen directed him to an abandoned building about 15 to 20 feet away from where defendant was detained. When Wrigley arrived at the corner of the abandoned building, he saw a green box matching the description that Olsen had provided. Wrigley opened the box and saw two small ziplock bags containing a white powder. Wrigley further testified that after defendant was detained, Olsen positively identified defendant.

Officer Acevedo testified that he inventoried the items that Officers Wrigley and Beyna delivered to him. Specifically, Wrigley gave him an inventory bag containing a small green box, a clear

piece of plastic, and two ziplock bags that contained suspect heroin. Beyna gave him an inventory bag containing \$50.

Debora Bracey testified that she is a forensic scientist and received an envelope in a heat sealed condition from an evidence technician on August 12, 2008. Bracey opened the envelope, saw two clear ziplock bags containing powder, and weighed one of the bags. The one item weighed .24 gram, and Bracey estimated the weight of the second item at .24 gram. Bracey performed a color test on one of the items, which indicated the possibility of the presence of heroin. Bracey performed a second test called a gas chromatography spectrometry (GCMS) test that was used to confirm the structure of the substance. The .24 gram that was analyzed tested positive for heroin. The tests that Bracey performed were generally accepted by the scientific community, and she concluded that based on her opinion within a reasonable degree of scientific certainty, the substance was positive for heroin. After closing arguments, the jury found defendant guilty of possession of a controlled substance with intent to deliver.

On appeal, defendant contends that this court should reverse his conviction because the State failed to prove beyond a reasonable doubt that the tested substance was heroin. He specifically maintains that Bracey presented no evidence regarding what equipment was used in the GCMS test, how that equipment was

maintained, whether it was tested regularly, or whether it was calibrated and functioning properly.

The State responds that defendant waived this argument by failing to object at trial and include the issue in his posttrial motion. Defendant replies that because this is a claim regarding the sufficiency of the evidence, it cannot be forfeited. In the alternative, defendant maintains that even if this court considers his claim a foundational issue, it rises to the level of plain error because the evidence was close, and the error affected his substantial rights.

Initially, we reject defendant's attempt to couch his foundational argument as a challenge to the sufficiency of the evidence, or as a purely legal question. An attack as to the proper foundation for expert testimony bears on the admissibility of the evidence, not the sufficiency of the evidence to convict. *People v. DeLuna*, 334 Ill. App. 3d 1, 20 (2002). The supreme court has recognized that a challenge to the foundation for expert testimony is subject to the ordinary rules of waiver. *People v. Bush*, 214 Ill. 2d 318, 332-33 (2005). We note that although *Bush* involved stipulated testimony, which is not present in the instant case, its reasoning is broadly applicable to any case in which a defendant allows the expert's opinion to be admitted without objection. *Bush*, 214 Ill. 2d at 336. Therefore, *Bush* applies in

this case because defendant challenges the foundation for Bracey's testimony.

Here, Bracey testified that the preliminary color and GCMS tests were generally accepted in the scientific community. As the State concedes, however, Bracey did not testify to the proper functioning of the GCMS machine. However, any error in the foundation of Bracey's opinion was forfeited by defendant because he failed to object at trial to Bracey's testimony, and he failed to raise the issue in a posttrial motion. See *Bush*, 214 Ill. 2d at 335 (stating that by failing to object at trial, a defendant waives any argument that an expert's opinion lacked an adequate foundation).

We further find defendant's argument that this court should review his claim under the plain error doctrine unpersuasive. The plain error doctrine permits review of claims that were not properly preserved for appeal when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

Defendant fails to cite any case holding that an error as to foundation amounts to plain error. In fact, this court declined to engage in plain error review under nearly identical circumstances in *Bynum* where a chemist failed to explain how a GCMS device was calibrated, or how she knew its results were accurate. *People v.*

Bynum, 257 Ill. App. 3d 502, 514 (1994). The *Bynum* court held that the failure of the State to lay a proper foundation is not a violation of defendant's substantial rights sufficient to warrant reversal under plain error. *Bynum*, 257 Ill. App. 3d at 515.

Nevertheless, defendant contends that the plain error rule applies because the chemist's opinion was the only evidence identifying the substance as heroin, and thus the evidence was closely balanced. However, the same was true in *Bynum*, where this court nonetheless chose not to engage in plain-error review. Moreover, in *Bush*, 214 Ill. 2d at 335, the supreme court noted that it applied the waiver principle in *People v. Jones*, 16 Ill. 2d 569 (1959), even though the defendant in that case "argued that the alleged lack of foundation rendered the State's evidence insufficient to convict." The instant case does not involve the State's failure to prove an element of the offense of possession with intent to deliver. See *DeLuna*, 334 Ill. Appl. 3d at 20. Instead, defendant presents an admissibility issue by challenging the lack of foundation as to the proper functioning of the GCMS machine. However, *Bush* makes it clear that it is the defendant's failure to object that deprived the State of the opportunity to correct that omission. *Bush*, 214 Ill. 2d at 335-36.

Defendant next contends that the trial court restricted his sixth amendment right to cross-examine the witness against him when it denied his motion to disclose the surveillance location of the

single police officer, *i.e.*, Officer Olsen, who allegedly observed him selling narcotics.

A defendant has a fundamental right to confront the witnesses against him; however, a trial court may limit the scope of cross-examination. *People v. Quinn*, 332 Ill. App. 3d 40, 43 (2002). The right to cross-examine is not absolute, and is satisfied when the defendant is permitted to expose the fact finder to facts from which it can assess the credibility and reliability of the witnesses. *Quinn*, 332 Ill. App. 3d at 43. The trial court's determination regarding the latitude permitted on cross-examination will not be disturbed absent a clear abuse of discretion. *Quinn*, 332 Ill. App. 3d at 43.

The State has a qualified privilege regarding the disclosure of secret surveillance locations. *Quinn*, 332 Ill. App. 3d at 43. In evaluating whether the privilege applies, the trial court holds an *in camera* hearing outside the presence of the defendant in which the State's witness must reveal the surveillance location, and make a preliminary showing that disclosure of the location would harm the public interest. *People v. Knight*, 323 Ill. App. 3d 1117, 1127 (2001). The need for disclosure is decided on a case-by-case basis, and the trial court must balance the public interest with the defendant's need to prepare a defense. *Quinn*, 332 Ill. App. 3d at 43. Where a defendant cannot overcome the privilege, he should still be allowed to cross-examine the officer as to his ability to

observe given the distance, weather, and possible obstructions involved. *People v. Stokes*, 392 Ill. App. 3d 335, 340 (2009).

We note that defendant failed to include this issue in his motion for a new trial. However, this court has held that the right to confront witnesses is fundamental, and thus this issue is not waived and can be considered under the plain error doctrine to determine if the surveillance location privilege is applicable. *Stokes*, 392 Ill. App. 3d at 339-40 (citing *Knight*, 323 Ill. App. 3d at 1125). We review issues under the plain error doctrine when the evidence is closely balanced, regardless of the seriousness of the error, or when the error is serious, regardless of the closeness of the evidence. *Piatkowski*, 225 Ill. 2d at 565. We must first determine whether any error occurred before determining whether the error rose to the level of plain error. *Stokes*, 392 Ill. App. 3d at 340.

Here, we find no error occurred because the trial court properly exercised its discretion in denying defendant's motion for disclosure of the surveillance location after conducting *in camera* hearings prior to and on the day of trial. Following the hearings, the trial court found that the officer's safety required that the precise surveillance location remain secret.

The case at bar is similar to *People v. Bell*, 373 Ill. App. 3d 811, 818-19 (2007), where this court found that the trial court did not abuse its discretion in limiting the questioning of a police

officer to prevent his exact surveillance location from being revealed. In *Bell*, this court held that the surveillance officer was extensively questioned as to the lighting conditions, possible obstructions, whether he used binoculars, and the distance of the nearest individual to the defendant during the surveillance and at the time of arrest. *Bell*, 373 Ill. App. 3d at 819. With the aforementioned questioning, the defendant was able to establish the officer's position sufficiently enough to allow the trial court to assess the officer's reliability, without pinpointing his exact location. *Bell*, 373 Ill. App. 3d at 819.

Similar to *Bell*, although defendant was not allowed to ascertain Olsen's exact surveillance location, he was able to determine Olsen's distance from the scene, ability to observe from his location, including whether he could tell what denomination of money was handed to defendant, whether he could identify the items inside the green box, and whether anything obstructed his view of the lot or defendant. Therefore, we find no error occurred and that the trial court did not abuse its discretion when it limited the questioning of the officer to prevent his exact location from being revealed.

In reaching this conclusion, we find *People v. Price*, 404 Ill. App. 3d 324 (2010) and *Knight*, 323 Ill. App. 3d at 1117, relied on by defendant, distinguishable from the case at bar. In *Price*, this court found that the trial court abused its discretion when it did

not properly apply the surveillance location privilege because it never conducted a balancing inquiry into its validity. *Price*, 404 Ill. App. 3d at 333. Here, by contrast, the trial court held two *in camera* hearings in order to determine whether the surveillance location privilege applied.

In *Knight*, this court held that the qualified privilege should not have been granted because the officer's testimony as to a suspected narcotics transaction was uncorroborated. *Knight*, 323 Ill. App. 3d at 1128. Here, however, Officer Olsen's testimony was corroborated by members of his team. Officer Beyna found money in defendant's pockets, and Officer Wrigley found the heroin where Olsen indicated the narcotics would be found. Wrigley also testified at trial that, after defendant was detained, Olsen positively identified defendant as the person he observed conducting narcotics transactions.

In this way, the case at bar is more similar to *Stokes* than *Knight*. In *Stokes*, this court upheld the application of the qualified surveillance location privilege where several officers testified as to their roles in the investigation. *Stokes*, 392 Ill. App. 3d at 342. Although there were two surveillance officers in *Stokes*, where only Officer Olsen observed defendant's actions in the case at bar, we note that this court found, "the case against defendant did not turn exclusively on a single officer's testimony; several officers testified as to their part in the investigation

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and subsequent arrest of defendant." *Stokes*, 392 Ill. App. 3d at 342. Similarly, in this case, Officers Olsen, Beyna, and Wrigley, testified to their various roles in the investigation, and Beyna and Wrigley corroborated Olsen's observations.

For the foregoing reasons, we affirm the judgment of the circuit court.

Affirmed.