

No. 1-10-3009

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 JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 08 CR 19468
)	
ERIC DUKES,)	Honorable
)	Kenneth J. Wadas,
Defendant-Appellant.)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Lavin and Justice Pucinski concurred in the judgment.

ORDER

- ¶ 1 *Held:* Where officers testified powder on defendant's clothing was comparable to drywall dust at location of crime, such testimony was permissible based on the witnesses' observations; the trial court did not abuse its discretion in allowing that testimony over the defense's objection.
- ¶ 2 Following a jury trial, defendant Eric Dukes was convicted of burglary. Based on his prior convictions, defendant was sentenced as a Class X offender to 15 years in prison. On appeal, defendant contends the trial court erred in allowing the arresting officers to testify that

white powder on defendant's clothing shortly after his arrest resembled drywall dust that was present at the site of the burglary. We affirm.

¶ 3 Defendant and his co-defendant, Michael Anderson, were charged with burglary in connection with the removal of copper pipes from a building at 5842 South Sangamon in Chicago.¹ Prior to trial, defense counsel moved *in limine* to preclude the State from presenting, *inter alia*, evidence that police officers observed "white powder on the defendant that looked like drywall dust." The State argued that the officers should be allowed to testify as to their observations, and the court ruled it would allow such testimony.

¶ 4 At trial, Roland Duncan, the building's owner, testified that in September 2008, the structure was undergoing a complete renovation, including plumbing and electrical work. Duncan stated that by September 9, his hired workmen had erected the interior walls and were priming and painting the walls. In the early morning hours of September 10, Duncan received a call that the building had been burglarized. When Duncan arrived at the property between 11 a.m. and noon, he observed that several doors and windows were damaged, and inside the structure, walls were "broken out" and all of the copper pipes had been removed from inside the walls. Duncan admitted he did not see defendant enter the building.

¶ 5 Chicago police officer Daniel O'Connor testified that at about 2:10 a.m. on September 10, he and partner Ed Johnson responded to a radio dispatch of a burglary in progress at 5842 Sangamon, which was not far from their location. The officers observed an unoccupied van near the building. O'Connor testified that Johnson dropped him off so he could approach the building on foot, and Johnson drove into the alley. As O'Connor approached the building, he saw defendant and Anderson leave the building through a rear door and walk toward the van.

¹ Anderson pled guilty and was not involved in the instant trial.

Defendant was carrying copper pipe and a long tool used for prying, and Anderson also was carrying items. The officers arrested defendant and Anderson near the van.

¶ 6 O'Connor testified that he and Johnson then transported defendant and Anderson to the police station. O'Connor and his partner then returned to the building and went inside. O'Connor stated there were "numerous holes in the drywall" and pieces of pipes missing, and both officers identified photographs of the scene that were entered into evidence.

¶ 7 Over objections from defense counsel, O'Connor stated defendant was "covered pretty much in a white powder *** similar to what you would have on your clothing if you were breaking drywall or sheetrock." O'Connor observed powder on the floor of the building "in front of most of the holes in the walls." On cross-examination, O'Connor stated he did not know where the powder came from and acknowledged the powder was not tested.

¶ 8 Johnson testified the area was well-lit and he observed defendant and Anderson carry copper pipes toward the van. Johnson corroborated O'Connor's testimony as to the interior damage and identified a photo of the damaged portions of the drywall that also showed dust on the floors. Over defense counsel's objection, Johnson testified defendant had "a lot of white powder on his clothing" that "looked like sheetrock or drywall dust" and resembled the powder near the broken drywall. Timothy Poland, the police evidence technician who photographed the scene, also testified as to the presence of dust.

¶ 9 The defense presented no witnesses. After deliberating, the jury convicted defendant of burglary. Defendant moved for a new trial, raising among other issues that the court erred in allowing the officers' observations as to the white dust. The court denied defendant's motion for a new trial.

¶ 10 On appeal, defendant contends the trial court committed reversible error in permitting O'Connor and Johnson to offer opinions regarding the white powder they observed on his

clothing. Although the State asserts defendant has forfeited this issue and that we must apply plain error review, a review of the record establishes that this point was clearly preserved by defense counsel's contemporaneous objections to the testimony, as well as the inclusion of the issue in defendant's post-trial motion.

¶ 11 Defendant argues on appeal that the police officers supplied improper lay opinion testimony by stating the powder on his clothes appeared to be drywall dust from the burglarized building. The trial court addressed this precise point when it considered the defense's motion *in limine* and ruled the officers could testify as to what they observed. The admission of evidence lies within the sound discretion of the trial court, and a reviewing court will disturb the trial court's ruling only for an abuse of that discretion. *People v. Bowman*, 2012 IL App (1st) 102010,

¶ 31. An abuse of discretion occurs where the trial court's ruling is arbitrary, fanciful or unreasonable or where no reasonable person would take the view adopted by the trial court. *Id.*

¶ 12 To be admissible, the testimony of a lay witness must be confined to statements of fact of which the witness has personal knowledge. *People v. Donegan*, 2012 IL App (1st) 102325 (2012), ¶ 41; see also *People v. McCarter*, 385 Ill. App. 3d 919, 934 (2008). While a lay witness may testify to his observations or sensory perceptions, he generally may not give his opinions or interpretations of those observations. *Id.* For example, a witness may not testify what the defendant meant by a statement that the witness overheard; the court reasoned that conclusion required an inference that extended beyond the witness's sensory perception or observation. *McCarter*, 385 Ill. App. 3d at 933-34.

¶ 13 As to the specific topic of physical substances, as is at issue in this case, our supreme court has stated that a lay witness "may testify to the nature of substances observed by them with which they are familiar, and that testimony is not limited to a statement of the detailed characteristics observed, but may take the form of a conclusion as to what the substance was."

People v. Ward, 154 Ill. 2d 272, 295-96 (1992) (officer's testimony that defendant had brain matter on his face and clothing when he was arrested was proper).² Defendant acknowledges that lay witnesses have been allowed to identify commonly known substances such as blood and to testify that an open beer can in a defendant's car contained alcohol based on its scent, as described in *People v. Allison*, 236 Ill. App. 3d 175, 192-93 (1992), and *People v. Angell*, 184 Ill. App. 3d 712, 717 (1989).

¶ 14 However, defendant challenges the testimony of O'Connor that the white powder on defendant's clothing was "similar to what you would have on your clothing if you were breaking drywall or sheetrock" and Johnson's testimony that powder on defendant "looked like" the drywall dust he had seen in the building. He argues the officers impermissibly testified his clothes were covered in drywall dust without personally knowing the source of the powder. He points out that no test was performed on the substance to determine its origin. Defendant also contends the officers' testimony was not based on any personal knowledge and merely constituted speculation.

¶ 15 Based on the rule espoused in *Donegan, McCarter and Ward*, the officers in the instant case could offer a conclusion as to the nature of the white powder on defendant's clothing. In addition, the fact that the powder appeared similar to the drywall dust observed at the crime scene was permissible testimony as it was well within the witnesses' powers of observation of both defendant and the building's interior space.

¶ 16 We reject defendant's suggestion that this case invites any comparison with *People v. Crump*, 319 Ill. App. 3d 538 (2001). In *Crump*, the trial court allowed a police officer who responded to a scene of a domestic battery to testify before a jury, over the defense's objection,

² The police officer in *Ward* who described the presence of brain matter on the defendant testified that he was familiar with that substance from his prior experience. See *Ward*, 154 Ill. 2d at 296.

that he believed the defendant committed the offense. *Id.* at 540-41. In holding the trial judge abused its discretion in admitting that testimony, this court held that the officer's statement constituted opinion testimony that went to the "ultimate question of fact to be decided by the jury." *Id.* at 544.

¶ 17 Here, in contrast to *Crump*, the officers' testimony was based on their viewing of the crime scene and of defendant. That testimony was admissible as relevant to defendant's guilt. See generally *People v. Hahn*, 39 Ill. App. 3d 969, 975-76 (1976) (court did not abuse its discretion in admitting into evidence a posed photograph of defendant in police custody wearing clothing with "chalky substance" that officer testified was the same substance that he observed in burglarized business; photograph was "material to the issue of defendant's presence" at crime scene because it corroborated the officer's identification of defendant as man he saw at scene). Therefore, the trial court did not abuse its discretion by allowing that testimony.

¶ 18 Accordingly, the judgment of the trial court is affirmed.

¶ 19 Affirmed.