2012 IL App (1st) 103639-U

FOURTH DIVISION
October 25, 2012

No. 1-10-3639

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. 09 CR 8894
	)	
GEORGE CHATMAN,	)	Honorable
	)	Carol A. Kipperman,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE LAVIN delivered the judgment of the court.
Justices Epstein and Pucinski concurred in the judgment.

O R D E R

¶ 1 *Held*: The trial court did not abuse its discretion in failing to *sua sponte* appoint standby counsel for defendant.

¶ 2 Following a jury trial at which he represented himself, defendant George Chatman was convicted of residential burglary and sentenced to 20 years in prison. On appeal, defendant contends that he is entitled to a new trial because the trial court failed to exercise its discretion and appoint him standby counsel. For the reasons that follow, we affirm.

¶ 3 Defendant's conviction arose from the burglary of the Berwyn home of Mario and Andrea Vazquez. In brief, in the early morning hours of March 24, 2008, Mario Vazquez discovered that several items were missing from his living room. When the police investigated, they found a cloth in the living room and a small pool of saliva on the pavement in the back yard. DNA samples developed from the cloth and the saliva matched defendant, who was arrested for the crime.

¶ 4 Prior to trial, defendant indicated to the court that he wished to represent himself. The trial court admonished defendant at length regarding his right to representation and asked whether he wanted an appointed attorney, but defendant responded, "The Public Defender, no." After further admonishments, including a warning that the trial court would "not appoint a lawyer for you to consult during the trial," the trial court found that defendant had intelligently, voluntarily, and freely waived his right to counsel. Thereafter, the original trial judge recused himself. The newly-assigned judge also admonished defendant at length regarding his right to an attorney, and defendant again indicated that he wished to represent himself at trial.

¶ 5 At a subsequent court date, defendant indicated that he wished to have several witnesses subpoenaed, including Detective Becvar of the Berwyn Police Department and a civilian named Gus Warsaw. The trial court told defendant that the State could subpoena the witnesses and would have them at trial. The prosecutor asked for a continuance so as to serve the witnesses.

¶ 6 On the next court date, defendant noted that he had asked for various witnesses to be subpoenaed. The prosecutor responded that the State was not responsible for subpoenaing defendant's witnesses, but after defendant pointed out that the witnesses' addresses were redacted from the discovery materials, offered to subpoena them. When defendant then provided a list of his potential witnesses, the prosecutor stated that the State would have the "officers" made available for trial, but that she did not intend to subpoena four civilians on the list, including Gus

Warsaw, because she did not believe the witnesses would be relevant at trial. However, the prosecutor stated that she would be willing to stipulate to their potential testimony if defendant would make an offer of proof. Defendant represented that in the police report, the four civilians stated he was not at the scene of the crime. The prosecutor responded that the State would draft a written stipulation that the civilians, including Gus Warsaw, "did not see [defendant] at that house." Defendant agreed to the State's offer to stipulate as to the potential witnesses' testimony.

¶ 7 At the next court date, defendant made a motion for a bar association attorney, stating that since he was defending himself, he could not "get certain things done." Among other things, defendant stated that he wanted another laboratory to check the State's DNA evidence. The trial court stated that it would not appoint a bar association attorney and offered to appoint the Public Defender. Defendant refused, saying that he did not trust the Public Defender.

¶ 8 The parties next met for *voir dire*. Prior to beginning the process, the State tendered to defendant its draft of stipulated testimony, and defendant indicated on the record that the stipulation was satisfactory. The trial court again admonished defendant regarding his right to an attorney, and again, defendant asserted that he wished to proceed *pro se.* Following some discussion of motions *in limine*, the trial court commenced *voir dire*. During *voir dire*, defendant asked questions of at least one potential juror and exercised challenges for cause and peremptory challenges. After the jury was empaneled, the State and defendant made opening statements.

¶ 9 At trial, Mario Vazquez testified that about 4 a.m. on the day in question, he got up to feed his infant son. Mario watched television as his son drank the bottle, and then he put the baby back in his bassinet and went back to bed. Around 7:20 a.m., Mario's wife, Andrea, got up to take her turn feeding the baby. Mario noticed it was cold in their basement apartment, so he got up to investigate and found that the kitchen window was open. As he closed the window, he saw his paint ball guns, which had been inside, scattered around the yard. Mario then noticed

that his wallet, which had been on his desk in the living room, was open on the kitchen table with everything pulled out of it. At that point, Mario ran to the living room, where he discovered that the television was missing. After checking on his two-year-old daughter and finding her asleep in her room, he ran back to his bedroom and told Andrea to call 911.

¶ 10 When the police arrived, Mario told them what had happened and led them through the apartment. On the living room floor, he noticed a rag that did not belong to him or Andrea. He pointed out the rag to the police, who collected it. Mario testified that in addition to the television, an X-Box game box and six games, two laptop computers, a camera, a camcorder, and the contents of his wallet had been taken from his home. Finally, Mario testified that he did not know defendant and had not given him permission to enter his apartment or take any of his belongings.

¶ 11 Andrea Vazquez testified that on the day in question, when she woke up about 7:25 a.m. to feed her baby, she noticed it was very cold in their apartment. Her husband, Mario, got up to check where the cold air was coming from. Andrea saw him walk toward the kitchen. Less than a minute later, he came back to the bedroom doorway and said, "Where's the TV?" Mario checked on their daughter and then told Andrea to call the police and take the children upstairs, where her parents lived.

¶ 12 Andrea testified that when the police arrived, she and Mario went through the apartment with them, identifying items that were missing or out of place. Among the missing items were the television, two laptop computers, a camera, a video camera, an X-Box game console and games, and a credit card. Next to the television cabinet, Andrea noticed a green rag that she had never seen before. Andrea testified that she did not know defendant and had not given him or anyone else permission to enter and take items from her apartment on the morning in question.

¶ 13 Berwyn police officer Joseph Fitzgerald investigated the crime scene. At trial, he testified that he walked through the apartment with Mario and Andrea Vazquez. During the walk-through, they pointed out a green cloth on the floor of the living room that they had never seen before. Officer Fitzgerald and Mario Vazquez then went outside into the back yard, where Mario pointed out his paint ball guns. On a patch of nearby pavement, Officer Fitzgerald observed what appeared to be expectorated saliva. He collected two swabs of the substance for DNA testing and recovered the green cloth.

¶ 14 During the course of State's case, defendant reminded the trial court that he had requested the State subpoena Detective Becvar. The prosecutor informed the court that the officer was retired and living in Las Vegas, but that the State would be willing to stipulate "to anything that is in his reports." The prosecutor also offered to make available Detective Kenny, who worked as Detective Becvar's partner in the investigation.

¶ 15 The State presented the testimony of three forensic scientists with the Illinois State Police: Debra Kot, Amanda Soland, and Janice Youngsteadt.

¶ 16 Debra Kot testified that she received the two swabs of the substance that had been recovered from the sidewalk and tested them for the presence of saliva. After the swabs tested positive, she secured them for further testing by a DNA analyst. Kot also received the cloth that had been recovered from the scene. She swabbed the cloth to collect any possible cellular material and secured the swabs for further analysis.

¶ 17 On cross-examination, Kot acknowledged that when she swabbed the cloth, she did not know whether there was any cellular material present. She also acknowledged that although the swabs and the cloth were collected from the crime scene in March 2008, she did not conduct her work on them until January 2009. In response to questions posed by defendant, Kot explained

that temperature would not change the DNA in a sample, although extreme heat may cause a sample to degrade, thus affecting the ability to obtain results during testing.

¶ 18 Amanda Soland testified that she performed DNA analysis on the swabs taken from the saliva and the cloth, using a process called "short tandem repeat analysis." Her analysis revealed the same DNA profile on both samples. A search of a computer database revealed that defendant was associated with the DNA profile she generated. Based upon that information, she requested a confirmatory sample be taken from defendant. Some time later, Soland received defendant's DNA profile, which had been developed by forensic scientist Janice Youngsteadt. Soland testified that the DNA profile generated from the saliva and the cloth matched defendant's DNA profile. Specifically, she stated that the profile "would be expected to occur in approximately one in 7.5 quadrillion black individuals, one in 1.0 quintillion white individuals, or 1 in 540 quadrillion related Hispanic individuals." On cross-examination, Soland testified that cold temperatures could preserve DNA.

¶ 19 Janice Youngsteadt testified that she received a buccal swab that had been taken from defendant. She generated a DNA profile from the swab, made a report of the results, and sent her report and a copy of the DNA profile to Amanda Soland. On cross-examination, Youngsteadt testified that the mechanism she used to generate the DNA profile from the swab was the "polymers chain reaction" method.

¶ 20 Near the close of the State's case, the prosecutor informed the trial court that the State would not stipulate to Gus Warsaw's testimony because Warsaw had never been interviewed by the police. Rather, any potential testimony from Warsaw had been gathered during a police interview of Warsaw's sister-in-law, Denise Grossman. The prosecutor indicated that the State would stipulate as to what Grossman said with respect to Warsaw. After a lengthy discussion,

the trial court asked defendant to make an offer of proof as to Warsaw's potential testimony. Defendant responded as follows:

> "Well, since Denise Grossman brought his name up when she was interviewed that that is her brother [in-law] and that he is supposed to live with her at the time in question. And that in the morning of -- in the morning of March 24, that he's supposed to have got up at 6:00 in the morning and went to work and that at said time, between 4:00 in the morning and 7:30, the residential burglary occurred. That at the time that -- I wanted to know if -- did he see anything unusual? Did he hear anything unusual, because she did say that he leaves at 6:00 in the morning."

The trial court found that the offer of proof was purely speculative and therefore irrelevant, and stated that it would not compel Warsaw to testify.

¶ 21 Defendant thereafter informed the court that he was waiting for Detective Becvar's arrival in court, as he was under the impression that the State had subpoenaed the officer for him. When the trial court asked defendant to make an offer of proof as to Detective Becvar's proposed testimony, defendant stated that the officer would testify as to whether cameras were present at two gas stations where Mario and Andrea Vazquez's credit cards were used, and if so, if those cameras captured images of the person who used the credit cards. The prosecutor informed the court that Detective Becvar was retired and living in Las Vegas, but that the State had brought in Detective Becvar's partner, Detective Jim Kenny, who could be questioned regarding the investigation of the use of the credit cards. Following further discussion, the trial court found that the offer of proof was purely speculative and ruled that it would not compel Detective Becvar's testimony.

¶ 22 Defendant called Detective Jim Kenny as a witness. Detective Kenny testified that he did a follow-up investigation of the burglary, and that he worked closely with Detective Becvar on the case. Detective Becvar had informed him that he had looked into the use of the credit cards taken during the burglary by contacting the Vazquez family and representatives of the credit card company's fraud department.

¶ 23 After defendant indicated he had no additional witnesses, the parties and the trial court discussed the stipulated testimony. Defendant then read into evidence a stipulation that if called, Officer Joseph Peterson would testify that he conducted a canvass of the area surrounding the crime scene during which he spoke to Edward Avila, Lucidia Salem, and Denise Grossman, each of whom stated he or she did not hear or see anything unusual on the day in question. In addition, Grossman would testify that her brother-in-law, Gus Warsaw, left for work very early in the morning, as he had to be in Chicago by 6 a.m., and that she did not know whether Warsaw left by the alley or the front of his residence.

¶ 24 Following closing arguments, the jury found defendant guilty of residential burglary.

¶ 25 Post-trial, defendant asked for and received appointed counsel. Counsel filed a motion for a new trial arguing, *inter alia*, that the trial court erred in not appointing standby counsel, not compelling Detective Becvar or Gus Warsaw to testify, and not postponing trial to secure those two witnesses. The trial court denied the motion. In the course of doing so, the court stated that it had warned defendant about the disadvantages of representing himself at least twice, and at great length, and that it had "in those warnings stated that he would not be given standby counsel." With regard to Gus Warsaw, the trial court stated that "the State agreed to his stipulation as to what his testimony would have been, although there was no offer of proof by defendant." With regard to Detective Becvar, the trial court found nothing improper in the State's refusal to subpoena him as a witness.

¶ 26 The trial court subsequently sentenced defendant to 20 years in prison. At the sentencing hearing, the court noted that defendant's criminal history included 11 felony convictions, 7 of which were for residential burglary.

¶ 27 On appeal, defendant contends that the trial court failed to exercise its discretion by not appointing him standby counsel. He argues that the trial court should have articulated its consideration of the criteria set out in *People v. Gibson*, 136 Ill. 2d 362, 375, 380 (1990), which, according to his argument, would have demonstrated the need for standby counsel. Defendant asserts that the charges and sentence facing him were severe, that the case was legally complex due to the State's use of DNA evidence and expert testimony, and that he lacked the legal and educational experience to represent himself without standby counsel. Defendant argues that he was prejudiced by the trial court's failure to appoint standby counsel, as counsel could have aided him in obtaining independent review of the DNA evidence and in securing testimony from Detective Becvar and Gus Warsaw.

¶ 28 As an initial matter, we note that in order to preserve an issue regarding the appointment of standby counsel, a defendant is required to raise the issue at trial and in a post-trial motion. *People v. Ware*, 407 Ill. App. 3d 315, 350 (2011). Here, defendant failed to make an objection at trial. Accordingly, the issue is forfeited. Forfeiture aside, defendant's arguments fail.

¶ 29 Relying upon *People v. Moore*, 207 Ill. 2d 68, 75 (2003), and *People v. McGee*, 286 Ill. App. 3d 786, 793 (1997), defendant argues that *de novo* review is appropriate in this case because the question presented is not whether the trial court abused its discretion, but whether it exercised its discretion at all. We disagree with defendant's argument. In *Moore*, our supreme court found that the trial court acted under a legal misapprehension by employing a remedy that was not "within the bounds of the law." *Moore*, 207 Ill. 2d at 75. In *McGee*, the record indicated

that the trial court failed to conduct a meaningful inquiry into whether the probative value of several previous convictions outweighed their prejudicial effect. *McGee*, 286 Ill. App. 3d at 793.

¶ 30 Here, in contrast, nothing in the record indicates that the trial court acted under a legal misapprehension or deviated from an established standard. The trial court informed defendant that he could represent himself or be represented by the public defender. The court also refused defendant's motion for appointment of a bar association attorney, an action which, in our view, encompasses an exercise of discretion by the trial court. Moreover, while the trial court did not articulate reasons for not appointing standby counsel, a trial court is presumed to know the law and apply it properly. *People v. Phillips*, 392 Ill. App. 3d 243, 265 (2009). Given these circumstances, we review the trial court's decision not to appoint standby counsel for an abuse of discretion. *Phillips*, 392 Ill. App. 3d at 265. A trial court will be found to have abused its discretion only where its ruling is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view adopted by the trial court. *Ware*, 407 Ill. App. 3d at 349.

¶ 31 A criminal defendant does not have a right to standby counsel. *Gibson*, 136 Ill. 2d at 375, 383; *Ware*, 407 Ill. App. 3d at 349. In cases involving the denial of standby counsel, a finding of an abuse of discretion is rare; as recently as May 2009, this court noted "that '*no* trial court in Illinois has been reversed for exercising its discretion to *not* appoint standby counsel, and this absence of reversals appears consistent with nationwide experience.' (Emphasis in original.)" *People v. Pratt*, 391 Ill. App. 3d 45, 57 (2009), quoting *People v. Williams*, 277 Ill. App. 3d 1053, 1061 (1996).

¶ 32 In *Gibson*, our supreme court set out three factors a trial court should consider in deciding whether to appoint standby counsel: (1) the nature and gravity of the charge; (2) the expected factual and legal complexity of the proceedings; and (3) the defendant's abilities and experience.

Gibson, 136 Ill. 2d at 380. After balancing the *Gibson* factors, we conclude that the trial court's decision not to appoint standby counsel was not an abuse of discretion.

¶ 33 First, we acknowledge that the charge was serious, as it resulted in a sentence of 20 years' incarceration. However, with regard to the second factor, neither the facts nor the law was particularly complex, despite the State's use of DNA evidence and expert witnesses.

¶ 34 The DNA evidence presented in the instant case was straightforward. Janice Youngsteadt testified that she developed a DNA profile for defendant from a buccal swab sample taken from him. Debra Kot testified that she received swabs taken from the sidewalk outside the apartment and, after an initial test indicated the presence of saliva, she prepared the swabs for DNA analysis. Kot also received the green rag recovered from inside the apartment and swabbed it to collect possible cellular material. Amanda Soland testified that she conducted DNA analysis on the swabs from the sidewalk and the green rag and developed a DNA profile from them. She then matched that profile to defendant's, which she initially found in a database, and later confirmed against the profile developed by Youngsteadt.

¶ 35 Defendant cross-examined Youngsteadt, Kot, and Soland, and asked appropriate questions of each witness. He elicited testimony from Kot that at the time she swabbed the cloth, she did not know whether there was any cellular material present, and that she did not conduct her work until 10 months after the cloth and saliva sample had been recovered. Defendant asked both Kot and Soland questions about the effect temperature would have on a DNA sample. He also elicited testimony showing that Soland and Youngsteadt used different testing methods in performing DNA analysis. In our view, defendant's cross-examination of the witnesses demonstrated that he had a decent understanding of the scientific evidence presented at trial, and that it was not so complex that standby counsel was necessary.

¶ 36 We are mindful of defendant's argument that the legal complexity of a case can be determined by whether or not it is based upon forensic evidence or expert testimony. In support of this argument, defendant relies upon *Gibson*, 136 Ill. 2d at 380, and *People v. Lovejoy*, 235 Ill. 2d 97, 123 (2009). In *Gibson*, our supreme court found that the seriousness of the charge, the difficulty of the evidence, and the defendant's limited experience, taken together, indicated that the refusal to appoint standby counsel would have been an abuse of discretion. *Gibson*, 136 Ill. 2d at 381. In *Lovejoy*, a case involving a request for a continuance, our supreme court found there was no good reason for denial of the request in light of the seriousness of the charge, the complexity of the evidence at issue, and the lack of hardship that would have been created by granting a continuance. *Lovejoy*, 235 Ill. 2d at 123. Neither of these cases stands for the proposition that the State's use of forensic evidence and expert testimony *per se* renders a trial "complex." We cannot agree with defendant that because the State presented DNA evidence through several expert witnesses, the second *Gibson* factor is automatically met.

¶ 37 As to the third *Gibson* factor, defendant was 44 years old and not a stranger to criminal proceedings, as he had been convicted of 11 prior felonies, including 7 residential burglaries. Thus, he was an adult with experience and familiarity with the court system. At trial, defendant made opening and closing statements, participated in jury selection, cross-examined witnesses, presented his own witness, and read stipulated testimony into the record. In this way, he demonstrated his ability to proceed without standby counsel. It is also notable that defendant never made a request to the trial court that standby counsel be appointed. See *People v. Parker*, 335 Ill. App. 3d 474, 486 (2002). However, defendant did request that a bar association attorney be provided for him, which shows that he had knowledge of other avenues of legal representation.

¶ 38 After balancing the relevant factors, we conclude that the trial court's decision not to appoint standby counsel was not arbitrary, fanciful, or unreasonable, and cannot say that no reasonable person would take the view adopted by the trial court. See *Ware*, 407 Ill. App. 3d at 349. We find no abuse of discretion.

¶ 39 For the reasons explained above, we affirm the judgment of the circuit court of Cook County.

¶ 40 Affirmed.