

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).

2016 IL App (4th) 140678-U

NO. 4-14-0678

FILED

December 8, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
KIERSTIN E. WEASE,)	No. 13DT531
Defendant-Appellant.)	
)	Honorable
)	Thomas J. Difanis,
)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Presiding Justice Knecht and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held:* Because defendant failed to object to the admissibility of the forensic scientist's expert opinion, she cannot object on appeal to the foundation for the opinion.

¶ 2 Defendant, Kierstin E. Wease, was charged with two counts of driving under the influence of alcohol in violation of the Illinois Vehicle Code (blood alcohol concentration of 0.08 or more and driving under the influence of alcohol, respectively) (625 ILCS 5/11-501(a)(1), (2) (West 2012)). In May 2014, a jury found defendant not guilty of driving under the influence of alcohol, but guilty of driving under the influence with a blood alcohol concentration of 0.08 or more. Defendant appeals, raising only a single issue. Defendant contends she was not proved guilty beyond a reasonable doubt because the State did not lay a proper foundation for the accuracy of the testing instrument relied upon to form the State's expert witness's opinion. We affirm.

¶ 3

I. BACKGROUND

¶ 4 Because the issue here is limited, we also limit our discussion of the facts in this case, as they are not relevant to our disposition.

¶ 5 On October 10, 2013, at 2:30 a.m., Champaign County Sheriff's Deputy Jonathan Reifsteck saw defendant, age 19, approach a stop sign in her vehicle and fail to stop. After noticing defendant's eyes were bloodshot, glassy, and watery, and smelling a moderate odor of alcohol from inside the vehicle, Reifsteck eventually administered field sobriety tests to defendant, some of which she passed and some of which she failed.

¶ 6 Defendant agreed to submit to blood and urine tests. After establishing an appropriate chain of custody, the State called Christine Cava as a witness. Cava had been employed for nearly six years with the Illinois State Police (ISP) Division of Forensic Services. She had a bachelor of science degree in biochemistry and served as a forensic scientist specializing in toxicology. She was certified by ISP to perform alcohol and drug testing on biological fluids. The State tendered Cava as an expert witness. Following some cross-examination by defense counsel and an objection "for the record," the trial court accepted Cava as an expert.

¶ 7 In describing the testing she performed, Cava testified:

"A. I take the blood tubes and/or I open up one blood tube and I pipette the samples and they were in duplicate, and I run it on a gas chromatograph flame ionization detector and it will find the results from the analysis.

Q. Is that the machine that you typically use for these types of tests?

A. It is instrumentation that we use only at the lab, yes.

Q. And are you familiar with the instrument?

A. Yes, I am.

Q. And how many times have you used it?

A. A couple hundred.

Q. On this occasion, do you remember anything that alerted you to it not functioning correctly?

A. There didn't appear to be anything wrong with the instrument, so there was nothing to note in terms of its function.

Q. Okay. Now you said you run in duplicate. What does that mean?

A. I run the sample twice. I take two aliquots. I pipette two samples of the—or I take two aliquots, two samples from the one tube."

On cross-examination, Cava testified:

"Q. So these machines can have different levels of accuracy depending on what machine it is?

A. In terms of putting into use, it must meet a certain requirement and it depends on what instrument you are talking about.

Q. So, for this machine, what is the level of accuracy that is required?

A. The level of accuracy? About two standard deviations.

Q. Is there a percentage?

Q. About 95 percent, yes.

Q. Is anyone qualified or approved or certified to maintain these machines?

A. At the laboratory?

Q. Yes.

A. Not to my knowledge.

* * *

Q. Okay. When was the last time that machine was calibrated before you ran this test?

A. I don't recall.

* * *

Q. Okay. Now, you said there was an error rate in this whole process; is that correct?

A. Yes.

Q. So it's possible that there could be a false positive?

A. For ethynyl [*sic*]?

Q. For this test?

A. I don't—I wouldn't consider it a false positive finding ethynyl [*sic*].

Q. Okay. You said that there is a [five] percent chance that these accurate—that these results would not be correct, is that right?

A. Yes.

Q. Okay. You said that the machine wasn't—it didn't appear that anything was malfunctioning, is that right?

A. Yes.

Q. Did you check to see if it was?

A. The quality controls were run with it indicating that it wasn't—there wasn't any kind of malfunction.

[Defense counsel]: All right. Judge, I have no further questions."

On redirect, Cava testified:

"[Assistant State's Attorney] Q. So you followed your procedure as you have been trained?

A. Yes, I have.

Q. In conducting the tests the same way you have been doing it for five years?

A. Yes.

Q. And do you believe that you would be allowed to use a machine if it wasn't calibrated?

A. If it wasn't calibrated it wouldn't be in use.

Q. Okay. And you don't know the particulars of everything that goes on in the lab, correct?

A. That is correct.

Q. So you wouldn't be familiar with the people who come

in and actually calibrate the instrument?

A. Calibrate the instrument or do a check?

Q. Or do a check, either.

A. I am not familiar with the people that do checks, if there are people that come in and check it.

Q. And to your knowledge, before or after that you did these tests, have you been notified at any point in time that the instruments that you were using was [*sic*] not functioning correctly or not calibrated?

A. To my knowledge, no, there wasn't anything wrong with the instrument.

Q. Now, you mentioned a quality control is run with the test. What is the quality control?

A. There is a standard that is of a whole blood and a high control with no values, and if those values start to drift away then that notifies whether or not the laboratory needs to do another calibration or if there is actually something wrong with the instrument.

Q. And none of that occurred while you were conducting these tests, correct?

A. That is correct.

Q. And you mentioned that, if there is a difference in .008, that would cause you concern with the results, knowing the results

were accurate?

A. Yeah. That would cause a concern in terms of how it was performed. So then it would be done again. It would be re-pipetted.

Q. And in this instance, conducting the tests on these samples, there was nothing to indicate that there was a variation .008?

A. There was no indication.

Q. Is there any reason that you can think of to put into question the result of what you got on the instrument from these tests?

A. No."

¶ 8 In addition, Cava testified, if there was a problem with a machine or instrument, it would be marked "Out of Service" and she would not use it.

¶ 9 Following the close of the State's evidence, defense counsel moved for a directed verdict, stating, "Yes, Judge. I make a motion for directed verdict. Based on the evidence that has been heard and in light of taking all the evidence and viewing it in the best light possible of the nonmoving party, I believe that a reasonable jury would not be able to convict [defendant] beyond a reasonable doubt and I would ask that the court grant this motion." The trial court denied the motion.

¶ 10 Defendant did not present any evidence. The jury found defendant guilty of driving with a blood alcohol concentration of 0.08 or more and not guilty of driving under the influence of alcohol.

¶ 11 On June 17, 2014, defense counsel filed a motion for new trial. In the 26 paragraphs of the motion, defendant never specifically attacked the foundation for admission of the blood test results or Cava's opinion testimony. The closest the motion comes to such an allegation is paragraph 12, where the motion states, "The State failed to prove beyond a reasonable doubt that the sample collecting procedures and testing procedures used by the State were reliable and accurate."

¶ 12 At the hearing on the motion for a new trial, defense counsel made no argument concerning a lack of foundation for the testing results, but he stood on his motion. The trial court denied the motion for a new trial. Following a sentence to conditional discharge, defendant filed a motion to reconsider her sentence, which was denied. Defendant timely filed her notice of appeal.

¶ 13 II. ANALYSIS

¶ 14 Defendant contends the State's expert, Cava, did not provide foundational proof as to the reliability of the gas chromatography flame ionization detector (GC) and, therefore, the trial court erred when it admitted the expert's testimony. The State responds defendant forfeited her claim of error to the foundation of Cava's testimony by failing to object on the basis of foundation at trial. Defendant never moved to strike Cava's testimony, nor did she argue Cava's testimony was inadmissible due to a lack of foundation.

¶ 15 Defendant states in her reply brief she is not challenging the result of the GC detector, nor does her appeal relate to the admissibility of evidence. Rather, she states she is challenging the reliability of Cava's opinion because the State failed to show an adequate foundation establishing the information Cava relied on to form her opinion is reliable.

¶ 16 As we did in *People v. Durgan*, 346 Ill. App. 3d 1121, 1130-31, 806 N.E.2d 1233,

1240-41 (2004), we reject defendant's attempt to couch her foundational challenge to Cava's opinion in any other way.

¶ 17 In *People v. Bynum*, 257 Ill. App. 3d 502, 514, 629 N.E.2d 724, 731 (1994), the court noted, when expert testimony is based upon an electronic or mechanical device, the expert must offer some foundation proof the device was functioning properly at the time it was used, so that the machine's reliability can be established. As in *Bynum*, however, defendant did not raise an objection as to the foundation for Cava's expert testimony.

"A party waives his right to appellate review of an alleged error made during trial unless he preserves this right by objecting to the alleged impropriety in a timely manner and by mentioning the specific objection in a post-trial motion. (*People v. Herrett* (1990), 137 Ill. 2d 195, 209, *** 561 N.E.2d 1; *People v. Enoch* (1988), 122 Ill. 2d 176, 186-88, *** 522 N.E.2d 1124.) An objection to evidence based upon a specific ground is a waiver of all objections not specified. (*People v. Pope* (1985), 138 Ill. App. 3d 726, *** 486 N.E.2d 350; *People v. Andrews* (1982), 105 Ill. App. 3d 1109, *** 435 N.E.2d 706.) The rule requiring defendant to make a specific objection is particularly well suited for application when a defendant argues on appeal that the State has failed to lay the proper technical foundation for the admission of evidence. This is so because a timely and specific objection allows the State the reasonable opportunity to correct any deficiency in the foundation proof. See *Rivera*, 182 Ill. App. 3d at 43, *** 537

N.E.2d 924." *Bynum*, 257 Ill. App. 3d at 514-15, 629 N.E.2d at 732.

¶ 18 Here, defendant never objected to the admission of Cava's testimony or the test results, nor did she move to strike Cava's testimony once given. Her general motion for a directed verdict was insufficient to preserve any such objection, even if one had been made. Consequently, defendant has forfeited her foundational objection.

¶ 19 Moreover, although the State's evidence could have been more thorough on the issue of the reliability of the GC, we note Cava testified to using it a couple hundred times, there did not appear to be anything wrong with the machine on the day she used it on defendant's sample, the results were within the two standard deviations of accuracy, there was no kind of malfunction with the machine, and if the machine was not calibrated properly, it would not be in use.

¶ 20 Based on Cava's testimony and defendant's forfeiture of her objection, we find no error occurred.

¶ 21 III. CONCLUSION

¶ 22 For the reasons stated, we affirm the trial court's judgment in this case. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2012).

¶ 23 Affirmed.