2018 IL App (1st) 161099-U

No. 1-16-1099

Order filed November 30, 2018

SIXTH DIVISION

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. 14 CR 14033
	)	
CORNELIUS QUINN,	)	Honorable
	)	Timothy Joseph Joyce,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Delort and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 *Held*: On a charge of delivery of a controlled substance, the trial court did not err in admitting an expert opinion as to whether the substance at issue contained heroin.

¶ 2 Following a 2016 jury trial, defendant Cornelius Quinn was convicted of delivery of a controlled substance (1 gram or more, but less than 15 grams, of heroin) and sentenced to eight years' imprisonment. He contends on appeal that the evidence was insufficient to convict him

beyond a reasonable doubt because the State did not establish that the equipment used to test the alleged contraband substance was working properly. For the reasons stated below, we affirm.

¶ 3 Defendant was charged with delivery of a controlled substance for allegedly knowingly and unlawfully delivering 1 gram or more, but less than 15 grams, of a substance containing heroin on or about June 25, 2014. 720 ILCS 570/401(c)(1) (West 2014).

¶ 4 At trial, Chicago police officer Curtis Ivy testified that he and another officer went undercover (not in uniform, and in an unmarked car) with $40 in prerecorded cash to buy narcotics in a store parking lot. They waited in their car for about three minutes until defendant walked up to their car and sat down in the back seat. Defendant was wearing a blue and orange Bears jersey, jeans, and white shoes. Defendant spoke first, asking "How many you want?" Ivy took this as an offer to sell narcotics, and replied "Give me four" so he would receive four bags of narcotics. Defendant reached into his pocket and removed five small plastic bags, each containing a white powder that Ivy suspected to be heroin. Ivy presumed that defendant delivered an additional bag as a "bonus" to encourage return business. Ivy handed defendant the $40 in prerecorded cash, and defendant exited the car and walked away.

¶ 5 Ivy drove away and informed other officers by radio of his purchase, including defendant's description. About 20 minutes later, Ivy learned by radio that other officers had detained nearby a person fitting defendant's description. Ivy drove to that location and saw that the man being detained was defendant, who had sold him the bags of powder. Ivy then went to a police station where he inventoried the bags of white powder. He also viewed an array of five photographs from which he identified defendant as the seller of the bags of powder.

¶ 6 Officer Robert Davis testified that he was working with Ivy as a surveillance officer on the day in question. Davis saw Ivy arrive and park in the store parking lot. He saw defendant, wearing a Bears jersey, jeans, and white shoes, walk up to Ivy's car and sit down in the back seat. He saw defendant exit the car "a few minutes" later and walk away. Davis then followed defendant until he entered a nearby home. When defendant exited the home about a half-hour later, still wearing the same clothing and shoes, he walked back towards the store. Davis described defendant to other officers by radio, and saw Officer Michael Killeen detain defendant. Defendant was not searched, but merely questioned, and was not arrested that day.

¶ 7 Officer Michael Killeen testified that he detained defendant because he was in the location and fit the description in Davis's radio message. Ivy indicated to Killeen that the detained man was the man who sold Ivy suspected heroin. Killeen briefly interviewed defendant, learning his name, birthdate, and similar information. Defendant was not searched or arrested.

¶ 8 The officer who arrested defendant on July 17 testified that defendant did not flee or hide. No money or narcotics were found in defendant's post-arrest search.

¶ 9 Forensic chemist Lenetta Watson of the Illinois State Police crime laboratory testified to her qualifications as a forensic chemist, and was accepted without objection as an expert on forensic chemistry. Watson received from a vault a sealed bag containing five items, which she confirmed to be consistent with the inventory sheet associated with the sealed bag. She weighed the five items, then emptied each of the five small bags into individual containers and reweighed them. She knew that the scale was working properly because she tested it weekly. She learned that the powder, without bags, weighed 1.344 grams.

¶ 10 Watson then conducted a preliminary test, specifically a color test whereby a reagent is added to a small sample of the powder. When she did so, the powder turned red, which indicated to her that heroin was present. She knew that the color test worked because she placed the reagent onto an empty dish and saw no color change, and she performed the test against a standard. She then conducted a "more confirmatory" test with a gas chromatograph mass spectroscopy (GCMS) instrument, by placing a small amount of the powder into a solvent and injecting the solvent into the instrument. The instrument produced a spectrum of the sample's contents. When she compared that spectrum to a standard spectrum, it indicated that the sample contained heroin. She performed no further testing, and "the tests" she performed were "generally accepted in the scientific community." She placed the evidence into new plastic bags, sealed them, and returned them to the vault.

¶ 11 When Watson was asked if she formed an opinion, from her knowledge and experience with chemistry, regarding the presence of a controlled substance in the contraband, the defense objected on foundational grounds. The court overruled the objection. Watson then replied that 1.3 grams of powder contained heroin.

¶ 12 On cross-examination, Watson testified that she wore gloves and a mask during her weighing and testing to protect both herself and the evidence being tested. The crime laboratory tests evidence placed in its vault by the police based on instructions from the police or State's Attorney, and the testing can include fingerprints as well as chemical testing.

¶ 13 Out of the jury's presence, the defense explained its foundational objection by noting that the State had not asked Watson whether the GCMS instrument was functioning properly and had

been calibrated. Counsel asked the court to reconsider its decision, but the court found that the objection was still overruled.

¶ 14 Defendant's motion for a directed finding was denied without argument. Following closing arguments, instructions, and deliberations, the jury found defendant guilty as charged.

¶ 15 The written posttrial motion challenged the sufficiency of the evidence but did not challenge the foundation for, or admission of, any trial evidence. At the motion hearing, counsel stood on the written motion. The court denied the motion, expressly finding that there were no "evidentiary errors" and the evidence was sufficient to convict. Following a sentencing hearing, the court sentenced defendant to eight years' imprisonment as a mandatory Class X offender.

¶ 16 On appeal, defendant contends that the evidence was insufficient to convict him of delivery of a controlled substance because the State did not establish that the GCMS equipment used to test the substance in question was working properly. The State responds that defendant's claim is not a sufficiency of the evidence claim but a foundational challenge to the admission of evidence that defendant has forfeited. Defendant replies that his claim challenges the reliability of forensic chemist Watson's opinion that the powder at issue contained heroin, and the reliability of a witness's testimony is a matter of the sufficiency of the trial evidence that cannot be forfeited.

¶ 17 Defendant timely objected to the foundation for Watson's opinion, when the State asked for her opinion after she did not testify that the equipment was working properly. Thus, defendant did not deprive the State of an opportunity to correct any deficiency in the foundation. *People v. Banks*, 2016 IL App (1st) 131009, ¶ 75. However, defendant's posttrial motion did not raise a foundational challenge to Watson's opinion testimony. Generally, a claim not raised by a

trial objection and in a posttrial motion is forfeited. *People v. McDonald*, 2016 IL 118882, ¶ 45. A challenge to the sufficiency of the evidence is not subject to forfeiture. *Id*. However, a challenge to the foundation for the admission of evidence, including expert testimony, is an evidentiary claim subject to forfeiture rather than a sufficiency claim. *People v. Woods*, 214 Ill. 2d 455, 471 (2005); *People v. Bush*, 214 Ill. 2d 318, 330-35 (2005); *People v. Hamilton*, 361 Ill. App. 3d 836, 844 (2005). "Foundation, after all, is 'evidence or testimony that establishes the admissibility of other evidence.' " *Bush*, 214 Ill. 2d at 333 (quoting Black's Law Dictionary 682 (8th ed. 2004)). Defendant's challenge is to the foundation for Watson's opinion and thus forfeited.

¶ 18 We may address a forfeited claim under the plain-error doctrine when a clear or obvious error occurred and either (1) the evidence was so closely balanced that the error alone threatened to tip the scales of justice against the defendant, or (2) the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *People v. Harvey*, 2018 IL 122325, ¶ 15. In applying the plain-error doctrine, we first determine whether error occurred at all. *Id*.; *People v. West*, 2017 IL App (1st) 143632, ¶ 11.

¶ 19 The admission of expert testimony requires the proponent to lay an adequate foundation establishing that the information upon which the expert bases his opinion is reliable. *Bush*, 214 Ill. 2d at 333; *People v. Burhans*, 2016 IL App (3d) 140462, ¶ 30. For an adequate foundation for expert testimony, the facts relied upon by the expert must be of a type reasonably relied upon by experts in that field in forming opinions or inferences. *Burhans*, 2016 IL App (3d) 140462, ¶ 30. The admission of evidence at trial, including expert witness testimony, is left to the discretion of the trial court and will be reversed only for an abuse of discretion. *People v. Lerma*, 2016 IL

118496, ¶ 23. A court abuses its discretion when its ruling is arbitrary, fanciful, or unreasonable, or when no reasonable person would agree with the court. *Id*.

¶ 20 Defendant challenges the reliability of the GCMS test results because Watson did not testify to calibrating the GCMS instrument. However, assuming *arguendo* that the court was to disregard the GCMS results, we nonetheless conclude that the trial court did not abuse its discretion in admitting Watson's expert opinion that the powder at issue, weighing 1.3 grams, contained heroin. Watson gave her opinion following, and based upon, her acceptance without objection as an expert in forensic chemistry and her testimony to her weighing and testing of that powder. She testified that she weighed the powder at issue without the bags, and testified that she confirmed that the scale was functioning properly. She testified that she subjected the powder to a color or reagent test and saw the color change consistent with the presence of heroin, and she testified that she had confirmed that the color test was functioning properly. She testified that the testing she performed is generally accepted in the scientific community. Therefore, we find a sufficient foundation in this testimony for concluding that the information underlying Watson's opinion was reliable, and thus for admitting her opinion as the trial court did. As there was no error in admitting her opinion testimony, there was no plain error.

¶ 21 Against this conclusion, defendant relies heavily upon *People v. Raney*, 324 Ill. App. 3d 703 (2001), where this court held that the State failed to present a sufficient foundation for expert testimony that a certain substance was cocaine, because the State failed to present testimony that the GCMS instrument in that case was working properly.

> "Here the expert testimony of forensic scientist Bethea was based upon test results from operation of an electronic or mechanical device, specifically the GCMS machine. Bethea

> did not provide any foundation proof as to the method of recording the information provided by the GCMS machine. More importantly, Bethea did not provide any foundation proof that the GCMS machine was functioning properly at the time it was used. The expert witness failed to explain how the machine was calibrated or why she knew the results were accurate." *Id*. at 710.

The *Raney* court framed its conclusion in terms of sufficiency of the evidence. "We find that the State failed to prove defendant guilty beyond a reasonable doubt based on the lack of proper foundation for expert Bethea's opinion that the substance in the 14 packets contained cocaine." *Id*. at 706. The *Raney* court never mentioned the trial court's discretion in admitting evidence.

¶ 22 However, *Raney* was decided before our supreme court made clear that the reliability of the information upon which an expert witness based his opinion is not a matter of sufficiency but a foundational or evidentiary question directed to the trial court's sound discretion and subject to forfeiture. *Bush*, 214 Ill. 2d at 332-34; *Lerma*, 2016 IL 118496, ¶ 23. "When determining the reliability of an expert witness, a trial court is given broad discretion." *Lerma*, 2016 IL 118496, ¶ 23. Stated another way, the *Raney* court found the entire expert opinion inadequate to prove that the contraband therein was a controlled substance because of the absent foundational element for the GCMS test. By contrast, we conclude that the trial court here did not abuse its discretion in admitting Watson's expert opinion as reliable based on the totality of the evidence upon which she based her opinion, including her performance of the color test, confirmation that it was operating properly, and testimony that it is generally accepted in the scientific community.

¶ 23 Defendant also argues that Watson did not testify to the reliability of the color or reagent test "such as statistical confirmation of the test results or independent scientific date proving the

validity of the test." However, Watson testified that "the tests" she performed are "generally accepted in the scientific community" and that she particularly checked that the color or reagent test was working properly. The defense did not cross-examine Watson regarding her testimony that the tests she performed are accepted in the scientific community or that she checked the color test. This argument does not change our conclusion above that the admission of Watson's opinion testimony was not error and thus not plain error.

¶ 24 Accordingly, the judgment of the circuit court is affirmed.

¶ 25 Affirmed.