2019 IL App (1st) 162571-U
Order filed: March 15, 2019

FIRST DISTRICT
FIFTH DIVISION

No. 1-16-2571

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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. 14 CR 7651
	)	
RICKY NELSON,	)	Honorable
	)	Thomas J. Byrne,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hoffman and Hall concurred in the judgment.

ORDER

¶ 1 *Held*: We affirmed defendant's conviction for burglary over his claims that improper evidence was admitted at trial. We ordered the correction of the fines and fees order.

¶ 2 Following a jury trial, defendant Ricky Nelson was found guilty of burglary and sentenced to eight years' imprisonment. On appeal, defendant argues the trial court improperly admitted both prejudicial other-crimes evidence and expert testimony that lacked a proper foundation. Defendant also challenges the fines and fees order. For the following reasons, we affirm defendant's conviction, but order the fines and fees order corrected.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged by information with a single count of burglary alleging that, on or about August 14, 2012, he knowingly and unlawfully entered a building located on South Prairie Avenue in Chicago, Illinois (building) with the intent to commit therein a theft. Although not contained in the information itself, the record reflects that on that date the front window of a vacant basement unit at the building was broken open and copper plumbing pipes were stolen from inside.

¶ 5 Prior to trial, defendant filed a motion seeking to bar the State from introducing any evidence at trial regarding a custodial statement defendant made to the police. In that statement, defendant indicated that he had broken into vacant buildings in the past to steal copper pipes in order to sell the pipes to support his drug habit, but defendant did not specifically recall doing so with respect to the building at issue here. The State then filed a motion seeking to admit this statement at trial as other-crimes evidence tending to establish defendant's *modus operandi*, intent and motive. The trial court granted the State's motion in part, allowing the State to introduce the majority of defendant's statement—excepting that portion regarding defendant's use of the proceeds from selling copper pipes to purchase drugs—as other-crimes evidence tending to establish defendant's *modus operandi*, intent and motive.

¶ 6 The matter then proceeded to a jury trial in December 2015. Just prior to trial, the trial court indicated that it had *sua sponte* reconsidered its prior evidentiary ruling, and that the State would now be allowed to introduce defendant's statement to show intent, motive and knowledge, but not to establish *modus operandi*.

¶ 7 During opening statements, defense counsel specifically argued that the State would not be able to prove that defendant entered the building "with the intent to commit a theft or felony therein."

¶ 8 The State's evidence at trial included the testimony of the owner of the building, Mark Foreit, and Joe Cody, who was employed by Mr. Foreit to do maintenance and demolition work at Mr. Foreit's numerous rental properties. The building at issue here was one of Mr. Foreit's rental properties.

¶ 9 Both Mr. Foreit and Mr. Cody were at the building on August 14, 2012. Mr. Foreit supervised a plumber's installation of new copper piping in the basement, after copper piping had been stolen from the building the prior week. Mr. Cody was at the building to complete some maintenance and "keep an eye on the building," as the building's rental units had recently become vacant. Indeed, at the time, Mr. Cody was staying in the first floor unit of the building.

¶ 10 When Mr. Cody returned to the building around 10 p.m. that evening, he heard water running in the basement. Upon inspection, Mr. Cody observed that the front window to the basement of the building had been shattered and that a majority of the copper plumbing pipes had been "ripped from the boilers" and removed from the building. After calling and informing Mr. Foreit of the situation, Mr. Cody shut off the water main to the building and boarded up the broken window. Both Mr. Foreit and Mr. Cody testified that no such damage to the window or the copper pipes was present when they left the building earlier in the day. They each also testified that they did not know the defendant, and that defendant did not have permission to enter the building.

¶ 11 The police were called the following morning, and Mr. Foreit met them at the building. The State's evidence at trial included testimony and evidence that fingerprints and a sample of blood were obtained by the police from the broken front window. Following defendant's arrest in 2014, a buccal swab containing defendant's DNA and defendant's fingerprints were also obtained by the police. Expert testimony was presented to the jury that subsequent testing

established that the DNA and fingerprints obtained from the broken front window of the building matched the DNA and fingerprints of defendant. Ms. Kell testified that she performed a statistical calculation using FBI frequency data, and that defendant's DNA profile "would be expected to occur in approximately 1 in 34 quintillion black, 1 in 1.6 sextillion white, or 1 in 18 sextillion Hispanic unrelated individuals."

¶ 12 During the State's presentation of this evidence, defendant's counsel made a general foundational objection to the expert testifying as to the results of the DNA testing. That objection was overruled.

¶ 13 Finally, the State introduced evidence that following defendant's 2014 arrest in connection with this case, defendant stated "that he has done burglaries to vacant buildings in the past for the purpose of stealing copper," but with respect to the building at issue here defendant "did not remember doing this one in particular." The trial court then immediately instructed the jury that they could consider this evidence solely for the limited purpose of establishing defendant's knowledge, intent and motive.

¶ 14 Defendant did not present any evidence at trial. During closing arguments, defense counsel specifically contended that the State had failed to prove "each and every element" of the offense of burglary beyond a reasonable doubt. The above referenced limiting instruction regarding defendant's statement was included in the jury instructions then provided to the jury.

¶ 15 At the conclusion of its deliberations, the jury found defendant guilty of a single count of burglary. Defendant's posttrial and supplemental posttrial motions for a new trial—which included a challenge to the admission into evidence of defendant's statement but did not include a challenge to the evidentiary foundation for the DNA evidence—were denied. At a subsequent

sentencing hearing defendant was sentenced to 8 years' imprisonment. Defendant timely appealed.

¶ 16 II. ANALYSIS

¶ 17 As noted above, on appeal defendant argues the trial court improperly admitted both prejudicial other-crimes evidence and expert testimony regarding the DNA test results that lacked a proper foundation. Defendant also challenges the fines and fees order.

¶ 18 First, we address defendant's challenge to the introduction of his statement to the police, as other-crimes evidence for the purpose of establishing defendant's knowledge, intent and motive.

¶ 19 "All relevant evidence is admissible, except as otherwise provided by law. Evidence which is not relevant is not admissible." Ill. R. Evid. 402 (eff. Jan. 1, 2011). " 'Relevant evidence' " means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Ill. R. Evid. 401 (eff. Jan. 1, 2011). Thus, while evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith, except in situations not relevant here, "[s]uch evidence may also be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ill. R. Evid. 404(b) (eff. Jan. 1, 2011). Nevertheless, although relevant, such "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Ill. R. Evid. 403 (eff. Jan. 1, 2011).

¶ 20 The admissibility of evidence is a decision soundly within the discretion of the trial court, and will only be reversed upon a showing of a clear abuse of discretion. *People v. Lovejoy*, 235 Ill. 2d 97, 135–36 (2009). A trial court abuses its discretion when its "decision is arbitrary,

fanciful, or unreasonable, such that no reasonable person would take the view adopted by the trial court." *Id*. at 125.

¶ 21 Here, we find the court did not abuse its discretion in allowing the other-crimes evidence to be admitted. This evidence was both relevant to establish and probative of defendant's intent during the charged conduct. As noted above, defendant was charged by information with a single count of burglary alleging that, on or about August 14, 2012, he knowingly and unlawfully entered the building with the intent to commit therein a theft. "The element of intent is an essential part of the crime of burglary which must be properly alleged and proved." *People v. Kerestes*, 38 Ill. App. 3d 681, 683 (1976). Indeed, a burglary is complete "upon entering with the requisite intent, irrespective of whether the intended felony or theft is accomplished." *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011). Furthermore, the State's evidence of intent was something that defense counsel specifically challenged and placed at issue at trial during opening and closing arguments. We therefore reject defendant's contention on appeal that intent was not an issue below.

¶ 22 We also reject defendant's argument that his statement should not have been admitted as evidence of intent because it described prior behavior so generally that it amounted to nothing more than improper evidence of defendant's propensity to commit burglary. When evidence of other crimes is being offered to prove intent, general areas of similarity are sufficient to allow admission of the evidence. *People v. Wilson*, 214 Ill. 2d 127, 140–41 (2005). Here, the other-crimes evidence is substantially similar to the charged conduct, as both instances involve instances where defendant entered vacant buildings with the intent to steal copper piping.

¶ 23 Additionally, with respect to defendant's contention that his statement should have been excluded because its probative value was substantially outweighed by the danger of unfair

prejudice, we note that the trial court gave a limiting instruction to the jury, both just after defendant's statement was entered into evidence and just before deliberation, that defendant's statement could only be considered for the limited purpose of establishing defendant's knowledge, intent and motive. See *Lovejoy*, 235 Ill. 2d at 136–37 (admission of other-crimes evidence upheld where it was relevant to defendant's intent and the trial court further limited prejudice by giving a limiting instruction to the jury). Under these circumstances, we cannot find that the court abused its discretion in admitting defendant's statement as other-crimes evidence.

¶ 24 Next, we address defendant's argument that the trial court improperly permitted the State to introduce expert testimony that the DNA sample obtained from the blood found on the broken front window of the building matched the DNA sample collected from defendant, on the basis that this evidence lacked a proper foundation.

¶ 25 As an initial matter, we note that to preserve an issue for review, a defendant must raise an objection both at trial and in a written posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 119 (1988). Here, while defendant did raise a general foundational objection to the introduction of this evidence at trial, he did not raise a similar objection in either his original or supplemental posttrial motions for a new trial. The issue has therefore been forfeited. See *People v. Woods*, 214 Ill. 2d 455, 471 (2005) (a challenge to the foundation for the admission of evidence, including expert testimony, is an evidentiary claim subject to forfeiture).

¶ 26 Defendant nevertheless asks this court to review this issue for plain error. The plain error doctrine "bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error ***." *People v. Herron*, 215 Ill. 2d 167, 186 (2005). The plain-error doctrine is applied where "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the

seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). In either circumstance, the burden of persuasion remains with the defendant. *Herron*, 215 Ill. 2d at 182.

¶ 27 On appeal, defendant claims plain error only under the first prong, an argument we ultimately reject. The first step in our plain-error analysis is to determine whether any error actually occurred. *Piatkowski*, 225 Ill. 2d at 565.

¶ 28 "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Ill. R. Evid. 702 (eff. Jan. 1, 2011). 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. *People v. Burhans*, 2016 IL App (3d) 140462, ¶ 30. To lay 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; Ill. R. Evid. 703 (eff. Jan. 1, 2011). "If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." Ill. R. Evid. 703 (eff. Jan. 1, 2011). Thus, an "expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise." Ill. R. Evid. 705 (eff. Jan. 1, 2011).

¶ 29 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*.

¶ 30 On appeal, defendant does not challenge the introduction of the DNA test results into evidence at trial on the basis that such evidence was unreliable because the facts relied upon by the expert were not a type reasonably relied upon by DNA experts in forming opinions or inferences. Rather, defendant relies upon authority supporting the additional proposition that where the expert's testimony is based on a mechanical or electronic device, the expert must offer some foundational proof regarding the method of recording the information, and proof that the device was functioning properly at the time of testing. *People v. Raney*, 324 Ill. App. 3d 703, 710 (2001) (citing *People v. Bynum*, 257 Ill. App. 3d 502, 513-14 (1994)). Thus, courts have recognized that "[i]f an expert (1) fails to testify that the machine used was working properly, (2) does not indicate whether any testing was done to assess the operating condition of the machine, or (3) fails to explain how the machine was calibrated, a proper foundation for the admission of the results obtained from the machine is not established." *People v. Thompson*, 2017 IL App (3d) 160503, ¶ 14 (citing *Raney*). "Where the required foundation is not established, the expert testimony is inadmissible." *Id.*

¶ 31 At trial, the DNA test results were entered into evidence through the testimony of Lisa Kell, a forensic scientist employed by the Illinois State Police (ISP) at the Forensic Science Center in Chicago. Ms. Kell was qualified—without objection—as an expert in the fields of forensic biology and DNA analysis, and she testified that she was the person that completed the

analysis on the DNA samples obtained from the broken window of the building and from defendant.

¶ 32 In describing her lab, Ms. Kell testified that it was accredited by the American National Standards Accreditation Board and the American Society for Quality. Her lab also conformed to ISO quality standards and FBI quality assurance standards for DNA. In describing the DNA testing process completed in this case, Ms. Bell testified that she did employ mechanical scientific instruments. She also testified that: (1) she employs a "clean technique" to avoid contamination, (2) she runs a "series of controls with every test" in order to determine that her tools are "clean" and "working properly," (3) "the instruments that I use are all performance checked," and (4) she follows procedures that have been validated and tested by the ISP. She also specifically testified that she followed procedures that have been validated and tested by the ISP in this particular case, and that none of the controls she employed in this case—which included controls specifically designed to ensure that "the tests that I'm doing are working correctly"—indicated any problem.

¶ 33 In light of this testimony, we reject defendant's contention that the trial court abused its discretion in overruling his foundational challenge to the results of the DNA testing being entered into evidence at trial.

¶ 34 In so ruling, we reject defendant's contention that this case should be controlled by the reasoning in *Raney*.

¶ 35 In that case, defendant was convicted of possession of a controlled substance with intent to deliver based, in part, upon the admission into evidence of the results of scientific testing completed on a gas chromatography mass spectrometer (GCMS) machine showing that the substance was cocaine. *Raney*, 324 Ill. App. 3d at 705. The laboratory analyst who completed the

testing testified that she performed the test, but did not state whether the machine was functioning properly at that time. *Id*. at 705. In reversing defendant's conviction, this court concluded that because the expert failed to offer evidence that the GCMS machine was functioning properly at the time it was used to test the suspected controlled substance found in defendant's possession, the State failed to provide the necessary foundational proof for admitting the expert's opinion. *Id*. at 710. In doing so, the *Raney* court stated:

> "[The expert] was never asked whether the GCMS machine was functioning properly at the time it was used to test the substance contained in * * * the 14 packets of suspected cocaine. While she is not personally required to test the accuracy of the machine, at the very least she should be able to offer some testimony that the GCMS machine was functioning properly at the time it was used. There was no testimony verifying the accuracy of the GCMS machine. There was no evidence as to the policy or procedures maintained by her department regarding that specific GCMS machine to ensure that it was properly maintained in working order and would thereby provide accurate results." *Id*. at 708.

¶ 36 The situation in *Raney* stands in stark contrast to that presented here. While the expert in Raney was faulted for failing to provide "any foundational proof," we conclude that the testimony of Ms. Kell summarized above—at a minimum—meets the requirement to provide "some foundational proof" that the mechanical scientific instruments employed by Ms. Kell were functioning properly at the time of testing. *Id*. at 710.

¶ 37 We find more convincing our supreme court's decision in *People v. Williams*, 238 Ill. 2d 125 (2012). In that case, the court rejected a foundational challenge to the introduction of DNA test results—and specifically limited *Raney*—in the face of an argument that an insufficient

foundation for DNA test results was provided because "there was no testimony that the instruments used by Cellmark [a third-party lab] were calibrated and functioning properly. *Id*. at 139. After noting that the expert at trial "maintained that Cellmark necessarily met the threshold of proper DNA analysis because Cellmark was an accredited laboratory and followed guidelines, the court specifically declined to "accept the defendant's invitation to broadly interpret *Raney* to find an insufficient foundation where an analyst merely relies upon data obtained from electronic or mechanical equipment." *Id*. at 140.

¶ 38 The *Williams* court also distinguished *Raney* on the grounds that "the testing of narcotics using a GCMS machine is not comparable to [DNA testing]." *Id*. at 140. After noting that the expert in Raney "merely regurgitate[d] results generated by a machine," the *Williams* court noted that the DNA expert in that case "used her expertise and professional judgment to compare the DNA profiles" and "also determined the statistical probability of the match by examining the alleles and entering them into a frequency database to determine how common they are in the general population." *Id*. The record reveals that Ms. Kell undertook the same expert analysis here.

¶ 39 In light of the above discussion, we reject defendant's contention that the trial court abused its discretion in rejecting his foundational challenge and admitting the DNA test results into evidence. As there was no error in admitting the expert testimony regarding the DNA testing, there was no plain error.

¶ 40 Even if we agreed with defendant that expert testimony regarding the DNA test results was improperly admitted at trial, we would still reject his claim that first-prong plain error occurred in this case. Aside from the DNA test results, the State introduced uncontradicted evidence that: (1) there was no damage to the basement window or the copper piping in the

building just a few hours before Mr. Cody returned to the vacant building at 10 p.m. on the date of the burglary, (2) defendant's fingerprints were collected from the broken front window the day after the burglary, and (3) defendant admitted to the police in 2014 that he had previously "done burglaries to vacant buildings in the past for the purpose of stealing copper." In light of these circumstances, we do not believe that the evidence was so closely balanced that defendant has demonstrated that any possible error in the admission of the DNA test results "threatened to tip the scales of justice against the defendant." *Piatkowski*, 225 Ill. 2d at 565.

¶ 41 Finally, defendant contends that the fines and fees order must be corrected, with the $499 in fines and fees imposed therein reduced.

¶ 42 Defendant first contends that: (1) neither a $20 "Violent Crimes Victims Assistance Fund" fine nor a $5 Electronic Citation fee should have been assessed, and (2) presentence incarceration credit should have been applied against the imposition of a $15 "State Police Operations" fee and a $50 "Court System" fee. The State concedes these issues on appeal, and we concur.

¶ 43 The parties dispute defendant's remaining fines and fees arguments on appeal, however, with the State rejecting defendant's argument that he is also entitled to have presentence incarceration credit applied against the imposition of: (1) a $190 "Felony Complaint Filed" fee, (2) a $15 "Automation" fee, (3) a $2 "Public Defender Records Automation Fund" fee, a (4) $15 "Document Storage" fee, and (4) a $25 "Court Services" fee.

¶ 44 After the parties completed briefing this matter, our supreme court specifically addressed the first four of the above referenced fees in *People v. Clark*, 2018 IL 122495. Therein, the court concluded that each of those four fees "are all fees that compensate the State for a cost related to the defendant's prosecution," and as such they are "not subject to defendant's presentence

incarceration credit." *Id.*, ¶ 51. In conformity with *Clark*, we therefore reject defendant's argument with respect to the first four fees detailed above. *Supra* ¶ 43.

¶ 45 That leaves only the argument that presentence incarceration credit should apply to the $25 "Court Services" fee imposed upon defendant. This court has already considered such a challenge to this assessment and found that it is a fee rather than a fine, and as such not subject to offsetting presentence custody credit. See *People v. Smith*, 2018 IL App (1st) 151402, ¶15; *People v. Tolliver*, 363 Ill. App. 3d 94, 97 (2006).

¶ 46 In light of the above discussion, we direct the clerk of the circuit court to correct the fines and fees order to reflect these findings and impose a corrected total assessment, not offset by any presentence credit, of $409.

¶ 47 III. CONCLUSION

¶ 48 For the foregoing reasons, we affirm defendant's conviction and sentence but order the fines and fees order corrected as discussed above.

¶ 49 Affirmed; fines and fees order corrected.