2012 IL App (1st) 102748-U

FOURTH DIVISION
AUGUST 9, 2012

No. 1-10-2748

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 13991
	)	
DONALD MASCIO,	)	Honorable
	)	Maura Slattery-Boyle,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Lavin and Justice Sterba concurred in the judgment.

O R D E R

¶ 1 *Held*: Judgment entered on defendant's conviction of possession of a controlled substance affirmed over his claims that the State did not establish a sufficient chain of custody, and that the trial court failed to comply with Rule 431(b); $200 DNA fee vacated.

¶ 2 Following a jury trial, defendant Donald Mascio was found guilty of possession of a controlled substance, then sentenced to four years' imprisonment. He was also assessed fines and fees totaling $1,160. On appeal, defendant contends that the trial court: (1) abused its discretion in admitting narcotics into evidence where the State did not establish a *prima facie* case that it

took reasonable protective measures against tampering, alteration, or substitution; (2) committed reversible error by failing to ask prospective jurors whether they understood the principles set out in Illinois Supreme Court Rule 431(b) (eff. May 1, 2007); and (3) improperly assessed him a $200 DNA analysis fee.

¶ 3 The record shows, in relevant part, that defendant elected a jury trial on a single charge of possession of a controlled substance. During *voir dire,* the trial court made the following comments to the prospective jurors:

> "Under the law, a defendant is presumed to be innocent of the charge against him. This presumption remains with him throughout every phase of the trial and during your deliberations on the verdict, and is not overcome unless from all the evidence you are convinced beyond a reasonable doubt that [defendant] is guilty of the charge.
>
> The State has the burden of proving [defendant] guilty beyond a reasonable doubt, and this burden remains on the State throughout the case. [Defendant] is not required to prove his innocence nor is he required to present any evidence on his behalf.
>
> * * *
>
> Is there anyone here that cannot follow – or cannot follow the basic principle of law that an individual is innocent until proven guilty? If you cannot follow that basic premise, please raise your hand now.

> Let the record reflect that it is 11:24; the Court has asked the beginning of the Zaire [*sic*] questions; no one in the venire has raised their hands.
>
> Is there anyone here that cannot follow the premises of law that an individual is not required to take the stand or present any evidence, that the burden is upon the State, and that an individual charged does not have to prove anything? Is there anyone here in this venire can cannot [*sic*] follow that principle?
>
> Let the record reflect it's 11:25; none of the individuals in the venire have raised their hands, all indicating that they can follow this basic principle of law."

¶ 4 The court subsequently addressed these principles with the prospective jurors a second time, stating:

> "I am just going to go over – I talked briefly and generally with the whole venire – with everyone about some basic principles of law, and I like to do it twice.
>
> Is there anybody in the jury box right now that cannot follow the basic premise or principle of law that an individual is innocent until proven guilty? Is there anyone in the jury box that cannot follow that premise of law?
>
> Let the record reflect that it is 12:10. I am asking the venire questions again – of the individuals in the jury box. No one has indicated they cannot follow that premise or that principle of law.

> Is there anyone here can cannot [*sic*] follow the principle of law that an individual is charged need not prove or say anything or take the stand, it is not their requirement; rather it's the burden of the State – of the prosecutors to prove their case? Is there anyone in the jury box that cannot follow that principle of law.
>
> Let the record reflect it is 12:11. Of all the 14 individuals in the jury box, they all indicate they can follow that principle of law."

¶ 5 At the ensuing trial on the single charge of possession of more than .1 but less than 15 grams of a substance containing cocaine, the State called as its first witness Penny Evans, a forensic scientist for the Illinois State Police Crime Lab. She testified that on July 21, 2009, she received inventory number 11724133, in a sealed condition, from an evidence technician at the vault. Upon taking possession of the evidence bag, she checked it against the inventory sheet to confirm that the RD and inventory numbers matched, then verified that its contents matched the inventory sheet. The bag contained one clear, knotted plastic bag which, in turn, contained four additional clear, knotted plastic baggies of a white chunky substance. Evans tested two of the items, and determined that they weighed 8.5 grams and were positive for the presence of cocaine. She then repackaged the items, placed them back into the evidence bag, heat-sealed the bag, and returned it to the vault, having all the while maintained care, custody, and control of the evidence.

¶ 6 Evans identified the evidence in court based on her personal markings and testified that it was in substantially the same form as when she last saw it. The State asked Evans at one point to use a pair of scissors to remove the narcotics out of the bag in which they had been repackaged, and she warned that "[t]here's going to be powder all over the desk." On cross-examination,

Evans stated that a chunky substance can become powder, but that a powdered substance cannot become chunky.

¶ 7 Chicago police officer Angel Cahue then related the events which led to the recovery of the narcotics and the charge against defendant. Officer Cahue testified that about 10:35 p.m. on July 10, 2009, he and his partner, Officer Ramiro Gonzalez, responded to a call of an armed Hispanic male in the area of 30th Street and South Kedvale Avenue, in Chicago. When they arrived, they approached a group of three Hispanic males on the sidewalk to conduct a field interview. Defendant, who was among the group, looked in their direction, turned quickly, and walked at a fast pace while "fidgeting" with his left hand and left pants pocket. Officer Cahue instructed defendant to show his hands and walk to his location, and when defendant complied, the officer performed a protective pat-down. As he was doing so, defendant stated, "I have some coke in my pants," and Officer Gonzalez recovered a white plastic bag containing four additional baggies of a "chunky, white substance," suspected to be cocaine, from defendant's left, rear pants pocket. Defendant subsequently told the officers that "the cocaine was for personal use."

¶ 8 Officer Cahue identified the evidence bag containing the suspect narcotics and testified that it was in substantially the same condition as when the narcotics were recovered "[w]ith the exception of it being opened." On cross-examination, Officer Cahue described the narcotics as a "powdery substance," but in "a chunk form."

¶ 9 Chicago police officer Gonzalez testified that during Officer Cahue's protective pat-down of defendant, he recovered from defendant's back pocket a clear, knotted bag, which he described as "a good size chunk," containing four items of a substance that was "white in color, powder, rocky" and which he suspected to be cocaine. He immediately secured the narcotics on his person, then transported them to the police station, keeping them in his constant care, custody, and control until he inventoried them under the unique inventory number 11724133. When the

State asked Officer Gonzalez to explain "what you mean when you say that you inventoried the items," he responded:

> "I take the drugs. I go back to the station. There's a form we have to fill out, plastic bag. It's got my name on it. It's got the time recovered, recovered from who. They want you to explain what it is, what kind of drug. Then I have to heat-seal it, and then I put my initials on top along with the sergeant so he sees what I'm doing. He signs it. Then I have to drop it in the vault.
>
> Once it's dropped in the vault, nobody can grab it at all. The sergeant's got to sign that he saw me drop it in the vault."

¶ 10 Officer Gonzalez identified the evidence bag containing the narcotics and testified that it was in substantially the same condition as when he submitted it to the inventory vault other than it being "opened on the side and on top by Illinois State Police." However, he acknowledged describing the recovered substance on the evidence bag as a "white powder," and noted that it was "not really" in the same condition as when he inventoried it because "[n]ow it's more of a hard rock. It may have been – it's been over a year or so. It was more of a powder substance."

¶ 11 On cross-examination, the following exchange took place between defense counsel and Officer Gonzalez:

> "Q. Officer, you testified towards the end of the State's questioning that when you inventoried these drugs, they were more of a powder, and over the course of a year, it's turned into a chunk? Is that what you said?
>
> A. It was powder. I mean, I don't know how it becomes chunk. I know it goes in a vault, and after that, I don't see it. I don't know if it goes in a freezer. I don't know what –

Q. You're saying when you inventoried these drugs, it was a powder, right?

A. Some of it was, yes, what I remember.

Q. And today it appears to you to have transformed into some kind of a chunk?

MS. HANUS [assistant State's Attorney]: Objection.

THE COURT: Overruled. You may answer.

A. It's still a powder substance.

Q. Officer, you indicated that what you inventoried was mostly powder, and what you took a look at today is mostly a chunk, right?

A. Yeah. The big one looks like a harder chunk. Again, it's been a while so I don't –

Q. My question to you is, when you inventoried this, on the front of the inventory bag you wrote 'white powder substance,' correct?

A. I did write that, yes.

Q. You did not write 'chunky substance'?

A. No."

¶ 12 The State subsequently sought to admit the recovered narcotics into evidence, and defense counsel objected, stating, "Clearly Officer Gonzalez had said that wasn't the substance that he had inventoried." The court overruled counsel's objection, however, noting that "[t]here has been ample testimony about powdery chunk, chunk, powder. The jury has heard the testimony. The jury is the trier of facts. The jury will assess the credibility and the weight of the witnesses and make a determination based on the law that I instruct them on."

¶ 13 Defendant then moved for a directed verdict and argued, *inter alia*, that "there is a chain of custody problem in this case in that there is some question that those drugs that were analyzed and appeared in court today are not the same drugs that were inventoried." The court denied defendant's motion, and the defense rested without presenting any evidence.

¶ 14 Following deliberations, the jury found defendant guilty of possession of a controlled substance, and defendant subsequently filed a motion for judgment notwithstanding the verdict or for a new trial alleging, *inter alia*, that the trial court abused its discretion in allowing the recovered narcotics to be admitted into evidence. The court denied defendant's motion and found, in pertinent part, that "[t]he descriptions and the variations the Court does not find is sufficient to indicate that there's any type of tampering to warrant that there was tampering or lack of chain of custody." The court then sentenced defendant to four years' imprisonment.

¶ 15 In this appeal from that judgment, defendant first contends that the trial court abused its discretion in admitting the recovered narcotics into evidence because the State failed to establish a *prima facie* case that it took reasonable protective measures against tampering, alteration, or substitution. He claims that the State failed to explain the "obvious discrepancy" between Officer Gonzalez' testimony that he recovered white powder cocaine, and his testimony that the narcotics introduced at trial were a "hard rock" and chunky. He also points out that the State never established who had custody of the narcotics after they were inventoried by Officer Gonzalez and prior to their arrival at the Illinois State Police Crime Lab.

¶ 16 The State responds that it established a *prima facie* showing that the chain of custody was sufficient, and that defendant is attempting to avoid his burden of showing actual evidence of tampering, substitution, or contamination. A challenge to the chain of custody is considered an attack on the admissibility of the evidence (*People v. Alsup*, 241 Ill. 2d 266, 275 (2011), citing *People v. Woods*, 214 Ill. 2d 455, 473 (2005)), and the trial court's ruling on the sufficiency of a

chain of custody will not be reversed absent an abuse of discretion (*People v. Blankenship*, 406 Ill. App. 3d 578, 588 (2010)).

¶ 17 It is axiomatic that when the State seeks to introduce the results of chemical testing of a purported controlled substance, it must provide a foundation for its admission by showing that the police took reasonable protective measures to ensure that the substance tested was the same one recovered from defendant. *Alsup*, 241 Ill. 2d at 274. To establish a sufficiently complete chain of custody, the State must demonstrate that reasonable measures were employed to protect the evidence from the time of seizure and that it was unlikely that the evidence had been altered. *Woods*, 214 Ill. 2d at 467.

¶ 18 Here, the record shows that Officer Gonzalez recovered from defendant a clear, knotted bag containing four items of a substance that was "white in color, powder, rocky" and suspected to be cocaine. He immediately secured the narcotics on his person and transported them to the police station where he filled out an evidence bag with his name, the time when the narcotics were recovered, who they were recovered from, and a description of the narcotics. He then heat-sealed the bag, placed his initials at the top of it along with his sergeant's initials, and dropped the bag in the inventory vault where "nobody can grab it at all."

¶ 19 Penny Evans subsequently received an evidence bag at the Illinois State Police Crime Lab which contained the same inventory number as that inventoried by Officer Gonzalez (11724133). The bag was in a sealed condition and contained one clear, knotted plastic bag filled with four additional clear, knotted plastic baggies of a white chunky substance. Evans checked the evidence bag against the inventory sheet to confirm that the RD and inventory numbers matched and verified that the contents of the bag matched the inventory sheet. She then tested the items, repackaged them, placed them back into the evidence bag, heat-sealed the bag, and returned it to the vault.

¶ 20 These procedures indicate that the State took reasonable protective measures to ensure that the knotted plastic bag containing four baggies of suspect cocaine recovered by Officer Gonzalez was the same knotted plastic bag containing four baggies of cocaine tested by the forensic chemist, and that it was improbable that the evidence had been subject to tampering, alteration, or substitution. *Alsup*, 241 Ill. 2d at 278-79. The State thus established its *prima facie* case, and the burden shifted to defendant to show actual evidence of tampering, alteration, or substitution. *Alsup*, 241 Ill. 2d at 274-75.

¶ 21 Defendant attempted to meet his burden by calling attention to the uncertainty expressed by Officer Gonzalez in his trial testimony regarding whether the narcotics had retained the same consistency since his recovery of them almost a year before. Officer Gonzalez never voiced any doubt that the items presented in court were the same ones recovered from him the year before, however, and his equivocal testimony that the substance was now "more of a hard rock," though "still a powder substance" is not *actual evidence* of tampering, alteration, or substitution. *Alsup*, 241 Ill. 2d at 274-75. Moreover, absent such evidence of contamination, the State was not obligated to present the testimony of every individual who handled the narcotics from the time they were placed in the vault at the police station to the time they were received by Evans at the Illinois State Police Crime Lab, as defendant now claims. *Alsup*, 241 Ill. 2d at 275. Evidence may be admitted even where there is a missing link in the chain of custody provided that there is testimony which sufficiently described the condition of the evidence when delivered which matches the description of the evidence when examined. *Alsup*, 241 Ill. 2d at 275, citing *Woods*, 214 Ill. 2d at 467-68. That requirement was met here, and, thus, any deficiencies in the chain of custody, such as the one suggested by defendant here, went to the weight rather than the admissibility of the evidence. *Alsup*, 241 Ill. 2d at 279.

¶ 22 Defendant nonetheless disputes that the State established its *prima facie* case and claims that the officers' testimonies did not provide sufficient assurance that reasonable protective measures were taken, citing *People v. Gibson*, 287 Ill. App. 3d 878 (1997). However, in *Gibson* 287 Ill. App. 3d at 880-82, a pre-*Woods* case, the chain of custody issue was reviewed as a matter relating to the sufficiency of the evidence, rather than its admissibility, and the court noted the large discrepancy between the weight of the narcotics recovered and those received at the lab, and that there was absolutely no evidence presented at trial regarding the safekeeping of the recovered narcotics. Here, on the other hand, the descriptions of the narcotics recovered and tested were substantially consistent, and both Officer Gonzalez and Penny Evans gave detailed testimony as to the safekeeping procedures they followed. *Gibson* is thus readily distinguishable from the case at bar, and we conclude that the trial court did not abuse its discretion in admitting the narcotics in question. *Blankenship*, 406 Ill. App. 3d at 588.

¶ 23 Defendant next contends that the trial court committed reversible error by failing to question prospective jurors in accordance with Supreme Court Rule 431(b). That rule requires the trial court to ask each potential juror individually, or as a group, whether he or she understands and accepts that: (1) defendant is presumed innocent of the charge against him; (2) before defendant can be convicted, the State must prove him guilty beyond a reasonable doubt; (3) defendant is not required to offer any evidence on his own behalf; and (4) defendant's failure to testify cannot be held against him. Ill. S. Ct. R. 431(b).

¶ 24 Defendant concedes that the trial court asked each of the prospective jurors whether they accepted the principles set out in Rule 431(b), but claims that the court failed to ask whether they also understood those principles. Defendant acknowledges that he forfeited this issue by failing to object in the trial court (*People v. Enoch*, 122 Ill. 2d 176, 186 (1988)), but urges plain error review under the closely balanced evidence prong of the plain error doctrine (*People v. Luna*, 409

Ill. App. 3d 45, 55 (2011)). The first step of plain error review is to determine whether any error occurred (*People v. Thompson*, 238 Ill. 2d 598, 613 (2010)), and our review is *de novo* (*People v. Garner*, 347 Ill. App. 3d 578, 583 (2004)).

¶ 25 The supreme court has held that Rule 431(b) mandates a specific question and response process in which the trial court must ask potential jurors individually, or as a group, whether they understand and accept each of the stated principles. *Thompson*, 238 Ill. 2d at 607. However, Rule 431(b) does not set out the principles in the form of questions to be asked *in haec verba*, and there is neither a particular methodology for establishing the venire's understanding and acceptance of them, nor magic words or catechism to ensure the court's compliance. *People v. Digby*, 405 Ill. App. 3d 544, 548 (2010).

¶ 26 During *voir dire* in this case, the trial court instructed the prospective jurors regarding the principles that defendant is presumed innocent, that the State has the burden of proving defendant guilty beyond a reasonable doubt, that defendant is not required to present any evidence on his own behalf, and that "an individual is not required to take the stand." The trial court then asked the venire whether anyone could not "follow" those principles, and no one raised his or her hand. Thereafter, the trial court questioned the venire a second time and asked whether anyone could not "follow" the principles that an individual is innocent until proven guilty, that it is the State's burden to prove its case, and that "an individual *** need not prove or say anything or take the stand." Again, no one raised his or her hand.

¶ 27 In *People v. Quinonez*, 2011 IL App (1st) 092333, ¶ 48, the trial court questioned prospective jurors as to whether they "had a problem" with the first principle of Rule 431(b), "disagreed" with the second and third principles, and whether they would hold defendant's decision not to testify against him. Under those circumstances, this court found that the words used by the trial court clearly indicated to the prospective jurors that it was asking them whether

they accepted *and* understood the principles enumerated in the rule. *Quinonez*, 2011 IL App (1st) 092333, ¶ 50.

¶ 28 Here, likewise, the trial court asked prospective jurors whether any of them could not "follow" the principles of Rule 431(b). The verb "follow" is commonly understood to mean both "to accept as authority" and "to understand the sense or logic of." Webster's Ninth New Collegiate Dictionary 479 (1990). Thus, the court's word choice clearly indicated to the jurors that it was asking both whether they accepted and understood the stated principles. *Quinonez*, 2011 IL App (1st) 092333, ¶ 50. We therefore find no error, and honor the procedural default of defendant's claim. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010).

¶ 29 Defendant lastly contends that he was improperly assessed a $200 DNA analysis fee because he previously submitted his DNA to the Illinois State Police in connection with a prior conviction. The State concedes that this fee was improperly assessed and should be vacated. Pursuant to the supreme court's ruling in *People v. Marshall*, 242 Ill. 2d 285, 303 (2011), we agree that the trial court was not authorized to assess defendant the $200 DNA fee where he is currently registered in the DNA database. We therefore vacate that fee.

¶ 30 For the reasons stated, we vacate defendant's $200 DNA fee and affirm the judgment of the circuit court of Cook County in all other respects.

¶ 31 Affirmed in part; vacated in part.