2014 IL App (1st) 121951-U

SECOND DIVISION
September 30, 2014

No. 1-12-1951



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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 11 CR 13003 |
| | ) | |
| MICHAEL SHIVERS, | ) | Honorable |
| | ) | Noreen V. Love, |
| Defendant-Appellant. | ) | Judge Presiding. |

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PRESIDING JUSTICE SIMON delivered the judgment of the court.
Justices Neville and Pierce concurred in the judgment.

**O R D E R**

¶ 1 *Held*: Defendant's procedural default must be honored when he attempts, on appeal, to challenge the admission of evidence that was admitted pursuant to a stipulation at trial. Defendant's claim of ineffective assistance of counsel must fail where he cannot establish he was prejudiced by the complained of actions when the evidence at trial established that he used a gun to rob a drug dealer of cannabis and to hold three coworkers against their will. Defendant's conviction for armed violence is affirmed where he was not improperly convicted of both the predicate offense of possession of cannabis and armed violence.

¶ 2 Following a bench trial, defendant Michael Shivers was found guilty of armed violence, three counts of aggravated unlawful restraint, and two counts of aggravated unlawful use of a

weapon. He was sentenced to 15 years in prison for the armed violence conviction. He was also sentenced to three five-year sentences for the aggravated unlawful restraint convictions, and to two three-year sentences for the aggravated unlawful use of a weapon convictions. All sentences were to be served concurrently.

¶ 3 On appeal, defendant first contends that he was not proven guilty beyond a reasonable doubt because the State failed to meet its burden to demonstrate that the chain of custody for certain cannabis introduced at trial was sufficiently complete. He next contends that he was denied the effective assistance of counsel when, *inter alia*, counsel entered into a stipulation regarding the cannabis and failed to cross-examine the police officer who inventoried it. Defendant finally contends that his conviction for armed violence must be vacated because it arises out of the same physical act as his other convictions. We affirm in part, vacate in part, and correct defendant's mittimus.

¶ 4 The evidence at defendant's trial established, through the testimony of defendant's coworkers Benjamin Dain, Bridget Murphy, and Michael Hahn, that the group went to an alley in a car driven by Murphy in order to purchase cannabis from Dain's drug dealer "Snoop." After Snoop gave defendant a sample, defendant asked to see the "product," so Snoop retrieved a bag and handed it to defendant. Dain described the bag as a large Ziplock bag containing fabric softener, coffee grounds and another Ziplock bag filled with cannabis. At this point, defendant pulled out a gun, announced that it was a stick-up, and told Murphy to drive away. Although Murphy did not see the gun because she was looking straight ahead, Dain and Hahn saw the gun.

¶ 5 As the car pulled away, gunshots were fired at the car. Defendant then asked Dain to throw the bag containing fabric softener and coffee grounds out of the window. Dain complied.

Dain and Hahn testified that defendant told them not to answer their phones. Defendant also told the group not to look at him or he would start shooting and to call him Malcolm X. Defendant subsequently told Murphy to pull into a gas station. Once there, defendant told Dain to get out of the car and warned him that if Dain called the police, defendant would start shooting. However, Dain called the police and described Murphy's car. After Dain left the car, Murphy followed defendant's instructions to continue driving. When a police car was spotted, defendant told her to pull into another gas station and then told Murphy and Hahn to go inside. When they returned to the car a few minutes later, a squad car was present.

¶ 6 Officer Tony Ikis testified that after hearing a dispatch on his radio regarding people in a car being held against their will by a man with a gun, he saw a car matching that description parked at a gas station. He pulled in behind the car, instructed Murphy and Hahn to move away, and observed defendant "ducking down" in the back seat. When Ikis opened the car door and told defendant to exit the car, he smelled a strong order of cannabis. A subsequent search of the vehicle revealed a small silver bag located where defendant had been seated. When he opened the bag, Ikis saw a green plantlike substance which later field tested positive for cannabis. He also recovered a handgun from the bag. Ikis inventoried the cannabis under inventory number 11-6890 and performed all the "proper" procedures for inventorying narcotics. He believed that he heatsealed the bag. Ikis was not cross-examined.

¶ 7 The parties then stipulated that forensic scientist Debra Bracey, if called to testify, would testify, that she performed certain tests upon the contents of a heatsealed bag labeled with inventory number 11-6890. The contents of the bag tested positive for the presence of cannabis and weighed 108.5 grams.

¶ 8 Ultimately, the court found defendant guilty of armed violence, three counts of aggravated unlawful restraint, and two counts of aggravated unlawful use of a weapon. The armed violence count was predicated upon the court's finding that defendant possessed cannabis. Defendant was sentenced to 15 years in prison for the armed violence conviction, 5 years for each of the aggravated unlawful restraint convictions, and 3 years for each of the aggravated unlawful use of a weapon convictions.

¶ 9 On appeal, defendant first contends that he was not proven guilty beyond a reasonable doubt when the State failed to present evidence regarding the chain of custody of the cannabis admitted at trial. In other words, defendant argues that because the State presented "no chain of custody," the State failed to link the cannabis recovered from Murphy's car to the evidence that was tested and admitted at trial. Defendant acknowledges that he failed to raise this objection at trial, but argues that this error may be reviewed pursuant to the plain error doctrine. See *People v. Woods*, 214 Ill 2d 455, 471-72 (2005) (in the rare instances where a complete breakdown in the chain of custody occurs, thus raising the probability that the evidence sought to be introduced at trial was not the same item recovered from the defendant, a challenge to the chain of custody may be brought under the plain error doctrine).

¶ 10 To preserve a claim of error for review, a defendant must both object at trial and include the alleged error in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Pursuant to the plain error doctrine, this court may address unpreserved errors "when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence." *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). A defendant bears the burden of persuasion under both prongs of the plain error doctrine, and if he fails to meet this

burden, his procedural default will be honored. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). The first step of plain error analysis is to determine whether a clear or obvious error occurred. *People v. Ramsey*, 239 Ill. 2d 342, 412 (2010).

¶ 11 A defendant arguing that a chain of custody for evidence is deficient argues that the State failed to establish an adequate foundation for the admission of that evidence. *Woods*, 214 Ill. 2d at 471. Such an attack challenges the admissibility of the evidence and is subject to the ordinary rules of forfeiture. *People v. Alsup*, 241 Ill. 2d 266, 275 (2011). In cases involving controlled substances, the State has the burden of establishing a chain of custody as a foundation for the admission of that evidence, *i.e.*, the State must establish that the police took reasonable protective measures to ensure that the substance recovered from the defendant was the same substance tested by the forensic chemist, and that it is improbable that the evidence was subject to tampering or accidental substitution. *Woods*, 214 Ill. 2d at 466-67. Unless a defendant produces evidence of actual tampering, the State does not have to present the testimony of each person in the chain to satisfy its burden, nor must it exclude every possibility of tampering or contamination. *Woods*, 214 Ill. 2d at 467.

¶ 12 "The law is well established that an accused may, by stipulation, waive the necessity of proof of all or part of the case which the People have alleged against him." *People v. Polk*, 19 Ill. 2d 310, 315 (1960). " 'A stipulation is conclusive as to all matters necessarily included in it' " (*Woods*, 214 Ill. 2d at 469 (quoting 34 Ill. L. & Prac. *Stipulations* § 8 (2001))), and " '[n]o proof of stipulated facts is necessary, since the stipulation is substituted for proof and dispenses with the need for evidence' " (*Woods*, 214 Ill. 2d at 469 (quoting 34 Ill. L. & Prac. *Stipulations* § 9 (2001))). A defendant is generally precluded from attacking or otherwise contradicting any facts

to which he has stipulated. *Woods*, 214 Ill. 2d at 469. Stipulations are binding and conclusive on the parties, and parties will not be relieved from a stipulation absent a clear showing that the matter stipulated to was untrue and only then when the objection is timely. *People v. Calvert*, 326 Ill. App. 3d 414, 420 (2001).

¶ 13 Here, Ikis testified that he recovered a small silver bag containing a green plantlike substance from the area where defendant was sitting in Murphy's car, inventoried the substance under inventory number 11-6890, heatsealed the bag, and performed all the proper procedures for inventorying narcotics. The parties also stipulated that the results of forensic scientist Bracey's tests upon the contents of a heatsealed bag labeled with inventory number 11-6890, indicated the presence of cannabis and a weight of 108.5 grams. Contrary to defendant's assertion on appeal, a detailed matching description of the narcotics was not necessary to establish the integrity of the evidence because the stipulated testimony established that the evidence was received in a sealed condition with a matching inventory number. See *People v. Paige*, 378 Ill. App. 3d 95, 99 (2007). Our supreme court has found that the testimony of an officer coupled with a stipulation from a forensic chemist is sufficient to link the substance seized at the time of the defendant's arrest to the substance tested by the chemist. *Woods*, 214 Ill. 2d at 473; see also *Polk*, 19 Ill. 2d at 315 (in rejecting the defendant's argument that there was no evidence of continuity of possession of drug evidence, the court noted that, while such proof may be necessary under certain circumstances, the stipulation between the parties "had the effect of eliminating proof which otherwise might have been required").

¶ 14 Although defendant argues that the stipulation has no relevance to the issue of whether the substance tested by Bracey was the same substance recovered from Murphy's car, a review of

the record reveals that the parties' decision to enter into a stipulation as to Bracey's testimony removed from dispute any questions regarding the chain of custody of the substance or its chemical composition. In other words, by stipulating to Bracey's testimony and not attacking the chain of custody at trial, defense counsel placed the State in a position of believing that there was no issue as to the sufficiency of the chain of custody. If counsel had indicated that the defense stipulated to Bracey's testimony but not the chain of custody, the State could have addressed this issue at trial. Accordingly, under the circumstances of the case at bar, when no issue was raised either as to the identity of the substance or with respect to the sufficiency of the chain of custody, it is reasonable to conclude that the parties intended to remove this issue from the case, and that there was no dispute involving the admissibility of the evidence. See *Woods* 214 Ill. 2d at 474-75. Consequently, defendant has affirmatively waived review of the chain of custody issue because he seeks to challenge on appeal the admission of evidence that he agreed to have admitted at trial. See *People v. Caffey*, 205 Ill. 2d 52, 114 (2001) (when a party procures or invites the admission of evidence, he cannot challenge on appeal the admission of that evidence).

¶ 15 Accordingly, because a defendant who has agreed to the admission of certain evidence at trial cannot challenge the admission of that evidence on appeal, defendant has waived review of the chain of custody issue and we must honor that procedural default. See *Woods*, 214 Ill. 2d 473-75.

¶ 16 Defendant next contends that he was deprived of the effective assistance of counsel at trial when counsel entered into a stipulation regarding the cannabis rather than object based upon the inadequacies in the State's chain of custody, failed to cross-examine Ikis and did not object to

the State's "sweeping" questioning of Ikis. He also contends that counsel failed to adequately cross-examine and impeach the State's witnesses and to make a closing argument.

¶ 17 To establish a claim of ineffective assistance of trial counsel, defendant must show that his attorney's performance was deficient and that he suffered prejudice as a result, *i.e.*, there was a reasonable probability that but for counsel's deficient performance, the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984). If the defendant fails to establish either prong, his ineffective assistance claim must fail. *Strickland*, 466 U.S. at 687. "If it is easier, a court may proceed directly to the second prong of *Strickland* and dismiss an ineffective assistance claim on the ground that it lacks sufficient prejudice, without first determining whether counsel's performance was deficient." *People v. Valladares*, 2013 IL App (1st) 112010, ¶ 70. To establish prejudice, the defendant must show a reasonable probability that, absent counsel's alleged error, the trial's outcome would have been different. *People v. Evans*, 209 Ill. 2d 194, 220 (2004).

¶ 18 Initially, we note that all the complained of errors, *i.e.*, whether to object or to cross-examine or impeach a witness or to enter into a stipulation, relate to trial strategy and may not form the basis of a claim of ineffective assistance counsel. See *People v. Perry*, 224 Ill. 2d 312, 344 (2007) (the decision whether to object is a strategic one that may not form the basis of a claim of ineffective assistance of counsel); *People v. Pecoraro*, 175 Ill. 2d 294, 326 (1997) (the decision whether or not to cross-examine or impeach a witness is a matter of trial strategy which will not support a claim of ineffective assistance of counsel); *People v. Coleman*, 301 Ill. App. 3d 37, 46-47 (1998) (the use of a stipulation, in and of itself, does not establish ineffective assistance of counsel).

¶ 19 Even were this court to agree with defendant that counsel's performance was somehow deficient, we find that defendant cannot establish the prejudice prong of the *Strickland* test. To satisfy the prejudice prong, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have different. See *Strickland*, 466 U.S. at 694. Here, when three witnesses testified that defendant was armed with a gun, took a bag of cannabis from Snoop and ordered Murphy to drive away, and a gun and cannabis were recovered from the area in Murphy's car where defendant was seated, we cannot conclude that there was a reasonable probability that, but for counsel's alleged errors, the result of defendant's trial would have been different. *Strickland*, 466 U.S. at 694; see also *People v. Bew*, 228 Ill. 2d 122, 135 (2008) ("*Strickland* requires actual prejudice be shown, not mere speculation as to prejudice"). Therefore, defendant's claim of ineffective assistance of counsel must fail (see *Strickland*, 466 U.S. at 687).

¶ 20 Defendant finally contends that his conviction for armed violence must be vacated when it arises out of the same physical act as his remaining convictions.[1] Although "[i]t is well settled that multiple convictions of both armed violence and the underlying felony cannot stand where a single act is the basis for both charges" (*People v. Smith*, 258 Ill. App. 3d 261, 263 (1994)), here, defendant's conviction of armed violence was predicated on the offense of possession of cannabis, and the court did not enter a conviction on that offense. Thus, defendant's argument must fail.

[1] Although defendant argues that convictions for armed violence and armed robbery cannot arise from the same physical act, the record reflects that defendant was not convicted of armed robbery.

¶ 21 This court notes that the State requests that we correct defendant's mittimus to reflect only one conviction for aggravated unlawful use of a weapon based upon the State's concession that the act of possession was the same in each count. The State requests that this court vacate defendant's conviction on count 7, citing *People v. Eubanks*, 279 Ill. App. 3d 949, 963 (1996), for the proposition that where multiple convictions are based on the same physical act, the State has the right to elect which conviction should be retained. We accept the State's concession. Pursuant to Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we order the clerk of the circuit court to correct defendant's mittimus to reflect one conviction for aggravated unlawful use of a weapon on count 6. See *People v. Douglas*, 381 Ill. App. 3d 1067, 1069 (2008) (the appellate court may correct a mittimus without remanding the cause to the circuit court).

¶ 22 For the foregoing reasons, defendant's conviction on count 7 is vacated and his mittimus shall be corrected to reflect one conviction for aggravated unlawful use of a weapon on count 6. We affirm the judgment of the circuit court of Cook County in all other aspects.

¶ 23 Affirmed in part; vacated in part; mittimus corrected.