2017 IL App (1st) 152623-U

FIFTH DIVISION
June 23, 2017

No. 1-15-2623

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

	)	Appeal from the
THE PEOPLE OF THE STATE OF ILLINOIS,	)	Circuit Court of
	)	Cook County
Plaintiff-Appellee,	)	
	)	
v.	)	No. 14 CR 14436
	)	
TIFFANY THOMAS,	)	
	)	Honorable
Defendant-Appellant.	)	Joseph M. Claps,
	)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: Affirming the judgment of the circuit court for delivery of a controlled substance where defendant forfeited chain of custody claim through stipulation.

¶ 2 Following a bench trial, defendant Tiffany Thomas was convicted of one count of delivery of a controlled substance and one count of possession of a controlled substance with intent to deliver. The trial court subsequently merged the counts and sentenced defendant to four years in the Illinois Department of Corrections for delivery of a controlled substance (cocaine)

(720 ILCS 570/401(d) (West 2014)). On appeal, defendant contends the State failed to prove her guilty beyond a reasonable doubt due to its failure to establish a proper chain of custody between the substances recovered from her and the substances tested by the forensic chemist. For the reasons that follow, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 Defendant was charged by indictment with four counts of delivery or possession of a controlled substance with intent to deliver within 1,000 feet of a church or school, and one count each of delivery of a controlled substance and possession of a controlled substance with intent to deliver. Defendant waived her right to a jury trial and the matter proceeded to a bench trial.

¶ 5 At trial, Officer Bolten testified that on July 21, 2014, at 6 p.m. he, along with a team of Chicago police officers, conducted an undercover controlled narcotics purchase operation at the intersection of West Augusta Boulevard and North Lavergne Avenue in Chicago. [1] Officer Bolten was to be the undercover buy officer. Prior to conducting the operation, Officer Bolten recorded the serial number of two ten-dollar bills he was intending to utilize in the transaction (prerecorded 1505 funds).

¶ 6 Officer Bolten testified he approached defendant and requested "two seeds," which he intended to mean two bags of crack cocaine in exchange for the two ten-dollar bills. Defendant delivered to him one clear Ziploc bag that contained a white, rock-like substance, which Officer Bolten suspected to be crack cocaine. Receiving only one bag, Officer Bolten requested defendant return one of the ten-dollar bills. Defendant complied, but left the scene and shortly thereafter returned, delivering to Officer Bolten a second bag containing a white, rock-like substance Officer Bolten suspected to be crack cocaine in exchange for the ten-dollar bill.

[1] The full name of the officer does not appear in the record.

¶ 7 Following the sale, defendant was arrested and transported to the police station. Officer Bolten testified he kept both bags he received from defendant in his possession until he returned to the police station. Once at the station, he delivered the two items to the inventorying officer, Officer Hubbard. Additionally, Officer Bolten testified he confirmed the same ten-dollar bills he had prerecorded were the ones recovered during the custodial search of defendant and that Officer Hubbard then inventoried those funds as well. [2]

¶ 8 Officer Marcella Musgraves testified that she participated in the undercover operation on July 21, 2014, along with Officer Bolten. According to Officer Musgraves, from her surveillance vehicle, which was parked 50 feet away, she observed defendant tender a small unknown object she suspected was narcotics to Officer Bolten in exchange for an unknown amount of currency. Officer Musgraves then observed defendant and Officer Bolten engage in a conversation. Defendant then walked away from Officer Bolten and Officer Musgraves lost sight of her. Five minutes later, defendant returned and tendered Officer a small unknown object. Officer Bolten, in turn, provided defendant with an unknown amount of currency.

¶ 9 Officer Arletta Kubik testified she detained defendant following the transaction with Officer Bolten and conducted a custodial search of defendant's person at the scene. Officer Kubik testified she recovered the two ten-dollar bills in prerecorded funds in addition to $64. Following the search, defendant was transferred to the station where Officer Kubik performed a second search of defendant, recovering a plastic bag containing seven clear Ziploc bags of suspected crack cocaine from defendant's waistband.

¶ 10 Officer Kubik further testified that, while at the station, she viewed all of the narcotics

[2] We note, Officer Hubbard did not testify at trial. In addition, testimony regarding the distance the transaction occurred from various churches and schools was also presented by the State at trial, but is not reproduced here as it is not at issue on appeal.

that were involved in the transaction with defendant, including the two individual bags Officer Bolten received. She testified that the total of nine recovered bags were "clear Ziploc bags," which was a common form of packaging for controlled substances in the area where the transaction occurred. She further testified she provided the seven items she recovered from defendant's waistband to Officer Hubbard to inventory. Officer Kubik, with her fellow officers in the same room (including Officer Bolten), then observed Officer Hubbard inventory the items that were recovered from defendant.

¶ 11 Following the live testimony, the parties stipulated that Chandra Girtman, an expert forensic chemist with the Illinois State Police crime laboratory, would testify as follows: she received two evidence bags from the Chicago Police Department with inventory numbers 13226588 and 13226577. Both were in a sealed condition. Inventory bag number 13226588 contained two items of a rock-like substance, while inventory bag number 13226577 contained seven items of a rock-like substance. After performing tests commonly accepted in the area of forensic chemistry for ascertaining the presence of a controlled substance, Girtman concluded inventory bag number 13226588 contained 0.21 grams of cocaine and inventory bag number 13226577 contained 0.89 grams of cocaine. Regarding the chain of custody for these inventory bags, the parties further stipulated Girtman would testify that "a proper chain of custody was maintained at all times." Defense counsel voiced no objection to the stipulation.

¶ 12 After stipulations, the State rested. Defendant raised a motion for a directed finding. During his argument, defense counsel did not challenge the chain of custody of the contraband; in fact, defense counsel twice asserted that he was not disputing that Officer Bolten received cocaine from defendant. Rather, defense counsel argued that the location where the transaction occurred was not established by the evidence and thus defendant could not be found guilty of

delivery or possession of a controlled substance with intent to deliver within 1,000 feet of a church or school.

¶ 13 After considering the arguments, the trial court granted defendant's motion in part, finding the State failed to prove the four counts pertaining to defendant's delivery or possession of a controlled substance with intent to deliver within 1,000 feet of a church or school. The trial court, however, denied defendant's motion as to the counts of delivery of a controlled substance and possession of a controlled substance with intent to deliver. Thereafter, defendant rested without presenting any evidence and both parties waived closing arguments.

¶ 14 The trial court ultimately found defendant guilty of the remaining counts and merged the possession of a controlled substance with intent to deliver count into the delivery of a controlled substance count. Prior to sentencing, defendant filed a motion for a new trial. The posttrial motion did not raise any challenge to the chain of custody, but instead asserted generally that the evidence was insufficient to prove her guilt beyond a reasonable doubt. The trial court denied the motion and proceeded immediately to sentencing where defendant was sentenced to four years in the Illinois Department of Corrections. This appeal follows.

¶ 15 ANALYSIS

¶ 16 On appeal, defendant argues that the State failed to prove her guilty of possession and delivery of a controlled substance beyond a reasonable doubt where there was a complete breakdown in the chain of custody. Defendant maintains that there is no link between the items recovered from her and the items tested by the forensic chemist where: there is no testimony regarding the police department's standard inventory procedures, no testimony as to an inventory number assigned to the items recovered, and no demonstration of the chain of custody for the items.

¶ 17 The State responds that defendant forfeited her purely evidentiary chain of custody claim by failing to raise it in the trial court. It further asserts that, under the supreme court's holding in *People v. Woods*, 214 Ill. 2d 455 (2005), a challenge to the sufficiency of the evidence cannot be based on a defect in the chain of custody.

¶ 18 The threshold question is whether defendant's argument amounts to a challenge to the sufficiency of the evidence or its admissibility. If it is the former, defendant need not have raised the issue in a posttrial motion, as a challenge to the sufficiency of the evidence may be raised at any time. *People v. Enoch*, 122 Ill. 2d 176, 190 (1988). If it is the latter, however, defendant must have properly raised it in order for this court to review his claim of error. *Id*. at 186; *People v. Mendoza*, 354 Ill. App. 3d 621, 627 (2004). Accordingly, we first turn to consider whether defendant's challenge to a chain of custody is a challenge to the sufficiency of the evidence.

¶ 19 As suggested by the State, we find *Woods* to be dispositive of this issue. In *Woods*, defendant was arrested for possession of a controlled substance. *Woods*, 214 Ill. 2d at 460. At trial, the police officer testified to the inventory number of the packets of the alleged controlled substance. *Id*. In addition, the parties stipulated to the testimony of the forensic chemistry expert, who, if called, would have testified to the inventory number of the recovered items, that she tested the substance, and that she found it to be heroin. *Id*. at 461. After the defendant was convicted of possession of a controlled substance, he appealed, arguing for the first time that he was not proven guilty of possession of a controlled substance beyond a reasonable doubt because the State failed to establish a sufficient chain of custody for the recovered narcotics. *Id*. at 462-63. The appellate court reversed the defendant's conviction, holding that the evidence presented at the defendant's trial was insufficient to sustain the verdict because the State had failed to establish a sufficient chain of custody for the controlled substance. *Id*.

¶ 20 Our supreme court reversed the judgment of the appellate court holding that the defendant's argument was an attack on admissibility of evidence, rather than a claim against the sufficiency of the evidence. *Id*. at 471. The supreme court explained that it is because the chain of custody establishes a foundation for such evidence as reliable and admissible, but does not function as proof of the existence of an element of the crime of possession of a controlled substance. *Id*. at 473. Our supreme court further observed that, as an attack on admissibility of evidence, defendant's claim against the chain of custody was subject to the rules of forfeiture, and that defendant forfeited his chain of custody challenge regarding recovered narcotics. *Id*. at 469-70.

¶ 21 *Woods* thus established that a challenge to the chain of custody is an attack on the admissibility of the evidence, not the sufficiency of the evidence. *Id*. at 469. Similar to *Woods*, defendant here did not object to the testimony at trial and is challenging the chain of custody for the first time on appeal. Pursuant to *Woods*, we conclude that chain of custody is an evidentiary issue which is subject to forfeiture if not properly preserved for review. *Id.* at 471. To preserve a chain of custody claim, defendant must make a specific objection at trial and include the issue in a posttrial motion. *Id.* Defendant has clearly failed to do so in this case, and her chain of custody claim is procedurally defaulted. See *id.* at 473.

¶ 22 Notwithstanding, the supreme court in *Woods* recognized that under limited circumstances, a defendant may attack the chain of custody, although forfeited, if the alleged error rose to the level of plain error, *i.e.*, where there is a complete breakdown in the chain of custody such that there was no link between the substance recovered by the police and the substance tested. *Id.* at 471-72.

¶ 23 The plain-error doctrine allows a reviewing court to consider procedurally defaulted

issues where evidence at trial was closely balanced or alleged error was so prejudicial that it denied defendant a fair trial. *People v. Herron*, 215 Ill. 2d 167, 178 (2005); *People v. Lewis*, 2014 IL App (1st) 122126, ¶ 48. For a reviewing court to consider unpreserved error under the plain-error doctrine, the defendant must demonstrate both that there was plain error and either (1) that the evidence was so closely balanced that the error alone affects substantial rights or (2) a clear or obvious error occurred and that error is so serious that it affected the fundamental fairness and the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Nitz*, 219 Ill. 2d 400, 427-428 (2006); *People v. Weathersby*, 383 Ill. App. 3d 226, 231 (2008); *People v. Vasquez*, 368 Ill. App. 3d 241, 251 (2006). The defendant bears the burden under both prongs of the plain-error doctrine. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). "If the defendant fails to meet his burden, the procedural default will be honored." *Id.* The first step of a plain-error analysis is to determine whether any error occurred at all. *People v. Ramsey*, 239 Ill. 2d 342, 412 (2010).

¶ 24 In cases involving controlled substances, the rules of evidence require that before the State can introduce the results of chemical testing of a purported controlled substance, it must provide a foundation for its admission by demonstrating the police utilized reasonable protective measures to ensure that the substance recovered from the defendant was the same substance tested by the forensic chemist. *People v. Alsup*, 241 Ill. 2d 266, 274 (2001). The trial court must determine whether the State has met its "burden to establish a custody chain that is sufficiently complete to make it improbable that the evidence has been subject to tampering or accidental substitution." *Woods*, 214 Ill. 2d at 467. Once the State has established this *prima facie* case, the burden then shifts to the defendant to present actual evidence of tampering, alteration, or substitution. *Id.* at 468.

¶ 25 A defendant, however, may waive the necessity of proof of chain of custody by entering into a stipulation with respect to the evidence. *Woods*, 214 Ill. 2d at 468. A stipulation is an agreement between parties or their attorneys with respect to an issue before the court, and courts look with favor upon stipulations because they tend to promote disposition of cases, simplification of issues[,] and the saving of expense to litigants. *Id.* (quoting *People v. Coleman*, 301 Ill. App. 3d 37, 48 (1998)). The primary rule in the construction of stipulations is that the court must ascertain and give effect to the intent of the parties. *Id.* at 468-69. " 'A stipulation is conclusive as to all matters necessarily included in it,' and '[n]o proof of stipulated facts is necessary, since the stipulation is substituted for proof and dispenses with the need for evidence.' " *Id.* at 469 (quoting 34 Ill. L. & Prac. *Stipulations* §§ 8, 9 (2001)). A defendant is generally precluded from attacking or otherwise contradicting any facts to which he or she stipulated. *Id.* (citing *People v. Polk*, 19 Ill. 2d 310, 315 (1960)).

¶ 26 We observe that in *Woods*, as here, the defendant affirmatively waived his challenge by agreeing to stipulate to the chemist's testimony. *Id.* at 461. Our supreme court noted that it was the clear intent of the parties to remove from the case any dispute regarding the chain of custody. *Id.* at 474. Similarly, in *People v. Alsup*, 241 Ill. 2d 266 (2011), our supreme court held that the parties' stipulation to the forensic chemist's testimony that a " 'a proper chain of custody was maintained at all times' " "entirely removed" the chain of custody issue from consideration. *Id.* at 271, 279.

¶ 27 Turning to the instant case, we find the testimony and the stipulation at trial established the probability that the items recovered by Officers Bolten and Kubik and the items tested by Girtman were the same. The record reveals Officer Bolten testified he was tendered two clear Ziploc bags containing a white, rock-like substance (which he suspected to be cocaine) from

defendant. It is undisputed that Officer Bolten used reasonable protective measures to ensure safekeeping of the evidence from the time he seized it. According to his unchallenged testimony, Officer Bolten kept the evidence from the scene on his person, then transported it back to the police station all while maintaining it under his care, custody, and control. The two items he recovered were then provided to the inventory officer, Officer Hubbard in the presence of other officers, including Officer Kubik.

¶ 28 Officer Kubik, in turn, testified she recovered seven clear Ziploc bags containing a white, rock-like substance from the waistband of defendant's pants during a custodial search at the police station. She provided these items directly to the inventorying officer in the presence of other officers. Furthermore, Officer Kubik testified she also observed the two items recovered by Officer Bolten and that they were also packaged in clear Ziploc bags. While Officer Hubbard did not testify, a sufficiently complete chain of custody does not require that every person in the chain testify. *Woods*, 214 Ill. 2d at 467. Furthermore, absent a defendant's evidence of actual tampering, substitution or contamination, a sufficiently complete chain of custody does not require the State exclude every possibility of tampering or contamination. *Id.* Our supreme court in *Woods*, specifically stated, "It is not erroneous to admit evidence even where the chain of custody has a missing link if 'there was testimony which sufficiently described the condition of the evidence when delivered which matched the description of the evidence when examined.' " *Id.* at 468.

¶ 29 Further, the parties agreed that Girtman, an employee at the Illinois State Police crime laboratory, would have testified that she received two inventory bags in sealed condition from the Chicago police department, one containing two items and another containing seven items for a total of nine items. Girtman would have testified similarly to Officers Bolten and Kubik that

these items were a "rock-like substance" and that these items tested positive for cocaine. Importantly, Girtman would have testified that a proper chain of custody was maintained at all times and the parties stipulated to that testimony. All of this evidence, in addition to the stipulation, indicates that it was improbable that the evidence had been subject to tampering, alteration, or substitution, and therefore the State satisfied its *prima facie* case. See *Alsup*, 241 Ill. 2d at 278-79.

¶ 30 We further acknowledge that once the State has established the probability that the evidence was not compromised, and unless the defendant provides actual evidence of tampering or substitution, deficiencies in the chain of custody go to the weight, not admissibility, of the evidence. *Woods*, 214 Ill. 2d at 467. Therefore, assuming *arguendo* that the chain of custody was deficient, such a deficiency only goes to the weight of the evidence. *Id.* As this matter was tried as a bench trial, the experienced trial judge is presumed to have followed the law and to have given proper consideration to any deficiencies when weighing the evidence. *People v. Paige*, 378 Ill. App. 3d 95, 100 (2007) (citing *People v. Mandic*, 325 Ill. App. 3d 544, 546 (2001)); see *People v. Stack*, 311 Ill. App. 3d 162, 173-74 (1999). Accordingly, we presume that the trial court properly weighed the evidence in reaching the verdict.

¶ 31 Defendant disagrees that the stipulations amount to waiver and claims that she only stipulated to the introduction of the testimony but not to its truth. In *Alsup*, however, in considering a stipulation that contained similar language to the stipulation at issue here, our supreme court found that "the chain of custody issue was entirely removed from consideration by the stipulation." *Alsup*, 241 Ill. 2d at 279. Moreover, in *People v. Muhammad*, 398 Ill. App. 3d 1013 (2011), as in the case at bar, defense counsel did not challenge the chain of custody as to the drug offense or that the substance recovered was cocaine, rather defense counsel focused his

attack on the State's failure to prove a particular element of the offense. *Id.* at 1015-16. The *Muhammad* court ultimately held that the evidence, via testimony and stipulation, was sufficient to establish a chain of custody. *Id.* at 1018. The court further stated that, "It is clear from that evidence and the action of the parties in that regard that it was the parties' intention to remove the chain-of-custody issue from this case so that the more important, contested issues could be focused on." *Id*. In light of these two cases, it is apparent that defendant has "procured, invited, or acquiesced in the admission of the evidence and in any resulting error that has occurred." *Id.* at 1017; see *Woods*, 214 Ill. 2d at 475. Accordingly, we conclude that defendant has waived review of the chain of custody issue where she agreed to what she now seeks to challenge on appeal.

¶ 32 In sum, defendant's challenge to the chain of custody is not a challenge to the sufficiency of the evidence, but to the admissibility, and finding no error in the admissibility of the evidence, there can be no plain error. Moreover, defendant waived any argument regarding the chain of custody issue when she stipulated to the forensic chemist's testimony. Therefore, we affirm the judgment of the trial court.

¶ 33 CONCLUSION

¶ 34 For the reasons stated above, the judgment of the circuit court of Cook County is affirmed.

¶ 35 Affirmed.