2014 IL App (5th) 120521-U

NO. 5-12-0521

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Saline County.
	)	
v.	)	No. 11-CF-301
	)	
TEDDY R. PRICE II,	)	Honorable
	)	Walden E. Morris,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Presiding Justice Cates and Justice Spomer[1] concurred in the judgment.

ORDER

¶ 1 *Held*: Where the court did not deny the defendant's due process rights by introduction of new evidence during trial when the defendant denied the court's offered recess to review the evidence and interview the witness, and also chose not to ask for a continuance, we affirm the conviction. Where the pretrial loss or destruction of "evidence" was not material or prejudicial, we affirm the verdict.

¶ 2 The defendant seeks a new trial on the basis that the trial court denied him his due process rights. He raises two evidentiary issues on appeal. The first issue involves the

[1]Justice Spomer fully participated in the decision prior to his retirement. See Cirro Wrecking Co. v. Roppolo, 153 Ill. 2d 6, 605 N.E.2d 544 (1992).

trial court's admission of a lumber yard sales receipt that the State had not previously provided to defense counsel in discovery. The second issue involved the pretrial loss or destruction of a mason block and a photograph of a can of paint stripper. We affirm.

¶ 3 FACTS

¶ 4 The State charged the defendant with two counts of criminal damage to property, a Class 4 felony (720 ILCS 5/21-1(1)(a) (West 2010)). Two automobiles were damaged on May 28, 2011. A caustic substance was poured onto the automobiles, and windows of both automobiles were broken. Sabrina Stout and Gary Mason owned the vehicles. Sabrina Stout had dated the defendant in the past. There was considerable evidence at trial of the defendant's harassment of Sabrina following their breakup. Gary Mason was Sabrina's current boyfriend.

¶ 5 A Harrisburg police officer, Terry Sisky, went to the scene and conducted the initial investigation. He found a cement block inside one of the two cars. He believed the block may have been the object used in the crime to break out the windows. He did not mention the recovery of the block in the police report. Officer Sisky also does not know what became of the block, because the block was not maintained as a piece of evidence.

¶ 6 Detective Curt Hustedde followed up on the criminal investigation. He determined that the defendant purchased a can of paint stripper the day before the crimes from a local hardware store, Barnes Lumber. An owner of the business, Jeff Baker, knew the defendant, and was the person who sold the paint stripper to him. Baker told Hustedde that the defendant charged the stripper to his dad's account.

¶ 7 Detective Hustedde also spoke to a former female friend of the defendant, Julie Wolf, who told the detective that the defendant took a can of paint stripper to the home of her brother, Matt Denbow, for storage. The detective then went to Matt Denbow's home, to interview him about the can of paint stripper, and took a photograph of the can. Although he took a photograph of the can of paint stripper, this fact was not included in the police report. At the time of trial, the photo was missing.

¶ 8 Four months later, Detective Hustedde interviewed another former girlfriend, Shawna Mitchell, who told the detective that the defendant confessed to her that he and Julie Wolf damaged the two vehicles. Detective Hustedde went back to Julie, who when confronted with the defendant's confession to Shawna, denied that she was involved in the criminal damage. She did, however, tell the detective that the defendant told her that he had damaged the vehicles.

¶ 9 During the State's case-in-chief, it called Jeff Baker, the owner of Barnes Lumber, to testify about the transaction in which he sold the paint stripper to the defendant. The defendant charged the stripper to his father's account. Baker testified the defendant told him that he needed to strip the paint off a fender "real fast." The defendant told Baker to keep the purchase of the stripper on "the down low."

¶ 10 During the defendant's case, his attorney questioned Detective Hustedde about the can of paint stripper found at Matt Denbow's house. The implication of the questioning was that because the police found a full can of paint stripper at Matt Denbow's home after the crime was committed, and because Mr. Baker had only testified that the defendant

bought one can of paint stripper, the defendant was not the person guilty of pouring a caustic substance onto both of the victims' cars.

¶ 11 In rebuttal, the State called Jeff Baker, the Barnes Lumber owner, to testify that Barnes Lumber sold a second can of paint stripper. Jeff Baker was asked to verify the authenticity of a computerized printout. The printout reflected Barnes Lumber's inventory of paint stripper. The store purchased two cans of paint stripper on September 13, 2009. The store sold one can charged on an account on May 27, 2011, and the second can was sold as a cash sale on June 3, 2011. No information was contained in this document about the identity of the cash purchaser. Jeff Baker's earlier testimony had already established that he sold the first can of paint stripper to the defendant, who charged the item to his father's credit account at the store.

¶ 12 The defendant objected to introduction of this document as a discovery violation because it had not been previously provided in discovery. The State took the position that the question of a second can of paint stripper was made relevant by defense counsel's questioning of Detective Hustedde that a second can was seen at Matt Denbow's home. Following defense counsel's cross-examination of Detective Hustedde, the State contacted Mr. Baker over the lunch hour and had asked him to provide a document of the store's inventory which included the June 3 cash sale. The court offered the defendant and his attorney the opportunity to have a court recess to review the document, and to question Baker about the document. The defendant declined the offer. Over the defendant's objection, the document was entered into evidence.

¶ 13 The jury deliberated at the end of the trial, and rendered verdicts of guilty on both charges. The court sentenced the defendant to 30 months of probation.

¶ 14 The defendant appeals from this verdict.

¶ 15 LAW AND ANALYSIS

¶ 16 The defendant first argues that he deserves a new trial on the basis of the State's discovery violation. Initially, the defendant objected to the evidence on the basis that the State did not provide the paint stripper inventory document to him before the State sought to introduce it. He also objected to the introduction of the document on the basis that it did not meet the criteria for a record ordinarily kept in the business of Barnes Lumber.

¶ 17 When the State does not provide discovery to the defense counsel, and there is an objection to its introduction, the court may allow defense counsel the opportunity to examine the witness and evidence at issue. *People v. Pondexter*, 214 Ill. App. 3d 79, 85, 573 N.E.2d 339, 343 (1991) (citing Ill. S. Ct. R. 415(g)(i) (eff. Oct. 1, 1971)). Allowing the continuance for examination of the witness and evidence prevents surprise. *Id.* Excluding the evidence in this context does not further the goal of the search for the truth. *People v. Bagley*, 338 Ill. App. 3d 978, 982, 789 N.E.2d 860, 864 (2003). Whether the trial court orders a sanction for the discovery violation, the decision is reviewed for an abuse of discretion. *People v. Kladis*, 2011 IL 110920, ¶ 23, 960 N.E.2d 1104.

¶ 18 The issue of the existence of a second can of paint stripper was first raised at trial during the State's redirect examination of the defendant's former girlfriend, Shawna Mitchell. She testified that the defendant asked Matt Denbow to buy a second can of paint to justify where the paint stripper came from. The answer was unresponsive to the

question asked, which had been whether the defendant had admitted to her that he bought the paint stripper at the lumber yard. It was after Shawna testified that the defendant admitted that he had, that she added that he had asked Matt Denbow to go buy another can. Defense counsel then followed this up by questioning Officer Hustedde at length in its case-in-chief about the second can of paint stripper. It was at this point that the State claims that it determined to establish the existence of the second can of stripper. Jeff Baker was called as a rebuttal witness to provide the evidence about the paint stripper inventory and sales.

¶ 19 The defendant acknowledges that he was given the opportunity to examine the witness, Jeff Baker, and to examine the inventory record created. He turned down this opportunity. On appeal he argues that the opportunity would not have been helpful in this case because the State was seeking to introduce the document as a business record. The defendant argues that the record was created at the State's request, and therefore could not qualify as a regular business record. He also argues that the recess would not have been sufficient because he would have needed to examine the computer system for Barnes Lumber in order to confirm that the document really was a business record.

¶ 20 The State counters that the defendant has waived this argument because he turned down the opportunity to examine the record and the witness who could have provided the information about how the record was maintained and produced. In addition to refusing the opportunity to interview the witness and examine the document, the defendant did not ask the court for a continuance. Failure to use the corrective actions offered by the court, and failure to request a continuance, results in forfeiture of any claimed error. *People v.*

Hood, 213 Ill. 2d 244, 262-63, 821 N.E.2d 258, 268 (2004); *People v. Washington*, 182 Ill. App. 3d 168, 174, 537 N.E.2d 1354, 1358 (1989).

¶ 21 We agree with the State that the defendant forfeited the right to argue this issue because he was given an opportunity to learn all that was needed to cross-examine Jeff Baker about this business record. We also agree that there would have been no point in allowing the defendant to examine the computer used by Barnes Lumber. First of all, defense counsel did not seek the continuance which could have afforded him the time to do so. Furthermore, the rules of evidence are not supportive of this type of investigation. Rule 803 allows business records to be presented as a hearsay rule exception if the record is kept in the regular course of business activity, and if it was the regular practice of that business activity to create such a record. Ill. R. Evid. 803 (eff. Jan. 1, 2011). All that is required to establish that the record is a business record and qualifies as an exception to the hearsay rule is the testimony of the records custodian or other qualified witness. Ill. R. Evid. 803(6) (eff. Jan. 1, 2011). There was no need to go beyond an inquiry of Jeff Baker, as an owner of the business and the person in charge of records management. Finally, the State's obligation to produce discovery records is limited to records that amount to favorable material evidence to an accused. *People v. Guest*, 115 Ill. 2d 72, 87, 503 N.E.2d 255, 267 (1986). A record of sale of a can of paint stripper one week after the crimes were committed is not a favorable piece of defensive evidence, and the defendant does not argue that it was.

¶ 22 The defendant next argues he was denied due process of law due to the loss of two pieces of evidence: the mason block apparently thrown through the vehicle windows, and

the photograph of the can of paint stripper Detective Hustedde found at Matt Denbow's home.

¶ 23 The State's failure to disclose potentially exculpatory evidence constitutes a due process violation regardless of whether the State's intent was good or bad. *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988). However, failure to preserve evidence only amounts to a due process violation if the State's intentions were bad. *Id.* at 57-58. Once the evidence is lost, courts struggle with determining if the evidence at issue was exculpatory. *Id*. Courts are unwilling to mandate that police agencies retain and preserve every conceivable piece of evidence. *Id.* at 58.

¶ 24 The defendant contends that the fact that the police possessed the two items at some point during the investigation equates to a conclusion that the items must have been exculpatory. The defendant provides no explanation of this theory. We conclude that the argument is without merit. Numerous items are gathered during the course of a criminal investigation. Most of the items are collected with the goal of inculpation–not exculpation. There is no automatic legal understanding that if evidence is collected, it must be exculpatory in nature. Some items are simply not considered important in the course of an investigation.

¶ 25 In this case, the cement block may very well have been the item used to break out the windows; however the State was not required to prove the method used. The State only had to establish that the defendant broke the vehicle windows.

¶ 26 The photograph of the paint stripper can found at Matt Denbow's home was not a critical piece of evidence. Testimony and documentary evidence adduced at trial

established that the can of paint stripper at Matt Denbow's home was purchased after the crimes were committed.

¶ 27 We reviewed the record and conclude that the loss of both pieces of evidence was inadvertent, and therefore not in bad faith. Accordingly, we find that the defendant's due process rights were not violated by the inadvertent loss of the two items of evidence.

¶ 28 CONCLUSION

¶ 29 For the foregoing reasons, we affirm the sentence of the Saline County circuit court.

¶ 30 Affirmed.