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2014 IL App (4th) 120802-U

NO. 4-12-0802

FILED
February 6, 2014
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from
Plaintiff-Appellee,	) Circuit Court of
v.	) Macon County
DARRIUS D. CLIFF,	) No. 11CF1681
Defendant-Appellant	)
	) Honorable
	) Robert C. Bollinger,
	) Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Harris and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court did not err in admitting evidence regarding the use of the Emergency Response Team in executing the search warrant as it was relevant in part and not unfairly prejudicial.

(2) The testimony regarding what a "stash house" is was not relevant to prove an element of the offense of possession in this case, but such testimony does not rise to the level of plain error.

¶ 2 In June 2012, a jury found defendant, Darrius D. Cliff, guilty of unlawful possession of a controlled substance (less than 15 grams of cocaine) (720 ILCS 570/402(c) (West 2010)) and possession of firearm ammunition without a firearm owner's identification (FOID) card (430 ILCS 65/2(a)(2) (West 2010)). In August 2012, the trial court sentenced defendant to 18 months' probation. Defendant appeals, claiming he was denied a fair trial because the court improperly admitted "irrelevant and prejudicial testimony depicting him as a dangerous drug

dealer." Specifically, defendant takes issue with the testimony elicited regarding (1) the use of the Emergency Response Team (ERT) and (2) what a "stash house" is. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In December 2011, following the execution of a search warrant, the State charged defendant by information with unlawful possession of a controlled substance (less than 15 grams of cocaine) (720 ILCS 570/402(c) (West 2010)) and possession of firearm ammunition without a FOID card (430 ILCS 65/2(a)(2) (West 2010)). During defendant's June 2012 jury trial, the following evidence relevant to this appeal was introduced.

¶ 5 On November 18, 2011, at 4 a.m., the Decatur ERT, comprised of 11 armed police officers, executed a search warrant on 952 East Johns Street in Decatur. The ERT gained entry into the residence by breaking down the door with a battering ram. They located defendant, who was named on the search warrant, in the basement bedroom where he was handcuffed and placed under arrest.

¶ 6 During the search, police officers seized the following evidence: (1) a box of ammunition from a shelf near defendant's bed; (2) the corner of a plastic sandwich bag containing suspected cocaine residue from a shelf near defendant's bed; (3) the corner of a plastic sandwich bag containing suspected cocaine residue from a kitchen garbage can located on the main floor; (4) $426 in currency from a dresser located in the northeast bedroom on the main floor; (5) a "hitter pipe," commonly used to smoke cannabis, from a dresser drawer located in the northeast bedroom on the main floor; (6) $170 in currency from a purse located in the northeast bedroom; (7) a digital scale from a shelf located in the living area of the basement; (8) $320 in currency from a drawer in a coffee table located in the living area of the basement; (9) a box of plastic sandwich bags located on top of the coffee table; (10) a razor blade located inside the box

of plastic sandwich bags; and (11) defendant's driver's license, listing his address as 952 East Johns Street, from the top of the coffee table and located approximately one inch from the box of sandwich bags.

¶ 7 The white powder residue contained in the plastic bags tested positive for cocaine, as did the razor blade, while the digital scale tested positive for cocaine base and cannabis residue. Defendant's fingerprints were not found on any of the items seized from the residence. Police officers did not locate a FOID card issued to defendant during their search. Defendant's mother, whose bedroom was located in the northeast corner of the house on the main floor, testified the dresser and the "hitter pipe" found there belonged to defendant's father.

¶ 8 Sergeant Toby Williams, the ERT's team supervisor, testified to the purpose and function of the ERT as follows:

> "Anytime you're going to use an ERT, [Special Weapons and Tactics (SWAT)] team, anything of that nature, there's got to be something out of the ordinary, something fairly serious whether it's weapons, whether the suspects have a propensity of violence to fight or whether there could be fortifications, doors, fortified windows, fortified something that would make entry difficult for the regular narcotic unit or just other officers or something similar to if they have an aggressive dog, something like that. This one, I believe, the occupant—[.]"

Defense counsel objected as to relevance, asserting Williams' testimony regarding why his services were needed on this occasion was not relevant to the charged offenses. The prosecutor

responded he was not going to go into the specific reasons the ERT was used in this case and the trial court overruled the objection.

¶ 9 Following the trial court's ruling, the following colloquy between the prosecutor and Sergeant Williams ensued:

> "Q. How are you deployed?
>
> A. We have [Battle Dress Uniforms] or camouflage attire, like, very similar to military attire. We all have a raid vest that's black in color and it's got several police markings all over them. Then you wear your tactical gear so you have your side arm. Your tactical gear goes farther down on your hip. It's on your leg. And then whoever gets assigned a rifle or a long gun, usually we try to assign with two men teams. We try to assign one person with a pistol and one person with a long gun. That way, if you come across someone, the person with the long gun can cover them while the person with the pistol can holster up and go hands on, if necessary, to take that person in custody.
>
> Q. You're also carrying tasers and other devices?
>
> A. Tasers and other devices."

There was no further objection by defense counsel to this line of questioning.

¶ 10 Officer Semaj Allen also testified, without objection, regarding the ERT as follows:

> "Q. What is the Emergency Response Team?

> A. It's what commonly people know as a SWAT team. We respond to emergency situations, hostage, barricade situations. We also assist in the execution of high risk search warrants."

Officer Allen testified he knocked on the door of the house and announced the police department's presence. When no one answered the door after 10 seconds, Allen used a tool to pry open the screen door and his team partner then used a battering ram to open the main door.

¶ 11 Scott Rosenbery, a detective in the Decatur police department's street crimes unit, testified, over defense counsel's relevance objection, as follows:

> "Prior to executing a search warrant, if we believe that the individual listed on the search warrant meets certain, what we feel, criteria that would maybe compromise our safety without using a tactical unit like the [ERT], we will then use them. In this situation, we utilized the [ERT] and that is whenever I notified Sergeant Williams. Then I then briefed him on what information I had on the individual listed on this search warrant at 952 East Johns, Darrius Cliff."

¶ 12 The prosecutor attempted to tender Officer Chad Ramey as an expert in the field of narcotics distribution. Outside the presence of the jury, the prosecutor asserted, "We're here to talk about the packaging, we [are] here to talk about the razor blade, we're here to talk about residue and we're here to talk about operations of what a stash house could or could not be." Defense counsel objected, arguing defendant was only charged with possession, not possession with the intent to deliver, and any testimony portraying defendant as a "drug dealer" would be more prejudicial than probative. While the prosecutor acknowledged defendant was only

charged with possession, he argued the proffered testimony would assist the trier of fact, explaining, "[t]he State's theory of this case boils down to the fact, we believe Mr. Cliff was selling cocaine. We believe that he just ran out [of cocaine] when they did the search warrant. That's our theory. Now is he charged with intent, no." The trial court sustained defense counsel's objection, noting intent was not an element at issue in this case, thus the probative value of the proffered testimony was substantially outweighed by the danger of unfair prejudice. However, the court limited its ruling to Ramey being tendered as an expert, and advised the prosecutor he could question Ramey consistent with earlier testimony regarding the seizure of "the scale, the pipe, the razor blade, [and sandwich bags.]"

¶ 13 Later in his questioning of Officer Ramey, the prosecutor asked, "What's a stash house?" Defense counsel objected to relevance and a sidebar was held, after which the trial court overruled the objection. (The issue(s) discussed during the sidebar are not included in the record before us.) Ramey testified as follows:

> "[A] stash house is a term that's come around. It's when I—back when we first started doing drug cases and even before my time, we used to find everybody would have their money, their drugs, the firearms[,] the scales. Everything that they would have for drug sales, they would have it right there with them. Throughout the time, everybody's got a little smarter. They keep money at one location ***. They may keep drugs or money in a different location. They may not have firearms with them. Not all dealers have firearms either. *** But the stash house may be a spot where they keep that money, the drugs, whatever it may be, other items

> that they purchased, things like that. That way if they're caught by us, we don't find everything that they have. That's why sometimes we get—[.]"

Defense counsel objected to the narrative form at this point, and the trial court sustained the objection.

¶ 14 At the close of evidence, the jury found defendant guilty of the charged offenses.

¶ 15 In July 2012, defendant filed a posttrial motion asserting, in relevant part, the trial court erred in allowing testimony regarding the details of the search warrant and its execution. Specifically, defendant alleged "the testimony elicited from Sergeant Tobie [*sic*] Williams as to why the ERT was used was irrelevant and more prejudicial than probative." During the August 2012 hearing on the motion, defense counsel also argued the "stash house" testimony had an "overwhelmingly prejudicial effect." The trial court denied the motion, finding the testimony concerning the ERT "had some relevancy to show the jury why these various officers were at the home and to an understanding of why they were there and how they would have had encounters here with the defendant or the other physical evidence that was identified on the premises." The court further stated the probative value of the evidence was not "substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury." Additionally, the court found the "stash house" testimony was not unfairly prejudicial. The court sentenced defendant to 18 months' probation.

¶ 16 This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 On appeal, defendant claims he was denied a fair trial because the court improperly admitted "irrelevant and prejudicial testimony depicting him as a dangerous drug

dealer" when he was charged only with possession. Specifically, defendant takes issue with the testimony elicited regarding (1) the use of the ERT and (2) what a "stash house" is. While defense counsel objected to some testimony on relevancy grounds, the State contends defendant forfeited any issue regarding the (1) ERT testimony by failing to object contemporaneously on the ground of unfair prejudice at trial; and (2) "stash house" testimony by failing to include it in his posttrial motion.

¶ 19 A. Standard of Review

¶ 20 The determination of whether evidence is relevant is within the sound discretion of the trial court and will not be reversed absent a clear abuse of such discretion. *Bachman v. General Motors Corp*., 332 Ill. App. 3d 760, 797-98, 776 N.E.2d 262, 295 (2002). "An abuse of discretion will be found only where the trial court's decision is arbitrary, fanciful or unreasonable or where no reasonable man would take the trial court's view." (Internal quotation marks omitted.) *People v. Morgan*, 197 Ill. 2d 404, 455, 758 N.E.2d 813, 842-43 (2001) (quoting *People v. Illgen*, 145 Ill. 2d 353, 364, 583 N.E.2d 515, 519 (1991)).

¶ 21 B. Forfeiture

¶ 22 To preserve an issue for appellate review, a defendant must (1) object at trial and (2) file a written posttrial motion raising the issue. *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1130 (1988). Further, "a specific objection waives all other unspecified grounds." *People v. Cuadrado*, 214 Ill. 2d 79, 89, 824 N.E.2d 214, 220 (2005).

¶ 23 In this case, defense counsel objected to the following during the trial: (1) Sergeant Williams' testimony regarding the purpose and function of the ERT on the grounds of relevance (overruled); (2) the prosecutor's attempt to tender Officer Ramey as an expert in the field of narcotics distribution on the grounds such testimony would be more prejudicial than

probative because it would portray defendant as a "drug dealer" (sustained); (3) the prosecutor's "[w]hat's a stash house?" question directed at Ramey on the grounds of relevance (overruled); and (4) Ramey's testimony about the characteristics of a "stash house" (after the relevance objection was overruled) on the grounds of Ramey's narrative response (sustained).

¶ 24 Because defense counsel objected to the ERT and "stash house" testimony on relevance grounds only, defendant has forfeited any claim of unfair prejudice as a result of this testimony on appeal. We note defendant cites *People v. Wheeler*, 226 Ill. 2d 92, 132, 871 N.E.2d 728, 750 (2007), for the proposition the issues of relevance and prejudice are intertwined because a trial court *must* reject proffered evidence on the grounds of relevance if it presents a risk of unfairly prejudicing the trier of fact. However, *Wheeler* actually holds a trial court *may, in its discretion* " 'reject offered evidence on the grounds of irrelevancy if it has little probative value due to its remoteness, uncertainty, or possibly unfair prejudicial nature.' " *Id*. at 132, 871 N.E. 2d at 750 (quoting *People v. Harvey*, 211 Ill. 2d 368, 392, 813 N.E.2d 181, 196 (2004)). Further, while defendant asserts in addition to the repeated relevance objections, counsel also argued the prosecutor's portrayal of defendant as a "drug dealer" was "more prejudicial than probative," we note the one objection defense counsel made regarding prejudice pertained to the State's attempt to qualify Officer Ramey as an expert in narcotics distribution, not the ERT testimony. Thus, defendant's failure to contemporaneously object to the ERT or "stash house" testimony on prejudice grounds results in forfeiture of those issues.

¶ 25 The State also argues forfeiture of the "stash house" issue on the basis defendant failed to raise the issue in his written posttrial motion. However, defense counsel raised the issue at the hearing on the posttrial motion, the State did not object, and the trial court actually ruled on the matter. We decline to find forfeiture on this basis.

¶ 26 Although defendant does not request this court to consider the ERT testimony under the doctrine of plain error, he does assert the "stash house" testimony amounted to plain error. In the pursuit of justice, we will consider both.

¶ 27 C. Plain Error

¶ 28 Pursuant to Illinois Supreme Court Rule 615(a) (eff. Jan. 1, 1967), "[p]lain errors or defects affecting substantial rights may be noticed [by a reviewing court] although they were not brought to the attention of the trial court. " Our supreme court explained in *People v. Herron*, 215 Ill. 2d 167, 186-87, 830 N.E.2d 467, 479-80 (2005):

> "[T]he plain-error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error 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. In the first instance, the defendant must prove 'prejudicial error. ' That is, the defendant must show both that there was plain error and that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him. The State, of course, can respond by arguing that the evidence was not closely balanced, but rather strongly weighted against the defendant. In the second instance, the defendant must prove there was plain error and that the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. [Citation.] Prejudice to the defendant is presumed because of the importance of the right

> involved, ' *regardless* of the strength of the evidence.' (Emphasis in original.) [Citation.] In both instances, the burden of persuasion remains with the defendant."

Before conducting a plain-error analysis, this court first determines whether an error occurred at all. *People v. Glasper*, 234 Ill. 2d 173, 203-04, 917 N.E. 2d 401, 419 (2009).

¶ 29 Evidence is relevant if it has any tendency to make any element of the offense more or less likely to be met than it would be without the evidence. *Morgan*, 197 Ill. 2d at 455-56, 758 N.E.2d at 843. "[R]elevant evidence is inadmissible only if the prejudicial effect of admitting that evidence *substantially outweighs* any probative value." (Emphasis in original.) *People v. Pelo*, 404 Ill. App. 3d 839, 867, 942 N.E.2d 463, 487 (2010).

¶ 30 1. *ERT Testimony*

¶ 31 During the hearing on defendant's posttrial motion, the trial court concluded the ERT testimony "had some relevancy to show the jury why these various officers were at the home and to an understanding of why they were there and how they would have had encounters here with the defendant or the other physical evidence that was identified on the premises." Further, it noted the evidence was not "substantially outweighed by the danger of unfair prejudice." Additionally, as the State points out, during the hearing on defendant's posttrial motion, defense counsel argued defendant was unfairly prejudiced from evidence regarding how the ERT entered the house. The trial court asked counsel "what testimony was objected to on that issue," noting the only objection at trial pertained to the relevance of why the ERT was called in. Counsel responded the "military tactics" used by the ERT suggested the police considered him to be a violent or dangerous person. However, the court noted counsel failed to articulate "those types of [prejudicial] arguments" during trial and rejected counsel's insistence

he had approached the bench and argued the evidence was being used to portray defendant as a dangerous and violent person. The court further stated despite its instruction to the attorneys to place any sidebar arguments "on the record," no record was made of defense counsel's alleged arguments pertaining to prejudice.

¶ 32 The testimony regarding the use of the ERT in this case is similar to the testimony elicited in *People v. Orr*, 149 Ill. App. 3d 348, 364-65, 500 N.E.2d 665, 677 (1986). In that case, the defendant argued it was reversible error for a police officer to testify "a backup unit was called when defendant was about to be arrested, and that two officers went to the front door of the building where defendant was located and two officers went to the back door of the building." *Id*. According to the defendant, the State elicited such testimony "to create the impression that the police had to 'surround' the house in which defendant was situated because the defendant was a 'dangerous felon from whom the police expected resistance.' " *Id*. at 365, 500 N.E.2d at 677. The *Orr* court found no reversible error because the "testimony regarding the circumstances of the defendant's arrest *** was an integral part of the narrative of the police investigation of the crime which led to the defendant's arrest." *Id*. In so holding, the court found it significant the prosecutor did not make reference to this evidence in closing argument to show the defendant was a dangerous felon. *Id.*

¶ 33 As in *Orr*, the ERT testimony in this case concerned the circumstances leading to defendant's arrest and the charges filed against him. The use of the ERT made it less likely any contraband could be moved prior to the ERT's entry into the house and, thus, more probable the evidence seized from the house belonged to defendant. In addition, counsel only objected to the relevancy of Williams' testimony about why his services were needed on this occasion. Williams was there to assist with the execution of the search warrant. The trial court correctly overruled

counsel's relevancy objection at that point. When Williams gave other arguably irrelevant testimony about how the ERT team is deployed, that they carry tasers, etc., no objection was made. While the State mentioned to the trial court its theory was defendant was a drug dealer, this comment was made outside the presence of the jury. Further, the prosecutor did not refer to the ERT evidence in his closing argument.

¶ 34 Defendant asserts his case is analogous to *People v. Harbold*, 124 Ill. App. 3d 363, 384, 464 N.E.2d 734, 750 (1984), where the defendant's right to be judged solely on the crime charged, *i.e.*, stabbing a man to death, was violated when the prosecutor elicited testimony a gun was found in defendant's residence on the basis he believed the testimony was "indicative of the type of person [defendant was]." We disagree. Here, the ERT evidence was introduced as part of the narrative to show how the police were involved, how the search was conducted, and to bolster the circumstantial evidence found in the home. The ERT evidence, at least in part, was relevant, and any prejudice resulting from portions that were arguably irrelevant did not impact the outcome of the trial nor affect the fairness of defendant's trial. Thus, we find no plain error.

¶ 35 2. *"Stash House" Testimony*

¶ 36 Defendant also asserts the prosecutor's consistent tactic of portraying him as a dangerous drug dealer was exacerbated by testimony that implied defendant "may have kept drugs and weapons in a 'stash house' to avoid detection" and falls under the second prong of the plain-error doctrine.

¶ 37 Defendant was charged only with possession of a controlled substance and ammunition without a FOID card. We are not persuaded by the State's argument the "stash house" testimony was relevant to "bolster the circumstantial evidence of knowledge by explaining the lack of bagged cocaine and firearms in the residence." Although the State's

"theory of the case" may have been defendant was a drug dealer who ran out of cocaine, defendant was not charged with intent to deliver and this theory was not before the jury. Based on our review of the record, however, any error in allowing the "stash house" testimony did not rise to the level of plain error.

¶ 38 Under the second prong of the plain-error analysis, "the defendant must prove there was plain error and that the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *Herron*, 215 Ill. 2d at 187, 830 N.E.2d at 479-80. Officer Ramey's testimony described what a "stash house" was, but he did not opine defendant's house was a "stash house" nor did he state defendant had stashed his drugs and guns elsewhere. The trial court sustained defendant's objection to Ramey's narrative, and by doing so, limited the scope of the testimony, thus reducing any impact from the error. We find such testimony was not so prejudicial as to affect the fairness of defendant's trial.

¶ 39 III. CONCLUSION

¶ 40 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 41 Affirmed.