2016 IL App (3d) 130641-U
(Consolidated with 130642)

Order filed July 15, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2016

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. LARNELL T. WESTON, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois, Appeal No. 3-13-0641 Circuit No. 11-CF-349 Honorable Amy Bertani-Tomczak, Judge, Presiding.

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. TERNELL L. WESTON, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois, Appeal No. 3-13-0642 Circuit No. 11-CF-350 Honorable Clark Erickson, Judges, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justice Holdridge concurred in the judgment.
Justice Wright dissented.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion by admitting DNA evidence found on a facemask. Defendants were proven guilty beyond a reasonable doubt, and trial counsel provided reasonable assistance.

¶ 2 Defendants, Larnell Weston and Ternell Weston, appeal from their convictions for home invasion, armed robbery, and residential burglary. On appeal, defendants argue: (1) the State failed to prove their guilt beyond a reasonable doubt; (2) the trial court erred in admitting certain DNA evidence; and (3) their trial counsel was ineffective for failing to present exculpatory evidence. We affirm.

¶ 3 BACKGROUND

¶ 4 Following a February 19, 2011, incident, the State charged three men, Larnell Weston, Ternell Weston, and Raunchino James, with home invasion, armed robbery, and residential burglary. The bill of indictment specifically indicated that the defendants, while armed with a dangerous weapon, knowingly entered the home of, and took United State currency from, the victim, Dorothy Fullilove. All three defendants retained the same attorney and opted for a joint bench trial. The trial court found each defendant guilty of the three charged offenses. This appeal involves the consolidated appeals of Larnell Weston and Ternell Weston.

¶ 5 At the defendants' December 2012 bench trial, the State called the victim, Dorothy Fullilove, as its first witness. Fullilove testified that she lives at 617 Gordon Terrance in University Park, Illinois, with her 12-year-old son, Michael. At approximately 1:15 a.m., she heard banging on the door and loudly asked who was there. The men responded by yelling "the police" and abruptly entered her home. She saw three men dressed in black-hooded sweatshirts coming toward her with guns. Each man wore a facemask, which Fullilove described as tight, black cotton ski masks that pull over the face. The men told her to "just shut up" and tell them "where the money at." She obliged by giving them ten $20 bills from her dresser. The men also

took a few other items, including a camcorder, a laptop, and her son's Xbox, which was in a Chicago Bears backpack.

¶ 6 While the men were still in her home, Fullilove was able to reach her cell phone and call the police. When the men heard her dial 911, they fled out the back door. Fullilove briefly followed the men and saw them run into the woods located just west of her home. She did not make an in-court identification of defendants as the men she saw fleeing her house.

¶ 7 Officer McMahon of the Crete police department testified that he was dispatched to the scene at 1:28 a.m. When he arrived, he set up a perimeter at the 700 block of Sandra Lane in University Park around the forest preserve. While in this position, he heard footsteps and/or leaves and branches breaking to the south of his location. He turned around and saw three men wearing all black clothing. McMahon first identified himself as police and asked the subjects to stop. The subjects did not stop. Again, McMahon identified himself and commanded the subjects to stop. At this point, the three men ran away and up apartment complex stairs at 717 Sandra Lane. McMahon waited for backup before entering the apartment complex. McMahon did not make an in-court identification of defendants as the men he watched run up the apartment stairs.

¶ 8 Two additional University Park police officers, Officer Glowinke and Officer Gillespie, arrived at the apartment complex at approximately 2:10 a.m. to assist Officer McMahon. Together, McMahon and Glowinke knocked on several apartment doors. At the fourth apartment, Roger Allen, a relative of defendant Raunchino James, allowed the officers to enter his apartment. Once inside, the officers found three other men wearing dark colored clothing in Allen's living room. McMahon observed leaves and branches in one of the subject's hair, but did not recall seeing any dirt or tracks on the stairs leading to the apartment. He could also see

perspiration on the mens' foreheads.

¶ 9 University Park police officer Dalian Pearman testified that he was the booking officer that night and inventoried the currency found on the three suspects. He collected $82 from defendant James's wallet, $60 from Ternell's pocket and $60 from Larnell's sweatpants. Pearman secured the currency as evidence by placing it in a sealed evidence envelope. The currency included ten $20 bills and two $1 bills for a total of $202. When Officer Pearman opened the exhibit and counted the money on the witness stand, he found ten $20 bills, two $1 bills and four $5 bills, for a total of $222 in the sealed evidence envelope.

¶ 10 University Park police officer Scott Glowinke took the witness stand next. Glowinke testified that Officer Pearman found the Chicago Bears backpack containing an Xbox across the street in the woods near 721 Wright Road. According to Glowinke, with the assistance of a police canine, the officers also located two bulletproof vests. Glowinke identified the two vests, which he personally recovered in the woods, in court as well as his signature and handwriting on the evidence tape for the packaging on the exhibit containing the vests.

¶ 11 According to Officer Glowinke, after retrieving the vests in the woods, he assisted Officer McMahon when searching the apartments and was with McMahon when a resident gave permission for the officers to enter an apartment. Once inside the apartment, the officers observed three subjects dressed in all black clothing. Their clothes and shoes appeared to have dirt on them. Glowinke believed that the subjects may have been running shortly before the officers entered the apartment. Officer Glowinke made an in-court identification of Raunchino James as one of the men that were present in Allen's apartment, but could not distinguish between Ternell Weston and Larnell Weston for purposes of the in-court identification.

¶ 12 After assisting Officer McMahon, Officer Glowinke went back to the woods to conduct

another search of the area. During that search, Glowinke found three loaded pistols and a camcorder. Glowinke documented the serial numbers from the guns, and stored them in evidence. After he and the other officers removed the subjects from the apartment at 717 Sandra Lane, they conducted a search of the area behind the apartment where the defendants were located. During this subsequent search, the officers found a black facemask outside the building at 701 Sandra Lane. Glowinke placed this black facemask in a bag, but did not seal, sign, or date the bag for evidence. According to Glowinke, he delivered the facemask to the investigations department on February 19, 2011. After turning the facemask over to the investigations department, he observed Deputy Chief Box handle the facemask with his bare hands while showing the facemask to Fullilove at the station. At trial, Glowinke identified the facemask as the one he had recovered from the scene in February 2011.

¶ 13 The trial court admitted the bag containing the facemask into evidence as People's exhibit No. 11. The first signature on the exhibit is that of Investigator Jermaine Jones, bearing a date of July 14, 2011. When Jones took the stand, he testified that he had signed and dated the bag containing the facemask in July because it had not previously been sealed, or signed by any other officer. He testified that a different police officer had placed the tape on the bag, but that he had signed and dated it. Jones believed that it was Officer Glowinke who had placed the evidence tape on the bag. Jones then testified to his procedure in obtaining, sealing, and transporting the defendants' DNA samples. On July 14, 2011, Jones delivered the defendants' DNA samples and the recovered pistols, vests, camcorder, and facemask to the Illinois Crime Lab for analysis. Wilber Wilkins, a latent fingerprint expert, testified that he recovered no fingerprints or palm prints from the guns, their ammunition, or the camcorder.

¶ 14 Before the State's DNA expert, Kelly Krajnik, could testify, defense counsel objected to

the introduction of the facemask and publication of the DNA test results pertaining to the facemask, due to an insufficient chain of custody on the facemask itself. The State argued that while the chain of custody was problematic, the trial court should admit the facemask and DNA test results because the defendants would be able to address any gaps in the chain of custody during cross-examination. The court stated that the defense objection "go[es] more to weight, as opposed to admissibility" and took the issue under advisement before allowing the State to present Krajnik's testimony concerning the DNA test results.

¶ 15 During her direct examination, Krajnik relied on her lab report and testified that a major DNA profile matching Ternell's DNA was found on the facemask, together with other minor DNA profiles. On cross-examination, defense counsel questioned Krajnik about the likelihood of DNA transfers to the facemask. Krajnik agreed that the minor profiles on the facemask indicated that another person may have used or handled the same facemask. Krajnik clarified that a major profile such as Ternell's, results from vigorous interaction with an item that consists of more than merely touching the item.

¶ 16 Krajnik's lab report also documents test results showing one single male major DNA profile common to both bulletproof vests and the camcorder. According to the lab report, the single major male profile found on both vests and the camcorder was common to all three items and did not match any of the three defendants. The State tendered Krajnik's lab report to defense counsel in May of 2012. At trial, neither the State nor defense counsel asked Krajnik any questions about the DNA evidence pertaining to the bulletproof vests and camcorder found in the woods, or the major DNA profile common to those items that did not match the defendants' DNA samples. At the conclusion of the State's case, the trial court denied the defendants' motion for a directed finding.

¶ 17 In the defendants' case-in-chief, defense counsel introduced the video of the victim interviews. After reviewing these videos, the trial court reviewed the evidence and found all three men guilty as charged.

¶ 18 During the trial court's ruling, it first observed that the State's evidence was circumstantial. However, the court noted that the cumulative circumstantial evidence established defendants' guilt. The court focused on the suspicious behavior of a group of three men running from police, the discovery of a group of three men in a nearby apartment, the discovery of the stolen Chicago Bears backpack containing the Xbox found between the victim's home and the apartment complex, and the discarded facemask near the apartment containing Ternell's DNA, before concluding the State met its burden of proof beyond a reasonable doubt for each defendant.

¶ 19 On January 29, 2013, defendants filed a motion for new trial based on a lack of actual defendant identification and nexus to the crimes. After arguments, on August 26, 2013, the court denied defendants' motion. Defendants filed a timely notice of appeal.

¶ 20 ANALYSIS

¶ 21 Because defendants are challenging the sufficiency of the evidence used to support their convictions, we will first address whether the trial court erred in admitting the facemask containing Ternell's DNA into evidence. Defendants claim the State failed to show that the police took reasonable measures to protect the mask from contamination and, therefore, this court should reverse their convictions and/or grant them a new trial.

¶ 22 At the onset, the State contends that the defendants' failure to require the trial court to announce a ruling on their objection to the DNA evidence forfeits the DNA issue for purposes of this appeal. After our careful review of the record, we reject the State's position.

¶ 23 At trial, defense counsel strongly opposed the admission of the facemask and DNA evidence gathered from the facemask based on the State's incomplete chain of custody. We recognize that the trial court did not clearly rule on the objection but, rather, took the matter under advisement before allowing the DNA expert to testify to the conclusions set out in her report. Nonetheless, it is clear from the record that the court admitted the DNA evidence over defense counsel's objection because the court relied on the DNA evidence to support its findings of guilt. Accordingly, we will address the merits of defendants' claim.

¶ 24 When the State seeks to introduce an object into evidence, it must lay a proper foundation either "through its identification by witnesses or through a chain of possession." *People v. Stewart*, 105 Ill. 2d 22, 59 (1984). The character of the object the State seeks to introduce determines which method of establishing a foundation the State must employ. *People v. Woods*, 214 Ill. 2d 455, 466 (2005). If an item is "readily identifiable and [has] unique characteristics, and its composition is not easily subject to change," the party may elicit testimonial evidence showing that the item is the same item recovered and that it is in substantially the same condition as when it was recovered. *Id.* Where an object is sufficiently unique in character to be susceptible to sight identification, proof of a chain of custody is not a prerequisite to its admissibility. *People v. Gilbert*, 58 Ill. App. 3d 387, 390 (1978) (citing *People v. Nemke*, 46 Ill. 2d 49 (1970)). However, if the evidence is "not readily identifiable or may be susceptible to tampering, contamination or exchange," the party must establish a sufficient chain of custody. *Woods*, 214 Ill. 2d at 467.

¶ 25 In the case at bar, we conclude that the State established a sufficient foundation for admission of the facemask through witness identification. At trial, Officer Glowinke testified that the facemask introduced by the State containing Ternell's DNA was the same facemask he

had placed into an evidence bag in February 2011. Defense counsel objected to introduction of the mask on the ground that the State could not show a sufficient chain of custody; the bag containing the facemask remained unsealed for a period of approximately five months. However, as mentioned above, the State does not need to show a chain of custody if the object it seeks to admit is readily identifiable and its composition is not easily subject to change. *Id*. at 466.

¶ 26 Unlike physical evidence recovered during a narcotics investigation, which may be susceptible to tampering, contamination, or exchange, items of clothing generally contain unique characteristics making them readily identifiable. See, *e.g.*, *People v. Morris*, 2013 IL App (1st) 111251, ¶¶ 85-87 (finding a sufficient foundation where the defendant's pants and boots were readily identifiable by unique characteristics and four witnesses identified the items as belonging to the defendant); *People v. Gilyard*, 124 Ill. App. 2d 95, 105 (1970) (finding a sufficient foundation where witnesses identified hat and gloves found at the crime scene as those worn by defendant during the crime); *People v. Kristovich*, 32 Ill. App. 3d 979, 985 (1975) (finding a sufficient foundation where a witness identified clothing exhibits as her own); c*f. Woods*, 214 Ill. 2d at 466-67 (noting that the State was required to establish a chain of custody for recovered packets of heroin).

¶ 27 Because Officer Glowinke distinctively identified the facemask in this case as the same facemask that he recovered from the scene (and because defense counsel never made any argument to the contrary), we conclude that the trial court did not err when it allowed the facemask into evidence. See *People v. Gilbert*, 58 Ill. App. 3d 387, 390 (1978) (citing *People v. Nemke*, 46 Ill. 2d 49 (1970)) (where defense counsel has not presented any evidence of tampering, alteration, or substitution and the witness's identification has not been impeached, the

evidence is admissible). The sloppy handling of this piece of evidence by the police does not explain the fact that defendant's DNA was on it.

¶ 28 Nevertheless, even if we were to assume that the mask was improperly admitted, no reasonable probability exists that defendants would have been acquitted without the error. See *In re E.H.*, 224 Ill. 2d 172, 180 (2006); *In re April C.*, 326 Ill. App. 3d 245, 261-62 (2001) (An "error in the exclusion or admission of evidence is harmless and does not require reversal if there has been no prejudice or if the evidence has not materially affected the outcome of the trial.").

¶ 29 The evidence presented at trial was that at 1:15 a.m., three black men in black clothing and ski masks abruptly entered Fullilove's home. While inside the house, the men pointed their guns at Fullilove and her son and took several items and ten $20 bills from Fullilove's dresser. Following the incident, Fullilove saw the men run into the woods behind her house.

¶ 30 The police set up a perimeter around the woods and at 1:28 a.m., Officer McMahon located three men wearing all black clothing walking in the area of the perimeter. When Officer McMahon asked the men to stop, they ran into a nearby apartment complex and up the stairs. The police subsequently located three men in dark clothing (the defendants) in one of the upstairs apartments at the apartment complex. Officer McMahon testified the men were sweating and one of them had leaves and branches in his hair. Officer Glowinke testified the men seemed out of breath and had dirt on their clothes. The police recovered ten $20 bills from the mens' pockets, and other stolen items were located in the woods between Fullilove's house and the apartment complex. This evidence, though circumstantial, was more than sufficient for the trial court to have found defendants guilty of home invasion, armed robbery, and residential burglary. Accordingly, the alleged evidentiary error in this case is harmless. For these same reasons, we conclude defendants were proven guilty beyond a reasonable doubt. See *People v.*

Brown, 2013 IL 114196, ¶ 48 (we will reverse a criminal conviction only "where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt.").

¶ 31 Which brings us to defendants' final argument—that their attorney provided ineffective assistance when he failed to provide the trier of fact with exculpatory evidence. Defendants specifically argue that the State's evidence tended to show that the suspects used two bulletproof vests to commit the crimes, yet defense counsel failed to present Krajnik's findings showing that the major DNA profile which was present on both vests and the recovered camcorder did not belong to any of the defendants.

¶ 32 To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance fell below an objective standard of reasonableness and that, but for counsel's errors, a reasonable probability exists that the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Davis,* 205 Ill. 2d 349, 364 (2002). A reasonable probability is one sufficient to undermine confidence in the outcome. *People v. Morris*, 335 Ill. App. 3d 70, 84 (2002). If we, as the reviewing court, can dispose of an ineffective assistance of counsel claim for lack of sufficient prejudice, we need not even consider the quality of the attorney's performance. *Strickland*, 466 U.S. at 697; *People v. Johnson*, 128 Ill. 2d 253, 271 (1989).

¶ 33 Here, we conclude that admission of Krajnik's DNA findings concerning the bulletproof vests would not have changed the result of the proceedings and, therefore, defendants cannot show they were prejudiced by counsel's alleged ineffective assistance. Although the State did introduce the bulletproof vests recovered from the woods into evidence, the State never claimed that defendants were wearing vests during the offense, or that the vests even belonged to

defendants. In fact, Officer Glowinke testified that at no point in time had anyone described the suspects as wearing body armor. Moreover, Fullilove, the only testifying eyewitness to the offense, specifically stated that the men who broke into her home with guns were wearing black hooded sweatshirts (*i.e.*, not bulletproof vests). Although Fullilove did testify that the men had stolen a camcorder, she never testified that the camcorder recovered from the woods was the same camcorder that the subjects took from her home. For these reasons, and those stated in our harmless-error analysis above, defendants cannot show they were prejudiced by defense counsel's decision not to present the DNA findings.

¶ 34 CONCLUSION

¶ 35 For the forgoing reasons, we affirm defendants' convictions for home invasion, armed robbery, and residential burglary.

¶ 36 Affirmed.

¶ 37 JUSTICE WRIGHT dissenting.

¶ 38 I agree the introduction of the face mask as circumstantial evidence did not constitute error. However, I respectfully dissent because I conclude the DNA test results should not have been admitted into evidence or considered by the court. My conclusion is based on the fact that the State did not provide a sufficient chain of custody regarding the face mask before it was delivered to the crime lab for analysis.

¶ 39 A proper chain of custody must be "sufficiently complete to make it improbable that the evidence has been subject to tampering or accidental substitution." *People v.* Woods, 214 Ill. 2d 455, 467 (2005) (citing *People v. Harris*, 352 Ill. App. 3d 63, 68 (2004)). The five-month gap in the chain of custody in this case is not "sufficiently complete," in my opinion, to eliminate the possibility of accidental substitution or contamination of the physical evidence before arriving at

the crime lab. On this basis, I conclude the trial court abused its discretion by admitting and then relying on the DNA test results. For this reason, I would afford defendants a new trial without the DNA evidence.