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2017 IL App (3d) 150515-U

Order filed January 19, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
Plaintiff-Appellee,	)	Peoria County, Illinois.
	)	
	)	Appeal No. 3-15-0515
v.	)	Circuit No. 14-CF-169
	)	
STEPHEN CORLETT,	)	Honorable
	)	David A. Brown
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Presiding Justice Holdridge and Justice O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: Plain error resulted from trial court's admission of expert testimony regarding results of scientific testing on defendant's blood that revealed presence of controlled substance where expert failed to testify how machine used was maintained and calibrated or that it was functioning properly when she used it.

¶ 2 Following a bench trial, defendant was found guilty of one count of aggravated driving under the influence (DUI) for driving while having alprazolam, a controlled substance, in his blood or urine. The trial court sentenced defendant to three years in prison. On appeal, defendant argues that the State failed to prove him guilty of aggravated DUI beyond a reasonable

doubt because the results of blood tests performed by the State's expert using a liquid chromatography mass spectrometer (LCMS) machine were unreliable. We reverse and remand for a new trial.

¶ 3 On September 28, 2013, defendant Stephen Corlett, while driving an automobile in Peoria County, struck a motorcycle being driven by Joseph Spears, causing Spears' death. As a result of the collision, defendant was charged by indictment with two counts of aggravated DUI (625 ILCS 5/11-501(d)(1)(F) (West 2012)). Count I alleged that defendant was under the influence of a combination of diazepam, methadone and alprazolam "to a degree that rendered him incapable of driving safely." Count II alleged that defendant was driving with "an amount of a schedule IV controlled substance, alprazolam, in his blood or urine in violation of the Illinois Controlled Substances Act."

¶ 4 Defendant waived his right to a jury trial. At defendant's bench trial, the evidence established that at approximately 12:20 p.m. on September 28, 2013, both defendant and Spears were traveling west on Route 150 in Peoria County. Defendant was driving a car, and Spears was driving a motorcycle directly in front of defendant's vehicle. As Spears approached Route 150's intersection with Gilles Road, he slowed down because the vehicle in front of him was stopped, waiting to turn left onto Gilles Road. Defendant did not decelerate and crashed his vehicle into the back of Spears' motorcycle. Spears was thrown from his motorcycle and landed on the ground. Both Spears and defendant were taken to the hospital. At the hospital, blood and urine samples were taken from defendant.

¶ 5 The parties stipulated that prior to September 28, 2013, Spears was in good health. They also stipulated that the Department of Veterans Affairs (V.A.) keeps an exhaustive list of all medications prescribed to its patients and has a list of all medications prescribed to defendant.

Alprazolam was not on the list of medications prescribed to defendant. All prescriptions, other than those written by the V.A., are recorded by the Illinois Prescription Monitoring Program. An employee of the Illinois Prescription Monitoring Program provided a complete and exhaustive list of all prescriptions, other than those prescribed by the V.A., prescribed to defendant from September 29, 2011, to September 29, 2013. Alprazolam was not on that list.

¶ 6 Jonathan Quast of the Peoria County Sheriff's Office was the first officer to respond to the scene of the accident. He spoke to defendant and saw no obvious signs of impairment or behaviors that caused him to believe defendant was under the influence or impaired by drugs.

¶ 7 Deputy Lee Hoffman of the Peoria Sheriff's Office, arrived on the scene of the accident, spoke to defendant and transported him to the hospital so that blood and urine samples could be taken from him. Hoffman had no reason to suspect defendant was impaired based on his observations of and conversations with defendant at the scene of the accident, on the 20-minute drive to the hospital, or at the hospital, where Hoffman stayed with defendant for up to an hour.

¶ 8 Dave Hoyle, a detective with the Peoria County Sheriff's Office, testified that he investigated the collision. He went to the hospital and spoke to defendant. After spending approximately 30 minutes with defendant, nothing led Hoyle to believe that defendant might be under the influence of alcohol or a drug.

¶ 9 Dr. Scott Denton, a forensic pathologist in Peoria County, performed an autopsy on Spears and determined that he died as a result of bronchopneumonia in his lungs because of brain injuries caused by the September 28, 2013 motor vehicle accident.

¶ 10 Dareea Paiva, a forensic scientist employed by the Illinois State Police Springfield Forensic Science Laboratory, testified for the State. She is certified by the Illinois State Police to

analyze blood, urine and other body fluids to determine the presence of alcohol and other drugs. Paiva analyzed one tube of defendant's blood and one bottle of defendant's urine.

¶ 11 Paiva performed a TOXI-A extraction on defendant's urine, which is used to detect a variety of medications and illegal substances. The results of that test showed no alprazolam or hydroxyalprazolam in defendant's urine. Paiva then performed a benzodiazepine extraction on defendant's urine, which detected hydroxyalprazolam, a metabolite of alprazolam. She testified that "[f]or the hydroxyalprazolam to be present in the urine *** the alprazolam would have had to have been used at some point in time."

¶ 12 Paiva testified that she is not aware of any other drugs that metabolize to hydroxyalprazolam but admitted that it is possible that other drugs might metabolize to hydroxyalprazolam. She agreed that if other drugs metabolize to hydroxyalprazolam, then the presence of hydroxyalprazolam in defendant's urine did not necessarily mean that defendant took alprazolam.

¶ 13 Paiva testified that in analyzing defendant's blood, she performed solid phase extraction using a liquid chromatography with mass spectrometer (LCMS) machine. She explained that the instrument was set up to look specifically for alprazolam. To determine the amount of alprazolam in defendant's blood, Paiva spiked a blank sample with alprazolam at six different concentrations and compared it to an internal standard. She entered that information into a computer program that calculates the ratio versus concentration and draws a standard curve. The amount of alprazolam she found in defendant's blood was on the curve but in a ratio less than that of the lowest standard of 12.5 micrograms per liter. She, therefore, determined that alprazolam was present in defendant's blood in an amount less than 12.5 micrograms per liter. Paiva also ran a control sample and blank sample to make sure that her quantification was

correct. She explained that "[t]he standard curve along with the control acts as a performance check."

¶ 14 Paiva testified that she received training on the LCMS machine and had to demonstrate, through oral and written exams, that she is proficient at using it. She testified that the liquid chromatography machine has been in the lab since 2007 or 2008, and she has routinely used it since 2010. She explained that combining the liquid chromatography machine with the mass spectrometer was "a new technique to come into our laboratory."

¶ 15 On cross-examination, Paiva admitted that using the LCMS machine to test defendant's blood was considered an "experimental" procedure because it is not contained in the State Police laboratory's procedures manual. She is no longer allowed to perform that technique in the State Police lab because it is "considered an experimental method, and it hasn't been properly validated." She admitted that appropriate validation of solid phase extraction using an LCMS machine has not taken place on the machine that she used to test defendant's blood. Nevertheless, Paiva testified that the methods she used to test defendant's blood, including her use of the LCMS machine, are widely accepted and commonly used in the scientific community.

¶ 16 Defendant objected and moved to strike Paiva's testimony "as it relates to the results" of the testing she performed on defendant's blood using the LCMS machine, arguing that those results were not reliable. The trial court noted defendant's objection. At the close of the State's case, defendant made an oral motion for a directed verdict, arguing that the State failed to meet its burden of proving that alprazolam was present in defendant's blood or urine based on Paiva's testimony. The trial court denied the motion.

¶ 17 James O'Donnell, a certified pharmacologist and licensed pharmacist, testified for defendant. He reviewed Paiva's lab report and disagreed with her conclusion that alprazolam

was present in defendant's blood. He testified that since the lowest level of detection used by Paiva was 12.5 micrograms of alprazolam per liter and Paiva found less than 12.5 micrograms per liter of alprazolam in defendant's blood, the amount of alprazolam in defendant's blood was "below the reportable level" and should not have been reported as detected.

¶ 18 O'Donnell also disagreed with Paiva's conclusion that the presence of hydroxyalprazolam in defendant's urine meant that defendant had taken alprazolam. O'Donell explained that hydroxyalprazolam is formed through the metabolism of drugs other than alprazolam, including nidazolam. O'Donnell concluded that there was "[n]o competent scientific evidence supporting with reasonable scientific certainty that alprazolam was present in Mr. Corlett's body."

¶ 19 Dr. Ernest Rose, a board certified physician, has been treating defendant since 2012. He testified that "[t]he only time I've ever known of a drug getting reported as less than as opposed to a specific number is if it either fell out of the normal testing guidelines, or it was so low as to be non-reportable, and *** it would be reported as [a] negative test." He thought that the presence of less than 12.5 micrograms per liter of alprazolam in defendant's blood "may well be the result of some kind of cross-reaction with another chemical."

¶ 20 After defendant's witnesses testified, the State called Paiva to provide additional testimony. She testified that it was still her opinion to a reasonable degree of scientific certainty that there was alprazolam in defendant's blood.

¶ 21 After both parties rested, the court addressed defendant's objection to the admission of the results of the testing performed by Paiva using the LCMS machine. The trial court overruled defendant's objection and denied his motion to strike Paiva's testimony. Defendant then renewed his motion for a directed verdict, which the trial court denied.

¶ 22 The trial court found defendant not guilty of count I of the indictment, explaining that it was "not convinced beyond a reasonable doubt that at the time of the accident * * * the drugs in [defendant's] system rendered him incapable of safely driving." The court found defendant guilty of count II of the indictment based on Paiva's testimony.

¶ 23 Defendant filed a motion for a new trial, followed by two amended motions for a new trial. In those motions, defendant argued that the trial court erred in admitting the results of the testing performed by Paiva with the LCMS machine. The trial court denied the motions. The trial court sentenced defendant to three years in prison. Defendant filed a motion to reconsider sentence, which the trial court denied.

¶ 24 ANALYSIS

¶ 25 Expert testimony is admissible if the proffered expert is qualified, a foundation is laid establishing a basis for the expert's opinion, and the testimony would assist the trier of fact in understanding the evidence. *Todd W. Musburger, Ltd. v. Meier*, 394 Ill. App. 3d 781, 800 (2009). The proponent of expert testimony must lay an adequate foundation establishing that the information upon which the expert bases his opinion is reliable. *People v. Safford*, 392 Ill. App. 3d 212, 221 (2009). It is the function of the trial court to determine whether the foundational requirements have been met. *Id.* That determination presents a question of law that we review *de novo*. *Id.*

¶ 26 "[W]hen expert testimony is based upon an electronic or mechanical device, *** the expert must offer *** proof that the device was functioning properly at the time it was used." *People v. Bynum*, 257 Ill. App. 3d 502, 514 (1994). This foundational proof is necessary to ensure that the admission of expert scientific testimony based upon a testing device is both relevant and reliable. *Id.*

¶ 27 An expert offering scientific testimony based on an electronic or mechanical device must show that the specific machine was in good working order when it was used. *People v. Raney*, 324 Ill. App. 3d 703, 709 (2001). Such proof requires the expert to explain how the machine is maintained and calibrated and why the expert knows the results are accurate. See *id*. at 708-10; see also *People v. Berrier*, 362 Ill. App. 3d 1153, 1160-61 (2006) (expert testified that gas chromatography mass spectrometer (GCMS) machine was operating properly before and after testing); *People v. DeLuna*, 334 Ill. App. 3d 1, 21 (2002) (expert testified that GCMS machine was properly functioning and was "daily tuned"); *Washington v. Police Board of City of Chicago*, 257 Ill. App.3d 936, 939 (1994) (experts testified about how GCMS machine was calibrated).

¶ 28 Where an expert fails to testify that the machine she used was working properly, does not indicate whether any testing was done to assess the operating condition of the machine, and fails to explain how the machine was calibrated, she does not lay a proper foundation for the admission of the results obtained from the machine. See *Raney*, 324 Ill. App. 3d at 708-10. If the required foundation is lacking, the expert's testimony is inadmissible. See *id*. at 710. If the State fails to lay a sufficient foundation for the results of expert testing and those results are the only evidence establishing defendant's guilt, defendant's conviction must be reversed. See *id*. at 711.

¶ 29 To challenge the foundation for admission of evidence, a defendant must make a "timely and specific objection to the foundation requirements." *People v. Rigsby*, 383 Ill. App. 3d 818, 823 (2008). An objection based on improper foundation is especially important because errors in laying a foundation may be easily cured. *People v. Korzenewski*, 2012 IL App (4th) 101026, ¶ 7.

¶ 30 Generally, to preserve an issue for review, the defendant must object at trial and raise the issue in a posttrial motion. *Id.* Failure to properly preserve an issue for review results in forfeiture. *Id.* However, a foundation issue that has been forfeited can be reviewed under the plain-error doctrine. *Id.* ¶ 16.

¶ 31 The plain-error doctrine provides a narrow exception to the general rule of procedural default. *Id.* ¶ 17. The plain-error doctrine permits a reviewing court to consider unpreserved errors under two scenarios:

> "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Sargent*, 239 Ill. 2d 166, 189 (2010).

¶ 32 A plain-error analysis begins by determining whether an error occurred. *Korzenewski*, 2012 IL App (4th) 101026, ¶ 17. If an error did occur, the court then considers whether either of the two prongs of the plain-error doctrine has been satisfied. *Id.* Under both prongs, defendant bears the burden of persuasion. *Id.*

¶ 33 Here, Paiva testified that she was certified to analyze blood and urine for the presence of alcohol and drugs. She testified that the techniques she used in this case, including the LCMS machine, were widely accepted and commonly used in the scientific community. When quantifying the drug, she ran a control, a blank sample and a sample of defendant's blood. She entered that information into a computer program that calculates the ratio versus concentration

and draws a curve. The amount of alprazolam she found in defendant's blood was on the curve. Paiva explained that "[t]he standard curve along with the control acts as a performance check."

¶ 34 Paiva also provided testimony about the LCMS machine itself, explaining that it had been in the lab since 2007 or 2008. She testified that she received training and certification on the LCMS machine, along with other machines she used in the lab. She testified that she began using the LCMS machine as early as 2010, but the combination of the LCMS machine and mass spectrometer was a "new technique" to the lab when she used it.

¶ 35 Paiva testified about the tests she ran on the LCMS machine. However, she failed to testify that she made sure the LCMS machine was working properly before she used it to test defendant's blood. Paiva never testified how the LCMS machine was maintained or calibrated to ensure that it was functioning properly. Because the record is devoid of any testimony that the LCMS machine was functioning properly when Paiva used it to analyze defendant's blood, the State failed to establish the necessary foundation for admission of Paiva's expert opinion. See *Raney*, 324 Ill. App. 3d at 708-10.

¶ 36 Having found that Paiva's testimony lacked the necessary foundation to be admissible, our next step is to determine if the admission of this evidence rises to the level of plain error because defendant did not object to Paiva's testimony on this basis. While defendant objected to Paiva's testimony on reliability grounds, he failed to object to it on foundational grounds. Therefore, the admission of this evidence constitutes reversible error only if it amounts to plain error. See *Korzenewski*, 2012 IL App (4th) 101026, ¶ 7.

¶ 37 Here, defendant was charged with two counts of aggravated DUI, one for driving while impaired and one for driving with alprazolam in his blood or urine. The trial court found that the State failed to prove that defendant was driving while impaired but found defendant guilty of

driving with alprazolam in his blood or urine. The evidence in this case showed that Paiva found hydroxyalprazolam, but no alprazolam, in defendant's urine. Defendant's expert testified and Paiva agreed that it was possible for a substance other than alprazolam to metabolize into hydroxyalprazolam. As a result, the State failed to prove beyond a reasonable doubt the presence of alprazolam in defendant's urine.

¶ 38 The only evidence of the existence of alprazolam in defendant's blood came from Paiva based on the testing she performed using the LCMS machine. Without those results, there was no evidence that defendant had taken alprazolam before driving. Thus, the evidence against defendant was closely balanced, and the trial court's error in admitting the results of Paiva's testing tipped the scales of justice against defendant, resulting in plain error.

¶ 39 Having determined that the trial court committed plain error in admitting Paiva's testimony about the blood test results into evidence, we must determine the appropriate remedy. The double jeopardy clause prohibits retrial for the purpose of affording the prosecution another opportunity to present evidence it failed to provide in the first proceeding. *People v. Lopez*, 229 Ill. 2d 322, 367 (2008). It does not preclude retrial where a conviction has been set aside because of an error in the proceedings if the evidence presented at the first trial, including the improperly admitted evidence, would have been sufficient for any rational trier of fact to find the essential elements of the crime proven beyond a reasonable doubt. *Id.*; *People v. McKown*, 236 Ill. 2d 278, 311 (2010).

¶ 40 To prove defendant guilty of aggravated DUI, as alleged in count II of the indictment, the State had to prove that defendant drove with an amount of alprazolam in his blood or urine. See 625 ILCS 5/11-501(d)(1)(F) (West 2012). The trial court admitted the results of the tests Paiva performed showing that defendant had less than 12.5 micrograms per liter of alprazolam in his

blood after the accident. Viewed in the light most favorable to the State, this evidence was sufficient for a rational trier of fact to find that defendant was guilty of aggravated DUI. Accordingly, there is no double jeopardy impediment to retrial, and we remand the cause to the trial court for that purpose.

¶ 41 The judgment of the circuit court of Peoria County is reversed, and the cause is remanded for a new trial.

¶ 42 Reversed and remanded.