2019 IL App (1st) 162004-U

No. 1-16-2004

Order filed June 7, 2019

SIXTH DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 CR 22017
	)	
EVERETT SMITH,	)	Honorable
	)	Mauricio Araujo,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Delort and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion in prohibiting defense counsel from cross-examining a forensic chemist regarding the $100 criminal laboratory analysis fee that would be assessed were defendant convicted, as the alleged bias was remote and the cross-examination satisfied defendant's right to confrontation.

¶ 2 Following a jury trial, defendant Everett Smith was convicted of delivery of a controlled substance and sentenced to six years' imprisonment. On appeal, he contends the trial court erred

by precluding him from cross-examining one of the State's witnesses, a forensic chemist, regarding her potential bias involving the $100 criminal laboratory analysis fee (730 ILCS 5/5-9-1.4(b) (West 2014)) imposed on persons convicted of violating the Illinois Controlled Substances Act (720 ILCS 570/100 *et. seq.* (West 2014)). We affirm.

¶ 3 Defendant was charged by indictment with one count of delivery of a controlled substance, less than one gram of heroin (720 ILCS 570/401(d) (West 2014)). The State filed a motion *in limine* to prohibit the defense from referencing "sentencing or punishment possibilities" during trial, which the trial court granted without objection.

¶ 4 At trial, Chicago police officer David Bridges testified he was working undercover with a narcotics team on November 15, 2014. At approximately 3:10 p.m., he drove an unmarked vehicle to the 4100 block of West Gladys, an area known for narcotics sales. Bridges exited the vehicle, observed defendant in front of a two-flat residence, and asked him for "D," meaning heroin. Defendant asked "how many," and Bridges said, "two." Defendant entered the residence and returned 30 seconds later holding two clear Ziploc bags with Nike logos encased in white tape, each containing a white substance. Defendant handed the bags to Bridges, and Bridges gave defendant a prerecorded $20 bill. Then, Bridges returned to his vehicle and radioed defendant's description and location to other officers, who detained him. Bridges identified defendant and returned to the police station, where he inventoried the Ziploc bags and sent them to the Illinois State Police Crime Lab.

¶ 5 Chicago police officer Jonell Hamilton testified she observed the transaction between defendant and Bridges from an unmarked vehicle. Officer Richard Sanchez testified he arrested defendant outside the two-flat residence, and recovered the prerecorded $20 bill and "all kinds of

different things" from his pocket. Sanchez kept the bill and gave the other items to Officer Charlie Johnson. Around that time, an "older African-American woman" approached the officers from the sidewalk east of the residence and took defendant's property from Johnson.

¶ 6 Michelle Etheridge, a forensic chemist for the Illinois State Police Crime Lab, testified she worked for the lab for nearly 21 years and had served as an expert witness more than 10 times. She examined the contents of both Ziploc bags recovered from defendant, which had a combined weight of 0.892 grams and tested positive for heroin.

¶ 7 On cross-examination, Etheridge confirmed she worked for the state police and tested 50 to 100 substances each week. When Etheridge received the bags in defendant's case, she also received an inventory slip stating the bags contained "suspect heroin"; however, she "didn't really know [the bags were] supposed to contain heroin at that point" because the slip "doesn't mean *** that is what it is." Etheridge did not know who recovered the suspect heroin or "where [it] came from prior to it being placed in the evidence bag," and acknowledged that she was not requested to perform fingerprint or DNA testing.

¶ 8 Defense counsel then asked Etheridge whether she knew "the Illinois State Police gets $100 every time there is a conviction for a violation of the Illinois Controlled Substances Act." The trial court sustained the State's objection. During a sidebar, defense counsel noted that Etheridge's laboratory report contained the following text: "730 ILCS 5/5-9-1.4(b) states that a criminal laboratory analysis fee of $100 shall be imposed for persons adjudged guilty of an offense in violation of *** the Illinois Controlled Substances Act." Defense counsel argued that Etheridge had a "financial incentive and core bias" because "she works for an entity that will receive $100 if [defendant] is convicted." Accordingly, defense counsel asked the court to permit

questions about the criminal laboratory analysis fee, take judicial notice of the fee statute, and "instruct the jury accordingly." Defense counsel tendered a proposed jury instruction stating that, by law, a $100 charge "shall be imposed for persons adjudged guilty of an offense in violation of the Illinois Controlled Substances Act," and that "[f]or analysis conducted by a laboratory operated by the Illinois State Police, said $100 shall be forwarded to the State Crime Laboratory Fund."

¶ 9 The State responded that the criminal laboratory analysis fee constituted a punishment, which the defense could not address at trial due to the motion *in limine*. The State also posited that whether defendant would be convicted, and whether the fee would be assessed, collected, and disbursed, was uncertain, and "no evidence" showed Etheridge would receive a "cut."

¶ 10 The trial court observed the criminal laboratory analysis fee "may seem inflammatory," but did not establish that Etheridge was biased. The court noted the fee would be assessed only if defendant was convicted, "which is not for [Etheridge] to determine," and could also be suspended. However, the court allowed defense counsel to make an offer of proof by questioning Etheridge outside the jury's presence.

¶ 11 During questioning, the following colloquy occurred:

> "DEFENSE COUNSEL: Your understanding is if [defendant] is convicted of this offense, a $100 fine or fee may be admitted to the Illinois State Police Crime Lab because you did the analysis in this case, correct?
>
> THE WITNESS: That is my understanding.
>
> DEFENSE COUNSEL: *** [A]nd every time *** an employee of ISP finds drugs, that is included in the report, correct?

THE WITNESS: Yes, it is part of our report.

DEFENSE COUNSEL: *** [Y]ou had knowledge that that is a possibility when you conducted your analysis in [defendant's] case, correct?

THE WITNESS: Yes."

¶ 12 The trial court asked Etheridge whether she received "a bonus," "stock options," or financial "benefit" when the criminal laboratory analysis fee is assessed in cases where substances she tests contain heroin, and she answered negatively. Etheridge had "no idea" how much of the Illinois State Police Forensic Services budget derived from the fee, did not know whether the fee funded the purchase of equipment, and had "no idea where [the money] goes."

¶ 13 Defense counsel argued that Etheridge's answers "establishe[d] a motive and bias and interest not per se on her part but on part of the institution of the Illinois State Police," as the fee is an "incentive and an income generator" even if Etheridge "doesn't specifically get money." The trial court disagreed, explaining that Etheridge stated "she does not receive anything" from the fee and did not know whether the proceeds are used to pay her salary or purchase equipment. Consequently, the court prohibited cross-examination on the issue. The State then rested, and the court denied defendant's motion for directed verdict.

¶ 14 The defense called Gloria Ward, defendant's aunt, who testified that she lived on the first floor of the two-flat residence and that her sister and defendant lived on the second floor. Defendant did not have keys, so Ward would unlock the doors to let him inside. On November 15, 2014, Ward left the residence when she observed defendant and two police officers outside. She denied the officers gave her defendant's belongings. On cross-examination, Ward stated her sister had keys to the residence, and she did not know whether her sister copied the keys.

¶ 15 The State called Johnson in rebuttal, who testified that he helped arrest defendant. Johnson observed Sanchez search defendant and recover the "buy money," a set of keys, and "miscellaneous stuff" from his pockets. An "older lady" approached the officers, and Johnson "assume[d]" she had exited a vehicle he had seen "pulling up." Defendant identified the woman as his aunt, and she asked if she could "get the keys from him." Johnson gave her the keys and other items.

¶ 16 The jury found defendant guilty of possession of a controlled substance. Defendant filed a posttrial motion arguing the trial court erred by prohibiting him from cross-examining Etheridge regarding the criminal laboratory analysis fee, not taking judicial notice of the fee statute, and failing to instruct the jury thereon. Defendant attached a 2009 report from the Office of the Auditor General showing the Illinois State Police collected $3.8 million per year from the criminal laboratory analysis fee. From that sum, $2.7 million was "budgeted to contractual services and the purchase of new equipment." Defendant also attached a 2013 law review article regarding "the dangers raised when [a] crime lab has a financial incentive in the outcome of the [substance] analysis."

¶ 17 The trial court denied defendant's motion, explaining that it "didn't believe" the fee questions should have been asked and that the proposed instruction "would mislead the jury."[1] Following a hearing, the trial court sentenced defendant to six years' imprisonment.

¶ 18 On appeal, defendant contends the trial court erroneously prohibited him from cross-examining Etheridge regarding the criminal laboratory analysis fee. According to defendant, the Illinois State Police Crime Lab's "financial interest" in the outcome of the case was relevant to

[1] The trial court stated that it provided the parties a six-page written order denying defendant's posttrial motion, which is not included in the record.

Etheridge's motives and biases, as the fee is "integral" to the lab's operations—and "by extension," her job and salary—even if she did not directly benefit. The State, in response, maintains that any potential bias was too "speculative, remote or uncertain," and because Etheridge did not know how the Illinois State Police used the proceeds, she was unaware whether she had "something to gain or lose through her testimony." Alternatively, the State argues any error was harmless due to the "overwhelming" evidence against defendant, and moreover, the motion *in limine* precluded defendant from referencing sentencing or punishment at trial.

¶ 19 Both the United States and the Illinois constitutions guarantee a defendant's right to confront the witnesses against him. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. The right to confrontation "includes cross-examining witnesses to show any interest, bias, prejudice or motive to testify falsely." *People v. Arze*, 2016 IL App (1st) 131959, ¶ 113. However, "the right to confront and cross-examine is not absolute" (*People v. Bean*, 137 Ill. 2d 65, 93 (1990)), and the trial court "may impose limits on a defense counsel's inquiry into the potential bias of a prosecution witness without offending defendant's sixth amendment right" (*People v. Klepper*, 234 Ill. 2d 337, 355 (2009)). The trial court has "wide latitude to impose reasonable limits based on concerns about harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or of little relevance." *Id.* Thus, " 'the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' " (Emphasis in original.) *People v. Harris*, 123 Ill. 2d 113, 144-45 (1988) (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985)).

¶ 20 The parties dispute the applicable standard of review. Defendant asserts this court should review his assignment of error *de novo*, while the State argues for an abuse-of-discretion standard. This court has observed:

> "Cross-examination to show interest, bias or motive on the part of a witness is a matter of right, subject only to the broad discretion of the trial court to preclude repetitive or unduly harassing interrogation and, *assuming a proper subject matter,* to control the extent of cross-examination. [Citation.] It is a right protected by both the Federal and Illinois constitutions. * * * The interest is satisfied when counsel is permitted to expose the jury [to] facts from which the jurors, as the sole triers of fact and credibility, could *appropriately* draw inferences relating to the reliability of the witness. [Citation.] It is important to note that the constitutional requirement must be satisfied first and only then does the court have discretion to limit the scope or extent of cross-examination." (Emphasis in original.) *People v. Green*, 339 Ill. App. 3d 443, 455 (2003) (quoting *People v. Furby*, 228 Ill. App. 3d 1, 3-4 (1992)).

Thus, whether a cross-examination satisfies constitutional scrutiny is a question of law that is reviewed *de novo*. *People v. Williams*, 238 Ill. 2d 125, 141 (2010) ("The defendant's claim that his sixth amendment confrontation right was violated involves a question of law, which we review *de novo.*"). If a cross-examination is found to be constitutionally sufficient, a trial court's limitation of that cross-examination is reviewed for an abuse of discretion. *Arze*, 2016 IL App (1st) 131959, ¶ 113.

¶ 21 In determining whether defendant's cross-examination of Etheridge was constitutionally sufficient, we evaluate what the defense was allowed to do rather than what it was prohibited

from doing. *Id*. " 'If the entire record shows that the jury has been made aware of adequate factors concerning *relevant* areas of impeachment of a witness, no constitutional question arises merely because defendant has been prohibited on cross-examination from pursuing other areas of inquiry.' " (Emphasis in original.) *Green*, 339 Ill. App. 3d at 456 (quoting *People v. Averhart*, 311 Ill. App. 3d 492, 497 (1999)).

¶ 22 Here, defense counsel cross-examined Etheridge regarding her employment with the Illinois State Police, the number of tests she performed per week, the inventory slip that identified the evidence as suspect heroin, the chain of custody, and the fact she did not test the evidence for fingerprints or DNA. Therefore, the jury was apprised that Etheridge was paid by the police to test suspect narcotics, knew the items in this case were thought to contain heroin even before she tested them, and did not look for other evidence probative of defendant's guilt or innocence. These factors were relevant to Etheridge's credibility, and were explored by defense counsel in detail. Consequently, defendant was not denied the opportunity to question Etheridge regarding her relevant biases or motives, and the cross-examination was constitutionally sufficient. *Id.*

¶ 23 Having made this determination, our next inquiry is whether the trial court abused its discretion when it prohibited cross-examination regarding the criminal laboratory analysis fee.

¶ 24 "The latitude to be allowed on cross-examination rests within the sound discretion of the trial court; a reviewing court should not interfere absent a clear abuse of discretion resulting in manifest prejudice to the defendant." *People v. Hall*, 195 Ill. 2d 1, 23 (2000). The trial court abuses its discretion when "its decision is fanciful, arbitrary, or unreasonable to the degree that

no reasonable person would agree with it." (Internal quotation marks omitted.) *People v. Kladis*, 2011 IL 110920, ¶ 23.

¶ 25 As this court has observed, " '[p]otential limitations on a defendant's right to cross-examine a witness as to bias, interest or motive to testify falsely are clearly rooted in the relevancy concepts of materiality and probative value.' " *People v. Johnson*, 2018 IL App (1st) 140725, ¶ 91 (quoting *Green*, 339 Ill. App. 3d at 455). While a defendant has the right to cross-examine a witness regarding bias, interest, or motive to testify falsely, "the evidence used to impeach the witness must give rise to the inference that the witness has something to gain by her testimony." *Id.* Thus, "the evidence used to establish bias must be timely, unequivocal and directly related, and may not be remote or uncertain." *Id.* ¶ 91.

¶ 26 Defendant sought to cross-examine Etheridge regarding the $100 criminal laboratory analysis fee that, were he found guilty, would be imposed and disbursed to the Illinois State Police Crime Lab. However, as Etheridge explained during the offer of proof, she knew the fee would be assessed but had "no idea" how much of the Illinois State Police Forensic Services budget derived from the fee or how the proceeds were used. While defendant's posttrial motion included an auditor general's report describing the Illinois State Police's proceeds and expenditures from the fee, Etheridge was unaware of this information when she tested the evidence and testified at trial. She also denied receiving any financial benefit when the fee is imposed. Under these circumstances, the trial court did not abuse its discretion in concluding that Etheridge's knowledge of the fee did not support an inference that she had "something to gain by her testimony." *Johnson*, 2018 IL App (1st) 140725, ¶ 91.

¶ 27 Defendant relies on *People v. Thompson*, 75 Ill. App. 3d 901 (1979) and *People v. Hughes*, 51 Ill. App. 3d 985 (1977), where we found the trial court erred by precluding cross-examination of complaining witnesses regarding their financial interests in the proceedings. In *Thompson*, the trial court prohibited cross-examination to demonstrate the outcome of the case would affect the amount of money the witness could receive from an insurance settlement. *Thompson*, 75 Ill. App. 3d at 903. Similarly, in *Hughes*, the trial court barred cross-examination to show the witness expected to recover medical expenses for injuries allegedly caused by the defendant. *Hughes*, 51 Ill. App. 3d at 987. Here, unlike in *Thompson* or *Hughes*, the defense's offer of proof did not show that Etheridge had a personal, ascertainable stake in the outcome of the trial. To the contrary, the information adduced could also support the inference that the benefit of the criminal laboratory analysis fee to the Illinois State Police was too remote to be probative of Etheridge's credibility, and instead, would confuse the jury or distract it from issues relevant to weighing her testimony, including her employment with the Illinois State Police, her knowledge that items she was testing contained suspect heroin, and the fact she did not examine the bags for fingerprints or DNA. *Klepper*, 234 Ill. 2d at 355. These issues, as noted, were explored in detail at trial. Based on the foregoing, the trial court did not abuse its discretion in prohibiting the defense from questioning Etheridge regarding the criminal laboratory analysis fee, and defendant's claim of error is without merit.

¶ 28 For all the foregoing reasons, we affirm the judgment of the circuit court.

¶ 29 Affirmed.