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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CR-22-732

SHAWN EDWARD SMART APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** January 24, 2024 APPEAL FROM THE INDEPENDENCE COUNTY CIRCUIT COURT [No. 32CR-21-138] HONORABLE TIM WEAVER, JUDGE AFFIRMED

BRANDON J. HARRISON, Chief Judge

An Independence County jury convicted Shawn Edward Smart, a habitual offender with four or more past felony convictions, of possessing less than two grams of methamphetamine, Ark. Code Ann. § 5-64-419(b)(1)(A) (Supp. 2021), and failure to appear, Ark. Code Ann. § 5-54-120(c)(1) (Supp. 2021). The circuit court imposed the jury's recommended sentence of 15 years imprisonment and a $5,000 fine for possessing methamphetamine, and 20 years imprisonment for the failure to-appear, to run consecutively. Smart appeals the sufficiency of evidence for the possession count—and, really, whether a discrepancy in the weights of the suspected methamphetamine taken into evidence (0.07 grams) and the sample tested at the Arkansas State Crime Laboratory (0.3736 grams) indicates it was not the sample seized from his home. We affirm.

I.

Smart was a parolee under the supervision of Brian Gould, an officer with the Division of Community Correction. On 13 August 2021, Gould conducted an unannounced visit at Smart's home. He found Smart in his bedroom, lying on his bed. In an open drawer beside it, Gould saw a clear baggie containing what he suspected was methamphetamine. Between the dresser and the bed was a small mirror with white residue on it. When Gould asked about the residue, Smart replied "it was nothing."

Gould then asked what was in the baggie. He was not in suspense. Gould has seen a lot of methamphetamine in his time as a parole officer, he testified, and can identify it by appearance. Smart admitted it was methamphetamine, and asked Gould to get rid of it for him. Gould declined. Instead, he took possession of the baggie while dispatch called law enforcement. Officer Frank Ramirez from the Independence County Sheriff's Office arrived and took possession of the baggie to take it into evidence.

The chain of custody began. Gould, the first link, testified at Smart's August 2022 trial. Officer Ramirez, the second, could not. He had died in the line of duty. An evidence-intake form he had logged in Smart's case, State's Exhibit 3, describes a package containing a "white crystal like substance" suspected to be methamphetamine with an "Amount" of "0.07" grams. The chain of custody ended with Amanda Blox, a forensic chemist with the Arkansas State Crime Laboratory. In the sample she tested, the granular substance alone (which Smart does not dispute was methamphetamine) weighed 0.3736 grams. A Splenda packet weighs one gram.

At the close of the State's case, Smart moved for directed verdict, arguing the State's evidence was insufficient because there was a "chain of custody issue" resulting from the difference in those weights. He argued the State had failed to prove the substance found in Smart's dresser was the same substance chemist Blox had tested. The circuit court denied the motion. It reasoned that Smart could make the argument in closing, but the jury would decide whether the seized and tested samples were the same. Despite the difference in weights, there was other evidence the substance tested at the Arkansas State Crime Laboratory had come from the baggie Officer Ramirez had originally sealed in a brown paper sack. The court found no evidence of tampering. Further, it noted that the evidence included an excerpt of Smart's incriminating statements in open court at a June 2022 hearing. Smart says that when he gets out after spending time in prison, "I just go out there and just do dope and get high." The excerpt continues, "I got caught with dope. There's no denying it. I mean, there's no denying that." Smart rested without calling witnesses, and renewed his directed-verdict motion, which the court denied.

II.

On appeal, Smart renews what he terms a challenge to the sufficiency of evidence. To the extent there is a challenge to the sufficiency of the evidence, then it seems grounded on a chain-of-custody point made during his motion for directed verdict. At a minimum, chain of custody is an authentication issue related to the admissibility of evidence. The purpose of establishing chain of custody "is to prevent the introduction of evidence that has been tampered with or is not authentic." *Crisco v. State*, 328 Ark. 388, 391, 943 S.W.2d 582, 584 (1997). The supreme court reversed in *Crisco* for the circuit court's abuse of

discretion admitting into evidence what was described in the evidence-submission form as an "off white powder" but described in the lab report as a "tan rock-like substance." *Id.* at 389, 943 S.W.2d at 583. In *Crisco*, a sufficiency argument—whatever it was—was too vague to consider on appeal. The supreme court noted that the chain-of-custody requirements are stricter for interchangeable items like drugs. Minor inconsistencies in that evidence, at least, are among the "[v]ariances and discrepancies in the proof" that "go to the weight or credibility of the evidence" and are for the fact-finder to resolve. *Marts v. State*, 332 Ark. 628, 644–45, 968 S.W.2d 41, 49 (1998).

In *Dixon v. State*, the supreme court considered chain-of-custody evidence as both an admissibility issue and—despite holding the defendant should have raised the point before the directed-verdict stage—a sufficiency issue. 310 Ark. 460, 471–72, 839 S.W.2d 173, 179–80 (1992). However, it analyzed sufficiency under the admissibility standard.[1] Here, Smart argues that the State's evidence left his connection to the tested methamphetamine in doubt: the officer who had weighed and logged it into evidence died without leaving an account of what he had done, and the weights he and chemist Blox recorded did not match. *Cf. Graham v. State*, 2022 Ark. App. 502, at 11–12, 655 S.W.3d 918, 925 (holding that circuit court abused its discretion by admitting testimony about meth pipe where chain-of-

[1] *Id.* at 472, 839 S.W.2d at 180. In *Sanderson v. State*, following authority mostly from our own opinions, none of which provided much analysis, this court refused to consider the merits of an appeal from the denial of a motion to dismiss based on deficient chain-of-custody proof because the defendant had not objected when the drugs and chain-of-custody testimony were introduced at his bench trial. 2023 Ark. App. 205, at 2. We might one day need to consider more deeply the approach in *Sanderson*. Among other things, it seems to require the defense to raise chain-of-custody objections before the testimony could establish a chain-of-custody problem. But that day is not today.

custody evidence included serious gaps). At least one court has acknowledged that, at some point, deficiencies in the proof of chain of custody for contraband admitted without objection could nonetheless undermine the proof of the possession element of a drug charge:

> [I]n those rare instances where a complete breakdown in the chain of custody occurs—e.g., the inventory number or description of the recovered and tested items do not match—raising the probability that the evidence sought to be introduced at trial was not the same substance recovered from defendant, a challenge to the chain of custody may be brought under the plain error doctrine. When there is a complete failure of proof, there is no link between the substance tested by the chemist and the substance recovered at the time of the defendant's arrest. In turn, no link is established between the defendant and the substance. In such a case, a failure to present a sufficient chain of custody would lead to the conclusion that the State could not prove an element of the offense: the element of possession.

People v. Woods, 828 N.E.2d 247, 257–58 (Ill. 2005). Of course, we do not recognize the plain-error doctrine.

The takeaway here is that the line between an "authenticity argument"—and when it must be made in circuit court—and a "sufficiency of the evidence" argument—and when it must be made—can blur. In *Sanderson*, we refused to consider the merits of an appeal from the denial of a motion to dismiss based on deficient chain-of-custody proof because the defendant had not objected when the drugs and chain-of-custody testimony were introduced at his bench trial. 2023 Ark. App. 205, at 2. Here, it is not at all clear how Smart could have made his main point that the substance (methamphetamine) tested in the lab was not the same as the substance that was purportedly recovered from the original scene without running that waiver gauntlet. Smart in fact attempts to use the State's case against itself.

To this end, Smart's counsel developed proof about the chain of custody and the drug weights throughout the trial. He argued in his directed-verdict motion, "It seems clear

that whatever substance was tested by the crime lab, is not the same substance that was brought in by Officer Ramirez to the sheriff's office." The State and the circuit court acknowledged below that this was a question for the jury. And the jury was charged with finding proof of all the elements beyond a reasonable doubt. Although it doesn't make a difference—because we affirm the conviction in any event—we here analyze the chain-of-custody proof with the other evidence at trial as an ordinary sufficiency issue.

When considering a challenge to the sufficiency of the evidence, we view the proof in the light most favorable to the State, considering only the evidence that supports the verdict. *Noble v. State*, 2017 Ark. 142, 516 S.W.3d 727. We affirm if there is substantial evidence to support the conviction, meaning evidence of sufficient force and character to compel a conclusion beyond speculation or conjecture. *Id.* Determining the weight of the evidence and credibility of the witnesses is the jury's role, not ours. *E.g.*, *Tryon v. State*, 371 Ark. 25, 32, 263 S.W.3d 475, 481 (2007).

Circumstantial evidence can be substantial evidence, but it must be consistent with the defendant's guilt and inconsistent with any other reasonable hypothesis. *Armer v. State*, 2022 Ark. App. 163. Whether evidence excludes every reasonable hypothesis is for the jury, not the court, to decide. *Id.*

Smart was convicted of knowingly possessing less than two grams of methamphetamine. Any amount below that threshold would do. Ark. Code Ann. § 5-64-419(b)(1)(A). Smart's concern with what he describes as a fivefold discrepancy in the weight of the suspected contraband is well taken—at least, on this record, where Officer Ramirez could not explain it. But the jury had sufficient evidence to find Smart guilty, including

testimony that tended to show the seized sample and tested sample were the same—not to mention Smart's admission in open court that he "got caught with dope"—and his admission to Gould that he possessed methamphetamine specifically.

We mentioned Gould and Blox above to highlight the issue on appeal. But the jury heard from other witnesses in the chain of custody. Zachary Bailey, an investigator with the Independence County Sheriff's Office, testified that he was assigned to Smart's case. He described how each case is assigned a case-tracking number that is linked to all the evidence—including a custody-history log of the evidence. On 16 August 2021, he had retrieved from the evidence locker a sealed paper bag that bore the case number for Smart's case, Officer Ramirez's initials, and the date it was stored there, 13 August 2021. The paper bag was admitted over Smart's objection as State's Exhibit 4.

Bailey field-tested the substance in the package for methamphetamine. It tested positive. He repackaged the evidence in a tape-sealed manila envelope marked with the case number, date, and his own initials, together with an evidence submission sheet for transport to the Arkansas State Crime Laboratory. He then logged the package back into the evidence locker. On cross-examination, Bailey testified he had weighed the substance within; however, he did not make a note of the weight. Shawn Stephens, the Independence County Sheriff, identified the sealed package and testified that he took it to the Arkansas State Crime Laboratory, without opening it, with an evidence submission sheet he signed.

Finally, chemist Blox confirmed that the evidence she tested came to the lab on 19 August 2021 in a sealed manila envelope marked with the matching case number and the initials "ZB." Inside was a ziplock bag containing a piece of a plastic glove and—inside the

piece of glove—an off-white crystalline substance that her tests confirmed was methamphetamine. She returned the substance to the envelope, sealed it where she had originally opened it, and made sure the seals were intact before returning it to be picked up. Sheriff Stephens retrieved the envelope on 14 March 2022 and returned it to the evidence locker. The methamphetamine and its packaging were admitted without objection as State's Exhibit 5.

The State argued below that the discrepancy in the weights Blox and Officer Ramirez had measured could simply have been a typo. Blox testified that she had weighed ziplock bags by themselves, and a small one weighs about 0.2 grams. Adding the weight of the methamphetamine, and allowing 0.1 grams for the glove piece, the gross weight would be just under 0.7 grams. If Officer Ramirez weighed the evidence inside a ziplock bag, the gross weight might have come to about 0.7 grams—one zero away from the figure he entered.

Smart argues this left the jury to resort to "pure speculation" that exactly this had transpired. We conclude from the whole record that any tension resulting from the potentially conflicting evidence about the sample weight went to the weight or credibility of the evidence, and was for the jury to resolve. *Marts*, 332 Ark. at 644–45, 968 S.W.2d at 49. Further, the jury did not have to buy the State's "typo theory"—and conclude that Blox and Officer Ramirez accurately weighed the same evidence, but he inaccurately recorded the result—to disregard the discrepancy.

The evidence submission sheet that accompanied the evidence in Smart's case to the Arkansas State Crime Laboratory does not list a weight. But Blox testified that if it had

listed the 0.07 gram weight Officer Ramirez had logged, she would not have seen the discrepancy as significant enough to merit follow up, since the sample was clearly labeled and both weights were under the two-gram threshold in Ark. Code Ann. § 5-64-419(a)(1)(A). Some difference in weights is expected. She testified that the Arkansas State Crime Laboratory uses balance scales that are regularly calibrated. She does not know the protocol local law enforcement agencies follow in weighing samples, what scales they use, or how many decimal places the scales display. She would consult the agency's weights to catch evidence submitted with the wrong case number, for example, not to make sure the amount matches exactly. But even a five-to-one difference in weights is not necessarily significant, she testified, because while "five times 100 grams is a very large difference," "five times 0.1 gram is a very small difference." Five times 0.07 grams is even smaller.

Sheriff Stephens testified that his deputies typically weigh narcotics inside the packaging. Stephens conceded that it would be unusual in his experience for the Arkansas State Crime Laboratory to record a substantially higher weight for a substance than his department had recorded. But he could not say the department's scales had been calibrated, either. Indeed, he testified that patrol officers use scales that had been seized as evidence if they still work after they've been through court.

Methamphetamine is not the only white crystalline substance. (Think Splenda.) We *might* have reversed on the same record without Smart's admissions—or affirmed easily, even without them, if Officer Ramirez had lived to testify to how he measured and logged the weight at intake, and the calibration and precision of the scale he used. If weighing the same contraband on different scales is likely to result in apparent discrepancies like these, as

Blox seemed to testify, we would sooner require evidence of the precision, accuracy, and calibration of the scales law enforcement used than hold their weight measurements can be ignored. On this record, however, the conflict was for the jury to resolve, and sufficient evidence supports its decision.

Affirmed.

BARRETT, J., agrees.

KLAPPENBACH, J., concurs without opinion.

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