No. 2—09—1086
Order filed February 25, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 84—CF—31
TERRY DUKE,	)	Honorable Perry R. Thompson,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hutchinson and Hudson concurred in the judgment.

ORDER

Held: Where defendant failed to establish that fingerprint evidence was not subject to the requested testing at the time of trial or that the requested fingerprint testing method was not scientifically available at the time of trial and would provide a reasonable likelihood of more probative results, and where the evidence on which defendant seeks DNA testing is not materially relevant to his actual innocence claim, the trial court did not err in denying defendant's motion for fingerprint or forensic testing not available at trial regarding actual innocence under section 116—3 of the Code of Criminal Procedure of 1963 (725 ILCS 5/116—3 (West 2008)).

Defendant, Terry Duke, appeals the denial of his motion for fingerprint or forensic testing not available at trial regarding actual innocence under section 116—3 of the Code of Criminal Procedure of 1963 (the Code) (725 ILCS 5/116—3 (West 2008)). Defendant was convicted in 1984

of rape, aggravated battery, and robbery (Ill. Rev. Stat. 1983, ch. 38, pars. 11-1, 12-4, 18-1). He contends that fingerprint evidence recovered from the victim's car; hairs recovered from the victim's body, clothing, and car; and "likely bodily fluid" from the victim's clothing should be subjected to testing not available at the time of trial, namely the "ACE-V" method of fingerprint testing and DNA testing. For the following reasons, we affirm.

BACKGROUND

This case arises out of defendant's 1984 rape, aggravated battery, and robbery convictions. The evidence at trial established that on the evening of July 28, 1983, the 31-year-old victim was returning home from her law school class on the train from Chicago to Hinsdale, Illinois and walked to her car in a nearby parking lot. The victim testified that as she was unlocking the front door, a man approached her from behind, grabbed her around the chest, and pushed her down to the ground. The assailant then forced the victim into her car. The victim attempted to move across the front seat to the passenger side door to escape, but the assailant pulled her back and told her to put both of her hands on the dashboard. The assailant told the victim not to look at him and that he wanted the victim's money. The victim told him that she had five $20 bills in her purse because she had gone to the bank that day. The assailant asked the victim if she was married; she replied yes. In response to the assailant's question about what her husband did, the victim stated that her husband was a doctor.

The victim testified that she attempted to "go for the right door again" as she was in the right front passenger's seat and the assailant was in the driver's seat, but the assailant grabbed her by the head and pushed her head down into his lap. The victim tried to reach the "left door," but the assailant "grabbed my hand and I remember being rammed up" against the driver's side door handle.

The victim testified that the assailant stated, " 'I'll bet you're the type of either lady or woman that would rather be *** killed than raped.' " The assailant choked the victim and "kept saying if [she] didn't do what he said, he would '[b]reak [her] fucking neck.' " In response to the prosecutor's question whether anything was in front of her face at this point, the victim testified that her hair "was all over" because the assailant "told me not to look at him."

The victim testified that the assailant unbuttoned her blouse, pushed her bra up, and fondled and kissed her left breast. The assailant "pushed my skirt up, my slip up, my pantyhose were down," and "[m]y panties were pushed down." The assailant "put a finger or two fingers in my vagina," then "put his penis in my vagina," and then "put several fingers back into my vagina and he hurt me." The assailant asked the victim whether she was excited, and she responded that he was hurting her. The assailant massaged the victim's abdomen, told the victim she was beautiful, and kissed the victim. The assailant told the victim to wait for five minutes before she went to the police. After the assailant exited the car, the victim tried to sit up and close the right front passenger's side door that the assailant left open. The victim testified that she decided "why should I wait five minutes," covered herself with her blouse, and ran to the Hinsdale police department (which was 75 yards from her car) where she reported what happened. The victim testified that the incident lasted approximately 20 minutes. She described the assailant as tall, agile, and strong and stated that she could see the assailant's light brown, sandy colored hair, but testified on cross-examination that she never saw the assailant's face or his clothes because her hair was over her face. The victim also testified on cross-examination that when she was at the hospital later, she might have told a police officer that the assailant was "between 25 to 35 years of age" and "anywhere from five foot ten to six foot two." The victim did not make an in-court identification of defendant as the assailant. The

victim testified that when the police returned her purse and wallet to her, the five $20 bills were missing.

The victim was taken to the emergency room soon after arriving at the Hinsdale police station. Amy Canaday, the emergency room nurse, testified that the victim relayed what had happened and was physically shaken, trembling, crying, and very frightened and upset. The victim had red marks on her neck, a bruise on her left breast, and bruises and a scratch on her back. Canaday collected the victim's blouse, skirt, slip, bra, "underclothing," and shoes and placed them in labeled bags for the police. The skirt and blouse were introduced as evidence. Canaday testified that the blouse "was much more damp that night. It was very hot." She also testified that the skirt had a stain on it: "there was a circular wet area of the skirt and it was towards the back in about this region right here."

Canaday testified that she took saliva samples from the victim and hair samples from the victim's scalp, body, and pubic region for the "Vitullo Rape Kit." She also took blood from the victim and clipped the victim's nails and did scrapings underneath her nails for the rape kit. The emergency room physician took smears from the victim's vagina for the rape kit.

Detective Raymond Coch, from the Du Page County Sheriff's Office, testified that he vacuumed the victim's car for "trace evidence." He vacuumed the front seat area, the passenger's side floor area, and the driver's side floor area. He explained that trace evidence is microscopic. "It could be hairs, it could be fibers. It is just evidence that is hard to see and would be picked up by the vacuum and can be examined under the microscope." Detective Coch further explained that "in the tube area of the vacuum there is a filter and the filter is placed so that when an item is sucked into the vacuum cleaner, it has to go into the filter before it goes to the other side of the vacuum. It is

retained in that filter area." Then "you open up the chamber and you remove the filter area that has the objects or evidence in it." The evidence is packaged and sealed. Detective Coch testified that he made "three vacuumings" of the interior of the victim's car.

Detective Coch also testified that he "dusted" the interior and exterior of the victim's car for latent fingerprints. He described latent fingerprints:

> "[Y]our fingers naturally produce oils and perspiration. When a finger area or body area touches an area or a surface, what there is is a transfer from a ridge pattern, say, on the fingerprint, to that material that you touch, and this transfer stays on the material that was touched, and that would be perspiration, oil, other body fluids which stay on that object."

Detective Coch explained the process of dusting for latent fingerprints:

> "[Y]ou have a fingerprint powder. You apply powder to a brush. It is a nylon brush, at which time you would go around the vehicle using a circular motion with this brush and powder, going over the exterior of the vehicle, at which time you would develop latent prints, if they were there."

He explained that the purpose of fingerprint dusting is to raise or make visible the prints that are present on the surface:

> "As you dust a surface and you develop a fingerprint, you then take a fingerprint card tape and you apply that to the surface that the latent is on. You would then smooth the tape over the latent fingerprints and go over the surface until you press that tape to that surface.
>
> At this time, you would lift that fingerprint tape with the impression on it and place it on a white card. You would lay the fingerprint card down on a flat surface and then press the tape onto that card, and you have the representation from the print onto that card. You

would then turn it over, mark whatever information you had as far as the location, where it was recovered, your name, date."

Detective Coch testified that he had performed the process "thousands" of times. Detective Coch testified that he recovered 13 "latent lifts" from the victim's car, which were admitted into evidence as group exhibit 16A through 16M. Detective Coch testified that he recovered exhibit 16C [a latent fingerprint] from the "inside window area, the upper middle of the passenger's side door."

David L. Grieve, the Forensic Science Administrator, Training and Applications Coordinator for Latent Prints for the Illinois Department of Law Enforcement, Bureau of Scientific Services, testified about his 19 years of experience in the fingerprinting field. He described a latent fingerprint:

"On the insides of the hands and the bottoms of the feet there is a special kind of skin which is referred to as friction ridge skin. It is not smooth. It is corrugated. There are raised portions which are called ridges and depressed portions which are called furrows or valleys. The raised portions of skin, the ridges, have innumerable sweat pores and the sweat pores are constantly exuding perspiration. Perspiration coats the raised portions of skin, the ridges, plus the hands are very mobile. They are constantly around the face or touching items where they may pick up grease or oil.

When this friction ridge skin comes in contact with the relatively smooth surface, it leaves a deposit, a residue which is in the outline of those raised portions of skin. Usually a latent fingerprint is not visible to the eye and must be developed by the use of powders or chemicals to make it visible."

Grieve described an inked fingerprint as the "application of some medium, like black fingerprint ink to those raised portions of skin, the ridges, and deliberately placing the outline of those ridges onto a piece of paper, card or something like that." Grieve discussed the method for comparing latent and inked fingerprints and making identifications:

> "The ridges do not run continuous. They may break or abruptly end, which is called an ending ridge. The single ridge may form two ridges like a fork, which is called a bifurcation, or it may be a very short length in which case it is called a dot.
>
> Throughout the friction ridge skin, these characteristics, as we refer to them, are scattered. The comparison of the latent fingerprint to an inked print is the operation of those characteristics in the latent print, noting their size, their shape and their relative position to each other and finding a comparable area in an inked print.
>
> If the comparison reveals that the characteristics agree in size, shape and position to each other, then we have an identification."

Grieve testified that he examined 13 "lifts" taken from the victim's car and that three of the lifts contained latent fingerprints, two of the lifts contained fabric impressions, and the remaining lifts did not contain anything for identification purposes. Grieve further testified that he identified two of the three latent fingerprints as the victim's fingerprints, and one of the latent fingerprints as defendant's fingerprint. He explained that the latent fingerprint he identified as defendant's fingerprint (exhibit 16C) showed "a slight smear" but was "of very good quality" and showed a "second impression" meaning "the lift actually contained two latent impressions which were suitable for comparison."

Grieve explained the examination comparison he made between the latent fingerprint and defendant's inked fingerprint:

"My initial examination of the latent print was to observe the individual characteristics that I referred to earlier.

I found an arrangement of these characteristics within this latent impression. I then went to the inked fingerprint to see if I could find a similar arrangement of characteristics of the same size, shape and relative position.

For illustrative purposes, I have marked this particular characteristic, which is a bifurcation, opening towards the left, as point number one.

I then noticed that one ridge to the right and down slightly was a bifurcation opening downward. I marked that point number two.

By following the far right side of that bifurcation, I found a second bifurcation marked point number three.

On my inked print, I observed that there was a bifurcation, opening towards the left. By following the ridge down, there was a bifurcation which opened downwards, and by following this around, there was a bifurcation marked point number 3.

By following this side of the bifurcation down, there was another downward opening bifurcation opening marked point number 4.

By following this one down, there was a downward opening bifurcation marked point number 4.

> I continued doing this with all the characteristics that I could see in the latent print and found exactly the same type of characteristic, same shape, same size, same relative position to each other in that inked print."

Grieve testified that he made 15 points of comparison between the latent fingerprint from the victim's car and defendant's inked fingerprint. He testified that in his experience, the minimum number of comparison points between an inked and latent fingerprint that he had made for identification purposes was seven. On redirect, Grieve testified that "[o]n the inked fingerprint there is a scar which occurred evidently deep enough to severe [*sic*] through the first two layers of skin and it has pulled the ridges in a downward direction here, making sort of a V." According to Grieve, "[s]cars cannot be used as characteristics, but it is an observable fact of what happened to that section of skin." Grieve testified that he also observed the scar on the latent fingerprint: "[a]t the very corner, the ridges are being pulled down to a similar type V."

Defendant was arrested by La Grange police officers on the evening of January 5, 1984, and transferred to the Hinsdale police station that evening. Assistant State's Attorney Thomas Knight testified that he interviewed defendant that evening after both he and the police separately advised defendant of his *Miranda* rights, and defendant waived his rights. Knight testified that he told defendant that defendant's "palm print was found on the inside of the victim's car window."[1] "[S]ubstantially later" in the conversation defendant looked at copies of the complaints for rape, robbery, and intimidation, and said, " 'Well I'll tell you one thing, there's one thing right there I didn't do.' " Knight testified that he asked defendant to which complaint he was referring, and

[1]In closing argument, the State acknowledged that Knight was wrong; the police matched a fingerprint from the victim's car to defendant, not a palm print.

defendant responded, " 'That one right there, the rape case. I didn't rape anybody. I didn't hurt anybody.' "

Knight testified that the conversation proceeded as follows:

"I started by saying the first matter is how did you get there. He said he walked. All the way, and he said yes.

Then the next thing I remember asking shortly after that was where were you when you first saw the victim.

He said he was sitting on a car right behind the police department.

I remember him grinning at that point. Grinning at the police officers, and saying he was right behind the police department.

I asked him, I said what were you doing, just waiting for some woman to get off the train?

And he said no, he didn't even know that she had gotten off the train, he said, he just saw her as she came there.

***

Well, right about that point when he said he just saw her there, I said what were you doing if you weren't waiting for her, what were you doing sitting on a car right behind the police station.

He said, 'I was just thinking about maybe jumping a police officer, and then she came by instead.'

I remember at that point one of the police officers chimmed [*sic*] in and asked, 'Well, what did she look like?' And the other thing I can remember him saying at that time was that

she had long dark or black hair, and that he wasn't paying much attention to what she looked like or what she was wearing.

* * *

He said that he had gotten off work sometime earlier in the afternoon, and that he was thinking about going over to a friend's house to get high, but that he never ended up getting there.

So one of the police officers asked him, '[H]ow did you manage to approach or sneak up on the girl?' And he said he just came up behind her and grabbed her.

He was asked, did she scream? He said, 'No, she never did scream. She did struggle a lot,' he said.

At that point I asked him, I said, 'Well, what do you mean by a lot?' He said, 'Quite a while.'

I said, 'Well, that means different things for different people. Can you give us some idea how long you are talking about? Minutes or seconds or what?'

He ended up saying about maybe eight or nine minutes."

Knight testified that defendant specifically denied kissing or fondling the victim, sticking his finger in her vagina, or threatening to kill her. Rather, defendant said that he blew the horn of the victim's car a couple of times and stated, " 'Not only that, if you guys would have looked, you would have found the money right there, too.' " According to Knight, when asked what he did with the money, defendant stated, " 'Well, actually I don't think I took any money.' " When asked whether defendant conversed with the victim, defendant said, " 'I remember her saying she was married to a doctor, and that she was happily married.' " Knight testified that defendant stated that after he

exited the victim's car, he walked around the front of the police station and started walking home. Defendant stated that as he was walking home, a police car stopped him and asked him what he was doing. The police let him go after he stated he had been at a party or a friend's house. Knight testified that defendant stated that when he returned home, he " 'just sat around and thought about what a stupid thing it was,' " and that he " 'thought about calling a psychologist, but I then figured he'd probably tell on me.' "

On cross-examination, Knight testified that defendant initially stated that the police "had the wrong man," and did not make the statements until after a "good hour" of conversation. In response to defense counsel's question whether defendant told Knight that he wanted to engage in conduct that would allow the police to kill defendant, Knight responded: "Not in precise words, but during that hour I was telling you about, that's what his story evolved to be." Knight clarified, "But that includes some inferences, in all candor. His words, he didn't come out in those very words and say that." With respect to the information defendant relayed in his statements, Knight testified that "based on my experience, it would not have been information he could have gotten from the newspaper."

Defendant testified at trial. He specifically denied fondling or kissing the victim's breast, putting his fingers in her vagina, or raping, robbing, intimidating, or harming the victim. He testified that after returning home from work on the evening of January 5, 1984, he was arrested at his apartment by several police officers from the La Grange police department and brought to the La Grange police station. One of the police officers told defendant that they, "talking about me, had caught the Burlington rapist." About an hour later, Hinsdale police officers transported defendant

to the Hinsdale police station. Defendant testified that he was not informed of the rape, robbery, and intimidation charges against him until after he signed a waiver of his *Miranda* rights.

Defendant testified that Knight told defendant that Knight was " 'a lawyer for the State of Illinois,' " and that he could " 'put [me] in that car by a palm print that [I] left on that car.' " Defendant told Knight " 'you're crazy, you know. It ain't my palm print.' " According to defendant, Knight "kept insisting that I did have something to do with it, and it was very important that I cooperate with him right now, because he said 'You know that there's other counties and other towns that want to talk to you about a string of rapes that happened along the Burlington railroad.' " At this point, defendant could see police officers from Cook County through a window of the interrogation room. Defendant testified that for "a good hour and a half," he and Knight "went back and forth ***[:] I was saying I didn't have nothing to do with it and he was trying to tell me he knew it was me, there was no doubt in his mind."

Defendant testified that one of the police officers in the room stated "by your experience you know that people in jail don't like these kinds of crimes," and "you would not want to go to Cook County Jail with that kind of jacket put on your shoulders." With respect to the reference to "your experience," defendant explained that when he was in the army, he was "arrested for three and a half grams of marijuana," and was sent to the United States Disciplinary Barracks in Fort Leavenworth, Kansas. Defendant testified that "there was a large amount of black people there," and "we did not get along real great." Specifically, defendant testified that "[a]bout two months after I was there I was escorted by two of the guards down there into the hole which is underneath the castle that I was staying in" where "there was quite a few black people down there," and he was "[s]exually attacked, beat up and sexually attacked by those people" on more than one occasion.

Defendant testified that after he relayed this information to Knight, Knight told defendant that if he cooperated, defendant "would be discharged there in Hinsdale and I would be going to this brand new Du Page County Jail in Wheaton." According to defendant, he was tired because he had been awake for 36 or 37 hours at this point; "they were getting mad;" the Cook County police officers were staring at him; and he determined "it would be in my best decision to say things." Defendant testified, "I said just what Mr. Knight said I said. He might have added a few things, but that was generally what I said." Defendant stated that he obtained the information that he relayed to Knight from the newspaper and "then I just made up some things." Defendant testified that he "didn't know how much money, so I just told him that I didn't take the money." Defendant admitted that he told Knight about honking the horn, sitting in the car behind the Hinsdale police station, and wanting to jump a police officer, but testified that he made this information up. However, on cross-examination, defendant denied telling Knight that the victim told him that she was happily married to a doctor and denied stating that he thought he should talk to a psychologist.

Defendant testified that he made up information to tell Knight "[b]ecause at the time I realized that I was not leaving that jail that night, and I wanted to be put in Du Page County Jail where I was told [*sic*] was a very good jail, very clean jail. And I would be relatively safe." Defendant further testified that "I was kind of getting worried about if they let Cook County get me back, I was worried about my safety in general. Not jails, but from the police officers, too." According to defendant, Knight told defendant that he "would definitely not be getting out of jail," and that "if I cooperated with him, that he wouldn't promise me, but he would keep me in Du Page

County Jail until all this was taken care of, as long as he had the right to keep me in Du Page County Jail."[2]

Donna Metzger, a forensic serologist with the Illinois Department of Law Enforcement, the Bureau of Scientific Services, testified that she examined the smears from the victim's rape kit for the presence of semen. She conducted an acid phosphatase test, the results of which were weak to negative for the presence of semen. She also examined the smears microscopically and found no sperm. Metzger likewise tested and examined the victim's clothing that she had been wearing the night of the crime. Metzger testified that she "did not find any seminal stains on the clothing." She explained that the "absence of seminal material really does not lend itself to draw any conclusions. I can't make a conclusion from a negative finding. Not finding seminal material does not indicate whether or not sexual activity took place." She explained that one possibility from the absence of semen is that no ejaculation occurred. Metzger testified that she also examined the hairs from the rape kit.

On cross-examination, Metzger testified that she recovered Caucasian head hairs from the victim's bra, a single pubic hair from the victim's underwear, and hairs from the victim's blouse and skirt and the hospital sheet. On redirect, Metzger testified that she collected the hairs manually, using her fingers and eyes, "placed them in a white paper packet and marked them as to what item of evidence they would be from," and then "placed those packets back with the original evidence and everything, including the hairs, went back to the police agency." She performed no testing on the hairs.

[2]The trial court denied defendant's pretrial motion to suppress his statements.

Judie Welch, a forensic serologist with the Illinois Department of Law Enforcement, Bureau of Scientific Services, testified that she conducted a microscopic examination of defendant's head and pubic hair, as well as the victim's hair and hairs recovered from the victim, her clothing, and her car. She explained the steps conducted to determine a possible source of hair:

"The first step is visually removing the hair or extraneous hairs from a person's clothing, or for example the Vitullo evidence collection kit.

Those hairs are analyzed visually to determine characteristics which might be present, and then mounted on a microscope to make a microscopic analysis.

The microscopic analysis part is composed of two different types of microscope.

The first microscope is a stereo microscope. This allows you to get a three-dimensional view of the hair.

The second type of microscope I utilize is a comparison microscope.

This microscope allows you to observe a questioned hair and a standard hair at the same time in the same field of view under a microscope, so you can actually line up a known hair and a [*sic*] unknown hair and do a comparison.

Based on these results then I make a conclusion as to the possible source of the hairs."

Welch explained that five regions of the hair are analyzed: the root portion, the tip portion, the cuticle, the cortex, and the medulla. "Based on the different characteristics I observe in these five different regions, I can base a conclusion between a questioned hair and a standard hair, and hopefully determine a possible source of a questioned hair." As a standard for comparison, 20 to 25 pulled head hairs and 12 to 15 pulled pubic hairs are required. "What we do is we determine all the ranges present in the victim's standards and in the suspect's standards, and then we compare those

ranges with ranges found or characteristics found in questioned hairs." Welch explained the three types of conclusions that can be drawn from a microscopic examination of hairs:

> "The most positive statement we can make is that a hair did not originate from a certain individual.
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> The next type of conclusion would be an associative conclusion. That is, the hair could have originated from a certain individual.
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> And finally, the third type of conclusion which may be drawn is an inconclusive result."

Regarding her examination of defendant's hair, the victim's hair, and hairs recovered from the victim, her clothing, and her car, Welch testified that she identified a "number of Caucasian pubic hairs and head hairs, all of which were dissimilar to the standards of [defendant]" and which were "consistent with the head and pubic hair standards from [the victim]." Specifically, she testified that there was "one caucasian head hair identified in the head hair from the Vitullo kit which was dissimilar to the head hair standard of both [the victim] and [defendant]"; "one caucasian pubic hair identified from the white hospital sheet which was dissimilar to the standard of [defendant], but the comparison with the standard of [the victim] was inconclusive."

With respect to the vacuumed samples from the front seat passenger side floor of the victim's car, Welch testified that she "removed the hairs and miscellaneous debris found in that plastic envelope, separated the hairs by a visual examination, those hairs which were obviously dissimilar to [defendant] and could have originated from the victim's hairs," and the "other hairs were mounted on a microscope slide and a microscopic analysis was conducted." Welch testified that "[a]fter

removing the hairs and conducting a microscopic examination, a number of conclusions were determined[:]"

"The first one was based on the visual examination, in which approximately nine caucasian head hairs were identified, which were visually consistent with the victim standards and dissimilar to the standard of [defendant].

***

Those hairs were approximately twelve inches long and were within the range of the color shown by the victim's standards.

These characteristics were dissimilar to the standards from [defendant].

***

There were three caucasian head hairs and two caucasian head hair fragements [*sic*] identified, which were consistent with the head hair standards from [the victim] and dissimilar to the head hair standards from [defendant].

There were three caucasian pubic hairs which were consistent with the pubic hair standards from [the victim] and dissimilar to the pubic hair standards from [defendant].

There were also two caucasian, two black hairs indicative of forcible removal identified, consistent with the pubic hair standards from [defendant] and dissimilar to the pubic hair standards from [the victim].

There were two caucasian head hairs identified dissimilar to the head hair standards from both [the victim] and [defendant].

There were four caucasian head hairs, one indicative of forcible removal of indeterminate body origin present."

Welch explained that she concluded that the two pubic hairs consistent with the pubic hair standards from defendant were forcibly removed because those "hairs had the tissue material attached to the root portion of the hair, which is indicative of forcible removal." Welch testified that forcible removal of pubic hairs may be caused by physical contact, "physical contact of sexual activity," washing, or drying. On redirect, she described the characteristics found in defendant's pubic hair:

> "They were relatively fine hairs, thin diameter for a pubic hair.
>
> They did have a tappered [*sic*] tip. The tip was darker than the root area. The root area in some hairs contained little or no pigment.
>
> There was not a lot of buckling or change in diameter which is often associated with pubic hairs present."

Based on the similarity of these characteristics with the characteristics of the two pubic hairs from the front seat passenger side floor of the victim's car, Welch concluded that the two hairs "could have originated from [defendant]."

With respect to the vacuumed samples from the front seat floor driver's side of the victim's car, Welch testified that "[n]one of the hairs found in this plastic bag could have originated from [defendant]." Also, "[t]here was one caucasian head hair identified dissimilar to the head hair standard of both [the victim] and [defendant]." However, "[t]here were approximately eight or nine caucasian head hairs identified, some of which were visually consistent with the standards of [the victim], and some which were microscopically consistent with the standards of [the victim]."

Welch testified that she analyzed a third bag that contained hair samples vacuumed from the victim's car. She stated that "none of the hairs were similar to the standards of [defendant] and did

not originate from [defendant]," and "based upon a visual examination there were a number of hairs which were consistent with the head hair standards of [the victim]."

The jury found defendant guilty of rape, aggravated battery, robbery, and intimidation. Defendant was sentenced to 20 years' imprisonment for rape and concurrent 5-year terms of imprisonment for aggravated battery and robbery. The trial court found that the intimidation charge merged with the aggravated battery charge.[3]

On direct appeal, defendant argued that: (1) the State failed to prove a material requirement of the rape statute by failing to present evidence of defendant's age; (2) the trial court erred in admitting hair sample evidence because the State failed to show a continuous chain of possession; (3) the evidence against him was insufficient because the victim could not identify him, the hair sample evidence was inconclusive, and the fingerprint identified as his contained a significant smudge; and (4) plain error occurred when the prosecutor expressed his personal belief that defendant had lied and was guilty, commented in his closing argument on defendant's failure to call a fingerprint expert, and stated in his rebuttal closing argument, "I give you the Burlington Northern rapist." We affirmed defendant's conviction. See *People v. Duke*, No. 84—767 (March 11, 1986) (unpublished order under Supreme Court Rule 23).

On April 1, 2009, defendant, through counsel, filed a motion for fingerprint or forensic testing not available at trial regarding actual innocence under section 116—3 of the Code. He requested "fingerprint comparison testing, RNA (mitochondrial DNA) testing, and DNA testing on

[3]Defendant states in his brief that he "has finished his sentenced [*sic*] in this case and now is in State custody as a collateral consequence of this conviction."

any other materials that may contain DNA evidence." Specifically, defendant argued that the hair comparison analysis used at the time of trial is outdated. According to defendant,

> "A refined type of Polymerase Chain Reaction (PCR) testing, Mitochondrial DNA analysis, has been increasingly utilized by scientists in the United States. DNA contained in the mitochondria of cells can be isolated and the sequence of DNA bases can be determined. This type of testing is now generally performed on samples that are unsuitable for PCR testing of nuclear DNA, such as hair *shafts*, or other samples that contain very little or highly degraded nuclear DNA.
>
> ***
>
> It therefore appears that, for reasons as yet not determined, the technology to conduct PCR analysis was not available to the Illinois Department of Law Enforcement, Bureau of Scientific Services lab forensic professionals at the time of [defendant's] trial. *** There exists a substantial array of biological samples suitable for re-testing, specifically fingerprints, and perhaps more importantly, hair. It is clear from the evidence inventories that numerous hairs were recovered on or near the victim's body and vehicle which were either not analyzed, or were examined using crude and unreliable visual comparison techniques. ***"

Defendant also argued that "a fingerprint analysis was done for purposes of the trial, however, the validity and reliability of that analysis is in question and therefore a new analysis should be ordered." Defendant further argued that the "investigation of this crime was headed by then Assistant State's Attorney Thomas Knight, now infamous as the only Assistant State's Attorney ever prosecuted for knowingly introducing manufactured evidence in the case of *People v. Rolando*

Cruz, 162 Ill. 2d 314 (1994), and is therefore suspect." At the initial status hearing on defendant's motion, defense counsel informed the trial court that "[i]t turns out that there is, in fact, a skirt and a blouse. And who knows, maybe there's underwear there as well, all of which could have DNA."

In response to defendant's motion, the State noted defendant's claims "that identity was an issue at trial ***, that the relevant hair samples are still in existence with a proper chain of custody, and that this type of mitochondrial DNA technology was not an available method of forensic testing at the time of trial." The State further responded that it did "not dispute defendant's contentions regarding the identity issue, the continued chain of custody, or the unavailability of mitochondrial DNA at the time of trial." However, the State argued that the requested retesting did not have the potential to produce new, noncumulative evidence materially relevant to defendant's actual innocence claim in light of the compelling and overwhelming evidence of defendant's guilt, including his incriminating statements and the fingerprint evidence. The State also pointed out that subsequent to defendant's conviction in this case, defendant pled guilty to several similar offenses in Cook County. Moreover, the State argued that there was no statutory basis for retesting of the fingerprint evidence because fingerprint testing was available and used at the time of defendant's trial.[4]

On August 31, 2009, following oral argument, the trial court denied defendant's motion. The trial court found:

> "I believe a review of the record shows that identity was not an issue, as far as a number of these offenses.

[4]At an August 13, 2009, status hearing, defense counsel referred to a reply brief that he filed in the trial court, but the record does not contain this brief.

[Defendant] denied the commission of a rape. He was consistent in his denial of that. But the jury had evidence that he was the robber, the detainer, if you will, inside the victim's vehicle. They had significant evidence of that. They had corroborated evidence of that, with the fingerprint.

And I appreciate that technology changes, but you've shown nothing to impeach the validity of that test. You simply say there's a better test, but nothing to challenge that test.

So, you have the statement, the victim's description of the incident, the fingerprint inside the vehicle.

You recall, again, from the police report, in talking about being there, laughing that he was so close to the police department during this. There was so much there, that in my opinion, identity was not an issue at the trial. That he was a perpetrator of some of these offenses. They chose to believe he also committed the rape. He did not confess to that. He did not admit to that. Identity was not an issue. The jury simply had to decide whether he also committed the offense of rape, in addition to the other offenses.

So, lacking that crucial element of the statute, there is no basis to grant the motion. Deny the motion for additional testing."

On September 30, 2009, defendant filed a motion to reconsider the denial of his section 116—3 motion on grounds that the trial court improperly determined that identity was not an issue at trial, particularly where the State did not contest the issue. On October 13, 2009, following oral argument, the trial court denied defendant's reconsideration motion.

The trial court explained:

"THE COURT: [W]e have to look at what's presented and what's available and then logically look through there to determine what really were trial issues, if you will, —

MR. ALBUKERK [defense attorney]: Right.

THE COURT: — in terms of construing this statute, —

MR. ALBUKERK: Correct.

THE COURT: — which, of course is a statute added well after these — this case, right? So, you have that going, too, and you try to infer and read what the Legislature intended. You know, you look at the timing, and certainly there are certain types of scientific evidence now where the technology is not just different or improved but brand new, which I think is kind of what you have to read in here.

We've got things out there that could make some differences sometimes, when in the whole context of the trial we've got some questions about whether we've got the right person or not.

MR. ALBUKERK: Right.

THE COURT: I mean that's, I think, what they're trying to do here is, you know, to avoid the screw up, —

MR. ALBUKERK: Correct.

THE COURT: — that haunts the system all the time. We all know about those.

So, you try to read that in here —

MR. ALBUKERK: Yes.

THE COURT: — and look at the context of the whole thing.

And so when I make my ruling, I'm making my ruling based on that context of the evidence that I was presented with, the summary of evidence, if you will, —

MR. ALBUKERK: Yes.

THE COURT: — the transcripts of certain things, making that ruling based on what I read as to what is at issue for purposes of the statute, and so when I made my statement, that's so you know what I was thinking —

MR. ALBUKERK: Right.

THE COURT: — and what I based it on.

And then, of course, you still have that second prong, of course, is there testing that would cause us to believe that the first testing that was done was wrong, not just, you know, maybes but it was wrong.

MR. ALBUKERK: Right.

THE COURT: And I don't see that that's here either."

Defendant timely appealed.

ANALYSIS

Defendant brought his motion for fingerprint or forensic testing not available at trial regarding actual innocence pursuant to section 116—3 of the Code. Section 116—3 provides:

"Motion for fingerprint, Integrated Ballistic Identification System, or forensic testing not available at trial regarding actual innocence.

(a) A defendant may make a motion before the trial court that entered the judgment of conviction in his or her case for the performance of fingerprint, Integrated Ballistic Identification System, or forensic DNA testing, including comparison analysis of genetic

marker groupings of the evidence collected by criminal justice agencies pursuant to the alleged offense, to those of the defendant, to those of other forensic evidence, and to those maintained under subsection (f) of Section 5—4—3 of the United Code of Corrections, on evidence that was secured in relation to the trial which resulted in his or her conviction, and:

(1) was not subject to the testing which is now requested at the time of trial; or

(2) although previously subjected to testing, can be subjected to additional testing utilizing a method that was not scientifically available at the time of trial that provides a reasonable likelihood of more probative results. Reasonable notice of the motion shall be served upon the State.

(b) The defendant must present a prima facie case that:

(1) identity was the issue in the trial which resulted in his or her conviction; and

(2) the evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect.

(c) The trial court shall allow the testing under reasonable conditions designed to protect the State's interests in the integrity of the evidence and the testing process upon a determination that:

(1) the result of the testing has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence even though the results may not completely exonerate the defendant;

(2) the testing requested employs a scientific method generally accepted within the relevant scientific community.

(d) If evidence previously tested pursuant to this Section reveals an unknown fingerprint from the crime scene that does not match the defendant or the victim, the order of the Court shall direct the prosecuting authority to request the Illinois State Police Bureau of Forensic Science to submit the unknown fingerprint evidence into the FBI's Integrated Automated Fingerprint Identification System (AIFIS) for identification. 725 ILCS 5/116—3 (West 2008).

Accordingly, a defendant initially must demonstrate that the evidence to be tested was not subject to the requested testing at the time of trial, or although previously subjected to testing, can be subjected to additional testing utilizing a method that was not scientifically available at the time of trial that provides a reasonable likelihood of more probative results. See *People v. Gecht*, 386 Ill. App. 3d 578, 581 (2008).[5] Upon satisfying that requirement, the defendant is required to establish a *prima facie* case for testing by showing that identity was the issue at trial and that the evidence to be tested has been subject to a secure chain of custody. *Gecht*, 386 Ill. App. 3d at 581. Once the defendant has established a *prima facie* case, the defendant is entitled to the requested testing if the result of the testing has the scientific potential to produce new, noncumulative evidence that is materially relevant to the assertion of actual innocence. *Gecht*, 386 Ill. App. 3d at 581-82. Evidence that is materially relevant to a defendant's actual innocence claim is evidence that tends to

[5]We note that section 116—3 has been amended twice since its enactment in 1998, but the amendments do not impact our reliance on cases decided prior to the current version. We also note that the State incorrectly quoted a prior version of the statute in its brief.

significantly advance that claim. *People v. Savory*, 197 Ill. 2d 203, 213 (2001); accord *People v. Pursley*, No. 2—09—0913, slip op. at 7 (Ill. App. Ct. Jan. 26, 2011).

We review *de novo* a trial court's ruling on a motion brought under section 116-3. *People v. Price*, 345 Ill. App. 3d 129, 133 (2003). *De novo* review is appropriate because the trial court's decision is necessarily based upon a review of the pleadings and trial record and is not based upon an assessment of witness credibility. *Price*, 345 Ill. App. 3d at 133.

Defendant contends that the trial court's finding that identity was not an issue at trial was harmful error, against the manifest weight of the evidence, and denied defendant his due process rights. We agree with defendant on the limited issue that the trial court erred in denying the motion for retesting on grounds that identity was not an issue at trial. Indeed, although the State argues on appeal that the "trial court's reasoning was correct, in that there was a surplus of evidence presented by the State that defendant was indeed the perpetrator of this crime, including an admission by defendant himself that he was the one struggling with the victim in her car," the State explicitly did not dispute that identify was an issue at trial in its response to defendant's motion in the trial court.

Defendant testified that he made incriminating statements to Knight because he was tired, scared, and wanted to be held at the Du Page County jail rather than the Cook County jail. Defendant specifically denied fondling or kissing the victim's breast, putting his fingers in her vagina, or raping, robbing, intimidating, or harming the victim. The victim never identified defendant as the assailant. Accordingly, defendant established that identity was a central issue at trial. See *People v. Shum*, 207 Ill. 2d 47, 66 (2003) (the defendant established that identify was a central issue at trial even where the victim, who had been acquainted with the defendant prior to the crime, identified the defendant because the defendant consistently denied involvement in the crimes);

People v. Bailey, 386 Ill. App. 3d 68, 74 (2008) (the defendant established that identity was a central issue at trial despite a mere conclusory statement regarding the issue in his motion for retesting where the record reflected that the defendant confessed but defense counsel adamantly contested the defendant's guilt).

Nevertheless, the trial court also appeared alternatively to hold, *albeit* not explicitly, that defendant failed to establish that the testing he sought was a method not scientifically available at the time of trial that provides a reasonable likelihood of more probative results. In particular, the trial court stated, "And I appreciate that technology changes, but you've shown nothing to impeach the validity of that test. You simply say there's a better test, but nothing to challenge that test." Moreover, we may affirm the trial court's denial of defendant's motion for retesting on any grounds that are called for by the record. See *People v. Stefanski*, 377 Ill. App. 3d 548, 552 (2007).

Defendant contends that the latent fingerprint from the victim's car that was identified as his should be retested using the "ACE-V" technique rather than the "gross ridge analysis and comparison" technique used at trial. He also contends that "hair shaft" evidence and "clothing with likely bodily fluids" should be subjected to DNA testing. With respect to defendant's request to retest the fingerprint evidence with the ACE-V technique, we note that, although the State does not raise the issue, in the trial court, defendant merely argued that the fingerprint evidence should be retested because the validity and reliability of the fingerprint analysis conducted at trial was in question. He never mentioned ACE-V testing. Accordingly, defendant forfeited his argument that the fingerprint evidence should be retested using the ACE-V technique. See *People v. Barker*, 403 Ill. App. 3d 515, 524 (2010) (holding that the defendant "waived" his argument that evidence should be retested using "Y-STR" or mitochondrial DNA testing because he merely requested "STR,"

"PCR," and "RFLP" testing in the trial court), citing *People v. Johnson*, 154 Ill. 2d 227, 233 (1993) (holding that in the postconviction context, any claim not raised in the original or amended petition is deemed waived).[6]

Forfeiture aside, we hold that defendant failed to establish that the fingerprint evidence was (1) not subject to ACE-V testing or (2) that ACE-V testing was not scientifically available at the time of trial and would provide a reasonable likelihood of more probative results. Defendant argues that "[u]nder present day criteria the fingerprint analysis performed by witness David Grieve at the time of trial, namely "*only* gross ridge analysis and comparison *without* magnified ridge and sweat pore analysis or *peer review*, does not meet the criteria established by *Daubert* or *Frye* in present day trials regarding admissibility."[7] Defendant defines ACE-V testing as follows: "gross analysis of

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[6]As currently described, the term forfeiture refers to "issues that could have been raised, but were not, and are therefore barred." *People v. Blair*, 215 Ill. 2d 427, 443-44 (2005).

[7]In Illinois, admission of expert testimony is governed by the "general acceptance" test first expressed in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). *Northern Trust Co. v. Burandt and Armbrust, LLP*, 403 Ill. App. 3d 260, 275 (2010). Illinois Rule of Evidence 702 (eff. Jan. 1, 2011) retains the *Frye* test. In federal court and other jurisdictions, admission of expert testimony is governed by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Unlike the *Frye* general acceptance test, the *Daubert* test for admissibility of expert opinion provides general observations to consider in determining whether a standard of evidentiary reliability has been reached that would assist the trier of fact in understanding the fact at issue. See *Donnellan v. First Student, Inc.*, 383 Ill. App. 3d 1040, 1057-58 (2008) (discussing distinction between *Frye* and *Daubert* tests).

pattern of ridges and grooves in both latent print and exemplar, comparison patterns at a more magnified level of ridges and sweat pores between latent print and exemplar, evaluate degree of similarity between latent print and exemplar & [*sic*] verify [through independent peer review—which reduces chance of improper influences on examiner's subjective opinion]."

In support, defendant relies on *United States v. Havvard*, 260 F.3d 597 (7th Cir. 2001). The court in *Havvard* affirmed the district court's holding that latent fingerprint identification satisfied the standards of reliability for admissible expert testimony under *Daubert*. *Havvard*, 260 F.3d at 600-01. The court recounted the fingerprint expert's testimony in the district court: during the initial phase, the examiner determines whether the flow of the ridges follows the same pattern and determines the orientation of the imprint left by the fingerprint ridges; the examiner next studies each separate ridge (the location, type, direction, and relationship) in the fingerprint and determines its relationship to the other ridges in the print; in the third phase, the examiner compares individual ridges to determine whether those in the latent print match each ridge in the exemplar and compares the unique sweat pores in each print. *Havvard*, 260 F.3d at 598-99. The court never mentioned the term ACE-V testing, although we note that the district court decision uses the term and explains that the term is an acronym for the four-step process used by a fingerprint examiner: analysis, comparison, evaluation, and verification. *United States v. Havvard*, 117 F. Supp. 2d 848, 853 (S.D. Ind. 2000).

Even if defendant's cryptic definition of ACE-V testing is accurate, defendant fails to explain the distinction between the ACE-V method and the method of fingerprint testing used at trial. Interestingly, in *Commonwealth v. Patterson*, 840 N.E.2d 12, 16 n.4 (Mass. 2005), the court pointed out that "[a]lthough the term ACE-V was not coined until at least 1995, when the scientific working

group on friction ridge analysis, study, and technology (SWGFAST) documented standards for comparing prints, the steps performed under ACE-V are essentially the same steps performed by fingerprint experts over the last hundred years."

To be sure, defendant contends that Grieve did not conduct "magnified ridge" or "sweat pore analysis," and that his work was not peer reviewed. He does not explain magnified ridge or sweat pore analysis or contrast these methods with the method about which Grieve testified at trial. Although the State does not raise the argument, such bare assertions unsupported by argument or citation to authority are deemed forfeited. See *Barker*, 403 Ill. App. 3d at 526 (holding that the defendant further "waived" his argument that evidence should be retested using mtDNA testing because he "only mentions mtDNA testing twice in his opening brief, without any accompanying explanation of what it is or what specific benefits such testing would lead to, and does not discuss the 'materially relevant' aspect of the analysis at all").

Forfeiture aside, defendant seeks to extrapolate the holding in *Havvard*—that latent fingerprint identification satisfied the standards of reliability for admissible expert testimony under *Daubert*—to his argument that the fingerprint testing Grieve conducted in this case would be *inadmissible* today. Defendant provides no support for this argument. In fact, he concedes "there is no case law on this point."

Defendant nevertheless cites *People v. Ford*, 239 Ill. App. 3d 314 (1992), and *United States v. Lee*, 502 F.3d 691 (7th Cir. 2007), apparently to support his argument that the "gross methodology for fingerprint identification used by Grieve is no longer the accepted methodology used by a significant portion of the scientific community." *Ford* stands for the proposition that when a conviction is based solely on fingerprint evidence, the fingerprint evidence must satisfy both physical

and temporal criteria. *Ford*, 239 Ill. App. 3d at 317. These criteria were never challenged in this case.

In *Lee*, the court held that the district court did not abuse its discretion in holding that the defendant's proffered fingerprint expert was unqualified and in allowing the government's fingerprint expert to testify. *Lee*, 502 F.3d at 698-99. The fingerprint in *Lee* was a partial fingerprint, and defendant recounts the court's statement that the "fingerprint on the handgun recovered by the police was a partial fingerprint, suitable for comparison but not for identification purposes" in that the partial fingerprint could be used only to exclude possible persons as the offender. *Lee*, 502 F.3d at 698. Defendant states that the latent fingerprint that Grieve identified as defendant's fingerprint was a partial fingerprint. Defendant offers no further analysis. Grieve testified at trial that the latent fingerprint identified as defendant's fingerprint contained a "slight smear" but was "of very good quality." Defendant provides no basis to question Grieve's ability to identify the latent fingerprint as defendant's fingerprint. In fact, Grieve testified that he made 15 points of comparison between the fingerprints. Significantly, our supreme court has noted that no Illinois case expressly sets forth the minimum number of points of similarity between a latent fingerprint and an exemplar to be sufficient for identification:

> "[F]ingerprint evidence of identity has been held admissible in some cases where the expert found five points of similarity, and in another in which the expert found only four. The courts, in those cases, took the position that the paucity of points of similarity went to the weight accorded to the evidence." *People v. Campbell*, 146 Ill. 2d 363, 384 (1992).

Lee provides no authority for defendant's contention that Grieve's method of fingerprint testing would be inadmissible today.

Defendant does not explain or provide any support for the proposition that the fingerprint evidence was not subject to ACE-V testing or that ACE-V testing was not scientifically available at the time of trial and would provide a reasonable likelihood of more probative results. Accordingly, the trial court did not err in denying defendant's motion with respect to his request for retesting of the fingerprint evidence. See *People v. Shelton*, 351 Ill. App. 3d 292, 294 (2004) (affirming the trial court's denial of the defendant's motion for retesting pursuant to section 116—3 because the defendant failed to allege the threshold issue that the DNA testing he sought was not available at the time of his trial).

In addition to his request for retesting of fingerprint evidence, defendant argues that "hair shaft" evidence and "clothing with likely bodily fluids" should be subjected to DNA testing.[8] He contends that "[t]oday, a sophisticated, very accurate type of DNA testing of genetic material is available for the evidence in question (hair shaft and bodily fluid clothing stain evidence). A refined amplification technique termed Polymerase Chain Reaction (PCR) can produce from a tiny sample a large enough quantity of DNA for testing even from minute samples of DNA." He further contends that "[m]itochondrial DNA Comparisons with a known sample, has been increasingly utilized by scientists in the United States for identification purposes in forensic situations," and that "DNA contained within the mitochondrial of cells can be isolated, amplified, and unique DNA sequences can be determined and compared to known samples. This type of testing is now generally performed on samples that are unsuitable for PCR testing of nuclear DNA, such as hair shafts, or other samples that contain very little or highly degraded nuclear DNA."

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[8]The State does not dispute that the evidence sought to be tested has been subject to a secure chain of custody.

Defendant's argument is vague. He fails to specify each piece of evidence he seeks to retest and does not delineate the testing he seeks on each piece of evidence. This is a problem because a determination of whether the evidence at issue is materially relevant to defendant's actual innocence claim "cannot be determined in the abstract." *Savory*, 197 Ill. 2d at 214. Rather, the determination "requires a consideration of the evidence introduced at trial, as well as an assessment of the evidence defendant is seeking to test." *Savory*, 197 Ill. 2d at 214.

Nevertheless, we glean from defendant's argument that he seeks PCR and mitochondrial DNA testing on the victim's clothing and the hairs recovered from the victim, her clothes, and her car. We hold that the evidence defendant seeks to test is not materially relevant to his actual innocence claim. A review of the record reflects that defendant's convictions were based on defendant's incriminating statements and Grieve's identification of the latent fingerprint recovered from the victim's car as defendant's fingerprint. Knight testified that during the January 5, 1984, questioning at the Hinsdale police station, defendant denied raping, touching, or threatening the victim, but admitted sitting on a car right behind the police department when he saw the victim and thinking about " 'maybe jumping a police officer, and then she came by instead.' " According to Knight, defendant stated that the victim had "long dark or black hair" and told defendant that she was married to a doctor. Defendant also allegedly disclosed that " 'if you guys would have looked, you would have found the money right there, too,' " although defendant subsequently stated he did not think he took any money.

Defendant argues that this evidence should be discounted because he was coerced "by a now discredited prosecutor" into concocting these statements. Defendant, however, admitted that he made the statements (although he subsequently denied telling Knight that the victim revealed she

was married to a doctor). He testified that he learned the details about the crime to which he confessed from the newspaper. The State's position was that defendant could not have known the details to which he confessed unless he was in fact the assailant. The prosecutor argued in closing argument: "[W]hat kind of newspaper is going to have the marital information of the victim in it?" and "What kind of newspaper account is going to tell you the victim had very long hair?" It was up to the jury to resolve this issue.

Moreover, in closing argument, the prosecutor described the fingerprint as "the most important piece of evidence." Grieve testified that he made 15 points of comparison between the latent fingerprint from the victim's car (exhibit 16C) and defendant's inked fingerprint. Detective Coch testified that he recovered the latent fingerprint marked exhibit 16C from the "inside window area, the upper middle of the passenger's side door." The prosecutor explained in closing argument that the victim testified that the assailant "left by this door, the door the print had been lifted on."

Against this backdrop, the evidence defendant seeks to retest, the victim's clothing and the recovered hair evidence, is not materially relevant to defendant's actual innocence claim. The victim's clothing was introduced at trial, but the State did not rely on the clothing as evidence of defendant's guilt. Canaday (the emergency room nurse) testified that the victim's blouse was damp and the skirt had "a circular wet area." However, Metzger (a forensic serologist) testified that she found no seminal stains on the clothing and that the "absence of seminal material really does not lend itself to draw any conclusions." The State did not mention the victim's clothing in closing argument. Defendant makes no showing that the clothing even contains DNA.

Welch (a forensic serologist) examined the hair evidence and concluded that two pubic hairs recovered from the front seat passenger side floor of the victim's car were "consistent with the pubic

hair standards" from defendant. The prosecutor affirmatively stated in closing argument that the pubic hairs were not a positive means of identification and merely had "some corroborative value because they can type someone or some hairs as either being from this kind of person or not."

Under analogous facts, our supreme court affirmed the denial of a defendant's section 116—3 motion for retesting. *Savory*, 197 Ill. 2d at 214-16. In *Savory*, the 14-year-old defendant was convicted in the stabbing deaths of two teenage siblings in the victims' home. While being questioned by police, the defendant confessed to the crimes. After an initial conviction, the appellate court reversed on grounds that the confession was inadmissible. *Savory*, 197 Ill. 2d at 205-06. At a second trial, the State introduced the defendant's admissions to friends that he had killed the victims and statements to the police before making the inadmissible confession, including what the victims had prepared for dinner and the fact that a television had been moved from its usual position. The State also introduced evidence that hairs consistent with the defendant's hair were found in the victims' bathroom sink and tub, that a knife from the defendant's home had blood on it, and that a bloodstain on a pair of trousers recovered from the defendant's home was of the same blood type as one of the victim's blood. The defendant's father testified that the bloodstained trousers belonged to him and that the bloodstain was from a cut on his leg. *Savory*, 197 Ill. 2d at 207-08.

After he was convicted, the defendant filed a section 116—3 motion to conduct DNA testing on the bloodstained trousers. *Savory*, 197 Ill. 2d at 208-09. Our supreme court held that the evidence that the defendant sought to retest was not materially relevant to his actual innocence claim. *Savory*, 197 Ill. 2d at 214. The court reasoned that the testimony regarding the possible source of the bloodstain on the trousers was only a minor part of the State's case. *Savory*, 197 Ill. 2d at 214-15. The State mainly relied on the defendant's inculpatory comments to friends and the police.

Savory, 197 Ill. 2d at 215. The bloodstained trousers were a collateral issue and not central to the State's case. *Savory*, 197 Ill. 2d at 215. Under these circumstances, "a test result favorable to defendant would not significantly advance his claim of actual innocence, but would only exclude one relatively minor item from the evidence of guilt marshaled against him by the State." *Savory*, 197 Ill. 2d at 215.

Likewise, here, the victim's clothing did not play a role in the State's case against defendant, and the hair evidence was only a minor part of the State's case. Evidence that two pubic hairs from the victim's car were "consistent with the pubic hair standards" from defendant was a collateral issue, as emphasized by the prosecutor's express acknowledgment during closing argument that the pubic hairs were not a positive means of identification. The State relied on defendant's incriminating statements that demonstrated knowledge about the victim that only the assailant could have had and evidence that a latent fingerprint from the victim's car was identified as defendant's fingerprint. The evidence defendant seeks to retest is not materially relevant to his actual innocence claim.

For the foregoing reasons, we affirm the judgment of the circuit court of Du Page County.

Affirmed.