

No. 1-09-3513

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IN THE APPELLATE COURT  
OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 09 CR 14067
	)	
NICHOLAS WALTON,	)	Honorable
	)	Thomas M. Davy,
Defendant-Appellant.	)	Judge Presiding.
	)	

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JUSTICE STERBA delivered the judgment of the court.  
Justices Steele and Salone concurred in the judgment.

**ORDER**

*Held:* There was adequate foundation for the fingerprint examiner's testimony that the latent prints found on the car matched defendant's known prints. However, the examiner's testimony that a non-testifying co-examiner had reached the same conclusion was inadmissible hearsay that rose to the level of plain error and supports reversal of defendant's conviction. Moreover, double jeopardy concerns do not prohibit a retrial.

¶ 1 Defendant Nicholas Walton was convicted of burglary following a bench trial and sentenced to two years of TASC probation. On appeal, defendant contends that the State failed

1-09-3513

to prove him guilty of burglary beyond a reasonable doubt where the only evidence linking him to the crime consisted of his latent palm prints found on the victim's car. The remainder of defendant's arguments surround the admission of this palm print identification into evidence. First, defendant contends that the trial court should not have considered the identification in the absence of testimony that it was verified. Defendant also challenges the introduction of the hearsay of a non-testifying examiner regarding her verification of the prints as a violation of his confrontation clause rights. Next, defendant contends that his counsel rendered ineffective assistance where he failed to request a *Frye* hearing to determine the admissibility of the results of the fingerprint analysis. Alternatively, defendant maintains that it was plain error for the trial court to allow the examiner's expert testimony without first evaluating its admissibility through a *Frye* hearing. For the reasons that follow, we reverse the judgment of the trial court and remand for a new trial.

¶ 2

## BACKGROUND

¶ 3 This case arises out of a residential burglary of car tires which occurred on or about April 27, 2008, in Chicago, Illinois. Victim Conrad Carey testified at trial that on the evening of April 27, he washed his car and then ran a five-minute errand to a nearby gas station. When he returned home, he parked his car next to his sister's in his two-car, detached garage. After parking his car, Carey closed both the garage door and the service door and entered his house, where he stayed the remainder of the evening. The next morning, he tried and failed to open the garage door by remote. He then went to the side of the house and opened the access door, which "just pushed open." Carey attempted to initiate the override system to open the garage door, but when that

1-09-3513

failed, he opened the door manually. It was then that he saw all four tires of his car, as well as three tires from his sister's car, were missing. Carey immediately called the police, and when an officer arrived, he informed him that he did not know who had stolen the tires. At trial, Carey testified that he did not know defendant and had never seen him before. Additionally, he had never given him permission to enter his garage or take his tires.

¶ 4 Carey went on to testify that when both cars are in the garage, there is no room to walk around the perimeter of the garage. He also testified to the ordinary use of both cars.

Specifically, he stated that in the week prior to the burglary, he had driven his car to and from work. However, his sister's car had not been driven for several weeks prior to April 27 as his sister had recently had surgery.

¶ 5 The State then called Officer Michael Scarriot, an evidence technician for the Chicago Police Department, to testify. Officer Scarriot arrived at the scene of the burglary on April 28 and spoke to Carey. Officer Scarriot observed two cars in the garage, both without tires. He lifted six or seven fingerprints and palm prints from Carey's car: one from the driver's side, two from the hood, two from the windshield, and one from the passenger side. He testified that he was unsuccessful in his attempt to collect prints from Carey's sister's car due to the fact that it was dirty and dusty. He also did not recover prints from the interior of the garage. After taking a set of elimination prints from Carey, Officer Scarriot inventoried the prints and proceeded to send them to latent print examiners.

¶ 6 Leo Cummings, a latent print examiner for the Chicago Police Department also testified for the State and was qualified as an expert in his field. He explained that his job as a print

1-09-3513

examiner was to take latent prints and determine their value for purposes of comparison with known prints. A latent print is an impression of skin transferred onto an object handled by the individual that requires a chemical application to develop. A known print, in contrast, is a recording of an individual's skin through the use of a medium such as ink or photography to a contrasting background. It is an intentional reproduction under controlled conditions.

¶ 7 Cummings testified that when he receives a latent fingerprint obtained from a crime scene, he first assesses its suitability for identification purposes. Next, he determines if there is a unique, visible characteristic to use as a focal point. Typically, there are approximately 75 to 125 individual characteristics from the tip to the base of an index finger. A palm print has substantially more detail, and thus more characteristics. Fingerprints are compared through evaluation of the ridge characteristics. Cummings stated that when approximately 8 to 12 points of comparison match in both the latent and known prints, an identification can be made. This is a scientific process known as ACE-V, which stands for analysis, comparison, evaluation and verification. Addressing the verification requirement, Cummings testified that an identification is only established after a second qualified examiner compares the evidence and arrives at the same conclusion. Cummings has never had another examiner disagree with his conditional identification.

¶ 8 With regard to the instant case, Cummings testified that he compared the latent palm prints recovered from the car with Carey's known prints and eliminated the prints as Carey's. Cummings then gave the latent prints to his colleague, Cynthia Seavers, who entered them into the Chicago Police Department's computerized palm print database. The database recovered a

1-09-3513

possible match with a known palm print that belonged to defendant. In February 2009, Cummings compared this known print with the latent prints and made what he characterized as a positive identification. Later, in July 2009, Cummings compared defendant's known palm print taken at the time of his arrest with the latent palm prints and again conditionally identified the latent prints as defendant's. Specifically, Cummings testified that he was able to find at least 12 matches on distinguishing characteristics on each of the six latent palm prints when comparing them with the two sets of known prints, which led him to conclude that defendant's palm prints were on Carey's car.

¶ 9 Both the latent prints and the known prints were entered into evidence. Cummings stated that both he and his co-examiner, identified only as 'CMS,' initialed the six latent prints and noted that his co-examiner "wrote down the, what was identified on each lift and the date."

¶ 10 At the conclusion of Cummings' testimony, the State rested. The defense proceeded by way of stipulation to Officer Sotek's testimony, who would testify that he spoke with Carey and his sister on May 4, 2009, and was told that it was Carey's sister's car, rather than Carey's car, that had been washed on April 27, 2008.

¶ 11 After hearing closing arguments, the trial court found defendant guilty of burglary and sentenced him to two years probation. The court relied on the fingerprint identification and described Cummings' testimony as follows:

"He testified that each one of the latent prints had from 8 to 12 and possibly more areas of comparison to the palm prints, specifically that there were four of the left palm identified and two of the right palm that were identified.

The first analysis was whether there was a sufficient amount to identify and then he made the comparisons ultimately with the prints of the defendant, which were also reviewed by a second expert in his office."

¶ 12 Defendant's motion for a new trial and motion to reconsider sentence were both denied, and defendant timely filed this appeal.

¶ 13 ANALYSIS

¶ 14 The dispositive issue on appeal is the admissibility of the fingerprint identification made by Cummings. Defendant first contends that the identification was inadmissible because there was inadequate foundation for Cummings' opinion that the latent prints on the car matched defendant's known prints. Specifically, defendant argues that no testimony was elicited on the issue of whether Cummings' conditional identification was verified in accordance with the ACE-V methodology. Defendant concedes that no objection to foundation was made at trial or in posttrial motions, but asks us to review for plain error. The State responds that plain error review is inapplicable because defendant elicited the evidence to which he objects on appeal. See *People v. Bush*, 214 Ill. 2d 318, 332 (2005). However, a review of the record does not support this contention.

¶ 15 During the voir dire conducted to qualify Cummings as an expert, Cummings testified generally that before an official identification of latent fingerprints can be made, the examiner must comply with the ACE-V methodology, which requires analysis, comparison, evaluation and verification. In response to defense counsel's question regarding the quality assurance process for identifications, Cummings testified "every examination has to go to another qualified

1-09-3513

examiner and they have to agree with your results before it ever is established as an identification. So, every case is peer reviewed." Contrary to the State's contention, this is not the testimony to which defendant now objects. Rather, he argues on appeal that the remainder of Cummings' testimony did not establish that the required peer review, or verification, occurred. This contention may be reviewed for plain error, notwithstanding the fact that defendant forfeited his objection to foundation by failing to raise it at trial. See *People v. Korzenewski*, 2012 IL App (4th) 101026, ¶16 (after finding forfeiture, court proceeded to consider foundation objection under plain error doctrine).

¶ 16 Plain error allows a reviewing court to consider otherwise unpreserved issues on appeal if: (1) the evidence is closely balanced; or (2) the error so seriously affects the integrity of the judicial process that it denies the defendant his right to a fair trial. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). Before turning to whether either of these prongs have been satisfied, we must first determine whether there was in fact a foundational error in the admission of the fingerprint identification into evidence. We hold that there was not.

¶ 17 It has long been held that the admission of fingerprint evidence requires expert testimony based on scientific knowledge. *People v. Palmer*, 181 Ill. App. 3d 504, 512 (1989). The expert's testimony must be supported by an adequate foundation that establishes that the information upon which the expert bases his opinion is reliable. *People v. Negron*, 2012 IL App (1st) 101194, ¶ 35 (citing *People v. Safford*, 392 Ill. App. 3d 212, 221 (2009)). We review *de novo* the issue of whether foundational requirements have been satisfied. *Safford*, 392 Ill. App. 3d at 221.

¶ 18 As discussed above, Cummings, who was qualified as an expert in the area of fingerprint

1-09-3513

identification, testified that he followed the ACE-V methodology in reaching his conclusion that the latent prints belonged to defendant. With regard to the verification requirement, Cummings testified that the latent fingerprint cards, which were admitted into evidence, contained both his initials and those of his co-examiner's. While he did not explicitly state that his co-examiner verified his conditional identification as to whom the palm prints belonged to, he testified that his co-examiner "wrote down the, what was *identified* on each lift and the date." (Emphasis added.) Specifically, the cards read: "IDNT: Nicholas W. Walton (susp) IR # 1451498 26 Feb 09." This statement, coupled with the co-examiner's initials on the card, supports an inference that the co-examiner compared the two sets of prints and also identified them as belonging to defendant. Thus, we conclude that the verification requirement was satisfied so as to provide foundation for Cummings' conclusion that the latent palm prints matched those of defendant. As such, no error occurred to a degree which would give rise to plain error review.

¶ 19 In the alternative, defendant argues that even if Cummings' identification was supported by adequate foundation, the identification was nevertheless inadmissible because the statement of the non-testifying examiner who verified Cummings' opinion was hearsay. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted and is generally inadmissible. *People v. Simms*, 143 Ill. 2d 154, 173 (1993). The State initially responds that no third party statements were admitted into evidence. This argument is flatly contradicted by the record, which, as described above, reveals that Cummings' co-examiner initialed the latent prints and made a notation indicating they were identified as belonging to defendant. Certainly, this qualifies as a statement for hearsay purposes. See Ill. R. Evid. 801(a)(1) (eff. Jan. 1, 2011)

1-09-3513

(statement defined as any oral or written assertion).<sup>1</sup>

¶ 20 Alternatively, the State argues that the identification made by the co-examiner was not offered for the truth of the matter asserted, but to show that the ACE-V methodology was followed. Though this presents a closer question, ultimately, we find the State's argument unpersuasive.

¶ 21 *People v. Smith*, 256 Ill. App. 3d 610 (1994), and its progeny provide guidance on this issue. The *Smith* court held that testimony by a fingerprint examiner that her identification of prints had been verified by a second, non-testifying examiner was inadmissible as hearsay. *Smith*, 256 Ill. App. 3d at 615. The court relied in part on the well settled proposition that a witness who testifies to statements made to him by a non-testifying third party that identify defendant as the perpetrator of a crime constitutes hearsay. *Id.* (citing *People v. Lopez*, 152 Ill. App. 3d 667, 672 (1987)). We recently affirmed the holding in *Smith* in *People v. Yancy*, 368 Ill. App. 3d 381 (2005), and *People v. Prince*, 362 Ill. App. 3d 762 (2005). In both *Yancy* and *Prince*, though the verifying examiner was not identified by name and only the fact of the verification was testified to, we nevertheless held that the verification testimony constituted inadmissible hearsay. *Yancy*, 368 Ill. App. 3d at 385; *Prince*, 362 Ill. App. 3d at 776. Significantly, in *Yancy*, we rejected the very same argument the State raises here: that the testimony as to verification "alerted the trier of fact to the process by which fingerprints are

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<sup>1</sup> Were we to accept the State's contention that no statement of a non-testifying third party was admitted into evidence, then we would necessarily need to conclude that the foundational requirements to support Cummings' identification were not satisfied, as we would be left without evidence of verification. See *supra*.

1-09-3513

identified," and as such, was admissible as non-hearsay. *Yancy*, 368 Ill. App. 3d at 385.

¶ 22 Certainly, evidence that Cummings' conditional identification was peer reviewed does go to show compliance with the ACE-V methodology. But this evidence was also necessarily introduced to prove the truth of the matter asserted; namely, that the prints were identified by Cummings' co-examiner as defendant's. Indeed, if the verification was not considered for its truth, then we are confronted with the problem of inadequate foundation. The ACE-V methodology requires verification by a second examiner before an identification is established. It follows that without considering the written statement of Cummings' co-examiner for its truth, verification would be missing, and the identification would be incomplete.

¶ 23 Having found that Cummings' testimony as to his co-examiner's identification constituted inadmissible hearsay, we turn to whether the admission rose to the level of plain error. Here we depart from *Yancy* and *Prince*, which reviewed the admission of the hearsay for harmless error. *Yancy*, 368 Ill. App. 3d at 386-87 (finding hearsay harmless where the defendant was identified by the owner of the bar which he robbed); *Prince*, 362 Ill. App. 3d at 777 (admission of hearsay was harmless error where several eyewitnesses positively identified the defendant and the victim's blood was found in the co-defendant's car). Defendant argues that although he forfeited his objection to the hearsay testimony by failing to raise it at trial, the evidence was closely balanced so as to implicate the first prong of plain error review. We agree. Evidence is closely balanced if the verdict resulted from the error rather than the properly admitted evidence. *People v. Anderson*, 2012 IL App (1st) 103288, ¶ 66 (citing *People v. White*, 2011 IL 109686, ¶ 133).

1-09-3513

¶ 24 The State contends that the verdict could not have resulted from the erroneous admission of the hearsay because this case was tried before the bench, and we are required to presume the judge knew the law and disregarded the hearsay testimony. See *People v. Mandic*, 325 Ill. App. 3d 544, 546 (2001). However, this presumption is rebutted where the record provides affirmative evidence to the contrary. *Id.* Here, while recounting the evidence before finding defendant guilty, the judge referred to the hearsay, stating that Cummings' comparisons of the prints "were also reviewed by a second expert in his office." The court's reference to the co-examiner as an "expert" though she had not been qualified as such is indicative of the weight the court placed on Cummings' testimony that his work was peer reviewed and rebuts the presumption that the hearsay was disregarded.

¶ 25 Furthermore, if the court did not consider the identification by the non-testifying co-examiner for its truth, as the State maintains, then there was inadequate foundation for the identification of the latent prints as defendant's. Cummings' conditional identification, standing alone, did not support a conclusion that the palm prints belonged to defendant, as Cummings explicitly testified "no identification is complete until another qualified examiner looks over the same evidence and arrives at the same conclusion." In other words, because the only evidence linking defendant to the crime were his latent prints on Carey's car, a finding of guilt could not have been made absent the erroneously admitted evidence that Cummings' co-examiner also identified the palm prints as defendant's. Accordingly, we conclude that the admission of the co-examiner's statement constituted plain error and requires reversal. For this reason, we need not address defendant's remaining claims of error. However, the constitutional prohibition on double

1-09-3513

jeopardy requires us to consider defendant's argument that the evidence was insufficient to sustain his conviction. See *People v. Strong*, 316 Ill. App. 3d 807, 815 (2000).

¶ 26 When a defendant challenges the sufficiency of the evidence, the reviewing court does not retry the defendant but determines whether, in considering the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime to be proven beyond a reasonable doubt. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). For purposes of double jeopardy, we may consider improperly admitted hearsay in reviewing the sufficiency of the evidence. *People v. Olivera*, 164 Ill. 2d 382, 394 (1995).

¶ 27 Defendant argues that he was not proven guilty beyond a reasonable doubt where the only evidence that he stole the tires was his fingerprints on the victim's car. In order to sustain a conviction based solely on fingerprint evidence, the fingerprints must be found in the immediate vicinity of the crime and under such circumstances as they could only have been made at the time the crime occurred. *People v. Span*, 2011 IL App (1st) 083037, ¶ 35. Stated differently, the fingerprints must meet both physical and temporal proximity criteria. *People v. Gomez*, 215 Ill. App. 3d 208, 216 (1991). Here, defendant maintains the temporal proximity requirement was not satisfied, because, despite the fact that there was evidence the car was washed and garaged immediately before the burglary, there was no evidence as to the thoroughness of the washing. *Contra People v. King*, 135 Ill. App. 3d 152, 153-54 (1985) (fingerprint evidence on car sufficient to support conviction for burglary of garage where car was recently washed at full service car wash and hand dried with towels). As such, defendant argues the State did not refute the possibility that the prints could have been made at an earlier time.

1-09-3513

¶ 28 We do not find the lack of evidence as to the thoroughness of the wash dispositive on the issue of whether the temporal proximity requirement was satisfied. Our supreme court has stated that in providing evidence of the time the print was made, the State is not required to "negate every conceivable possibility that the print was impressed at some time other than during the commission of the offense." *People v. Campbell*, 146 Ill. 2d 363, 387 (1992). Rather, in some cases, the particular location of the print along with attendant circumstances may prove the item could have been touched only at the time of the crime. *Id.* In the case *sub judice*, the evidence revealed not only that the car was recently washed, but also that six palm prints were found in several different places on the car, including the driver's side door, the windshield, the hood, and the passenger door. The trier of fact could conclude that the number of prints found all around the car would not have survived even the most superficial wash and must have been made at a time after the wash. Moreover, the particular placement of the prints around the car could have been deemed consistent with the movement of a person in the narrow confines of the garage. Taken together, the evidence is sufficient to satisfy the requirement of temporal proximity so as to support defendant's conviction based on fingerprint identification.

¶ 29 This case is thus distinguishable from *People v. Henderson*, 385 N.Y.S. 2d 863, 864-66 (N.Y. App. Div. 1976), relied on by defendant, where the court held that a single fingerprint belonging to the defendant found on a file cabinet washed with soap and water a month before a burglary was insufficient to sustain the defendant's conviction for burglary of the safe on top of the cabinet. In support of its conclusion, the court pointed out that there was no controlled access to the office in which the cabinet and safe were located, and, more significantly, defendant had

1-09-3513

permission to be there in the days prior to the burglary. *Id.* at 866-67. In contrast, here, the car was washed mere hours before the offense, there were multiple palm prints on the car, and defendant had never been given permission to enter the garage in which the car was parked. Therefore, defendant's reliance on *Henderson* does not compel a finding that the evidence was insufficient to sustain his conviction and bars a new trial.

¶ 30

#### CONCLUSION

¶ 31 For the reasons stated, we reverse and remand for a new trial.

¶ 32 Reversed and remanded.