2013 IL App (1st) 112441-U

SECOND DIVISION
June 18, 2013

No. 1-11-2441



IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| IN THE INTEREST OF | ) | Appeal from the Circuit Court of Cook County |
| SHANNON H., a Minor, | ) | 10 JD 3759 |
| Respondent-Appellant. | ) | Honorable Patricia Mendoza, Judge Presiding. |

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Harris and Justice Simon concurred in the judgment.

**O R D E R**

***Held*:** It was not ineffective assistance of counsel for trial counsel to fail to request a *Frye* hearing on the fingerprint evidence; and the State proved defendant guilty beyond a reasonable doubt where it laid a proper foundation for the expert fingerprint testimony.

¶ 1 The respondent-appellant Shannon H. (respondent), a minor, was found guilty of residential burglary and sentenced to five years of probation. On appeal, he argues that he

received ineffective assistance of counsel because his trial counsel failed to challenge the admissibility of the fingerprint evidence and failed to cross-examine the State's fingerprint expert. Respondent also contends that the State failed to establish his guilt beyond a reasonable doubt where the State provided no evidentiary basis for the latent print examiner's expert opinion testimony regarding a matching fingerprint. For the following reasons, we affirm the judgment of the circuit court.

¶ 2 I. BACKGROUND

¶ 3 Respondent was charged with one count of residential burglary, one count of burglary, one count of theft, one count of criminal trespass to residence, and one count of criminal damage to property. Prior to trial, defense counsel indicated that she had referred the case to her forensic science division, and needed to get an order to produce the fingerprint evidence that had been collected by Chicago Police Department (CPD) officers. Defense counsel then asked for another status date so that her expert had time to review the fingerprint evidence.

¶ 4 At trial, Sandy Browder testified that she lives in a house at 2730 West 85th Street in Chicago, with her two daughters. Browder testified that there are two entrances to her house, one in the front and one in the rear. She has a driveway that runs the length of her house, and leads to a garage. At approximately 7 a.m. on March 4, 2010, Browder left for work with her 16-year-old daughter. Browder exited out the back door. She testified that she always locks her door when she leaves the house. Her other daughter was already at school at the time.

¶ 5 Browder testified that later that afternoon she received a call from her daughter telling her that when she returned from school, she noticed the back window had been broken. The window

leads to the kitchen, which is located in the rear of the home. Browder testified that the ledge of the window is about six feet from the ground. The window that was broken on the date in question was about 30 inches long, or a "couple feet" long, and three or four feet high. The window had an outer screen, then a storm glass window pane, and then an inner glass window pane. When Browder returned home from work, she saw that the screen had been torn and the storm window pane had been broken. The inside window pane had been lifted, but was intact.

¶ 6 Browder testified that several of her belongings were missing. She was missing laptops, digital cameras, iPods, an Xbox 360, and bottles of wine. Browder testified that she did not know the respondent, and he had never been in her house before.

¶ 7 On cross-examination, Browder testified that on the day in question police officers went through the house to make sure no one was there. The police officers then collected fingerprint evidence from the window and elsewhere throughout the home.

¶ 8 Evidence technician Barry Earls testified that he is employed by the Chicago Police Department (CPD). He met with Browder on the date in question and was directed to the broken window. The screen had been cut and there was broken glass from the storm window. Earls testified that the window was approximately six or seven feet from the ground. Earls was able to develop three fingerprints from the home, one of which was taken from the outside of the storm window pane. Earls testified that he kept the fingerprint lifts in his sole care, custody, and control until he was able to inventory them that same day. He put them in an envelope, sealed with evidence tape, and generated a number for the inventory. Once at his location assignment, he sent them to the latent examiners for processing.

¶ 9 Earls testified that Lift B, which was located on the storm window pane, on the outside of the glass, was a ridge impression. Earls testified that time, air, moisture, and dust can effect the quality of a ridge impression.

¶ 10 Detective Ray Verta testified that the respondent was a suspect in the burglary and arrived at Area 1 police station with his father and an attorney on August 10, 2010.

¶ 11 The parties then stipulated that if called to testify, Fulton Knight would testify that he was employed by the Chicago Police Department (CPD), and that he took the fingerprint and palm prints of the respondent on August 10, 2010. Knight would further testify that he used the CPD MorphoTrak, which is a computerized fingerprint system pursuant to CPD protocol.

¶ 12 Officer Thurston Daniels, a latent print examiner with CPD, testified that he has been a latent print examiner for three years. His duties are to evaluate fingerprint lifts, photographs, and negatives to determine if they contain latent impressions, and then determine if those impressions are suitable. He compares unknown latent impressions to inked and live scan prints of known individuals. He then records his conclusions on a fingerprint examination report and testifies as an expert in a court of law if asked.

¶ 13 Officer Daniels testified that he received 232 classroom hours in the evaluation comparison and identification of latent impressions. He then completed a one-year apprenticeship with experienced latent print examiners of the CPD. Officer Daniels testified that he has done thousands of comparisons, and has made hundreds of identifications based on those comparisons. He testified that he has been qualified as an expert in a court of law four times. Officer Daniels was then tendered as an expert witness with no objection by defense counsel.

¶ 14 Officer Daniels then testified as to the basic principles of latent print identification. One of the basic principals is that no two fingerprints have ever been found to be the same. Such prints are formed prior to birth and they remain the same. The raised areas of a print are called "ridges." The top of the ridge contains oil, and when a surface is touched, a reproduction of the ridges may be left on the object. Most times, the reproduction is invisible, which is called a latent fingerprint.

¶ 15 Officer Daniels further testified that a known print is an intentional recording of friction ridges under controlled circumstances either using ink on a white card or a Live Scan machine. Fingerprints are compared side-by-side using a five-time magnifier. A focal point is found on the latent print, and from there you compare the prints going from focal point to focal point. Officer Daniels testified that the side-by-side comparison is a method commonly used in his field. He further testified that there are three basic identifying characteristics in fingerprints: a ridge where it ends, a ridge where it divides into two, and sometimes a ridge will appear as a dot. Daniels testified that an identification occurs when a technician finds characteristics of the same type, direction, and in a certain sequence in the corresponding areas of two different prints with no unexplainable differences. There is no minimum number of matching characteristics that must be met to constitute an identification. Daniels testified, however, that he has never made an identification based on less than eight matching characteristics.

¶ 16 Officer Daniels testified that he compared the Lift B fingerprint, which was found on the storm window, to the respondent's fingerprint and identified Lift B as belonging to the respondent. Daniels testified that the probability of a latent impression with 12 characteristics

belonging to someone other than respondent would be 1 in 10 million. Defense counsel chose not to cross-examine Officer Daniels.

¶ 17 During closing arguments, defense counsel argued that the only evidence to even place the respondent at the scene of the burglary was "a pair of fingerprints" that was recovered from the window. Defense counsel argued that the prints were found on the exterior of the storm window, and not inside the house. She argued that there was other fingerprint evidence found in the house, which did not match defendant, and no other evidence put the respondent inside the house.

¶ 18 Defense counsel argued that it was the State's burden to prove the respondent guilty beyond a reasonable doubt, and that the respondent did not need to present a theory for how his fingerprint got on the window. Defense counsel argued that there was no evidence that the fingerprint was left on the window at the time the offense was committed, which was an element of the offense. Defense counsel argued that the prints could have been left earlier in the day and that the burglary could have been committed later in the day by someone else. Defense counsel stated that the evidence technician did not testify as to the condition of the prints or how long the prints had been there.

¶ 19 The trial court found that there was no question that the fingerprint lifted off the storm window belonged to respondent, so the only question that remained was whether the evidence was enough to establish beyond a reasonable doubt that the respondent committed the offense. The trial court found that the respondent's fingerprint was found six feet off the ground and that access to that window was not generally accessible to the public. Moreover, the trial court found

that the window could only be accessed by removing the screen or cutting through the screen. Finally, the court found that the owner of the home had testified that she did not know respondent and thus respondent did not have access to her home on any prior occasions. The court found that the State met its burden of finding defendant guilty beyond a reasonable doubt of residential burglary. Respondent was sentenced to five years' probation. He now appeals.

¶ 20 II. ANALYSIS

¶ 21 On appeal, respondent first contends that defense counsel was ineffective when she failed to request a *Frye* hearing on the validity of the fingerprint testing, and where she failed to cross-examine the testimony of the State's latent print examiner regarding a matching fingerprint. The State responds that defense counsel met the objective standard of reasonableness, and that respondent failed to show prejudice.

¶ 22 A. Ineffective Assistance of Counsel

¶ 23 Claims of ineffective assistance of counsel are evaluated under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984), which requires the defendant to demonstrate: (1) that counsel's performance fell below an objective standard of reasonableness and (2) a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Davis*, 205 Ill. 2d 349, 364 (2002). We assess counsel's performance using an objective standard of competence under prevailing professional norms. *People v. Ramsey*, 239 Ill. 2d 342, 433 (2010). To establish deficient performance, the defendant must overcome the strong presumption that counsel's action or inaction was the result of sound trial strategy. *People v. Evans*, 186 Ill. 2d 83, 93 (1999). "As a result, counsel's

strategic choices that are made after the investigation of the law and the facts are virtually unassailable." *Ramsey*, 239 Ill. 2d at 433.

¶ 24 1. *Frye* Hearing

¶ 25 Respondent contends that trial counsel was deficient for failing to request a *Frye* hearing on the fingerprint evidence. In Illinois, scientific evidence is admissible at trial only if it meets the standard expressed in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), which dictates that "scientific evidence is admissible at trial only if the methodology or scientific principle upon which the opinion is based is 'sufficiently established to have gained general acceptance in the particular field in which it belongs.' " *In re Commitment of Simmons*, 213 Ill. 2d 523, 529-30 (2004) (quoting *Frye*, 293 F. at 1014). Once a principle, technique, or test has gained general acceptance in the particular scientific community, its general acceptance is presumed in the subsequent litigation. See *People v. Hickey*, 178 Ill. 2d 156, 277 (1997). Application of the *Frye* standard is limited to scientific methodology that is considered "new" or "novel." *People v. McKown*, 226 Ill. 2d 245, 257 (2007). Our supreme court has explained that generally a scientific technique is new or novel if it is original or striking, or does not resemble something formerly known or used. *Donaldson v. Central Illinois Public Service Co.*, 199 Ill. 2d 63, 78 (2002), abrogated on other grounds by *In re Commitment of Simons*, 213 Ill. 2d 523 (2004).

¶ 26 Respondent contends that expert scientific evidence is admissible only if the methodology underlying the expert's opinion has gained general acceptance in the particular field in which it belongs, and that standard has yet to be met with regard to latent fingerprint identification. Respondent admits that there has never been a *Frye* hearing in Illinois to determine whether

generally accepted scientific principles support latent fingerprint identification. Nonetheless, he contends that there have been numerous challenges to the admission of latent print evidence, and that defense counsel should have requested a *Frye* hearing.

¶ 27 As respondent notes, the decision whether to file a pretrial motion is considered trial strategy, and trial counsel enjoys the strong presumption that failure to move to exclude evidence was proper. *People v. Rodriguez*, 312 Ill. App. 3d 920, 925 (2000). To overcome that presumption, the defendant must demonstrate a reasonable probability that the motion would have been granted and that the outcome of the trial would have been different. *Rodriguez*, 312 Ill. App. 3d at 925. Reasonable probability is defined as a probability sufficient to undermine confidence in the outcome. *People v. Spann*, 332 Ill. App. 3d 425, 433 (2002).

¶ 28 We find that respondent has not demonstrated a reasonable probability that a pretrial motion for a *Frye* hearing would have been granted. As the State notes, in *People v. Mitchell*, 2011 IL App (1st) 083143, ¶ 31, this court found that fingerprint analysis is neither novel or new. This court reasoned that "[u]ntil our supreme court decides otherwise, as it did with regard to the HGN evidence in *People v. McKown*, 226 Ill. 2d 245, 257 (2007), there is no authority in this state for the defendant's claim that the circuit court erred in rejecting the defendant's motion for a *Frye* hearing on the admissibility of fingerprint evidence." *Id*. Accordingly, we find that defense counsel was not ineffective for failing to request a *Frye* hearing on the fingerprint evidence.

¶ 29 2. Cross-Examination of Fingerprint Expert

¶ 30 Respondent's second ineffective assistance of counsel argument is that defense counsel was ineffective in failing to cross-examine the State's fingerprint expert. Respondent maintains

that Officer Daniels' testimony was confusing and conflicting, and should have been impeached by defense counsel. Specifically, respondent contends that Daniels' testimony that he did a side-by-side comparison of unknown latent fingerprints with respondent's fingerprint, conflicts with Earls' testimony that he recovered only one friction ridge impression from the window. Additionally, respondent contends that Daniels' testimony was confusing, and that Daniels never clarified the scientific basis for his fingerprint identification, or explained how many characteristics must be shared between prints before a match is declared. Respondent takes issue with the fact that defense counsel did not ask how Daniels determined that there was a 1 in 10 million chance that the unknown fingerprint matched anyone other than respondent. Respondent argues that defense counsel should have exploited the weakness of the State's fingerprint evidence through cross-examination or argument.

¶ 31 Generally, the decision whether or not to cross-examine or impeach a witness is a matter of trial strategy which will not support a claim of ineffective assistance of counsel. *People v. Pecoraro*, 175 Ill. 2d 294, 326 (1997). "The manner in which to cross-examine a particular witness involves the exercise of professional judgment which is entitled to substantial deference from a reviewing court." *Id*. at 326-27. "Defendant can only prevail on an ineffectiveness claim by showing that counsel's approach to cross-examination was objectively unreasonable." *Id*. at 327. Here, we find that respondent has not shown that counsel's failure to cross-examine Daniels was objectively unreasonable.

¶ 32 As the State notes, prior to trial, defense counsel indicated that she had referred the case to her forensic science division, and needed to get an order to produce the fingerprint evidence.

Defense counsel then asked for another status date so that her expert had time to review the evidence. At trial, defense counsel never disputed the fingerprint evidence or the identification of the fingerprint lifted from the window as respondent's. Rather, her trial strategy was to argue that the fingerprint was left in a place accessible to the public, and could have been left there at any time, rather than contemporaneously with the commission of the offense.

¶ 33 Defense counsel argued that there was no evidence showing that respondent had ever entered the home in question, and that his fingerprint was only on the outside of the window, which did not prove he was ever in the home. Defense counsel noted that there was testimony about two other prints found inside the home, but no evidence presented linking those to respondent. Additionally, defense counsel argued that nine hours elapsed since anyone had been home and when the burglary was discovered.

¶ 34 It is apparent to us that it was not defense counsel's strategy to argue that the fingerprint on the window did not belong to respondent, but rather that there was no evidence presented indicating that respondent's fingerprint had been left on the window at the time of the burglary, and that there was no evidence linking him to anything inside the home. Accordingly, we find that defense counsel's decision not to cross-examine the fingerprint expert was part of her trial strategy, and was not objectively unreasonable.

¶ 35 B. Guilt Beyond a Reasonable Doubt

¶ 36 Respondent's next argument on appeal is that the State did not prove him guilty of residential burglary beyond a reasonable doubt. Respondent contends that the only evidence linking him to the residential burglary at Browder's home is the testimony of the State's

fingerprint expert, Daniels, who determined that respondent's fingerprint matched a print recovered from the window, which was the point of entry. Respondent argues that Daniels' testimony regarding the number of fingerprints lifted conflicted with the testimony of Earls, and that Daniels provided no basis for his conclusion that the fingerprint found on the window matched respondent's fingerprint.

¶ 37 In assessing a sufficiency of the evidence claim, our inquiry is " 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original) *People v. Bush*, 214 Ill. 2d 318, 326 (2005) (quoting *Jackson v. Virginia*, 442 U.S. 307, 318-19 (1985)). "Under this standard, a reviewing court must allow all reasonable inferences from the record in favor of the prosecution." *Bush*, 214 Ill. 2d at 326. This standard applies to all criminal cases, regardless of whether the evidence is direct or circumstantial. *People v. Ford*, 239 Ill. App. 3d 314, 317 (1992); *Bush*, 214 Ill. 2d at 326.

¶ 38 Respondent was charged with residential burglary, in that he knowingly and without authority, entered into the dwelling place of Browder, with the intent to commit a theft. Fingerprint evidence is circumstantial evidence which may serve the basis for a conviction, and when a conviction is obtained based solely on circumstantial fingerprint evidence, fingerprints must satisfy both physical and temporal proximity criteria. *Ford*, 239 Ill. App. 3d at 317. "Physical and temporal proximity criteria are satisfied by proving that the fingerprints were found in the immediate proximity of the crime under circumstances which indicate that they could have been made only at the time of the occurrence." *Id*. (citing *People v. Gomez*, 215 Ill. App. 3d 208,

216 (1991)).

¶ 39 Here, respondent is not contending that the State failed to satisfy the physical and temporal proximity criteria. In fact, he admits that, "Browder testified that she did not know [respondent], had not given him permission to enter her home and that the window in question was not readily accessible to the public, thereby establishing the 'physical and temporal proximity criteria' for the fingerprint evidence." Rather, respondent is arguing on appeal that "the fingerprint science linking the latent print to [respondent] remains at issue." Specifically, respondent contends that Daniels' testimony did not rise to the level of proof beyond a reasonable doubt where he provided no scientific basis for his opinion regarding the fingerprint match. This is not a sufficiency of the evidence argument, but instead an admissibility argument in which respondent is contending the State failed to lay the proper foundation for Daniels' expert testimony. And, as respondent admits, he has failed to preserve this issue of a proper foundation on appeal.

¶ 40 In order to preserve an issue on appeal, a respondent must both object to it at trial and include it in a post-trial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). The purpose of this two-fold requirement is to allow the trial court the opportunity to address and correct errors if necessary. *People v. Jackson*, 391 Ill. App. 3d 11, 37 (2009). Forfeiture applies when the defendant asserts a claim that is completely different than the one he raised below. See *People v. Hieder*, 231 Ill. 2d 1, 18 (2008). Here, respondent did not raise any foundation claims when the State presented its fingerprint evidence. There is no post-trial motion in the record on appeal, and thus we assume none was filed. *People v. Barker*, 403 Ill. App. 3d 515, 523 (2010) (any

doubts arising from the incompleteness of the record will be construed against the appellant and in favor of the judgment rendered in the lower court). Moreover, defense counsel's argument at trial was that the State failed to prove that respondent's prints were left on the window at the time of the commission of the offense. Now, respondent is admitting that the temporal and physical proximity criteria of the fingerprint evidence has been satisfied, but arguing that a proper foundation was not laid for the fingerprint evidence. Because this is an entirely different argument than the one he raised below, respondent has forfeited this argument on appeal. *Hieder*, 231 Ill. 2d at 18.

¶ 41 Nevertheless, respondent urges us to review the issue of a proper foundation under the plain-error doctrine. The plain-error doctrine allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). The first step is therefore to determine whether error occurred at all in the presentation of foundation for the fingerprint evidence.

¶ 42 In order for expert testimony to be admissible, the proponent must lay an adequate foundation establishing that the information upon which the expert based his opinion is reliable. *People v. Safford*, 392 Ill. App. 3d 212, 221 (2009). In the case of fingerprint evidence, expert testimony based on scientific knowledge is necessary. *People v. Hunley*, 313 Ill. App. 3d 16, 29

(2000). When a fingerprint expert provides testimony, he must lay an adequate foundation explaining how he reached his conclusion. *Safford*, 392 Ill. App. 3d at 223. Such a foundational showing is necessary to ensure that the expert's result is trustworthy and reliable. *Id.* Without such testimony, the jury has no way of evaluating the expert's testimony, and the defendant cannot adequately challenge the testimony through cross-examination. *Id*. at 224-26. If fingerprint testimony is provided without foundational facts or reasons, the defendant's right to a fair trial is affected. *Id*. at 223.

¶ 43 In *Safford*, the State's fingerprint expert "testified he looks at three levels of detail of each fingerprint undergoing an analysis, explaining what he looked at for each level." *Id*. at 220. He then testified that he twice compared a latent print recovered from the crime scene and defendant's prints and concluded that the latent print could belong "to no other person than the defendant." *Id*. However, he failed to explain the level one, two, or three details that he observed that led him to conclude that the two prints matched. *Id*. at 221. He was able to describe what he saw in common between the latent print and the known print, but did not provide any testimony as to how he arrived at his conclusion that the latent print could only belong to the defendant. Accordingly, his testimony lacked an adequate foundation and was inadmissible. *Id*. at 226.

¶ 44 In *People v. Mitchell*, 2011 IL App. (1st) 083143, decided two years after *Safford*, the defendant argued that pursuant to *Safford*, the testimony of the State's fingerprint expert lacked an adequate foundation. However, this court found that the facts of *Mitchell* stood "in contrast to the fingerprint examiner's testimony in *Safford*." *Id*. at ¶ 26. In *Mitchell*, the fingerprint expert

explained the procedure she followed to make a comparison of the latent prints and the defendant's known prints. *Id.* She then did a side-by-side comparison of the two sets of prints, looking for "certain things like pattern type, ridge flow and things such as this *** [Like] ridges that end, ridges that split in two, and short ridges or dots." *Id.* at ¶ 14. She took that information and matched the defendant's prints to the latent prints taken from the crime scene. *Id.* at ¶ 26.

¶ 45 The testimony of the fingerprint expert in this case is more like the testimony provided by the expert in *Mitchell* than in *Safford*. Daniels testified that when he compares prints side by side, he uses a five-time magnifier. He testified that a focal point is found on the latent print, and from there he compares that to the known print, going from focal point to focal point. Daniels further testified that there are three basic identifying characteristics in fingerprints: a ridge where it ends, a ridge where it divides in two, and sometimes a ridge will appear as a dot. He testified that an identification occurs when he finds characteristics of the same type, direction, and in the certain sequence in corresponding areas of two different prints with no explainable differences. While there is no minimum number of matching characteristics that must be met to constitute an identification, Daniels testified that he has never gone below eight matching characteristics in making an identification. Daniels found 12 matching characteristics between respondent's print and Lift B. He testified that the probability of a latent print with 12 matching characteristics as respondent, belonging to someone else, would be 1 in 10 million.

¶ 46 We find that the fingerprint expert in this case presented sufficient details supporting his conclusion that the latent fingerprint and respondent's fingerprint matched, based on his explanation of how he makes an identification, and his explanation of how many matching

characteristics existed between respondent's print and the latent print. Accordingly, we find that there was no error in the foundation presented for Daniels' expert fingerprint testimony, and therefore there is no plain error. Additionally, because respondent does not argue on appeal that the State failed to prove the elements of residential burglary beyond a reasonable doubt (choosing instead to only to attack the validity of the fingerprint testimony), we find that the State proved respondent guilty of residential burglary beyond a reasonable doubt.

¶ 47 III. CONCLUSION

¶ 48 The judgement of the Circuit Court of Cook County is affirmed.

¶ 49 Affirmed.