

No. 1-11-2871

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

| | | |
|--------------------------------------|---|-------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from |
| |) | the Circuit Court |
| Plaintiff-Appellee, |) | of Cook County. |
| |) | |
| v. |) | No. 08 CR 11812 |
| |) | |
| ALEJANDRO QUEZADA, |) | Honorable |
| |) | Lawrence Flood, |
| Defendant-Appellant. |) | Judge Presiding. |

PRESIDING JUSTICE QUINN delivered the judgment of the court.
Justices Simon and Pierce concurred in the judgment.

ORDER

¶1 *HELD:* Judgment entered on defendant's conviction for vehicular hijacking affirmed over claims that the trial court erred in refusing to instruct the jury on a lesser offense and that trial counsel was ineffective for failing to request a *Frye* hearing; fines and fees order modified.

¶2 Following a jury trial, defendant Alejandro Quezada was found guilty of vehicular hijacking, then sentenced to 11 years' imprisonment. He was also assessed fines and fees totaling \$785. On

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appeal, defendant contends that the trial court erred in refusing to instruct the jury on the lesser offense of criminal trespass to a motor vehicle, that trial counsel was ineffective for failing to request a *Frye* hearing to challenge the admissibility of fingerprint evidence, and that he was improperly assessed a \$200 DNA fee. For the following reasons, we affirm and vacate the \$200 DNA fee.

¶ 3 BACKGROUND

¶ 4 The record shows, in relevant part, that defendant was tried on charges of vehicular hijacking and kidnapping. The vehicular hijacking count alleged that on June 1, 2008, defendant "KNOWINGLY TOOK A MOTOR VEHICLE, TO WIT: 1998 FORD, FROM THE PERSON OR THE IMMEDIATE PRESENCE OF MELITON RUIZ BY THE USE OF FORCE OR BY THREATENING THE IMMINENT USE OF FORCE."

¶ 5 At trial, Meliton Ruiz testified through an interpreter that about 7:45 p.m. on June 1, 2008, he was driving home in his 1998 Ford Windstar mini-van when he turned around in a restaurant parking lot and exited onto 24th Street heading east. As he was driving slowly through the intersection at 24th Street and Pulaski Road, defendant opened the door to his van, grabbed the steering wheel, told him to move, and pushed him with his body. Ruiz moved to the passenger seat and asked to get out of the van, but defendant told him, "You don't understand that I have to get out of here." Defendant then drove quickly down 24th Street to Ridgeway Avenue, made a left turn, proceeded to Ogden Avenue, and "made a few turns around the streets."

¶ 6 At some point, defendant hit a speed bump and the rear hatch of the vehicle opened up, causing some of Ruiz's things to fall out the back. This drew attention from people outside, who were picking the things up, and after about two minutes, defendant stopped and told Ruiz to get out

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and close the door. Ruiz got out of the van and ran away, without closing the door. Defendant then got out, closed the door himself, and drove off quickly in the vehicle. Ruiz approached police three blocks away and was taken to a police station. Later that evening, they took him to an alleyway where he saw his vehicle.

¶ 7 Ruiz testified that about four or five minutes elapsed from the time defendant entered his van until the time he was able to get out. It was still daylight at the time, and he was able to look at defendant. On June 9, 2008, Ruiz identified defendant in a lineup because he "recognized the face." On cross-examination, Ruiz stated that the person who entered his van was not wearing anything on his head.

¶ 8 Chicago police officer Veronica Silva testified that about 7:50 p.m. on June 1, 2008, she and her partner, Officer Kenneth Smith, were in the area of 24th Street and Pulaski Road looking for defendant, who was wanted for an incident that had occurred in Cicero the day before. It was daylight, and as they were traveling westbound on 24th Street, past the intersection at Pulaski Road, they saw an individual matching his description walking westbound on the north side of 24th Street. They stopped the car, and Officer Silva got out to approach him. When she was about 10 or 15 feet away, defendant looked in her direction and ran eastbound on 24th Street. Officer Silva pursued, and defendant ran from the sidewalk into the street where a red Ford Windstar was pulling out of a restaurant parking lot. He opened the driver-side door of the van, got in, and quickly drove eastbound on 24th Street across Pulaski Road. Officer Smith made a U-turn and met Officer Silva with the squad car. They then drove eastbound on 24th Street, but were unable to locate the van. Within an hour, the van was located behind a residence near 54th Avenue and West 22nd Place, in

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Cicero. On June 9, 2008, Officer Silva identified defendant in a lineup. She recognized "[h]is whole look, his height, his build, the facial hair, [and] tattoos on his neck."

¶ 9 In addition to the testimony of Ruiz and Officer Silva, the State presented evidence that Ruiz's van was dusted for fingerprints and that six prints were recovered, one from the interior and five from the exterior. The State then called Chicago police officer Frederick Scott, a latent print examiner for the Chicago Police Department, to testify as an expert in the field of latent print examination. Officer Scott testified that he uses the ACE-V¹ method for comparing friction ridge impressions, which involves three levels of detail: (1) pattern or general ridge flow; (2) characteristics, and (3) pore structures of the individual ridge units.

¶ 10 Officer Scott testified that he received a set of six latent prints from the Chicago Police Department Evidence and Recovered Property Division and determined that three of the latent impressions had value for comparison, lifts A, C, and F. He also received elimination fingerprint impressions of the victim's fingerprints and obtained a known standard for defendant from a database. He identified Lift A as the right middle finger of the victim, Meliton Ruiz. He then compared Lift C, a palm print, to the known standard of defendant and observed the same characteristics at ten different points of comparison. Officer Scott subsequently received another known standard for defendant and compared it to lifts C and F, another palm print, as well as the prior known standard of defendant. He opined that the two known standards originated from the same individual, and that lifts C and F matched both known standards.

¶ 11 The State rested. The defense made motions for a mistrial based on certain evidence

¹ ACE-V is an acronym for Analysis, Comparison, Evaluation, Verification.

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introduced through Officer Scott and for a directed finding. Both motions were denied.

¶ 12 The defense called Chicago police officer Timothy Kastler. Officer Kastler testified that on the evening of June 1, 2008, he spoke with Ruiz through an interpreter. He asked Ruiz for a description of the offender, and Ruiz told him that the man was wearing a black hat.

¶ 13 The defense rested. During the jury instruction conference, the defense requested a jury instruction on the offense of criminal trespass to a vehicle, arguing that it was a lesser included offense of vehicular hijacking. The State argued that criminal trespass to a vehicle "requires a separate element that is not included in the greater offense of vehicular hijacking," *i.e.*, entry of a vehicle, and therefore was not a lesser included offense of vehicular hijacking. The trial court ultimately denied the proffered instruction, citing *People v. Kolton*, 219 Ill. 2d 353 (2006), and noting, "I have no cases that tell me that what you're requesting is a lesser included offense for the charge of vehicular hijacking."

¶ 14 Following deliberations, the jury returned verdicts finding defendant guilty of vehicular hijacking and not guilty of kidnapping. The trial court then sentenced defendant to 11 years' imprisonment. Defendant now appeals pursuant to Illinois Supreme Court Rule 606 (eff. Mar. 20, 2009).

¶ 15 ANALYSIS

¶ 16 Defendant first contends that the trial court erred in refusing to instruct the jury on the offense of criminal trespass to a vehicle, arguing that it was a lesser included offense of vehicular hijacking. A trial court's decision to decline to give a jury instruction is reviewed for an abuse of discretion. *People v. Davis*, 213 Ill. 2d 459, 475 (2004).

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¶ 17 In Illinois, courts apply the charging instrument approach when determining whether an offense qualifies as a lesser included offense and thus warrants a jury instruction. *Davis*, 213 Ill. 2d at 475. Under this two-tiered approach, we first determine whether the charging instrument describes the lesser offense, *i.e.*, whether it contains "a broad foundation or main outline" of the lesser offense. *People v. Ceja*, 204 Ill. 2d 332, 360 (2003). Our supreme court has noted that "whether a particular offense is 'lesser included' is a decision which must be made on a case-by-case basis using the factual description of the charged offense in the indictment." *People v. Kolton*, 219 Ill. 2d 353, 367 (2006). "A lesser offense will be 'included' in the charged offense if the factual description of the charged offense describes, in a broad way, the conduct necessary for the commission of the lesser offense and any elements not explicitly set forth in the indictment can reasonably be inferred." *Kolton*, 219 Ill. 2d at 367. Ultimately, "[w]hether a charged offense encompasses another as a lesser-included offense is a question of law, which this court reviews *de novo*." *Kolton*, 219 Ill. 2d at 361.

¶ 18 If the charging instrument identifies a lesser-included offense, we next determine whether the evidence adduced at trial rationally supported the conviction on the lesser-included offense. *Ceja*, 204 Ill. 2d at 360. In doing so, we "must examine the evidence presented and determine whether the evidence would permit a jury to rationally find the defendant guilty of the lesser-included offense, but acquit the defendant of the greater offense." *Ceja*, 204 Ill. 2d at 360.

¶ 19 In this case, defendant was charged by indictment with the Class 1 felony of vehicular hijacking in that he "KNOWINGLY TOOK A MOTOR VEHICLE, TO WIT: 1998 FORD, FROM THE PERSON OR THE IMMEDIATE PRESENCE OF MELITON RUIZ BY THE USE

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OF FORCE OR BY THREATENING THE IMMINENT USE OF FORCE." 720 ILCS 5/18-3 (West 2008). He claims that the trial court should also have instructed the jury on the Class A misdemeanor of criminal trespass to vehicles, which occurs when a person "knowingly and without authority enters any part of or operates any vehicle." 720 ILCS 5/21-2 (West 2008).

¶ 20 Contrary to the State's claim, we find that the charged offense of vehicular hijacking included the "broad foundation or main outline" of criminal trespass to vehicles. Both offenses contain a mental state of knowingly, and it can be reasonably inferred from the indictment that defendant's alleged act of taking a motor vehicle from the presence of Ruiz involved him entering and operating the vehicle. *Kolton*, 219 Ill. 2d at 367.

¶ 21 That said, we cannot say that the trial court abused its discretion in refusing to instruct the jury on that offense. The evidence adduced at trial showed that on June 1, 2008, Chicago police were in the area of 24th Street and Pulaski Road looking for defendant. About 7:50 p.m., they observed him walking down 24th Street and tried to approach him, at which point defendant fled in the opposite direction, ran into the street, and entered the driver-side of a red Ford Windstar driven by Meliton Ruiz. Once inside the van, defendant pushed Ruiz with his body and grabbed the steering wheel. He then drove quickly down various streets before eventually letting Ruiz out of the van and driving away by himself. The defense did not present any evidence to call these events into question and instead solely challenged the reliability of Ruiz's identification of defendant. Under the circumstances, we find that the evidence strongly supported a conviction for the charged offense of vehicular hijacking. We therefore cannot say that the evidence would have permitted the jury to rationally find defendant guilty of the lesser-included offense of

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criminal trespass to vehicles and not guilty of vehicular hijacking. *Ceja*, 204 Ill. 2d at 360.

¶ 22 A similar conclusion was reached by this court in *People v. Austin*, 216 Ill. App. 3d 913 (1991), cited by the State. In that case, defendant was convicted of residential burglary and claimed on appeal that the trial court erred in refusing to instruct the jury on the offense of criminal trespass to residence. *Austin*, 216 Ill. App. 3d at 914-15. Although the *Austin* court found that criminal trespass to residence was a lesser included offense of residential burglary, the court nonetheless found that the trial court correctly refused to instruct the jury on that offense. *Austin*, 216 Ill. App. 3d at 916-17. The court explained:

"In this case, although nothing was taken from the residence and defendant did not touch [the victim], the jury could not have rationally convicted defendant of criminal trespass to residence and acquitted defendant of residential burglary. To prove intent to commit a theft or unlawful restraint, the State presented evidence that at 2:30 a.m. defendant entered the [victim's] residence through a rear door. Defendant was wearing rubber gloves on a hot, muggy July night. Defendant also had one hand near [the victim's] mouth as his other hand reached to turn off the light. Defendant offered no evidence to refute this testimony. The only defense arising from the evidence and from defense counsel's arguments was misidentification. Defendant was either guilty of the offenses as charged or not guilty. Thus, the trial court properly

refused defendant's instructions on the lesser-included offense."

Austin, 216 Ill. App. 3d at 917.

See also *People v. Moore*, 206 Ill. App. 3d 769, 775 (1990) (holding that defendants were not entitled to an instruction on lesser-included offenses where the State's evidence that defendants committed residential burglary was overwhelming). Given the holdings in *Austin* and *Moore*, we find that the trial court did not abuse its discretion in declining to instruct the jury on the offense of criminal trespass to vehicles.

¶ 23 Defendant next contends that he received ineffective assistance of trial counsel. To establish a claim of ineffective assistance of counsel, defendant must first show that counsel's performance was deficient, *i.e.*, it fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Secondly, defendant must show that counsel's deficient performance resulted in prejudice to the defense, *i.e.*, a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 687, 694. Both prongs of *Strickland* must be satisfied to succeed on a claim of ineffective assistance of counsel. *People v. Flores*, 153 Ill. 2d 264, 283 (1992).

¶ 24 In this case, defendant claims that trial counsel was ineffective for failing to request a *Frye* hearing on the admissibility of the State's expert testimony regarding the palm prints taken from Ruiz's van. He argues that there is a "sharp divide in the scientific community regarding the reliability of latent print analysis" and, thus, it was "incumbent upon counsel" to request a *Frye* hearing. The State, meanwhile, responds that counsel would not have prevailed on a motion for a *Frye* hearing because latent print evidence "has been deemed admissible in Illinois courts for

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over 100 years."

¶ 25 In Illinois, the admission of expert testimony is governed by the *Frye* standard, 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 Simons*, 213 Ill. 2d 523, 529 (2004) (quoting *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923)). "[T]he *Frye* test applies only to 'new' or 'novel' scientific methodologies." *In re Commitment of Simons*, 213 Ill. 2d at 530 (quoting *Donaldson v. Central Illinois Public Service Co.*, 199 Ill. 2d 63, 78-79 (2002)). "[A] scientific methodology is considered 'new' or 'novel' if it is original or striking or does not resembl[e] something formerly known or used." (Internal quotation marks omitted.) *In re Commitment of Simons*, 213 Ill. 2d at 530 (quoting *Donaldson*, 199 Ill. 2d at 79).

¶ 26 Here, defendant claims that a motion for a *Frye* hearing to challenge the admissibility of the fingerprint examiner's testimony would have had a reasonable probability of success. In *People v. Mitchell*, 2011 IL App (1st) 083143, ¶ 31, however, this court rejected a defendant's claim that he was entitled to a *Frye* hearing to challenge the methodology of a fingerprint examiner. In doing so, we noted that "fingerprint analysis is neither novel nor new" and 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." *Mitchell*, 2011 IL App (1st) 083143, ¶ 31.

¶ 27 The decision of counsel whether to file a motion is a matter of trial strategy that is entitled

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to great deference. *People v. Shlimon*, 232 Ill. App. 3d 449, 458 (1992), citing *Strickland*, 466 U.S. at 688. In light of our holding in *Mitchell*, it is clear that trial counsel's decision not to file a motion for a *Frye* hearing in this case was based on sound trial strategy. Defendant, moreover, cannot establish that he was prejudiced by counsel's decision not to move for a *Frye* hearing where two eyewitnesses positively identified him as the offender who took Ruiz's van. *People v. Slim*, 127 Ill. 2d 302, 307 (1989) ("A single witness' identification of the accused is sufficient to sustain a conviction if the witness viewed the accused under circumstances permitting a positive identification). We therefore conclude that defendant has failed to establish that he received ineffective assistance of trial counsel.

¶ 28 Defendant lastly contends that he was improperly assessed a \$200 DNA analysis fee because his profile is already in the Illinois State Police database. The State concedes that the fee was improperly assessed and should be vacated. Pursuant to the supreme court's ruling in *People v. Marshall*, 242 Ill. 2d 285, 303 (2011), we agree that the trial court was not authorized to assess defendant the \$200 DNA fee where he is currently registered in the DNA database, and therefore vacate that fee.

¶ 29 For the reasons stated, we vacate defendant's \$200 DNA fee and affirm the judgment in all other respects.

¶ 30 Affirmed; fines and fees order modified.

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