

No. 1-12-0048

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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 21099
	)	
DUWAYNE ALLMON,	)	Honorable
	)	Thomas M. Davy,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE TAYLOR delivered the judgment of the court.  
Justices McBride and Palmer concurred in the judgment.

**ORDER**

¶ 1 *Held:* Chewing gum containing defendant's DNA that was found at the victim's apartment was sufficient evidence to sustain defendant's conviction for residential burglary; failure to demonstrate prejudice precludes claim of ineffective assistance of counsel; affirmed.

¶ 2 Following a bench trial, defendant Duwayne Allmon was convicted of residential burglary and sentenced as a Class X offender to 15 years in prison.<sup>1</sup> On appeal, defendant argues his conviction should be reversed because the evidence was insufficient to prove that he was the person who committed the burglary. In the alternative, defendant contends his trial counsel was ineffective for failing to properly present certain evidence. We affirm.

¶ 3 The evidence at trial revealed that Akeseiah Felton's apartment was burglarized on July 20, 2008. A piece of chewing gum that contained defendant's DNA was recovered from the scene.

¶ 4 At trial, Akeseiah Felton testified that on July 20, 2008, she was living with her two children in an apartment in a multi-unit building at 6956 South Paxton in Chicago. Felton described herself as a very clean person, and had not allowed gum in her house as long as she had children. Additionally, her children were not allowed to play outside. Felton stated that she cleaned her apartment every morning before leaving, her hardwood floors were always mopped and waxed, and she dusted at least three times a week. On July 20, one of the last tasks Felton did before leaving was mop and sweep after she had cleaned the apartment. When she left around 10 a.m. with her children, her front and back doors were locked.

¶ 5 When Felton and her children returned home around 1 p.m. that day, her daughter struggled to unlock the door. When Felton ultimately entered the apartment 30 to 40 seconds later, she saw what she believed was a shadow in her peripheral vision. She further observed that her children's game box had been moved from the television to the middle of the living room floor, and that her back kitchen door had been kicked open off its frame. Elsewhere, she

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<sup>1</sup> Defendant's last name is spelled "Allmon" and "Allman" at different points in the record. Here, we use the spelling on defendant's notice of appeal.

observed that her drawers were opened and had been gone through, her laptop was no longer under her bed, and a piece of chewing gum was in the middle of her bedroom floor, "as if somebody had just dropped it." She further described the gum as green and big, and when she stood near it, she observed that it was wet, had bubbles and teeth marks on it, and did not have any flat surfaces. Felton stated that she had not given anyone permission to enter her apartment that day, defendant had never had permission to enter her apartment, and that items were taken from her home. At the time, only Felton and her daughter had keys to the apartment. During her testimony, the State introduced a map Felton had drawn of her apartment, which indicated the kitchen, bathroom, Felton's bedroom, her children's room, the living room, and the front and back doors, as well as the location of the gum and where she had stood at various points when she returned home on July 20.

¶ 6 On cross-examination, Felton admitted that the gum could have been thrown or tracked in, but maintained that the gum could not have been moved from under her bed because she had looked there to retrieve her shoes that morning. When asked if she had ever seen defendant before trial, Felton responded that he looked familiar from the neighborhood.

¶ 7 Michael Scarriot, an evidence technician, testified that when he arrived at 6956 South Paxton in response to a burglary call, he observed that the rear entry door appeared to have been kicked open. To him, the apartment was exceptionally clean. As Scarriot processed the scene, he collected a piece of chewing gum from the floor of the master bedroom. Although Scarriot conducted a fingerprint dusting of several areas in the apartment, including the rear kitchen door and miscellaneous electronic items, no fingerprints or other evidence, besides the chewing gum, was recovered.

¶ 8 A forensic scientist, Debra Kot, testified that when she received a chewed piece of gum in July 2009, she observed that the gum had some hairs and a piece of tape on it, but otherwise did not have a lot of debris. The hairs and part of the tape were removed so that the gum could be further analyzed. Another forensic scientist determined that the gum contained a large amount of DNA from a single male profile. The parties stipulated that pursuant to further analysis, the male DNA profile on the gum matched defendant's profile, and this DNA profile would be expected to occur in approximately 1 in 1.4 quintillion black, 1 in 8.9 quintillion white, and 1 in 2.5 quintillion Hispanic unrelated individuals.

¶ 9 Detective Daniel O'Connor testified for the defense. When defense counsel asked Detective O'Connor if, during his investigation, he learned where defendant lived on July 20, the State made an objection on the basis of hearsay, which the trial court overruled. Reading from a highlighted portion of a report that he had prepared, Detective O'Connor stated that defendant's residence was 6956 South Paxton, apartment 2A, in Chicago, and confirmed that defendant's building address was the same as Felton's. On cross-examination, Detective O'Connor admitted that his report also listed defendant's address as 11344 South Washtenaw in Chicago. Detective O'Connor could not recall where he received those two addresses, but noted that it was common for him to ask defendants for previous addresses without a timeframe. He added that defendant did not recall where he was living on July 20.

¶ 10 In closing, the State argued that the circumstantial evidence showed that while Felton and her children were fidgeting with the door, defendant was still in the home, but left in a hurry, and the gum came out when defendant became startled. Defense counsel argued that the only evidence recovered was one piece of chewing gum, which was not proof beyond a reasonable doubt. Additionally, defense counsel contended that the gum could have been tracked or thrown

in. In rebuttal, the State argued that the gum matched defendant and there was no reason for defendant to be in the apartment except to commit a burglary.

¶ 11 In finding defendant guilty of residential burglary, the trial court stated the following, in part, regarding Detective O'Connor's testimony:

"I will consider the testimony that the detective had two addresses; one in the same building as the victim in a different apartment number, and also an address on\*\*\*South Washtenaw. The detective indicated that the defendant did not recall where he was living on that particular date\*\*\*"

The trial court further stated:

"[I]t has clearly been proven that the defendant's DNA was on that gum in numbers larger than even the federal deficit. It is there. The issue is how the gum got there. It was suggested by the defense maybe someone threw it in. In viewing the diagram\*\*\*done by Miss Felton, someone throwing it would obviously have to be inside. Someone could not stand outside of the kicked-in kitchen door and get that gum into the master bedroom without hitting the kitchen wall.

The testimony of Miss Felton was that the gum appeared to her to be wet, to [have] teeth marks on it. That it was not smashed down as if someone had stepped on it.

Additionally, the testimony of Miss Kot was that there was not a lot of debris on the gum as there would be if someone had

stepped in. If the defendant was perhaps living [there] at the same time, and he had dropped the chewing gum outside and someone broke into the apartment with that chewing gum on the bottom of his feet and somehow it got deposited in the master bedroom, that there was not debris that would indicate that it had been any place where such a thing could occur.

The evidence against the defendant is circumstantial.\*\*\*  
Based on the testimony that has been presented at this time, there is no explanation for a fresh piece of chewing gum with the defendant's DNA being on it in a burglarized apartment other than the defendant himself was there and spit or dropped the chewing gum out as he was fleeing from the apartment."

Defendant was sentenced as a Class X offender to 15 years in prison.

¶ 12 On appeal, defendant argues the State failed to prove him guilty beyond a reasonable doubt because the presence of hair and tape on the gum refutes the theory that the gum came from defendant's mouth when he was inside the apartment. According to defendant, the most reasonable explanation for the gum's presence is that it was initially in the hallway, where it attracted dirt and tape, and then was tracked in by the actual perpetrator of the burglary.

¶ 13 When a defendant challenges the sufficiency of the evidence, "the relevant question 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. Collins*, 106 Ill. 2d 237, 261 (1985) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). This standard of review applies in all criminal cases,

whether the evidence is direct or circumstantial. *People v. Maggette*, 195 Ill. 2d 336, 353 (2001). Our function is not to retry the defendant. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). Further, in a bench trial, it is for the trial judge, sitting as the trier of fact, to determine the credibility of witnesses, weigh and draw reasonable inferences from the evidence, and resolve any conflicts in the evidence. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). We will not reverse a conviction unless the evidence is so unreasonable, improbable, or unsatisfactory that it raises a reasonable doubt of the defendant's guilt. *People v. Evans*, 209 Ill. 2d 194, 209 (2004).

¶ 14 Proof of an offense requires two concepts: that a crime occurred and that it was committed by the person charged. *People v. Ehlert*, 211 Ill. 2d 192, 202 (2004). Here, the parties do not dispute that a residential burglary occurred—that a person knowingly and without authority entered or remained within a dwelling place of another with the intent to commit a felony or theft therein. 720 ILCS 5/19-3(a) (West 2008). Rather, defendant only disputes that the evidence was sufficient to prove he was the person who committed the burglary.

¶ 15 In this case, defendant's conviction rested solely on the piece of chewing gum found in Felton's apartment. Both defendant and the State urge that the appropriate standard for determining whether defendant's conviction can rest solely on the chewing gum is the standard used where a conviction rests solely on fingerprint evidence. There, the fingerprints must satisfy both physical and temporal proximity criteria—they 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. Rhodes*, 85 Ill. 2d 241, 249 (1981); *People v. Span*, 2011 IL App (1st) 083037, ¶ 35. This standard has also been applied to a conviction that rested only on shoeprint evidence. *People v. Campbell*, 146 Ill. 2d 363, 387 (1992). Because like fingerprints, DNA

creates a unique profile for each individual, we agree that this standard should be applied here. See *In re Jessica M.*, 399 Ill. App. 3d 730, 744 (2010) (noting that component of DNA creates a unique DNA "profile" of an individual); *People v. Gomez*, 215 Ill. App. 3d 208, 217 (noting that fingerprints possess unique qualities).

¶ 16 Here, the chewing gum satisfies the physical and temporal proximity criteria needed to sustain defendant's conviction. The chewing gum was found in the middle of the floor of Felton's bedroom, near the items that had been tampered with. Not only were Felton's floors consistently kept mopped and waxed, but gum was not allowed in Felton's home and she cleaned the floors before leaving on July 20. Other than Felton and her daughter, no one else had keys to the apartment, and no one had permission to enter the apartment while Felton and her children were gone. When Felton returned, she saw a shadow in her peripheral vision and found the gum, which was wet, had teeth marks, did not have flat surfaces, and looked as if it had just been dropped. Apart from hair and tape, the gum did not have a lot of debris. When analyzed, the gum was found to contain large quantities of defendant's DNA. The evidence that the gum could only have been left by defendant at the time of the burglary is not so unreasonable, improbable, or unsatisfactory as to leave a reasonable doubt of defendant's guilt.

¶ 17 We are not persuaded by defendant's claim that, because hair and tape were on the gum, the most reasonable explanation for the gum's presence was that it was tracked in by someone else. Where the evidence is capable of producing conflicting inferences, as here with the hair and tape, the matter is best left to the trier of fact. *Campbell*, 146 Ill. 2d at 380. Further, the trial court is not required to search out all possible explanations consistent with innocence and raise them to a level of reasonable doubt. *People v. Hall*, 194 Ill. 2d 305, 332 (2000).

¶ 18 Defendant's reliance on *People v. Gomez*, 215 Ill. App. 3d 208 (1991), is misplaced. There, the defendant's fingerprint was found in the kitchen of the murder victim, who was also his landlord. *Gomez*, 215 Ill. App. 3d at 211. The fingerprint evidence was insufficient to prove defendant's guilt because defendant had been in the kitchen prior to the murder to pay rent. *Id.* at 216-17. While the defendant in *Gomez* had another reason to be in the victim's apartment, here, defendant did not. Defendant had never been permitted in Felton's apartment. Although defendant posits that the gum could have nonetheless been tracked in because it is mobile, the trial court was free to reject his improbable explanation of how his unique identifying characteristics could have been at the scene of the crime without criminal involvement. *People v. Elston*, 223 Ill. App. 3d 186, 189 (1991) (stating that the trial court is free to reject a defendant's improbable explanation of how his fingerprints could have been left at the scene of the crime without criminal involvement).

¶ 19 Next, defendant argues that his trial counsel was ineffective for failing to properly present evidence that he lived in the same building as Felton. Defendant contends that if this evidence had been properly presented, it would have provided another reason for the gum to be in Felton's apartment—it was tracked in because defendant lived nearby.

¶ 20 To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984). A defendant is entitled to competent, not perfect representation, and the fact that a defense tactic was unsuccessful does not retrospectively demonstrate incompetence. *People v. Nunez*, 263 Ill. App. 3d 740, 748 (1994). A defendant establishes prejudice by showing that there is a reasonable probability that, but for his counsel's errors, the result of the proceeding

would have been different. *People v. Peeples*, 205 Ill. 2d 480, 513 (2002). A reasonable probability is not merely a possibility of a different result, and must be a probability sufficient to undermine confidence in the outcome, or to have rendered the result of the trial unreliable or fundamentally unfair. *People v. Evans*, 209 Ill. 2d 194, 220 (2004). The failure to satisfy either part of the *Strickland* test, deficiency or prejudice, precludes a finding of ineffective assistance of counsel. *Peeples*, 205 Ill. 2d at 513.

¶ 21 Here, defendant's claim fails because he cannot establish prejudice. Defense counsel elicited the testimony of Detective O'Connor, who stated that defendant provided an address that was the same as Felton's apartment building. On cross-examination, Detective O'Connor stated that defendant also gave another address, and that defendant could not recall where he was living on the date of the burglary. Prior to ruling, the trial court stated it was considering the testimony that defendant had two addresses, one of which was the same as Felton's building, and the testimony that defendant could not recall his address. Beyond this, the trial court explicitly considered and rejected defendant's theory that because he lived in the same building, the gum was tracked in, when it stated:

"If the defendant was perhaps living [there] at the same time, and he had dropped the chewing gum outside and someone broke into the apartment with that chewing gum on the bottom of his feet and somehow it got deposited in the master bedroom, that there was not debris that would indicate that it had been any place where such a thing could occur."

More definitive evidence about defendant's address would not have changed the outcome, where the trial court already allowed for the exact scenario that defendant claims his counsel failed to

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establish. Contrary to defendant's assertion, this situation is not analogous to *People v. York*, 312 Ill. App. 3d 434, 436-38 (2000), where the defense counsel failed to introduce conclusive, potentially exculpatory forensic evidence that DNA samples recovered from an aggravated criminal sexual assault victim showed that the defendant did not deposit semen on the victim. Stronger evidence that defendant lived in Felton's building would not have been similarly helpful, particularly where the gum containing defendant's DNA was found in the middle of Felton's floor, wet and freshly chewed.

¶ 22 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 23 Affirmed.